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Complaint.

JUDGMENT RECORD.

New Jersey Supreme Court

KATHRYN SWARTZ AUER, executrix under the last will and testament of Gustave S. Auer, deceased,

Plaintiff,

vs.

SINCLAIR REFINING COMPANY, a corporation, and JAMES MAC-LACHLAN,

Defendants.

10

Action at Law.

On Postea.

Judgment Record.

Benjamin M. Weinberg, attorney.

20

Sinclair Refining Company, a corporation, and James MacLachlan, the defendants in this cause, were summoned to answer unto Kathryn Swartz Auer, executrix under the last will and testament of Gustave S. Auer, deceased, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued June 30, 1925.)

30

Complaint.

The plaintiff, residing at No. 114 North Sixteenth street, in the City of East Orange, in the County of Essex and State of New Jersey, says:

1. On February 13, 1925, Gustave S. Auer, died in the City of East Orange, in the County of Essex and State of New Jersey, as hereinafter mentioned and set forth.

40

Complaint.

10 2. On February 24, 1925, the said Kathryn Swartz Auer, widow of the said Gustave S. Auer, qualified as executrix under the last will and testament of the said Gustave S. Auer, deceased, and letters testamentary were issued to her as such executrix, by E. Garfield Gifford, Surrogate of the County of Essex, and accepted by her, and she is now executrix of the estate of Gustave S. Auer, deceased.

3. Prior to and on February 13, 1925, the said defendant, Sinclair Refining Company, conducted its business in its various branches, in the State of New Jersey and elsewhere.

20 4. On said February 13, 1925, James MacLachlan, was then and there the servant, agent and employee of the said defendant, Sinclair Refining Company, a corporation.

5. On said day, the said James MacLachlan, as servant, agent and employee of the said Sinclair Refining Company, had the control and management of a certain automobile, which said automobile, was used by him for the benefit and in the business of, the said defendant, Sinclair Refining Company.

30 6. On said day, the said Gustave S. Auer was lawfully crossing Park avenue, at the corner of North Sixteenth street, in the City of East Orange, in the County of Essex and State of New Jersey.

40 7. While crossing said Park avenue, as aforesaid, he was forcibly run into, knocked down and run over by said automobile, propelled and managed by the said defendant, James MacLachlan, as the servant, agent and employee of the said defendant, Sinclair Refining Company.

Complaint.

8. The collision between the said automobile so driven by the said defendant, James MacLachlan, and Gustave S. Auer, as aforesaid, was due to the high rate of speed, and the careless and reckless manner in which said automobile was operated by him upon said Park avenue, aforesaid, without making proper observation as to persons and things in the highway; without sounding any whistle or horn announcing his approach near and to the intersection of Park avenue and North Sixteenth street, and otherwise in carelessly, negligently and improperly operating the said automobile at the time and place aforesaid. 10

9. As the result of the collision between the said automobile so operated and managed for the benefit and in the business of the said defendant, Sinclair Refining Company, as aforesaid, by the said defendant, James MacLachlan, the said Gustave S. Auer suffered and sustained mortal injuries, from which injuries, he, the said Gustave S. Auer then and there died, to wit, at East Orange, in the County of Essex, New Jersey, on the said Thirteenth day of February, 1925. 20

10. Plaintiff further says that the said Gustave S. Auer, at the time of his death, was forty-four years of age, and that he left him surviving his widow, the said Kathryn Swartz Auer, aged forty-six years, and three children, viz: Edward Everett Auer, aged fourteen years; Robert V. Auer, aged eleven years, and Richard M. Auer, aged eight years, who are all of his next of kin. 30

11. Plaintiff further shows that this action has been commenced within two years from the 40

Answer.

10 date of the death of the said Gustave S. Auer, whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff, Kathryn Swartz Auer, executrix of the estate of the said Gustave S. Auer, deceased, by reason of the premises aforesaid, and she brings into court, the letters testamentary granted to her as aforesaid, whereby it fully appears to the Court, that she, the said plaintiff is executrix of the estate of the said Gustave S. Auer, deceased, under his last will and testament.

Plaintiff, executrix, as aforesaid, demands as damages, the sum of Seventy-five Thousand (\$75,000.00) Dollars.

20 BENJAMIN M. WEINBERG,
Attorney of Plaintiff.

(Filed July 21, 1925.)

Answer of Sinclair Refining Company.

The defendant, Sinclair Refining Company, a corporation, by way of answer says:

30 1. It has not sufficient knowledge of the allegations in paragraphs 1 and 2 of the complaint and leaves the plaintiff to her proof.

2. The defendant admits that on February 13, 1925, James MacLachlan was an employee of the said defendant, but denies that he was the servant or agent of the defendant, Sinclair Refining Company, at the time of the accident as alleged in paragraphs 4 and 5 of the complaint.

40 3. The defendant denies the allegations in paragraphs 6, 7, 8 and 9 of the complaint.

Answer.

4. The defendant has not sufficient knowledge of the allegations in paragraph 10 of the complaint and leaves the plaintiff to her proof.

5. Defendant denies paragraph 11 of the complaint.

FIRST SEPARATE DEFENSE.

10

The proximate cause of the injuries to the plaintiff's intestate was the carelessness and negligence of the said plaintiff's intestate, Gustave S. Auer, and said carelessness and negligence consisted in that said Gustave S. Auer failed to look to his right as he was crossing Park avenue; in that he did not use reasonable care and caution for his own protection and safety while crossing Park avenue; in that he failed to heed the warning signal of the approach of the automobile belonging to the defendant, Sinclair Refining Company: in that he walked into the path of the approaching automobile without due regard for his safety; in that he collided with the automobile of the defendant, Sinclair Refining Company, by reason of his failure to use reasonable care and caution in crossing the said Park avenue; and as a result thereof the plaintiff was injured.

20

30

SECOND SEPARATE DEFENSE.

The plaintiff's intestate, Gustave S. Auer, contributed to the happening of the alleged accident by reason of his own carelessness and negligence; in that Gustave S. Auer failed to look to his right as he was crossing Park avenue; in that he failed to heed the warning signal of the approach of the automobile belonging to the defendant, Sinclair Refining Company; in that

40

Answer.

10 he walked into the path of the approaching automobile without due regard for his safety; in that he collided with the automobile of the defendant, Sinclair Refining Company, by reason of his failure to use reasonable care and caution in crossing the said Park avenue; and as a result thereof the plaintiff was injured.

JNO. A. MATTHEWS,
Attorney for Defendant,
Sinclair Refining Company.

(Filed August 11, 1925.)

Answer of James MacLachlan.

20 The defendant, James MacLachlan, residing in the Town of Bloomfield, County of Essex, State of New Jersey, by way of answer says:

1. He has not sufficient knowledge of the allegations in paragraphs 1 and 2 of the complaint and leaves the plaintiff to her proof.

30 2. Defendant admits that on February 13, 1925, he was employed by the defendant, Sinclair Refining Company, but denies that he was acting as their servant or agent at the time of the alleged accident as alleged in paragraphs 4 and 5 of the complaint.

3. The defendant denies the allegations in paragraphs 6, 7, 8 and 9 of the complaint.

4. The defendant has not sufficient knowledge of the allegations in paragraph 10 of the complaint and leaves the plaintiff to her proof.

40 5. Defendant denies paragraph 11 of the complaint.

Answer.

FIRST SEPARATE DEFENSE.

The proximate cause of the injuries of the plaintiff's intestate was the carelessness and negligence of the said plaintiff's intestate, Gustave S. Auer; in that said Gustave S. Auer failed to look to his right as he was crossing Park avenue; in that he failed to heed the warning signal of the approach of the automobile belonging to the defendant, Sinclair Refining Company; in that he walked into the path of the approaching automobile without due regard for his safety; in that he collided with the automobile of the defendant, Sinclair Refining Company by reason of his failure to use reasonable care and caution in crossing the said Park avenue; and as a result thereof the plaintiff was injured.

10

SECOND SEPARATE DEFENSE.

The plaintiff's intestate, Gustave S. Auer, contributed to the happening of the alleged accident by reason of his own carelessness and negligence; in that Gustave S. Auer failed to look to his right as he was crossing Park avenue; in that he failed to heed the warning signal of the approach of the automobile belonging to the defendant, Sinclair Refining Company; in that he walked into the path of the approaching automobile without due regard for his safety; in that he collided with the automobile of the defendant, Sinclair Refining Company, by reason of his failure to use reasonable care and caution in crossing the said Park avenue; and as a result thereof the plaintiff was injured.

20

30

JNO. A. MATTHEWS,
Attorney for Defendant,
James MacLachlan.

40

(Filed Aug. 11, 1925.)

Reply.

Reply.

The plaintiff replies to the amended answer of the defendant, Sinclair Refining Company, a corporation, and says:

10 1. She denies each and every allegation in said defendant's "First Separate Defense."

2. She denies each and every allegation in said defendant's "Second Separate Defense."

BENJAMIN M. WEINBERG,
Attorney for Plaintiff, Kathryn Swartz
Auer, Executrix under the Will and Testa-
ment of Gustave S. Auer, deceased.

(Filed Aug. 18, 1925.)

20

Reply.

The plaintiff replies to the amended answer of the defendant, James MacLachlan, and says:

1. She denies each and every allegation in said defendant's "First Separate Defense."

2. She denies each and every allegation in said defendant's "Second Separate Defense."

30

BENJAMIN M. WEINBERG,
Attorney for Plaintiff, Kathryn Swartz
Auer, Executrix under the Will and Testa-
ment of Gustave S. Auer, deceased.

(Filed Aug. 18, 1925.)

40

*Postea and Judgment.***Postea and Judgment.**

This action was tried before the Honorable William A. Smith, one of the Circuit Court Judges, to whom the said cause was duly referred by the Honorable William S. Gummere, Chief Justice of the above said Court, for trial with a jury, in the presence of the counsel for the respective parties, at the Essex Circuit, on June 8, 1926. 10

This cause having been heard and submitted to the jury, they returned a verdict in favor of the plaintiff, Kathryn Swartz Auer, executrix under the last will and testament of Gustave S. Auer, and against the defendants, Sinclair Refining Company, and James MacLachlan, and assessed the plaintiff's damages in the sum of Twenty-two Thousand Five Hundred (\$22,500.00) Dollars. 20

Whereupon it is adjudged that the plaintiff, Kathryn Swartz Auer, executrix under the last will and testament of Gustave S. Auer, deceased, do recover of the said defendants, \$22,500.00 Sinclair Refining Company, a corporation, and James MacLachlan, 58.86 the sum of twenty-two thousand, \$22,558.86 five hundred dollars damages, together with her costs, which have been taxed at the sum of fifty-eight dollars and eighty-six cents, making in the whole the sum of twenty-two thousand, five hundred fifty-eight dollars and eighty-six cents. 30

Judgment entered June 11, 1926.

WM. S. GUMMERE,
C. J.

A true copy. 40

EDWARD J. KELLEHER,
Clerk.

Julius L. Hahn, direct.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

June 7, 1926.

10

KATHRYN SWARTZ AUER, executrix under the last will and testament of Gustave S. Auer, deceased,

vs.

SINCLAIR REFINING COMPANY
and JOHN MACLACHLAN.

*Action at
Law.*

Before Hon. William A. Smith, *J.*, and a jury.

20

For the plaintiff appear Benjamin M. Weinberg and Wilbur A. Mott.

For the defendant appears John A. Matthews.

(A talesman having been called:)

Mr. Weinberg: I challenge for cause. The talesman says that he is a stockholder in a company which owns a large block of stock and is interested in their dividends.

30

The Court: Swear the talesman.

JULIUS L. HAHN, being duly sworn on his *voir dire*, testifies as follows:

By Mr. Weinberg.

Q Where do you live? A South Orange.

Q What is your business? A Insurance.

Q And that business is conducted where? A New York.

40

Q What is the name of your company? A Globe & Rutgers Insurance Company.

*Motion for Non-Suit on the Opening.**By the Court.*

Q You say you are a stockholder in the insurance company? A Yes.

By Mr. Matthews.

Q Would that interfere with a just verdict in a matter in which the company is a litigant? A I really couldn't say. I would say I would be inclined to be lenient. I really couldn't say. I think I might have a tendency. 10

The Court: I will sustain the challenge. Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Weinberg opens in behalf of plaintiff. 20

Mr. Matthews: I move for a non-suit on the opening. There is not a single fact of negligence alleged against MacLachlan as to the proceedings in this case.

I want to make a motion as to the Sinclair Refining Company. They contribute \$2.75 to the maintenance of the car. The man had finished his day's work and was on his way home when the accident happened. It was not within the scope of his employment, and therefore this defendant is shown not to be negligent or not to be within the purview of the pleadings in the case. 30

The Court: Do I understand that he kept his car at his home? In other words, the car had not been returned after the business of that day.

Mr. Weinberg: It was always in use until it was returned. There was no place other than the regular place to return it. 40

Charles Day Moulton, direct.

The Court: If the car had been returned from his day's work then I would be inclined to grant the motion.

Mr. Weinberg: No, it was not returned from the day's work.

10 The Court: Then I will refuse to grant both motions.

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

Exception noted as ground of appeal.

Mr. Matthews opens in behalf of defendant.

20 CHARLES DAY MOULTON, sworn in behalf of the defendant.

Direct examination by Mr. Weinberg.

Q Dr. Moulton, you are a practicing physician and surgeon in the City of East Orange? A Yes, sir.

Q And you are connected with the Orange Memorial Hospital? A Yes, sir.

30 Q And have been connected how long? A Since 1904.

Q Did you know Gustave Auer of Sixteenth street? A I did.

Q Do you recall a man by the name of Auer being brought to your office in 1925? A I do.

Q Do you recall who came with him? A Mr. LaFreta is the only man, the only man; the other gentleman, I didn't know his name.

40 Q Where is your office? A Corner of North Nineteenth and Park avenue.

Charles Day Moulton, direct.

Q What time of the night did Mr. LaFreta come to your office? A Somewhere about 6:15; it was a little after 6:15.

Q Did he have an injured man with him? A Yes, sir.

Q Was that injured man brought to your office? A Yes, sir. 10

Q Did you make an examination of him? A Yes, sir.

Q Do you recall what that examination disclosed without first referring to any memorandum? A Yes, sir.

Q What was your examination? A The man was totally unconscious; he was bleeding from his nose and mouth; his pupils were unequal, he had abrasions on his hands and chest. Later I re-examined him up at the hospital and made notes. 20

Q Did you at the first examination look at his head? A I did.

Q What did you find? A The abrasions and the swelling, what we call the exudate.

Q How was he sent to the hospital? A In the ambulance; on account of the condition of the road, snow and ice, and it probably took twenty to twenty-five minutes.

Q When you got him to the hospital did you make an examination of him? A Yes. 30

Q What, if anything else, did you discover at the examination at the hospital? Do you need your notes to refresh your memory? A Yes, sir; notes that I made at the bedside. The man was sent in the office about 6:15, 122 Park avenue, East Orange. Patient was totally unconscious; he was bleeding from his nose and mouth and his pupils were unequal. An examination of head didn't show any signs of fracture, but 40

Charles Day Moulton, direct.

diagnosis of the right base was made; sent to the hospital; 8:15 P. M. the man was still unconscious, bleeding from the right ear, breathing heavily, pulse weak, and extreme pallor was noticed. The general condition of the man was extreme shock.

10 Q You say you diagnosed a fracture at the base? A The fracture of the base is the bottom of the skull; the vault is what we call the top of the head.

Q Where was the fracture of the skull? A The occipital portion of the head.

Q And the nose bleeding? A That was a fracture of the nose, which would have to be, to bleed to that extent.

Q Where were the abrasions on his body? A On his chest and hands; they were minor.

20 Q Was there any mark on his head? A Yes, there was a big hematoma, a big blood vessel in the occipital region.

Q How long did you stay with the man? A Until he died, say ten o'clock, the patient died at 10:30.

Q Did you determine the cause of his death? A It was a coroner's case.

30 Q From your knowledge? A From my knowledge, a fracture of the base and hemorrhage of the brain.

Q Could you say what induced the fracture? A It would be a violent blow.

Q You noticed the condition of the man's clothing? A It wasn't in bad condition.

Q Did he have his overcoat on at the time he was brought in? A He did.

Q Was he a large man or a tall man? A He was a short stocky man, to my recollection.

40 Q You didn't know him before this thing? A No, sir.

Everett Auer, direct.

Q You didn't know his widow before that?

A No, sir.

Q Did you see the man after his death? A
No, sir.

Q Were you there at the time of his death?

A I left just before he died.

Q You learned that he died that night? A 10
Yes, they 'phoned me.

Q Miss Banta, whom I called, simply is cus-
todian of the records? A Yes.

Cross examination by Mr. Matthews.

Q Did you say the man's clothing wasn't in
bad condition? A No, it wasn't torn or ragged
particularly.

Q Did you say there was a hematoma at the
base of the skull at the point that I point to on 20
my skull? A Yes, sir.

Q And that was the only mark on the head,
was it? A Yes.

Q And the abrasions on his face and hands
were superficial? A Yes, sir.

Q Scratches, were they? A Yes, sir.

By the Court.

Q He didn't regain consciousness? A At 30
no time. He never regained consciousness at
the hospital.

EVERETT AUER, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Everett, how old are you? A Fifteen
years old. 40

Everett Auer, direct.

Q Where do you live? A 114 North Sixteenth street, East Orange, New Jersey.

Q Gustave Auer was your father? A He was.

Q Kathryn Auer is your mother? A She is.

Q Do you go to high school? A I do.

10 Q East Orange High? A Yes, sir.

Q How long have you been going there? A This is the ending of the second year.

Q And at the time that you went to high school did you become familiar with the use of drawing materials? A Yes, I took mechanical drawing one year.

Q Do you know how to make measurements? A Yes.

20 Q Did you at my request make measurements of Park avenue? A My mother asked me to make measurements for the lawyer.

Mr. Matthews: I trust he is not going to qualify this boy as a map expert or drawing of maps. It does seem to me that a map could have been made in the proper manner.

30 Q Did you make measurements of Park avenue? A I did.

Q Did you make measurements of Sixteenth street? A I did.

Q You live a short distance from Park avenue? A I live nearer William street than Park avenue.

Q That would be south of Park avenue? A From William street.

40 Q That is a long block there, Park avenue to William, and you live somewhere in the center? A Yes, sir.

Everett Auer, direct.

Q Do you live on the east side or west side?

A East side.

Q Did you measure these little gardens on Park avenue? A I did.

Q Did you make a drawing according to scale? A Yes, sir.

Q What was the scale? A One inch equals 10 four feet.

Q Did you make your measurements on a paper drawing? A I did.

Q I am going to show you a paper and ask you if that is the drawing made by you (showing witness paper). A It is.

Q What direction does the upper part of that paper indicate?

Mr. Matthews: I object to any questions 20 as to the map.

Mr. Weinberg: In the testimony referred to by myself and Mr. Matthews as having been taken by consent in my office, that map was used by consent and marks made on the paper. It has been used by a witness and submitted by counsel.

Mr. Weinberg: I will offer it now.

Mr. Matthews: I will object to it until 30 I have a chance to look at it.

By Mr. Matthews.

Q Have you measured the distance from this island to this corner? A Thirteen feet.

Q Have you got it marked on the map? A No, but I know it.

Q A line drawn from that corner to this corner is eighteen feet (indicating)? A Yes, sir.

Q You measured it out? A Yes, sir. 40

Everett Auer, direct.

Q Your measurement would be on a line with that? A Yes.

Q Not allowing for the curb? A No.

Q There is a line here that shows twenty-one feet. When you got that measurement of eighteen feet did you draw an imaginary line like
10 that and there measured out with an imaginary line that would be flush? A No, I took a line straight down like that.

Q That would make eighteen feet, as you figured it? A Yes, sir.

Q As you have drawn that diagram the top part is north? A Yes, sir.

Q Take the pointer and point to west. A (Indicates.)

Q What is the end that you put your pointer
20 on? A That is the island that runs in the center of Park avenue, runs right through the center of Park avenue.

Q And the long green strip in the right-hand side of it. A That is the green island that runs between Fifteenth street and Sixteenth street.

Q What are the paint spots that you have indicated there? A The paint spots are the distance between these two islands.
30

Q You have some measurements there? A Yes, sir.

Q And your scale is drawn to what? A One inch equals four feet.

Q And you say the distance between the curb on the southerly side of the street and the southerly side of the garden in the center of the street is what? A Is twenty feet.

Q And that is the same distance on the north-
40 erly side of the garden? A Yes, sir.

Everett Auer, direct.

Q And you have the distance from the garden on the easterly side of Sixteenth street to the garden on the westerly side? A That is seventy feet between those two points, from the middle end of this line to the middle end of this line.

Q Have you the width of the garden indicated? A The width of the gardens are eighteen feet. 10

Q So they are indicated as being two inches wide on your map? A Yes, sir.

By Mr. Matthews.

Q Is the opening of Sixteenth street north wider? A As I measured it, it is exactly the same distance.

Q If I drew a line straight like that, it wouldn't come down this way? A No, sir, it is the same width. 20

By the Court.

Q The two ends of the street do not offset each other? A No, sir.

Mr. Weinberg: I would like to read the testimony of Robert W. Hanson, taken at my office, and referred to by Mr. Matthews in his opening. 30

(Mr. Weinberg reads the testimony referred to.)

Robert W. Hanson, direct.

May 8, 1926.

10 Transcript of shorthand notes of testimony taken in the above-entitled cause at the office of Benjamin M. Weinberg, 738 Broad street, Newark, New Jersey, at 11:30 A. M., on the 8th day of May, 1926, in the presence of Benjamin M. Weinberg, for plaintiff; John A. Matthews (by Mr. Kane) for defendants.

(Examination taken by consent of counsel for the respective parties. It is understood and agreed by and between said counsel that the testimony of Mr. Hanson may be read at the above said trial and that the signature of Mr. Hanson be waived.)

20 ROBERT W. HANSON.

Direct examination by Mr. Weinberg.

Q Now, Mr. Hanson, where do you live? A 62 Park avenue.

Q East Orange? A East Orange.

30 Q And your occupation? A Well, I am a traveling salesman, a manager and a vice-president. Salesman is what I go under most of the time.

Q What concern? A S. J. Emmerick Company.

Q Of New York City? A New York, 29 West 57th street.

Q And I understand you are about to leave the city on a more or less extended trip? A Yes. I should have gone away tomorrow night.

40 Q And you expect to be gone a month or so, I understand? A I couldn't tell you that. I expected to get as far as Minneapolis.

Robert W. Hanson, direct.

Q Mr. Hanson, were you acquainted with Gustave Auer in his lifetime? A No, sir; did not know him.

Q Did not know him? A Did not know any of them.

Q And did not know his family? A No, sir. In fact, I never heard of them.

Q You know where the corner of Park avenue and 16th street is? A Yes, sir. I live two doors from that corner. 10

Q Do you remember February 13, 1925? A Yes, sir; the day after Lincoln's Birthday—the night after.

Q Do you recall what time you came home from business on that day? A No; I couldn't say exactly the time, because there was about three different trains I would be apt to catch.

Q Well, about what time? A Well, I should have an idea, if I got the 5:35, it would be along about 6:05, 6:10 when I got to the Ampere station. I get off at the Ampere station. 20

Q And Park avenue is about how many minutes' walk—(interrupted)? A From five to ten minutes—

Q (Continuing.) From the Ampere station? A Easy ten and fair walking, five.

Q Now, did you see anything occurring in or about the neighborhood of Park avenue and 16th street? A No, sir. 30

Q I understand you did not see the accident? A No, sir; I did not.

Q In which it is claimed that Mr. Auer lost his life? A No.

Q Where were you at the time that you were made aware of the fact that something had happened? A Take this as Park avenue, and we will call the depot here (indicating with hand); this is Park avenue, here is 16th street. I live 40

Robert W. Hanson, direct.

on Park avenue. There is 16th about there, and I had got to about there when I heard the crash.

Q When you say "there" just where do you mean? A Well, now, I don't like to say, 100—about thirty-five or forty yards from the corner.

Q Which way, west? A West.

10 Q In other words, about thirty-five or forty yards west from the corner of 16th street— A That is rough saying, yes.

Q —on Park avenue? A On Park avenue.

Q When you heard— A A crash.

Q —a crash. All right. Now, upon hearing that crash, did you do anything? A Yes, sir, I turned around.

Q After hearing the crash you turned around and on turning around what did you see? A Well, I saw this automobile there fairly well up
20 on the snow bank and a man coming out the door of it, and he seemed to have lost his head and was screaming, "Who have I killed?" And then I went over there.

Q Now, where was this snow bank that you refer to? A Well, now, that was on the west side of 16th street, and there was one on the other side. The city had not cleaned those streets to amount to anything there, but, you
30 know, that little park that is down the avenue?

Q Yes. Let us call those little— A Safties.

Q —green safety gardens. A That is all right. That is what it is. They run the whole block.

