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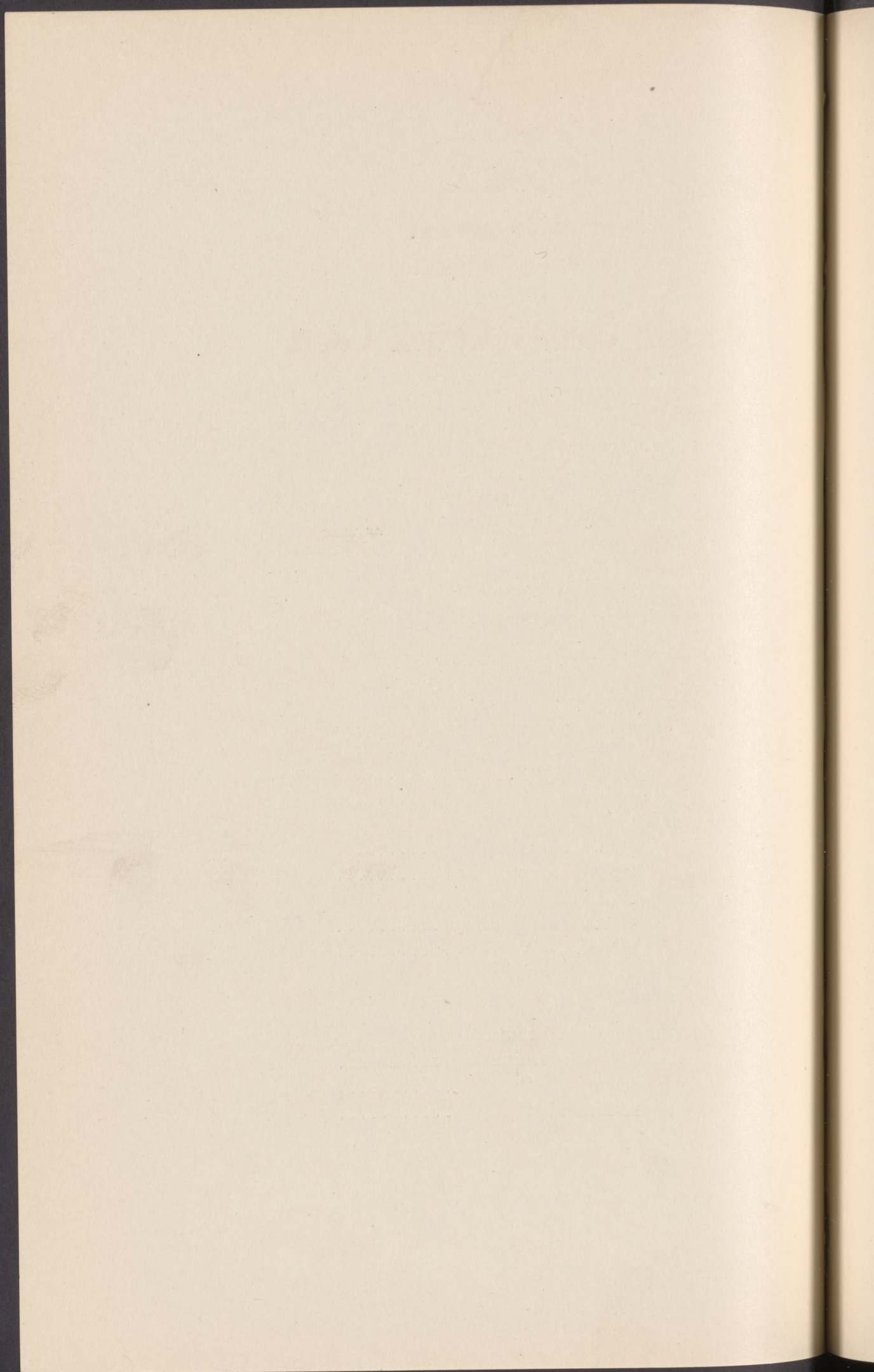
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Notice of Appeal.

NOTICE OF APPEAL.

Filed May 26, 1926.

Passaic County Circuit Court

MICHAEL DALY, <i>Plaintiff,</i> <i>vs.</i> SINGAC AUTO SUPPLY Co., a body corporate, and JOHN JOYCE, <i>Defendants.</i>	}	10 <i>Action at Law.</i> <i>Notice of Appeal.</i>
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To the above-named plaintiff, and Michael J. 20
Murphy, attorney for plaintiff, Romaine Build-
ing, Paterson, N. J.

Please take notice that the defendant, Singac
Auto Supply Co., a corporation, herein appeals
from the whole of the judgment entered in the
above-entitled cause to the Court of Errors and
Appeals in New Jersey, the court of last resort
in all causes.

Dated, May 22, 1926.

Respectfully yours, 30

HEINE, BRADNER & LAIRD,
Attorneys for Defendant,
Singac Auto Supply Co.

Service of a copy of the above Notice is hereby
acknowledged this 24th day of May, 1926.

MICHAEL J. MURPHY,
ARTHUR C. DUNN,
Attorneys for Plaintiff. 40

Grounds of Appeal.

GROUNDS OF APPEAL.

Filed June 13, 1926.

New Jersey Court of Errors and Appeals

10	<p>MICHAEL DALY, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>SINGAC AUTO SUPPLY Co., a body corporate, <i>Defendant-Appellant.</i></p>	<p><i>Action at Law.</i></p> <p><i>On Appeal from Passaic County Circuit Court.</i></p> <p><i>Grounds of Appeal.</i></p>
20		

The appellant, the Singac Auto Supply Co., a corporation herewith, states the following grounds of appeal:

1. The Trial Court erred in denying the defendant's motion to strike out the complaint filed in the above-entitled cause on the grounds that said complaint did not set forth facts sufficient to sustain a cause of action.
2. The Trial Court erred in refusing to strike out the answer to the following question:

"The Court: Who was driving the truck?
A The salesman for the Singac Auto Supply Co."
3. The Trial Court erred in refusing to grant a non-suit to the defendant on the grounds,

First: No negligence was shown on the part of the defendant.

Grounds of Appeal.

Second: The plaintiff was guilty of contributory negligence.

4. The Trial Court erred in its charge to the jury in charging as follows:

“And the plaintiff says that upon the slowing or stopping the lights were extinguished so that it no longer displayed a light of warning.” 10

Dated, June 8, 1926.

Respectfully yours,

HEINE, BRADNER & LAIRD,
Attorneys for Defendant-Appellant.

Service acknowledged this 11th day of June, 1926.

MICHAEL J. MURPHY,
ARTHUR C. DUNN,
Attorneys for Plaintiff-Respondent. 20

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Summons.

THE STATE OF NEW JERSEY to SINGAC
 AUTO SUPPLY Co. (a body corporate)
 (SEAL) and John Joyce:

10 YOU ARE SUMMONED to answer the
 annexed complaint of Michael Daly, in
 an action at law in the Circuit Court of the
 County of Passaic. And take notice, that unless
 you file your answer to said complaint with the
 Clerk of said Court, at Paterson, in the County
 of Passaic and State of New Jersey, within twenty
 days after service upon you of this writ and
 the annexed complaint, the plaintiff may proceed
 in the suit and judgment may be entered against
 you.

20 WITNESS, CLIFFORD L. NEWMAN, Esq., Judge of
 said Court at Paterson, this 22nd day of July,
 1925.

MICHAEL J. MURPHY,
 ARTHUR C. DUNN,
 Attorneys.

JOHN McCUTCHEON,
 Clerk.

30

40

Complaint.

COMPLAINT.

PASSAIC COUNTY CIRCUIT COURT.

MICHAEL DALY,

Plaintiff,

vs.

SINGAC AUTO SUPPLY Co., a
body corporate, and JOHN
JOYCE,

Defendants.

*Action at
Law.*

10

Complaint.

The plaintiff, Michael Daly, residing at No. 313 McBride ave., Paterson, N. J., says that:

1. On April 9, 1924, between 9 and 10 o'clock P. M., at the invitation and request of the defendant, the Singac Auto Supply Co., plaintiff was riding in a Ford automobile truck owned by said defendant and operated and controlled by said defendant through its agent and servant in an easterly direction on the public road known as Newark-Pompton Turnpike in the Township of Little Falls in the County of Passaic aforesaid.

20

2. The defendant, Singac Auto Supply Co., expressly invited and requested plaintiff to ride in said automobile truck and to accompany its servant to witness a demonstration of the operation of the same by said defendant to induce plaintiff to purchase the said truck from said defendant.

30

3. It became and was the duty of the said defendant in the premises to use proper care in operating said truck, and to have said truck

40

Complaint.

properly equipped and furnished with the usual and necessary appliances and with lights in the front and rear of said truck.

10 4. While plaintiff was riding in said truck as aforesaid the truck was improperly equipped with faulty and defective mechanism and parts and by reason thereof it stalled on the said road, and as plaintiff, after alighting therefrom was standing beside the front of said truck while the said defendant through its servant was examining the motor and parts of said truck to discover and remedy the defects in the same, and the said truck not having or showing any rear light, as it should have had and shown, the defendant, John Joyce, who was driving his automobile on said road in an easterly direction, drove
20 his said automobile so carelessly and at such an excessive rate of speed that he drove the same into and against the rear of the truck of the defendant, Singac Auto Supply Co., and with great and sudden force propelled the same against plaintiff, the said truck thereby throwing plaintiff forcibly to the ground, causing great and severe injuries to plaintiff, to wit, fracturing his collar bone and both of the bones of his right leg, and cutting and bruising him in other
30 parts of his body, and otherwise maiming and injuring him.

5. By reason of said injuries and hurts so caused by the negligence of said defendants, plaintiff suffered great pain and anguish and became disabled and his right leg is permanently crippled and shortened, and he was obliged to undergo long and expensive treatments in a hospital for the care and attempted cure of his said
40 injuries, and paid large sums of money for said

Complaint.

treatment and will be obliged to suffer from said injuries in the future and to pay large sums of money for the treatment of them; and he lost large sums of money by being deprived of the wages and money he was earning and otherwise would have earned.

Plaintiff demands \$15,000 damages. 10

MICHAEL J. MURPHY,
ARTHUR C. DUNN,
Attorneys for Plaintiff.

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Demand for Bill of Particulars.

DEMAND FOR BILL OF PARTICULARS.

PASSAIC COUNTY CIRCUIT COURT.

MICHAEL DALY,

Plaintiff,

vs.

SINGAC AUTO SUPPLY Co., a
body corporate, and JOHN
JOYCE,

Defendants.

*Action at
Law.*

10

*Demand for
Bill of
Particulars.*

To the above-named plaintiff, and or Michael J. Murphy and Arthur C. Dunn, attorneys for plaintiff, Romaine Building, Paterson, N. J.

20

PLEASE TAKE NOTICE that the defendant, Singac Auto Supply Co., a corporation, hereby demands that you furnish it with a bill of particulars with reference to the following matters:

1. In what way or manner was the said plaintiff requested by the defendant, Singac Auto Supply Co., to ride in said automobile?

2. What particular faulty or defective mechanism was said defendant's truck equipped with at the time of the alleged accident?

30

3. What particular permanent injuries are claimed by the plaintiff?

4. What is the plaintiff's vocation and his income therefrom?

5. What loss of income does plaintiff claim as the result of the alleged accident?

40

Bill of Particulars.

6. What sums of money has plaintiff expended in medical treatment, hospital bills, &c.? Give in detail.

Respectfully yours,

HEINE, BRADNER & LAIRD,
Attorneys for Defendant.

10

Dated, August 5, 1925.

BILL OF PARTICULARS.

PASSAIC COUNTY CIRCUIT COURT.

20

MICHAEL DALY,

*Plaintiff,**vs.*SINGAC AUTO SUPPLY Co., a
body corporate, and JOHN
JOYCE,*Defendants.**Action at
Law.**Bill of
Particulars.*

30

1. The plaintiff was contemplating the purchase of a Ford automobile truck from the defendant, Singac Auto Supply Co., and the agent of the Singac Auto Supply Co. requested him to ride with him in the Ford automobile truck so that he might demonstrate the car to the plaintiff and induce him to buy the same.

40

2. The machine was equipped with defective machinery which caused it to stall and it also was equipped with defective lights which failed to work when the car had been stopped.

Bill of Particulars.

3. The plaintiff suffered a broken collar bone, a fracture of the tibia and fibula of his right leg. His right leg is permanently injured, his collar bone is permanently injured and his nervous system sustained a permanent injury.

4. The plaintiff's occupation is that of a silk finisher. His income therefrom was \$32 a week. 10

5. The plaintiff was laid up from April 9, 1924, to January 21, 1925, as a result of the accident and thereby suffered a loss of income amounting to about \$1,344, and since that time he has only been able to do light work.

6. Plaintiff has received a bill of \$10 from Dr. Ives and a bill for \$350 from Dr. Clay, and has had other miscellaneous expenses for medicines, bandages, etc. 20

MICHAEL J. MURPHY,
ARTHUR C. DUNN,
Attorneys for Plaintiff.

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Interrogatories.

INTERROGATORIES.

PASSAIC COUNTY CIRCUIT COURT.

