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NEW JERSEY
Court of Errors and Appeals

NOTICE AND GROUNDS OF APPEAL

(Filed Nov. 9, 1923)

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NEW JERSEY SUPREME COURT

THOMAS McLAUGHLIN,

Plaintiff,

vs.

CHARLES DAMBOLDT,

Defendant.

Action
at Law
On Appeal
from Su-
preme
Court

20

To Samuel D. Williams, Esq.,
Attorney for Defendant.

Sir:

TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on the following grounds:

30

1. That the Supreme Court reversed the judgment of the Hudson County Circuit Court, whereas said Supreme Court should have affirmed the judgment of said Hudson County Circuit Court.

ALEX. SIMPSON,
Attorney for Plaintiff.

40

OPINION

(Filed Nov. 7, 1923)

NEW JERSEY SUPREME COURT

No. 23. June Term 1923

10

THOMAS McLAUGHLIN,
Plaintiff-Respondent,
vs.
CHARLES DAMBOLDT,
Defendant-Appellant.

20

Argued June 7, 1923.
Decided November 7, 1923.

On appeal from the Hudson Circuit Court.

Before JUSTICES KALISCH and KATZANBACH.

Alexander Simpson, Esq., for the Plaintiff-Respondent.

Samuel D. Williams, Esq., for the Defendant-Appellant.

30

Harlan Besson, Esq., Of Counsel.

Per Curiam:

This is an appeal from a judgment of the Hudson County Circuit Court. The action was instituted by Thomas McLaughlin, a motorcycle policeman against Charles Damboldt to recover for injuries received by McLaughlin due to a collision between the motorcycle he was riding and the auto-

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Opinion

mobile of the defendant. The plaintiff's injuries were severe including the loss of his right leg. The verdict was \$19,000 and was subsequently reduced by the trial court to \$16,500 for which amount judgment was entered. The collision took place in the Township of Weehawken in Hudson County on the thoroughfare known as the Weehawken Branch of the Hudson Boulevard, just east of the point where Highwood Avenue enters the Boulevard. The defendant was driving his car westerly on the right hand side of the Boulevard. The plaintiff, according to his testimony, was riding in an easterly direction, on an avenue known as Highwood Terrace, which entered the Boulevard at a point where the Boulevard made a curve to the southwest. He intended to turn into Highwood Avenue. He saw the Damboldt car approaching at a rapid rate of speed, as he claimed, and signaled to it to stop by the raising of his right hand. He then made the turn from Highwood Terrace to Highwood Avenue and in doing so was struck by the Damboldt car which had continued to move eastwardly rapidly. The defendant's account of the accident was that McLaughlin came from Highwood Terrace and along the Boulevard at high speed and then tried to pass ahead of a line of cars going in an eastwardly direction on the Boulevard in order to pass into Highwood Avenue without apparently making an observation. He crashed into the radiator of the defendant's car. These statements of the two versions of the accident are made to show the sharp conflict of the evidence. The appellant insists that the trial court should have granted the motion made to non-suit on the ground of the plaintiff's contributory negligence. We think on this point

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Opinion

the evidence presented a debatable question which made it one for the jury to pass upon.

10 The appellant further contends that he was prejudiced by portions of the Court's charge to which exceptions were duly taken. We are of the opinion that in this respect the appellant's contention is well founded. The learned trial judge said, "If you find that the accident was due to the negligence of this defendant and that such negligence was the proximate cause of the plaintiff's injury, then the plaintiff can recover in this suit, unless you find that the plaintiff was guilty of what the law terms contributory negligence, that is negligence on his part that contributed to this accident." He then said, "If you find from the evidence that the proximate cause of the plaintiff's injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant," and "If you find the defendant was not negligent, but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover."

20

30

We think these latter portions of the charge instructed the jury that it could not find the plaintiff guilty of contributory negligence unless the defendant was free from negligence. This is not the law. The defendant may have been negligent yet if the plaintiff had contributed to his injury in such a way that if he had not been negligent he would have received no injury from the negligence of the defendant, he cannot recover, notwithstanding the defendant's negligence.

40

ORDER ON REVERSAL OF JUDGMENT

NEW JERSEY SUPREME COURT

| | | |
|----------------------------|---|-----------------------|
| THOMAS McLAUGHLIN |) | On Appeal from |
| Plaintiff-below-Respondent |) | Hudson County Circuit |
| vs |) | Court. |
| CHARLES DAMBOLDT |) | RULE ON REVERSAL AND |
| Defendant-below-Appellant |) | REMITTITUR |

This cause having been duly argued at the June Term 1923, of this court by Harlan Besson, Esq., of counsel for the Appellant and Alexander Simpson, Esq., of counsel for the respondent and the court having inspected the record and judgment below and considered the grounds of appeal:

IT IS THEREUPON ORDERED, that the judgment of the Hudson County Circuit Court be in all things reversed, set aside and for nothing holden; and that the record and proceedings be remitted to the said Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

SAMUEL D. WILLIAMS,

Attorney for Defendant-below-Appellant.

To be inserted in State of Case, in place of Rule as printed on page 5.

NEW JERSEY SUPREME COURT

THOMAS McLAUGHLIN
Plaintiff-below-Respondent

vs

CHARLES DAMBOLDT
Defendant-below-Appellant

On Appeal from Hudson County
Circuit Court
RULE ON REVERSAL AND REMITTANCE

Samuel D. Williams
Att'y for Def't Appellant
810 Broad Street,
Newark, N.J.

FILED

Nov. 10, 1923
Edward J. Kelleher
Clerk

Order of Reversal of Judgment

It is said by the respondent that the trial court charged correctly on the subject of contributory negligence in the passage first above quoted. Assuming this to be so it does not cure a mis-statement of the law in another part of the charge because it is impossible to tell whether the verdict of the jury might not have been the result of the erroneous portion of the charge. In the present case the jury might have found that the plaintiff was guilty of contributory negligence had it not been for the Court's instruction that in order to do so the defendant must have been free from negligence. 10

This case is one of great importance to each of the parties. Each is entitled to an unequivocal statement from the trial judge as to the law. This we feel the appellant did not have. The judgment will be reversed and a *venire de novo* issued. 20

ORDER OF REVERSAL OF JUDGMENT

NEW JERSEY SUPREME COURT

| | | | |
|---|---|--|----|
| THOMAS McLAUGHLIN, Plaintiff-Respondent, vs. CHARLES DAMBOLDT, Defendant-Appellant. | } | On Appeal from Hud- son Cir- cuit | 30 |
|---|---|--|----|

This cause having been duly argued at the June Term, 1923, of this Court, by Alexander Simpson, Esq., of counsel for plaintiff-respondent, and Sam- 40

Notice of Appeal

uel D. Williams, Esq., of counsel for defendant- appellant, and Harlan Besson, Esq., of counsel, and the Court having inspected the record and judgment below,

10 It is thereupon, on this day of November, 1923, ORDERED, that the judgment of the Hudson County Circuit Court be in all things reversed and a *venire de novo* issue.

On motion of

SAMUEL D. WILLIAMS,
Attorney for Defendant-Appellant.

 NOTICE OF APPEAL

20

(Filed April 17, 1922)

NEW JERSEY SUPREME COURT

HUDSON COUNTY CIRCUIT COURT

| | | | |
|----|---|---|--|
| 30 | THOMAS McLAUGHLIN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> CHARLES DAMBOLDT, <div style="text-align: right;">Defendant.</div> | } | Action at Law. On Appeal to New Jersey Supreme Court. |
|----|---|---|--|

To Alexander Simpson, Esq.,
Attorney for Plaintiff.

Sir:

40 TAKE NOTICE, that the defendant appeals to the New Jersey Supreme Court from the whole of

New Jersey Supreme Court

Notice of Appeal

(Filed April 17, 1923)

HUDSON COUNTY CIRCUIT COURT

THOMAS McLAUGHLIN,

Plaintiff,

vs.

CHARLES DAMBOLDT,

Defendant.

Action at Law.
On appeal
to New Jersey
Supreme Court. 20

To Alexander Simpson, Esq., Attorney for Plaintiff.

Sir:

TAKE NOTICE that the defendant appeals to the New Jersey Supreme Court from the whole of the judgment in this cause, on the following grounds:

1. Because the trial court overruled the following question propounded by counsel for the defendant to the witness, Edward Patrick Sullivan: 30

“What was your salary as baggage man?”

2. Because the trial court overruled the following question propounded by counsel for the defendant to the witness, Raymond M. Radcliff: 40

Notice of Appeal

“And did you explain your answer that way at the other trial?”

10 3. Because the trial court overruled the following question propounded by counsel for the defendant to the witness, Edward A. Fenrich:

“Would he be responsible for what he said, would he know what he was saying in your opinion?”

4. Because the trial court overruled the motion for nonsuit by counsel for the defendant at the close of the plaintiff's case on the following ground:

20 That the proximate cause of the plaintiff's injury was his own negligence.

5. Because the trial court overruled the motion for nonsuit made by counsel for the defendant at the close of plaintiff's case on the following ground:

That the testimony offered by the plaintiff, showed that the plaintiff's injuries were proximately caused by the plaintiff's contributory negligence.

30 6. Because the trial court overruled the following question propounded by counsel for the defendant to the witness Charles Damboldt:

“Mr. Damboldt, why were you reporting to the police?”

40 7. Because the trial court denied the motion made by counsel for the defendant to direct a verdict in favor of the defendant, based upon the following ground:

Notice of Appeal

Because the entire evidence offered in the case showed that the plaintiff's negligence was the proximate cause of the injuries upon which he based his suit.

8. Because the trial court denied the motion made by counsel for the defendant to direct a verdict in favor of the defendant, based upon the following ground: 10

Because the evidence offered in this case showed as a matter of act, that the plaintiff was guilty of contributory negligence which was the proximate cause of the injuries upon which he based this suit.

9. Because the trial court in the face of timely exception taken by defendant's counsel, erroneously charged the jury as follows: 20

"If you find from the evidence that the proximate cause of the plaintiff's injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant."

10. Because the trial court, although requested to do so, refused to charge the jury as follows: 30

"4. Police Officers are not excepted from the operation of laws limiting the speed of vehicles on public highways."

11. Because the trial court, although requested to do so, refused to charge the jury as follows:

"7. If you find by a fair preponderance of the evidence that the proximate cause of the plaintiff's injury was his own negligence, then you must find your verdict for the defendant." 40

Summons

12. Because the trial court, although requested to do so, refused to charge the jury as follows:

10 “8. If you find that the plaintiff was driving on the left side of the street in the direction he was travelling, and that he was proceeding at excessive speed at the time of the accident, then you are entitled to infer that he was guilty of negligence.”

Dated, April 11th, 1923.

SAMUEL D. WILLIAMS,
Attorney for Defendant-Appellant.

20

Summons

(Filed Feb. 14, 1922)

The State of New Jersey to Charles Damboldt:

You are summoned to answer the annexed complaint of Thomas McLaughlin, in action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within 20 days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

30 WITNESS, Luther A. Campbell, Judge of the Circuit Court of the County of Hudson, at Jersey City, this 1st day of February, 1922.

JOHN J. McGOVERN,
Clerk.

Alex. Simpson,
40 Attorney.

Complaint

(*Filed Feb. 14, 1922*)

HUDSON COUNTY CIRCUIT COURT

| | | |
|---|---|-----------------------------|
| THOMAS McLAUGHLIN, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div> | } | 10 |
| vs. | | |
| CHARLES DAMBOLDT, <div style="text-align: right; padding-right: 20px;">Defendant.</div> | } | Action at Law. Complaint |

The plaintiff who resides at No. 42 First Street, in the Town of Weehawken, in the County of Hudson, State of New Jersey, says that:

1. Defendant, on the 14th day of September, 1921 was the owner of a certain automobile hereinafter mentioned 20

2. On said 14th day of September, 1921, said automobile of the defendant was being driven along a public highway known as the Boulevard, at the intersection of Highwood Terrace, Weehawken, in the County of Hudson.

3. The plaintiff, while riding a motorcycle along a public highway known as Highwood Terrace, at the intersection of the Boulevard, Weehawken aforesaid, on said 14th day of September, 1921 was struck by said automobile of the defendant. 30

4. The collision aforesaid was caused by the negligence of the defendant, which consisted in this:

Failure to use reasonable care by the defendant in the following particulars: 40

Complaint

- (a) To keep a lookout for persons in the vicinity of said automobile;
- (b) To control the motion thereof so as to avoid striking persons in the vicinity thereof;
- (c) To give warning of the approach thereof;
- 10 (d) To propel same at rate of speed safe to persons in the vicinity thereof;
- (e) To equip same with proper lights, appliances and brakes, as required by the statute in such case made and provided.

5. By reason of said negligence the plaintiff was so injured that his right leg had to be amputated.

6. The plaintiff was at all times in the exercise
20 of due care for his safety.

7. By reason of said injuries plaintiff has been compelled to expend money for medical attendance, and has lost and will hereafter lose earnings he otherwise would have made.

Plaintiff demands \$100,000 damages.

ALEX SIMPSON,
Attorney for Plaintiff.

Answer*(Filed Feb. 14, 1922)*

HUDSON COUNTY CIRCUIT COURT

THOMAS McLAUGHLIN,

Plaintiff,

vs.

CHARLES DAMBOLDT,

Defendant.

10

Action at Law.
Answer.

Defendant, residing at No. 153 First St. Hoboken, Hudson County, New Jersey, answering plaintiff's complaint says:

1. This defendant admits the allegations of the first paragraph of the plaintiff's complaint.

20

2. This defendant admits the allegations of the second paragraph of the plaintiff's complaint.

3. This defendant admits the allegations of the third paragraph of the plaintiff's complaint.

4. This defendant denies each separate subdivision of the fourth paragraph as if they were repeated at length.

30

5. As to the allegations of the fifth paragraph, this defendant has not sufficient knowledge or information to form a belief.

6. This defendant denies the allegations of the sixth paragraph of the plaintiff's complaint.

7. As to the allegations of the seventh paragraph, this defendant has not sufficient knowledge or information to form a belief.

