

*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed April 29, 1926.

**New Jersey Supreme Court**

FRANCES ALTIERI, an infant, by  
Louis Altieri, next friend,  
and LOUIS ALTIERI,

*Plaintiffs,*

*vs.*

PUBLIC SERVICE RAILWAY COM-  
PANY,

*Defendant.*

10

*Action at  
Law.*

To: James W. Donohue, Esq., Attorney of  
Plaintiffs.

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Sir:

PLEASE TAKE NOTICE that the defendant,  
PUBLIC SERVICE RAILWAY COMPANY, appeals to the  
New Jersey Court of Errors and Appeals from  
the whole of the judgment entered in the above-  
entitled cause.

Dated: April 21st, 1926.

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Yours truly,

JOSEPH COULT,  
Attorney of Defendant.

(Endorsed.) "Service of a copy of within  
notice is hereby acknowledged this 28th day of  
April, 1926, James W. Donohue, Attorney of  
Plaintiffs."

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*Complaint.*

**SUMMONS.**

The defendant was duly summoned.

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**COMPLAINT.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

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FRANCES ALTIERI, an infant, by  
Louis Altieri, next friend,  
and LOUIS ALTIERI,  
*Plaintiffs,*

20

*vs.*

PUBLIC SERVICE RAILWAY COM-  
PANY, a corporation,  
*Defendant.*

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30 The plaintiff, Frances Altieri, who is an infant under the age of twenty-one years, residing at No. 329 New street, in the City of Newark, County of Essex and State of New Jersey, by Louis Altieri, her father, residing at the same place, who is duly admitted by the Court to prosecute as next friend of the said Frances Altieri and Louis Altieri, say that:

**FIRST COUNT.**

40 1. At all the times hereinafter mentioned, the defendant was and still is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New Jersey.

*Complaint.*

2. At all the times hereinafter mentioned, the defendant was in the general control, management and operation of a certain line of street surface cars, known as the Clifton Line, which ran its cars on and along Norfolk street at and near the junction of said Norfolk street with Hartford street, in the City of Newark, State of New Jersey, and said defendant controlled, managed and operated all of the cars of said line running on said Norfolk street at and near said point. 10

3. At all of said times, the said Norfolk street and the said Hartford street were both public streets or thoroughfares in the City of Newark, State of New Jersey.

4. On or about March 24, 1923, the infant plaintiff was lawfully crossing the said Norfolk street at or near the junction of the said Norfolk street with Hartford street, and in order for her to do so, it was necessary for her to cross the railroad tracks on said Norfolk street on which the defendant ran and operated the said cars. 20

5. While so crossing, the said infant plaintiff was struck and run down by one of the said cars of the defendant. 30

6. The infant plaintiff was so struck and run down owing solely to the careless, negligent, reckless, improper and unlawful manner in which the defendant, its agents, servants and employees managed, operated and propelled its said car at said time and place:

(a) In that the said car was run into and against the infant plaintiff without any signal or warning of its approach beng given; 40

*Complaint.*

(b) In that the said car was being run and operated at a high and excessive rate of speed;

(c) In that the said car was run, managed, operated and propelled without regard to the presence of the infant plaintiff in the public street or highway;

10 (d) In that it was not driven, managed and directed so that it would not come in contact with the said infant plaintiff;

(e) In that the defendant, its agents, servants and employees did not have the said car under sufficient control and did not properly manage it;

(f) In that the defendant, its agents, servants and employees were careless in not seeing and avoiding the infant plaintiff;

20 (g) In that the defendant, its agents, servants and employees did nothing which they might have done to avoid the accident.

7. The said infant plaintiff and the persons responsible for her care and custody were entirely free from any fault or negligence in the premises.

30 8. By reason of the premises, the infant plaintiff was made sick, sore, lame and disabled; she was cut, injured and bruised; she was seriously injured in and about her head, limbs and body; one of her legs was fractured and severely cut, crushed and lacerated; she sustained a severe injury to her head; she has been and will be caused to suffer great pain in mind and body; her spine and back were severely wrenched, sprained and injured; her nervous system sustained a severe shock; her body, arms, legs and head were cut, injured, lacerated and bruised; she has been and  
40 still is confined to a hospital and will be so con-

*Complaint.*

fined for a long time to come; she has been and will be compelled to undergo surgical operations in an endeavor to lessen the effects of her said injuries; that her said injuries are permanent and she will never wholly recover therefrom but she has been maimed and crippled thereby for life.

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## SECOND COUNT.

1. Paragraphs "1," "2," "3," "4," "5," "6," "7," and "8" of the First Count are hereby made part of this Count.

2. This plaintiff, Louis Altieri, is the father and guardian of the aforesaid Frances Altieri, and was obliged to and did expend large sums of money for medical attendance and medicines, and that he will hereafter be compelled to expend large sums of money therefor in the attempt and for the purpose of treating and endeavoring to cure his said infant daughter of her injuries; and that he has and will hereafter necessarily be compelled to incur and pay large sums of money for nursing and taking care of his said infant daughter by reason of her said injuries, and that the plaintiff has further by reason thereof been deprived of the comfort and happiness, earnings, services, aid and assistance of his said infant daughter for a long period of time and permanently.

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Plaintiff Frances Altieri, by Louis Altieri, her next friend, demands \$50,000.00 as damages on the First Count, and plaintiff, Louis Altieri demands \$25,000.00 as damages on the Second Count.

KENT & KENT,  
Attorneys for Plaintiffs,  
160 Market Street, Paterson, N. J.

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*Answer—Reply.*

**ANSWER.**

Filed July 26, 1923.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, says that:

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**FIRST COUNT.**

1. It admits the allegations contained in paragraphs one, two and three of the first count.

2. It denies the allegations contained in the remaining paragraphs of the first count.

**SECOND COUNT.**

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1. In answer to paragraph one of the second count, it repeats its answer to the first count.

2. It denies the allegations contained in paragraph two of the second count.

JOSEPH COULT, JR.,  
Attorney of Defendant.

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**REPLY.**

The plaintiffs deny each and every allegation contained in the answer of the defendant herein.

KENT & KENT,  
Attorneys for Plaintiffs.

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*Judgment.*

**SUBSTITUTION OF ATTORNEY.**

By a rule entered April 11, 1924, James W. Donohue was substituted in place of Kent and Kent as attorney of plaintiff.

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**JUDGMENT.**

NEW JERSEY SUPREME COURT.

FRANCES ALTIERI, an infant, by Louis Altieri, her next friend, and LOUIS ALTIERI, <div style="text-align: right;"><i>Plaintiffs,</i></div> <div style="text-align: center;"><i>vs.</i></div> PUBLIC SERVICE RAILWAY COM- PANY, a corporation, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>	20
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Verdict by a jury, judgment for plaintiff.

Amount Frances Altieri...\$8,000.00

“ Louis Altieri..... 500.00

Costs

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Total

James W. Donohue, attorney for plaintiff.

This case was tried before Judge Worrall F. Mountain with a jury, at the Essex Circuit on March 29th and 30th, 1926.

The jury rendered a general verdict in favor of the plaintiff, Frances Altieri, against the defendant for Eight Thousand Dollars (\$8,000) and rendered a general verdict in favor of the

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*Judgment.*

plaintiff, Louis Altieri, against the defendant for Five Hundred Dollars.

Whereupon it is adjudged that the plaintiff Frances Altieri, an infant, by Louis Altieri, her next friend, plaintiff, do recover of the said defendant Public Service Railway Company (a corporation), the sum of eight thousand dollars damages, and that the plaintiff Louis Altieri, do recover of the said defendant Public Service Railway Company (a corporation), the sum of five hundred dollars damages, together with their costs, which have been taxed at the sum of  
 10 making in  
 the whole the sum of

Judgment entered and signed April 16, 1926.

20 WM. S. GUMMERE,  
 C. J.

**Certificate.**

The certificate of Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, is annexed to the record as sent to the Court of Errors and Appeals for the purpose of this  
 30 appeal.

*Louis Altieri, direct.*

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

FRANCES ALTIERI, by next friend  
Louis Altieri, and LOUIS  
ALTIERI,

*Plaintiffs,*

*vs.*

PUBLIC SERVICE RAILWAY COM-  
PANY, a corporation,

*Defendant.*

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*Action at  
Law.*

March 29, 1926.

Before Hon. Worrall F. Mountain, *J.*, and a jury. 20

For the plaintiffs appear Donohue & O'Brien  
(by John A. Matthews).

For the defendant appears Joseph Coult, Jr.  
(A jury is called and sworn.)

Mr. Matthews opens for the plaintiffs.

Mr. Coult opens for the defendant.

LOUIS ALTIERI, one of the plaintiffs, sworn. 30

*Direct examination* by Mr. Matthews.

Q Your are the father of Frances Altieri?

A I am.

Q You are the plaintiff in this suit in your  
own behalf and in her behalf, are you not? A  
I am.

Q How old was Frances on the 24th of  
March, 1923? A Five, going on six.

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*Louis Altieri, direct.*

Q When would she be six? A The 11th of that year.

Q The 11th of what month of that year? A Of April.

Q You did not see this accident the child was in? A I did not.

10 Q What was the health of your child prior to March, 1923, so far as you were able to observe of your own knowledge? A The health of the girl. I never had any sickness or trouble with her outside of a few children's sicknesses, that's all.

Q On the night the accident happened did you go to the hospital to see her? A I did.

Q What hospital? A The City Hospital.

Q Was she conscious when you got there?

20 A She was not.

Q While the child was in the hospital did you submit to a skin grafting operation? A I did.

Q When, how long after the accident? A About two and a half weeks after.

Q At that time what was your business? A Chauffeur.

Q For whom? A Mr. De Salvio.

Q What were your wages at that time? A I was getting \$35 a week.

30 Q How long were you confined to the hospital as the result of the skin grafting operation? A Nine days.

Q What month did you tell me the skin grafting operation was done? A About two and a half weeks after the accident, about April.

Q At the time the skin grafting operation was done, were you chauffeuring? A I was not.

40 Q What was your occupation? A I was a moulder for the Splitdorf Electrical Company.

*Louis Altieri, direct.*

Q Were you a moulder when you went to the hospital? A I was.

Q What wages were you receiving at that time? A Nine and a half to ten dollars a day.

Q Were you working steadily, or piecework? A Working steady on piecework.

Q You say you were working steadily on piecework? A Yes, sir. 10

Q When the child was injured did you have medical expenses outside of the hospital treatment? A A few minor expenses.

Q What were they, if you have them in mind? A About \$18.

Q What was that for? A I took her over to the doctor about her complaining about her foot and to see what I could do about her urinating the bed. 20

Q Who was the doctor you took her to? A Dr. Pisano.

Q Where is his office? A 304 Bank street.

Q Is he the man to whom you owed the money for services? A Yes, sir.

Q How much was that? How much did you pay him? A \$18.

Q Does your child today appear to be in the same condition to you as she did before the accident? A She does not. 30

Q What is the difference? A She seems to be very nervous since the accident and fidgety and at crossings she gets excited, I suppose she thinks she is going to get hit; I can't seem to control her.

Q What is her weight today as before the accident, if you know of your own knowledge? A I don't know. Her weight today is about fifty-nine pounds. 40

*Louis Altieri, direct.*

Q What was it before the accident? A I don't know.

Q What grade was she in in school just before the accident? A She had just started school going two and a half weeks.

Q How long was she in the hospital? A  
10 Three months.

Q Did she start back to school at the school year? A She did not.

Q Did she go to school for a year after the accident? A She did not go to school until the term opened again.

Q That is to say she lost her schooling from March until June and then started in in September? A In September.

Q From September, 1924, until now has she  
20 been regular in attendance at school? A She has not.

Q Has she had any other illness to keep her away from school? A No.

Q All besides the accident? A Not as I know of.

Q How frequently had she been away from school from the term of September, 1923, to the present time, if you know? A I don't know.  
30 She is away quite often. The Sister has complained that she must attend school more regularly and she is on probation now for not attending school.

Q Does she stay away of her own accord? A She does not feel good.

Q What is the condition of the child's heel today as compared with before the accident; the heel of the left foot? A It seems that every now and then it like blisters up and breaks open  
40 and pus runs out of it.

*Frances Altieri, direct.*

Q Whereabouts on the heel? A Right in the back of the heel.

Q Stand up and show us on your foot. A Right in there (indicating).

Mr. Matthews: Pointing to the top of the back of the heel.

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*Cross examination by Mr. Coult.*

Q At the time the accident happened the child was not living with you, was she? A At the time, no, sir.

Q She was living with her grandmother? A Yes, sir.

Q She was the daughter of your first wife? A She was.

Q You had married again? A Yes, sir.

20

*Re-direct examination by Mr. Matthews.*

Q Your first wife had died? A Yes, sir.

Mr. Matthews: At the last trial the child was not allowed to testify, but now she is a year older and I would like to submit her to the Court as to her ability to testify now.

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The Court: You may examine her.

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FRANCES ALTIERI, examined by Mr. Matthews.

Q How old are you? A Eight years old.

Q Where do you go to school? A St. Joseph's School.

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*Frances Altieri, direct.*

Q What is that you have your hand on there?

A A book.

Q That is the Bible, do you know what the Bible is? A Yes, sir.

Q What is the Bible? A It's got all the prayers in.

10 Q Do you know what it means to tell the truth? Do you know what it means to tell a lie? A It is a sin.

Q What does God do to little girls that tell lies? A Punishes them.

Q How does he punish them, what does he do with them? When they die what happens to them? A They go down.

Q Down where? A To the devils.

20 Mr. Coult: This child two years ago was not of sufficient capacity to be sworn, as your Honor then found. I should say it would be very dangerous to take her testimony under oath now, particularly on account of her inability, obviously, to give an accurate account of what happened when she was five and a half years old, despite the fact she now realizes the solemnity of the oath.

30 Mr. Matthews: I do not want to ask her anything about the accident, but about her condition.

Mr. Coult: The best person then, I think, would be the observations of the ones who had seen her.

Mr. Matthews: I just want to ask her about her arm and leg, whether they hurt her and how.

40 Mr. Coult: I have no objection to that, but I do not want the examination to go beyond that.

*Frances Altieri, direct.*

The Court: If you will make that agreement between you I am willing.

Mr. Matthews: I shall abide by that, your Honor.

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FRANCES ALTIERI, one of the plaintiffs, 10  
sworn.

*Direct examination by Mr. Matthews.*

Q Frances, is one of your heels sore? A Yes, sir, my left heel.

Q What is the matter with it? A Sometimes when I put new shoes on and they are tight over here (indicating), it gives a big blister. 20

Q Only when you put new shoes on you get blisters? A Yes, sir.

Q You do not get any when you put old shoes on? A No.

Q How about your left leg, is that all right? A Sometimes it bothers me.

Q How does it bother you? A I have a pain in it.

Q Where does it pain you? A Over here (indicating). 30

Q Point where? A Here (indicating).

Q Pointing to the inside of the left leg at a point somewhere below the vagina. Does it hurt you for a long time or just for a little while? A Sometimes it hurts me all day.

Q Have you any other pain in that leg or heel? A No.

Q Do you play just as well as the other girls? A No, nothing like I used to.

Q Do you skip rope? A Yes, sir. 40

*Benedict Caironi, direct.*

Q It is all right if you jump rope, isn't it?

A I can't jump so good.

Q Can you run? A Not so good.

Q Do you go to school every day? A Not sometimes, sometimes I have a pain, the back of my heel hurts me, I get a blister and have to stay home from school.

10 Q So, when you have old shoes on you do not have any pain in the back of your heel? A No.

Q That is the only time you stay home from school, when you have new shoes? A Yes, sir.

Q How many times were you home in the month of February, this year?

Mr. Coult: I object, as putting a considerable strain on this child's memory.

20 A Two or three times.

Mr. Coult: Withdraw the objection.

Q How many times this month, March? A About two times already.

Cross examination waived.

30

BENEDICT CAIRONI, sworn in behalf of the plaintiffs.

*Direct examination by Mr. Matthews.*

Q How old are you? A Around nineteen.

Q Where do you live? A 159 Norfolk street.

Q Newark? A Yes, sir.

40 Q Whom were you employed by in March, 1923? A Pyrene Fire Extinguisher.

*Benedict Caironi, direct.*

Q In March, 1923? A Yes, sir.

Q Did you see an accident on that day in which this little Altieri girl figured? A I did.

Q Where were you at the time of the accident? A On the left-hand side.

Q Out loud. A On the left-hand side.

Q Of what street? A Norfolk street going 10  
in that direction (indicating).

Q Going in what direction? A A northern direction.

Q Going in a northerly direction on Norfolk street? A Yes, sir.

Q Were you on the east or west side of the street? A I think it is the west side, the side I lived on.

Mr. Matthews: Have we some chalk so 20  
we can draw it on the blackboard?

Mr. Coult: The difficulty with that is we cannot get our testimony properly in the record with a sketch on a blackboard that is erased.

The Court: I would see if I could not get along without that.

Q Norfolk street runs how, if you know. 30  
North, or south, or east and west? A I think  
north and south.

Q You were going north on Norfolk street?  
A On the west side.

Q On the west side? A Yes, sir.

Q That would be on the left-hand side as you were going north. Is that right? A Yes, sir.

Q At or near what street were you walking when you saw what you saw? A I was four 40  
or five houses back from Hartford street.

*Benedict Caironi, direct.*

Q Do you live on Norfolk street? A I do.

Q How long have you lived there? A Twelve years this June.

Q You say you were four or five houses back from the corner of Hartford and Norfolk street when you saw this accident? A About.

10 Q Tell us, please, what you saw. A As I was coming up I happened to see a little girl step off the curb there right near the crossing; I couldn't tell exactly.

Q You cannot tell exactly? A A foot or two from the crossing.

Q By the crossing, what do you mean, the cross-walks between the streets? A The cross-walk to cross over the other side.

Q You say you saw this girl step off the sidewalk at that point? A Yes, sir.

20 Q What next did you see or what did she do? A A truck was coming over.

Q A truck was coming which way? A South.

Q Coming south? A Yes, sir, and for awhile I lost a view of the girl, because the truck blocked my view and I happened to notice a car going pretty fast, until he had rung once or twice—I think it is customary for a car, because it does not stop there—

30 Q What do you mean, "It does not stop there"? A A regular stop.

Q There is no regular stop at Hartford and Norfolk street? A No, sir.

Q You think you heard a gong ring once or twice? A It is customary when they do not stop to ring once or twice.

Q You say you saw a truck and a car, and the car was going opposite to the truck, was it? A Yes, sir.

40 Q How fast was the trolley car going, would you say? A Pretty fast.

*Benedict Caironi, direct.*

Q What amount of speed, would you say?

A About twenty miles, twenty-five miles per hour.

Q You say you lost a view of the child when the truck blocked your view? A Yes, sir.

Q What next did you see? A Then, I just seen as the car struck her out in the roadway as it next hit her. 10

Q What did you do when you saw the car hit the girl? A I was excited right away and ran in and told my sister and when I came out again I saw a man holding her in his arms.

Q How far did the car go after it hit the girl, if you know? A From the curb it went in front of Shonstein's store.

Q To in front of Shonstein's store? A Yes, sir. 20

Q How far away from the corner where the accident happened is Shonstein's store, by houses, if you know? A About three or four houses.

Q Then, do I understand you right, that after the trolley struck the little girl it proceeded on for three or four houses? A Yes, sir.

Q Can you approximate that in feet? A I would say about fifty feet. 30

Q Do you know what the position of the little girl was on the street when she came in contact with the trolley car? A The position?

Q Yes, had she or not crossed any rails of the trolley? A I would say not exactly until she had struck—

Q This car was proceeding north, was it not? A Yes, sir.

Q There were southbound rails, too, weren't there? A Yes, she was past the southbound rail. 40

*Benedict Caironi, cross.*

*Cross examination by Mr. Coult.*

Q You were on the west side of Norfolk street going north? A Yes, sir.

10 Q And the truck that you mentioned was on the same side of the street that you were on, coming towards you, is that right? A Yes, sir.

Q What kind of a truck was it? A Well, I didn't notice the name. It is a pretty medium size furniture truck.

Q A van, covered van? A Yes, sir, it was a covered van.

Q You saw the little girl go off the curb back of this truck, didn't you? A Yes, sir.

20 Q The truck was not moving fast, was it? A Well, I couldn't say it was moving fast; about a medium gait I would say, about ten miles per hour.

Q How far behind the rear of that truck did the little girl go after she left the curb? A It was at this curb here (indicating) and the girl was on the other curb and there is two cross-walks here (indicating).

Q You say the little girl went behind the van? A Yes, sir.

30 Q How close to it? A I would say from one cross-walk to the other, that is about ten yards.

Q Which cross-walk was she at? A At the left-hand, on the other cross-walk.

Q The one furthest away from you? A Yes, sir.

Q On the north cross-walk? A No, on the west side.

40 Q There are two cross-walks coming across. She was on the nearest one to you or the furthest one to you? A At the furthest one.

*Benedict Caironi, cross.*

Q On the furthest one? A It would be the nearest one.

Q Which one was it? A On the first one.

Q The nearest one? A Yes, sir.

Q That is where the truck was? A Not the truck.

Q Well, the van? A Yes, sir. 10

Q Then, she went directly behind the van?

A Not exactly behind it, she was a little distance away if the truck was moving.

Q You said a minute ago that the van was on the near cross-walk and the girl on the further cross-walk, you do not mean that, do you?

A Certainly, I do.

Q A moment ago you told me that the van coming towards you had got to the nearest cross-walk and you said then the girl was going across the other cross-walk; did you mean that? 20

A Yes, sir.

Q That is, the girl did not cross on the cross-walk nearest to you at all, but on the furthest cross-walk? A Yes, sir.

Q Is that the way you saw this accident? A Yes, sir.

Q Do you remember that there was a van there? A I do.

Q You say the van obscured your view? A For awhile. 30

Q The van you saw was on the nearest cross-walk to you? A Yes, sir.

Q The little girl went out of your sight? A Yes, sir.

Q Then came into your sight again on the other side of your truck? A She just came in sight when she got struck; I just happened to look and she was hit.

Q When you saw her get struck you looked past the front of the truck? A Yes, sir, I did. 40

*Benedict Caironi, cross.*

Q You watched her come out behind the truck and get struck? A Yes, sir.

Q And the car went from the place where she was struck to Shonstein's store? A Yes, sir.

10 Q That is from the northerly cross-walk all the way up to Shonstein's store? A Yes, sir.

Q Did you see another trolley car there? A When I come out, I did.

Q Where was that? A On the opposite side.

Q That was on the same cross-walk the little child came across, wasn't it? A Yes, sir, that is when I seen the both cars stop, when I came out a little after. At the time I seen the accident there was only one car there.

Q No other car there at all? A No.

20 Q You made a statement in this case? A I did.

Q I show you what purports to be a statement in writing of Benedict Caironi dated March 28, 1923, in three pages and I call you attention to the signature at the foot of the first page and I ask you if that is your signature? A It is.

30 Q I show you page two of the same statement and I ask you if that is your signature? A Yes, sir.

Q I show you page 3 and I ask you if that is your signature on there? A Yes, sir.

Mr. Coult: I ask that the statement consisting of three sheets be marked for identification. Each sheet is signed.

(Same are marked D. 1 for identification.)

40 Q Do you remember the time when the statement was taken? A I do.

*Benedict Caironi, cross.*

Q How was your memory then, pretty good?

A I was the same as now.

Q Was it better then than now or worse? A About the same.

Q The statement was taken four days after the accident, wasn't it? A A couple of days after, I don't know whether it was four. 10

Q The accident happened in March, 1923, didn't it? A Yes, sir.

Q You think your memory is just as good now, three years from the date as it was nearer the date? A I think it is.

Q You do not think it would assist your memory any if you looked at this statement? A What do you say?

Q I say you do not think it would assist you any if you looked at this statement? A I didn't write the statement. 20

Mr. Coult: I ask that the answer be stricken out as not responsive.

Q Do you think it will assist your memory any if you look at this statement? A I do not, it might and it might not.

Q I call your attention to this portion of the statement, "I saw this little girl lying on the ground at the left front end of the car being dragged for two or three yards and then the car stopped," do you recall that? A I don't recall him reading that to me. I didn't look at the statement; he was just reading it to me. 30

Q You signed it before you read it? A I didn't read it, he read it to me.

Q Did you tell the man who took the statement that the little girl was dragged two or three yards and then the car stopped? A I 40

*Benedict Caironi, re-direct.*

did not. He didn't even show me the statement; he made me sign it and just read it to me.

Q He read it to you and then you signed it. You say this trolley car was going how fast? A Pretty fast. I would say about twenty miles per hour. Usually all go fast because there is  
10 no stop there.

Q I call your attention to the portion of the statement as follows: "As she approached this point there was a Clifton car that was north-bound on Norfolk street just passing my house going at a fair rate of speed." Do you recall that? A No, I do not recall him reading that to me.

Q Did you say that? A He didn't show me the statement.

Q Did you tell the gentleman who took the  
20 statement that the trolley car was going at a fair rate of speed? A I told him it was going pretty fast, that's what I told him.

*Re-direct examination by Mr. Matthews.*

Q That is the man at the end of the table who took the statement? A Yes, sir.

30 Mr. Matthews: Because of the failure of this witness to thoroughly identify the point, I think we should be entitled to put on the board two lines to indicate Norfolk street and two lines to indicate Hartford street and a point to indicate the cross-walks, and a point to indicate Shonstein's store. We had pictures in the last trial which we have not had at this trial and in the absence of the pictures I wish to use the blackboard.

40 Mr. Coult: I object to the use of the blackboard on the ground it tends to con-

*Benedict Caironi, re-direct.*

fuse the record. If counsel wanted a chart they could have had one here.

This witness is testifying to these things as he remembers them and there is no confusion in the statement so far as he goes. It is true he has it all wrong, as I understand the facts, but his testimony stands as he gives it. 10

Mr. Matthews: I ask the Court to permit me to draw a sketch along the lines I have indicated.

(Argument.)

The Court: If there was no objection, of course, I would permit it. Ordinarily, a map is produced, identified and sworn to.

I will let you have an exception.

Plaintiff's counsel prays an exception to this ruling of the Court. 20

Exception noted as ground of appeal.

Mr. Matthews: In order that my objection may be on the record may I state it? I desire to have the witness sketch upon the blackboard in the court room and behind the witness-stand, lines indicating the direction of Norfolk street, Newark, New Jersey, and lines indicating the direction of Hartford street, particularly to show the intersection of the two streets and thereafter mark on the blackboard Shonstein's store to indicate the point to which this trolley car was supposed to have gone; according to the testimony of this witness after it hit the child. 30

We have not produced a map, because the father of this child has not been able to afford the expense of it. 40

*Phillip G. Hood, direct.*

Mr. Coult: I object to it because such a map would not be drawn to scale and the very location of Shonstein's store would be a question.

The Court: Sustain the objection.

10 Mr. Matthews: I call for the pictures of the defendant which were used at the last trial.

Mr. Coult: I object to producing them because at the former trial these photographs were marked by various witnesses by various marks and we have tried to erase them and we could not do it and the marks still show on the photograph and in that condition I do not think it is proper to use them again. Maybe I can get fresh photographs. If I can I will try and produce them.

20

Mr. Matthews: May I withdraw this witness at this time to ask him later one question about this truck on re-direct?

The Court: You may.

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30 PHILLIP G. HOOD, sworn in behalf of the plaintiffs.

*Direct examination by Mr. Matthews.*

Q You are a practicing physician and surgeon in the State of New Jersey? A I am.

Q And have been how long? A Since 1904.

Q Are you identified with the X-ray department of the City Hospital? A I am assistant roentgenologist.

40 Q Were you so identified on the 24th of March, 1923? A I was.

*Phillip G. Hood, direct.*

Q Did you make X-rays of this little girl, Frances Altieri? A Yes, sir.

Q Have you those plates now? A No.

Q Why? A The rule in the hospital is to save them—

Mr. Coult: I object to the rule at the hospital as not binding on us. 10

Mr. Matthews: In the absence of primary evidence we can introduce secondary evidence.

The Court: I will admit it.

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

Exception noted as ground of appeal.

Q What happened to the plates? A They were sold. 20

Q Have you the records, that are the permanent records, with you before the plates were sold? A Yes, sir.

Q Have you those records with you? A Yes, sir.

Q Were those records made under your supervision? A Yes, sir.

Q Referring to them do you find a record of the plates you took of this child, Frances Altieri? A I do. 30

Mr. Matthews: Do you admit the witness' competency?

Mr. Coult: Oh, yes.

Q Tell us what the plates you took of the child Frances Altieri on the 23rd or 24th of March, or whenever it was at the time of the accident, show? A The first record I have shows the 23rd of April, 1923; two films No. 4243 40

*Phillip G. Hood, direct.*

and 4244. They were taken of the upper third of the left femur.

10 Q The femur is what? A The thigh bone, and the thigh bone according to this report was fractured in its upper third and the fragments were in poor position and there was callus at that time.

Q Was there another plate besides that? A We have a record on the 30th of April, 1923; film No. 4483 and a diagnosis or interpretation at that time was a probable sprained fracture of the astragalus; good position.

Q The astragalus is what? A A small bone in the foot.

Q What part of the foot? A The part that joins the lower part of the leg bone.

20 Q Is it at the front or the back of the foot? A At the top of the foot.

Q The bone itself is at the top of the foot? A Yes, sir.

Q Has it any involvement with the heel, the astragalus? A It joins or articulates with the bone of the heel.

Q It articulates with the bone of the heel? A Yes, sir.

30 Q Was there any other film or films taken at that time? A Not that same day, but on the 31st of May, 1923, there were four taken, No. 6898, 6900, 6901, 6902.

Q What do they show? A They show a fracture of the femur at the upper margin of the plate and we asked for the case to be returned to get a better picture or more of the femur and the report of the tibia and fibula, the lower part of the leg, showed the tibia to be in good position.

40 Cross examination waived.

*Alfred M. Mamlet, direct.*

ALFRED M. MAMLET, sworn in behalf of the plaintiffs.

*Direct examination by Mr. Matthews.*

Q Are you a practicing physician and surgeon in the State of New Jersey? A I am. 10

Q How long have you been such? A Since 1923.

Q In 1923, March, were you attached in any capacity to the City Hospital? A I was.

Q In what capacity? A As house surgeon.

Q Do you recall the child, Frances Altieri, being brought to the hospital? A I do.

Q What day was it, do you recall? A The last Saturday of March.

Q Was it the day of the accident, if you know? A The day of the accident. 20

Q What was the child's condition when she was brought in? A The child was unconscious, bleeding, with severe lacerations of the inner surface of the left thigh, muscles; the leg tissues were very badly lacerated.

