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SUMMONS AND COMPLAINT.

Filed August 4, 1922.

(L. S.) The State of New Jersey to John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, and Joseph Cosiello: 10

You are summoned to answer the annexed complaint of Cona Jackson, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, 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, within twenty days after the 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, Worrall P. Mountain, Judge of the Essex County Circuit Court at Newark, this fourth day of August, nineteen hundred and twenty-two.

JOHN H. SCOTT,
Clerk.

William & Ben Harris,
Plaintiff's Attorneys. 30

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Essex County Circuit Court

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff,* *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Complaint.*

The above-named plaintiff residing in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. The defendant, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, at all times hereinafter mentioned were and still are engaged in the trucking business in the City of Newark, County of Essex and State of New Jersey.

2. On the sixteenth day of July, 1922, plaintiff's intestate, Larnie Jackson, was lawfully riding on or propelling his bicycle in an easterly direction on Lincoln Park, at or near the said Lincoln Park where the same intersects with Pennsylvania avenue in the said City of Newark.

Complaint.

3. At said time and place the agents, servants and employees of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, operated a motor truck or motor vehicle of said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, in an easterly direction through said Lincoln Park on the business of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons. 10

4. In 1903 the Legislature of the State of New Jersey passed an Act entitled "An Act Defining Motor Vehicles and providing for the registration of the same and the licensing of the drivers thereof; fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violation." 20

5. Section 23 of said Act as amended by the Public Laws of 1909, entitled "Provisions Concerning Safety of Traffic" (C. S. of the State of New Jersey, pp. 3436 and 3437), which relates to the rates of speed for motor vehicles on the public highways of the State of New Jersey, is incorporated herein by reference as if fully set forth herein. 30

6. On April 6, 1915, the Legislature of the State of New Jersey, passed an Act entitled "An Act to amend an act entitled 'An act providing for the regulation of vehicles, animals and pedestrians on all public roads and turn-pikes, and 40

prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violations, and granting authority to towns, cities, boroughs and townships, under certain restrictions, for the adoption of ordinances further
10 regulating vehicles, pedestrians and animals, and designating the authority to enforce its provisions, and defining their power and authorities, approved April sixth, one thousand nine hundred and fifteen."

7. Section 3, Subdivision 2, of said Act, as amended and approved February 27, 1918, provides as follows:

"In turning while in motion or in starting to turn from a standing-still position, signal shall
20 be given by extending the whip or hand, or by operating an adequate mechanical device indicating the direction in which the turn is to be made."

8. At the time and place aforementioned and while plaintiff's intestate was then and there approaching said intersection, said agents, servants or employees of the said defendants, John S. Geiger & Sons, negligently, carelessly and reck-
30 lessly operated the said motor truck or motor vehicle (which then and there lacked proper safeguards and safety appliances) at a rate of speed in excess of the rate of speed allowed or permitted by Section 23 of the above-mentioned Act of the Legislature of the State of New Jersey and in violation thereof; and in violation of Section 3, subdivision 2, of the Act of 1915, relating to signals, they failed to give any signal by extending a whip or hand, or by operating
40 an adequate mechanical device indicating the

direction in which they intended to turn or drive said motor truck, as they were bound to do, or of their intention to turn or drive said motor truck into said Pennsylvania avenue, while plaintiff's intestate was then and there driving his said bicycle, on Lincoln Park.

9. By reason of the violation of the said provisions of said Acts of the Legislature of the State of New Jersey by the agents of the said defendants, John S. Geiger & Sons and their carelessness, recklessness and negligent omissions as aforesaid, at the time and place aforesaid, they lost control of said motor truck, as the result of all of which the said motor truck ran into and collided with and struck the bicycle and person of the said Larnie Jackson, who was then and there lawfully driving or propelling his bicycle as aforementioned, whereby the said Larnie Jackson was severely and fatally injured, sustaining a fracture of the skull and other severe internal and external injuries, whereof he became insensible and unconscious and shortly thereafter on the said date, died from the effects of said injuries.

10. At the time of his death, plaintiff's decedent was thirty years of age and at said time and for a long time prior thereto had been earning the sum of thirty dollars per week as a moulder, which amount he gave to the support of plaintiff, who is his wife, and plaintiff's two minor children by the decedent, all of whom have survived said decedent and who have, by reason of his said premature death, resulting from the negligence of said defendant as aforesaid, suffered great pecuniary injuries.

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11. On the fifth day of August, 1922, the Essex County Surrogate's Court granted letters of administration *ad prosequendum* upon the estate of the said Larnie Jackson to the plaintiff, who accepted the same.

Plaintiff demands fifty thousand dollars damages.

SECOND COUNT.

1. The defendant, Joseph Cosiello, resides at 33 Bergen street, in the City of Newark, Essex County, New Jersey, and at all the times hereinafter mentioned was engaged as a driver on one of the automobiles or motor trucks of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, which he, the said Joseph Cosiello drove or operated at the time and place herein mentioned on the business of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons.

2. Plaintiff repeats paragraph 2 of the first count.

3. At said time and place the said defendant, Joseph Cosiello, operated a motor truck or motor vehicle of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, in an easterly direction through said Lincoln Park on the business of the said defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons.

4. Plaintiff repeats paragraph 4 of the first count of said complaint.

5. Plaintiff repeats paragraph 5 of the first count of said complaint.

6. Plaintiff repeats paragraph 6 of the first count of said complaint. 10

7. Plaintiff repeats paragraph 7 of the first count of said complaint.

8. At the time and place aforementioned and while plaintiff's intestate was then and there approaching said intersection, the said defendant, Joseph Cosiello, negligently, carelessly and recklessly operated the said motor truck or motor vehicle (which then and there lacked proper safeguards and safety appliances) at a rate of speed in excess of the rate of speed allowed or permitted by Section 23 of the above-mentioned Act 20 of the Legislature of the State of New Jersey and in violation thereof; and in violation of Section 3, subdivision 2, of the Act of 1915, relating to signals, he failed to give any signal by extending a whip or hand, or by operating an adequate mechanical device indicating the direction in which he intended to turn or drive said motor truck into said Pennsylvania avenue, while 30 plaintiff's intestate was then and there driving his said bicycle, on Lincoln Park.

9. By reason of the violation of the said provisions of said Acts of the Legislature of the State of New Jersey by the defendant, Joseph Cosiello, and his carelessness, recklessness and negligent omissions as aforesaid, at the time and place aforesaid, he lost control of said motor truck, as the result of all of which the said motor truck, ran into and collided with and struck the 40

bicycle and person of the said Larnie Jackson, who was then and there lawfully driving or propelling his bicycle as aforementioned, whereby the said Larnie Jackson was severely and fatally injured, sustaining a fracture of the skull and other severe internal and external injuries,
10 whereof he became insensible and unconscious and shortly thereafter on the said date, died from the effects of said injuries.

10. Plaintiff repeats paragraph 10 of the first count.

11. Plaintiff repeats paragraph 11 of the first count.

Plaintiff demands fifty thousand dollars damages.

20 WILLIAM & BEN HARRIS,
Plaintiff's Attorneys.

30

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ANSWER OF DEFENDANTS, JOHN S. GEIGER & SONS.

Filed August 18, 1922.

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff*, *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Answer of Defendants, John J. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons.*

The defendants John J. Geiger and Charles G. Geiger co-partners trading under the firm name and style of John S. Geiger & Sons, answering the complaint filed herein say that:

ANSWER TO FIRST COUNT.

1. They admit paragraph one.

2. They deny paragraph two.

3. They deny paragraph three.

4. They do not answer paragraphs four, five, six and seven as they contain matter of law only.

5. They deny paragraphs eight, nine, ten.

6. They have no knowledge or information sufficient to form a belief as to paragraph eleven.

ANSWER TO SECOND COUNT.

They deny all the allegations of the Second Count in so far as they relate to these defendants
10 and do not answer them in so far as they relate to the defendant Joseph Cosiello.

FIRST SEPARATE AND DISTINCT DEFENSE.

The plaintiff's intestate, Larnie Jackson, was guilty of contributory negligence in that at the time and place set forth in the complaint he was conducting himself in a careless and negligent manner, was not paying proper attention to his
20 safety, was not making proper observations and did, in fact, by his own negligence cause the collision complained of in the complaint.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendants, John J. Geiger and Charles G. Geiger, copartners trading under the firm name and style of John S. Geiger & Sons.

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REPLY TO ANSWER OF JOHN S. GEIGER & SONS.

Filed August 18, 1922.

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff,* *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Reply to Answer of Defendants, John J. Geiger and Charles G. Geiger, etc.*

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The above-named plaintiff replying to the answer of the defendants, John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, says that:

30

REPLY TO FIRST SEPARATE AND DISTINCT DEFENSE.

Plaintiff denying the allegations set forth in the first separate and distinct defense of the answer filed by said defendants, objects to same on the grounds that same is insufficient in law as a defense to the action set forth in the complaint in that same does not set forth the facts upon which plaintiff's intestate's contributory negligence can be predicated and in that same

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merely charges conclusions of law and in that same is vague, impertinent, irrelevant and immaterial, for all of which reasons plaintiff at the trial hereof will move to strike out said defense.

WILLIAM & BEN HARRIS,
Plaintiff's Attorneys.

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ANSWER OF DEFENDANT, JOSEPH COSIELLO.

Filed August 24, 1922.

ESSEX COUNTY CIRCUIT COURT.

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CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff,* vs. JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Answer of Defendant, Joseph Cosiello.*

20

The above-named defendant, Joseph Cosiello, answering the complaint filed herein, says that:

ANSWER TO FIRST COUNT.

1. He has no knowledge or information sufficient to form a belief as to Paragraphs Nos. 1 and 2.

30

2. He denies Paragraph No. 3.

3. He does not answer Paragraphs Nos. 4, 5, 6 and 7, as they contain matter of law.

4. He denies Paragraphs Nos. 8, 9 and 10.

5. He has no knowledge or information sufficient to form a belief as to Paragraph No. 11.

40

ANSWER TO SECOND COUNT.

1. He denies all the allegations of the Second Count insofar as they concern him.

FIRST SEPARATE AND DISTINCT DEFENSE.

10 The plaintiff's intestate, Larnie Jackson, was guilty of contributory negligence in that at the time and place set forth in the complaint, he was conducting himself in a careless and negligent manner, was not paying proper attention to his safety, was not making proper observation and did, in fact, by his own negligence, cause the collision complained of in the complaint.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant,
20 Joseph Cosiello.

30

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REPLY TO ANSWER OF JOSEPH COSIELLO.

Filed August 30, 1922.

ESSEX COUNTY CIRCUIT COURT.

Cona Jackson, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff,* *vs.* John J. Geiger and Charles G. Geiger, co-partners trading under the firm name and style of John S. Geiger & Sons, and Joseph Cosiello, *Defendants.*	*Action at Law.* *Reply to Answer of Defendant, Joseph Cosiello.*

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20

The above-named plaintiff denies the allegations set forth in the first separate and distinct defense, and at the trial hereof, will move to strike out said second separate and distinct defense on the ground that same is insufficient in law, in that same does not set forth the facts upon which the plaintiff's intestate's contributory negligence can be predicated, and that same merely states conclusions of law, and that same is vague, impertinent, irrelevant and immaterial.

30

WILLIAM & BEN HARRIS,
Attorneys for Plaintiff.

40

Postea.

POSTEA.

Filed Tuesday, April 8, 1924.

ESSEX CIRCUIT COURT.

10 33070

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased,

Plaintiff,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO,

20 *Defendants.*

Action at Law.

The jury being called, all appeared and the trial progressed.

Attorney for plaintiff, William Harris; evidence, Cona Jackson.

Attorney for defendant, Schneider & Schneider; evidence.

30

Exhibit. Letters of administration.

Exhibit. Marriage certificate.

George Salter.

At this stage of the proceedings, the Court on motion of defendant's attorney, granted a nonsuit in favor of all of the defendants, and by order of the Court, the jury was excused from further service in the above-entitled case.

40

NOTICE AND GROUNDS OF APPEAL.

Filed April 11, 1924.

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff*, *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Notice and Grounds of Appeal.*

10

20

To Jacob Schneider, Esq., attorney for defendants:

TAKE NOTICE that plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this case on the following grounds:

1. That the Trial Court directed a judgment of non-suit against the plaintiff and in favor of defendants when thereunto moved by counsel for defendants, whereas said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

30

WILLIAM HARRIS,
Attorney of Appellant.

Dated, April 8, 1924.

40

Remittitur.

REMITTITUR.

Filed December 22, 1924.

New Jersey Court of Errors and Appeals

May Term, 1924.

10

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased,
Plaintiff,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO,
Defendants.

20

Remittitur.

This cause having been duly argued at the present term of this Court by Israel B. Greene, of counsel with plaintiff-appellant, and Jacob Schneider, of counsel with defendants-respondents, and the Court having considered the same, and the Court having found error in the record and proceedings of the Essex County Circuit Court, in granting a judgment of non-suit in favor of defendants-respondents and against plaintiff-appellant, and being of opinion that the said judgment should be reversed and a new trial granted, it is thereupon

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ORDERED AND ADJUDGED, that the judgment of non-suit of the Essex County Circuit Court, removed by appeal to this Court, be reversed with

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Remittitur.

costs, and that the record in said cause be remanded to the Essex County Circuit Court, to the end that a *venire de novo* be granted.

On motion of

ISRAEL B. GREENE,
Of Counsel with Plaintiff-Appellant.

10

Endorsed.

Filed October 24, 1924.

THOMAS F. MARTIN,
Clerk.

20

30

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Postea.

POSTEA.

ESSEX COUNTY CIRCUIT COURT.

33070.

10 CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased,

Plaintiff,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and

20 JOSEPH COSIELLO,

Defendants.

Action at Law.

On verdict by a jury judgment for:

Amount	$10,000.00
Costs	251.89
Total	$10,251.89

30 William Harris, Plaintiff's Attorney.

This action was tried before Judge Worrall F. Mountain, with a jury at the Essex County Circuit Court on September 22, 1925.

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

They find in favor of the plaintiff, Cona Jackson, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, and against

40 the defendants, John J. Geiger and Charles G.

Geiger, co-partners trading under the firm name and style of John S. Geiger and Son, and Joseph Cosiello, for the sum of Ten thousand dollars ($10,000) damage.

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of Ten thousand dollars ($10,000) and costs which are taxed at the sum of Two hundred fifty-one dollars and eighty-nine cents. 10

Judgment entered September 22, 1925.

WILLIAM S. GUMMERE,
Judge.

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NOTICE OF APPEAL.

Filed October 1, 1925.

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff*, *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners, etc., *Defendants.*	*Action at Law.* *Notice of Appeal.*

10

20 To William Harris,
Attorney of Plaintiff.

Please taken notice that the defendants appeal to the New Jersey Supreme Court from the whole of the judgment entered in the above-entitled cause.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendants.

30 JACOB SCHNEIDER,
Of Counsel.

Service of a copy of the within notice of appeal is hereby acknowledged this 23rd day of September, 1925.

WILLIAM HARRIS,
Attorney of Plaintiff.

40

GROUNDS OF APPEAL.

Filed.

NEW JERSEY SUPREME COURT.

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff-Appellee,* *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO, *Defendants-Appellants.*	*Action at Law.* *On Appeal from Essex County Circuit Court.* *Grounds of Appeal.*

10

20

The defendants-appellants hereby set forth the grounds of appeal in the above-entitled matter.

1. Because the Trial Court struck out the whole or part of the testimony of the defendants' witness Michael J. Doherty, as given in the following answer:

> "A I noticed a truck and two colored fellows on bicycles, which at that time, when I noticed them, were ten or fifteen feet off and apparently racing; they were apparently speeding."

30

The testimony of the witness, Michael J. Doherty, was taken in the form of a deposition in the State of Michigan. No objection was made to the question at the time when the witness was testifying, no objection was made to the answer, no motion was made to strike it out, and no action

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whatsoever was taken with reference to the question or answer at the time.

Exception was taken to the Court's ruling.

2. Because the Trial Court struck out the words "was attempting to pass," and also the words "at the time he got ready to pass," from
10 an answer of the said witness, Michael J. Doherty.

Proper exception was taken to this ruling on the same ground as stated above.

3. Because the Trial Court struck out the following question, propounded to the said witness, Doherty, at the said time of the taking of said deposition, and refused to allow said question to be read at the trial, and likewise refused to allow the answer thereto to be read.

20
> "Q Can you state the approximate distance between the truck and the right-hand curb at the time the bicycle rider attempted to pass on the right-hand side?"

Exception was taken to the Court's ruling on the same ground set forth above.

4. Because the Trial Court sustained an objection by plaintiff's counsel to the following question, propounded to the said witness, Do-
30 herty, and refused to allow the answer, as given in the deposition, to be read.

> "Q Was there anything to prevent the rider who was injured from taking a course to the left of the truck when passing it?"

Exception was taken to the Court's refusal on the same ground set forth above.

5. Because the Trial Court refused to grant defendants' motion for a direction of a verdict at the close of the case, and submitted said case
40 to the jury, whereas said court should have

granted said motion and directed a verdict in favor of the defendants.

Exception was taken to the Court's ruling.

6. Because the Trial Court refused to charge request No. 5 of the defendants.

7. Because the Court refused to charge request No. 6 of the defendants. 10

8. Because the Trial Court refused to charge request No. 8 of the defendants.

9. Because the Trial Court charged the jury as follows:

> "When you retire to the jury room, it becomes your duty to examine the conduct of both drivers. Many questions will suggest themselves to you; you will inquire as to the speed at which Cosiello was driving, but in connection with that inquiry you will remember two things, it seems to me, first, that at whatever speed he was driving he passed these bicyclists in safety at the corner of Lincoln Park and Clinton avenue, and that they then caught up to him. Second, that the speed may be important as indicating, if it was continued in, that he did not intend to turn into Pennsylvania avenue, but intended to persist in his course down Lincoln Park." 20

Exception was taken thereto. 30

10. Because the Trial Court charged the jury that a witness had testified that the truck in question, that is, the truck of the defendants, was fifteen or twenty feet from the curb.

Exception was taken thereto.

11. The jury, after having deliberated for some time, sent the following communication to the Court:

> "Has a man driving a motor vehicle or any other kind of vehicle at any time or under 40

any circumstances, the legal right to pull in to the right of another vehicle ahead of it and going in the same direction, and drive alongside it without passing it?"

The Court sent the following reply to the communication of the jury:

"To confine my answer to the case at bar, the Court charges you that Jackson had a legal right to come up behind the truck and to propel his bicycle on the right of and alongside the truck. That act alone would not *in law* constitute negligence, but you may find that under all the facts and circumstances in this case it did *in fact* amount to negligence. If you find Jackson intended to pass the truck on its right side, you may consider that such an act was in contravention of the statute, and indicates or tends to indicate negligence. You may find to the contrary as well.

"(Signed) Worrall F. Mountain, Judge."

Neither counsel were present, but the Court noted an exception on behalf of both plaintiff's counsel and defendants' counsel.

The Court erred in so charging.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendants-Appellants.

JACOB SCHNEIDER,
Of Counsel.

Consent is hereby granted to the filing of the within grounds of appeal as of time.

November 21, 1925.

WILLIAM HARRIS,
Attorney of Plaintiff-Appellee.

ESSEX COUNTY CIRCUIT COURT.

September 21, 1925.

CONA JACKSON, administratrix *ad prosequendon* of the estate of Larnie Jackson, deceased, *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO.	*Action at Law.*

10

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

20

For the plaintiff appears William Harris, Esq., (by Israel Greene, Esq.).

For the defendants appear Schneider & Schneider, (by Jacob A. Schneider, Esq.).

(A jury is called and sworn.)

Mr. Greene opens for the plaintiff.

Mr. Schneider opens for the defendants.

30

The Court: You admit this Larnie Jackson died as a result of the collision?

Mr. Schneider: Yes, your Honor.

Mr. Greene: Do the defendants admit that the defendant, Cosiello, was the servant of the defendants acting within the scope of his authority at the time of the accident?

Mr. Schneider: Yes.

Mr. Greene: There is one more thing, if your Honor please, that is the testimony of Hall.

40

Mr. Schneider: I will admit the testimony of Hall and it may be read.

ALEXANDER M. BORRIE, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

10

Mr. Schneider: I will admit Mr. Borrie's qualifications as a surveyor.

Q (By Mr. Greene.) You are a surveyor in the City of Newark? A Yes, sir.

Q Did you at my request draw this map to the rear of you (indicating)? A Yes, sir.

Q When did you make that map? A April, 1924.

20 Q That map was made from actual measurements of the locality it represents? A Yes, sir, I made the map and the measurements myself.

Q Your map was made from field notes and everything shown by your field notes is shown on this map? A Yes, sir.

Q At the time you made the map in 1924 were the street lines designated on the map the same as they were on July 16, 1922? A There has been no change, to my knowledge.

30 Q Do you travel up there every day? A Yes.

Q Measure and tell us the width of each side of Lincoln Park. A Between the curbs?

Q Yes. A Thirty-five feet.

Q That distance is equal throughout Lincoln Park? A Yes, sir.

Q How wide is Pennsylvania avenue at the corner? A Forty-five feet.

Q Now, measure the distance between the

40 southeasterly corner of Lincoln Park and Clinton

avenue to the corner of Pennsylvania avenue? A About 163 feet. That is from the intersection of the curb lines to the intersection of curb lines.

Q Now, will you measure the distance between the northeasterly corner of Clinton avenue and Washington street, formerly known as Lincoln Park, to the intersection of Clinton avenue on a straight line? A Two hundred forty feet. 10

Q How wide is Lincoln Park? That is the old part of Lincoln Park now known as Washington street? A About forty-eight and one-half feet between curbs.

Q What is the width of Clinton avenue from the northeasterly intersection here (indicating), to the southwest? A Thirty-four feet.

Q This map is drawn according to scale? A That map is drawn to a scale of one inch to ten feet. 20

Cross examination by Mr. Schneider.

Q Your measurements are from curb to curb? A From curb to curb, yes, sir, in other words, the measurement of the roadway.

Q Calling your attention to the southwest corner of Pennsylvania avenue and Lincoln Park. Point to that, please. A The southwest corner of Pennsylvania and Lincoln Park here (indicating). 30

Q Yes. Now, what kind of an angle is that intersection, or approximately? A Very close to a right angle, ninety degrees.

Q Substantially about a right angle? A Yes, sir.

40

Re-direct examination by Mr. Greene.

Q That is a pretty well built-up section of the City of Newark, isn't it? A Yes. Of course, this is Lincoln Park here (indicating), and this is Lincoln Park (indicating). All the buildings along here are quite close together, and here (indicating), they are built quite close together.

CONA JACKSON, plaintiff, sworn.

Direct examination by Mr. Greene.

Q You are the widow of Larnie Jackson? A Yes, sir.

Q You are the plaintiff in this case as the administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased? A Yes, sir.

Mr. Greene: I offer in evidence a certified copy of an order of the Essex County Surrogate's Court appointing Mrs. Cona Jackson as administratrix *ad prosequendum* of the estate of her late husband, authorizing her to sue in this case.

(Same is marked Ex. P. 1.)

Q When were you married to your late husband? A December 18, 1912.

Q Whereabouts? A Slocum, Alabama.

Q From the time you were married did you live with your husband? A Yes, sir.

Q Did he support you? A Yes, sir.

Q Have you any children by him? A Two.

Cona Jackson, direct.

Q What are the names of the children? A Laura, twelve years old, and Thelma, ten.

Q The children are now in your custody, living with you? A Yes, sir.

Q During the time your husband was living did he support you and the children? A Yes, sir.

10

Q Send them to school? A Yes, sir.

Q Where did your husband work? A Essex Foundry.

Q Newark? A Yes, sir.

Q How much did he make a week and how much did he bring you a week? A About $28.

Q What was his business there, what did he do there? A A laborer of some kind.

Q How old was your husband at the time he was killed? A Twenty-eight.

Q What was his condition of health? A Good.

20

Q Did he ever stay out of work because he was sick? A No, sir.

Q Did he ever earn more than $28 a week? A Yes, sir, sometimes.

Q When did he earn more than $28 a week, and where was he working when he earned it? A When he worked for the Worthington Pump Works he made $40 a week.

30

Q Did you give him any part of the $28 a week he brought you for his own expenses? A Yes, sir, I did.

Q About how much did you give him? A About four or five dollars.

Q What were his habits, was he a sober and industrious man? A Yes, sir, he was sober.

Q Are you sending your children to school? A Yes, sir.

Q Was your husband sending the children to school when he was alive? A Yes, sir.

40

Cross examination by Mr. Schneider.

Q Do you remember when your husband worked for the Worthington Pump Works? A I don't remember what year it was.

Q Was it during the war? A Yes, sir; during the war.

10

GEORGE F. SALTER, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q What is your occupation? A Life insurance actuary.

20

Q What is an actuary? A An actuary is a person who is usually connected with a life insurance company whose duty it is to compute premium rates and mortality tables and everything connected with the probability of death.

Q What is your standing as an actuary? A I am a Fellow of the Actuary Society of America.

Q What does that mean? A That is the highest rank we have in this country.

30

Q You are an actuary for the Prudential Life Insurance Company? A I am connected with that department in the Prudential Life Insurance Company.

Q You have had experience in computing the expectancy of life, knowing the habits and the physical condition of the decedent? A I have.

Q In computing the expectancy of life of a negro do you use any particular table? A There is a special standard table issued by the United States Government called the Glover table.

40

George F. Salter, cross.

Q You have heard the testimony of Mrs. Jackson about the habits of her husband and his physical condition? A Yes.

Q His being twenty-eight years of age? A Yes, sir.

Q Assuming the decedent, Larnie Jackson, was twenty-eight years of age, in good physical health before he was killed, could you, according to your established table, compute his expectancy of life? A Yes, sir, I can. 10

Q Do that. A His expectancy of life would be 28.6 years.

Q Does that figure differ any from the white table? A I can give you the white.

Q Yes, please? A 36.3 years on the white.

Q Of course, your computation would be subject to the usual risk in life, sickness, accident, and so forth? A Yes, sir. 20

Cross examination by Mr. Schneider.

Q There are a lot of elements that would change the average of life in that way, aren't there? A Yes, sir; certainly.

Q You might say I have perhaps twenty-eight or twenty-five years expectancy of life now and I might be gone by next year, that is true, isn't it? A Yes, that is possible. We contemplate only averages. 30

Q And general classifications? A Yes, sir.

Q And on individuals there is a great divergency? A Of course, on that you cannot foresee.

Q If Mr. Jackson had an expectancy of 28.6 years of life, he may have died from sickness the next day? A Yes, if he was a sick man he likely would.

40

Q In six months he might have gotten the grippe or the "flu," or had some accident, or something of that kind? A Yes, sir.

Q Your deduction is on the general classification? A It is the total number of years a group of persons would live under ordinary conditions.

10

Q No one but the higher power can tell about the individuals comprising that group? A No.

Re-direct examination by Mr. Greene.

Q Your table from which you derived that takes into consideration all the human elements of life? A Yes, sir, it is what is known as a census table, based on the United States census.

20

S. GEORGE WEBB, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q What is your business at the present time? A I am with Morrisey & Walker, real estate developers at Asbury Park.

30

Q You resided in the City of Newark on July 15, 1922? A I did.

Q Did you on that date see this accident for which this suit is brought? A I did.

Q Tell us where you were when you saw the accident, referring to the map? A I was walking in a westerly direction, this direction (indicating) on this side of Clinton avenue. I had reached a point about here (indicating).

40

Q Put an X where you were at the point you reached? A Here (indicating) when I noticed a truck coming down Washington street.

Q (By Mr. Schneider.) Do you mind raising your voice a little, please? A I was at that point, approximately, when I noticed the truck coming down at a high rate of speed down Washington street. 10

Q (By Mr. Greene.) Indicating traveling south on Washington street. Go ahead. A The truck made an abrupt turn at this point (indicating).

Q Referring to north.

> Mr. Schneider: I think the witness should testify. He is well qualified to testify.
>
> The Court: You may indicate on the map the point. 20

Q Indicating the northeast intersection of Washington street and Clinton avenue. A The truck was coming in this direction (indicating). It made an abrupt turn at this point (indicating) to escape two children. He scattered these children, who were walking in this direction (indicating), across this street.

Q Indicating walking east? A Walking east 30 across Washington street in the opposite direction in which I was coming. I was coming in this direction (indicating). The children were panic stricken, the boy running backwards and the girl running this way (indicating) and the truck made a—just escaped the girl within a few inches, coming very near this curb (indicating). That incident directed my attention and I stopped and walked to the curb at this point (indicating) and stood there to watch what 40

S. George Webb, direct.

further might happen, because of the reckless speed at which the truck was being driven down here (indicating).

Q Indicating Lincoln Park? A Yes. I stood on that curb watching the truck coming down here (indicating) and then, when it turned unexpectedly into Pennsylvania avenue here (in-
10
dicating) I heard a shout—

Mr. Schneider: I object to the word "unexpectedly" and ask that it be stricken out as a conclusion of the witness.

The Court: Strike it out. You may describe the turn, indicate how the truck turned, and what rate of speed it was going and how sharp the turn was, if it was sharp, and the general conditions that existed at
20
that time. Whether the truck slackened its speed any or what was done at the time the turn was made.

The Witness: The truck made this turn into Pennsylvania avenue and the front of the truck was obscured by a house on this corner (indicating). I heard shouts and saw the man lying approximately in this position (indicating) on the street.

30

Q Put a "J" there. A With the wreckage of the bicycle. The truck then disappearing and disclosing this man, that is, the truck having gone over him.

Q Can you approximate the speed of that motor truck when it was crossing Clinton avenue? A My judgment would be thirty miles an hour. It was going at a high speed.

Q Have you ever driven an automobile? A Yes, sir.
40

S. George Webb, direct.

Q Did you observe whether or not the truck lessened or decreased its speed as it was proceeding on Lincoln Park? A There seemed to be no diminution in speed as I could observe.

Q Did you hear any signal from the truck at the time the turn was made into Pennsylvania avenue? A I do not recall any signal having been given.

Q Were you near enough to the truck to have heard a signal if one had been given by its horn?

Mr. Schneider: I object.

The Court: Sustain the objection.

Q Did you observe whether any hand or whip was extending from either side of the truck at the time of the turn? A No.

Q Did you observe how far the truck proceeded south on Pennsylvania avenue before it came to a stop? A Yes. After I ran down here (indicating) I saw the truck about 100 feet away.

Q What was the condition of the decedent, Larnie Jackson, at that time? A He was just like a crumpled mass of man with a bicycle on the road.

Q Was Jackson lying directly on a line with the south curb of Lincoln Park?

Mr. Schneider: I object to counsel leading and pointing.

(Withdraw the question.)

Q Was he lying on Lincoln Park or on Pennsylvania avenue? A On Pennsylvania avenue, at this intersection (indicating). Distinctly in Pennsylvania avenue.

Q Nearer to which side of Pennsylvania avenue, the right or the left? A My judgment was about the middle.

Q Did you observe which part of the truck passed over him? A The truck in disappearing left the man there, the whole truck, apparently,
10 having gone over him.

Mr. Schneider: I object to that and ask that it be stricken out. The witness did not see it. He is just guessing.

The Court: Strike it out.

Q Did you see any marks there afterwards? A Yes, sir.

Q What did you see? A Indentations in the asphalt pavement.

20 Q What kind of indentations? A Well, they were a series of pits in the asphalt, scratches and pits.

Q (By the Court.) How close to the body were these scratches and pits? A The body was right there, and after the body was moved the pits and scratches were there.

Q (By Mr. Greene.) Did you observe what kind of a truck this was? A Yes, sir.

30 Q What kind of a truck was it? A It was a large dirt truck.

Q Did it have a cab on? A I didn't particularly notice, but I think it did.

Q What is your recollection as to whether this cab, if there was one on there, was open or closed? A That I didn't particularly notice.

Q You say it was a dirt truck? A Yes, sir.

Q Was it loaded with dirt? A Yes, sir.

Q Can you give us some estimate as to how high the dirt was piled? A It seemed to be
40 fully loaded.

S. George Webb, direct.

Q Was it loaded above the tailboard, or could you see the dirt? A Yes, sir, it was loaded above the tailboard.

Q What kind of a day was this? A It was in the morning, a summer day, beautiful day.

Q Did you see the decedent, Jackson, and a friend of his by the name of Hall, riding bicycles before the accident? A I don't recall seeing them. 10

Q You say you followed the truck? A My whole attention was concentrated on the truck as I stood at this point (indicating) and I was watching the truck. I didn't pay attention to the other.

Q What was there about this truck that attracted your attention? A Because it was going so recklessly. 20

Mr. Schneider: I move that that be stricken out as a conclusion.

The Court: Strike it out.

Q Do not use that word. Tell us what you saw him do and as to how you saw him traveling.

Mr. Schneider: I object to counsel's comments. I think he should ask questions. 30

The Court: You may proceed.

Q What did you see the truck do that attracted your attention? A It was going at a high rate of speed.