Q And these gardens run in the center of Park avenue? A That is right.

Q A considerable distance east and west from North 16th street? A They run a block below there, too.

Q Yes. And they run considerably west, too?
40 A Yes, sir.

Robert W. Hanson, direct.

Q And they divide Park avenue into two parts, so to speak? A Yes.

Q And create east and west bound traffic? A Yes.

Q Now, let us have that understood. A That is right.

Q And there are gardens at that particular place on the east as well as the west side of what would be 16th street continued across Park avenue? A Well, it does. 10

Q But the gardens are actually in Park avenue and not 16th street; is that right? A That is right. 16th street is open right straight through.

Q Sixteenth street is open, but it is Park avenue at that place? A That is it.

Q Where was the snow bank that you have referred to? A Where the machine was, right here (indicating with hands), that is west. 20

Q Now, instead of saying "here," will you just designate that? Tell us for the record where that snow bank was. Refer to the object. A This one here is on the west side of 16th street, on Park avenue, on the west side of 16th street, by the intersection, that is on the west side.

Q Near what? A Here is where the snow bank was, right here (indicating). 30

Q The snow bank was— A There was snow all around, but this bank was here and so was the one around there

Q The snow bank that you refer to was near or in front of the gardens on the west side of 16th street, on Park avenue? A Yes, sir.

Q Is that right? A On the west side, and that snow bank extended—instead of being around and thrown up around here. When I saw the snow bank I went out here (indicating). 40

Robert W. Hanson, direct.

Q "Out here," referring to the snow outside of or east of the end of the garden that you have referred to on the west side of 16th street?

A Uh, huh.

Q On Park avenue? A On Park avenue.

10 Q Now, you have not told us what was the position of the automobile, as you saw it. Was it upright or what? A No; it was gone over.

Q Turned over? A Yes. It had not turned down all the way, I wouldn't like to say that. You see, that time of night it was not daylight; it was dark.

Q What time was it? A I should judge it would be somewhere around five minutes past six. Let us see, around half-past six, I should think, somewhere in there. I wouldn't say sure.

20 Q The automobile was overturned—upturned, rather? A It was right here, turned over.

Q Turned over. Did you notice which way the automobile was facing? A Yes, it was facing right down 16th. I have to say that again. It was facing down 16th street or more into this bank, like this. Here is about the way, if it was coming up here, it would hit about there in the snow bank.

30 Mr. Weinberg: The witness at this point is shown a map which it is consented, at least for the present, may be used by this witness. Right?

Mr. Kane: That is right.

Mr. Weinberg: This map will be marked Exhibit P. 1.

(Map marked Exhibit P. 1, May 8, 1926.)

40 Q Now, looking at the map, Mr. Hanson, will you just mark with a lead pencil, if you will,

Robert W. Hanson, direct.

where you say this automobile was at the time you first saw it, and put your initial there? A That is as near as I can tell it.

(Witness marks "R. W. H." on map.)

Q Have you an idea as to how high the snow pile in question was at that time at that place? 10

A I should think it was four to five feet, going up like that, you know.

Q Slanting up? A Yes, sir.

Q And four to five feet what, length? A Height.

Q Not that height the entire— A No. These places—can I explain this to you? Do you want me to do it?

Q All right. A In cleaning this snow around here, all the way along this snow was placed up against these places, and down here. 20

Q "Down here," referring to a point in front of the garden where his initial is marked. Go ahead. A They had thrown a pile of snow up there. The city done that.

Q Now, where did the pedestrians at that time walk? A The walk here, that may be right, but it strikes me that ought to come out here a little further—the people come down, at 16th street people would have to come like that. 30

Q This is— A This is Park avenue.

Q Don't get confused. These red lines— A Is a street.

Q No. Enclose the sidewalks. A That is what I meant. That is what I am saying.

Q When you get beyond the red line you are in the street. Your sidewalks are over here somewheres (indicating). A They had to go along about like that, say. 40

Robert W. Hanson, direct.

Q Just make some dotted lines in which you indicate what was the regular foot pathway across Park avenue at that particular point on the day in question. A (Witness marks diagram as requested.) I have got that a little too far down, but it was just about that way.

10 Q One inch is four feet according to this scale and that is more or less approximate, but it is about what your recollection is. Did you go over to the point where the upturned automobile was? A I did.

Q And was anybody there by the time you got there? A I was on one side of the car—

Q No, no. Was anyone there? A I think there was one that got there about the same time I did.

20 Q You didn't know who that person was? A No; I didn't know one of them.

Q Did you see the man that was driving the car? A Yes, sir.

Q Where was he when you first saw him? A He was climbing out of the door.

Q And did you see anybody else at that time? A I saw him climbing out before I got right to the car, you know. When I got to the car there was another man that come over from this
30 direction over here and afterwards, I think, there was another one, and they picked this man—I am getting ahead of my story.

Q All right. Can you tell me, Mr. Hanson—to go back a second or two—just where the automobile was lying with respect to the eastbound portion of Park avenue? A It is nearer to the east than to the west. Eastbound, that is what you mean?

Q That would be— A West traffic coming
40 into the east.

Robert W. Hanson, direct.

Q Detail that answer a little more, please.

A You asked me a question, where it was nearest and I told you it was near—it was across the eastbound, but it hadn't got out in eastbound traffic, as far as I could see.

Q Was it an open or closed car? A Closed car, it was.

10

Q Did you see anything of the injured man at that time? A Saw him laying there, that was all.

Q Saw him laying there. Laying where? A On the ground.

Q How near to this automobile? A I should think the man's body was laying—either his head or his feet—part of his body, I should say, was about even with the front of that car.

Q Did you notice what his condition was at that time? A No.

20

Q Was he talking? A No. Oh, the man was knocked out. There is no doubt about that.

Q Did you see any groceries, or anything, thrown along the street? A No. I didn't see that. I have heard a lot talked about it, but I didn't see it.

Q Did you notice how he was dressed? A No. I didn't notice that. Dark clothes, I think. I couldn't tell you that.

30

Q Did he have a hat on at that time, when you saw him? A I didn't say that. I don't think he did, but I couldn't say.

Q And which way was the front of the automobile facing? A It was facing the south—southeast, I would call it.

Q Did you wait until the man, who was in the automobile, got out of it entirely? A Yes.

Q And was anything else said in addition to what you have just stated here? A What do you mean? What this man said?

40

Robert W. Hanson, cross.

Q Yes. A Why, the man seemed to have—

Q What did he say at that time? A He said, "Who have I killed?" And he kept saying that and went around there like a madman for quite a while. He seemed to have lost his head, I suppose, like any man in an accident of that kind.

10 Q Don't make observations, please. How long did you remain there, Mr. Hanson? A Oh, they had him in an automobile inside of five minutes or ten minutes.

Q Referring to the injured man? A Yes. They gathered him up.

Q Then you waited there until they took the injured man away? A Yes, sir.

Q And then you went home? A Right. I did.

20

Cross examination by Mr. Kane.

Q How many times did you hear him say, "Whom have I killed?" A Well, sir, I couldn't tell you. I suppose fifteen. He seemed to be very much—he wanted to see the man, I think.

Q No. Not what you think. A I will say I heard him say that at least fifteen or twenty times.

30

Q When was the first time you heard him say it? A While he was getting out of the machine.

Q How far away were you from him then? A I was not more than four or five feet. They seemed to have some difficulty in getting that door open.

Q Now, you said that there were one or two other persons there who picked the man up? A Yes, sir.

40 Q And put him into an automobile? A Yes.

Robert W. Hanson, cross.

Q You said that part of his body, either his head or his feet, was even with the front of the automobile. Now, when you say "even with the front of the automobile," what do you mean?

A Right beside the automobile.

Q Or a few feet away from it, or what distance? A Well, he was—I should say he was— 10
well, I don't know. His body was away from the automobile, on the side. See what I mean? Here is the automobile, and his body was laying about there (indicating). Now, my recollection of it, as I am trying to give it to you, I think his body was laying, his head or his feet, of course, which, I don't know, because, by the time I got around there, these other two men were there, but his body was lying right there and they picked him up and stopped an automobile and 20
picked him up.

Q By the time you got around to where the man was, these other two men were handling this body, they were lifting him or moving him?

A Yes, sir.

Q So that you don't know just the position he was in? A He was right on the ground, sir.

Q But you don't know the position he was in before they started to move him. A Oh, yes, 30
because they had not moved him when I got there—just leaning over him. This was one man was leaning over him and the other one came up and, as I told you, they stopped an automobile and got him up the street as fast as they could. The man was senseless at the time. There is no doubt about that.

Q Well, now, his head or his feet was lying near the automobile. Were his head and feet and the rest of his body all together— A It 40
was like that.

Robert W. Hanson, cross.

Q How many feet away from the automobile was the nearest part of his body? A I couldn't say.

Q Approximately. A It would be a guess. I couldn't tell you.

10 Q Near which part of the automobile was his body? A On the side away from where it was cleaned, over this way, and he was off there.

Q Was he to the north, the east, the west or the south of the automobile? A He was east of the automobile.

Q You can use the map if you want to. A I say, he was east of the automobile.

Q He was east of the automobile? A Yes.

Q And was he at the north or south of the garden? A That garden?

20 Q Yes. A I should say he was darn near right in front of where that safety zone—it is about right here (indicating).

Q Meaning the garden? A I mean the garden.

Q And was the automobile in the street or in the garden? A Well, I should say—I couldn't give you that on account of that pile of snow being there, but I think so.

30 Q Not what you think. You don't know? A No.

Q All right. Was the body of the man nearer to the front or the rear or the right or the left side of the automobile? A It was on the south side, the body was, of the automobile. Excuse me. Not the south side, the east side. I get this bungled up. I will show you here. Here is where the body was, over here (indicating).

Mr. Weinberg: Witness points to his initials on the map.

40 Witness: Yes.

Robert W. Hanson, cross.

Q Now, where was the automobile with reference to that point? A That automobile—this curve here was all filled in with snow—that automobile was—that machine come up and come off along like that, about there (indicating).

Mr. Weinberg : Indicating X marked by Mr. Kane. 10

Q Now, with reference to the X, which is the automobile, where was the body of the man, remembering that, or trying to remember that this scale is one inch to four feet? A Yes. Well, now, the body of that man ought to be pretty near where I have got that X. More on the other side of it.

Q No, no. Not where it ought to be. Where was it, if you know, A Right there (indicating). 20

Mr. Kane: "Right there," indicating this point here. I will put an "O" there, indicating a point marked with an "O"; is that correct?

Witness: Yes.

Mr. Weinberg: That represents what, the body?

Witness: The body. 30

Mr. Kane: The body, he said.

Q And they were starting to move the body when you got to that point; is that right? A Oh, they were leaning over him, they started a couple of minutes or a minute afterwards, I guess. He was laying on the ground when I got around there.

Q Now, how was this automobile when you saw the man climbing out of it? Was it standing 40

Robert W. Hanson, cross.

on its four wheels or on two wheels or in what position? A I couldn't tell you that. I wouldn't say. It was leaning over, because this man had a hard time to get out. He had to go around the automobile to get to where these people had this man, where the man was hurt.

10 Q What direction was the front of the automobile facing? A The front of the automobile was facing south.

Q And how far out from the end of this garden was that snow bank? How far did it extend off from the end of the garden? A It was piled with snow up along here and that snow bank was out like that. I have got it draw too far, but, you see, you couldn't see that far; that was all covered with snow.

20 Q How many feet do you think it was extended out, if you know? A I don't know.

Q Was it ten feet? A No. Oh, no.

Q You didn't see this automobile until you heard a crash of some kind. You then turned around and the automobile was stopped; is that right? A That is right.

Q And just before the accident you were walking west on Park avenue? A Park avenue.

30 Q And you had arrived at a point about thirty-five yards, did you say? A Now, one minute. The corner is fifty feet front. Let us see. That is fifty feet, and the sidewalk, you might— Get that down right—it would be about thirty feet. Their entrance into that corner there is right in the middle of that lot. Allowing for the sidewalk, that would be, I should say, about thirty feet.

40 Q You were about thirty feet away from the corner? A Yes, sir.

Robert W. Hanson, re-direct.

Q The exact position of the body, that is, whether his feet or his head were nearest to the automobile you don't know? A (Witness nods no.)

Q Do you know what way his head was pointing? A No, sir.

Q Nor his feet were pointing? A I couldn't see that. 10

Q It was quite dark? A It was dark.

Mr. Kane: I guess that is all.

Re-direct examination by Mr. Weinberg.

Q Just a question or two. Mr. Hanson, in your direct examination you said you were about thirty or thirty-five yards— A I meant feet. It wouldn't be that far. 20

Q You meant to say feet instead of yards? A Yes, sir.

Q Mr. Kane asked you to state how far the nearest part of Mr. Auer's body was from the car when you saw it at first and you said you couldn't give an estimate. Now, I do not mean to pin you down to inches, nor does Mr. Kane, but we would like to have your best judgment, in answer to that question. You are a man of intelligence. Give us your best judgment. A Thank you for the compliment. I will say, three feet, the farthest. 30

Q The what? A I say, that is the extreme.

Q (By Mr. Kane.) So that it is a guess as to this distance? A Yes.

Q (By Mr. Weinberg.) How near to being accurate is it, do you think? A Well, I think it is as accurate as I can make it.

Alice Barnes, direct.

ALICE BARNES, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Where do you live? A Sixteenth street, East Orange.

10 Q Where were you living in February, 1925?

A The same place.

Q Were you employed anywheres at that time? A Yes, sir.

Q Where? A New York City.

Q Do you remember the evening of February 13, 1925? A Yes.

Q What time did you come from New York that evening? A I had a 6:05 train; presumably it was about 6:30 when I reached East
20 Orange.

Q Which way did you come from the station?

A Straight out Sixteenth street, going south.

Q What station is that? A The Ampere station of the Lackawanna.

Q Which way did you come along? A On the west side of Sixteenth street.

Q How did you cross Park avenue? A I crossed in the usual way, Sixteenth street, from the curb to the north and the south side.

30 Q On the east or the westerly side? A On the westerly, yes, sir.

Q Did you see anything that evening? A Yes, sir; an overturned automobile.

Q Where was it with respect to where you were crossing? A It was impeding my progress if I had continued.

Q What did you do? A I had to go around it.

40 Q Where did you see this automobile tire? A It was lying, as I remember it, about opposite

Alice Barnes, cross.

that little garden, perhaps a little bit further south, a little bit toward that way.

Q Toward which side of Park avenue was it against? A It was mostly against the station on the north side of Park avenue.

Q Bearing in mind that that map runs east and west, that the portion above the ground on the map is the westerly side of Park avenue, and the long end of the map represents the eastbound station on Park avenue, this is the north and this is the south, can you tell us about where that automobile was lying at the time you saw it? A I saw him this way, straight across. I had to go toward the little garden and then cross. The automobile was lying, I should say, about six feet from that garden. 10

Q Which way? A It was facing southbound. 20

Q When you say five or six feet from the garden, which way from the garden? A I meant out.

Q That would be east of it. Did I ask you where you lived? A Sixteenth street.

Q The same street as Mrs. Auer? A Yes, sir.

Q Were there any people around the automobile? A Some people, yes.

Q The injured man wasn't there? A No, I didn't stay to look. 30

Cross examination by Mr. Matthews.

Q Whom did you first speak to about this case? A To my sister when we saw the item in the newspaper and then I went across the street to offer my sympathy as a neighbor.

Q She lives across the street from you and she is your neighbor? A Yes, sir. 40

William Fahrenstock, direct.

Re-direct examination by Mr. Weinberg.

Q Does that affect your testimony any? A No, sir.

Q Are you related to her? A No, sir, not at all.

10

WILLIAM FAHRENSTOCK, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q What is your business? A Broker.

Q You belong to a firm? A Yes, Fahrenstock & Company, New York City.

20 Q You knew Gustave Auer during his lifetime? A I did. He was my secretary.

Q How long had he been employed by you? A Just about five years.

Q What were his habits generally as a man? A Unexceptional in every way. We never had any complaints. Always there and always very efficient.

30 Q From what you could see what was the state of his health generally? A It was always good. I never knew him to be sick except once when he had pneumonia, that is all. He was there every morning before I got there and he was there when I left.

Q What were his hours? A From about quarter after nine to about five o'clock.

40 Q Do you know how much he was paid? A He was paid \$6,500 up to the 1st of January before he died, and just then it was raised to \$7,100.

Lear La Freta, direct.

Q Did he receive any other money besides that? A No, that was all, my brother and myself, and there was one trust that we had.

Q What was the nature of the work that he did? A General secretary, everything checked on all trades.

Q That took in what? A All my private business, everything, keeping of the books, collecting dividends, cutting off coupons. I am treasurer of several things and he was always with me. 10

Q Was he a man of ability? A Very.

Q Do you know whether he was at work for you or your brother on February 12th? A I am told he was—

Objected to.

20

Q When did you last see him? A I sailed on the 22nd of January for Nassau. I saw Mr. Auer on the dock; he came down to say goodbye with my brother, and I never saw him again.

Cross examination waived.

LEAR LA FRETA, sworn in behalf of plaintiff. 30

Direct examination by Mr. Weinberg.

Q Where do you live? A Sixteenth street, East Orange.

Q Where did you live in February, 1925? A Sixteenth street, East Orange.

Q The same place? A The same place.

Q What was your work or business in 1925? A Butcher. 40

Lear La Freta, direct.

Q February, 1925, you were living at the same address? A Yes, sir, 146 North Sixteenth street.

Q Are you a married or single man? A Married.

10 Q Were you at your work on that day? A Yes, sir.

Q Where? A 50 North Sixteenth street, East Orange.

Q Who were you working for? A George J. Bogel.

Q What time did you come home that evening? A Left the store at 6 o'clock and got to my house at about 6:15.

Q Which way did you walk? A North.

Q And you were walking toward Park avenue? A Yes, sir.

30 Q What, if anything, attracted your attention? A I was just going up my front steps when I heard a crash and immediately started for the corner, and when within about twenty feet of the corner I heard a man break the glass of the door, call out, "My God! What have I hit?" Not once, numerous times. I started to go to his aid. He was just getting off the seat of the car, and then I proceeded to look to see if he had hit anybody, and I pitched over the body, and I turned him over, and I saw it was Mr. Auer. I called this other man to help me get him in the car—I hailed a car going west on Park avenue. We carried him and put him in the car and carried him to Dr. Moulten's office.

Q Was there anybody else there besides you when you got there? A Not a soul except Mr. MacLachlan crawling out of the car.

40 Q Where was the car when you first saw it? A Turned over on its right side. The top of

Lear La Freta, direct.

the car toward the west and the wheels towards the east.

Q And where was it lying? A From four to six feet from the center aisle of Park avenue, projecting out on the east drive about six feet.

Q Have you seen the map which is back of you? A No, I haven't. 10

Q Will you look at it and see if you understand it? A Yes, sir.

Q Will you indicate about where the automobile was when you first saw it? The scale is one inch equals four feet. A (Indicating on map.) About here.

Q Where do you say that was projecting? A Out on this drive, pointing to the east drive?

Q How far did you see it projecting out? A I should say four feet. It is hard to say exactly. 20

Q Was that an open or closed car? A Closed car.

Q Those gardens, you have seen them. Did you notice any snow that evening? A Yes, sir; parked all around the garden it had been shovelled up around the ends of the garden.

Q And where was this snow? A Parallel where the pedestrians walk. 30

Q Where was the automobile with regard to the pedestrians walk? A Right on the walk.

Q Did you notice what make car it was? A Chevrolet coupe.

Q Did you notice the condition of Park avenue with respect to snow at that time? A There was snow along the sides of the garden and on the side of the street, but most of it was piled up on both sides of the garden, east and west side. 40

Lear La Freta, direct.

Q Did you notice whether there were any automobiles parked along Park avenue on the west side? A No, sir, I didn't notice that.

Q Did you notice anything as to marks of an automobile? A After taking him to the doctor's office I noticed—

10

Objected to.

Q Did you go to the doctor's office with Mr. Auer? A I did.

Q You put him in somebody else's car? A Yes, sir.

Q At the time you picked Mr. Auer up what was his condition? A He was unconscious or rolled up like a ball.

20 Q Did you notice any marks? A Blood from the ears and nose and mouth.

Q You saw that? A Yes, sir.

Q Was he dressed? A Yes, sir.

Q Could you notice any groceries around there at that time? A Yes, lemons and butter strewn all over the street, the lemons were all over the street and the butter was in front of the car.

Q Oranges? A No, sir, just lemons.

30 Q Where did you see them? A Scattered around the east side.

Q With respect to the automobiles how far were they? A They were scattered west of the automobile.

Q How far? A Some of them, perhaps ten or fifteen feet.

Q Did you notice anything else? A No, sir.

Q Just the lemons and butter? A Yes, sir.

Q You say you went with him to Dr. Moulten's office? A Yes, sir.

40

Lear La Freta, direct.

Q Did you help carry him in the office? A I did.

Q Did you work there until the doctor was through examining him? A I did and went out and flagged an ambulance with Dr. Moulten.

Q After that you saw him taken away? A Yes, sir.

Q When you got back to the point of the accident what did you see?

10

Objected to.

Q You were going to say something about marks. Without testifying about them, could you say that the marks that you were talking about were made by one or more machines? A One machine.

Mr. Matthews: I object. What difference does it make unless it is shown that it was this machine.

20

Objection overruled.

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

Exception noted as ground of appeal.

Q Just describe the marks you spoke of.

30

Objected to.

The Court: You have not tied them up yet.

Objection sustained.

Q Where were the marks with reference to the automobile in question?

Mr. Matthews: I object. It seems to me that any marks that were near the auto-

40

Lear La Freta, direct.

mobile in question must be proved to be the marks of the automobile and that there were no other automobiles passed from the time that he went to the doctor's office and back.

The Court: You have not connected it up.

10

Q Was the automobile there when you got back? A Yes, sir.

By the Court.

Q Was it in the same position? A No, sir; it had been moved, been righted up.

Q Outside of that had it been moved? A Yes, sir, it was standing on the west side.

20

Q Had it been moved frontward or backward? A It had been swerved backward to the east drive.

By Mr. Weinberg.

Q Did you see any marks that you could identify as the marks of the Chevrolet?

Objected to.

30

Objection sustained.

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

Exception noted as ground of appeal.

Q Do you recall when you got back to the place where the automobile was when you went to Dr. Moulten's? A I don't get your question.

40

Q You say you went back to the scene of the accident after going to Dr. Moulten's? A Yes, sir.

Lear La Freta, direct.

Q After you came back from Dr. Moulten's I understand that the automobile had been moved some distance from where you first saw it? A It had been righted on four wheels.

Q Aside from being put up on its four wheels, was it in any different position than it was when you first saw it? A Yes, sir, it was on four wheels. 10

Q How far was it then from where it was first lying after it was on its four wheels? A About ten feet.

Q And to the north? A To the north.

Q Did you at that time, meaning the evening of the accident, speak to Mr. MacLachlan? A Yes, sir, he came to my place of employment and wanted to talk to me and wanted to know if I have made any testimony. 20

Q He came to your place of employment how long after the accident? A Perhaps two weeks.

Q Do you know Mr. MacLachlan? A I didn't know him, no, sir.

Q You know him now? A By sight, yes, sir.

Q What did he say to you? A He wanted to know if I saw the accident, and I said, "No, I didn't"; and he wanted to know what I knew about it, and I didn't feel that I should talk to him about it at all. He carried it very light. 30

Objected to.

The Court: That will be stricken out.

Q You are just to state what I ask you to state, if you had a conversation? A I didn't finish.

Objected to.

40

Lear La Freta, direct.

The Court: You are asked to tell what he said, not to characterize his actions.

Q What did he say and what did you say?

A He wanted to know what I knew about the accident and I told him as far as I thought, I said no.

10

Q What did you say to him? A I don't just recall what I did say to him. I didn't pay much attention to him. I was busy at the time.

Q What happened further? A He went on about his business.

Q Did he say anything to you about how the accident happened? A He skidded around from 16th street into Park avenue. He said that he skidded off the snow banks after hitting the car that was parked on the north side of 16th street into 16th street and turned over.

20

Q Did he say that he knew he hit anybody? A He said he didn't know that he hit anybody.

Q That is, on the occasion of his call upon you? A Yes, sir.

Q Just what, if anything, was said? A Then he went on about his business and that is the last I have seen him until today.

Q Did he tell you any more particularly where this car was that he hit? A No, he just said on the north side of Park avenue.

30

Q Then he did say that? A Yes, sir.

Q Did he hit a car on the north side of Park avenue, is that so? A Yes, sir.

Q Did he say how far he went or what happened to his car, or anything of that kind?

Objected to as leading.

Q Did he say anything else? A No, sir, he didn't.

40

Lear La Freta, cross.

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

At 1 o'clock P. M. the Court took a recess of one hour.

AFTER RECESS.

10

Cross examination by Mr. Matthews.