40

Rule for Judgment

AFFIRMATIVE DEFENSES

1. This defendant avers that the accident complained of was caused by the negligence of the plaintiff.
- 10 2. This defendant avers that the negligence of the plaintiff contributed to the happening of the accident complained of.

SAMUEL D. WILLIAMS,
Attorney for Defendant.

Rule for Judgment

20 HUDSON COUNTY CIRCUIT COURT

| | | | |
|--|------------------------------|---|---------------------------------------|
| THOMAS McLAUGHLIN, <p style="text-align: center;">vs.</p> CHARLES DAMBOLDT, | Plaintiff, Defendant. | } | Action at Law Rule for Judgment |
|--|------------------------------|---|---------------------------------------|

- 30 The above entitled cause having duly come on to be heard before Hon. Willard W. Cutler and a jury on the 18th day of January, 1923, and the evidence having been adduced by counsel for the respective parties, the jury returned its verdict in favor of the plaintiff, Thomas McLaughlin and against the defendant, Charles Damboldt, in the sum of nineteen thousand dollars (\$19,000.00), damages.

40 It is hereby ordered and adjudged that the plaintiff, Thomas McLaughlin, have and recover against the defendant, Charles Damboldt, the sum

Rule to Show Cause

of \$19,000.00 damages and costs to be taken and judgment be entered accordingly.

WILLARD W. CUTLER,
Judge.

On motion of
Alex. Simpson, 10
Attorney for Plaintiff,
January 19, 1923.

Rule to Show Cause

(Filed Feb. 27, 1922)

HUDSON COUNTY CIRCUIT COURT

| | | | |
|---|---|---------------------------|----|
| THOMAS McLAUGHLIN, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">vs.</div> CHARLES DAMBOLDT, <div style="text-align: right;">Defendant.</div> | } | On rule to show cause. | 20 |
|---|---|---------------------------|----|

On application made within six days after the rendering of the verdict herein:

It is, on this 21st day of February, A. D. Nineteen Hundred and Twenty-three, on motion of Samuel D. Williams, Attorney of the Defendant, Charles Damboldt, ORDERED that the plaintiff show cause before this court on Saturday the 3rd day of March, A. D. Nineteen Hundred and Twenty-three, why the verdict in this case should not be set aside as to the damages allowed. 30

AND IT IS FURTHER ORDERED that the said defendant be permitted to reserve all the exceptions taken at the trial of this cause, and that this rule will not preclude the taking of an appeal by the said defendant. 40

WILLARD W. CUTLER,
Judge.

Order*(Filed Mar. 5, 1923)*

HUDSON COUNTY CIRCUIT COURT

| | | | |
|----|---|---|-------------------------------------|
| 10 | THOMAS McLAUGHLIN, . vs. CHARLES DAMBOLDT, Defendant. | } | On rule to show cause. Order. |
|----|---|---|-------------------------------------|

20 It appearing that there has been a rule obtained in the above entitled cause returnable on March 3rd, 1923, at the Court House in the City of Jersey City, N. J., and it further appearing that it is impossible for Mr. Besson, attorney for the defendant on this rule to show cause, to appear to argue this rule on March 3rd, 1923:

30 IT IS THEREUPON on this day of March, A. D. Nineteen Hundred and twenty-three, ORDERED that the above rule be extended from March 3rd, 1923 to March 10th, 1923, at ten a. m. at the Court House in the City of Jersey City, N. J.

WILLARD W. CUTLER,
Judge.

We consent to the making of the above order.

ALEXANDER SIMPSON,
Attorney for Plaintiff.
SAMUEL D. WILLIAMS,
Attorney for Defendant.

Judgment*(Filed Mar. 31, 1923)*

HUDSON COUNTY CIRCUIT COURT

| | | | |
|----|--|---|--------|
| 10 | THOMAS McLAUGHLIN, <div style="text-align: right;">Plaintiff,</div> | } | Order. |
| | vs. | | |
| | CHARLES DAMBOLDT, <div style="text-align: right;">Defendant.</div> | | |

20 The above entitled cause having been tried at the Hudson County Circuit Court, and the jury having rendered a verdict in favor of the plaintiff for \$19000. And the defendant having obtained a rule to show cause why the verdict should not be set aside and a new trial granted, and the said rule having been duly argued and considered by the Court.

And the Court having filed its memoranda, finding among other things that "the verdict of \$19000. is excessive.

30 If the plaintiff will consent to reduce his verdict to sixteen thousand five hundred dollars (\$16500.) it may stand for that amount, and unless the plaintiff will within ten days after a copy of a rule drawn in accordance with this memoranda is served on his attorney, file his written consent to such reduction with the Clerk of this Court, a new trial will be granted, but on the question of damages only."

40 And the plaintiff having within ten days after the filing of said memoranda, filed with the Clerk of this Court his written consent that the said

Testimony

verdict be reduced to sixteen thousand five hundred dollars (\$16500.).

It is on this thirty first day of March, 1923, ordered that the said verdict of nineteen thousand dollars be reduced to sixteen thousand five hundred dollars (\$16500.) and that judgment be entered in favor of the plaintiff and against the defendant for the said sum of sixteen thousand five hundred dollars (\$16500.), and that the said rule to show cause be discharged. 10

WILLARD W. CUTLER,
Judge, etc.

Testimony

20

HUDSON COUNTY CIRCUIT COURT

 THOMAS McLAUGHLIN,

vs.

CHARLES DAMBOLDT.

 Tried January 18, 1923 before CUTLER, J. and a jury. 30

Alexander Simpson for the plaintiff.
Samuel D. Williams and Harlan Besson for the defendant.

THOMAS McLAUGHLIN, sworn:

Direct-examination by Mr. Simpson:

Q. Mr. McLaughlin, how old are you? A. Going on 39. 40

Thomas McLaughlin—Direct

Q. What is your business? A. Police officer.

Q. Were you a police officer connected with the police department of Weehawken on the 14th of September, 1921? A. I was.

(10) Q. How long have you been connected with the police department? A. Around six months; more than six months.

Q. Were you on a motorcycle on that day? A. I was.

Q. Where were you on duty? A. I was on duty on Highwood Terrace and Park Avenue.

Q. Highwood Terrace runs from where? A. From Park Avenue to the Boulevard—Hudson County Boulevard—East Boulevard.

(20) Q. I show you a picture; can you tell me if that is a picture of Park Avenue near the scene of the accident? A. This is a picture of Highwood Terrace looking south. Highwood Avenue is here; this is the Boulevard; Highwood Terrace is here; this is the Boulevard going this way.

Q. Then this is a picture of Highwood Terrace? A. Highwood Terrace this way.

Q. Is it a picture of Highwood Terrace as it goes toward Union Hill? A. Toward Union Hill.

(30) Q. Is that a correct picture of it as it was on the day of the accident? A. Correct picture.

Photograph offered in evidence and marked P-1.

Q. I show you another picture. Can you tell me whether that is a correct—A. That is Highwood Terrace going east.

Q. Going towards the Boulevard? A. Going towards the Boulevard.

Q. Is it a correct picture of Highwood Terrace on the day of the accident? A. Correct.

(40) Photograph offered in evidence and marked P-2.

Thomas McLaughlin—Direct

Q. Now, what time of the day did the accident occur? A. Six o'clock.

Q. In the evening? A. In the evening.

Q. Was it daylight? A. Daylight.

Q. Where were you coming from? A. Coming from Park Avenue and Highwood Terrace.

Q. You were going where? A. Going east on Highwood Terrace. I was moving in the direction of the Boulevard. 10

Q. What were you doing there that day; what duty were you on? A. I was on fixed post for two hours; then I was off an hour to ride the town, ride all over; then I came back and worked two hours more and rode another hour. This hour I rode the town.

Q. Took care of traffic and anything? A. Traffic and anything. 20

Q. And on this day at six o'clock you were about to go where? A. To the garage to get gas and oil. We generally do at that time of night.

Q. What kind of a motorcycle were you riding? A. Harley Davidson.

Q. How much did that weigh? A. Close on to four hundred pounds.

Q. Did you see the car of the defendant before the accident? A. I did. 30

Q. Where were you when you first saw this car? A. I was on the southern part of the Boulevard, that is the southern side of the Boulevard; the Boulevard runs east and west at that particular point.

Q. You mean there is a spur of the Boulevard there? A. Yes. I had come directly straight, going east on Highwood Terrace to the Boulevard.

Q. I do not quite follow you; you mean you were going from Highwood Terrace? A. I was going from Highwood Terrace. 40

Thomas McLaughlin—Direct

Q. In other words, you were going away from Bergenline Avenue? A. Away from Bergenline Avenue; I was going east.

Q. Towards the Boulevard? A. Towards the Boulevard.

Q. And you had got onto that spur of the Boulevard? A. Yes; onto the spur of the Boulevard.

Q. About how far from the river wall were you there? A. The river wall there is quite a ways.

10 Q. A block or two blocks? A. The river wall would be close on to fifteen hundred feet from where I was.

Q. And you were going in the direction of the river wall? A. In the direction of the river wall.

Q. When you saw this man's automobile can you tell where it was? A. Yes; it was on the top of the hill, coming over the knoll of the hill. There is a hill there.

20 Q. It was in full sight? A. It was in full sight of me.

Q. Can you tell whether it was going fast? A. It was going very fast as I thought.

Q. That is as it appeared to you? A. Yes.

Q. There was some talk in the opening of the defendant about there being a line of automobiles and you having shot out from behind them. Did you see any line of automobiles? A. There was nothing on the Boulevard, only myself and this one automobile.

30 Q. As he came he was on what side of the street? A. On the right-hand side of Highwood Terrace.

Q. Going which direction? A. Going east. I came up on the right-hand side of the Boulevard.

Q. I do not care where you came. He came up on the right-hand side? A. I came on the right-hand side and he came down the middle of the street.

Thomas McLaughlin—Direct

Q. That is what I am asking you, about him; he came down the middle in what direction, towards the river or away from it? A. He was coming away from the river.

Q. When you saw him coming in the middle of the street what did you do? A. I was going to cross into Highwood Avenue and I put up my hand to cross over. 10

Q. Wait a minute now. Can you show me on either of these pictures which have been offered in evidence—A. Both of them.

Q. —where Highwood Avenue is? A. This is Highwood Avenue here.

Q. Make an "H. A." where you say Highwood Avenue is and make an "M" where you say you were. A. This is the Boulevard right here (witness marks picture). 20

Q. You being at "M" and wanting to go to where you have marked "H. A." what did you do to avoid this automobile or to signal to him that you were coming? A. I put up my right hand.

Q. How far away was he from you when you put up your right hand? A. I should judge forty feet or more—fifty feet.

Q. When you say forty feet do you mean directly across? A. Directly behind me. 30

Q. Did you do anything then; did you turn and proceed? A. I turned and proceeded into the avenue.

Q. Towards the avenue? A. Towards the avenue.

Q. What was the next thing that happened? A. The automobile was on top of me and I tried to avoid it by—

Q. Don't tell us so much at one time. The next thing that happened you found the automobile on top of you? A. On top of me. 40

Thomas McLaughlin—Direct

Q. How far away from you was it? A. When I first saw the—

Q. Not when you first saw it; when you saw it on top of you how far away from you was it? A. Less than six feet.

10 Q. When you saw it on top of you was it moving? A. It was moving.

Q. When you saw that position of danger what did you then do? A. I put my hand out to avoid an accident; that is I tried to throw the machine first, and the machine was very heavy and when you try to throw the machine—I could not throw the machine this way; and I put my hand this way and I threw myself. When I threw myself the bumper of the car—that is, the bumper of the car—
20. —the car was coming in this direction; I was about on a 45 degree—

Q. “In this direction” doesn’t mean anything; to these men or to me. A. I was over a 45 degree.

Q. Do you mean 45 degrees when you started to turn or—A. Forty-five degrees when—

Q. Wait a minute; you do not know what I am going to say. Do you mean forty-five degrees when you started to turn or when you found the automobile on top of you? A. When I started to
30. turn.

Q. When you found this automobile on top of you, what was your position? A. I was almost across—I was across the avenue.

Q. Were you practically directly in front of him? A. Practically directly in front of him.

Q. When you saw this danger and saw he was not stopping and you started to throw your machine, what else did you do? A. I threw my hand this way and grabbed the radiator of the machine.

40. Q. And what happened to you? A. The next I remember I was going over the radiator, but I

Thomas McLaughlin—Direct

held onto it and I slid down the radiator to the mudguard and off the mudguard onto the street alongside of the curbstone.

Q. That is, you went completely over the car?

A. I went completely over the car in that direction.

Q. And did you fall on the mudguard? A. Not exactly; I slid over.

Q. You found yourself then on the other side of the car? A. On the right-hand side of the car.

Q. Do you remember whether or not he was moving with the car? A. Yes; he was moving, because if I didn't jump when I was going he would have run over me.

Q. When you were in this process as you described it of going over the car, you say it was still in motion? A. Still in motion.

Q. When you got off the car where did you find yourself? A. The next I remember I was laying alongside of the curbstone, within three or four feet of it.

Q. Up to that time, from the time you put up your hand to signal him, until the time of the collision, did you hear any horn blown or signal given? A. No, sir; no signal given or no horn blown.

Q. Then what was the next that happened? A. They picked me up and put me in an automobile and took me to the North Hudson Hospital.

Q. How long were you there? A. I was in the hospital ten weeks.

Q. Ten weeks? A. Ten weeks to the day.

Q. What were your injuries? A. I lost my leg below the knee, injured my left leg, cut it all up through here, and the knee, and my shoulder—my right shoulder, my right arm

Q. What is the condition now of your leg that

Thomas McLaughlin—Direct

was not taken off? A. That is in fairly good condition.

Q. What is the condition of your shoulder? A. My shoulder is in fairly good condition.

Q. How long do you say you were in the hospital? A. Ten weeks.

Q. What were you earning at the time of your accident? A. Two thousand dollars.

10 Q. While you were in the hospital did this man, the defendant, come in to see you? A. Yes; I remember him coming in once to see me.