Q How close to this curb did this truck pass when it almost struck the children? A Within a very few inches, probably less than twelve inches.

40

S. George Webb, cross.

Q Was there any traffic on Lincoln Park at that time? A Traffic was very light as I recall it.

Q Did you hear any horn blown? A I don't recall any horn being blown.

Q When this truck was passing those two
10 children, did you then hear any signal? A No, I did not notice any signal at that time.

Q Did you hear any signal? A No.

Q Please describe this turn that the driver of the truck made at Pennsylvania avenue? A It was an abrupt, and I used the word unexpected, turn, almost on a right-angle turn, very abrupt.

Q At what point of Pennsylvania avenue, that is, from curb to curb, was that turn made, was it made close to one side or the other, or in the
20 middle? A It was made in this way (indicating) so that undoubtedly the turn was started here (indicating) because of the position of the truck.

Q You say about the middle of the street? A About the middle of the street.

Q Describe the locality in which this accident happened, whether it is a built-up portion of the city or not? A There are houses here (indicating) and houses here (indicating) and
30 there is a house on this corner. The rest of it is open. There are houses here (indicating) and this is all open (indicating) and this is all open (indicating).

Cross examination by Mr. Schneider.

Q Where do you live? A Asbury Park.

Q Street and number, please? A 1109 Grand avenue.

Q Grand avenue? A Yes, sir.
40

S. George Webb, cross.

Q How long have you been living there? A Since the early part of June.

Q June of this year? A Yes, sir.

Q You say you are working for Morrisey & Walker, the real estate people who are making this development down at the seashore? A Yes, sir.

10

Q Shark River Hills and other places? A Yes, sir.

Q Indicate again how that truck made that turn into Pennsylvania avenue. Do you mind standing a little on the side? A The truck was approximately in the middle of the street and it made an abrupt turn in here (indicating) so, in turning into Pennsylvania avenue it was practically in Pennsylvania avenue.

Q It was on the right-hand side of the street, wasn't it, on Lincoln Park, on its right? I mean the truck was proceeding on the right side of the street, wasn't it? A No, it was more in the center of the street.

20

Q Take the center line of the street, was the truck to the right of the center line? A I wouldn't so regard it. That was not my recollection; it was in the center.

Q Would you assert positively that the truck was on the left-hand side of the street or on the right-hand side of the street? What would you say on that point? A I would say as near as my recollection serve it was in the center, nearer the center that either the right or the left.

30

Q On its right or wrong side of the street? A I would say neither, about in the center.

Q You take the extreme left-hand side of the truck as it came down Lincoln Park, was that on the right or the wrong side of the street? A You mean here (indicating)?

40

Q No, down near the center of the street? A Yes, sir.

Q As the truck came down that street, take its left side, its left wheel so to speak, was that on the right side of the street or the wrong side, which?

10

Mr. Greene: I object to that.

The Court: Sustain the objection.

Q Were they on the right side of the street or the left side of the street, which?

Mr. Greene: I object. The witness said it was in the center.

The Court: I will admit it. You mean by the right and the left, the physical side of the street?

20

Mr. Schneider: Yes.

Q Taking the chauffeur, as he sat at his wheel, to be more exact, was he on the south side or the north side of Lincoln Park? A He was nearer the center of the street, neither right, north or south.

Q Was any part of his truck on the left side of the street? A My recollection was he was practically in the center of the street.

30

Q That is the best answer you can give? A That is the best answer I can give.

Q He made a very abrupt turn into Pennsylvania avenue there at thirty miles an hour? A I didn't say that.

Q You said it was your judgment he was going thirty miles an hour? A I said it was my judgment when I was here (indicating) and he was passing here (indicating) he was going thirty miles an hour.

40

S. George Webb, cross.

Q You said also in answer to counsel's question there was no diminution in his speed? A No apparent diminution.

Q So, apparently, to your eye and to your judgment, when he made that turn into Pennsylvania avenue he was going exactly thirty miles an hour? A He was going thirty miles an hour at the speed at which he passed me here (indicating). 10

Q That is thirty mles an hour? A That was my judgment.

Q That is your best judgment? A Yes, sir.

Q He made a very abrupt turn into Pennsylvania avenue at that speed? A No, I wouldn't say at that speed, because here; I was standing here (indicating).

Q Pardon me! A May I answer it, your Honor? 20

Q At what speed did he turn into Pennsylvania avenue, using your best judgment and recollection? A At a high rate of speed.

Q Would you say at the same speed he passed you at the other corner, at substantially the same speed? A I ask permission to explain my answer, your Honor.

The Court: You may. 30

The Witness: In standing here (indicating) I could judge his speed when he was passing me, but I couldn't judge his speed when he was going away from me, that is, looking at the truck disappearing away, but as far as I could judge the speed was not reduced.

Q So, substantially, he turned into Pennsylvania avenue at the rate of thirty miles an hour. 40

S. George Webb, cross.

Substantially and apparently? A As far as I could judge, the speed was not materially reduced.

Q If it had been materially reduced you would have noticed it, because you were watching him? A Yes, sir.

10 Q And if that speed was materially or substantially reduced you would have noticed it, wouldn't you? A Yes, sir.

Q Are you familiar with the corner of Lincoln Park and Pennsylvania avenue? A Yes, sir.

Q That is a right-angle intersection there, isn't it? A Yes, sir.

Q What part of the street, of Pennsylvania avenue, was he in when he turned his truck? A

20 Approximately the center.

Q Approximately the center? A Yes, sir.

Q That is, were his left wheels at or near the center? A Approximately the center.

Q That is, the left wheels of the truck were approximately in the center? A Yes, sir, and the rights wheels were approximately in the center, because the indentation on the pavement would show approximately the center of the street.

30

Q Sit down. You did not see those bicyclists at all, did you? A I do not recall seeing them.

Q In other words, you did not see them, did you? A No. My attention was concentrated on the truck.

Q You noticed there was no other traffic on Lincoln Park, you say? A I did not observe the other traffic; there was undoubtedly other traffic.

40

S. George Webb, cross.

Q Before that truck turned into Lincoln Park did you notice any bicycles at the corner there? A No, I did not.

Q Did you notice any bicycles following the truck there? A I did not.

Q What month in the year was this? A What month? 10

Q Yes. A July.

Q You could see right across there, you could see the whole of Lincoln Park there and Pennsylvania avenue? A Yes, sir.

Q There was nothing to obstruct your view? A No, sir.

Q You could see the truck as it went down the street there? A Yes, sir.

Q In your estimation it kept at the same speed all the way down that street? A I would say he was going at a very high rate of speed. 20

Q It kept up substantially the same speed you saw it going at at the first corner, no diminution you could see? A No.

Q It went down all the way at thirty miles an hour? A I could not judge the speed when it was going away from me.

Q Didn't you notice two bicycles in back of that truck, catching up with it? Didn't you notice a bicycle on the north side of the truck, on your side, as it went down Lincoln Park? A I didn't observe the other traffic. My attention was concentrated on the truck itself. 30

Q You never saw the bicycles at any time at all? A I probably saw them, but did not pay attention to them.

Q It was the rear of the truck that went over Mr. Jackson? A No, the whole truck, apparently, went over him.

40

Q Are you sure it was the whole truck? A May I explain?

Q Answer the question yes or no.

The Court: You may explain.

10 A Supposing here is the house (indicating) and here is the truck as it disappeared (indicating). The man was lying crumpled up with the bicycle in the center of the road, in the center to the rear of the truck, the truck having gone over him, and the truck then disappeared out of sight.

Q Did you personally see the truck go over him at all? A I saw the man as the truck left him; I saw the man and the wreckage of the bicycle on the pavement.

20 Q Do you remember testifying at the last trial in this case? A Yes, sir.

Q Page 25. Do you remember this question, "Do you know whether it was the front of the truck that came in collision with him?" and your answer, "No, I did not see the actual impact." A That is true.

Q And this question, "So as to what part of the truck came in collision with him, you do not know?" *Answer*: "The rear of the truck

30 passed over his body." A I know the rear passed over his body, because I saw the truck disappear.

Q You remember those questions and answers? A Yes, sir.

Q They are correct? A Yes, sir.

Q "The rear of the truck passed over his body?" *Answer:* "The man was left laying in the roadway, and the truck left from there, and the truck had not gone over him." Do you re-

40 member that? A Yes, sir.

S. George Webb, cross.

Q "You say it was the rear of the truck that passed over his body?" *Answer:* "The rear of the truck was all I saw, because it was obscured by this house here (indicating), and the rear half of the truck certainly went over the man's body." That's right, isn't it. A Yes, sir.

10

Q The dirt on that truck was all heaped up, wasn't it? A Yes, sir.

Q So that it obscured the driver sitting at his wheel or his side, didn't it? A I wouldn't be able to answer that yes or no.

Q You cannot answer that? A No.

Q At any rate, the dirt was heaped away up over his head? A You say obscured to the right or left.

Q The dirt was heaped away up over his head? A No, it was behind him.

20

Q I didn't mean physically over his head. It was a left-hand drive, wasn't it, Mr. Webb? A That I couldn't answer.

Q You noticed the driver as he sat on his truck? A Yes, sir.

Q It was a left-hand drive, wasn't it? A I wouldn't swear to that, but I think it was.

Q You don't know positively whether it was a left or a right-hand drive? A No.

30

Q You do not know positively whether he blew his horn at that intersection, do you? A I would swear I did not hear him.

Q You do not really know whether it was a left or a right-hand drive, that is, on which side of the truck the driver was sitting? A No, I cannot visualize the truck as I saw it.

Q You cannot visualize where the driver was sitting, whether on the left or the right? A I wouldn't swear to that.

40

Q Can you visualize that? A He was sitting on the front of the truck.

Q (By the Court.) How far down Pennsylvania avenue, from the intersection of Lincoln Park, was the truck when you arrived at the corner? A About one hundred feet.

10 Q That is, about one hundred feet from the intersection? A Yes, sir.

Q It had stopped there, hadn't it? A Of course, it would be off the map.

Q Yes. A It was one hundred feet from here (indicating) to the place he stopped, which was near the curb.

Mr. Greene: I desire to read into the record the testimony of William Hall, pur-
20 suant to consent of counsel for the defendants. This testimony was taken at the first trial between the parties on Monday, April 7, 1924.

Mr. Schneider: May I interrupt a moment? I do not suppose there is any question about my reading the testimony of a gentleman whose testimony was taken at Cadillac, Michigan?

30 Mr. Greene: No question about that.

Page 36.

"WILLIAM HALL, sworn in behalf of plaintiff.

Direct examination by Mr. Greene.

Question: How old are you? A Twenty-seven.

40

William Hall, direct.

Q Did you and Mr. Larnie Jackson, on July 16, 1922, go bicycle riding? A Yes, sir.

Q Where did you start out from? A From Barclay street, 120 Barclay street.

Q Newark, New Jersey? A Yes, sir.

Q You came down Clinton avenue and over Lincoln Park? A Yes, sir. 10

Q Tell us who was riding on the right on Lincoln Park and who was riding to the left. A Larnie Jackson was riding to the right and I was riding to the left.

Q And you and Larnie Jackson turned in from Clinton avenue to Lincoln Park at this point (indicating); did you see a truck of the defendants? A Yes, sir.

Q Where did you see it? A Crossing Clinton avenue. 20

Q Point out to us where you saw the truck. Do you understand this map? A Yes, sir; the truck was coming out from Washington street into Lincoln Park.

Q This map shows Lincoln Park is a continuation of Washington street. A It was coming out here (indicating) to Clinton avenue, so the truck crossed and we pulled in behind the truck, Larnie on the right side and I pulled to the left.

Q You let the truck pass? A Yes, sir. 30

Q How far from this corner did you and Larnie Jackson; that is, how far from this southwest corner of Lincoln Park and Clinton avenue did you permit the truck to pass you; how far were you? A From the curb?

Q No, from this corner (indicating). How many feet from this corner on Clinton avenue were you? A About ten feet.

Q How close to the curb on the left side of the truck were you traveling? A About four feet. 40

William Hall, direct.

Q Did you observe how close to the right-hand curb Larnie Jackson was traveling? A Just about three feet.

Q You continued, did you, with the truck? A Yes, sir.

Q Did you see the truck make the turn at
10 Pennsylvania avenue? A Yes, sir, I did.

Mr. Schneider: I object as leading.

Q What did you see the truck do? A I was riding along with the cab and I could see between the cab and the body of the truck, and I saw Larnie; he was right on the right-hand side of the cab, kind of cat-a-cornered; I was a little bit ahead of Larnie, from what I could see on the right-hand side and I saw as the truck was riding near the street, I was looking over the
20 truck thinking it would keep on Broad street, so he got to the corner of Pennsylvania avenue and he wheels right in, with no signal at all.

Q Did you hear any horn blown? A No, sir; no signal at all.

Q Did you see whether the driver of the truck put his hand out? A I could see the driver, but he didn't put his hand out.

Q What happened as he made the turn? A
30 As he made the turn Larnie tried to turn with the truck and he ran down in the gutter at the curb and that made his wheel gain speed and run out into the other truck, and the front wheel on the right-hand side of the truck struck Larnie's rear wheel and tripped him and the rear wheel on the right-hand side came on and ran over him.

Q Did you see where the truck continued to go? A Yes, sir; I saw where the truck continued to go.

Q Do you know how far it went before it
40 stopped? A Well, to the next street after there, South street, I think it is."

William Hall, cross.

Mr. Schneider: I will read the cross examination of Mr. Hall as it was cross examination by myself.

"*Cross examination* by Mr. Schneider.

Question: You went right on, didn't you (indicating)? A No, sir; I didn't go down that far.

10

Q Didn't you pass this gentleman who was just on the stand before? A No, sir; I didn't see him.

Q Did you see him afterwards at the scene of the accident? A No, sir.

Q Did you come back afterwards? A Yes, sir.

Q Didn't you see that gentleman, Mr. Connallon, at the time of the accident at all? A I didn't see anyone; I didn't pay any attention.

20

Q You went right on, didn't you? A I guess on to about here (indicating).

Q Past Pennsylvania avenue? A Yes, sir; past it to about here (indicating).

Q And then you got off your wheel? A Yes, sir.

Q How did you see that truck go down Pennsylvania avenue? A Because I turned right around and made back to Larnie and made back to the drug store to call an ambulance.

30

Q How did you see what part of the truck hit Larnie? A I was watching Larnie all the time; it is a wide space on that street there.

Q This truck was going at a moderate rate of speed? A She was speeding pretty fast.

Q You gave the statement to the prosecutor of this county about this accident? A Yes, sir; I was with the boy.

40

William Hall, cross.

Q You gave a statement to the prosecutor which is in the prosecutor's private possession? A Yes, sir.

Q You told him all about how this accident happened, didn't you? A Yes, sir.

Q When you were at the corner of Lincoln Park and Clinton avenue you saw this truck cross Clinton avenue? A We wasn't at the corner.

10

Q Where were you? A Along in here (indicating) as the truck was coming out of Washington street.

Q When you were down here did you say fifty feet? A Fifteen feet.

Q When you were fifteen feet from this corner here, from Lincoln Park and Clinton avenue, you saw the truck coming out of Lincoln Park over here (indicating)? A Yes, sir.

20

Q And it was coming across Clinton avenue, wasn't it? A Yes, sir.

Q You let it go by? A Yes, sir.

Q Was it going fast across Clinton avenue? A Pretty fast.

Q Did it continue going down very fast? A Yes, sir.

Q Did it turn around the corner pretty fast? A Yes, sir; she never slowed up at all.

30

Q You stopped here (indicating) to let the truck go by? A Yes, sir.

Q Did you have a coaster brake on your wheel? A No, sir; not on mine, his was.

Q Then the truck passed in front of you? A Yes, sir.

Q Then, you followed the truck? A Yes, sir.

Q You went on the left-hand side of the truck and he went on the right-hand side? A Yes, sir.

40

Q You caught up with the truck? A Yes, sir.

Q Were you passing the truck? A No, sir; just riding along with the truck.

Q When you got to the corner here (indicating) the corner of Lincoln Park and Clinton avenue after the truck passed you how far down the street did the truck go ahead of you? A As soon as he passed across the street I went around on the left side and kept going down.

Q And Larnie went on the right? A Yes, sir.

Q Before you went around to the left of the truck how far ahead of you was the truck? A How far ahead?

Q Yes. A I guess he was over five feet ahead of me.

Q How many miles an hour did you say it was going? A I couldn't say.

Q Was it going thirty miles an hour? A I wouldn't say she was going thirty miles an hour.

Q How many miles an hour, then? A My best judgment is he was going twenty miles an hour.

Q You caught up with her, did you? A Yes, sir.

Q In fact, you passed from her rear to the front of the cab? A Yes, sir.

Q On what part of the street there of Lincoln Park did you catch up with the cab of the truck? A I caught up with the cab about the middle in the block.

Q And Larnie was a little behind you, wasn't he? A Yes, sir.

Q When this truck was in the middle of the block, and that block is about 150 feet long, isn't it? A I guess so.

10 20 30 40

Q Well, when that truck was about in the middle of the block you caught up with what part of it? A I was right at the front end of the body.

Q You were right at the front end of the body? A Yes, sir.

10 Q Is that near the front wheel or behind the front wheel? A Behind the front wheel.

Q Then, you kept on going along? A Yes, sir.

Q Where was Larnie at that time? A I guess Larnie was middle ways of the truck.

Q So, when the truck was in the middle of this street here, midway between Pennsylvania avenue and Clinton avenue, Larnie was midway of the truck by the cab? A Yes, sir.

20 Q As you turned to go to the left of the cab you made some remark, didn't you? A No, sir.

Q Didn't you say, 'Let's go?' A No, sir, I didn't say anything.

Q Did you have any bell on your bicycle? A I did not.

Q Did Larnie? A I don't know, I wouldn't be positive to say he did or didn't.

Q You didn't hear any horn blown on that
30 occasion as you turned? A No, sir.

Q Or you didn't hear any bell ring? A I didn't hear any.

Q Larnie didn't ring his bell? A I didn't hear it.

Q If he had rung it you would have heard it? A Well, I don't know, with the sound of a bicycle and a Mack truck running.

Q You didn't hear a bell? A No, sir.

Q You were passing that truck, weren't you? A No, sir; just riding with the truck.
40

William Hall, cross.

Q You were intending to pass it? A No, sir; just intending to ride along with it.

Q Were you using the truck as a pacemaker? A No, sir; I was just riding, I was going home.

Q What was your idea in getting alongside of the truck, were you going to pass it? A No, sir; I was just riding along with the truck. 10

Q You did make an effort fifteen feet from this corner (indicating) to catch up with the truck, didn't you? A The truck was coming out of Washington street.

Q After it crossed Washington street and after it went down at this fast rate of speed, down Lincoln Park, you made an effort to catch up with it? A Yes, sir.

Q And you did catch up with it? A Yes, sir.

Q How fast were you going on your bicycle? A About the same rate. 20

Q You must have been going faster than the truck? A Not after I caught up with it.

Q And Larnie Jackson was going at the same rate of speed as you? A Yes, sir.

Q When the truck was in the middle of the street between Pennsylvania avenue and Lincoln Park Larnie was on the other side of the truck? A Yes, sir; so I could see under the truck.

Q And there was seventy-five feet to go to the corner of Pennsylvania avenue; about that? A Yes, sir. 30

Q And when the truck was near Pennsylvania avenue Larnie was on the right side of the cab, wasn't he? A Yes, sir.

Q He had caught up with it? A Yes, sir.

Q So, Larnie was going faster than the truck, wasn't he? A He was riding along with the cab.

Q So, from the middle of this block between Pennsylvania avenue and Clinton avenue, Larnie 40

went from the middle of the truck to the front end of the truck? A Yes, sir; the cab.

Q So, he was going faster than the truck, wasn't he?

Mr. Greene: I object as calling for a conclusion.

10

Q Was he going faster than the truck?

Mr. Greene: I object.

The Court: I will admit it.

A Yes, sir; at the time he was.

Q So that for a distance of fifty or sixty-five feet Larnie on the right-hand side of the truck was going faster than the truck, wasn't he? A Yes, sir.

20

Q You didn't hear any bell given by him? A No, sir; I didn't hear any bell, no horn.

Q Nothing? A No, sir.

Q You didn't give any bell? A No, sir; I didn't need to give any bell. I was in the clear.

Q When you pass another vehicle on the street, don't you know that under the law you must give some signal?

30

Mr. Greene: I object.

The Court: Sustain the objection.

Q What do you do when you pass a vehicle as you did on that day on its left on a public highway?

Mr. Greene: I object.

The Court: Sustain the objection.

40

William Hall, cross.

Q What rate of speed was Larnie going when he was ten feet from the corner? A He was riding with the truck.

Q How fast was he going? A About twenty miles an hour, as near as I can judge.

Q And the truck was going twenty miles an hour? A About that. 10

Q What kind of a bicycle was it? A I don't know.

Q You say when the truck was turning in here (indicating) Larnie turned with it? A Yes, sir.

Q And at that time he was riding behind the cab? A No, sir; I didn't say that.

Q Where was he then? A When he was trying to get away at the turn here (indicating)?

Q Yes. A At the gutter there and his wheel gained speed and that shot him out in front of the truck and the front wheel tripped him and the hind wheel ran over him. 20

Q He shot into the truck? A I didn't say that.

Q You say the gutter shot him into the truck? A I said shot him out in front of the truck.

Q Did he actually come in front of the truck? A Close enough to the front of the truck for the front wheel to hit his hind wheel. 30

Q What part of the truck did he actually hit, wasn't it the right-hand side he actually hit? A That is what part of the truck hit him.

Q What part of the truck was it that came into collision with Larnie Jackson's bicycle? A The front wheel.

Q What part of the front wheel? A The hub.

Q So, it was the hub of the truck that came into collision with the front wheel of Larnie 40

Jackson's bicycle? A With the rear wheel of Larnie Jackson's bicycle.

Q And then what went over him? A The rear wheel of the truck.

Q This truck was on the right-hand side of the street, wasn't it? A Yes, sir.

10 Q How close to the curb was it? A How close to the curb was it?

Q Yes. A Where, in Pennsylvania avenue or Lincoln Park?

Q Lincoln Park. A How close to the curb he was riding?

Q Yes. A About nine feet of the curb on the right-hand side.

Q What is that? A I guess he was riding about nine feet of the curb on the right-hand side nearer the center than he was the curb.

20 Q He was on the right-hand side of the street, wasn't he? A Yes, sir.

Q Of course, the position Larnie Jackson was in riding alongside of the truck there, he couldn't see the driver stick out his hand, could he, on the right-hand side?

Mr. Greene: I object.

The Court: Sustain the objection."

30

JOSEPH CONNALLON, sworn in behalf of the plaintiff.

Direct examination by Mr. Greene.

Q What is your business? A Fountain pen maker.

Q You work for the Waterman Fountain Pen
40 Company? A Yes, sir.

Joseph Connallon, direct.

Q How old are you? A Thirty-nine.

Q On April 16, 1922, did you see this accident? A Yes, sir.

Q Point on the map where you were standing when you saw the accident? A On that corner (indicating).

Q Put "C" at that point. How did you get to that point? A Coming over through Chestnut street and from crossing over through the park. 10

Q Is there a sidewalk there? A Yes, sir, there is a sidewalk there.

Q Approximately what distance is the point "C" to the scene of the accident? A I should imagine about fifty feet.

Q Which way were you looking as you approached that point marked "C"? A On account of being disabled, I, of course, make it a habit to look up and down before crossing to avoid an accident. 20

Q What did you do on this occasion? A I stopped on this walk marked "C."

Q Which way did you look? A Down towards Clinton avenue.

Q What time of day was it? A It must have been nine-thirty.

Q Was it a clear day? A Yes, sir. 30

Q Did you see much traffic around there? A No, it was very light on account of that time in the morning.

Q What day of the week was it? A Sunday.

Q Where were you going then? A Church.

Q Where is the church located? A About a block from there.

Q With respect to the point "C," how were you going to get to church? A Cross the park and the church is located here (indicating). 40

Joseph Connallon, direct.

Q In other words, you were coming across Lincoln Park? A Yes, sir.

Q What did you observe when you reached the point "C?" A What first attracted me was a truck loaded with dirt coming at a very rapid speed.

10 Q How far away from the intersection of Pennsylvania avenue and Lincoln Park was it when you first arrived at the point marked "C?" A I should judge that would be twenty feet from the corner.

Q What part of the street was that truck traveling in? A Traveling on. It was coming towards Broad street.

Q What part of the street, in the center or to the right or to the left of the center? A I should judge fifteen to twenty feet from this
20 side.

Q From the right-hand curb? A From the right-hand curb, yes, sir.

Q Can you place it as to whether it was the center or to the left or to the right of the center? A I should judge about fifteen or twenty feet from the right-hand side of the sidewalk, it was coming towards Pennsylvania avenue.

Q Did you observe at what point of the inter-
30 section that truck made the turn? A Yes, sir, around this corner here (indicating).

Q Did it make a turn near to one side or the other, or about the center of the street? A Why, just about as near as that curb; it struck the curb there.

Q What is that? A He hit the curb there, coming at such a rapid speed on Pennsylvania avenue.

Q How far away were you from the scene of
40 the accident? A About fifty feet.

Q You saw it head-on, didn't you? A Yes, sir; I was waiting for it to pass. I was under the impression it was going to pass me going towards Broad street.

Mr. Schneider: I object to that and ask that it be stricken out, "I was under the impression it was going to pass me."

10

The Court: Strike it out.

Q What did you notice about the manner in which the truck was going, that made you stop at the point "C?" (Withdraw the question.) How did that truck travel as you saw it? A It was going pretty fast. I stopped there in order for it to pass, because I was under the expectation it would pass me.

20

Mr. Schneider: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q Could you approximate the speed at which that truck was going when you saw it? A I couldn't very well do that. I don't drive a car.

Q Could you give us an approximate estimate? A The truck was going at a rapid rate of speed, as far as I could judge.

30

Q Did you notice what kind of a truck it was? A Yes it was a Mack truck.

Q Did you notice how wide the truck was in front? A Pretty wide, one of those five-ton dirt trucks.

Q Was it piled up with dirt? A Yes, sir, quite a lot.

Q How high was the dirt piled? A It had a pretty good load on.

40

Q What do you mean when you say "pretty good load?" A It was over the level of the truck itself.

Q Did you observe whether that truck had a cab on it? A It did.

Q Was it an open cab or a closed cab? A It was a closed cab, I believe it had two openings in the rear.

Q Do you mean the rear or the side? A The rear, I believe they have a little window or something.

Q Did you notice whether a hand could have been extended out of that? A I didn't notice anything.

Q Did you notice the decedent, Larnie Jackson, at the time? A Pardon?

Q Did you see the decedent, Larnie Jackson, at any time? Did you see him traveling with the truck when you saw the truck? A I did.

Q How far from the corner of Pennsylvania avenue was he when you saw him traveling with the truck? A About twenty or twenty-five feet.

Q About how much space was there between the truck and the right-hand curb for Mr. Jackson to travel in? A I should judge about fifteen feet.

Q With what part of the truck? A He was traveling between the driver and the front, I believe it is the front of the truck.

Q The front of the cab? A The front of the cab.

Q Could the driver see him to his right or to his left?

Mr. Schneider: I object.

The Court: Sustain the objection.

Q Did you observe whether there was any glass on the side or did you observe how the cab was constructed, whether or not there was glass on the side or a solid frame? A Not as far as the truck was concerned, I think they had openings on both sides and openings in the rear.

Q He was traveling, you say, about opposite the cab of the truck when you saw him? A Yes, sir.

Q Did you hear any signal or see any extension of a whip or hand just before the turn? A I did not.

Q What happened? Tell us what you saw when this accident happened. A As I said before, I waited on the other side in order to let the truck pass, as I had an idea it was going this way, and when I seen the truck making that turn, Larnie Jackson in order to get away was pocketed in this corner here (indicating), and in order to try to avoid the truck from knocking him down he made a turn right about there (indicating), and the truck hit him about five or ten feet from the corner.

Q Did you notice how far the truck went before it stopped? A About one hundred feet.

Q On which part of Pennsylvania avenue did the truck continue to go, that is on the center right or left? A Right in the center. It almost went as far as the corner.

Q What is the next corner beyond Lincoln Park? A South street.

Q How far a distance is it from Lincoln Park to South street? A It is quite a long block.

Q You say it stopped pretty near to South street? A Yes, sir, about three-quarters of a block, I should judge.

Joseph Connallon, cross.

Q Who brought the truck to a stop? A Why, there was quite a few shouted, and then there was people going on the way to church, coming through South street in order to cross the street of the church and he stopped then.

Q What did you do with respect to taking Mr. Jackson to the hospital? A Why, I was one of them that helped, the best I could, to lift him off the pavement and put him on the sidewalk.

10

Q In what part of Pennsylvania avenue was Mr. Jackson lying when you went to pick him up? A About ten feet from the curb on Pennsylvania avenue, pretty near the center of the street.

Q Did you notice what part of the truck struck him? A Why, the rear wheel.

20

Cross examination by Mr. Schneider.

Q When you first saw the truck how far do you say it was from the corner of Pennsylvania avenue and Lincoln Park there? A From Pennsylvania avenue?

Q Yes. A About fifteen or twenty feet.

Q Wasn't it about ten feet? A Well, it might have been ten or fifteen feet.

30

Q Do you remember testifying at the last trial in this court room? A Well, I am not a surveyor, so I am just giving a rough estimate.

Q You remember testifying here? A Yes, sir.

Q Your recollection at that time was clearer than now, if anything? A Well, it is just about the same.

Q The last time you testified here was on April 7, 1924, over a year from the time of the accident, then, wasn't it? A Yes, sir.

40

Joseph Connallon, cross.

Q Do you remember telling us at that time the truck was ten feet from Pennsylvania avenue when you first saw it? A About ten or fifteen feet.

Q About that distance, anyway, at that time it was a very short distance? A Yes, sir.

Q You had not seen the truck before that? A Not until I came to the curb. 10

Q You had not seen the bicycle before that? A I couldn't very well see them before I came to the curb.

Q The first thing you saw was the truck about ten or fifteen feet from the corner of Pennsylvania avenue with the bicycles alongside of it? A Yes, sir.

Q Whereabouts was Hall on the left-hand side of the truck; at what part of the truck was he when you first saw him? A On the left-hand side. 20

Q At what part, towards the front or the rear? A Towards the front.

Q He passed on, didn't he?

Mr. Greene: I object to any question about Hall; we are not concerned with Hall, but with this accident.

The Court: I will admit it. 30

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

Exception noted as ground of appeal.

Q He passed on, didn't he? A Yes, sir, he passed on.

Q In fact he rode on this bicycle to where you were standing, didn't he? A Yes, sir.

Q He was going pretty fast, wasn't he? A Yes, sir.

40

Mr. Greene: I object to what Hall was doing.

The Court: I will admit it.

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

Exception noted as ground of appeal.

10

Q He was going pretty fast, wasn't he, on his bicycle? A My mind was concentrated on the truck.

Q He was beating the truck, wasn't he?

Mr. Greene: I object on the same ground.

The Court: I will admit it. I do not see that it has anything to do with the accident,

20 but I think it is part of the general spectacle.

Q When you first saw the truck ten or fifteen feet from Pennsylvania avenue where was Jackson, who was on the other side of the truck, at what part of the truck was he then? A The right-hand side.

Q What part of the truck was he at? A Up where the driver is, about even with the driver,

30 I should judge.

Q At the cab of the truck? A Yes, sir.

Q And the other man, Hall, was also at the cab of the truck on the other side? A Yes, sir.

Q They were riding neck and neck? A They were riding even when I saw them.

Q They were riding even with the truck in between them? A Yes, sir.

Q Did you hear any bell sounded by either bicyclist? A No.

40 Q No horn was blown? A No signals at all.

Joseph Connallon, cross.

Q No warnings of any kind from anybody? A No, sir.

Q The truck was on the right-hand side of the street, wasn't it? A They were to the right.

Q He was on his right, wasn't he? A About fifteen feet from the curb. He was more so to the right.

10

Q Can you give us any idea as to the speed of the truck, or can't you estimate that, you not having driven a machine? A I can't estimate that, because I do not drive a car.

Q All you can say is they were going fast? A Yes, sir.

Q How close to the truck was Hall on the other side of the truck?

Mr. Greene: I object as immaterial.

The Court: I will admit it.

20

A Quite a ways from the truck.

Q How many feet? A He was—well, maybe ten feet or so.

Q Ten feet to the left of the truck? A Ten feet to the left of the truck.

Q How close was he to the curb, to the northerly curb of Lincoln Park? A I should judge about the same distance.

Q Ten feet? A Ten or fifteen feet.

30

Q He was ten feet from the northerly curb of Lincoln Park and ten feet from the truck? A To the best of my judgment.

Q How wide is the truck? A I don't know.

Q So the extreme left side of the truck must have been about twenty feet from the north side of Lincoln Park?

The Court: I think that is argumentative.