Q What street do you live on? A 146 North 16th street.

Q How far away from Mr. Auer's house is that? A About 400 feet.

Q It is on the opposite side of the street of Mr. Auer's? A The same side.

Q And is that the east or west side? A East. 20

Q What was Mr. Auer's number, do you know? A 114.

Q And by the east side, you mean the side toward Newark? A Yes, sir.

Q How many houses in from the southeast corner was Mr. Auer's house? A About eighteen houses in.

Q Are you familiar with South 16th street as it approaches North 16th street from the south? A Yes, sir. 30

Q Will you tell me how many stores there are as you count from the Ampere station? A There is one on the corner of 4th avenue.

Q The station is situated how with reference to North 16th street, west or east? A North.

Q But on the westerly side? A Yes, off that way.

Q But I have been talking about North 16th street; I have been talking about the direction of these two lines. A Yes, sir. 40

Lear La Freta, cross.

Q Then, if we understand these lines to run up in this fashion, we have North 16th street; here is the Ampere station? A Yes, sir.

Q The grocery store that you referred to is somewhere on this side? A Yes, sir.

10 Q And the approach of the station may be crossing this way or this way? A Yes, sir.

Q You told me that Mr. Auer and yourself lived on this side? A Yes, sir.

Q And that he lived about fourteen or sixteen houses in on this side? A Yes, sir.

Q On the easterly side of North 16th street. There are no stores from the station on, are there? A Yes, sir.

Q Where? A Near 4th avenue.

20 Q Whereabouts? A A confectionery store and a tailoring establishment.

Q Are they under the arch of the railroad? A This side of the arch.

Q What other stores on this side? A Two vacant stores.

Q What were there on the day in question? A I don't think anything.

Q Tell me, if you know, and if you don't know, say so. A I don't know exactly.

30 *By the Court.*

Q You said there was one store on the west side of North 16th street? A Yes, sir, cigar store.

By Mr. Matthews.

Q On the westerly side of 16th street, what was there? A A cigar store.

Q What else? A Two vacant stores.

40 Q What else? A Nothing else.

Lear La Freta, cross.

Q No butcher shop? A There is a baker shop, florist shop, shoe shine parlor and vegetable market, hardware store, delicatessen store and a drygoods store.

Q You were walking north on Park avenue? Will you point to your course? A I was going north on 16th street. 10

Q How? A North.

Q That is, you were going towards what? A Towards Park avenue.

Q At about what point on South 16th street were you walking north when you heard the crash? A About 250 feet from the corner of Park avenue.

Q That is pretty nearly near your own home? A Right at my own home.

Q I think you said you were on the steps of your home when you heard it? A Yes, sir. 20

Q Were you going in or coming out? A Going in.

Q From which direction had you come? A South and north.

Q From where? A From William street.

Q Do you remember making a statement to Chief Gilhooley of the park police with reference to this accident? A Yes, sir. 30

Q When you heard the crash you came out from the steps of your home and traveled 250 feet on the run? A Yes, sir.

Q Was it when you got up to the automobile that you heard Mr. MacLachlan say, "My God! what have I hit?" A Yes, sir.

Q How far were you away from him when you heard him say, "My God! what have I hit?" A About fifty feet.

Q When you go up to him had he gotten out of his automobile? A Just crawling out. 40

Lear La Freta, cross.

Q Did you hear the crash of glass? A No, sir.

Q Didn't you know that the glass was broken, with the turning of the car? A I know that according to Mr. MacLachlan coming through the door with his shoulders or his head he broke
10 the glass somehow; he got out.

Q And you saw that fifty feet from the corner? A Yes, sir.

Q Your testimony is that when you were fifty feet from the corner you heard him say, "My God! what have I hit," and you heard the glass break and saw him crawling through? A I saw him crawling through and I heard him say, "My God! what did I hit"?

Q You saw the headlights of the car? A Yes, sir.

20 Q Pointing in which direction? A South.

Q Was the car parallel with 16th street? A Not exactly, practically southwest.

Q And four to six feet projecting into the east drive? A Yes, sir.

Q Will you turn your attention again to the map? I call your attention to the safety aisle with an "X" and an "O"; I call your attention to the curb lines marked on the sidewalk. The
30 testimony is that there is eighteen feet from this green island here; it is about eighteen feet from there to about where this line would come flush; is that right? A Yes, sir.

Q Was there any snow between this point, the center of the safety aisle to the west and the line that would be the connecting line between the two curbs? A No, sir.

Q You can't be mistaken about that? A No, sir.

40 Q Don't you know that there was a mound of snow there? A No, sir.

Lear La Freta, cross.

Q Do you remember talking to the police officer about the mound of snow there? A No, sir.

Q There was snow right here at the end of this garden? A Yes, sir.

Q How far did it extend? A About three feet from the end of this garden, piled up. 10

Q How high would you say? A Perhaps two to three feet.

Q Do I understand you to say that from two to three feet out from this westerly safety aisle there was snow between two and three feet high? A Yes, sir.

Q Do you still insist that between that and the safety aisle there was no snow? A No, sir.

Q Do you remember talking to Chief Gilhooly about this? A Yes, sir. 20

Q Do you remember saying to him they ought to have cleared the street? A Yes, sir.

Q When the automobile you said was about four feet from this snow drift that it would make it from seven to nine feet? A While it was standing up; it was about six feet.

Q When it was lying down where was it? A It came across the safety aisle. The top of the car was in the mound of the snow.

Q Was the top of the car flush with the safety aisle? A No, sir. 30

Q How far out to that mound of the snow was the top of the car? The top of the car was near the mound of snow? A Yes, sir.

Q The automobile pointed this way? A This way (indicating).

Q The car was pointed with its headlights in which direction? A Southwest.

Q This would be north, isn't it? A The headlights were down here, yes, sir. 40

Lear La Freta, cross.

Q And the top of the car was here? A Yes, sir.

Q And it projected some feet, you say, into this green aisle? A Yes, sir.

Q You are certain of the fact that between the three feet mound of snow and this side of
10 the end of that safety aisle there was no snow?
A Yes, excepting on this crosswalk.

Q How long do you think the mound of snow was from the end of the easterly safety aisle extending into 16th street? A Perhaps two or three feet.

Q Not more than that? A No, I don't think so.

Q Then the only snow on this intersection was two or three feet at the end of this safety
20 aisle and two or three feet at the end of this safety aisle, and yet you tell me you said to Chief Gilhooly they should have cleaned that street?
A Yes.

Q They had cleaned it? A Yes, sir, but it had fallen back onto the walk, where the pedestrians walk.

Q Show me on the map. A (Indicating.) Here.

Q So, on the walk where the pedestrians
30 walked there was snow? A Yes, sir.

Q Was it cold that night? A Yes, sir—it wasn't very cold—it was winter-time.

Q Was it slippery at that point, do you know? A That I don't know.

Q If you can do it without the pointer, can you tell me whether or not there was snow to the north and south of the safety aisle? A Here and here and the same here.

Q To what extent in the roadway? A About
40 two feet.

Lear La Freta, cross.

Q What is your approximation of some objects in this room which this indicates? A (Indicates.)

Q Two feet. There was two feet of embanked snow here? A Yes, sir.

Q As automobiles would drive along that night there was two feet of snow to the north of the easterly safety aisle as you came along? 10

A Yes, sir.

Q And it was two feet? A Yes, sir.

Q And as you came along the two feet extended three feet in the street? A Yes, sir.

Q You said you didn't know whether there were any cars parked along the north side of the street or not? A No, sir.

Q Will you jog your memory? When you talked to Chief Gilhooly you said there were cars parked there? A No, I didn't talk to him two minutes. I wrote my statement. 20

Q Do you know who lived on the northeast corner? A I knew the party's name who lived on the southeast corner; I knew the owner, but I didn't know whether he lived there.

Q What is his name? A Stoves.

Q Did you know a Mr. Terril? A No, sir.

Q Did you know Mr. Bentley? A No, sir.

Q Then you wouldn't have seen these men if you didn't know them? A Mr. Bentley was there. 30

Q Was Mr. Bentley there before or after you got there? A That I don't know.

Q When do you recall having seen him? A When I leaned down to turn him over and saw who the man was, some man stopped behind me.

Q And that was Mr. Bentley? A That was Mr. Bentley.

Q Who assisted you in picking up Mr. Auer? A Mr. Bentley. 40

Lear La Freta, cross.

Q When you picked him up how far away from Mr. MacLachlan's car was he? A From the wheel that was on the ground, perhaps four feet.

10 Q Let us get the position of that car again. The car is lying with its top in the first foot of the three-foot snow bank, according to your testimony, and pointed in the direction that I hold my pointer, and its headlights pointed in this direction? A Yes, sir.

Q Pointing now to the southwest. Which wheel are you referring to? A The right front wheel.

Q The right front wheel that was on the ground? A Yes, sir.

Q The other three wheels were up in the air? A Yes, sir.

20 Q And he was four feet to the east of the right front wheel? A Yes, sir.

Q So that it was the width of the car; he wasn't under the car? A If the car had been put down on its four wheels he would have been about under the left wheel.

Q (Question read.) A Yes, sir.

30 Q So that his body was the width of the car and four feet beyond, one foot in from the snow bank, isn't that right? A No, not the width of the car; the width of the car was standing up.

Q It had some width lying down, hadn't it? A Yes, a little over two feet—thirty inches.

Q But that is in the position it was, four feet from that wheel? A Yes, sir.

Q Do you know how wide the pedestrians' walk was at that point? A No, sir, not exactly.

Q And you say there wasn't any other snow on that street between that mound and that three feet mound in the street? A Yes, sir.

40 Q It was entirely clear? A Yes, sir.

Lear La Freta, cross.

Q Except for the snow that had been thrown down? A Yes, sir.

Q And you don't know whether it was slippery or not? A No, sir.

Q And it had been traversed by pedestrians, so far as you know, that night? A Yes, sir.

Q When Mr. MacLachlan went to your place of employment two weeks after the accident he asked you what you knew about it, and I think you said to Mr. Weinberg, "I didn't think I ought to tell him." Is that right? A Yes, sir. 10

Q That is because you were going to be a witness for Mrs. Auer? A Absolutely not; in the first place, I didn't like the attitude Mr. MacLachlan took when he first came in.

Q Mr. MacLachlan did tell you at the start that his car skidded off the snow bank after hitting the car parked on the curb? A Yes, sir. 20

Q And that this car was parked along the north side? A Yes, sir.

By Mr. Weinberg.

Q You are acquainted with the houses around there? A Yes, sir.

Q How far are they apart? A Two houses to a block on each side; between 15th and 16th street on the north side there is two three-family houses and one large family house and a store; on the other side, Park avenue, between 15th and 16th street, there is a gas filling station, a public garage and a one-family house. 30

Q How long are those lots? A I should imagine about 300 feet. North of 16th street, on the south side of Park avenue, and on the north side of Park avenue there is a large house, there is a one-family house and two two-family houses and a church; on the north side of Park 40

Lear La Freta, cross.

avenue, west of North 16th street on Park avenue.

Q Is there a 15th street? A Yes, sir.

Q Is there a 14th street? A Fourteenth street runs just to the hill.

Q It doesn't cross Park avenue? A No, sir.

10 Q So that the street that crosses Park avenue after you come over that bridge is 15th street?
A Yes, sir.

Q And the bridge is where? A It starts at 11th street.

By the Court.

Q From your observation, would you say at that point, at the intersection, that the houses average over one hundred feet apart on Park avenue? A On one side of the street they are
20 about one hundred.

Q Taking both sides together? A They average about fifty feet.

By Mr. Matthews.

Q What is there on the northeast corner of North 16th street and the northeast corner of North 15th street? A There is a one-family house, two two-family and three stores.

30 Q In about how many feet? A Three feet, I should imagine.

Q It is North 15th street when you come in at the foot of that culvert? A No, sir.

Q How much of it? A About thirty or forty feet.

Q So it is thirty to forty feet from the bridge, not 300 feet from the corner of North 15th street? A Yes, sir.

40 Q Do you recall how soon after he got out of the automobile the Dodge car came along that took Mr. Auer? A Perhaps five minutes.

William Bentley, direct.

Q Was he there to assist to pick him up? A No, sir.

Q Did he help you pick him up? A No, sir.

Q Didn't someone tell you to get out of there, "He is hurt"? A He didn't assist me at all.

Q Don't you know that the Dodge car was there when you got out? A I didn't see a Dodge car. 10

Q What car? A A Maxwell.

Q What car took him to the doctor's office? A The Maxwell car.

Q Wasn't that Maxwell car there when you got out of the car? A No, sir.

Q How soon afterwards did it come along? A Five minutes.

Q What was he doing during those five minutes? A Walking around. 20

Q Did you see this Barnes woman? A No, sir, I didn't.

Q Did you see Mr. Hanson? A No, sir.

Q Didn't see him at all? A No, sir.

By Mr. Weinberg.

Q Have you ever been in the automobile business? A Yes, sir. 30

Q And you know cars? A Yes, sir.

WILLIAM BENTLEY, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Where do you live? A 179 North 16th street, East Orange. 40

William Bentley, direct.

Q Where did you live in February, 1925? A
At the same address.

Q What is your business or occupation? A
I operated a garage.

Q And before that what did you do? A I
had a gas station on the corner of 16th street
10 and 4th avenue.

Q Where was your garage? A 220 Main
street, East Orange.

Q How far from 16th street? A That is
about half a mile, I should say.

Q Do you remember the evening of February
13, 1925? A I do.

Q Where were you about some time in the
evening about 6 o'clock? A At about 6:10 I
came out of my house, out of my home, after
20 having supper, to go back to the garage, and I
was just starting up my car in front of my house.

Q Just where was your house with relation
to Park avenue? A There is a one family house
on the corner which would take up a hundred
foot lot and then the third house from that lot
was my garage.

Q On North 16th street? A North of Park
avenue and the west side of North 16th street.

30 Q You say you had just come out of your
house? A And I was just starting up my car,
I had to crank the car. I went down to the car
to put the key in, to put the switch in, and as I
went to go to the front of the car to crank it I
saw a car coming west on Park avenue at the
snow; I seen the snow fly from the left front
wheel as it passed the crosswalk, the easterly
crosswalk of 16th street; it went almost across
16th street and it turned over on the westerly
40 crosswalk of 16th street in Park avenue.

William Bentley, direct.

Q Will you look at the map behind you and tell us if you understand that map? A Yes, sir, I do.

Q Where were you at the time? A When I made this observation, which is the northwest corner of North 16th street, I was on 16th street, about 200 feet from this curb. 10

Q And from there you saw an automobile come in what direction? A Going west on Park avenue and it hit the snow, which I noticed distinctly, just the edge of the safety aisle.

Q You are pointing to the safety aisle on the east side of 16th street? A Yes, sir, struck the snow with the left front wheel, went across North 16th street and opposite on the west side of 16th street on the crosswalk, right in the pile of snow; it covered up that pile of snow. I was on the west side of 16th street and I ran down from my car to the overturned car to the west side of the car. As I stopped there, I didn't see anybody on the side of the car. As I ran up the fellow operating the car had crawled, as I thought, through the window of the car; it might have been a door—I couldn't tell from that distance what part of the car it was, and he went on the other side of the crosswalk, and I came between him and the car and stood there, when Mr. LaFreta came from the other direction and bent over. I went to the other side of the car and I seen that he was picking up a man. 20 30

Q How close to the car was the man when you first saw him? A He was probably not more than two feet away from the car. That is, the nearest part of his body was two feet to the nearest part of the car.

Q Just tell the jury where that automobile was when it upset? A It was on the westerly 40

William Bentley, direct.

side of 16th street, a little further south than the center of the street.

10 Q With reference to the east side of Park avenue or the eastbound traffic, where was this automobile in question? A The furthest point of the automobile projecting out into the eastbound traffic would be about five feet from the concrete of the park or the green, about five feet out into the eastbound traffic.

Q What happened at that point that you are referring to? A That is, the point of the automobile, it was furthest south. That would be the wheel, the extreme point of the automobile.

Q And how near to the snow bank was the automobile? The snow bank I have referred to is practically the garden on West 16th street? A I observed two snow banks. One snow bank was practically covered up by the car itself.

20 Q Where was that snow bank? A The nearest point was about six feet from the abutment or the head.

Q You are referring to the garden? A Yes, sir.

Q Where was the other snow bank? A Right in the shadow of the hedge.

30 Q Was there any space between the snow bank and the edge of the garden or the snow running right up to the garden? A No, the snow sloped from the one side and then there was a space and then snow on the other side, so that there was a space between the two.

Q Which one of the snow piles was the automobile on at the time? A The one furthest from the abutment.

Q The garden? A The garden.

40 Q With reference to that snow pile where was Mr. Auer's body lying? A Mr. Auer's

William Bentley, direct.

body was laying just south or southeast of that pile of snow toward the car, practically covered it up, and it was just southeast of the car.

Q Did you see how near he was to the car?

A The nearest part of his body would be about two feet from the nearest part of the car, the right front wheel. The left third wheel was up in the air, but it was over. 10

Q What would be over? A The left front wheel.

Q Did you notice how he was dressed at all?

A No, I didn't take any particular notice how he was dressed.

Q Did you observe anything that was lying there? A I had to pick some of the stuff from under my feet.

Q What stuff? A I didn't notice just what it was; I wouldn't say definitely that it was any particular article. 20

Q You just made out that there was something there? A Yes, that got under my feet.

Q Something other than snow? A Yes, sir.

Q Were they wrapped up in paper, those things that you refer to? A No, I didn't notice any paper.

Q You didn't notice what the things were, but that there was something there? A Yes. 30

Q Did you hear anything said as you came over to the place where the automobile was upset? A I heard the driver saying "What did I hit"? but I didn't take any notice to any hollering and any running around. He didn't help us to pick up the body.

Q Do you know who that man was? A (Indicating.) That man there.

Q Mr. MacLachlan. Where was this automobile, the one that eventually turned over, 40

William Bentley, direct.

when you saw it? A When I first saw the car it was just coming into view as it passed the house on the northeast corner of 16th and probably ten feet from the edge of the garden.

10 Q Where was this snow that you said you saw flying? A The snow that I saw flying was at the edge of the garden.

Q Can you indicate on the map? A (Indicating on the map.) This is the south side in the shadow of this hedge of this garden there was snow shoved up the hedge and ran right up to the edge of this concrete abutment.

20 Q Did you see whether the automobile went over part of the garden on 16th street? A I don't think it could; I saw it hit the snow and the snow around in the garden and the snow out in the road.

Q Did you observe the general conditions around there with respect to the snow and ice? A The only snow around there was just in the shadow and in this one pile of snow that the car toppled over; the rest of the road was dry.

30 Q What was the condition of Mr. Auer when you first saw him? A When I first saw him Mr. LaFreta was ready to pick him up, but I held him firmly by the back to pick him up under his arm. His feet were towards the car.

Q What was his condition and appearance? A He was bleeding in the face when we got him out in the light and picked him up to get him away from the car. A car came along going west on Park avenue and we hailed that car and that stopped and helped him in the car.

40 Q Where was the light which you have just referred to? A I couldn't say distinctly where the light was.

William Bentley, cross.

Q You just said when you got him to the light? A He was so close to the car.

Q What light was there? A I don't know where the light comes because I was looking at the man.

Q Do you know where there was a light in the neighborhood? A No, I don't.

10

Q A street lamp? A No, sir.

Q Just what did you mean when you said you got him in the light? A When we got him away from the car and then we could see that he was bleeding.

Q Did you go along with Mr. LaFreta to Dr. Moulten's? A Yes, sir.

Q And then after he was taken to the hospital you went back to the scene of the accident? A I believe in that same car.

20

Cross examination by Mr. Matthews.

Q Will you mark that with a B, first, the points where the two snow banks were marked, mark them B1 and B2. (Indicating.) Right there.

Q How far out did that extend? A That extended about two feet.

Q Two feet B1 is the first snow bank. Where was the second snow bank? A It started from here (indicating).

30

Q Mark that B2. Will you put the 3 where the end of the snow bank was? A (Witness indicates.)

Q Do I understand you correctly, there was one snow bank, B1, which ran from the concrete of the safety aisle down where? A Two feet from there.

Q Then there was space between B1 and B2, was there? A Yes, sir.

40

William Bentley, cross.

Q Was that space a crosswalk? A Yes, sir.

Q Which bank did the top of MacLachlan's car cover? A His car covered banks B1 and B2.

10 Q But the pedestrians' walk was between the extensions of B1 and B2? A No the pedestrians' walk partly covered the pedestrians' walk through the snow; there was no pedestrians' walk through the snow.

Q There was no pedestrians' walk through the snow? A No, sir.

Q If I understood you correctly, when you first saw the automobile it came in view about ten feet east of the garden? A Yes, sir.

Q And you saw it toward the center? A Yes, sir.

20 Q And you don't think it could have gone across the concrete? A No, sir.

Q It went through the snow and then did you see it turn over? A Yes, sir.

Q Where was the car when it turned over? A Right over here (indicating).

Q Was there any snow between here and there (indicating)? A No, sir.

30 Q How far west of the easterly aisle did the snow extend? A It didn't extend west at all.

Q How far even did it go? A Just the concrete here, just about eight inches of concrete and then the hedge starts right from there, that way.

Q Did you notice whether there were any cars parked on the northerly side of Park avenue? A When I noticed, when we were putting the man in the machine, that there was a car on Park avenue.

40 Q Do you know what make it was? A I don't know what make of car it was, and I don't

William Bentley, re-direct.

know whether it was parked there, but it was parked there when we were putting the man in the car.

Q How far back? A It was probably four feet back, east.

Q The northeast curb? A Yes, sir.

Q That is forty-five feet from here? A 10
Yes, sir.

Q Where would that bring it in reference to the end of the safety aisle, do you know, that is supposed to be eighteen feet, according to this map? A Further back at the end of the safety aisle.

Q How much back? A Ten or fifteen feet.

Q Twenty? A Twenty feet back.

Q Twenty feet back from the edge of the easterly safety aisle. When his car was turned over on the mound there between B2 and B3, you say that two feet from the nearest part of his car was the nearest part of Mr. Auer's body? A 20
Yes, sir.

Q What was the nearest part of his body to the car, his head or his feet? A His feet.

Re-direct examination by Mr. Weinberg.

Q Did you observe the speed at which the MacLachlan car was going? A It is hard to estimate the exact speed of a car, but I should judge that it was going probably in the neighborhood of twenty miles an hour. 30

Q You drive a car? A Yes, sir; I have been driving a car for about six years.

Q I didn't hear your answer to Mr. Matthew's question when he asked you about how far east of the front end of the safety aisle that parked car was? 40

William Bentley, re-direct.

The Court: He said twenty feet.

By the Court.

Q After the car struck the first bank of the snow did its speed increase or diminish going across the street? A I would say that the
10 speed stayed about the same. He didn't go down perceptibly or didn't speed up.

Q The snow bank on the east corner of the green there on Park avenue, how high would you say that was? A I would say that snow bank was approximately eighteen inches high.

Q Did you see the man at the time the car turned over, run into the door of the house on the southwest corner of North 16th street and Park avenue? A I did.

20 Q Did you see him go later from the front door and go later to Park avenue? A Yes, sir.

Q Did he come to assist the man? A Not to my knowledge.

Q Do you know a Mr. Terrill who lived there? A I don't know Mr. Terrill.

Q Which house was it that the man ran into? A He didn't run into the house; he ran to the portion of the house on the corner (indicating). This house, there was a porch there.

30 Q The man ran from here to there? A From the scene of the accident to this house and then at Park avenue.

Q You don't know the name of the man? A No.

Q (Indicating.) Is this the house that the man ran from here to there? A Yes, sir.

Q Did you make a statement to the police at this time? A I did.

40 Q You made a statement to the police some time after the accident? A Yes, sir.

Thomas Jones, direct.

Q Who was the man you made it to? A If I am not mistaken, it was Chief Gilhooly.

Q In that statement did you tell the chief that there was a car parked on Park avenue about thirty feet east of 16th street when the accident occurred? A As I understand the street, the width of a street is from the building line to building line. When I wrote my statement in Chief Gilhooly's office I meant there the Sixteenth street building line; that is not from the curb. 10

Q Is the building line marked on the map? A No, sir.

Q What do you mean, thirty feet from where to where? A The building line on 16th street is approximately thirty feet from the park.

Q In this way, eighteen feet from here to here from the building line to back here? A Yes, sir, approximately fifteen feet. 20

Q And it is eighteen feet here from the flush of the corner? A Yes, sir.

Q When you say thirty feet, would you say thirty feet from the building line? A Yes, sir.

Q That would make it about twenty feet from where you now stand? A Yes, sir. 30

THOMAS JONES, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Where do you live? A 58 Steuben street, East Orange.

Q And you lived there in February, 1925? A No.

Q Where did you live? A 59 Park avenue. 40

Thomas Jones, direct.