Q. How long had you been in the hospital then? A. I believe around three or four days; I am not positive sure.

Q. He came in to talk to you about the accident, did he? Or were you under opiates? Don't you remember? A. I really do not remember what he did say.

20 Q. You were under opiates? A. Yes; I was very bad then. They did not expect me to live for four days. The fifth day was the first time they had hopes for me.

Q. Who was your physician? A. Doctor Fenrichs.

Mr. Simpson: Cross-examine.

Mr. Williams: I understand Senator Simpson does not require me to qualify this map. I would like to put it in before I cross-examine Mr. McLaughlin.

30 The Court: Have you any objection to his offering the map now?

Mr. Simpson: No.

The Court: It may be offered by consent at this time of the parties.

Map designated D-1.

Thomas McLaughlin—Cross

CROSS-EXAMINATION by Mr. Williams:

Q. Officer McLaughlin, you said, as I understand it, that you were on your way to the garage at that time? A. Yes.

Q. Where is the garage? A. Highwood Avenue and Hudson Place.

10

Q. Highwood Avenue is a different street from Highwood Terrace? A. Yes.

Q. Can you see this map from where you are? A. I can see it, but I don't know what is on it. Do you want me to go over and look at it?

Q. I wish you would, please. I wish you would look at the map and say if it correctly shows the street intersections at the scene of this accident.

A. This is the Boulevard. There is one thing wrong. This corner does not project out far enough on the map—nothing like it.

20

Q. Does it show Highwood Avenue? A. Part of it, but it does not show Duer Place.

Q. Is that the street the garage was on? A. The garage is down this street.

Q. Down Highwood Avenue? A. Down here, over about three hundred feet.

Q. How long had you been on duty at the time of this accident on this day? A. I went on duty at four o'clock that afternoon.

30

Q. And what were you going to the garage for? A. For gas and oil.

Q. Where was your post of duty? A. My post of duty was a fixed post for two hours at the corner of Highwood Terrace and Park Avenue; then for the next hour I would ride the town; that would be all over the town; then I would come back and do two more hours.

Q. You mean the first two hours were from four to six? A. From four to six I would be on fixed post.

40

Thomas McLaughlin—Cross

Q. And you had just finished your fixed post duty? A. I had just finished my fixed post.

Q. You said you were proceeding on Highwood Terrace on the right-hand side of the street, is that correct? A. Yes, sir.

10 Q. What sort of pavement has Highwood Terrace? A. Asphalt; composition.

Q. And the Boulevard the same? A. A composition of asphalt, I believe.

Q. And you say when you saw this Damboldt car it was in the middle of the Boulevard? A. Yes.

Q. About half way up the hill? A. Yes; more than half way up the hill, in the middle of the Boulevard.

20 Q. And that you think it was going fast. What do you mean by that? A. I said the car was going fast. I mean the car was going probably 25 miles an hour.

Q. How fast? A. About 25 miles an hour.

Q. How far away from you was it when you first saw it? A. Fifty feet or more.

30 Q. Fifty feet or more might mean five thousand feet. A. No, not exactly. It was a pretty hard thing to judge a man at a distance when you were both riding and he was coming to you. You could probably judge fifty feet the length of this room.

Q. The car was in the middle of the hill? A. Yes.

Q. And where were you? A. On the right-hand side of the road.

40 Q. Whereabouts, in Highwood Terrace? A. I was not on Highwood Terrace at that time when I saw the car; I was on the Boulevard. Highwood Terrace ends there.

Q. You said, as I understand it, on the direct-

Thomas McLaughlin—Cross

examination, that you were in Highwood Terrace when you first saw this car. A. I do not believe I said that; I said I was on the Boulevard.

Q. You did not say that? A. Not that I know of.

Q. Supposing you had said it, were you mistaken? 10

Mr. Simpson: I object to that as improper cross-examination. It is first supposing and then asking an opinion on an impossible proposition.

The Court: Objection sustained.

Q. Do you remember whether you said in answer to one of Senator Simpson's questions that you first saw this car when you were in Highwood Terrace? A. No; I do not remember that. 20

Q. The Damboldt car, however; was in the middle of the Boulevard? A. Yes, as near as I can judge.

Q. Now, do you want to qualify that, Officer?

Mr. Simpson: I object to that. His desire to qualify is not proper cross-examination.

The Court: He may answer that question.

(Question repeated.) 30

A. Yes; the car was in the middle of the Boulevard.

Q. How do you apply the brakes on the car you were driving that day? A. You mean the motorcycle I was driving?

Q. Yes. A. With your right foot.

Q. It is a foot brake? A. It is a foot brake.

Q. Were the brakes in good condition on that day? A. Positively; it was a brand new machine.

Q. How fast were you driving on the motorcycle 40

Thomas McLaughlin--Cross

when you first saw Mr. Damboldt's car? A. Going to make the turn, do you mean?

Q. How fast were you driving your motorcycle when you first saw Mr. Damboldt's car? A. About six miles an hour.

10 Q. At six miles an hour in how short a distance could you stop your motorcycle? A. In less than its own length at that rate of speed.

Q. In less than its own length? A. Yes; you can stop it directly—right short.

Q. How long had you been driving this particular motorcycle? A. This particular motorcycle I had been driving about one month because it was a brand new machine.

20 Q. About how long? A. About one month. I was the first one that ever drove the machine. It came out of the store and I rode it first—that particular machine.

Q. How long had you been running a motorcycle prior to this accident? A. A year.

Q. A year? A. More.

Q. The same type of motorcycle as this one? A. The same type.

30 Q. You say you were going six miles an hour about when you first saw Mr. Damboldt's car; how fast were you going when you had made this 45-degree turn that you speak of? A. Why, about six miles an hour.

Q. You had not decreased your speed? A. No, sir; if anything I decreased the speed in making the turn, if anything.

Q. That actually slowed you down a little? A. Actually slowed me down.

40 Q. So that would you say you were going more slowly after you made this turn? A. No; I would not say I was going any slower; I was going six miles an hour.

Thomas McLaughlin—Cross

Q. That is after you made the turn? A. From the time I started around the turn.

Q. So that when this car got six feet away from you, as you said on direct-examination, you still could stop your car within its own length? A. Yes.

10

Q. Now, how do you control the speed of that motorcycle other than by the brakes? A. I control it with the gas.

Q. Where are the gas controls? A. On the handle bars.

Q. Is there one on each handle bar? A. One on each handle bar; the spark on one side and the gas on the other.

Q. And which is which? A. The spark is on the left-hand side.

20

Q. And the gas on the right? A. On the right.

Q. And which hand was it that you raised—your right hand? A. My right hand.

Q. And did you raise that right hand before you started to make this forty-five degree turn? A. I did.

Q. Now, you testified in this case before, didn't you? A. I did, sir.

Mr. Williams: I understood from Senator Simpson that he would not require that I qualify the transcript. 30

Mr. Simpson: I admit that Mr. Kelley has given him this typewriting as a correct transcription of the shorthand notes. That is, I do not admit it for the purpose of this case, but I say what he holds in his hand is a correct transcript.

Q. How long ago was this, Officer McLaughlin? A. It was September the 14th, a year ago—a year past. 40

Thomas McLaughlin—Cross

Mr. Simpson: No; he means when was the last trial?

A. I do not remember the last trial, the date of it.

Q. Do you remember testifying at the last trial
10 as to where the Damboldt car was when you first saw it? A. I am not sure.

Q. You are not sure? A. That is, where I first saw it?

Q. Yes. A. Yes; I guess I did.

Q. Mr. McLaughlin, I ask you if in answer to a question of Senator Simpson on the other trial as follows: "Q. When you were on your right-hand side on Highwood Terrace and first saw this car, where was the car?" your answer was:
20 "A. About seventy-five feet up the Boulevard on the left-hand side of the street." Is that where the Damboldt car was? A. Well, the Boulevard is a wide space; it is pretty hard to judge the middle from the right to the left-hand side of that street. I said the car was, I believe, on that first trial—I believe I said the car if anything was a little bit to the left of the street, if I remember correctly.

Q. How wide is the Boulevard, do you know?
30 A. I believe the Boulevard there is around sixty feet.

Q. And you say because of its width it is hard to judge whether a car is on the left or right? A. Yes; it is very hard to judge. On the extreme right or left you can tell; but when you look up a street you can't exactly tell; we never measure it.

Q. You say now the car was on the left-hand side of the Boulevard, as you said on the other
40 trial, or in the middle as you said on this trial?

Thomas McLaughlin—Cross

A. I say it was in the middle if anything. One wheel may have been to the left of the street.

Q. How much to the left? A. Probably two feet. Probably two feet.

Q. Now, I ask you if you remember testifying as follows in answer to a question of Senator Simpson's: "Q. How close to the left hand? A. Probably eight feet away from the curb." A. I do not remember. 10

Q. You do not remember that? A. I do not remember.

Q. I ask you if you remember testifying in answer to a question of Senator Simpson's: "Q. How far away was he (I presume he meant Mr. Damboldt) from you when you signaled to him to stop, that you were going to cross?" A. 20 Probably between seventy and seventy-five feet I judge." Do you remember that? A. I do not remember.

Q. You said this morning in answer to a question of Mr. Simpson's that you landed on the pavement close to the right-hand curb of the Boulevard; is that correct? A. Yes, sir.

Q. Were you conscious when you landed on the pavement? A. Just about. That is all I remember. I just remember falling over, that is 30 all I remember; and the next I remember was Officer O'Connor grabbing me, and that is all I remember. I do not remember anything more. I remember laying back on the street and I guess I was close to the curbstone.

Q. Is your statement about where you landed only a guess? A. No; it is a sort of a dream, that is all it is, I can not exactly swear where I landed, but as near as I can remember I landed near the curbstone—not exactly near the curbstone, within 40

Thomas McLaughlin—Cross

where I could see the curbstone, falling this way. That is what I remember.

Q. That was the right hand curbstone? A. That was the right-hand curbstone; I know that.

Q. And how far away from Highwood Avenue were you? A. You mean Highwood Avenue—the intersection of Highwood Avenue?

Q. Yes. A. I should judge it would not be over eight feet.

Q. And that is toward the sea wall? A. That is what I call the east side of Highwood Avenue.

Q. Perhaps we do not understand each other. A. The sea wall is too far away from there. The sea wall is fifteen hundred feet away from there. I cannot judge by the sea wall. I will give you the intersection of the street. You have a map there; I will show you on the map.

Q. I was trying to save you that trouble. You were you say, eight feet away from Highwood Avenue? A. Yes, sir.

Q. Were you toward the sea wall or toward Park Avenue? A. Toward the sea wall; that is the east side of Highwood avenue.

Q. Now, you say you grabbed the radiator of the Damboldt car? A. As near as I can remember.

Q. Do you remember which hand you grabbed it with? A. I did, because my shoulder was out of place; that is how I remember it so well. I wrenched my wrist; I wrenched my shoulder.

Q. Which shoulder was out of place? A. Right shoulder.

Q. Is that the only thing on which to base your statement that you grabbed the radiator? A. That is about the only thing that I can say, because I remember just reaching over and grabbing

Edward Patrick Sullivan—Direct

it. Naturally I am right-handed and I would grab it with my right hand.

Q. Isn't it possible the wrenched shoulder and the sprained wrist came from the collision, the blow of the collision? A. It could be possible.

Q. And in spite of the fact that you grabbed it with your right hand—if the vehicle had been on the left of you you would have grabbed it with your left hand? A. The vehicle happened to be on my right hand; that is why I grabbed it with my right. I would not grab over this way to grab. 10

Q. Do you testify now under oath that you grabbed that radiator of the Damboldt car? A. I went over it.

Q. I am not asking you that; I asked you if you grabbed it. A. I do not remember. 20

Q. How long had you been a traffic policeman prior to this accident? A. About six months; four or six months.

 EDWARD PATRICK SULLIVAN, sworn:

Direct-examination by Mr. Simpson: 30

Q. Where do you live? A. 6 Pleasant Avenue, Weehawken.

Q. How long have you lived in Weehawken? A. Over ten years.

Q. What is your business? A. Deckhand on the West Shore ferries.

Q. On the day of this accident in September, 1921—I think the date is September 14, 1921—about six o'clock were you going to your work? A. Yes. 40

Edward Patrick Sullivan—Direct

Q. Where do you live? A. No. 6 Pleasant Avenue.

Q. Where is that with reference to the place of this accident? A. It is about eight or nine blocks south of Highwood Terrace.

10 Q. When you got to Highwood Terrace or the vicinity of Highwood Terrace, did you see Officer McLaughlin? A. Yes; I saw him on the corner, standing on the corner.

Q. Was his motorcycle with him? A. His motorcycle was there.

Q. On the corner of what? A. Park avenue and Highwood Terrace.

Q. Then you walked on? A. Yes; down Highwood Terrace.

20 Q. Did you see this automobile which afterwards hit him before it hit him? A. Yes; I saw the automobile before it hit him.

Q. Where was the automobile when you first saw it? A. Just coming over the hill on the Boulevard.

Q. How was it coming, fast or slow? A. Yes; it was coming pretty fast.

30 Q. When you say "pretty fast" was it coming fast enough to attract your attention? A. Yes.

Q. Which side of the street was it on? A. Right side of the Boulevard.

Q. It was about how far from the point where you saw him standing with his motorcycle? A. About seventy feet—about sixty or seventy feet.

Q. Did you speak to McLaughlin? A. I did, on the corner of Park Avenue and Highwood Terrace.

40 Q. As you passed him? A. As I passed him then.

Edward Patrick Sullivan—Direct

Q. As you passed him was that before or after you saw this fast-approaching automobile? A. Before.

Q. How long before? A. About four or five minutes I guess.

Q. Then you saw the automobile after you had passed him? A. Yes. 10

Q. At the time you saw it coming fast did you hear any horn or signal that it wanted the right of way? A. No, sir; I did not.

