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Summons

Filed April 23, 1931

THE STATE OF NEW JERSEY, to:

Wallace Jacobus and Schwartz Brothers, Truckmen, Inc., a New Jersey Corporation. 10

(L. S.) You are summoned to answer the annexed Complaint of Francis O'Neil, in an action at law in the Essex County Circuit Court.

And take notice that unless you file your answer to said Complaint with the Clerk of the Essex County Circuit Court at Newark, New Jersey, within twenty days after service upon you of this Writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

Witness, Hon. Nelson Y. Dungan, Hon. Worrall F. Mountain, and Hon. William A. Smith, Judges of the Essex County Circuit Court, at Newark, this 23rd day of April, nineteen hundred and thirty-one. 30

JOHN H. SCOTT,
Clerk.

JAMES P. MYLOD,
Attorney.

Complaint

Filed April 23, 1931.

ESSEX COUNTY CIRCUIT COURT

10

FRANCIS O'NEIL,

Plaintiff,

vs.

WALLACE JACOBUS and SCHWARTZ
BROTHERS, TRUCKMEN, INC., a
New Jersey Corporation,
*Defendants.**Action at Law.
Complaint.*

20

Plaintiff, Francis O'Neil, residing in the Town of Bloomfield, County of Essex, State of New Jersey, says that:

30

1. On or about May 24, 1930, plaintiff was riding in a certain automobile owned and operated by the defendant, Wallace Jacobus, by invitation of said Wallace Jacobus, which said automobile was being operated in a westerly direction in and along Bay Avenue, a public highway in the Town of Bloomfield, Essex County, New Jersey.

40

2. At the time and place aforesaid, the defendant, Wallace Jacobus, operated his automobile in a careless, reckless and negligent manner at an unlawful rate of speed, without proper brakes and without keeping a proper lookout for the other automobiles on said highway.

Complaint

3. On the aforesaid date, the defendant Schwartz Brothers, Truckmen, Inc., a New Jersey Corporation, was the owner of a certain automobile truck and trailer, which it was operating by its agent, servant or employee, in a westerly direction in and along Bay Avenue aforesaid, in a careless, reckless and negligent manner, without lights, at an unlawful rate of speed without proper brakes and without due regard for the safety of others lawfully on said highway. 10

4. By reason of the premises aforesaid and the carelessness and negligence of the defendants as aforesaid, the said motor vehicles collided with great force and violence, seriously and permanently injuring plaintiff.

5. By reason of the premises and the carelessness and recklessness of the defendants, the plaintiff suffered severe injuries of a permanent and lasting nature, about his face, head, legs, arms and body and received a severe shock to his nervous system. Plaintiff received severe cuts and abrasions about his face and his eyesight was impaired. His nose and right leg were broken and the plaintiff was sick, sore and disabled and will in the future be sick, sore and disabled for a long period of time and is permanently scarred, disfigured and injured. 20 30

6. By reason of the premises, plaintiff was forced to spend divers sums of money for medicine, medical aid and attention in an effort to cure and heal the said injuries and will in the future be forced to spend divers sums of money in an effort to cure and heal said injuries.

7. By reason of the premises, plaintiff suffered the loss of all the clothes he wore at the time of said accident, said clothing being ruined and of no further use to the said plaintiff. 40

Complaint

8. By reason of the premises, plaintiff was confined to his bed and home and suffered the loss of great gains, profits and advantages he would otherwise have gained.

Plaintiff demands as damages the sum of fifteen thousand dollars (\$15,000.00).

19

JAMES P. MYLOD,
Attorney of Plaintiff.

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30

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Answer of Defendant Schwartz Brothers

Filed April 30, 1931.

ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,	}	<i>Plaintiff,</i>	<i>Action at Law.</i> 10
vs.		<i>Answer of</i>	
WALLACE JACOBUS and SCHWARTZ	}	<i>Defendant</i>	
BROTHERS, TRUCKMEN, INC., a		<i>Schwartz</i>	
New Jersey Corporation,		<i>Brothers,</i>	
<i>Defendants.</i>		<i>Truckmen, Inc.</i>	

Defendant, Schwartz Brothers, Truckmen, Inc., 20
 having a place of business in the City of Newark,
 County of Essex and State of New Jersey, for answer to the complaint herein says:

FIRST DEFENSE

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations of the first paragraph of the complaint, except that it admits that on the night of May 24-25, 1930, an automobile was operated by Wallace Jacobus along Bay Avenue, a public highway, in the Town of Bloomfield, County of Essex and State of New Jersey. 30

2. The second paragraph of the complaint is admitted.

3. The third paragraph of the complaint is denied, except that this defendant admits that its automobile truck was being driven along Bay Avenue aforesaid.

Answer of Defendant Schwartz Brothers

4. Answering the fourth paragraph collision is admitted, but all allegations of carelessness and negligence on the part of this defendant are denied. As to the extent of any injury to the plaintiff this defendant has no knowledge or information sufficient to form a belief.

10 5-6-7-8. This defendant has no knowledge or information sufficient to form a belief as to the extent of any injury, damage or expenses sustained by the plaintiff. Otherwise the fifth, sixth, seventh and eighth paragraphs of the complaint are denied.

SECOND DEFENSE

Any injury, damage and expenses suffered and sustained by the plaintiff from the accident inaccurately described in the complaint was proximately
 20 caused by the negligence of defendant Wallace Jacobus, in that he drove his automobile at an excessive speed, without making proper observations as to the conditions ahead of him, without keeping his automobile under proper control, without regard to the traffic regulations, without making timely application of his brakes and when the same were not in proper condition.

THIRD DEFENSE

30 Plaintiff was guilty of contributory negligence, in that he acquiesced in the reckless, careless and negligent manner in which the automobile of Wallace Jacobus was being driven, and did not warn him of the imminence of an accident, although he saw the conditions then and there existing, and furthermore continued to ride with Wallace Jacobus with knowledge of his reckless driving upon the night in question.

40 KELLOGG & CHANCE,
Attorneys of Defendant,
Schwartz Brothers, Truckmen, Inc.

Reply to Answer of Defendant Schwartz Brothers

Filed May 19, 1931.

ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,	}	<i>Action at Law.</i>	10
<i>Plaintiff,</i>		<i>Reply to</i>	
vs.		<i>Answer of</i>	
WALLACE JACOBUS and SCHWARTZ	}	<i>Defendant,</i>	
BROTHERS, TRUCKMEN, INC., a		<i>Schwartz</i>	
New Jersey Corporation,		<i>Brothers,</i>	
<i>Defendants.</i>		<i>Truckmen, Inc.</i>	

Plaintiff in reply to the Answer of defendant, Schwartz Brothers, Truckmen, Inc., says that: 20

1. Plaintiff neither admits nor denies the truth of the allegations contained in the Second Defense but leaves this defendant to its proof.

2. Plaintiff denies the allegations contained in the Third Defense.

JAMES P. MYLOD,
Attorney of Plaintiff.

30

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Answer of Defendant Wallace Jacobus

Filed June 19, 1931.

ESSEX COUNTY CIRCUIT COURT

10

FRANCIS O'NEIL,

Plaintiff,

vs.

WALLACE JACOBUS and SCHWARTZ
BROTHERS, TRUCKMEN, INC., a
New Jersey Corporation,

Defendants.

Action at Law.

*Answer of
Wallace
Jacobus.*

20

Defendant, Wallace Jacobus, answering the complaint in this cause, says that—

FIRST DEFENSE

He denies paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the complaint.

SECOND DEFENSE

30

The accident referred to in the complaint was caused solely by the negligence of the defendant, Schwartz Brothers, Truckmen, Inc., in the operation of their automobile truck and trailer, which negligence consisted in this—that said defendant operated said truck and trailer at an excessive rate of speed, on the wrong side of the highway, without warning, without proper control thereof, without proper brakes, in violation of the motor vehicle and traffic laws of this State and of this defendant's rights upon the highway, and other carelessness and negligence.

40

MCCARTER & ENGLISH,
Attorneys, Defendant Wallace Jacobus.

Reply to Answer of Defendant Wallace Jacobus

Filed June 24, 1931.

ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,

Plaintiff,

vs.

WALLACE JACOBUS and SCHWARTZ
BROTHERS, TRUCKMEN, INC., a
New Jersey Corporation,
Defendants.

Action at Law.

Reply.

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20

Plaintiff, in reply to the answer of the defendant, Wallace Jacobus, says that:

1. He neither admits nor denies the truth of the Second Defense and puts the defendant to his proof.

JAMES P. MYLOD,
Attorney of Plaintiff.

Filed June 24, 1931
11:51 A. M.

JOHN H. SCOTT,
Clerk.

30

40

Judgment for Defendant Jacobus

Entered April 4, 1933.

ESSEX COUNTY CIRCUIT COURT

10	FRANCIS O'NEIL, vs. WALLACE JACOBUS and SCHWARTZ BROTHERS, TRUCKMEN, INC., a New Jersey Corporation, <i>Defendants.</i>	}	<i>Action at Law. On Verdict By a Jury and Judgment for Defendant.</i>
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APRIL 4, 1933

Costs	\$78.35—Defendant
Damage	\$2,000.00
Costs	109.67
Total	\$2,109.67

McCarter & English, Attorneys for Defendant.
 James P. Mylod, Attorney of Plaintiff.
 Judge, Newton H. Porter.

30

This action was tried before Judge Newton H. Porter with a jury at the Essex Circuit Court on April 4, 1933.

The cause having been heard and submitted to the jury they returned their verdict as follows:

They find in favor of the defendant Wallace Jacobus and against the plaintiff Francis O'Neil no cause for action; they further find in favor of the plaintiff, Francis O'Neil and against the defendant Schwartz Brothers, Truckmen, Inc., for
 40 the sum of two thousand (\$2,000.00) damage.

Judgment for Defendant Jacobus

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant Wallace Jacobus recover of the plaintiff costs which are taxed at seventy-eight dollars and thirty-five cents; the plaintiff recover of the defendant Schwartz Brothers, Truckmen, Inc., the sum of two thousand dollars (\$2,000.00) damage and costs which are taxed at one hundred nine dollars and sixty-seven cents making in the whole the sum of two thousand one hundred nine dollars and sixty-seven cents. 10

Judgment signed and entered April 4, 1933.

Costs on Motion \$13.25.

4/22/33

20

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Notice of Appeal

Filed April 28, 1933.

ESSEX COUNTY CIRCUIT COURT

10	FRANCIS O'NEIL, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<div style="text-align: center;">vs.</div> WALLACE JACOBUS and SCHWARTZ BROTHERS, TRUCKMEN, INC., a New Jersey Corporation, <div style="text-align: right;"><i>Defendants.</i></div>		

20 To: James P. Mylod, Esquire, Attorney for
 Plaintiff, and McCarter & English, Esquires, At-
 torneys for Defendant Wallace Jacobus.

Sirs:

Take notice that the defendant Schwartz Broth-
 ers, Truckmen, Inc., appeals to the Court of Errors
 and Appeals of New Jersey from the whole of the
 judgment entered in the above entitled cause, and
 that they will hereafter, in compliance with law
 and the rules of court in such case made and pro-
 vided, serve and file grounds of appeal.

30 Dated: April 27, 1933.

Respectfully yours,

KELLOGG & CHANCE,

*Attorneys for Defendant
 Schwartz Brothers, Truckmen, Inc.*

Service acknowledged this 27th day of April 1933.

JAS. P. MYLOD.

40 Service acknowledged 27th of April 1933.

McCarter & ENGLISH.

Filed May 17, 1933.

NEW JERSEY COURT OF ERRORS AND APPEALS

10

<p>FRANCIS O'NEIL, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;">vs.</p> <p>WALLACE JACOBUS, <i>Defendant-Respondent,</i></p> <p style="text-align: center;">and</p> <p>SCHWARTZ BROTHERS, TRUCKMEN, INC., <i>Defendant-Appellant.</i></p>	}	<p><i>Action at Law.</i></p> <p><i>On Appeal</i> <i>from Essex</i> <i>Circuit Court.</i></p> <p><i>Grounds of</i> <i>Appeal.</i></p>
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To: James P. Mylod, Esquire, Attorney for Plaintiff-Respondent, and McCarter & English, Esquires, Attorneys for Defendant-Respondent, Wallace Jacobus.

30

Sirs:

The defendant-appellant, Schwartz Brothers, Truckmen, Inc., state the following grounds of appeal.

1. That the trial judge erred in denying defendant Schwartz Brothers, Truckmen, Inc.'s motion for a non-suit, to which denial of motion exception was duly noted by defendant's counsel.

40

Grounds of Appeal

2. The trial judge erred in denying the motion made by defendant Schwartz Brothers, Truckmen, Inc., for direction of verdict in favor of the defendant, to which denial of motion exception was duly noted by defendant's counsel.

10

KELLOGG & CHANCE,
Attorneys for Defendant-Appellant,
Schwartz Brothers, Truckmen, Inc.

Service of a copy of the within Grounds of Appeal is hereby acknowledged this 15th of May, 1933.

JAMES P. MYLOD,
Attorney for Plaintiff-Respondent.

20

McCARTER & ENGLISH,
Attorney for Defendant.
WALLACE JACOBUS.

30

40

Notice of Argument

Filed June 16, 1933.

NEW JERSEY COURT OF ERRORS AND
APPEALS

FRANCIS O'NEIL,	}	Action at Law. On Appeal from Essex Circuit Court. Notice of Argument.	10
<i>Plaintiff-Respondent,</i>			
vs.			
WALLACE JACOBUS,			
<i>Defendant-Respondent,</i>			
and			
SCHWARTZ BROTHERS, TRUCKMEN,			
INC.,			
<i>Defendant-Appellant.</i>			20

To: James P. Mylod, Esquire, Attorney for Plaintiff-Respondent, and McCarter & English, Esquires, Attorneys for Defendant-Respondent, Wallace Jacobus.

Sirs:

Take notice of the argument in the above-entitled cause before the Court of Errors and Appeals of the State of New Jersey to be held at the State House, in the City of Trenton on the 3rd Tuesday of October, next, at eleven o'clock in the forenoon, or as soon thereafter as the said court can attend to the same. 30

KELLOGG & CHANCE,
Attorneys for Defendant-Appellant,
Schwartz Brothers, Truckmen, Inc.

40

Acknowledgment

Service of a copy of the within notice of argument is hereby acknowledged this 29th day of May, 1933.

JAMES P. MYLOD,
Attorney for Plaintiff.

10

20

30

40

Service

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.

Edward A. Kaplan, of full age, being duly sworn according to law, on his oath deposes and says that he served a copy of the within Notice of Argument upon the Attorneys of the Defendants, Wallace Jacobus, McCarter & English, by leaving a copy thereof with Miss Catherine Schmaeling in charge of the office of McCarter & English, on the 29th day of May, 1933, at 1:45 p. m. 10

EDWARD A. KAPLAN,

Sworn and subscribed to before me
 this 29th day of May, 1933.

JOHN I. QUINN, 20
Attorney at Law of New Jersey.

30

40

Affidavit of Notice of Appeal

STATE OF NEW JERSEY, }
 COUNTY OF ESSEX, } ss.

I, John H. Scott, Clerk of the Circuit Court,
 in and for the County of Essex in the State of New
 Jersey,

10

Do hereby certify that the foregoing is a true
 and correct copy of the Notice of Appeal and Tran-
 script of all the proceedings in the case of Francis
 O'Neil, Plaintiff, vs. Wallace Jacobus and Schwartz
 Brothers, Truckmen, Inc., a N. J. Corp., Defendant
 and Judgment recorded April 4, 1933, in Book 119,
 page 7, of Circuit Court Judgments.

20

And the same is taken from and compared with
 the original papers and records filed and entered
 in the County Clerk's Office and as the same now
 remains on the files of said Court.

In Testimony Whereof, I have hereunto set my
 hand and affixed the official seal of said Court and
 County at Newark, N. J., this fifteenth day of June,
 A. D., 1933.

JOHN H. SCOTT,
Clerk.

30

40

*Appearances***ESSEX COUNTY CIRCUIT COURT**

Tuesday, April 4, 1933.

FRANCIS O'NEIL,

vs.

WALLACE JACOBUS and SCHWARTZ

BROTHERS TRUCKMEN, INC., a

New Jersey Corporation.

10

*Action
at Law.*

20

Before Hon. Newton H. Porter, *J.*, and a jury.

For the plaintiff appears James P. Mylod.

For the defendant Jacobus appears Gerald M. F. McLaughlin.

For the defendant Schwartz Brothers, Truckmen, Inc., appear Kellogg & Chance (by John F. Gillick).

A jury is called and sworn.

Mr. Mylod opens for plaintiff.

Mr. McLaughlin opens for defendant Jacobus.

Mr. Gillick opens for defendant Schwartz Brothers, Truckmen, Inc.

30

FRANCIS O'NEIL, plaintiff, sworn in his behalf.

Direct examination by Mr. Mylod.

Q Where do you live, Mr. O'Neil? A 17 Hill Street, Bloomfield.

Q With whom do you live? A My mother and father. 40

Francis O'Neil, direct

Q By whom are you employed? A Lackawanna Railroad.

Q How long have you been employed by the Lackawanna? A It will be ten years in July.

Q What is your position with the Lackawanna? A Ferry Dispatcher at Hoboken.

10 Q What was your position with the Lackawanna Railroad on or about May 25, 1930? A I was a clerk in the Chief Train Dispatcher's office.

Q Do you recall being on Bay Avenue, Bloomfield, that night? A Yes, sir, I do.

Q Do you recall riding in an automobile? A Yes, sir.

20 Q Will you tell us how you happened to get into the automobile? A I was coming from a dance on Broughton Avenue, and was going down Broad Street to go home, to get a bus.

Q About what time was it that you got into this automobile? A Why, it was after midnight some time, I should say, between twelve and one.

Q Tell us how you happened to get into the car. What was said to you? A I was walking along, and Mr. Jacobus called to me and asked me if I was going down.

Q Do you know Mr. Jacobus's first name? Is his name Wallace Jacobus? A Yes.

30 Q He asked you if you were going home? A Yes, sir.

Q What did you say? A I said, "Yes."

Q What did he say? A He told me to jump in and he would drive me home.

40 Q Then, after you got in the car, what happened? A Why, I had only gotten in the car and sat down and straightened myself out, and we had proceeded a short distance, it had not been any more than two or three minutes, and I looked up

Francis O'Neil, direct

all of a sudden, and saw this big object in front of me.

Q Can you describe the object you saw in front of you? A It looked like the back of a house to me, it was so big.

Q Will you tell us the condition of the weather?
A It was raining. 10

Q Was it foggy at all? A No, it wasn't foggy.

Q After you looked up and you saw what appeared to be the back of a house, where was it—in the road or on the side? A It was in the road in front of us.

Q In front of the car in which you were riding?
A Yes.

Q Did you observe any light on this object in the road? A No, sir.

Q Then what happened after you observed that?
A We hit right away. 20

Q Did Mr. Jacobus do anything from the time that you observed this object in the highway until the crash? A He pulled his wheel to the left and tried to avert it, but he couldn't, it was too late.

Q How long would you say elapsed from the time that you saw the object out in the highway until the time that the cars crashed? A I don't believe I would have been able to count five. 30

Q After the crash what was the next thing you remember? A The next thing I remember after the crash was waking up in the hospital with a doctor working on my face.

Q What hospital were you taken to? A Mountainside Hospital.

Q How long did you remain there? A For eight days.

Q What did they do for you there? What was the matter with you? A I had an injury to my 40

Francis O'Neil, direct

leg, a fractured bone in my leg, a fractured nose, and four permanent scars on my face, one on the left temple over the right eye, one under the right eye, and one on the bridge of my nose.

10 Q What treatment did they give you? What did they do, for instance, for your leg in the hospital? How did they treat it? A Why, they took X-rays first. Then they put it in a cast.

Q How long was it in the cast? A Six weeks.