Q Where was that? A The southwest corner of Park avenue and 16th street.

Q What was your business or occupation at that time? A I was working for three trucking concerns.

10 Q Where? A Harrison, Newark, and also for myself.

Q What do you do now? A I sell hardware.

Q For whom? A C. J. Smith, New York.

Q Do you remember the night of February 13, 1925? A Yes.

Q You didn't see the accident? A No, sir.

Q Were you home that evening? A Yes, sir, I was in the house.

20 Q Was your attention directed to anything that evening? A No.

Q Did you observe anything at the corner of 16th street and Park avenue? A Not until my wife called me.

Q Your wife told you something and then what did you do? A She was downstairs and she called up to me.

Q What did you do? A I had on my hat and coat and went out to where the accident occurred.

30 Q Where did you go? A Downstairs.

Q What floor did you live on? A Third.

Q A two or three family house? A It was a one family house converted into a three family house.

Q At the time there was more than one family living there? A Yes, sir.

Q About what time was that? A I imagine about 6:20 when I got there.

40 Q What did you see when you got downstairs? A A car overturned.

Thomas Jones, direct.

Q Where was the overturned car lying when you saw it? A On Park avenue, protruding enough for the traffic to slow up and go around it, that is, eastbound traffic.

Q How far was it protruding into the easterly part of Park avenue? A Five or six feet, the front.

10

Q What was its position? A It was lying on its right side.

Q Towards where was the rear pointing, if you know? A As I recollect, it was pretty near straight; if anything, it was facing a little toward the house that I lived in, not much.

Q When you got there did you see anybody? A Yes, there were a few people around there.

Q Did you see anything of an injured man? A No.

20

Q Was he gone at that time? A He was gone, just left.

Q Did you see him leave? A No, they had just taken him away.

Q When you saw the automobile was it still on its side? A It had its lights lit.

Q What kind of car? A It was a coupe, but I couldn't say what brand of car it was.

Q How long did you remain there? A Twenty-five minutes to half an hour.

30

Q Did you wait until the car was taken away? A No.

Q How long did it remain there, do you know? A I don't know.

Q Did you see a wrecking car there? A No.

Q Did you notice the condition existing that evening with respect to snow? A Yes, sir.

Q Tell us about that. A The street was clean. The snow protruded from each aisle, that is, taking the east and west island, the

40

Loretta Reilly, direct.

cement abutment there which keeps dirt from going in the street; to my recollection, that was covered. It had been piled up there and was in the pedestrians' path.

10 Q Did you notice any marks on the snow? A I was particularly interested, because being in the trucking business and driving trucks I went back to see how this accident happened and what caused it.

Objected to.

Q Did you see any marks in the snow? A What snow?

Q In the snow that was near the westerly side of 16th street? A I didn't look.

20 Cross examination waived.

LORETTA REILLY, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

30 Q What is your business? A I am a telephone operator and clerk for Fahrenstock & Company.

Q Were you working for Fahrenstock & Company on February 20, 1925? A I was.

Q What were your hours? A From 9:30 to 5:30—6.

Q Did you know Mr. Auer during his lifetime? A While he was working there.

40 Q Who was working there the longest, he or you? A I was.

James T. Riddle, direct.

Q What were his hours for arriving and leaving there? A Usually at 9:00 and usually left around 5:00.

Q Do you know whether he was in his place of employment on the 13th of February? A He was.

Q Do you know what time he left there? A 10 He left around 5:00, it may have been a little before.

Q Was or was not, as far as you could see, he in his usual state of health? A He was.

Q He never came back after the 13th? A He did not.

(Cross examination waived.)

20

JAMES T. RIDDLE, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Where do you live? A 106A Sixteenth street, East Orange.

Q Where did you reside on February 13, 1925? A The same address. 30

Q What is your occupation? A I am a public accountant.

Q Are you familiar with the corner of Park avenue and North 16th street? A Reasonably so.

Q Were you out on the street the night of February 13, 1925? A Yes.

Q Where had you been, and at what hour? A In the neighborhood of 6:30 I started out to take a short walk. 40

James T. Riddle, direct.

Q Which way did you walk? A I went north on 16th street and got as far as Park avenue when I stopped.

10 Q Why? A On account of it being an overturned automobile there and making inquiries as to whether anybody had been hurt, and so forth.

Q Where was this overturned automobile that you saw? A Just north of this garden down the avenue and projected over into the eastbound traffic way.

Q How far would you say it projected into this eastbound traffic way? A Probably six feet.

20 Q You noticed that? A Yes, sir, I particularly observed that because the eastbound traffic was diverted by a policeman at that point, kept them in a single file.

Q And what were the general conditions around there in respect to snow? A Well, the street had been scraped, was cleaned pretty thoroughly. There was an accumulation alongside of the curbstones, of the curb of the garden side in the center of Park avenue.

Q Does that apply to the both gardens, east, and west on North 16th street? A Yes.

30 Q Where was this automobile lying? A The westerly side of the intersection of North 16th street and Park avenue.

Q And how close to it? A Very close.

Q You say pretty close, what is your judgment? A The car was overturned and resting on its two right wheels and it was partially on this accumulation of snow, and I am not sure but a portion of it may have been on the parkway.

40 Q What do you mean by the parkway? A The center park space that runs along Park avenue.

John MacLachlan (for Plaintiff) direct.

Q What we have been calling the garden? A Yes, sir.

Q Was there any injured man there at that time? A No; I made inquiry and simply was told that no one had been hurt, the driver escaped injury, and I went on with my walk. I didn't know at that time that anybody had been hurt seriously. 10

Cross examination by Mr. Matthews.

Q The car had not been righted? A No, sir.

Q You lived on North 16th street? A Yes, sir.

Q Mr. Auer lived how far away? A He lived at 114.

Q Did you know him in his lifetime? A Quite well. 20

JOHN MACLACHLAN, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q You are one of the defendants in this case? A Yes, sir. 30

Q What is your occupation? A Salesman.

Q For whom? A Sinclair Refining Company.

Q How long have you been salesman for the Sinclair Company? A Two years the 15th day of June.

Q Were you salesman for the Sinclair Refining Company in 1925? A Yes, sir.

Q Were you acting as salesman for the Sinclair Refining Company on the 13th day of February, 1925? A I was. 40

John MacLachlan (for Plaintiff) direct.

Q Just tell us what you would do as salesman? A Industrial salesman, public factories, oil factories through a number of counties in New Jersey.

10 Q What was the territory in 1925? A All of Essex County, all of Middlesex, all of Union and parts of Hunterdon.

Q Just what was your particular work? You say industrial salesman. Just what do you mean? A Call on the plants in any of those counties to try to interest them in the Sinclair Refining Company.

Q In other words, you sold the products of the Sinclair Refining Company to different industrial concerns in those counties? A Yes, sir,

20 Q How are you paid by the Sinclair Company? A Paid on a monthly basis—semi-monthly.

Q What were you paid? A How much?

Q Yes, weekly or monthly? A Paid every two weeks.

Q What did you use for getting around to see your trade? A An automobile.

Q How long had you been using an automobile to see your trade? A About five months.

30 Q Before the accident? A Yes, sir.

Q Could you get around and do your work without that automobile? A Not in the outlying territory.

Q Who owned the automobile? A I did.

Q Who bought it? A I did.

Q Where? A From the Mallin Motor Car Company.

40 Q On your account or the account of the Sinclair Refining Company? A On my own account.

John MacLachlan (for Plaintiff) direct.

Q What did you use that automobile for, to cover your territory? A To cover my territory.

Q You live in Irvington? A Yes, sir.

Q I suppose you had a garage connected with your home? A I did, yes, sir.

Q At the time? A Yes, sir. 10

Q That is where your car was always kept? A Yes, sir.

Q You would leave your home in the morning and go out and tend to your business during the day? A Yes, sir.

Q Did you always come back that night; did you come home at night? A Sometimes I had to stay away all night in the outlying territory.

Q And you stored it in the garage? A Yes, next to my house. 20

Q Did the Sinclair Refining Company contribute anything to the upkeep of this automobile of yours? A They paid me \$2.75 to run it.

Q How often did they pay you that? A Every week.

Q What did they pay that to you for? A To use the car for the benefit of getting business for them.

Q In addition to the \$2.75 a day that they paid you, did they pay you anything else towards the upkeep, the management or expenses of that car? A Entertaining. 30

Q I asked you whether they paid you anything else in connection with the upkeep of that car? A Not over \$2.75 a day.

Q Are you sure? A If you will explain. I don't know just what you mean. I got \$2.75 every week for the running of my car.

Q Did the Sinclair Refining Company pay for the gasoline? A No, sir. 40

John MacLachlan (for Plaintiff) direct.

Q You used Sinclair Refining Company's gasoline? A Yes, sir, whenever I could get it.

Q For nothing? A No, I paid for it.

Q And you used Sinclair Company oil? A Yes, sir.

Q You paid for that? A Yes, sir.

10 Q Out of the \$2.75? A Yes, sir.

Q You never had your car to New York; you always kept it in this territory? A Only on pleasure.

Q On business it was always kept over here? A Yes, sir.

Q Whenever you did keep the car when you were home it was in this garage next to your home? A Yes, sir.

20 Q And that is where you started from in the morning, and that is where you ran it at night, when you didn't remain out of town? A Yes, sir.

Q You didn't report to the office? A Only by telephone.

Q You were serving free lance in the State of New Jersey in your territory? A Yes, sir.

Q On the 13th of February you were out on the business of your firm? A Yes, sir.

30 Q You were working Essex County? A That day.

Q Do you remember the last customer of the Sinclair Refining Company that you called upon? A I do.

Q Who is that? A Romer Brothers, 556 Market street, Newark.

Q What time were you there? A About half-past four in the afternoon.

Q How long did you remain there? A Just a little over an hour; about half-past five.

40 Q Then you left Romer's? A Yes, sir.

John MacLachlan (for Plaintiff) cross.

Q And where did you go? A I started to go home.

Q What route did you take? A Up Market street, Commerce street, Cole street, I think the name of the street is, to Centre street and through Centre street up Washington Place, to Washington street, up Sussex avenue to Roseville avenue and turned to the left on Park avenue. 10

Q Then you turned into Park avenue at Roseville avenue? A Yes, sir.

Q And you were then going where? A Going home.

Cross examination by Mr. Matthews.

Q When you got through at Romer's did you or did you not telephone to your concern in New York? A I did. 20

Q Did you make any other telephone call after that? A I called my wife.

Q Was it your intention to go home and put your car in the garage at this time? A No, sir.

Objected to.

Q As a result of calling your wife were you going home to stay home or were you going out? 30

Objected to as immaterial.

Objection overruled.

A I was going out.

Q After you got home? A After I got home.

Q Were you going to put your car in? A Yes, sir.

Q Going to discontinue its use? A Yes, sir. 40

John MacLachlan (for Plaintiff) cross.

Q Where were you going? A Going to a dance—

Objected to.

Witness: —with Mr. Romer.

10 Q Was that part of your business entertainment? A Yes, sir. If I want to take out a customer at night it don't mean that I will do any business, but very often I will invite a customer out at noon or out at night.

Q Did I understand you to say that you were going out? A I was invited by Mr. Romer and another gentleman also, Mr. Landon.

Q It was Mr. Romer who was taking you out? A Yes, sir.

20 Q You said that the route of your car was up? A Market street, through Cole to Centre street and through Centre street to Washington Place into Central avenue, up to Sussex avenue to Roseville avenue on Park avenue, and turned to the left on Park avenue.

Q Where were you going? A I was going to continue home.

Q What route did you take on Park avenue? A Directly up Park avenue.

30 Q When you came up Park avenue what rate of speed were you going? A Not more than fifteen miles an hour.

Mr. Weinberg: I object to this as not cross examination. I haven't asked him any questions on this point at all. I object to his giving any testimony while he is my witness other than that strictly—on direct examination.

40 The Court: I will sustain the objection.

John MacLachlan (for Plaintiff) re-direct.

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

Exception noted as ground of appeal.

Q Did you proceed up Park avenue as far as 16th street? A I did.

Q When you came at or near the corner of North 16th street, what happened, if anything, to your car? 10

Objected to as not cross examination.

Objection sustained.

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

Exception noted as ground of appeal.

Re-direct examination by Mr. Weinberg.

20

Q Did you make the appointment with Mr. Romer for this entertainment while you were at his office? A Made the appointment with Mr. Landon.

Q Of the Romer firm? A Yes, sir.

Q While you were there at their place of business? A Yes, sir.

Q And I think you did mention on your cross examination that in addition to your salary the \$2.75 that was allowed you toward the upkeep of your machine, you were also allowed something for the entertainment of customers? A Yes, sir, only to the extent of lunch money. 30

Q If it was advisable to pay for their luncheon then you would pay for it? A No, sir.

Q Do you know why you wouldn't? A No, sir, it wouldn't be allowed, only a noontday luncheon; it was to entertain at lunch; it was specified on my expense account. 40

John MacLachlan (for Plaintiff) re-cross.

Q This was done to retain the good will of the customers? A No, I wouldn't say that it was; I was friendly with them long before I was selling for the Sinclair Refining Company.

Q But it was to retain their friendship that you went with them? A No, I didn't have to do that.

10 Q Had you been to any entertainment with these people before? A No.

Q How long had they been your customers? A They were not my customers.

Q You were calling on them as a customer for the Sinclair Company? A No, sir, I got it originally, but I turned it over to somebody else.

Re-cross examination by Mr. Matthews.

20 Q You didn't go there on business? A No, sir.

Q Just personally and friendship? A Yes, sir.

Q If I understand you rightly, you told us that the Romers and Landon had invited you to go to the dance? A Yes, sir.

Q This dance wasn't any expense to you? A No, sir.

30 Q Or any expense to your wife? A No, sir.

Q This was no part of your attempt to get or keep the business of the Romers to go with the treasurer that night? A No, sir.

Objected to.

Objection overruled.

Witness: It was not.

By Mr. Weinberg.

40 Q You had been working that day seeing customers? A Yes, sir.

Kathryn Swarts Auer, direct.

Q And the Romers were customers of the firm? A Yes, sir.

Q And still are? A Yes, sir, as far as I know. I don't call on them any more.

KATHRYN SWARTS AUER, plaintiff, sworn 10
in her own behalf.

Direct examination by Mr. Weinberg.

Q You are the wife of Gustave S. Auer? A I am.

Q You are the executrix under his last will and testament? A I am.

Q Have you the letters testamentary with you? A I handed them to you in your office. 20

Mr. Matthews: It is admitted that she is the executrix under the last will and testament of Gustave S. Auer.

Q Have you the original? A I have the original at home.

Q How old are you? A Forty-seven.

Q At the time of your husband's death? A Forty-six. 30

Q How old was Mr. Auer at the time of his death? A Forty-four.

Q When were you married? A 1906.

Q You have lived with your husband from the time of your marriage to the time of his death? A Eighteen years.

Q And you have lived with him continuously as his wife during all that period? A Yes, sir.

Q Were there any children of your marriage born to you? A Four. 40

Kathryn Swarts Auer, direct.

Q How many are living? A Three are living.

Q Name the living ones. A Floretta, fourteen; Robert, fifteen, and Richard, eight.

Q They are now living with you? A Yes, sir.

10 Q They have been ever since they were born?
A Yes, sir.

Q You live at 104 North 16th street? A Yes, sir.

Q How long have you lived there? A Since we are married.

Q Do you know where your husband worked before his death? A He worked for Fahrenstock & Company.

20 Q What time would he usually leave his office? A He would leave his office in time to arrive at his home 6:20 or 6:40.

Q He took one or two trains? A He took the one that he could get around that time.

Q What was Mr. Auer's occupation? A He had prepared himself for banking work, but he then became secretary to Fahrenstock.

Q And secretaryship work had been his occupation for some time? A Yes, sir.

30 Q What, so far as you know, did Mr. Auer do with the money he was paid? A He regarded it—

Q What did he do with it, as far as you know? A He saved as much of it as he could; that is, what would be left after the expenditures of stuff home would be paid for.

Q How did you run that, on what plan? A We ran it on a joint basis.

Q What do you mean by that? A A joint account.

40 Q With whom? A The City Trust Company of Newark.

Kathryn Swarts Auer, direct.

Q With whom was the joint account? A My husband; he and I took out an account.

Q Out of that account— A Out of that account we paid our bills and the rest was saved.

Q Can you tell us what his personal expenses amounted to? A He was so modest that I don't believe you would believe me. 10

Q Nobody is doubting your word. A When a man who has so few expenditures of a personal—

The Court: Tell us what his expenditures were.

Witness: He had commutation tickets, he had his clothes to buy, he had lunch money and such money as he needed in coming, going and the wear and tear from business, a little pocket money that a man would carry. 20

Q Was he a club man? A No, sir.

Q Did he drink? A He had no vices of any kind.

Q Did he smoke? A He didn't smoke.

Q Was he a good dresser? A He was neat and orderly, but never extravagant.

Q He was rather a small man? A Short. 30

Q What was the condition of his health prior to the accident for some time? A He was robust, healthy.

Q He had an ailment while he was with Fahrenstock? A He was sick one time during that time; he had quincy sore throat.

Q Did he recover from that all right? A Yes, sir.

Q What was his condition on the morning of February 13th, when he left his home, what was 40

Kathryn Swarts Auer, direct.

his mental condition? A He was happy in the prospect of a day's work; he always went away from home happy.

Q What time did you see him leave his home?

A 8:20.

Q He always traveled on the Lackawanna? A
10 Yes, sir.

Q Taking the Ampere train? A Yes, sir.

Q Did you ever go to and from New York? A
I did.

Q What was his usual way of coming from Ampere to his home? A When you leave the Ampere station you must walk this way, but one place you must cross east, and he selected his place of crossing to cross eastward along the south side of Park avenue.

Q As he would come along the crossing of
20 Park avenue, what side did he usually take? A He would go past the east end of the plot.

Q That would be on the opposite side from where you live? A Yes, sir.

Q And across Park avenue? A Yes, sir.

Q And then after Park avenue he would cross over to your side of the street? A Yes, at the foot of our block.

Q Did he ever do any shopping for you? A
30 He brought home some things from the Washington Market.

Q Groceries? A Very often either butter or fruit.

Q Did you tell him to bring these things? A Well, he brought the butter because he preferred the Washington Market butter.

Q You are referring to the market in New York City? A Yes, sir.

Q Did you ever know him to do any shopping
40 on the East Orange side? A The stores were

Kathryn Swarts Auer, direct.

closed in the evening when he came home. He didn't stop in our home city.

Q He didn't stop in New Jersey? A No.

Q You did say the stores were closed. What time did the stores close in East Orange? A All the good reliable stores are closed at 6, as far as I know.

10

Q How was Mr. Auer dressed when he left on February 13th? A A dark gray coat and he had on a dark suit.

Q Did you see him the same day, February 13th? A I saw him leave in the morning, but I saw him no more until I saw him at the hospital in the evening.

Q When he left on February 13th did he have an overcoat on? A Yes, sir.

Q Did you see that overcoat again in the evening? A The nurse brought the clothes and things that were on his person out to me and we checked them up together.

20

Q Have you the overcoat that you think he wore that day? A I have, yes, sir.

Q What did you see on the overcoat the night you received it at the hospital which was different from the condition it was in when you saw it at home in the morning? A (Examining overcoat.) Of course, it had these marks, all dust on it. One thing I remarked was that on the left part of each shoulder this tear.

30

Q The left side of the coat, a few inches below the top of the pocket; is that right? A Yes, sir.

Q Was that cut in the overcoat the morning that he went away, on the morning of the 13th? A Oh, no.

Q Did you see him after his death? A I saw him after his death.

40

George M. Crogan, direct.

Q When did he die? A He died on the night of February 13th, in the hospital, about 10:20.

Q Where was he buried? A He was buried Woodland Cemetery, New York City.

Q When? A On Monday following the 13th.

Q What day of the week was the 13th? A
10 Friday; he was buried the morning of the 17th.

Q What time did you see Mr. Auer after he left your home on February 13th for the first time? A I was summoned to the hospital, and I reached there, it seems to me, soon after 7:00.

Q And was he conscious then? A I never saw him conscious.

Q Did you observe his appearance, condition?
A Yes, sir.

Q What did you observe? A You would
20 hardly believe it was he. This portion of his head—

Q Referring to what was abnormal? A And this portion of his face was raised.

Q Did you observe any other marks on him?
A He had marks on his hand and his forehead.

Q Did you see the back of his head? A No, sir, he wouldn't allow me to touch it.

Cross examination waived.

30 (The overcoat referred to is offered in evidence and marked Ex. P. 1.)

GEORGE M. CROGAN, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Mr. Crogan, what position do you occupy?

40 A I am connected with the actuarial or mathematical department of the Mutual.

George M. Crogan, direct.

Q You have been connected with that department for a number of years? A Thirty-five years.

Q And your business is generally what? A It would require familiarity with the mortality tables and other fields of actuarial work.

Mr. Matthews: We will admit Mr. Crogan's qualifications.

10

Q I suppose you have become familiar with the American Experience Table of Life known as the Carlisle Table? A Yes, sir.

Q And the United States Life Tables? A Yes, sir.

Q Will you tell us what would be the expectation of a person forty-four years of age in apparently good health?

20

Mr. Matthews: I object. I think something more should be required. His vocation should be given.

Q Does the Carlisle Table classify different occupations, or does the Carlisle Table take them all together in arriving at the life expectancy with respect to different occupations? A No.

30

Q It is just based on the average length of a person who lived in that little town in England when they first got up these tables? A Yes. It is twenty-five and nine one-hundredths.

Q Will you give me the expectancy period of a woman forty-six years of age, in apparently good health? A At age forty-six the expectancy, according to the Carlisle Table, is twenty-three and eighty one-hundredths of a year.

40

George M. Crogan, direct.

Q Have you figured the joint expectancy of two lives, a man forty-four and a woman forty-six? A The joint expectancy, the average time of ages forty-four and forty-six, those lives remaining together, would be 17.12, according to the Carlisle Table.

10 Q Does the American Experience Table differ in any material respects from the Carlisle Table? A On these particular ages there is very little difference.

Q Is there a variation of a year or less? A It would be less than a year.

Q And the other, have you had that in connection with the Mutual Life Insurance Company? A We have the United States Life Tables, tables made up from the census reports in this country, one of the latest reports made up.

20

Q Does your company use them? A The company does not use them. This is made up from the general population of the company. The Carlisle and the United States Life Tables are general population tables. We know nothing about the condition of the health of those who enter into the makeup of these tables, yet the difference is very slight at those ages.

30 Q Tell us what was the expectancy under the American Table of a man forty-four? A At age forty-four under the American Table it would be twenty-five and twenty-seven one-hundredths.

Q So the difference is only eighteen one-hundredths of a year? A Yes, sir.

Q Take the United States Table. A According to the United States Table, it would be twenty-four and fifty-six one-hundredths; slightly different.

40

George M. Crogan, direct.

Q The joint expectancy. A Carlisle, 17.12, and for the American Experience it would be 17.67, and for the United States life tables it would be 17.58.

Q Will you figure the future earnings of a man at \$7,000 a year for a period of 17.12 years?

10

Objected to.

Objection sustained.

Q Give me the present value of \$1,000 per year for a period of 17.12 at six per cent.

Mr. Matthews: I object to that as incompetent.

The Court: Objection sustained. It seems to me you have got to work it out on a dollar.

20

Mr. Matthews: I object to the question.

The Court: Ask your question.

Q Give us the present value based on a dollar.

Mr. Matthews: I object to it as incompetent and irrelevant now.

30

Objection overruled.

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

Exception noted as ground of appeal.

The Court: As I understand it, your question is the present value of \$1 a year for 17.12 years.

Mr. Matthews: I object to that.

The Court: Objection overruled.

40

George M. Crogan, direct.

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

Exception noted as ground of appeal.

10 A According to the Carlisle Table which gives an expectancy of 17.12, the sum of 9.44 and nine mills, on the basis of six per cent. compound interest, would provide a dollar yearly, and be exhausted at the end of the 17.12 years.

Q If the fund were invested at five per cent. how much would that dollar be?

Objected to.

Objection overruled.

A Five per cent. compound interest the amount would be 10.282.

20 Q And at four per cent.?

Mr. Matthews: I object on the same ground.

The Court: The same ruling.

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

Exception noted as ground of appeal.

30 A 11.229. The lower the rate the higher is the present value.

By the Court.

Q It would take more to earn it, I suppose?

A Yes, sir.

By Mr. Weinberg.

40 Q That amount of money invested would consume itself at the end of this joint expectancy period that you have stated.

George M. Crogan, direct.

Mr. Matthews: I object on the same ground.

Objection overruled.

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

Exception noted as ground of appeal.

10

Q On the basis of the Carlisle figures the present value of a dollar during the period of expectancy mentioned, namely 17.12 would be 9.449? A Yes.

Q So that by the same rule of mathematics, to make an income of \$1,000 a year, you would multiply this thousand?