10	MICHAEL DALY, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<div style="text-align: center;"><i>vs.</i></div> SINGAC AUTO SUPPLY Co., a body corporate, and JOHN JOYCE, <div style="text-align: right;"><i>Defendants.</i></div>		

To the above-named plaintiff:

20 PLEASE TAKE NOTICE that the defendant, Singac Auto Supply Co., herewith demands that you answer the following interrogatories under oath within ten days after service of the same upon you or your attorney:

1. On what side of the front of defendant's truck was the plaintiff standing immediately before the alleged accident?
2. Was any part of his body touching defendant's automobile immediately before the alleged accident?
- 30 3. Did plaintiff hear the automobile driven by the defendant, John Joyce, approaching? If so, how far away was it when he first saw it?
5. Was the engine in defendant's automobile running at the time of the alleged accident?

Dated, September 15, 1925.

Respectfully yours,

40 HEINE, BRADNER & LAIRD,
Attorneys for Defendant.

Answer to Interrogatories.

Service acknowledged September 17, 1925.

MICHAEL J. MURPHY,
ARTHUR C. DUNN,
Attorneys for Plaintiff.

ANSWER TO INTERROGATORIES. 10

PASSAIC COUNTY CIRCUIT COURT.

MICHAEL DALY,	}	<i>Plaintiff,</i>	<i>Action at</i>	<i>Law.</i>	
<i>vs.</i>					
SINGAC AUTO SUPPLY Co., a body corporate, and JOHN JOYCE,	}	<i>Defendants.</i>	<i>Answer to</i>	<i>Interroga-</i>	<i>tories.</i>
					20

TO HEINE, BRADNER & LAIRD:

Answering the interrogatories served in the above cause of action, the plaintiff says:

ANSWER TO FIRST INTERROGATORY.

I was standing on the right side, near the front of the automobile of the defendant, Singac Auto Supply Co. 30

ANSWER TO SECOND INTERROGATORY.

No.

ANSWER TO THIRD INTERROGATORY.

No.

ANSWER TO FOURTH INTERROGATORY.

No.

ANSWER TO FIFTH INTERROGATORY.

No. 40

MICHAEL DALY.

Judgment.

STATE OF NEW JERSEY, }
 COUNTY OF PASSAIC. } *ss.*

Michael Daly, of full age, being duly sworn according to law, on his oath deposes and says that the foregoing answers and interrogatories of the defendant are true, to the best of his
 10 knowledge, information and belief.

MICHAEL DALY.

Sworn to and subscribed before me this 21st day of September, A. D. 1925.

(SEAL) ELLA M. ROSKOP,
 Notary Public for N. J.

20

JUDGMENT.

Whereupon, it is adjudged that the plaintiff, Michael Daly, recover of the defendant, Singac Auto Supply Co. (a body corporate), the sum of twenty-five hundred dollars (\$2,500.00), and his costs, which are taxed at the sum of fifty-two dollars and sixty-two cents (\$52.62), making in
 30 the whole the sum of twenty-five hundred and fifty-two dollars and sixty-two cents (\$2,552.62). Judgment entered and signed May 1st, A. D. 1926, at 10:54 A. M. Action No. 9940, Docket J, page 374.

CLIFFORD L. NEWMAN,
 Judge.

40

Motion to Strike Out Complaint.

PASSAIC COUNTY CIRCUIT COURT

MICHAEL DALY,	}	<i>Plaintiff,</i>	<i>vs.</i>	<i>Action at</i>	10
SINGAC AUTO SUPPLY Co., a body corporate, and JOHN JOYCE,					

Paterson, N. J., April 29, 1926.

Tried before HON. CLIFFORD L. NEWMAN,
Judge, and a jury.

Appearances:

Mr. Michael J. Murphy and Mr. Arthur C.
Dunn, for plaintiff.

Messrs. Heine, Bradner & Laird (by Mr. Alex.
MacLeod), for defendants.

A jury of twelve was duly empanelled and
sworn.

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

Thereupon, the following proceedings were
had:

Mr. MacLeod: If your Honor please,
these pleadings are made by Heine, Bradner
& Laird, and I notice they have an objection
to the complaint, on a point of law, notice
having been given to the plaintiff, that de-
fendants will object that, before the trial
of the issues joined herein, that the com-
plaint does not state a cause of action, and

Michael Daly, direct.

I would like to enter that on the record now, and move to strike out the complaint on the ground it does not set forth any negligence as against this defendant, the Singac Auto Supply Co., and does not set forth a cause of action upon which it might go to the jury.

10 The Court: (After discussion.) I will deny the motion.

Mr. MacLeod: Your Honor, allow me an exception.

Mr. MacLeod thereupon opened the case to the jury on behalf of the defendant.

MICHAEL DALY, sworn for plaintiff.

Direct examination by Mr. Murphy.

20

Q Where do you live? A 313 MacBride avenue.

Q Paterson? A Paterson, New Jersey.

Q How old are you, Mr. Daly? A Forty years, the 26th of September.

Q On April 9, 1924, did you have any business with the Singac Auto Supply Co.? A On the evening of April 9, 1924, I went to Singac, to the Singac Auto Supply Company, under an arrangement to purchase a truck.

30

Q Had you been there before? A I had been there previous, on the 6th of April.

Q Did you go there by an arrangement made with them?

Mr. MacLeod: I object to that "made with them," that is very indefinite unless—

Q (Continuing.) With the defendant?

40

Mr. MacLeod: With whom, of the defendant?

Michael Daly, direct.

The Court: I suppose he cannot make an arrangement with a corporation; it must be made with some individual.

Q Under what arrangement did you go there?

A The arrangement was made with the salesman of the Singac Auto Supply Co.

10

Mr. MacLeod: I object to that, and ask that it be stricken out, not material.

The Court: Motion denied.

Mr. MacLeod: Exception.

A (Continuing.) And he said—

Mr. MacLeod: I object.

The Court: Don't tell what he said.

20

Q Now, you got there on the 9th of April about— A I should judge about half-past eight.

Q Anybody with you? A There was another gentleman by the name of Mr. Daly.

Q Any relation? Is he any relation of yours?

A No relation whatsoever.

Q Very well. Now, you tell the Court and jury what happened there after you arrived at the place of the Singac Auto Supply Co. A After going in and finding the salesman we came out to the yard of the Singac Auto Supply Co. to where the truck was, and there the salesman came out and we looked the truck over. Finally I decided that I would like to purchase it. There was a part of a seat and underneath this seat was a battery, and I called the attention of the salesman to the fact that this was only—

30

Mr. MacLeod: I object to what he told the salesman, if your Honor please.

40

Michael Daly, direct.

The Court: Yes, don't tell what the salesman said to you or what you said to him.

Q Well, what was done? A I asked the salesman—

10 The Court: Don't tell what you said to the salesman. "What was done?" your counsel asked you.

A The salesman started to crank the motor up and I noticed that the lights didn't burn after the motor was in operation. I asked him, "Aren't you going to have some lights?"

Mr. MacLoid: I object to what he said to the salesman.

20 The Court: Don't tell what you said to the salesman; tell what was done.

A There wasn't any light and the machine was taken in the garage and the mechanic was put to work on it.

Q Yes. A And the lights was then fixed to burn.

30 Q And then? A Then we were invited to get on the seat and ride out and see how the machine worked. We had gone about three hundred yards from the garage when the machine was throttled down and it become stalled, and so I asked—

Mr. MacLeod: Now—

40 Q What part of the road did it occupy when it became stalled? A It was on the right-hand side of the road, two front wheels and one back.

Michael Daly, direct.

wheel was off the amesite. It was the front of the truck was facing crooked.

Q Directly or at an angle? A At an angle.

Q Yes.

Mr. MacLeod: I didn't hear that—"two front wheels that was out"—

10

A Two front wheels and one side rear wheel was partly off the amesite. The lights were out. The crash come—

Q Now, where were you? In the car or not?

A I was on the side of the road. I had been requested to get off the seat.

Mr. MacLeod: I object to "had been requested" and move to strike out what was said to him.

20

The Court: Strike it out. Where were you?

A I was on the side of the road. The salesman tried to crank the car.

Mr. MacLeod: I object to what he tried to do.

The Court: I will permit it. Go ahead. What was done?

30

A (Continuing.) The salesman tried to crank the car—

Q Yes. A —and the motor would not respond. He went forward to the wheel to get more spark or gas, and while he was in that operation the accident happened—

Q Now, you say "he went forward to the wheel;" what do you mean? A That he went—

40

Michael Daly, direct.

Q To the crank or did he go to the wheel? A From the front of the car, and he stood where the wheel is located.

Q While he was doing that, where did you stand? A I stood at the front of the car, to the right of the car.

10 Q While you were there, standing in that position, what happened? A The crash come and I found myself underneath the car.

Q What threw you under the car? A Well, I was hit by some part of the car—

The Court: What car?

The Witness: Of the truck that I was riding on.

20 Q The truck that was being demonstrated to you by the salesman?

Mr. MacLeod: I object to counsel leading.

Mr. Murphy: Well, we are ascertaining a little more definitely what he said.

30 Q What car was it that struck you and threw you under? A It was the truck that I was riding on that struck me and threw me underneath it.

Q That was the truck that you came out in from the— A From the Singac Auto Supply Co.

40 Q What was the result of this striking you by this car? A The result was that I was taken to the Paterson General Hospital in the ambulance, and Dr. Clay performed an operation on the leg one week afterwards, and I stayed in the hospital for four weeks, when I was allowed to

Michael Daly, direct.

come home, and I had to stay in the one position when I was home with the part underneath this leg that was injured.

Q What was injured? What was the extent of the injury? A It was a double fracture; both bones of the right leg were broken.

Q About what place? A Between the knee and the ankle. 10

Q Yes. A And on the 21st of May I was taken back to the hospital, and the plates that was placed in this fracture was removed.

Q Yes. A The break was of such a nature that these plates had to remain in there, and I spent another two weeks in the hospital. I was for seven months on crutches, suffering great pain, and it was nine months before I was able to return to work. 20

The Court: Which leg was it?

The Witness: It was the right leg.

Q What is your present condition with reference to that injury? A The present condition is that on walking I have to be very careful; I cannot step down—

Mr. MacLeod: I object to that. 30

The Court: I will permit him to tell.

A (Continuing.) On walking I have to step down from the curbstone with the left foot instead of the right foot.

Q Why? A On account of the pain that a sudden step might cause.

Q Does a sudden step cause pain or not?

Mr. MacLeod: I object to that as leading. 40

Michael Daly, direct.

A It does.

The Court: I will permit it.

Q Can you more fully describe your present condition with reference to that? A Wherever I ride on the bus or a trolley car to and from work due to a surgical insertion that is in the leg which is very tender, I have to keep the left leg crossed over the right leg, afraid that a sudden stop or something might cause this skin to break on this insertion.

Q Have you now described your present condition? A I have fully described my present condition.

Q Now, were you injured otherwise besides this fracture of the leg by this accident? A I fractured—I had received a fracture of the left collar bone.

Q Yes, and who treated that? A Dr. Clay.

Q While you were in the hospital? A While I was still in the hospital.

Q What is the present condition with reference to that injury? A Regards to the injury to the collar bone, I find that if I have anything heavy in the left hand, that I cannot hold it. If I was to go down in the cellar for a pail of coal, and if it was to be full, by the time I would get to the second floor with it, it would be about all that I could to do carry it.

Q As a result of the injury to the collar bone? A Yes, a direct result of the injury.

Q Was there a union of the bone as a result of the treatment that you got? A There was no union of the bone until this plate; that was the reason why this plate—

Q I am referring to the collar bone. A There was a union to that.

Michael Daly, direct.

Q Have you now told all of the injuries that you suffered by reason of this accident, physical injuries, I mean? A Well, I was considerably bruised and blackened about the shoulders and the other parts of the body, but the right leg and the collar bone was the principal injuries that I received in this accident.

10

Q Did you or not receive any cuts or abrasions? A No cuts or abrasions only where the direct cut had taken place.

Q At this time what work were you doing? What was your vocation? A I was working as a silk finisher for the Silk Dyeing Company of New York City.

Q Where are they located? A At 142 East 22nd street, New York City. I was receiving thirty-two dollars a week while I was working with them, and after the accident I was not able to work for nine months.

20

Q You said, I believe, that Dr. Clay attended you for these injuries. A He attended me from the night that I was hurt until the 21st of October.

Q How much was the amount of his bill for his services? A The amount of the—

30

Mr. MacLeod: I object to that; what he paid, I do not object to.

The Court: Permit the question.

Mr. MacLeod: Allow me an exception.

A Dr. Clay's bill for services was \$350.00.

Q What was the amount that you became obligated to pay the hospital for your stay and attendance there? A I was obligated to pay the hospital \$129.00; that is, I received the bills.

40

Michael Daly, direct.

Q Do those two sums include all of the expenses you were put to for medicine or medical attendance by reason of your injury? A The two sums covers the doctor's bill and the hospital bills.

10 Q Well, was there any other item of expense? A There was no other bill excepting the witch hazel and other things, that was all, which I suppose would be about ten dollars.

Q That you had to buy? A That I had to buy.

Q Do you remember when you resumed work?

A I resumed work on the 21st of January, 1925.

Q What work did you do then? A I went back at the silk finisher trade for the—Silk Dyeing Company of Brooklyn, New York.

20 Q Were you able to perform the duties of a silk finisher? A When I went back to work, it was some three months before I was in any kind of right shape at all.