40

Q You did just say that Hall, as he came down the street, was about ten feet from this side (indicating)? A I should judge so.

Q He was ten feet from the side of the truck, is that right? A Yes, sir.

Q Is the truck about eight feet wide? A I don't know.

10

Q It was a pretty wide truck, wasn't it? A Yes, sir.

Q The street is about thirty-five feet wide? A So I heard testified.

Q You are rather sure, are you, that the distance between Hall and the curb was about the same as the distance between Hall and the truck? A What do you mean by being sure? I wouldn't take an oath on it.

Q I don't mean that. That is the way it appears to you. A It appeared that way to me; it may have been a little less.

20

Q That is to your best judgment? A Yes, sir.

Q So, from the left side of the truck, that would be about fifteen feet towards the south side of Lincoln Park, wouldn't it?

Mr. Greene: I object, as these questions are all questions of mathematics.

30

Q (Withdraw the question.)

Plaintiff Rests.

Mr. Schneider: I will open my case by reading the testimony taken in the State of Michigan of Michael J. Doherty.

Mr. Greene: I would like to have the original read into the record. I object to

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the copy being used, as I notice on page 2 the word "nigger" was stricken out and the words "colored fellow" inserted.

Mr. Schneider: I will read Mr. Greene's copy.

Mr. Greene: I insist upon the original.

The Court: You will have to read the original one on insistment of counsel. 10

(Argument.)

Mr. Schneider: Then, I would ask that the testimony of the witness Hall, read from the last trial, be stricken from the record for the reason my allowing Mr. Greene to read that was contingent on his allowing me to read this testimony of Mr. Doherty.

The Court: I will not strike it out. I will let you read the original. 20

(Argument.)

Mr. Greene: I will consent that he read my copy.

The Court: Very well, proceed.

Mr. Schneider: This is the testimony of Michael J. Doherty:

"Deposition of Michael J. Doherty, a witness, taken before me, Mary E. Smith, a notary public of Wexford County, State of Michigan, pursuant to the stipulation to take such testimony by commission hereunto attached. At the time and place named therein I attended for the said examination. 30

Fred C. Wetmore appeared as attorney for the plaintiff.

Henry Miltner appeared as attorney for the defendant.

40

Michael J. Doherty, direct.

The said witness, Michael J. Doherty, was first sworn to tell the truth, the whole truth, and nothing but the truth concerning the matter at issue in the cause, and said witness then testified as follows:

10 *Direct examination* by Henry Miltner for the defendant.

Q State your name? A Michael J. Doherty.

Q Your present residence? A 611 E. Division street, Cadillac, Michigan.

Q Were you in the City of Newark, New Jersey, on July 16, 1922? A Yes, sir.

Q How did you happen to be there? A On business for the Falk American Potato Flour Corporation of Pittsburgh.

20 Q Whether or not you are acquainted with the streets known as Lincoln Park and Pennsylvania avenue, and the intersection thereof? A Yes, sir, I lived right on that corner.

Q State whether anything unusual attracted your attention on the street there that morning? A Yes, sir.

Q What happened? A I saw a truck pass over a nigger."

30 Mr. Schneider: I will say in justice to the man himself—

Mr. Greene: I object to any comments by counsel.

The Court: Just read the testimony.

"*Question:* What was your location just before that accident? A Well, I would say I was somewhere between two and three hundred feet away from it, and facing it, facing south—walking south in Lincoln Park.
40

Q With reference to the intersection of Pennsylvania avenue and Lincoln Park street, where is Lincoln Park? A Lincoln Park street is a street running east and west on the south end of Lincoln Park.

Q When you were two or three hundred feet off from the accident, what did you first notice coming down the street? A I noticed a truck and two colored fellows on bicycles, which at that time when I noticed them were ten or fifteen feet off and apparently racing; they were apparently speeding."

Mr. Greene: I object to that part and ask that it be stricken out.

The Court: Strike it out.

Mr. Schneider: There was no objection taken at that time and my understanding is if no objection is taken at the time it cannot be ruled on.

(Argument.)

The Court: The one thing that impresses me with the fallacy of that is this: if depositions are taken in California, according to your reason, you would expect the California lawyers to be so familiar with our evidence act that in a certain case they would know enough to object to the testimony. That would work a great hardship. A California lawyer could not be expected to be familiar with our rules of evidence and our evidence act, and from his knowledge do the best he can in examining a witness, under the laws of this State, so I think it is only fair and just and good sense to hold if an objection was properly made the Trial Court could rule upon any objection in the absence of

any comment at the time the examination was taken. I will strike it out.

Mr. Greene: For the same reason, I want the next question and answer stricken out, because it relates to the same subject matter.

The Court: I cannot do that.

10

Mr. Schneider: May I have it appear on the record in regard to your Honor's ruling, that in the transcript of testimony as taken at Cadillac, Michigan, there was no objection to the evidence raised on which your Honor has ruled now, and no motion was made to strike out at that time, and no objection was made, but that the objection is being made now?

The Court: All that is on the record.

20

Mr. Schneider: Then, I will respectfully pray an exception.

Exception noted as ground of appeal.

The Court: What is the next question?

"*Question*: When you were two or three hundred feet off from the accident, what did you first notice coming down the street?"

30

Mr. Greene: That is right. The one following that, first of all I object to it as it is leading, and secondly because it calls for a conclusion.

The Court: In the answer before that, the only words I will strike out are, "Apparently racing," and I will not allow the next question.

Mr. Schneider: Then, I will have nothing on the record. I think I should have the

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question read, then have your Honor rule on it.

The Court: The words in the answer, "Apparently racing," that answer I will not allow.

Mr. Schneider: Will your Honor allow it to appear on the record that there was no objection or motion made to strike it out at the time of the taking of the deposition? 10

The Court: Yes, no objection was made at the time the testimony was taken, to that question.

"*Question*: Each had a bicycle? A Yes, sir.

Q And they were traveling in what direction? A Traveling east on Lincoln Park.

Q How far behind the truck when you first noticed them? A I would say about fifteen to twenty-five feet. 20

Q What direction was the truck traveling? A East on Lincoln Park.

Q On which side of the street? A I would say on the right-hand side. Yes, I would say it was on the right-hand side.

Q In what direction? A Traveling east.

Q What did the two men on bicycles next do after they left the point fifteen or twenty feet behind the truck?" 30

Mr. Greene: I object to any question about Hall.

The Court: I will admit it.

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

Exception noted as ground of appeal.

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"*Answer*: At that point fifteen or twenty feet behind the truck, they were riding fairly close together—two to three feet apart.

Q What did you next notice with reference to the two men on bicycles?"

10 Mr. Greene: I object to any mention of the person on the left side of the truck.

The Court: Objection overruled.

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

Exception noted as ground of appeal.

"*Answer:* Coming up to the truck, they both separated—one on either side of the truck—one passing on the right and one on the left.

20 Q One man passing to the right of the truck, between the truck and the curb? A No, the man on the right never passed.

Q Which of the two men was injured? A The man on the right of the truck.

Q After the rider started to pass to the right of the truck state in your own way what followed and what happened to him? A Well, when the man on the right was attempting to pass—"

30

Mr. Greene: I object to the witness' characterization of what he was attempting to do, that is merely a conclusion of his.

The Court: I think the words "was attempting to pass" call for a conclusion, in other words, that is for this jury to decide and not for the witness to conclude. From all the testimony they may conclude he was attempting to pass, or from all the evidence

40 they may conclude he was not. It is not for

a witness to give his conclusion. I think I would omit those four words in the answer.

Mr. Greene: And also the words, "At the time he got ready to pass."

The Court: Yes.

Mr. Schneider: May I object to your Honor striking that out and ask for an exception on the ground that no motion and no exception was made with reference to the words or the answer at the time the deposition was taken, and, therefore, none can be interposed now in open court.

10

The Court: You may have an exception.

Exception noted as ground of appeal.

Mr. Schneider: Will your Honor likewise have it appear on the record that no motion to strike out or no objection was raised to the answer at the time of the taking of the deposition?

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The Court: It so appears on the record which you are reading by consent.

Mr. Schneider: Nothing appears on the record of any objection to the motion, and so forth, that is right?

Mr. Greene: Yes.

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(Mr. Schneider continues with the reading of the deposition.)

"*Answer:* Well, when the man on the right"—leaving out the words the Court instructed me to leave out—"The truck which was traveling east was then on the intersection of Pennsylvania avenue with Lincoln Park, going east on Lincoln Park and as far east as the intersection of Pennsylvania avenue, and as the man on the

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truck went to turn, the man on the bicycle hit right into him, and the crossbeam of the truck hit the bicycle or hit the driver, I don't know which, of course. And then, of course, the second time as the truck made the turn further around knocked the fellow to the ground and passed over him with the hind wheels. The fellow on the bicycle never got any further up on the side of the truck than to the back of the cab. I do not believe he ever got up aside of the driver.

Q Did some portion of the truck pass over the rider of the bicycle? A The back right wheel passed over him between the knee and the hip.

Q State whether you could see the bicycle traveling alongside of the truck on its right side for some distance? A I could see that very clearly, I could see the wheels of the bicycle very clearly.

Q With reference to the two truck wheels, the front and the back, where was the bicycle traveling? A At which time?

Q At the time of the accident? A About midway of the truck when it first hit him. It hit him twice.

Q Whether or not the bicycle rider at any time traveled beyond the center of the truck? A Well, I would say yes. The truck knocked him in the same direction in which it was traveling. At that time he was as far as the back of the cab.

Q Was he at any time as far forward as the front wheel? A No, sir.

Q Where did the point of collision occur with reference to the north intersection of Pennsylvania avenue and Lincoln Park—east or west of that point? A You mean where he was hit?

Michael J. Doherty, direct.

Q Yes. A Well, I would say he was hit on the south—well, he was hit right after he turned in on Pennsylvania avenue on the east side. He was not on the east side either, but was past the center on Pennsylvania avenue. At the time he was hit first, he was in the center of the street when the truck hit him—the center of Pennsylvania avenue. 10

Q What time of day was this? A Somewhere between nine and ten o'clock.

Q Morning or night? A Morning.

Q Did you observe whether other persons were in the vicinity just before or at the time of the accident? A Well, there was a girl on the sidewalk of Pennsylvania avenue, on the east side of the sidewalk, I guess.

Q At the time of the collision what did you do? A I ran towards him and the first thing I tried to do was to get a doctor who lived on the corner of Pennsylvania avenue and Lincoln Park. 20

Q What happened to the bicycle? A Well, when he hit it it fell with the driver, about the same position as he was riding on it. The truck traveled over the bicycle as well as over the driver.

Q What became of the other bicycle rider after the two separated behind the truck? A He rode away; he kept on going. 30

Q He passed the truck on which side? A He passed the truck on the left-hand side.

Q What kind of a truck was this? A The make of the truck?

Q No, its plan of construction. A Well, they were hauling dirt on it. I don't know what you would call it. Flat beds with side boards on it about fourteen inches high. 40

Q With cab? A Cab in front.

Q State whether open or enclosed. A You mean the cab?

Q Yes. A I don't know as you would designate it as a cab. Had an enclosed cab on the back of it and sides. No door, as I remember.

10 Q What speed was the truck travelling? A I consider about a normal rate of speed.

Q Whether you observed the truck turning to the right into Pennsylvania avenue? A Yes, I saw the turning.

Q What kind of a turn is there at this point? A Well, it is not a right angle. It is more than a right angle.

Q Did you approach the injured man immediately after the accident? A Yes, sir.

Q What was his condition when you reached 20 him as to being conscious or unconscious? A Unconscious.

Q Did he recover consciousness? A No, sir, not when I was there.

Q Did you hear him say anything about the accident? A No.

Q Did you hear him say anything before or after the accident? A No, I didn't hear him say anything at any time.

30 Q Can you state the approximate distance between the truck and the right-hand curb at the time the bicycle rider attempted to pass on the right-hand side?"

Mr. Greene: I ask that that part be stricken out.

The Court: Strike it out. The question is improper.

Mr. Schneider: Your Honor will not permit that question?

40

The Court: No.

Mr. Schneider: I pray an exception to your Honor's ruling and I desire to read the answer on the ground that no motion or objection was made at the time the deposition was taken and this is the first time an objection is made in open court. 10

The Court: I will state an additional reason for denying this question, and that is, that neither counsel who were present at this examination were counsel of this State and the examination was taken, as they are usually taken out of the State and lawyers from another State attended. They, of course, would not have been permitted and were not permitted to participate in the trial. This is in no sense the trial of the case. This is the preparation for the trial of the case. You are trying to dignify this examination by permitting these counsel from another State to make motions which they could not make at all, and go a little further by saying because these men who had no right to make motions did not make a motion, that the Court is wrong in excluding the question. They had no standing in this court as lawyers and were not here at the time of the trial. The taking of testimony in this way is in preparation for the trial. When the case comes on for trial the Court decides whether the question to be asked and the answers given are proper or not. 20 30

You may proceed.

"*Question:* Were you able to tell from anything on the truck what hit him?"

40

Mr. Greene: I object to the answer unless it is yes or no.

Mr. Schneider: That is within the discretion of the Court.

The Court: I will admit it.

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

Exception noted as ground of appeal.

"*Question:* Were you able to tell from anything on the truck what hit him? A Well, what appeared to me, they had a crossbeam on the truck between the cab and rear, and it looked to me as though he ran right into that thing when it started to turn.

Q Ran into this beam just before he fell? A
20 Well, the first time."

Mr. Greene: I object to that question on the theory that the other question was inadmissible.

The Court: I will admit it.

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

Exception noted as ground of appeal.

30 Mr. Schneider: May I have it appear on the record that I shall not raise any objection or make any motion to strike out answers, or raise any objections to questions on any grounds, because I feel myself bound, because of the fact that my representative at the deposition did not raise any question at that time. In other words, although I think some of the questions are improper and some of the answers should be stricken out,
40 I feel bound by his neglect, to take objections

and, therefore, I am not asking that anything be stricken out.

The Court: You can do anything you wish in any way you wish to help your client.

(Cross examination by Mr. Wetmore is read by Mr. Greene.) 10

"*Question:* I think you said you were in the park north of what is known as Lincoln Park street? A Right.

Q And were walking south? A Yes, walking south.

Q That would be toward the point of the accident? A Right.

Q And how far away? A Between two and three hundred feet I judge. 20

Q Were you on a street or sidewalk? A On a park walk.

Q Where were you with reference to Clinton avenue? A I was east of Clinton avenue.

Q East and south were you? A No.

Q Clinton runs diagonally? A Clinton runs almost diagonally with Pennsylvania. It runs diagonally into Broad street. 30

Q Well, Clinton avenue runs northwest and southwest? A Correct.

Q Were there any trees in this park? A Yes, sir.

Q Any trees between you and the point of the accident? A No, sir.

Q At the time of the accident where were you standing or walking? About opposite Pennsylvania avenue? A About opposite Pennsylvania avenue.

40

Q How wide is Lincoln Park street? A Well, I would have to guess at that. I would say sixty feet anyhow.

Q It is a one way street? A No, two way street. It was then.

Q Did you observe where the truck came from? A It came off from Clinton avenue.

Q Did you observe where the bicycle riders came from? A They also came off from Clinton avenue.

Q Are you sure they did not come from Washington street? A Well, they had to cross Clinton avenue if they did.

Q The first you saw they were crossing Clinton avenue? A The first I saw of them they were on the east side of Clinton avenue.

Q And at that point were behind the truck? A At that point were behind the truck.

Q You said the truck was going at a normal speed? A I considered just normal driving in a town, neither going fast or very slow.

Q Would you be able to state the rate which they were traveling? A No, I didn't pay much attention to the rate, but I know they were not going very fast.

Q Could you say how fast the bicycle riders were going? A Well, no I would not say how fast they were going. They traveled much faster than the truck.

Q Did the man on the left pass the truck before the truck passed on Pennsylvania avenue? A Passed about as he was making the turn.

Q And the fellow on the right of the truck was about even with him? A Yes, sir.

Q Now, did I understand you to say that Pennsylvania avenue did not run at right angles

to Lincoln Park street? A Not exactly at right angles, no.

Q So that the turn made by the truck was not a square turn? A No, not exactly a right angle turn.

Q A little more than a right angle? A A little more than a right angle. 10

Q I think you said that the truck as it turned was about in the center of Pennsylvania avenue? A Yes, it was rather; well, that is, it was a little past the center.

Q You do not know how close to the curb at the corner the truck turned? A No, I don't know just how close.

Q How many men were on the truck? A Just the driver.

Q Did he make any sort of a signal before he turned? A Cannot say as to that. Did not notice that. 20

Q Cannot say whether he sounded his horn, or extended his hand, or made a signal of any kind? A No, I cannot.

Q When the bicycle and the truck first came together, that was right at the corner of Pennsylvania avenue and Lincoln Park street, was it? A You mean at the west side of Pennsylvania avenue?

Q Yes, that would be the west side? A Well, I would say it was. Well, the bicycle I would say was right at the corner, but the truck I would say was slightly past the corner. Turning, in other words." 30

Recess From 1 to 2 P. M.

40

Michael J. Doherty, cross.

"*Question:* How far south on Pennsylvania avenue did the truck go before it stopped? A Well, I would say anywhere between eighty and one hundred feet.

Q And how far south on Pennsylvania avenue did the truck carry the bicycle and the rider?
10 A It didn't carry them at all.

Q Ran over him right at the corner? A Ran over him; knocked him down.

Q You were on the opposite side of the truck from the bicycle rider, were you not? A Yes, sir.

Q During the time that this accident was happening I assume that your distance from the point of the accident did not change to any extent? A Getting closer all the time as I saw
20 them coming. Walking in that direction.

Q At the time of the accident you were from two to three hundred feet away? A Yes, sir.

Q When the truck turned into Lincoln Park street, was it ahead of or behind the two men on the bicycles? A Well, I didn't notice it when it was turning into Lincoln Park street at all. All were on Lincoln Park street when I noticed them.

Q Did the truck throw the rider of the bicycle
30 against the curb at the corner where the accident happened? A No, it didn't.

Q Was the truck a right or left-hand driving truck? A I am not sure about that; left, I believe.

Q That is, the driver sat on the left-hand side of the cab? A Right.

Q I think you already stated that you did not know how far the truck was from the right-hand curb on Lincoln Park street at any time?
40 A Well, as to number of feet, I do not know

how far, but I will say he was not past the center of the street.

Q That is, he was on the right of the center of the street? A Yes, sir.

Q Near the center of the street? A Well, I could hardly judge. He was not very close I know to the sidewalk."

10

(Re-direct examination by Mr. Miltner is read by Mr. Schneider.)

"*Question:* What is the distance from Clinton avenue to Pennsylvania avenue? A I don't know. It isn't over one hundred fifty feet, I don't believe.

Q About one city block, or is it one block? A It is really a block, but the block runs in an angle. Clinton avenue runs on an angle.

20

Q Your recollection is that both the truck and the bicycle riders came from Clinton avenue over onto Lincoln Park street? A When I saw them they were both on Lincoln Park street.

Q You were asked whether the truck was ahead or behind the bicycles? A Ahead of the bicycles.

Q Was the bicycle rider who was injured at any time ahead of the truck? A No, he was not ahead of the truck at any time.

30

Q Do you recall whether there was any other traffic on the street at this particular point at this time? A Do you mean vehicles?

Q Yes. A There was none, absolutely.

Q Was there anything to prevent the rider who was injured from taking a course to the left of the truck when passing it?"

Mr. Greene: I object as calling for a conclusion.

40

The Court: Sustain the objection.

Mr. Schneider: I respectfully pray an exception to the fact that no motion or objection was made or taken at the time of the deposition, the first objection for a motion was made in open court.

10 Exception noted as ground of appeal.

"*Question:* You stated the truck did not carry the bicycle rider south on Pennsylvania avenue at all? A No.

Q Did the rider come in any other direction than south from the impact?"

Mr. Greene: I object.

The Court: I will admit it.

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

Exception noted as ground of appeal.

"*Answer:* No; the truck knocked him south on Pennsylvania avenue. Knocked him in the direction that the truck was turning.

Q Can you state what distance the bicycle rider was knocked before the wheel ran over him? A I would say five feet.

30 Q What did you mean by stating the man fell the second time? A The man fell the second time.

Q You mean after he was hit or before?"

Mr. Greene: I object to that as leading.

"Q Explain again what happened after the bicycle rider collided with the truck."

The Court: I will admit it.

40

Michael J. Doherty, re-cross.

"A The truck hit him, and before he had time to get righted again the truck hit him the second time.

Q Then what happened? A Passed over him.

Q All within a distance of five feet? A Yes.

Q At the point of the intersection, what direction does Lincoln Park street run? A Lincoln Park runs east and west. 10

Q What direction does Pennsylvania avenue run? A Northeast and southwest, or, rather, northwest and southeast, I guess.

Q Would you call the turn from Lincoln Park to Pennsylvania avenue a short turn or a long turn? A You mean the street?

Q To the right? A Well, I would call it a short turn, I guess. That is, a short turn if you are traveling east and a long turn if you are traveling west. 20

Q The truck in question was driving east? A Driving east; yes, sir."

(Re-cross examination by Mr. Wetmore read by Mr. Greene.)

"Q At the time you reached the point of the accident where was the bicycle rider with reference to the corner? A Well, at the time I reached the point of the accident, the bicycle rider was laying on the east side of the center of Pennsylvania avenue, about five feet in from Lincoln Park. 30

Q How near the curb? A Well, I would judge at least fifteen feet or more. I am sure it was at least fifteen feet.

Q Is Pennsylvania avenue a narrow street? A No; it is almost as wide as Lincoln Park.

Q And it runs southeast and northwest? A Northeast and southwest, I think. 40

Q Then it runs in a southwesterly direction from Lincoln Park street? A The street does, yes, southwesterly from Lincoln Park.

Q Now, there was plenty of room to pass on each side of the truck, was there not, when you saw the bicycle riders and the truck? A For a
10 bicycle rider, yes."

Mr. Schneider: May I have it appear in the record that this testimony was signed by Michael J. Doherty and properly sworn to by Mary E. Smith, a notary public, who attached her statement that it was taken in the regular due form.

Mr. Greene: I won't say that the original was so sworn to.

20 Mr. Schneider: That both our copies have that on.

Mr. Greene: I do not know. I do not think the copy is admissible.

JOSEPH COSIELLO, sworn in behalf of the defendant.

30 *Direct examination* by Mr. Schneider.

Q Where do you live? A 33 Bergen street.

Q Newark, New Jersey? A Yes, sir.

Q How long have you lived in Newark? A All my life.

Q Were you in 1922, July 16th, employed by John S. Gieger & Sons? A Yes, sir.

Q In what capacity? A Chauffeur.

Q How long have you been working for Gei-
40 ger? A Fourteen years.

Joseph Cosiello, direct.

Q How long have you been driving trucks or motor vehicles of any kind? A Eight years.

Q Are you employed at the present time by Geiger? A Yes, sir.

Q Still driving a truck? A Yes, sir.

Q Were you, on the day mentioned before, a regular licensed driver of this State? A Sir? 10

Q Were you, on July 16, 1922, a regular licensed driver of this State? A Yes, sir.

Q Were you driving this truck on that day—Geiger's truck? A Yes, sir.

Q Where were you going to? A I was coming down East Kinney street and High. I came down Kinney street, down to Washington street and over Washington street to Clinton avenue and crossing Clinton avenue a trolley car was approaching. I went by the trolley. 20

Q Going down Lincoln Park? A Going down Lincoln Park, crossing Clinton avenue.

Q Where were you going to? A Pennsylvania avenue.

Q What was your destination? Where were you going to finally? A South street dumps.

Q What were you going to do there? A Dump my load.

Q What kind of a load did you have? A Dirt. 30

Q What kind of a truck was this you were driving? A Five-ton truck.

Q How much dirt did it have on it? A Six yards.

Q How much of a load would that be in tons? Can you tell us approximately. A I cannot just tell you how many tons it would be.

Q Was it a big or a small load? A A big load of dirt.

40

Q How was it piled on the truck? A Yes, sir.

Q What kind of a truck was it? Explain the construction. A It had a big body and the cab was built right over your head, and there is a little glass in the back and it is open on each side. It is built about that far with glass in on each side.

Q How wide is this truck? A Every bit of eleven or twelve feet.

Q Pardon me? A Every bit of eleven or twelve feet.

Q As much as that? You don't mean quite as much as that, do you?

Mr. Greene: I object to that.

Q That is your best estimate? A Yes, sir.

Q What is your estimate as to the length of the truck? A I couldn't tell you that.

Q Is it a long truck? A Yes, sir, it is pretty long.

Q Is it one of the very wide trucks? A Oh, yes; yes, sir.

Q Is it as wide as they come in that style? A Yes, sir.

Q What kind of a drive has it? A Left-hand drive.

Q So, you sit at the left-hand drive as you drive it? A Yes, sir.

Q How many speeds has the truck? A Four.

Q Without reverse? A Four with reverse.

Q Three speeds and reverse? A Five and reverse, first, second, third, high, and then reverse.

Q It has the same speed, then, as the ordinary touring car, has it? A Yes, sir.

Joseph Cosiello, direct.

Q As you came down Washington avenue about how were you going as to speed? A I was crossing Clinton avenue, going ten or twelve miles an hour.

Q Was there any other traffic around Clinton avenue that you could see, of any other kind? A No, sir.

10

Q Were there any motor vehicles around? A No, sir.

Q Any trolley cars? A A trolley car.

Q Where was the trolley car? A Up Clinton avenue.

Q About how far up? A Twenty-five feet away when I crossed Clinton avenue.

Q Was the trolley car standing or going? A Standing.

Q You passed in front of it? A Yes, sir, I passed in front of it.

20

Q Was there any other kind of traffic around the intersection that you noticed? A No, sir, I did not.

Q Did you see any bicycle riders? A Yes, sir.

Q How many bicycle riders did you see? A Two.

Q Where were they as you were crossing Clinton avenue? A Up Clinton avenue.

30

Q About how far up? A They were about even with the trolley car.

Q How were they riding, side by side?

Mr. Greene: I object to counsel prompting the witness.

Q How were they riding? A Together.

Q How did you pass them, before or behind them? A Before them.

40

Joseph Cosiello, direct.

Q When you passed them about how far were they from you? A Well, they were about ten or fifteen feet away from me then.

Q Did they stop? A That I don't know, I was looking ahead of me then.

Q After you passed them, where did you go,
10 down what street? A Down Lincoln Park to Pennsylvania avenue.

Q On what side of the street were you? A The right-hand side.

Q Did you see these bicycle riders again after you passed them before the accident happened? A No, sir, I did not.

Q Tell this Court and this jury just what happened at that corner in reference to the accident? A I was coming down Lincoln avenue
20 on the right-hand side and before I got to the corner I put my hand out, I generally do.

Mr. Greene: I object to what he generally does.

The Court: Proceed.

A I put my hand out and blew my horn to make my turn and goes about 100 feet and hear a voice holler "Whoa," and I stopped and
30 jumped off and seen a man lying there.

Q Was this Mr. Jackson in the street? A Yes, sir.

Q Did you do anything to help to assist? A Yes, sir, I helped to carry him over to the touring car.

Q What was done then? A They took him up to the hospital.

Q Did you notice him at all before the accident, or before you saw him on the ground after
40 the accident? A No, sir, I did not.

Joseph Cosiello, cross.

Q What kind of a turn did you make? A I made my right turn to go around the corner.

Q Abrupt or gradual? A A gradual turning.

Q Where did you put your hand out, as you say? A Right before I made the turn.

Q Which hand? A My left hand. 10

Q You say you blew your horn? A Yes, sir.

Q Did you feel any impact at all? A No, sir, I did not.

Q Using your best judgment, how heavy was that truck of yours with the dirt on it? A About nine or ten tons.

Q A load of dirt is four or five tons? A About that.

Q Did you hear any bells from the bicycles? A No, sir, I did not. 20

Q Did you see any bicycles to the left of you or to the right of you before the accident? A No, I did not.

Cross examination by Mr. Greene.

Q What time did you begin working that morning? A About ten minutes to nine.

Q Sunday morning? A Sunday morning.

Q Ten minutes of nine? A Ten minutes of nine. 30

Q What makes you fix that as the exact time in your mind? A What do you mean?

Q Is there anything about this day that makes you remember you started at ten minutes to nine? A We kept that down in the books.

Q That is pretty late for you to start work, isn't it? A It sure is.

Q On other days you start when? A At eight o'clock.

40

Q This accident happened when? A Nine-thirty.

Q And how long did it take for the men to fill that truck on the job? A Three or four minutes.

Q This job was where? A High and East
10 Kinney streets.

Q How far away from the scene of the accident was that? A About five blocks.

Q It took three minutes for the truck to be loaded and took you from seven minutes of nine to half-past nine to go six blocks? A Yes, sir.

Q Do you want us to believe that?

Mr. Schneider: I object.

20 Q To be correct, you say it took you from seven minutes of nine until nine-thirty to go these six blocks, is that correct? A I had trouble on the way.

Q What was the trouble? A Why, my chain.

Q What was the matter? A A stone caught in my chain.

Q Where was that trouble? A Coming down the hill. I couldn't stop on the hill on ac-
30 count of the trolley cars and I kept to the right of the trolley car.

Q How did that affect your driving of the car, did it interfere with your driving the car? A Sure, it stalled my car.

Q How long did it take you to fix it? A I don't know how long.

Q Did it take you five minutes, maybe, or maybe more, or couldn't you tell me whether it took you five or ten or fifteen minutes? A It
40 may have taken ten or five.

Joseph Cosiello, cross.

Q Have you ever had trouble with your chains before? A Sometimes.

Q How often? A It may be a long time.

Q When there is chain trouble you cannot stop your car when it is in motion? A You sure can.

Q On other occasions when you had difficulty with your chain, how long did it take you to fix it? A About five to ten minutes. 10

Q So, if we subtract five or ten minutes it will give us approximately the length of time, the difference, in what it took you to travel these six blocks? A Yes, sir.

Q How many speeds have you? A Five.

Q What speed were you in at the time of the accident? A Second.

Q How fast could you go in second speed on that car? A Five miles an hour. 20

Q How fast were you traveling at the time of the accident? A Well, I was in second speed.

Q Going five miles an hour? A Going five miles an hour.

Q Within how many feet could you stop your car traveling five miles an hour? A How many feet?

Q Yes. A I judge about three feet. 30

Q After the accident you traveled for one hundred feet, didn't you? A One hundred feet.

Q And you could stop your car at that speed you were going in three feet? A In second speed.

Q What is the highest speed you can go in third speed? A High speed is third.

Q What is the highest speed you can go in in high speed? A Twelve or fifteen miles an hour.

40

Joseph Cosiello, cross.

Q What is the highest speed you can go in fourth speed? A I couldn't judge, pretty slow, low speed, pretty slow.

Q How many truck loads of dirt had you delivered that morning to the dumping ground? A That was my first load.

10 Q Did you see these bicycle riders at any time while you were traveling from the East Kinney street job at the time of the accident? A No, sir. The only time was when they were coming down Clinton avenue.

Q Where were you when you first saw them? A Crossing Clinton avenue.

Q Referring to the map, show us where you were on Clinton avenue when you first saw the bicycles and where the bicycles were at that

20 time? A There is the trolley tracks, the bicycles were up here.

Q Pust a "B" where the bicycles were? A I was crossing Clinton avenue.

Q Where were you first when you saw the bicycles? A Right here.

Q Put your initials there "C." Put the letter "B" where you saw the bicycles? A Here.

Q About how many feet were those bicycles

30 away from you when you first saw them? A Quite a ways from me.

Q How many feet? A I couldn't judge how many feet, about ten or fifteen feet.

Q What did you see them do as you were crossing the street? A They were racing, trying to beat the trolley car.

Q Which way was the trolley car going? A Going in the same direction they were.

Q They were to the right of the trolley car, weren't they? A To the right.

40

Joseph Cosiello, cross.

Q Was the trolley car further up than they were? A No, they were neck and neck.

Q This trolley car did not shut off your view, did it? A No, sir.

Q How could you see what they were doing if there was a trolley car racing with them? A You could see from that wide space of Clinton avenue. 10

Q Didn't the trolley car obstruct your view? A No.

Q What did you do after you saw them racing? A When I crossed Clinton avenue I slackened down for the trolley and went by the trolley and these two fellows were coming down.

Q You say you were going five miles an hour? A In second speed crossing Clinton avenue.

Q To how many miles an hour did you slow down? A Five miles an hour I was going, I am just telling you. 20

Q How many miles an hour had you been going before you slowed down to five miles an hour? A I come pretty near to a dead stop and then threw her in second.

Q You came pretty near to a dead stop and then threw her in second, and before that time you had not been traveling more than five miles an hour; is that right? A Yes, sir. 30

Q In fact, no time from the time you left the job until after the accident had you gone more than five miles an hour? A I was in second speed.

Q What is the highest speed at which you traveled from the time you left the job until the time of the accident? A Ten miles an hour.

Q Where did you travel those ten miles an hour? A Washington street.