Q Was it a plaster cast, or were they plaster bandages that were put around it? Can you describe the cast it was in? A It was a plaster cast.

Q And you had to keep the leg stiff for the six weeks? A The whole leg was stiff.

20 Q After you were discharged from the hospital, was your foot still in a cast? A Yes, sir.

Q And it remained in a cast for how long a time? A For six weeks.

Q Did you go about on a crutch after you left the hospital? A About a week or ten days after I left the hospital I could go out and get around on crutches.

Q Were there any stitches taken in the cuts that you talk about on your face? A Yes, sir, there were stitches in all of them.

30 Q Do you suffer any trouble or inconvenience now as a result of the broken bone in your leg? A Yes, sir.

Q In what way? A Take a day like today, it gets very stiff and sore in rainy weather. And if I go out and try to play baseball, or anything, I am practically laid up.

Q How old are you now, Mr. O'Neil? A Twenty-five now.

40 Q What inconvenience or trouble or pain, if any, do you suffer from your nose? A I have frequent headaches and nose bleeds from my nose.

Francis O'Neil, direct

Q Were you accustomed to having nose bleeds prior to the bone being broken in your nose? A No, sir.

Q You returned to your work how long after the accident? A As soon as the cast was taken off the leg, six weeks later.

Q You were being paid by the Lackawanna Railroad at the time of the accident how much a week? 10

A \$30.

Q You lost six weeks' wages, did you? A Yes, sir.

Q \$180? A Yes, sir.

Q Did you lose any other income or moneys as a result of being laid up for these six weeks? A Well, shortly before the accident occurred I had been told that there was going to be a vacancy for a new position, the position which I now hold there. While I was away, that position was taken by some one else, because I couldn't get it. 20

Q How much over \$30 a week did the position pay?

Mr. McLaughlin. It seems to me this is very speculative.

Mr. Mylod. I shall withdraw the question.

Q Did you eventually get this position that you expected to get at the time of the injury? A I hold that position now, yes, sir. 30

Q When did you get that position? A December of that same year.

Q December of the same year? A Yes.

Q You went back to work some time in June? A About June 1st, I don't recall exactly. Not June 1st, July 1st.

Q You were promoted in December? A Yes, sir. 40

Francis O'Neil, direct

Q Did you expend anything for crutches or medical supplies in any way? A Yes, I had to buy braces for my ankle, my right ankle, and various rubs to massage my broken leg.

Q About how much would you say you spent for those miscellaneous items? A Well, between \$50
10 and \$75.

Q How much? A About \$50 or more.

Q Did you have glasses with you at the time of this accident? A I did.

Q Eye glasses? A Yes, sir.

Q What happened to the eye glasses? A They were lost.

Q Did you replace them? A Yes, sir.

Q How much did these eye glasses cost you?
20 A It was \$12, I believe.

Q Whom did you buy them from? A Dr. Brown in Bloomfield.

Q What about your clothing? What about the suit of clothes you wore the night you were injured? A The pants were ripped clean off where the leg was broken.

Q What did that suit of clothes cost you? A \$35.

Q About how old was it at the time that it was ruined? A About two or three months.
30

Q Did you have an overcoat on? A I had a top coat.

Q Did you ever use the top coat after the accident? A No, sir.

Q Why not? A It was a light coat and it was covered with blood, and the stains couldn't be taken out.

Q Where was the coat purchased? A At Bam-berger's, where I buy all my clothes.

40 Q What did you pay for the coat? A \$35.

Francis O'Neil, cross

Q How long had you worn that top coat? A I had got it the previous fall.

Q Did you receive a bill from the hospital for the time you were there? A I did.

Q Have you got the bill? A No, I haven't got it with me, I mislaid it and couldn't find it.

Q Do you recall the amount of the bill? A I believe it was \$29. 10

Q After you were discharged from the hospital, what treatment did you receive? A Only the care I took of myself.

Q Did you go back to the clinic in the hospital? A Oh, yes, I went to the clinic two or three times. They took the cast off my leg.

Q What is the name of the doctor who attended you in the hospital? A Dr. Van Gieson. 20

Q When you went back to the clinic, did Dr. Van Gieson still take care of you in the clinic? A He took care of me under the supervision of Dr. Nicola who is the bone specialist there.

Q Who set the bone in your leg, if you know? A I don't remember.

Q Did you have any scars on your face prior to this accident? A No, sir.

Q And your nose was all right before the accident, it was not broken, it was not deformed in any way? A No, sir. 30

Cross examination waived by Mr. McLaughlin.

Cross examination by Mr. Gillick.

Q How far had you proceeded on Bay Avenue after you had been picked up at Broughton Avenue?

A Why, it was about a short block.

Q How many feet? Do you know? A I wouldn't venture to say. 40

Francis O'Neil, cross

Q Would you say it was 400 or 500 feet? A Well, I tell you, I would say it is five or six times, or maybe four or five times the length of this room.

Q Had you noticed any of these what you described as "as big as a house," I think, these wagons, pass you while you were standing on Broughton
10 Avenue? A No, this is the only one I saw.

Q Is this the only one you saw up until the time of the actual contact? A At that time do you mean?

Q Yes. Do you remember passing any other wagons of this size as you came up in a westerly direction on Bay Avenue? A No, I don't.

Q You did not? A No.

Q When was the first time you remember seeing this box, this wagon? A Just before we hit it.
20

Q How many feet were you from it? A Why, it couldn't have been more than 3 or 4 feet.

Q It was not foggy? A No, sir.

Q Was it raining heavily? A Well, just like today. It was raining heavy, and then it would slow up.

Q When you first looked, were you directly behind this big box? A We were right in back of it.

Q Were you on your righthand side of the road?
A Yes, sir.
30

Q How close to the curb? A More towards the center of the road.

Q Did you note whether there was room enough for Mr. Jacobus to pass on your right? A You mean just to pass the truck on the right?

Q Yes. A I couldn't say that, I don't know.

Q Do you remember Jacobus blowing his horn when he was 20 feet behind this big box? A No.

Q Did Jacobus blow his horn at any time? A
No, I don't believe so. I didn't hear him.
40

Q Did Jacobus swerve to his left? A Yes.

Francis O'Neil, cross

Q And how far was he behind this big box when he swerved to his left? A Just a short distance.

Q How many feet, would you say? A About 4 or 5 feet.

Q Did Mr. Jacobus swerve to his left, blow his horn, and in response to that blowing of the horn did this driver motion for him to come on, this man sitting next to me (indicating)? A I didn't see anyone on the truck, or I didn't hear him blow his horn. 10

Q You did not hear him blow his horn and you did not see Mr. Tauriello wave his hand for Mr. Jacobus to come on? A No, sir.

Q Did you see this truck swerve, this big box? A Yes; it seemed to swerve in front of us.

Q You did not see it until you were 3 feet in back of it? 20

Mr. McLaughlin. I don't think you should misquote the testimony. He did not say 3 feet, he said 4 or 5 feet.

Q You had not seen this big box until you were 4 or 5 feet in back of it? A I said about 4 or 5 feet.

Q How fast were you going at the time? A An average rate of speed.

Q Well, what would you say that was? A About 25 or 30 miles an hour maybe. 30

Q 25 or 35 miles an hour? A I said 25 or 30.

Q I show you two pictures of this trailer and ask you: Would you recall it as being the trailer that was struck that night (handing photographs to witness)? A Do I recall whether this was the trailer that I saw?

Q Yes. A No, I couldn't recall that. It was one similar to this, I would say, but I don't know whether this is the one or not. 40

Francis O'Neil, re-direct

Q You don't know whether that trailer in that particular accident that night was equipped with reflectors? I mean this glass here (indicating) and this glass down there (indicating). A No.

10 Q Would you say that the box was not equipped with those particular reflectors? A No, I wouldn't say they were not.

Q Do you recall whereabouts in the road you were when the accident occurred? What particular part of the road were you in? A Just where you would be driving, on the righthand side of the road, on the right side of the road.

Q So that the box was always on its right side of the road? A The box?

Q This trailer. A Yes.

20 *Mr. Gillick.* I should like to have these photographs marked in evidence now, if there is no objection.

(The same are received in evidence and marked Schwartz Brothers' Exhibits D-1 and D-2.)

Q Do you recall where Jacobus's car was immediately after the accident? A I don't remember anything immediately after the accident.

30 *Re-direct examination* by Mr. Mylod.

Q Would you point out the scars on your face to the jury? A There is one on the righthand side under the eye (indicating) and one over the eye (indicating) and one on the left temple (indicating), and one across the bridge of the nose.

Q Did your nose ever have a lump on it, Mr. O'Neil, prior to this accident, on the bridge of the nose, as it has now? A No, sir.

40

Gertrude O'Neil, direct

GERTRUDE O'NEIL sworn in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q You are the mother of Francis O'Neil who was just on the witness stand? A Yes, sir.

Q And he lives at home with you on Hill Street in Bloomfield? A Yes, sir. 10

Q And he has always lived at home? A Yes, sir.

Q Do you know whether or not Francis is now suffering from nose bleeds? A Yes, he is.

Q In what way do you notice that fact? A Why, I notice it on his pillow and his handkerchiefs, and he has nose bleeds at different times.

Q Prior to this accident was Francis subject to nose bleeds? A No, he was not.

Q How old is Francis? A He is twenty-five. 20

Cross examination waived.

ZANE THOMAS CWIRKO sworn in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q Where do you live, Mr. Cwirko? A 44 Bay Avenue.

By the Court. 30

Q Bloomfield? A Bloomfield.

By Mr. Mylod.

Q Where is Bay Avenue, Bloomfield, with reference to Broughton Avenue? A Broughton Avenue ends at Bay Avenue.

Q Where were you about midnight on the 24th of May, 1930? A I was standing on a porch of my neighbor's home where they were just finishing up a party. 40

Zane Thomas Cwirko, direct

Q The porch on which you were standing—what street is that on? A It is practically opposite Broughton Avenue.

Q On Bay Avenue? A On Bay Avenue.

10 Q Did you see any trucks and circus wagons pass where you were standing? A I saw several of them.

Q Do you recognize these exhibits, Schwartz Brothers' exhibits D-1 and D-2, as the wagons or similar to the wagons which passed attached to the trucks? A Yes, that is just about what I saw.

20 Q As these trucks passed you, did you observe whether or not there was a tail light on the truck or the trailer? A I didn't pay particular notice to most of them, except one which I believe was the last truck going through.

Q Can you tell us why you paid attention to the last truck which went through? A Yes, I can. We were standing on this porch watching a red pilot light that was on that corner—

Mr. Gillick. I don't know what materiality that would have.

30 *The Court.* I do not either. We shall find out in a minute. If it is not material, we shall strike it out.

Witness. That pilot was explained to me later on as a signal for the turn of those trucks, where they were to turn.

40 Q After the last truck went down Bay Avenue towards Broad Street, what happened? A Why, just after that truck had turned that corner a car was coming west on Bay Avenue, and as it approached this truck it almost collided with it, and that is what made me take notice to the truck, not

Zane Thomas Cwirko, direct

having a tail light on it. As it swerved around past that truck, it almost hit a car which was parked in front of my house, right next door.

Q As you were watching that automobile passing the truck, did you then observe whether or not there was a tail light on the truck or the trailer?

A I didn't see any tail light on it.

10

Q And then shortly after that what happened, if anything? A Well, I would say about a minute or two, approximately, I heard breaking glass. I paid absolutely no attention to that, because I have heard bottles broken out there many a time, so I thought it was just a bottle being broken.

Q Well, did you learn anything shortly after that? A Yes, shortly after that crash somebody came running up to the porch and told us there was a big smash-up down the street.

20

Q Did you go down? A We ran down.

Q What did you see when you got down there? A When we got down there, Mr. O'Neil had already been removed to the hospital, and I didn't pay much attention to the wreck because it was raining, and I wanted to get back home and keep dry.

Q Did you see Mr. Jacobus's car? Did you see a touring car there? A It was a roadster, I believe.

30

Q On which side of the street was the roadster, when you got there? A The roadster was on the left-hand side of the street.

Q Was there anything about it that you observed? A Yes, the windshield was so smashed, and it seemed as though the dash board was pushed in a ways, sort of clamping his leg in there.

Q Did you put your hand on it at all? A Yes, I put my hand on the car and I came away all sticky.

40

Zane Thomas Cwirko, cross

Q Do you know what was on your hand? A It was blood.

Q Did you observe where this large circus wagon was at that time? A I didn't pay any particular attention to the position of anything there except this car.

10 *Cross examination by Mr. McLaughlin.*

Q You had been at a party; is that it? A Yes, sir.

Q Was it a good party? A Well, what would you call a good party?

Q What would you call a good party? In any event, the ball was over when this thing happened, is that right? A Yes.

20 Q You were out on your porch at the corner of Broughton Avenue and Bay Avenue, were you?

A It was not my porch, it was a neighbor's porch.

Q You live around there, though? A Yes.

Q You saw one of these big contraptions going by. It seemed to be the last one, did it? A Yes, I saw several, one by one, come through. I no iced it was the last one.

Q They were all rumbling through, were they? A Yes.

30 Q Going about as fast as they well could seemingly? A I will say crawling along.

Q Showing you Exhibit D-1, I imagine that is what is called a trailer; is it (handing Schwartz Brothers' Exhibit D-1 to witness)? A Yes, sir.

Q Between it and the truck there was a large pole? A There was something connecting it.

Q More or less similar to that (indicating on photograph)? A Somewhat. I wouldn't say it was exactly that.

40 Q These photographs give us a general idea of what it was; isn't that it? A Yes.

Zane Thomas Cwirko, cross

Q The distance between the truck and the trailer was about 10 feet? A Well, I couldn't say what the distance was. I know it was quite a space there.

Q Can you help us out a little bit as to the width of Bay Avenue? A Approximately 40 or 50 feet.

10

Q That is a kind of a high estimate, isn't it?

A (No answer.)

Q Well, it is the best you can do, in any event?

A About the best I can do.

Q As to this last truck and trailer, did it come around Broughton Avenue and then go into Bay Avenue? A It came down Broughton Avenue and then swung into Bay Avenue.

Q After that swung into Bay Avenue, you saw that going west towards Broad Street, and you are positive it did not have any tail light on? A Absolutely positive. That is, I didn't see any tail light on it. I looked for it, and I didn't see it.

20

Q This was a rainy night, was it? A It was raining quite heavily.

Q At that time, as I understand it, even then there was almost a collision between it and some automobile? A Yes, sir.

Q Was that difficult to see, back of that trailer, without any light? A On that particular corner it would not be difficult, because there is a light there on that corner.

30

Q As it got down further and the light faded, then it was difficult? A It is very dark down further.

Q Then afterwards there was an accident down further—that is, west on Bay towards Broad? A Yes.

Q About how far away was that from where you had been? A About a block.

40

Zane Thomas Cwirko, cross

Q You went down there, as I understood you, and when you went down there you saw one of these big apparatuses—that is, the truck—and the in-between connection and the trailer? A Yes, sir.

10 Q Where was that, Mr. Cwirko? A I couldn't tell you exactly where that was, because I didn't pay particular attention to it. I just watched the roadster.

Q You do remember, don't you, that the truck and trailer were towards its righthand curb, in a diagonal fashion? A I wouldn't say that, I don't recall.

20 Q That truck and trailer that were standing there were the only truck and trailer that were in the vicinity at that time; isn't that so? A I wouldn't say it was the only one, but it was the last one I saw coming through there before that accident.

Q Were there any others stopped there after the accident? A I think there was a few more standing down further.

Q Towards Broad Street further? A Towards Broad Street.

30 Q This particular truck that you saw, and the trailer, when you went up after the accident that did not have any light on either, did it? A I didn't pay any attention to the truck after it was standing there after the accident, but I know for a fact that it did not have a tail light as it passed me before that.

By Mr. Gillick.

40 Q Which truck are you talking about? The last truck in line? A The last truck in line.

Zane Thomas Cwirko, cross

Q You are not talking about the truck that was involved in the accident? A Well, that is the truck that was involved in the accident.

Q The last truck in line? A The last truck that I saw.

By Mr. McLaughlin.

10

Q That was the truck that went by a little while before that, without any light on? A Yes, sir.

Q To your best recollection, as you observed it later when you went down from the place where the party had been, about a block towards Broad Street, you don't remember any light on it then either, do you? A No, sir.

Q The roadster that you are talking about, do you know what kind of a car that was—what make? A It looked to me like a Dodge roadster.

20

Q You say it was smashed about at the dash? A Yes, sir.

Q That is just about where the cowl light is, isn't it? A Yes, sir.

Q And that was on the righthand side? A Yes, sir.

Q And the windshield was smashed there, too, wasn't it? A Yes, sir.

Cross examination by Mr. Gillick.

30

Q I think you testified that as you were standing on this particular porch you had observed a certain number of these trailers and these boxes going by? A Yes, I would say that.

Q And I think you testified that the reason you noted that was that you saw some sort of a light on the corner there? A Yes.

Q A pink light did you call it? A A regular pilot light, a torch light, that is what it was.

40

Mary Ennis Keeler, direct

Q And the Jacobus car coming out of Broughton Avenue almost struck that particular truck you had been looking at at that time?

10 *Mr. McLaughlin.* I object to that, your Honor. That is a deliberate misstatement of this man's testimony.

Mr. Gillick. He can correct me if I am wrong. I thought Jacobus's car had almost struck that last truck.

Mr. McLaughlin. I do not see how counsel could have such an impression.

Q How many trucks had you seen? A I saw several. I don't recall how many. I would judge about five or six.

20 Q Could you estimate the speed of Mr. Jacobus's car? A I didn't see Mr. Jacobus's car pass there. I didn't say I saw it.

MARY ENNIS KEELER sworn in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q Miss Keeler, where are you employed? A At the Mountainside Hospital in Montclair.

30 Q What is your position there? A I am employed in the record room.

Q Did you bring your records in the Francis O'Neil case with you in court today? A I did.

Q Are these the hospital records and the X-rays of Francis O'Neil from the hospital? A They are.

Mr. Mylod. I offer them in evidence.

40 *Mr. McLaughlin.* They are not legal evidence.

Wallace Jacobus, direct

Mr. Mylod. All right.

(The same are marked Exhibit P-1 for identification.)

Mr. Mylod. I understand that ownership and operation are admitted on the part of both defendants.

10

WALLACE JACOBUS, one of the defendants, sworn in his own behalf.

Direct examination by Mr. McLaughlin.

Q Where do you live, Mr. Jacobus? A 5
Hendricks Place, Bloomfield.

Q How long have you lived in Bloomfield? A
I was born and raised in Bloomfield.

Q Whom do you live with at that address? A 20
My mother now.

Q Is your father dead? A Yes, sir.

Q What is your business? A I drive a truck
for a plumbing supply company.

Q How long have you been on that job? A
Pretty nearly six years.

Q Did you say how old you were? A I will be
thirty the 17th of this month.

Q And you are not married, are you? A No, 30
sir.

Q You live at home with your widowed mother?
A Yes, sir.

Q The particular night of this accident, back
in 1930, you were then a volunteer fireman, weren't
you? A Yes, sir.

Q Are you still a volunteer fireman? A Yes,
sir.

Q You people were having an affair or some-
thing, weren't you? A Yes, sir. 40

Wallace Jacobus, direct

Q Where was that? A Up at the corner of Broughton Avenue and Watchung Avenue.

Q So that the jury will know, if they don't, where is that with reference to Bay Avenue and Broad Street? Is it east or west? A Well, it is east.

10 Q On the Belleville side, more towards Newark?
A Yes, sir.

Q This particular night of the accident, what sort of a night was it? A It was raining pretty hard, and it was kind of foggy.

Q Were you busy around the affair that night?
A Yes, I was relief man that night.

Q What does that mean? A Well, relieving a man from each post every fifteen or twenty minutes.

20 Q Does that mean some of those wheels? A
Side shows and scooters and ferris wheels and all that.

Q After the affair was over, was it still raining?
A Yes.