Q During those three months, did you receive the full wages for that work? A I received the full amount.

30 Q When this car stalled on the Newark turnpike, what was the condition of the lights, as to the light or darkness? A The light? I didn't notice any light; it had been raining and to me it seemed a dark night.

Q Yes. But did you notice whether or not there was an arc light anywhere in the neighborhood? A I didn't notice any light.

Q Was there one? A I don't know.

Q If there had been one, would you or not have seen it?

40 Mr. MacLeod: One moment; I object to that.

Michael Daly, cross.

The Court: I sustain the objection.

Mr. Murphy: Cross examine.

Q (By the Court.) Was there a light when the truck stopped? A When the truck stopped, there was no light.

Cross examination by Mr. MacLeod.

10

Q You hadn't said that before, had you, that when the truck stopped, there was no light? A I don't know; I wasn't asked.

Q You had decided to buy a truck, hadn't you, Mr. Daly? A I decided to buy a truck from the Singac Auto Supply Co.

Q And you were in the garage at that time? A The truck was in the yard.

20

Q There wasn't any doubt in your mind as to whether the truck was all right, or not, when you decided to buy it, was there, to buy one? A The truck seemed all right with the exception of the light.

Q Well, was there any doubt in your mind about the light? A There was; there was no light.

Q So you had decided to buy a truck providing the lights were all right? A Providing the lights were all right.

30

Q So that you wanted to be assured the lights were all right before you would buy one; is that so? A I wanted to be sure of the fact, that everything was all right.

Q How did you want to be assured of that fact? A Well, on a demonstration, if the truck—the motor—carried the truck all right and the lights were perfect order to remain lighted for my safety, I was satisfied to buy the truck.

40

Michael Daly, cross.

Q So that is the reason you went out in the dark to find out whether that was all right, or not; is that so? A That was the reason.

10 Q When you got about—how many feet, did you say from the corner of the intersection there? A About three hundred feet from the intersection of Main street with the Pompton-Newark turnpike.

Q Was that going toward Newark on the Pompton turnpike? A Going toward Newark on the Pompton turnpike.

Q So that if you went from Paterson to Singac, you would turn to the left to go that way? A Turn to the left, yes.

Q So this truck had gone down that road three hundred feet, on the right-hand side? A On the right-hand side.

20 Q And the motor began to go bad? A The motor was throttled down; the salesman said, "I will throttle the—"

Q I asked you, if the motor began to go bad. A The motor was working all right until it was throttled down, and then it began to stall.

Q The motor was throttled down? A It was throttled down.

30 Q It didn't work so good throttled down? A It stalled.

Q It stalled.

The Court: Who was driving the truck?

The Witness: The salesman for the Singac Auto Supply Company.

Mr. MacLeod: If your Honor please, I ask to have that stricken out, that is his conclusion that he was a salesman for the Singac Auto Supply Company.

40

Michael Daly, cross.

The Court: Motion denied.

Mr. MacLeod: Exception.

Q When the motor was throttled down, it did not act right, did it? A It stalled immediately.

Q And the car rolled on a ways? A The lights went out. 10

Q I didn't ask you that.

Mr. MacLeod: I ask that be stricken out.

Q Did the car roll on a ways after the motor stalled? A The car rolled a few feet until it became stalled.

Q And it rolled to its right, did it, out to the side of the street? A It rolled to the right of the street. 20

Q Yes, and the two front wheels went off the amesite, didn't they? A Partly off the ameside.

Q Well, you said on direct examination that the two front wheels went off, and one of the rear wheels went off.

The Court: Partly off, he said.

Mr. MacLeod: I will withdraw that. 30

Q What do you mean by partly off? A Well, that they were just about off the amesite.

Q The two front wheels were off, weren't they? A Just about clearing the amesite.

Q That is, on the shoulder of the road, what you call it? A On the right.

Q The right shoulder? A The right rear wheel was half on the amesite and half off of it.

Q When you said one wheel was on the amesite, as you stated on direct examination, was 40

Michael Daly, cross.

there more than one wheel on the amesite? A
The left wheel was fully on the amesite.

Q I see, the left wheel was fully on the amesite and the right rear wheel was half off and half of it on? A It was half off the amesite and half on it.

10 Q You particularly noticed that? A The position of the car.

Q Now, you particularly noticed that the rear right wheel was half on the amesite and a half on the shoulder of that road; is that right? A No, I didn't particularly notice that.

Q Then, how do you know that half of the rear right wheel was on the amesite and half of it off, if you did not look at it and see it? A Judging from the position of the front wheels.

20 Q You are only judging from the front wheels? You did not go back to see what was on or off the amesite, did you? A I didn't go to the back of the car at all.

Q You sat on the right-hand side of this car when you were riding it? A I sat on the right-hand side of the seat.

Q When it was all stopped, it was on the right-hand side of the road, when it stopped? A It was all on the right-hand side of the road
30 when it stopped.

Q All of it was on the right-hand side of the road, wasn't it? All of this truck was on the right-hand side? A The whole truck was on the right-hand side of the road.

Q You got out, didn't you? A I got out.

Q And the driver got out the same side you got out, did he? A He got out on the same side.

Q And he walked up to the motor? A He
40 walked up to the motor.

Michael Daly, cross.

Q Did he raise the hood? A He did not.

Q What did he do when he went up to the motor? A When he got up to the motor he tried to crank the motor.

Q All right. How many times did he crank it over to crank it? A He cranked it once.

Q Just pulled up once on it? A Just pulled up once on it. 10

Q You were standing when he pulled up once on it where with respect to the truck? A Right of the front of the car.

Q Do you mean you were right further up beyond the radiator, or do you mean you were to the right of the right front mudguard? A I was to the right of the right front mudguard.

Q So that you were standing at the side of the truck, up near the front part of it; is that right? A At the front, near the front part of it. 20

Q So this man got out and turned the crank once, then he walked back to the wheel, you said, and attempted to give it more spark? A To give it more spark or gas, I said.

Q Which side of the truck did he walk on to go to the wheel, left side or the right side of the truck? A He walked on the left side of the truck. 30

Q Left side, so that he walked out on the street then, didn't he, like this (illustrating)? A He walked out on the street.

Q So all he did was to get out of the truck, go around to the crank at the front of the radiator, where the crank is, cranked it once, then walked around to the left side, to give it more spark or gas, as you say, at which time the other car hit it and the crash came; is that it? A That is right. 40

Michael Daly, cross.

Q That is the truth, isn't it? So that it all happened in a moment? A All happened in a second.

Q Do you know who hit your car? A No, I do not.

Q Did you try to find out? A I did every-
10 thing that is possible.

Q Did you get his number? A I didn't get his number.

Q Did anybody for you get his number? A No.

Q How did you know his name was "Joyce"?
A Because I was taken—

Q Now, I didn't ask you "where."

The Court: He is trying to tell how he
20 found out his name.

A At Dr. Ives' office, where I was taken by some passing automobile for first-aid treatment, an officer of the Little Falls Police Department was in there, and I heard Dr. Ives and the officer speaking—

Mr. MacLeod: Now, I object to the conversation.

The Court: He is telling how he got the
30 name "Joyce."

Q Can't you tell us how you know it was his car—Joyce's—without going all over this preliminary, telling us how? Do you have to tell us all of this preliminary stuff in order to tell us how you know Mr. Joyce was in that other car? Is it necessary? A The truck salesman mentioned his name.

40 Q That night? A That night.

Michael Daly, cross.

Q You heard his name mentioned then. Never heard his name since? A My counsel—

Q Now, I am asking about you, not what your counsel did. A I have never heard his name since.

Q Did you get his first name that night too? A No, I did not. 10

Q What name did you get that night? Just Joyce? A Just heard him called "Joyce."

Q Heard him called "Joyce." Did you go up and look at the police record to try to get the number of this other car? A I did not.

Q You did not do anything, then, to locate this fellow "Joyce," then, yourself, did you? A I did not.

Q You do not know whether he is in the State of New Jersey or out of the State of New Jersey, do you, yourself? A Personally, I do not. 20

Q Personally, you do not. Now, Mr. Daly, from the time you got out of the car on the right-hand front side until this crash, you did not go to the rear of this truck; did you? A I did not.

Q You, of your own knowledge, do not know whether there was a light lit on the rear of this truck or not; do you? A I do not.

Q So that you cannot now, under oath, before this jury, swear that the light was out on the rear from your own knowledge, can you? A Well, I— 30

Q From your own knowledge, I mean, not from guess or imagination. A I do, from the simple reason that the lights were operated on a magneto.

Q You don't know that, do you? A That was why I asked the salesman to bring the car into the garage to have the lights fixed. 40

Michael Daly, re-direct—re-cross.

Q And they were fixed, weren't they— A Yes.

Q You went out after they were fixed, didn't you? A But there was no battery—

Q Just a minute. You went out after the lights were fixed in the garage? A The lights were burning, yes.

10 Q At no time did you walk to the rear of this truck before the accident? A I did not.

Q And the last time when you saw the lights, and they were burning, was in the garage before you went out? A Before I went out.

Mr. MacLeod: That is all.

Re-direct examination by Mr. Murphy.

20 Q Now, Mr. Daly, did you or not give me, your attorney, the name of this man "Joyce" and his address? A Mr. Daly that was with me the night of the accident did.

Q Did you give me such address, I asked you? A Yes.

Q That address was Pompton, New Jersey? A It was Pompton, New Jersey.

Mr. Murphy: That is all.

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

Q I didn't understand— There was another man with you in this truck, was there? A There was.

Q He was sitting in the front seat? A He was standing on the left mudguard, or the left running board of the truck.

Q At the time of the accident? A At the time of the accident, he was standing on the ground.

40

Michael Daly, re-direct—re-cross.

Q Was he on your side of the truck? A He was on my side of the truck.

Q He was standing by you? A By me.

Q You did not see this other car at any time, did you, Mr. Daly? A I seen no car.

Q Never looked at the other car at all? A I never seen it.

10

Mr. MacLeod: That is all, Mr. Daly.

Re-direct examination by Mr. Murphy.

Q Were you, or not, rendered unconscious by this blow?

Mr. MacLeod: I object, calling for a conclusion.

The Court: I will permit it.

20

Mr. Murphy: He ought to know whether he was unconscious or not.

A I must have been unconscious.

Mr. MacLeod: I object to that, he must have been.

Q Were you, or not? A I was entirely unconscious because I do not remember anything until I was picked up and placed in an automobile.

30

Mr. Murphy: All right; that is all.

Re-cross examination by Mr. MacLeod.

Q You were stunned from the blow, from the first blow, weren't you, Mr. Daly? A I was stunned.

40

Michael Daly, re-cross.

Q The side of the truck must have hit you, didn't it? A I don't know what part of the truck hit me, but I was knocked under it.

Q Was your back to the truck when it hit you or was your face to it? A I was—my back was to the rear of the truck; I was facing the front of the truck.

10 Q Facing toward Newark that would be. It all happened so quick you had just about gotten out when it happened? A I had gotten out.

Q You hadn't stood there very long? A No, I hadn't stood there very long.

Q Just long enough for this man to make one crank, touch the spark, and it happened? A I was hit by a part of the truck and thrown underneath and I called for help.

20 Q Right away you called for help? A That I can't say because I don't know.

Q Because you were unconscious? A How long I was under the truck, I don't know.

Q Are you sure you were unconscious now, or not? A I don't remember a thing.

30 Q When your counsel said to you, "Were you unconscious after this accident?" you said, "I must have been." Did that make you think that you might have been unconscious when, as a matter of fact, you were not, just because counsel suggested it to you, or not?

Mr. Murphy: I object to this word "suggested."

Q (Continuing.) Well, "said" to you? A I remember calling for help.

40 Q You remember calling for help? A (Continuing.) And from that then I don't remember anything until I was partly down to Dr. Ives' office.

Michael Daly, re-cross.

Q Didn't you just say you remembered the first thing you remembered was when they put you in an automobile to go to the doctor's office? A I remember going to the doctor's office.

Q Do you remember being put in an automobile? A I remember being put in an automobile. 10

Q Then you remember before you were partly down there, don't you? A Yes.

Q It all happened so suddenly it is hard to remember all of the incidentals? A It is very hard.

Q One of those things that happened like that (snapping finger)? A It was sudden.

Q You don't think it was this man's fault here, the defendant? 20

Mr. Murphy: I object.

Q What would you have done that he didn't do, under the circumstances?

Mr. Murphy: I object.

Mr. MacLeod: I will withdraw the question if counsel objects; I will leave it to the jury. 30

Mr. Murphy: That is all.

By the Court.

Q Just where were you standing with relation to the truck when you were knocked down?

A I was standing on the right-hand side of the truck, close to the radiator.

Michael Daly, re-cross.

By Mr. MacLeod.

Q On the side by the right-hand fender? A
By the right-hand fender.

Q That fender goes over the right-hand
wheel, does it not? A I does.

10 Q That is where you were standing. Show
us how far you were standing from the wheel,
how far, by the hand? A I was standing about
that far from the wheel (illustrating).

Q So that you could look over the guard and
see this man making the motions? A So that
I could look over and find out what he was doing.

Q So that if that is the front of the truck—
it was on a sort of a square truck like this, isn't
it?