Mr. Matthews: I make the same objection.

A Any other amount would be in proportion.

20

Mr. Matthews: I object to it as incompetent, irrelevant and immaterial as stated in this last question.

The Court: Objection overruled.

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

Exception noted as ground of appeal.

30

Q (By Mr. Matthews.) A person forty-four years of age normally, according to this English Table, would live twenty-five years, he would be sixty-five? A Yes, sir.

Q And a woman forty-six years of age, she would be sixty-nine? A That would be.

Q What takes the eight years off of these people if they only live seventeen? A It means that people at those ages, forty-four and forty-six, joined together, classified together, will break

40

Motion for a Non-Suit.

up as two sets of lives at the end of seventeen years.

Q Will you tell me, is that the only explanation you have for the seventeen years? A That is the only explanation that any one could have.

10 Q So that table is like— A That table and explanation is perfectly clear.

Q What is it that makes this forty-four year aged man, who has lived twenty years with a woman forty-six years—I want to see if there is any sense in this joint expectancy business? A When a man forty-four years dies he breaks up a pair of lives.

Q But he is living, sixty-nine. A It has nothing to do with the full life. When we say that a man has an expectancy of twenty-five
20 years he may have an expectancy of thirty years.

Mr. Weinberg: I offer in evidence the interrogatories submitted to the defendant Sinclair Refining Company and the answers. (Marked Ex. P. 1.)

PLAINTIFF RESTS.

30 Mr. Matthews: I move for a non-suit, first on behalf of the defendant MacLachlan on the ground that the facts in the pleadings are not proved; and, on the second ground, that the contributory negligence of the plaintiff's decedent is shown. I would like to add as a third ground, that that evidence is entirely silent as to the point of contact with the automobile and decedent, and I want it on the record that the medical testimony is that there was a hematoma at the base of
40 the skull, there was a scratch on the hand

Joseph Read, direct.

and on the chest, the latter of which was superficial.

The Court: I will deny your motion.

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

Exception noted as ground of appeal.

Mr. Matthews: I make a motion in behalf of the Sinclair Refining Company on the ground that your Honor will note from the pleadings that we deny that he was about our business, and on the ground that at the time of this alleged accident MacLachlan was not our servant or agent. 10

The Court: I will deny the motion for non-suit.

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

Exception noted as ground of appeal.

Adjourned until tomorrow, Tuesday, June 8, 1926, at 10 o'clock A. M.

SECOND DAY.

Tuesday, June 8, 1926. 30

Continued pursuant to adjournment.

Present, counsel as before stated.

JOSEPH READ, sworn in behalf of defendant.

Direct examination by Mr. Matthews.

Q You are a police officer of the City of East Orange? A Yes, sir. 40

Joseph Read, direct.

Q And were such on the 18th of February, 1925? A Yes, sir.

Q On that evening did you have occasion to go to the scene of the accident at 16th and Park avenue in your city? A Yes, sir.

10 Q Was there an automobile upturned when you got to that corner? A There was.

Q Where was that automobile lying when you got there? A On the westerly side of 16th street.

Q How far from the green, as we will call it, on 16th avenue? A There was a pile of snow there.

Q Did you observe the condition of the north-bound parkway through the easterly side of 16th street that night? A Yes, sir.

20 Q What was the condition of travel on the eastern side of the parkway? (Indicating.) This is a map drawn by the son of the decedent and this is West and this is North 16th and this is South 16th street. I am asking you the condition of this Parkway for automobile travel? A It was rutty.

30 Q By that what do you mean? A The automobile tracks had worn down to the pavement and left heaps of snow the other side of it.

Q Do I understand you right that automobiles traveling on that parkway would travel on the clear—

Objected to.

Objection sustained.

Q Where were the ruts? A Where each wheel would make it.

40 Q That is, there were two ruts? A Yes, sir.

John MacLachlan (for defendant), direct.

Q And the general width was of an automobile? A Yes, sir, because traffic stayed to either side and somebody had to turn out.

Q Did you stay until after the automobile was moved? A I don't think I did. I think we went back after we had learned that the body had been taken away.

10

Q Then you went away? A Then we went away.

Cross examination by Mr. Weinberg.

Q What part of the roadway did those ruts occupy, where were they, in other words? A The traffic is divided on Park avenue.

Q I mean by my question, to obtain information as to whether the ruts were in the center of the roadway. A They couldn't be in the center.

20

Q I am not asking you where they couldn't be. A The other side of the center.

Q How far was the nearest rut to the curb on the northerly side of the westbound portion of Park avenue? A That I don't know.

Q You didn't notice that? A No, sir.

30

JOHN MACLACHLAN, recalled in behalf of the defendant.

Direct examination by Mr. Matthews.

Q You are one of the defendants in this action? A Yes, sir.

Q Your employer in February, 1925, was the Sinclair Refining Company? A Yes, sir.

40

John MacLachlan (for defendant), direct.

Q Were you working for them on the 13th of February, 1925? A Yes, sir.

Q What was your position? A Salesman.

Q In what branch of their service? A Industrial service department.

10 Q And your duties were what? A Selling and covering, soliciting, in other words, industrial and factory trade in New Jersey.

Q And I think you told us that your territory covers several counties. Will you repeat them? A Essex County, Middlesex, Hunterdon. I believe that is all.

Q In the pursuit of your business did you use an automobile? A I did.

Q Whose automobile did you use? A My own.

20 Q You bought the automobile? A I did.

Q With whose money? A My own.

Q Did or did not the Sinclair Refining Company contribute any money to the upkeep of that car? A They did.

Q How much? A \$2.75 a day.

Q When you say \$2.75, do you mean every day? A No, sir, I was paid \$2.75 for six days a week.

30 Q Did you put your car in your own garage? A No, sir, it was the garage next door to my house, but it wasn't on my premises.

Q On or about February 13th did you go about your employer's business? A Yes, sir.

Q What time did you leave in the morning? A About 9:00 or 9:30.

Q Was that your regular hour for leaving? A No, sir.

40 Q What was the reason for your leaving so late? A I had been in the house four or five days in bed sick.

John MacLachlan (for defendant), direct.

Q When you left the house that morning where did you go? A I went to a service station to have a new battery put in my car.

Q After that where did you go? A I went to Newark.

Q Did you make any calls in Newark that day? A I believe I made one in the morning before 12:00 o'clock. 10

Q After 12:00 o'clock what did you do, if anything? A I don't remember making any calls in the afternoon, particularly between 12:00 and 2:00.

Q After 2:00 o'clock do you remember making any calls? A I don't recall. I may have made one; I don't remember.

Q What was your practice with your employers at the close of the day's calls? A I called them on the telephone. 20

Q Did you call New York City after the completion of your calls? A Yes, sir.

Q After you had called New York City after the completion of your calls did you go anywhere? A Yes, sir.

Q Where did you go? A To Romer Brothers, Market street, Newark.

Q What is Romer Brothers? A Trucking account. 30

Q What is the difference between an industrial and a trucking account? A An industrial account is solicited by a man who handles nothing but factory trade.

Q What kind of an account is the Romer? A Re-salesman.

Q You tell me the Romer business was trucking business. Had you on February 13, 1925, known any one of the Romer concern? A I have known them all for a number of years. 40

John MacLachlan (for defendant), direct.

Q Have you known them in business or in social ways or how? A Both.

Q Whom did you know particularly in the Romer Company? A The secretary, Mr. Fred Landon.

Q Who else? A Charlie and Fred Romer,
10 two of the brothers.

Q Did I understand you to say that you went there after you had made your New York call?
A Yes, sir.

Q Why did you go there?

Mr. Weinberg: I object. Romer Brothers is a customer.

Objection overruled.

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

Exception noted as ground of appeal.

A I was in Newark that day and very tired, particularly tired; I had been advised not to go out of the house—

Objected to.

Witness: And I happened to be in that
30 particular neighborhood and I dropped into Romer Brothers merely on a social or friendly call.

Q How long did you stay, did you remain there? A I might have gotten there 4:00 or half-past four; I was there a full hour at least.

Q While you were at Romer's did you or did you not have a conversation with anyone of the firm or one of the employees with reference
40 to an entertainment that evening?

John MacLachlan (for defendant), direct.

Objected to.

The Court: You can ask him if he had a conversation.

Q Did you have a conversation with one of the men? A I did.

Q As a result of that did you telephone your wife? A I did. 10

Q As the result of that did your wife telephone some place else?

Objected to.

Objection sustained.

Q While you were at Romer Brothers was it in connection with the Sinclair Refining Company business? A No, sir. 20

Q Were you on business up there?

Mr. Weinberg: I object to that as leading and as immaterial.

The Court: Objection sustained.

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

Exception noted as ground of appeal.

Q After you had spent some time at Romers did you leave the place? A I did. 30

Q How did you leave? A With my car.

Q Were you going home from Romers to stay home? A No, sir.

Q Where were you going? A I was going home.

Q Were you going home to put up your car for the night? A No, sir.

Q You were going elsewhere that night? 40

John MacLachlan (for defendant), direct.

Objected to.

Objection overruled.

Q On your way home from Romer & Company you have described your route in Mr. Weinberg's examination; you took certain streets
10 until you came to Park avenue? A Yes, sir.

Q That was the direct way from Romers to Park avenue, wasn't it? A Yes, sir.

Q Will you tell us everything that happened from the time you struck South 16th street until this accident occurred? A I came up Park avenue from Roseville avenue and just before I got to 15th street, was just in from 15th street, the snow had been taken from the gutters as much as possible—that is, the excess snow had been
20 pushed up—

Objected to.

Q Just tell what the condition was? A The snow was piled up on the green, that is, leading from the green into Park avenue on a slope, in other words, down into Park avenue.

Q On which side of the green was that? A On the left-hand side of the green going west.
30 My two left wheels, the front and the rear, went in order. To lead up to that spot it was necessary for me to lead with my both left wheels up on this pile of snow; my right wheels were in the road on Park avenue, and there were two cars parked without lights, a Cadillac, I believe. As I got up Park avenue there was more snow protruding. As I got up on 16th street on the easterly end of it, this rut was so deep that it was impossible to get out of it, but was, I think, far
40 enough for cars parked on Park avenue to pass them—

John MacLachlan (for defendant), direct.

Mr. Weinberg: I object and I ask that the part of the answer that the rut was too wide to get out be stricken out.

The Court: You may describe that rut.

Q The Court suggests that you describe that rut. A The rut was very deep, and as I came to about fifteen feet to the easterly side of the end of the green there was a small car parked up against the curb (illustrating). If this is the curb here, his car was parked parallel with the curb, with his car parked this way, with his front wheel jogged out up against the curb. 10

Q Have you since the accident found out whose car that was, the name of the man? A I have.

Q Did you go to where that man lived to try to subpoena him for this case? A I have. 20

Q Could you find him? A No, sir.

Q Did you make further efforts than at the place he lived, did you make inquiries to find him? A I have.

Q Were you successful? A No, sir.

Q Will you give us the man's name? A Terrill.

Q Do you know where his residence was at that time? A Either he or his father or mother or some relation lived next door to Park avenue. 30

Q Did you make investigation there? A Yes, sir.

Q Did you try to get him there? A I inquired at the house where Mr. Terrill could be found and they said they didn't know—in fact, they didn't know Mr. Terrill.

Q Continue with your narrative with reference to the car. A The front wheels of this car were parked out into Park avenue. As I came 40

John MacLachlan (for defendant), direct.

up to this car my right front wheel struck the left front wheel of this car that was parked up against the curb. As I hit the front part of this car it threw the wheel out of my hand, which caused my car to swerve over a snow bank, which was exactly on the green which run down to the middle of Park avenue.

10 Q Mark on the map with your initials where the parked car was. A (Indicating on map.) The parked car would be in here.

Q Just put your initials over here. A (Indicating.)

Q Give us your estimate of the number of feet from the end of the green, meaning here--

The Court: He said fifteen feet.

20 *By the Court.*

Q When you say it was fifteen feet altogether, would you say it was the front of the car? A Yes, sir.

By Mr. Matthews.

30 Q Will you describe your course on the map with a dotted line, if the Court and Mr. Weinberg do not object, from the time you say you struck the wheels of that parked car until you struck the snow bank? A (Indicates on map.)

Mr. Matthews: A dotted line is drawn by the witness from the parked car, which, of course, is not his car, to the end of the easterly green plot.

40 Q When do you say the wheel of your car went out of your hand, before or after you struck the snow bank? A Before.

John MacLachlan (for defendant), direct.

Q What, if anything, did you strike when the wheel went out of your hand? A I struck this snow bank on the corner.

Q After you struck the snow bank which way did your car go? Tell us orally before you describe it on the map, what was your course after your car struck the snow bank? A I went directly over the snow bank and threw it and my car turned over. 10

Q Point out where that is on the map that your car turned over? A My car practically turned over in the middle of the intersection of 16th street and Park avenue.

Q Make an S on the map where your car turned over, your best estimate of it, unless you know the exact feet. A I would say that the car was about there. 20

Mr. Matthews: Witness makes an S on the map practically below the S that is printed on the map.

Q When your car tipped over did it remain stationary and did it go further? A It went further.

Q How far did your car go after it tipped over? A I should say it went about four feet further. 30

Q When your car tipped over what was the position of the headlights—were they north or south? A South.

Q What was the condition of the intersection of South 16th street looking now at the westerly side with reference to the island and the snow surrounding it? A There was one large patch of snow directly and to the east side of the green in the middle of Park avenue. 40

John MacLachlan (for defendant), direct.

Q Were the lights lighted as you came west on Park avenue? A Yes, sir.

Q Did you or did you not sound your horn as you came towards 16th street?

Objected to as leading.

10

Q What else did you do as you came to South 16th street as you were driving along? A I had occasion to look at the speed that I was going.

Q What was your reason for that? A By looking at the speedometer.

Q Why did you look at the speedometer? A Because I had, as I said before, a new battery put in my car in the morning and was informed by the battery man—

20

Objected to.

Q As the result of information by the battery man, you looked at your car? A Yes; it was the ammeter.

Q What was your speed as you approached 16th street? A About fifteen miles an hour.

Q Was there any pedestrian or traffic in front of you prior to the time that you came to that parked car on Park avenue? A No, sir.

30

Q Between the time you came to the car on Park avenue and the parked car did you observe any pedestrian before you? A No, sir.

Q Did you look?

Objected to.

Q As you approached Park avenue did you look in front of you for pedestrians crossing the highway? A Yes, sir.

40

John MacLachlan (for defendant), direct.

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling.

Exception noted as ground of appeal.

Q After your car, as you say, struck this parked car, describe the course that it took, turning on its side and leaning at the point that you have indicated; what did you do? A I climbed out of my car. 10

Q As you turned over which side of your car was on the ground and which was in the air? A The right-hand side of the car was on the ground.

Q And which part was in the air? A The left.

Q What was the position of the right-hand side of the car immediately after the accident? A The window was broken. 20

Q Before the accident was that window up or down? A Up.

Q Totally up? A Yes, sir.

Q What was the condition of the window on the left side? A The window was down in the case of the car.

Q When the car turned over what happened to the windows? A They both broke. 30

Q When you came out of the car did you say, "Whom have I killed?" A No, sir.

Q What, if anything, did you say? A "My God! What have I hit?"

Q You said that as soon as you got out of the car? A Yes, sir.

Q When you got out of the car through the window on the left-hand side did you step down on the green or what did you do? A I got out of the car and got on the running board and dropped to the ground. 40

John MacLachlan (for defendant), direct.

Q Where was that man lying with reference to the car? A He was lying to the right of my car.

Q How far to the right? A I would say about at least six or seven feet.

Q You mean he was lying north six or seven feet or east six or seven feet? A North.

Q North six or seven feet? A Yes, sir.

Q Will you put on the map the point where you best approximate where this man's body was when you got out of your car? A (Indicating.) In this position here.

Q Put an A there. A (Indicating on map.)

Q When you got out of the car was there anybody there? A Yes, sir.

Q Who? A Besides the man lying on the street there were a couple of men and there was an automobile parked and another automobile had stopped and they were helping this man in the automobile.

Q Did you see Mr. Bentley, who testified here? A No, sir.

Q Did you see Mr. LaFreta who testified here? A No, sir.

Q Did you talk to either of those two men at the scene of the accident? A Not that I know of.

Q Did you examine this car after the accident? A I did.

Q What was its description; describe in detail to the Court and jury. A There were two broken windows; that is, the two glasses in the windows; the hub cap on the right front wheel had been dented in.

Q Do you know what the condition of that hub cap was before the accident? A Yes, sir; it was in perfect condition; it was brand new.

John MacLachlan (for defendant), direct.

Q How long before was it brand new? A About a week previous.

Q What else did you observe about the car?

A My car was laying—

Q I am asking you about the condition of your car. A My lights were lit; in fact, my motor had just stopped turning over. The glasses were not broken. 10

Q How about your fenders? A They were in good condition also.

Q Were there any marks on the front of your car, any dent or mark on your car? A There were no dents, but on the right-hand side of the car there were some scratches on the top of the wooden body.

Q What do you mean by that? A On the side where it was lying.

Q How far up the sides were they? A All the way up. 20

Q Do I understand you to say that those scratches were on the side of the car that was on the ground? A Yes, sir.

Q Did you meet, in connection with this accident, a police officer, Dell? A Yes, sir.

Q Was Mr. Dell at the scene of the accident? A No, sir.

Q Did you make an effort to subpoena him? 30

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

A I did.

Q Did you find where Mr. Dell is? A He is in the hospital with a broken arm. 40

John MacLachlan (for defendant), cross.

Q At any time from the time that you approached South 16th street and Park avenue until you got out of your car, did you see Mr. Auer, the man who was lying on the street? A No.

Cross examination by Mr. Weinberg.

10 Q Starting with the last thing first about subpoenaing Mr. Dell, the first attempt was last night? A Yes, sir.

Q You knew that this case had been on the list for about a month? A I didn't know how long it had been carried.

Q You were never told to prepare for this case? A No, sir.

20 Q As to the parties, when did you first find out their names? A The accident happened on a Friday and I knew it on a Sunday morning.

Q How long after that did you make an attempt to learn where they lived? A Oh, probably four or five months; maybe more.

Q Why did you not try before that? A I can't say that I wasn't interested, but I thought this man would be brought here and I wanted to find his address—I wanted to talk to him, in other words, as I did Mr. LaFreta.

30 Q You didn't think it was interesting to speak to Mr. Terrill four or five months after the accident when you had known of this before? A Yes, sir.

Q Four or five months after the accident you knew where he lived? A I tried to find him, but I couldn't locate him.

40 Q I understood you to say that you didn't make a trial to locate Mr. Terrill? A I went to the address I stated before and they said they didn't know a man by that name.

John MacLachlan (for defendant), cross.

Q When did you first inquire of anybody as to where Mr. Terrill lived? A After I had found his name from the Essex County Park Commission.

Q What Sunday? A Two days after the accident happened.

Q So, two days after the accident you learned from the Park Police that a man by the name of Terrill lived at the corner of Park avenue and 16th street? A Yes, sir. 10

Q And it was more than four or five months after that that you tried to see Mr. Terrill? A Yes, it was that.

Q It was more than four or five months? A It may have been.

Q It may have been more than a year? A No, sir. 20

Q When was it? A I don't remember that.

Q Whom did you see? A The same party next to the corner house, on the north side of Park avenue, two houses in from 16th street.

Q Did you go to the house where Terrill lived? A I understood it was the second house.

Q Did the people tell you he did live there? A They didn't know him. 30

Q Did you have the number of Mr. Terrill's registration? A I didn't, no.

Q You didn't inquire from the Commissioner of Motor Vehicles? A No.

Q You were not limited in your hours of going to work and coming from work? A No, not particularly.

Q What do you mean by that qualification, please? A When I was working in Newark I was. 40

John MacLachlan (for defendant), cross.

Q So, that you answer my question by saying that your hours were not limited? A In Newark they were, outlying districts they were not.

Q Were you instructed by the Sinclair Refining Company as to what time you had to leave the garage or your home? A Yes.

10 Q Were you told what time you had to come home? A No, sir.

Q Were your hours of work limited or not? A Not to any specified time, not to any hours.

Q What you mean to say by that, you were supposed to work six days a week? A Yes, sir.

Q But your time during the day was your own time? A My own time.

Q As long as you did a certain amount of work that is all the company required of you?

20 A No, I wouldn't say that.

Q What have you to say about it? A My hours in the City of Newark were limited.

Q Do you recall this question and answer before Mr. John MacLauchlan, a master appointed by this Court to take your testimony? A I remember the day.

Q On page No. 3: "What has been your general authority? A I have no authority as far as doing what I please as long as I get my work done, and, of course, naturally do business.

30 Q Are your hours limited? A No." Is that right? A I may have answered the question that particular day that particular way.

Q Was that question asked of you and did you answer it? A If it is on that paper I answered it that way.

Q Then it is true if it is on the paper? A I have answered the question that in the City of Newark my hours were limited.

40

John MacLachlan (for defendant), cross.

Q I am asking you if that question was asked you and that answer was made by you at the time the question was asked and the answer was given, was it true? A Yes, it was true.

Q And then, "You start out and make your own trade, I suppose? A Yes, unless there is a letter telling me to go to a certain specified place that day." That question was asked you and answered by you? A Yes, sir. 10

Q "You take orders from dealers for products of the defendant, Sinclair Refining Company? A From factories? Q In that respect you are a free lance and can go where you want and when you want? A At that time, yes." That is true? A Yes, sir.

Q Were you ever told by the Sinclair Company that you could not park this automobile in the garage in your own home? A No, sir. 20

Q Were you told by the Sinclair Refining Company where to park the car on February 13th? A No, sir.

Q And there was no other place to park the car at that time except that garage? A I wouldn't say that.

Q I don't mean that you couldn't go into any other garage, but you didn't have at that time any other place provided for the car? A I was using just that garage. 30

Q And in supplying you with this \$2.75, the company didn't tell you how, when and where you were to use that \$2.75, as long as it was credited to you for use of your automobile? A Incidental expense.

Q For the use of your automobile? A Yes, sir.

Q That \$2.75 was limited solely for your automobile; that is true? A Yes, sir. 40

John MacLachlan (for defendant), cross.

Q In addition to that they gave you other money, expense money, which you call entertainment money? A Yes, sir.

Q You said yesterday that was limited to supplying midday luncheons? A Yes, sir.

10 Q Do you recall this question and answer, page 8, after referring to the previous question, you were asked this question: "In addition you received this extra allowance you have stated? A And my expenses. Q What were the expenses for? A Telephone, cigars— Q Entertainment of customers? A Yes. Q Meals? A No." A Yes.

Q You used no railroad? A Unless my car was broken down.

20 Q You used no street car? A I will make the same answer, unless my car was broken down.

Q You were asked: "You used no railroad? A No. Q Any street car? A No, sir." That is true? A I made that statement.

Q You mean if your automobile was broken down you would have to use other means of transportation? A Yes, sir.

Q Hire another car or go on a trolley car or bus? A That is right.

30 Q You never showed your face in the office of the Sinclair Refining Company? A No, sir.

Q In order to get this \$2.75, what did you have to do, anything? A Yes.

Q What was the nature of the information? A I don't know just what you mean.

40 Q See if you recall this question, page 9: "In order to have the \$2.75 a day, did you have to do anything?" And your answer: "I had to give them the motor number, the serial number, and the license number." A That is true.

John MacLachlan (for defendant), cross.

Q You understood the question and you answered it and it is true? A Yes, sir.

Q And you did say that? A Yes, sir.

Q And you made no stop after leaving Romer's, you were on your way home? A Yes, sir.

Q And you arrived at the point of the accident about half-past six? A I believe it was a little before 6:30, between 6:15 and 6:30. 10

Q As you were coming up Park avenue you noticed the road was rutted? A Yes, sir.

Q How far down did the rut go? A Half way down the parkway.

Q I mean, with respect to the surface of the road? A About half-way down Park avenue.

Q I say, with respect to the surface of the road, was the concrete or the asphalt showing through or was there any ice or snow showing in the rut? A I couldn't see any asphalt. 20

Q Then you think there was snow? A I don't know.

Q What did you say? A I don't know; I didn't look.

Q You don't know whether there was snow under your wheels or whether you were in direct contact with the asphalt? A Not in the rut I was driving, I don't know. 30

Q Alongside of this rut, how high would you say this snow was? A At least six inches.

Q You observed that as you were driving along? A I would say it was that high.

Q I say, you made that observation at the time you were driving along Park avenue? A Not at that particular point. Up further I did, noticed that the snow was piled up six inches on every side.

Q Whatever point you have been testifying from? A It was. 40

John MacLachlan (for defendant), cross.

Q From your observation at or about the time of the accident? A Yes, sir.

Q It is not your recollection this morning? A No.

Q That is your recollection from the observation that you made on the evening of February
10 13th? A Yes.

Q So, as you came up Park avenue, you observed there was a rut and snow bank? A Yes.