Q What did you do? A It started to rain. We all had a box. We had to give it into the chief. At night all the tickets we took in we took them over to the chief. It was raining, and we kept ducking under tents there.

30 Q You had to give the tickets to the chief of the fire department, you mean? A That is right. We were ducking from tent to tent. I slowed up until I could get to my car.

Q After a while did you get in your car? A Yes, sir.

Q Where did you go? A I came down Broughton Avenue.

Q Were you going to this dance? A No, sir.

40 Q In any event, did you see Mr. O'Neil? A I saw him at the corner of Broughton Avenue and Bay Avenue.

Wallace Jacobus, direct

Q Did you offer to give him a lift home, or something like that? A Yes, sir.

Q Where do you live with reference to Broad Street and Bay Avenue? A I live about maybe a mile and a half away.

Q So you were headed towards home? That is, you were headed west on Bay Avenue towards Broad Street? A Yes, sir. 10

Q With Mr. O'Neil in the car? A Yes, sir.

Q On which side of the street were you riding? A I was riding a little to the right of the middle of the road.

Q At that time, just before the accident, was it still raining? A Yes, sir.

Q Was it raining hard, or otherwise? A Pretty hard. 20

Q What kind of an automobile did you have? A I had a Dodge roadster.

Q That is a one-seat affair, is it? A Yes, sir.

Q As you were going along, did you see anything in front of you? A Not till I got about 15 or 20 feet away.

Q At that distance what did you see? A Well, I seen a big—something like a freight car in front of me. I slowed up and threw my car back in second and pulled over to the left and blew my horn, and I seen a man's hand motioning for me to come on. I started to come on, and this thing just skidded right into me. 30

Q Which thing? A The box. His left corner skidded into my right cowl light.

Q That is what we have been calling the trailer? A Yes, sir.

Q That is not the truck proper? A No, sir.

Q What was pulling that trailer? A Some kind of a truck. 40

Wallace Jacobus, direct

Q What was between them? A There was a shaft there, maybe 10 or 12 feet long.

Q When this thing swung around and hit you, where did it strike your car? A Right at the right cowl light where Mr. O'Neil was sitting.

10 Q That is just about where the person on the righthand side was sitting? A Yes, sir.

Q At the right cowl light is just about where the right leg would be, under that cowl light? A Yes, sir.

Q The cowl is right here (indicating) and where the man is sitting—that is his right leg (indicating)? A It pushed that right in on his leg.

20 Q It was his right leg that was hurt? A Yes, sir.

Q Where was your car after the accident? Where did you go? Over to the left? A I was only about a foot away from the curb.

Q That is, over to the left? A The left.

Q If you went any further, what would happen? A If I went any further, about 8 feet over there is an embankment. There is a park right there and there is a pole about 10 feet in front of that.

30 Q After this happened, did you stop your car? A Yes, sure.

Q Did you help Mr. O'Neil? A I had to take him over the doors, the door was wedged, I couldn't get him out.

Q The door was wedged? A Yes, sir.

Q The righthand door? A Yes, sir.

40 Q Why was it wedged? How was it wedged? A Well, it was pushed right in. Where the cowl light was hit, it pushed right up against the door so that you couldn't open it.

Wallace Jacobus, direct

Q That is where the door was smashed by this thing coming around? A Yes, sir.

Q It was so badly pushed in that you couldn't open it? A Yes, sir.

Q How did you get him out? A I pulled him over the top of the door.

Q On the right or lefthand side? A On my side, on the left side. 10

Q And then what did you do with him? A I put him down at the side of the park there, and I took my handkerchief out and started to wipe him off.

Q You did the best you could for him? A Yes, sir.

Q After that, did he get to the hospital? A Yes, sir. 20

Q If you recall, did you see the big apparatus afterwards, the truck and the trailer? A Yes, sir. 20

Q Where was that? A The front, the truck part, was to the right; and the other part was about 2 feet away from me, sort of this way (indicating).

Q By that you mean diagonal, do you? A Yes, sir.

Q Diagonal towards the right curb? A Yes, sir. 30

Q But with the back of it away over towards you? A Towards the left.

Q How long was this thing altogether? Can you give us an idea? A You mean just the trailer?

Q I mean the whole thing, the truck and the big pole in the middle and the trailer. If you cannot tell us, why, don't. A Well, I couldn't tell you exactly. 40

Wallace Jacobus, cross

Q After the accident, did you see that truck driver? A Yes, sir.

Q What did he say? A I asked him to help me out with O'Neil. He walked away and started to pull the truck over.

10 *Cross examination by Mr. Gillick.*

Q How far had you proceeded up Bay Avenue the night of the accident until the time of the contact? A Maybe 400 or 500 feet.

Q When was the first time you saw what you describe as the big wagon? A The first time I seen the one I was in the accident with?

Q Yes. A It was about 300 or 400 feet from Broad Street.

20 *By the Court.*

Q How close were you to it when you first saw it? A About 15 or 20 feet.

By Mr. Gillick.

Q How fast were you going at that time? A Maybe 15 or 20 miles an hour.

Q Was your car in good condition? A Yes, sir.

30 Q In how many feet do you think you could stop your car? Within what distance?

Mr. McLaughlin. I object to that. There is not any testimony that he tried to stop his car.

Q Did you try to stop your car? A I slowed it up and threw it back into second gear.

Q How fast were you going then? A Maybe 5 miles an hour.

40 Q When you were traveling 5 miles an hour, where were you then with respect to this big

Wallace Jacobus, cross

wagon? A I was over to the left, and I blew my horn.

Q What happened when you blew your horn?

A I saw the man wave to me to come ahead.

Q Where were you then? On the left of the road? A Yes, about a foot away from the curb, ready to pass him.

10

Q How wide is the street? A From curb to curb?

Q Yes. A I don't think it is over 25 feet.

By the Court.

Q Where was the man who waved to you—on the trailer or on the truck? A On the truck.

By Mr. Gillick.

Q Could you have passed this big wagon at any time on your right? A No, sir.

20

Q I suppose he was close to the curb. A Well, the road is bad on that side. It is bad on the gutter side of it.

Q How close would you say he was to the curb? A How close was I?

Q No, how close was he? A He was about in the middle of the road, I guess.

Q How close was his righthand side of the wagon to the curb? A I don't understand the question.

30

Q You don't know how close he was to the righthand curb—that is, the right side of the wagon? A No, I don't.

Q How many feet of space did you say, Mr. Jacobus, there was between your car after the accident and the wagon? A Between the curb and the wagon?

Q I think you testified you were close to the curb, you were within a foot of it after the accident occurred. A Yes, sir.

40

Wallace Jacobus, cross

Q Where was this wagon with respect to your car? A He was about a foot and a half away from my car, after we hit.

Q A foot and a half away from your car? A After we hit.

10 Q Do you remember Officer Wilhelm coming to the scene of the accident? A Yes, sir.

Q He was not there when the accident happened? A No, sir.

Q Do you remember testifying in another action arising out of the same accident that the cars—

Mr. McLaughlin. Please read the question and answer.

20 Q This question was asked of you by the Court: "Was your automobile and the trailer in the same position when this officer arrived as it was immediately at the time of the accident?"

Mr. McLaughlin. I object to that. He is merely reading the question.

Mr. Gillick. I am going to read the answer. The answer was, "Yes, sir."

30 *Mr. McLaughlin.* I object to that because there is nothing contradictory here that the witness has said.

The Court. Do not read anything that is not contradictory to what he said here.

(Argument.)

By the Court.

Q There was an officer who did arrive there afterwards? A Yes, sir.

40 Q At the time that he arrived, was the position of your car and the position of the truck and

Wallace Jacobus, cross

the trailer the same as it had been immediately after the accident? A Yes, sir, it was.

By Mr. Gillick.

Q Were you examined by Dr. Klenk after the accident? A Yes, sir.

Q What for? A Drinking. 10

Mr. Gillick. That is all.

Mr. McLaughlin. I neglected to ask a question on direct examination. May I ask it now?

The Court. Certainly.

By Mr. McLaughlin.

Q Was there any light on the rear of this big freight car apparatus? A No lights at all. 20

By Mr. Gillick.

Q Did you notice whether there were two reflectors on the rear of that wagon? A No, sir, I didn't.

Q Did you see the picture which is now in evidence? A No, sir, I didn't.

Q I show you that picture (handing photograph to witness). Do you see two reflectors in the rear? Would you say those reflectors were not on that wagon? A I didn't see them. 30

Q You would not say they were not on there, would you? A No. I didn't see them.

Q You did see this wagon when you were 15 or 20 foot behind it? A Yes, sir.

Cross examination by Mr. Mylod.

Q Mr. Jacobus, I understand you to say you came down and were about to pass the trailer or the truck, and you blew your horn? A Yes, sir. 40

Wallace Jacobus, cross

Q And you were 20 feet behind the trailer? A
When I first seen it.

Q How close were you to the trailer when you
blew the horn? A Well, I was over to the left
of it. The front of my car was already past it.
If he had kept going straight, I could have got
10 through.

Q You were passing the rear of the trailer at
the time you blew your horn? A Yes, sir.

Q That is the first time you blew your horn,
when the front part of your car was even with
the rear of the trailer? A No, it was just com-
ing up to the rear of his trailer—my car.

Q You say you first blew your horn when you
were passing the rear of the trailer? A Yes, sir.

Q That is the first time you blew it in order
20 to get past the truck? A Yes, sir.

Q Then after blowing the horn the man in
the cab leaned out and beckoned to you? A Yes,
sir.

Q And at the time that he got his arm out to
call you forward, where was your car with ref-
erence to the side of this truck? In other words,
how far did you travel from the rear of the car
when you blew your horn until he put his arm
out to wave you to come on? A I was only
30 about a couple of feet in, the front of my car.

Q Would you say the front of your car was
up to the door on the circus wagon? A No, it
wasn't that far.

Q When you say the front of your car was a
couple of feet in past the end of the truck, do you
mean that the engine part of your car, two feet
of the engine, was beyond the truck? A The
front of it, at the radiator.

Q And then you say the truck swung to the
40 left? A Yes, sir.

Wallace Jacobus, cross

Q Why didn't you blow your horn to pass this truck before you attempted to pass it? A I slowed down and got back into second and—

Q But you say you did not blow your horn?

Mr. McLaughlin. Let him finish his answer.

A When I got a couple of feet away from the truck I blew my horn. By the time he put his hand out, the front of my car was right even with the end of his trailer. 10

Q I understand you to say you blew your horn before you got even with the rear of the truck.

Mr. McLaughlin. I object to that, because the witness has already testified to that. Judge Mylod would rather have him blow his horn after he gets past the trailer, but that is not the witness' testimony. 20

(Argument.)

Q (Question read.) Is that what you say now, that you blew your horn before you got even with the rear of the truck? A When I first seen the truck I was 15 or 20 feet behind it.

Q But you did not blow your horn until the front of your car was even with the rear of the truck? A No, about 4 or 5 feet behind the truck. 30

Q Where was your car with reference to the rear of the truck at the time that the driver of the truck put his arm out and waved for you to come on? A About a foot away from the left curb. 30

Q Had you reached the rear of the truck at the time that he put his arm out? A I was just about getting to it.

Q In other words, you were going to pass the truck before you received a signal, weren't you? 40

Wallace Jacobus, cross

A I could have passed it if he had stayed where he was.

Q But, as a matter of fact, you were passing the truck before you got the signal from the truck driver? A No, sir, I was not up to it yet.

10 Q Do you recognize this man as the man that gave you the signal (indicating)? A It was dark and raining; I couldn't say.

Q The rain was too heavy for you to see his face? A I seen his face, but it is so long ago I couldn't say.

Q You talked to him after the accident, didn't you? A I just asked him to help me out with O'Neil, out of the car.

20 Q What would you say is the distance from the rear of the trailer or the circus wagon to the cab in which this man was seated? A The pole was about 10 feet long, and maybe his part was 15. About 20 or 25, I don't know.

Q From the cab in which he was seated to the rear of his truck—what is that distance? A To the end of the trailer?

Q No, to the end of the truck alone? A I couldn't say.

30 Q 5 feet? Was the truck 5 feet long, the truck itself? A It is more than that.

Q 7 feet would you estimate? A I didn't look at the truck, I didn't go up to see the truck.

Q Well, how did you estimate that the pole on the trailer which was attached to the rear of the truck was 10 feet long? A I went down there a couple of days after, where they were down at Irvington, and seen the one that was in the accident.

40 Q Did you measure the length of the pole? A No, I just took a guess at it.

Edgar Wilhelm, direct

Q How long is the circus wagon? A I don't know.

Q Did you take a guess at the length of that, too? A I don't know how long it is.

Q Would you say it is also at least 10 feet long? A Maybe, and maybe not. I don't know.

Q Will you tell us your best judgment as to the distance your car was behind the trailer when the man put his arm out of the cab and beckoned for you to come? A Maybe 3 to 5 feet behind. 10

Q And you could see him in the rear very plainly? A There was a light there about where he was. There is a light pretty near across from Clark Avenue.

Q There was plenty of room to pass him on the left? A Yes, if he had stayed there. 20

Q Why didn't you pass him? What did you blow your horn for? A To let him know I was coming. How did I know he was going to turn left?

Q I am asking you: Why did you blow your horn to pass this truck that was proceeding in the same direction you were proceeding? Why didn't you pass the truck? A To let him know I was going to pass him.

EDGAR WILHELM sworn in behalf of defendant Wallace Jacobus. 30

Direct examination by Mr. McLaughlin.

Q Officer Wilhelm, you are connected with the Bloomfield Police Department? A Yes, sir.

Q And have been for how many years? A Ten years.

Q And you were, of course, in 1930 when this accident happened; is that right? A Yes, sir. 40

Edgar Wilhelm, direct

Q You have been subpoenaed here on behalf of the defendant Jacobus to tell what you know? A I have three subpoenas.

Q In any event, one of them—seeing that there are only three parties here—is from my client, Mr. Jacobus; is that right? A Yes, sir.

10 Q Did you see the accident, Mr. Wilhelm? A Not at the time it happened.

Q You were on duty that night, weren't you? A Yes, sir.

Q Were you afoot or on horseback or on a motorcycle or what? A Driving a Buick sedan.

Q As I understand it, you arrived at the accident after it was all over? A Yes, sir.

Q Are we correct in saying that Bay Avenue runs approximately east and west? A Yes, sir.

20 Q And that Broad Street, Bloomfield, runs approximately north and south? A Yes, sir.

Q With reference to a cross street, if any—Broughton or Clark or what—which was the nearest cross street to Bay Avenue where this thing happened? A Clark Avenue.

Q About how far is Clark from Broughton? A Four blocks. Excuse me, three blocks.

30 Q Will you tell us whether they are large blocks embracing great distance, or small blocks, or what? A Very small blocks.

Q When you got to the scene of the accident, had Mr. O'Neil been taken away? A No, sir.

Q Was he still there? A Yes, sir.

Q Did you direct his removal to the hospital? A I took him to the hospital.

Q In your Buick? A Yes, sir.

Q At that time, the automobiles were there, weren't they? A Yes, sir.

40 Q This truck and trailer, that was there? A Yes, sir.

Edgar Wilhelm, direct

Q Do you recall whether or not there was a light on the rear of that trailer? A There was no light.

Q Are you positive about that? A Positive.

Q That was part of your official inspection, was it? A Yes, sir.

Q Can you give us approximately—if you can, and if you cannot, why, say so—the length, over all, of the truck, the center piece and the trailer? A A good 30 feet. 10

Q That was headed in which direction, or where in the road, Mr. Wilhelm? A Headed west, or rather north. West, nosed in. This Mack truck drawing the trailer was nosed so that it would be northwest.

Q In other words, it was not parallel with the street, was it? A No. 20

Q It was diagonal towards its righthand curb? A Yes.

Q And the rear of it—that is, the trailer—in your best judgment extended where? A Pretty close to half way across the road.

Q Did you see the roadster, the Dodge roadster? A I did.

Q Where was that? A Parked on the left-hand side of the street.

Q That is again facing west? A Facing west. 30

Q Is it correct, Mr. Wilhelm, that on that left-hand side, which would be the south side of Bay Avenue, there is after a few feet a drop for the park? A Yes, there is.

Q Observing the roadster, did you see where the damage was to it? A Yes.

Q Where was it? A Not all the damage but where they had come together in the impact. It was at the cowl light on the righthand side. 40

Edgar Wilhelm, direct

Q Mr. Wilhelm, were you there when Mr. Jacobus took Mr. O'Neil out of the car? A No, I was not.

Q He was on the ground and Mr. Jacobus was helping him at that time? A I couldn't say whether he was helping him. He was on the ground.
10 There was a gang gathered there, and everybody was excited.

Q In any event, at the cowl light on the right-hand side, just immediately behind that comes the door? A Yes, sir.

Q Did you observe whether the door was in a damaged condition? A I didn't take particular notice of it.

Q Is there anything else you know about this thing, Mr. Wilhelm, that will help us here? A If
20 you will ask me any question, I will answer what I can.

Q I have asked you every question I can think of. Is there anything else that occurs to you that will help the jury and Judge Porter? A The only thing I seen was the position of the car as I arrived there, and I took the men to the hospital.

By the Court.

30 Q Did you take them both? A Yes, sir.

Q Both of them were hurt? A Both were injured.

Q Was Mr. O'Neil conscious or unconscious? A He was unconscious.

Q And he remained so until you got him to the hospital? A Well, him and Jacobus sat in the back of this car.

Q Who else was in the car with you? A No
40 one.

Edgar Wilhelm, cross

Cross examination by Mr. Gillick.

Q You say that when you arrived there the pleasure car was at the left curb? A At the left curb.

Q Where was the rear of the Dodge roadster with respect to the rear of the trailer? A I would say about evenly across the street.

Q How much distance was there between the automobile and the truck at the time you arrived there? A Oh, approximately 10 feet. 10

Q 10 feet between the sides? A That is, from the righthand side of the Dodge car to the lefthand side of the box car.

Q So when you arrived there, there was plenty of room for that Dodge roadster to have gone through? A There was 10 feet between the two cars. 20

Cross examination by Mr. Mylod.

Q Where would you say the end of the trailer was with reference to the center of the road? A Within a foot of being in the center of the road.

Q Would you say that there was any part of the end of the trailer to the left of the center of Bay Avenue when you arrived? A Yes. Not past the center. It was to the center, within a foot of being in the center of the road. 30

Q I mean across the center. A No, not across the center.

Q Then do we understand that the trailer was entirely to the right of the center of Bay Avenue when you arrived? A No.

Q How much of the end of the trailer was to the left of the center of Bay Avenue when you reached the scene of the accident? A This big trailer or box car was being drawn by a Mack truck. 40

Edgar Wilhelm, cross

The Mack truck has nosed in to the curb. There was a bar between this Mack truck and the trailer. Then the trailer extended out this way (indicating). The machines were faced in that direction, the Mack truck here (indicating) and the trailer about here (indicating).

10 *By the Court.*

Q Was there any part of the trailer out beyond the left of the center of the road? A Not beyond the left, I would say.

By Mr. Gillick.

Q Was there any projection, any rod or anything, sticking out from behind the end of the trailer, that you know of? A I didn't notice any.

20 *By the Court.*

Q You say there was no light lighted on the trailer when you arrived there? A No, sir.

Q Was there any light there at all that was not lighted? A No, sir.

Q There was not only no light but no provision for a light; is that what you mean? A Well, there was provision there.

30 Q What provision was there? A Little red lights on the bottom by the license plate.

Q With an electric bulb in it? A I didn't examine it to see whether there was an electric bulb there or not. There was no light there.

Q There was a lamp there, but it was not lighted? A Yes, sir.

Q Was it broken? A Yes.

Q It was broken? A Yes.

40 Q The lamp was broken? A Not the lamp, but this little plate that sets in these sockets was broken. It was not broken, there was none in there.