20 Mr. MacLeod: Strike that out.

Q If this were the truck, the front of it, the
handle here, the crank handle here, fender here,
you were standing about here, weren't you? A
I stood more between the dashboard of the truck
proper.

Q Show us where you stood right here? A
Well, this is the front of the truck—

30 Q This is the crank handle; this is the radia-
tor, these are the sides (illustrating). A Here
is the front of the truck, here is the driver's
seat; I was standing right about there (illus-
trating).

Q Between the dash on the right-hand side—
A On the right-hand side.

Q Between the dash and the right-hand side
of the fender? A Between the dash and the
right-hand front of the truck.

40 The Court: That is all.
(Witness excused.)

Peter Daly, direct.

PETER DALY, sworn for plaintiff.

Direct examination by Mr. Murphy.

Q Where do you live? A 301 Caldwell avenue, Paterson.

Q Speak loud enough for all of the jury to hear you. How old are you? A Forty-six. 10

Q Are you related to the plaintiff, Michael Daly? A No, sir.

Q Were you with Michael Daly on April 9, 1924, when he went to Singac for the purpose of purchasing the truck as just recited by him? A Yes, sir.

Q What time of the day was it when you got to Singac? A I should judge it would be around eight o'clock, half-past eight, something like that. 20

Q Were you with him when he entered the business place of the Singac Auto Supply Co.? A Yes, sir.

Q Did you or not see the truck that he was about to purchase? A I saw the truck.

Q Where was it when you first saw it? A In the yard; the truck was laying in the yard first off.

Q Did anybody on behalf of the company come out and have any discussion or arrangement with Mr. Daly about that truck? 30

Mr. MacLeod: I object to that, very indefinite.

The Court: Permit the question; did you, yes or no?

A Yes.

Q What was the condition of the truck with reference to its having light or not? A When 40

Peter Daly, direct.

the motor started up there was no lights lit on the truck.

Q I am speaking of the truck now when it was in the yard of the defendant company. A When it was in the yard it was started up in the yard, and there was no lights on it, and it was
10 taken around to the front of the garage, ran in there, and the lights was repaired.

Q And were the lights repaired in there? A Yes, sir; the lights were repaired, and the lights were burning.

Q After the lights were repaired and burning, what was done with the truck? A We took the truck off to demonstrate, and went out on the road.

Q Who drove the truck? A A party—I
20 don't remember the name—some man from the Singac Auto Supply Company, and we were taken out on the road, for the demonstration.

Q Who was in the truck when it was taken out? A It was Mr. Daly, the salesman, and I was standing on the left side of the truck. I was on the truck also.

Q On which side was Mr. Daly seated? A On the right-hand side.

Q Well, now, what happened after the truck
30 was taken out, and you three in it? A We ran along the road for a distance, oh, probably three or four hundred feet.

Q How far about? A Oh, probably three or four hundred feet.

Q Yes. Then what happened, if anything? A This man went to demonstrate the truck, how it would throttle down, and in throttling down the truck stopped.

Q Did it stop suddenly or otherwise? A
40 No, by degrees; it rolled for a distance.

Peter Daly, direct.

Q When it stopped, what, if anything, happened to the light? A When we got off the truck there was no lights lit; the lights were all out.

Q Did you get off the truck? A Yes, sir.

Q On which side? A Right-hand side.

Q That would be on the right side? A 10
Right-hand side.

Q When it stopped, how was it with relation to the road? A The truck was on an angle off the road, that is, partly off the road.

Q Now, when you say "road," you mean the paved part, do you? A Off the amesite

Q How about the rear of it? A I couldn't say about the rear of it; I wasn't around there.

Q Well, are you sure, as you say, it was at an angle? A Yes, sir. 20

Q And partly off the amesite? A Yes, sir.

Q Now, when you stepped off and the car stalled there, what happened next; that you noticed? A Well, this operator on the car went to start it up.

Q To do that, what did he do? A Walked around to the front of the car. That is the reason I went around to the front to watch him. He tried to crank it, and he said to us, that is how you turn this. With that he walked back to the seat, and I accompanied him to the seat, and while he was standing there the crash came (snapping fingers). 30

Q (By the Court.) Smash of what? A The other car, the truck, the car coming from the rear.

Q A car came from the rear and smashed into it? A Yes, sir.

Q Now, when that occurred, were there any lights on this truck? A No, sir. 40

Peter Daly, direct.

Q Where was Mr. Michael Daly standing with reference to the truck when the crash came?

A I left him in the front of the truck.

Q Did you see him there? A Yes, sir.

Q Was he directly in front or not? A Well, when I last saw him, he was standing in front
10 of the truck. I wouldn't say he would be exactly in the center of it, but he was in the front of it.

Q What happened to Mr. Daly when this smash came—Mr. Michael Daly? A First thing I heard him holler, "Oh, get it off of me! Get it off of me!" Then I ran around to the front of the truck and I discovered he was under it. The wheel had pinned him.

Q The wheel? A The wheel of the truck.
20 We had to push the truck back in order to release him from under it.

Q You were not injured? A No, sir.

Q Now, did you notice the condition of the weather that night as to lights lit or darkness?

A It had been raining earlier in the evening, but it had stopped; it seemed to me as though it was clearing.

Q As what? A Clearing.

Q Well, that doesn't describe the lightness
30 or darkness? A Well, it would be dark; yes, sir.

Q Now, did you notice whether or not there was an arc light in that vicinity? A Well, I really did not notice; I couldn't say whether there is a light there or not.

Q Well, will you tell the Court and jury whether or not it was light or dark in that neighborhood of the car? A Well, I would judge it would be an ordinary darkness of any country
40 road there, although I didn't see any lights

Peter Daly, cross.

around there. There was a light to the rear of it, toward Main street.

Q How far? A Oh, I really couldn't say; maybe twenty feet, thirty feet.

Q What was along the side of the road, buildings or wood? A Yes, sir.

Q (Continuing.) Or what? A There were 10
buildings there, and it seemed to me as though there was some work going on there at the time, because the earth was all mud there, looked as if it had just been dug up.

By the Court.

Q Did this truck have anybody on it? A Yes, sir.

Q What was the body height? A I should judge the body would be about two foot high 20
up to about fourteen or sixteen foot long.

Q How wide? A About six foot.

By Mr. Murphy.

Q Was there a cab to this truck? A Yes, sir.

Q Closed or open? A Partly closed; it was closed with the exception the doors wasn't on it. 30

Cross examination by Mr. MacLeod.

Q Mr. Daly, after the motor stalled the car rolled on a little distance, did it? A Yes, sir.

Q How far did it roll on, do you know, about? A About, I should judge, five or six feet, something like that.

Q And it went towards the extreme right, did it not, off the amesite? A Yes, sir; rolled in that direction. 40

Peter Daly, cross.

Q Didn't the two front wheels go off the amesite altogether? A I believe there was two of the wheels off.

Q And the right rear wheel was off also, wasn't it? A I didn't go to the rear; I couldn't say.

10 Q Did you notice that there was a pole right there, at this truck, where it stopped? A I think there was a telegraph pole of some description.

Q Don't you know there was a light on that pole? A No, sir.

Q You didn't look? A No, sir.

Q You were not looking for lights? A Not those kind of lights.

20 Q Well, if an automobile was coming along with headlights on it, it could very plainly see this big truck along the side of the road?

Mr. Murphy: I object, conclusion.

The Court: I do not suppose he could tell how plainly it could see.

30 Q How far down the road could you see with your naked eye that night? A There was a little light there; I guess you could see about half way down to the corner of Main street.

Q How far is that about? A Oh, three or four hundred feet.

Q Three or four hundred feet.

The Court: You mean that is as far as you could see?

The Witness: No, it was about half that distance—that far to Main street.

40 Q Then you could see at least a hundred and fifty feet to two hundred feet, half this, could

Peter Daly, cross.

you? A I really couldn't say because I didn't pay any particular notice.

Q Well, you said to Main street, you could—was up to Main street about three or four hundred feet—and you could see about half that distance. A You could see that on account of the lights about to Main street.

10

Q Weren't there lights all along this road? A I didn't notice them.

Q You didn't notice them? A No, sir; I didn't notice them.

Q You would not say there aren't lights along this highway, would you? A I couldn't say.

Q Do you live up that way? A No, sir.

Q Now, you were on the left-hand running board, Mr. Daly, and you didn't go to the rear of this truck at any time after the accident, or before the accident, did you? A No, sir.

20

Q The last time you saw the lights in the rear was in the garage? A Yes, sir.

Q They were lit then? A Yes, sir.

Q This was a truck that the lights go out when the car stops, don't they? A I believe it is.

Q Don't you know? A Well, it is; I don't know much about automobiles.

30

Q I see, all right. So that you assume the light was out in the rear because the car stopped; that is natural isn't it? A Well, I really couldn't say whether the light was lit or out in the back, because I didn't go back.

Q Didn't you say on direct examination when Mr. Murphy asked you that at the time of the accident the lights were out? A At the front of the truck the lights were out.

40

Peter Daly, cross.

Q I mean, at the back? A I said I didn't go around to the back. I don't know what was in the back before the accident.

Q You didn't say there was any light lit in the back before the accident? A I don't know.

Q You don't know? A No, sir.

10 Q As far as you know, they may have been and they may not have been; is that right? A Yes.

The Court: Did the front lights go out when the car—engine stopped?

The Witness: Yes, sir.

Q What wheel was holding Mr. Daly down?

A What wheel was holding Mr. Daly? Why, it was the left front wheel.

20 Q Left front wheel? A Yes, sir; that he was under.

Q Before the accident happened, he was standing on the right side of the right front wheel; is that right? A The last I saw he was in front of the truck.

Q In front of the truck. Was he right in front of the radiator? A I wouldn't say whether he would be on the right or left side of it, but he was in the front of the truck there.

30 Q Can't you say whether he was on the right-hand side or the left-hand side? A I didn't pay any particular notice. I couldn't say whether he was on the right-hand side or not.

Q Why, weren't you watching him? Or, weren't you watching the chauffeur get the car started? A I wasn't watching Mr. Daly at the time; I was watching the man operating the car.

Q The first thing you knew about this accident, there was a crash? A I went to the side

40

Peter Daly, cross.

of the car with the operator when he went to adjust it and then the smash come.

The Court: Adjourn here to two o'clock; be in your seats promptly at two, members of the jury. Mr. Daly, be in your seat promptly at two o'clock.

10

(Noon recess.)

April 9, 2:00 P. M.

Witness resumes witness stand.

Cross examination by Mr. MacLeod (Cont'd.).

Q Mr. Daly, after the accident, you went with Mr. Daly, the plaintiff in this suit, to the doctor's? A No, sir. 20

Q Didn't you go with him? A No, sir.

Q Didn't you go to Dr. Ives' office? A No, sir.

Q Didn't you go with him any place? A No, sir.

Q Did you go down with Mr. Joyce? A No, sir.

Q Didn't you go anywhere with Mr. Joyce afterwards? A No, sir. 30

Q Weren't you present down at the doctor's office, Dr. Ives' office, with Mr. Joyce? A No, sir.

Q Did you talk with Mr. Joyce at all? A Yes, sir.

Q Where did you talk to him, Mr. Daly? A When he was sitting in his car talking, after.

Q After the accident? A After the accident took place. 40

Peter Daly, cross.

Q The accident was all over? A No, this was while we were releasing Mr. Daly from under the truck. We were trying to push the truck off of him and he says to the officer—

10 Mr. MacLeod: Never mind, I object to what was said to the officer.

Q Never mind what you said. A Yes.

Q After you pushed the truck, as you say, off Mr. Daly, you then went to Mr. Joyce's car, did you? A Yes, sir.

Q Where was Mr. Joyce then? A Sitting on the running board of his car.

Q Which running board, the right or left side? A The right side.

20 Q The right side? A Yes, sir; between the two trucks, between the truck and the car.

Q Between the truck and the car? How close did you get to him? A Well, I placed my hands on his knees, and I asked him if he was hurt.

Mr. Murphy: Never mind.

Q Never mind what you said to him. You put your hands on his knees, did you? A Yes, sir.

30 Q What else did you do? A Asked him if he was hurt.

Mr. Murphy: I object.

Q Not what you said. What did you do besides putting your hands on his knees? What else did you do? Did you talk with him? A Outside of this question I just repeated.

40 Q You talked with him, didn't you? A Yes, sir.

Peter Daly, cross.

Q Don't tell us what you said. You talked with him and he talked with you? A Yes, sir.

Q You both had a conversation with each other, did you? A Yes; he just said that his stomach was hurt.

Q Never mind what you said. You did talk with him? A Yes, sir. 10

Q Regardless of what the man said— A Yes.

Q —were you near enough to smell his breath?

Mr. Murphy: I object.

The Court: I will permit the question.

Q The Court says you can answer. A Why, yes, I could smell it.

Q Did you detect any odor from his breath of any kind? A Well, I could smell liquor. 20

Q What is that? A I could smell drink off of him.

Q What do you mean by drink? A Well, liquor.

Q Do you know the smell of liquor? A Well, I kind of think so.

Q Where did Mr. Joyce go after that? A I could not say.

Q Now, you know the other Mr. Daly, who is the plaintiff in this suit, same name as yours, but he is no relation to you? A Yes, sir. 30

Q He is no relation? A No.