Q Six inches? A Yes, sir.

Q You came along Park avenue and you observed cars parked? A I observed one.

Q Where was the first automobile that you observed? A Parked about midway between 15th and 16th streets.

Q What kind of a car was it? A Cadillac.
20

Q Did it have a light on it? A No, sir.

Q You were able to observe the car, it was plenty light enough for you to see it? A Yes, sir.

Q And that was just in the block preceding 16th street? A Yes, sir.

Q And you also observed another car there. What make was that? A At the time I hit the car I don't know.

Q You did answer Mr. Matthews and tell him what kind of a car it was? A Yes, sir.
30

Q What did you tell him? A I don't know as he asked me when I noticed it.

Q What car have you observed was standing ahead of the Cadillac towards 16th street? A A Chevrolet car.

Q How far in front of the Cadillac was the Chevrolet? A I don't know how many feet it was. I would say probably as far as maybe the
40 length of this room, maybe a little bit less.

John MacLachlan (for defendant), cross.

Q Did it have a light on the rear? A That I don't remember.

Q And you observed at that time that it was approximately fifteen feet east of the westerly end of that garden, that is, on the long side of 16th street? A At that particular time I didn't notice; it was after I had gotten out of my car that I noticed how far back that car was. 10

Q What was it that caused you at that moment of excitement—I suppose it was—to observe this car? A I walked over to see it.

Q Why? A Because I knew I had hit it.

Q You didn't notice the condition of the car you hit? A Yes, sir.

Q You started to say that you didn't observe that it was a Chevrolet at that time? A No, I didn't.

Q Did you know that there was a car there at that time? A Yes, sir. 20

Q Did you know what you hit? A Yes, sir.

Q When you uttered the expression, "My God! What did I hit?" Were you referring to the automobile you had hit? A No, I didn't know what I hit.

Q After you had collided with the car? A With the car. 30

Q You say that the front wheels of that automobile were turned into the curb? A Yes, sir.

Q Did you observe that at the time you came along Park avenue? A Yes, sir.

Q And still you kept on in the rut? A I didn't keep on after I hit the car.

Q But you kept on the rut knowing that there was an automobile in front of you that was impeding your progress? A I didn't observe it until I got right up to it. 40

John MacLachlan (for defendant), cross.

Q Before you got to it you saw it? A Yes, but I didn't see the wheels turned out.

Q How far away were you, do you think, when you observed the front wheels of the Chevrolet turned into the curb, which naturally turned it into the rut? A About two or three
10 feet. The front of my car was probably two or three feet away from the car at that time.

Q When you saw these wheels out? A Yes, sir.

Q You said before that you couldn't leave the rut? A That is right.

Q As a matter of fact your car did get out of the rut? A Yes, sir.

Q And it did get out of the rut after you struck the Chevrolet? A Because I couldn't.

20 Q Did you try? A I had no reason to try.

Q Then you don't know whether you could? A That is so.

Q Whether you observed just where the front wheel, where it was turned, you did observe that the car was pretty close to the rut, that is true?

A It wasn't the car that was close to the rut; it was the two front wheels.

30 Q What kind of a car were you driving? A Chevrolet.

Q When you turned the front wheels of the Chevrolet so that the right hand, right back of the periphery of the wheel would be up against the curb, how far would you say the wheel projected beyond? A About six inches.

Q You don't know a car that projects six inches? A Yes.

40 Q Four inches is a big projection when the wheels were turned that way beyond the mud-guard? A I couldn't say.

John MacLachlan (for defendant), cross.

Q After you hit the Chevrolet you traveled a distance shown on the map and indicated by initials J. M. to what mark you put there to indicate where you stopped? A X.

Q You didn't make a straight line from the point of contact with the Chevrolet to where you overturned? A No. 10

Q Did you hit the snow bank in the garden on the easterly side of 16th street? A I went right through it.

Q Didn't you upset there? A Just as I dropped off the edge of the snow bank.

Q How far do you say it is from the end of the garden on the easterly side of 16th street to the point where your automobile overturned? A About ten feet.

Q I ask you now whether your designation 20 on the map is not more than ten feet from the end of the garden? A When I made those marks I wasn't making them according to any scale.

Q You want us to understand that is your estimate? A No, it is not an estimate; it is just a point where I indicated.

Q Your recollection is that your car overturned ten feet? A Yes. 30

Q That mark is in the wrong place. 30

Objected to.

Q What is your best judgment from the observation you made the night of the accident as to how far your car went from the end of the garden on the easterly side of 16th street until it turned over? A My car turned over, as I said, about ten feet, and when it stopped it had slid from one place and rested on the snow 40

John MacLachlan (for defendant), cross.

bank. That was, I would say, about twenty feet away from the easterly end of the green.

Q Then it didn't lay where it turned over?

A No, sir.

Q As I understand, your automobile overturned just as soon as you hit the snow bank?

10 A That was practically as soon; it wouldn't turn over until I hit the green. The fact of my hitting the snow bank—

Q You are reasoning it out now. A It turned over and hit the ground.

Q When this examination was held you remember just what happened? A Yes, sir.

Q Page 15: "After running into the snow bank, what course did your car take? A Turned over. Q Immediately? A Yes. Q Then what

20 happened? A Then I climbed out of my car."

A I answered that question that way, yes, sir.

Q You say as you came along 16th street you observed the speed of the car? A Yes, sir.

Q You were looking at your ammeter? A Yes, sir.

Q By looking at your ammeter you observed your speedometer? A Yes, sir.

30 Q Those are both small dials? A One is a dial and one is a larger dial.

Q And you think you can charge or discharge the battery at the same time that the speedometer is recording? A Yes, just by a glance of the eye.

Q And you were looking at it just previous to the accident? A Yes, sir.

Q Although you were driving your car all day you were looking at your speed? A I had been watching it all day.

40

John MacLachlan (for defendant), cross.

Q So, you had been coming along looking at your speedometer? A Yes, sir.

Q And you were blowing your horn? A Why, I must blow my horn on every corner.

Q Do you recall on that particular night you blew your horn before you got to 16th street?

A Yes, sir.

10

Q Where did you go before you got to 16th street? A 15th street.

Q Before that? A I can't recall every time I blew my horn.

Q Do you know where you were when you looked at your speedometer prior to the time you looked at it near the point of the accident? A Probably a half dozen times; just where I don't know.

Q But you know now that you did look at it just before the accident? A I did, yes, sir.

20

Q And you do remember, although you can't remember at what point you had blown your horn, that you did blow it just before the point of the accident? A Yes, sir.

Q At the time of the collision with the Chevrolet, what was the situation of your feet on the gas accelerator? A I don't know. My feet may have been resting on the accelerator or on the brake.

30

Q Were you running it from the quadrant or foot accelerator? A I had a little quadrant.

Q You don't know whether you were feeding the gas either by hand or by foot so that you wouldn't be able to tell me whether the foot was knocked off the accelerator or the hand off the wheel? A No, I don't remember.

Q You don't know whether your gas was on or shut off? A No, I don't.

40

Motion for Direction of a Verdict.

Q But you do think that you hit the Chevrolet? A I said about twenty feet; my car was about twenty feet from the green.

DEFENDANT RESTS.

PLAINTIFF RESTS.

10

Mr. Matthews: I respectfully move for the direction of a verdict in behalf of the Sinclair Refining Company, urged on the grounds yesterday, using that argument again.

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

Exception noted as ground of appeal.

20

The Court: I will hold that the defendant MacLachlan was a servant of defendant, Sinclair Refining Company, and was driving the car in furtherance of his employer's business and that employer is liable for defendant, MacLachlan's negligence while driving toward his home in going west on Park avenue. For the benefit of counsel, and the upper court, if necessary, I will state that I am following the case of Lewis against the National Cash Register Company, 84 Law, 598; Depue *v.* Salmon Company, 92 Law, 550; Ferris *v.* McArdle, 92 Law, 580; Whatman *v.* Pearson, L. R. 3 C. P. 422; Donaldson *v.* Ludlow & Squire, 110 Atl. 690.

30

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

Exception noted as ground of appeal.

Mr. Matthews sums up in behalf of defendant.

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Mr. Weinberg sums up in behalf of plaintiff.

*Charge to Jury.***CHARGE.**

The Court charges the jury as follows:

SMITH, J.

Members of the Jury: This is what is called a death action. Under the common law no suit could be brought for causing the death of another person due to the fact that that person is dead; our legislature has passed an act called the Death Act, which gives the right of action to the wife and next of kin (in this case the children) to recover damages for negligently causing the death of the person who was killed, and in this case the action is brought by Mrs. Auer as the executrix of the last will and testament of Gustave S. Auer, to recover the loss which she claims she and her children have sustained by the death of Mr. Auer, charging that Mr. MacLachlan, acting for the Sinclair Refining Company, negligently caused the death. The accident occurred February 13, 1925, about 6:30 in the evening. Of course, it was dark and there was snow on the ground. It happened at the intersection of North 16th street and Park avenue, in the City of East Orange. The defendant's car was going in a westerly direction along his right side of the parkway on Park avenue, that is he was to the right of that garden spot which runs down through the centre of Park avenue. Just what the deceased was doing at the time we have not before us by direct testimony of any of the witnesses. We do know that the deceased was employed in New York and usually used the Lackawanna Railroad and that the Ampere station was in a northerly direction up 16th street, and it is plain that he was in the act of crossing this highway from

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Charge to Jury.

the north side to the south side when he was struck by the automobile operated by MacLachlan. The plaintiff claims that the automobile was operated without due care and at an excessive speed, and that the automobile struck the deceased and that blow caused his death.

10 The defendant claims that if the accident occurred it was inevitable. He said that he was driving in ruts and that he passed one car in clearance, and that a second car was parked to his right, and that the left wheels were pointed to the left, and that he struck the hub cap of his front right wheel on the protruding part of his car with the result that he was thrown to about the easterly end of the island there and from there thrown part way across 16th street and overturned, and then slid for some distance;

20 that he was pointed in a southerly direction somewhere around the centre of the intersection of the two streets, and that Mr. Auer's body was to the rear of his car in a northerly direction some, three, or four, or five feet.

I am not going to review the testimony of the different witnesses to you. I think you have paid careful attention and I think the evidence has been fairly well presented, as well as it can

30 be presented in a case where the deceased, one party involved in the accident is not here and not able to give testimony. These are the disputed questions of facts and you as jurors are charged with the obligation of determining what the true facts are. The responsibility is yours; you are charged with that duty. My duty is to tell you what the legal rules are governing the case, and you will be guided by your own recollection in determining those facts, not as I may

40 quote it to you, because, as I have said you are

Charge to Jury.

the judges of the facts. You will take the circumstances as you find them and decide upon the probabilities from those circumstances.

In this case there have been a number of motions on behalf of the defendant asking that this case be non-suited or that a verdict be directed. You will pay no attention to my rulings on those motions. That merely means that I have decided that the questions of fact must be left to you to ascertain. The burden of proof is upon the plaintiff, and if the evidence is evenly balanced, then, of course, she will not be entitled to your verdict. She must establish her case by a fair preponderance of the evidence, and what she must establish is negligence on the part of the driver of this automobile. 10

Negligence is the failure to observe for the protection of another that the degree of care, precaution and vigilance which the circumstances justly demand—namely, reasonable care. Where, by reason of such failure, such other person suffers injury or damage, negligence must be the proximate cause of the injury or damage. You should use this rule to guide you in determining whether MacLachlan, in the operation of his machine, was negligent, and whether his negligence, if it was negligence, was the proximate cause of the death of the deceased. In order for the plaintiff to recover, she must establish that the deceased was struck by the defendant's automobile and that that blow was the proximate cause of his death. That, of course, must be established. 20 30

The defendant here has set up as a defense contributory negligence. To conclude the plaintiff from maintaining her action, his conduct must have been negligent, and his negligence must 40

Charge to Jury.

10 have contributed to the injury in such a way that, if he had not been negligent, he must have received the injury which caused his death from the negligence of the defendant. Ordinary care is required which a prudent person would take under the existing circumstances. That is an affirmative defense, and the burden of proof is upon the defendant to establish that defense. Unless evidence to the contrary appears, it is presumed that the deceased was in the exercise of due care in crossing this street.

20 In considering this case it is proper for you to consider certain provisions of the Motor Vehicle and Traffic Acts. The speed limit provided by law was twelve miles an hour at that particular place. The statute also provides that a vehicle shall keep to the right. Of course, that must be taken with due consideration of the condition of the highway as it existed at that time. You have heard the testimony as to the condition of the highway. The statute also provides that "In places where houses are on the average less than one hundred feet apart, pedestrians shall have the right-of-way over vehicles at any street crossing." The houses were on an average of less than a hundred feet
30 apart, and therefore, that provision of the statute governs in the event that the deceased was crossing at a crosswalk. Whether he was or not is a question of fact for you to determine. When a pedestrian and an automobile moving in different directions approach such a crossing at the same time, or in such a manner that if both continued their respective courses there is danger of collision, then the pedestrian is entitled to first
40 use the crossing, and it is the duty of the driver of the automobile to stop or to so reduce speed

Charge to Jury.

as to give such pedestrian a reasonable opportunity to pass in safety, and to that end to have such automobile under such control as to enable him to do so.

Violations of the provisions of the Motor Vehicle or Traffic Act are not conclusive evidence of negligence—that is, just because there is a violation you shall therefore find that there is negligence. It is a circumstance in the case to be considered by you, in finding negligence. 10

I take the responsibility in this case of directing you that if MacLachlan was negligent, and his negligence was the proximate cause of this accident, that the Sinclair Refining Company is responsible with him, the same as he is in this case, and you will therefore take that direction in that regard and you will not have to pass upon the question as to the relationship between Mr. MacLachlan and the Sinclair Refining Company. 20

If, after a consideration of this case, you come to the conclusion that the defendant driver was not negligent, then your verdict will be for both defendants. If you come to the conclusion that he was negligent, that his negligence was the proximate cause of the accident, but that the deceased himself was guilty of contributory negligence, then your verdict will be for the defendant. If you should find that this was an accident, that is, that either party was not chargeable with negligence then your verdict will be for the defendant. But if you come to the conclusion that the driver of the car was negligent, that his negligence was the proximate cause of the accident, and that the deceased was not guilty of contributory negligence under the rule I have laid down to you, then you should return a verdict for the plaintiff. 30 40

Charge to Jury.

If you arrive at that verdict, then you will take up the question of damages. The damages are limited to the pecuniary loss resulting from the death to the widow and next of kin, that is, the money loss, not loss of association or companionship, but the money loss, the pecuniary
10 loss, which the plaintiff sustained. She has three children whose ages are respectively eight years, eleven years and fourteen years, at the time of her husband's death, all of whom live home and received their support from the deceased. Mr. Auer, previous to his death, was forty-six years of age, and in apparent good health.

The pecuniary loss is the deprivation of a reasonable expectancy of pecuniary advantage, which would have resulted by a continuance of
20 the life of the deceased. You should take into consideration the amount of the deceased's earnings and the amount thereof devoted to or from which the widow and children received benefits, the age and respective health of the deceased and his widow and children, the probability of deceased living, if not killed by the accident so as to warrant the widow and children receiving pecuniary benefits from the deceased's earnings, and the probability of the widow and children
30 living to receive or enjoy such income. In dealing with the deceased's income, due consideration should be given to the fact that part of his income was devoted by the deceased to his personal use, such as living expenses, carfare, and so forth.

The evidence shows that the deceased was earning \$7,100 a year as private secretary to two bankers. You have heard the evidence as to the expectancy of life of the deceased. The ex-
40 pectancy of a man at forty-four years of age

Exceptions to Charge.

is 25.09 years; the expectancy of a woman forty-six years of age is 23.81; and the joint expectancy of a man forty-four years of age and a woman forty-six, is 17.12. That means, of course, that that is the probability. The death of either, of course, would terminate that expectancy.

It has been testified here that the present value of one dollar a year for 17.12 years, at six per cent. compounded yearly, would be 9.449; at five per cent. 10.282; at four per cent. 11.229. 10

You must not decide this case by sympathy. You must decide it according to the rules of law as I have laid them down and the facts. Your sympathy is not justified if the defendant is not guilty of the charge.

(The jury retires.)

20

Mr. Matthews: I take exception to that part of your Honor's charge in which your Honor said, "I have decided that there are certain questions of law and that certain questions of fact be left to the jury," my thought being that this statement in the charge is prejudicial to the defendant in this regard, that the motions that were made and the language of the Court in denying them virtually became a part of this statement. 30

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

Exception noted as ground of appeal.

Mr. Matthews: And to that part of your Honor's charge where your Honor said regarding twelve miles an hour, that that provision of the statute governs if he was crossing at a cross-walk, my thought being that that absolute statement by the Court was not sufficiently qualified by what the Court said afterward. 40

Exceptions to Charge.

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

Exception noted as ground of appeal.

10 Mr. Matthews: I also take exception with respect to where the Court said that it took the responsibility of saying that if MacLachlan was negligent then the Sinclair Refining Company also was, and all the language that your Honor used thereafter in taking away from the jury the question of whether or not the Sinclair Refining Company are liable. Your Honor said, "You have heard evidence as to the experience tables," and to everything that your Honor said in reference to the experience tables.

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

20 Exception noted as ground of appeal.

30 Mr. Weinberg: These exceptions relate in a general way to the Court leaving to the jury to decide the question of negligence and contributory negligence, the plaintiff's insistence being that there was not a scintilla of evidence in the case offered by the defendant, or which came from any one of the plaintiff's witnesses, to lay the foundation for a finding of contributory negligence against this deceased, and, consequently, that there was no fact in dispute with respect to the manner in which the accident occurred, there was no disputed question which the jury should consider in determining whether or not the conduct of the defendant MacLachlan was reasonable, that the testimony indicated that his conduct was unreasonable, and there was no disputed question on the subject.

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

40 Exception noted as ground of appeal.

Notice of Appeal.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

KATHRYN SWARTZ AUER, execu-
trix under the last will and
testament of Gustave S. Auer,
deceased,

Plaintiff-Appellee,

vs.

SINCLAIR REFINING Co., a cor-
poration, and JOHN MAC-
LACHLAN,

Defendants-Appellant.

10

*Action
at Law.*

*Notice of
Appeal.*

20

*To: Benjamin M. Weinberg, attorney of the
above-named plaintiff:*

TAKE NOTICE, that the above-named defend-
ants, Sinclair Refining Co., a corporation, and
John MacLachlan, appeals to the Court of Errors
and Appeals in the last resort in all causes in
New Jersey, from the whole of the judgment
entered in the above-entitled cause in the New
Jersey Supreme Court, Essex County.

30

JNO. A. MATTHEWS,

Attorney of Defendants-Appellants.

Dated, September 17, 1926.

Service of a copy of the within Notice of
Appeal acknowledged as of time, this 4th day
of October, 1926.

BENJAMIN WEINBERG,
Attorney of Plaintiff-Appellee.

40

Grounds of Appeal.

GROUND S OF APPEAL.

New Jersey Court of Errors and Appeals

10	KATHRYN SWARTZ AUER, execu- trix under the last will and testament of Gustave S. Auer, deceased, <p style="text-align: center;"><i>Plaintiff-Appellee,</i></p> <p style="text-align: center;"><i>vs.</i></p> SINCLAIR REFINING COMPANY, a corporation, and JAMES MAC- LACHLAN, <p style="text-align: center;"><i>Defendants-Appellants.</i></p>	} <i>Action</i> } <i>at Law.</i> } <i>Grounds</i> } <i>of Appeal</i>
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20 The above-entitled cause was tried in the New Jersey Supreme Court, Essex County, before Honorable William A. Smith, Judge of said court and a jury.

30 The defendants hereby write down their grounds of appeal upon which they rest their appeal to set aside the verdict rendered in favor of the plaintiff and against the defendants and to grant a new trial of said cause:

1. Because the Court refused to non-suit the plaintiff upon being requested so to do by the defendants.

2. Because the Court refused to direct a verdict to be rendered in favor of the defendants and against the plaintiff when requested so to do by the defendants.

40 3. Because the said verdict is against the weight of evidence.

Grounds of Appeal.

4. Because the Court improperly refused to permit John MacLachlan, witness for the plaintiff, to answer on cross examination the following question: "When you came at or near the corner of North 16th street, what happened, if anything, to your car?"

5. Because the Court improperly permitted George M. Crogan, witness for the plaintiff, to answer over objection the following question:
"Q Give us the present value based on a dollar?"

6. Because the Court improperly stated as follows:

"The Court: As I understand it, your question is the present value of \$1 a year for 17.12 years."

7. Because the Court improperly permitted George M. Crogan, witness for the plaintiff, to answer over objection the following questions:

"Q If the fund were invested at five per cent., how much would that dollar be?"

"Q And at four per cent.?"

"Q That amount of money invested would consume itself at the end of this joint expectancy period that you have stated."

8. Because the Court improperly permitted George M. Crogan, witness for the plaintiff, to answer over objection the following questions:

"Q So that by the same rule of mathematics, to make an income of \$1,000 a year, you would multiply this thousand?"

9. Because the Court improperly refused to permit John MacLachlan, witness for the plaintiff, to answer the following question:

"Q Were you on business up there?"

Grounds of Appeal.

10. Because the Court erroneously and improperly charged the jury as follows:

10 "I take the responsibility in this case of directing you that if MacLachlan was negligent, and his negligence was the proximate cause of this accident, that the Sinclair Refining Company is responsible with him, the same as he is in this case, and you will therefore take that direction in that regard and you will not have to pass upon the question as to the relationship between Mr. MacLachlan and the Sinclair Refining Company."

11. Because the Court erroneously and improperly charged the jury as follows:

20 "You have heard the evidence as to the expectancy of life of the deceased. The expectancy of a man at forty-four years of age is 25.09 years; the expectancy of a woman forty-six years of age is 23.81; and the joint expectancy of a man forty-four years of age and a woman forty-six, is 17.12. That means, of course, that that is the probability. The death of either, of course, would terminate that expectancy. It has been testified here that the present value of one dollar a year for 17.12 years, at six per cent. compounded yearly, would be 9.449; at five per cent. 30 10.282; at four per cent. 11.229."

12. Because the Court, in denying defendant counsel's motion for a direction of a verdict, erroneously and improperly said:

40 "I will hold that the defendant, MacLachlan, was a servant of defendant, Sinclair Refining Company, and was driving the car in furtherance of his employer's business and that employer is liable for defendant, MacLachlan's negligence while driving toward his home in going west on

Grounds of Appeal.

Park avenue for the benefit of counsel, and the upper court, if necessary, I will state that I am following the case of Lewis against the National Cash Register Company, 84 Law, 598; Depue *v.* Salmon Company, 92 Law, 550; Ferris *v.* McArdle, 92 Law, 580; Whatman *v.* Pearson, L. R. 3 C. P. 422; Donaldson *v.* Ludlow & Squire, 110 Atl. 690.” 10

JNO. A. MATTHEWS,
Attorney for Defendants-Appellants.

Service of a copy of the within Grounds is hereby acknowledged this 4th day of October, 1926.