Edward John Van Gieson, direct

Q What do you mean, "There was none in there"? A This little glass plate that sets over the light. There was no plate in there.

Q No plate? A No glass plate.

Q Was there an electric bulb in there? A No, sir.

Q None in there at all? A No, sir. 10

EDWARD JOHN VAN GIESON sworn in behalf of plaintiff.

Direct examination by Mr. Mylod.

Q You are a practising physician of the State of New Jersey, Doctor? A Yes, sir.

Mr. McLaughlin. I admit the doctor's qualifications, on behalf of Mr. Jacobus. 20

Mr. Gillick. I will admit them also.

Q Did you examine Francis Peter O'Neil within the last couple of days? A Yesterday.

Q Will you take the hospital records? You saw him in the Mountainside Hospital? A Yes, sir.

Q Will you describe what injuries Mr. O'Neil had, using the records to refresh your recollection?

The Court (To the witness): If you need them. 30

A Of course, this was two years ago, and it is necessary.

By the Court.

Q Did you treat him? A Yes, sir, I did. When Mr. O'Neil was brought in, apparently by the Police Department, he showed evidence of a marked amount of bleeding, with multiple lacerations of the face and head, meaning possibly four lacerations. 40

Edward John Van Gieson, direct

tions—yes, four lacerations of the face and head, three on the face and one on the forehead. The bleeding was profuse from those lacerations. Of course, they necessitated a good many sutures. He also presented evidence of a fracture of the right leg, upper third of the fibula, which is the small
10 bone, of the right leg. This fracture of course could be felt physically when Mr. O'Neil was brought into the accident room.

Q Could the bone be seen protruding through the skin? A No, sir.

Q It did not protrude? A It was not compounded. Mr. O'Neil of course was semiconscious when he was in the hospital—that is, when he came into the accident ward, apparently from the blow which he received on the head in the accident.
20 X-ray findings of the head revealed no evidence of a fracture of the skull itself, but did reveal a fracture of the nasal bones, which as I recall definitely was very markedly displaced.

By Mr. Mylod.

Q Have you the X-rays there, Doctor? A Yes, sir.

Q Can you identify the X-rays as the X-rays of Mr. O'Neil? A Do you want to look at them?

30 Q Yes, look at them. A These are the X-rays.

Q What do the X-rays show with reference to the right leg? A Definite fracture of the right fibula in the upper third.

Q Can it be seen on the X-ray? A Yes, sir.

Q Have you any other X-rays? A This is the X-ray of the skull, which shows definite evidence of a fracture in the nasal bone.

Q Will you point out on the X-ray where the fracture shows? A Right through here (indicating).
40

Edward John Van Gieson, direct

Q Are there any other X-rays? A First we take the skull in four different plates, because of a possible fracture. Of course, these are just lateral views. The other is a posterior view which shows nothing of the nose at all, showing a negative head condition.

Mr. Mylod. I offer the X-rays in evidence. 10

(The same are received in evidence and marked Exhibit P-2.)

Q Have you refreshed your recollection from the records? A As near as I can, yes, sir.

Q What injuries are permanent? A The fracture of the nose has shown evidence of an increased amount of callus formation, which is undoubtedly permanent. Of course, I am not giving testimony as an expert, but I feel from a general practitioner's standpoint that this is permanent. The scars of his face are permanent. 20

Q I notice, Doctor, that there is not only a scar on his temple but very very heavy flesh and a raising of the flesh at that point. Is that permanent? A That is permanent, yes, sir.

Q The scar on the nose, does that show any deformity, any thickening of the tissue? A The scar is just a definite scar tissue on the nose, although there is a deformity of the nose from the callus formation, from within. 30

Q Is the deformity in the young man's nose permanent? A Yes, sir.

Q What about his leg, Doctor? Did you examine his leg too? A His leg shows very good healing. There is no evidence of any definite marked deformity that you can feel. An X-ray will probably show callus formation, but as far as the leg is concerned I do not feel that we can consider 40

Edward John Van Gieson, direct

that as a permanent condition except from the fracture standpoint.

Q Does the skin on the leg where the fracture occurred—does that show where the fracture was?

A No, sir.

10 Q That is not evident then? A No evidence outwardly at all.

Q The young man complains of frequent nose bleeds since the accident. What have you to say about that? A That is undoubtedly due to the amount of scar tissue in the nose or the calcified tissue in the nose which is covered by a mucus membrane which is very vascular. If he happens to strike it, or anything, it will naturally bleed, and possibly as he gets out of a chair or has any exertion.

20 Q The bill of the Mountainside Hospital for the eight or nine days he was in the hospital amounts to \$29. Would you say that \$29 is a reasonable charge? A I would, for the circumstances which he was treated under.

By the Court.

Q Had you any bill, Doctor? A Only for this morning.

30 Q No, I don't mean this morning. A Pardon me, I did not mean this morning. I mean yesterday when I examined him.

Cross examination waived.

PLAINTIFF RESTS.

40 *Mr. Gillick.* At this time, if your Honor please, it seems to me there is nothing in this case which would indicate any negligence on the part of the defedant Schwartz Brothers, Inc. Looking at the case from any angle, the

Edward John Van Gieson, direct

plaintiff O'Neil did not see anything until he was 3 or 4 feet away, and after the accident he could not testify to the position of the cars.

As to the defendant Jacobus, there is no question as to lights. Jacobus saw the car when he was 15 or 20 feet away. He said he sounded his horn although O'Neil said he did not hear him sound it. Jacobus said that the position of the cars was the same after the accident when Officer Wilhelm got there as it was at the time of the accident, and at that time his car was against the curb and our car was over on our right side of the road, and there was a distance of 10 feet between the sides of both cars. There was plenty of room for him to pass. If he did what a reasonably prudent man would have done, there would have been no accident. There has been no negligence shown on our part. We were always on our side of the road.

The question of lights does not enter into the case, because Jacobus saw our car when he was 15 or 20 feet away.

It seems to me from the very nature of this box, this trailer, it would not perform the maneuvers which are credited to it.

On that ground I ask that there be a nonsuit as far as the defendant Schwartz Brothers, Inc., is concerned.

(Motion denied.)

Mr. Gillick prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Joseph P. Tauriello, direct

JOSEPH P. TAURIELLO sworn in behalf of defendant Schwartz Brothers, Truckmen, Inc.

Direct examination by Mr. Gillick.

Q Mr. Tauriello, on May 24, 1930, were you employed by Schwartz Brothers, Truckmen? A Yes, sir.

10 Q Are you employed by them now? A No, sir.

Q For how long had you been driving for Schwartz Brothers at the time of the accident? A About eighteen months.

Q On this particular night in question, what were you doing? A I got orders to take my truck out of the garage and go to the—what do you call it?—a carnival, I don't know whether it is a carnival or what kind of an affair they had. We got orders to go up there, and we were supposed to pull a wagon from Bloomfield to Irvington. So I went up there.

Q How many trucks were up there that evening? A About nine.

Q What happened when you arrived at the carnival? A It was raining, so we had orders to pull the truck to the side of the road.

Q What time did you leave the carnival grounds? A About twelve o'clock.

30 Q What did you do then? A They gave me orders to couple up to one of the wagons. I did couple up to the wagon, and I pulled the wagon to the side of the road, and he told me to park there.

By the Court.

Q That was at the carnival grounds? A Yes.

By Mr. Gillick.

40 Q Why did he tell you to park there? A Because he wanted all of us to leave at one time.

Joseph P. Tauriello, direct

Q You mean the nine wagons? A The nine wagons.

Q What part of the procession were you in? Were you the first, second or third one? A I was the first wagon leaving the carnival grounds.

Q Were you the first wagon all along? A The first wagon all the time. 10

Q At what rate of speed were you proceeding?
A I was ordered from the bosses of the carnival—

Mr. McLaughlin. I object to that.

The Court. Objection sustained.

Q At what rate of speed were you proceeding?
A The rate of speed of 3 to 5 miles an hour.

Q Is there any particular reason why you should have gone 3 to 5 miles an hour? A The reason why I was going 3 to 5 miles an hour was if I went more than 5 miles an hour, the box of the wheel would get red hot, which is liable to snap the axle or burn the wheel up, and I wouldn't be able to draw the wagon. 20

Q As you proceeded down Bay Avenue, up till the time that this accident happened, did you hear anyone at any time blowing a horn? A No, sir.

Q Did you put your hand out at any time? A No, sir.

Q What kind of a shirt were you wearing? A I didn't have no shirt. I had a lumber jacket, one of them leather jackets. 30

Q Was there anybody with you at that time?
A Yes, sir.

Q What was the first you knew of the accident?
A When I heard a crash.

Q Where was your car at that particular time with respect to the intersection? A I was on the right side of the road. 40

Joseph P. Tauriello, direct

Q How much room was there between the left side of your car and the curb? A I would say a foot or two.

By the Court.

10 Q He asked you what distance there was between the curb and the left side of your car. A The left side of the wagon and the truck?

Q How much space was there between the left of your truck and trailer and the lefthand curb? A Oh, about 13 or 14 feet.

By Mr. Gillick.

Q Was your truck equipped that night with reflectors? A Yes, sir.

20 Q I am going to show you a picture which has been marked Exhibit D-1, and ask you if that is a picture of that particular wagon (handing Exhibit D-1 to witness). A This is the wagon that I was drawing from the carnival.

Q Were those two reflectors in working order that night before you started out? A Yes, one was an amber light attached to the back of the wagon, and the red reflector glass was on the bottom of the wagon, facing down.

30 Q That lamp that is there, was that on there the night of the accident? A It was not on there at the time of the accident. I put that lantern there after the accident occurred.

Q Why did you do that? A Because I didn't have no parking light which anybody else could see, so I had to put a lantern onto it.

Q Did I ask you what was the first you knew of the accident? A Yes, you asked me that.

40 Q What happened after the accident? A When I heard the crash, I stopped.

Joseph P. Tauriello, cross

Q Did you get out of your truck? A I got out of the truck, and I seen the car was to the side of the road. So I helped the fellow out of the car.

Q You helped the fellow out of the car? A Yes, me and the fellow that was riding with me.

Q Did Mr. Jacobus help him out of the car? A 10
No, sir.

Q Is the man who was riding with you in court here today? A Yes, sir.

Cross examination by Mr. McLaughlin.

Q As I understand it, you were proceeding on Bay Avenue, going toward Broad Street, at a speed of not more than 3 to 5 miles an hour at the time you heard the crash. Is that right? A Yes, sir. 20

Q You were on your righthand side of the road, weren't you? A Yes, sir.

Q Then you stopped when you heard the crash; is that right? A Yes, sir.

Q You stopped within how many feet? A Well, I couldn't tell you exactly how many feet—

Q Well, you stopped immediately, going at 3 miles an hour, didn't you? A Yes, I stopped. Say the car was to the right of the road and I am to the left of the road, the car tracks were about even as I stopped. 30

Q At the time you stopped, when you heard the crash and stopped, you stopped immediately? A I stopped immediately.

Q How was it that after the accident and before the cars were moved, your truck, the front part of this procession, was nosed into the curb diagonally? A My nose of the truck was direct straight from behind the wagon.

Q It was never nosed into the curb diagonally? A Not that I could notice. 40

Joseph P. Tauriello, cross

Q You have just said that it was straight, parallel with the curb, as far as you could see? A As far as I could see. It was kind of dark that night.

Q But you did not head in towards the curb, did you? A No, sir.

10 Q You did not try and get your truck back over to the righthand side of the road, did you? A No, sir.

Q And it was not at that time that the trailer on this wet, nasty night came up behind you and skidded into the Dodge coupe, was it? A No, sir.

Q Had you pulled these trailers before? A Yes, sir, I have been driving one for nine years.

Q Driving a trailer? A Yes.

20 Q I do not pretend to be an expert. I am talking about this thing (indicating on photograph). A That is the first time I ever drew one of them behind a tractor.

Q Well, now we are getting somewhere. Do you understand that I mean this (indicating) as the trailer? A Yes, sir.

Q When you say you have been driving nine years, you mean driving a truck? A That is not exactly a trailer. That is a wagon being drawn behind a truck. A trailer is altogether different, it is a unit to the truck what I drive, it is stationary.

30 Q A trailer is part of a truck? A It is not part of the truck itself.

Q The trailer that you are used to driving is built to fasten on the back of the truck? A Yes, sir.

Q And the handling of it, the manipulating of it by the driver, is therefore easy, isn't it? A It is the same thing as that (indicating).

40 Q This wagon that we are talking about here is not the same as the trailer that is specially con-

Joseph P. Tauriello, cross

structed for the truck that you are used to driving, is it? A No, sir.

Q This is the first time you ever pulled one of these things? A Yes, sir.

Q This was a pretty nasty night, wasn't it? A Yes, sir.

Q And these are flat wheels on this thing, aren't they? A Iron rims. 10

Q Iron rims on the wagon? A Yes, sir.

Q There were no chains on them, were there? A No, sir.

Q What kind of pavement is on Bay Avenue?

A A tar road, with gravel and stone mixed in it.

Q A pretty good road, isn't it? A Yes, sir.

Q With the rain that had been on the pavement all night, it was a little slippery, wasn't it? A No, that I could notice. 20

Q Did you notice anything that night? A The only thing I noticed—I was keeping on going straight, and there was nothing that occurred to me, only the crash.

Q Did you keep on going straight? A Yes, sir.

Q You made a turn at Broughton Avenue, didn't you? A That was where I had to make a turn. I couldn't go no further because on the other side of Broughton Avenue is a dead end street like.

Q You remember that you testified on your direct examination that you did not put your hand out at all that night? A Yes, sir. 30

Q You did not put it out going around Broughton Avenue either, did you? A No, sir.

Q And you almost struck a car there? A I didn't strike no car.

Q Of course you did not strike it, but you almost did, didn't you?

Mr. Gillick. I object to this. There is no testimony that he almost struck a car. 40

Joseph P. Tauriello, cross

The Court. Somebody almost ran into him, then.

Q You never even knew that? A I don't know what you mean.

10 Q Did you hear the neighbor who testified on the stand a few minutes ago? A He said that that was the last wagon. I wasn't the last wagon of the carnival. I was the leading wagon from the carnival grounds.

Q He said it was the same wagon that was in an accident a little bit later up near Clark Avenue, which is your wagon. A It is impossible for it to be my wagon.

Mr. Gillick. I object to the comparison of testimony.

20 Q After the accident you hung a lantern on the wagon? A Yes, sir.

Q And then you had the picture taken with the lantern on? A I didn't have the picture taken.

Q This is the thing that was in the accident, isn't it (indicating on photograph)? A Yes, sir.

30 Q You didn't know anything about the mechanism on that wagon before you got on the scene, did you? You had nothing to do with hooking up the ignition, did you? A I got orders to hook it up, that is all.

Q Where did you hook up the tail light to? A To the rear of the wagon.

Q What sort of a light was that? A What do you mean? Before I left the carnival grounds?

Q Yes. A I never touched it. They are equipped with the wagons, they are stationary on them.

40 Q You never touched the light at all? A No, sir.

Joseph P. Tauriello, cross

Q And you never looked behind you from the time you started? A Yes, I did.

Q When was that? A At the time I left the carnival grounds there was a red reflector glass and an amber light. They are both equipped on the left rear of the wagon.

Q Showing you Exhibit D-1, which is supposed to be the same or a similar apparatus, and pointing to the left rear— A (Interrupting) That is the amber light, and here is your red reflector glass which was busted when the accident happened (indicating). 10

Q This is the tail light that is down here near the wheel (indicating); is that right? A Yes, sir.

Q That is the light fixture that did not even have a glass in it, isn't it? A It had an amber light in the place there. It doesn't carry no bulbs or electric. The lights from a car behind show in the reflector glass, which would give you a red light. 20

Q So now we come down to it that there was not any light on the wagon at all—

Mr. Gillick. I object to that, unless you explain to the witness what you mean by "light."

Mr. McLaughlin. He has just explained it to me. 30

Q Didn't you just tell us that there was not any bulb in the amber thing, that something shines on it, and then it is a red light? A Yes, sir. That is what the law requires.

Q So that there was not any light there, was there? A There was a red reflector glass and an amber light.

Q Would you mind telling us what they are, again? A It is a red piece of glass what you hook onto the back of a car. That is a red light. 40

Joseph Cifello, direct

Q That is a piece of glass, so far. A I don't know whether you call it glass or not, but that is a light.

Q Is there an electric bulb in it? A No, it don't have no electric bulb in it.

Q Then there is not any electric bulb in the rear of it? A No, sir.

Re-direct examination by Mr. Gillick.

Q Do you know of your own knowledge whether all these wagons were equipped with these reflectors? A Most of the wagons that I paid attention to, they had amber and red lights.

Q They did not carry lamps? A No.

Q You said that was all the law required, just the reflectors? A The reflectors.

JOSEPH CIFELLO sworn in behalf of Schwartz Brothers, Truckmen, Inc.

Direct examination by Mr. Gillick.

Q Were you riding with Mr. Tauriello on the night of the accident? A Yes, sir.

Q At what rate of speed were you proceeding along Bay Avenue? A 3 to 5 miles an hour.

Q Did you at any time hear a horn blown? A No, sir.

Q Did you see Mr. Tauriello put his hand out? A No, sir.

Q Did Mr. Tauriello swerve his car or that truck which he was in? A No, sir.

Q On what side of the road were you proceeding? Were you on the right or on the lefthand side? A The right.

Q How close were you to the center? A To the center of the road?

Joseph Cifello, cross

Q Yes. A We weren't at the center of the road, we were at the curb, the right curb.

Q After this accident, what was the first that you knew of the accident? A When I heard the crash.

Q What did you do? A We jumped out of the car and pulled Mr. O'Neil out. 10

Q Who pulled Mr. O'Neil out? A Me and Joseph Tauriello.

Q Didn't Jacobus pull him out? A No, sir, he told us to leave him alone, he said he was not hurt.

Q Jacobus said O'Neil was not hurt? A Yes, sir.

Q And you and Tauriello helped him out? A Me and Tauriello helped him out. He said that he could stand up, so we left him alone, and he crashed to the ground, he was unconscious. So we thought we would hail a car and put him in and take him to the hospital. 20

Q What was the position of the cars immediately after the accident? Where was Mr. Jacobus's car? A It was towards the left.

Q How much space was there between your car—that is, the box attached to the truck in which you were riding—and Jacobus's car? A You mean the left? 30

Q Yes. A About 12 or 13 feet.

Q Room enough for one or two cars to pass?

A Room enough for one car.

Cross examination by Mr. McLaughlin.

Q Do you drive an automobile? A No, sir.

Q Did you ever drive an automobile? A No, sir.

Q What were you doing on this truck? A I was with Joseph Tauriello. 40

Joseph Cifello, cross

Q He was driving. Were you helping? A Yes, sir.

Q You are a truck helper; is that it? A I wouldn't call it a truck helper, I just was giving him a hand.

10 Q You say that this truck was moving along this particular night at three miles an hour? A Three to five.

Q Why do you say three to five? A I did say three to five.

Q I said: Why do you say it? A Why do I say it?

Q Yes. A Because he can't go any faster.

Q Who can't go any faster? A The truck, because the wagon won't carry the weight, because the wheels would burn up.

20 Q What wheels would burn up if it went more than 3 miles an hour? Will you show me that on the photograph? A I don't know much about trucks.

Q This is not a truck, by the way. This is a wagon. A They are wooden wheels.

Q Wooden? A Yes.

Q I thought they were iron. A Well, the rims are iron, but they are wood there (indicating).

30 Q You say that a wooden wheel will burn up if it goes more than 3 miles an hour; is that it? A I think so.

Q What makes you think that? A Because it can't go any faster.

Q I beg your pardon? A He couldn't pull it any faster.

40 Q Did you ever see any of these wagons rumb-ling along, driven by horses? A Listen, I don't know nothing about wagons, I am not a truck driver.

Joseph Cifello, cross

Q Did you ever drive horses? A No, sir.