40

Q When you reached the corner of Washington street and Clinton avenue you slackened down to five miles an hour? A Yes, sir.

Q How did you pass the corner of Washington street and Clinton avenue, with respect to the northeast corner? A What do you mean, what rate of speed I was going?

10

Q Yes. A I am just telling you, five miles an hour crossing the tracks.

Q How close to the curb did you pass while passing that corner? A About three feet away from the curb of Lincoln avenue.

Q Do you remember seeing two little children there at the curb? A No, sir.

Q Isn't it a fact that you almost struck two little children right near the curb? A No, sir, I did not.

20

Q Do you remember seeing little children there? A No, sir.

Q Did you blow your horn at that corner? A No, sir.

Q You did not blow your horn when intending to cross Clinton avenue? A No, sir.

Q Notwithstanding you saw a trolley and two bicycles coming down? A No, sir.

Q At what speed did you cross Clinton avenue? A Five miles an hour.

30

Q You continued that speed until you made your turn? A I continued at that speed until I made my turn and then threw her out.

Q You were arrested, weren't you, or taken to police headquarters right after the accident happened?

Mr. Greene: I object. If Mr. Schneider is going into that I wish he would go right through with that and show what happened.

40

Joseph Cosiello, cross.

Q You made a statement at police headquarters, didn't you? A Yes, sir, and made one to the prosecutor.

Q Did you make this statement, that at no time did you observe either of the colored men until your attention had been called by some other person who was standing on the sidewalk of Pennsylvania avenue acquainting you with the fact that you had an accident? A What is that?

Q Is it a fact that you told at police headquarters that at no time did you observe either of the colored men until your attention had been called by some unknown person who was standing on the sidewalk that you had an accident? A I don't know who was standing on the sidewalk; they just hollered "Whoa," and I stopped.

Q Is it a fact, then, that you so told them at police headquarters? A Yes.

Q Did you just tell me you saw the two bicycle riders when they were crossing Clinton avenue? A When I crossed they were coming down.

Q Why did you tell them at police headquarters you never saw those two men until your attention was called to them at the time of the accident? A I didn't say at police headquarters I didn't see them.

Q What made you blow your horn as you were turning into Pennsylvania avenue? A What made me blow my horn as I was turning into Pennsylvania avenue?

Q Yes. A I always do.

Q Is that how you remember you did it, because you always do? A I always do.

Q Do you remember because you always do it or because you remember specifically you did it on this occasion? A No, sir.

Q Do you remember blowing your horn on this particular occasion? A I remember blowing a horn, but I don't remember blowing the horn on that occasion.

10

Q You remember it, because you say you generally do it? A I generally do it at any crossing.

Q You have no specific recollection of blowing your horn at that intersection? A You are supposed to.

Mr. Greene: I object to that and ask that it be stricken out.

The Court: Strike it out.

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Q Have you an absolute recollection when you turned that corner that you blew your horn, or did you tell us that because you say you always do? A I don't understand the question.

Q Did you see these bicycle riders riding with the cab of your truck? A No, sir.

Q You say you put your hand out, did you? A Yes, sir.

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Q Where were you when you put your hand out? A Making the bend, the turn.

Q How near the corner of Pennsylvania avenue and Lincoln Park were you when you put your hand out? A About five feet.

Q What kind of sides did you have on your cab? A Wire sides.

Q Were they open? A No, sir.

Q You could put your hand out? A There is a place on the seat I can put my hand out that way.

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Q They were open if you could put your hand out? A The front is always open.

Q At any rate, you never saw either of these bicycle riders riding with the cab of your truck or in front of your truck? A No, sir, I did not.

Q In what part of the street were you driving your truck? A I was driving my truck on the left-hand side, I was driving. 10

Q On what side? A I was driving on the left-hand side of the truck.

Q What side of the street? A The right-hand side.

Q Nearest the center or nearest to the right-hand side? A Nearest to the right.

Q How many feet from the curb? A Five or six feet away from the curb.

Q Your truck was eleven or twelve feet high? 20
A The truck was about eleven or twelve feet high, yes, sir.

Q How high was the dirt piled on top? A It was even with the cab.

Q It was high enough, if you had a mirror in front of you, you could not see to the rear? A No, sir.

Q Did you have a mirror to guide you to see if any vehicles were traveling in your rear? A 30
No, sir.

Q Did the pile of dirt on the truck hide your view to the rear? A To the rear?

Q You piled it up so high— A I didn't pile it up.

Q It was piled up. How high with respect to the top of your cab? A I don't know. It had a nice load on.

Q You say the rear was open, you could look out the rear? A Look to the rear. 40

Q The pile of dirt obstructed your view? A No, sir.

Q Didn't you say the dirt was piled up? A I couldn't see the back of the truck, but I could see the load of the truck.

Q A lot of dirt prevented you from seeing
10 any riders in the back? A Any riders in the back?

Q Did you, at any time, between the time you began to cross Clinton avenue, and the time you made your turn into Pennsylvania avenue, apply your brakes? A It was a brand new truck.

Q Did you ever apply the brakes? A No, sir.

Q You were going so slow it was not necessary for you to apply your brakes? A No, sir.

20 Q When you made the turn, did you make the turn at the right of the center of Pennsylvania avenue or past the center of Pennsylvania avenue? A No, sir, right on the right.

Q You say you heard no shrieking at the time of the collision? A No, sir.

Q Who was it called your attention to the fact the accident had happened? A I couldn't say other than I heard a voice holler, "Whoa,"
30 and I stopped.

Q You did not hear any impact between your truck and the bicycle? A No, sir.

Q About how many seconds did it take you? You know what seconds are, don't you? A Yes, sir.

Q How many seconds did it take you to cross Clinton avenue, from the corner of Clinton avenue and Washington street to Pennsylvania avenue? A I don't know. That's something I
40 don't know.

Joseph Cosiello, cross.

Q Give us your approximate judgment? A You mean how long it took me to cross Clinton avenue to Lincoln Park?

Q Yes. A I suppose it is hard to say; I don't know.

Q A minute, two minutes, a half a minute. You have been driving a number of years? A It might have been a minute or two. 10

Q Didn't you testify on cross examination that you were crossing Washington avenue at ten or twelve miles an hour? A Yes, sir.

Q Didn't you tell me, when I asked you, that you were going five miles an hour? A I said from five to ten miles an hour.

Q I am asking you if you didn't, when Mr. Schneider asked you how fast you were crossing Washington avenue, didn't you say that you were traveling ten or twelve miles an hour? A I was coming down Washington street at that rate. When I was crossing Clinton avenue it was five miles an hour. 20

Mr. Greene: I object to the answer and ask that it be stricken out.

The Court: Didn't you testify on your direct examination by your counsel that you crossed over Clinton avenue at ten or twelve miles an hour. 30

(Witness pauses.)

Q (By the Court.) Do you remember saying that? A I don't just remember, no.

Q According to my notes you said you crossed Clinton avenue at ten or twelve miles an hour, and in answer to Mr. Greene's question you stated you crossed at five miles an hour. Now, he apparently has a similar recollection as I, and 40

I ask you how you reconcile those two statements? A No, sir, I testified one way to the Prosecutor.

Q (By Mr. Greene.) If you testified one way to the Prosecutor and on direct examination testified that you were traveling ten or twelve miles an hour, why did you tell me that you were traveling five miles an hour when I asked you? A I don't know exactly how fast the car is going, I ain't got no speedometer.

Q Didn't you tell me you were traveling in second speed and in second speed could not go more than five miles an hour? A That's all I could.

Q Why did you say that you were traveling ten or twelve miles an hour? A I don't know.

Q Is that the only thing you don't know, or don't you know about anything you testified to?

Mr. Schneider: I object to that.

Q You say you never saw those children? A No, sir, I did not.

Q As you were crossing Clinton avenue at Washington street? A No, sir, I did not.

HARRY LANGVIN, sworn in behalf of the defendant.

Direct examination by Mr. Schneider.

Q Where were you living on July 16, 1922? A 33 East Alpine street.

Q Newark? A Newark, New Jersey.

Q What section is that in? A That is south of Lincoln Park.

Q Is that in that general direction where the accident happened? A Down this street (indicating).

Q South of it? A Yes, sir.

Q How far is that from the scene of the accident? A Approximately seven blocks.

Q Were you in the neighborhood at the time the accident happened between the truck and the bicycle? A Yes, sir, it was a Sunday morning after church. 10

Q Where were you? A I used to take a walk over to the park to get my shoes shined.

Q Whereabouts were you at that time? A Why, about at that point here (indicating).

Q Take the pointer and show me where you were sitting? A Right about in here (indicating). There was a seat there, a chair. I was sitting there and had my shoes shined. 20

Q After you had your shoes shined what did you do? A I got up and started to walk back over this way, to go home (indicating).

Q In the direction of Pennsylvania avenue and Lincoln Park? A Yes, sir, this way I go home (indicating).

Q About the time when you saw these things which way were you going, just about where were you? A When I got up from here (indicating) and walked back probably five feet or so, I heard this truck coming across Clinton avenue. 30

Q You could hear it? A Yes, because it had an exhaust whistle on it. Of course, I couldn't see the truck very well on account of the bushes and trees in here (indicating). So, I was walking along about like this, and when I got about the middle here (indicating) I heard on the corner, "Let's go." 40

Mr. Greene: I object to what he heard unless he can show what he heard or saw it uttered by certain parties and ask that to be stricken out.

The Court: Sustain the objection and it will be stricken out.

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Q Tell us first, before you tell us what you heard, what you saw? A Well, when I got down about that far (indicating).

Q Was it then you heard something? A I looked up the street and I heard them say, "Let's go" again. They repeated it three times.

Mr. Greene: I object and ask that that be stricken out.

The Court: Strike it out.

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Q Who said, "Let's go?" A I saw the two colored men on bicycles and they repeated it, and said, "Let's go" at least three times.

Q When you heard that exclamation, "Let's go," what did you see there? A I seen the two colored gentlemen who were on the bicycles and the truck was ahead of them about twenty-five feet, and I was gradually walking through this park. When they got about here (indicating)

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after hollering, "Let's go," one takes the left-hand side of the truck and the other the inside of the truck, which I should judge from standing about here (indicating) that Jackson on the inside of the truck did not have over four or five feet between the curb and the truck, and I was looking to see where Jackson was going to come out, so when I came down towards the corner, the truck turns the corner and the last I seen, I closed my eyes and I seen his hands about the middle

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of the truck.

Q Whose hands? A Mr. Jackson, about the middle of the truck, I seen him like sliding under the back wheel.

Q What was his hand doing? A He was trying to protect himself, one hand on the handle bar and one hand on the side of the truck.

Q What happened? A I didn't think any more about it. I don't know if the back wheel ran over him or not, I closed my eyes. 10

Q When you opened your eyes? A He was laying with one leg over the wheel, just as if straddling the wheel.

Q What wheel? A The bicycle, and these two parties walked over and carried him over to the curb and I walked over to the curb with him.

Q He was taken away? A I was about in here (indicating) just about the crossing on Pennsylvania avenue. 20

Q He was taken away? A An automobile came along and they helped him into the automobile and took him to the hospital.

Q What do you say as to the way the truck was coming down Lincoln Park, as to speed? A Why, he came across here (indicating). I know it took him quite awhile from the time I seen him here to turn this corner. I had a chance to walk that part across, which is all of seventy-five or eighty feet, but I didn't notice his speed. He may have been going ten miles an hour or twelve miles an hour; he was going slow. 30

Q Did you notice whether any signal was given when he turned? A That exhaust whistle, the compression whistle on his cab. He had a compression whistle on it.

Q The compression whistle was going when he turned? A Yes, sir. 40

Q What kind of a sound does that make? A A toot, toot, toot, toot.

Q It makes a tooting sound? A You can hear it fifteen blocks away.

Q Did you notice whether he had his left-hand out?

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> Mr. Greene: I object to whether he noticed a particular hand.

Q You said you did not notice? A No, I did not notice.

Q The dirt was piled up pretty high? A Yes, sir, it was over the sides.

Q How was it, a wide truck? A Well, those trucks run eight or nine feet wide, I guess.

Q Do you figure that truck was about that wide? A Yes, it must be, the whole of it.

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Q When the bicyclists started how far behind the truck were they on Lincoln Park? A They were possibly twenty-five or thirty feet behind the truck.

Q How far about was it before they caught up to the truck at all? A Right about in here (indicating).

Q Whereabouts was that? A Almost in the center.

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Q Then, they caught up to what part of the truck? A This outside fellow came up to the cab and I was watching the inside fellow, but when the truck turned the corner this outside fellow was away down here somewhere (indicating).

Q He was going faster? A He was down here by the time the truck turned the corner (indicating).

Q Where was the inside gentleman? A The inside gentleman turned in this way (indicating)

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and when he turned in he enters in between the curb and the truck where the driver turns here short; I don't think there is over eighteen inches here.

Q Before the truck started to turn what part of the truck was Mr. Jackson at? A I couldn't see him on the other side of the truck. They have disc wheels and chains on, you couldn't see on the other side of a Mack truck. 10

Q When you saw his hand grasping, it was on what part of the truck? A Right in back of the cab. That would make the cab a yard in front of the back wheels, right about the sprocket of where the chain goes on.

Cross examination by Mr. Greene.

Q Where do you live now? A I live in Monahan Park, White Plains, New York. 20

Q How much have you received, if anything, to come down here and testify in this case? A I haven't received anything.

Q Your expenses are paid down here? A I expect my day's pay and my expenses paid coming down here.

Q How do you know you expect it? A I told them I wouldn't come down unless he gives me my day's pay. 30

Q How much is that? A Ten dollars a day.

Q Do you make ten dollars a day? A Yes, sir.

Q Where? A Repairman down at the Yonkers Express Company.

Q You make ten dollars a day? A Yes, sir.

Q How much do you make a week? A Fifty-five dollars a week.

Q Is that ten dollars a day? A Yes, sir. 40

Q How many days do you work? A Five and a half days.

Q Do you work on Sunday? A That is double time if I do.

Q Who was it asked you to come down here and testify in this case? A Lyndhurst.

10 Q I don't know him. A The lawyer.

Q He promised you ten dollars a day for expenses? A I told him I wouldn't come down unless I got a day's pay and my expenses to come down here.

Q How much expenses did you expect to be refunded to you? A I expect, today, possibly it cost me fifteen dollars to come down here.

Q Ten dollars and fifteen dollars in addition? A I expect fifteen dollars altogether, carfare,
20 and this noon time.

Q You were down here on other occasions, weren't you? A Yes, sir.

Q Were you paid on the other occasions that you came down here? A Yes, sir.

Q How much were you paid? A I was working for the Chevrolet Motor Company before and was paid $8 a day and expenses.

Q You do not expect more than $15? A
30 That is the agreement I came down on.

Q Fifteen dollars a day? A Ten dollars and my expenses.

Q When you were working in the city were you subpoenaed or did you come of your own volition? A They asked me if I would come, when I lived here, and I told them yes.

Q Without a subpoena? A Yes, sir.

Q Upon agreement that you were not asking over eight dollars a day plus expenses? A I was working—
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Q For whom were you working at that time? A Vacuum Drip Products at the corner of Frelinghuysen avenue—

Q Did you get $8 a day? A I was working piece work, making as high as ten dollars.

Q You came for $8? A No, I didn't come then.

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Q Were you subpoenaed or did you come of your own volition? A When I was working there there wasn't no case up. I left there in the spring of 1923.

Q How far away were you from the scene of the accident on that sidewalk when you heard or saw this motor truck crossing Clinton avenue? A Across here (indicating).

Q Put an X where you were when you first saw the truck crossing Clinton avenue. A On the sidewalk.

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Q Yes, put a mark there. How far is the point X to the crosswalk or to the sidewalk on the northerly side of Lincoln Park, in other words, what is the distance between X and to the sidewalk on Lincoln Park? A I figured that in the neighborhood of seventy-five to eighty feet; I never measured it.

Q When you saw this truck crossing you were having your shoes shined? A Just after getting a shine. The bootblack was there.

30

Q What was there about this motor truck to attract your attention to watch it crossing the street? A There was nothing else on the street to be seen.

Q Is that what you were out for, to see automobiles passing? A I have been around thirty or forty-five years and that's all I care to say.

Q Is that the reason why you watched this motor truck? A Not exactly. I didn't watch the motor truck.

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Q What did you watch? A The two colored fellows saying "Let's go."

Q What attracted your attention to these two colored fellows? A Racing.

Q Didn't you tell on direct examination you watched the motor truck crossing? A I also
10 watched the motor truck crossing until I saw the two fellows.

Q Didn't you say your attention was directed first to the motor truck crossing Clinton avenue? A Crossing Clinton avenue.

Q What was it that attracted your attention, about that motor truck? A Nothing else but to look at it.

Q What speed was it traveling at? A I couldn't say. It came across very slow.

20 Q You couldn't say its speed? A It wasn't speeding, no.

Q Did you notice from which side of Washington street the truck came from, whether from the east side or the west side? A I couldn't say which side it came out, I could only see it crossing Clinton avenue, that's all.

Q Put a mark at the point of Lincoln Park where the truck was coming out from when you
30 first saw it. A On Clinton avenue.

Q Put a mark there. A Here (indicating).

Q Was it about midway of Washington street or would you say— A It was on Clinton avenue. I didn't notice where they came out.

Q Did you notice whether to one side of Washington street or the other? A No.

Q Did you notice whether it was in the center of the street? A No.

Q What is your best recollection? A Nothing at all on that, because I can't recall it.
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Harry Langvin, cross.

Q Did you see two children there trying to cross the street? A No children, absolutely no one.

Q Did you see Mr. Webb, the gentleman who testified here? A No, sir.

Q When you were standing at Lincoln Park at the time of the accident did you see Mr. Cannallon? A No, sir. I saw him after the accident. 10

Q Where did you see him? A Away down this way, where the accident occurred here (indicating).

Q You say you did not see Mr. Webb? A No.

Q How far away was that truck or these bicycles when you first saw the bicyclists? A When I first noticed the bicyclists? 20

Q Yes. A Why, the nearest I can recollect would be about twenty-five or thirty feet, for a rough guess, it wouldn't be under twenty feet.

Q Did the bicyclists get out of Lincoln Park before the truck overtook them? A No, the bicyclists were on Clinton avenue when the truck was on Lincoln Park.

Q How many feet away from Lincoln Park were the bicycle riders when you first saw this motor truck crossing? A I didn't see no bicycles when I first saw the motor truck crossing. 30

Q How soon after you saw the motor truck crossing did you see the bicycle riders? A After the truck went down the street I noticed the bicyclists behind it by their hollering, "Let's go," which drew my attention to them.

Q How fast did the bicycle riders go? A In that little stretch, they picked up probably twenty to twenty-five miles an hour.

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Q They were only twenty-five feet behind? A Between twenty and thirty feet.

Q How fast was the truck going? A It was going slow; they pulled up to the truck.

Q How slow was the truck going? A Slow speed for a truck was going ten or twelve miles
10 an hour.

Q You say it was going that? A No, I couldn't say what speed it was going.

Q Why can you approximate the speed of the bicycle riders when you cannot approximate the speed of the truck? A Why should I, when I don't recall it. I noticed them speeding, but I didn't notice the speeding of the truck.

Q You did not see the truck driver put out his hand, did you? A No, I did not. I wasn't
20 looking at that at all.

Q You did not hear any horn? A Yes, I heard his exhaust whistle.

Q You heard that all along way down, didn't you? A No, I heard it at the crossing of Clinton avenue and turning the corner.

Q You did not hear a horn blown? A No, I did not hear no horn.

Q You say the bicycle rider to the right was driving with the cab? A Why, he came up that
30 way, he just sprang up in about one hundred feet from where I seen him, that would be probably about 125 feet, before he got up to the side of the cab.

Q How could you see how near the cab he was driving if there was this heavy motor truck opposite you, obstructing your view? A Why—

Q You were looking at the motor truck traveling, how could you see where the bicycle was when your view was obstructed? A My view
40 was not obstructed.

Q Do you mean to say you could see the bicycle rider when the truck was traveling in front of him? A He was on this side (indicating) Jackson.

Q Could you see Jackson from the other side? A I couldn't see Jackson from the inside, I could see the fellow on the other side. 10

Q How could you see Jackson when the truck was obstructing your view? A I couldn't see him, that's what made me watch until I saw him go under the truck.

Q There are a lot of trees there in that section of the park you were traveling in? A Yes, sir.

Q This was in the summertime when everything was in full bloom? A Yes, sir.

Q Do you mean to say you could see through those trees? A You could by standing in the center of the park; you couldn't see from across. 20

Q Did you go and stand in the center? A I was walking across.

Q How do you know the truck was four or five feet from Jackson when the truck was obstructing the view? A Because of the way the truck and he was coming down.

Q Is that the only way you know? You do not know because your view was obstructed by the truck? A I could see the front of the truck coming right down to me. 30

Q Could you see Jackson? A I couldn't see him. I kept looking for him until I seen him cut in.

Re-direct examination by Mr. Schneider.

Q You could see Mr. Jackson, of course, before he passed the back of the truck? A I saw 40

Mr. Jackson and the other colored fellow when they started.

Q Before Mr. Jackson got past the back of the truck you could see him? A I could see him when the truck got down about that far, they stepped up one on one side of the truck and Jackson on the inside of the truck.

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Q When the truck was turning into Pennsylvania avenue did you see Jackson again? A I didn't see him until the truck turned and then I saw Jackson holding on to the side of the truck.

Q Where were you standing when the truck had turned? A Almost on that corner. This is a thirty-five foot road and I was four foot away.

Q When the truck turned in you could see it? A I could see it plenty and there wasn't a party in sight.

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Re-cross examination by Mr. Greene.

Q Was Jackson laying in the middle of Pennsylvania avenue or to the left or the right of that street when you saw him? A To the right of that street.

Q Near the curb? A Three of my paces from the curb.

Q How many feet? A I judge in the neighborhood of nine feet.

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Q You are positive of that, you wouldn't say he was lying in the center of the street? A No.

Q Or to the left of the center? A About nine feet away from the curb.

DEFENDANT RESTS.

Mr. Schneider: I respectfully move for the direction of a verdict in favor of the defendant on the ground that no negligence

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has been shown, but contributory negligence on the part of the plaintiff's decedent has been shown.

The Court: The motion will be denied, principally on the ground of the case of *Jackson* v. *Geiger,* which was decided in 126 Atl. Rep. 10

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

Exception noted as ground of appeal.

Mr. Schneider sums up for the defendant.

Mr. Greene sums up for the plaintiff.

Adjourned to ten o'clock Tuesday, September 22, 1925.

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SECOND DAY.

September 22, 1925.

Continued pursuant to adjournment.

Present, counsel as before stated.

The Court charges the jury as follows:

MOUNTAIN, *J.:* 30

Perhaps some of you are serving for the first time in the capacity of a juror in this county. In the case which has been tried before you the plaintiff has brought suit under a statute passed by the legislature of this State permitting her to sue for the benefit of herself and next of kin and recover pecuniary damages, which I will advert to later, for the death of her husband, provided that she can prove that her husband's

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death was proximately caused by the negligence of the defendant, or the defendant's employee Cosiello, who it is admitted was the servant of the defendant at the time that this unfortunate accident happened, and was acting within the scope of his employment. It is admitted that
10 the decedent, Larnie Jackson, the husband of the plaintiff in this case, died as the result of this collision. It appears that in July, 1922, the defendants owned and operated a motor truck and, as I have said, employed Cosiello. It appears that on the 16th day of July of that year that Cosiello was driving this motor truck partially or wholly filled with dirt. He estimated that the load was about six yards and he was going from some job down to the city dumps. The course which he pursued for that purpose,
20 we have been told, brought him across Clinton avenue in this city and along Lincoln Park. He proposed on the day in question to proceed along Lincoln Park, not to Broad street, but to turn to his right and go down Pennsylvania avenue. The map which we have in evidence indicates that Pennsylvania avenue runs north and south and Lincoln Park runs east and west.

Your inquiry is solely to the facts in this case;
30 it is my duty to give you instruction as to the law, but all questions of fact must be determined by you and, of course, the questions which are outstanding in this case is whether Cosiello was or was not negligent, and whether the plaintiff's intestate was or was not negligent. I refer to Larnie Jackson, the plaintiff's deceased husband.

The plaintiff alleges that on the day in question when Cosiello, driving this truck of the defendant, turned from what I think is now Wash-
40 ington avenue for the purpose of crossing Clin-

ton avenue, that he was driving this truck at a reckless speed. One witness called by the plaintiff testified he saw the truck scatter children at the point on this map where Lincoln Park, which is now, I think Washington street, intersects Clinton avenue, and that the children were panic stricken and that the truck just escaped one little girl by a few inches. The witness who gave that testimony said he stood still to watch the course of the truck because of the rate of speed at which it was being driven; that it crossed Clinton avenue at thirty miles an hour and did not seem to diminish its speed. He admitted that as the truck receded from him it was impossible for him to state with much precision as to the exact speed of the truck, but in his opinion he thought it did not slow up. He said he heard no signals or observed no signal when the truck approached Pennsylvania avenue, but that it turned into Pennsylvania avenue and after the turn he saw Jackson lying in the street. He testified the turn that was made into Pennsylvania avenue was abrupt, but testified he did not see Jackson or the other bicyclist before this turn was made.

Another witness called on behalf of the plaintiff testified that when the turn was made, the driver gave no signal by putting his hand out. That witness, Mr. Hall, thought the truck was going twenty miles an hour. Mr. Connallon, you will recall, said he was approaching Lincoln Park with the intention of crossing over from the north side to the south side and proceeding down Pennsylvania avenue to church, which reminds us that the testimony was that this was Sunday morning and a clear day. Mr. Connallon hesitated on the curb for the purpose of making an observation to see whether the street was safe

for him to cross and he saw this truck filled with dirt, according to his testimony, coming at a very rapid rate of speed, fifteen to twenty feet from its right-hand curb. He said he noticed no signal and that he did see Jackson riding his bicycle on the right-hand side of the truck. He testified when the driver reached the intersection at Pennsylvania avenue at Lincoln Park, that he turned to the right so abruptly that he hit the curb of Pennsylvania avenue with the truck when making the turn, and that Jackson by virtue of this turn was pocketed. The accident happened and, he testified, the truck went one hundred feet before it stopped.

There were other witnesses called on behalf of the defendant to show that the circumstances were not as narrated by those who testified for the plaintiff. Cosiello, himself, who was driving the truck, said he had been driving for about eight years, that he crossed Clinton avenue at some speed with the notion of proceeding along Lincoln Park to Pennsylvania avenue and down Pennsylvania avenue towards the city dumps.

All facts must be decided by you and you must not take my recollection of any of the testimony, but your own memory of what the individual witnesses said and, warning you that you must take your recollection and not my impression of the testimony, I say I think he testified first that he was crossing Clinton avenue at ten or twelve miles an hour and later that he stated when he crossed Pennsylvania avenue he was going five miles an hour. I may be in error in that. At any rate, he testified, as I recall it, that when he crossed Clinton avenue he passed these bicycle riders; that they were about fifteen feet from him, and he went on into Lincoln Park and

that the bicycle riders were somewhere behind. When he reached the intersection of Pennsylvania avenue he testified that he put his hand out and blew his horn and made a gradual turn; that he heard someone call out and brought his truck to a stand and found that the accident had happened; that he went about 100 feet from the place where it had happened before he stopped. He further indicated as to his recollection of the situation at that time, on cross examination, that he had no specific recollection of blowing a horn when he made the turn. Another witness called by the defendant indicated by his testimony that there were two colored boys on bicycles following this truck somewhere near the corner of Lincoln Park and Clinton avenue and that one, or both of them, said, "Let's go"; that at some time when the position of these respective vehicles was near the corner of Clinton avenue and Lincoln Park the bicyclists were twenty-five to thirty feet behind the truck and that they picked up speed and caught up with the truck, the one bicyclist riding to the left of the truck and the other bicyclist, Larnie Jackson, who was killed, going to the right of the truck, putting himself in a position between the truck and the curb. That witness testified he heard the driver's exhaust whistle at some time as he was driving from the time he turned into Clinton avenue and that the distance in his opinion between the right-hand side of the truck and the curb was four or five feet. Other witnesses have estimated the distance between the right-hand side of the truck and the curb as fifteen to twenty feet. The defense called a witness or read the testimony of one Michael J. Doherty, taken in Cadillac, Michigan, who was not able to say he heard any signal,

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but who did testify the truck was traveling at a normal rate of speed.

On the state of facts that have been presented to you you must consider the question of whether in your opinion Jackson was negligent, whether in your opinion, the driver of the truck was negligent. The burden of proof in this case is upon the plaintiff, Mrs. Jackson, to prove by the greater weight of the evidence that the defendant was negligent.

If you find that Cosiello was negligent you may find that the defendants were negligent because he was in their employ on the day in question, but the defendants insist that the plaintiff's own negligence contributed to this accident and proximately contributed to his death and because they allege that the burden of proof is upon the defendants to prove contributory negligence.

This case is interesting because of its ramifications from the common law doctrine by virtue of the Traffic Act of this State. The driver of this truck and Larnie Jackson both owed reciprocal duties to one another. They each had the right to use the highway but with that right, they had correlative duties of exercising reasonable care, not only to protect themselves but to protect and regard the rights of others who were using the highway in the exercise of care. Long before automobiles were invented the common law said that any man who used the highway must exercise reasonable care and in case of an accident this is the standard which we indicate as reasonable under the circumstances, i. e., that the operator of a vehicle should use such care as an ordinarily prudent man would have exercised under similar conditions. So, in this instant case Cosiello was required to use such

care, in the operation and control of that truck as he proceeded down Lincoln Park in an easterly direction and turned into Pennsylvania avenue, as a reasonable, careful and prudent man would have exercised under similar circumstances. And Jackson, too, in the operation of his bicycle was charged with a like obligation. 10

If you find that Jackson was guilty of negligence which contributed to his injuries, his widow cannot recover anything, because manifestly it would be improper for her to profit in any action where it was proved that the basis of the recovery was the negligence of her husband. So, if you find he was negligent that settles the case at once and the plaintiff cannot recover.

Perhaps because of the increase in traffic and the obvious necessity of regulating traffic the Legislature of this State passed a law which we 20 refer to as the Traffic Act. It does not change the common law rule which I have indicated as to reasonable care, but it does contain certain regulations. The Legislature hoped, I suppose, that those who used the highways would familiarize themselves with these regulations, so that others might assume that the drivers whom they met would operate and control their vehicles in accordance with the statute. 30

The Traffic Act provides, among other things, that one who operates an automobile or vehicle on the road should drive on the right-hand side of the improved portion of the road. It further provides that if the driver of one vehicle proposes to pass another he shall pass it on the left-hand side. It further provides that if the driver of a vehicle proposes to make a right-hand turn he shall extend his hand or operate some mechanical device indicating the direction in which the turn is to be made. 40

If Cosiello gave no signal or warning, you may find that the decedent would have been warranted in believing that he was going straight ahead. The decedent in the exercise of ordinary care was under no legal obligation to anticipate that Cosiello would fail in his duty to indicate by a proper signal or warning in ample time, that instead of proceeding ahead he intended to make a turn down Pennsylvania avenue. Of course, whether the signal was given or not is a question of fact. The driver of the defendant's truck says his signal was made; he says he extended his left hand. Others have testified they did not remember the signal being made.

Now let us turn to Larnie Jackson's operation of this bicycle. Was he negligent? It is a question of fact for you to determine from all the circumstances and, among other things, it seems to me that because of the position he was in you must determine whether he was passing or intended to pass this truck on its right-hand side. You will remember I told you that the Traffic Act provided that if one vehicle passes another, going in the same direction, it must pass the vehicle in front on its left. You must decide whether Larnie Jackson speeded up his bicycle and put himself, under all the circumstances, in a perilous place and that his action and operation of that bicycle amounted to negligence, which proximately caused his death. If you find from your examination of the case that both Jackson and the driver of the truck were negligent, then Mrs. Jackson cannot recover in this action.

The Traffic Act to which I have referred has something to say in reference to speed and in reference to signals, and it has been claimed in

this action that this motor truck was going at a rate of speed which would not be countenanced by the statute. I charge you, by the terms of the act to which I have referred, the defendants' employee Cosiello was not permitted to exceed a speed, in making this turn into Pennsylvania avenue, of one mile in seven minutes. If you find that on Lincoln Park the testimony shows the houses were an average of less than 100 feet apart, then, the speed limit of the defendants' employee Cosiello was twelve miles per hour and Jackson was not permitted to exceed that rate of speed. The Legislature provided in the Traffic Act, that so far as motor vehicles were concerned nothing in that act should permit any person to drive a motor vehicle recklessly or at a greater speed than was reasonable, having regard for the use of the highways or streets so as to endanger the life or limb or injure the property of any person. That act provides, I think, as I said, that in turning while in motion, or in starting to turn from a standing still position, signals shall be given by extending the whip or hand or by operating a mechanical device indicating the direction in which the turn is to be made. These statutes which enlarge the common law rule of reasonable care are not intended to provide a hard and fast rule applicable to all hazards and in all situations regardless of actual conditions so as to liberate from responsibility one who by adhering to the regulations, may be otherwise reckless and indifferent to the situation of others who may be lawfully using the highway.