Q. Then what was the next thing that attracted your attention? A. Officer McLaughlin was coming down. I stood about eight feet from the corner. There were some children playing there, and I just stood looking at the children playing, and Officer McLaughlin passed me. As he passed me I turned to look at him. He kept going down Highwood Terrace until he got onto the Boulevard, and I saw him going along the Boulevard, and he raised his hand like that (illustrating) as he went to make the turn. This Damboldt car came down and struck Officer McLaughlin. 20

Q. You are sure it was moving when it hit him? A. It was moving when it hit him.

Q. Was it moving as fast as it was when you first saw it, or had it slowed down? A. I believe the man had the brakes on, but he put the brakes on about the time he struck Officer McLaughlin, and he pushed the motorcycle with Officer McLaughlin on it. 30

Q. How far did he push it? A. About six feet.

Q. Did you see what happened to the officer? A. I saw the officer fall over the side of the automobile onto the pavement.

Q. Then what did you do? A. I ran over and 40

Edward Patrick Sullivan—Cross

saw the officer laying on the ground, and I looked down and saw the officer's foot was off.

Q. You saw his foot was off then? A. Yes, sir.

Q. Where was the motorcycle when you got over there? A. It had fallen in front of the auto-
10 mobile.

Q. Was it directly in front or to the left or to the right of the automobile? A. That I cannot say; it was lying there.

Q. He was lying under the motorcycle with his foot off? A. Yes.

Q. Did you see the condition of the motorcycle, whether it was smashed up or not? A. No; I did not take notice to the motorcycle.

Q. Then he was taken away? A. Yes.

20 Q. Did you see this man Damboldt, the defendant, there? A. There was four people in the car, but none got out of the car to help him.

Q. Who did help him? A. Officer Connors arrived and Officer Connors and I helped him.

Q. And the four people stayed in the car? A. Yes, sir.

Q. Did you hear anybody in the car say anything immediately after the accident? A. No, sir.
30

CROSS-EXAMINATION by Mr. Williams:

Q. Where were you employed on the day of this accident? A. New York Central Railroad.

Q. What department? A. The baggage department.

Q. Where? A. Weehawken.

Q. What did you do there in the baggage department? A. We handle trunks, handle people's baggage.

40 Q. You are a baggageman? A. Yes, sir.

Edward Patrick Sullivan—Cross

Q. Who was your superior officer? A. At that time?

Q. At that time? A. Mr. Maerhof, Stationmaster.

Q. Mr. who? A. Charles Maerhof.

Q. He was Stationmaster? A. Yes. 10

Q. How long had you been in the baggageroom of the Weehawken station prior to this accident?

A. I was only there about three months; to be exact, from July.

Q. What time were you supposed to go on duty this particular day? A. Six-thirty.

Q. How far away from the scene of this accident is the Weehawken station? A. It is down at the foot of the hill. I do not know how far you would call it; probably half a mile. 20

Q. You had been walking that route for some time? A. Yes.

Q. How long would it take you ordinarily to go from the scene of this accident to the Weehawken station? A. About ten minutes.

Q. About ten minutes? A. Yes, sir.

Q. How long did you continue to be employed as a baggageman at that place after this accident?

A. I think it was in October I was laid off, after the rush was over. 30

Q. That was about a month after this accident?

A. Yes—well, it wasn't quite a month. I was there about three weeks, I guess.

Q. What was your salary as baggageman?

Mr. Simpson: I object as improper cross-examination. Suppose he got a million dollars a month, what difference would it make in this case?

The Court: That is not competent. 40

Edward Patrick Sullivan—Cross

Mr. Williams: I think on the question of credibility of this witness it is competent.

Mr. Simpson: Do you mean a man who gets forty dollars is more to be believed than a man who gets eighty?

10 The Court: I will sustain the objection.

Mr. Williams: Exception.

Q. You say you went on duty at 6:30? A. Yes.

Q. What time did you go off duty? A. 2:30 in the morning.

Q. You testified in this case before, didn't you? A. Yes.

Q. As I understand your story you first saw Officer McLaughlin on his fixed post at Park street and Highwood Terrace? A. Park Avenue
20 and Highwood Terrace.

Q. How far from the scene of this accident is that? A. About a block and a half on one side of the street.

Q. Is it more on the other side of the street? A. There is a short street comes in on the right-hand side of Highwood Terrace.

Q. One short street? A. Yes.

Q. Isn't there more than one short street; do you know if there is more than one short street?
30 A. No, I really do not.

Q. You had been in the habit of walking up there for some time prior to this accident? A. Yes.

Q. Did you have to walk up on the same side that you walked up on this night? A. No, not always.

Q. You said about five minutes before the happening of the accident it was that you saw Mr. McLaughlin at his fixed post? A. Yes.
40

Q. Had it taken you that five minutes to go

Edward Patrick Sullivan—Cross

from Park Avenue to Highwood Avenue? A. No; it did not take me all that time.

Q. Where did you go in the meantime? A. I met a friend on the way down and was talking to him for a few minutes.

Q. Where did you meet him? A. Just be- 10
tween—I do not know exactly whether it is Edgar Street or not that runs in there. It was just a little below Park Avenue that I met this friend of mine. He worked in the gang with me; he was off that night.

Q. How long did you talk with this friend? A. Two or three minutes, I guess—two minutes.

Q. Then you proceeded easterly toward the sea wall? A. Yes.

Q. Where were these children playing that you 20
speak of? A. In the house—one house from Highwood Avenue.

Q. Toward Park Avenue? A. Towards Park Avenue.

Q. You do not mean they were in the house, do you? A. No; on the street.

Q. On the sidewalk? A. On the sidewalk.

Q. Did you stand there watching them play?
A. Just for a moment, that was all.

Q. What were they playing? A. I do not know 30
what they were playing; they were playing around the street as children always do.

Q. What caused you to stop and watch them playing? A. Nothing, only curiosity, I suppose.

Q. What time was this? A. About four or five minutes after six.

Q. Four or five minutes after six? A. Yes; it might have been a little later.

Q. You say you watched them—stopped and
watched them about a minute? A. Yes. 40

Edward Patrick Sullivan—Cross

Q. Then you went on east, didn't you? A. Yes.

Q. When you went on east you had your back to Park Avenue? A. Yes.

Q. You were facing away from Park Avenue? A. Yes.

10 Q. You were facing away from the direction that Officer McLaughlin was coming? A. Yes.

Q. You said on your direct-examination a moment ago that when you saw this Damboldt car it was on the right side of the Boulevard; is that correct? A. Yes.

Q. You testified in this case before, didn't you? A. Yes.

Q. Do you remember when it was? A. No; I do not.

20 Q. It was not very long ago, was it? A. No; it is not so very long ago.

Q. Do you remember in answer to a question of Senator Simpson's as follows: "Q. And where was the automobile; was it on his right-hand or on his left-hand side?" answering "It was on his left-hand side"? Do you remember that A. It was on the left-hand side of Officer McLaughlin.

Q. Is that what you meant by that answer? A. I suppose it was.

30 Q. Is that what you meant by that answer? A. I do not know.

Q. You do not know? A. No.

Q. Now, I will ask you another question. Do you remember in answer to a question of Senator Simpson's as follows: "Q. About how far from the curb on the left-hand side of the street when you first saw it?" your answer being "He was almost in the middle of the street." Do you remember that? A. He was in the middle of the

40 street.

Edward Patrick Sullivan—Cross

Q. Who was? A. Damboldt's car.

Q. What do you mean then by testifying a moment ago that he was on the right-hand side of the street? A. He was on the right of the middle.

Q. How far right of the middle was he? A. Not very far; a few feet. 10

Q. A few feet? A. Yes.

Q. How many is "a few feet" in your opinion? A. He was not over two or three feet off the center of the road.

Q. He was two or three feet— A. From the center of the road.

Q. —to the right of the center of the road; is that correct? A. Yes.

Q. Was his whole car two or three feet to the right of the center of the road? A. I do not know whether his whole car was or not; it must have been. 20

Q. Now, you said in answer to a question of Senator Simpson's a moment ago that he put on his brakes—meaning Mr. Damboldt—just as he collided with Officer McLaughlin. A. That was when I heard the screech of the brakes.

Q. Is the screech that you just speak of the only knowledge you base your statement upon that he put on his brakes? A. That is all. 30

Q. Do you know from which machine the screech came? A. From the automobile.

Q. How do you know that? A. The sound of it; you could tell by the sound of it. Officer McLaughlin did not have no screech in his brakes.

Q. You could tell by the sound that the screech you heard came from the Damboldt car and not from the McLaughlin motorcycle? A. Yes.

Q. How could you tell? A. I have been around automobiles enough to know the screech of an automobile brake. 40

Edward Patrick Sullivan—Cross

Q. Have you been around motorcycles enough to know the screech of a motorcycle brake? A. No; I have not.

Q. When you saw this automobile whereabouts in Highwood Terrace were you? A. About eight
10 feet from the curb of Highwood Avenue on Highwood Terrace.

Q. Eight feet west? A. West, yes, sir.

Q. Eight feet toward Park Avenue? A. Towards Park Avenue.

Q. And did you continue walking east? A. Yes; I continued walking east.

Q. Where were you when you saw Officer McLaughlin first? A. I was about twelve or fourteen feet back from the curb when I saw Officer Mc-
20 Laughlin.

Q. You saw Officer McLaughlin before you saw the Damboldt car? A. I saw Officer McLaughlin as he passed me; as he passed me I turned my attention toward the east and I saw this Damboldt car coming.

Q. At that time where was Officer McLaughlin's motorcycle? A. He was almost on the Boulevard at that time.

Q. Where were you when this accident hap-
30 pened? A. I was about eight feet from the corner of Highwood Avenue on Highwood Terrace.

Q. You mean eight feet toward Park Avenue? A. Toward Park Avenue.

Q. You had not gone on then after you saw Damboldt and McLaughlin? A. I kept right on going, right along.

Q. If you were eight feet away from the corner when you first saw these cars and kept on going, you were not then eight feet away when they col-
40 lided, were you? A. When they collided I was just stepping off the curb.

Edward Patrick Sullivan—Cross

Q. You are sure of that, are you? A. Yes; I am sure.

Q. Will you indicate on the map where you were when this collision occurred? A. I was about here by this third tree.

Mr. Williams: Indicating a point on Highwood Terrace west of Highwood Avenue. 10

A. The children were playing about here.

Mr. Williams: Indicating the same place.

A. I continued on here. I was about eight feet from this curb.

Mr. Williams: Indicating eight feet from the west curb of Highwood Avenue.

A. Yes. Officer McLaughlin had passed me; when I got past he was over in here on the Hudson Boulevard. 20

Mr. Williams: Indicating a point in the middle of the Boulevard just east of the figures 7—50.

Q. When you saw Officer McLaughlin at the point you have indicated, where were you? A. I was eight feet from Highwood Avenue.

Q. I ask you if you remember testifying in the other trial as follows in answer to a question of mine: "Q. Did you stop walking after you first saw Mr. Damboldt's car coming over the top of the hill? A. No, sir. Q. You proceeded? A. Proceeded, yes, sir. Q. How far had you gotten when the accident happened? A. May be about eight or ten feet. 30

Q. In Highwood Avenue? A. Across Highwood Avenue, yes.

Q. You were in the street then? A. Yes; I was in the street." Is that correct, Mr. Sullivan? A. When the accident happened? 40

Edward Patrick Sullivan—Cross

Q. Yes. A. I just stepped off the corner; I was in the street then.

Q. You mean off the curb? A. Off the curb.

Q. I ask you if you remember testifying as follows in answer to a question of mine at the other trial: "Q. He was about in the middle of the street but a little nearer the left curb—Mr. Damboldt's car? A. Yes. Q. Is that right? A. Yes." Do you remember testifying that way? A. No; I do not remember.

Q. You do not remember? A. No.

Q. I ask you if you remember testifying as follows: "Q. Had you seen Officer McLaughlin at that time? A. Yes; I saw Officer McLaughlin. Q. He was coming from your rear, wasn't he? A. He was coming from my rear; he was just a little ahead of me at that time." Do you remember that? A. He was ahead of me at that time, yes.

Q. At what time? A. At the time that I stepped—that I reached the corner; he was ahead of me.

Q. Do you mean at the time you were stepping down off the curb? A. No; just about the time I reached the corner he was in the Boulevard.

Q. "Q. What is that? A. He was just about abreast of me at that time. Q. He was just about abreast of you at what time? A. At the time I saw him." Do you remember that? A. From the time I saw Officer McLaughlin, yes.

Q. Do you remember this: "Q. Where were you then? A. I was crossing the street." Is that correct? A. No; it is not correct.

Q. That is not correct? A. I do not remember saying it.

Q. I ask you if you remember testifying this way at the other trial: "Q. The first time you saw Officer McLaughlin to know him you were in High-

Edward Patrick Sullivan—Cross

wood Avenue down on the roadway, were you not?
A. Yes." Is that correct? A. No.

Q. Is it correct? A. No; I do not remember saying I was in the roadway.

Q. You do not remember saying that? A. No, sir; I do not.

Q. I ask you if you remember this: "Q. Going east? A. Yes, sir. Q. You had gone about eight feet you say? A. Yes." Do you remember that? (No answer.)

Q. You now say then, Mr. Sullivan, that you were not in the roadway of Highwood Avenue when you first saw Officer McLaughlin? A. No; I said I was about eight feet away from the curb when I first saw Officer McLaughlin. When the accident happened I was stepping off the corner.

Q. Then you were mistaken, were you, in the other trial when you said you first saw Officer McLaughlin after you had stepped down and were in the middle of the highway?

Mr. Simpson: I object to that. There is no proof he said so at the first trial. He denies that he said it. In the second place I object on the ground he cannot ask him to characterize his testimony, whether he was mistaken or not.

The Court: Objection sustained.

Q. Who was the superintendent of the ferry house in Weehawken on the day of this accident?
A. Mr. McCoy.

Raymond M. Radcliffe—Direct

RAYMOND M. RADCLIFF, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 5235 Hudson Boulevard, North Bergen.

10 Q. What is your business? A. I am a motor vehicle agent for the State of New Jersey.

Q. You are connected with the Motor Vehicle Department and a motor vehicle agent? A. Yes.

Q. What are your duties as a motor vehicle agent? A. My particular duty at this time is issuing licenses; I have charge of No. 2 agency in Newark, New Jersey, corner of Washington and Bank Streets.