Q You and he were going to go in business together, weren't you? A Yes, sir.

Q You are a good friend of his? A Yes, sir.

Q You were going in the ice business as partners? A Yes, sir.

Q That is why you were getting this truck? A Yes, sir. 40

Defendant's Motion for a Non-suit.

Mr. MacLeod: That is all.

(Witness excused.)

Mr. Murphy: I am waiting for the doctor. With his testimony, our case is in.

10 The Court: Proceed; you may renew your application to examine him when he comes in.

Mr. MacLeod: You rest?

Mr. Murphy: With the exception of the doctor, we rest.

Mr. MacLeod: We are put in a position similarly. Our driver has not arrived here yet. We are expecting him any minute. Is that the only witness you have got, Dr. Clay?

Mr. Murphy: Yes, sir.

20 (Plaintiff rests.)

DEFENDANT'S MOTION FOR NON-SUIT

30 Mr. MacLeod: I move for a non-suit, your Honor, on the ground that they have shown no negligence on the part of this defendant, the operator of this truck; as far as the evidence is concerned, the evidence does not show that the operator of the truck did anything that a prudent man should not have done under the circumstances. There is no direct proof—the only possible thing, as to the light, would be the proof here that you could see—this man could have seen or the light was sufficient to see a distance of two hundred feet or a hundred and fifty feet, possibly two hundred feet, by their own witness. None of them testify that there wasn't

40 any light on the rear. Of course, I say to

Officer James Garribrant, direct.

your Honor now in fairness, that these trucks are operated—although, as I say, the evidence don't show it—if this truck stops these lights all go out; but, I say, the mere fact that it was not lit, that was not the proximate cause of this accident.

The Court: I think that will be sufficient to present a jury question. 10

Mr. MacLeod: Your Honor, allow me an exception.

Thereupon, the defendant, to further maintain the issues on its part, introduced the following evidence:

OFFICER JAMES GARRIBRANT, sworn for defendant. 20

Direct examination by Mr. MacLeod.

Q Officer Garribrant, you are a police officer in Singac? A Yes, sir.

Q How long have you been an officer in Singac? A About seven years.

Q What is your capacity as an officer? A Oh, motorcycle officer, patrolman. 30

Q Patrolman. Do you remember an accident having happened on the Newark turnpike in 1924?

A Yes, sir; I do.

Q Do you know the defendant in this suit, Singac Auto Supply Company—what is the name, please? A Singac Auto Supply Co.

Q Singac Auto Supply Co.? A Yes, sir.

Q Whose truck figured in that accident? A Yes, sir. 40

Officer James Garribrant, direct.

Q What other cars were in that accident, that you know of? A Joyce, the man that ran into him.

Q Did you meet him, too? A Yes, sir.

Q Do you know Mr. Daly, the plaintiff here?

A I met him in the lobby today; yes, sir; I remember seeing him.

10 Q You didn't know him before that time? A Never before.

Q Where were you when the accident happened? A On the four corners, Singac.

Q How far is that away from where the cars came together? A Four street light poles.

Q How far are those street light poles apart? A About a hundred feet apart.

Q About four hundred feet apart? A About a hundred feet apart.

20 Q About four hundred feet altogether? A Yes, that is away—

Q From the corner? A From the corner about.

Q Did you see the Joyce car go past the intersection? A Yes, sir. At that time I was called to a telephone when he passed. I paused a moment to stand to see if he was going to pass the corner without an accident.

30 Q Were you in uniform or in citizen's clothes? A No, sir.

Q In what capacity? A In regular clothes.

Q Plain clothes? A Citizen's clothes.

Q You were not on duty at that time nights?

A No, I was on days at that time.

Q How far below the corner was it this accident happened? A Four hundred feet about.

Q How fast was he going, in your opinion, when he passed the corner, Joyce's car? A That machine—of course, I was not behind him—

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Officer James Garribrant, direct.

must have been riding at, as far as my experience goes, between thirty-five and forty miles on the corner. I would not swear to that, only it was an awful speed for the corner.

Q After he passed the corner, what happened?

A I heard the crash and I heard a man holler. I refused the telephone, and I went to the accident.

10

Q What did you do, run right to the accident?

A Ran right down; yes, sir.

Q When you got there, where was this truck in question, on what side of the road was it? A It was on the right-hand side.

Q From that intersection to where this pole was four hundred feet down, was it visible to you from the corner? A Yes, sir; for when that was, after I heard the noise, I could see the both cars.

20

Q How far distance was that, that you could see it? A Four hundred feet.

Q Was there any other lights around there—

Mr. MacLeod: Withdraw that.

Q Were there any lights around where this accident happened? A Where I stood was an arc light. Then every third pole or fourth pole was a street light, but on the fourth was a little arc light, just a small hundred power.

30

Q Hundred watt light? A Hundred watt light; yes, sir.

Q On which pole was that on? A Fourth one.

Q How near was the truck to this pole standing? A I had all I could do to squeeze in between it when we lifted the rear end off the road, and backed the car back off Mr. Daly who was under it.

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Officer James Garribrant, cross.

Q Where was this arc light hanging? A It has just a little arm, about a couple of feet over the sidewalk or over the mud-walk.

Q Did that light throw any reflection on the roadway? A They do; you can read under one of them, for twenty-five or thirty feet around.

10 Q Did you take Joyce to the police station?
A Yes, I was ordered by the driver—

Q Never mind what the driver said. You took Joyce to the police station, did you? A Yes, sir.

Q Did you get his license number? A Yes, sir.

Q And his name and address, everything, did you get? A Yes, sir.

20 Q It is on file up in the police station? A Yes, sir; we have it there; and you can have it any time you want it.

Q Now, then, how close were you to this fellow Joyce? A Why, I brought him down to the doctor there for examination.

Q What doctor did you take him to? A Dr. Ives, Little Falls.

30 Q What did you take him to Dr. Ives for? A I was ordered by the driver of the truck to take him; he ordered me to take him down to the doctor.

Q Were you close enough to smell his breath? A No, I don't even remember that, getting that close, only for questioning him for his license, but I didn't notice anything on him myself.

Mr. MacLeod: Cross examine.

Cross examination by Mr. Murphy.

40 Q Did I understand you to say, officer, that you were about to go into the telephone when you

Officer James Garribrant, cross.

saw Joyce going by? A I was called from the corner to the lunch wagon, on the other side of the garage. You see, there is a lunch wagon there, and they called me on the phone.

Q Did you go in there? A No, I did not; this car came past me so fast I stood still, and when I stood the noise came.

10

Q Did you have your motorcycle with you? A No, sir; I was on days that month.

Q When he passed, how far away from him were you? A When he passed me?

Q Yes, when he passed you? A I wasn't more than about seven feet from him.

Q Did you stand right where you were until you heard the crash? A I still went towards the lunch wagon and then the noise came and I refused the telephone call, when I heard the report of the collision, when I heard this smash.

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Q Had you arrived at the lunch wagon before you heard the crash? A No, I didn't even go there; I ran to the accident.

Q How long after he passed you was it that you heard the crash? A It wasn't no more than forty-five seconds; it wasn't half a minute, it seemed so quick. He was riding terribly fast, I couldn't even get his number.

Q Did you notice any other vehicles going by at that time? A None at all; I had my mind on him.

30

Q You didn't see the car ahead after he passed you until after the crash, did you? A I never saw the truck at all, no.

Q You are well acquainted with the members of this corporation, Singac Auto Supply Company? A I live right by them; yes, sir.

Q You live right by them; know them all personally? A Yes, sir.

40

Officer James Garribrant, cross.

Q How long have you been an officer in Little Falls? A I am going now on seven years in June.

Q Do you know that little church on the side of the Newark-Pompton turnpike up there? A Yes, sir.

10 Q How far away is that from the corner? A About a hundred feet, little over.

Q How far beyond that church was it that the accident happened? A About three hundred foot.

Q On which side of the road are the lights? A On the right-hand side.

Q Are they in along the sidewalk or on the—over the driveway? A These poles are right on the curb, and there is no curb or sidewalk at this amesite; fair weather you could walk on that a little bit.

20 Q How far in from the amesite are the poles placed? A The poles from the amesite would measure about a yard and a half from the amesite, little more, perhaps.

Q You mean about four foot and a half? A About four foot.

Q How wide is the dirt part of the road? A That runs from the amesite to the property line, would measure about twelve feet.

30 Q Twelve feet. Well, are these poles placed outside of that line? A Right there, there is—the sewer runs up, used to be a curb, and the poles are on the outside of this that begins to the curb, what should be a curb.

Q Does that run up as far as to where this accident happened? A Yes, sir; further—about three or four times up further than that.

40 Q Are those lights always lighted every night? A Yes, sir; when one of them is out we report that to the roadlight commission.

Officer James Garribrant, cross.

Q So that they do sometimes go out? A Once in a while they burn out occasionally.

Q Did you pay any particular notice this night as to whether or not the light nearest the scene of the accident was lighted? A Yes, sir; I got the man's name under the same light.

Q How far was that from where his car was? A His car was about a foot and a half pinning it up to this pole. I crowded through the pole and the truck. 10

Q What was the position of the truck with reference to the road? Was it running along with it or was it at an angle to it? A There were two wheels—front two wheels—right and the left front wheel, the left front wheel going up the turnpike was—say this is the amesite—the back left wheel was on the amesite about a yard. 20

Q About a yard? A The left of it over off the amesite.

Q Now, how wide is the amesite? A That amesite will measure, I believe, twenty foot.

Q Did you ever measure it? A No, but I am pretty sure that it is about the width of that. I believe it is sixty some feet—sixty-two or sixty-three—road, property line to property line, one side to the other. 30

Q Did you notice the condition of the weather, as to its being dark or light that night? A Yes, sir; early in the evening it was a little rainy or stormy; but then it was not raining.

Q I don't mean raining, but was it dark or not? A Yes, it was a dark night.

Mr. Murphy: I think that is all.

Thomas A. Clay, direct.

Re-direct examination by Mr. MacLeod.

Q Was this truck visible from the light which was over on that side, as you have described? A Yes, I got the man's name there off his license.

10 Mr. MacLeod: That is all.
(Witness excused.)

Mr. Murphy: Dr. Clay is here now, if your Honor please.

Mr. MacLeod: That is all right; I have no objection to your putting him on.

THOMAS A. CLAY, M. D., sworn for plaintiff.

20 *Direct examination by Mr. Murphy.*

Mr. Murphy: I presume you admit the qualifications of Dr. Clay, as a physician and surgeon, that is?

Mr. MacLeod: Yes.

30 Q Doctor, do you remember having treated Mr. Michael Daly? Do you know him? A Yes, sir.

Q You have treated him, or not? A Yes, sir; I have.

Q On the 9th of April, 1924? A Yes, sir.

Q Now, will you tell the Court and jury the condition, physical condition, in which you found him, and the treatment that you extended to him? A He had a broken leg, on the right side, it being a compound, comminuted fracture; that is, that the bones protruded through the wound; and he had a broken left clavicle. He was—

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Thomas A. Clay, direct.

Q (Interrupting.) Clavicle, commonly called the collar bone? A Collar bone. He was placed in the General Hospital, and steps taken to reduce this fracture by what is known as the "cast method," that is, putting them up in a cast. He was operated upon, and it was found that pieces of muscle and tissue were between the fragments, stopping the reduction, and that a piece of the tibia, or shin bone, had become so loosened that it had to be removed during the operation. A "Lane" plate, that is, a steel plate, was put in the leg, with two screws above to the upper fragments, and two screws below to the lower fragments. His arm was put up in this position (illustrating), which is known as the "Jones posture." He left the hospital, I think, about April 27th, with the cast in place, and he returned again in May to have the "Lane plate" removed. When the "Lane plate" was removed, it was found that there had not been quite enough union between the ends of the bones and the fragment was still ununited. The leg was then swung up again and the plate taken out, and the leg put back in a cast. He was sent home about the first of June. He was then treated about once a week with the application of what is known as "unna's paste" dressing and the lateral splints to give the leg support, and he was discharged in October, 1924.

Q Have you seen him since, and examined his condition? A I saw him the other night in my office; and as a result of this fracture his carrying angle is not perfect; there is an inward bowing of the tibia or shin bone, and he has about ten per cent. loss of the use of that leg, and about five per cent. of his arm.

Thomas A. Clay, direct.

Q How long will that continue? A I think that will be permanent. It has been going on long enough now to show any further improvement, if there will be any. It has gone by long enough now that he ought to have all of the improvement he is going to get.

10 Q Does this inconvenience and disability attendant upon this condition—is there or not a likelihood of pain attendant upon it? A Well, of course, that is a subjective symptom. With all broken legs, people say they are painful. We take their word for it. Of course, there has been pain as a result of the operation, having the leg opened up and plate being put in, having it reopened again and set again. That would naturally cause some pain.

20 Q Yes, but I was referring to his present condition. A Now?

Q Yes. A Oh, yes. That is wholly subjective. Changes of weather, they say, they know it is going to rain or snow; but, as I have told you, that the result is ten per cent. loss of his leg and five per cent. of his arm, functional loss, as a result.

30 Q This plate that you have told us about, has that been removed? A That was taken out on the second operation; that was why he was operated on the second time.