In this action the plaintiff charges, among other things, that the defendant violated these statutes. Among the elements of negligence complained of by the plaintiff are that the defendant

Cosiello was negligent in that he operated the motor truck in question at an unlawful rate of speed and failed to do any of the things required by the statute before making this turn into Pennsylvania avenue. If you find that the collision occurred because of the violation of these statutes by the defendant Cosiello, then, from that you may find that the defendant Cosiello was not negligent.

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When you retire to the jury room it becomes your duty to examine the conduct of both drivers. Many questions will suggest themselves to you; you will inquire as to the speed at which Cosiello was driving, but in connection with that inquiry you will remember two things, it seems to me; first, that at whatever speed he was driving, he passed these bicyclists in safety at the corner of Lincoln Park and Clinton avenue, and that they then caught up to him. Second, that the speed may be important as indicating, if it was continued in, that he did not intend to turn into Pennsylvania avenue, but intended to persist in his course down Lincoln Park. Of course, that situation may be modified by whether or not you find a signal was given. Then, under the conditions which existed, your inquiry, of course, would be made as to whether or not in your opinion Jackson, riding his bicycle and placing himself between this truck and the curb, was not placing himself in a position, under all the facts and circumstances, of danger. What would have happened if the driver of the truck had turned into the curb very suddenly? Instead of doing that we have testimony he turned the corner very suddenly. Did Jackson put himself in a position where his negligent act, if it was a negligent act, caused his

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death or contributed to it? Did Jackson intend to pass this truck on the right? If he did, such action was in contravention of the statute.

After having decided the facts in this case, your duties are not yet through; I am not sure that the most difficult part is yet to come. The action is brought under what we call in this State the Death Act. At common law Mrs. Jackson could have brought no such action against the defendant, but the Legislature which convened in 1917 provided that such an action might be brought for the exclusive benefit of the widow and next of kin, and that a jury in hearing an action of this kind might give such damages as it might deem fair and just with reference to the pecuniary injuries, resulting from the death, to the wife and next of kin. The fact that the Legislature put the word pecuniary into that statute has been interpreted by the courts to mean that such damages are measured by what money would have gone from the deceased to the wife and next of kin during their joint lives. No damages can be awarded by a jury for distress or pain or suffering. The jury have to consider the fact, as in this case, that this man had a wife and family and that he gave money to them and that money indicated a pecuniary benefit which they had while he was alive and anticipated while he lived. What was that pecuniary loss when he was taken away? I know of no statute which leaves more to a jury to conjecture than this particular statute, because you have to consider so many speculative things. In this instant case, if the plaintiff is entitled to recover, of course, then you have to consider what damages you will allow and they must be allowed under the statute.

What might have been the length of his life had he not been prematurely killed? The expert called by the plaintiff, Mr. Salter, said that his expectation, I think, was 28.6 years. Larnie Jackson at that time was 28 years old and in good health. He left a widow and two children, who are now aged twelve and ten respectively. At the time of his death he was working for the Essex Foundry and earning twenty-eight dollars a week, out of which he received four or five dollars for his own expenses. If he had lived, what amount would he have contributed to the widow and next of kin during the joint lives of them all?

Assuming that you do decide for the plaintiff and that you fix that amount based, of course, among other things, on his earning capacity and the duration of his life, the duration of the lives of the widow and daughters, a minute's thought will persuade you that the amount which you have fixed is too large, because it fixes the total amount. It is your duty to commute that amount to the present expectation of whatever the amount is, in other words, to fix some capital fund which is the present value of that future expectation and that is the amount to which the plaintiff in this case is entitled if she has proved her case and is entitled to anything.

I have been asked to charge you on behalf of the plaintiff certain requests. The first request I think I have covered, but I will ask both counsel if they admit—they seem to from the requests that have been made—that this accident occurred in a built-up portion of the City of Newark where the houses are less than one hundred feet apart.

Mr. Greene: It is so admitted, your Honor.

Mr. Schneider: We will admit that.

The Court: Then, that admission is before you gentlemen of the jury.

The second request of the plaintiff I will deny. Requests Nos. 3 and 3A and the 4th and 5th requests are denied. The 6th I will charge. 10

6. The defendants among other defenses charge that plaintiff's decedent was guilty of contributory negligence. To constitute contributory negligence, such as would bar the plaintiff in the suit from recovering, it must appear that such negligence so contributed to the injury that if the decedent had not been negligent, he would have received no injury from the negligence of the defendant.

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7. The burden of establishing contributory negligence on the part of the plaintiff's decedent, Larnie Jackson, is upon the defendants to be established by them by the greater or preponderant weight of the evidence; and in order to establish such contributory negligence on the part of the plaintiff's intestate as will bar the plaintiff in this suit from recovering, defendants must show not only that plaintiff's intestate was negligent but that such negligence was a contributing or proximate cause of the collision. 30

The 8th, 9th, 10th, 11th and 12th I will deny.

The 13th I will charge.

13. If you find that the defendant Cosiello was negligent and plaintiff's intestate was free from contributory negligence, then your verdict must be for the plaintiff and against both defendants, since it is admitted that Cosiello was 40

the servant and employee of the defendant, John S. Geiger & Sons, and that the plaintiff was injured by the truck of the defendants, John S. Geiger & Sons, the negligence of the employee being imputed and charged to his masters.

The 14th I will charge.

10 14. If your verdict is for the plaintiff, then plaintiff is, under our statute, entitled to recover a "capital fund" (so to speak), which shall represent the present value of all the pecuniary or money loss, which will fall upon the widow, Mrs. Jackson, and her infant children, who are the next of kin of decedent, resulting from premature death of the decedent, Larnie Jackson.

The 15th will be denied.

20 The 16th I will charge.

16. In arriving at the damages you may take notice of the fact that the dollar has decreased in value.

The defendant has requested me to charge and I do charge as follows:

1. If the deceased was guilty of any negligence that was one of the proximate causes that
30 contributed to the collision that resulted in his death, your verdict should be in favor of the defendants.

2. Under the law of this State, one vehicle overtaking another on the highway or street should pass to the left of the latter. If you find that, in this case, the deceased was operating a bicycle and was passing or attempting to pass the truck of the defendant on its right side instead of on its left as prescribed by our law, and
40 if you find that this act of the deceased in pass-

ing on the wrong side of the truck was negligent and was one of the proximate causes of the collision resulting in his death, in that event, the deceased was guilty of contributory negligence and your verdict should be for the defendants.

The 3rd is withdrawn.

The 4th I will charge. 10

4. If you find that Mr. Jackson was passing or attempting to pass the defendant's truck on its right side instead of its left side and if you further find that he was thereby passing or attempting to pass it on the wrong side, you may in your discretion decide that he was thereby guilty of negligence, and if you find also that this act of negligence was one of the proximate causes of the collision, your verdict should be for the defendants. 20

The 5th and 6th I will deny.

I can only charge part of the 7th because the Court has no right to express an opinion on the facts, as I understand the particular request, but I will charge you this: "The defendants made a motion for the direction of a verdict which was denied by the Court, that motion was properly made and was decided on a question of law." As I said before, all facts are within 30 the province of the jury, the Court has only to decide questions of law, and my decision had nothing to do with the facts in the case.

The 8th request will be denied.

The 9th I will charge.

9. If you find that the driver of the truck and the deceased were both guilty of negligence

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that proximately contributed to the collision, your verdict should be for the defendants.

(The jury retires.)

Mr. Greene: Is there any objection to the map going down to the jury?

10 Mr. Schneider: No.

Mr. Greene: I respectfully pray an exception to so much of the charge of the Court which suggested to the jury that under the circumstances in the case Jackson put himself in a careless or dangerous position, without charging the jury that the mere passing or being of Jackson to the right of the truck was not *ipso facto.*

The Court: I do not remember that. Do not put on the record anything I did not say.

20 Mr. Greene: The suggestion by the Court without also suggesting to the jury that the mere being or traveling to the right of the truck was not as a matter of law negligence.

Exception noted as ground of appeal.

Mr. Greene: I respectfully pray an exception to that portion of your Honor's charge, "That the reminder of the Court to the jury that in considering the speed of Cosiello they should

30 also remember that the bicyclists trailed the driver of the truck."

Exception noted as ground of appeal.

Mr. Greene: I respectfully pay an exception to the suggestion of the Court to the jury that they had a right to consider what happened to the decedent by reason of his position to the right of the truck if the driver of the truck had turned suddenly to the curb, without suggesting to the jury that the mere position of the decedent

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to the right of the truck is not as a matter of law negligence.

Exception noted as ground of appeal.

Mr. Greene: I respectfully pray an exception to the statement of the Court that they might consider that if the decedent intended to pass the truck or was passing the truck it was in contravention of the statute, without stating that the mere violation of the statute in itself would not be negligent as a matter of law. 10

Exception noted as ground of appeal.

I respectfully pray an exception to the statement of the Court to the jury that the jury by reflecting on the amount of the damages at first glance would be persuaded that the amount is too large.

Exception noted as ground of appeal. 20

Mr. Greene: I respectfully pray an exception to the Court's refusal to charge as requested by the plaintiff which the Court denied.

Exception noted as ground of appeal.

Mr. Greene: I also respectfully pray an exception to the Court's charge of Charges Nos. 2, 4 and 8 of the defendant's requests which were charged.

Exception noted as ground of appeal. 30

Mr. Schneider: I respectfully pray an exception to your Honor's refusal to charge the fifth, sixth and eighth of the defendant's requests.

Exception noted as ground of appeal.

Mr. Schneider: I respectfully pray an exception to your Honor's charging the requests of the plaintiff.

Exception noted as ground of appeal. 40

Mr. Schneider: I respectfully pray an exception to that part of your Honor's charge wherein your Honor said that the speed of the vehicle might show an intention to turn or not to turn into Pennsylvania avenue.

Exception noted as ground of appeal.

10 Mr. Schneider: I respectfully pray an exception to that part of your Honor's charge wherein your Honor said that the driver on the right of the road had a right to assume from the speed of the truck whether the truck intended to turn into Pennsylvania avenue or not.

Exception noted as ground of appeal.

Mr. Schneider: I respectfully pray an exception to your Honor's failure to comment in anyway on the testimony of the witness Hall.

20 Exception noted as ground of appeal.

Mr. Schneider: I also pray an exception to your Honor's saying that a witness testified that a truck was fifteen or twenty feet from the curb. It seems to me the only one who testified to that was Connallon and he afterwards corrected that by his mathematical proof by saying his bicycle was ten feet from the left curb and ten feet from the truck. The street being thirty-five feet wide.

30 Exception noted as ground of appeal.

(The jury sent the following communication to the Court, "Has a man driving a motor vehicle or any other kind of vehicle at any time or under any circumstances, the legal right to pull in to the right of another vehicle ahead of it and going in the same direction, and drive alongside it without passing it?")

(The Court sends the following reply to the communication of the jury, "To confine my an-

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swer to the case at bar, the Court charges you that Jackson had a legal right to come up behind the truck and to propel his bicycle on the right of and alongside the truck. That act alone would not *in law* constitute negligence, but you may find that under all the facts and circumstances in this case it did *in fact* amount to negligence. If you find Jackson intended to pass the truck on its right side, you may consider that such an act was in contravention of the statute, and indicates or tends to indicate negligence. You may find to the contrary as well."

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(Signed) Worrall F. Mountain,
Judge.)

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

Exception noted as ground of appeal.

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

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1. It is admitted that the accident occurred in a built-up portion of the City of Newark, where the houses were less than 100 feet apart.

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2. On the subject of speed in such a built-up portion of the city, the Traffic Act provides:

"(a) A speed of one mile in seven minutes (about 8½ miles) upon the sharp curves of street or highway or when turning a corner * * *"

"(b) A speed of one mile in five minutes (12 miles) where such street or highway passes through the built-up portion of the City, Town,

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Township, Borough or Village, where the houses are on the average of less than 100 feet apart."

Section 4 of the same Act provides, however, that nothing provided in the previous sections shall permit any person to drive a motor vehicle at a speed greater than is reasonable, having re-
10 gard for the traffic and use of highways or streets, as to endanger the life or limb or injure the property of any person; and it further provides that nothing in said sections shall effect the right of any person injured either in his person or property by the negligent operation of a motor vehicle to sue and recover damages therefor.

Denied.

3. On the subject of signals the Traffic Act
20 provides as follows:

"SIGNALS: On all public roads, streets, highways and turnpikes, the following regulations shall be in force: (1) In turning while in motion or in starting to turn from a standing-still position, signals shall be given by extending the whip or the hand or by operating an adequate mechanical device indicating the direction in which the turn is to be made."

Denied.
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3A. These statutes although not intended to provide a hard and fast rule, applicable to all hazards and all situations so as to liberate from responsibility one who by adhering to these regulations may be otherwise reckless and indifferent to the situation of others who may be lawfully using the highway, nevertheless increase the duty imposed by the common law upon drivers of motor vehicles.

40 Denied.

4. In this suit plaintiff charges among other things that the defendants violated these statutes. Among the elements of negligence complained of by plaintiff are that the defendant, Cosiello, was negligent in that he operated the motor truck in question at an unlawful and excessive rate of speed and failed to give any of the signals required by the statute before making his turn into Pennsylvania avenue. I, therefore, charge you that if you find that the collision in question occurred alone from the violation of these statutes by the defendant, Cosiello, then from that you may find that the defendant, Cosiello, was negligent. 10

Denied.

5. If you find that the defendant, Cosiello, violated these statutes or any of them and such violations were the proximate cause of the collision with the decedent, then you would be justified in finding that the defendants were negligent. 20

Denied.

6. The defendants among other defenses charge that plaintiff's decedent was guilty of contributory negligence. To constitute contributory negligence, such as would bar the plaintiff in the suit from recovering, it must appear that such negligence so contributed to the injury that if the decedent had not been negligent, he would have received no injury from the negligence of the defendant. 30

Charged.

7. The burden of establishing contributory negligence on the part of the plaintiff's decedent, Larnie Jackson, is upon the defendants to be established by them by the greater prepon- 40

derant weight of the evidence; and in order to establish such contributory negligence on the part of the plaintiff's intestate as will bar the plaintiff in this suit from recovering, defendants must show not only that plaintiff's intestate was negligent but that such negligence was a contributing or proximate cause of the collision.

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Charged.

8. The mere fact alone that the decedent was moving in close proximity with the truck of the defendant and keeping up with it does not constitute contributory negligence, which would bar the plaintiff in this suit.

Denied.

9. There is testimony which tends to show that the defendant's truck passed the decedent's bicycle on the left, leaving a space of ten feet or more between the path of the truck and the right-hand curb in which space the plaintiff's decedent was and continued to propel his bicycle, keeping to the right and where, under the law of the road he was entitled to be. There is also testimony showing that the decedent was riding opposite the cab of the defendant's truck; that the cab was an open cab and the driver of the truck, if he had looked, could have seen the decedent alongside of him and could have put his hand out to make a signal. There is also testimony that the truck was going at a rapid rate of speed, in about the center of the road, apparently headed towards Broad street and that the driver of the truck, without having given any signal or warning of his intention to turn to the right and down Pennsylvania avenue, abruptly turned his truck to the right into the avenue and the decedent perceiving his perilous position which this unex-

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pected course of the truck created and so suddenly confronted him with, turned his bicycle in the same direction in order to avoid running headlong into the truck, but his effort was frustrated by the hub of the truck striking the rear wheel of his bicycle and with a fatal result to him.

Denied. 10

10. Now, in the absence of any signal or warning that the truck was taking the turn, the decedent would have been warranted in believing that the truck driver was going straight ahead and, therefore, the fact that decedent was keeping alongside of the truck or even attempting to pass it was not by itself contributory negligence; for even if it be assumed that the testimony established that the decedent was riding rapidly and that his intention was to pass the truck, even 20 then his conduct was only a factor to be taken into consideration with other circumstances of the case as to whether or not he was guilty of contributory negligence and whether or not such negligence was contributory to the negligence of the driver of the truck in making the abrupt turn and in failing to give ample warning of his intention to do so.

Denied.

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11. The plaintiff's decedent in the exercise of ordinary care was under no legal duty to anticipate that the truck driver would fail, in his duty to indicate by proper signal or warning, in ample time, that instead of proceeding ahead to Broad street he intended to make a turn down Pennsylvania avenue.

Denied.

12. Plaintiff's decedent had a right to rely upon the duty imposed by the law upon the de- 40

fendant and its driver in charge of its truck, to exercise care in the operation thereof; to exercise care in the operation thereof in respect to its speed and control thereof so as not to endanger the safety of drivers using the highway, whether on foot or wheeled vehicles; and plaintiff's decedent was entitled to assume that the defendant's driver would obey the law of the road and would violate no regulations pertaining to its use. According to the testimony, plaintiff's decedent in riding where he did, did not place himself in a position of obvious danger but was made dangerous, through failure of the driver to give a signal or warning of his intention to turn down Pennsylvania avenue.

Denied.

13. If you find that the defendant, Cosiello, was negligent and plaintiff's intestate was free from contributory negligence, then your verdict must be for the plaintiff and against both defendants, since it is admitted that Cosiello was the servant and employee of the defendant, John S. Geiger & Sons, and that the plaintiff was injured by the truck of the defendants, John S. Geiger & Sons, the negligence of the employee being imputed and charged to his Masters.

Charged.

14. If your verdict is for the plaintiff, then plaintiff is, under our statute, entitled to recover a "capital fund" (so to speak), which shall represent the present value of all the pecuniary or money loss, which will fall upon the widow, Mrs. Jackson, and her infant children, who are next of kin of decedent, resulting from premature death of the decedent, Larnie Jackson.

Charged.

15. It is the reasonable expectation of pecuniary benefit of which the person in whose interest the action has been brought has been deprived, that is recoverable in an action of this nature. *May* v. *West Jersey Ry. Co.,* 62 N. J. Law 63. There is evidence in this case that the decedent at the time of his death was earning $28.00 per week; that he was in good physical health; that he was supporting his wife and children and that according to the mortality tables his expectancy of life was 28.6 years. Although in these death cases you must to a large extent form your estimate of the damages on contingencies, yet, whereas in this case the evidence furnishes you some standard for valuations of damages, you cannot disregard such standard.

Denied.

16. In arriving at the damages you may take notice of the fact that the dollar has decreased in value.

Charged.

DEFENDANTS REQUESTS TO CHARGE.

1. If the deceased was guilty of any negligence that was one of the proximate causes that contributed to the collision that resulted in his death, your verdict should be in favor of the defendants.

Charged.

2. Under the law of this State, one vehicle overtaking another on the highway or street, should pass to the left of the latter. If you find that, in this case, the deceased was operating a bicycle and was passing or attempting to pass

the truck of the defendant on its right side instead of on its left as prescribed by our law, and if you find that this act of the deceased in passing on the wrong side of the truck was negligent and was one of the proximate causes of the collision resulting in his death, in that event, the
10 deceased was guilty of contributory negligence and your verdict should be for the defendants.

Charged.

3. Under the laws of our State, when a vehicle overtakes another and is passing or attempting to pass it, it should give some signal to the other vehicle of its intention to pass. If you find that in this case, Mr. Jackson, the deceased, was passing or attempting to pass the defendants truck without giving a signal and if you find that
20 this failure to give a signal was one of the proximate causes of the accident, in that event, Mr. Jackson was guilty of contributory negligence and your verdict should be for the defendants.

Withdrawn.

4. If you find that Mr. Jackson was passing or attempting to pass the defendant's truck on its right side instead of its left side and if you further find that he was thereby passing or at-
30 tempting to pass it on the wrong side, you may in your discretion decide that he was thereby guilty of negligence, and if you find also that this act of negligence was one of the proximate causes of the collision, your verdict should be for the defendants.

Charged.

5. A person doing something in a manner contrary to law or proper regulations pertaining to the act does so at his peril, and if he is in-
40 jured thereby on account of his improper action,

it is legally his own fault and he cannot recover damages; and in this case, his estate cannot recover and your verdict should be for the defendants.

Denied.

6. If you find that Mr. Jackson was passing or attempting to pass the defendant's truck on the wrong side and if you find further that he did not give any signal or bell of his intention to pass, you may find that he was thereby doubly negligent and if this negligence was one of the proximate causes of the collision, he was guilty of contributory negligence and your verdict should be for the defendants. 10

Denied.

7. The defendants made a motion for a direction of a verdict which was denied by the Court. This decision was made simply as a matter of law and has nothing to do with the facts of the case and does not even express the opinion of the Court on the facts. 20

Charged in Part.

8. The Traffic Act of this State provides that no person shall drive any horse-drawn vehicle or ride any bicycle upon or along any street at a greater speed than at the rate of eight miles an hour where the houses are on the average of less than one hundred feet apart and twelve miles an hour where the houses are more than one hundred feet apart. If you find that Mr. Jackson was exceeding the speed limit and that this was a proximate cause of the accident, your verdict should be for the defendants. 30

Denied.

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Defendants Requests to Charge.

9. If you find that the driver of the truck and the deceased were both guilty of negligence that proximately contributed to the collision, your verdict should be for the defendants.

Charged.

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OPINION OF SUPREME COURT.

Filed August 10, 1926.

NEW JERSEY SUPREME COURT.

No. 33, January Term, 1926.

Cona Jackson, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased, *Plaintiff-Respondent,* *vs.* John J. Geiger, *et als.*, trading as John S. Gieger & Sons, and Joseph Cosiello, *Defendants-Appellants.*	*On Appeal from a Judgment of the Essex Circuit.*

Before Gummere, *C. J.*, and Justices Kalisch and Campbell.

For appellants, Jacob Schneider.

For respondent, Israel B. Greene.

Per Curiam:

The respondent has a judgment for $10,000 for damages for the death of her intestate. This is the result of a retrial of the cause. The result of the first trial was a judgment of non-suit directed upon the ground of the contributory negligence of the decedent. This was reversed by the Court of Errors and Appeals, 2 N. J. Adv. Rep. 1653.

The appellant Cosiello was driving a motor truck of the respondents, John S. Gieger & Sons, in a southerly direction on Lincoln Park, Newark, and in so doing crossed Clinton avenue and

proceeded in an easterly direction on Lincoln Park until he reached Pennsylvania avenue. The distance between Clinton and Pennsylvania avenues being 150 feet. Ten or fifteen feet east of the intersection of Clinton avenue and Lincoln Park Larnie Jackson, respondent's intestate, and 10 his companion, Hall, both of whom were riding bicycles, allowed the truck to pass them, and when it was five feet ahead they followed and overtook it, Hall riding to the left of the truck and Jackson to the right. When the truck reached the middle of the block between Clinton and Pennsylvania avenues, about seventy-five feet from the latter avenue, Hall, at the left, was at the front end of the body of the truck and Jackson was on the right side about the middle of the truck. When about ten feet from Penn- 20 sylvania avenue, Jackson had brought himself about at the cab of the truck. At Pennsylvania avenue the truck turned to the right into that highway and Jackson endeavored to turn with it but was unsuccessful, the front wheel of the truck coming in contact with his bicycle, throwing him and causing injuries from which he died.

There was proof that the truck was traveling fast and also that it was proceeding at a mod- 30 erate rate of speed. The contention of the appellants was that Hall and Jackson were racing with each other and the truck and that Jackson by his own negligent acts placed himself in a position of obvious danger, did not exercise reasonable care for his own safety and that his acts were the proximate contributory causes of the happening resulting in his injuries and death.

There are eleven grounds of appeal.

Numbers 3, 9, 10 and 11 are not argued.

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The remaining grounds are grouped under three points:

Point one, grounds 1, 2, 3 and 4.

Point two, ground 5.

Point three, grounds 6 and 7. These were abandoned at the oral argument.

Point one. The testimony of Michael J. Doherty was, by consent, taken *de bene esse,* in Michigan. At the trial these depositions were offered and certain questions and answers being objected to by counsel for respondent, the objections were sustained by the Trial Court. The contention of appellants is that such rulings by the Trial Court were erroneous because no objections had been lodged against such questions and answers at the time the depositions were taken.

These depositions were taken pursuant to section 57 of the Evidence Act (2 Comp. Stat. 2237), which, *inter alia,* provides, "* * * either party may file the transcript of such testimony with the clerk of the court in which such action is pending, and thereupon either party may use the testimony so taken on the trial of said action in the same manner, and with the same force and effect, as if said testimony had been taken under a commission duly issued by the Court on application therefor made as hereinbefore provided to take *de bene esse* the testimony of such party or witness."

Section 52 of the same act (2 Comp. Stats. 2236) provides, "Any deposition or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the Court, upon any objection taken to the competency of the witness, the mate-

riality or competency of the evidence given, or the regularity of the questions put; but shall not be excluded for any irregularity or informality in taking or returning the same, if the Court in which the same is offered is satisfied that the testimony of the witness has been fairly
10 and truly taken and returned; and if such deposition or examination shall be admitted in evidence by the Court no exception shall be taken to the admission thereof on the ground of any irregularity or informality in taking or returning the same."

We think the statute contemplates that objections made to the competency of the witness and relevancy of the testimony, if made to the Trial Court when the depositions are offered in the trial of the cause, are timely and such objections
20 need not have been made at the time of taking the depositions.

"Objections to the procedure of taking and the form of the document must be made before trial; also objections to the manner of the interrogatories, for example as improperly leading the deponent, or to the manner of the answers, as being insufficient or irresponsive. On the other hand, objections to the materiality or rele-
30 vancy of the particular facts need not be made until the trial."

Wigmore, Vol. 1, p. 55, Sec. 18.

To the same effect is 18 Corpus Juris, title Depositions. Section 351, p. 754, and Section 208, p. 687.

There was no error, therefore, in the action and rulings of the trial judge in this respect.

Upon the question as to whether the questions and answers objected to were properly excluded,
40 we find that they were because they were expres-

sions of opinion or conclusions of the witness, and therefore there was no error in that direction.

The remaining grounds are argued under point two and are directed at the refusal of the trial judge to direct a verdict in favor of appellants upon the ground of contributory negligence.

We are unable to find that the state of the proofs is materially different from what it was at the first trial and we conclude that now as then it was a matter of facts and circumstances requiring submission to the jury.

The judgment below is therefore affirmed.

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REMITTITUR.

NEW JERSEY SUPREME COURT.

January Term, 1926.

10

CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased,
Plaintiff-Respondent,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons,
20 and JOSEPH COSIELLO,
Defendants-Appellants.

Remittitur.

This cause having been duly argued at the present term of this Court by Jacob Schneider, Esq., of counsel with defendants-appellants, and Israel B. Greene, Esq., of counsel with plaintiff-respondent, and the Court having considered the same and having found no error in the record
30 and proceedings of the Essex County Circuit Court, and being of the opinion that the judgment entered herein in favor of the plaintiff-respondent and against the defendants-appellants should be affirmed; it is thereupon,

ORDERED and ADJUDGED that the judgment in favor of the plaintiff-respondent and against the defendants-appellants, removed by appeal to this Court from the Essex County Circuit Court, be affirmed, with costs, and that the record in
40 said cause be remanded to the Essex County

Remittitur.

Circuit Court, to the end that said Court may proceed in accordance with law and the rules and practices of said Court.

Entered August 16, 1926,

On motion of

ISRAEL B. GREENE,
Of Counsel with Plaintiff-Respondent.

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A true copy.

EDWARD J. KELLEHER,
Clerk.

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NOTICE AND GROUND OF APPEAL.

Filed August 24, 1926.

NEW JERSEY SUPREME COURT.

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CONA JACKSON, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased,
Plaintiff-Respondent,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO,
Defendants-Appellants.

20

Action at Law.

Notice of Appeal.

To Will Harris and Israel B. Greene, attorneys for plaintiff-respondent, Cona Jackson, administratrix *ad prosequendum* of the estate of Larnie Jackson, deceased:

TAKE NOTICE, that the defendants-appellants, John J. Geiger and Charles G. Geiger, co-part-
30 ners trading under the firm name and style of John S. Geiger & Sons, and Joseph Cosiello, appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this Court on the ground that the New Jersey Supreme Court affirmed the judgment of the Essex County Circuit Court, although there was error in so doing.

SCHNEIDER & SCHNEIDER,
40 Attorneys for Defendants-Appellants.

JACOB SCHNEIDER,
Of Counsel.

Service of the within notice of appeal is hereby acknowledged this 23rd day of August, 1926.

WILL HARRIS,
ISRAEL B. GREENE,
Attorneys of Plaintiff-Respondent.

Filed August 24, 1926.

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New Jersey Court of Errors and Appeals

CONA JACKSON, Administratrix *ad prosequendum* of the Estate of Larnie Jackson, deceased,

Plaintiff-Respondent,

vs.

JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of John S. Geiger & Sons, and JOSEPH COSIELLO,

Defendants-Appellants.

Action at Law.

On Appeal from New Jersey Supreme Court.

Sat Below, GUMMERE, *C. J.,* AND KALISCH AND CAMPBELL, *J. J.*

BRIEF OF PLAINTIFF-RESPONDENT.

Statement.

This is the *defendants'* appeal from a judgment of the Supreme Court, affirming a judgment for $10,000 damages recovered by the plaintiff, for the death of her intestate in the Essex County Circuit Court. The opinion of the Supreme Court is reported in ~~2 A. R. 1653;~~ 134 A. 288. 4 Misc 723 This was the result of a re-trial of the cause. The first trial resulted in a judgment of non-suit, directed by the trial court on the ground of the contributory negligence of the decedent. This Court, upon appeal, reversed the non-suit and granted a *venire de novo.* 2 N. J. Adv. Reports 1653; 126 Atl. 438.

Plaintiff's intestate was killed, while riding on his bicycle in an easterly direction on Lincoln Park, near the corner of Pennsylvania avenue, in

the City of Newark, when struck by the defendants' motor truck, going in the same direction, which, suddenly, and without any warning, or signal, made an abrupt *right* turn into Pennsylvania avenue. The truck was owned by the defendants, John J. Geiger & Sons, and was driven by their servant, the defendant, Cosiello. The judgment is against both the master and servant.

GROUNDS OF APPEAL.

Counsel for the appellants has abandoned 6 of the 11 grounds of appeal, originally filed in the Supreme Court. He argues the remaining 5 grounds under two points, which attack the trial court's action:

(1) In suppressing parts of the deposition of the defendants' witness, Michael Doherty.

(2) In refusing to direct a verdict in the defendants' favor, on the ground of the contributory negligence of the decedent.

These will be considered in the order in which they are discussed in the appellants' brief.

REPLY TO POINT I.

The trial court properly suppressed parts of the deposition of defendants' witness, Michael Doherty.

By agreement of counsel for both parties to this suit, prior to the first trial, the deposition of Michael Doherty, one of defendants' witnesses, was taken before a Notary Public, residing in the City of Cadillac, in the State of Michigan. Neither counsel in the case attended at the taking of the deposition, but each of them designated

a member of the Michigan bar to attend in his behalf and examine the witness. The witness was examined, cross examined, etc., before the Notary Public. Many of the interrogatories propounded and answers given were improper, both as to form and substance. This is conceded by counsel for the defendants (p. 80). Neither examiner objected to any of the questions or answers. *At the trial defendants' counsel failed to produce the stipulations between counsel, relating to the taking of these depositions and also failed to produce the original depositions certified to by the Notary.* By the plaintiff's consent, counsel for the defendants read the depositions from what purported to be a copy thereof.

By Doherty's deposition the defendants sought to show that the decedent met his death while racing and while attempting to pass and overtake the truck on its right. Counsel for the defendants offered to read into the record the following questions and answers from the copy of the depositions:

> "Q When you were two or three hundred feet off from the accident, what did you first notice coming down the street? A I noticed a truck and two colored fellows on bicycles, which at that time when I noticed them were ten or fifteen feet off and *apparently racing;* they were apparently speeding" (p. 71).
>
> "Q After the rider started to pass to the right of the truck, state in your own way what followed and what happened to him. A Well, when the man on the right *was attempting to pass* the truck, which was traveling east, was then on the intersection of Pennsylvania avenue with Lincoln Park, going east on Lincoln Park, and as far east as the intersection of Pennsylvania avenue, and as the man on the truck went to turn, the man on the bicycle hit right into him,

and the crossbeam of the truck hit the bicycle or hit the driver, I don't know which, of course. And then, of course, the second time as the truck made the turn further around, knocked the fellow to the ground and passed over him with the hind wheels. The fellow on the bicycle never got any further up on the side of the truck than to the back of the cab. I do not believe he even got up aside of the driver" (p. 74).

3. "Q *Can you state the approximate distance between the truck and the right-hand curb at the time the bicycle rider attempted to pass on the right-hand side?*"

4. "Q *Was there anything to prevent the rider who was injured from taking a course to the left of the truck when passing it?*" (pp. 85-86).

Upon plaintiff's objection, the trial court suppressed the questions, answers and part thereof designated in italics, on the ground that they were expressions of opinion or conclusions of the witness.