Q Did you ever ride a bicycle? A No, sir.

Mr. Gillick. I object, your Honor.

Mr. McLaughlin. I withdraw the question.

Q In any event, you were going along on Bay Avenue this wet night, after midnight, with this big Mack truck? A It was a Mack truck. 10

Mr. McLaughlin. You haven't got a picture of the truck, have you, Mr. Gillick?

Mr. Gillick. No.

Q There was a big trailer behind you; is that right? A Yes.

Q And there was nothing else on the road except your own rolling stock, was there? A What do you mean by that? 20

Q I mean: There was nothing else coming at you from the opposite direction on Bay Avenue, was there? A You mean was there anything coming towards us?

Q Yes. A No, sir.

Q You were the first truck, weren't you? A Yes, sir.

Q And you were out in the clear, in the middle of the road? A No, sir, we were on the side, at the right of the road, to the curb. 30

Q With it after midnight and with this big apparatus and nothing else on the road but you, you were over at the curb; is that right? A At the curb.

Q You were not riding on the crown of the road with this difficult job of pulling this trailer, were you? A What do you mean by the crown of the road? 40

Fred R. Gieseke, direct

Q I mean around the middle of the road. A No, sir.

Q What makes you say you were riding next to the curb, the righthand curb? A Because I jumped off on that side.

10 Q You jumped off on that side. Did you get on the sidewalk? A I jumped off. It was pretty dark there.

Q And you were still in the street, weren't you? A Yes. When I heard the crash, I got out.

Q And then did you walk over to the righthand sidewalk, up over the curb? A I went to the left, around the truck.

Q Around the front of the truck? A Yes, and come over to the accident.

20 Q Did you see there was not any light on the rear of that trailer too? A There were reflectors.

Q Would you mind answering the question, if you understand it? There was no light on the trailer, was there? A What do you mean by a light? Do you mean a lantern?

Q A light. I mean a light. Was there a light on the trailer? A I don't know.

FRED R. GIESEKE sworn in behalf of defendant Schwartz Brothers, Truckmen, Inc.

30 *Direct examination by Mr. Gillick.*

Q Mr. Gieseke, were you employed by Schwartz Brothers on the night of this accident? A I was.

Q Had you gone to Bloomfield, to these circus grounds? A I did.

Q Were you driving the same sort of a truck that Mr. Tauriello was? A Yes, sir, it was also a Mack truck.

40 Q Were you also drawing one of these wagons? A Yes, sir.

Fred R. Gieseke, direct

Q What was your wagon equipped with in the matter of lights? A The wagon I had had reflectors, amber and red reflectors.

Q The same as Mr. Tauriello's? A That is right.

Q Is that what was always used, as far as you know? 10

Mr. McLaughlin. I object to that, because they never had these wagons before this particular trip.

Q Is that what all these wagons were equipped with that night? A All these wagons I know of had the amber and red glass.

Q Were you directly in line behind Mr. Tauriello? A I was second in line.

Q And what was Mr. Tauriello? A He was first. 20

Q Did you proceed right along in back of him along Bay Avenue? A We had orders—

By the Court.

Q Not what you had orders to do. What did you do? A We stayed about 50 to 75 feet apart.

By Mr. Gillick.

Q When you were 50 foot from the rear of the wagon drawn by Mr. Tauriello, could you see Mr. Tauriello's wagon? A Yes, I had very powerful headlights. 30

Q Do you remember Jacobus's car passing you at any time? A It passed on my left.

Q At what rate of speed was he going? A I would say fast.

Q Did anything happen as he passed you? A He barely missed the left front of my truck. 40

Fred R. Gieseke, cross

Q You did not actually see the collision, did you? A I didn't see the collision.

Q Did you see where the cars were located after the accident? A I did.

Q Where was Jacobus's car? A The lefthand side of the road.

10 Q Up alongside of the curb? A I would say very close to the curb.

Q Where was Mr. Tauriello's truck, the wagon? A On the righthand side of the road.

Q How much distance was there between the wagon and the right side of the Jacobus car? A I would say approximately 12 foot or so.

Q Enough room for one or more cars to pass? A I passed myself, after the accident.

20 Q You passed between the Jacobus car and the box after the accident? A I did.

Q Was there any particular reason why these wagons could not be hauled at a rate of speed faster than 3 to 5 miles an hour? A Well, it seems they were loaded very heavy with machinery and different things, and if they went too fast the grease would burn out, and that would mean frozen axles, which would cause a break-down.

Q Did you at any time see Mr. Tauriello's car swerve? A I didn't notice it particularly.

30 Q Did you see it swerve? A Not particularly.

Cross examination by Mr. McLaughlin.

Q You remember it swerving when it nosed into the curb? A I was following in back of him, he was going right along.

Q You remember him nosing into the curb? A I didn't see him nose into the curb.

40 Q You saw him go towards his righthand curb, which is approximately northwest? A He was riding on the righthand side of the road.

Fred R. Gieseke, cross

Q Would you mind answering the question?

(Question read by the stenographer.)

A I didn't particularly notice him.

Q You saw, after the accident, that the truck was nosed into the curb, didn't you? A The truck was standing on the righthand side of the road. 10

Q Wasn't the front of the truck in a diagonal direction towards its righthand curb after the accident? A I would say it was standing on the right side of the road.

Q Standing on the right side of the road, but not parallel with the road, was it? A (No answer.)

By the Court.

Q Was it straight on the road or crooked on the road? A I would say parallel with the curb. 20

By Mr. McLaughlin.

Q Were you there after the accident? A I was second in line.

Q Did you follow this other truck? A There was nine of us in a row.

Q Did you follow the truck that was in the accident? A I did.

Q Immediately behind it; is that right? A 50 30
to 75 feet, approximately.

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

Q Well, then, you saw the near collision at Broughton Avenue and Bay Avenue, didn't you? A I didn't notice any.

Q Didn't you see a car pass? A Quite a few cars passed us.

Q Did a car pass the truck immediately ahead of you at the intersection of Broughton Avenue and Bay Avenue? A I didn't notice any. 40

Fred R. Gieseke, cross

Q You were looking right ahead, weren't you?

A Yes, sir.

Q And you had powerful headlights? A Yes, sir.

Q You did not see the driver of the truck ahead of you put his hand out, did you? A No, sir.

10 Q For the turn? A No, sir.

Q As a matter of fact, he didn't, did he? A I didn't notice.

Q And he did not blow his horn? A I didn't hear any.

Q You did not blow yours either? A No, sir.

Q You had never pulled such a weight before, had you? A That was the first time.

Q What speed were you pulling your wagon at?

A We had orders not to travel at over 3 to 5 miles
20 an hour.

Q Now, tell the jury what actual speed you were traveling at. A I would say about 3 miles an hour.

Q What kind of a truck were you driving? A A Mack truck.

Q Was that a great big bull dog Mack? A A bull dog Mack.

Q That is a 7-ton truck? A A 5-ton truck.

Q You said something about these wagons being loaded with machinery. A That is right.

30 Q What machinery were they loaded with? A Ferris wheels and merry go round equipment, and so on.

Q And a lot of horses and boxes and things like that, weren't there? A They were all closed and solid.

Q What? A They were closed up tight.

Q The boxes? A The wagons.

Q The wagons were closed? A Yes, sir.

40 Q And you don't know what was in them, do you? A No, sir.

Fred R. Gieseke, cross

Q Then you don't know that machinery was in the wagon ahead of you? A Some of the wagons were marked what they had in them.

Q What was the wagon ahead of you marked? A I don't know.

Q What was your wagon marked? A I don't remember. 10

Q Then you don't know whether the wagon ahead of you had any heavy stuff or not? A No.

Q How long have you been driving an automobile? A Eight years.

Q Do you say that a wagon or an automobile gets a hot box on its wheels when it is driven more than 3 miles an hour? A So we were told by the carnival men, not to proceed over 3 to 5 miles an hour.

Q Why, your truck would not pull that trailer going at 3 miles an hour, would it? 20

Mr. Gillick. I object to that.

The Court. I shall allow it.

A Yes, sir.

Q How long have you been driving those? Nine years? A I have been driving trucks since 1926.

Q How long have you been driving this bull dog Mack that you drove that night? A We have a fleet of cars. We drive different ones down there. 30

Q Did you ever drive any of the trucks at 3 miles an hour on the road? A We drove them faster if we had nothing attached to us.

Q You got there immediately after the accident? A I was in back of Mr. Tauriello.

Q 50 feet, as I understand it? A Approximately.

Q And you kept coming up to the scene of the accident? A I stopped when I heard the crash. 40

Fred R. Gieseke, cross

Q You were 50 to 75 feet behind the truck that was in the crash? A That is right.

Q That would make you how much behind the trailer? A I said behind the trailer 50 to 75 feet.

10 Q What is your idea of 50 feet? A Well, to the best of my judgment, a little better than the length of this room.

Q So the first thing you knew was that you heard a crash? A Yes, sir.

Q Do you mean that? A Yes, sir.

Q You, 50 feet behind the truck, the trailer directly behind it, with your powerful headlights centered on the accident, and the only thing you know about the accident is that you heard the crash? A You pay attention to your driving.

20 Q This was directly ahead of you on the road, the length of this room away, and there was a street light there too, and you did not see what happened; is that it? A I heard the crash. I didn't see the accident.

Q That is because you were not behind the driver of the other truck but ahead of him, weren't you?

Mr. Gillick. I object to that.

30 *The Court.* I shall allow it.

A I was second in line.

Q Did you get out of your truck and go up to the scene of the accident? A I did.

Q Then you saw the truck, didn't you? A Yes, sir.

Q And the trailer? A Yes, sir.

Q And the Dodge roadster? A Yes, sir.

40 Q Did you help Mr. O'Neil— A By that time they were pretty well getting straightened out.

Fred R. Gieseke, cross

Q You can anticipate me better than I can, but listen to the end of the question. Did you help Mr. O'Neil out of the automobile? A No, sir.

Q He had already been taken out by the time you got there; is that it? A Yes, sir.

Q Was he on his way to the hospital by that time? A No, sir. 10

Q Did you see Officer Wilhelm? A I didn't see Officer Wilhelm.

Q You did not see him at all? A No, sir.

Q Are you sure about that? A Yes, sir.

Q Well, they were taken to the hospital while you were there, weren't they? A We had to proceed right on, we had no time to waste.

Q You did stop and get out and go up to the scene of the accident, didn't you? A Just for a moment. 20

Q And you did see the Dodge? A Yes, sir.

Q And you saw the damage to the Dodge, didn't you? A Yes.

Q And it was the right door of the Dodge that was caved in, wasn't it? A I would say the front of the car.

Q Do you deny that the right door of the Dodge was smashed in? A I do not.

Q Do you deny that at the cowl light there was damage to the Dodge? A No, sir. 30

Q And that the front on the right hand side was so crushed that it prevented the door being opened? A No, sir.

Q Do you deny that? A No, sir.

Mr. McLaughlin. That is all.

Mr. Gillick. I would like to move now for a directed verdict on the same ground that I moved for a non-suit. 40

Charge to the Jury

The Court. Motion denied.

Mr. Gillick prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10 Mr. Gillick sums up for defendant Schwartz Brothers, Truckmen, Inc.

Mr. McLaughlin sums up for defendant Jacobus.

(At one o'clock p. m. the court takes a recess until two o'clock p. m.)

Mr. Mylod sums up for plaintiff.

The Court charges the jury as follows:

20 PORTER, *J.*

Gentlemen of the Jury:

You are called upon to decide some issues of fact which are raised in a suit brought by Francis O'Neil against Wallace Jacobus and Schwartz Brothers, Truckmen, a New Jersey corporation.

The suit is for damages which Mr. O'Neil asks from the defendants, basing his claim on the charge of negligence the proximate result of which consisted of certain physical hurts that he received.

30 It is not dispute that on the night of May 24, 1930, on Bay Avenue, Bloomfield, there was a collision between the Jacobus automobile in which Mr. O'Neil was riding as a guest and a vehicle owned by Schwartz Brothers.

It is not in dispute that as a result of the collision between those two vehicles Mr. O'Neil was hurt.

40 But there is a dispute with respect to just how the accident happened, with respect to who was at fault, with respect to who was guilty of negligence.

Charge to the Jury

You are called upon as the triers of the facts to decide what the real facts are, what the truth of the matter may be with respect to whether it is true, as Mr. O'Neil charges, that there was negligence on the part of the driver of the car in which he was riding and on the part of the driver of the vehicle owned by Schwartz Brothers. That is the charge on which Mr. O'Neil predicates his suit, and before he may recover from either or both of the defendants he must satisfy you of the truth of the charge which he makes. 10

Before the plaintiff is entitled to a verdict, you must be satisfied by the weight of the evidence, by the prevailing evidence, by the preponderating weight of the evidence, that the charge which the plaintiff makes has been established, because negligence in the law is never presumed but must be proven. The mere happening of an accident is not enough. There must be proof of the charge that is made. 20

Mr. O'Neil says that he was a guest in the Jacobus car; that Mr. Jacobus ran into the rear of the truck; that the truck was on the wrong side of the road, or swerved over into the path of the Jacobus car; that it was negligent for Mr. Jacobus to have driven so carelessly as to have collided with the truck, under the circumstances; that it was negligent for the driver of the truck to have so driven his vehicle as to cause it to swerve over into the path of the Jacobus car. 30

The plaintiff says that both of the drivers acted as reasonably prudent drivers would not have acted. That is the test of negligence. In applying the test, you are to ask yourselves: How would the reasonably prudent person act or fail to act under a given set of circumstances? Negligence may be an act 40

Charge to the Jury

of omission or it may be an act of commission. The test is not: How would the most particular driver drive? Rather, the test is: How would the reasonably prudent person act under a given set of circumstances?

10 You have had this scene depicted to you, of these two vehicles going in the same direction on a rainy night, late at night, and the vehicles coming in contact with each other.

Mr. O'Neil says that he did not see this truck ahead of him; that suddenly there loomed up in his path what looked to him to be a house; that he was a few feet from it and before he could count five the crash occurred, and the next thing he knew the doctors were working on him in the hospital.

20 Mr. Jacobus said that he saw the car ahead some distance before he reached it, a greater distance than that which Mr. O'Neil described; that he sounded the horn of his car, signaling to the driver of that truck that he wished to pass; that he went over to the left of the road in order to pass the truck; that he was then signaled by the driver of the truck to proceed on, the truck driver waving his arm; that as he started to pass the truck the trailer swerved into his path and came into contact with the front right of his car—where his passenger, Mr. O'Neil, was seated—crushing in the cowl and crushing in that corner of the car so that the door was jammed and could not be opened, and causing the injuries to the plaintiff.

30 The police officer who arrived right after the accident and before Mr. O'Neil was taken away tells you about the positions of the vehicles on the road at the time. He says that the truck was headed into the right curb, it was not parallel with the road but was at an angle, although the rear of the trailer
40 was to the right of the center line of the road.

Charge to the Jury

There is a dispute as to whether or not the trailer was to the right of the center line of the road at the time the collision occurred. The driver of the truck says it was over to the right of the road at all times, that he did not turn at any time, that he stopped immediately after the crash and did not turn to the right, that he was always parallel with the side of the road.

10

How far the vehicles may have moved after the crash is not described very intelligently, except there is some testimony that the truck stopped immediately.

There is no doubt that there was a collision. There is no doubt, I think, from the testimony, that there were no lights on the rear of the trailer. Whether that had anything to do with the accident is for you to say. If it had nothing to do with the accident, then it does not matter. The driver of the Jacobus car saw the trailer even though there were no lights on the trailer; he does not say he came into contact with the rear of it because there were no lights on it. He says he came into collision with it because it swerved.

20

Mr. Jacobus's theory, as I understand it, is that when he gave a signal to the driver of the truck that he was going to pass the truck the driver of the truck turned to give him more room and in the act of turning caused the rear of the trailer to slide sideways in front of him. That is the inference that I draw from Mr. Jacobus's testimony. It may not be correct; perhaps it is not a proper inference. Mr. Jacobus then said that the truck went on a little ways, and went over to the righthand side of the road after the accident and before it came to a stop, and Mr. Jacobus's car went some further distance beyond the point where the two vehicles collided.

30

40

Charge to the Jury

As to that, of course, it is for you to say whether or not you may draw that inference from the testimony. It is for you to say whether the truck stopped immediately, without traveling any distance at all after the two vehicles collided.

10 Mr. Jacobus had a right to pass the truck on the left. In fact, it was his duty to pass a vehicle going in the same direction on the left. He had the right to go over to the left of the road in order to pass him. And it was his duty to signal the truck that he was going to pass it, in order that he might be sure that he would be given sufficient room to pass.

20 There is testimony that the truck and trailer were over on the right of the road afterwards. The officer says that, and that testimony bears out the statement of the driver who says that there was sufficient room to the left of the trailer and truck for him to pass after the accident and before the truck and trailer had been moved.

30 There are two versions given as to the accident. There is a dispute as to whether it is a fact that Mr. Jacobus saw the truck ahead in sufficient time to turn out and go around it and whether through the negligence of the driver of the truck he was prevented from doing that by reason of the careening or skidding of the trailer on the wet pavement into his path. Or, is it a fact that Mr. Jacobus never saw the truck at all and crashed into it?

40 If the latter version be the version that you accept from the testimony and from the inferences which you may properly draw from the testimony, then it is for you to say whether the absence of lights on the rear of the trailer had something to do with the accident and explain why Mr. Jacobus did not see the trailer before.

Charge to the Jury

The absence of lights on the rear of the trailer might account for the fact that Mr. O'Neil did not see the trailer until he was almost upon it. But Mr. O'Neil was under no duty to make observations. He was not driving the car. It may be that he was not looking, and that was the reason why he did not see the trailer.

10

There were reflectors on the back of the trailer which were intended, I take it, to pick up the rays of light from an on-coming car and reflect the light of the on-coming car in the reflector.

You have to decide these questions of fact with respect to the actions of the drivers of the two vehicles. If Mr. Jacobus was guilty of negligence and his negligence had something to do with the accident, you must find a verdict against him. If you find that the driver of the truck was guilty of negligence and that his negligence contributed to the happening of the accident, you must find a verdict against his employers; because they are responsible for the wrongful act of their servant and employee.

20

If you find there was negligence on the part of only one of the drivers and no negligence on the part of the other, then you will exonerate the one who was guiltless of negligence and only find a verdict against the party whose negligence was the cause of the accident.

30

If both of the drivers were negligent, you are to find a verdict against both of the defendants without attempting to say how much of your verdict each is to pay. If they are both responsible, they are equally responsible. In such a case you will render a verdict against both defendants in a certain sum to represent the damage that Mr. O'Neil suffered. You will do that even though you may

40

Charge to the Jury

find one driver was guilty of greater negligence than the other. We do not weigh negligence. It is not a question of who may have been guilty of the greater negligence. If both of the drivers were guilty of negligence which contributed to the happening of this accident, your verdict must be
10 against both defendants. If only one was guilty of negligence, your verdict must be against only that one, and "No cause of action" as to the other.

If your verdict be in favor of the plaintiff, the question of damages must be decided by you. In that event you must take into consideration the nature of the injuries that the plaintiff received.

There is not any dispute that Mr. O'Neil was cut about the head and face; that the upper third of one of the bones in the lower leg was broken; that
20 he was taken to the Mountainside Hospital where sutures were taken in the wounds of his face; that there was a bone in his nose broken; that there was a reduction of the break of the bone in the leg; that there was a plaster cast applied; that Mr. O'Neil stayed in the hospital for a period of eight or nine days and then went home; that he was incapacitated from attending to his work or his usual activities for six weeks, during which time his leg was immobilized in this plaster cast.

30 The plaintiff is, and was at that time, employed by the Delaware, Lackawanna & Western Railroad Company. He lost \$180 in wages, \$30 a week for six weeks.