Q Doctor, this treatment that he received from you, it was doubtless a necessary treatment, and I suppose that he necessarily suffered severe pain? A Well, that, as I told you, is just a subjective symptom. The man said he had pain on account of his leg being broken and the fragments did not unite, and when he started to walk on it it hurt.

40 Q Do you know the amount or the value of your services, the bill you charged? A I believe

Thomas A. Clay, direct.

my services plus the hospital was \$350.00, for the whole thing, I think.

The Court: \$350.00 for yourself?

The Witness: Including everything.

Q Mr. Daly has testified that your bill was \$350.00. 10

Mr. MacLeod: I object to that, if your Honor please.

Mr. Murphy: I was going to ask him whether what he thinks—

Mr. MacLeod: Comparison of testimony is not proper.

Mr. Murphy: He is not sure is the reason I am asking him this question. 20

The Court: Proceed.

A I know that is—

The Court: You haven't finished your question yet. I cannot deal with it.

Q I said—I stated that Mr. Daly testified this morning that your bill was \$350.00; I ask you whether that is correct or not. A It is not correct in this case. I know the hospital sent me Mr. Daly's bill, and the two bills were \$350.00. Seventy dollars has been paid by Mr. Daly, fifty dollars of which I paid the General Hospital. 30

The Court: Is that a reasonable charge, \$350.00?

The Witness: Yes; it is a reasonable charge, including the hospital and care for April to October.

Mr. Murphy: You may cross examine. 40

Thomas A. Clay, cross.

Cross examination by Mr. MacLeod.

Q That is five months, doctor, isn't it? A
Five months?

Q April to October? A Yes.

10 Q Subjective symptoms are symptoms that
the patient tells you? A Tells you.

Q They are not symptoms that you can find
by observation, are they, in this case particu-
larly? A Well, except for the—

Q (Interrupting.) Wincing or twisting of the
face or something like that? A If the man has
a fracture and the two ends of the bone protrud-
ing through the skin, and they are broken, and
you press on or strike that, in setting it, and the
face twitches, and they complain of pain; the
twitching is objective.

20 Q It was a very good operation, wasn't it,
doctor? Successful operation? A Well, I
wasn't so proud of it for a while.

Q Are you proud of it now? A Well, I
think now that he has a very good result.

Q Very good result? A Yes.

Mr. MacLeod: That is all, doctor.

(Witness excused.)

30 Mr. MacLeod: Now, if your Honor please,
our driver is in Little Ferry, and we have
telephoned for him to be here, but he is not
here yet. Of course, the only testimony he
is going to give us practically what is in;
that is, that the motor stopped and rolled to
the side of the street, and that he got out to
crank it and give it more gas and along came
the accident. With that, I will rest.

DEFENDANT RESTS.

The Court: Defendant rests. Any rebuttal?

Mr. MacLeod: I might—

Mr. Murphy: We have no more testimony.

Mr. MacLeod: I might, if your Honor please, make the statement that we did try to get him here. He is not working for us any more. 10

Mr. Murphy: We will admit that.

Mr. MacLeod: You will admit that?

Mr. Murphy: We will admit that you tried to get the witness.

Mr. MacLeod: You will admit that we tried to get him and that he would testify as I stated?

Mr. Murphy: Yes. 20

Mr. MacLeod: We have been trying to get him, and we have been expecting him in here any minute. We did not think we would finish so quick. We rest with that statement.

The Court: Defendant rests.

DEFENDANT RESTS.

Mr. MacLeod thereupon summed the case to the jury on behalf of the defendant. 30

Mr. Murphy thereupon summed the case to the jury on behalf of the plaintiff.

Charge to Jury.

Thereupon, the Court charged the jury as follows:

Members of the Jury:

10 This is an action brought by Michael Daly against the Singac Auto Supply Co. and John Joyce to recover damages that Mr. Daly alleges he has suffered by reason of the negligent operation of an automobile by the defendant on April 9, 1924. Mr. Joyce was never served with process in this suit and therefore you cannot consider this case as against him, but it leaves this case solely as against the Singac Auto Supply Co., who was served with process and who appears in this case.

20 The plaintiff in this case alleges that he was a prospective purchaser of a truck from the defendant company, and that during the process of such negotiations for purchase he visited the place of business of the defendant at Singac in this county for the purpose of inspecting the truck which he proposed to purchase, and that the defendant company proceeded to give him a demonstration of the truck as to how it ran, etc., and that he accompanied the driver on the truck who was to give him the demonstration; that before starting out the truck had been started but
30 that the lights failed to light; that after some work on the car by a mechanic the lights did light; that the operator of the car started out with this truck from the place of business of the defendant accompanied by Mr. Michael Daly, the plaintiff, and Mr. Peter Daly, not a relative but a namesake, who went with the plaintiff in this case for the purpose of seeing the demonstration; that it had gone three or four hundred feet south
40 on the Newark turnpike in the course of this

Charge to Jury.

demonstration, when for some reason it stopped upon the driver attempting to slow it down; and the plaintiff says that upon the slowing or stopping the lights were extinguished so that it no longer displayed a light of warning; that when it stopped the front wheels were off the amesite, which is about twenty feet wide, with the right hind wheel off and with the left hind wheel still upon the edge of the amesite. The plaintiff further says that the operator of the car, representing the defendant company, got out to attempt to crank it; that he went around to the front and turned the crank but the engine did not go and he immediately returned to the seat to undertake to manipulate some mechanism relating to the spark, when at that instant the other alleged defendant, Joyce, came along, driving a car, and ran into the tail end of this truck, knocking it against the plaintiff, who was standing somewhere near the front of the truck, knocking him down, and from which he received the injuries of which he now complains and for which he seeks compensation at your hands.

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The defendant says that in view of those facts there was no negligence on its part and denies any liability. The facts are not very seriously in dispute, but the dispute between the parties is as to what legitimate inferences from those facts may be drawn by you as tryers of the facts. Now, under these circumstances, the defendant had a certain legal duty or obligation cast upon it, and that was that it should exercise reasonable care in the operation of this truck on this demonstration.

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Negligence is the basis of the right of recovery. The mere fact that Mr. Daly suffered some injury in itself does not entitle him to recover.

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Charge to Jury.

Before he may recover in this case he must satisfy you by the fair preponderance of the evidence that the defendant, through its driver, on that occasion, was negligent, that is, that the driver failed to exercise reasonable care.

10 Now, the plaintiff says that the driver did not exercise reasonable care in taking this car out in its present condition and in permitting it to remain upon this highway unguarded by any warning lights to those who might be approaching in other vehicles. The defendant says that there was no negligence in either respect upon the part of its driver.

20 Of course, negligence could not be predicated upon the mere stopping of the car in the highway, because one who is driving a car in the highway has a right under the law to stop it, so that the mere fact that the car stopped could not be the basis of negligence upon the part of the defendant. But as to the question of guarding it with lights, or a light, there is a sharp issue between the parties as to whether there was negligence or not. The plaintiff says that some light should have been on this truck, either generated by the motor or put there by the operator of the car, or that some means or method
30 should have been provided or taken for the purpose of warning approaching motorists of the presence of this truck.

The defendant says that there was no negligence in that respect, because it had not been stopped for a sufficient length of time without the lights, to have given it an opportunity in the meantime, or by that time, of providing some means of warning to persons approaching the truck; and that presents a question of fact for
40 your solution.

Charge to Jury.

Negligence means a failure to exercise reasonable care; and what is reasonable care, when there is a failure to exercise reasonable care, based upon facts, is a question of fact for your determination.

Before the plaintiff may succeed, he must show you that the defendant was negligent, that is, failed to exercise reasonable care, and, second, that his failure to do so was the proximate cause of the plaintiff's injuries. 10

The defendant denies negligence and says, also, that if there was negligence, it was not the proximate cause of the plaintiff's injuries. Proximate cause means that cause which necessarily sets the other causes in operation. And the defendant says that any failure to have this light for that short space of time was not the proximate cause, because the defendant says that there was another light there by which the presence of this truck in the street could easily have been ascertained by the approaching motorist, Mr. Joyce, so the defendant says that its failure to have any red light there was not the proximate cause of the injury. Of course, that is a question of fact for your solution. 20

If the plaintiff has satisfied you by the fair preponderance of the evidence that the defendant was negligent, that is, failed to exercise reasonable care, and that its failure to exercise such reasonable care was the proximate cause of the injury to the plaintiff, then the plaintiff would be entitled to recover, unless, as is alleged by the defendant, the plaintiff himself was guilty of contributory negligence which proximately contributed to his own injury. 30

Now, the defendant denies negligence and sets up contributory negligence on the part of the 40

Charge to Jury.

10 plaintiff. The burden of proving that by a fair preponderance of the evidence rests upon the defendant. So the second question which you must ask yourselves, if you have resolved the first one in favor of the plaintiff, is: "Has the defendant shown us by a fair preponderance of the evidence that the plaintiff himself did not exercise reasonable care for his own safety, and that his failure to do so proximately contributed to his own injury?"

20 The defendant says it was negligence for this plaintiff to stand where he did, either in front of the truck, as was stated by one witness, or at the side of the truck, by the wheel, as was stated by the plaintiff; and the test in that regard is as to whether the plaintiff in the exercise of reasonable care should have anticipated that an accident like this would have occurred, or would occur, whereby he might receive such injury. If he was negligent and his negligence proximately contributed to his own injury, that, of course, would defeat his right of action, whether the defendant were negligent or not.

30 Now, if the accident was due to the negligence of both the driver and Mr. Daly, then, of course, Mr. Daly, the plaintiff, could not recover. If the accident were due to the negligence of the driver of the defendant's truck, then the plaintiff could recover, if he were not guilty of contributory negligence. Where an accident is due to the negligence of two persons, the person injured may sue both or one of them.

40 Negligence cannot be apportioned. You could not say that Mr. Joyce should be responsible for a certain portion of the damages and the defendant for another portion. If the defendant is liable at all, it is liable for the whole damage.

Charge to Jury.

Now, if your verdict is in favor of the defendant, then your verdict is no cause of action. If your verdict is in favor of the plaintiff, then you proceed to consider the damages to which the plaintiff would be entitled.

The plaintiff alleges that he received a compound comminuted fracture to the right leg, that is, both bones were broken; that he was transported to the Paterson General Hospital, in this city, where he was first confined four weeks; that after one week, there was an operation; that he was confined to one position in his chair for some period; that the leg was broken between the knee and the ankle; that on May 21st he went back to the hospital, where a further operation was performed for the removal of a steel plate which had been inserted and screwed fast to the bones in the leg; that on this occasion he was two weeks in the hospital; that thereafter he was seven months on crutches, suffering pain; that it was nine months thereafter before he was able to work; that he also received a fracture of the left collar bone, and that he, by reason of that, he was unable to exercise the usual amount of strength or grasping power in his left hand; that in addition to that he suffered certain bruises.

Having ascertained from the evidence the nature and extent of the plaintiff's injuries, if he recovers, he would be entitled to reasonable compensation for any pain and suffering which he has undergone as the result of any injuries which he received in this accident; and he would, likewise, be entitled to recover any reasonable sum which he has expended or indebtedness incurred in an endeavor to heal himself. He says that Dr. Clay's bill was \$350.00 and the hospital bill

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Charge to Jury.

was \$129.00. Dr. Clay says that \$350.00 was the total charge, both for his services and the hospital. And the plaintiff alleges further that he has been obliged to expend approximately ten dollars for medicines to heal himself. Whatever reasonable sum he has expended or reasonable amount of indebtedness he has incurred, he would be entitled to recover, if he recovers.

10 Then he alleges that he has lost wages; that at the time of his injury he was employed as a silk finisher, at which he was earning \$32.00 per week; that he was unable to work by reason of such injuries from April 9, 1924, the date of this accident, until January 21, 1925; so that whatever wages he has lost by reason of his inability to work, because of the injuries received, he would be entitled to recover. What that is is a question for your solution from the evidence.

20 Then he alleges that he has received permanent injury both to his leg and arm, which Dr. Clay has measured at ten per cent. to his leg and five per cent. to his arm. He would be entitled to reasonable compensation for any permanent injury which has resulted to his leg and arm, as a result of this accident.

30 Those are the elements or damages which he would be entitled to recover, if he recovers. Whether he shall recover or not is for you to say after you have settled the facts and applied to those facts the few rules of law which the Court has given you.

40 You must exclude, of course, from your consideration any question of sympathy in this case, either sympathy for the plaintiff or sympathy for the defendant. Sympathy has no place in your consideration, but you must decide the case solely upon the facts and the law; and when you

Exception to Charge.

have rendered your verdict, you will be excused until tomorrow morning at ten minutes of ten to answer roll call.

(The jury retires.)

Mr. MacLeod: I except to that part of the Court's charge in which the Court said the plaintiff testified or said that upon stalling or stopping the lights were extinguished. There is no evidence that there was any light at the rear *on* this truck. That the evidence of the plaintiff was that the only lights he knew that were out were the headlights, and that he never went to the rear of the truck, and did not know whether there was a light lit or not in the rear, as the testimony shows in this case.

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New Jersey Court of Errors and Appeals

MICHAEL DALY,

Plaintiff-Respondent,

vs.

SINGAC AUTO SUPPLY Co., a
corporation,

Defendant-Appellant.