1. Counsel for the defendants does not now contend, nor did he contend at the trial, that the suppressed parts of this deposition were proper or competent. On the contrary, he practically concedes their impropriety. The *sole* ground upon which he predicates their admissibility is *the failure of the plaintiff's representative to object to the same at the time the deposition was taken before the Notary Public.* It is difficult for us to understand upon what theory the deposition of this witness was entitled to any higher evidential status or privilege than would have been his oral testimony at the trial.

Whether or not the decedent was racing and attempting to pass the defendants' truck on its right, were questions for the jury.

In *Jackson* v. *Geiger, supra,* this Court said:

> "Whether or not, as he (referring to the decedent) speeded along, his intention was to keep up with the truck which was going rapidly or to pass it, was a factual question for a jury to determine and not a court question; for the intention of the decedent in that regard was only determinable by inferences to be drawn from his own conduct and other circumstances in respect to which reasonable men may reasonably differ."

The witness' opinions that the decedent was *"apparently racing"* and *"attempting to pass"* were purely *conclusions* and *not statements of fact.* The third and fourth questions were clearly improper because they embodied the premise that the decedent was attempting to pass the truck on its right. These questions touched the very heart of the case and the *opinions* of the witness with respect thereto were both irrelevant and incompetent. *Austrian* v. *Laublein,* 78 N. J. L. 178, 73 Atl. 228, affirmed 80 N. J. L. 459, 78 Atl. 1134. *Murphy* v. *North Jersey St. Ry. Co.,* 80 A. 331; 81 N. J. L. 706. In the latter case this Court said:

> "To draw a conclusion from all this evidence was the jury's prerogative, and the opinion of this witness in respect to the question was both irrelevant and incompetent."

The Court below approved the action of the trial court in suppressing the objectionable parts of the deposition, saying "upon of the trial court in suppressing the objection of the parts of the deposition, saying "upon the question as to whether the questions and answers objected to were properly excluded, we find that they were because they were expressions of opinion or conclusions of the witness and therefore there was no error in that decision."

2. It is well established that objections to the substance of depositions may be made for the first time at the trial, and are not waived by failure to make objection at the taking of the depositions. In Jones on Evidence (2d Ed. Sec. 673, Pocket Ed. p. 841) it is said:

> "It is a rule, which has often been declared, that objections to the form of a deposition or to the competency of the witness must be taken before the case is called for trial, *but that objections to the substance may be made during the trial.*" Citing copious authorities.

See also *Wilmer* v. *Placide,* (Court of Appeals of Md., 1920) 111 Atl. 822; *Woodward* v. *Tying,* 123 Md. 98 at 116, 91 Atl. 166.

Professor Wigmore in his valuable work on Evidence (Second Ed. Vol. 1, Chapter 2, pp. 18, 178-179), says:

> "* * * objections to the materiality or relevancy of particular facts need not be made until the trial." Citing Wall *v.* Williams, 11 Ala. 834; Walker *v.* Walker, 34 Ala. 469-472; Floral Creamery Co. *v.* Dillon, 83 Conn. 65, 75 Atl. 82; McCoy *v.* People, 71 Ill. 111-116; Myers *v.* Murphy, 60 Ind. 282 at 285; Wanamaker *v.* Megraw, 168 N. Y. 125, 61 N. E. 112; Cudlip *v.* Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925.

In *Clark* v. *Employers' Assurance Co.,* 72 Vt. 458, 48 Atl. 639, the Supreme Court of Vermont, speaking through Mr. Justice Munson, said:

> "The court properly excluded so much of Dr. Campbell's answer to interrogatory 5 as related to the manner of Atherton Hall's death. It is fairly apparent from the answer, especially when read in connection with other parts of the deposition, that it was hearsay. But counsel contend that, if there was any uncertainty in regard to this, the adverse party should have called atten-

tion to it at the time of taking by a specific objection, so that the uncertainty could have been removed by further inquiry. We think, however, that *it was the duty of the party taking the testimony to see that enough appeared to show its competency, and that a specific objection before the magistrate was not required to entitle the plaintiff to raise this question on trial.*''

* * *

* * * and, the previous answers as to the manner of his death having been excluded, it was not error to exclude this.''

See also 18 C. J. (Depositions), Sec. 351, p. 754, and Sec. 208, p. 687.

The foregoing authorities are cited, merely to indicate the general rule prevailing in most jurisdictions that objections touching the substance of a deposition need not be made when the deposition is taken, but may be raised for the first time at the trial.

3. It will serve no useful purpose to review the authorities without the State at greater length, for the reason that the status and evidential value of the deposition in the case at bar is regulated and well defined by our Evidence Act (P. L. 1900, p. 362, etc.).

Section 51 of said act provides that the deposition of a witness, taken, returned and filed as provided by the act, etc., shall be as competent evidence in the cause as if such witness had been examined in open court, proof being first made that such witness resides, or is out of the State, or is dead, etc.

Section 52 provides as follows:

''Any deposition or examination taken under this act shall be subject to be excluded or overruled, wholly or in part, according to the opinion of the court, upon any objec-

> tion taken to the competency of the witness, the materiality or competency of the evidence given, or the regularity of the questions put; but shall not be excluded for any irregularity or informality in taking or returning the same, etc."

Thus, by Section 52 of the Evidence Act, the deposition of an absent witness is entitled only to the same status as would be his testimony if he were present on the witness stand; and may be excluded or overruled, wholly or in part, according to the opinion of the court, upon any objection taken to the materiality or competency of the evidence and the regularity of the questions put. Since it must be conceded that the portions of the deposition suppressed were incompetent and otherwise improper, it necessarily follows that they were rendered inadmissible by the very language of our Evidence Act. That being so, the action of the trial court was proper and justified under the statute.

The intent of the Legislature in conferring upon the trial court the right to rule upon the admissibility of depositions, is obviously based upon the reason that the officer taking the deposition has usually no authority to exclude testimony or rule upon the objections that might be made; and upon the further reason that usually the examiners are neither members of the Bar of our State nor learned in the law of evidence of this State.

The court below, construing this statute said:

> "We think the statute contemplates that objections to the competency of the witness and relevancy of the testimony if made to the trial court, when the depositions are offered, in the trial of the cause are timely and such objections need not have been made at the time of taking of the depositions."

4. Counsel for the defendants insists that notwithstanding the incompetency and impropriety of this testimony, the Court should nevertheless have admitted the same in evidence for the reason that he has been deprived of the opportunity of removing the objectionable features thereof. He argues, that had timely objection been made when the deposition was taken, his representative might have remedied the objectionable features thereof, and framed proper questions. The fallacy of this argument is too apparent to require any extended consideration. This contention is based upon the three erroneous propositions: First: that the plaintiff was under a duty to instruct the defendants' representative who attended at the taking of the depositions, as to what were proper interrogatories to propound to the witness. Second: that the Notary Public taking the depositions had power to rule on any objections which might have been made. Third: that defendants' representative was learned in and familiar with the law of evidence of this State. Neither of these propositions is tenable. As was observed by the Court in *Clark* v. *Employers' Assurance Co.*, *supra, it is the duty of the examiner to see to it that the testimony is competent and proper.*

5. Upon the authority of *Wallace, Muller & Co.* v. *Leber & Meyer*, 69 N. J. L. 312, counsel for the defendants argues that the trial court suppressed the aforementioned portions of the deposition on the erroneous view that the deposition *was not evidence in itself* but was merely in "*preparation for trial.*" All that this Court decided in that case, was, that a deposition taken under Section 45 of the Evidence Act could be used by either party at the trial. That case did not involve the question *sub judice, e. g.*, whether

or not an objection going to the substance of the deposition could be raised for the first time at the trial. It is true that this Court did say that the deposition in that case, which was taken under Section 45 of the Evidence Act, was *evidence*, and not merely in "*preparation for the trial.*"

In the case at bar, however, there was nothing before the trial court, and there is nothing in the record, to indicate that the deposition of the defendants' witness, Doherty, was taken pursuant to any section of the Evidence Act. Neither the stipulations between counsel nor the original deposition was offered in evidence at the trial. Since the evidential status of a deposition springs from, and is regulated by the statute, it was the duty of counsel for the defendants to show that he had complied with the statutory requirements before claiming the statutory benefit. *Graham* v. *Whitely,* 26 N. J. L. 254; *Flannerty* v. *Central Brewing Co.,* 70 N. J. L 715. Counsel for the defendants having failed in these respects, it was not error for the court to construe the deposition as merely in "preparation for trial." In any event, we fail to see how the defendants have been injured or prejudiced by the suppression of the foregoing portions of the deposition, since they were not entitled to the benefit of the same.

That the court will never reverse a verdict of a jury on the admission or rejection of evidence, unless the complaining party has been prejudiced thereby, is too well settled to require any citation of authority.

In the case of *Wallace Muller & Co.* v. *Leber & Meyer, supra,* this Court held that, if a deposition contains no competent proof favorable to the party who seeks to read it to the jury, he is

not injured by the denial of his abstract right in this respect. As heretofore observed, the parties in that case took depositions under Section 45 of our Evidence Act, and after the same had been duly filed as required by the statute, the defendant offered to read the same at the trial. The trial court overruled the defendant's offer, holding that the depositions were evidence only for the party proposing the interrogatories and not otherwise, confusing this section of the Evidence Act with the provisions of our Practice Act relating to interrogatories which provides that "the answers shall be evidence in the action if offered as such by the party proposing the interrogatories, but not otherwise." Although this Court held that the trial court violated the defendant's abstract right to read the interrogatories in evidence, it nevertheless refused to upset the verdict of the jury on that ground, for the reason that an examination of the depositions disclosed that the depositions offered to be read were incompetent and irrelevant and that therefore the defendant was not injured by the deprivation of his abstract right. Justice Garrison, speaking for the court, at page 323, said:

> "The result of my examination is that the trial court acted upon an erroneous view of the general right of the defendants to use the deposition in question. Notwithstanding, however, this errancy in judicial reasoning, the defendants were in nowise injured, for the reason that the deposition itself contained no competent testimony bearing upon any matter of defense open to them. * * * The expressions of the witness upon cross examination * * * were at best, non-expert opinions as to the persuasive force that might be accorded to the defendants' contention that certain changes in the tariff law would impart to the trade name in question a significance that it did not previously pos-

> sess. This was matter of argument, not of testimony. The refusal of the court, therefore, to permit the reading of the deposition, while placed upon an untenable ground, did not deprive the defendant of any legal evidence to which he was rightfully entitled."

On appeal the Court is concerned with the correctness of the trial court's actions and not with the reasoning which induce the same. *McCarty* v. *Hoboken R. R. Co.,* 93 N. J. L. 247.

The cases of *Chambers* v. *Hunt,* 22 N. J. L. 552; *Black* v. *Lamb,* 12 N. J. E. 108; *Willett* v. *Morse,* 71 N. J. L. 104, 58 Atl. 72; *Cunningham* v. *State,* 61 N. J. L. 67, 38 Atl. 847; and *Delaney* v. *Erie R. Co.,* 117 Atl. 395, cited by counsel for the defendants in his brief, have no application to the point under consideration, and are of no assistance to the defendants. In *Chambers* v. *Hunt, supra,* the deposition was taken by a commission; the interrogatories addressed to the witness were approved by the Court, after notice to the objecting party. No objection was made to the form of the interrogatories when the commission issued. At the trial an objection was made to the form of the interrogatories and the Court overruled the objection, and properly so. The decision in that case was based on the grounds, first, that the objection was to the *form* of the deposition and not to its *substance* and, second, that the objecting party had his opportunity to object to the form of the interrogatories before the commission issued. In the case at bar, however, the objection is to the *substance* of the interrogatories and not to its form.

In *Black* v. *Lamb, supra,* the Chancellor directed an issue to be tried at law. The deposition of one John Gibbs was read, *"Under the order of the Court of Chancery; * * * taken*

by its authority and under its rule." The Court overruled certain objections to parts of the deposition. Upon the return of the jury's finding to the Chancellor, the objecting party applied to the Chancellor for a new trial on the ground among others, that the trial court had erroneously overruled the objections to the deposition. In denying a new trial, the Chancellor said, at page 121:

> "This deposition was read under the order of this Court. It was taken by its authority and under its rule. When this Court made an order that it should be read at the trial, the judge conducting that trial had nothing to do with the admissibility of the whole or any part of the evidence. This Court by its order, became itself responsible for the legality of the evidence" * * *

(Page 113):

> "He (the Chancellor) may give directions to the Court to which the issue is sent for trial to disregard the strict rules of law; he may direct the admission of evidence which the rules of law would exclude, and he may order both parties to be examined * * * It may be perfectly clear that competent testimony has been rejected and illegal admitted, or that the Judge has misdirected the jury; and yet this Court is not bound to grant a new trial for any of these reasons."

This case is authority only for the proposition that an issue at law directed by the Chancellor is merely to inform the conscience of the Court, with respect to the facts submitted to the jury; and that the Chancellor is not bound by the strict rules of law to the admission or rejection of evidence. The cases of *Willett* v. *Morse*, *Cunningham* v. *State*, and *Delaney* v. *Erie R. R. Co.* merely reiterate the general rule that in the course of a trial, objection to oral evidence must

be made timely, and before the answers are given, and that it is too late to object after an answer has already been given. These cases have no bearing whatsoever upon the point under consideration. The cases from other jurisdictions, cited by counsel for the defendant, on this point, do not represent the general rule prevailing in the Courts of the United States, and do not affect the Rule under our Statute.

The adjudications of the New York Court of Appeals under a similar statute dispose of this subject adversely to the defendants. See *Cudlip* v. *N. Y. Evening Journal,* 180 N. Y. 85; 72 N. E. 925, and *Wanamaker* v. *Megraw,* 61 N. E. 113, 168 N. Y. 125.

REPLY TO POINT II.

The trial court properly denied defendants' motion to direct the verdict in their favor.

On the re-trial counsel for the defendants feared to venture a motion for non-suit on the ground that decedent was guilty of contributory negligence, as he had done at the first trial. Obviously he realized the folly and futility of such a motion, in view of the decisive opinion of this Court in *Jackson* v. *Geiger, supra,* in which all of his contentions were vigorously overruled. But at the conclusion of the defendants' testimony, counsel for the defendants, moved for a direction of the verdict in the defendants' favor, precisely on the same grounds upon which he sought to support the non-suit in this Court. His argument is summed up in the following excerpt, appearing at page 3 of his brief (below middle of page).

"The gist of the contention of the defendants is that the decedent placed him-

> self by his own negligent acts in a highly dangerous position, did not take any reasonable precaution for his safety, and that his acts were proximate contributing causes of the occurrence which resulted in his death. The decedent was guilty of speeding, of attempting to pass a vehicle in an improper manner under the law, and in not giving any warning of his intention so to do. The defendants contend that these facts are undisputed, and there is undisputed affirmative evidence of the defendants' witnesses that the decedent and a companion named Hall were racing on bicycles. Hall passing the truck to the left and the decedent passing the same to the right, at a high rate of speed."

It is to be observed, that counsel for the defendants practically concedes the negligence of the defendants, and that such negligence was a proximate cause of the decedent's death. The gravamen of his argument is that the decedent's negligence was a contributing cause of the accident.

In this State, contributory negligence is an affirmative defense and must be pleaded, and proved by the defendant by the greater weight of the evidence. *Danskin* v. *Public Service R. R. Co.*, 79 N. J. Law 526, 76 Atl. 975.

The arguments now urged by the defendants, as indicating contributory negligence, are far beyond the allegations of contributory negligence alleged in the defendants' answer. On the subject of contributory negligence, the defendants' answers alleged as follows:

> "The plaintiff's intestate, Larnie Jackson, was guilty of contributory negligence, in that at the time and place set forth in the complaint, he was conducting himself in a careless and negligent manner, was not paying attention to his safety, was not mak-

> ing proper observation and did, in fact, by his own negligence cause the collision complained of in the complaint."

This plea, it must be admitted, consists of several conclusions of law, is vague and uncertain, and does not set forth a legally sufficient defense. These objections in point of law were raised by plaintiff's reply.

In our opinion, the decision of this Court in *Jackson* v. *Geiger, supra,* is dispositive of this case on every issue. And so the Supreme Court held when it said:

> "We are unable to find that the state of the proof is materially different from what it was at the first trial and we conclude that now, as then, it was a matter of facts and circumstances requiring submission to the jury."

This statement in the *per curiam* opinion of the Supreme Court, is entitled to great weight and respect, particularly in view of the fact that all three judges who concurred therein, sat in this court, on the appeal from the non-suit, and two of them voted to sustain the non-suit. By now affirming the judgment, these two judges have adopted the majority opinion of this court, that the question of contributory negligence, was for the jury. And the verdict of the jury demonstrates the correctness of this court's opinion.

But the extravagant charges of contributory negligence, so often repeated in the defendants' brief, make it necessary to review the testimony pro and con with some degree of care and detail.

At the opening of the plaintiff's case, counsel for the defendants admitted that the plaintiff's intestate died as the result of a collision with the defendants' truck, which was driven by their servant, the defendant, Joseph Cosiello (p. 27).

The map inserted at the end hereof is a photostatic copy of a large map used at the trial, showing the scene of the accident. From this map and the testimony of Alexander M. Borrie, its draftsman, it appears that Lincoln Park runs generally east and west; that Pennsylvania avenue runs generally north and south; that Lincoln Park is thirty-five feet wide, that Pennsylvania avenue is forty-five feet wide; the distance from the southeast corner of Clinton avenue and Lincoln Park to the westerly corner of Pennsylvania avenue and Lincoln Park is one hundred and sixty-three feet; the distance from the westerly corner of Pennsylvania avenue and Lincoln Park to the northeast corner of Pennsylvania and Washington street is two hundred and forty feet. The testimony shows that the scene of the accident is located in a built-up portion of the City of Newark, where the houses are close together (pp. 28-30).

On the question of defendants' negligence, plaintiff called the same three witnesses who testified at the first trial. Their testimony was, in substance practically a repetition of their testimony at the first trial.

Mr. S. George Webb testified that, about 9:30 A. M. on the day of the accident, as he was approaching the corner of Clinton avenue and Washington street (this corner being designated as "X" on the map) going west, he saw the defendants' truck (a five-ton truck, loaded with dirt) coming towards Clinton avenue, from his right, through Washington street, at a *high rate of speed* (p. 35); that he stopped and watched the truck cross Clinton avenue into Lincoln Park, because its speed was so *excessive* that it almost ran over two children, who were crossing from the northwesterly corner of Washington street

to the corner where he was (p. 35); that without reducing its speed, and at a *"reckless"* speed, estimated at thirty miles per hour, the truck *abruptly* turned into Pennsylvania avenue (pp. 35, 36, 40, 42, 43); that he did not see or hear the truck make or give any signal indicating an intention to turn into Pennsylvania (pp. 37, 40, 67); that as the truck turned into Pennsylvania avenue, he heard a shout, and ran to the place of the accident, and there found the decedent unconscious and crumpled up with the wreckage of the bicycle at about the center of Pennsylvania avenue, marked "J" on the map (pp. 36, 37, 38, 46); that the rear of the truck went over the body of decedent (p. 38); that the truck proceeded southerly on Pennsylvania avenue for about one hundred feet, before stopping (pp. 37, 48); *that before the accident he did not see the decedent* (pp. 39, 44, 45); that before the accident the truck was traveling in the *middle* of the street (Lincoln Park) (pp. 41, 42); that in making the turn into Pennsylvania avenue, the truck turned in the *center* of the street, at a point which is indicated by an indentation in the pavement (p. 44).

Mr. Joseph L. Connollon, who was an eyewitness to the accident, testified: that he saw the collision, facing it westerly from a point in the northerly side of Lincoln Park, at one of the passageways through Lincoln Park, designated as "C" on the map, about fifty feet from the point of the accident (p. 59); that when at this point, he saw defendant's truck about between ten to twenty feet from Pennsylvania avenue, coming easterly towards Broad street, traveling in the *center* of the road, at a *rapid speed* (pp. 59, 60, 64, 65), with decedent riding his bicycle with the cab of the truck, and to the

right thereof; and that there was *fifteen-foot clearance space* between the truck and the street curb (pp. 62, 67); that he was going to church and intended to cross over to the southerly side of Lincoln Park and waited for the truck to pass by, before attempting to cross the street, *expecting that the truck would continue straight to Broad street* (pp. 59, 60); that he saw the defendants' truck make an *abrupt* turn into Pennsylvania avenue in the *center* of the street without the driver giving any signal or blowing a horn, thus *"pocketing"* the decedent, who, in an effort to escape injury, turned right with the truck, but was struck by the truck when about five or ten feet on Pennsylvania avenue (p. 63); that the truck continued southerly on Pennsylvania avenue in the *center* of the street to almost South street, before coming to a stop (p. 63); that the cab of the truck was located behind the radiator and front wheels, and had *openings* on the *sides* and *rear,* so that the driver thereof could see to either side thereof, and could have put out his hand as a signal (p. 63).

The witness William Hall testified: that the decedent and he had been riding their bicycles easterly on Clinton avenue and turned into Lincoln Park, the decedent riding to his right (p. 49); *when about fifteen feet easterly on Lincoln Park, from the southwest corner of Lincoln Park and Clinton avenue he saw defendants' truck coming from his left, out of Washington street* (pp. 49, 52); that he and the decedent separated, the decedent riding to the right, while he, the witness, rode to the left, permitting the truck to overtake them; that he, Hall, rode a little ahead of the truck on its left (p. 49); that the truck was riding in the *middle* of the street (p. 49); that he thought *the truck was*

going straight ahead to Broad street (p. 49); that the defendant's truck made a *quick right turn,* at a *"pretty fast"* speed into Pennsylvania avenue without giving any signal and striking the decedent (pp. 50, 51, 52, 54); and continued southerly on Pennsylvania to the next street before stopping; that the speed of the truck was about twenty miles an hour (p. 53); that because of the noise caused by the truck, he couldn't hear whether the decedent sounded any bell or warning at the turn (p. 54). He specifically denies that the decedent and he were racing (pp. 54, 55).

There was also evidence that the weather was clear and that there was no traffic in the vicinity of the accident.

For the defense, counsel for the defendants called three witnesses, Michael Dougherty, whose testimony was taken by deposition, saw the accident while walking in Lincoln Park, between 200 and 300 feet from the scene of the accident (p. 81). He testified that the decedent was *at no time ahead of the truck* (p. 85); *that there was plenty of room on both sides of the truck to pass* (p. 88); *he doesn't remember seeing or hearing any signal from the truck* (p. 83); that decedent was even with the truck when it turned into Pennsylvania avenue (p. 82); that the truck continued for about between 80 and 100 feet beyond point of collision before stopping (p. 84); that the truck was driving at a normal rate of speed (pp. 78, 82); and that *the accident occurred past the center of Pennsylvania avenue* (p. 77); and that after the accident *the decedent lay on the east side of Pennsylvania avenue near Lincoln Park* (p. 87).

This last testimony is of great significance in the case, first, because it indicates that *in turn-*

ing the driver of the truck violated the Traffic Act in not keeping to the right of the center of Pennsylvania avenue, and second, because this conduct had the natural tendency of *lulling the decedent into a feeling of security and belief that the truck intended to proceed straight on to Broad street.* From this testimony the jury was justified in finding that the truck driver was either guilty of inattention in driving, or had lost control of the truck, to such an extent, that he was compelled to make his turn *beyond the center of Pennsylvania avenue.* The jury was also justified in finding that originally, he intended to proceed straight on to Broad street; and that his determination to turn into Pennsylvania avenue when passing Pennsylvania avenue was an *afterthought;* and that his sudden change of mind, without giving any timely warning or signal, imperilled the decedent's life. The foregoing testimony of this witness was most favorable to the plaintiff, and most damaging to defendant, coming, as it did, from the defendants' camp.

Cosiello, the driver of the truck, testified, that at the time of the collision he was carting a big load of dirt to the South street dumps (p. 89); that the truck was between ten to twelve feet in width (p. 90); that it carried a cab, with glass inserts to the rear thereof, and was open on each side (p. 90); that the front of the cab was open (p. 101); that the dirt was piled high, and even with the top of the cab (p. 101); that the truck did not carry a mirror to reflect vehicles moving to the side or rear thereof (p. 101); and that the pile of dirt was so high, that it *prevented him from seeing any one to the side or rear of the truck.* On direct examination, he testified that he saw the decedent and his friend Hall about twenty-five feet "*up Clinton ave-*

nue" when he was crossing Clinton avenue, and that he passed in front of them about ten to fifteen feet (pp. 91, 92). On cross examination he admitted making a statement to the prosecutor *that he had not seen the riders until after the accident* (p. 99). It was for the jury to say which version was true. He testified he had *no specific recollection of blowing his horn* before making a turn into Pennsylvania avenue (p. 100). At one point in the testimony he admitted *driving his truck on the left side of the street (Lincoln Park)*, but a few moments later he changed his testimony, saying he was driving on the right-hand side of the street (p. 92). It was for the jury to say which version of this testimony to believe. He admits having proceeded about one hundred feet beyond the point of collision before coming to a stop (p. 92). At one point he testified he was driving at about five miles an hour on Lincoln Park and at another point he testified he was driving ten to twelve miles an hour (p. 103). He further testified that at a speed of five miles per hour he could have stopped his car within three feet (p. 95). The manner of his testimony and the glaring contradictions in parts of it, added very little weight or credibility to his testimony.

The defendants' third witness, Longevin, claims to have seen part of the accident from Lincoln Park. He didn't see the truck crossing Clinton avenue because of the trees and bushes obstructing his view (pp. 105, 115).

He says he heard the exhaust whistle of the truck (p. 106), but did not watch the truck (p. 111). The truth of this testimony is extremely doubtful. He is the only witness, in the entire case, who makes any mention of an exhaust whistle. If the truck carried an exhaust whistle,

it is reasonable to suppose that Cosiello would have made some mention of it. Longevin didn't see the bicycle riders when they were passing Clinton avenue (p. 113), nor did he see the position of the decedent before the truck turned into Pennsylvania avenue, because his vision was obstructed by the truck (pp. 109, 116). He estimated the speed of the truck on Lincoln Park, before the turn, at between ten and twelve miles per hour (pp. 107, 114), and says that the bicycle riders caught up with the cab of the truck in the center of the street, and were riding with it (p. 108).

From the foregoing summary of the evidence, it is clear that the defendants' witnesses, in part, corroborated and in part disputed the testimony of the plaintiff's witnesses. Hence, the case presented a jury question, and, therefore, the defendants' motion for a direction of the verdict in their favor was properly denied.

Counsel for the defendants, however, seems to specify two distinct acts of omission or commission, which he contends conclusively establish, that decedent was guilty of contributory negligence. They are,

1. *That the decedent was guilty of speeding and attempted to pass the truck, in violation of the Traffic Act, and without giving any warning or signal of his intention so to do.*

On this point the witness, Hall testified as follows:

> "Q You were passing that truck, weren't you? A No, sir, just riding with the truck.
> Q You were intending to pass it? A No, sir, just intending to ride along with it.
> Q What rate of speed was Larnie going when ten feet from the corner? A He was riding with the truck" (pp. 54, 55).

Defendant's witness, Dougherty, testified that the bicyclists "*were not going very fast*" (p. 82).

Dougherty, Cosiello and Longevin testified that the truck was going at a normal rate of speed. Connollon testified that he saw the decedent riding with the truck when between fifteen to twenty feet from the corner of Pennsylvania avenue. Webb testified, that, although he was watching the course of the truck across Clinton avenue into Lincoln Park, he did not see the bicycle riders. Hall testified that he and the decedent were about fifteen feet on Lincoln Park when he first saw the truck coming out of Washington street, a distance of about two hundred and forty feet. The distance between the southwest corner of Clinton avenue and Lincoln Park is one hundred and fifty feet. Apparently both Hall and the decedent continued on Lincoln Park while the truck was crossing Clinton avenue. This may explain why Webb did not see the bicycles; his line of vision to the bicycle riders must have been cut off by the course of the truck, passing between him and the bicycle riders. Hall testified that the truck was going at the rate of about twenty miles an hour. If he and the decedent continued at that pace, then the decedent traveled at the rate of about twenty-nine feet per second and reached within ten feet of Pennsylvania avenue in a little over four second (distance of about one hundred and twenty-five feet). At the same speed it took the defendants' truck about eight seconds to travel from Clinton avenue and Washington street to within ten feet of Pennsylvania avenue (distance of about two hundred and forty feet). From these calculations it would seem to us that two vehicles could not have met within ten

feet of Pennsylvania avenue at a speed of twenty miles per hour. If the decedent was driving at about twelve miles per hour, the meeting was possible at the corner of Pennsylvania avenue. From this discrepancy the jury may properly have found that the truck passed the decedent close to the corner of Pennsylvania avenue and not that the bicycle riders caught up to the truck. "A verdict of a jury may rest upon inferences which, as jurors, they are permitted to draw." *Queen* v. *Jennings,* 108 A. 379, 93 N. J. L. 352.

Thus it is clear that the question of speed and the question as to whether the decedent was passing or intended to pass the truck on its right were peculiarly within the province of the jury.

On this point this Court said in *Jackson* v. *Geiger, supra.*

> "Whether or not as he speeded along his intention was to keep up with the truck which was going rapidly, or to pass it, was a factual question for a jury to determine and not a court question; for the intention of the decedent in that regard was only determinable by inferences to be drawn from his own conduct and other circumstances in respect to which reasonable men may reasonably differ.
>
> In the absence of any signal or warning that a turn was to be made, the decedent would have been warranted in believing that the truck driver was going straight ahead, and therefore the fact that the decedent was keeping alongside of the truck or even attempting to pass it was not *per se* negligent conduct; for even if it be assumed that the testimony established that the decedent was riding rapidly and that his intention was to pass the truck, then according to the cases above cited, his conduct was only

> a factor to be taken in connection with the other circumstances of the case as to whether or not he was negligent, and if so, whether or not such negligence was contributory to the negligence of the driver of the truck in making the abrupt turn and in failing to give ample warning of his intention to do so."

Of all the witnesses in the case Cosiello is the only one who says that he gave a signal just before turning into Pennsylvania avenue, but as heretofore pointed out he had no specific recollection of doing so.

Even assuming that the decedent intended to pass or was passing the truck on its right, there is no positive testimony in the case that he failed to give any signal or warning of his intention to pass. The fact that no one heard such a signal does not militate against him, for the reason, that Hall testified that the noise of the truck was so great that even if the decedent had given a signal, it could not have been heard. This being a death case, the negligence of the decedent will not be presumed. It must be affirmatively shown. *Middleton* v. *Pa. R. R. Co.,* 57 N. J. L. 154, 31 Atl. 616; *Danskin* v. *Public Service Ry. Co., supra.* The only person who might have positively established the giving of the signal is the decedent.

In *Aquino* v. *Morris Ct. Traction Co.,* 107 Atl. 427, at 429, Justice Kalisch said:

> "The rule seems to be as stated in 38 Cyc., p. 1507, viz: that a verdict will not be directed where the only person who could have contradicted the witness is dead."

2. *That the decedent placed himself, by his own negligent acts in a highly dangerous position.*

In *Jackson* v. *Geiger, supra,* this Court said:

> "2. The mere fact that the decedent was moving in close proximity to the truck and keeping up with it does not constitute negligent conduct *per se.* Simpson *v.* Snellenburg, 96 N. J. Law 115, A. 403, 24 A. L. R. 503. * * * here the plaintiff's decedent was in a place where he was lawfully entitled to be, according to the testimony, and which was one not of obvious danger, but was one made dangerous through the failure of the driver of the truck to give a signal or warning of his intention to turn down Pennsylvania avenue so that oncoming drivers of vehicles might have an ample opportunity to control their speed, and thus avoid collision with the truck or other vehicles on the highway.
>
> The plaintiff's decedent in the exercise of ordinary care was under no legal duty to anticipate that the truck driver would fail in his duty to indicate by proper signal or warning, in ample time, that instead of proceeding ahead he intended to make a turn down Pennsylvania avenue. See Consolidated Traction Co. *v.* Haight, 59 N. J. Law 577, 37 A. 135."

While it is true that the decision of this Court in *Jackson* v. *Geiger, supra,* was based on the plaintiff's testimony alone, we contend that it is equally applicable now, after the defendants' witnesses have been heard, for the reason that the defendants' testimony in part merely disputed the testimony of the plaintiff's witnesses. A verdict will not be directed where the facts and inferences deducible therefrom are in dispute. *Jones* v. *Public Service R. R. Co.,* 92 A. 398, 86 N. J. L. 646. It must be conceded that reasonable men might reasonably differ in the

conclusions reached by them from the disputed facts in this case. On a motion for the direction of the verdict the Court cannot weigh the evidence but must accept as true the testimony adduced by the plaintiff and the most favorable inferences that may be drawn therefrom for the plaintiff's benefit. *Fagan* v. *Central R. R. Co.*, 111 A. 32; 94 N. J. L. 454.