Q For what distance were they lacerated? A They were lacerated from the junction of the thigh almost to the knee.

Q Where was she bleeding from, if anywhere? A She was bleeding from the torn tissues and from her vagina. 30

Q What else did you notice about her at that time? A She also had a swelling about the ankle on the same side.

Q Who was the attending physician, you? A Dr. Sprague.

Q What was done in your presence by either you or Dr. Sprague? A A blood transfusion was done immediately. 40

*Alfred M. Mamlet, direct.*

Q From whom was the blood transfusion taken, if you know? A Some relative of the child's.

Q What next was done after the blood transfusion? A The child was taken back to the ward and placed in a Bryant extension to treat the fracture.

10 Q After she was placed in this extension position did she remain there any length of time in the extension? A The child was left in the extension for about two months approximately, I am not positive of that.

Q Do you know why that extension position was maintained for two months? A The wound was badly infected and the bones had to be set and the wound was healing slowly.

20 Q Now, you have talked about the tissues and muscles being torn, did you say. A Torn and lacerated so that the bone was exposed.

Q On what part of her body. When you say the junction of the thigh to the body was it on the inside or the outside of the leg? A The inner surface.

Q How close to the vagina was the tearing? A Right next to it.

30 Q Did that tearing proceed, or not, from the vagina in a straight line, or irregular? A It did not quite reach the vagina, it was right next to it, but the hymen was lacerated.

Q What is the hymen? A Commonly known as the virgin cord.

Q That was lacerated, you say? A Yes, sir.

40 Q After being in an extension which you say for a period of two months, you say during all that time there was infection? A No, the child had infection up to about the last week before we took the extension down.

*Alfred M. Mamlet, direct.*

Q After you took the extension down what next was done for the child? A I performed a skin graft.

Q From whom did you take the skin graft upon the child? A The father.

Q Describe the operation to us. A Both patients are placed on two tables, approximate, and the skin is removed from the father and small pieces are placed upon the raw surfaces of the wound. I think in this case we took about twenty square inches of skin. 10

Q From what part of the father's body? A From the thigh. I think both thighs. I am not quite sure.

Q That skin was placed on the raw flesh of the little child? A Yes, sir.

Q At what point of her body did the skin grafting take place? A From the inner surface of her thigh down to the knee. 20

Q From near the vagina down to her knee? A Yes, sir.

Q You did that skin grafting operation? A I did.

Q Was there any other doctor assisting? A There was, but I can't recall who.

Q You told us her leg was fractured on the upper femur? A Yes, sir. 30

Q The femur is what bone? A The thigh bone, and she also had a fracture with displacement to the astragalus, on the same side.

Q She had a fracture with displacement of the astragalus on the same side? A Yes, sir.

Q The astragalus involved the heel of the child? A That involved the heel. The child also had an extensive laceration of the tendon Achilles, or the tendon from the muscles of the leg to the heel. 40

*Alfred M. Mamlet, direct.*

Q Is that on the top of the heel as I point to the left heel, that you show? A Yes, sir.

Q That is the tendon Achilles? A Yes, sir.

Q You say that was lacerated? A Yes, sir.

Q The astragalus was broken or dislocated? A Fractured and dislocated.

10 Q What did you do for the tendon Achilles situation and the fractured and dislocated astragalus? A That part of the leg had been immobilized when the child was in extension and we further immobilized the leg after the child was taken down from the extension.

Q Do you remember how long the child was in the immobile position? A From the day the child entered the hospital until two weeks before the child was discharged.

20 Q Do you remember when that was, in what month? A In the month of June, I don't remember the date.

Q Doctor, since this child was treated by you have you seen her? A I saw the child twice.

Q When was the first time after you treated her? A I examined the child before the last trial and examined the child yesterday.

30 Q What did you find yesterday with reference to the lacerations that you have described that extended from the inner vaginal section of the left leg down to the knee? A I find that the wound has healed, that is, that there is a great deal of contraction.

Q Contraction of what? A Of tissues. The circumference of that leg is much less than the circumference of the other leg.

Q Do you mean a line measuring around the leg? A Yes, sir.

40 Q Did you measure the legs of the child? A There is no shortening. I measured it.

*Alfred M. Mamlet, direct.*

Q Did you measure the circumference of the leg? A I didn't measure that. I just put a string around it and found there was a difference.

Q How much, do you know? A I do not.

Q Was it appreciably enough? A It was visible to the naked eye. 10

Q You say there is what of the tissues there? A A contraction.

Q Does or does that not interfere with the locomotion of the child? A I gave the child some tests for locomotion and the child could not sustain her weight upon that leg as long as she could upon the other.

Q Did you give her the reflex test? A There is a slightly exaggerated reflex on the infected side. 20

Q Did you examine her heel and the tendon Achilles in the astragalus section? A Yes, sir.

Q What did you find there? A There is good union of the astragalus but the tendon Achilles has a good deal of callus showing the thing has not healed absolutely.

Q Did you or did you not find an injury that is subsisting at this time on the tendon Achilles section? A Only what I have stated. 30

Q What else did you find with reference to the injury from the vaginal section down to the knee beside the strained condition of the tendons and the smaller circumference condition? A Very marked disfigurement.

Q Does the disfigurement extend to the knee? A Almost to the knee.

Q You said earlier in your testimony that the hymen was ruptured. You did not make a vaginal examination yesterday, did you? A No, sir. 40

*Alfred M. Mamlet, cross.*

Q Was there anything else you did yesterday in the examination you wish to tell us about in reference to this condition in the parts that were injured in March, 1923? A No, sir, except that the child has a rapid sound of the heart, but outside of that her physical examination was negative.

10 Q You do not know what her heart condition was prior to the accident, do you? A I do not.

Q Do I understand you correctly when you tell us that her locomotion now is perfect? A I explained the difference of the two sides. I wouldn't call it exactly perfect.

Q Has she or has she not a limp or a hop, or anything that is in her flexion or walking? A There is no perceptible difference.

20 Q There is no shortening of the leg? A No shortening.

Q You say there is a narrowing in the circumference of the left leg? A Yes, sir.

Q From your experience, and your knowledge and the condition of the injury as you saw it yesterday would you or would you not say this would impede the child in her future activities, locomotion? A To a certain extent.

30 *Cross examination by Mr. Coult.*

Q I thought you said the locomotion was all right, now? A The locomotion, yes.

Q It is all right now, is it? A Yes, sir.

Q You just said in answer to the last question by plaintiff's counsel it would impede the locomotion of the child in the future. A Yes, I mean that if the child should want to do any professional dancing or work of that nature she  
40 could not do it.

*Alfred M. Mamlet, cross.*

Q I mean— A That the leg would not stand the strain.

Q When you referred to impediment of locomotion you had in mind she might not be able to engage in a profession such as dentistry? A No, dancing.

Q She could not become a professional dancer, but she could dance as other children could, couldn't she? A I couldn't say. 10

Q You couldn't say she could not? A I couldn't say she could not, no.

Q What other impediment in locomotion do you think she will have in the future? A I think she will not be able to walk a long distance.

Q What is the reason for that? A Because even now she does not show as much strain on the infected side as she does on the opposite side. 20

Q Why is that? A Loss of muscle tissue.

Q You say you measured these legs with a piece of string? A The length.

Q Didn't you measure the circumference? A The circumference, yes, there is a difference.

Q You say there is a perceptible difference? A Yes, sir.

Q You cannot give us the difference in inches, can you? A No, I didn't measure it in inches. 30

Q You did not measure with a tape, did you? A No, sir.

Q Do you remember at the last trial of this case what you testified to then? A Yes, sir.

Q There was an inch and a half difference then, wasn't there? A In circumference?

Q Yes. A I measured it then.

Q Do you remember it was an inch and a half then? A I measured it but I don't remember what I testified to. 40

*Alfred M. Mamlet, cross.*

Q There was a very marked difference at that time, wasn't there? A Very marked.

Q That was due to what they call atrophy?

A Yes, sir.

Q That is non-use? A Yes, sir.

10 Q You cannot put a leg in a cast or apparatus and keep it still without producing atrophy, can you? A Not to such an extent.

Mr. Coult: I move that the answer be stricken out.

Q I said you cannot put a leg or limb in a cast where it is immobile without causing atrophy, can you? A No.

20 Q Sometimes it takes a long time for a limb to come back, doesn't it? A Yes.

Q The limbs of this child have come back, haven't they? A They were not in a cast.

Q They were in an apparatus that held it immobile? A Both of them.

Q Both legs were immobile? A Yes, sir.

Q Was the condition described at the last trial the result of atrophy or not? A The result of loss of tissue.

30 Q I say was the condition you described at the last trial the result of atrophy or not? A No, sir.

Q It was not? A No, sir.

Q To what do you attribute the improvement? A To the usage.

Q So in your opinion the usage has restored the loss of tissue, has it? A Somewhat.

Q Of course, the child has grown since the last examination? A Yes, sir.

40 Q So far as you know the tendency of the leg to resume its normal circumference has been

*Alfred M. Mamlet, cross.*

regular and gradual, hasn't it? A It has been slow.

Q It is going to continue, isn't it? A Continue to a certain extent.

Q Now, when this little girl attains normal growth there will be no trouble even in the circumference of the leg, will there? A There will be. 10

Q In spite of the fact it was one and a half inches short at the other trial and in spite of the fact there is a difference now, you say there will be a difference when she is matured? A Yes.

Q So far as the fact of the bone itself is concerned in the thigh there was a good result, wasn't there? A Yes, sir.

Q That is indicated by the fact there is no shortening? A Yes. 20

Q There was no shortening in this case? A There is none now.

Q Callus is a natural formation, is it? A Yes, sir.

Q When a bone is broken the first effort of nature to unite it is shown in the formation of callus? A Yes, sir.

Q Broken bones throw out callus which makes a uniting material, so to speak? A Yes, sir. 30

Q And later on that is absorbed and becomes almost imperceptible? A Yes, sir.

Q So, the first time you looked for this callus? A Yes, sir.

Q That is a good sign? A In bone, yes.

Q After a bone has been broken and callus has formed normally and the callus has hardened, that bone is just as strong as it ever was? A Yes, sir. 40

*Alfred M. Mamlet, cross.*

Q The astragalus is the bone which is right at the base of the two bones of the leg where it joins the foot? A Yes, sir.

Q It lays between the tibia and the fibula and between the bones of the foot? A Yes, sir.

10 Q What is this permanent bone on the inside of the ankle? A That is the internal condyle of the tibia.

Q The astragalus lays approximately just below that? A Yes, sir.

Q Right in the center of the foot? A Below that.

Q In this case the injury to that bone is what is called a sprained fracture? A Yes, sir.

Q That means that a portion of the bone attached to the tendon was pulled out of position? A What is that question?

20 Q I say that means the portion of the bone attached to the tendon was pulled out of position? A The portion of the tendon is attached to that bone.

Q Was the Achilles tendon attached to it? A No, sir, only a portion of it.

Q I am talking now of the fracture to the astragalus; you say that was a sprained fracture? A Yes, sir.

30 Q Does that mean that a portion of the bone has been displaced? A Yes, sir.

Q Did you get a good result in that case? A Yes, sir.

Q That all went back? A Yes, sir.

Q How long did it take for complete union of the astragalus; to return to the normal condition? A It varies with the extent of the fracture.

40 Q How long did it take in this case? A About the time when the child entered the hospital until she was discharged.

*Alfred M. Mamlet, cross.*

Q At the time she was discharged from the hospital you had a normal union there? A Yes, sir.

Q Everything was back where it should be, wasn't it? A The bones had healed.

Q That is what I mean. A Yes, sir.

Q There was no deformity you could discover? A No deformity of the bone. 10

Q Was there any deformity in connection with the tendons? A Yes, sir.

Q The tendon attached to the astragalus? A Yes, sir.

Q What was that? A There is deformity there now. The tendon in healing throws out a substance that is not as hard as callus and takes a good deal longer to heal, and in my examination that day I found that the tendon had been healing and throwing out so many calluses that there is quite a difference in the appearance from the normal. 20

Q I think you said that was the Achilles tendon. A Yes, sir.

Q Is that the one attached to the astragalus? A Is that attached to the astragalus?

Q Yes. A Only partially attached to the astragalus. 30

Q Is that the one you said was attached to the astragalus and which was involved in the sprained fracture? A That is only partially attached to the astragalus.

Q You said there was a fracture of the astragalus involving one tendon or more? A There were two identical injuries; the fracture of the astragalus did not involve the tendon Achilles.

Q The fracture of the astragalus went back to normal? A Yes, sir. 40

*Amelia Mulvaney, direct.*

Q As far as the tendon Achilles is concerned you say there was a callus absorption there? A Yes.

Q Nothing unusual about that, is there? A There is.

Q Callus on the heel? A The tendon Achil-  
10 les is not on the heel.

Q I thought that was the vulnerable point of the Achilles called the tendon. Isn't it a fact that was the place where the curve made by the heel the tendon comes down there and attaches to the heel? Isn't the tendon Achilles so called because it attached to the heel? A Yes, but it extends from the heel upward about three inches.

Q Where did you find the callus? A The  
20 callus began, there were two formations of cal-  
lus, one at the median junction of the tendon  
Achilles at the heel and one about an inch above  
that.

Q Is there anything unusual about callus at that point? A You do not find it normally.

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AMELIA MULVANEY, sworn in behalf of the  
30 plaintiffs.

*Direct examination by Mr. Matthews.*

Q Where do you live? A Where do I live  
now?

Q Yes. A 150 Hudson street.

Q Where did you live in March, 1923? A  
150 Norfolk street.

Q How long had you lived on Norfolk street  
at this time of March, 1923? A About two  
40 years.

*Amelia Mulvaney, direct.*

Q Was that near Hartford street? A Yes, sir.

Q How many houses from the corner of Norfolk street and Hartford street was your house?

A The second door from Hartford street.

Q Your house was the second door from Hartford street? A Yes, sir. 10

Q Do you know which is the east and which is the west side of Norfolk street? A The side I lived on.

Q The side you lived on is the east side? A West.

Q Is it the side the sun sets on? A Yes, sir.

Q So, that you lived on the west side of Norfolk street? A Yes, sir.

Q Two or three houses from the corner? A 20  
The second house from the corner.

Q On the 24th of March, 1923, did you see an accident at the corner of Hartford street and Norfolk street? A Yes, sir.

Q Where were you at the time of the accident? A At the window.

Q In the window? A The second floor.

Q The window of the second floor of your home? A Yes, sir. 30

Q Was your window open or closed? A Open.

Q Was the day fair or stormy? A It was a clear day.

Q Were you sitting at the window; standing at the window, or how were you at the window?

A Standing up looking out of the window.

Q While you were standing up looking out of the window did you see anything happen with reference to the little Altieri girl and the trolley 40

*Amelia Mulvaney, direct.*

car? A Yes, sir, she was crossing the street as the trolley car hit her at the crossing.

Q When you say crossing, what do you mean? A When she was going to cross the street.

Q Do you know of your own knowledge  
10 whether there is a pedestrian's cross-walk at that point? A No, I don't know.

Q Do you know what I mean, the walk upon which people cross the street? A There was a crossing there.

Q Do you know whether or not the child was on the crossing? A She was on the crossing.

Q Which side was she crossing there, from the west to the east or the east to the west? A She was on this side of the street (indicating).

20 Q Does that mean your side? A Yes, sir.

Q She was crossing from your side to the other side? A Yes, sir.

Q Had she gotten entirely across the street? Tell us what you saw when you saw her leave the sidewalk. A I saw her leave the sidewalk, and as she got to the second car track a car came along and hit her.

Q Did you see whether the car was going fast or slow? A Fast.

30 Q What do you call fast? A It was going quite fast, like full speed.

Q Did you hear any bell of the trolley car? A No, sir, there was no bell.

Q After the trolley car hit the child how far did the trolley car go? A Up as far as Shonstein's store.

Q Do you know how far away Shonstein's store is away from the crossing, how many houses? A The second crossing from the first  
40 where she was hit.

*Amelia Mulvaney, cross.*

Q The second crossing from the first where she was hit? A Yes, sir.

Q Can you tell us by houses how far away from the crossing it is? A About two or three houses, I think.

Q You told us you lived two years on that street? A Yes, sir. 10

*Cross examination by Mr. Coult.*

Q Now, which cross-walk did this happen on, the one nearest to you or the one furthest away from you? A The one nearest to me.

Q That is the southerly cross-walk? A Yes, sir.

Q You saw the trolley car before the child was struck, did you? A Yes, sir, I seen the trolley car coming. 20

Q Did you see a moving van or truck coming the other way? A No, sir.

Q Was there any there? A No, sir, there was nothing there at all.

Q There is no doubt in your mind about that? You know there was no truck there? A There was none there.

Q Did you see a southbound trolley car? A No, sir. 30

Q Was there one there? A Not until after the child was hit.

Q How long after? A I couldn't tell you how long after that car come.

Q Did you see that car at all? A I seen it when it took the child to the hospital.

Q Where were you then? A I went downstairs.

Q Out on the street? A Yes, sir. 40

*Amelia Mulvaney, cross.*

Q How long after the accident? A About five or ten minutes after.

Q Now, you say you were in your window on the second floor of your home? A Yes, sir.

Q You were not doing anything in particular, were you? A No, sir.

10 Q What had you been doing just before? A I hadn't been doing anything, just looking out the window.

Q The first thing that attracted your attention was the trolley car, wasn't it? A No, I was watching the child.

Q What had the child been doing? A Nothing.

20 Q I mean before that? A She came right down Hartford street and went across the street and when she was at the second crossing the trolley car came along and hit her.

Q Did you see her playing ball? A No, sir.

Q Did you see other children there? A No, sir, I didn't see any other children there.

Q You say there was nothing at all between you and the child? A No, sir.

Q When she came down to the cross-walk she stepped down on the street? A She stepped on the crossing.

30 Q I mean on the crossing of the street? A Yes, sir.

Q At the time she walked out on the crossing where was the trolley car? A It was close to her.

Q How near? A I couldn't tell you how near it was.

Q As far as from me to you? A Yes, sir, about that far.

Q Just about this distance? A Yes, sir.

40 Q How far is this?

*Amelia Mulvaney, re-direct—re-cross.*

(The distance is measured and indicates  
11 feet 5 inches.)

*Re-direct examination by Mr. Matthews.*

Q When you told Mr. Coult now that the trolley car was from here to you away when she walked out, where was she when she was that distance? A Off the curbstone she came. 10

Q Was she on the rail of the other car or where was she?

Mr. Coult: I object as leading.

Q Where was she? Describe where she was when you say the trolley car was about the distance from you to me. A She was just about in the middle of the second car track. 20

*Re-cross examination by Mr. Coult.*

Q I thought I made myself clear, what I am trying to ask you. What I am trying to ask you is this, how far away was the trolley car when this little girl stepped off the curb to go into the street? A About the second house from where she was hit; I couldn't tell you how many feet, or how it was. 30

Q What was at the second house? A The trolley car.

Q The second house from where? A From where the child was hit.

Q How many feet? A I couldn't tell you how many feet.

Q You saw this child struck, didn't you? A Yes, sir.

Q Did you know whose child it was? A No, sir, I did not. 40

*Amelia Mulvaney, re-cross.*

Q You had never seen the child before? A No, I didn't see her before.

Q Did you see what became of her when she was struck? A All I seen, they took her to the hospital.

Q Did you see what happened to the child?  
10 A After she was struck?

Q Yes. A Only the car dragged her up as far as Shonstein's.

Q Did you see her dragged along the street?  
A I couldn't say. I guess she was.

Q You think so, then? A Yes, sir.

Q What did you do? A I went back in the kitchen, that's all I could do.

Q You didn't go downstairs then? A Not right away.

20 Q You didn't go outdoors? A Not right away.

Q Was anybody else in your house? A Only my husband.

Q Was your husband there? A He certainly was there.

Q Did you speak to him about this? A I told him about it.

30 Mr. Matthews: I object as immaterial whether she did or not.

The Court: Sustain the objection.

Q Did he go out of the house? A No, sir, he did not, he just came home from work.

Q How long was it before you went out? A About five or ten minutes after the child was hit I went out.

Q (By the Court.) How did she cross the street? How did she proceed? A She walked  
40 right across the crossing towards you and I.

*Amelia Mulvaney, re-cross.*

Q She walked, did she? A Yes, sir, she walked.

Q You have given this distance of 11 feet 5 inches. I do not yet know what that distance was or when it was. Tell us what that distance was again.

Q (By Mr. Coult.) You said from you to here was a certain distance, where was the child and where was the car? A The child was crossing going to the crossing when the car came along. 10

Q You mean the second pair of rails? A Yes, sir.

Q The first rail of this two pair? A The second rail where the car was going to hit the child.

Q How far was the car from the child when the child stepped on the first rail? A I couldn't tell you how far. I didn't see where the car was then. I wasn't looking at it. 20

Q Which side of the car struck the child, do you remember that? The side towards you? A No, it was the other side.

Q So the child had passed in front of the car? A She did not get past the front of the car.

Q Was she struck before she got on the track? A She was struck when she got in the middle of the track, in the second car track, that is where she was struck. 30

Q Right in the middle of the second car track? A Yes, sir.

Q To get there she crossed the first rail? A Yes, sir, she crossed the first rail.

Q Where was the car when she crossed the first rail? A I couldn't tell you how far it was, away from her. About from here over to there, I guess. 40

*Margaret Ritchie, direct.*

Q To where? A To that thing over there.

Q (By Mr. Matthews.) What do you point to? A This thing on the desk here.

Q (By the Court.) You mean the end of the desk, don't you? A Or about there (indicating).

10 Mr. Coult: May we measure that?

The Court: Yes.

Mr. Coult: Eight feet, seven and a half inches.

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MARGARET RITCHIE, sworn in behalf of the plaintiffs.

20 *Direct examination by Mr. Matthews.*

Q You are the historian of the City Hospital in Newark- A Yes, sir.

Q As such you have charge of the records of the hospital? A Yes, sir.

Q Have you the records of the case of Frances Altieri? A Yes, sir.

Q When were they made, do you know? A In March, 1923.

30 Q By whom were they made, do you know? A They were made by various doctors and nurses.

Q When they are made by the doctors and nurses are they turned over to you for custody? A Yes, sir.

Q What you have in your hand is the City Hospital records of Frances Altieri from the time she entered until she was discharged? A Yes, sir.

40 Q You have the records there? A Yes, sir.

*Motion for a Non-suit.*

Mr. Matthews: I offer the records in evidence.

Mr. Coult: I object on the ground they are not competent.

The Court: Sustain the objection.

## PLAINTIFF RESTS.

10

Mr. Coult: I respectfully move for a non-suit in favor of the defendant Public Service Railway Company on the ground there is no evidence of negligence on their part in this case.

(Argument.)

(The jury retires.)

The Court: The only question I have to consider here is the question as to whether a prima facie case has been made out against the defendant, without consideration of contributory negligence. There is testimony favorable to the plaintiff that tends to show that this little girl intended to cross Norfolk street from the west side to the east side and that the car of the defendant was approaching from the south going twenty to twenty-five miles an hour and that the motor-  
man did not ring the bell. Of course, there is  
testimony that he did ring the bell, but I  
have to resolve the testimony in favor of  
the plaintiffs in every instance, for the pur-  
pose of this motion. There is testimony  
that after the car struck her it went three to  
four houses which was estimated to be about  
fifty feet; whether that was fifty feet from  
the curb or fifty feet from the scene of the  
accident I do not recall. There is testimony

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40

*Motion for a Non-suit.*

10 that the child was on the crossing from the time she left the sidewalk and that there was no one there. The car was going, Mrs. Mulvaney said, "Like full speed," and went up as far as Shonstein's store before it stopped; that was the testimony also of Caironi. There was testimony that the car was two houses away when the child stepped off the curb.

I do not know why I should non-suit the plaintiff.

20 If this child, aged about five years, stepped off the west curb of Norfolk street and started to walk across the street on a crossing and if, at the time she stepped off, the trolley car was at the second house from where the child was hit, it seems to me that in the absence of any consideration of contributory negligence that the motion of the defendant cannot prevail. If the van was not proceeding southward on the street and did not interfere with the motorman's observation, as far as the child was concerned, it seems to me he could have seen the child in the exercise of reasonable care when she left the sidewalk.

30 Mr. Coult: Your Honor has to go further than that, you will have to be satisfied that negligence did not proximately cause this accident and you have the situation where the child leaves the curb and the car is a considerable distance away and they both keep on coming.

40 The Court: As I say, I think I have no right to consider contributory negligence at all.

*Benjamin A. Furman, direct.*

I will deny the motion to non-suit. You may have an exception, Mr. Coult.

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

Exception noted as ground of appeal.

(The jury returns into court.)

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BENJAMIN A. FURMAN, sworn in behalf of the defendant.

*Direct examination* by Mr. Coult.

Q Where do you live? A 31 Roseville avenue.

Q You are a practicing physician and surgeon in the State of New Jersey? A I am. 20

Q Practiced your profession how long? A Since 1910.

Mr. Coult: Do you admit his qualifications?

Mr. Matthews: I admit his qualifications to testify as to his examination of this child.

Q Did you make an examination of Frances Altieri, the plaintiff in this case? A I did. 30

Q How many? A Three.

Q Where and when was the first one? A The first one was at the City Hospital on March 28, 1923.

Q And the second? A The second one was on September 29, 1923, at Mr. Robinson's office in New York City, Nassau street, and the third was made last Saturday at Mr. Donohue's office. 40

*Benjamin A. Furman, direct.*

10 Q Describe the examination you made at the City Hospital. A Well, at the time I saw her at the City Hospital she was in an extension, that is a Bryant extension, by that I mean both of her legs and thighs were raised at a right angle to her body, hanging in the air, that is the position that is used for children in fractures of the femur. I saw the wound to her leg and she had the skin all ripped off at the inside of the thigh for an area I should say seven by five inches, readily exposing the subcutaneous tissue and fat and in some places the muscle.

Q Was the bone exposed? A I couldn't see the bone.

20 Q How much skin and tissue, in your opinion, had been ripped off? A The whole thickness of the skin had been taken off, and what we call under the skin there is a layer of fat or fibrous tissue which was also scraped off in some places and left on in others.

Q What was the depth of that wound at the deepest point? A I should say three-eighths to one-half an inch at its deepest point.

30 Q Did you make any further examination at that time? A Well, I looked at it. I couldn't, in the position she was in, I couldn't go into the examination any more thoroughly than that.

Q When did you see her again? A I saw her in September, on the 29th of September, the same year, in Mr. Robinson's office in New York City.

Q Who is Mr. Robinson? A An attorney.

40 Q Who was present? A Mr. Robinson and, at least I assume it was Mr. Robinson, and the father and another man who I believe was a friend of Mr. Altieri.

*Benjamin A. Furman, direct.*

Q What did your examination consist of? A Well, I had the youngster strip and lying on a couch and I examined the leg and thigh, the heel and went over her pretty carefully.

Q What did you find then? A I found she had a scar in the left groin, sort of a branch scar, it had two branches, the left one was six to eight inches long and the other branch running off from it was about two inches long. There was a diminution in the size of the two legs measured with a steel tape at the thigh over the point of the injury. 10

Q What was the difference? A An inch and a half.

Q What was that due to? A That was due to contraction and the loss of subcutaneous fat and tissue under the skin.

Q Was there any difference in the length of the legs then? A No, the legs measured exactly the same. 20

Q What else did you find at that time? A She had a scar, a little scar over the ankle bone on the same leg on the inner side.

Q What was the appearance of these scars, were they normal and healthy or otherwise? A They were all healed up.

Q Is there such a thing as a normal scar? A Yes, I suppose so; it is a healed scar in which there is no evidence of any inflammation, that is the white scar tissue which has a different consistency from the rest of the scars. 30

Q Was there any abnormality about these scars? A There was considerable contraction in the scar due to its length, otherwise nothing abnormal.

Q At that time did she have any disability in locomotion or function? A No, she could walk around all right. 40

*Benjamin A. Furman, direct.*

Q That was in September, 1923? A Yes, sir.

Q Did you make an examination of her vagina then? A I did not, no.

Q Why not? A I didn't know there was any claim of injury to the vagina.

10 Mr. Matthews: I object and ask that that answer be stricken out.

The Court: No, I will not strike it out.

Q When did you learn of any injury to the vagina? A At the trial.

Q You made the last examination yesterday?

A Yes, sir, I did.

Q What sort of an examination did you make then? A I had her on a desk with an overcoat over the desk and we pulled her clothes—took  
20 off her shoes and stockings and drawers and pulled her clothes up; we didn't take off her dress on the shoulder's, the upper part of the body. We exposed her up above the waist.

Q What was the condition of these scars yesterday? A They were about in the same condition they were in before, about the same size—I am talking of the big scar.

Q How about the little scar? A The little  
30 scar at the lower part of the leg had disappeared, I did not see a scar there, but she had a scar on the tendon Achilles which I don't remember having seen before.

Q What kind of a scar was that? A A slight scarring on the tendon Achilles which might be due to the rubbing of the shoe or some such thing as that.

Q Was that any disability? A There was no  
40 disability attended by that, as far as I could see, no inflammation about it, just a thickened scar.

*Benjamin A. Furman, cross.*

Q Is there anything unusual in the condition you found in the Achilles tendon? A Unusual?

Q Yes. A I do not think the scar involves the Achilles tendon, I think it involves the skin.

Q At the time of your examination in 1923 was there anything you could observe that was unusual about the Achilles tendon then? A 10  
No.

Q Did you make a vaginal examination yesterday? A I did not make a vaginal examination, no, but I separated the thighs in examining her hymen and as far as I could see it was normal.

*Cross examination by Mr. Matthews.*

Q You say you examined her vaginally and found her hymen normal? A I didn't say I 20  
examined her vagina at all, I said I separated her thighs.

Q I understand you do not make a minute vaginal examination of a child or anybody, unless it is a married woman. Do you mean to tell me the hymen of that child was normal? A Yes, sir.

Q Did you hear Dr. Mamlet testify that she was bleeding from the vagina when she was 30  
brought into the hospital?

Mr. Coult: I object on the ground that it is immaterial whether he heard it or not.

The Court: I will admit it.

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

Exception noted as ground of appeal.

A Yes, sir.

*Benjamin A. Furman, cross.*

Q Did you hear him say that the hymen was ruptured?

Mr. Coult: I object on the same ground.

The Court: I will admit it.

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

Exception noted as ground of appeal.

A I did.

Q Yet you come here this morning and tell us her hymen is normal? A I do.

Q You are the Public Service doctor, are you?