BENJAMIN WEINBERG,
Attorney for Plaintiff-Appellee. 20

30

40

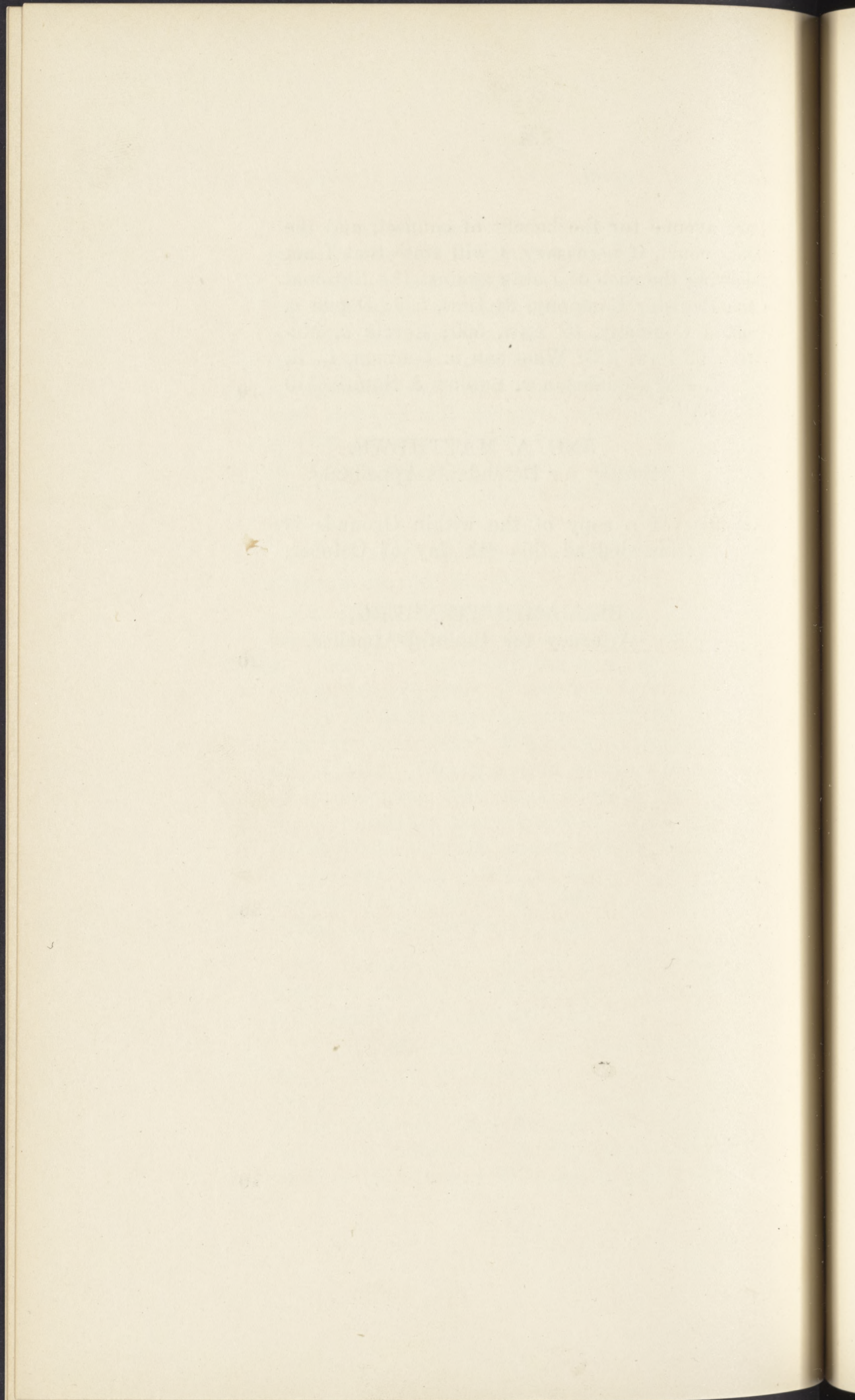


Exhibit P. 1.

moneys in addition to the amount paid to him for salary or wages?

5. Did you supply an automobile for the use of the said James MacLachlan in the performance of his duties in your behalf?

10 6. Did you pay for, or did you contribute anything for the upkeep, maintenance and, (or) operation of an automobile which was used by said James MacLachlan in your business prior to and on February 13, 1925? If so, state the amount paid or contributed by you and the purpose of such payment or contribution.

20 7. Did you pay to him or to any person or corporation for, or on his or your behalf, public liability, collision or other insurance on the automobile which was used by him prior to, and on February 13, 1925?

8. How long has the said James MacLachlan been in your employ?

Yours very truly,

BENJAMIN M. WEINBERG,
Attorney for Plaintiff.

30 Service of a copy of the within Interrogatories is hereby acknowledged this 24th day of April, 1926.

JOHN A. MATTHEWS,
Attorney of Defendants.

Exhibit P. 1.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

KATHRYN SWARTZ AUER, Execu-
trix Under the Last Will and
Testament of GUSTAVE S.
AUER, deceased,

*Plaintiff,**against*

SINCLAIR REFINING COMPANY,
a corporation, and JAMES MAC-
LACHLAN,

Defendant.

10

The defendant, SINCLAIR REFINING COMPANY,
for its answers to the interrogatories of the
plaintiff as proposed, testifies as follows:—

20

Answering Interrogatory 1:—Yes.

Answering Interrogatory 2:—Salesman.

Answering Interrogatory 3:—Yes.

Answering Interrogatory 4:—Incidental ex-
penses only.

Answering Interrogatory 5:—No.

Answering Interrogatory 6:—Daily car al-
lowance \$2.50 per day.

30

Answering Interrogatory 7:—No.

Answering Interrogatory 8:—Since 6/16/1924.

Sworn to before me this 6 day
of May 1926.

M. E. HYMAN.

W. T. DINKINS,
District Manager.

[L. s.]

40

New Jersey Court of Errors and Appeals

KATHRYN SWARTZ AUER, executrix under the last will and testament of Gustave S. Auer, deceased,

Plaintiff-Appellee,

vs.

SINCLAIR REFINING COMPANY, a corporation, and JAMES MACLACHLAN,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS.

Informative Preliminary Statement.

This is an appeal by the defendants, Sinclair Refining Company, a corporation, and James MacLachlan, from a judgment for \$22,500.00 obtained against them in the Essex Circuit Court before Judge William Smith and a jury by the plaintiff, Kathryn Swartz Auer, executrix under the will of her husband, Gustave S. Auer, deceased.

The action below was brought by the plaintiff executrix under the Death Act, and in its complaint alleged that the death of plaintiff executrix's decedent on February 13, 1925, was due to the negligent operation of an automobile by the defendant, MacLachlan, on February 13, 1925, which said automobile at the time of the accident was under the control and management of defendant, MacLachlan, as the servant, agent and employee of the defendant, Sinclair Refining Company, and was being used by MacLachlan as such servant at the time of the acci-

dent for the benefit and in the business of defendant, Sinclair Refining Company; that plaintiff executrix's decedent was without negligence at the time of the accident and that at his death on the day of the accident (some hours afterward) he left surviving as next of kin, his wife (plaintiff executrix), age forty-six years, and three sons, Edward, Robert and Richard, aged respectively, fourteen, eleven and eight years.

Defendants answered separately but similarly, that defendant, MacLachlan, was an employee of defendant, Sinclair Refining Company, on February 13, 1925, but they both denied that MacLachlan was operating said automobile at the time of the accident (about 6:10 P. M., Feb. 13, 1925) as the servant, agent or employee and for the benefit and in the business of defendant, Sinclair Refining Company; they further denied in every detail the negligence of operation of the automobile by MacLachlan alleged in the complaint and in separate defenses both alleged the contributory negligence of the decedent as the proximate cause of his injuries and resulting death. (State of Case, Pleadings, pp. 1-7 incl.)

Topography of Accident.

This accident happened at or near the intersection of Park avenue and North 16th street, East Orange. Park avenue is a thoroughfare running east and west. It has a garden separation between the north and south sides consisting of a grass and shrubbery plot that is curbed around. This garden runs in the middle of Park avenue, dividing east from west bound traffic. North 16th street, East Orange, crosses Park avenue north to south and, of course, at this crossing there is no garden separation and

the distance between the two garden ends at this crossing is 70 feet (State of Case, p. 19). Park avenue is 20 feet wide from garden to each curb. Moreover, the north side of North 16th street is not directly opposite the south side of North 16th street, at Park avenue, the south entrance of North 16th street meeting Park avenue some distance east of where the north entrance of 16th street meets Park avenue.

The deceased, Auer, lived at 114 North 16th street, which was that part of North 16th street to the south of Park avenue, and he lived on the easterly side of the street (State of Case, p. 17). He was returning from work in New York, the Ampere Station (East Orange) at which he left the train, being to the north of Park avenue, and his course from the station to his home according to his custom as testified by his wife (State of Case, p. 82, ll. 10-30) was as follows:

“Q As he would come along the crossing of Park avenue, what side did he usually take? A He would go past the east end of the plot.

Q That would be on the opposite side from where you live? A Yes, sir.

Q And across Park avenue? A Yes, sir.

Q And then after Park avenue he would cross over to your side of the street? A Yes, at the foot of our block.”

Defendant's Testimony as to the Accident.

There were no eye-witnesses of the collision between MacLachlan's automobile and the decedent, not even MacLachlan saw the man until he, MacLachlan, got out of his overturned car.

MacLachlan was driving west on Park avenue and before he got to 15th street he noticed that the snow was piled upon the green (the garden

separating east and west traffic on Park avenue) and the piled snow sloped down into Park avenue (State of Case, p. 98, ll. 15-27). As he got up Park avenue there was more snow protruding (State of Case, p. 98, ll. 35-36). As he came to within fifteen feet of the easterly side of the end of the green (garden) at 16th street, he was in a deep rut and there was a small car parked against the curb, parallel with the curb, with the front wheel jogged out up against the curb. (State of Case, p. 99, ll. 10-17.) As he came up to this car his right front wheel struck the left front wheel of this parked car and it threw the steering wheel out of his hand which caused his car to swerve over a snow bank (p. 99, l. 40, p. 100, ll. 1-10). As the car went over the snow bank it turned over practically in the middle of the intersection of 16th street and Park avenue and it slid on its overturned side about four feet. (State of Case, p. 101, ll. 7-30.) When the car overturned the headlights were pointing south and there was a large patch of snow directly and to the east side of the green that was on the westerly side of Park avenue. (State of Case, p. 101, ll. 32-40.) MacLachlan's lights were lighted as he came to the place of overturning (State of Case, p. 102, ll. 1-2); his speed was about fifteen miles per hour (State of Case, p. 102, ll. 26-27); he blew his horn (State of Case, p. 117, ll. 8-10); there was no pedestrian or traffic in front of him prior to the time he hit this parked car (State of Case, p. 102, ll. 27-30); he saw no pedestrian in front of him, though he looked for pedestrians as he approached Park avenue (State of Case, p. 102, ll. 31-40). He climbed out of his overturned car, the left side of which was in the air, and exclaimed, "My God, *what* have I hit?" (State of Case, p. 103, ll. 10-35). When he got out he saw

a man lying to the right of his car, lying north of his car 6 or 7 feet. (State of Case, p. 104, ll. 1-11.) There were two broken windows in the car, and the right front hub cap, which was brand new a week before the accident, was dented in. (State of Case, p. 104, ll. 31-40.) The headlights were lit after the accident, the glasses in them were not broken, the fenders or front of the car were not dented or marked, and the only scratches on the car were on the side that was lying on the ground. (State of Case, p. 105, ll. 5-24.) The defendant, MacLachlan, finally said from the time he approached 16th street and Park avenue until he got out of his car when it was overturned, he did not see the deceased, Auer (State of Case, p. 106, ll. 1-9).

Besides the testimony of MacLachlan, the defendants produced as a witness an East Orange policeman, named Joseph Read, who saw the overturned car after the accident and after the injured man had been removed. The auto was upturned on the westerly side of 16th street at a pile of snow. (State of Case, p. 92, ll. 10-16.) He said that there were ruts the general width of an automobile in Park avenue at the intersection of 16th street. (State of Case, p. 92, ll. 2-40.)

Plaintiff's Testimony as to Accident.

As said above, there were no eye-witnesses of the accident and in reviewing plaintiff's testimony, we respectfully urge that it failed in itself and with the defendants' testimony to support the allegations of the complaint and that, therefore, the Court erred in refusing first non-suit and second direction of verdict, which are the first two grounds of appeal.

The first witness for the plaintiff was Dr. Moulton and he testified that he examined the

man directly after the accident, that his clothing was not torn or ragged, particularly, that there was a hemotoma (blood tumor) at the base of his skull, that that was the only mark on his head and that there were superficial scratches on his face and hands. (State of Case, p. 15, ll. 13-29.) This supports our contention that we did not hit this man, but that he slipped in crossing and struck the base of his skull.

The witness, Hanson, whose testimony was read to the jury, did not see the accident but when he was about 40 yards west of the corner of Park avenue and 16th street, he heard a crash and he turned around and saw an automobile fairly well up on the snow bank and a man coming out of the door of it, and he seemed to have lost his head and was screaming, "Who have I killed?" (State of Case, p. 33, ll. 1-23.) He said there was a snow bank on the west side of 16th street and one on the other side and the City had not cleaned those streets to amount to anything. (State of Case, p. 22, ll. 24-30.) The auto was overturned but it had not got out into eastbound traffic (State of Case, p. 27, ll. 1-8). The man's body, "either his head or his feet," was about even with the front of the car. His body was east of the automobile (State of Case, p. 30, l. 16).

The next witness for the plaintiff was a neighbor, Alice Barnes. Her testimony proved nothing. (State of Case, pp. 36-37.)

The next plaintiff witness was LaFreta. He did not see the accident but heard a crash when he was going up the steps of his house 250 feet away from the accident and he heard a man say, "My God, what have I hit?" (State of Case, p. 38, ll. 20-28.) He saw the car lying about 4 to 6 feet from the center aisle of Park

avenue, projecting out on the east drive about 6 feet. (State of Case, p. 39, ll. 3-6.) He said that MacLachlan told him he skidded off the snow banks after hitting the car that was parked on the north side of 16th street into 16th street and turned over, and that he didn't know he hit anybody. (State of Case, p. 44, ll. 16-22.) He said the snow that had been piled up had fallen back on the pedestrians' walk and that he didn't know whether it was slippery or not. (State of Case, p. 50, ll. 29-30.)

The next plaintiff witness was William Bentley. He said he was 200 feet down North 16th street; he saw an auto going west on Park avenue and it hit the snow at the edge of the safety isle on the east side of 16th street, with the left front wheel, went across North 16th street and opposite on the west side of 16th street in the pile of snow on the cross-walk. (State of Case, p. 57, ll. 10-20.) He heard the driver (MacLachlan) say, "What did I hit?" On cross examination he said there was no pedestrians' walk through the snow and that MacLachlan's car was on the snow bank (State of Case, p. 62, ll. 13-16) and the man's body was two feet from the overturned car and that MacLachlan's car was probably going in the neighborhood of 20 miles an hour (State of Case, p. 63, ll. 30-34) when it hit the bank.

This in summary is the entire testimony of both plaintiff and defendants with reference to the accident. Its analysis leads us to the conclusion that the plaintiff failed to prove the negligence alleged in the complaint. There is no witness of the accident and it is just as consistent with the facts as presented by the plaintiff to maintain that he slipped and fell, hitting the base of his skull, as that he at all came in

contact with the automobile. There is positive proof that the accident happened as MacLachlan stated. This is corroborated by Bentley and the condition of the clothes of the victim and the absence of any injuries, indicating a collision, forces us to the conclusion that under the evidence it was error for the Court to refuse nonsuit and direction.

As to Ground 3, that the verdict is against the weight of the evidence, we reiterate our conclusions used as argument on the evidence offered in Grounds 1 and 2.

We now proceed to Ground 4, that the Court improperly refused to permit MacLachlan, while a witness for the plaintiff, to answer in cross examination the question, "When you came at or near the corner of North 16th street, what happened, if anything, to your car?" (State of Case, p. 129.)

It is our contention that since the plaintiff made MacLachlan his witness and questioned him as to the route he took home (State of Case, p. 75, ll. 1-18) the door was opened to us to cross examine him on everything relevant to the trip home and that the denial of this right was prejudicial error.

Grounds 5, 6, 7 and 8 will be considered together. They are all objections to questions asked by plaintiff of her witness, George M. Crogan, with reference to the Carlisle mortality tables and they are all contained at pages 87, 88 and 89 of the State of the Case.

It is our contention that the computations asked for in these questions are incompetent and irrelevant and immaterial for they import an absolute rule of computation. The result of al-

lowing these questions to be answered left the jury with the idea that they were entitled to award damages on this absolute rule of computation. Now in the case of *Camden & Atlantic R. R. Co. v. Williams, et al.*, 61 N. J. Law, page 646, the Court said:

“Standard mortuary tables may be used, in a judicial proceeding, to aid in determining the probable duration of human life. They do not furnish an absolute rule of computation. Each case must stand by itself, on its own conditions.”

We submit, therefore, that these questions were properly objected to and it was harmful error to have allowed this testimony.

Ground 9 of appeal is abandoned.

Ground 11 of appeal has to do with the Court's charge (State of Case, pp. 124, 125) with reference to the testimony objected to in Grounds 5, 6, 7 and 8. We maintain that the Court's language in this part of his charge was equivalent to allowing the jury to compute damages on an absolute rule of computation and without regard to any other circumstances of the case; and it was further misleading and harmful in that it left the impression that the jury were entitled to take \$7,100.00 as the multiplier in their problem of arriving at the damages this plaintiff was entitled to and either \$9,449 or \$10,282 or \$11,229 as the base or multiplicand.

Grounds 10 and 12 will be considered together for both refer to the same matter, namely, that the Court erred first in denying defendant counsel's motion for a direction of a verdict in favor of Sinclair Refining Company on the grounds that there was no proof that defendant, MacLachlan, was its servant or agent at the time of

the accident, and second in charging the jury in the following language:

“I take the responsibility in this case of directing you that if MacLachlan was negligent, and his negligence was the proximate cause of this accident, that the Sinclair Refining Company is responsible with him, the same as he is in this case, and you will therefore take that direction in that regard and you will not have to pass upon the question as to the relationship between Mr. MacLachlan and the Sinclair Refining Company.”

Now, in order that we may properly argue this point, may we briefly summarize all of the testimony as to MacLachlan's agency as follows:

Called by the plaintiff, the defendant, MacLachlan, testified that he was and had been a salesman for the Sinclair Refining Company for two years (State of Case, p. 71, ll. 30-40); that his territory in 1925 was all of Essex, Middlesex and Hudson Counties and parts of Hunterdon, and that his duties were to call on the *plants* in any of those counties to interest them in Sinclair Products (Case, p. 72, ll. 1-18); that he was paid on a monthly basis, semi-monthly, that he used an automobile to get around to the trade, that he could not get around to the outlying trade without an auto, that he owned and bought the auto on his own account (Case, p. 72, ll. 20-40); that he used the auto to cover his territory, that he lived in Irvington and had a garage connected with his home where he always kept the car; that he sometimes stayed away all night when in outlying territory (Case, p. 73, ll. 1-19); that the Sinclair Company paid him \$2.75 a ~~week~~^{Day} to run his auto, to use the car for the benefit of getting business; that they did not pay for his gasoline or oil; that he always kept the car

over here for business, though he took it to New York for pleasure; *that he reported to the office by telephone* (Case, p. 74, ll. 23, 24); that on February 13th, the day of the accident he was out on business for the Sinclair Company in Essex County; that his last call (not his own customer nor a customer call as will be shown later by the evidence) was Romer Brothers, Market street, Newark, and that he left Romers and took a described route and was going home. (State of Case, pp. 74, 75.)

Now, on cross examination by defendant counsel, MacLachlan said that when he got through at Romers' he telephoned to New York to Sinclair Company, and that he then telephoned his wife, that it was not his intention to go home and put the car in the garage at this time, but that after he got home he was going out again and he was going to discontinue the use of his car. (State of Case, p. 75, ll. 19-40.)

Again on re-direct by Mr. Weinberg, MacLachlan testified that Romer was not his customer and that he was not calling on them as customers. (State of Case, p. 78, ll. 13-17.)

And on my re-cross, MacLachlan testified that he didn't go to Romers' on business, that it was just a personal friendship call, and that it was no part of an attempt to get or keep the Romers business. (State of Case, p. 78, ll. 20-37.)

Again as a witness for the defense, MacLachlan testified on direct as follows: that he had been in the house four or five days sick and left home in his auto a little late the morning of the accident about 9 or 9:30 A. M. (State of Case, p. 94, ll. 33-40); that he went to a service station and got a battery for his car, went thence to Newark, made one business call

before 12 noon, doesn't recall having made any other call and *as was his practice* at the close of his day's calls, he called the Sinclair Company in New York on the telephone (State of Case, p. 95, ll. 1-23); that after he had 'phoned the Sinclair Company he went to Romer Brothers who had a *trucking* account as distinguished from his line of *industrial* accounts, because he had known Romers, all of them, for a number of years (State of Case, p. 95, ll. 24-40); he said he went there because he had been sick, was tired that day and as he happened to be in the neighborhood after he had 'phoned New York he dropped in merely on a social or friendly call (State of Case, p. 96, ll. 11-32); that he stayed about an hour and as a result of a conversation with the Romers he called his wife on the 'phone, that he left Romers and was going home not to put up his car for the night as he was going elsewhere that night. (State of Case, p. 97, ll. 1-40.)

On cross examination of this testimony by Mr. Weinberg, MacLachlan testified that when he was working in Newark his hours were limited (Case, p. 107, bottom 108, ll. 1-3); that his hours in the City of Newark were limited (Case, p. 108, ll. 18-22); and again at p. 108, ll. 38-40, he said, "I have answered the question that in the City of Newark my hours were limited."

MacLachlan further testified on cross examination that the \$2.75 a ~~week~~^{Day} the Sinclair Company gave him was limited solely to the use of the automobile and that to get this \$2.75 he had to give the Sinclair Company the motor number, the serial number and the license number of his auto.

I think from this analysis of the testimony, it appears that MacLachlan was not the servant of

the Sinclair Company at the time of the accident and that the facts in this case clearly distinguish it from the cases cited by the Court (State of Case, p. 118, ll. 18-33) as the basis of its ruling. MacLachlan insisted that his hours in Newark were limited and that he had finished his work in Newark and had telephoned his report to Sinclair Company in New York and that thereupon he dropped in on an old-time friend who happened to be the customer of Sinclair, but not MacLachlan's customer, and that while there a date was made and that MacLachlan was then going home not to garage the car but to come out with his wife to meet the Romers.

Surely if this accident happened while MacLachlan was on the way to the place of pleasure that he was to attend with the Romers, he would not have been the Sinclair Company servant, nor can we see under the testimony how he could possibly be construed as on Sinclair business while on his way home to get his wife, even though he were to eat dinner at home.

If MacLachlan, as thus argued, was not the servant of Sinclair, then the motions for nonsuit and direction as to Sinclair Company were wrongly denied and it was error for the Court to deny them.

But if the testimony as analyzed did not warrant the Trial Court in taking the case from the jury on the motion of the defendant, Sinclair Refining Company, certainly it did not warrant the Court's finding as a matter of law that MacLachlan was the Sinclair Company's agent, and therefore, the charge of the Court (State of Case, p. 123, ll. 14-22) was clearly erroneous. We maintain, therefore, that under our state of acts this case is not within the legal purview of the cases cited by the Trial Court as the predicate of

its rulings in this regard, but rather that the issue of MacLachlan's agency depended upon the determination of facts not conclusively established and hence that the Court should have allowed the case to go to the jury on the question of MacLachlan's agency at the time of the accident.

To Summarize This Brief.

It is our impression, we respectfully urge, that Grounds 1, 2 and 3, and Grounds 10 and 12 depend entirely upon whether the facts of evidence fit in with principles of law that your Honors need no citations to be conversant with, to wit, as to Grounds 1, 2 and 3 the principles, did the evidence of the plaintiff under the pleadings make a prima facie case, or did the evidence of all the case leave the matter a jury question under the pleadings and proof? And as to Grounds 10 and 12 the principle, was agency established as a matter of law under the evidence or was it a jury question?

As to the other grounds, the principles of evidence, were the questions overruled or asked competent and relevant either as cross examination in the case of Ground 4, or as direct evidence in Grounds 5, 6, 7 and 8.

We respectfully submit that the judgment of the Court below should be reversed for the reasons stated.

JOHN A. MATTHEWS,
Attorney for/ ^{and of Counsel with the} Defendants-Appellants.

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New Jersey
Court of Errors and Appeals

KATHRYN SWARTZ AUER, Executrix under the Last Will and Testament of Gustave S. Auer, deceased,

Plaintiff-Appellee,

vs.

SINCLAIR REFINING COMPANY, a corporation, and JAMES MAC-LACHLAN,

Defendants-Appellants.

At law.
On Appeal
from Supreme
Court, Essex
Circuit.

BRIEF ON BEHALF OF PLAINTIFF-APPELLEE

Preliminary Statement

The plaintiff obtained a judgment against the defendants for damages to compensate her and her children, as the next-of-kin of Gustave S. Auer, for his wrongful death, which occurred on February 13, 1925, when he was struck by an automobile driven by defendant, James MacLachlan, while in the employ of the defendant, Sinclair Refining Company. An appeal having been taken by the defendants, the matter is now before this court for review.

Statement of Facts

Gustave S. Auer, who for some time past, had been in the employ of Fahnestock & Co., brokers of New York City, as a private secretary, while on his way to his home, #114 North 16th Street, East Orange, New Jersey, was struck and killed by an automobile, driven by the said defendant, James MacLachlan, on the southwest side of North 16th Street, where it crosses Park Avenue, in East Orange, N. J.

Park Avenue is one of the principal thoroughfares in the City of East Orange, running generally east and west. In the center of the highway, there are a number of garden spots or aisles, which divides the Avenue into east and westbound traffic. It is a wide street. Allowing for the gardens, which are eighteen feet wide, the actual space for east and west bound traffic, is approximately twenty feet. The width of 16th Street, is not given, but it is of ordinary width.

On the day in question, there was some snow on both Park Avenue and North 16th Street, several or more piles being heaped up on the westerly or upper side of 16th Street. The deceased habitually came home by way of D. L. & W. R. R., getting off at the Ampere Station, and walking south through 16th Street on the upper or westerly side thereof, until he crossed Park Avenue, when he, would cross to the easterly side of North 16th Street, and from thence reach his home, but a short distance therefrom, about 6:30 p.m. (S. C. p. 82).