20 Q. How long have you been connected with the Motor Vehicle Department? A. Close onto seven years.

Q. You are familiar in your business with the speed of cars? A. I am, sir.

Q. Were you anywhere near the car which collided with Officer McLaughlin on the day of the accident? A. Yes, sir.

30 Q. Where did you first see it? A. If I can recall, I was on the Boulevard, it was either Main street or Columbia street; and my car that I was in was against the curb and this car went by at a speed unordinary and I followed it after I had got started.

Q. About how fast would you say it was going? A. Judging from the time that I started to go after this car I should say it was between thirty and thirty-five per hour.

Q. That was the reason that caused you to go after him? A. Yes, sir.

Q. Because he was going so fast? A. Yes.

40 Q. You followed him down to where? A. I followed him to the accident. I do not know whether

Raymond M. Radcliffe—Direct

you are familiar with the condition of the road there.

Q. No; you had better describe it to the jury.

A. From Main Street to I should say the entrance into Union Street and Highwood Park there is quite a bend in the road. As I came to the top of the hill the man had gone over the hill and when I got at the top of the hill the accident had already occurred at the corner of Highwood Avenue and Union Street. 10

Q. This top of the hill that he went down, taking him out of your sight, how far was that from the point of the accident? A. I could not judge that distance—from the top of the hill, the knoll of the hill.

Q. You were following this man and he went down a hill and by reason of that he went out of your sight? A. Yes. 20

Q. From the point he went out of your sight to the point you found the automobile stopped after the accident, how far was it, a block or half a block or twenty feet? A. It was a full, good block.

Q. Then you continued on down the hill? A. Came down to the accident and I pulled up alongside of it.

Q. What did you find when you pulled up alongside? A. When I arrived alongside the car I asked who owned the car and the gentleman who owned the car acknowledged that he was the owner and the driver, and I asked him to produce his license. This he did. Just about the time that he handed me his owner's license and his driver's license Officer Rabold of the Boulevard Police Department came along and I turned over both the registration of the car and the driving license to Officer Rabold, who then took charge of the case. 30 40

Q. What do you mean, took charge of the case?

Raymond M. Radcliffe—Cross

A. He took it in hand. In other words, I tried to get rid of a job myself.

Q. You turned it over to Rabold? A. Yes.

Q. Who put the driver under arrest, did you or Rabold? A. I apprehended him at first and
10 then turned over the cards to Rabold.

Q. How long in time would you say occurred from the time you went down the hill until the time you got up to the point of the accident in other words how long did it take you to get from the point where you lost sight of him up to the point of the accident? A. I was not more than five minutes behind him.

Q. But I mean going at the speed he was going when you lost sight of him, how long would it
20 take him from the point you lost sight of him to reach the point where you saw him stopped? A. I would not say it would take him more than a couple of seconds going down that hill.

Q. When you lost sight of him he was still going at this clip of thirty or thirty-five miles an hour? A. Yes, sir.

Q. Did you see the officer when you got there? A. I did.

Q. What was his condition? A. One of his
30 legs was cut off here, and the foot was hanging off on the side.

Q. Did you see the condition of this automobile of the defendant, whether it was smashed up or not? A. I didn't take particular notice of that, no.

CROSS-EXAMINATION by Mr. Williams:

Q. How far away from the scene of this accident is Columbia Street, or Main Street, in blocks?

40 A. From the point of the accident did you want?

Q. Yes. A. That is hard for me to say di-

Raymond M. Radcliffe—Cross

rectly. It may be eight or ten blocks; I really cannot tell you offhandedly.

Q. At that time—at the time he passed you, you say your car was then at the curb; is that right? A. Yes.

Q. Do you remember testifying in this case before? A. I do. 10

Q. Do you remember in answer to a question of Senator Simpson's, as follows: "Q. Did the defendant say anything at the time of the accident as to how the accident happened?" and your answering as follows: "Not to me. He was very much excited and did not say a word to me." A. That is very true.

Q. Didn't you just say that he told you he was the owner of the car and produced his license cards, etc? A. I did, sir. 20

Q. Did he do that without saying a word? A. Did he do that without saying a word?

Q. Yes. A. Well, he didn't say very much.

Q. Well, did he say a word? A. Certainly. That is a technical question. He certainly had to say a word, naturally, but I hadn't any other conversation with him, if that is what you mean.

Q. You think that is a technical question? A. Yes, sir. 30

Q. I ask you what you meant by your testimony in this other trial in answer to the question that I have read—"Not to me; he was very much excited and didn't say a word to me." What do you mean by that? A. What I meant by those remarks is this, that the man when I spoke to him did not say anything to me in particular pertaining to the accident.

Q. And did you explain your answer that way at the other trial? A. I didn't— 40

Raymond M. Radcliffe—Cross

10 Mr. Simpson: I object. He has the record here, and it is only fair to this man to read him what has to do with that. He cannot ask him what he did at the last trial without calling his attention to the testimony.

The Court: He can read him any part of the testimony and his answer, and ask him whether he testified to that. You cannot very well ask him to explain what he tried to explain then.

20 Mr. Williams: This witness now tries to explain voluntarily the meaning of the words that he used at the other trial. I think I have a right to ask him if he made that same explanation at the other trial.

Mr. Simpson: I object to that.

The Court: You see, you are asking him now to explain it. I think you must find out whether you asked him at the other trial and whether he explained it in the same way.

30 Mr. Williams: I have not asked him to explain it; I am asking him if at the other trial he explained those words as he now explains.

Mr. Simpson: I object to that. It calls for a conclusion.

The Court: I will sustain the objection.

Mr. Williams: Exception.

40 Q. Mr. Radcliff, at the other trial do you recollect testifying that you meant by your statement that Mr. Damboldt did not say a word to you, that he did not say a word to you about the accident? A. That is just what I explained before, that he did not say anything, any word, pertaining to the accident. The man was excited

Raymond M. Radcliffe—Cross

and I immediately asked him to give me his license cards; then I left him in charge of the officer.

Mr. Williams: I would like to have the question answered.

Mr. Simpson: I submit that is a responsive answer. 10

The Court: You may answer that question.

A. I do remember testifying in that manner. I did not have the opportunity to explain as I have just now.

Q. I ask you if you remember testifying as follows at the other trial in answer to questions of mine: "Where is Main or Columbia Street from the top of the hill? A. A couple of blocks possibly. Q. So that he passed you a couple of blocks from the top of the hill? A. Yes, sir. Q. Going the same way as you were going? A. Yes. Q. And you followed him? A. Yes." What did you mean by that testimony, "Going the same way you were going? A. Yes." A. Meaning that my car was faced the same direction that his car was going over the road, traveling over the road. 20

Q. What you meant was then, as I understand it, that he was going the same way you intended to go? A. Well, that may be so. 30

Q. How long after this Damboldt car passed your standing car was it before you got your car in motion? A. I cannot determine time, sir; I really do not know.

Q. Can't you give us any approximation of the time? A. It does not take long to start a car, get in it.

Q. After Damboldt's car passed yours did you 40

Charles D. Leech—Direct

immediately get into yours and start off? A. Yes.

Q. What were you standing at this particular point for? A. No particular reason whatsoever. That is a habit that some men in the Department
10 have to park alongside the roadways.

Q. Were you in your car when he passed? A. No; not at the time.

Q. What kind of a car had you at the time? A. An Essex touring car.

Q. Was anyone with you? A. Yes.

Q. Who was with you? A. Friends of mine.

Q. Are they in court? A. No, sir.

Q. How long did it take you to travel from the point where you started your car to the scene of
20 this accident? A. I could not say.

 CHARLES D. LEECH, sworn:

Direct-examination by Mr. Simpson:

Q. Mayor Leech, you are the Mayor of Weehawken? A. I am.

Q. At the time of the accident who was the Mayor of Weehawken? A. Mr. Emil W. Grauert.
30

Q. Were you a member of the council? A. Member of the council and Chairman of the Police Committee.

Q. Were you called to the scene of this accident? A. I was returning from business at that time; I was informed there was an accident and I immediately proceeded to the point of the accident.

Q. Where did you go to? A. To the intersection of what they call Highwood Avenue and
40 Boulevard Loop.

Charles D. Leech—Direct

Q. What did you find when you got there? A. I found that Officer McLaughlin had met with an injury through colliding with an automobile, and the ambulance—they were endeavoring to take him away in an automobile and the ambulance came there and I believe they took him away in the ambulance. 10

Q. Was Officer McLaughlin there when you got there? A. I did not see Officer McLaughlin. I saw the motorcycle with the flesh of his leg all mangled in the mechanism.

Q. What part of the motorcycle was the flesh of his leg? A. On the right-hand side.

Q. Did you see the standing automobile there and then? A. I did.

Q. Did you notice anything about that; did you make any measurements or do anything in connection with that automobile? A. There was a line extending quite a distance up the roadway and a mark showing the direction of the automobile as it had come down the hill. Mayor Grauert being an architect I asked him to make the measurements of the lines connecting with the rear wheels of the automobile. 20

Q. Did these lines go right into the rear wheels, were the rear wheels sitting in the lines that were marked? A. They did. 30

Q. From the rear wheels they led in what direction? A. To the rear—up the Boulevard, to a point afterwards measured by Mayor Grauert a distance of 32 feet.

Q. What kind of marks were they, as if the machine had skidded or what? A. A mark that is customary from the wheels of a machine after the brakes had been applied.

Q. The marks looked like the marks of a wheel that had been braked? A. Yes. 40

Charles D. Leech—Direct

Q. And Mayor Grauert measured it? A. He did.

Q. What measurement was it? A. Thirty-two feet.

10 Q. How far was the automobile standing from the curb? A. In the neighborhood of eight feet.

Q. How wide is the street there? A. I should say about sixty feet wide.

Q. Was the automobile eight feet from the left-hand or right-hand curb as it stood there? A. The right front wheel of the automobile to the curb was the point measured by Mayor Grauert, and that was in the neighborhood of eight feet.

Q. How wide is the street there? A. I should say about sixty feet wide.

20 Q. Was the automobile as it stood there eight feet from the left-hand or right-hand curb? A. The right front wheel of the automobile to the curb was the point measured by Mayor Grauert, and that was in the neighborhood of eight feet.

30 Q. Where the marks started, back, where did they start from the same distance from the curb or from the middle of the Boulevard? A. From the middle of the Boulevard. At that point you come around the Boulevard from the upper section of the town and the grade is so there that when you turn you swing wide until you get perhaps to the top of the hill. The intersection of that street—there are five different highways coming into that one point—the Boulevard, the place of the accident, is in the neighborhood of sixty feet wide, I should judge, and the intersection of Highwood Terrace, that leads right into that point, is a narrow street I should say about forty feet wide; consequently the distance coming from the Boulevard down brings travel perhaps on a direct line

40

Charles D. Leech—Direct

with the curb of the beginning of Highwood Terrace; it is a very dangerous point.

Q. When you speak of these marks—I am trying to find out—you say they went thirty-two feet back. When you go thirty-two feet back where did they begin with reference to the curb; were they still eight feet from the curb or out in the middle of the street or where were they? A. They came I should say about in the center of the Boulevard.

Q. So that these marks were in a diagonal line?

A. Yes.

Q. Did you see the defendant there? A. I did.

Q. Was he out of the car or in the car when you got there? A. In the car.

Q. He hadn't got out yet? A. No.

Q. Did you have any conversation with him? A. I just spoke with him and I was informed he had been put under arrest by Officer Rabold, and he being on the Boulevard and the Boulevard Police having jurisdiction at that point, he was put in their hands.

Q. That is the Boulevard Police and not the Weehawken Police had jurisdiction? A. Yes.

Q. And Officer Rabold had him in charge? A. Yes, sir.

Q. Then what happened? A. He was put in another automobile, placed under arrest by Officer Rabold, and Officer Connors of the Weehawken Police Department went along with him.

Q. While you were there was any explanation given by him or anybody in the car of the accident? A. No.

Q. Nobody said the Officer had run into a standing car or anything of that kind? A. No; the driver appeared very much excited. I do not

Charles D. Leech—Cross

think any of them had gotten out of the car at all.

Q. None of them had gotten out of the car and all appeared very much excited? A. Yes; until after the measurements were taken by Mayor
10 Grauert, when the gentleman sitting with the driver of the car got out and expressed a desire to take measurements also to confirm the measurements taken.

Q. Did the gentleman sitting with the driver of the car take measurements in your presence? A. Yes.

Q. That is all you know about it? A. Yes.

CROSS-EXAMINATION by Mr. Williams:

20 Q. How long after the accident did you go there, do you know, Mayor? A. I could not exactly tell, only the time consumed was the length of time taken to get the injured man into the conveyance to take him to the hospital; I could not tell the exact time.

Q. No; you misunderstood me. How long after the accident was it that you got there, if you know? A. I do not know exactly. I imagine it might have been within ten minutes after the
30 accident that I got there.

Q. You do not know whether any of the occupants of the car might have been out of the car and gotten in again, do you? A. Not before I got there. They were still sitting in the car when I got there in a very much excited condition.

Q. And you do not know whether they had gotten out of the car before you got there and gotten back again or not. Now, you did not make these measurements yourself? A. I did not; I asked
40 Mayor Grauert.

Charles D. Leech—Cross

Q. And you stood right there while he made them? A. I did.

Q. You say that at the easterly end of the mark, the point 32 feet or 30 feet away from the place where the automobile stood, the mark was toward the center of the Boulevard? A. A slight degree toward the center, yes. 10

Q. Are you sure of that? A. Well, I am pretty positive of it, yes, because a man coming around that turn, his automobile is making a wide sweep and he naturally comes in toward the right-hand side of the road only after he has reached the top of that hill.