A I don't know whether I am the Public Service doctor or not.

20 Q You testify in court frequently for the Public Service? A What do you mean by "frequently"?

Q Tell us what you understand by frequently.

A I suppose once a week would be frequently; I have been in court three times this year.

Q How many times last year? A About fourteen times.

Q You make examinations for the Public Service every day, don't you? A I do.

30 Q For the purpose of testifying if the cases are brought to court? A If they are brought to court, yes, sir.

Q Was there any doctor with you yesterday when you examined this little girl by stretching her thighs apart? A There was.

Q Who else was there besides the doctor? A Mr. Donohue and Mr. O'Brien and her father.

40 Q When you saw her in the City Hospital did you look at her in the extension position to see whether her hymen was ruptured? A I did not.

*Benjamin A. Furman, cross.*

Q Did you know that her vagina was bleeding when she was brought into the hospital? A At that time I did not.

Q When she went into the hospital the child was in an extension position? A Yes, sir.

Q You told us that the deepest part of the wound on this occasion was three-eighths to one-half an inch, didn't you? A Yes, sir. 10

Q And it was only the subcutaneous tissue that was scraped off? A No, I said the skin and tissue.

Q Tell us what that is. A That is tissue immediately underlying the deep layer of the skin.

Q The muscles were not involved at all? A The muscles were visible and in some places scraped.

Q They were not torn? A I couldn't see any tearing. 20

Q Did you know that the child's wound was infected? A Yes, sir.

Q Was it before or after the infection you saw her? A She had some infection I think the day I saw her.

Q So the child's deepest wound was three-eighths to one-half inch? A Yes, sir.

Q Did you hear Dr. Mamlet testify of the muscular tearing from the vaginal section down to the knee? 30

Mr. Coult: I object as immaterial and incorrect.

Q Did you hear Dr. Mamlet testify that the muscle tissue was lacerated from a point near the vagina to a point almost down to the knee.

Mr. Coult: I object.

The Court: I will admit it. 40

*Benjamin A. Furman, cross.*

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

Exception noted as ground of appeal.

A I did.

10 Q You say it was only scraped three-eighths to one-half inch deep with no involvement except the subcutaneous tissue which was fat? A And the muscle was scraped.

Q Scraped but not torn? A Yes, sir.

Q Was this a compound or simple fracture? A It was a compound fracture.

Q When the skin over a fracture is broken that means the bone has come all the way clean through the skin? A Not at all.

20 Q What does it mean? A It means that the skin over the point of the fracture is broken making it possible for infection to get in down to the bone.

Q What breaks the skin over the point of the fracture?

Mr. Coult: I object.

The Court: Sustain the objection.

30 Q You said the bone was not exposed? A I did.

Q The bone of the child as she lay there in extension was not through the muscle tissue at all, it was not what broke the skin tissue? A I imagine it was the force of the wheel or car or whatever hit her.

Q The force of the wheel or the car broke the skin tissue? A Yes, sir.

40 Q Don't you know as you sit there the bone was protruding through the skin tissue? A I do not.

*Benjamin A. Furman, cross.*

Q Are you as sure of that as you are sure that her hymen was not broken? A Just as sure.

Q In September, 1923, when you were over in Mr. Robinson's office you said you found a branch scar in her left groin, is that right? A Yes, sir.

10

Q You found an inch and a half difference in her left thigh, compared to her right? A Yes, sir.

Q That is where the scars were that you talked about? A Yes, sir.

Q You found contraction there? A In the scarring, yes.

Q Did you measure the scar as she lay in extension? A In the hospital?

Q Yes, for depth? A Naturally not.

20

Q So three-eighths to one-half an inch is your estimate of it? A It is.

Q Did you measure the scars when you were over in Mr. Robinson's office? A I did.

Q With what? A A steel tape.

Q You measured the depth of the scar? A You could not measure the depth of the scar.

Q How deep were they at that time? A There was no depth to them at that time, because they had healed over.

30

Q Healed over on a level with the rest of the leg? A With the rest of the skin.

Q There is no depression there where the scars were? A Yes, there is some depression there.

Q What is the depth of that? A You cannot measure that with a tape measure.

Q No, but could you measure it with the same kind of an eye you used when she was in the ex-

40

*Benjamin A. Furman, cross.*

tension in the hospital? A I suppose one-eighth of an inch would cover it.

Q What is the difference in her left leg today as compared to her right? A One inch.

Q So she has improved a half an inch in the three years, is that it? A Yes.

10 Q You say you did not know anything about a scar on the tendon Achilles on the first examination in September, 1923? A No, I did not.

Q So, you do not know whether there was one there or not? A I think if there had been one there I would have seen it.

Q Did you hear Dr. Mamlet testify that there was? A Yes.

Q You heard Dr. Mamlet testify that he was the doctor who received her after she came in with the injury? A I don't remember him saying that, but probably so.

20

Q Did you hear him testify also that there was a callus formation there thrown off by the tendon at that point? A Yes, I did.

Q You did not find that, did you? A No.

Q Did you find her yesterday able to reflex with her left leg? A Yes, sir.

Q What did you find? A I found the right leg had increased and the left leg was slightly diminished.

30

Q How did you test her reflexes, by sitting her down and raising her leg and patting it? A No.

Q Did you get anything when you patted her leg? A Once or twice I got a reaction.

Q How many times didn't you? A Three or four.

Q When you measured her right foot yesterday did you hold the tape tight on the right foot?

40 A I tried not to.

*Benjamin A. Furman, cross.*

Q Did you hold it tight on the left? A I tried to have the same tension at both times.

Q After you held it on both you found an inch difference yesterday, is that it? A Yes, sir.

Q Did you test the wounded portion of this child's left leg in the region of the groin for feeling? A Yes, I did. 10

Q What did you find when you did it? A I found close to the scar below and to the outer side of the scar there was a small area of about an inch wide she did not feel a pin prick.

Q Was that anywhere near her vagina? A No.

Q Whereabouts was it? A I should say three or four inches from it.

Q Stand up and point on yourself. Visualize yourself as female for the purpose of this demonstration. A Her scar runs along here (indicating). 20

Q Draw a line how close. A An inch and a half.

Q That is where there was no feeling in the thigh? A No, the feeling was on the other side of that scar away from the crouch.

Q Close to the vagina there was feeling, away from the vagina there was not? A Yes. 30

Q Did you try to have the child stand on its left foot? A I did.

Q How about it? A She could stand on the left leg and stand on the right leg both.

Q When she stood on the left leg did she stand as well as she did on the right? A Not quite so well.

Q The child was lying on the table when you pulled her legs apart in the condition of undress, was she? A Yes. 40

*Gerhard C. Brunz, direct.*

Q On the table just like I am standing in front of you? A Yes, sir.

Q In order to see her hymen you pulled her legs apart like that (indicating)? A Yes, sir, that close up.

10 Q Did you look down in this fashion or get down on the floor? A I bent over and looked.

Q You bent over and looked from a standing posture, didn't you?

Recess from 1 to 2 P. M.

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AFTER RECESS.

20 GERHARD C. BRUNZ, sworn in behalf of the defendant.

*Direct examination by Mr. Coult.*

Q Where do you live? A Bloomfield.

Q What is your business? A Baker supply business, wholesale.

Q Are you in business for yourself or do you work for someone? A In business with my father and brother.

30 Q How old are you? A Twenty-six.

Q Did you see this accident? A I didn't see the accident itself.

Q Where were you at the time the accident happened? A In the trolley car.

Q In which trolley car? A In the trolley car going in a northerly direction along Norfolk street.

40 Q That was the one that was in the accident? A That was the one that was in the accident, yes, sir.

*Gerhard C. Brunz, direct.*

Q Where had you taken the car? A At Springfield avenue and Belmont avenue.

Q Where were you going? A To Central avenue.

Q What part of the car were you sitting in, if you were seated? A Yes, I was seated at the time at the front right-hand side. 10

Q How near to the front? A I believe it was—I was about the fourth person from the front of the car, fourth or fifth.

Q Did this car have side seats or cross seats? A Side seats.

Q What street were you on at the time of the accident? A Norfolk street.

Q Near what street? A Hartford street.

Q Did you see the little girl before the accident? A I did. 20

Q What was she doing when you first saw her? A When I first saw her she was playing with a ball.

Q Where? A On the west side of Norfolk street.

Q Where did you see her next? A Next I saw her running diagonally across the street chasing a ball.

Q When you say “diagonally” you mean in what direction, generally? A Northeast direction, she was running with the car. 30

Q How far away was the front of the car from the point of the accident when you first saw the little girl leave the sidewalk? A Approximately twenty-five feet.

Q How did she go from the time you saw her leave the sidewalk until the time of the collision? A I just don't understand your question. 40

*Gerhard C. Brunz, cross.*

Q Can you describe her course to the jury?

A Why, she ran, as I said before, in a north-easterly direction with the car, but on an angle.

Q When did you lose sight of her? A Just before she was hit.

10 Q Where was she then when you saw her last? A She was about in the tracks going in the opposite direction.

Q You mean the southbound tracks? A The southbound tracks.

Q How did you come to lose sight of her? A My view was obstructed, the people in the car had gotten up and I could not see any more.

Q After you lost sight of her what happened to the trolley car? A The trolley car stopped shortly afterwards.

20 Q Where did the trolley car stop? A It stopped about not quite half-way across the intersection of Hartford street and Norfolk street.

Q Just before the accident happened, how had that car been running? A At a moderate rate of speed.

Q Can you recall whether any signal was given or not? A Absolutely, the man was ringing his bell right along.

30 Q What did you do after the car stopped? A I remained inside the car for a time and then I got out and walked to Central avenue.

Q Did you see the little girl after the accident? A No, I did not.

*Cross examination by Mr. Matthews.*

Q You testified at the last trial, didn't you?

A I did.

40 Q You didn't say anything about seeing a little girl playing with a ball at the last trial, did you?

*Gerhard C. Brunz, cross.*

Mr. Coult: I object.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Q Did you say at the last trial that the child was chasing a ball? A If I remember rightly I believe I did. 10

Q I show you the transcript of the state of the case at the last trial.

Mr. Coult: I object. It does not contradict anything to show that a person is silent on a subject.

Mr. Matthews: I submit I am entitled to call his attention to the state of the case and ask him to point to the place where he saw her playing with the ball. 20

The Witness: If I was asked that question I did say I saw the child.

Q Now, you say to me if you were asked the question you say— A If the gentleman didn't hear me I can't help it, that's what I answered.

Q You mean to say just now when you answered my first question that you added, "If I was asked that question." Did you say at the last trial that you saw the little girl running down when you were crossing the street chasing the ball? 30

Mr. Coult: I object to that question on the ground it does not contradict anything.

The Court: Sustain the objection.

Plaintiff's counsel prays an exception to this ruling of the Court. 40

*Gerhard C. Brunz, cross.*

Exception noted as ground of appeal.

Mr. Matthews: I seek to contradict the witness for the purpose of testing his credibility.

10 The Court: There is no objection if you do it right. Read him the question that was asked at the last trial and ask him if he said that.

Q Did you say this at the last trial when questioned by Mr. Coult, "What was the first you saw of this little girl that was injured?"

*Answer:* Why, I saw the girl running across the street, starting from the other side of the street." Did you say that? A Yes, sir.

20 Q The next question, "How was she going?"  
*Answer:* Going in a diagonal. *Question:* Diagonally, was it to the north or south? *Answer:* Towards the north, northeast?" Did you say that?

Mr. Coult: I object on the ground it serves to contradict nothing.

30 Mr. Matthews: It is contradictory because he says here he saw her chasing a ball, and he said nothing like that at the last trial.

The Court: I will admit it.

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

Exception noted as ground of appeal.

40 Q "How far away was the car from the place where the accident occurred when you noticed her? *Answer:* Approximately twenty-five feet."

*Gerhard C. Brunz, cross.*

Mr. Coult: I object on the ground it does not serve to contradict anything.

The Court: I will admit it.

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

Exception noted as ground of appeal.

10

Q Did you say that? A I did.

Q Did you say in response to this question, "Did she continue to run or stop or what?"  
*Answer:* As long as I could see her she was running."

Mr. Coult: I object on the same ground.

The Court: I will admit it.

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

20

Exception noted as ground of appeal.

Q Did you say that? A I did.

Q Did you at the last trial say at all anything about her having a ball?

Mr. Coult: I object on the same ground.

The Court: He may testify as to whether he remembers it or not.

(Argument.)

30

The Court: I will admit it.

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

Exception noted as ground of appeal.

Q (Question read.) A If I remember rightly I didn't notice the question was asked me.

Q Did you testify this-wise at the last trial, page 63, "Can you give us any estimate in miles

40

*Gerhard C. Brunz, cross.*

per hour or not? *Answer:* No, I am no judge on how fast a trolley car can go." Did you testify to that?

Mr. Coult: I object on the same ground.

The Court: I will admit it.

10 Mr. Coult: I respectfully pray an exception on the ground that is not the proper test of his credibility.

Exception noted as ground of appeal.

Q (Question read.) A I did; how fast a trolley car can go.

20 Q "Did you recall any sound at the time the car and the girl came together, was there anything to indicate that the child came in contact with the car? *Answer:* No, I didn't notice any noise outside of the brakes."

Mr. Coult: I object on the same ground.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

30 Q Did you testify at the last trial as follows: "Question: Did you hear any sound, did you hear anybody call out? *Answer:* No."

Mr. Coult: I object on the same grounds.

The Court: I will admit it.

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

Exception noted as ground of appeal.

40 A I testified that way.

*Gerhard C. Brunz, cross.*

Q You have just said to Mr. Coult the gong was ringing all the time. A I did.

Q You did not testify so at the previous trial.

Mr. Coult: I object. That calls for something not contradicted.

The Court: I will admit it.

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

10

Exception noted as ground of appeal.

A I said nothing about the gong ringing, there was no question asked me about a gong ringing.

Q You were sitting the fourth or fifth person from the front on the right-hand side of the car, weren't you? A Yes, sir.

Q What kind of a car was it? A A closed car.

20

Q Did it have vestibule doors on it leading into the body of the trolley car? A No.

Q So that you walked right from the body of the car down on to the motorman's platform without the opening of any doors? A Yes, sir.

Q Was there a blind side to the car or did the car open on both sides? A I couldn't swear as to whether the car did open on both sides or not.

30

Q Were you looking out of the car when you saw the little girl? A Yes, sir.

Q What part of the car were you looking out of when you saw her? A I was looking out of the left side of the car.

Q What part? A Towards the front.

Q Were you looking out the side or the door at the left front? A I couldn't look out of the door, I had to look out of the window.

40

*Gerhard C. Brunz, cross.*

Q You were looking out of the window opposite where you were sitting? A Yes, sir.

Q In the body of the car? A On the what?

Q In the body of the car and at the motorman's platform? A I wasn't looking out of the motorman's platform.

10 Q In addition to that you have told us there were people seated in the car on both sides? A Yes, sir.

Q You were looking across over the heads of the people sitting opposite you? A Yes, sir.

Q You say some people got up and blocked your view. When did they get up? A After the motorman applied his brakes very suddenly they stood up and I imagined then that something was going to happen.

20 Mr. Matthews: I object to that answer and ask that it be stricken out.

The Court: Strike it out.

Q So that is why they got up?

Mr. Coult: I object to that.

The Court: Sustain the objection.

30 Q You first saw the girl then, you say, outside playing with the ball on the sidewalk, is that right? A I saw the girl playing with the ball and then run with the ball.

Q She was playing with the ball on the sidewalk when you first saw her? A I don't remember whether she was playing on the sidewalk or where she was.

40 Q You do not remember where you first saw her playing with the ball? A I don't remember whether she was on the sidewalk or not.

*Gerhard C. Brunz, cross.*

Q Where was she when you first saw her? You do not remember? A I can't exactly say whether she was on the sidewalk or off the sidewalk, but she was somewhere in the vicinity between the sidewalk and the curb.

Q Between the sidewalk and the curb? A Yes, sir.

Q What do you understand by the curb? A The curb? 10

Q Yes. A Why, a projection of the stone that raises from the street up to the level of the sidewalk.

Q Where was she? You say you do not know whether she was on the sidewalk or off of it. A I didn't say I didn't know whether she was on or off, I said I didn't know whether she was by the center or not.

Q I didn't ask you that, I asked you if she was on the sidewalk and you said you didn't know. Do you know whether she was on the sidewalk or not? A I don't know whether she was on the sidewalk or not. 20

Q What kind of a ball did she have? A I don't know, I wasn't close enough to see.

Q How was she playing with it? A She was chasing after it when I saw her.

Q You told Mr. Coult she was playing with a ball on the west side of Norfolk street when you first saw her? A I did. 30

Q Was she playing with it or chasing after it? A If she was chasing after it she was playing with it.

Q Now, that you have corrected me, was she chasing the ball when you first saw her or did she have it in her hand? A She was chasing it.

Q Where was the ball? A The ball was out in the street, if I remember correctly. 40

*Gerhard C. Brunz, re-direct—re-cross.*

Q How do you know, did you see it?

Mr. Coult: I object to that, asking the witness how he knows.

The Court: I will admit it.

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

Exception noted as ground of appeal.

A How do I know she was chasing the ball?

Q Did you see the ball? A I did.

Q Where was it? A It was in the street.

Q So from your seat, the fourth on the right-hand side of that trolley car and out the windows, not out the motorman's platform window, you saw the ball in the street? A I did.

20 *Re-direct examination* by Mr. Coult.

Q There is some question as to whether the child was on the sidewalk or on some other portion of the street. Had the child left the curb yet when you first saw her?

Mr. Matthews: I object to that as not re-direct examination.

30 The Court: I will admit it.

A She was not off the curb yet.

*Re-cross examination* by Mr. Matthews.

Q What do you mean, "She was not off the curb yet." Do you mean she was standing on that piece of stone that comes up from the sidewalk? A I didn't say that.

40 Q What do you call the curb? A At that particular point the sidewalk is quite wide.

*Gerhard C. Brunz, re-direct—re-cross.*

Q It is. A I believe so.

Q What makes you believe so? A I haven't been in that particular spot for quite some time, but I am under the impression the sidewalk is quite wide.

Q Assuming for a moment your impression is correct what has the width of the sidewalk got to do with what the curb is? A Absolutely nothing at all. 10

Q You told me in your cross examination you did not know whether she was on the sidewalk or not, didn't you? A I did.

Q You do not know, do you? A No, I do not.

*Re-direct examination by Mr. Coult.*

Q Your idea is this: There is a curb on the side of the street? A Yes, sir. 20

Q Then, between that and the sidewalk—

Mr. Matthews: I object as leading.

Q Beyond the curb what is there, inside of the curb? A I think there is a space.

Q Then, what next? A Then, the sidewalk.

*Re-cross examination by Mr. Matthews.* 30

Q You are sure there is a space of ground? A I didn't say I am sure, I said I think.

Q If you are only thinking how can you tell me the child was standing in a space of ground. You do not know whether she was on the sidewalk or not? A I told you before I wasn't sure she was on the sidewalk.

*Etta Westry, direct.*

ETTA WESTRY, sworn in behalf of the defendant.

*Direct examination by Mr. Coult.*

10 Q Where do you live? A Where do I live now?

Q Yes. A 43 Livingston street.

Q Did you see this accident? A Yes, sir, I did.

Q Where were you? A I was in the window with the window up.

Q Where were you living at that time? A I was living on Norfolk street, the third house from Hartford street.

20 Q Speak a little louder. A I was living on Norfolk street the third house from Hartford street at the time on the second floor.

Q Where were you when the accident happened? A I was living on Norfolk street.

Q Where were you? A In the window.

Q Which window? A The one on the left.

Q The first floor or second floor? A Second floor.

Q How far is that from the corner? A The third house from the corner.

30 Q Which way, south or north? A North.

Q Which corner do you mean, Norfolk and what? A Norfolk and Hartford street.

Q Which side of the street were you on, the east side or the west side? A I was on the west side.

Q What did you notice first, the little girl or the trolley car? A I noticed the little boy, her brother, she was playing ball with him and he was running after her.

40 Q Where were they playing? A In the street.

*Etta Westry, direct.*

Q Did you know that little girl before? A No, I didn't know her.

Q Did you know the brother? A No.

Q How did you know they were brother and sister? A My little boy knew them.

Q Had you ever seen them before? A No, I never took notice to see them before.

Q What did these children do? A What did they do? 10

Q What were they doing with the ball? A He threw the ball and he got across safe, and she followed him.

Q He got across safe where? A Across Norfolk street.

Q Who got across? A Her brother.

Q How much distance was there between them when she went over? A What, the trolley car? 20

Q No, the two children. How much before her did he go over? A Well, he was from the distance to here (indicating) and she was just where you are standing (indicating).

(The distance is measured and found to be fifteen feet, nine inches.)

Q Did you see the little girl start to go across the street? A Yes, sir, I did. 30

Q When the little girl started to go across the street where was the trolley car? A Well, the trolley car hadn't got in front of my door.

Q What did the little girl do? A She was running after her brother.

Q What did the trolley car do? A The trolley car was going very slow.

Q What did it do, keep on going, or stop?

A It was going, it didn't stop.

Q Where did it stop? A After it hit her. 40

*Etta Westry, cross.*

Q How far did it go after it hit her before it stopped? Do you understand the question? Where did the trolley car finally stop? A It stopped a little before it got to my house where I lived there.

10 Q What happened to the little girl when she was hit? A I couldn't see what happened to her.

Q Did you go out of the house? A No, sir, I did not.

Q Before the accident happened did you hear the trolley car give any signal? A No, I did not.

*Cross examination by Mr. Matthews.*

20 Q You live in the third house from Hartford street north from the corner? A Yes, sir.

Q And on the west side? A Yes, sir.

Q That is, you lived nearest to Central avenue? A No, sir.

Q In the direction of Central avenue do you call north? I want to see if you are sure your house was north of the corner of Hartford street and Norfolk street? A It was near Warren street.

30 Q Which side of Hartford and Norfolk street did you live on? Did you live on the side nearest to South Orange avenue or the side nearest to Central avenue? A I know it is near Hartford street.

Q It is the third house from Hartford street but we do not know which way? A Towards Central avenue, South Orange avenue.

40 Q So, you lived three doors from Hartford street south then, did you? You understand what south is? A Yes, sir.

*Etta Westry, cross.*

Q Three doors below the corner of Hartford street and Norfolk? A Yes, sir.

Q Are you sure of that? A Yes, sir.

Q Does Mrs. Mulvaney live near you? A Well, I don't know her.

Q You saw the lady who was on the stand? A Yes, sir. 10

Q Does she live near you? A Yes, she lived there, too.

Q Where did she live, what house? A The second house.

Q She lives the next house to you? A Yes, sir.

Q So, you are three doors from Hartford street, south of Hartford street? A Yes, sir.

Q You live on the second floor? A Yes, sir.

Q You were in the front window of your second floor looking out? A Yes, sir. 20

Q Where was the little girl when you first saw her? A The little girl and her brother was playing ball.

Q Never mind about that, where was she? A In the street, when I first saw her.

Q What part of the street, near where? In front of your house? A She was a door from my house when I first seen her.

Q Was she right in front of the house next door to you? A Yes, sir. 30

Q There was nothing else in the street but her and the little boy? A No.

Q When you saw her in front of the house next door about where was the trolley car? A Well, the trolley car was leaving about the middle of the block away from her.

Q The trolley car was where when you saw the little girl in front of the house next door to you as you say you saw her? Where was 40

*Etta Westry, cross.*

the trolley car? A The trolley car was leaving the corner.

Q What corner? A Crossing Warren street. It had got across Warren street.

Q Did you see it down there? A Yes, sir.

10 Q So, at the time you saw the little boy playing with the ball in front of the house next to yours you also saw the trolley car just leaving Warren street? A Yes, sir.

Q When it was right at Warren street, a block away, it was going slowly, wasn't it, the trolley car? A Yes, it was going slowly.

Q When the little girl was in front of the house next door where was the ball, did she have it in her hands? A She did not have the ball, no, sir.

20 Q How far out in the street was she when she was at the house next to yours playing with the ball and the trolley car was at Warren street? A She was in the street.

Q How far out in the street was she with the ball? A About middle way of the street.

Q The middle of the trolley tracks? A Yes, sir.

30 Q And the trolley car was at Warren street? A Yes, sir.

Q About a block away? A No, not a block away.

Q Didn't you tell me that when the little girl was in the middle of the street in front of the house next door the trolley car was starting away from Warren street? A Yes, sir.

Q That is right? A Yes, sir.

40 Q It was going slowly, the trolley car? A Yes, sir.

*Etta Westry, cross.*

Q Where was the brother when the little girl was in the middle of the tracks playing with the ball? A He wasn't very far in front of her.

Q She was following him across? A Yes, sir.

Q Did you watch the car come up from the Warren street corner to where it hit this little child? A I seen the trolley, yes, sir. 10

Q You saw it come all the way up the street, from Warren street? A Yes, sir.

Q You saw it coming slowly all the way? A Yes, sir.

Q But you did not hear its bell? A No, I did not.

Q While the car was coming up from Warren street that distance, the little girl was playing in the center of the tracks? A Yes, sir. 20

Q There was no other trolley car there at the time? A No.

Q Nothing else in the street? A I didn't notice any other.

Q There wasn't, was there? A No, sir, I didn't see any.

Q You didn't see anything else in the street except the little girl in the trolley tracks playing with her brother when the car started from Warren street coming slowly? A She wasn't in the car tracks, she was out in the street. 30

Q How far away from the car tracks do you think she was? A Was she walking?

Q How far away from the car tracks do you think she was? A Well, she wasn't far, because she was running across.

Q And the first sight you saw of her was running across? A Yes.

Q And the car was at Warren street and going slowly. A She had not crossed when the 40

*Etta Westry, re-direct.*

car was at Warren street; she was playing in the street.

Q When the car was at Warren street? A Yes, sir. The car started off and her little brother got across.

10 Q You saw the car come all the way from Warren street up to when it hit that little girl?

A Yes, sir.

Q How did they get your name as a witness?

A Someone said my little boy knew them.

Q So, they came to see you? A Yes, sir.

Q Did they tell you they were going to pay you for coming here? A Well,—

Q They did, didn't they? A Yes.

Q They paid you the last time, didn't they?

A Yes, sir.

20 Q What do you work at? A Laundry work.

Q At home? A No, I go out.

Q They are going to pay you this time, aren't they? A Yes, sure.

*Re-direct examination by Mr. Coult.*

Q At the last trial you were paid your expenses, weren't you? A Yes, sir.

30 Q How much were they? A How much were my expenses?

Q How much a day was it? A Four dollars.

Q You expect to get \$4 for today? A Yes, sir.

Q Were you here yesterday? A No, sir.

Q This is the first day you have been here?

A Yes, sir.

Q You expect to get \$4 for your attendance here? A Yes, sir.

Q That is the amount you lose from your work? A Yes, sir.

40

*Etta Westry, re-cross.*

Mr. Coult: I allege surprise and ask leave to question the witness as to the last two questions on page 70 for the purpose of neutralizing that testimony because it is a surprise.

Q I will ask her, how far away was the trolley car when the little girl went over the street? A The trolley car was coming in from Warren street. 10

Q How far away was the trolley car when the little girl went over the street? A From the little girl?

Q Yes. A It looked to be about five feet somewhat.

Q At the time the little girl started to cross the street then you say the trolley car was five feet— 20

Mr. Matthews: I object as leading and it is a repetition of the testimony.

The Court: I will admit it.

Q When the little girl started to go across the street how far was the trolley car? A How far was the trolley car when she started to go across the street alone? 30

Q Yes. A About five feet.

*Re-cross examination by Mr. Matthews.*

Q You told me that when the car was at Warren street the little girl was playing in the street. A Yes, sir.

Q Playing in the street? A Yes, sir.

*Ferdinand Kroch, direct.*

FERDINAND KROCH, sworn in behalf of the defendant.

*Direct examination by Mr. Coult.*

- 10 Q Where do you live? A 442 South Seventh street.
- Q What is your business? A Motorman.
- Q In the employ of the Public Service Railway Company? A Yes, sir.
- Q How long have you been with the Public Service Railway Company? A Since 1916.
- Q Did you see this accident? A Yes, sir.
- Q What line were you working on then? A Clifton.
- 20 Q Which car were you on? A I was on the southbound car.
- Q Where did you stop previous to the accident? A Right on the corner.
- Q What corner? A Hartford street on the near corner at the north side.
- Q On the north side of Hartford street? A Yes, sir.
- Q How long had you been standing there? A Long enough to pick up one passenger.
- 30 Q And you started again? A Yes, sir.
- Q How far did you go before the accident occurred? A About five or ten feet.
- Q Was there anything ahead of you? A There was a truck a little ways ahead of me.
- Q Where was that truck at the time the accident happened? A Why, on the far side of the street.
- Q The far side of which street? A Norfolk street.
- 40 Q Which way was that going? A Going south.

*Ferdinand Kroch, direct.*

Q Did you see this little girl before the accident? A Yes, sir.

Q Where did she come from? A She was standing at the curb.

Q Then, what did she do? A She ran across on an angle towards the center of the street.

10

Q Did she come ahead of the truck or behind the truck? A Behind the truck.

Q When she started to cross the street was there a trolley car around there? A The trolley car was on the south side of the crossing.

Q The south side of which crossing? A On Norfolk street, the south crossing.

Q How far was that trolley from the south cross-walk when the little girl started to go across? A Just facing the crossing.

20

Q What did the little girl do? A Ran on an angle towards the center of the street.

Q What happened to her? A Why, she run to the corner post of the left side of the car, that is the blind side and it threw her down, facing, she was facing westbound on the inside rail with her stomach down and one of her legs was up on the trucks, of the car, that holds the wheels.

Q Which side of the car was she when she fell? A On the blind side, that is the left side of this car.

30

Q On the left side of the car as it was going? A Yes, sir.

Q That would be the west side? A Yes, sir.

Q How far did that car go before it stopped? A Why, it stopped about the center of the street.

Q When you say the center of the street do you mean the center of the intersection? A Yes, between the two crossings.

40

*Ferdinand Kroch, direct.*

Q At the time that car stopped and after you had stopped your car what was the relative position of the two cars? A Why, there was fifteen to twenty feet in between us.

10 Q What did you do? A Well, I was going to help him out there for awhile, and then I seen some drunken fellow arguing with him and I started to go away and I said, "Never mind arguing with him we will find out who the girl is."

Q Do you know where the drunken man came from? A No, sir.

Q Did you see the little girl taken out from under the car? A Yes, sir.

Q Do you know who got her out? A A passenger on my car took her out.