The facts in the case indicated that he met his death while on the upper side of 16th Street,

somewhere in the neighborhood of that part of Park Avenue reserved for the eastbound traffic, by being struck by the automobile of the said defendant, driven by the said James MacLachlan. The evidence as to the happening of the accident, is summarized as follows:

ROBERT W. HANSON, Manager and Vice-President of the S. J. Emmerick Company, of New York City, whose testimony was taken by the consent of counsel for the respective parties, out of Court testified that he reached a point a short distance above Park Avenue, when he heard a crash. Turning around, he saw a man (later proved to be the defendant, MacLachlan), coming out of an automobile, which had upset on a snow bank on the westerly or upper side of 16th Street, and who was screaming "Whom have I killed?" (p. 29). The auto was facing down 16th Street, (l. 20, p. 24), and was across the eastbound part of Park Avenue (top p. 27). The body of the deceased was laying about even with the front of the car (l. 15, same page).

This witness says that the driver went around like a madman saying repeatedly, "Whom have I killed?" (p. 28).

From a mark made on a small map which was used by him, and later admitted in evidence, it appears that the regular place where the pedestrians walked, while crossing Park Avenue, was on the upper or westerly side of 16th Street.

ALICE BARNES testified that on the evening in question, as she was coming to East Orange, from New York, she saw this automobile lying about six feet out from one of the gardens in question, facing southbound.

LEAR LAFRETA, who lived on North 16th Street, a short distance south of Park Avenue, testified that he reached his house about 6:15 p. m., and that as he was walking toward Park Avenue and going up his front steps, he heard a crash and immediately started for the corner, and that when he was within twenty feet of the corner, he heard a man break the glass of the automobile and call out, "My God, what have I hit," a number of times. He went to his aid just as he was getting out of the seat of his car, and while looking to see if anyone had been hit, he "pitched over the body" of Mr. Auer (p. 38). When he got there, Mr. MacLachlan was just about crawling out of the car, which was turned on its right side. The top of the car being toward the west and the wheels toward the east. It was lying from four to six feet from the center aisle of Park Avenue, projecting out on the east drive, about six feet. He says that the overturned automobile was right on the pedestrians' walk. He noticed that it was a Chevrolet Coupe (bot. p. 38, p. 39).

At the time this witness picked Mr. Auer up, he was unconscious, "rolled up like a ball" and had blood coming from his ears and mouth. He noticed that groceries, such as lemons and butter, were strewn all over the street.

Right here, it is to be noted that Mrs. Auer stated that it was her husband's custom to bring groceries to her from New York, particularly butter, which he always purchased in the Washington Market, New York City (bot. p. 82).

Witness LaFreta, further testifying, said, that some time later, defendant MacLachlan called upon him and wanted to know if he saw the ac-

cident, to which he said he replied that he had not; (l. 20, p. 43), that defendant said to him that

“He skidded around from 16th Street into Park Avenue. He said that he skidded off the snow banks after hitting the car that was parked on the north side of 16th Street into 16th Street and turned over, and that he didn't know at the time that he hit anybody” (l. 15, etc. p. 44).

WILLIAM BENTLEY, who, at the time of the accident, conducted a garage and lived on North 16th Street, a short distance north of Park Avenue, said that he had just come out of his house and was about to crank up his car, when he saw a car coming east on Park Avenue and hit the snow. He saw the “snow fly” from the left wheel as it passed the crosswalk, the easterly crosswalk of 16th Street; it went almost across 16th Street and turned over on the westerly crosswalk of 16th Street in Park Avenue (bot. p. 56). As he ran, a man crawled through either the window or the door of the car. Witness went to the other side of the car and saw Mr. LaFreta, the previous witness, picking up a man, whose body, at that time, was not more than two feet from the car. He says that when the automobile upset, it was on the westerly side of 16th Street, a little further south than the center of the street (p. 57, top p. 58).

This witness also heard the driver say, “What have I hit” (l. 33, p. 59). This witness also noticed a car which was parked on Park Avenue, about twenty feet back or east of the end of the safety aisle. (This is the car referred to by defendant, MacLachlan himself, in his recital of

how the accident happened q. v.). He observed the speed at which MacLachlan's car was going at the time of the accident, and estimates it at 20 miles an hour (bot. p. 63).

THOMAS JONES, another witness, testified to the fact that he got to the place of the accident about 6:20 p. m., and observed the overturned car lying on Park Avenue,

“protruding enough for the traffic to slow up and go around it, that is eastbound traffic,”

and that it protruded into the easterly part of Park Avenue, five or six feet (top p. 67).

The same evidence was substantially given by one James T. Riddle, a witness sworn on behalf of the plaintiff.

DEFENDANTS' TESTIMONY

In citing from the testimony of the defendant, James MacLachlan, a division will be made. That portion which refers to the negligent operation of the automobile, will be discussed separately from that portion which refers to his connection with the defendant, Sinclair Refining Company, on the question of agency at the time of the accident.

Negligent Operation:

As to the operation of the automobile by the defendant, MacLachlan, he testified that after leaving the place of business of one of the customers of the Refining Company, for which he worked, he came up various streets until he

turned into Park Avenue, along which he came at a speed of not more than 15 miles an hour (l. 30, p. 76). As he came up Park Avenue, he met with two cars parked near 16th Street. He says the snow was deep there and the road was rutted; (p. 98), that as he came to about 15 feet of the easterly side of the end of one of the gardens, there was a small car parked parallel with the curb, but with the front wheel "jogged out up against the curb" (l. 10, p. 99). He proceeds:

"As I came up to this car, my right front wheel struck the left front wheel of this car that was parked up against the curb. As I hit the front part of this car, it threw the wheel out of my hand, which caused my car to swerve over a snow bank, which was exactly on the green which runs down to the middle of Park Avenue" (p. 100).

He continued:

"I went directly over the snow bank and through it and my car turned over * * * my car practically turned over in the middle of the intersection of 16th Street and Park Avenue. After the car tipped over, it continued on about four feet further" (p. 101).

He admits that after he came out of the car, he said "My God, what have I hit."

He got out of the car through a window and out on the running board and dropped to the ground. The injured man, according to him, was lying to the right of his car and about 6 or 7 feet away (bot. p. 103, top p. 104).

Witness, as he came up Park Avenue, had no difficulty in seeing that the road was rutted or that cars were parked in the street (p. 112). The car he hit, which he observed, was a Chevrolet, was approximately 15 feet east of the westerly end of the garden, near 16th Street (p. 113). He noticed the parked Chevrolet when he was two or three feet away from it (top p. 114). Witness apparently came so swiftly, that in his own language, as he hit the snow bank in the garden on the easterly side of 16th Street, he

“went right through it” (l. 10, p. 115).

No other witness, except Joseph Read, a police officer, who simply testified that Park Avenue was rutted at the time, was called by the defendants.

The above comprises substantially all of the testimony given by either side, with respect to the happening of the accident. There is, however, this additional testimony, making it clear beyond peradventure of a doubt, that Gustave S. Auer, came to his death by reason of being struck by the automobile driven by MacLachlan.

DR. MOULTON, to whose office the injured man was immediately taken, testified that his examination disclosed that

“the man was totally unconscious; he was bleeding from his nose and mouth; his pupils were unequal; he had abrasions on his hands and chest” (l. 16, p. 13).

Later when the man was taken to the hospital, he examined him and found the same conditions present with the exception that he made diagnosis of a fracture of the right base of the skull; that he was bleeding from the right ear, breath-

ing heavily and his pulse was weak. There were other marks on the deceased, such as abrasions on his hands and chest and a big hematoma in the occipital region. He remained with the man until he died at 10:30 p. m. Asked if he could say what induced the fracture, he answered:

“It would be a violent blow” (bot. p. 13, top p. 14).

MRS. KATHRYN SWARTZ AUER, widow of Gustave S. Auer, testified that prior to the accident, her husband was robust and healthy (l. 30, p. 81). She exhibited an overcoat which was worn by her husband when he left his home on the morning of the accident. This overcoat was brought to her with other things on his person, by a nurse in the evening. She testified that the coat was torn on the left side, a few inches below the top of the pocket, as well as on the left part of the shoulder, and that the overcoat had not been cut in the morning when he went away (bot. p. 83).

She states that he was injured to such an extent that you could hardly believe that it was he, (l. 20, p. 84), and that he had marks on his hand and his forehead (l. 25, same page).

Agency of the Defendant, James MacLachlan:

When called to the stand on behalf of the plaintiff, this defendant testified that prior to and on the day of the accident, he was acting as a salesman for the Sinclair Refining Company, looking after public factories and oil factories through Essex, Middlesex, Union and part of Hunterdon Counties; that it was his business to call on the plants in any of those counties to try to interest

them in the Sinclair Refining Company; that he was paid on a monthly basis—every two weeks, (p. 72); that he used an automobile for getting around his trade, which automobile was owned by him; that in addition to his salary, he received from the Sinclair Refining Company, \$2.75 per day (erroneously stated in defendants' brief as \$2.75 per week) towards the keep and management of this automobile, in addition to which he received money for entertaining; that he left his home each morning and came back every evening, unless he had to stay away all night in the outlying territory, keeping his car in a garage near his home. The car was always kept in East Orange when he was home and he never took it to New York, except, perhaps, on pleasure. Neither did he ever go to the company's office in New York, but always reported to it by telephone; that he was a "free lance" in the State of New Jersey, in the territory allotted to him (p. 74).

On the day of the accident, the last customer of his firm that he called upon, was Romer Bros., on Market Street, Newark. He got there about 4:30 p. m., and remained until about 5:30 p. m., when he left there and started to go home, taking a route described by him, which eventually led him into Park Avenue (bot. p. 74, top p. 75). He says that when he finished at Romers, he telephoned his concern in New York and thereafter telephoned his wife (l. 20, p. 75). He said that he intended, after he got home, going out again to a dance with Mr. Romer. Asked if that was part of his business entertainment, he answered,

"Yes, sir. If I want to take out a customer at night, it don't mean I will do any

business, but very often I will invite a customer out at noon or at night" (p. 78).

Re-called by the defendant, he went further into details as to his employment, reiterating much of what has been above stated. He made it clear that his hours were not limited to any specified time and that he was never told what time to come home (p. 108). He did say that his hours of work in the City of Newark were limited, but did not say, when, how or to what extent.

Answering questions categorically, he stated that he could go where he wanted and when he wanted in search of business; that he was never told by his company that he could not park his automobile in the garage in his home, and that he was not told by the company where to park his car on February 13th, 1925, and that the garage to which he was going to take his car, was the same he was then using (p. 109). He had never showed his face in the office of the Sinclair Refining Company.

To show that the company exercised control not alone over MacLachlan, but over his automobile, he testified that in order to receive the \$2.75 per day,

"I had to give them the motor number, the serial number and the license number."

ARGUMENT OF THE LAW

Defendants have assigned twelve grounds of appeal, which are found on pages 128 to 130 inclusive, of the printed book. They will be argued in the same order that they appear in defendant's brief.

The First and Second grounds, which refer to the court's refusal to non-suit and to direct a verdict, are obviously groundless. The defendant himself made out a clear case of negligence on his own part, as did also the witnesses, extracts from whose testimony are given above. In such a case, to wit, if from the facts established, negligence may reasonably and legitimately be inferred, it is the duty of the court to leave it to a jury to say whether from those facts negligence ought to be inferred.

Newark Passenger Ry. Co. v. Block,
55 N. J. L. 605;
Napodensky v. West Jersey etc., R. R.
Co., 85 N. J. L. 336;
Baer v. Lehigh & Hudson River Ry.
Co., 93 N. J. L. 85;
Dickerson v. Mutual Grocery Co., 100
N. J. L. 118.

The Third Ground, that the verdict is against the weight of evidence, cannot be considered on this appeal. The principle of law governing this question has been so frequently enunciated by this court, that citations on the subject are deemed wholly unnecessary. However,

See

Donaldson v. Ludlow & Squier, 94
N. J. L. 306;
Osburn v. DeYoung, 99 N. J. L. 204.

The Fourth assigned ground, that the court improperly refused to permit the defendant, MacLachlan to answer a question asked by his counsel as to what happened when he approached North 16th Street, bears no weight, for the reason that that question was asked the defendant when

called by the plaintiff for an entirely different purpose, and it was struck out on the ground that it was not cross-examination. However, all of the testimony in connection with the happening of the accident, including the answer to that very question, was given by the defendant when called on his own behalf, so that if it was error to exclude the question in the forepart of the case, that error was harmless and cured by subsequent testimony on that subject, of which this witness' testimony fairly bristles.

Grounds Five, Six, Seven and Eight which were considered together by defendants in their brief, are herein also considered together. They relate to the question asked by the plaintiff's attorney of a witness, George M. Crogan, an employee in the Actuarial Department of the Mutual Benefit Life Insurance Company, who qualified as an expert on life tables, such as the Carlisle Table, the American Experience Table, and the United States Table. The objection to the questions as stated in Defendants' Brief, is, that they are

“incompetent, irrelevant and immaterial, for they import an absolute rule of computation. The result of allowing these questions to be answered, left the jury with the idea that they were entitled to award damages on this absolute rule of computation.”

We here find a rather confused objection to the testimony. That the questions asked this witness were neither incompetent, irrelevant or immaterial, are shown by the very citation used by the defendant, to wit, “*Camden and Atlantic R. R. Co. v. Williams*, 61 N. J. L., 646.”

That very case states that such mortuary tables may be used, but do not furnish an absolute rule of computation, and unless something was said by the court in its charge to the jury, contrary to the legal principle enunciated in the case in question, it is difficult to perceive upon what grounds the questions asked were incompetent, irrelevant and immaterial.

In the case of *Dickerson v. Mutual Grocery Co.*, *supra*, the use of the Carlisle table of mortality was approved by this court, when its purpose was to show

“The average expectancy of human life, or the present value of the alleged loss of income based on that expectancy.”

That was the only purpose, according to the record, for which the statistics were furnished by the witness, Crogan, whose qualification was admitted by the attorney for the defendants (top p. 85).

In the light of the above, it cannot be perceived as to how, or in what manner, the defendants were injured, or why the answers given by the witness were not material or relevant to the issue.

Ground *Nine*, being abandoned by the defendants, is therefore not discussed herein.

Ground *Eleven*, is connected with Grounds Five, Six, Seven and Eight, in that, it is insisted that the court's language in its charge to the jury on the subject of the life expectancy of the deceased, and the present value of the alleged loss of income based on that expectancy, was erroneous and harmful in that, it “left the impression” that the jury was entitled to multiply the income

of the defendant by the present value of a dollar for the period of expectancy. Nothing in the court's charge could be said to have left the impression that the jury was obliged to adopt the figures mentioned, although it is insisted that the jury *was entitled* to take those figures into consideration.

The extract from the charge in that respect, which is set forth in paragraph 11 on page 130, of the printed case, simply shows that the court stated to the jury that it had heard the evidence as to the expectancy of life of the deceased, thereafter stating the period of expectancy of the deceased, as well as the period of expectancy of his wife and the joint expectancy of both the deceased and his wife; after which he said:

“That means, of course, that that is the probability. The death of either, of course, would terminate that expectancy.”

Certainly nothing of a binding or misleading character appears in that statement. The court then proceeded to recount that the evidence showed what the present value of a dollar at various rates of interest for the expectancy periods, amounted to, and made no further or other comment on the subject.

That the jury was in nowise misled by anything stated by the court, or even by the actuary, is clear beyond any doubt, because, if the jury had taken the minimum period of expectancy—the joint expectancy—instead of that of the deceased alone, it would have been entitled to multiply the amount of the deceased's income, which was testified as being \$7100.00 per year, by at least the minimum value of a dollar to be earned during

the period of expectancy, which would have meant a verdict of over \$65,000.00, and if it considered the value of the deceased's future expectation, based upon his individual life expectancy, we would have a sum at least one-half more than that amount.

That the court made no further or other comment respecting the use of the tables in question, is not a matter of error.

In the case of *Camden & Atlantic R. R. Co. v. Williams*, 61 N. J. L. 646, the Court of Errors & Appeals discussed at great length the use of the mortality tables. The complaint in that case, as stated by Judge Collins, who wrote the opinion for this court, was that: (p. 649)

“The judge did not explain and limit the evidential force of the table and particularly caution the jury that it could not be considered at all unless the deceased was proved to have been in good health at the time of the injury. * * * It was legal evidence, irrespective of the condition of health of the deceased, for it is not a table compiled from statistics of selected lives only, but, of course, such condition had to be taken into account and testimony on the subject was in fact taken by both parties. * * * That the judge in his charge, failed to refer to and explain the legitimate use of the table, *affords no ground of complaint in the absence of any request for cautionary instruction and of any exception in that regard*” *Mead v. State*, 24 Vr. 601.

It is, therefore, urged that there is nothing in this ground of appeal.

Grounds *Ten* and *Twelve*, having been considered together by defendant's counsel, in his brief, will be so considered in this brief. The two grounds mentioned are found on page 130 of the printed book.

Ground Ten brings before this court, the instruction to the jury that, if it found that McLachlan was negligent, and that his negligence was the proximate cause of the accident, the Sinclair Refining Company was responsible with him.

Ground Twelve raises the same question.

The question, therefore, to be answered, is this: Was the court justified in taking from the jury, the question as to whether the relation of master and servant, between the two defendants, existed at the time of the accident, and deciding that question as a matter of law?

A careful examination of defendant's brief fails to disclose any legal argument against the court's right to control the jury on that question. Counsel says in his brief that the facts raised a question for the jury to determine, but an examination of the testimony cited in that brief, as well as all comments thereon, fail to show where any controversy on the facts arose, which should have been submitted to the jury. The position is clearly one where the court was called to declare itself one way or another. Either from the facts—the question of agency was made out, or it was not made out. In the first event, the plaintiff was entitled to the instruction given to the jury by the court. In the second, the defendant would have been entitled to a binding instruction,

but in no event could it be left to the jury to extract a legal situation from undisputed facts.

As shown above, the defendant, McLachlan, was an employee of the defendant, Sinclair Refining Company, giving to that company, all of his time, while being at the same time, the master of his doings. Certain specified territory was given to him in which to solicit business, included in which was the entire county of Essex, in which the Cities of Newark and East Orange are located. In order to further the business of the company, he used an automobile, toward the upkeep of which, the company paid a sum of money in addition to the wages paid him. Further, the company supplied him with entertainment money for customers. He had no regular route to pursue; he had no prescribed way of going to his work; no defined way of coming back to his home or to his garage, from his work, and no time was fixed as to when he should so return, so that, in a sense, he was always going to work or coming from work and the cases, therefore, that bear on the question of a servant deviating from his regular route, are not in point.

What the employee *intended to do* in the evening, after he got the car home, is immaterial, although great stress was laid upon that point in the examination of the defendant by his counsel. The fact that did ~~not~~ appear was, that the employee had called upon the firm of Romer Bros., of Newark, a customer of the Sinclair Refining Company, after which he telephoned his employer in New York, as was his usual custom. He says that he made an appointment with Romer to take him out in the evening to some dance, but, of course, the appointment was never kept because

the accident occurred and interrupted the social engagement. To show that the relation of master and servant not only existed prior to the employee's going home, but would have continued thereafter, had he gone out on a social excursion with the Romers, or one of them, reference is made to the testimony given by him, that such entertainment was in line with his work and in keeping the good will of the firm's customers.

McLachlen, the employee, in his travels during his business hours, which we take to mean from the time that he left his home until his return thereto, was never separated legally from the Sinclair Refining Company, the other defendant.

The Learned Judge, before whom this case was tried, took this very question under serious consideration, and in his charge to the jury on that question, stated that his instruction followed the rulings in cases which he then and there cited (p. 118).

Taking those cases as they appear in their order, we find that in the case of *Lewis v. National Cash Register Co.*, 84 N. J. L. 598, the facts were that the sales agent of the defendant used an automobile belonging to him, the use of which the master did not even know about. The employee was to pay all his own expenses, travel, office or otherwise, for which, he was to contract in his own name and under no circumstances to represent the company as responsible therefor. It was found, however, that it was within the contemplation of the parties that some sort of a conveyance to carry the employer's product was to be used, though no particular kind was specified. Justice

Kalisch, in the opinion in that case, after stating the facts, said: (p. 601)

“We are satisfied with the soundness of the view expressed in the Singer case (*Singer Mfg. Co. v. Rahn*, 132 U. S. 518), and its applicability to the facts before us, which results in the conclusion that Kaler (the employee) was not an independent contractor, but a servant of the appellant, for whose negligence, within the scope of his employment, it would be responsible.”

The judgment in favor of the plaintiff was affirmed.

In *Depue v. Salmon*, 92 N. J. L. 550, defendant's employee was using its car to take him to his home, the only purpose being so that he could reach his place of employment the next morning, at an earlier hour than he otherwise could. While on his way home, he struck the plaintiffs and injured them. The Court of Errors & Appeals held in that case, the employer was responsible for the employee's negligence, referring to the case of *Cicalese v. L. V. R. R. Co.*, 75 N. J. L. 897. In that case, the railroad company provided hand-cars for the transportation of its employees from the place where they had been working, to a point convenient to their homes. While operating one of the cars, the plaintiff was thrown from it and injured. On the question of the relation between master and servant, this court, speaking through Justice Bergen, said; (p. 900)

“The relation of master and servant continues during the carriage of the servant to and from his work, when done by the master, or with his consent, where from

the character of the service, such transportation is beneficial both to the master and servant.”

In *Ferris v McArdle*, 92 N. J. L. 580, it appeared that plaintiff's intestate was killed, by a collision on a public street, with defendant's auto. It was urged that the servant in charge of the car was not in the service of the defendant when the accident happened. It appeared that the driver did not live with his master and that when he was kept in service until late in the day, his habit was to drive to his home, get his supper and then take the auto to the garage and wash it. After driving defendant's wife around, he started to his home to get his supper, but before he reached his home, the accident happened. Under the circumstances, this court held that the master was responsible for the employee's negligence.

In the case of *Whatman v. Pearson*, L. R. 3 C. P. 422, cited in *Driscoll v. Carlin*, 50 N. J. L. 28 (31), defendant's workman, contrary to his instructions, left his horse and cart unguarded in the street while he went to dinner, and the horse ran away and injured the plaintiff's property, for which injury the defendant was held liable.

In *Donaldson v. Ludlow & Squier*, 94 N. J. L. 306, it appeared that the defendant hired from the plaintiff an automobile for the use of it in his business and put it in charge of his driver. The driver of the car, after his work was done, went to a place to buy tickets for himself to witness a fight, intending to return to put the car in the garage afterwards. He left the auto in charge of a boy, unlocked, and while gone, the automobile was stolen. On the question of

whether at the time the servant was acting within the scope of his master's employment, the court said: (p. 307)

"In the present case, the servant was in the employment of the master until he had finished his work for the day, and returned the automobile to the garage."

It is only where the facts as to the agency are disputed that it becomes a question for the jury. In the case of *Osburn v. DeYoung*, 99 N. J. L. 204, the first syllabus runs as follows:

"Where the testimony whether or not the servant of the defendant, who was driving the automobile, was at the time of the accident, engaged on the appellant's business, was disputed, the question was properly submitted by the trial court to the jury."

An oft cited case is that of *Drake v. Norfolk Steam Laundry*, 135 Va. 354; 116 S. E. 668; 17A Am. Dig. 1509; 39 C. J. 1298, Note 16, where the following was said:

"Where a servant is allowed by his master to combine his own business with that of the master, or even to attend to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured by his negligence, but the master would be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master in the act, the negligent performance of which caused the injury."

That the automobile belonged to the servant and not to the master, is not in itself a circumstance, which will permit the master's being held.

In the case of *Goldsmith v. Chesebrough*, 113 Atl., 285 (Ct. of E. & A. of Maryland), plaintiff, who was injured, attempted to hold the employer of a salesman who used his own automobile for the solicitation of his master's business. It affirmatively appeared that the defendant told the servant that he did not want him to use the automobile in question. A nonsuit was considered proper and the judgment of the plaintiff was reversed.

The court, in stating what law should control, quotes from *Labatt's Master and Servant*, (2nd Ed.) p. 6888, where it is said:

“If the other circumstances involved in a case are consistent with, or require the inference that the tort complained of was within the scope of the servant's employment, the mere fact that the instrumentality which occasioned the plaintiff's injury did not belong to the master, will not preclude him from recovering damages. The action is deemed to be maintainable or not maintainable, according as his use of the instrumentality was or was not authorized expressly or impliedly, by the master.”

All of the evidence with respect to McLachlan's connection with the defendant, Sinclair Refining Company, tending in one direction only, subject to no varying inferences, all pointing to the absolute relationship between the parties at the time of the accident, it is insisted, with submission,

that there was but one course open for the court to pursue, and that was, to take from the jury the question of agency and to resolve it as the court did against the defendants.

It is, therefore, respectfully submitted that the appeal taken by the defendants should be dismissed and the verdict rendered in the Supreme Court affirmed with costs.

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