Q. Aside from what a man naturally does, I ask you if you are quite sure that these particular marks that you saw measured at the easterly end, the 32 foot end I call it, were not in the same place with relation to the northerly curb—I guess it is—of the Boulevard, as they were at the car? A. Well, there was a slight degree. 20

Q. A slight degree? A. A slight degree, yes.

Q. What do you mean by a slight degree? A. Well, I might mean that the center of the road, perhaps—well, say the margin of his left wheel being within five feet of the center of the road.

Q. Now, the marks at the car—the mark of the right-hand wheel at the car as I understood you was eight feet away from the right-hand curb? A. Yes. 30

Q. I ask you how far away from that same curb was the mark of the right-hand wheel where you stopped measuring—easterly? A. Well, I should say about perhaps 12 feet, about.

Q. Twelve feet? A. Yes.

Q. So that in 32 feet— A. The measurement was not taken at the top from the curb; the measurement was take of the distance covered and 40

Charles D. Leech—Re-direct

then the distance from the right-hind wheel of the automobile to the curb; it was not measured from the curb to the line of the machine after the brakes had been applied at the top.

Q. But in spite of the fact that it was not taken,
10 your judgment is that at that point 32 feet away from the car tracks of the right hind wheel were twelve feet away from the right-hand curb? A. Yes; my idea of the line would estimate that distance to be a distance of about four feet.

Q. In other words, in traveling thirty-two feet the car got four feet nearer the right-hand curb, is that right? A. Yes; as I estimate the distance, the distance at the beginning of that skid, that
20 mark, the distance would be about twelve feet from the curb.

Q. What kind of marks were these? A. It was an impression on an asphalt or hard-surface pavement caused by something being dragged along.

Q. Did it have any color? A. A dark mark; no especial color.

Q. Did it look like a tire rub?—The rubbing of rubber along the pavement? A. Yes, naturally.

RE-DIRECT-EXAMINATION by Mr. Simp-
30 son:

Q. At the time of this accident there was no heavy trucking allowed on this street? A. No.

Q. Only pleasure vehicles? A. Only pleasure vehicles. The Boulevard is restricted, and all our asphalt pavements in Weehawken are restricted to the light traffic.

Q. Particularly directing your attention to where these marks were found, there was no heavy traffic allowed there, only pleasure vehicles?
40 A. Only pleasure vehicles.

Emil W. Grauert—Direct

RE-CROSS-EXAMINATION by Mr. Williams:

Q. Is it not so that a heavy truck loaded with materials for a house in any block or a point in any block on the Boulevard at the scene of the accident was permitted to go on the Boulevard for the purpose of discharging its load and then getting off at the next intersecting street? A. I believe in your photographs there you will notice there are signs calling attention to "No Heavy Traffic;" and if there is anybody that wants to make delivery he has got to make his desire known to the police on post before he can go in. 10

Q. If he makes his demand and satisfies the officer that he has a load which should be delivered to a point within the block, he is permitted to do so? A. Yes. 20

Q. Then it is true that under certain circumstances heavy trucks may go on the Boulevard? A. Yes.

Q. It is also true, isn't it, that busses travel on the Boulevard? A. There were no busses traveling the Boulevard at that time. They were restricted. It has only been within the last few months that busses have been allowed to come through there.

Q. There were no busses allowed on that Boulevard at the scene of the accident in November, 1921? A. No, sir. 30

EMIL W. GRAUERT, sworn:

Direct-examination by Mr. Simpson:

Q. You were Mayor of Weehawken at the time of this accident? A. Yes.

Q. Did you visit the scene of the accident? A. 40
I did.

Emil W. Grauert—Direct

Q. What was the condition of the car and the man when you got there? A. Why, the automobile was standing still. The motorcycle was laying against the curb, at right angles to the curb, but against it. The officer had been removed to the
10 hospital when I arrived.

Q. Did you see any marks leading from the rear wheel of the standing automobile in the direction of the river? A. Yes.

Q. Did you make measurements of those marks? A. Yes.

Q. What were those measurements you made? A. Thirty-two feet in length beginning at the dark spot under the center of the rear wheel and going eastward to the place where it began.

20 Q. What kind of a mark was it, as though the brakes had been put on the wheel, or not? A. Just such a mark as putting a brake on a rubber-tired wheel would make.

Q. Did you measure the width of the mark so as to satisfy yourself it was made by the wheel of this car? Did you note what the width of it was? A. No, sir; I did not.

30 Q. But you were satisfied it was made by the wheel of this car? A. Positively, because the marks of both wheels were distinctly visible.

Q. Where did they end, this 32 feet away, where was that with reference to the curb; was it in the center of the street? A. From the rear wheel the curb was eight feet, but the marks looking eastward, from the rear of the car, swung slightly outward toward the center of the Boulevard—quite slight—I could not say how much.

40 Q. Could you say how far they were from the curb where they ended, 32 feet away from the car? A. Where the mark began?

Q. Yes. A. I do not know; a foot or two possibly; it was a very slight curve.

Emil W. Grauert—Cross

Q. Did you see the defendant and the other people there at the time? A. I saw four people sitting in the car.

Q. They hadn't got out when you got there? A. No, sir; they had not.

Q. The officer had been taken away, you say? 10
A. The officer had been taken away,

Q. Were there any other automobiles there beside this one when you got there? A. There were a number of automobiles there just standing around.

Q. Was Mr. Radcliff there when you got there? A. I did not notice him.

Q. Were you there when Officer Rabold took the defendant away? A. No, sir.

Q. Were you there when Officer Rabold arrested 20
him? A. No; the defendant's car was driven around into Highwood Avenue down about fifty or sixty feet; that was the last I saw of it.

Q. Did the defendant make any explanation to you or in your presence as to how the accident occurred? A. No, sir.

Q. Did he claim the motorcycle ran into this standing car or anything of that kind? A. We had a few words of conversation and that was all.

Q. Do you remember what he said? A. No, sir; 30
I do not.

Q. Do you remember his exhibiting his licenses to the motor vehicle inspector? A. I was not there then.

Q. That is all you know? A. Yes.

CROSS-EXAMINATION by Mr. Williams:

Q. When you said in answer to one of Senator Simpson's questions that they had not gotten out of the car, you meant they did not get out while 40
you were there? A. They did not, no, sir.

Emil W. Grauert—Cross

Q. You do not know whether they had gotten out before you got there? A. I am satisfied no one got out of the car before I got there because they were completely surrounded with autumn leaves of that sort, so no one could get out of the car without disturbing them.

10 Q. How long after the accident did you get there? A. That I cannot say, certainly not less than ten minutes.

Q. You testified before, didn't you, Mayor Grauert? A. Yes, sir.

Q. You were the one who actually made these measurements, weren't you? A. Yes.

Q. I ask you if you remember testifying in the other trial to one of my questions as follows: "Q. 20 Were the marks for their entire length parallel with the curb? A. Parallel to the curb.

Q. And they were 32 feet long? A. 32 feet long.

Q. So that for a distance of 32 feet at least the car was traveling parallel to the curb about eight feet away from it? A. Yes, sir." Do you remember testifying that way, Mayor Grauert? A. I do, yes.

Q. Does that correctly state the condition as you found it? A. It was a correct answer to the question as it was then put to me. I was not asked 30 whether the marks swerved toward the center of the road.

Q. You mean that you were not using the word "parallel" in its usual sense? A. At the point where I measured it the car evidently came from the center of the road towards the curb; it was a very slight curve. At the point where I measured it which was directly back of the hind wheel, it was eight feet, and it may have been that 40 same eight feet for a distance of ten or twelve feet back.

Emil W. Grauert—Cross

Q. Was Mayor Leech present all during the time you made these measurements? A. Yes; he was.

Q. And did you measure the distance from the curb to the track at the easterly end of the track?

A. No, sir; I did not.

Q. Then how do you know that it bore slightly toward the center? A. That was evident to me.

Q. Then what did you mean at the other trial by saying the track was parallel for a distance of thirty-two feet? A. Why, the curve would be—oh, by the bye, I might add this: The Boulevard has a curve at that point, and it may be that this curve I have just spoken of was parallel to the curve of the Boulevard.

Q. I would be interested to know if that is so, if you can say so. A. That is so, yes.

Q. It is so? A. It is so.

Q. Will you point out on the map the curve that you speak of? A. Yes. Do you want to see it?

Q. Yes. A. Right here; right there. From west to east.

Q. Indicating a curve from west to east, directly opposite the words "Hudson Boulevard," on the north side of the Boulevard. Is that correct? A. Yes, sir.

Q. And is that the curve you mean? A. Yes.

Q. Then you were exactly correct when you said that the track was parallel for its entire distance of 32 feet and eight feet away from the curb, weren't you? A. Perhaps so. I am very certain I was.

Q. Is that consistent with your present statement that the track at a distance of 32 feet away from the car bore toward the center of the street? A. It may not be consistent but it is practically

Michael Conners—Direct

the same thing. The bearing away from the parallel curvature of the Boulevard was not more than 18 inches or 2 feet at the most, as I recall it, and that would make to a momentary no difference at all.

10 Q. And if the curb curves at the point where you have indicated, the whole street does, doesn't it? A. Oh, yes.

Q. So that the center of the street curves too?

A. Yes, sir.

MICHAEL CONNERS, sworn:

20 Direct-examination by Mr. Simpson:

Q. Officer Conners, are you connected with the Weehawken Police Department? A. Yes, sir.

Q. And were you on the day of the accident? A. Yes, sir.

Q. What if anything do you know about the accident? A. Well, I relieved McLaughlin at six o'clock; that was my duty, to relieve him at that time. He left men and went to go to the garage. He told me he was going there to get some gas and
30 oil. Well, he left me and in about a minute or so later I heard a crash and I looked down and I saw that he had met with an accident.

Q. What did you see when you looked down; did you see this automobile? A. All I could see was a few people around and I noticed that the motorcycle was laying there; that was as far as I could see.

Q. Did you notice whether the automobile was still in motion when you saw the motorcycle? A.
40 No; the automobile was stopped.

Michael Conners—Direct

Q. That was immediately after the accident when you looked up? A. Yes.

Q. When you looked up the motorcycle was in the street and the automobile was stopped, and where was McLaughlin? A. Laying on the ground.

Q. Then what did you do? A. I ran over to the scene of the accident and I could see he had been hurt, and I called an automobile standing there on Highwood Terrace and I asked him to pull over there, so he pulled over and I did what I could for McLaughlin, and I tied up his leg and helped him into the car. We just got him in the car when the ambulance came.

10

Q. Was the automobile a new one? A. Yes; a brand new car.

Q. Where was it standing still when you saw it? A. About six feet from the curb of Highwood Avenue.

20

Q. What did you do; did you go down there? A. Yes; I went there; the first thing I done was to take McLaughlin to the hospital; then I came back to the scene of the accident and I placed Damboldt under arrest.

Q. And did you have any conversation with Damboldt? A. No, sir; I did not.

Q. Did he get out of his automobile? A. He was out of the automobile when I got there.

30

Q. When you came down and found McLaughlin lying on the ground, the four people were still in the automobile and they had not got out to help him? A. No.

Q. How long after did they get out of the car? A. I went to the hospital.

Q. Were they still in the car when you went to the hospital? A. Yes.

Q. When you came back who put them under

40

Michael Conners—Cross

arrest? A. Officer Rabold was there and he had them in charge.

Q. And that is all you know about it? A. That is all I know.

Q. How far were you away from the crash when
10 you heard this crash, what distance? A. Well, it is three short blocks from Park Avenue.

Q. Well, how far in feet would you say you were away? A. It is about two hundred feet.

Q. Did you hear any horn blown or signal given by this automobile that afterwards you saw standing still, before the crash? A. I could not say I did.

Q. Well, you did not hear it? A. No.

Q. I ask you whether you heard it or not,
20 whether you, two hundred feet away, heard any signal of this approaching automobile? A. No; I did not.

Q. The first you heard was the crash? A. Yes.

Q. What was it you heard? A. I heard like two machines coming together.

Q. As if they were both in motion? A. Yes, sir.

CROSS-EXAMINATION by Mr. Williams:

30 Q. At that time you were at the corner of Park Avenue and Highwood Terrace? A. Yes, sir.

Q. And you say that is two hundred feet away? A. About that, yes.

Q. How long have you been an officer? A. Fifteen years.

Q. Are you familiar with this district? A. Oh, yes.

Q. How long have you been familiar with it? A. Twenty-five years.

40 Q. Will you come down here and point out

Edward A. Fenrich—Direct

where Park Avenue and Highwood Terrace are?

A. This is Park Avenue here.

Mr. Williams: Pointing to Park Avenue.

Q. And where was the scene of the accident?

A. Right there (indicating).

Q. And that is what you say was about two hundred feet away? A. Yes. 10

Q. And it was the crash that attracted your attention, was it? A. Yes.

Q. Did you go there immediately? A. Yes.

Q. Did you walk? A. I ran up.

Q. You ran over there? A. Yes.

Q. Were you there when these measurements were made? A. No; I was at the hospital at that time.

20

EDWARD A. FENRICH, sworn:

Direct-examination by Mr. Simpson:

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. Where do you practice? A. Weehawken.

Q. How long have you been in practice? A. Twenty-two years. 30

Q. Are you connected with the North Hudson Hospital? A. Yes.

Q. Did you attend to McLaughlin, the plaintiff in this case? A. I did.

Q. What was the first thing you did for him?

A. I amputated his leg.

Q. Where? A. At the upper third.

Q. Is that above the knee or below the knee?

A. That is below the knee. I call above the knee the thigh; below the knee is the leg. It was the upper third below the knee. 40

Edward A. Fenrich—Direct

Q. What was the condition when you operated?

A. The leg was badly mangled, torn, practically hanging on a shred.

Q. Were there any serious injuries to the other leg? A. He suffered contusions and abrasions
10 all over his body I believe.

Q. Have you any memorandum that will enable you to tell correctly what injuries there were beside the mashing of this leg that you amputated?

A. I have none with me.

Q. Did this amputation entail a shock? A. Very marked.

Q. Did you have to give him any opiates, do you know? A. At the time of the operation or following it?

20 Q. Following it. A. Yes; he was kept under opiates I should say for about a week.

Q. During that time he could talk? A. Yes, sir.

Q. Would he be responsible for what he said, would he know what he was saying in your opinion?

Mr. Williams: I object to that question.