*Action
at Law.*

*On Appeal
from Passaic
County
Circuit
Court.*

BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment entered in the Passaic County Circuit Court in an action charging negligence on the part of the Singac Auto Supply Co., a corporation, as a result of which the plaintiff, Michael Daly, received personal injuries.

Facts.

The facts of this case are as follows:

On April 9, 1924, the plaintiff, Michael Daly, went to the Singac Auto Supply Co. to purchase a truck from them (S. C., 16, l. 30). He looked the truck over which they showed him and decided he would like to purchase it. When the truck was first cranked up, the lights did not burn (S. C., 18, l. 12), thereupon, the mechanic in charge of the garage repaired the lights so that they were fixed to burn. The plaintiff, Michael Daly, was then taken upon a demonstration ride. They went about 300 yards from the garage, when the machine stalled on the right-hand side of the road (S. C., 18 and 19). The two front wheels and one back wheel were off

the amesite on the shoulder of the road, and the left rear wheel was partly on and partly off of the amesite. While in this position, another automobile truck driven by a man by the name of Joyce crashed into the rear of the truck owned by the Singac Auto Supply Co., which caused the same to run over the plaintiff, who was standing on the road near the right front part of the truck.

The Singac Auto Supply Co. truck at the time it was stalled was practically right up against a telegraph pole, upon which there was a hundred-watt electric light (S. C., 51, ll. 30-40). At the time of the accident the street was well lighted and could be seen for a distance of at least 400 feet (S. C., 51, l. 22).

The plaintiff charged that the defendant, Singac Auto Supply Co., should have had the truck equipped with necessary lights and did not show or have any rear light. An answer to a demand for a bill of particulars disclosed that the plaintiff claimed that the defendant's machine was equipped with defective machinery and equipped with defective lights, which failed to work when the car had been stopped (S. C., 10, ll. 36-40). There was no evidence given by the plaintiff to the effect that the rear light was not lit, because neither the plaintiff nor his witness went to the rear of the truck either before or after the accident to see whether or not any light was there.

The evidence on behalf of the defendant disclosed that the street at the time of the accident was fully lighted; that the defendant's truck was squeezed up against a pole on which hung a hundred-watt light; that the road could be perceived for a distance of at least 400 feet. In

spite of this testimony, which was given by a police officer who came up immediately after the accident, and in spite of the fact that neither the plaintiff nor his witness knew whether or not the rear light was lit on the automobile belonging to the Singac Auto Supply Co., the case went to the jury and a verdict was rendered in the favor of the plaintiff in the sum of twenty-five hundred dollars (\$2,500).

Grounds of Appeal.

1. The Trial Court erred in denying the defendant's motion to strike out the complaint filed in the above-entitled cause on the grounds that said complaint did not set forth facts sufficient to sustain a cause of action.

2. The Trial Court erred in refusing to strike out the answer to the following question:

“The Court: Who was driving the truck?”

A The salesman for the Singac Auto Supply Co.”

3. The Trial Court erred in refusing to grant a non-suit to the defendant on the grounds:

First. No negligence was shown on the part of the defendant.

Second. The plaintiff was guilty of contributory negligence.

4. The Trial Court erred in its charge to the jury in charging as follows:

“And the plaintiff says that upon the slowing or stopping the lights were extinguished, so that it no longer displayed a light of warning.”

FIRST POINT.

The Trial Court erred in denying the defendant's motion to strike out the complaint filed in the above entitled cause.

The plaintiff's complaint set forth in paragraph 3 that it was the duty of the defendant to have its truck properly equipped and furnished with the usual and necessary appliances and with lights in the front and rear of said truck (S. C., 5 and 6). It further charged in paragraph 4 that the truck was improperly equipped with faulty and defective mechanism and parts, &c., and the said truck not having or showing any rear light as it should have had and shown, the defendant John Joyce carelessly and negligently drove his automobile into the rear of the truck of the defendant Singac Auto Supply Co. (S. C., 6). The defendant in its answer reserved an objection in point of law to the complaint. The objection was moved and argued preceding the trial and the Court denied the defendant's motion.

It is respectfully submitted that the Court erred in denying this motion. Nowhere in the complaint is any charge of carelessness and negligence made concerning the defendant Singac Auto Supply Co., a corporation. It is true that the complaint alleges that it is the duty of the defendant to have lights in the front and rear of its truck, but charges that the truck "not having or showing any rear lights, as it should have had and shown," the other defendant, John Joyce, carelessly and negligently drove his automobile into it, but it does not appear as a fact in the complaint that the violation of the alleged duty to display lights was a proximate cause of the accident. There is no allegation that the

night was dark, that the street was unlighted and that because of the defendant's violation of its alleged duty, the defendant John Joyce ran into the defendant's truck.

It is respectfully submitted that when the words "carelessly and negligently" are omitted from the complaint that facts must be alleged from which the conclusion may be drawn that the defendant was careless and negligent, and that said facts must show that the defendant's acts were a proximate cause of the plaintiff's injury. As the complaint now stands, all that it shows is that the defendant John Joyce carelessly and negligently drove his truck into the rear of the defendant's truck. It does not show that any part of the alleged collision was caused by any neglect of the defendant Singac Auto Supply Co.

It is well established that the mere allegation in words of a duty will not help the pleader unless facts are set forth from which the Court may determine the existence of the duty and its breach. See *Miller v. Pathe Freres*, 79 Atl. 1062, N. J. L. ; *Breese v. Railroad*, 52 N. J. L. 250, 19 Atl. 204; *Marples v. Standard Oil*, 71 N. J. L. 352. The only allegation of fact in the complaint are the words "not having or showing any rear light." The phrase following, "as it should have had and shown," is merely the conclusion of the pleader, and this conclusion is probably based upon other facts or circumstances in existence in the mind of the pleader and not alleged in the complaint. In other words, as the complaint stands, it merely alleges a condition which was in existence at the time of the accident, but it does not allege the other circumstances surrounding that particular condition which would make it the duty of the defendant

Singac Auto Supply Co. to have had its rear light lit at the time of the alleged accident.

POINT TWO.

The Trial Court erred in refusing to strike out the answer to a certain question.

The Trial Court (S. C., 26, l. 33) asked the following question directed to the plaintiff, Michael Daly:

“Q Who was driving the truck? A The salesman for the Singac Auto Supply Co.”

Defendant's counsel moved to have the answer stricken out, as it was a conclusion. The motion was denied.

There is no evidence in the case whatsoever that any servant or agent of the Singac Auto Supply Co. was driving or in charge of the truck at the time of the alleged accident. There is no allegation in the complaint that any servant or agent of the Singac Auto Supply Co. was in charge of the defendant's truck at the time of the alleged accident. The answer filed is a general denial. Therefore, the burden of proof was upon the plaintiff to prove not only the ownership of the truck by the defendant, Singac Auto Supply Co., but also the fact that the truck was in charge of its agent at the time of the alleged accident. There was no proof of either ownership or agency except the statement made by the plaintiff, Michael Daly.

It is, therefore, respectfully submitted that the Court's refusal to strike out the answer to the Court's question was error because it called for the mere conclusion of the plaintiff.

POINT THREE.

The Court erred in refusing to grant a non-suit.

1. No negligence was shown on the part of the defendant.

Not only was no negligence charged on the part of the defendant in the complaint, but the plaintiff also failed to prove any negligence. To recall some of the evidence, it must first be stated that the lights were fixed to burn (S. C., 18, l. 24) on the defendant's truck before it was taken out for the alleged demonstration. When the machine stalled it was about 300 yards from the garage and was on the right-hand side of the road, two front wheels and one rear wheel being off of the amesite. The plaintiff stated that the lights were out (S. C., 19, l. 13); he then went on to state in answer to a very leading question that he didn't notice any light (meaning street light). He was asked again by a leading question whether he noticed an arc light. He said he didn't notice any light. He was then asked directly, "Was there one?" A "I don't know" (S. C., 24).

On his cross examination, however, he stated that he didn't go to the rear of the car at all (S. C., 28, l. 23). He repeated this statement later on in his cross examination (S. C., 21, l. 20), and he admitted that he did not know whether or not there was a light lit on the rear of the truck. He also admitted that the lights were fixed before the truck was taken out of the garage and that the lights were burning in the garage. It appeared that the truck had a battery in it before it left the garage (S. C., 17, l. 25). There is not the slightest evidence in the case anywhere that the battery was not charged

and working, nor is there any evidence in the case giving any reason why the lights should or should not work. The testimony of the plaintiff's witness, Peter Daly, is to the same effect. He testifies that the lights were repaired and burning before the truck left the garage (S. C., 38, ll. 10-20), but when the truck stalled it was mostly off the road, and when he was asked by rather leading question as to the condition of the weather, as to lights and darkness, he answers, "It seemed to me as though it was clearing.

"Q As what? A Clearing.

Q Well, that doesn't describe the lightness or darkness. A Well, it would be dark; yes, sir.

Q Now, did you notice whether or not there was an arc light in that vicinity? A Well, I really did not notice; I couldn't say whether there is a light there or not."

It is curious to note how much this witness had to be led in order to make the particular evening dark. However, on his cross examination he admitted that there was a telegraph pole of some description near where the truck stopped, but that he didn't know that there was a light on that pole; that he didn't look for a light (S. C., 42). He further stated that "I guess you could see about halfway down to the corner of Main street," which distance, he stated, was from 150 to 200 feet (S. C., 42). He further stated (S. C., 43, l. 34): "Well I really couldn't see whether the light was lit or out in the back, because I didn't go back."

Thus, we have the gist of the plaintiff's case with respect to this defendant, and upon reading both the direct and the cross examination of the two witnesses, it must be found as a fact:

FIRST. That they do not know whether or not the defendant's rear light was out or lit, because they didn't look. Therefore, there is no evidence in the case that it was out.

SECOND. They do not know whether or not there was an arc light at the scene of the accident. Therefore, there is no evidence in the plaintiff's case that there was not an arc light.

THIRD. It does appear that one could look up the road for a distance of 150 or 200 feet. Therefore, it must be accepted as a fact in the plaintiff's case that the defendant's truck could have been seen for at least this distance.

From these three facts and the inferences therefore, it seems to be conclusively proven:

FIRST. Either that the light upon the defendant's truck was lit, in which case he was guilty of no negligence, or if it was not lit, his truck could be seen for a great distance, and therefore, the absence of the light was not the proximate cause of the alleged collision.

It is respectfully submitted, however, that the proof in the plaintiff's case, granting them every reasonable inference from their testimony, does not disclose that the defendant's rear light was out. The most that this proof disclosed is that the light was lit when the car left the garage and that the plaintiff and his witness failed to observe whether or not it was out either before or after the alleged accident, and as the proof stands in this state it must be taken as a fact that the light remained lit after the truck left the garage. A thing is presumed to stay in *statu quo* until some change to the contrary has been definitely proven. Even if the plaintiff had offered evidence to the effect that they observed that the light was not lit immediately before

the alleged accident, still the burden would have been upon the plaintiff to have proven that the absence of the light was the proximate cause of the accident. This the plaintiff failed to do, because in his own case he admitted that a person could see for a distance of 150 to 200 feet down the road, and he also admitted his failure to observe whether or not the street lights were lit at the point of the alleged accident. An examination of the cases discloses that this theory of the law is correct. For example, the case of *Ireson v. Cunningham*, 90 N. J. Law, page 690, the Court says on page 691:

“Although the plaintiff was driving without a light on his wagon in violation of the statute, that fact does not operate to prevent his recovery if the defendant could see him, and if he could the unlawful act of the plaintiff in no way contributed to the accident.”

In the case at bar, no violation of the statute was charged or proven, but assuming that it had been, the statement that the road was clear and light for a distance of 150 to 200 feet would operate to defeat the plaintiff's cause of action. In spite of this, however, we still insist that there is no proof whatsoever in the plaintiff's case that the defendant's rear light was not lighted at the time of the alleged accident.

To the same effect is the case of *Surmaien v. Simons*, 107 Atlantic 229, where the Supreme Court of Rhode Island, on page 230, says:

“If, however, the collision between such traveler and the unlighted vehicle occurs in the night-time upon a highway which is itself so well lighted that the unlighted vehicle can be plainly seen by other travelers, then the fact that the violation of the statute is immaterial in consideration of the negligence of the respective parties be-

cause the absence of lights upon the vehicle had no causal relation to the collision. Therefore, the condition of the light in the highway in the neighborhood of the place of the accident in question became a material matter in the consideration of the case.”

To the same effect is the case of *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; also *Turner v. Bennett*, 161 Ia. 379, 142 N. W. 999.

In considering the motion for non-suit this Court undoubtedly will also consider the defendant's testimony, and if it does so, it will find that the testimony of Police Officer James Garrabrant is very pertinent. Garrabrant stated that he could see down the street a distance of 400 feet and that every third or fourth telegraph pole had an arc light on it. That the defendant's truck was squeezed against a telegraph pole which had a hundred-watt light on it. That this light was lit, because he took down the license number of the man, Joyce, underneath this particular arc light.