To be entitled to a direction of a verdict on the ground of contributory negligence the proof thereof must be so clear that no other legitimate conclusion could have been reached by a jury. *Consolidated Traction Co.* v. *Reeves,* 58 N. J. L. 573, 34 A. 128; *Day* v. *Donahue,* 62 N. J. L. 380, 41 A. 934; *Vrooman* v. *N. J. St. Ry. Co.,* 70 N. J. L. 818; *Middleton* v. *P. S. Ry. Co., supra.*

The contributory negligence of plaintiff's intestate must be so patent that it was not a debatable question and must be beyond doubt; and it must also appear that such negligence was a proximate cause of the collision, so that if he had not been negligent, he would have received no injury from the negligence of the defendant. *Penn. R. R. Co.* v. *Richter,* 42 N. J. L. 180; *Walton* v. *Ackerman,* 49 N. J. L. 234; *Schramm* v. *Parker,* 72 N. J. L. 243; *Orange, etc., R. Co.* v. *Ward,* 47 N. J. L. 560; *Brewster* v. *Central R. R. Co.,* 80 L. 447; *New Jersey Express Co.* v. *Nicols,* 33 N. J. L. 434; *Wiley* v. *West Jersey R. R. Co.,* 44 N. J. L. 251.

It is respectfully submitted that whether the plaintiff's intestate was guilty of contributory negligence under all the facts and circumstances of this case was a question for the jury. The jury may have reached any one or more of the following conclusions:

(a) That the driver of defendants' truck led plaintiff's intestate to believe, and that the latter had a right to rely on the belief, that the truck was proceeding straight on to Broad street.

(b) That the truck passed plaintiff's intestate such a short distance from Pennsylvania avenue, perhaps about ten feet, thus involuntarily placing plaintiff's intestate in a position where he could not extricate himself, or stop his speed, or move to the left of the truck or behind thereof, because his vision was obstructed by the front of the motor truck.

(c) That the driver of defendants' truck saw plaintiff's intestate riding with the cab of the truck and by reason thereof, and under all the facts and circumstances of the case, plaintiff's intestate had a right to assume that the driver of the truck would obey the rules of the road, slow down, and give the usual statutory signals if he intended to turn the truck into Pennsylvania avenue.

In Huddy on Automobiles, Sect. 512, on page 60, it is said:

> "* * * until a traveler on a street or highway has some knowledge indicating the situation to be otherwise, he is entitled to assume that other travelers will obey the law of the road and will violate no regulations pertaining to its use. A cyclist is not necessarily guilty of negligence because he sustains a collision on account of his reliance of such assumption or because he does not anticipate a violation."

It is apparent that the proximate cause of the accident was not decedent's riding with the cab of the defendants' truck, but rather the sudden and abrupt turn of defendants' truck to its right into Pennsylvania avenue, without giving any

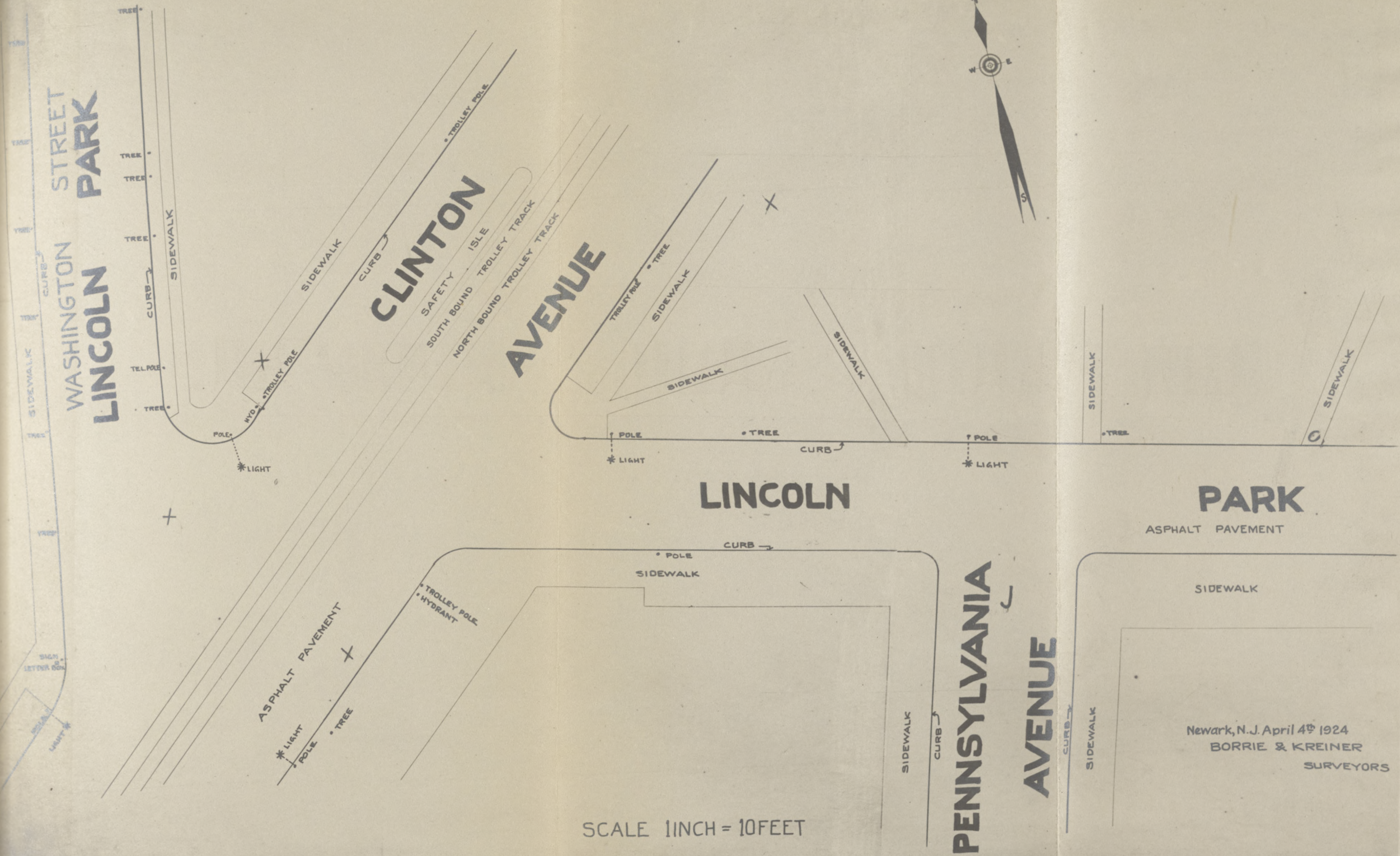
warning or signal, thus "pocketing" plaintiff's intestate. Had the driver of defendants' truck not made this turn as he did, but continued straight on to Broad street, no accident would have happened. It is conceivable that even if the plaintiff's intestate had been traveling at a slow rate of speed, at the point of the collision, the accident might have happened, if the driver of defendants' truck were guilty of the same negligence as appears in this case.

The position of the plaintiff's intestate was merely the *condition* under which the accident occurred. It was not a place of obvious danger. It was made dangerous by the negligence of the truck driver by failing to give the statutory signal. This negligence was the proximate cause of the collision. See *Walling* v. *Central R. R. Co.*, 81 A. 987, 82 N. J. L. 506, and the cases illustrative of this principle cited by the Court of Appeals in *Jackson* v. *Geiger, supra,* under Point V. See also *Daly* v. *Case,* 88 N. J. L. 295; *Peterpolo* v. *Public Service Ry. Co.,* 79 A. 307, 81 N. J. L. 390; and *Harmer* v. *Reed Apartment & Investment Co.,* 68 N. J. L. 332.

The fact that the decision of the Court of Appeals in *Jackson* v. *Geiger* was by a divided court is of no assistance to the defendants, but rather militates against them. It is reasonable to assume that if the members of the Court of Appeals disagree on a finding of fact, that reasonable men may reasonably differ in conclusions to be drawn from the facts and inferences of the case.

It is therefore respectfully submitted that the judgment of the Supreme Court should be affirmed.

ISRAEL B. GREENE,
Of Counsel with Plaintiff-Respondent.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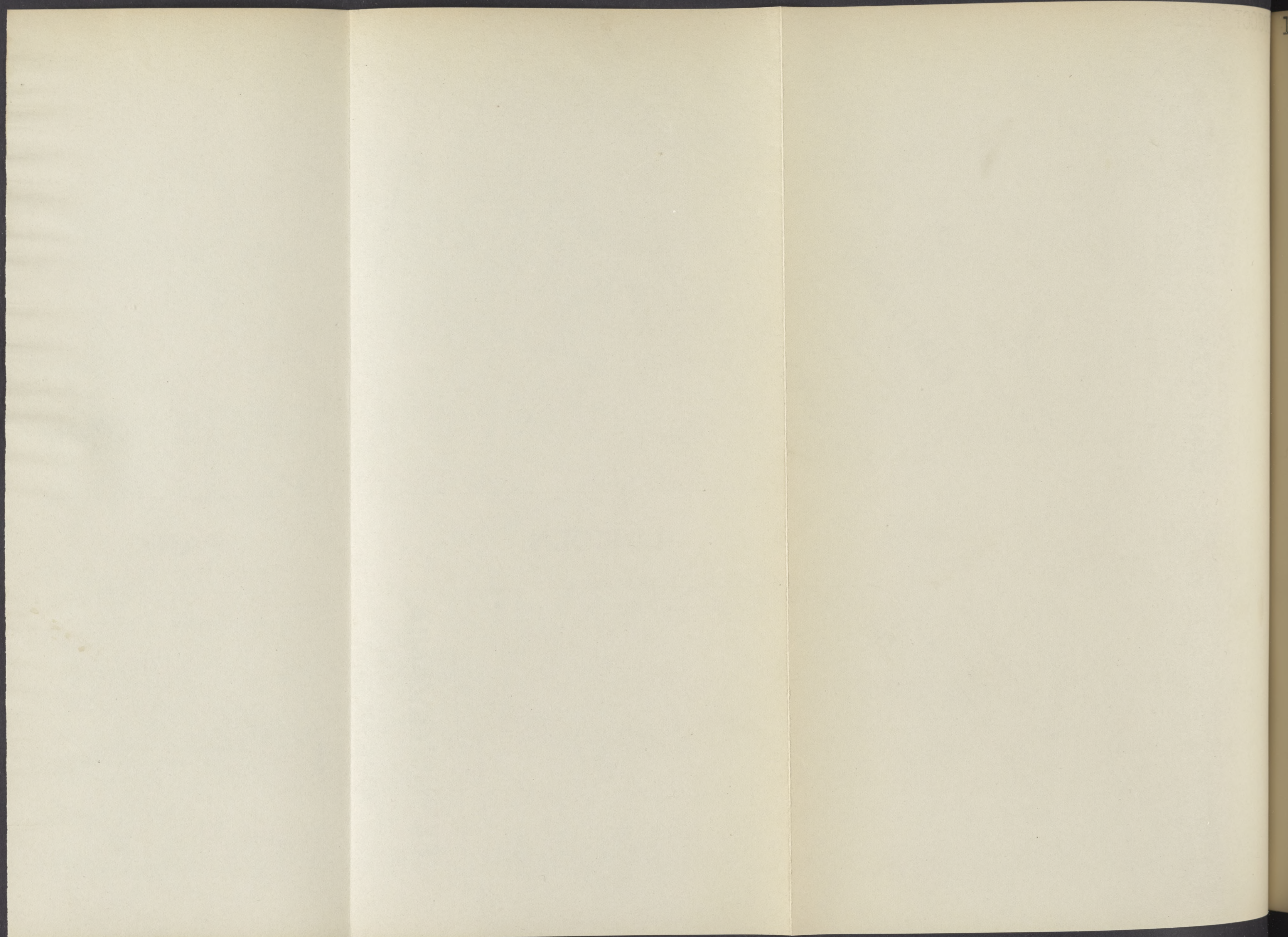

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New Jersey Court of Errors and Appeals

CONA JACKSON, administratrix *ad prosequendum* of the Estate of Larnie Jackson, deceased, *Plaintiff-Appellee,* *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of JOHN S. GEIGER & SONS, and JOSEPH COSIELLO, *Defendants-Appellants.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF OF THE DEFENDANTS IN FAVOR OF THE APPEAL.

I.

Statement of the Case.

The plaintiff, Cona Jackson, as administratrix *ad prosequendum* of her husband, Larnie Jackson, sued for the wrongful death of her said husband under the Death Act, alleging negligence in various respects, and naming as the active *tortfeasor* the defendant, Joseph Cosiello, who was engaged in driving a truck belonging to defendants John J. Geiger and Charles G. Geiger, trading as John S. Geiger & Sons, as their chauffeur at the time and place of the accident which resulted in the death of the said Larnie Jackson. The case was tried for the first time in the Essex County Circuit Court, and resulted in a non-suit at the close of the plaintiff's case on the ground of contributory negligence. Plaintiff appealed to the Court of Errors and Ap-

peals, which reversed the judgment of non-suit by a divided court. (*Jackson* v. *Geiger*, 2 N. J. Advance Report 1653, 1926 Atl. 438.) The case was then re-tried, and resulted in a verdict of ten thousand dollars in favor of the plaintiff and against the defendants. At the close of the entire case, defendants made a motion for a direction of a verdict on the ground of contributory negligence, which the Court denied, defendants taking exception to this ruling (p. 117). Defendants base their appeal on this ground as well as on other grounds set forth in the Grounds of Appeal (pp. 23-26 inc.), which will be set forth later.

The Supreme Court, in an opinion filed August 10, 1926, affirmed the judgment of the Circuit Court (pp. 145-149). Judgment was entered on this opinion on August 16, 1926 (pp. 150-151). An appeal was taken to the Court of Errors and Appeals from the whole of the judgment (pp. 152-153).

The following is a skeleton of the facts: Cosiello was driving defendants' truck in a southerly direction on Lincoln Park (formerly Washington street), crossed Clinton avenue, and proceeded in an easterly direction on Lincoln Park until he reached Pennsylvania avenue, where he turned to his right in a southerly direction on Pennsylvania avenue. The decedent, Larnie Jackson, and a friend named William Hall, were riding respectively on bicycles easterly on Clinton avenue and then easterly on Lincoln Park. Lincoln Park, from Clinton avenue to Pennsylvania avenue, is one hundred and fifty feet in extent. At a point about ten or fifteen feet east of the intersection of Clinton avenue and Lincoln Park the two bicyclists allowed the truck to pass them. When the truck was five feet

ahead of them they proceeded to follow and overtook it, Hall riding to the left of the truck, and Jackson to the right of the truck. When the truck was in the middle of the block, about seventy-five feet from the intersection of Pennsylvania avenue, Hall, on the left, was at the front end of the body and Jackson was alongside of the middle of the truck. At a distance of ten feet west of Pennsylvania avenue Jackson had passed as far as the cab of the truck, which was at the front. None of the witnesses heard any bell sounded by the deceased on his bicycle. At Pennsylvania avenue the truck turned to its right, southerly into said street; the deceased tried to turn with it, but did not succeed, and the front wheel of the truck came into collision with the bicycle; the deceased was thrown and suffered injuries from which he died. The defendants' witnesses testified that the truck was traveling at a moderate speed and that the bicyclists were speeding; the plaintiff's witnesses stated that the truck was going fast and that the bicyclists overtook it, thereby going faster. The gist of the contention of the defendants is that the decedent placed himself by his own negligent acts in a highly dangerous position, did not take any reasonable precaution for his safety, and that his acts were proximate contributing causes of the occurrence which resulted in his death. The decedent was guilty of speeding, of attempting to pass a vehicle in an improper manner under the law, and in not giving any warning of his intention so to do. The defendants contend that these facts are undisputed, and there is undisputed affirmative evidence of the defendants' witnesses that the decedent and a companion named Hall were racing on bicycles, Hall passing the truck to the left, and the decedent passing the same to the right, at a high

rate of speed. Moreover, there is not a scintilla of evidence, either express or inferential, even on the part of the witnesses of the plaintiff, to dispute or negative these facts.

Eleven grounds of appeal were set forth (pp. 23-26). The first, second, third and fourth deal with rulings of the Court on admission of evidence, and will be combined as Point I. Ground five, dealing with the denial of the motion for a direction of a verdict, will be discussed as Point II. Grounds six and seven, dealing with the charge of the Court, combined under Point III, were waived at the oral argument in the Supreme Court. Grounds eight, nine, ten and eleven were waived in the brief filed in the Supreme Court.

BRIEF OF THE ARGUMENT.

POINT I.

The testimony of a witness, Michael J. Doherty, was taken in the State of Michigan in the form of a deposition on stipulation between counsel. Although no objection whatsoever was taken to the testimony at the time of the taking of the deposition, the Trial Court, over objection of defendants' counsel, entertained objections and motions to strike out by plaintiff's counsel, and refused to allow certain parts of answers on matters material to the issues of this case and struck out other answers.

The witness, Doherty, was an actual eyewitness of the accident involved in this suit, and since he resided in Michigan his testimony was taken by stipulation in the Town of Cadillac, Michigan, before a Notary Public, both parties to this suit being represented by local counsel.

The witness was examined on direct examination, cross examination, re-direct and re-cross examination rather exhaustively. At the trial the deposition thus taken was read (pp. 68-88).

This testimony was taken under a stipulation signed by counsel for both parties, which was not filed, and which does not appear in the State of the Case. Counsel for the plaintiff has assured counsel for the defendants that if this Court should desire to have this stipulation added to the State of the Case, he will have no objection to its being done. Under the circumstances, we have taken the liberty to set out the stipulation as follows:

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the Estate of Larnie Jackson, deceased, *Plaintiff*, *vs.* JOHN J. GEIGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of JOHN S. GEIGER & SONS, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Stipulation.*

Whereas, the above-entitled case is at issue in the Essex County Circuit Court and whereas, one of the defendants' witnesses, to wit, Michael J. Doherty, resides in the State of Michigan, and is out of the jurisdiction of the process of the courts of this State and

Whereas, the plaintiff is willing to accede to the defendants' request that the testimony of said witness be taken in the State of Michigan without a formal order for that purpose,

It is, therefore, stipulated and agreed between the parties hereto as evidenced by the signature of their respective attorneys to this Stipulation as follows:

It is agreed that the testimony of the said Michael J. Doherty be taken in the Town of Cadillac in the State of Michigan on the sixth day of June, in the year nineteen hundred and twenty-three, at the office of Henry Miltner, Attorney and Solicitor at Law, Elks' Temple, Cadillac, Michigan, at 4:00 P. M. in the afternoon before Mary E. Smith, a Notary Public of the State of Michigan.

It is agreed that said testimony be used at the trial of the above-entitled case to the same effect as if the witness were produced.

It is also agreed that the defendant will produce at the time and place aforesaid the witness aforesaid and will submit him for examination and cross examination, that the testimony of said witness will be reduced to writing by said Notary Public and its accuracy certified by her, signature of the witness being expressly waived.

It is also agreed that the defendants will furnish a copy of said testimony to the plaintiff's attorney.

SCHNEIDER & SCHNEIDER,
Attorneys of Defendant.

WILLIAM HARRIS,
Attorney of Plaintiff.

Dated May 23, 1923.

ESSEX COUNTY CIRCUIT COURT.

CONA JACKSON, administratrix *ad prosequendum* of the Estate of Larnie Jackson, deceased, *Plaintiff,* *vs.* JOHN J. GIEGER and CHARLES G. GEIGER, co-partners trading under the firm name and style of JOHN S. GEIGER & SONS, and JOSEPH COSIELLO, *Defendants.*	*Action at Law.* *Stipulation.*

Whereas it has been heretofore stipulated and agreed that the deposition of Michael J. Doherty be taken at Cadillac, Michigan, on June 6, 1923, it is hereby agreed that the same shall be taken on June 8, 1923, at the same hour mentioned in the original stipulation.

SCHNEIDER and SCHNEIDER,
Attorneys of Defendant.

WILLIAM HARRIS,
Attorney of Plaintiff.

The testimony of this witness is important and will be discussed more at length under Point II. For the purpose of this point, the following may be stated about it. He testified that the truck of the defendants was proceeding at a moderate rate of speed; that it passed the two bicyclists; that they rode on and caught up with it, and then separated, the decedent going to the right of it and his companion Hall to the left of it; that they were going at a great

rate of speed, faster than the truck, which Hall in fact passed. The part of the testimony excluded by the Court, and which is the cause of the defendants' complaint was, in fact, *that the decedent was attempting to pass the truck, and was, in fact, passing it; that the two bicyclists were racing, and that there was nothing to prevent the decedent from passing to the left of the truck. This excluded part was vital and the Court's refusal to allow it to go into evidence was therefore prejudicial to the defendants.*

On page 71, lines 8 to 15, the following question and answer appear:

> "Q When you were two or three hundred feet off from the accident, what did you first notice coming down the street? A I noticed a truck and two colored fellows on bicycles, which at that time when I noticed them were ten or fifteen feet off and apparently racing; they were apparently speeding."

Counsel for plaintiff objected to part of the answer, and after some discussion between counsel and Court (pp. 71 to 72), the Court struck out the words "apparently racing." Counsel for defendants raised the point that no objection or any motion whatsoever had been made with reference to this question and answer at the time of the taking of the deposition, and that no objection could therefore be taken at the trial. It was agreed between Court and counsel for both sides, and the Court specifically made it a matter for this record, that no objection had been made at the time the testimony was taken to the said question (p. 73, ll. 9 to 15). Counsel for defendants took exception to the Court's striking out said phrase.

Similarly (p. 74, l. 25, to p. 75, l. 30), the following question was asked:

> "Q After the rider started to pass to the right of the truck state in your own way what followed and what happened to him? A Well, when the man on the right was attempting to pass—"

Counsel for plaintiff objected on the ground that the witness was characterizing what the decedent was attempting to do, and that it was merely a conclusion of the witness. The Court, after argument, struck out the words "was attempting to pass," and also the words "at the time he got ready to pass." Counsel for the defendants objected on the same ground, namely, that no objection had been made at the time of the taking of the deposition, and that therefore the Court had no right to entertain any objection at the trial, and took exception to the Court's ruling (p. 74, l. 30, to p. 75, l. 30).

Likewise (p. 78, ll. 30 to 35), the following question was asked:

> "Q Can you state the approximate distance between the truck and the right-hand curb at the time the bicycle rider attempted to pass on the right-hand side?"

On objection of counsel for plaintiff, the Court struck out the question as improper. Counsel for defendant took an exception on the same ground, namely, that no objection had been made at the taking of the deposition (p. 78, l. 35; p. 79, l. 38).

On page 85, lines 36 to 39, the following question appears:

> "Was there anything to prevent the rider who was injured from taking a course to the left of the truck when passing it?"

Counsel for plaintiff objected on the ground that it called for a conclusion and the Court

sustained the objection. Counsel for defendants took exception on the same ground, viz., that no objection had been made at the time of the taking of the deposition (p. 86, ll. 1 to 10).

Under ordinary circumstances, it would be a matter for argument resulting possibly in conflicting conclusions as to whether the point or points involved in or touched upon by the excluded testimony were material with regards to the issues of this case. It might, moreover, ordinarily, provide much room for debate as to whether or not this excluded testimony would have entered into or influenced the deliberations of the jury. *A discussion of this kind in this case is absolutely unnecessary, as the jury, by its own express action and written words, showed that the point involved was, in fact, very material and important, and did actually enter into their discussions in the jury room at the conclusion of the case. In fact, the whole question of liability or non-liability hinged on the point covered by the excluded testimony.*

On page 134, line 31, *et seq.*, appears the following:

> " '(The jury sent the following communication to the Court: "Has a man driving a motor vehicle or any other kind of vehicle at any time or under any circumstances, the legal right to pull in to the right of another vehicle ahead of it and going in the same direction, and drive alongside it without passing it?" '
>
> The Court sends the following reply to the communication of the jury: 'To confine my answer to the case at bar, the Court charges you that Jackson had a legal right to come up behind the truck and to propel his bicycle on the right of and alongside the truck. That act alone would not in law constitute negligence, but you may find that

under all the facts and circumstances in this case it did in fact amount to negligence. If you find Jackson intended to pass the truck on its right side, you may consider that such an act was in contravention of the statute, and indicates or tends to indicate negligence. You may find to the contrary as well.'

(Signed) WORRALL F. MOUNTAIN,
Judge.)

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

Exception noted as ground of appeal.

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

Exception noted as ground of appeal."

The fact of the matter was that the jury sent this communication to the Court some time after they had retired to deliberate on the verdict and when the attorneys for both sides were absent from the court room. The learned Trial Court replied and granted exceptions to both sides, although they were not present.

The question of the jury demonstrates beyond argument that there must have been a spirited debate as to whether the decedent was only driving alongside of the defendants' truck or whether he was driving alongside of it in the act of passing it, or with the intention of passing it.

Moreover, without taking into account this episode, the excluded testimony was, without doubt, most material, and its exclusion therefore was seriously prejudicial to the defendants. *The testimony would have tended to show that the decedent and his companion Hall were racing on their bicycles, and that the former was passing or attempting to pass the truck illegally on its right side without giving a signal, although*

there was plenty of room to the left of the truck, as all the witnesses in the case agreed. Certainly, this was important evidence in favor of the defendants' contention, especially on the point of contributory negligence, as the jury would have had a right to decide, if this testimony had been allowed to come before them, that the decedent had his mind more on the race than on his own safety and took no precautions for the same, and did, in fact, place himself in a position of otherwise obvious danger by racing past the truck on what the jury might have decided was the wrong side thereof, without giving any signal, and without making observations—as the jury might have decided—if they believed the excluded testimony. The jury, moreover, might have been influenced by this testimony to decide that the chauffeur of the defendants did give a signal, and that the decedent, in his eagerness to win the race, did not notice or heed the same.

Moreover, the phrases excluded, which appear on page 74 of the state of the case, viz., "attempting to pass," and "at the time he got ready to pass," and the question which appears on page 78, viz., "Can you state the approximate distance between the truck and the right-hand curb at the time the bicycle rider attempted to pass on the right-hand side?" would have constituted evidence on which the jury could have decided that the decedent was really attempting to pass the truck on the right-hand side thereof, and was, in fact, in the act of doing so. *This is very important testimony, especially on the point of contributory negligence. In fact, the case of Jackson* v. *Geiger (supra), which will be discussed at greater length under Point II,*

uses the following language in paragraph 4 of the syllabus:

> "Whether bicyclists keeping to right of truck intended to keep up with truck or to pass it, so as to be negligent under Pl. 1915, p. 286, pt. 2, pl. 4, held for jury."

The body of the opinion (p. 439, top p. 440) uses the following language:

> "In the absence of any signal or warning that a turn was to be made, the decedent would have been warranted in believing that the truck driver was going straight ahead, and therefore the fact that the decedent was keeping alongside of the truck, or even attempting to pass it, was not *per se* negligent conduct, for even if it be assumed that the testimony would be that the decedent was riding rapidly, and that his intention was to pass the truck, then, according to the cases above cited, his conduct was only a factor to be taken in conection with the other circumstances of the case as to whether or not he was negligent, etc."

It is therefore clearly evident, under the authority of Jackson v. *Geiger, that the excluded testimony was material and important to the defendants' case, and its exclusion detrimental and prejudicial.*

The last question on this point is whether the Court had a right to entertain objections to testimony when the same were not advanced at the time of the taking of the depositions. The Trial Court *inter alia* made the following comment (see p. 79, ll. 19-36) in referring to the taking of the deposition:

> "This is in no sense the trial of the case. This is the preparation for the trial of the case. You are trying to dignify this examination by permitting these counsel from another State to make motions which they could not make at all, and go a little fur-

ther by saying because these men who had no right to make motions did not make a motion, that the Court is wrong in excluding the question. They had no standing in this court as lawyers and were not here at the time of the trial. The taking of testimony in this way is in preparation for the trial. When the case comes on for trial the Court decides whether the question to be asked and the answers given are proper or not."

The learned Court was clearly in error in this, as the taking of the deposition is really part of the trial of the case, and is not merely preparation in any sense of the word.

The objection of counsel for defendants to the Court's entertaining objections to the testimony, which were not made at the time of the taking of the deposition, is not technical in any sense, but founded on good reason. When a deposition is taken out of the State it is, of course, because of the inability of the party to produce the witness in court. The taking of a deposition, therefore, is the only opportunity which the party has for introducing into the case the testimony of that witness. If the other party, therefore, allows questions to be asked without making objection to them, and if he should be subsequently allowed to object to them at the trial, and have them ruled out, it would be impossible to get the testimony into the case. On the other hand, if counsel objects at the time that the question is asked, the party has an opportunity to reframe the same. This is a common occurrence in trials in open court. And certainly a party should not be allowed to sit by and allow questions to be asked without objection and profit by his delinquency later.

The authorities seem to unanimously support the contention of the defendants in this respect.

The following language appears in Corpus Juris, Vol. 18, p. 753 #380:

> "In General. In the absence of proper and timely objections, all defects, irregularities and illegal evidence in depositions are waived."

Numerous cases in various states are cited in support.

The Trial Court, as quoted (*supra*) seemed to think that the taking of the deposition was "in no sense the trial of the case," but only "preparation for the trial of the case." That the learned Court was in error on this point is clearly shown by the case of

> *Wallace Muller & Co. Lim.* v. *Leber, et al.*, 69 N. J. L. 312, 55 Atl. 475.
>
> "I think that the fair meaning of this language, and the practical rule to be deduced from it, is that the testimony so given is to be taken as testimony given in the cause, and not merely as information obtainable by a party in aid of his line of action or of defense."

The language of the following case is on all fours with the defendants' main contention.

> *Chambers* v. *Hunt*, 22 N. J. L. 552 (Court of E. & A. 1849).
>
> "Again it is objected that leading questions were addressed to a witness, whose evidence was brought before the court by depositions taken upon a commission. But it is an objection which cannot first be raised at the trial. Before the interrogatories can be addressed to the witness, whose testimony is to be taken by commission, they must be approved by the court or a judge, an opportunity being first given to the opposite party for objection, if he thinks proper. If there is any objection to any one or more of the interrogatories in point of form, it ought then to be made. It is unreasonable that

> such objection should be first raised at the trial, to the surprise and injury of the party, after the expense of executing the commission, and in regard to a matter which might have been rectified, had the objection been made at the time of settling the interrogatories. Taking this view, it is not necessary to examine the character of the interrogatory. But it may be proper to remark, that it is often necessary to direct the attention, and it may be especially necessary when the questions are addressed to an absent witness by means of a commission."

The following cases in our State are not directly in point, but support defendants' contention by their reasoning and by analogy.

Black v. *Lamb,* 12 N. J. E. 108;
Willett v. *Morse,* 71 N. J. L. 104, 58 Atl. 72;
Cunningham v. *State,* 61 L. 67, 38 Atl. 847;
Delaney v. *Erie R. Co.,* 117 Atl. 395.

Cunningham v. *State* uses the following language:

> "The rule is established that counsel cannot take the chance of testimony making in his favor, and if it happens to be adverse, then interpose his objection."

We now cite and quote from various cases from other jurisdictions in our country.

Hill v. *Condon,* 70 South 208 (Ala. 1915).

> "Where the deposition of a witness has been regularly taken and returned, the objection cannot be sprung for the first time on the trial of the case that any portion of the deposition is not responsive to the interrogatories, or that it states either more or less than was called for by the interrogatories, unless the objection is accompanied by proof that the objector had no opportunity of making the objection at an earlier period. The defendant, who by his counsel was present at the oral examination, before a commissioner, of plaintiff—and who had

this opportunity then to make objection to her answer—made no objection to her answer to such question. Later, before the trial was entered upon, he again had opportunity to object to said answer, and still made no objection but suffered the plaintiff to enter upon the trial relying upon such answer as evidence—and raised no objection until such answer was being read at the trial. We hold that the objection came too late.

* * * * * * *

The objection should have been interposed at the oral examination of the witness before the commissioner, at which it appears defendants' counsel was present and cross examined the witness.

Parties may try their cases on illegal evidence if they choose to do so.''

Forehand v. *White Sewing Machine Co.*, 70 South 147 (Ala. 1915).

''But the testimony having been taken by deposition, appellant had an opportunity to object to the admissibility of the attached copy before going to trial. By suffering appellee to enter upon the trial in reliance upon this evidence, and by withholding his specific objection that this evidence offered was secondary until the deposition was being read, appellant waived the objection * * *, which would have been available if taken in due time.''

Hurts v. *Fitz Water Wheel Co.*, 197 Ala. 10, 72 S. 314 (Ala. 1916).

(6) The defendant's objections to interrogatories and answers came too late, even if there had been any merit in them. The bill of exceptions informs us as follows:

''The defendant had not objected to any of the interrogatories at the time they were filed in court, or at the time of filing his cross interrogatories, and the defendant objected for the first time to the deposition and to various interrogatories, and answers

thereto at the time of the trial when the same were offered in evidence."

The exceptions, under our uniform rulings, came too late, not being made until the trial. Creel *v.* Keith, 148 Ala. 233, 41 South 780; 6 Mayf. Dig. 261.