20 Q How much space was there between the little girl and the front of that northbound car when the little girl started to run out? A How much space where?

Q Between the little girl and the front of that northbound car when the little girl started to run out? A You mean from the curb to the center of the street?

30 Q (Withdraw the question.) How far was the front of this car from the place where the accident happened when the little girl started to run out in the street? A Right between the two crossings, the center of the street.

40 Q Give us an estimate, as near as you can, of the distance from where the car was and where the accident happened when the little girl ran out. How far did the car go between the time the little girl ran from the curb and the time the accident happened? A Oh, about five or ten feet.

*Ferdinand Kroch, cross.*

*Cross examination by Mr. Matthews.*

Q You were going towards South Orange avenue or south on Norfolk street with your car?

A Yes, sir.

Q Did I understand you stopped at the north corner of Hartford street? A Yes, sir.

10

Q Where there is a stop for southbound cars, is that right? A I stopped on the near side of the street.

Q Is there a stop for southbound cars on the north side of Hartford street? A Is there a stop? Every corner is a stop.

Q Is there a signal pole on the north side of Hartford street for trolleys going south? A It didn't make any difference.

Q Answer my question. Is there a signal pole on the north side of Hartford street for trolleys going south? A I don't know.

20

Q How long have you been traveling on that line? A I was a borrowed man for the time.

Q This was your first trip? A No, I worked there eight or nine times before.

Q Do you know when you were working there whether there was a stop sign for cars going south on the north side of Hartford street? A I don't know.

30

Q Do you know whether there was a stop sign on the south side for cars going north? A No, I don't know.

Q You did stop on the north side of Hartford street, didn't you? A Yes, sir.

Q The only reason you stopped was to let off a passenger? A Let on a passenger.

Q To let on a passenger? A Yes.

Q What are the trolley stops from Central avenue to South Orange avenue going south on Norfolk street?

40

*Ferdinand Kroch, cross.*

Mr. Coult: I object to that as being outside the proper limit of cross examination.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

10

Q Is there a trolley stop at Warren street?

Mr. Coult: I object on the ground it is immaterial.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

20 Q You do not know whether there is a trolley stop at Hartford street? A No, sir.

Q But you did stop to take on a passenger?  
A Yes, sir.

Q How near the cross-walk at the corner did you stop your car? A Right beside the cross-walk.

Q You mean right at the cross-walk? A Not to block the cross-walk.

30 Q Not to block the cross-walk, no. When you stopped your car at the cross-walk on the north side of Hartford street and Norfolk street where was the northbound trolley car? A Just the other side of the crossing, the south side.

Q Which is the other side of the southbound crossing? A Yes, sir.

Q When you came to a stop at the northbound cross-walk, the northbound car was just at the southbound cross-walk, is that right? A Yes, sir.

40

*Ferdinand Kroch, cross.*

Q And going at the time? A Just the other side of the southbound crossing.

Q When you say "Just the other side" do you mean right at the cross-walk? A It could be a half a car's length away or a car length.

Q A car is how long? A Because a truck that was going in the opposite direction was right on the crossing. 10

Q Was the truck going the same way you were going? A Yes, sir.

Q When you came to a stop at the northbound cross-walk where was the truck, how far in front of you? A Why, about ten feet.

Q Was it across the southbound cross-walk? A From the cross-walk where I stopped?

Q Yes. A Not quite.

Q That you are sure of, that the truck was less than the distance between the north and the southbound cross-walk in front of you when you stopped at the northbound cross-walk? A The truck was what? 20

Q The truck was less than the distance between the north and the southbound cross-walk in front of you when you stopped at the northbound cross-walk? A Yes, it was just leaving the crossing, the rear.

Q Was it across the cross-walk? A No, not quite. 30

Q What do you mean by "Not quite"? A The front wheels were across.

Q The front wheels were across the south cross-walk when you stopped at the north cross-walk? A Yes, sir.

Q At that time the northbound car was how far away from the southbound cross-walk? A Just about a half a car length away from the cross-walk. 40

*Ferdinand Kroch, cross.*

Q A half a car length away from the cross-walk, that is correct? A Yes, sir.

Q You opened the door to let on your passengers? A No, he got on the rear-end at the time.

Q Let on by your conductor? A Yes, sir.

10 Q You had a two-man car? Yes, sir.

Q Closed vestibule front and back? A Well, I don't know whether it was closed, it had doors on both sides.

Q It had doors on both sides? A Yes, sir.

Q Now, you say that the little girl was standing at the curb when you first saw her, is that right? A Yes, sir.

Q Standing at the curb of the southbound cross-walk? A Yes, sir.

20 Q Intending a direction of from west to east in her progress, right?

Mr. Coult: I object.

Q Going in a direction from west to east?

Mr. Coult: I object.

The Court: I will admit it.

30 Q Did you understand the question? A The girl was standing at the curb.

Q She was standing on the curb? A Yes, sir, when I first saw her.

Q Was she on the sidewalk on the curb? A Yes, sir.

Q She was on the sidewalk on the curb? A Yes, sir, if there is a sidewalk there. I don't know. She was ready to step off the curb.

40 Q She was ready to step off the curb? A Yes, sir.

*Ferdinand Kroch, cross.*

Q How wide is Norfolk street at that point, do you know? A I judge around thirty-five to forty feet.

Q After you took on your passenger I think you told Mr. Coult you started your car and had gone about ten feet when the accident happened, is that correct? A Five to ten feet. 10

Q Was it five or ten feet? A Ten feet.

Q Where was the truck when you started your car? A You mean when I started the second time?

Q Yes. You only started it once. A I made a stop on the corner to pick up a passenger and then I started up again.

Q Yes, you stopped at the northbound cross-walk and the truck's front wheels were across the southbound cross-walk stopped. You picked up a passenger, got your signal to go ahead and then proceeded about ten feet. Where was the truck when you started after picking up your passenger? 20

Mr. Coult: I object.

The Court: Sustain the objection.

Mr. Matthews: The purpose of this is to get where the truck was at the time the accident happened. 30

Q Where was the truck when you started after taking on your passenger? A I don't know. I could see the girl going across the street and I kept my eyes open for fear—

Mr. Matthews: I object to that answer and ask that it be stricken out.

Q Do you mean to tell me you don't know where the truck was? A I do not; no. 40

*Ferdinand Kroch, cross.*

Q You do not know where the truck was? A No.

Q You do not know whether the truck was ten feet from the southbound cross-walk? A No, sir.

10 Q While you were stopped at the cross-walk how long were you stopped? A How long?

Q Yes. A You mean after the accident happened?

Q No, before you took on your passenger. A Just enough to let a passenger on.

Q Well, approximate it. A How much time, you mean?

Q Yes. A I guess a half a minute or less.

Q The truck that preceded you when you saw it was it going fast or slow? A Slow.

20 Q How slowly? A I judge about eight miles per hour.

Q The trolley car that was going north how fast was that going? A About ten miles, or better.

Q Ten miles or better? A Yes, sir.

Q Well, how much better? A It couldn't have been any more than ten or twelve.

Q Do you remember testifying at the last trial? A Yes, sir.

30 Q Did you testify in the last trial as follows, "*Question*: You say the car which struck this girl was going at six miles per hour? *Answer*: Yes, sir." A I didn't say that.

Q Didn't you say that? A No, sir, I believe I said, eight, ten or better, or something like that.

Q You think you said ten or better in the last trial? A Yes, sir.

40 Q So, you did not say at the last trial in answer to this question, "*Question*: You say

*Ferdinand Kroch, cross.*

the car which struck this girl was going at six miles per hour? *Answer:* Yes, sir." You did not say that? A In the last trial I don't think I did.

Q I show you the record on page 60 which is the record of the trial.

Mr. Coult: I object to that.

10

The Court: Sustain the objection.

Q If it is in the record of the last trial would that refresh your recollection?

Mr. Coult: I object.

The Court: Sustain the objection.

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

20

Exception noted as ground of appeal.

Q Now, you say the car was going about ten to twelve miles per hour, is that right? A About that.

Q How fast were you going? A I was standing still at the time of the accident.

Q How fast were you going when you started? A Just started about five to ten feet, about four miles per hour.

30

Q So, you went ten feet from the northbound cross-walk, didn't you? A Yes, sir.

Q How many feet would you say there are between the two cross-walks? A About thirty-five feet.

Q You think Hartford street is thirty-five feet wide at that point? A I believe it is, I don't know.

Q The trolley car that was going twelve miles per hour, or about twelve miles per hour,

40

*Ferdinand Kroch, cross.*

which was about a half a car length south of the southbound crossing? A Yes, sir.

Q Had got to the west point when you started your trolley car after taking on the passengers?

Mr. Coult: I object.

The Court: Sustain the objection.

10

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

Exception noted as ground of appeal.

Mr. Matthews: The purpose is to show where the car was after he had gone a certain number of feet.

Q I will ask it in another way and do not answer until the Court has ruled. When you got to a point ten feet of the point where you were when you stopped to take on the passenger, where was the northbound trolley car? A Not quite this side of the center of the street.

20

Q Now quite this side of the center of the street; by that you mean not quite beyond half the distance between the north and the southbound cross-walk? A Not quite half the distance.

Q What was your position with reference to the north and southbound cross-walks? A Where I was at?

30

Q Yes. A I was about ten feet from the north crossing.

Q Ten feet beyond the north cross-walk? A This side (indicating) passing the north crossing.

Q Ten feet south of the north cross-walk? A Yes, sir.

Q The other trolley car had proceeded to a point about the middle of the two cross-walks?

40

A Yes, sir.

*John J. Dixon, direct.*

Q It was there the accident happened?

Mr. Coult: I object.

The Court: I will admit it.

A Yes, sir.

*Re-direct examination* by Mr. Coult. 10

Q Where did the northbound trolley car stop?

A The first time it stopped?

Q Not yours, the other one. Where did it stop? A Right this side (indicating) between the two crossings.

*Re-cross examination* by Mr. Matthews.

Q So, it did not go at all after it hit the little girl, didn't move at all after it hit the little girl? 20

Mr. Coult: I object. I think counsel takes a very unfair advantage of the witness.

Mr. Matthews: I submit that accusation is not fair.

Q (Question read.) So that the northbound car did not move at all after it hit the little girl, did it? A It went about five feet. 30

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JOHN J. DIXON, sworn in behalf of the defendant.

*Direct examination* by Mr. Coult.

Q Where do you live? A 207 Newark street. 40

*John J. Dixon, direct.*

Q What is your business? A Ice and coal.

Q Keep your voice up. Did you see this accident? A I didn't see it, no, sir.

Q Where were you when it happened? A In the trolley car.

10 Q Which trolley car? A The southbound trolley car.

Q What was the first you knew that anything unusual had happened? A The car seemed to stop on the cross-walk, sort of stopped for a short while and started up for awhile, and when it started up the second time it came to a kind of a sudden stop and I heard some people hollering, so, when I got up I saw them running towards the other side of the street and I went out the rear door.

20 Q You went out of the rear door of the southbound car? A Yes, sir.

Q Where did you go from there? A I walked around the back of the car and started facing the northbound car and as I got up to the front of the car I looked and seen a child laying there.

30 Q Where was the front of northbound car with reference to the front of the southbound car? A I beg your pardon?

Q Where was the front of the northbound car with reference to the front of the southbound car? A It seemed to me there was almost—there was quite a space between both cars.

Q How much space was there between the front of the two cars? A That I couldn't really tell, because the first thing I noticed when I came around I saw this child there and that took my mind.

40 Q Can you say where the northbound car was stopped with reference to the cross-walk?

*John J. Dixon, direct.*

A The northbound car, it seems to me, stopped about the same as our car had stopped.

Q Well, with reference to the cross-walk would you say it was nearer the north or the south or the middle or where? A Coming towards the middle.

Q Coming towards the middle? A After it came—the northbound car came across this crosswalk, it started I should judge it would be fifteen feet or so, pretty near to the middle of the street. 10

Q Fifteen feet beyond the south cross-walk?

Mr. Matthews: I object as leading.

Q Fifteen feet beyond which cross-walk? A Coming north.

Q The north or south cross-walks? A Beyond the southbound. 20

Q Beyond the southbound cross-walk? A Yes, sir.

Q Where did you find the little girl? A She was laying face down underneath the northbound car.

Q In what position were the child's limbs? A It seems the little child was laying with her face down and the left leg was probably under the left front wheel of the trolley car. 30

Q Had the left wheel gone over her? A I couldn't say whether it did go over it or not, because when I reached the child there seemed to be nothing on the child, because I took her by the arm.

Q Was the child in front or behind the wheels? A In front of the front wheels.

Q What part of the child's legs were next to the front wheels, where was the other leg? A The leg was straight out. 40

*John J. Dixon, cross.*

Q What did you do? A I picked up the child and walked over towards the gutter and someone with a machine there refused to open the door, so I went to the second machine and that gentleman opened the door and I stepped in and took her to the hospital.

10 Q Were those machines there at the time the accident happened? A I couldn't say that or not, because I only noticed them when I had the child in my arms.

Q Which side of the car was the child at, the west side or the east side? A Towards the west, facing towards Hartford street.

*Cross examination by Mr. Matthews.*

20 Q So you were in the car that was going south? A Yes, sir.

Q You got off after the southbound car started up at the corner of Hartford street, is that right? You were not a passenger at all at Hartford and Norfolk street? A I got off after the car stopped the second time.

Q There were machines there when you picked up the little child, weren't there? A On the right-hand side facing north.

30 Q How many, do you know? A I noticed two, because the first one I passed.

Q There were two machines there, is that right? A Yes, sir.

Q How many people were there? A I couldn't tell. They were coming from all over when I got out.

*August W. Lefflor, direct.*

AUGUST W. LEFFLOR, sworn in behalf of the defendant.

*Direct examination by Mr. Coult.*

Q Where do you live? A At the present time at 60 Magnolia street.

10

Q What is your business? A Driver for J. T. Castles Ice Cream Company

Q How long have you been with those people? A Twelve years.

Q What did you do before that? A Worked for the Public Service.

Q How long? A Oh, about nine years.

Q Did you see this accident? A Why, I saw—I hadn't saw how the accident occurred, but I saw the conductor at the time.

20

Q The conductor of which car? A The car that had the accident.

Q What was the first you knew about it? A The first I knew about it was then the motor-man made a sudden stop.

Q Previous to the sudden stop at what rate of speed had your car been traveling? A I should judge about between ten and twelve miles per hour.

Q Do you recall before the accident happened whether the bell had been rung or not, the gong? 30

A Yes, sir.

Q Had it? A Yes, sir.

Q Do you know where it had been rung? A About twenty-five feet the south side of Hartford street.

Q When the car made its stop where did it stop? A I actually measured about five feet from the south side of the south crossing where he made the sudden stop.

40

*August W. Lefflor, cross.*

Q Where did the car actually come to a stop? A Oh, five or eight, between five and ten feet north of the south crossing.

Q What did you do when the car stopped? A I went up to assist the motorman and got out and saw what happened.

10 Q What did you find? A I found a little girl caught in between the lifeguard and the truck.

Q The lifeguard on the front of the truck?  
A The lifeguard on the front of the truck.

Q Where was the little girl laying? A She was laying, one leg was up on the truck rigging and one leg on the rail.

20 Q Was the leg, that was on the rail, in front of the wheel or behind it? A About two inches in front of the wheel.

Q Was there anything between the girl's leg and the wheel? A No, sir.

Q Which side of the car? A The west side of the car; we call the blind side which is the left side of the car going forward.

*Cross examination by Mr. Matthews.*

30 Q You testified at the last trial, didn't you? Did you say at the last trial as follows: "*Question*: What did you find when you got to the front? *Answer*: The little girl with her face down with one leg on the truck rigging and one leg on the car." A What part of the car?

40 Q Did you say this: "*Question*: What did you find when you got to the front? *Answer*: The little girl with her face down and one leg up on the truck rigging and one leg on the car."

*August W. Lefflor, cross.*

Mr. Coult: I object to that question because it does not contradict anything.

The Court: I will admit it.

Q Did you, yes or no? A Yes, sir.

Q Did you testify as follows: "*Question:* How far was she from the front of the trolley? *Answer:* I should estimate from the bumper she was back about six feet." 10

Mr. Coult: I object to that question as it does not contradict anything.

The Court: I will admit it.

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

Exception noted as ground of appeal.

Q Did you? A Yes, sir. 20

Q Did you at the last trial testify as follows: "*Question:* At what rate of speed was your car traveling just before the accident? *Answer:* I should judge six to eight miles per hour." A I am not sure what I mentioned there, it might have been six to eight.

Q How long had you been a conductor through Norfolk street? A I was with the Public Service nine years and the only two lines I worked on was the Bergen and Clifton. 30

Q Was there any stop for the northbound car at Hartford street on Norfolk street? A Was there?

Q Yes. A Usually all motormen slacken up on their speed.

Mr. Matthews: I object to that and ask that it be stricken out.

The Court: Strike it out. 40

*August W. Lefflor, cross.*

Q Was there any stop for a northbound car at Hartford and Norfolk street?

Mr. Coult: I object as immaterial.

The Court: Sustain the objection.

10 Mr. Matthews: I want to contradict him as to the speed of the car.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Q Your car was going north, wasn't it? A North.

Q Were you intending to stop at Hartford street?

20

Mr. Coult: I object to that.

A I wasn't the operator at the time.

Mr. Coult: (Withdraw the objection.)

Q What was your answer? A I wasn't the motorman so I couldn't tell you.

Q You hadn't any signal to stop, had you?

30 A As a rule we slow down.

Q Did you have any signal from the conductor? A I hadn't given him any signal.

Q Had you been given any by any passenger to stop— A Not as I know of.

Q Yet, you tell us that car was going ten to twelve miles an hour at Hartford street going north.

40 Mr. Coult: I object to "And yet you tell us."

*August W. Lefflor, cross.*

Q Did you repeat the testimony to Mr. Coult on direct examination that you were going ten to twelve miles per hour crossing Hartford street? A I haven't repeated anything.

Q Will you repeat it now?

Mr. Coult: I object to that.

10

The Court: Did you say you had been going ten to twelve miles per hour?

A Of course, that is two years, but it may have been ten to twelve or six to eight.

Q (By Mr. Matthews.) You do remember it was not any less than six or any more than twelve, don't you? A We haven't any speedometers on the trolley cars.

Q Answer my question. Do you remember if it was not less than six or more than twelve? A It wasn't any less than six or more than twelve.

20

Q When you were twenty-five feet south of the southerly cross-walk at Hartford and Norfolk street you say the gong was rung? A Yes, sir.

Q How do you approximate the distance of twenty-five feet? How do you fix that? A About from here to the first bench (indicating).

Q Well, what makes you remember it was that distance that the gong was rung? A As a rule the motorman, I think, at the present time always rings a gong the same distance at every corner.

30

Q Is that the reason for your saying he rang it at this corner? A Yes, sir.

Q The next thing you knew is when the car stopped suddenly? A Yes, sir.

Q When the car stopped suddenly where were you with reference to the southerly cross-walk? A I was on the car.

40

*August W. Lefflor, cross.*

Q Where was your car with reference to the south cross-walk? A Five feet south of the south cross-walk.

Q So, when your trolley car stopped you were five feet south of the southerly cross-walk, is that correct? A When it stopped still it was on the north side of the south cross-walk.

10 Q What happened when you were five feet south of the south cross-walk? A That is when he plugged the car.

Q By that you mean he put on his brakes?  
A No, sir.

Q What do you mean? A Pulled his reverse on the controller.

Q Is that all he did? A Applied the air.

Q You say he pulled his reverse on the controller and applied the air when he was five feet south of the south cross-walk? A Yes, sir.

20 Q What do you approximate five feet to be in distance in this room? A About the length of that from that corner to the next corner (indicating).

Q You are speaking of the first panel in the jury box? A Yes, sir.

Q You say five feet below the south cross-walk he plugged his car and put on the air and reversed his controller and that he went across the cross-walk ten feet north? A Yes, the south crossing.

Q When you got out the little girl was caught in the lifeguard, one leg was in the truck rigging? A Yes, that is the rear of the lifeguard in one of the stanchions that holds the lifeguard up.

Q Her leg was caught in the rigging of the truck? A Yes, sir.

40 Q Did you say this at the last trial, "Question: Just where was that car (referring to the

*August W. Lefflor, cross.*

southbound car) brought to a standstill, that southbound car?" A No, sir.

Q "Answer: I should judge about four feet over the cross-walk?" A Four feet; the southbound car?

Q Yes, did you say that? A I am not certain what I said at the last trial, I can't recall two years back. 10

Q Why do you recall so well now? A Why?

Q Yes. A On our side I could tell, but you are talking about the southbound car now. I wasn't the operator on that car.

Q You were on the back end of the car you were operating, weren't you? A I was.

Q You don't know what distance it was across the cross-walk until you got out and looked at it, did you? A No. 20

Q When you got out and looked at it you must have seen the southbound car and seen that she was right there, wasn't she? A The southbound car was there, but I didn't measure no distances.

Q You did not measure any distances for the northbound, did you? A My judgment, that was all.

Q Did you? A I didn't have any rules to measure any distances of any kind, only what I figured it to be, about ten feet. 30

Q Didn't you figure what the northbound distance was? A About four feet across from the southbound car.

Q You tell us now the southbound car was four feet beyond?

Mr. Coult: I object. Is that contradicting anything.

*George M. Hashagen, direct.*

Q You tell us now the southbound car was four feet beyond the northbound crossing when you came to the front of your trolley car and picked the girl out from under it, is that right?

A Yes, sir.

10 Q You also tell us, don't you, that you picked the girl from under your car while your car was five or ten feet beyond the southbound cross-walk? A On the southbound crossing, north side, north of the southbound crossing.

Q Yes, five to ten feet north of the southbound crossing, that is correct, isn't it? A Yes, sir.

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20 GEORGE M. HASHAGEN, sworn in behalf of the defendant.

*Direct examination by Mr. Coult.*

Q Where do you live? A At the present time?

Q Yes. A 1731 Springfield avenue, Hilton.

Q What is your business? A My business now?

30 Q Yes. A Salesman.

Q For whom? A Rand Cruller Company.

Q How long have you been with them? A Approximately two years.

Q Previous to that with whom did you work? A The Public Service Railway Company.

Q How long did you work for the Railway Company? A About seven years.

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

40 Q Where were you at the time? A The motorman in the car.

*George M. Hashagen, direct.*

Q On which car? A The Clifton trolley car.

Q Going which way? A Going northbound.

Q Previous to the happening of the accident at what rate of speed had your car been traveling? A Well, I had made a stop at Norfolk street or Warren street and let off some passengers and I had just started up again and got in the middle of the sidewalk and there was a big truck coming along and through this truck I seen a girl dart off the sidewalk. 10

Q At what rate of speed were you traveling just before the accident happened? A Eight miles an hour; when you start you cannot go very fast.

Q Eight miles per hour do you mean to say? A Yes, sir. 20

Q Where was the little girl when you first noticed her? A On the sidewalk.

Q What did she do? A She darted right off the sidewalk.

Q Which way did she go? A Diagonally.

Q In what direction? A Diagonally east; from west to east.

Q Now, you say she went diagonally, you mean she went north of the cross-walk or south of the cross-walk? A She came from the west side to the east side. 30

Q You said something about going diagonally, did she run straight across north or to the north or south, which. (Withdraw the question.) Did she come straight across the street or diagonally? A Diagonally.

Q Diagonally in a northerly or southerly direction? A Northeast. This is east (indicating). 40

*George M. Hashagen, direct.*

Q I understand that. Did she, in the way your car was going, cut diagonally or the other way? A Yes, sir, the way my car was going.

Q To the north? A Yes, sir, northeast.

Q These two points are north? A She is coming from this side over to this side (indicating); it couldn't be towards more north.

10 Q At the time you saw her leave from the curb where was your trolley car? A About twenty feet.

Q From what? A From the cross-walk.

Q That is, you mean you were twenty feet south of the southerly cross-walk?

Mr. Matthews: I object as leading.

20 Q Which cross-walk, the north or the south? A The south.

Q North or south of the cross-walk, which? You say you were twenty feet from the cross-walk, were you north or south of it? A South.

Q What did you do when you saw this child dart out? A I reversed my car and applied my brakes.

30 Q What did you have to do to reverse your car? A Pulled the reverse handle to a backward position.

Q Where is your reverse handle? A In the middle, the controller.

Q What did you operate it with? A My hand.

Q Which way? A My left hand.

Q When you operated that with your left hand what else did you have to do? A Operate the air brakes with the right hand.

40 Q When you have done that what do you have to do, anything more? A Use your gong.

*George M. Hashagen, direct.*

Q I mean did you have to pull your controller after you pulled your reverse? A Well, to an all-the-way-around position.

Q Did you do that? A Yes, sir.

Q How far did your car go over the cross-walk? A About five feet.

Q Where did the little girl come into collision with the car? A Just a little beyond the cross-walk. 10

Q What part of the car did she come into collision with? A The blind side of the car.

Q What part, from the corner or the side? A From near the step.

Q Near which step? A The blind side.

Q That is your left side? A Yes, sir.

Q When she came from the curb and towards the tracks how did she come, fast or slow or otherwise? A She ran. 20

Q What did you do after you stopped your car? A Called the conductor quick and got out.

Q Which side did you get out of? A The right side.

Q Then, where did you go? A To the front of the car.

Q Did you see any other trolley car there? A Yes, sir. 30

Q Where was that? A On the other rail.

Q Where with relation to the north cross-walk? A Just a little beyond the cross-walk.

Q What did you do after you got around your car? A Called the conductor.

Q Did you see the little girl taken out? A Yes, sir.

Q How was she lying? A Face down.

Q Where were her legs? A One leg was over the truck rigging. 40

*George M. Hashagen, cross.*

Q Where was the other one? A Over the rod that protrudes from the lifeguard.

Q Was that leg behind or in front of the wheels? A In front of the wheels.

Q How near to the wheels? A I should judge a few inches.

10 *Cross examination by Mr. Matthews.*

Q You say when you saw the little girl one leg was over the truck and one was over the rod that protrudes from the lifeguard. A That holds the lifeguard, at the side of the car.

Q One leg over the truck and one leg over the rod that holds the lifeguard, is that correct? A That explains it.

20 Q What time of night was this accident? A It wasn't at night, it was in the afternoon.

Q What time? A I can't just recall the time.

Q Do you know whether it was four o'clock, two o'clock or five o'clock? A Right after dinner some time.

Q I say do you know whether it was four o'clock, five o'clock, or two o'clock? A I can't recall the time.

Q Was it your last trip? A No, sir.

30 Q Were you to return right away? A We were to go to Bloomfield avenue and back again to Weequahic Park.

Q Was it a clear day? A Yes, sir.

Q You said you saw the little girl as she was leaving the sidewalk and saw her through the truck that was coming in the direction opposite to you? A A big truck going in the opposite direction.

40 Q You told Mr. Coult you saw her through the truck, didn't you say that? A Yes, through the lattice-work of the truck.

*George M. Hashagen, cross.*

Q You did testify at the last trial. Stay at this trial. When you looked through the lattice work of the truck you saw the girl come off the sidewalk? A Yes, sir.

Q Where was your truck with reference to the trolley car? A Well, the front of my car was about to the front wheels of the truck.

10

Q You cannot be mistaken about that, can you? Are you sure of that? A I could see through the truck.

Q Are you sure the front of your car was at the front wheels of the truck? A Somewhere near the front wheels of the truck.

Q You were the motorman in the front of this trolley car standing at the controller box with the window in front of you, correct? A Yes, sir.

Q The truck was going in the opposite direction from you, was it not? The truck was going south and you were going north? A Yes, sir.

20

Q You first saw the little girl through the lattice-work of the truck? A Just the same as I look through here (indicating).

Q Just the same as you look through the lattice-work, pointing to the lattice-work on the witness-stand in front of you? A Yes, sir.

30

Q Now, is it so that when you looked through that lattice-work to see the little girl for the first time that the front wheels of that truck were at the front part of your trolley car you were driving? A Somewheres near there.

Q How near? A I couldn't just judge from here.

Q Was it five feet? A I had no measure.

Q You know what five feet is, don't you? A I didn't have a chance to measure anything, I just acted quickly as I could.

40

*George M. Hashagen, cross.*

Mr. Matthews: I ask that the answer be stricken out.

Q Answer my question. You know what five feet is, don't you? A Five feet is five feet.

10 Q Can you estimate it here from where you are to something in this room? Can you estimate five feet distance from the point where you are sitting now? A I am not a good estimator.

Q Wouldn't you say it was from the distance from where I am to you? A Take a measure and measure it; I am not a good estimator. I was hit this summer by a machine and I had a fractured skull and I am no estimator either. I cannot tell how far it was.

20 Mr. Matthews: I object and ask that the answer be stricken out.

The Court: Strike it out.

Q So, when you said your trolley car, after the accident, was five feet beyond the southbound cross-walk you did not really know what five feet was did you, how far? You do not know whether it was five or fifty feet, do you? A Five feet is five feet.

30 Q What is five feet in your estimation from where you are sitting? A Measure it and you will see.

Q What is your estimation? A I have no estimation.

40 Q Why did you tell Mr. Coult that after the accident your trolley car proceeded five feet beyond the southbound cross-walk if you don't know how to estimate five feet from where you are sitting. Do you remember testifying at the last trial as follows:

*George M. Hashagen, cross.*

Mr. Coult: I object.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

Mr. Matthews: The purpose being to contradict the statement that he was twenty feet. 10

Q What is your estimate of twenty feet from where you are sitting? A Twenty feet ain't as far as from here to that bench here (indicating).

Q This here (indicating). Is this what your estimation of twenty feet is from where you are sitting to here (indicating)? A Yes, sir.

Q What is your estimation of five feet? 20  
Where I am now? A Yes, sir.

Mr. Matthews: May I have this distance measured?

(The distance is measured and found to be seven feet seven inches.)

Q When you saw the girl through the lattice-work of the truck the truck was about at the front part of your trolley car and you saw her through the lattice-work and you looked through the side of your car, didn't you? A Not the side, the front of the car. 30

Q Where was the truck with reference to the southbound cross-walk? A Traveling on the street.

Q Yes. Answer my question. (Question read.) When you saw the little girl through the lattice-work. A What do you mean, in 40

*George M. Hashagen, cross.*

reference to the southbound—it was on the street, it couldn't be up in the air.

Q How many feet away from the southbound cross-walk was this truck when you looked through the lattice-work and saw the little girl leaving the sidewalk? A She wasn't very far away.

10 Q Was it five, ten or twenty feet? A I am no good of an estimator on that.

Q Keep your voice up. A I can't talk much louder.