The Court: When?

30 Mr. Simpson: Within these four or five days while he was under these opiates.

The Court: I will let him answer that question.

Mr. Williams: Exception.

A. I do not believe he would be responsible for any answers he might give to any question.

Q. What is the condition of this stump? I notice he goes on crutches. Is he able to wear an artificial leg or is it sore? A. Up to the last part of December he was still under treatment. There
40 is a very slight covering of the bone at the end

Edward A. Fenrich—Cross

of the stump which in my opinion a great many times will cause him trouble.

Q. Permanently cause him trouble? A. I would not say permanently.

Q. For how long a time in your opinion? A. I believe that he will be affected with pain in that stump, if that is what you mean, for practically the rest of his life. 10

Q. Is it discharging at all? A. It was up until the latter part of December.

Q. Would it be possible for him to wear an artificial limb? A. I believe in time he can wear an artificial limb.

Q. But not at the present time? A. He might for a while, and he will then have to leave it off until the stump itself becomes accustomed to the artificial limb. 20

Q. When you say there is a slight covering over the stump, do coverings differ after operations of this kind; sometimes are they thicker and heavier and other times slighter? A. Yes; it all depends on the scar where the cut was made, how close to the bone the cut was made. He has a very, very thin covering of skin over the bone.

Q. That would interfere to a degree with an artificial limb, wouldn't it? A. That will cause him trouble if the artificial limb presses against that slight covering or presses against the bone. 30

CROSS-EXAMINATION by Mr. Williams:

Q. What was the date when this operation was performed? A. I do not remember.

Q. Did you perform the operation yourself? A. I did.

Q. It consisted in the removal of the leg? A. Yes. 40

Edward A. Fenrich—Cross

Q. And he was given an anaesthetic; was he?

A. He was.

Q. And did you personally treat him after the operation? A. Yes.

Q. How often during the four or five days immediately succeeding the operation did you see him? A. Sometimes three, sometimes four; sometimes twice a day every day.

Q. Running from two to four times a day every day? A. Yes.

Q. For the first four or five days? A. Yes.

Q. How long was it before he came out of the anaesthetic following the operation? A. I do not remember just how long it was before he came out of the anaesthetic at that time.

20 Q. And what was the nature of the opiates that you say he was given? A. Codein; sometimes morphine.

Q. And what was the purpose of giving him codein? A. To relieve him of pain.

Q. And was morphine given for the same purpose? A. Yes.

Q. When were either of these opiates first given Mr. McLaughlin? A. He was first given, if my memory serves me correctly, a hypodermic of morphine on his admission to the hospital before the operation; that was the first time; and I do not remember just how long after he came from under the influence of ether that he was given the morphine; I could not just tell you when.

Q. Did you give it to him? A. No; I left the orders for the nurse to administer it.

Q. Oh, you left orders for someone else to do that? A. We always do that.

40 Q. Have you any personal knowledge that it was done? A. I have yes, from my observation of the patient I knew he was given an opiate.

Edward A. Fenrich—Cross

Q. You knew from your observation of the patient? A. And from the records of the hospital.

Q. You did not make the records of the hospital, did you? A. I did not.

Q. You do not want under oath to testify to a fact based on records of the hospital that you did not make, do you? A. I do not appreciate your question about testifying under oath. I testify to the best of my knowledge. 10

Q. Are you with respect to your testimony about the giving of the opiates depending on your own recollection and knowledge or the records of the hospital? A. I am depending upon both.

Q. To what extent are you depending on records of the hospital? A. As to the time of the administration, the amount given and who it was given by. 20

Q. Have you those records here? A. I have not.

Q. When did you look at them? A. I have not seen them since the operation.

Q. When was he first given morphine or codein after the operation? A. I believe I told you before that I do not remember just how soon after the operation he was given the first dose of morphine. It has been too long ago for me to remember. 30

Q. Doctor Fenrich, can you tell me from your own knowledge and without any reference to records of the hospital whether Mr. McLaughlin was given codein or morphine after the operation. A. Well, I was never present at the time it was given, so I could not say I saw him swallow it or saw it given him by hypodermic. 40

Edward A. Fenrich—Cross

Q. Then do you mean to say you do not know of your own knowledge whether he had codein or morphine after the operation?

Mr. Simpson: I object. He cannot characterize the weight of his testimony.
10 That is for the jury.

The Court: I think that question is objectionable.

Q. Do you know of your own knowledge whether Officer McLaughlin had morphine or codein after the operation?

The Court: You may answer that.

A. I do.

Q. How do you know it? A. From the symptoms usually following the administration of
20 morphine and codein.

Q. And the symptoms following the use of morphine and codein, are they the same in all cases?

A. Practically the same.

Q. And with all people? A. Not with all people.

Q. What were the symptoms of this particular case? A. There was an absence of pain and semi comatose condition of the patient himself.

Q. How long did that continue? A. It usually
30 would continue about—oh, that varies—sometimes an hour, sometimes four or five hours, sometimes a day.

Q. For how many days did it continue in the case of Mr. McLaughlin? A. Do you mean how many days was he given morphine, or each injection—how many days each injection.

Q. I will re-frame the question. For how many days after the operation did Officer McLaughlin shows symptoms that you have just enumerated
40 as resulting from the use of codein or morphine?

A. If I recollect, I believe about a week's time.

Edward A. Fenrich—Cross

Q. Would you say it continued beyond the third day after the operation? A. I think I can safely say that.

Q. Would you say of your own knowledge that that continued beyond the fourth day after the operation? A. I think so. 10

Q. Would you say of your own knowledge that these symptoms continued beyond the fifth day? A. I believe so.

Q. And how about the sixth day? A. I believe I said about a week's time.

Q. Well, what do you mean by about a week? A. Anywhere in the neighborhood of seven days; it may be an hour or two before or after the seventh day.

Q. Would you say those symptoms entirely 20 ceased on the seventh day? A. I could say they entirely ceased.

Q. Would you say they continued on the ninth day? A. I do not remember about that.

Q. You do not remember whether they extended beyond the seventh day, but you are sure they extended up to that time, is that right? A. I am quite sure they were within about a week's time.

Q. And so far as the effect of the opiates is concerned, there was none then after about a week's time? A. I do not believe so. 30

Q. Well, do you know? A. My testimony today is my recollection of something that happened a long time ago. I cannot tell you positively, and I am not swearing positively; it is my recollection of the case.

Q. You are not swearing positively? A. I am swearing to my actual recollection but not as to the 40

Edward A. Fenrich—Cross

exact condition. I may be mistaken. I have nothing to refresh my memory of the case.

Q. But you are quite sure about the effect of these opiates for the first week? A. That is my recollection of the case, yes.

10 Q. Is there any reason in this particular case why you cannot remember beyond a week? A. No particular reason.

Q. Nothing unusual about the case in that respect? A. I do not believe so.

Q. You saw the man after about a week? A. I saw him for a long time.

Q. You continued to see him then after a week? A. I did.

Q. And he remained right there in the hospital
20 for some time afterward? A. Yes.

Q. Did he always continue under your care? A. He did.

Q. Do you remember how often you saw him during the second week of his stay there? A. I do not remember the number of hours but I do remember seeing him every day.

Q. You saw him at least daily during the second week? A. Every day, yes.

Q. During the third week did you see him
30 almost daily? A. I did.

Q. Did he have a special nurse? A. He had two nurses, day and night.

Q. Do you know how long that continued? A. His having the nurses?

Q. Yes. A. The nurses remained with him for quite a long time; just how long I would not be able to tell you.

Q. Would you say it was more than a week?
40 A. Yes; I should say that the—well, they were there with him quite a number of weeks; just how

Edward A. Fenrich—Cross

long I would not be able to tell you. They were there a long time.

Q. When you say two nurses do you mean a day and a night nurse? A. Yes.

Q. So that he had a nurse constantly for two or three weeks after the operation? A. Yes. 10

By Mr. Simpson: Q. Will you, with His Honor's permission, show the jury on this stump what you mean by a thin covering which interferes with his use of an artificial limb? A. Right here. You can see as I tap on that that there is no covering but an ordinary skin covering, this being the bone. He had a second operation after the first, due to a pressure or disease of this bone, which required a scooping out. This is the other bone here. See, this is a hollow going directly into the 20 bone, so you can see there is nothing but a skin covering. A great many times we are able to bring a flap such as this lower flap over and that will allow a thicker covering over the end of this bone, this end here. In the meantime the pressure on it will cause him trouble, especially if he has an artificial leg. That is what is meant by the thin covering. There is nothing between the bone and the skin.

Mr. Simpson: That is all, except I have 30 subpoenaed the nurse with the charts to show the morphine and codein administered to him. Do you admit the operation of the car?

Mr. Williams: Yes.

Mr. Simpson: Do you admit that the houses at the point of the accident are less than 100 feet apart?

Mr. Williams. Yes.

40

Plaintiff rests.

Motion for Nonsuit

Mr. Williams: I move for a nonsuit on the ground that it appears by the testimony that the accident was caused by the act of the plaintiff in removing himself from a place of safety to a place of danger, his testimony being, and that of the witnesses, that he saw this car coming down the street when he was seventy-five feet away—one said forty-five and the other said seventy-five—that it was coming down on the right-hand side of the Boulevard, just two or three feet to the right of the centre, at which time he was on the right-hand side of Highwood Terrace and afterward got onto the Boulevard. Now, if that is so it is merely a mathematical demonstration that the two cars were in opposite paths and he was in a place of perfect safety. He then says—and it is not denied—that he turned sharp to the left, placing himself squarely in front of this car, which he says was coming very fast. Mr. Sullivan said it was going very fast, and Officer Radcliff says it was going thirty or thirty-five miles an hour some blocks away. In addition to that, Officer McLaughlin says that he could with his machine in the condition it was that day, a new machine, stop it in its own length. He therefore could have stopped this car, having nothing in front of him, he says, to obstruct his view; or if his theory is that he had a right to believe the other man was going to heed his warning, then he could have stopped it between the time he made his turn and the time of the collision. He says that he real-

Charles Damboldt—Direct

ized that the man was not going to give him the right of way six feet away. Even then he could have stopped. And in addition to that he testifies that he took his hand off the control instrument of his own machine in order to give this signal; in 10 other words, it clearly indicates it seems to me that the plaintiff being in a place of perfect safety voluntarily put himself in a place of danger, and on top of that failed to use the means of safety that he had at hand, and that no jury question is raised in this case.

The Court: I think there is enough to go to the jury in this case— for the jury to say. 20

Mr. Williams: Exception.

Recess.

CHARLES DAMBOLDT, sworn:

Direct-examination by Mr. Williams:

Q. You are the defendant in this case? A. Yes. 30

Q. And you were driving the car involved in this accident? A. Yes.

Q. And you were the owner of it? A. Yes.

Q. Prior to the accident how long had you been driving an automobile? A. From the first part of April.

Q. And the accident was in September? A. In September.

Q. In the period from April to September had you driven that car? A. At that time it was about five thousand miles. 40

Charles Damboldt—Direct

Q. What is your business? A. Delicatessen dealer.

Q. Where do you have your business? A. 559 First Street, Hoboken.

Q. How long have you been in that business?
10 A. For about twelve years.

Q. And were you in that business at the time of this accident? A. No; I was retired at that time.

Q. This particular business you are in now, at the address you have just given, how long have you been there? A. From the first of October, 1921.

Q. What kind of a car was this? A. A Nash.

Q. How many did it seat? A. Four.

20 Q. Touring car? A. Touring, yes.

Q. On the day in question who was in the car?
A. It was myself, Mr. Hoehne, my wife and Miss Kneise.

Q. Were you driving? A. Yes, sir.

Q. Is that a left-hand drive or a right-hand drive? A. Left-hand drive.

Q. Who was sitting in the front seat with you?
A. Mr. Hoehne.

Q. And the two ladies in the back? A. The
30 two ladies in the back.

Q. Where had you been that day? A. In Pearl River, New York.

Q. And were you on your way home? A. Yes.

Q. Will you describe the accident as you recall it? A. Yes. On that day, on the 14th of September, 1921, we went up to Pearl River, drove up nicely, came home nicely till this point where the accident happened. I came around very slowly and seeing four or five cars coming from Park
40 Avenue in a line, in the back was Mr. McLaughlin. I stopped; I wanted to make the turn to Hoboken,

Charles Damboldt—Direct

to leave the cars pass by. All of a sudden Mr. McLaughlin came past the last car—I was stopped on my side—he came and bumped into my car between the lamps, broke the radiator, the fender and the generator. As soon as he bumped he fell over the hood, struck the mudguard and fell right in front of the door of the car, and he was laying; so I got out of the car and I tried first to get a rag out of the car and tied his leg. That is about all I know. 10

Q. Did anyone else get out of the car? A. Yes; Mr. Hoehne did.

Q. Did the ladies get out of the car? A. No; not then.

Q. Were you arrested? A. Yes; I was arrested. 20

Q. Who arrested you? A. Officer Connors.

Q. How long was it after the collision before you were arrested? A. About twenty minutes or half an hour.

Q. You said “I came around there.” What do you mean, “I came around there”? Did you make a turn? A. Yes; from the Boulevard up to here; then I have to make another turn to go down to Hoboken.

Q. Will you point out on the map where you mean that you made a turn? A. I came around here. Here is a bend from the Boulevard. 30

Q. Does the turn show on the map? A. No; the turn is further to the right.

Q. Will you point out on the map where the collision between your car and the motorcycle took place? A. Yes, sir; right here.

Q. Put your finger on it, please. A. Right here.

Charles Damboldt—Direct

Mr. Williams: Pointing to a point right over the letter "S" in the word "Hudson" on the map.

A. Yes.

Q. Point out on the map where your car was
10 when you first saw Mr. McLaughlin. A. About half a block up, about here; about that street coming out there.

Q. Pointing to a point on the Boulevard just west of the westerly line of Bonn Place. And where was he then? A. Down here.