Champlin v. *Pawcatuck Valley St. Ry. Co.*, 82 At. 481 (R. I. 1912).

(6) The fifth exception is to the admission by the Court of questions Nos. 13 and 14 and the answers thereto in the deposition of the witness William Adams. * * *

These questions were read from the deposition of the witness taken before the trial to be used at the trial. No objection was made to either before the magistrate. The questions were properly admitted.

Oceana Canning Co. v. *King,* 166 N. W. 847 (Mich.).

Exhibit A, offered in evidence by the defendant, should have been admitted. This was a card containing the sealed record on arrival of the train at Chicago. * * *

The witness who identified the card testified by deposition, and after identifying it, stated its contents, but the card itself was not attached to the deposition. As no objection was made at the time the deposition was taken, we are of opinion the exhibit should have been admitted.

Hutchinson v. *Bambas,* 249 Ill. 624; 94 N. E. 987 (Ill. 1911).

(2) The complainant testified by deposition, and upon the hearing objections were made to her testimony concerning what the defendant wrote to her. She stated in a general way that she had none of his letters and had lost some of them, and then stated the information received from the defendant by means of the letters. No objection was made to the questions at the time nor before the hearing, and, inasmuch as any objection could have been obviated by further proof

concerning the loss of the letters, all objections for want of such proof were waived.

The opinion of the Supreme Court on this point (pp. 147-148) quotes Section 52 of the Evidence Act (2 Comp. Stats., (2236)) as follows:

> "Any deposition or examination taken under this act shall be subject to be excluded or overruled wholly or in part, according to the opinion of the Court, upon any objection taken to the competency of the witness, the materiality or competency of the evidence given or the regularity of the questions put; but shall not be excluded for any irregularity or informality in taking or returning the same if the court in which the same is offered is satisfied that the testimony of the witness has been fairly and truly taken and returned; and if such deposition or examination shall be admitted in evidence by the Court, no exception shall be taken to the admission thereof on the ground of any irregularity or informality in taking or returning the same."

It was then stated to be the opinion of the Supreme Court, that objections made to the competency of the witness and relevancy of the testimony, if made to the Trial Court when the depositions are offered in the trial of the cause, are timely and such objections need not be made at the time of the taking of depositions.

The language of Section 52 does not support this opinion. The phrase "Upon any objection taken" may just as well be construed as meaning an objection taken before the trial at the time of the taking of the deposition. The language of the section seems to indicate that it is made a matter of discretion for the Trial Court to rule on the questions of irregularity or informality in taking or returning the deposition, but that matters affecting the evidence itself is made a

matter of right on which exceptions may be taken to the rulings of the Court as Grounds of Appeal.

The opinion (p. 148) quotes Wigmore as follows:

> "Objections to the procedure of taking and the form of the document must be made before trial; also objections to the manner of the interrogatories, for example, as improperly leading the deponent, or to the manner of the answers, as being insufficient or irresponsive. On the other hand, objections to the materiality or relevancy of the particular facts need not be made until the trial."

The opinion also refers to 18 Corpus Juris, Title Depositions, Section 351, p. 754, and Section 208, p. 687.

It should be noted that Wigmore speaks of "Objections to the materiality or relevancy of the particular *facts. If the fact itself or the evidence is entirely and basically illegal, the objection can be made for the first time at the trial without waiver of any rights.* And this is logical, for the party offering such evidence cannot be injured thereby as he is clearly not entitled to adduce improper or irrelevant *facts or matter. If, however, the grievance is not with the facts sought to be elicited from the witness but with the phraseology of either the question or the answer, or with part thereof, then it is clearly unfair to allow either side to stand by without making objection and reserve the same for the trial. The party seeking to produce the evidence is, of course, thereby barred, whereas if objection were made at the hearing, especially where it is oral, as in this case, the questioner can then re-frame his question and eliminate the objectionable words or phraseology or might*

consent to the striking out of the answer by the witness and might then have the witness answer properly. The object of taking depositions is to give the party a fair chance to produce certain evidence. The opinion of the Supreme Court in this case would allow the opposing party to lure or trap his opponent and thereby keep out facts and matter which might tend to throw light on the case and thus help in the administration of justice. The procedure at the trial is absolutely analogous. Counsel propounds a question to the witness on the stand. If there is no objection made, it is answered; if objection is made and the reasons are stated, counsel then has a chance to re-frame his question and thus bring the matter or the evidence to the attention of the Court and jury. Otherwise, the trial of the case would be more like a game of chess and a premium would be placed on tricks and stratagems.

In this case the alleged objectionable questions sought to bring out three matters or facts with reference to the manner of driving of plaintiff's intestate in an attempt to show contributory negligence, viz:

1. *That he was racing or speeding.*

2. *That he was attempting, with his bicycle, to pass the defendant's truck.*

3. *That he could have passed to the left of defendant's truck instead of to the right and thus avoided the accident.*

These three facts were all competent, relevant and material facts of the case; there is not the slightest doubt of this. The only objection could be to the form of the questions or to the form of the answers in that an attempt was made to express an opinion or a conclusion of the witness

by the use of the word "Apparently" or by the use of the phrase "Attempted to Pass." If counsel for the plaintiff, at the time of the taking of the deposition, had objected and stated his objections, counsel for the defendant would have had an opportunity to re-frame his question and the witness could then have been instructed not to give his opinion or conclusion but to give the facts. And then the facts of this speeding by the plaintiff's intestate and the facts which would justify the jury in concluding that he was attempting to pass the truck in an illegal manner could have been brought to the attention of the Court and jury and it is probable that there would have been a change in the verdict. *It seems very unfair that matters throwing real light on the facts of the case should thus be excluded.*

Two cases in the Illinois Supreme Court illustrate very aptly and squarely the above contention and coincide with it. The following language is used in

> *Ill. Cent. R. Co.* v. *Foulks,* 191 Ill. 57, 60 N. E., 890 At. p. 896 (Ill. Supreme Court, 1901).
>
> "It is complained that the witness did not pretend that he had ever seen the potatoes. Whether or not he had seen them was ground for cross examination; but his answer shows that he knew their condition. Moreover, the answer was given in a deposition taken upon notice and the objection was one that could be obviated by better evidence, so that the proper method in which it should have been urged was by making a motion to suppress the deposition. No such motion was made before the trial and it was too late to make it at the trial," citing
>
> *Balkwill* v. *Furnishing Co.,* 62 Ill. App. 663.

Showing the opposite phase is the case of

C. H. Albers Commission Co. v. *Sessel*, 193 Ill. 153, 61 N. E., 1075 (Ill. Supreme Court, 1901).

The syllabus of this case reads as follows:

"Where the testimony is given in the form of depositions in an action on a claim against the decedent's estate, the failure to object to the competency of a witness as a party interested when the depositions are taken will not preclude objection thereto at the trial."

In this case, the witnesses were clearly and entirely incompetent under the Evidence Act and the cases construing it in Illinois whereby stockholders in a company cannot testify in a suit of the Company against the decedent's estate. Hence the Court argued that it worked no prejudice either to the plaintiff or to the administration of justice to bar this testimony at the trial, even though no objection was made at the taking of the depositions for the reason that the objection could not be cured in any manner whatsoever. *This case holds squarely that the objection to the evidence, if curable, must be made at the taking of the deposition or it is considered waived and will not be allowed to be made at the trial. The criterion is whether the party or justice is any worse off.* This last mentioned case speaks of the philosophy of the rule as laid down in

Clauser v. *Stone*, 29 Ill. 114, 81 Am. Dec. 299.

"The general rule is unquestionably as stated by appellee's counsel, that objections on the trial to a paper or other evidence must be specially pointed out so that it may be obviated, if possible; but this rule applies only to cases where the objection can

> be removed by evidence, or by the act of the party under the sanction of the Court, or by the action of the Court itself."

The defects in the testimony offered in the case sub jud. could have been cured if objection had been raised at the taking of the depositions; the evidence was very important and material and, in the interest of justice, should have gone before the Court and jury. The attorneys for the plaintiff did not object and thus give the defendant a chance to cure the questions and the answers and they therefore should be prevented from objecting at the trial when the depositions were read, at which time there was no chance to cure them.

The Supreme Court therefore erred in sustaining the Trial Court in its rulings on these points.

POINT II.

The Trial Court should have granted the defendants' motion for a direction of a verdict on the ground of contributory negligence.

The Supreme Court, in its opinion, dismissed this point with the following brief comment (p. 149):

> "The remaining grounds are argued under Point II and are directed at the refusal of the Trial Judge to direct a verdict in favor of appellants upon the ground of contributory negligence. We are unable to find that the state of the proofs is materially different from what it was at the first trial and we conclude that now, as then, it was a matter of facts and circumstances requiring submission to the jury."

It is our contention, however, that the defendants-appellants are not bound by the previous

decision in *Jackson* v. *Geiger* (*supra*), where the Court of Errors ruled on the non-suit granted by the Trial Court in a previous trial on somewhat the same evidence produced by the plaintiff at this trial for the following reason: In the previous trial, the defendants, of course, did not offer any testimony. The Court of Errors took into account all possible inferences to the best advantage of the plaintiff. In the instant case, witnesses of the defendants have been heard, and, as will be shown by analysis of the testimony, they eliminate and make impossible such inferences as might negative the proof of contributory negligence of the plaintiff's decedent and, in fact, demonstrate such contributory negligence to a certainty.

The plaintiff produced three witnesses as to the occurrence: S. George Webb, Joseph J. Connallon and William Hall. The scope of the testimony of these three witnesses is clearly defined. The first named, Webb, was standing at the northeast corner of Lincoln Park (formerly Washington street) and Clinton avenue and saw the truck's entire progress from that point to the scene of the accident but he did not see the bicyclists at all. His testimony, therefore, relates only to the negligence of the driver of the truck and does not relate in any respect to the contributory negligence of the deceased. The second witness, Connallon, saw the occurrence from the northerly side of Lincoln Park below the easterly side of Pennsylvania avenue if it were extended across the park and he first saw the truck when the front of it was ten to twenty feet westerly from Pennsylvania avenue; at that time, the two bicyclists were riding "neck and neck with the cab," Hall on the left and Jackson on the right. This testimony does not bear on the facts

of contributory negligence, he having seen only approximately the ending of the occurrence. The third witness, Hall, the companion of the decedent, relates the entire story, as he was with the decedent from start to finish and his story, therefore, is the most important and perhaps might be called complete and controlling. *Moreover, a reading of the testimony of the three witnesses will show that when their versions are put together, they present one practically and substantially uncontradicted and complete picture, so that at the close of the plaintiff's case there was direct proof of contributory negligence and no inferences contrary to it which were not eliminated and made impossible by the testimony of the defendants' witnesses.*

The witness Hall testified substantially as follows: As he and the decedent on bicycles came down Clinton avenue and came into Lincoln Park, they saw the truck in question come out from Washington street into Lincoln Park (p. 49, ll. 1-30). They let the truck pass at a point about ten feet from the intersection of Lincoln Park and Clinton avenue, at which time, Jackson was traveling about three feet from the right-hand curb and Hall about four feet (p. 49, l. 30 to p. 50, l. 10). When the truck passed them, Hall proceeded to overtake the truck on the left-hand side and Jackson on the right-hand side (p. 53, l. 35 to p. 53, l. 18). Before they started to overtake the truck it was over five feet ahead of them (p. 53, ll. 16-20). The truck was going about twenty miles an hour (p. 53, ll. 25-28). Lincoln Park from Clinton avenue to Pennsylvania avenue is one hundred and fifty feet and Hall caught up with the cab of the truck which is towards the front about in the middle of the block (p. 53, l. 30 to p. 54, l. 13). The cab is behind the front

wheel and at that time Jackson was at the middle of the truck, the same being in the middle of the block when Hall had caught up to the front of the truck and Jackson to the middle of the truck (p. 54, ll. 10-20). There were no horns blown or bells rung that the witness could hear (p. 53, ll. 23 to bot.). When the truck was near the intersection of Pennsylvania avenue, Jackson had passed on to opposite the cab of the truck passing from the middle of the truck to the cab in a distance of about sixty-five feet or so. Jackson was going faster than the truck at the time for a distance of fifty or sixty-five feet to the right-hand side of the truck (p. 55, l. 15, to p. 56, l. 20). About ten feet from the intersection of Lincoln Park and Pennsylvania avenue both truck and the deceased's bicycle were going about twenty miles an hour (p. 57, ll. 1-10). The truck, when near the intersection, was on the right-hand side of the street about nine feet from the right-hand curb nearer the center than to the curb but on the right-hand side of the street (p. 58, ll. 10-23). The truck turned to the right into Pennsylvania avenue without any signal and without the driver putting his hand out (p. 50, ll. 28 to bot.).

> "Larnie tried to turn with the truck and he ran down in the gutter at the curb and that made his wheel gain speed and run out into the other truck and the front wheel on the right side of the truck struck Larnie's rear wheel and tripped him and the rear wheel on the right-hand side came on and ran over him."

It was the hub of the front wheel of the truck that came into collision with the rear wheel of Jackson's bicycle (p. 57, l. 37, p. 58, l. 5).

The witness Connallon said that he first saw the truck when twenty feet from the fatal inter-

section (p. 60, ll. 10-15). He changed this to ten to fifteen feet on cross examination (p. 64, ll. 20-30). Similarly, the witness testifies that the truck was traveling fifteen to twenty feet from the south curb of Lincoln Park (p. 60, ll. 15-25), but on cross examination it appears that this distance was about seven feet (see p. 68) as the street was thirty-five feet wide, Hall was riding at least ten feet from the north curb, the truck was ten feet from him and the truck was eight feet wide, leaving about seven feet, as above stated, as the distance between the truck and the south curb. The truck was going at a rapid rate of speed (p. 61, ll. 20-30). The driver gave no signal (p. 63, ll. 10-15), turned into Pennsylvania avenue, Jackson turned with him and the collision occurred. *On cross examination, he stated* (pp. 65-66-67) *that when he first saw the truck, Jackson was on its right at the cab and Hall was on its left parallel with him. Riding neck to neck, going fast, and that Hall in fact passed him, fifty feet or more past the intersection, showing that they were racing.*

The witness Webb did not see the bicyclists at all (p. 44, ll. 30-40). He did not see the impact between truck and bicycle (p. 36). He testified that the truck was going about thirty miles per hour, did not give any signal and turned suddenly into Pennsylvania avenue.

At the close of the plaintiff's case, the following state of facts appear:

Jackson, the deceased, allowed the truck to pass him on his bicycle at a point approximately one hundred and forty feet from the fatal intersection. After it had clearly passed him by five feet, he started to overtake it at a greater speed

than the truck whose estimated speed was twenty to thirty miles an hour. At perhaps the utmost speed that a bicycle could attain, break-neck speed for such a vehicle, he overtook and passed the cab of the truck in a distance of about one hundred and thirty feet on the wrong side of the truck without giving any signal by bell or other instrumentality while the two vehicles were approaching an intersection, which he could clearly see, and at which, as a reasonable and prudent man, he might have anticipated that the truck would turn or where the truck had a perfect right to turn in towards the curb. Here he was where he could not see the driver of the truck extend his hand out to the left as the signal of his intention to turn, alongside of a truck which was heaped with dirt above the driver and where the driver's view in the rear was shut off by the structure of the truck and by the dirt. The driver had a legal right to draw closer to the curb even before he reached the intersection, at the intersection on turning to his right into Pennsylvania avenue he had a right to turn close to the curb. Jackson knowingly put himself in a position of the utmost danger, where, if the driver had done any of these things that he had a right to do, he would be pocketed and could not extricate himself on account of his speed. Surely his negligence in these respects is a proximate cause of the collision which resulted in his death, much more proximate than the acts of negligence alleged against the chauffeur of the truck. The speed of the truck was not a proximate cause of the accident and in that respect the deceased was just as wrong and even more wrong; the abrupt turn of the truck to is right could have done the bicyclist no harm if he had been overtaken and passing the truck on the proper side and furthermore, as said above, the

truck had a right to turn to its right close to the curb and the driver had a right to anticipate that if a vehicle were passing the truck it would be passing on the proper side, namely the left; the chauffeur's failure to extend his hand was not a proximate cause, as, as shown above, Jackson could not have seen the hand even if it had been extended; the failure to blow the horn on the part of the chauffeur was not a proximate cause as the law does not require the blowing of a horn when unnecessary and the chauffeur of the truck was under no duty to blow a horn with regards to the deceased, and furthermore the blowing of the horn is not fixed by the act or by reason as a signal of expressing an intention of the driver of the vehicle to turn. Even if any of the above-described acts of omission or commission on the part of the driver of the truck were negligent, the acts of the deceased were even more proximate; in other words the collision would not have occurred but for the negligent acts of Jackson; and that is the test as to whether such acts were proximate contributory causes.

It therefore appears that, at the close of the plaintiff's case, only the most liberal and wide inferences could possibly have prevented a non-suit. And these were all eliminated and made impossible by the defendants' testimony, not by contradiction, but by bridging over gaps in the testimony with positive evidence.

The witnesses Doherty and Langwin saw the truck and the two bicyclists from the intersection of Clinton avenue and Lincoln Park, and give a clear and concise narrative of the occurrence.

Doherty testified (p. 73) that he first noticed the cyclists when they were fifteen to twenty-five

feet behind the truck, that (p. 74) they caught up with the truck and drove on either side of it, then (pp. 75-76) as the truck turned into Pennsylvania avenue, the decedent turned with it and rode right into the truck. The truck was traveling at a normal speed (p. 78, l. 10). The bicyclists traveled much faster than the truck (p. 82, ll. 30-35).

The truck made a wide turn into Pennsylvania avenue (p. 83, ll. 5-15).

Langwin graphically describes the occurrence as follows (p. 106, l. 21, to p. 107, l. 20):

"Q Who said, 'Let's go?' A I saw the two colored men on bicycles and they repeated it, and said, 'Let's go,' at least three times.

"When you heard that exclamation, 'Let's go,' what did you see there? A I seen the two colored gentlemen who were on the bicycles and the truck was ahead of them about twenty-five feet, and I was gradually walking through this part. When they got about here (indicating) after hollering, 'Let's go,' one takes the left-hand side of the truck and the other the inside of the truck, which I should judge from standing about here (indicating) that Jackson on the inside of the truck did not have over four or five feet between the curb and the truck, and I was looking to see where Jackson was going to come out, so when I came down towards the corner, the truck turns the corner and the last I seen, I closed my eyes and I seen his hands about the middle of the truck.

Q Whose hands? A Mr. Jackson, about the middle of the truck, I seen him like sliding under the back wheel.

Q What was his hand doing? A He was trying to protect himself, one hand on the handle bar and one hand on the side of the truck.

Q What happened? A I didn't think any more about it. I don't know if the back wheel ran over him or not; I closed my eyes.

Q When you opened your eyes? A He was laying with one leg over the wheel, just as if straddling the wheel.

Q What wheel? A The bicycle, and these two parties walked over and carried him over to the curb and I walked over to the curb with him."

The truck was going slowly, perhaps ten to twelve miles an hour (p. 107, ll. 30-35). The compression whistle was making a tooting sound as he turned (p. 107, l. 35, to p. 108, l. 10).

The defendant Cosiello, the chauffeur, testified that he passed into Lincoln Park ahead of the bicycle riders (p. 91, ll. 35-40), that he proceeded down to Pennsylvania avenue, put his hand out and blew his horn and then turned and stopped when some one yelled to him. He had not seen the bicyclists since passing Clinton avenue (p. 92). He made a gradual turn (p. 93, ll. 1-5).

We repeat, with more force, the comment made previously at the end of the analysis of the testimony of the plaintiff's witnesses, that *the collision could not have occurred without the negligent act or acts of plaintiff's intestate, and that the very facts that fasten negligence on the defendants' chauffeur, fasten it the more on decedent.* The testimony of two witnesses for the defendant, Doherty and Langwin, besides the chauffeur, as likewise the testimony of Hall for the plaintiff shows that Jackson was proceeding into a dangerous position in a dangerous manner and the other witnesses do not negative this, even if they do also show negligence as regards the chauffeur. Therefore, there was no contradiction as to the contributory negli-

gence of the deceased, and a verdict should have been directed for defendants.

The pertinent statutory law is as follows:

Traffic Act, P. L. 1915, Chap. 156, Sec. 11, at page 293.

> "The following provisions shall be in force only in places where the houses are on an average of less than one hundred feet apart"; * * *

Subdivision 13, at page 295.

> "No person or persons should drive any horse drawn vehicle or ride any bicycle upon or along any street at a greater speed than at the rate of eight miles an hour." * * *

P. L. 1915, Chap. 156, Section 2, subdivision 4, at page 286.

> "A vehicle *overtaking* another shall pass on the left side of the overtaken vehicle and the vehicle overtaken shall bear to the right." * * *

Subdivision 5.

> "A vehicle turning into another road to the right shall turn the corner as near to the right-hand boundaries of the road as possible."

This act at page 285 has the following definition:

> "1. As used in this Statute:
> (1) The word 'vehicle' includes equestrians, led horses and everything on wheels or runners, except street railway cars and baby carriages, unless otherwise specified.
> (2) The word 'driver' includes the rider or driver of a horse, bicycle, or motorcycle, and driver or operator of a motor vehicle, unless otherwise specified."

Motor Vehicle Act, P. L. 1921, Chap. 208, Section 7.

"(2) (At p. 649.) Signalling device. Every motor vehicle must be equipped with

> a horn or signalling device and the operator of the same shall give reasonable warning of his approach whenever necessary to insure the safety of other users of the highway, and before passing any vehicle he may overtake or pedestrian using any part of the highway other than the sidewalk, also at curves and intersecting highways where the view of approaching vehicles is obscured; but the horn, bell or other signalling devices shall not be sounded unnecessarily."

P. L. 1915, Chapter 156, Section 3:

> (2) (At p. 288.) "In turning while in motion or in starting to turn from a standing still position signal shall be given by extending the whip or hand indicating the direction in which the turn is to be made."

In view of the rather numerous recent decisions, it has become elementary and almost superfluous to state that infractions of these traffic rules as set forth by the legislature do not in themselves constitute negligence but are circumstances which may be taken into account in applying the rule of reason; in other words they furnish additional and definite criteria.

Doyon v. *Massoline Motor Car Co.,* 120 Atl. Rept., p. 205, quotes with approval the following excerpt from a charge to a jury:

> "These acts, these statutes, constitute warnings to people operating motor vehicles that it is dangerous to act other than in accordance to those statutes, those rules, which the legislature had laid down for the guidance of the drivers of motor vehicles, and danger reasonably to be foreseen is a test of negligence."

In the case *sub jud.,* Jackson should reasonably have foreseen, to use the language of this charge, the danger of riding at breakneck speed on the wrong side of, and passing a moving vehicle, where he could not see the driver, approaching

an intersection, where he could not extricate himself if the truck moved nearer to the curb or turned at the intersection. *In other words, if Jackson had heeded the warnings of the Traffic Act and the Motor Vehicle Act, which he was presumed to know, the collision would have not occurred.*

Likewise:

Evers v. *Davis,* 86 N. J. L. 196; 90 Atl. Rept. 677;

Paulsen v. *Klinger,* 92 N. J. L. 99; 104 Atl. Rept. 95.

The following excerpt from the last case is pertinent:

> "The legislative act was not intended to provide an exclusively hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from responsibility one who by fortuitously adhering to the regulation may be otherwise reckless and indifferent to the situation of others lawfully exercising equal rights upon the highway, but who may be subject to untoward and unlooked-for situations beyond their control."

In the case *sub jud.*, Jackson was certainly not "lawfully exercising" rights in the highway and certainly was not "subject to untoward and unlooked-for situations" beyond his control. As shown above he was violating the law in at least three respects, put himself into a highly precarious situation and into a dangerous situation that he should have, in the exercise of reasonable diligence, foreseen as likely to occur and which was far from being untoward and unlooked for.

Jackson was guilty of contributory negligence and the only remaining question is whether such negligence was a proximate cause of the collision.

Bouvier's Law Dictionary, Rawle's 3rd Rev. Vol. III, p. 2762, defines "proximate" as follows:

"In its legal sense, closeness of causal connection," citing *Menger* v. *Lauer,* 26 Atl. Rept. 180. This case uses the following language at p. 184:

> "In this state the established rule is that if the plaintiff's negligence contributed to the injury, so that, if he had not been negligent, he would have received no injury from the defendant's negligence—the plaintiff's negligence being proximately a cause of the injury—he is without redress, unless the defendant's act was a willful trespass, or amounted to an intentional wrong, and in such a case the comparative degree of the negligence of the parties will not be considered. Express Co. *v.* Nichols, 33 N. J. Law, 435; Railroad Co. *v.* Righter, 42 N. J. L. 180. In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is whether the faulty act of the plaintiff was so remote from the injury as not to be regarded, in a legal sense, as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence, as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not, in a legal sense, a contributory cause thereof, then the sole question will be whether, under the circumstances, and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately—that is, directly—contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was willful or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of

> both parties or to determine the comparative degree of the negligence of each."

The facts of this case are somewhat analogous to those of the case *sub jud.* The plaintiff set up a surveyor's instrument in the roadway of a public street and left it there without anyone to look after its safety or to warn persons of its presence. The defendant driving slowly along the street looking at some houses did not see the instrument and had no reason to expect to encounter an obstacle of that character and struck it. Held that plaintiffs were guilty of contributory negligence. *In the case at bar the plaintiff's intestate voluntarily put himself into a dangerous position where the driver of the truck had no reason to expect him to be.* To follow the language of this case as quoted above, his placing himself in this position was not so remote from the injury as not to be regarded as a cause of the accident. *It certainly did not present simply the condition under which the injury was received but was, in fact, one of the producing causes thereof,* in fact the closer and more cogent. Other cases applicable on this point are as follows:

Evers v. *Traud,* 90 Atl. Rept. 677.

At page 690, Thayer in the Harvard Law Review for February, 1914, is quoted as follows:

> "Danger, reasonably to be foreseen at the time of acting, is the established test of negligence."

James v. *Delaware, Lackawanna & W. R. R. Co.,* 104 Atl. Rept. 328, 92 N. J. L. 149.

> "Syllabus 6. 'Contributory negligence' is present in a given case when the injured party by his own negligence has contributed to the injury in such a way, that but for his negligence, he would have received no injury from the negligence of the other party."

The following language at the bottom of page 333, seems to be on all fours with the case *sub jud.*:

> "If that which she did was not negligence contributing to her injury in such a way that had she not been so negligent she would have received no injury no matter how negligent the defendants, or any of them, were, it is hard to conceive of a case of that sort. It appears that she was utterly reckless and took no precaution whatever for her own safety."

She could not have been any more reckless than Jackson, the bicyclist, violating various warnings of the traffic act in an endeavor to race with his friend Hall, the bicyclist on the other side of the truck of the defendant Geiger & Sons.

Schnackenberg v. *Delaware, L. & W. R. R. Co.*, 93 Atl. Rept. 701, 86 N. J. L. 517.

In this case the plaintiff on account of his negligence placed himself "in a zone of danger" and was injured in an unsuccessful effort to extricate himself. It was a railroad crossing case where an engine struck a horse and wagon. The Court reversed a judgment in favor of the plaintiff on the ground that he did "practically invite a calamity of this character by his negligence or indifference." At page 702, the opinion says:

"'*Volenti non fit injuria'* is the maxim at the basis of the doctrine of contributory negligence and may properly be invoked here." Similarly, in the case at bar, where the deceased, as shown above, placed himself consciously in what may be called a trap, from which he could not extricate himself.

Hoff v. *P. S. R. R. Co.*, 91 N. J. L. 641, 103 Atl. Rept. 209;

Soriero v. *Pennsylvania R. R. Co.,* 86 N. J. L. 642, 92 Atl. Rept. 604;

Gillespie v. *Ferguson,* 78 N. J. L. 470, 74 Atl. Rep. 460;

Saunders v. *Smith Realty Co.,* 86 Atl. Rept. 404;

Mannebach v. *Stevens,* 71 N. J. L. 368, 58 Atl. Rept. 1089.

The last words in the opinion of the last-named case are on all fours with the case *sub jud.*

> "I can conceive of no theory of the plaintiff's case that would hold the driver responsible for the plaintiff's injury that would not also hold the plaintiff responsible."
>
> *Pennsylvania R. R. Co.* v. *Righter,* 42 N. J. L. 180.

Plaintiff will probably argue that the case of *Jackson* v. *Geiger,* 126 Atl. 438, is dispositive of this point, and that this Court is bound by the ruling of the Court of Errors therein. We contend, however, that the case *sub jud.* is not identical with the adjudicated case. In the first place, as argued before, the facts are different since the evidence of the witnesses for the defendant eliminated and destroyed inferences that might have been drawn and allowed to go to the jury from the evidence of the plaintiff's witnesses alone at the previous case, the previous case being a ruling on a motion for a non-suit and the present on a motion for the direction of a verdict. For instance, the opinion says specifically (p. 439) that "there was also testimony to the effect that the truck was going very rapidly and gave the appearance as if it were headed for Broad street, which was the next street beyond Pennsylvania avenue." This testimony was not allowed in the present case on the objection of defendants' counsel (see p.

61 of state of case). This seemed to be an important element in the previous case. Moreover, the Court in the previous case seemed to have had the idea that the negligence of defendants' chauffeur was "practically conceded" (see p. 439 of opinion). Negligence was conceded on the argument, but for the purpose of the argument only, and it now appears that there was a sound and meritorious defense, supported by two disinterested witnesses. Moreover, in the previous case, the Court had only the testimony of the witness Hall, the other bicyclist, as a narrative of the entire occurrence, so that there were, necessarily, gaps in the testimony and points of vagueness, which a jury might be allowed to speculate upon.

In the present case, however, we have as further complete narratives of the occurrence the testimony of the witnesses Doherty and Langwin. As will be shown, the points of vagueness and the gaps are filled in, so that there is no room or scope for the speculation of a jury. The testimony of the two witnesses for the defendant does not contradict the narrative of the one witness for the plaintiff; it merely fills it out.

Furthermore, the testimony of the other two witnesses for the plaintiff, Webb and Connallon, who saw only parts of the occurrence, does not contradict the other narratives. To be more explicit, Webb tells only of the progress of the truck, and knows nothing of the bicyclists, as he did not see them. His testimony, therefore, does not bear on the contributory negligence element. Likewise, Connallon saw the truck and the bicycles on either side of it, alongside the cab, neck to neck, when they were all only ten to twenty feet from the point of collision. His testimony, therefore, fits in and jibes with

the testimony of the other witnesses on the point of contributory negligence. The plaintiff's witness, Hall, expressly testified that they started to pursue the truck from some distance behind it, running alongside of it, and gaining on it all the time; he even passed it. On this point, Connallon agrees specifically, as he stated, that Hall passed him at a point at least fifty feet beyond the intersection. The witness Doherty traces the progress of the bicyclists from a point about twenty feet or so behind the truck to the point of collision, and states that Hall passed it and that Jackson was gaining on it all the time.

The witness Langwin states clearly that he heard the two bicyclists exclaim, "Let's go," and start racing past the truck on either side of it. The testimony was uncontradicted that the truck was piled high with dirt. It is true that the law required the driver, Cosiello, to stick out his hand or a whip, or something of that sort, to signify that he was about to turn. The truck was a left-hand drive, and it is clear that such a signal could not have been seen by Jackson in his then position. Whether Cosiello did give such a signal or not is, therefore, immaterial, and his failure to do so could not be construed as a proximate cause of the collision. Likewise, the failure to blow his horn could not be so construed, as the act does not require this to be done on turning. Even thmis cursory analysis of the testimony shows that the evidence in the present case assumes a far different aspect from that in the former case, so that many of the pronouncements of the Court in the latter as to the facts would not be justified in this case.

For instance, the Court says:

> "The mere fact that the decedent was moving in close proximity to the truck and keeping up with it, does not constitute negligent conduct *per se*" (p. 439).

Moreover, the Court on the same page speaks of the ten-foot space between the path of the truck and the right-hand curb, in which space the plaintiff's decedent was, and continued to propel his bicycle, etc.

The opinion also raises the following query:

> "Whether or not, as he speeded along, his intention was to keep up with the truck, which was going rapidly, or to pass it, was a factual question; for the intention of the decedent in that regard was only determinable by inference to be drawn from his own conduct, and other circumstances, in respect to which reasonable men may reasonably differ."

All these inferences as argued above are resolved and eliminated by the complete testimony, and it clearly appears that the decedent was unlawfully passing the truck on its wrong side, at an unlawful speed, and without giving any signal.

In the light of the facts and the law of the above cases, it is evident that the plaintiff's intestate in the sub jud. was clearly guilty of contributory negligence that was a proximate cause of the accident. The Trial Court should, therefore, have directed a verdict for the defendants, and the failure to do so is reversible error. The Supreme Court erred in sustaining the Trial Court on this point.

Conclusion.

It is therefore respectfully submitted that the judgment of the New Jersey Supreme Court, affirming the judgment of the Essex County Circuit Court, as well as the judgment of the Essex County Circuit Court, should be vacated and set aside so that a new trial may be had.

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