Q You say you do not know how many feet away from the south cross-walk this lattice-work truck was when you looked through it, right? A I didn't say that.

Q Do you know? A I said I didn't count it, or measure it.

20 Q How far do you think it was? A It wasn't more than five feet.

Q Do you mean the rear of the truck or the front? A The rear.

Q The rear of the truck was about five feet from the southbound cross-walk when you looked through the lattice work on the side and saw this little girl leaving the sidewalk? A She ran right off the sidewalk.

30 Q That you saw through the lattice-work of the truck, did you? A Yes, sir.

Q So, the little girl was actually on the cross-walk then when she left the sidewalk, wasn't she? A On the cross-walk? How could she be on the cross-walk and the sidewalk at the same time?

Q When she left the sidewalk? A She started from the sidewalk across the street running.

40 Adjourned to Tuesday, March 30, 1926,  
at ten o'clock, A. M.

*George M. Hashagen, re-direct.*

SECOND DAY.

Tuesday, March 30, 1926.

Continued pursuant to adjournment.

Present counsel as before stated.

GEORGE M. HASHAGEN, recalled, in behalf of  
defendant.

10

*Cross examination* (continued) by Mr. Matthews.

Q You have told us the rear of the truck which was in front of the southbound car was five feet from the southbound cross-walk when you saw the little girl cross the street. What kind of a truck was this? A A big truck.

Q The lattice-work was on the side of the truck, was it? A Yes, sir.

20

Q It was through that truck that you saw the little girl, wasn't it? A Yes, sir.

Q You said yesterday that your car was twenty feet from the south cross-walk when you first saw her, is that correct? A Yes, sir.

Q Didn't you at the last trial—this is in contradiction of this twenty feet from the southernly cross-walk, didn't you at the last trial testify as follows, page 53, question on line 20: "Question: Is that what you say when you first saw the girl dart off the cross-walk, you were about 200 feet away? Answer: Yes, sir." Did you say that? A Yes, sir.

30

*Re-direct examination* by Mr. Coult.

Q Calling your Honor's attention to page 53, did you also in that particular testify as fol-

40

*George M. Hashagen, re-direct.*

lows: "You understood what counsel is driving at on cross examination?"

Mr. Matthews: I object to "driving at."

Q "Did you know what he was intending by his last question? Answer: In a way I didn't." Remember that? A Yes, sir.

Q "Now, what I thought he was getting at was this:"

Mr. Coult: That was objected to.

Q Do you remember this question: "*Question*: Let us put it this way. Assume what he wanted to know was this: How far away was the trolley car from this little girl when she started to run across the track; can you indicate, how far it was?" And you answered, "I think I can." Do you recall that? A Yes, sir.

Q Do you remember being asked, "Can you point out something or give us some idea how far away this child was from you when she started out on the street"? And you answered, "Not very far." Do you remember that? A Yes, sir.

Q Do you remember being asked, "*Question*: Well, show us. Can you point to any object that will indicate it? Can you indicate on this photograph here which I am showing you? Answer: There (indicating). *Question*: Put your finger down there again. *Answer*: There (indicating)."

"Mr. Matthews: Put an x there."

Q "*Question*: Can you indicate, having put that mark on the photograph, will you indicate

*George M. Hashagen, re-cross.*

anywhere in this court room about how far you were from the cross-walk when that little girl started to go across? *Answer:* About from me to you." Do you remember that? A Yes, sir.

Q Do you remember being asked this question, "Now, do you understand the distance from the cross-walk in the front of your car and you say it is about from me to you? *Answer:* Yes, sir." Do you remember that? A Yes, sir. 10

Q Do you remember that was measured and that the Court said it is fifteen feet, the distance? A Yes, sir.

*Re-cross examination by Mr. Matthews.*

Q Do you remember then I took you up again on cross examination and I said to you, "So, when you told me 200 feet, what did you mean by that 200 feet." Do you remember saying this, "So, when you told me 200 feet, what did you mean by that 200 feet? *Answer:* I didn't quite understand you." Do you remember that? A Yes, sir. 20

Q Then I asked you, "What did you think I meant when you said 200 feet? *Answer:* The way I understood is that you meant from the near side of the street." Do you remember that? A No. 30

Q Do you remember my asking you this question, "Let me understand what you understood. What did you understand when you said 200 feet? I first went here (indicating) and you heard Judge Coult object to my question, and I repeated it to you and you did not answer me, and then I went here (indicating), 40

*George M. Hashagen, re-cross.*

didn't I? A Yes, sir." Do you remember me doing that?

Mr. Coult: I object.

Q Do you remember that question? A I remember your question.

10 Q Now, do you remember this, "Then I went here to the first bench (indicating) and you were unwilling to answer and then you gave me 200 feet, and the question was how far was the little girl when she darted—I used your own word—from the cross-walk. How far was she from your car, and you said 200 feet, didn't you? You did say it, didn't you? *Answer:* Yes, sir." You did say 200 feet, didn't you?

20 Mr. Coult: I object because whether this witness at that time remembered whether he had previously said something in contradiction to something he swore to at that time does not serve to contradict anything he testified to here.

The Court: I understood he changed his testimony from 200 feet to 15 feet, that is the way I charged.

30 Sustain the objection.

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

Exception noted as ground of appeal.

Mr. Matthews: May I read the last question of that examination before the testimony of August W. Lefflor?

The Court: You may read that.

Q Then do you remember I asked you this  
40 question, "And you thought that is what I

*George M. Hashagen, re-direct.*

meant, how far she was away from you? *Answer:* That's what I thought you meant." Do you remember answering that way? A I didn't understand you.

*Re-direct examination* by Mr. Coult.

Q You said something in answer to Mr. Matthews about having sustained a fracture of the skull. Do you remember so testifying? A Yes, sir.

10

Q When did you get that injury?

Mr. Matthews: I object as immaterial.

The Court: I will admit it.

Mr. Coult: I want to show whether it was after the accident in this case or before?

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

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Exception noted as ground of appeal.

Q Did you receive that injury after this accident, that is, the accident we are now discussing in this case, or before? A After, last year.

Q When last year? A July 4th.

Mr. Coult: I have had some difficulty in getting the map here which I promised I would produce. The engineer is on his way and will be here any moment.

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Mr. Matthews: I am through.

The Court: We shall wait a few minutes to get the map here.

40

*William E. Preston, direct.*

WILLIAM E. PRESTON, sworn in behalf of defendant.

*Direct examination by Mr. Coult.*

Mr. Matthews: His qualifications are admitted.

10

Q Where do you live? A Maplewood, New Jersey.

Q You are a civil engineer by profession? A Yes, sir.

Q And surveyor? A Yes, sir.

Q You are now employed by the Public Service Railway Company? A I am.

Q Have been employed how long by them? A  
20 Fourteen years.

Q There is a map on the wall behind you, did you make that? A I did.

Q What from? A A survey.

Q Who took the survey? A I did.

Q On the premises? A Yes, sir.

Q Is the map actually according to the survey? A Yes, sir.

Q What is the scale? A One inch on the  
30 map is ten feet on the ground.

Q Describe the map briefly. A The four black lines through the center represent four rails and the direction of the car east is towards the right lower track and left the upper track. The frame buildings are in yellow, the brick buildings are in red, the arrow points to the direction of north. New street is on the right-hand side and Warren street is on the left side. The green spots are trees and the black spots are trolley poles.

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*William E. Preston, cross.*

Q What is the distance between the west curb line on Norfolk street to the west rail of the southbound track? A 10:35 feet.

Q What is the distance between the two rails of the southbound track? A Four feet eight and a half inches.

Q What is the distance between the space between the two tracks? A Approximately 5:05 feet. 10

Q What is the width of Hartford street at the junction with Norfolk street? A 35.2 feet.

Q What is the distance between the north and the south cross-walk of Hartford street on Norfolk street? A 43 and  $\frac{1}{2}$  feet.

Q What is the distance from Warren street to Hartford street measured on the west side of Norfolk street? A  $236\frac{1}{2}$  feet. 20

*Cross examination by Mr. Matthews.*

Q As I look at this map Warren street is on my left? A Yes, sir.

Q These buildings here that are indicated on the side that the northbound car is running on they are on the west side? A They are on the east side. 30

Q Are there residences above that, do you know? A There is one marked "garage," one marked "grocery" and one vacant.

Q Point to the place called "Shonstein's store" on that map. A I don't recognize the name of the occupants.

Q This (indicating) you told me was the direction of the northbound trolley? A Yes, sir.

Q What is No. 146? A That is represented there as a residence. 40

*William E. Preston, re-direct.*

Q This is a garage (indicating)? A Yes, sir.

Q This is a grocery store (indicating)? A Yes, sir.

Q What is this here (indicating)? A A fence there.

10 Q When did you make this map? A The map was finished March 4, 1924.

Q At that time did you see Shonstein's store when you were making it? A I didn't see anything but what is represented there.

Q You think the only store is this grocery store? A No. 154.

Q I mean south? A That is north, that is the only store I remember seeing there.

Q You don't know what 146 is, do you, or is it a residence? A Right, it was a cigar store.

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

Q You say the marks here are trolley poles? A The black dots.

Q For what purpose? A For operating the cars.

Q Are there any stop poles on that street in either direction? A There is a stop pole on the north side for cars southbound.

Q But none on the other side? A No, sir.

Q Point to it? A Here (indicating).

30 Q That is the stop pole for cars going south? A Yes, sir.

Q There is no stop pole at the northerly point? A No.

*Re-direct examination by Mr. Coult.*

Q This car was 1140, can you give us the weight of it? A Yes, sir, 42,500 pounds.

40 Mr. Coult: I offer in evidence the map.  
(Same is marked Exhibit D. 2.)

*Discussion.*

Mr. Coult: I offer in evidence D. 1 for identification, being a statement signed by Benedict Caironi for the purpose of contradicting some portions of his testimony.

Mr. Matthews: I object to its introduction on the ground it is not properly proved.

The Court: Sustain the objection. 10

Mr. Coult: I offer the first page of D. 1 for identification, which I will show your Honor, for the same purpose.

Mr. Matthews: I make the same objection on the same ground, which ground it is not properly proven.

The Court: Sustain the objection.

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

Exception noted as ground of appeal. 20

The Court: My reason is, that to contradict that witness he should be confronted with the person who took the statement and that person should take the stand and have part of the statement read to him and that is the person to contradict the witness.

DEFENDANT RESTS.

PLAINTIFF RESTS. 30

Mr. Coult: I will ask the plaintiff for an opening in this case.

Mr. Matthews: I would say that defendant's counsel is not entitled to an opening, as this is not a criminal case.

The Court: I think he is.

Mr. Matthews: I object to counsel using this procedure of asking me for an opening in this case. 40

*Discussion.*

Mr. Coult: Is that in the record?

The Stenographer: Yes.

Mr. Matthews opens to the jury as follows:  
Gentlemen of the jury: I simply want to  
state that this little girl was on the cross-  
walk crossing the street and this car came  
along and ran her down.

10

Mr. Coult: I have nothing to state in  
answer to that.

Mr. Matthews: Does Mr. Coult desire to  
sum up?

The Court: Proceed, gentlemen.

Mr. Coult: I have no reply to that open-  
ing.

The Court: Then, you are not going to  
sum up?

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Mr. Coult: I do not know.

The Court: Do you want to reverse the  
positions of counsel?

Mr. Coult: No, sir. I have a right to de-  
mand an opening, and if I have nothing to  
say in reply the case is closed unless my op-  
ponent desires to make another opening.

Mr. Matthews: I submit that the plaintiff  
has the right to close and if Mr. Coult is  
not going to sum up to this jury, with your  
Honor's permission I will close.

30

The Court: Have you any cases on that?

Mr. Coult: Yes.

(Argument.)

The Court: There having been no reply  
I presume under the situation which exists  
you will request the making of a further  
opening.

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*Discussion.*

Mr. Matthews: I would like it on the record, the plaintiff's right to sum up to the jury.

The Court: My suggestion is that you open to the jury, but not quite so briefly, using your own discretion, and then let counsel for the defendant reply to that and you have then a right to reply to what he says, just the same as you would in an ordinary summing up. 10

Mr. Matthews opens to the jury.

Mr. Coult: The defendant has no reply.

Mr. Matthews: I desire to close the case for the plaintiff to the jury.

Mr. Coult: I object on the ground it would be beyond the Court's discretion to allow the third opening; that in the last address counsel has argued the case and the case is closed and I have waived my argument under the circumstances. 20

Mr. Matthews: The plaintiff is not willing to waive his closing and under the cases desires to close.

The Court: Do you think under the cases, Mr. Coult, that when a second address has been made to the jury by plaintiff's counsel and then you do not make a reply, the plaintiff cannot sum up. 30

Mr. Matthews: I want it on the record that it was not taken to show what I said in this second opening.

Mr. Coult: I am exercising the right I have, which is this: Not to argue unless something is presented by the plaintiff that I am required in my discretion to answer and I haven't found anything yet and so far 40

*Discussion.*

as I am concerned the case is closed. Counsel has closed twice and I am through.

10 Mr. Matthews: I did not intend to speak twice. I followed your Honor's directions to make a full opening, if I aided him by that opening at the outset and he had not replied your Honor would submit I have a right to close.

The Court: The question is whether you are foreclosed from closing because of defendant counsel's refusal to reply to what you have said in your opening.

Mr. Matthews: I am entitled to some evidence in this cause as this case is a case of a six-year-old child.

20 The Court: I will allow you to look at the law, Mr. Matthews.

Mr. Matthews: If your Honor holds that I opened twice, as it was your Honor's suggestion I do, then I cannot stand on that.

The Court: I told you, that you should use your own discretion.

30 Mr. Matthews: The law is as your Honor read it to me, and I got up the second time because I thought your Honor suggested to me to make a fuller opening and if I have been suggested into foreclosing this plaintiff's rights, I see why this motion was made, but I have to think of this plaintiff, five years old. Mr. Coult says there is nothing to answer and he submits therefore that two of his witnesses lied and submits—

Mr. Coult: I object to that.

40 Mr. Matthews: May I say this on the record? I got up to take the second time of the second opening because I thought the

*Discussion.*

Court suggested I do that to give Mr. Coult a fuller opening, because the Court read I would be allowed to close, and I now demand the right to close this case for the infant plaintiff.

The Court: Demanding is all very well, but what I want is not a demand, but a little assistance. If we follow the reasoning of the Chief Justice in *New York & L. B. R. R. Co. v. Garrity*, 63 N. J. L. 50, if you re-address the jury then Judge Coult has a right to be heard in reply to that and you are entitled to be heard in the closing argument. Assuming he does not exercise that right? 10

Mr. Matthews: It is your Honor's discretion. Your Honor realizes that no defendant's attorney, no matter who he is, will take away from the plaintiff's counsel the right to sum up, by subterfuge. 20

Mr. Coult: I object to that.

The Court: I am referring to the law. There are three cases here, one by Justice Garrison, one by the Chief Justice and one by Justice Fort.

Mr. Matthews: Certainly the law must entail that if defendant's counsel does not reply to plaintiff's he admits the plaintiff's facts. 30

(Argument.)

Mr. Matthews: If my opponent does not require me to talk, why—

Mr. Coult: I do not think I am entitled to remain here without objection and listen to this.

(Argument.)

(The jury retires.) 40

*Discussion.*

The Court: The plaintiff in this case has made an opening which the Court considers a nominal opening and the defendant made no reply to that opening, and then upon the plaintiff's request, the plaintiff was allowed to make a second opening, and at the conclusion of the second opening counsel for the defendant said that he had no reply to make and the plaintiff now desires to sum up. The Court is going to refuse that on the ground the situation is disposed of in the case of *New York & Long Branch Railroad Company v. Garrity*, 42 Atl. Rep. 842. Decision by Chief Justice Gummere. He said among other things, "Ordinarily, a plaintiff who makes a mere nominal opening does so at his peril and then if the defendant submits his case without argument the plaintiff will not be allowed to make a second argument." Also, on reaching this conclusion I have read the latter part of the last paragraph of the case of Hagny against the Delaware Telephone & Telegraph Company, Court of Errors and Appeals case, in which the logic of this decision is explained by Justice Fort.

You may have an exception.

Mr. Matthews: In order to show my exception, may the record show that I made an opening to the jury in which I alleged that the car was driven at a speed of twenty to twenty-five miles per hour and the child was crossing on a cross-walk and had the right of way. We thought we had proved our contention at the outset, that the trolley company was negligent. That is virtually my words. I said more than that, but I do not remember and I do not want to put it on the record to take advantage of argument, and Mr. Coult refused to reply to what I said,

*Discussion.*

and your Honor went out and got the cases Mr. Coult gave your Honor and when your Honor had read the cases I said to your Honor that the proposition was new and novel. You said to me that I might make an opening in brief and then Judge Coult could reply if he wished and then I could close. Your Honor positively said in the record and relying with respect, perhaps, mistakenly, upon your Honor's representations of this record I arose and made an opening, I thought in line with your Honor's suggestion, and now the motion is made to preclude me from summing up the case. Since this is a trial of a child five years and eleven months old I desire to have a chance to sum up to the jury in order that the jury and Court may have the benefit of the evidence. I consider the child's rights have been foreclosed and I ask an exception on these grounds on the record.

The Court: You may have an exception, but if the record is accurate I told you you could make it as extensive as you wanted to and I said I could not advise you.

Mr. Matthews: I do not remember that, your Honor said that to me, with respect to your Honor's advice, and it is not a desire on my part under the circumstances to shift it to your Honor.

May I have that on the record?

The Stenographer: I am taking it, Mr. Matthews, but in parts where it is just argument I am leaving that out.

Mr. Matthews: I desire to withdraw from the case, that's all.

The Court: I would not say that until—

Read what I said, Mr. Stenographer.

*Discussion.*

(The Stenographer reads as follows:)

“Mr. Matthews: I would like it on the record the plaintiff’s right to sum up to the jury.

The Court: My suggestion is to open to the jury, but not so briefly, using your own discretion and then let counsel for the defendant  
10 reply to that and you have then a right to reply to what he says just the same as you would in ordinarily summing up.”

The Court: Your statement is that you were misled by what I said?

Mr. Matthews: Yes, otherwise when he said, “I refuse to reply” I would have insisted on my right to sum up to the jury, because I am entitled to do that.

The Court: What the stenographer has read  
20 standing alone, is some ground.

The Court: What disturbs me is I do not like to mislead a lawyer. I do not intend to do that and I do not like the thought.

Mr. Coult: There isn’t the slightest evidence here that your Honor mislead Mr. Matthews.

The Court: I certainly did not mean to mislead Mr. Matthews by that statement and I feel it is rather my fault if I did not precisely state  
30 the law.

Mr. Matthews: Perhaps I was leaning on the Court, it might be my ignorance.

Mr. Coult: It is simply discretionary to allow the second opening and in the second place counsel opened for fifteen minutes, and not only opened but he argued the case. Now, you are going to allow counsel to open again for the third time and the only chance I have to speak to the jury is in answer to three openings, and  
40 I think that is going beyond the limit of the

*Discussion.*

Court's discretion. There isn't any contention here that he has not opened fully; he wants to argue and sum up the case.

The Court: I think Mr. Matthews is asking for the right to open.

Mr. Coult: Here would be three openings by counsel and if I answer it he will have closed four times to my once. 10

Mr. Matthews: Not through his own fault would he have spoken three times. Mr. Coult may insist I was not mislead, but I respectfully insist I was. It is nothing to me.

The Court: I am inclined to let you open again. This is an opening; this is the same as the others. You are not to sum up.

Mr. Matthews: Of course, I can sum up the whole case when I open, if I wish. 20

The Court: I have nothing to say about what you do at this time.

I am probably responsible for putting the defendant, as it stands now, in an unfortunate situation, too, however, I am going to permit you to open again, Mr. Matthews.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Mr. Matthews: If Mr. Coult replies I will have the right to close the case.

The Court: Yes, that is the law and if he does not reply you cannot say anything else.

Mr. Matthews: I will guarantee I will say enough this time so if he does not reply I will not take any more of your time. I will protect this child's interests. 40

*Discussion.*

Will your Honor get us in right with the jury; they may not know why I am getting up again.

(The jury returns into court.)

10 The Court: Gentlemen of the jury, the delay which has taken place is entirely due to the Court, not to counsel, I wish to explain that, because of a misunderstanding in a re-reading of the record, which we had to have among ourselves, so you can blame me for the brief vacation you have had in the jury room.

(Mr. Matthews proceeds to open to the jury.)

Mr. Coult sums up for the defendant.

Mr. Matthews sums up for the plaintiff.

20 Mr. Matthews, during the course of summing up to the jury said, "This happened to be about the time of day when they were probably taking home a lot of workmen. There was no reason for this car to go at that speed unless it was the last trip for the motorman and he was in a hurry to get to the end of his trip. Perhaps if he did not get to the end of this trip in the proper time it would be marked against him."

30 "We have to pay for the paving of their streets now between their tracks and the Public Service has persuaded the legislature to saddle us, the people, with the paving obligation."

"I would not mention that except when Mr. Coult summed up to you he said that if the Public Service was responsible for letting children play on the streets then you might be serious in blaming them."

40 "The Public Service for a nominal consideration gets from the City of Newark the right to run their cars through the streets of our city \* \* \*."

*Charge to Jury.*

Mr. Coult: I respectfully move for a mistrial on the ground that when your Honor was off the bench in the other room that Mr. Matthews in his summation to the jury told the jury that the trolley company, for a nominal consideration gets from the City of Newark a right to run their cars through the streets of our city, and also that the Public Service has persuaded the legislature to saddle us, the people, with the paving obligation. 10

Mr. Matthews: Yes, that is in reply to Mr. Coult stating in his summation that if the Public Service was responsible in allowing the children to play on the street then we might be serious in blaming them.

The Court: I do not think that is called for. 20

**CHARGE TO JURY.**

The Court charges the jury as follows:

MOUNTAIN, J.:

The case to which you have listened is an action brought by the plaintiffs against the defendant Public Service Railway Company. One of the plaintiffs is an infant, the other plaintiff is the infant's father. The father cannot recover unless the infant has made out a case. 30

This matter is not to be decided by you on any theory other than the theory laid down in the complaint and with due regard to the oaths that you took. The theory of the plaintiffs in this case is that the defendant was negligent in the operation and control of a car which it was running by its agents and employees in a northerly direction on Norfolk street, in the City 40

*Charge to Jury.*

of Newark, the afternoon of March 24, 1923. The negligence complained of is that no signal or warning was given of the approach of the car; the speed was high and excessive; that it was operated and controlled without regard to the presence of the infant plaintiff on that street; that it was not under sufficient control or was not properly managed and that the employees did nothing that they might have done to have avoided the accident. Those are some of the reasons given in the complaint alleging the character of the negligence. Witnesses have been called on behalf of the plaintiffs to substantiate these allegations. It is probable that when you retire to the jury room and consider the witnesses called, that you will be particularly interested on behalf of the plaintiffs' witnesses in the testimony of Benedict Caironi and the testimony of Amelia Mulvaney.

The Court is going to briefly touch upon the testimony of these two witnesses, but in doing so I must warn you that you must take your own recollection of what they said and not my statement as to my memory of their testimony; you are to decide all questions of fact. Benedict Caironi said that he was an eyewitness to the accident. He said that a truck was coming south on Norfolk street and that truck was mentioned by a witness of the defendant. He said he noticed a car going north; that is the car which struck the girl. He testified that the motorman of that car, the car which struck this little girl, rang his gong once or twice; that in his opinion the car was going at a speed of twenty to twenty-five miles an hour and that after striking her it went as far as Shonstein's store. His point of observation was on the west

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*Charge to Jury.*

side of Norfolk street. In connection with the truck or van, you will recall that he testified that the van was near the cross-walk and approaching him, as I understood his testimony, and the child left the sidewalk and went out of sight behind the van and the next time he saw her she was struck by the car. In other words, as I understood his testimony, as he watched the motions of the vehicles and this girl, he saw the approaching truck and saw her leave the sidewalk, disappear behind the truck, reappear again to be struck by the northbound car, and he heard signal bells and he saw her struck, he said. 10

What did Mrs. Mulvaney say? She said she was in an open window; it was a clear day, and as I recall her testimony she testified that this little girl left the sidewalk at the south crossing. Hartford street, you will see from the map, runs into Norfolk street from the west; it does not run into it, but it intersects the westerly side of Norfolk street and the southerly crossing is indicated on that map as the projection of the southerly sidewalk of Hartford street across Norfolk street to its easterly side. She testified that the car was going, to quote her, "Like full speed," and that after it struck this little girl it went up as far as Shonstein's store, but that the accident happened at the south cross-walk. She had no recollection of any moving van or truck. She said the child was alone and that the child was not playing ball; when the child stepped off the curb she said she thought the car was two houses away. There was testimony given by her, which as far as I was concerned, was not understandable and so I asked her how far the child was from the car when the child reached the first rail. As I recol- 20 30 40

*Charge to Jury.*

lect her testimony the child was eight feet seven inches from the car when she crossed the first rail.

Let us now turn to the defendant's case. I am not discussing the damages or injuries at all, I am simply discussing the facts as to the  
10 accident. One of the witnesses for the defendant testified that at one time prior to the accident he saw the little girl playing with a ball on the west side of Norfolk street and the next he saw her she was running diagonally across chasing the ball and that in his opinion she was twenty-five feet from the point of accident when she left the sidewalk. He qualified that a little later in his examination, as I recall it, by stating he wouldn't say she was on the sidewalk and  
20 said that the car was going at a moderate rate of speed and that the motorman was ringing his bell all the time. That witness' name was Gerhard C. Brunz.

Etta Westry, another witness called in behalf of the defendant, associated the child's activities with a ball. She said she was running with a ball some time prior to the accident and she saw her run across the street. She also stated that the child at one time was playing  
30 in the center of the tracks—I don't know just when that was—and she also stated that this little child, as I understood her, had a brother who was with her and he started to cross the street and the child followed. I think she was the only one who brought in the brother, if there was a brother.

The motorman on the car that was approaching in the opposite direction testified he stopped just before he reached the southerly cross-walk.  
40 In that position he was facing south looking

*Charge to Jury.*

towards the approaching car from the south as well as the van, which was probably receding in the distance and the child, which was somewhere I suppose on the cross-walk, or between the cross-walks; it depending on when he saw her. Now, what does he have to say? He told us that this truck was a little way ahead of him and that the little girl crossed diagonally behind the truck; that the trolley going north was on the south side of the cross-walk, it was just facing the crossing and she ran into the corner post of the blind side of the car. He said he thought the car was going ten to twelve miles per hour when it hit the girl and that it stopped in between the cross-walks and that there was a difference of five feet from the car to where the accident happened when she ran out.

John J. Dixon, who was in the southbound car, testified the northbound car stopped fifteen feet north of the southerly cross-walk after the accident. Another witness gave it as his opinion that the stop which was made by the northbound car was made between five and ten feet north of the south crossing. The car was going at six to eight miles per hour.

August Lefflor, who testified, said that twenty-five feet from the south cross-walk the gong had been rung. The motorman himself took the stand, he said he saw this big truck coming along and that the girl darted off the sidewalk diagonally east and that he thought he was going about eight miles per hour. He said he saw this girl through the lattice-work of the truck and that the car was twenty feet from the cross-walk when she left the curb; that he then applied his brakes and reversed the car and the car

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*Charge to Jury.*

went five feet over the cross-walk and she came into collision with the car near the step on the blind side of the car; with his left side of the car and that she was running.

10 As to the law, bearing in mind that the plaintiffs allege negligence. Of what might negligence have consisted? It was the unquestioned right of the child to use that street that day; it was the unquestioned right of the defendant company to operate its cars over that street that day. We find then, that they both had rights on the street. As in most cases these rights, however, carry with them reciprocal duties, which I will refer to in a moment.

20 The burden of proof is upon the plaintiffs to prove by the greater weight of the evidence that the defendant in the operation and control of this car on that day and at that time, under all the circumstances, was negligent.

30 The reciprocal duty which I have referred to and the obligation of the driver of the car, in the exercise of the right which he had to run it, was to use such care as a reasonably careful and prudent man would have used under similar conditions. Ordinarily, you know contributory negligence bars a person from recovering. If an adult of responsible age is so guilty as to contribute to an accident, there can be no recovery, because his contributory negligence precludes that, but how is it with a child? A child passes through a stage of transition from adolescence to youth and during that period the degree of knowledge which a child has as a youngster increases gradually by virtue of the natural education of the child and the experiences which the child has. As a matter of law it has been  
40 held in this State that there is a presumption

*Charge to Jury.*

that a child under seven years of age cannot be guilty of contributory negligence, but this presumption may be rebutted by proof to the contrary. The reason for this presumption, as you can understand, is that there is some point in this transition where a child is supposed, as a matter of fact, to have reached such age that she can exercise judgment as to the degree of care and caution necessary to take care of herself. To exaggerate, a baby of a month and a half would not have such judgment; a boy of fifteen might have it. Somewhere in the progress of that young life there is a point of transition reached where, as a matter of fact, a child crosses from adolescence to that place which we in law call *sui juris*, that is, where her capacity for understanding is sufficient, as a matter of fact, for her to use reasonable care in taking care of herself and to foresee and avoid danger. When a girl reaches that age, when she passes that point and becomes as we say *sui juris*, the degree of care and caution to be exercised by her is as much as would be ordinarily expected from a child of her age and experience. If this child, as a matter of fact, is found by you not to have reached that age of discretion that I have indicated, then no act of hers, even if it was contributory negligence, can be held against her. That is obvious, because it would not be fair to say that a child who did not have ability to reason to take care of herself, who had not reached that point which I have alluded to, could be charged with negligence when she did not have sense enough to protect herself, or the capacity to measure the responsibilities of her movements. So, if you find this youngster was not old enough and had not, as a matter of

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*Charge to Jury.*

fact, become *sui juris*, then, whether she was guilty of contributory negligence or not makes no difference.