The courts of this State have considered the question as to whether or not the absence or obstruction of a tail light is negligence *per se.*, and in the cases of *Osburn v. De Young*, 1 N. J. ^{Adv. Rep.} 1573, 122 Atl. 809, the Court, speaking through Justice Kalisch, is quoted as follows:

“It is further insisted for appellants that the Court erred in refusing to charge the following request:

‘That if the jury believe that there was no tail light on the Martin truck at the time of the accident, or if there was a tail light such as Martin described, that Osburn and Hart obscured it from the view of Welsh, then the plaintiffs were guilty of contributory negligence and they cannot recover.’

This request is manifestly unsound as a legal proposition, in that it erroneously as-

sumes that in the absence of a tail light on the truck or its obscuration by Osbun and Hart, the plaintiff is debarred of a recovery, regardless of the fact whether or not either of the circumstances alluded to was the result of negligence and a proximate contributing factor to the defendants' negligence that caused the plaintiff's injury. For it is firmly settled that it is only where the plaintiff's act is a negligent one, and proximately contributes to the defendants' negligence that caused the plaintiff's injury that the latter is debarred of a recovery. The leading cases in this state which illustrate this doctrine are *New Jersey Express Co. v. Nichols*, 33 N. J. L. 343, 97 Am. Dec. 722; *New York, Lake Erie & Western Railroad Co. v. Ball*, 53 N. J. Law 283, 21 Atl. 1052; *Menger v. Laur*, 55 N. J. Law 205, 26 Atl. 180, 20 L. R. A. 61."

It seems to us that the language of the learned Justice Kalisch most adequately covers the situation in the case at bar. To the same effect is the decision of *Powers v. Standard Oil Co.*, 119 Atl. 273, where the Supreme Court of New Jersey held that the violation of a parking ordinance is not in itself negligence, and that it had to be shown that the violation was the proximate cause of the accident in order to create a duty upon the defendant.

POINT FOUR.

The Trial Court erred in its charge to the jury.

The Trial Court in its charge (S. C., 63, ll. 2-8) says:

"And the plaintiff says that upon the slowing down or stopping the lights were extinguished, so that it no longer displayed a light of warning."

It is respectfully submitted that the Trial Court in making this statement seriously prejudiced the jury and in fact created a jury question when none existed. It is true that both the plaintiff and his witness state that the lights were out, but their cross examination discloses that they did not know whether or not the lights were out, and the Trial Court, therefore, erred in making the bald statement that the plaintiff said the lights went out when the automobile slowed down or stopped, because that was not the fact. The fact was that the plaintiff and his witness stated that they couldn't say whether or not the light was really out in the rear because neither one of them went back there.

POINT FIVE.

It is respectfully submitted that the judgment entered in the above-entitled cause should be reversed and set aside and for nothing holden and a judgment entered thereon for the defendant.

Respectfully submitted,

HEINE, BRADNER & LAIRD,
Attorneys for Appellant.

PALMER BRADNER,
Of Counsel.

The weather is very fine today
and the children are very happy
to be out in the open air.
They have been playing for
hours and are now resting
under the big tree.

The children are very
friendly and they all
get along very well.
They are very kind
and helpful to each other.

The children are very
clever and they all
do their work very well.
They are very hard
working and they all
love to learn.

The children are very
kind and they all
love to help each other.
They are very friendly
and they all get along
very well.

The children are very
happy and they all
love to play together.
They are very kind
and they all get along
very well.

The children are very
friendly and they all
love to help each other.
They are very kind
and they all get along
very well.

New Jersey Court of Errors and Appeals

Michael Daly, Plaintiff-Respondent, vs. Singac Auto Supply Co., a corporation, Defendant-Appellant.	} Action at Law On Appeal from Passaic County Circuit Court
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BRIEF FOR PLAINTIFF-RESPONDENT

FACTS

This is an appeal from the judgment entered on the verdict of the jury in the above case in the Passaic Circuit Court in favor of the plaintiff in the sum of \$2500 for damages for grave bodily injuries and the monetary loss resulting therefrom.

The physical injuries were a fracture of the collar bone and a compound comminuted fracture of the right leg, besides shock and bruises. These injuries required protracted and expensive treatment, and though the injuries are cured the plaintiff has lost about ten percent of the use of his leg and five percent of his arm. (S. C., p. 57, l. 30.) He lost a large amount of wages, and spent considerable money for doctor's and hospital bills.

The injuries to plaintiff were caused by the defendant in this manner:

Plaintiff was negotiating with defendant, a corporation, engaged in the business of selling automobiles, and plaintiff having selected a truck he

intended to buy, the defendant arranged to demonstrate to plaintiff, and invited him to enter, the auto truck, to witness a demonstration of its operations. (S. C., p. 16, l. 30; p. 17, l. 30.) The auto truck was on the premises of the defendant. Plaintiff, before entering the auto truck, when it was cranked by defendant, noticed that the lighting device did not work, and called the attention of defendant to that fact. Something was then done, or attempted to be done, by defendant's mechanic to remedy this defective condition of the truck. (S. C., p. 18, l. 20.) This all occurred at about 8.30 p.m. on April 9, 1924.

After the defendant attempted to fix the lighting apparatus, plaintiff, with a companion, entered the truck, and defendant's servant drove the truck out on the highway to demonstrate it to plaintiff. After proceeding about 300 yards the operator throttled the auto truck, and it "stalled". (S. C., p. 18, l. 30.) It stalled on the highway known as the Newark & Pompton Turnpike, partly off the amosite, with its rear extending over the amosite at an angle. The lights went out when the auto truck stalled. (S. C., p. 19, top.) Plaintiff got out of the auto to permit the operator to get out and crank it. He stood on the side near the front of the auto waiting for the operator to start the engine; and while so standing the automobile of the defendant, John Joyce, came from the rear and collided with this defendant's auto truck and propelled it against plaintiff, throwing him underneath and causing the injuries complained of by him.

Plaintiff charged negligence on the part of both defendants, the Singac Auto Supply Company and John Joyce; the latter defendant could not be served with process. The Singac Auto Supply Co. was charged with having its truck equipped with faulty and defective mechanism and parts, and by reason thereof it stalled on the road; and because of the want of a rear light on said truck, the automobile of the defendant Joyce ran into it, thus producing the injuries to plaintiff (S. C., p. 6, l. 10). These facts were testified to by the plaintiff and the witness, Peter Daly, and were not contradicted by any witness on behalf of the defendant.

The Judge's charge was eminently fair, and the jury's verdict was abundantly justified by the evidence and should not be disturbed.

Answer to First Point of Appellant's Brief

Appellant's first ground of appeal is "The trial court erred in denying the defendant's motion to strike out the complaint filed in the above cause."

We insist that there is no merit in this for the following reasons:

1. As recited in the statement of facts in this brief plaintiff charged faulty and defective equipment on parts of defendant's truck, which defects caused it to stall while the operator was attempting to "throttle it down," in the course of the demonstration; and that while it was so stalled on the highway it showed no rear right, and in

consequence thereof the automobile of Joyce crashed into it from the rear. This is a very specific charge of negligence, and dereliction of the duty owed by the defendant to plaintiff, even without the use of the adverbs "carelessly" and "negligently". Appellant seems to urge that the supposed negligence of the defendant Joyce should excuse the negligence of the defendant Singac Auto Supply Company. Of course that is not so. The Court properly denied defendant's motion.

2. Appellant's notice contained in the answer, viz., "This defendant will object at or before the trial of the issue joined herein that the complaint does not sustain a cause of action" is fatally defective, and the Court was right in denying defendant's motion for that reason.

In *Dunn v. Chernewski*, 127 Atl. Rep., p. 338, a notice of a motion to strike out the complaint was given in the identical words used in defendant's notice, save that the word "constitute" was used instead of "sustain", and the Supreme Court, speaking through Justice Kalisch, there said: "The notice of the motion is radically defective. It does not specify any particular cause of objection as required by rules 42 and 43 of the new Practice Act."

"The practice in this respect is the same as declared by Section 191 of the Practice Act of 1903, P. L., p. 587, which provides: 'The notice of a motion to strike out any pleading or any part thereof shall contain a particular statement of the defects in or objections to such pleading on which the party giving the notice intends to rely, and

matters not specified in the notice shall not be considered on the hearing'." And the motion to strike out the complaint was denied.

Answer to Point Two

The second ground of appeal is "The Trial Court erred in refusing to strike out the answer to the following question: 'Who was driving the truck'? Answer: 'The salesman for the Singac Auto Supply Co.'"

The argument of appellant to sustain this point is not supported by the facts. Appellant says "there is no allegation in the complaint that any servant or agent of the Singac Auto Supply Co. was in charge of the defendant's truck at the time of the alleged accident," whereas the first paragraph of the complaint, (p. 5, l. 20) alleges that "plaintiff was riding in a Ford automobile truck owned by said defendant, and operated and controlled by said defendant through its agent and servant".

The testimony of the plaintiff is that he was negotiating with the defendant for the purchase of the truck; that it was driven from defendant's yard by the salesman, after a mechanic in defendant's garage attempted to fix the lights. (S. C., p. 16, l. 20; p. 17, l. 30; p. 18, l. 10.) There is no denial of any part of this testimony by the defendant.

The answer appellant asked to have struck out (S. C., p. 26, l. 33) had been made to questions

asked plaintiff several times in his previous examination without objection by defendant (S. C., p. 17, l. 30; p. 18, l. 10; p. 19, l. 25). Defendant's counsel not only permitted plaintiff without objection to testify to the fact that he was dealing with defendant's salesman, but even acknowledged that plaintiff's statement was made to defendant's salesman (S. C., p. 18, l. 18).

The motion to strike out the answer of plaintiff, came after the plaintiff had given the same answer several times without objection, and was for that reason alone, properly denied by the court. Moreover, the question and answer were entirely proper in connection with plaintiff's previous testimony.

Answer to Point Three

Appellant's third point is that the "Court erred in refusing to grant a non suit".

Practically the whole argument of appellant under this point is that there is no evidence in the case to prove negligence on the part of defendant; and appellant again wrongfully states that no negligence was charged.

Yet plaintiff charged that defendant's truck was equipped with defective mechanism and parts and in consequence thereof the truck stalled on the highway, and there is uncontradicted testimony of that fact, both by plaintiff and the witness, Peter Daly. (S. C., p. 18, l. 30; p. 38, l. 36-40.) The testimony of these witnesses is uncontradicted also to the effect that when the truck stalled the lights

went out, (S. C., p. 19, l. 12; p. 25, l. 4; p. 27, l. 10; p. 39, l. 3), and in the cross examination of the plaintiff (S. C., p. 31, l. 34-36) he gives the reason why the lights went out when the truck stalled, to wit, "that the lights were operated on a magneto."

But it seems unnecessary to argue this point further in face of the admission of counsel for defendant in his motion for a non-suit. In the course of his argument he says (S. C., p. 48, l. 40, and p. 49, l. 1-10) "Of course, I say to your Honor now in fairness that these trucks are operated—although as I say, the evidence don't show it— if this truck stops these lights all go out; but, I say, the mere fact that it was not lit, that was not the proximate cause of this accident."

It will be seen therefore, that the two elements of negligence charged against the defendant, to wit, having the truck equipped with defective parts and mechanism resulting in the stalling of the truck, and failing to have a rear light on the truck while it was stopped on the highway at night have been amply proved.

And who can gainsay that this constituted negligence on the part of the defendant in the circumstances?

Permitting an automobile to stand on a much travelled highway at night without a light is to invite almost certainly a collision. It is gross negligence.

This Court will take judicial notice of the moto

vehicle law, which requires automobiles to show a rear light, which must be a red light, when stopped on the highway, at night.

And in passing, we wish to say that, notwithstanding the labored effort of appellant to show that this particular night was not dark, its own witness, officer J. Garrabrant says (S. C., p. 55, l. 38) "Yes, it was a dark night."

Appellant argues that because the stalled, unlighted truck of defendant on the highway could have been seen by Joyce, the latter was negligent in colliding with it. Be this as it may, it does not excuse the negligence of the defendant, nor absolve it from responsibility for plaintiff's injuries caused directly by its negligence.

We have examined the cases cited by appellant to sustain its point, and frankly confess that we can see no applicancy of the principles there stated, or of the facts there recited, to the instant case. In those cases the parties to the suit were both operating vehicles on the highway, or were servants of the owners of the vehicles, and their conduct and care with regard to each other were the facts to be considered. Here the plaintiff was an invited guest of the defendant who had exclusive control of the truck and its operation. In fact, appellant does not urge that plaintiff was guilty of contributory negligence, although it made that one of its grounds of appeal.

With this evidence in the case, the Court could not properly grant the motion for a non-suit.

Answer to Point Four

The fourth ground of appeal is "The Trial Court erred in its charge to the jury."

The part of the charge excepted to is this "And the plaintiff says that upon the slowing down or stopping the lights were extinguished, so that it no longer displayed a light of warning."

Plaintiff did say so, and gave the reason in his cross examination why the lights went out (S. C., p. 31, l. 34-38) and counsel for defendant admitted that was the fact. (S. C., p. 48, l. 40, and p. 49, l. 1-10.) Surely it was not error for the Court to state this testimony to the jury.

We respectfully submit that there was no error in the admission of evidence nor in the Court's charge to the jury, and that the Court properly denied the motion for a non-suit, and that the judgment entered on the verdict should be affirmed.

MICHAEL J. MURPHY, and
ARTHUR C. DUNN,
Attorneys for and of Counsel
with Plaintiff-Respondent.