Mr. O'Neil now complains of pain and stiffness in the leg at the site of the fracture, particularly during wet weather and upon exertion. He complains that his nose bleeds, and that he has headaches and has had them since the accident, al-
40 though he never had them before. He also com-

Charge to the Jury

plains of the permanent scars which are on his face and the bump on his nose where the nose was broken, which conditions are permanent and from which he will suffer permanently.

In addition to those hurts and the loss of wages which he suffered, he says that he had a hospital bill of \$29; that his glasses which had cost him \$12 were broken; that he spent \$50 to \$75 for medicines or rubbing lotions; that he had an overcoat and a suit of clothes which were destroyed, the overcoat having cost \$35 and the suit \$35. 10

I may not correctly remember those items of expense. You will remember those items and any other items which I may have neglected to mention.

The plaintiff asks that he be compensated for the amount of loss which he had, for the destruction or the spoiling of his clothing, for the expense to which he was put at the hospital, and for the loss of wages. He also asks that you award him such sum as you will say represents in dollars and cents the pain and suffering which he has had and may have in the future, as the result of these hurts, and the physical disability which he has had and may have in the future as a result of this accident. It is for you to say what sum of money will properly compensate him for those elements for which he asks compensation at your hands. 20 30

You are the triers of the facts. The question as to the extent and nature of the plaintiff's injuries is a question which must be decided by you as a matter of fact. The question as to liability, the question of negligence, must be decided by you as a matter of fact. Those are factual questions, and your duty as jurors is to find what the real facts are. 40

Charge to the Jury

The Court has nothing to do with questions of fact; the Court only has to do with questions of law. You have nothing to do with questions of law but everything to do with questions of fact. I have explained to you the law which governs this situation. You are to find the facts. Then you are
10 to find a verdict in accordance with those facts, without sympathy for any of the three parties to this suit, without any concern as to the consequences of your verdict.

Your duty as triers of the facts is to find the facts and then, without fear or favor, to render your verdict in accordance with those facts as I have charged you with respect to the issues that are involved in this suit.

Should there be a verdict in favor of the plaintiff, and if so against whom, and if so how much? Those are the questions for you to decide.
20

As far as Mr. O'Neil is concerned, there is no question presented as to whether or not he was at fault. He was not driving the car, and he was under no duty with respect to the operation of the car. He was a guest, and therefore there can be no question of any negligence on his part. As to the liability end of the case, the only question is with respect to the negligence of the drivers of the
30 respective vehicles.

When you have reconstructed this scene, when you have weighed the testimony, then you will have arrived at the real picture, at the real facts as to just how this accident happened.

You must decide the case from your recollection of the testimony and not from mine or counsel's. If any of us have misstated the testimony in any particular, you will disregard such misstatements
40 and depend entirely on your recollection of what

Charge to the Jury

the testimony was. Of course, none of us has intended to misquote the testimony, but if any of us have, disregard our mistakes and depend entirely on your recollection. And you are to consider and weigh all of the testimony, whether it has been recalled to you or not.

You realize that this accident happened quickly, that it was over almost before it began, and that it happened nearly three years ago. All parts of the testimony do not agree in every detail, because what one may see another may not. One may be more observant than another. Some people have better recollections than others. Just because all of the witness do not testify to the same thing does not necessarily mean that any of them are testifying falsely. 10

You are to reconcile the testimony, reconstruct this scene, and then say what really did happen. You are to take into consideration the likelihood of the stories being true, as you weigh the credibility of the stories. How did the witnesses impress you? What interest have they in the outcome of the suit? 20

Consider all of those elements and such others as you may think proper.

You have sized up the witnesses. What do you think happened? You are the triers of the facts. What are the facts? 30

When you have weighed the testimony, giving it the consideration that you think it entitled to—and it is only entitled to that consideration and that weight which you believe it should have, no more and no less—then you are to find what the real facts are. When you have done that, you will bring in your verdict in accordance with those facts.

You may retire.

(The jury retires.) 40

*Requests to Charge in Behalf of Schwartz Bros.*REQUESTS TO CHARGE IN BEHALF OF
DEFENDANT SCHWARTZ BROTHERS,
TRUCKMEN, INC.

10 1. It has been testified by the defendant Jacobus that he saw the trailer of the defendant Schwartz Brothers when he was fifteen to twenty foot behind said trailer. If you believe this to be the fact, and you also believe it to be a fact that he blew his horn when he was this distance behind the trailer, then the fact that the trailer had no lights, if it had no lights, would make no difference, because Jacobus having seen the truck and blown his horn was under a duty to exercise reasonable care for the protection of himself and the passenger in his automobile.

20 2. The driver of any vehicle overtaking another vehicle proceeding in the same direction shall pass at a safe distance to the left thereof, and shall not again drive to the right side of the highway until safely clear of such overtaken vehicle. Section 8, Article 8 of Traffic Act.

30

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MAY-26-1930

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P. O. VALENTINE

Commercial Photographer

39 Homestead Park, Newark, N. J.



MAY-26, 1930

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ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,

Plaintiff.

vs.

WALLACE JACOBUS AND
SCHWARTZ BROTHERS TRUCK-
MEN, INC., a New Jersey cor-
poration,

Defendants.

*Action At
Law
Rule To Show
Cause.*

Application having been made to me within six days from the rendition of the verdict herein for a rule to show cause why the verdict should not be set aside and a new trial granted and the matter having been considered,

It is on this 10th day of April, 1933, on motion of Kellogg & Chance, attorneys for the defendant, Schwartz Brothes Tuckmen, Inc., ORDERED that the plaintiff show cause before this court on the 18th day of April, 1933, at four o'clock in the afternoon at the Court House in the City of Newark, New Jersey, why the verdict should not be set aside and a new trial granted;

And it is further ORDERED that all objections or exceptions taken by the defendant Schwartz Brothers Truckmen Inc., during the course of the trial be and the same are hereby expressly reserved as grounds of appeal;

And it is further ORDERED that execution be and the same is hereby stayed until the further order of this court.

Let the above rule be entered.

NEWTON H. PORTER,
Circuit Court Judge.

ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,

Plaintiff.

vs.

WALLACE JACOBUS AND
SCHWARTZ BROTHERS TRUCK-
MEN, INC., a New Jersey cor-
poration,

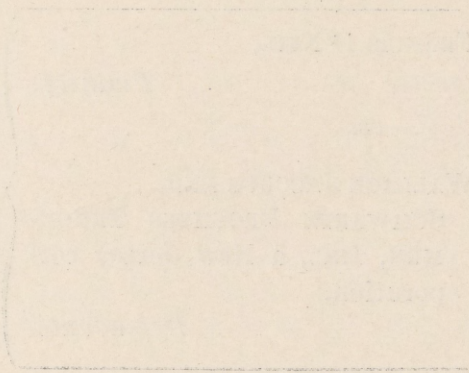
Defendants.

*Action At
Law.
Reasons.*

Now comes the defendant, Schwartz Bothers Truckmen, Inc., by Kellogg & Chance, its attorneys, and writes down the following reasons why the verdict entered in the above-entitled cause should be set aside and a new trial granted, viz:—

1. Because the verdict is against the weight of the evidence.
2. Because the verdict is a result of bias, passion, prejudice or mistake.
3. Because the damages awarded by the verdict are excessive.

KELLOGG & CHANCE,
Attorneys for Defendant,
Schwartz Brothers Truck-
men, Inc.



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ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEIL,

Plaintiff.

vs.

WALLACE JACOBUS AND
SCHWARTZ BROTHERS TRUCK-
MEN, INC., a New Jersey cor-
poration,

Defendants.

*Action At
Law.*

*Order Dismiss-
ing Rule To
Show Cause.*

A Rule to Show Cause having been entered in the above matter on behalf of the defendant, Schwartz Brothers Truckmen, Inc., a New Jersey corporation, on the 10th day of April 1933;

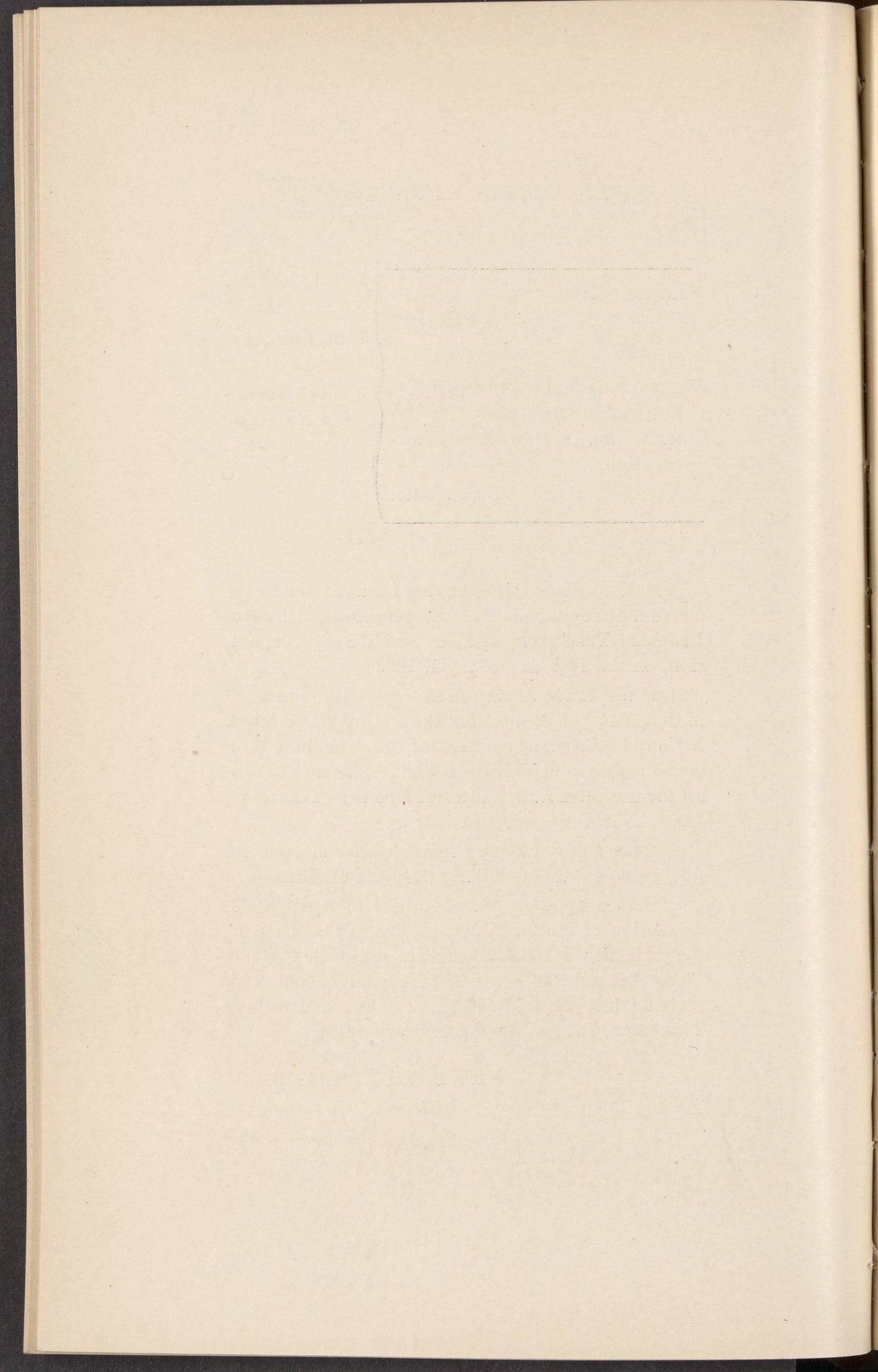
And the cause having been argued by James P. Mylod, Esq., of counsel for the Plaintiff, McCarter & English, Esqs., of counsel for the defendant Wallace Jacobus, and Kellogg & Chance, Esqs., of counsel for the defendant, Schwartz Brothers Truckmen, Inc., a New Jersey coporation;

And the Court having considered the matter and finding no cause for making the Rule absolute,—

It is thereupon, on this 18th day of April, 1933, on motion of James P. Mylod, Esq., of counsel for the plaintiff, ORDERED that the said Rule to Show Cause be and the same is hereby dismissed with costs against the said defendant Schwartz Brothers Truckmen, Inc., a New Jersey corporation.

NEWTON H. PORTER,

Circuit Court Judge.



ESSEX COUNTY CIRCUIT COURT

FRANCIS O'NEILL,

Plaintiff.

vs.

WALLACE JACOBUS AND
SCHWARTZ BROTHERS TRUCK-
MEN INC., a New Jersey cor-
poration,

Defendants.

*Action At
Law*

*Order Amend-
ing Order Dis-
missing Rule
To Show
Cause*

A Rule to show cause having been obtained in the above matter April 10, 1933 on behalf of the defendant Schwartz Brothers Truckmen, Inc., a New Jersey corporation, and upon the return day of the Rule to show cause—April 18, 1933, Attorneys for said defendant, Schwartz Brothers Truckmen, Inc., having indicated to the court that said defendant had decided not to prosecute said Rule but to take an appeal upon the exceptions reserved in the Rule to show cause;

And the court on said return day having signed an Order dismissing the Rule to show cause, in which said Order of dismissal it is recited among other things:

“And the cause having been argued by James P. Mylod, Esq., of counsel for the plaintiff, McCarter & English, Esqs. of counsel for the defendant Wallace Jacobus, and Kellogg & Chance, Esqs., of counsel for the defendant Schwartz Brothers Truckmen, Inc., a New Jersey corporation;

And the court having considered the matter and finding no cause for making the Rule absolute,—”

And whereas on the return day of said Rule to show cause the Rule was not argued nor was the matter considered, nor did McCarter & English, Esqs., of counsel as aforesaid, appear,—

It is, therefore, on this 19th day of September, 1933, ORDERED that the Order dismissing the Rule to show cause, heretofore entered April 18, 1933, be and the same is hereby amended to provide that said Rule was abandoned and said Order of dismissal was signed and entered without argument of either or any of the reasons advanced in support of said Rule.

NEWTON H. PORTER,
Circuit Court Judge.

I hereby consent to the making and entry of the within Order.

JAMES P. MYLOD,
Attorney for Plaintiff.

The Baker Printing Co., Law Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

FRANCIS O'NEIL,
Plaintiff-Respondent,

vs.

WALLACE JACOBUS,
Defendant-Respondent,

and

SCHWARTZ BROTHERS TRUCKMEN,
INC.,
Defendant-Appellant.

*On Appeal
from
Circuit
Court.*

APPELLANT'S REPLY BRIEF

I.

Our reply to respondent's first point is that the order which was entered (case, page 97), was in effect an order rescinding and excising the rule to show cause and all the reasons, for the express purpose of allowing appeal on the reserved exceptions. It was in substance a compliance with the practice of excising reasons referred to by the chief Justice in *Molnar vs. Hildebrecht*, 110 N. J. L. 246, indeed the rule to show cause and all its incidents were rescinded. There was never an argument of the rule on any point and no substantial adjudication of anything on the rule. The whole idea of the order which was consented to by opposing

counsel (case, page 98) is the wiping out of the rule and of its incidents so appeal could be taken.

The cases cited by opposing counsel all involve rules to show cause on which there was something argued and adjudicated. In such a case the decision would of course imply the decision of the issues raised by the reasons unless there was some court order to the contrary. But these cases have no applicability to this case in which no reasons were argued, considered or adjudicated by the court.

II.

Despite what opposing counsel says in his brief, we maintain that for the reasons given in our original brief there was no reasonable basis from which negligence of the defendant-appellant could be inferred. It is not weight of evidence that we urge but that there was no credible evidence of negligence.

Respectfully submitted,

KELLOGG & CHANCE,

*Attorneys for and of counsel with
Schwartz Brothers Truckmen, Inc.*

31
51 OCT. 1. 1933

New Jersey Court of Errors and Appeals

FRANCIS O'NEIL,
Plaintiff-Respondent,
vs.

WALLACE JACOBUS,
Defendant-Respondent,
and

SCHWARTZ BROTHERS TRUCKMEN,
INC.,
Defendant-Appellant.

*On Appeal
from
Circuit
Court.*

BRIEF FOR DEFENDANT-APPELLANT SCHWARTZ BROTHERS TRUCKMEN, INC.

This is an appeal by the defendant-appellant, Schwartz Brothers Truckmen, Inc., from a judgment entered against it for \$2,000.00 and costs in a case tried at the Essex Circuit before Judge Porter and a jury. The case arose out of an automobile collision. In the action there were two defendants. The jury found in favor of the other defendant Wallace Jacobus in whose car the plaintiff was a passenger.

As we view this case it presents for decision the question of whether a truckman whose truck and trailer were going on the righthand side of the road at a speed of about three to five miles an hour, can legally be made to pay damages to a passenger in an automobile which ran into the back of the trailer when the driver of the automobile carrying the passenger, by error in the operation of his car after seeing the trailer ahead, failed to turn out sufficiently to clear the trailer or to avoid running into it by stopping.

On May 24th, late at night, Schwartz Brothers Truckmen, Inc., had several of its trucks proceeding in a westerly direction along Bay Avenue, in the Town of Bloomfield (page 39, line 10). Attached to and behind each of these trucks was a large wagon containing circus paraphenalia belonging to the Melville-Reis Shows (page 60, lines 15 to 35). As this procession was moving along an automobile driven by the other defendant Wallace Jacobus, proceeding from the rear of defendant's truck, came in collision with one of the circus wagons (page 21, lines 10 to 20). Plaintiff was a passenger in Jacobus' automobile (page 20, line 22). The wagon with which Jacobus collided was attached to the truck at the head of the procession (page 61, line 8). Before the collision defendant's truck and trailer with which Jacobus collided, were on their righthand side of the street (page 28, lines 10 to 20; page 54, lines 10 to 20; page 69, lines 1 to 3; page 74, lines 12 to 14). Defendant's automobile and the circus wagon behind it proceeded slowly (page 32, line 30; page 61, line 18; page 68, line 28; page 74, lines 22 to 28).

The other defendant Jacobus said he saw the defendant's truck and the circus wagon to the rear of it when he was some distance behind (page 42, line 20). He said he saw the signal from the driver of defendant's truck waving him to pass (page 46, line 22), and that he thereupon proceeded to pass (page 46, lines 25 to 30). As he undertook to do so he collided with the circus wagon (page 46, lines 5 to 10). It was then that the plaintiff sustained his injury. Motion for non-suit and motion for direction of verdict were made and in each case, denied. Exceptions were taken to both of these rulings and noted as ground of appeal. Further details of the facts and the legal aspects of the case will be taken up under the head of argument.

GROUNDS OF APPEAL

The grounds of appeal stated are as follows:

1. THAT THE TRIAL JUDGE ERRED IN DENYING DEFENDANT SCHWARTZ BROTHERS, TRUCKMEN, INC.'S MOTION FOR A NON-SUIT, TO WHICH DENIAL OF MOTION EXEPTION WAS DULY NOTED BY DEFENDANT'S COUNSEL.

2. THE TRIAL JUDGE ERRED IN DENYING THE MOTION MADE BY DEFENDANT SCHWARTZ BROTHERS, TRUCKMEN, INC., FOR DIRECTION OF VERDICT IN FAVOR OF THE DEFENDANT, TO WHICH DENIAL OF MOTION EXEPTION WAS DULY NOTED BY DEFENDANT'S COUNSEL.

ARGUMENT

The foregoing grounds of appeal are the appellant's points. They will be argued together, because they both involve the proposition that there is no evidence which shows that any negligence on the part of this defendant Schwartz Brothers Truckmen, Inc., was the proximate cause of the plaintiff's injury.

At the outset we eliminate a matter which has no proper connection with the propriety of the rulings by the trial judge. It is the matter of lights on the circus wagon trailer. There was some question at the trial as to what kind of illumination there was on the back of the circus wagon with which Jacobus collided, but whether there was a proper light on the back of the trailer had nothing to do with the proximate cause of the accident. Jacobus by his own admission saw the trailer wagon behind defendant's truck (page 42, line 20) and as indicated above saw its driver wave his hand to pass

before he started by. The trial judge made mention of this fact in the charge at page 83, lines 20 to 25 in the following words:

“The driver of the Jacobus car saw the trailer even though there were no lights on the trailer; he does not say he came into contact with the rear of it because there were no lights on it.”