10 The common law duty, which I have indicated, that was imposed upon the motorman to exercise reasonable care, and the law as I have indicated as to whether or not you would find, as a matter of fact, that this little girl was or was not negligent, may be considered with respect also to certain other conditions and what, in this State, is known as the traffic act; an act passed by the legislature presumably as a guide for those who use the highways. I will say right here, so that there may be no misunderstanding, that the non-observance of any provision of the traffic act is not in itself negligent, but it is a factor to be taken into consideration. For example among other things, this act prescribes that one who operates a motor vehicle must drive on the right-hand side of the improved portion of the highway. Suppose a driver out in the country comes to a ditch which has been dug on the right-hand side of the road and the left-hand side was clear and there is no one around. Can it be said that it is an act of negligence for him to cross over to the left-hand side and go around the ditch and come back to the right-hand side of the road again? Yet, it would be a breach of a provision of the Traffic Act: so, I say to you that the non-observance of a provision of this act is not negligence of itself, but such a non-observance may be taken, if you find there was such non-observance, as a factor in the consideration of the case. What particular sections have anything to do with this action? There are only three that occur to me. One section is that it is provided that where

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*Charge to Jury.*

the houses are on the average of one hundred feet apart pedestrians shall have the right of way over vehicles at any street crossing. Of course, it is a question of fact whether the child was on the crossing; if she was not on the crossing you would probably find that section would not apply. Another section which occurs to me is that it is the duty of the motorman and drivers of cars to give ample notice to the drivers of vehicles and pedestrians of their approach, and also to afford all reasonable opportunity for them to avoid collision or accidents, and, provides further that nothing in this section shall relieve the motorman or street railway from any duty or care now due or owing to the users or occupants of any highway. Another section provides: "No street car shall be operated at a greater speed than fifteen miles per hour in places where the houses are on an average of less than one hundred feet apart, provided the tracks on which said street car is operated are laid upon any public street."

There was testimony in this case, I think, placing the speed of this car anywhere from six to twenty-five miles per hour—I do not know at what precise time those speeds were fixed, that is a question of fact for you to determine, as to the speed of the car—but you have to consider, or you may consider among other things as to whether this car was proceeding fast; as to the character of the injury and the place where the car stopped. If this child was struck on the southerly cross-walk and was carried to a place opposite Shonstein's store, wherever that is, and that which is for you to determine, is it probable that she would be alive today? The position of the child at the place where she was

*Charge to Jury.*

found and the character of her injuries have to do, perhaps, with indicating the speed at which the car was going, as to whether it exceeded the rate the Traffic Act imposed. You may find, as has been said, by calculation, that a car going twelve miles per hour is going almost seventeen and two-thirds feet per second, and a car going  
10 twenty-five miles per hour is going almost thirty-six and two-thirds feet a second, and perhaps you can verify that by mathematical calculations.

Assuming that you find that the plaintiffs' are entitled to recover, then I charge you that the child will be able to recover for the pain and suffering which she has sustained and the effect of this injury upon her health, as to degree and probable duration. Shortly after the accident  
20 the case was treated by transfusion of blood as well as the grafting of skin. There was testimony given on behalf of the plaintiff, by the doctor who attended the case, that the most severe injury, as I understood it, was on the inner side of the left thigh; I will not say the most severe injury, but that is about the area of the injury, from the junction of the thigh almost to the knee, and she was bleeding from torn  
30 tissues and bleeding at the vagina; that she was for two months in an extension and that subsequently, or at that time, the wound became infected. The doctor said that the hymen was lacerated; the upper femur was fractured and there was said there was a laceration of the Achilles' tendon and that a bone in the foot, which has been described in detail called the astragalus; was fractured and testimony has been given as to the point of recovery. Dr. Mamlet said there was no shortening of this  
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*Exceptions to Charge.*

leg, but it was less in circumference; that there was a good deal of callus at the tendon Achilles' and very marked disfigurement. In some respects the testimony of Dr. Furman differed from that of Dr. Mamlet. Among other things he testified in his opinion the hymen was normal; that there was no running sore, which I think was referred to in some point of the testimony at the Achilles' tendon, but there was this callus there. 10

As to the father, he cannot recover unless the child can and the child's pain and suffering, of course, is not an element of his damages. At the time he gave his skin to be grafted he had a position, I understood, which paid him \$9.50 a day on piecework with an electrical company. He testified, as a result of having to give a quantity of skin for this grafting that he was laid up for three weeks. If you find for the plaintiffs that would be one of the elements of the damages you could consider in his behalf. Further, he would be entitled to recover, if he is entitled to recover anything, in your judgment any reasonable amount which he has expended in the care or alleviation of the suffering of his daughter for the injury complained of. My recollection is that the only testimony as to that element of the damages is that he paid \$18 to Dr. Pisano for medical expenses. 20 30

I shall deny all the plaintiffs' requests to charge.

(The jury retires.)

Mr. Coult: I respectfully pray an exception to the Court's refusal to allow me a mis-trial. I did not take it at the time.

The Court: You may have an exception. 40

*Exceptions to Charge.*

10 Mr. Coult: I respectfully pray an exception to that portion of the charge in which the Court states to the jury that they might find liability, after having charged the jury safely that in order that the plaintiff shall recover the jury must find that there was negligence on the part of the defendant, without charging the jury that negligence must be the proximate cause of the accident, and I wish to put on the record now the request that the Court charge the rule as to proximate cause.

Exception noted as ground of appeal.

20 Mr. Coult: I respectfully pray an exception to what the Court had to say with regard to the contributory negligence of the infant plaintiff, on the ground that while the Court undertook to charge contributory negligence the Court had not stated to the jury what the effect would be if the jury should find the child was negligent, i. e., that judgment should be for the defendant.

Exception noted as ground of appeal.

30 Mr. O'Brien: I respectfully pray an exception to that part of your Honor's charge wherein you said that Caironi testified that the van was nearer the cross-walk and approaching him and that the child went on the cross-walk behind the van. That is merely according to my recollection.

Exception noted as ground of appeal.

40 Mr. O'Brien: I also pray an exception to that part of your Honor's charge where your Honor said that Mrs. Mulvaney said that when the child stepped off the curb the car was two houses away and that when the Court asked her, "How far the child was from the car when she reached

*Exceptions to Charge.*

the first rail, she said the child was eight feet and some inches from the car."

Exception noted as ground of appeal.

Mr. O'Brien: I respectfully pray an exception to that part of your Honor's charge wherein you said, "Lefflor testified that the gong was rung twenty-five feet from the cross-walk"; on the ground that the Court did not tell the jury that Lefflor believed that because it was usually done. 10

Exception noted as ground of appeal.

Mr. O'Brien: I respectfully pray an exception to that part of your Honor's charge wherein you said that both had the right to be on the street and those rights carried reciprocal duties, on the ground the child had no reciprocal duties, being only five years and ten months of age, and the presumption was she could not be guilty of contributory negligence. 20

Exception noted as ground of appeal.

The Court: You read the opinion of the upper court that reversed me before, in regard to that exception.

Mr. O'Brien: I respectfully pray an exception to that part of your Honor's charge where your Honor said, "There is a point at which she becomes *sui juris* and we must expect reasonable care under the circumstances," on the ground there is no testimony in this case adduced by the plaintiff, nor was there any testimony that came out during the trial tending to rebut this presumption and, therefore, the presumption holds that the child cannot be guilty of contributory negligence. 30

Exception noted as ground of appeal.

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*Exceptions to Charge.*

Mr. O'Brien: I respectfully pray an exception to that part of your Honor's charge where your Honor said that non-observance of the Traffic Act is not itself negligence, on the ground the jury can find it is of itself negligence even though it is not negligence in law.

10 Exception noted as ground of appeal.

Mr. O'Brien: I respectfully pray an exception to you Honor's refusal to charge the plaintiffs' requests as requested.

Exception noted as ground of appeal.

Mr. O'Brien: I respectfully pray an exception to your Honor not instructing the jury in reference to the father's damages for loss of services.

20 Exception noted as ground of appeal.

[The jury sends the following communication to the Court, "Your Honor: For our information do we understand, we, the jury, shall fix or determine amount of compensation to be allowed to daughter, also father? (Signed) Jury."]

30 [The Court sends the following reply to the question by the jury, "In answering your question let me supplement my charge by saying that if you find this little girl was *sui juris*, as I defined it, and was in fact guilty of contributory negligence, then neither the father nor daughter can recover and your verdict should be for the defendant.

If you find in accordance with my charge that the plaintiffs' are entitled to recover, then you should bring in separate verdicts for both father and daughter, awarding them

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*Plaintiffs' Requests to Charge.*

such amounts as are recoverable under the charge.

(Signed) Worrall F. Mountain, Judge."]

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

Exception noted as ground of appeal.

Defendant's counsel prays an exception to this ruling of the court. 10

Exception noted as ground of appeal.

## PLAINTIFFS' REQUESTS TO CHARGE.

1. The Court charges the jury that the law presumes that a child not over six years of age could not be guilty of contributory negligence and unless this presumption is rebutted by proof to the contrary, the child cannot be said to have contributed to the accident. 20

Denied.

2. The Court charges the jury that if the defendant corporation had not rebutted presumption that the plaintiff, Frances Altieri, could not have been guilty of contributory negligence, then I charge you that if the defendant trolley company was negligent in a degree or manner which proximately caused the accident, the child is entitled to recover for the injury she has sustained. 30

Denied.

3. The Court charges the jury that in determining whether or not the defendant trolley company was guilty of negligence, it is proper that you consider whether or not the servant operating the trolley car violated the provisions of the Traffic Act of the State of New Jersey.

Denied. 40

*Plaintiffs' Requests to Charge.*

4. The Court charges the jury that Section 8, Subdivision 1 of the Traffic Act of this State provides as follows with reference to trolley cars:

Trolley cars—On all public roads, streets, highways and turnpikes, the following regulations shall be in force:

10 (1) It shall be the duty of the motorman and drivers of cars to give ample notice to the drivers of vehicles and pedestrians of their approach, and also to afford all reasonable opportunity for them to avoid collision or accident; provided, nothing in this section shall relieve the motorman or street railway from any duty or care now due or owing to the users or occupants of any highway."

20 and section 11 of the Traffic Act, Subdivision 27, provides as follows:

"No street car shall be operated at a greater speed than fifteen miles per hour in places where the houses are on an average of less than one hundred feet apart, provided the tracks on which said street car is operated are laid upon any public street."

Denied.

30 5. The Court charges the jury that the plaintiff, Frances Altieri, is entitled to recover not only for the permanent injuries she may have sustained, but also for the pain and suffering which she had to endure as a result of the accident.

Denied.

*Exhibit D. 1 for Identification.*

**Exhibit D. 1 for Identification.**

R 321—25M—12-22.

In re Frances Altieri Case No. 123428

M Benedict Cairolì

Residence 159 Norfolk St

Where Employed Pyrene Mfg. Co 10

Occupation Enameller

Apparent Age 16 Years

Nationality U. S. A

Where Born.....

Husband's

If married Name.....

Where

Employed .....

Parent or

If a minor Guardian's Name Vincent Cairolì 20

Where

Employed 100 New St

Date 3/28/23 Time 5:40 P. M.

States to C Spengler Jr at his home  
as follows: On 3/24/23 about 2:14 P. M I was  
walking in a northerly direction along the west  
side of Norfolk St toward my home #159  
Norfolk St which is situated on the west side of  
Norfolk St, the 2nd door south of Hartford St.  
When I got in front of my home I noticed a little  
girl which came running east on the north side  
of Hartford approach the curb at the north  
crossing of Hartford and Norfolk Sts. As she  
approached this point there was a Clifton car  
which was north bound on Norfolk St. just pass-  
ing my house, and going at a fair rate of speed.  
The motorman was sounding his gong at the  
time. Just as the girl reached the curb at north  
west corner of Hartford and Norfolk St she  
slowed up, as there was an auto truck coming  
south in the south bound roadway and just cross-

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40

*Exhibit D. 1 for Identification.*

ing the north crossing of Hartford St. Just as soon as the

Witness .....

Signed Benedict Cairoli

## 2

10 rear part of truck (which was running at slow speed) cleared the north crossing of Hartford St the little girl ran from rear of truck in an easterly direction on north crossing, across Norfolk St When she stepped off the curb, the north bound trolley car was just starting to cross the south crossing of Hartford, and was just about to pass the front end of the truck (which was a closed body furniture truck). After the girl got in behind the truck I could not see her any more, as the truck hid my view, and just

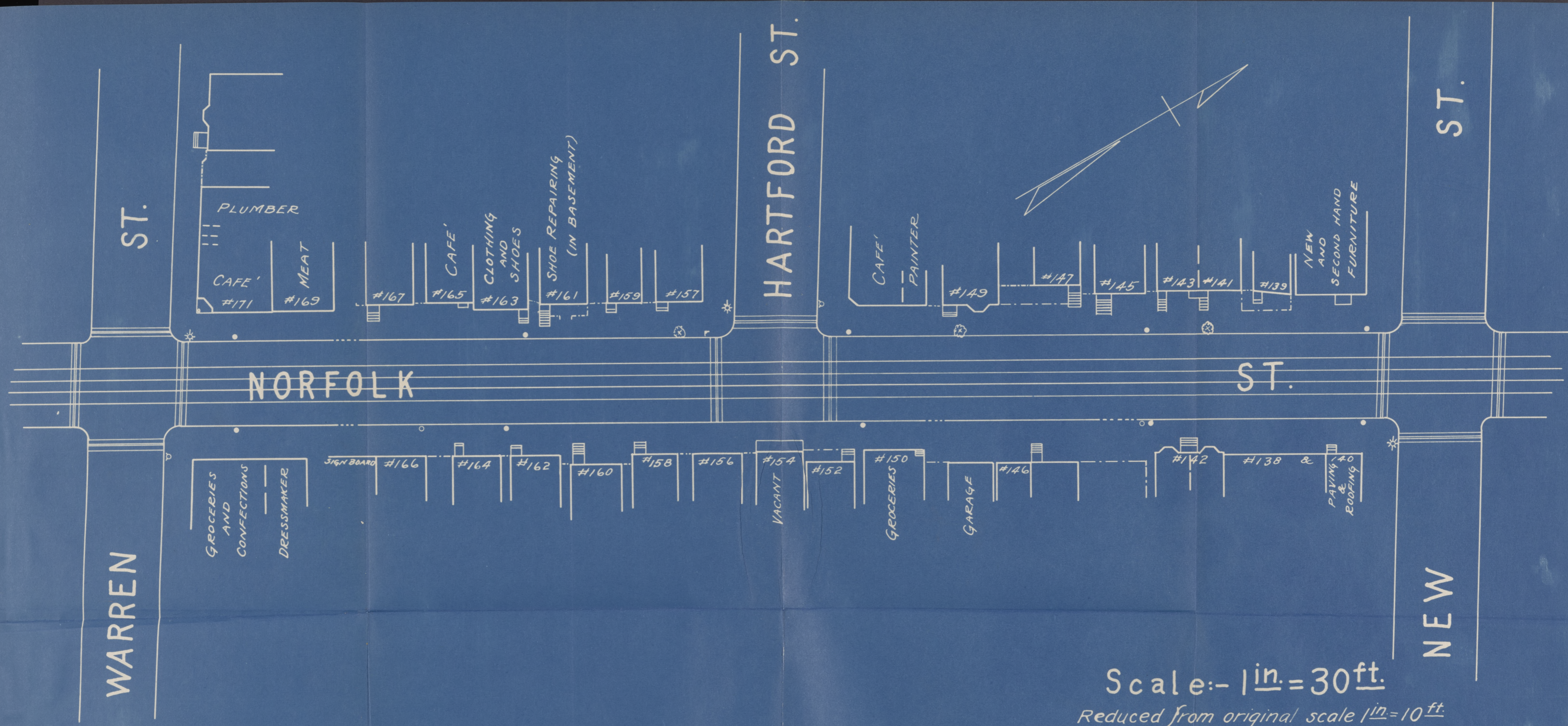
20 after truck was passing my house I saw this girl laying on ground at left front end of the car and was being dragged for at 2 or 3 yds. and then car stopped. Car came to a stopped with the front end just over the north crossing of Hartford St. The girl was laying under the left front corner of the car on her face heading north, on the west rail of

Signed Benedict Cairole

30 north bound track between the life guard and truck of car. I did not go away from my home and do not know how bad she was hurt. Car backed up a few feet to get her out, and some man picked her up and put her in an auto and took her away to hospital. I do not know how close car was to girl when she was about to pass on west rail of north bound track, as this auto truck obstructed my view. I did not notice any south bound car before accident, but there was one standing at north crossing of Hartford St

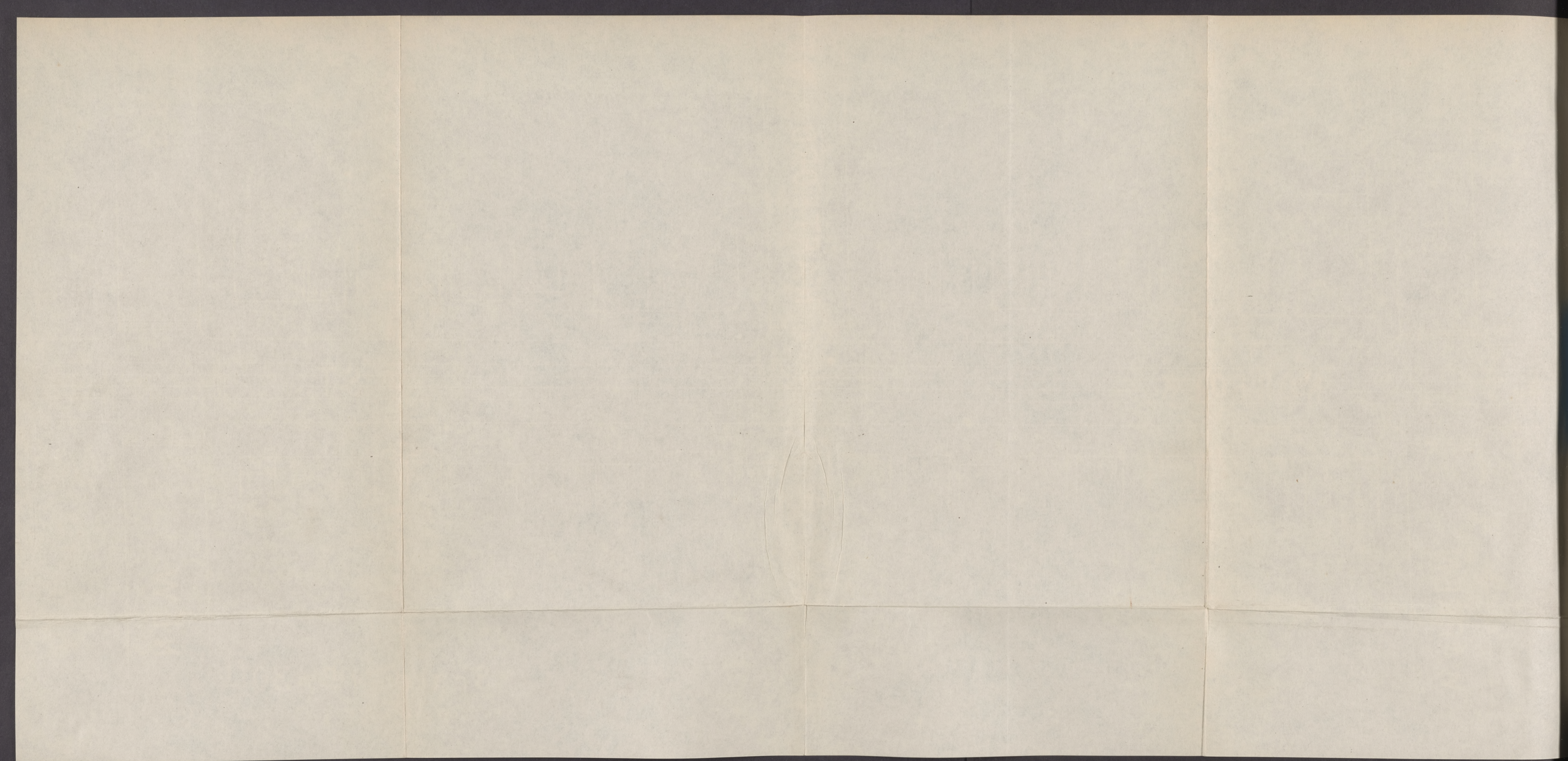
40 after girl was struck

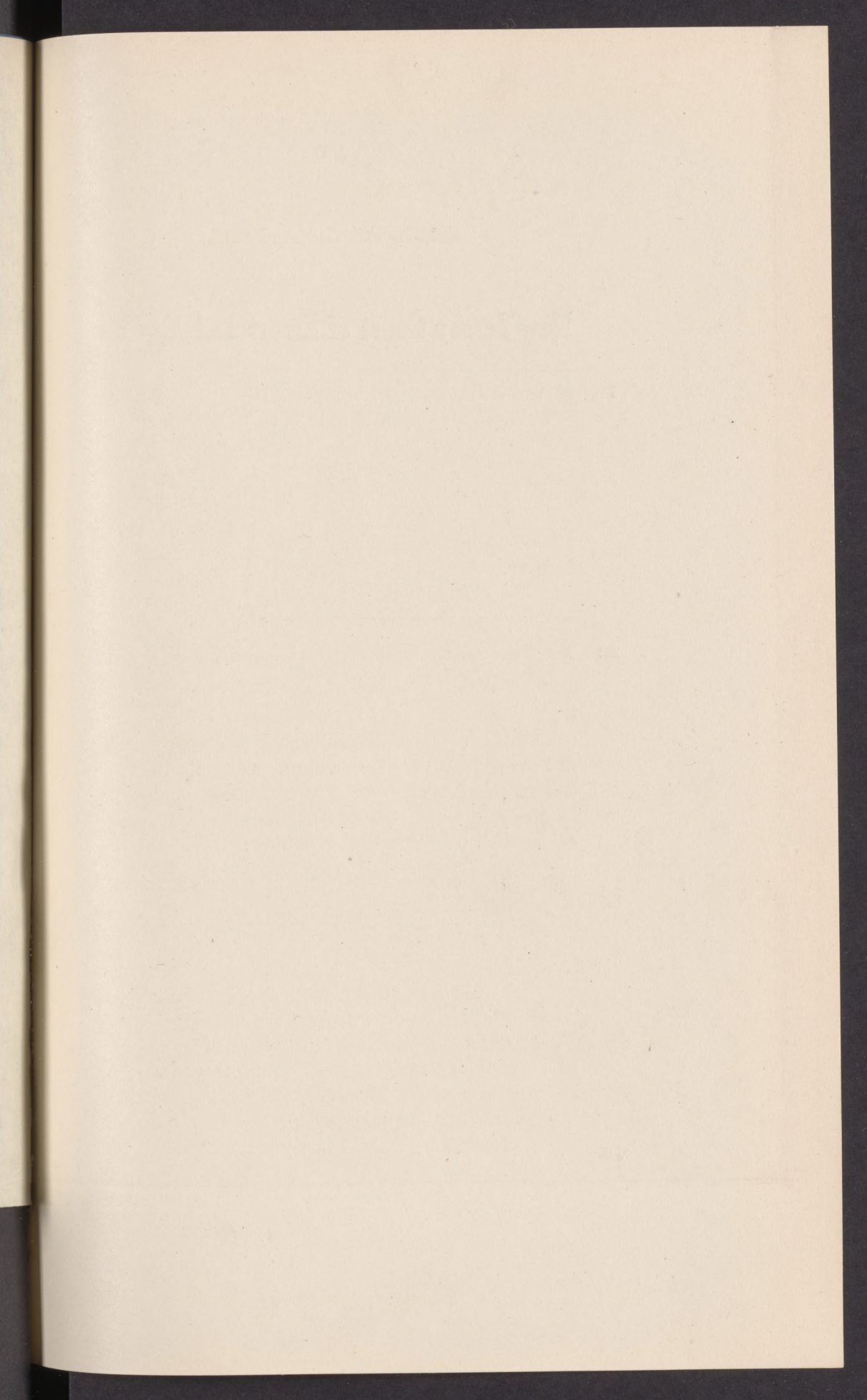
Signed Benedict Cairoli



Scale:- 1 in. = 30 ft.

Reduced from original scale 1 in. = 10 ft.





*Grounds of Appeal.***GROUND OF APPEAL.**

Filed June 17, 1926.

**New Jersey Court of Errors and Appeals**

10	FRANCES ALTIERI, by next friend Louis Altieri, and LOUIS AL- TIERI, <p style="text-align: center;"><i>Plaintiffs-Appellees,</i></p> <p style="text-align: center;"><i>vs.</i></p> PUBLIC SERVICE RAILWAY COM- PANY, <p style="text-align: center;"><i>Defendant-Appellant.</i></p>	} <i>Action at Law.</i> } <i>On Appeal from the New Jersey Supreme Court.</i>
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20 To: James W. Donohue, Esq., Attorney of Plaintiffs-Appellees.

Sir:

TAKE NOTICE that the following are the grounds of appeal which the defendant-appellant will urge why the judgment heretofore rendered against it in the above-entitled cause should be reversed, set aside, and for nothing holden:

30 1. Because the Court, at the close of the plaintiffs' case, although requested so to do by the attorney of the defendant, refused to non-suit the plaintiffs;

40 2. Because the Court, despite the objection of the attorney of the defendant, refused to admit in evidence, when offered by the attorney of the defendant, a statement in writing signed by Benedict Caironi, a witness called by the plaintiffs, or the first page of such statement, which signed statement, as

*Grounds of Appeal.*

well as the first page thereof, related to the subject-matter of the suit, and contained averments concerning important matters which were in direct contradiction of testimony given by the said witness at the trial of the cause;

3. Because the Court, despite the objection of the attorney of the defendant, permitted the attorney of the plaintiffs, at the close of the case, to make three separate opening addresses to the jury; 10

4. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows:

“The burden of proof is upon the plaintiffs to prove by the greater weight of the evidence that the defendant in the operation and control of this car on that day and at that time, under all the circumstances, was negligent.” 20

5. Because the Court, despite the objection of the attorney of the defendant, refused to charge the jury, when requested by the attorney of the defendant, that in order for the plaintiffs to recover the jury must find that there was negligence on the part of the defendant which was the proximate cause of the injury; 30

6. Because the Court, although requested so to do by the attorney of the defendant, refused to declare a mistrial because of improper statements made to the jury by the attorney of the plaintiffs;

*Grounds of Appeal.*

7. Because the Court, despite the objection of the attorney of the defendant, charged the jury as follows:

10 "Ordinarily, you know contributory negligence bars a person from recovering. If an adult of responsible age is so guilty as to contribute to an accident, there can be no recovery, because his contributory negligence precludes that, but how is it with a child? A child passes through a stage of transition from adolescence to youth and during that period the degree of knowledge which a child has as a youngster increases gradually by virtue of the natural education of the child and the experiences which the child has. As a matter of law it has been held in this State that there is a presumption that a child under seven years of age cannot be guilty of contributory negligence, but this presumption may be rebutted by proof to the contrary. The reason for this presumption, as you can understand, is that there is some point in this transition where a child is supposed, as a matter of fact, to have reached such age that she can exercise judgment as to the degree of care and caution necessary to take care of herself. To exaggerate, a baby of a month and a half would not have such judgment; a boy of fifteen might have it. Somewhere in the progress of that young life there is a point of transition reached where, as a matter of fact, a child crosses from adolescence to that place which we in law call *sui juris*, that is, where her capacity for understanding is sufficient, as a matter

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*Grounds of Appeal.*

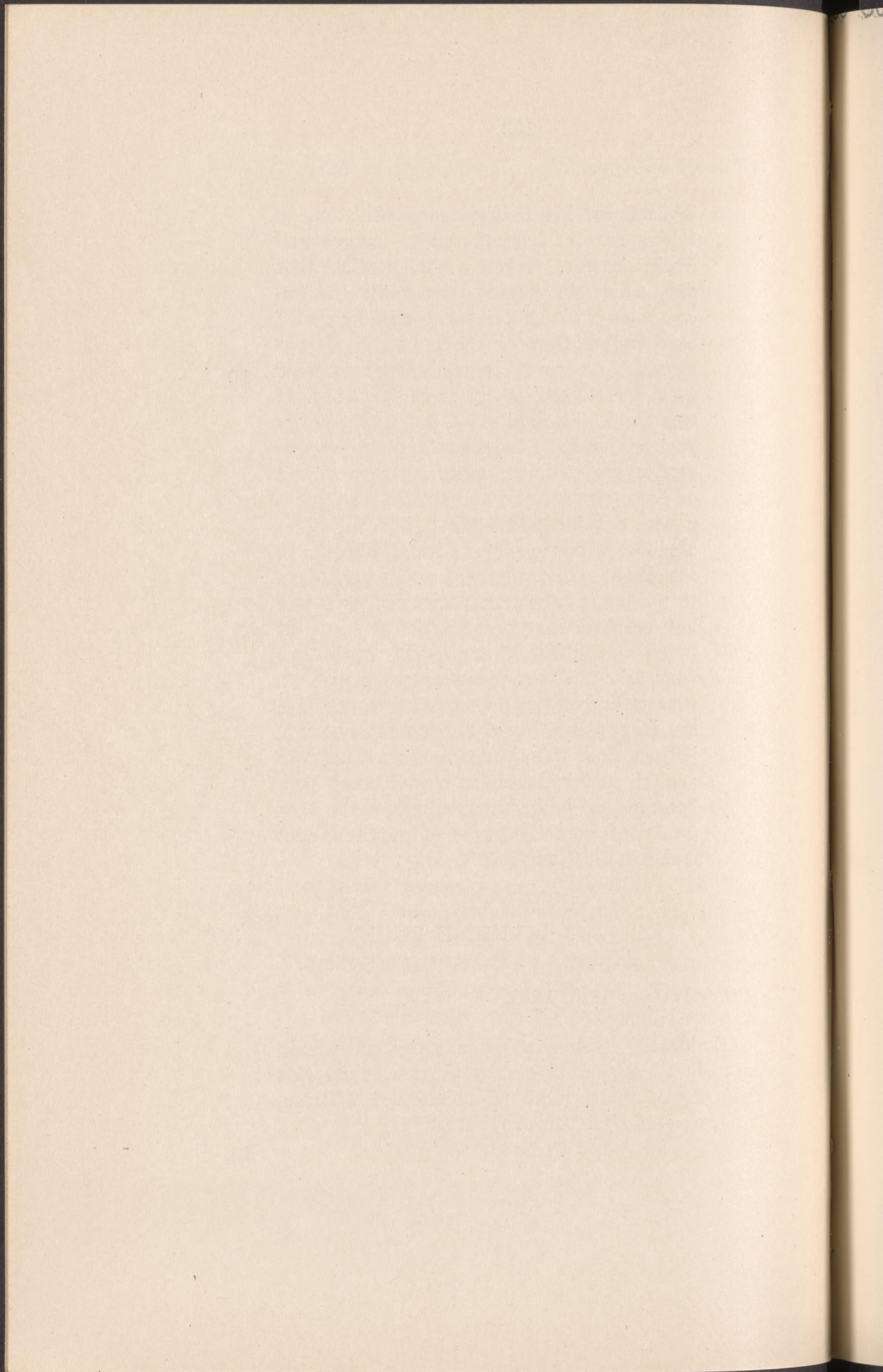
of fact, for her to use reasonable care in taking care of herself and to foresee and avoid danger. When a girl reaches that age, when she passes that point and becomes as we say *sui juris*, the degree of care and caution to be exercised by her is as much as would be ordinarily expected from a child of her age and experience. If this child, as a matter of fact, is found by you not to have reached that age of discretion that I have indicated, then no act of hers, even if it was contributory negligence, can be held against her. That is obvious, because it would not be fair to say that a child who did not have ability to reason to take care of herself, who had not reached that point which I have alluded to, could be charged with negligence when she did not have sense enough to protect herself, or the capacity to measure the responsibilities of her movements. So, if you find this youngster was not old enough and had not, as a matter of fact, become *sui juris*, then, whether she was guilty of contributory negligence or not makes no difference."