In *Martens vs. Martens*, 11 N. J. Misc. 705, reversing a judgment under appeal from the Bergen Common Pleas Court for failure to non-suit or direct a verdict, the Supreme Court recognized that negligence which was not the proximate cause of an accident furnishes no basis for recovery. In line with this ruling, if there was any negligence on the part of the defendant in respect of lights, it is immaterial in this case since it was clearly not the proximate cause of the accident. The truck and trailer ahead of Jacobus were merely visible objects imposing upon him the necessity for additional care in the use of the highway. While it was not immobile as was the automobile in *Powers vs. Standard Oil Company*, 98 N. J. L. 730, affirmed 98 N. J. L. 893, the absence of lights upon it was merely a condition and not the proximate cause within the reasoning of that decision. If Jacobus had not seen the trailer perhaps a jury question would have been presented as to whether he was negligent in not seeing it and as to whether the defendant had been guilty of negligence in not having better illumination, but his seeing the truck takes the question of lights out of the realm of proximate cause and makes the propriety of the denial of the motions dependent upon whether any negligence in the manner of operation of the defendant's truck was shown.

Apart from the question of lights the allegations of negligence made by the complaint in the third

paragraph, page 3, are very general. The complaint says this defendant was driving this truck and trailer "in a careless, reckless and negligent manner, without lights, at an unlawful rate of speed, without proper brakes and due regard for the safety of others lawfully upon the highway."

The allegation that the defendant's brakes were not proper may be dismissed with a statement that there is not any evidence which by any stretch of the imagination can support the allegation, or which would indicate that the nature of defendant's brakes had anything to do with the causing of the accident.

The allegation of unlawful rate of speed is likewise supported by no evidence. On the contrary the evidence is clear that this defendant's truck and trailer were going slowly. Testimony on this point follows:

ZANE THOMAS CWIRKO, WITNESS CALLED BY PLAINTIFF (page 32, lines 29 to 31):

"Q Going about as fast as they well could seemingly? A I will say crawling along."

JOSEPH TAURIELLO (page 61, lines 17 to 19):

"Q At what rate of speed were you proceeding? The rate of speed of 3 to 5 miles an hour."

JOSEPH CIFELLO (page 68, lines 28 to 30):

"Q At what rate of speed were you proceeding along Bay Avenue? A 3 to 5 miles an hour."

FRED GEISEKE (page 74, lines 22 to 28):

"Q Was there any particular reason why these wagons could not be hauled at a rate of speed faster than 3 to 5 miles an hour? A Well, it seems they were loaded very heavy

with machinery and different things, and if they went too fast the grease would burn out, and that would mean frozen axles, which would cause a break-down."

The only remaining allegation is the general one of carelessness and recklessness and lack of regard for the safety of others upon the highway. There is no direct evidence of any lack of regard for the safety of others in the way in which this defendant operated its truck. It was certainly not disregarding the safety of others for this defendant's driver to go at the slow rate of speed of from 3 to 5 miles an hour, which the above testimony shows he went. Neither could it be considered improper to ride next to the curb and parallel with it, which is what the following testimony shows the defendant's driver did.

JOSEPH TAURIELLO (page 63, lines 33 to 40):

"Q How was it that, after the accident and before the cars were moved, your truck, the front part of this procession, was nosed into the curb diagonally? A My nose of the truck was direct straight from behind the wagon.

Q It was never nosed into the curb diagonally? A Not that I could notice."

JOSEPH CIFELLO (page 68, lines 35 to 40; page 69, lines 1 and 2):

"Q On what side of the road were you proceeding? Were you on the right or on the left-hand side? A The right.

Q How close were you to the center? A To the centre of the road?

Q Yes. A We weren't at the centre of the road, we were at the curb, the right curb."

FRED GIESEKE (page 74, lines 12 to 14; page 75, lines 20 and 21) :

“Q Where was Mr. Tauriello’s truck, the wagon? A On the righthand side of the road.

Q Was it straight on the road or crooked on the road? A I would say parallel with the curb.”

PLAINTIFF, FRANCIS O’NEIL (page 28, lines 10 to 20) :

“Q Do you recall whereabouts in the road you were when the accident occurred? What particular part of the road were you in? A Just where you would be driving, on the righthand side of the road, on the right side of the road.

Q So that the box was always on its right side of the road? A The box.

Q This trailer. A Yes.”

As Mr. Jacobus testified that the cars were in the same position when Officer Wilhelm arrived as they were immediately after the accident (page 44, line 38; page 45, lines 1 to 3), Officer Wilhelm’s testimony corroborates the foregoing testimony that defendant’s car was on the righthand side of the road. Specific question and answer to this effect are on page 54, lines 10 to 20.

“Q Was there any part of the trailer out beyond the left of the centre of the road? A Not beyond the left, I would say.”

At the trial plaintiff’s attorney undertook to spell out negligence by attributing to the big wagon or trailer a manoeuvre which was physically impossible for it in the light of the undisputed testimony that the Schwartz Brothers’ truck was at the time proceeding three to five miles an hour on the

righthand side of the road. Annexed to the State of the Case is a picture of the rear of this trailer (D-1). An examination of that picture will show that it is of such construction that there was no possibility of any projection or overhang from it extending to the left even if the truck had turned to the right just at the time of the accident. It will be noted that the rear wheels under the trailer are at the back of it. The idea that this wagon trailer going at three to five miles an hour would have skidded or swerved over from its righthand side of the road to the lefthand side of the road and taken up the ample space between its lefthand side and the lefthand side of the road through which Jacobus then had room to pass, is so absurd on its face as to be entitled to no weight or consideration whatever. There is abundant authority for the proposition that testimony to be of any evidential value must not only proceed from the mouth of a credible witness but must be credible in itself. *The Second National Bank of Jersey City vs. S. O'Rourke*, 40 N. J. Eq. 92, and to the same general effect are the following cases:

Clark vs. Public Service Electric Co., 86 N. J. L. 144.

Riehl vs. Riehl, 137 Atl. 790.

Earl vs. Norfolk & New Brunswick Hosiery Co., 36 N. J. E. 188, affd. in 37 N. J. Eq. 315.

In the face of these cases no weight should be given to Jacobus' statement that the trailer swerved into him. Any such idea is inherently incredible and physically impossible, when we have in mind that the truck was going 3 to 5 miles an hour and straight ahead at the time. Even if despite this inherent incredibility, it could be assumed for the sake of argument that the trailer did skid when the truck pulling it was going straight ahead on

its righthand side of the road at a speed of from three to five miles an hour, it cannot be said that there was any negligence on the part of this defendant's driver in proceeding as he was for there was no reason for the driver to anticipate that driving in the manner he was would cause any such incredible manoeuvre. The cause of the accident in this case is revealed by O'Neil's testimony at page 21, line 22, where in answer to the question as to whether Mr. Jacobus did anything from the time O'Neil observed the trailer until the crash, Mr. O'Neil said: "He pulled his wheel to the left and tried to avert it, but he couldn't, *it was too late.*" In other words, Mr. Jacobus did not undertake to turn out to pass the trailer soon enough, notwithstanding the fact that by his own admission he saw the trailer when he was well to the rear of it. Mr. Jacobus said he was about 10 to 20 feet behind it when he saw it (page 42, lines 22 to 24), that he had plenty of room to pass between it and the lefthand curb appears from the following testimony.

JOSEPH TAURIELLO (page 62, lines 10 to 15) :

"Q He asked you what distance there was between the curb and the left side of your car.

A The left side of the wagon and the truck?

Q How much space was there between the left of your truck and trailer and the lefthand curb? A Oh, about 13 or 14 feet."

JOSEPH CIFELLO (page 69, lines 30 to 34) :

"Q Yes. A About 12 or 13 feet.

Q Room enough for one or two cars to pass?

A Room enough for one car."

FRED GEISEKE (page 74, lines 15 to 20) :

"Q How much distance was there between the wagon and the right side of the Jacobus car? A I could say approximately 12 foot or so.

Q Enough room for one or more cars to pass? A I passed myself, after the accident.

Q You passed between the Jacobus car and the box after the accident? A I did."

OFFICER WILHELM (page 53, lines 10 to 20) :

"Q How much distance was there between the automobile and the truck at the time you arrived there? A Oh, approximately 10 feet.

Q 10 feet between the sides? A That is, from the righthand side of the Dodge car and the lefthand side of the box car.

Q So when you arrived there, there was plenty of room for that Dodge roadster to have gone through? A There was 10 feet between the two cars."

There is not a bit of evidence that the defendant's driver did anything different from the time when Jacobus was back of the trailer to the time when the collision occurred, unless the statement by Jacobus that the truck was headed slightly to the right after the accident could be deemed as some indication that the driver of the truck turned to the right. Certainly it was not negligence for a truck driver going 3 to 5 miles an hour to turn to the right in an effort to observe the courtesy of the road so as to make as much room as possible for cars behind to pass. If Jacobus misjudged the distance he was behind when he undertook to pass, or did not turn out far enough, that cannot be negligence on the part of this defendant's driver.

There are features of the evidence that indicate that Jacobus must have been going at considerable speed. For instance he said his car by the cowl light was pushed in so the door could not be opened and the cowl was pushed down against O'Neil's leg, which indicates that Jacobus must

have hit the circus wagon violently. Of course speed on Jacobus' part was not negligence of this defendant's driver.

While the plaintiff O'Neil suggested that the trailer seemed to him to swerve, his statement in that regard was merely a conclusion. He did not observe the wagon ahead when Jacobus did and did not see it soon enough to make any real or effective observation. With regard to it, he said at page 20, line 40, and page 21, line 1:

"I looked up all of a sudden and saw this big object in front of me."

and further at page 21, lines 25 to 30:

"Q How long would you say elapsed from the time you saw the object out in the highway until the time that the cars crashed? A I don't believe I would have been able to count five."

and further at page 27, lines 25 to 30:

"Q You had not seen this big box until you were 4 or 5 feet in back of it? A I said about 4 or 5 feet."

And as to the speed at the time he looked up and saw the trailer, his testimony was:

"Q How fast were you going at the time? An average rate of speed.

Q Well, what would you say that was? A About 25 or 30 miles an hour maybe."

Assuming that Mr. Jacobus' car was going no faster than O'Neil said, the time taken for it to travel from the point where O'Neil (4 or 5 feet

away) first saw the trailer, to the back of the trailer, would be but an instant. He had no opportunity for observation which would enable him to judge anything as to the movement of the truck. If he had said the trailer looked like the Empire State Building to him in that instant, he would probably have been telling the truth, but that would not make its appearance to him of any evidential weight as to whether there was negligence on the part of the defendant's driver or not. It is clear that the testimony of O'Neil establishes no negligence on the part of defendant Schwartz Brothers Truckmen, Inc.

While Jacobus contradicts himself in saying at one place that the trailer was about one and a half feet away from him after the accident (page 44, lines 1 to 3), and saying in another that it was at the same place it was when Officer Wilhelm arrived (page 44, lines 36 to 40; page 45, lines 1 and 2), which as has been shown above was at a place allowing ample room for passage of vehicles between the lefthand side of the trailer and the lefthand curb, we might note that even if the trailer had been to the left of the centre of the road after the accident, which is contrary to abundant testimony, that would have been no indication that it was there at the time the accident happened, or that there was any negligence on the part of the defendant's driver.

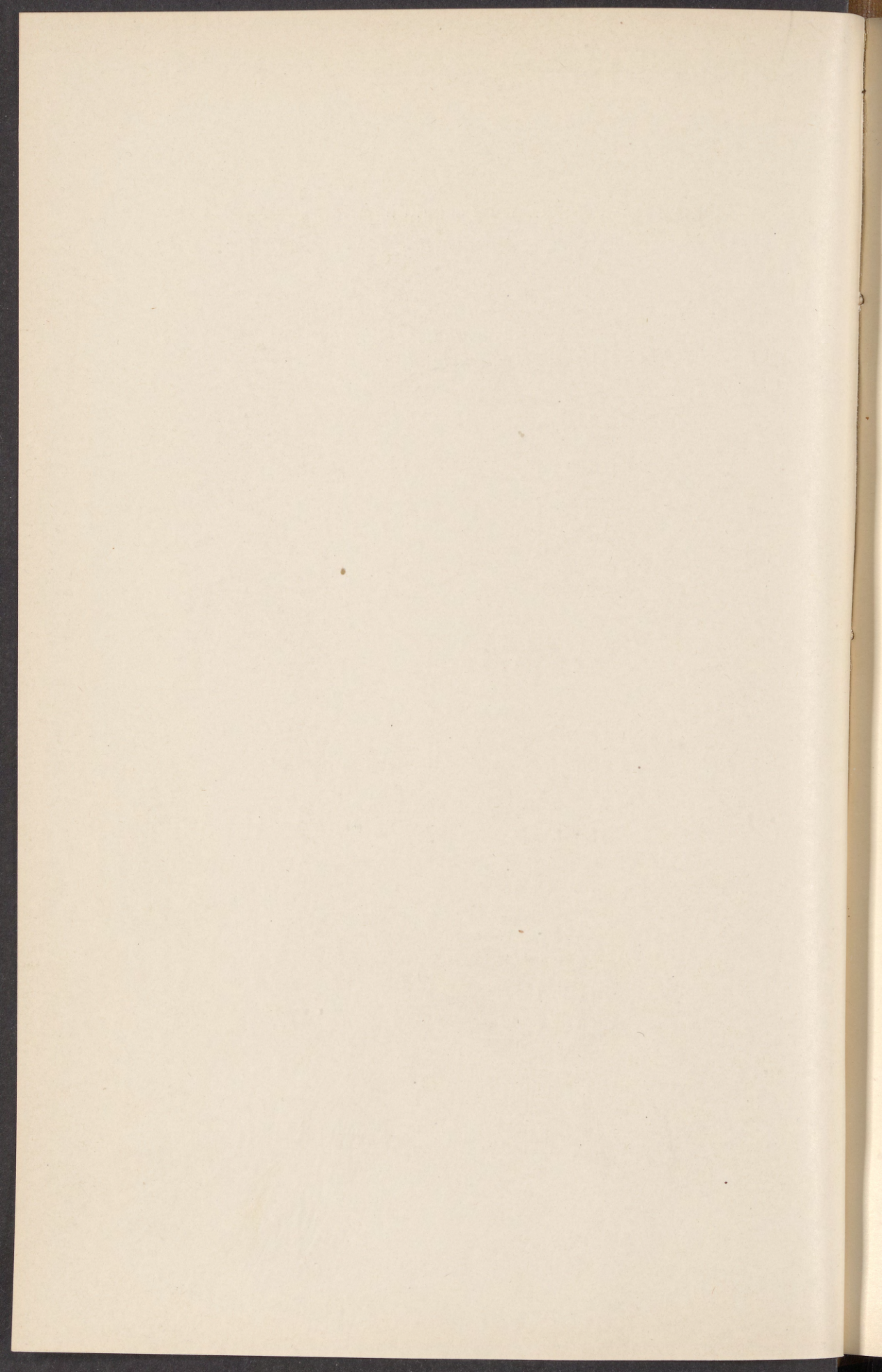
Summing up the case it is impossible to find any testimony of any evidential force which revealed any negligence whatever on the part of this defendant or its driver contributing to the proximate cause of the collision in question. Accordingly the motion for non-suit and the motion for direction of verdict should have been granted. The failure to grant them is reversible error.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

KELLOGG & CHANCE,
*Attorneys for and of Counsel with
Defendant-Appellant, Schwartz
Brothers Truckmen, Inc.*



New Jersey Court of Errors and Appeals

FRANCIS O'NEIL,
Plaintiff-Respondent,

vs.

WALLACE JACOBUS,
Defendant-Respondent,

and

SCHWARTZ BROTHERS TRUCK-
MEN, INC.,
Defendant-Appellant.

On Appeal
from Circuit
Court.

BRIEF IN FAVOR OF FRANCIS O'NEIL, PLAINTIFF-RESPONDENT.

Statement.

This appeal brings up for review a judgment of the Essex County Circuit Court wherein it was adjudged that the complaint of the plaintiff be dismissed as to the defendant Wallace Jacobus and that the plaintiff recover of the co-defendant Schwartz Brothers Truckmen, Inc. the sum of \$2,000 damage.

The judgment was signed and entered April 4, 1933. Six days later, on April 10, 1933 the defendant prosecuting this appeal, Schwartz Brothers Truckmen, Inc. obtained a rule to show cause why the verdict should not be set aside and a new trial granted, reserving exceptions taken during the course of the trial.

The reasons assigned (Case, page 93) are that

the verdict was against the weight of the evidence, a result of bias, passion, prejudice or mistake, and that the damages are excessive.

On the return day of the rule, April 18, 1933, counsel for the appellant appeared, and when the case was called for argument by the Judge of the Circuit Court, announced that the rule would be abandoned, and on motion of plaintiff's attorney the court ordered the rule dismissed and a formal order was thereupon presented and signed by the Judge of the Circuit Court in the presence of counsel for the appellant. The formal order dismissing the rule was signed on April 22, 1933. Costs on the order dismissing the rule were taxed and entered by the County Clerk (Case, page 11, line 16).

A notice of appeal was filed May 17, 1933 and subsequently a printed state of the case was served on the attorney for the plaintiff-respondent and on the attorneys for the defendant-respondent Wallace Jacobus.

Written objections to the state of the case, as printed, were made by the attorney for the plaintiff-respondent, served on the attorneys for the appellant, and filed with the Clerk of this court. The objections to the printed state of the case were based on the fact that the rule to show cause, the reasons, and the order dismissing the rule, were not included in the printed state of the case.

By agreement of counsel, and in order to clearly set forth what took place before the Circuit Court on the return of the rule and the making of the formal order dismissing the rule, a consent order amending the order dismissing the rule to show cause, was made and entered September 19, 1933. A transcript of the rule to show cause, the reasons, and the two orders entered on the rule, were then made a part of the printed state of the case, and now appear as pages 91-98.

The contentions of plaintiff-respondent are two-fold:

First: The defendant-appellant is precluded from arguing before this court that it was error for the trial judge to deny the motion for a non-suit and for a directed verdict, as these two particular exceptions are embraced within the reasons filed on the rule to show cause.

Second: Defendant-appellant's motion for a non-suit and for a directed verdict, were properly denied by the trial judge.

Facts.

Sometime after midnight, May 25th, 1930, the defendant, Schwartz Brothers Truckmen, Inc., was hauling the circus or carnival wagon (Case, p. 49, l. 1), pictures of which appear at the end of the State of Case, westerly along Bay Avenue, Bloomfield. The circus wagon or trailer was attached to a motor driven truck by a shaft or pole about ten feet in length (Case, p. 48, ll. 35-37). There was no light or lantern burning on the rear of the wagon; the lantern in the picture D-1 having been placed in the position shown in the picture after the accident occurred (Case, p. 62, ll. 30-35).

The plaintiff was a passenger in a Dodge roadster automobile owned and operated by the defendant, Wallace Jacobus, which was proceeding along Bay Avenue in the same direction as the circus wagon which was being towed by the defendant-appellant. "It was raining pretty hard and it was kind of foggy" (Case, p. 38, ll. 13-14).

The left corner of the box or circus wagon skidded into the right cowl light (Case, p. 39, l. 35) of the Jacobus car, smashing the door on the right side of the car and injuring the plaintiff.

The defendant Jacobus, against whom the jury found no cause of action testified that he first blew the horn of his automobile when he was passing the rear of the trailer (Case, p. 46, ll. 3-10, ll. 18-20); that the front part of the Dodge Roadster was already past the end of the circus wagon or trailer and that if the trailer had kept going straight instead of skidding or swerving to the left he "could have got through".

The State of Case is replete with testimony which will be quoted later, that the rear left end of the circus wagon or trailer skidded into the front part of the Jacobus car on the right hand side as the Jacobus car was attempting to pass the trailer after receiving a signal so to do from the operator who was in the cab of the truck to which the trailer was attached.

Testimony will also be quoted showing that as Jacobus blew his horn, the driver of the truck after waving to Jacobus to come on, steered the truck toward the right hand curb thus causing the trailer to swerve or skid to the left.

In the argument we will first take up the preliminary question as to whether the matters urged on this appeal are available to the defendant-appellant.

ARGUMENT.

POINT I.

Defendant-Appellant is precluded from arguing before this Court that it was error for the Trial Judge to deny the motion for a non-suit and for a directed verdict, as these two particular exceptions are embraced within the Reasons filed on the Rule to Show Cause.

A rule to show cause was obtained by the defendant April 10, 1933, the judgment having been entered April 4, 1933. The reasons then assigned were:

1. Because the verdict is against the weight of the evidence;
2. Because the verdict is a result of bias, passion, prejudice or mistake;
3. Because the damages awarded by the verdict are excessive.

The rule to show cause reserved as grounds of appeal all objections or exceptions taken by the defendant-appellant (Case, pp. 91-93).

When the matter was called for argument on the return day of the rule, April 18, 1933, counsel for the defendant-appellant announced that the rule would be abandoned, and thereupon a formal order dismissing the rule was signed by the Circuit Court Judge, before whom the case had been tried. Plaintiff-respondent contends that the dismissal of the rule to show cause leaves the defendant-appellant free to urge all its exceptions and objections which are not embraced within the reasons assigned under the rule to show

cause, but precludes the defendant-appellant from urging before this court any points which are embraced within the reasons under the rule to show cause.

It is conceded that there was no formal argument on the return of the rule to show cause, and in order to bring the matter squarely before this court a consent order was made and entered September 19, 1933 reciting the fact that the rule was abandoned and the order of dismissal was signed without formal argument (Case, pp. 97-98). There was no application by counsel for the defendant below to excise the reasons which were filed for setting aside the verdict, as required under the rule laid down by Chief Justice BROGAN in the case of *Molnar v. Hildebrecht Ice Cream Company, &c.*, 110 N. J. L. 246.

“1. When reasons filed on a rule to show cause why a new trial should not be granted include the point that the verdict is against the weight of the evidence, and the court, after argument on the rule, discharges it, the defendants estop themselves from arguing questions of nonsuit or direction of a verdict, even though the same are reserved; but where these reasons were by order of the trial court, on application by defendants’ counsel, excised from the reasons filed, these questions are not *res adjudicata*.” *Molnar v. Hildebrecht Ice Cream Co., &c.*, 110 N. J. L. 246.

That the questions of non-suit and direction of a verdict are embraced within the reason that “the verdict is against the weight of the evidence,” is well settled law, as shown by the following citations:

“1. A reason assigned for a new trial that the verdict is contrary to the weight of evidence, which reason was argued, con-

sidered and decided on the return of the rule, is necessarily embraced within exceptions to the refusal to nonsuit and to direct a verdict on the ground that there was no evidence of defendant's negligence and that contributory negligence of the plaintiff conclusively appeared, which were reserved in the rule, and therefore such exceptions cannot be considered on appeal." *Klein v. Shryer*, 106 N. J. L. 432.

"1. A reason assigned for a new trial that the verdict is contrary to the weight of evidence is embraced within exceptions to the refusal to nonsuit and to direct a verdict on the ground that contributory negligence of the plaintiff conclusively appeared; following *Catterall v. Otis Elevator Co.*, 103 N. J. L. 381.

* * * 3. On appeal from a judgment entered after defendant's rule to show cause has been discharged, the appellate court will not consider and decide any question which was assigned as ground for setting the verdict aside on the rule; following *Cleaves v. Yeskel*, 104 N. J. L. 497." *Holden v. Rolff*, 110 N. J. L. 499.

A diligent search by counsel fails to disclose any reported case wherein the identical reasons assigned on a rule to show cause may be urged on appeal after the rule to show cause has been dismissed.

The defendant-appellant does not appear to be in any better position than if it had failed to appear on the return of the rule to show cause and permitted the rule to be dismissed without argument and by default. The mere fact that the defendant-appellant did appear on the return of the rule and announced that the rule would not be prosecuted, but abandoned, and tacitly consented to the dismissal of the rule by the entry

of a formal order, does not entitle the defendant-appellant to a second choice as to the tribunal before which this particular exception may be urged, after having chosen the Circuit Court as its forum.

If rules to show cause why the verdict of a jury should not be set aside and a new trial granted could be abandoned at will on the return day of the rule without penalty to the party obtaining the rule other than the imposition of trivial costs, such practice could be used for the purpose of delaying the orderly progress of a case through the courts, increase the cost of litigation, and would undoubtedly result in great abuse.

Supreme Court rule 129 reads :

“Granting to a party a rule to show cause why a new trial shall not be granted, shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule.”

Under Rule 129 defendant-appellant expressly reserved all exceptions and objections taken at the trial, but by the reasons assigned under its rule to show cause it saw fit to invoke the discretionary power of the Circuit Court Judge before whom the case was tried, to review certain of the exceptions which it had reserved, and plaintiff-respondent contends that the same exceptions cannot be urged on appeal, but that the defendant-appellant should be limited in its appeal to the exceptions taken at the trial of the case, which are not embraced within the reasons assigned under the rule to show cause.

It is reasonable to assume that if defendant-appellant had made application to the Judge before whom the rule to show cause was returnable to excise the reason that “the verdict is against

the weight of the evidence'', objection would have been interposed and such application denied.

“1. On appeal from judgments entered after defendant’s rules to show cause had been discharged the appellate court will not consider and decide any question which was assigned as ground for setting the verdicts aside on the rule to show cause, such question being *res adjudicata*, whether argued or not, and although not decided in terms, on the rule to show cause.” *Margolies v. Goldberg*, 101 N. J. L. 75.

“1. By the argument of the weight of evidence on a rule to show cause, counsel, though he reserves exceptions to the refusal of a nonsuit and the direction of a verdict, is precluded from arguing these matters in this court.” *Dietz v. Glasgow*, 110 N. J. L. 490.

Plaintiff-respondent contends that the grounds of appeal, the refusal to non-suit and to direct a verdict, (Case, pp. 13-14) are not now available to the defendant-appellant.

POINT II.

Defendant-Appellant's motion for a non-suit and for a directed verdict were properly denied by the Trial Judge.

The evidence presented up to the time the motion for a non-suit was made is set forth generally under the Statement of Facts within and will under this head be supplemented only to the extent of meeting the arguments advanced in the brief filed on behalf of the defendant-appellant.

In the closing paragraph of defendant-appellant's brief, we find the following summation:

"Summing up the case it is impossible to find any testimony of any evidential force which revealed any negligence whatever on the part of this defendant or its driver contributing to the proximate cause of the collision in question".

In answer to this summation of the case, we quote from the record, the following testimony:

FRANCIS O'NEIL, Plaintiff:

Q. Then, after you got in the car, what happened? A. Why, I had only gotten in the car and sat down and straightened myself out, and we had proceeded a short distance, it had not been any more than two or three minutes, and I looked up all of a sudden, and saw this big object in front of me.
Q. Can you describe the object you saw in front of you? A. It looked like the back of a house to me, it was so big.
Q. Will you tell us the condition of the weather? A. It was raining.

Q. Was it foggy at all? A. No, it wasn't foggy.

Q. After you looked up and you saw what appeared to be the back of a house, where was it—in the road or on the side? A. It was in the road in front of us.

Q. In front of the car in which you were riding? A. Yes.

Q. Did you observe any light on this object in the road? A. No, sir.

Q. Then what happened after you observed that? A. We hit right away.

Q. Did Mr. Jacobus do anything from the time that you observed this object in the highway until the crash? A. He pulled his wheel to the left and tried to avert it, but he couldn't, it was too late.

(Case pg. 21, ll. 1-25).

On cross-examination by counsel for defendant-appellant, plaintiff testified as follows:

Q. Did Jacobus blow his horn at any time? A. No, I don't believe so. I didn't hear him.

Q. Did Jacobus swerve to his left? A. Yes.

(Case pg. 26, ll. 38-41).

Q. And how far was he behind this big box when he swerved to his left? A. Just a short distance.

Q. How many feet, would you say? A. About 4 or 5 feet.

Q. Did Mr. Jacobus swerve to his left, blow his horn, and in response to that blowing of the horn did this driver motion for him to come on, this man sitting next to me (indicating)? A. I didn't see anyone on the truck, or I didn't hear him blow his horn.

Q. You did not hear him blow his horn and you did not see Mr. Tauriello wave his hand for Mr. Jacobus to come on? A. No, sir.

Q. Did you see this truck swerve, this big box? A. Yes; it seemed to swerve in front of us.

(Case pg. 27, ll. 1-19).

WITNESS CWIRKO:

Q. As to this last truck and trailer, did it come around Broughton Avenue and then go into Bay Avenue? A. It came down Broughton Avenue and then swung into Bay Avenue.

Q. After that swung into Bay Avenue, you saw that going west towards Broad Street, and you are positive it did not have any tail light on? A. Absolutely positive. That is, I didn't see any tail light on it. I looked for it, and I didn't see it.

Q. This was a rainy night, was it? A. It was raining quite heavily.

Q. At that time, as I understand it, even then there was almost a collision between it and some automobile? A. Yes, sir.

Q. Was that difficult to see, back of that trailer, without any light? A. On that particular corner it would not be difficult, because there is a light there on that corner.

Q. As it got down further and the light faded, then it was difficult? A. It is very dark down further.

(Case pg. 33, ll. 15-36).

Further testimony on behalf of this witness clearly indicates that the passenger automobile was damaged on the right side and not in the front as it would have been had the roadster crashed into the rear of the circus wagon. (Case pg. 35, ll. 19-30).

WALLACE JACOBUS, Defendant:

Q. This particular night of the accident, what sort of a night was it? A. It was raining pretty hard, and it was kind of foggy.

(Case pg. 38, ll. 12-14).

Q. As you were going along, did you see anything in front of you? A. Not till I got about 15 or 20 feet away.

Q. At that distance what did you see? A. Well, I seen a big—something like a freight car in front of me. I slowed up and threw my car back in second and pulled over to the left and blew my horn, and I seen a man's hand motioning for me to come on. I started to come on, and this thing just *skidded right into me*.

Q. Which thing? A. The box. His left corner skidded into my right cowl light.

Q. That is what we have been calling the trailer? A. Yes, sir.

Q. That is not the truck proper? A. No, sir.

Q. What was pulling that trailer? A. Some kind of a truck.

(Case pg. 39, ll. 23-40).

Q. What was between them? A. There was a shaft there, maybe 10 or 12 feet long.

Q. When this thing swung around and hit you, where did it strike your car? A. Right at the right cowl light where Mr. O'Neil was sitting.

(Case pg. 40, ll. 1-10).

Q. Where was your car after the accident? Where did you go? Over to the left? A. I was only about a foot away from the curb.

Q. That is, over to the left? A. The left.

Q. If you went any further, what would happen? A. If I went any further, about 8 feet over there is an embankment. There is a park right there and there is a pole about 10 feet in front of that.

(Case pg. 40, ll. 20-29).

On cross-examination by counsel for defendant-appellant, Mr. Jacobus testified as follows:

Q. What happened when you blew your horn? A. I saw the man wave to me to come ahead.

Q. Where were you then? On the left of the road? A. Yes, about a foot away from the curb, ready to pass him.

Q. How wide is the street? A. From curb to curb?

Q. Yes. A. I don't think it is over 25 feet.

By the Court:

Q. Where was the man who waved to you—on the trailer or on the truck? A. On the truck.

By Mr. Gillick:

Q. Could you have passed this big wagon at any time on your right? A. No, sir.

Q. I suppose he was close to the curb. A. Well, the road is bad on that side. It is bad on the gutter side of it.

Q. How close would you say he was to the curb? A. How close was I?

Q. No, how close was he? A. He was about in the middle of the road, I guess.

(Case pg. 43, ll. 3-28).

On cross-examination by counsel for the plaintiff, Mr. Jacobus testified as follows:

Q. How close were you to the trailer when you blew the horn? A. Well, I was over to the left of it. The front of my car was already past it. If he had kept going straight, I could have got through.

(Case pg. 46, ll. 3-10).

Q. Had you reached the rear of the truck at the time that he put his arm out? A. I was just about getting to it.

Q. In other words, you were going to pass the truck before you received a signal, weren't you?

(Case pg. 47, ll. 38-40).

A. I could have passed it if he had stayed where he was.

(Case pg. 48, ll. 1-2).

Q. Why didn't you pass him? What did you blow your horn for? A. To let him know I was coming. How did I know he was going to turn *left*?

(Case pg. 49, ll. 20-24).

OFFICER WILHELM:

Q. Do you recall whether or not there was a light on the rear of that trailer? A. There was no light.

Q. Are you positive about that? A. Positive.

Q. That was part of your official inspection, was it? A. Yes, sir.

Q. Can you give us approximately—if you can, and if you cannot, why, say so—the length, over all, of the truck, the center piece and the trailer? A. A good 30 feet.

Q. That was headed in which direction, or where in the road, Mr. Wilhelm? A. Headed west, or rather north. *West, nosed in.* This Mack truck drawing the trailer was nosed so that it would be northwest.

Q. *In other words, it was not parallel with the street, was it?* A. No.

Q. *It was diagonal towards its righthand curb?* A. Yes.

Q. And the rear of it—that is, the trailer—in your best judgment extended where? A. Pretty close to half way across the road.

Q. Did you see the roadster, the Dodge roadster? A. I did.

Q. Where was that? A. Parked on the lefthand side of the street.

Q. That is again facing west? A. Facing west.

Q. Is it correct, Mr. Wilhelm, that on that lefthand side, which would be the south side of Bay Avenue, there is after a few feet a drop for the park? A. Yes, there is.

Q. Observing the roadster, did you see where the damage was to it? A. Yes.

Q. Where was it? A. Not all the damage but where they had come together in the impact. It was at the cowl light on the righthand side.

(Case pg. 51).

This witness as shown by the testimony at the top of page 54 of the State of the Case, brought out the fact that the "trailer or box car was being drawn by a Mack Truck" and that the truck was "nosed in to the curb".

A reasonable assumption that the so-called reflector on the back of the trailer was defective can be based on the following examination of the Officer by the Court:

Q. You say there was no light lighted on the trailer when you arrived there? A. No, sir.

Q. Was there any light there at all that was not lighted? A. No, sir.

Q. There was not only no light but no provision for a light; is that what you mean? A. Well, there was provision there.

Q. What provision was there? A. Little red lights on the bottom by the license plate.

Q. With an electric bulb in it? A. I didn't examine it to see whether there was an electric bulb there or not. There was no light there.

Q. There was a lamp there, but it was not lighted? A. Yes, sir.

Q. Was it broken? A. Yes.

Q. It was broken? A. Yes.

Q. The lamp was broken? A. Not the lamp, but this little plate that sets in these sockets was broken. It was not broken, there was none in there.

(Case pg. 54, ll. 20-41).

Q. What do you mean, "There was none in there"? A. This little glass plate that sets over the light. There was no plate in there.

Q. No plate? A. No glass plate.

Q. Was there an electric bulb in there?

A. No, sir.

Q. None in there at all? A. No, sir.

(Case, pg. 55, ll. 1-10).

The testimony quoted shows that the following situation was presented to the jury:

A Mack Truck was hauling a circus wagon along a street having a width of twenty-five feet from curb to curb. The circus wagon or trailer was connected or attached to the rear of the truck by means of a pole about ten feet long. The length of the truck and trailer combined was thirty feet. The circus wagon or trailer had the appearance, according to one witness, of the back of a house and according to another witness, the appearance of a box car. It was very wide as shown by the pictures which were exhibited to the jury. It was proceeding slowly along this narrow street, the surface of which was in bad condition. It was after midnight and it was raining heavily. There were no lights burning on the rear of the circus wagon. There may or there may not have been an adequate reflector on the back of the circus wagon to pick up the rays of a car following the wagon.

The defendant Jacobus was proceeding at a lawful rate of speed in his Dodge Roadster automobile with the plaintiff O'Neil as a passenger. He observed the obstruction in the road, slowed

down, blew his horn and the driver of the truck waved his arm for Jacobus to pass. Jacobus was passing, the front part of his automobile having passed the rear part of the trailer, when the driver of the truck pulled from the centre of the road to the right hand curb, thus throwing the end of the trailer to the left and against the side of the Jacobus car.

This combination of a Mack Truck with a circus wagon connected with a long pole or shaft had a total length of thirty feet and it was well within the province of the jury to assume that when the driver swerved the truck to the right, the end of the trailer which was approximately thirty feet from the driver's seat would, on a wet pavement, swerve to the left.

The defendant Jacobus made it clear that if the driver of the truck had continued straight ahead, he, Jacobus, would have cleared the end of the trailer without collision.

The jury had a right to find that the trailer swerved to the "left" as Jacobus said it did, and that the driver of the Mack truck in the exercise of reasonable care and caution should have known that to swerve his truck sharply to the right would cause the end of the circus wagon thirty feet away to swerve to the left.

The jury also had a right to consider in connection with the negligence of the defendant, the absence of a lantern or proper light on the rear of the trailer especially so in view of the fact that it was raining heavily.

The argument in the defendant-appellant's brief appears to be directed to a "discussion of the weight of the evidence" rather than the absence of any negligence of the defendant on the part of the defendant-appellant.

The quotations in defendant-appellant's brief from the testimony of the employee witnesses

Tauriello and Gieseke, are set forth, we assume, principally for the purpose of proving that the truck was "parallel with the curb". The jury, however, had a perfect right to disregard the testimony of these witnesses and to place reliance upon the testimony of Jacobus and the testimony of the Police Officer that the truck was "nosed to the curb". This is clearly a discussion of the weight of the evidence which would have been proper under the Rule to Show Cause why the verdict should not be set aside as contrary to the weight of the evidence, but has no weight or force whatsoever on an argument for a non-suit or a directed verdict.

"1. Motions for nonsuit and to direct a verdict for the defendant, for the purpose of the motions, in effect admit the truth of the evidence, and of every inference of fact that can be legitimately drawn therefrom, which is favorable to the plaintiff, but deny its sufficiency in law; and where such evidence or inference of fact will support a verdict for the plaintiff, such motions must be denied." *Fine & Jackson, &c., Corp. v. Lehigh Valley R. R. Co.*, 110 N. J. L. 385.

If the skidding or swerving of the circus wagon to the left as Jacobus was passing as shown by an abundance of testimony or if the absence of a light of some kind on the rear of the trailer did not "contribute to the proximate cause of the collision in question" what then was the proximate cause of the accident?

Jacobus explained his conduct under the circumstances, at least to the satisfaction of the jury so that the jury under adequate and proper instructions from the Court found no cause of action against Jacobus, but did find, under the same instructions, negligence on the part of the defendant-appellant.

Defendant-appellant argues that Jacobus may have "misjudged the distance he was behind when he undertook to pass or did not turn out far enough" and that this misjudgment of the distance or the failure to turn out far enough cannot be construed as negligence on the part of defendant-appellant's driver. Such argument overlooks the fact that the absence of a lantern or light on the back of the circus wagon may have caused the misjudgment of the distance and that in this respect, the question of a light on the back of the circus wagon could very properly be considered by the jury in determining the question of the defendant-appellant's negligence.

Plaintiff-respondent submits that the facts gave rise to a plain jury question and that it was not error for the trial judge to deny the motion for a non-suit and the motion for a directed verdict.

CONCLUSION.

For the reasons above stated, the judgment of the Circuit Court should be affirmed, with costs.

Respectfully submitted,

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Attorney for Plaintiff-Respondent.

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