Yours truly,

JOSEPH COULT,  
Attorney of Defendant-Appellant.

Dated: June 11th, 1926.

(Endorsed) "Service of a copy of within grounds of appeal is hereby acknowledged this 15th day of June, 1926. Donohue and O'Brien, Attorneys of Plaintiffs-Appellees."



## New Jersey Court of Errors and Appeals

FRANCES ALTIERI, an infant, by  
Louis Altieri, her next friend,  
and LOUIS ALTIERI,

*Plaintiffs-Appellees,*

*vs.*

PUBLIC SERVICE RAILWAY COM-  
PANY,

*Defendant-Appellant.*

*Action at  
Law.*

*On Appeal.*

### REPLY BRIEF OF DEFENDANT- APPELLANT.

Because certain matters contained in the brief of plaintiff-appellee appeared to require comment, and, in some cases, refutation, it was the earnest desire of the defendant-appellant that the appeal should be argued orally. Engagements of plaintiff's counsel, however, being urged as a reason for submitting the case on briefs, the defendant reluctantly consented to do so, but with the express understanding that a reply brief might be submitted, directed to those matters in the plaintiff's brief which required notice.

On page 7 of the brief the plaintiff quotes from the opinion of Chief Justice Gummere in the case of *State v. Mohr*, 99 N. J. Law 124; 122 Atlantic 837. An important portion of the opinion is omitted without indication to the reader that it had been deleted.

After that sentence which is concluded on page 7, line 14, of the brief the opinion, as reported, reads as follows:

"The contents of the paper were, to some extent, contradictory of his testimony while

on the witness stand. The paper was material and relevant, therefore, and there was no suggestion on the part of counsel, when the objection to its admission was interposed, that his client was not, in fact, the author of it. In this situation, it is difficult to understand upon what theory this paper should have been excluded, and the brief of counsel is not illuminating upon that point" etc.

In the present case the witness Caironi admitted the making of the statement (p. 22, l. 20):

"Q You made a statement in this case? A I did. Q I show you what purports to be a statement in writing of Benedict Caironi dated March 28, 1923, in three pages and I call your attention to the signature at the foot of the first page and I ask you if that is your signature? A It is. Q I show you page two of the same statement and I ask you if that is your signature? A Yes, sir. Q I show you page three and I ask you if that is your signature on there? A Yes, sir."

When the omitted portion of the above opinion is included with that portion quoted in the plaintiff's brief the whole constitutes an excellent authority in favor of the defendant, if it be borne in mind that Caironi did not deny his signature, admitted that the statement was read to him, and did not even deny that the contents of the paper were known to him when he signed it. He said that he did not *recall* that certain portions of the paper were read to him though he admitted that the whole paper was read before signature (p. 23, l. 35; p. 24, l. 10).

He denied making certain oral statements to the investigator who wrote down the statement which he signed, but such denials have no affect on the admissibility of the writing, but affect its weight only. Further, there were contradictory passages in the statement concerning which the

witness offered no explanation whatever. For instance: his statement that the trolley car had stopped with the front end just over the north crossing of Hartford street, contradicting his testimony that it went two or three houses beyond the second crosswalk; also his statement that the little girl ran from behind the truck as soon as it cleared the north crosswalk, contradicting his testimony that she crossed on the north crosswalk when the van was at the south crosswalk.

Neither of these contradictions was even mentioned by the witness, and the presumption that he knew they were contained in the writing when he signed it, is unimpaired by any explanation whatever.

Had the court permitted the defendant to put the written statement in evidence as a piece of proof regularly in the course of the defense, plaintiff could have produced such explanation or refutation of the matters contained in the statement as might be allowable in rebuttal of the defendant's case, and the defendant might then, if necessary, have called the investigator who took the statement in further contradiction of such testimony.

On page 6 of the plaintiff's brief there is a quotation from the case of *Daum v. North Jersey Street Railway Co.*, 69 N. J. L. 1, 54 Atlantic 221, in which Chief Justice Gummere justified the exclusion of a written statement signed by witness with his mark, when it appeared that the witness could neither read nor write and that he had no knowledge of what the statement would contain. This is sought to be made authority in favor of the plaintiff in the present case by the assertion in the brief that Caironi, in the present case, had denied making the statement which he signed.

This assertion is not warranted by the proof, as has already been pointed out.

The New Hampshire case of *Dunklee v. Prior* (plaintiff's brief, page 7), was one in which it was held that the trial court was justified in determining as a matter of fact that a certain witness had not made a signed statement. No such judicial action was attempted by the trial court in the present case, and, if it had been, such action would have been error, in view of the witness' admission that he had made the statement and that it had been read to him before signature.

On page 9 of the brief it is argued that the exclusion of the statement, if error, was harmless error, and it is there asserted that all of the discrepancies alleged to exist between the witness' testimony and his prior statements were brought out by counsel in cross examination. This is not so. Though the witness saw the whole papers only two discrepancies were read to him; those concerning speed, and the distance which the child was dragged by the car. Other contradictory matters, the importance of which has already been indicated in this brief, were not brought home to the jury at all, though the trial court had been apprised by them by examination of the writing itself.

At the bottom of page 11 of the brief, and at the top of page 12, this court is told that the motorman admitted that he had seen the child start to cross the street when the trolley car was 200 feet away. This is not true.

The briefer undoubtedly refers to testimony by the motorman at a previous trial when, being confused by counsel for the plaintiff, he gave a distance of 200 feet when he meant to say 15

feet. This error was afterwards corrected in his testimony at that trial.

At the present trial the motorman was asked whether he had not at the former trial testified that the distance mentioned was 200 feet. This he admitted. His attention was then called to the fact that he had afterwards corrected the error at the former trial and the trial judge said, referring to the former trial:

“I understood he changed his testimony from two hundred feet to fifteen feet; that is the way I charged” (p. 116, l. 25).

In the present case the motorman testified that his car was about 20 feet south of the south crosswalk when he first saw the child leave the curb (p. 106, l. 15).

The statement made by the motorman at a former trial could not be substantive proof in the present case, unless the motorman admitted that his former testimony was correct. Not only was there no such admissions but even at the former trial it was shown conclusively that the testimony as to this distance of 200 feet was a clear mistake and the correction was so convincing that the court at that trial accepted it in charging the jury.

It is difficult to understand how the misleading and prejudicial reference to the so-called “admission” of the motorman could have crept into the plaintiff’s brief without design, since the state of the case (pp. 113 to 116) plainly shows that the only basis for it is in the motorman’s testimony at a *previous trial*, which was read into the case by the trial counsel.

Respectfully submitted,

JOSEPH COULT,  
Attorney for and of Counsel  
with Defendant-Appellant.



## New Jersey Court of Errors and Appeals

FRANCES ALTIERI, an infant, by Louis Altieri, her next friend, and LOUIS ALTIERI, <i>Plaintiffs-Appellees,</i> <i>vs.</i> PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>Action  at Law.  On Appeal  from New  Jersey  Supreme  Court.</i>
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### BRIEF OF PLAINTIFFS-APPELLEES.

This is an appeal from judgments entered in the Supreme Court in favor of the plaintiffs after a trial at the Essex Circuit.

The accident upon which suit was instituted occurred on March 24, 1923, at the intersection of Norfolk and Hartford streets, Newark, when the infant plaintiff was injured through the negligence of the defendant corporation. Suit was instituted on July 6, 1923, and a trial had thereon in the Essex Circuit, which resulted in a judgment for the plaintiffs. This judgment, however, was set aside on a rule to show cause, necessitating a second trial. From the judgment entered in the second trial, the defendant now appeals, alleging error.

**POINT I.**

Answer to Point I, urged in the brief of defendant-appellant:

The Court did not err in excluding the written statement of **BENEDICT CAIRONI** to contradict his testimony, because said statement was not properly proven by the defendant.

Defendant-appellant urges a reversal of the verdicts in this case, alleging error on the part of the Trial Judge in excluding the statement alleged to have been made and signed by the witness **BENEDICT CAIRONI**. The statement was marked for identification during the cross examination of this witness, at which time he was shown the statement, consisting of three pages, and he identified his signature at the foot of said three pages. State of the Case, page 22, lines 20-40.

The witness denied that he had written the statement, which was uncontradicted by the defendant (S. C., p. 23, l. 20), and stated that he had not read the statement before signing it (S. C., p. 23, l. 34), and denied that he had made the statements contained in said written statement as read to him by Mr. Coult (S. C., p. 23, l. 30), and stated that he had not even been shown the statement, that he had been made to sign it (S. C., p. 24, l. 1), and that he had not made the other statements as read to him by Mr. Coult from said written statement (S. C., p. 24, ll. 11-22). Counsel for the defendant made no attempt to introduce the statement in evidence during the cross examination or at the termination of the cross examination of the witness; *nor did counsel for the defendant place upon the stand the person who was alleged to have written the said statement, and to whom*

*the witness was alleged to have made the statement.* No witness was introduced to testify that the witness had written the statement; or that the statement had been read to the witness before he signed it, or that the statement had been read to the witness in its entirety as it was introduced in court at the trial, all this despite the witness' denial of having read or seen the statement, other than to sign his name at the bottom of each of the three sheets.

At the conclusion of the whole case, counsel for the defendant offered the statement in evidence, whereupon the Court sustained the objection to its introduction, holding that it had not been properly proved and that the defendant should produce the person who took the statement, and have that person testify to the contents thereof, or that the witness had stated what the written statement contained.

It is not contended by the plaintiffs that the statement in question was not evidential. It is contended, however, that the statement was properly excluded by the Court because the defendant made no attempt to properly prove it.

Defendant's brief cites the case of *Lugosch v. Public Service Railway Company*, 100 N. J. L. 48, 126 Atl. 170, in which Justice Minturn, in behalf of the Supreme Court, stated that such documents are admissible to contradict the witness and effect his credibility, if they be inconsistent with his testimony at the trial.

The facts in that case were different from the facts in the case at bar.

In the *Lugosch* case, not only were the signatures to the statements identified, but no denial was made by the witnesses that the facts contained in said statements had been made by

them; nor did the witnesses in that case testify that they had not read the statement before signing it; nor that it had not been read to them; nor that they had never said the things contained therein. No question arose in that case as to the genuineness or authenticity of the statement. The only question was whether or not they should have been proven by the subscribing witness. The Trial Court having held that they should have so been proved, the judgment was reversed by the Supreme Court.

In the case of *Shreve v. Crosby*, 72 N. J. L. 491, cited in defendant's brief, the Supreme Court did not pass upon the question of admissibility of a document for the purpose of contradicting a witness, but merely held that such document, having been admitted in evidence, the plaintiff should be permitted to explain by oral testimony the facts and circumstances surrounding the writing and signing of said document. The holding of the Court in that case can have no bearing upon the point at issue herein.

The case of *Fox v. 44 Cigar Co.*, 90 N. J. L. 695, 101 Atl. 184, cited in defendant's brief, held that it is always allowable to prove different statements alleged to have been made by the witness from those to which he testified, but there is nothing in the opinion of the Court to show such statements admissible without proper proof having been offered to show that they were in fact made by the witness.

In the *Fox v. Cigar Co.* case, the letter, which was held to have been erroneously excluded, was written by the witness himself, and the genuineness of the letter was testified to. There was no denial in that case of the making of the statement, such as appears in the case at bar. The judgment based upon the directed verdict

was reversed on account of the exclusion of a letter which was harmful error in that case, because had the letter or its contents been admitted in evidence no direction of a verdict for the defendant could have been made. The contents of the letter were never brought out as evidence before the Court or jury. The statement in this case was not properly proven. The mere identification by the witness of his signature on the sheets of paper was not sufficient to warrant its introduction in evidence when he testified it was not written by him, not read by him and not read to him in the shape in which it appeared in the court. After the witness so testified, it became incumbent upon the defendant to produce testimony that he either read the statement or that he had read the statement before signing it, or that the statement as produced in court was read to him in its entirety before he signed it. When the defendant offered the statement in evidence, there was no proof that such statement had ever been made by the witness. *Although defendant's investigator who took the statement was at the trial and seated at the counsel table, no attempt was made (S. C., p. 24, l. 27) to swear him or produce his testimony that such a statement had been made by the witness.*

When the Court ruled upon the admissibility of it, there was nothing before the Court to show that the statement as it appeared in court had ever been made by the witness, and there was testimony of the witness as above mentioned that the statement as read in court had not been made by him.

In the case of *Daum v. North Jersey Street Railway Co.*, 69 N. J. L. 1, 54 Atl. 221, the Court excluded on plaintiff's objection a written state-

ment signed by one of plaintiff's witnesses. This was urged by the defendant as grounds of reversal.

In the opinion in that case, Chief Justice Gum-  
mere stated the law as follows:

"The fourth assignment of error, and the last which is argued on behalf of the defendant company, is directed at the ruling of the trial judge in excluding a written statement, signed by one of the plaintiff's witnesses, with his mark. The statement was offered for the purpose of impeaching the witness, the facts set forth therein being said to be contradictory of evidence given by him on the witness stand. But in order to make it competent, for the purpose for which it was offered, it was necessary for the plaintiff-in-error to have first inquired of the witness whether he had not made a statement, setting forth the facts which were contained in it, and this was not done. *Neither was it shown that the witness had any knowledge of what the statement contained when he signed it. It was not written by him, he was unable to read and it does not appear that it was read over to him. The statement was properly excluded.*"

The Court in effect held that not only was it necessary to lay a foundation for the contradiction of the witness' testimony, but that it was also necessary to show that the witness had knowledge of the contents of the statement when signed by him.

In view of the fact that it was not written by him, not read by him, and it appears doubtful whether it had ever been read to him in its entirety, the case is on all fours with the one at bar.

In the case of *State v. Mohr*, 99 N. J. L. 124, 122 Atl. 837, the Court of Errors and Appeals affirmed the admission in evidence of a paper

containing statements contradictory to those testified by the witness. In his opinion, Chief Justice Gummere said:

“The next ground of reversal is directed at the admission of a typewritten paper, which the state claimed was the production of plaintiff-in-error, at the foot of the paper appeared the name of ‘John Potter,’ with his address, and the plaintiff-in-error not only admitted on his cross examination as a witness that this name and the address were his own handwriting, but further admitted that the paper itself contained a part of a statement made by him. We have no doubt that, upon the facts which we have recited, the trial court was justified in assuming that the paper had been typewritten either by the plaintiff-in-error or under his direction, and that, consequently, it was properly receivable in evidence against him.”

The Court, in holding its admission proper, emphasized the fact that not only was the name and address at the foot of the typewritten sheet, signed by the witness, but, further, that the witness admitted that the paper contained the statement as made by him at the time it was given. This would indicate that the witness' signature, even without denials of the authenticity of the statement (as appears in the testimony in the case at bar) is not sufficient to warrant its introduction, but that there must be some proof that the statement was made by the witness.

In the case of *Dunklee v. Prior* (Supreme Court of New Hampshire, 80 N. H. 270, 116 Atl. 138), the Court held that a written statement alleged to have been given by the witness and signed by him, was properly excluded by the Court where the witness denied having ever made that statement, and where there was no evidence other than his signature to show that it had been made by him. Upon cross examina-

tion of the witness, he denied that certain statements inconsistent with his testimony had been made by him, and when asked if he had signed a statement relating to the case, and shown his signature, admitted the same.

Justice Plummer, in the opinion of the Supreme Court, stated as follows:

“The plaintiff contends that, having proved by the witness’ admission of his signature that he signed the statement, he was entitled, as a matter of law, to introduce it to discredit his evidence. If there had been no controversy relative to the making of the narrative as recorded in the signed statement, or if it had been conclusively established that the witness made it, he would be correct. But the witness denies having made the statements, and his evidence would warrant a finding that he did not.”

The Court held the statement properly excluded and overruled the exceptions taken thereto.

In the case of *Omaha L. T. Co. v. Douglass Co.*, 86 N. W. 936, the Court held in connection with the admission of a written statement to contradict testimony of a witness at the trial, that if the genuineness of the document or writing is not admitted, or if it is denied, it must be proved before admitting it.

The excerpt from *Jones on Evidence*, Vol. 5, par. 847, as contained in defendant’s brief, declares that such statements are admissible and that they may be proved and introduced in evidence in the regular course of the trial, but does not state that they are admissible of themselves. They must, of course, be proved in proper and regular form and such was not done in the case at bar.

It is also of interest to note that the statement offered in evidence in the case at bar con-

tained matters which, from his own testimony, the witness CAIRONI could have had no personal knowledge (S. C., p. 148, l. 33), as where he testified that the child was taken to the hospital.

In the case of *Union Square National Bank v. Simmons* (Court of Chancery, 42 Atl. 489) (no equity citation), Vice-Chancellor Pitney held that only such portion of a witness' testimony at a former trial as is called to his attention on cross examination can be introduced to impeach him. In view of the hearsay and opinion statements contained in the written statement, it is doubtful whether that was admissible even if it had been properly proved by the defendant.

**The exclusion of the statement if error at law was harmless error.**

All of the discrepancies alleged to exist between the witness' testimony and his prior statement were forcefully accentuated by counsel for the defendant in cross examining Caironi. These discrepancies, consisting of certain portions of the statement, were read to the witness in the presence of the jury. Witness denied ever having made those statements (S. C., p. 23, ll. 30-40; S. C., p. 24, ll. 1-22).

The jury had the full benefit of those portions of the statement which were in anywise helpful to the defendant, and the mere introduction in evidence of the sheets of paper could not have influenced the jury any more than defendant's forceful presentation of them on cross examination. The exhibition of the written statement to the jury would at most have been a duplication of the attempt to attack his credibility and could not have benefited defendant.

In the case of *Fox v. 44 Cigar Co.*, *supra*, the exclusion of the letter warranted a reversal because (despite defendant's contention in his brief to the contrary) its contents had never evidentially been brought before the jury on cross examination or otherwise, and if the principal contradiction had so been brought out, no verdict for the defendant would have been directed by the Trial Judge.

The exclusion of the statement was harmless, in view of the testimony of ANNA MULVANEY (S. C., p. 40, l. 30), who testified clearly to the negligence of the defendant, and especially in view of the outstanding lack of integrity on the part of defendant's witnesses to liability, all of whom made most impossible statements on their cross examination.

## POINT II.

**Answer to Point II in appellant's brief:**

**There was no error in the Court's charge to the jury as excepted to by the defendant and the Court did not err in refusing to charge when improperly requested.**

Exception was taken by the defendant to a portion of the Court charge, which reads as follows:

"The burden of proof is upon the plaintiff to prove by the greater weight of the evidence that the defendant in the operation and control of this car on that day and at that time under all the circumstances was negligent."

In the brief filed by counsel for the defendant much space is devoted under Point II to a review of the testimony in what appears to be an attempt to convince this Court that the verdict was an unjust one and against the weight

of evidence. Admission is made in this review of testimony that plaintiff's witnesses testified that the trolley car was traveling at a high rate of speed, that no gong was rung, that the trolley car went a distance of the width of Hartford street, and four stores, before it stopped after hitting the child. Emphasis is laid on the fact that under the estimations of Mrs. Mulvaney, the accident would have been unavoidable, because the trolley car could not have stopped within eleven and one-half feet after the child left the curb. This Court can well appreciate the inaccuracy of estimations made in a court room from point to point, as compared to estimations made in the open or upon the streets.

Counsel for the defendant lost sight of the fact that because the accident could not have been avoided one moment before it happened it is not necessarily, in law, an unavoidable accident, but would have been avoided and was avoidable if the defendant had not been guilty of negligence in failing to give warning of the approach of the trolley car and in failing to drive it at a lawful and proper rate of speed.

The testimony produced by the plaintiff to prove negligence was not the only testimony of negligence, for on the defendant's own case strong testimony of negligence was adduced on cross examination.

ETTA WESTRY, witness for the defendant testified on cross examination that the little girl who was injured was in the middle of the street when the trolley car was starting away from Warren street, a block from the scene of the accident (S. C., p. 78, l. 35).

GEORGE HASHAGEN, the motorman of the trolley car which struck the infant plaintiff, ad-

mitted that he had seen the child start to cross the street when the trolley car was 200 feet from the crosswalk on which the child was crossing (S. C., p. 113, l. 32).

These references to testimony are made in answer to the statement in appellant's brief that this case is a typical case in which the element of proximate cause is important, since the proof might warrant the finding that the negligence of the defendant had nothing to do with causing the accident.

In view of the testimony that the motorman had seen the child crossing the street when he was 200 feet from the intersection, that the car was traveling at a very fast rate of speed, and that no warning was given of its approach, and bearing in mind the additional fact that the injured person, a six-year-old child, could not have been guilty of contributory negligence, it is hard to conceive that the jury could have understood the judge's charge as above quoted to mean anything other than the negligence testified to, which was clearly the proximate cause of the accident.

There was no misdirection in the Court's charge as contended in appellant's brief. That portion of the Court's charge excepted to is admittedly correct.

Appellant's brief admitted this in the following language:

"Of course, it cannot be said that the Court's charge to the burden of proof which has been quoted above was erroneous standing alone, only can be said that the Court's submission of the case to the jury \* \* \* is erroneous standing alone."

Defendant has failed to point out any error in the Court's charge, and it is a fundamental

rule of law and one repeatedly followed by the courts of this State that the omission to state any legal principle which may be pertinent or applicable to the case affords in itself no ground for reversal upon appeal.

- Westcott v. Garrison*, 6 N. J. L. 132;  
*Folly v. Vantuyl*, 9 N. J. L. 153;  
*Cole v. Taylor*, 22 N. J. L. 59;  
*Hetfield v. Dow*, 27 N. J. L. 440;  
*Farrel v. Colwell*, 30 N. J. L. 123;  
*Mead v. State*, 53 N. J. L. 606, 23 Atl. 264;  
*Camden, etc., R. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634;  
*Dunne v. Jersey City, etc., Co.*, 73 N. J. L. 590, 64 Atl. 1076;  
*Daggett v. North Jersey St. Ry. Co.*, 75 N. J. L. 638, 68 Atl. 179;  
*Chess v. Vockroth*, 75 N. J. L. 672, 70 Atl. 73;  
*Miller v. Delaware, etc., Co.*, 85 N. J. L. 703, 90 Atl. 288, Ann. Cas. 1916C, 165;  
*Lange v. New York, etc., R. Co.*, 89 N. J. L. 604, 99 Atl. 346;  
*State v. Dichter*, 95 N. J. L. 212, 112 Atl. 413;  
*Sutro v. Jacobson*, 96 N. J. L. 555; 115 Atl. 79;  
*Leiferant v. Progressive Agency*, 98 N. J. L. 526, 120 Atl. 26;  
*Geyer v. Public Service Ry. Co.*, 98 Law 470, 120 Atl. 186;  
*Van Sciver v. Public Service Ry. Co.*, 96 N. J. L. 13, 114 Atl. 146.  
*Osbum v. DeYoung*, 122 Atl. 809;  
*Kopko v. N. Y. Trucking Co.*, 128 Atl. 870;  
*Fuller v. State Cafeteria*, 130 Atl. 4;  
*Posner v. Shapiro*, 132 Atl. 333;  
*Kvedar v. Shapiro*, 119 Atl. 104.

In the case of *Kvedar v. Shapiro*, 119 Atl. 104, defendant objected to a portion of the Court's charge "not because of what the court had said, but because of what in the opinion of counsel the court had omitted." Justice Katzenbach speaking for the Court of Errors and Appeals in that case said:

"The complaint, therefore, is that the charge is not sufficiently comprehensive. The remedy in such a situation is for counsel to present to the trial court a distinct request to charge upon the subject he desires covered by the court's charge. If the court refuses to charge the substance of the request an exception may be taken to the court's refusal, and, under this exception, a reviewing court will consider whether or not the court had erred in its refusal to charge as counsel has requested. \* \* \* Exceptions to a charge must be confined to what the court has said or has refused to say when requested to charge specific requests, and not to what counsel may feel the court has omitted to say in its charge."

In the case of *Leiferant v. Progressive Agency*, 120 Atl. 26, Justice Black, speaking for the Court of Errors and Appeals, said:

"The omission to state any legal principle which may be pertinent or applicable to the case, or the omission to give any charge whatever, when no charge is requested, affords in itself no ground for a new trial, much less for reversal upon a writ of error or appeal."

In the case of *Posner v. Shapiro*, 132 Atl. 333, decided by the Court of Errors and Appeals on February 1st of this year, the principles laid down in the cases above cited were again followed and affirmed.

No proper request to charge was made that the negligence of the defendant to support recovery by plaintiffs must have proximately caused the accident.

Appellant contends that it was an error for the trial court to refuse his request to charge the rule of proximate cause. In this connection we would refer your Honors to page 142 of the State of the Case, line 12, where the alleged request to charge is set forth as follows:

“And I wish to put on the record now the request that the Court charge the rule as proximate cause.”

It is to be observed that this in itself was not a proper request to charge. The request was not properly formulated, was not in writing, and was not submitted until after counsel had summed up and the Court had charged the jury.

In this State it is well settled that if requests to charge are desired they must be formulated in writing, submitted to the Court at the close of the evidence, and before the summation of the case by counsel.

In the case of *Klie v. Hollstein*, 98 N. J. L. 473, 120 Atl. 16, the Court of Errors and Appeals upheld the trial judge's refusal to charge a request which was not properly formulated. Justice Trenchard speaking for the Court said:

“The party wishing an instruction given must formulate it and state definitely and unequivocally what he desires to be given.”

In the case of *State v. Engeman*, 54 N. J. L. 247, 23 Atl. 676, Justice Van Syckel, speaking for the Supreme Court, said:

“After the jury had received the charge of the court and retired to consider of their verdict counsel for the defendants made a number of requests to charge. The Court

refused to recall the jury, stating that the established practice in that court was that requests to charge must be made before the jury retired. The regulation of the practice in that respect is within the discretion of the trial court, and parties and their counsel must conform to it. No error can, therefore, be assigned upon the refusal to charge these requests."

In the case of *Kinsmann v. Fisch House Furnishing Co.*, 131 Atl. 134, the Supreme Court said:

"The last ground upon which we are asked to make the rule absolute is based upon the refusal of the court to charge certain requests submitted by counsel for the defendant. It appears from the record, however, that the requests were not submitted until after the summing up by counsel was well under way, and the court refused to accept the requests or consider them because they had not been presented before the summing up was begun. We think this was a matter within the discretion of the trial judge. It is for him to say whether he will delay the progress of the cause while he reads and considers submitted requests, whether they be one or fifty in number, or whether he will refuse to accept them; and where nothing appears except the refusal and the ground upon which was rested we cannot say that the judicial discretion was abused."

It is the contention of the appellant under the cases of *Dunne v. Jersey City Galvanizing Co.*, 73 Law 586, 74 Atl. 1076, and *Benz v. Central R. R. Co.*, 82 N. J. L. 197, 82 Atl. 431, that the request was a timely one because the necessity for it arose out of the charge itself.

A perusal of the *Dunne* and *Benz* cases cited in the appellant's brief might lead one to believe that the omission by the Trial Court to charge a pertinent principle of law would warrant the

submission of requests after his charge. Appellant contends that the omission to charge proximate cause in the case at bar warranted his late request. This inference is an erroneous one, and it is now well settled that the word omit, as used in those cases, refers to an omission to charge a special request that has already been properly formulated and presented at the proper time.

In the case at bar the Court was not legally bound to charge proximate cause, since no request had been made, and there was therefore no omission which would warrant the late request to charge.

In the case of *Folly v. Van Tuyl*, 9 N. J. L., page 157, the Court said:

"If in the opinion of counsel a charge on particular legal points is necessary, such charge may be required, and its omission or the manner of its performance may then become the subject of investigation. And, if the court state any matter to the jury without being so requested by counsel exception may be taken to it. But unless the court charges erroneously, or *being legally required, omit or refuse to charge at all, or on some particular point*, there is no room for exception. In the case before us, according to these principles, I am of the opinion there is no error in the charge of the court."

In the case of *Leiferant v. Progressive Agency*, 98 N. J. L. 526, 120 Atl. 26, Justice Black, speaking for the Court of Errors and Appeals, said:

"The second ground of appeal is thus stated: The settled and accepted rule of practice on this point is, unless there is a request to charge upon a particular point, error is not assignable because the trial judge may have omitted to charge upon such point. \* \* \* But in *Benz v. Central R. R. Co. of N. J.*, 82 N. J. L. 198, 82 Atl.

431; affirmed for the reasons expressed in the Supreme Court, 83 N. J. L. 780, 85 Atl. 1134, it was said it was the duty of counsel to request the judge to charge, or at least to pray an exception to the omission so to do. In that case the words 'the omission so to do' must be construed to mean an omission to charge a specific request and not an exception to an omission to charge when no specific request is made.

### POINT III.

**The Court did not err in permitting counsel for the plaintiffs to open a third time under the circumstances in this case.**

At the conclusion of the testimony, upon defendant's request, counsel for the plaintiff made an opening to the jury consisting of but little over two dozen words, whereupon the defendant announced he had nothing in reply.

Counsel for the plaintiff thereupon requested that he be permitted to address the jury again, and announced that he desired to have the last argument in the case, as was his right in law. The Court thereupon said that the plaintiff should again open to the jury and then let counsel for the defendant reply to that, and then counsel for the plaintiff could reply and sum up his case (S. C. p. 123, l. 4).

Counsel for the plaintiff made another opening, which was merely a slightly more detailed account of the accident than his first opening. To this second opening the defendant made no reply. Counsel for the plaintiff announced that he desired to sum up the case, and that he had been misled by the Court's statement that the defendant would reply to his second opening, and that then the counsel for the plaintiff could sum

up the case (S. C., p. 124, l. 3; S. C., p. 125, l. 1), and plaintiff requested the right to again address the jury so that he might dwell upon the defendant's negligence and the damages to be recovered, which he had not spoken of in his second opening.

The Court, after a careful consideration of the record, felt that he had misled counsel for the plaintiff (S. C., p. 128, l. 13, l. 19, l. 21, l. 23) into believing that he would have the right to close, and in view of the Court's misleading statement permitted counsel for the plaintiff to open again to the jury, after which the defendant summed up its case (S. C., p. 130, l. 16).

Appellant contends that the Court erred in permitting the third opening to the jury and cites three cases, *Silber v. Public Service Ry. Co.*, 78 N. J. L. 59, 73 Atl. 232; *N. Y. & L. B. R. R. Co. v. Garrity*, 63 N. J. L. 50, 42 Atl. 842, and *Hackney v. Delaware A. T. & T. Co.*, 69 N. J. L. 335, 55 Atl. 252. None of these cases bear out appellant's contention.

In the case of *Silber v. Public Service Ry. Co.*, 78 N. J. L. 59, 73 Atl. 232, the Supreme Court held that it was reversible error to refuse the defendant the right to sum up his case, after a second opening had been made by the plaintiff. In that case the Court had no discretion in determining whether or not the defendant should have his unquestionable right to sum up to the jury. It was contended in that case that the Court erred in permitting the second opening by plaintiff, but the Supreme Court held that in so permitting a second opening the Trial Court was right, but that the Trial Court erred in then refusing the defendant his right to sum up.

In the case of *N. Y. & L. B. Co. v. Garrity*, 63 N. J. L. 50, 42 Atl. 842, the same state of facts existed as in the Silber case, and the Supreme Court held that "the refusal of the Court to permit defendant's counsel to reply to the enlarged opening of the plaintiff deprived him of a substantial right" and refused the judgment. Plaintiff has no quarrel with either of these decisions, since it is clear in the above cases that the substantial right of summation by the defendant was taken away by the Trial Court.

In the case of *Hackney v. Delaware A. T. & T. Co.*, 69 N. J. L. 335, 55 Atl. 252, the judgment was reversed among other grounds because the Trial Court permitted a second opening by a different counsel from the one making the first opening. The Court cited Rule 48 of the Supreme Court, which provided that where there shall be more than one counsel in a case, only one shall be heard in the opening, and in no event may both be heard in either opening or reply. In that case the Court upheld the discretion of a trial judge in permitting additional openings. Justice Fort, speaking for the Court of Errors and Appeals, said:

"It may be in the discretion of the court to permit the same counsel who had already addressed the jury to make a fuller opening in case he shall so request."

The cases cited uphold the Trial Court's discretion in permitting additional openings. It is true that in none of these cases was a third opening made, but it is also true that in none of them was it requested, and nothing was contained in the opinions from which even inference could be drawn that to permit a third opening would be error. The discretion of a trial judge in the conduct of the trial is not limited to the

number of times his discretion shall be exercised, but is only limited to the circumstances under which it is exercised.

To hold that the Trial Court in the case at bar abused his discretion in permitting a third opening, after he had by his own statement misled counsel for the plaintiff, would not only be most unjust to the plaintiff, but would also deprive the Court of an opportunity to right the wrong his errors had created.

In all the cases cited there was a deprivation of a substantial right.

In the case at bar there was no deprivation of any right. Counsel for the defendant replied to the third opening, *and thereby waived any right or exception which he might have theretofore had*. The Trial Court deprived him of no right and exercised that sound discretion which is essential to the administration of justice.

#### POINT IV.

**The Court did not err in refusing a mistrial on account of alleged improper remarks of plaintiff's counsel in his summation. Answer to Point IV in appellant's brief.**

Appellant desires a reversal of the judgment in this case on the ground that plaintiff's counsel in his summation made improper remarks, to wit, that the defendant gets the right to run their cars over the streets of the City of Newark for a nominal consideration, and had tried to persuade the Legislature to relieve it of its paving obligations. It is difficult to see how the defendant has suffered injury by reason of those remarks, especially since they were in partial reply to statements by defendant's coun-

sel "that if the Public Service was responsible in allowing the children on the street, then we might be serious in blaming them" (S. C., p. 131, l. 14).

Appellant's attempt to accuse the Trial Court of abuse of discretion and its claim of transgression of the limits of fair advocacy sit but poorly upon its shoulders, upon an examination of the record which contained but one of the improper remarks made by defendant in summation.

The granting or refusal of a mistrial for improper statements of counsel in summation is always discretionary with the Trial Court and cannot be reviewed on appeal. The proper practice is to request the Court to instruct the jury against the improper remarks. This was not done in the case at bar.

*See v. Public Service Ry. Co.*, 82 N. J. L. 144, 81 Atl. 745;

*State v. Terry*, 91 N. J. L. 539, 103 Atl. 238;

*Smith v. Brunswick Laundry Co.*, 93 N. J. L. 436, 108 Atl. 184;

*Mortimer v. Keppler*, 130 Atl. 547.

In the case of *State v. Terry*, 91 N. J. L. 539, 103 Atl. 238, Chancellor Walker said:

"The rule in this state undoubtedly is that where counsel, in summing up to the jury, goes outside of the testimony and makes appeals based upon facts which have not been proved, but rest upon his unsupported assertions, the party injuriously affected must, in order to be relieved, move the trial judge to order the remarks stricken out, and to charge the jury that they should be disregarded; an objection only to the illegal remarks does not require the trial judge to strike them out of his own motion, and unless counsel requests their elimination no ground for review is laid."

In the case of *Mortimer v. Keppler*, 130 Atl. 547, the Supreme Court said:

“Mistrial is discretionary. Proper practice is to request court to instruct jury against improper remarks, and upon court’s refusal to take an exception thereto.” *Smith v. Brunswick Laundry Co.*, 93 N. J. L. 436, 108 Atl. 184.

#### POINT V.

The first and seventh grounds of appeals served upon the plaintiff by the defendant have not been urged in defendant-appellant’s brief. Plaintiff’s answer thereto is that they have been abandoned.

#### POINT VI..

The case at bar received a fair and meritorious trial, and no substantial error has been made that could have in any degree affected the merits of the case.

In the Pamphlet Laws of 1912, page 382, section 27, provides as follows:

“27. Reversal or new trial on merits. No judgment shall be reversed or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after the examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.”

We respectfully submit that the appeal should be dismissed, and that the judgment of the Supreme Court should in all respects be affirmed.

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REPORT

Submitted by: [Name]  
 Title: [Title]  
 Date: [Date]

REPORT

Submitted by: [Name]  
 Title: [Title]  
 Date: [Date]

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## New Jersey Court of Errors and Appeals

FRANCES ALTIERI, an infant, by Louis Altieri, her next friend, and LOUIS ALTIERI, <i>Plaintiffs-Appellees,</i>  <i>vs.</i>  PUBLIC SERVICE RAILWAY COM- PANY, <i>Defendant-Appellant.</i>	}	<i>Action  at Law.    On Appeal  from New  Jersey  Supreme  Court.</i>
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### BRIEF OF DEFENDANT-APPELLANT.

This is an appeal from two judgments in the Supreme Court entered in favor of the plaintiffs after trial at the Essex Circuit.

The accident which forms the basis of the suit occurred March 24, 1923, at the intersection of Norfolk and Hartford streets, in the City of Newark, when a trolley car of the defendant corporation, northbound on Norfolk street, came into collision with the infant plaintiff (then about six years old) at a point somewhere near the south, or near, crosswalk, of Hartford street, inflicting personal injuries for which the infant, by her father as next friend, brought suit for compensation, the father adding a count individually *per quod*.

#### POINT I.

The court erred in excluding a written statement offered to contradict the testimony of plaintiff's witness. (Ground of Appeal No. 2, p. 50.)

Benedict Caironi testified that he was walking north on the west side of Norfolk street four or

five houses from Hartford street (p. 17, ll. 10-40); he saw the little girl step off the crossing (p. 18, l. 10); there was a truck coming south which blocked his view of her; he happened to notice a car going pretty fast and heard the gong rung once or twice (p. 18, ll. 20-40); it was coming about twenty or twenty-five miles per hour (p. 19, l. 1); he did not see the child again until the trolley car hit her (p. 19, l. 10); the car then traveled from the crossing to Shonstein's store, about three or four houses (p. 19, l. 25); that distance, he would say, was about fifty feet (p. 19, l. 30).

On cross examination this witness said that the truck or van which was coming toward him was traveling slowly, about ten miles per hour (p. 20, l. 20); the plaintiff was about ten yards away from the van as she started to cross the street (p. 20, l. 30); the van obscured this witness' view, and after the little girl was out of his sight the witness just happened to look when she was hit (p. 21, l. 35); to see her he had to look past the front of the truck (p. 21, l. 40); after the accident he recalled seeing another trolley car southbound at the north crosswalk, but no car was there when the accident happened (p. 22, l. 20).

A statement made by this witness four days after the accident (Exhibit D. 1 for identification, p. 147), consisting of three sheets, each signed by him, was exhibited to him and he admitted the signature upon each page (p. 22, ll. 20-30). The statement was then marked for identification (p. 22, l. 35).

The witness was asked to look at the statement, and certain portions of it were called directly to his attention (pp. 23-24); witness ad-

mitted that the statement had been read to him by the person who took it (p. 23, l. 40; p. 24, l. 1).

There was no cross examination as to the truth or falsity of the matters contained in the statement, nor was the witness on re-direct examination asked to explain any discrepancies.

At the conclusion of the whole case the attorney representing the defendant offered this statement in evidence as follows (p. 121):

“Mr. Coult: I offer in evidence D. 1 for identification, being a statement signed by Benedict Caironi for the purpose of contradicting some portions of his testimony.

Mr. Matthews: I object to its introduction on the ground it is not properly proved.

The Court: Sustain the objection.

Mr. Coult: I offer the first page of D. 1 for identification, which I will show your Honor, for the same purpose.

Mr. Matthews: I make the same objection on the same ground, which ground it is not properly proven.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

The Court: My reason is, that to contradict that witness he should be confronted with the person who took the statement and that person should take the stand and have part of the statement read to him, and that is the person to contradict the witness.”

The statement is sharply inconsistent with and contradictory to certain important portions of Caironi's testimony.

He testified that the car was going twenty to twenty-five miles per hour. His statement says “going at a fair rate of speed” (p. 147, l. 36).

He testified that the little girl crossed the north crosswalk when the truck or van was at the south crosswalk. His statement was, "Just as soon as the rear part of the truck (which was running at slow speed) cleared the north crossing of Hartford street the little girl ran from rear of truck in an easterly direction from north crossing, across Norfolk street."

He testified that the car stopped in front of Shonstein's store, two or three houses beyond the second crosswalk, and estimates the distance which the car traversed as being about fifty feet. In his statement he said (p. 148, l. 20): "After the girl got in behind the truck I could not see her any more, as the truck hid my view, and just after truck was passing my house I saw this girl laying on ground at left front end of the car and was being dragged for at 2 or 3 yds. and then car stopped. Car came to a stopped with the front end just over the north crossing of Hartford St." (p. 148, l. 25).

It is true that this witness located the site of the accident on the north, or far, crosswalk, at the intersection, in which particular his testimony contradicts the only other witness produced by the plaintiff who testified to the details of the accident, as well as all the witnesses produced by the defendant, who locate the point at which it happened as near the south crosswalk. But, nevertheless, the defendant should not have been deprived of the right to exhibit the written statement of this witness to the jury for the purpose of further attacking his credibility. It might be that the jury believed this witness and his version of the accident as against all the other testimony in the case, and predicated their findings upon his story. If the state-

ment was admissible in evidence for the purpose of contradiction it was harmful error to exclude it.

In *Lugosch v. Public Service Railway Company*, 100 N. J. L. 48, the first section of the syllabus is as follows:

“1. A written document, containing matter only incidentally or collaterally involved in the controversy, is admissible in evidence to contradict a witness or to affect his credibility, if the statements contained therein are inconsistent with the testimony of the witness at the trial.”

In that case, Justice Minturn, speaking for the Supreme Court, said:

“The theory upon which such documents are admissible, is that they may serve to contradict the witness, or, at least, affect his credibility, if the statements therein contained be inconsistent with his testimony upon the trial of the cause.”

In *Jones on Evidence*, Vol. 5, paragraph 847, it is said:

“*A fortiori*, if his statements have been reduced to writing, he has laid himself open to an attack for having sworn to given facts after having put in writing statements which cast doubt upon his sworn version of them, and which, if susceptible of explanation, he should explain, or else the weight of his testimony diminishes in proportion to the extent of the variation. Hence, witnesses may be impeached by producing their written statements, for example, their letters, affidavits, depositions or the like, which are inconsistent with the testimony given at the trial. By written statements is meant not only statements written by the witness, by such as may have been written by others and signed by him. \* \* \* The difference in the mode of laying the foundation is, that in case the statements are oral, the warning is given by asking the witness in substance

and effect, if he did not at a given time and place, in the presence of or to a person or persons specified make the alleged contradictory statements. In case the statements are in writing and unsubscribed, the paper must be shown or read to the witness and marked for identification, and, if subscribed, the signature, and, in case he so demands, the paper must be shown to him. The attention of a witness having been thus called to the contradictory statements, *they may be proven and introduced in evidence in the regular course of the trial.*"

In the case of *Shreve v. Crosby*, 72 N. J. L. 491 (New Jersey Supreme Court, 1906), one question determined was the right of the plaintiff to rebut a document used to discredit the husband of the plaintiff by showing what was said at the time it was signed. Justice Pitney there said (p. 502):

"So far as appears, the only pertinency of the document was to impeach the credibility of Shreve by showing that its contents were inconsistent with his present testimony. \* \* \* This paper was not evidential against the plaintiff upon the main issue in the case, but only upon the collateral issue whether Mr. Shreve was a trustworthy witness. The fact that it was in writing was of no special significance, save as it rendered it more convincing as evidence of the witness' former statement. Testimony of what transpired at the time the paper was signed, explanatory of its purpose, was admissible."

In *Fox v. 44 Cigar Company*, 90 N. J. L. 695, 101 Atlantic 184, there was a judgment for the defendant in the Supreme Court based upon a directed verdict from which plaintiff appealed. It appeared that the plaintiff had elicited from his own witness testimony which was unfavorable to his cause and had then put in evidence a

letter containing among other things statements contradictory to the witness' testimony. This letter was not written by the witness himself but contained a postscript signed by the witness to the effect that the facts contained in the letter would be testified to by the witness at the trial. At the conclusion of the case the letter was stricken from the record over the plaintiff's objection.

The Court of Errors and Appeals held that the exclusion of the letter constituted reversible error. Chancellor Walker, who wrote the opinion, said:

"It is always allowable to show that a witness had made other and different statements than those to which he testifies. Vice-Chancellor Pitney, in *Thorp v. Leibrecht*, 56 N. J. Eq. 499, at page 502, 39 Atl. 361, states that the rule forbidding a party calling a witness to offer evidence for the purpose of impeaching his general character for truth and veracity falls far short of forbidding the party to show by any legitimate evidence that the witness has testified to what is not true in a matter material to the issue. This rule was approved by this court in *Buchanan v. Buchanan*, 73 N. J. Eq. 544, at page 546, 68 Atl. 780. Although in *Thorp v. Leibrecht* and *Buchanan v. Buchanan* the witnesses called by complainants were defendants, the rule is not restricted to such witnesses, that is, witnesses who are adversary parties, but is as broad as the statement in *Buchanan v. Buchanan*, at page 546 of 73 N. J. Eq., at page 781 of 68 Atl., that:

'The rule against impeachment denies the right to impeach the general reputation of the witness for truth, but does not deny the right to show that the whole or any part of the testimony of the witness is untrue.'

In fact, counsel for defendant concedes this in his brief, where he says:

‘While the law permits one who calls a witness to contradict him, it does not permit impeachment.’

Impeachment, as shown, is an attack upon a witness’ general reputation for truth and veracity; and as that which was attempted in this case was not such an attack, but only a contradiction of the witness’ statement, the letter was admissible upon that score.”

It is true that the decision in that case turned upon the right of a party to contradict his *own* witness, but the exclusion of the letter itself was held to be error even though there had been, as appears plainly from the opinion, a full examination as to the contents of the document.

It is to be noted that in the present statement (pp. 147-148) there was no matter irrelevant to the details of the accident as testified to by the witness, and that no objection was made to the statement on that ground. Also that the trial counsel offered page 1 of the statement separately for the purpose of obtaining from the court a ruling as to a single discrepancy in the testimony, namely, as to the speed of the car, and that this offer was denied, and defendant’s exception noted (p. 121, l. 11).

No cross examination having been directed to the truth or falsity of the contradictory statements, and nothing having been permitted in the way of bringing home to the jury the force of the written document, and no explanation of the consistencies having been attempted by the plaintiffs, it is submitted that the exclusion of the paper itself, after it was properly proved, was an error prejudicial to the defendant. It was, in fact, violently harmful, in view of the fact that the plaintiffs produced only two witnesses as to liability, and the testimony of the only other plaintiff witness on that branch of

the case was of such a character as to almost warrant a non-suit; and also in view of the number and apparent integrity of the witnesses produced to support the defendant's theory.

## POINT II.

The court erred in not limiting the defendant's responsibility for the negligent acts to such as were the proximate cause of the plaintiffs' injury and in not charging the rule as to proximate cause when so requested. (Grounds of Appeal 4 and 5.)

Plaintiffs produced two witnesses as to liability. The first, Benedict Caironi, whose testimony has been adverted to, testified that the trolley car was running at about twenty-five miles an hour and that after the accident it went to a point fifty feet beyond the north crosswalk. He said that the child started out to cross the street on the north crosswalk (in which he was no doubt mistaken), and because of the intervening truck he could not see what happened between the time she left the curb and the time that she was actually struck.

According to his story, the trolley car was traveling at an unlawful rate of speed in this locality, where houses were less than 100 feet apart, and a jury, under the circumstances, from his testimony alone, would be justified in concluding that such rate of speed was negligent. This witness, however, did not undertake to tell how the accident occurred or to throw any light on the question as to whether the high speed of the car had anything to do with the child's injuries, except as fortuitously to bring the car to the position where it was in time to

come into collision with the child when she crossed the street.

The other witness produced by the plaintiffs on this branch of the case was Amelia Mulvaney, who testified that she saw the accident from the window of her home on the west side of Norfolk street (p. 41, l. 15). The child was on the south-erly crosswalk (p. 42, l. 15), walking from west to east (p. 42, l. 20). The trolley car was going fast "like full speed" (p. 42, l. 30), and there was no bell. She saw no southbound truck there (p. 43, l. 30); she saw no southbound trolley car.

As to the happening of the accident, she testified as follows (p. 44, l. 25):

"Q You say there was nothing at all between you and the child? A No, sir.

Q When she came down to the crosswalk she stepped down on the street? A She stepped on the crossing.

Q I mean on the crossing of the street. A Yes, sir.

Q At the time she walked out on the crossing where was the trolley car? A It was close to her.

Q How near? A I couldn't tell you how near it was.

Q As far as from me to you? A Yes, sir, about that far.

Q Just about this distance? A Yes, sir.

Q How far is this? (The distance is measured and indicates 11 feet 5 inches.)"

And again (p. 47, l. 34):

"Q Where was the car when she crossed the first rail? A I couldn't tell you how far it was, away from him. About from here to there, I guess.

Q To where? A To that thing over there.

Q (By Mr. Matthews.) What do you point to? A This thing on the desk there.

Q (By the Court.) You mean the end

of the desk, don't you? A Or about there (indicating). "xxx 8 ft. 7 1/2 in.

According to the testimony of this witness, the trolley car was only eleven and one-half feet away when the child stepped into the street, and about eight and one-half feet away when she got to the first rail of the tracks. The distance between the first two rails is four feet eight and one-half inches and between the two tracks about five feet. (Testimony of Wm. E. Preston, p. 119, l. 10.)

If these estimates by the plaintiffs' only witness who claims to have had a view of what happened after the plaintiff left the curb, are to be taken as even approximately correct, the accident would have been unavoidable unless the trolley car was going so very slowly that it could have been stopped within eleven and one-half feet after the child first left the curb, or within eight and one-half feet when the child was herself more than nine feet away from the point of collision.

The theory of the defense was that the plaintiff came from the street corner running after a ball, crossing the street diagonally and a little to the north of the south crossing, and ran into the front left corner of the forward part of the car without ever going in front of it.

Defendant's witnesses testify that the car was running slowly, that the motorman was sounding the gong and that the car stopped somewhere between the north and south crosswalks, within a very few feet after the collision. This is borne out by the testimony of Gerhard C. Brunz, a passenger in the northbound car; Etta Westry, who saw the accident from a house in Hartford street; Ferdinand Kroch, a motorman on the

southbound car, which was standing at the north crosswalk at the time of the accident; John J. Dixon, a passenger in the southbound car; August W. Lefflor, a passenger in the northbound car, and George M. Hashagen, the motorman of the northbound car.

Of course, the weight of the evidence has no significance in the argument of an appeal, and the foregoing references to the proof in the case are not made with the idea of impressing upon this Court that the jury went astray in deciding the case contrary to the evidence. What is intended, however, is to impress upon the court the fact that this was typically a case in which the element of proximate cause was important and that the proof would not warrant the conclusion that the failure of the court to instruct on the principle of proximate cause was harmless, and that, therefore, it might be said (as has been said in some cases) that the negligence complained of must have been the proximate cause of the accident, if such negligence existed.

The jury may have found the trolley car was being driven at a reckless rate of speed. They may have found that the child was too young to be charged with contributory negligence, and, therefore, found for the plaintiffs under the charge of the court as delivered. But if the court had charged that the negligence of the motorman must have been the *proximate cause* of the accident the jury might readily have concluded that the *actions* of the child constituted the *sole cause* of the happening, even though her tender age relieved her of legal responsibility.

In charging the jury the trial court first recited the allegations of negligence contained in the complaint (pp. 131-132), then reviewed the testimony of the various witnesses (pp. 134, 135,

136); mentioned the fact that both the infant plaintiff and the defendant company had rights in the street; then proceeded with the following (p. 136, l. 15):

“The burden of proof is upon plaintiffs to prove by the greater weight of the evidence that the defendant in the operation and control of this car on that day, and at that time, under all the circumstances, was negligent.”

The court then defined negligence on the part of the motorman, referred to the contributory negligence of the infant plaintiff, adverted to the provisions of the Traffic Act relative to the issue, and concluded (p. 140):

“Assuming that you find that the plaintiffs are entitled to recover, then I charge you that the child will be able to recover,” etc.,

the remainder of the charge being given up to the rules relating to damages. There is nothing in the charge about proximate cause. Objection was made as follows (p. 142, l. 1):

“Mr. Coult: I respectfully pray an exception to that portion of the charge in which the court states to the jury that they might find liability, after having charged the jury specifically (‘safely’ on the record) that in order that the plaintiff shall recover the jury must find that there was negligence on the part of the defendant, without charging the jury that negligence must be the proximate cause of the accident, and I wish to put on the record now the request that the court charge the rule as to proximate cause.

Exception noted as ground of appeal.”

Of course, it cannot be said that the court’s charge as to the burden of proof which has been quoted above was erroneous standing alone, nor can it be said that the court’s submission

of the case to the jury after having so charged with the statement, "if you find the plaintiff entitled to recover," etc., is erroneous standing alone, but the effect of what the court said with regard to negligence was to direct the jury to find for the plaintiff if they found that there was negligence on the part of the defendant company without regard to the very important question whether the negligent operation of the car was in any sense the cause of the accident, assuming that the car had been negligently operated.

The court undertook to charge on the question of negligence, but said only part of what was necessary, and the failure to limit the acts of negligence to those which might have been the proximate cause of the accident was more serious than a mere omission to charge, and constituted, in effect, a direction to the jury that if they found that the plaintiffs had proved by the preponderance of the evidence any act of negligence on the part of the defendant company the jury might then proceed to the assessment of damages. In other words, the court charged proximate cause out of the case.

The submission of the case to the jury in the posture in which it was presented by the whole charge was a mischarge, which was error and subject to exception.

But even if the failure of the court to limit the negligence of the defendant to such acts as were proximately the cause of the accident, in order to warrant recovery, should be viewed as a mere omission and, therefore, not subject to exception, the specific request made after the charge, that the rule as to proximate cause should be presented to the jury, was a timely request, be-

cause the necessity for it arose out of the charge itself, and the trial court was not, therefore, justified in declining to entertain it because it had not been reduced to writing and handed to the court before the summation.

In *Dunne v. Jersey City Galvanizing Co.*, 73 N. J. L. 586, 64 Atlantic 1076, Justice Fort, speaking for the Court of Errors and Appeals, said, at the conclusion of the opinion:

“To entitle a party presenting requests to charge after the court has concluded its charge, to have such requests considered and charged or refused, it should appear that the requests presented have been made necessary by something the court has already charged or omitted to charge.”

The case of *Benz v. C. R. R. of N. J.*, 82 N. J. L. 127, 82 Atlantic 431, aff. 83 N. J. L. 780, was a writ of error out of the Supreme Court to the Essex County Circuit. The assignment of error brought up an alleged omission by the trial judge in not charging the jury to take into consideration the expectancy of life of a widow and children of the deceased who were beneficiary to the suit. Justice Garrison, who wrote the opinion, said:

“Counsel’s failure to prefer a request covering this point may be explained by his supposing that it would be covered by the charge. When, however, counsel, having heard the charge, knew that the point was not covered it was his duty, if he desired to have the point covered or to avail himself of its omission, to request the judge to charge it or at least to pray an exception to the omission so to do.”

In the present case counsel assumed that the court would charge the jury that the defendant’s negligence must be established and that it must further appear by the greater weight of the evi-

dence that the negligence complained of was the proximate cause of the injuries. The charge of the court as delivered came as a surprise. The exception was taken and the request preferred promptly. We, therefore, submit that the failure of the court to repair the omission and mistake after attention had been called to it was a harmful error to the defendant.

### POINT III.

The court erred in permitting counsel for the plaintiffs to address the jury after the case was closed and after plaintiffs had made both a formal and full opening and defendant had submitted. (Ground of Appeal No. 3.)

At the conclusion of the testimony, the defendant called for an opening (p. 121, l. 30); the plaintiff's attorney opened perfunctorily (p. 122, l. 5); defendant's attorney announced that he had nothing to say in reply (p. 122, l. 11). The court thereupon permitted the plaintiff a second opening (p. 123, l. 10). Pursuant to such leave of the court, plaintiff's counsel addressed the jury a second time. This opening was not taken by the stenographer, but it appeared in the course of the colloquy without contradiction that he spoke for fifteen minutes, not only in opening but in arguing his case (p. 128, l. 35). At the conclusion of this so-called second opening, the defendant's attorney again announced that he had no reply (p. 123, l. 15). Plaintiff then demanded the right to address the jury a third time. This the court refused, the case was declared closed and counsel for the plaintiff took an exception to the ruling of the court (p. 126, l. 28). After further argument, the court decided to reopen the case and to permit the plaintiff to make what was then termed a third

opening (p. 129, l. 25). To the ruling of the court the defendant excepted (p. 129, l. 31).

It is submitted that such a usage was in contravention of those cases in this State which define and limit the exercise of discretion by a trial judge in such event. In *Silber v. Public Service Ry. Co.*, 78 N. J. L. 59, 73 Atlantic 232, and in *New York and Long Branch R. R. Co. v. Garrity*, 63 N. J. L. 50, 42 Atlantic 842, it was held that it lay within the discretion of the trial court to permit the plaintiff's counsel to make a second address to the jury in the nature of a fuller and more extended opening, in case of refusal by the defendant's counsel to reply when it appeared that plaintiff had been led into making a merely formal opening by the action of the defendant.

In *Hackney v. Delaware and A. T. & T. Co.*, 69 N. J. L. 335, 55 Atlantic 252, it was held, however, that when two counsel are engaged in a cause for the plaintiff and the defendant states to the court that he does not desire to reply to the opening by one counsel, it is error to permit a second counsel to further address the jury over objection. The process of reasoning by which the Court of Errors and Appeals reached that conclusion is that the address by a second counsel must necessarily constitute a reply and not an opening and that it was not within the trial court's discretion to permit what was really a reply under the guise of a second opening. At the conclusion of the opinion Justice Fort said:

"If there is nothing to reply to and the opening argument is full, as it may be, upon what principle is it justified to permit a second counsel to reargue the case? It is practically permitting a second opening. We think the true rule is stated in the case of *New York and Long Branch Railroad Com-*

pany *v. Garrity*, \* \* \* and that the error complained of in this regard in this case must be sustained.”

In the case at bar the opening was purely formal. The submission of the case by the defendant at that point entitled the plaintiff to a fuller opening if the court in the exercise of sound discretion so ordered. The counsel then, after being warned by the court of the limitation of his rights (p. 123, l. 5), having made a full and extended opening, and the defendant having again submitted, the case was closed and the trial court's discretion exhausted. Further address to the jury could not in the nature of things be an opening but must constitute a reply. Since there was then nothing to reply to, the opportunity for further argument at that time was “a substantial benefit to which by law and the practice of our courts the plaintiffs were not entitled.”

#### POINT IV.

**The court erred in not granting a mistrial on account of the improper remarks of the plaintiffs' counsel. (Ground of Appeal No. 6.)**

The plaintiffs' counsel, during his fourth address to the jury, in an interval when the court had left the bench, said, among other things, that the Public Service for a nominal consideration gets from the City of Newark the right to run cars through the streets and, also, that the Public Service had persuaded the legislature to “saddle us, the people, with the paving obligation.” Defendant moved for a mistrial, motion was denied and exception noted.

The trial of the case took place shortly after the passage of the act relieving the Public

Service of the obligation of repairing the paving between the rails of the tracks and before that act was vetoed by Governor Moore. That such comments were likely and calculated to create prejudice against the defendant in the minds of the jury need not be urged. That the power of the court to grant or refuse a mistrial is discretionary and that there is no review of such action unless it amount to an abuse of discretion is conceded. (*Smith v. Brunswick Laundry Co.*, 93 N. J. L. 436, 108 Atlantic 184.)

Therefore, this unfortunate phase of the present case would not be brought to this court's attention were it not that during the whole course of that portion of the trial which succeeds the close of the testimony the plaintiffs' counsel was permitted to transgress the limits of fair advocacy so often (p. 124, l. 30; p. 125, l. 20; p. 125, l. 35), and the cumulative effect of the whole must already have created so much bias in the jury that the designedly embittering allusions above quoted, delivered during the judge's absence, must have created a situation where a fair trial became impossible. Refusal to discharge the jury under such circumstances was an abuse of discretion which this court should correct.

Respectfully submitted,

JOSEPH COULT,

Attorney for and of Counsel

with Defendant-Appellant.