Q. And whereabouts in Highwood Terrace was he? A. When I saw him?

Q. First? A. Over here; he came about here and swung right over there.

20 Q. Will you indicate on the map where he was when he swung over? A. About here.

Q. Pointing to a place on the Boulevard south of the middle line and about in continuation of the easterly line of Parkview Avenue. Now, is it down grade from the turn in the Boulevard to the scene of the accident? A. Yes, sir.

Q. What part of the Boulevard were you driving your car on as you came down the hill? A. On my right side.

30 Q. How close to the curb were you? A. About eight feet.

Q. At what speed were you travelling as you came down the hill? A. Very little—hardly any speed.

Q. At the time of the collision was your car moving or standing still? A. No; it wasn't moving.

Q. How long had you been standing still at the time of the collision? A. I stopped it.

40 Q. How long had you been standing still at the time of the collision? A. May be a second.

Charles Damboldt—Direct

Q. How long after the instant of the collision was it before you got out of your car? A. I got out right away.

Q. At that time did you see Mr. Sullivan? A. No, sir.

Q. Did you see Mr. Sullivan at all at the scene of the accident? A. No, sir. 10

Q. When you got out of the car was anyone else there? A. When I got out, not at present.

Q. How long was it before anyone came? A. I judge a couple of minutes.

Q. And who came first? A. That is more than I know. I cannot tell you who was first.

Q. After your car stopped after the collision how far away was it from the right-hand curb of the Boulevard? A. Eight feet. 20

Q. Did you see it measured that day? A. Yes.

Q. Did you see Mayor Grauert measure it? A. No, not Mayor Grauert.

Q. Whom did you see measure it? A. One of my friends.

Q. What is his name? A. Mr. Hoehne.

Q. He was one of the men who was with you? A. Yes, sir.

Q. And how far away was it from Highwood Avenue—Highwood Avenue being the cross street—this street here on the map? A. About fifteen feet. 30

Q. Fifteen feet which way? A. Up towards east.

Q. Toward the river wall? A. Yes.

Q. Did you drive your car away after the accident? A. No; I could not. I could not move the car.

Q. The car could not be driven? A. No.

Q. Did you take it away? A. No. 40

Charles Damboldt—Direct

Q. Who did? A. I do not know; I got taken away while the car was standing there.

Q. Did you see Mr. McLaughlin after this accident? A. In the hospital.

Q. How long after the accident? A. I cannot
10 just exactly say when.

Q. Was it the day after the accident? A. No.

Q. Was it a year after the accident? A. No.

Q. Can't you give us any idea how long it was after the accident? A. Well, it was a couple of weeks anyway.

Q. In the meantime had you received any communication from Mr. McLaughlin? A. Yes, sir.

Q. When? A. A couple of days later, we got
20 communication.

Q. Maybe you do not understand what I mean by "communication." Did you get a message from Mr. McLaughlin? A. Yes. Not direct from him, but through a friend of his.

Q. Who was the friend? A. Mr. Raffo's wife.

Q. And what was the message?

Mr. Simpson: I object as incompetent.

Mr. Williams: I withdraw it.

Q. After the accident and before you had seen
30 Mr. McLaughlin, did you do anything to ascertain his condition? A. His condition?

Q. Yes. A. In what? What do you mean?

Q. I will withdraw that. After the accident and before you saw Mr. McLaughlin, did you find out how he was? A. Yes; through Mrs. Raffo; you know, she came down and told us.

Mr. Simpson: I object to that.

Q. Did you find out; did you inquire of the police how he was? A. Yes.

40 Mr. Simpson: I object as incompetent, what the police told him.

Charles Damboldt—Direct

The Court: I do not think that is competent.

Q. How long do you say it was after the accident that you saw Mr. McLaughlin? A. A couple of weeks later.

Q. And where did you see him? A. In the hospital. 10

Q. Was anyone with you? A. Yes.

Q. Who? A. Mr. Hoehne and Mr. Raffo.

Q. How did you come to go to the hospital? A. He sent word down you know that he likes to see me.

Mr. Simpson: I object as incompetent.

The Court: I do not think that is competent. You may show why he went there, that he got word to go there, but he cannot testify to what somebody else told him. 20

Q. Why did you go to the hospital? A. Because Mr. McLaughlin called for me.

Mr. Simpson: I object to that.

The Court: Strike it out.

Q. Did you see Mr. McLaughlin when you went there? A. Yes.

Q. Did you go more than once? A. Twice.

Q. Did you see him both times? A. Yes.

Q. The first time you went where was he? A. 30
In the bed.

Q. In the ward or in a room? A. In a separate room.

Q. Was there anyone in the room beside the people that went with you? A. His wife, Mr. Hoehne, Mr. Raffo and some other women; there was more women; they went out right away.

Q. Did you have a talk with him? A. Yes, sir.

Q. Did he say anything about this accident? A. Yes, sir.

Q. What did he say? A. When I came in he 40

Charles Damboldt—Direct

said "You are the party I ran into, and I want to have you lose no sleep over it because it could not be helped," or something like that it was—"I want to take that off your shoulders; they can't hold you for anything."

10 Q. At the time of the conversation with Mr. McLaughlin were you still being required to report to the police? A. Yes.

Q. How often did you report to the police? A. About seven—

Mr. Simpson: I object as incompetent.

The Court: What difference does it make? I sustain the objection.

20 Mr. Williams: The testimony of the witness is that McLaughlin told him he need not worry. I think it is competent for us to show what he was worrying about, viz., if he was under charges.

Mr. Simpson: He might be worrying about his bank account. That does not influence us at all.

The Court: The question now is how long he reported to the police.

Mr. Simpson: That is what I objected to.

The Court: Objection sustained.

30 Q. Mr. Damboldt, why were you reporting to the police?

Mr. Simpson: I object as incompetent.

The Court: Objection sustained. We cannot try the police case.

Mr. Williams: I realize that, but it seems to me competent for this witness to show why the plaintiff told him he need not worry any longer.

40 The Court: Whatever the plaintiff said is competent and I have allowed you to prove it. In other words, you are trying

Charles Damboldt—Cross

to get this man's conclusion of what the other man was worrying about.

Mr. Williams: Your Honor will allow me an exception?

The Court: Yes.

Q. How long did you stay the first time at the hospital? A. About twenty minutes. 10

Q. How long after the first time was it that you went again? A. A couple of weeks later.

Q. And did you have a talk with Mr. McLaughlin the second time? A. He spoke very little the second time.

Q. Well, what did he say the second time? A. He said "Hello," and that was pretty nearly all he said that time. There was another man looked in the door and asked him how that happened, and then he turned his head around and said "The less you say the better off you are." 20

Q. What is that? A. "The less you say the better off you are." That was what Mr. McLaughlin said. Then he turned and looked out of the window.

The Court: Who said that; somebody that was in the room?

A. No; somebody looked in the door, in the room, and asked him how that happened, and Mr. McLaughlin said "The less you talk about it the better off you are." 30

CROSS-EXAMINATION by Mr. Simpson:

Q. You testified at the last trial that the first time you saw McLaughlin in the hospital was three days after the accident, didn't you?

Mr. Williams: I object unless it is shown that he did so testify.

Mr. Simpson: I am asking him.

The Court: Yes; he is asking him. 40

Charles Damboldt—Cross

Q. Didn't you testify at the former trial that you went to see McLaughlin three days after the accident, in the hospital? A. I forgot that.

Q. You forget whether you said that? A. Three days after the accident?

10 Q. Yes. Didn't you say at the last trial that you first called at the hospital three days after the accident? What do you say about that? A. I do not know.

Q. You do not know? And haven't you changed your testimony because you have heard in the court today that McLaughlin was under the influence of opiates for a week after the accident; isn't that the reason you change your testimony and now say it was two weeks after the accident?

20 A. Well, on my estimation now it is different. I figured that up how often we went to the police court and how often it was delayed and I inquired there if I could see McLaughlin and they told me no.

Q. I am not asking you that. A. That is the reason I found out later how long that was.

Q. And you have not changed your testimony today because you found out in court that he was under opiates at the time you said you visited him, at the last trial; that is not why you changed your testimony? A. I did not see him under opiates.

30 Q. What? A. I did not see him under them. He was nice and bright when I saw him.

Q. What do you now say is the first time you saw him in the hospital, how long after the accident? What do you say now? A. I guess about three weeks.

Q. You told me two weeks; now you say three.

40 A. Yes.

Q. Now, let us see what happened at the ac-

Charles Damboldt—Cross

cident. You say you were standing there about a second before the collision, is that right? A. Yes.

Q. Where was this man McLaughlin when you first saw him? A. Coming down from Park Avenue.

Q. How long was that before he ran into you, as you say? A. About a minute; that don't take long. 10

Q. How long was it? I am not asking you for any opinions. How long was it? A. About a minute.

Q. So that you stopped a second and you were going a minute all but a second before he ran into you, is that right? A. When McLaughlin came down and I saw him that was a minute.

Q. I am not asking you to rehearse that story; I am asking you about time now. You said "I stopped a second before he ran into me and I saw him about a minute before he ran into me." A. Yes. 20

Q. So that you were in motion for a minute with the exception of a second up to the time he hit you? A. Yes.

Q. Now, isn't it a fact you both stopped at the same time practically? A. No.

Q. You say it was a second before he hit you? A. Yes. 30

Q. How do you figure out such a short distance of time as a second and say you were in motion for fifty-nine seconds but you were stopped one second at the time he hit you; how do you figure that up? A. Before he hit me I was stopped.

Q. How do you figure out so close as to say "I saw him a minute before he ran into me; I was only stopped a second when he ran into me"—A. Yes; because he came—

Q. Wait a minute. You do not know what I am 40

Charles Damboldt—Cross

going to ask you. How do you figure it so close that you can say "I was in motion for fifty-nine seconds and stopped one second at the time he hit me;" how do you figure it so close as that? A. My car was stopped and Mr. McLaughlin shot
10 over from the other side. In a second or two seconds he came over from the other side.

Q. You have told us that two or three times, but you do not tell me or these men, who are more important than I am, how it is you can figure up to one second of the time the collision occurred. How are you able to figure up to one second? A. Well, Mr. McLaughlin came over from the other side while my car was stopped.

Q. Oh, you have told us that. You were in the
20 delicatessen business? A. Yes.

Q. When did you retire? A. Why I got retired?

Q. When did you retire? A. The first of April.

Q. Now, you never went thirty or thirty-five miles an hour as this motor vehicle man says? A. No.

Q. You do not know him? A. No.

Q. No reason why he should lie about you? A. That is more than I know.

30 Q. You never saw him until the day of the accident? A. No.

Q. You have never had any trouble with him? A. No.

Q. And yet you say he is not telling the truth when he says you went thirty or thirty-five miles an hour; you never went as fast as that? A. No.

Q. How fast were you going? A. Around that turn you can't go faster than ten.

40 Q. I am talking about how fast you were going. A. Ten.

Charles Damboldt—Cross

Q. That is the fastest you went? A. Around that turn.

Q. I am not talking about the turn; I am talking about the Boulevard when this man says he followed you. He says he followed you from Union Street and you were going thirty-five miles an hour? A. No. 10

Q. How fast do you say you were going? A. Ten to fifteen.

Q. Fifteen miles an hour is the fastest you went? A. Yes, sir.

Q. As a matter of fact you did not see this motorcycle policeman until you and he came into collision? A. The motorcycle policeman?

Q. Yes; did you see him until you came into collision? A. Yes, sir. 20

Q. Now, you were stopped perfectly still? A. Yes, sir.

Q. And he ran into your bumper? A. Yes; between the lamps right in the centre.

Q. What part of you did he run into? A. Right in the bumper between the lamps.

Q. When he ran into the bumper what did it do to him; did he go into the hood, over the hood or into the wheel? A. He came right over the hood.

Q. Between the two mudguards? A. On my right-hand mudguard he fell over. 30

Q. You said he hit the bumper. Did he fall over the hood or over your bumper? A. He went from one side of the hood to the ground.

Q. Where did his motorcycle go? A. Flopped right from the front of the car.

Q. So that the motorcycle dropped in front of the car? A. Yes.

Q. And he went over the side of the car? A. Yes. 40

Q. And he laid on the side of the car? A. Yes.

Charles Damboldt—Cross

Q. What cut his leg off then? A. His motorcycle.

Q. If he came right off his motorcycle and went clean over your hood and left his motorcycle one side and he was lying on the other, what cut his
10 leg off? A. His motorcycle was cutting it off.

Q. How could his motorcycle cut his leg off if he ran into your car and the force of that collision knocked him off his motorcycle over your car, how could his motorcycle cut his leg off? A. He bumped into the car and while he was bumping in there the motor was going and chewed his leg off; then he came over and flew over there.

Q. You mean his leg was cut off before he went over? A. I saw him go over with his leg off.

20 Q. His leg was cut off before he hit your car? A. That is more than I know; may be it was.

Q. You think it was cut off before he hit you. Now, when you first saw him how far away from you was he? A. Coming down that street.

Q. How far was he from you? A. A block and a half.

Q. You saw him all the time? A. Yes, sir.

Q. You were in motion when you first saw him? A. Yes, sir.

30 Q. How far away from you was he when you stopped? A. Maybe fifteen or twenty feet.

Q. And you saw him a block and a half away? A. Yes; before he shot out.

Q. Before what? A. Before he came shooting out I saw him there; I saw the whole line coming.

Q. You saw him a block and a half away? A. Yes.

40 Q. Now, there is some talk here about his suddenly shooting out from behind a line of vehicles and your not seeing him at all. You say you saw him a block and a half away, is that right? A. Yes.

Charles Damboldt—Re-direct

Q. So you knew he was coming when you saw him a block and a half away? A. Yes, sir.

Q. How far away were you from the point of the collision when you first saw him? (No answer.)

Q. How far away were you from the point of the collision when you first saw him? A. About a block and a half away I saw him—Oh, from the collision? 10

Q. How far away were you from the point of the collision when you first saw him? A. Do you want me to show you on the map?

Q. No; I do not want any map. You know where you came into collision with him? A. I was by that Place, whatever you call it.

Q. How far were you from that "Place"? A. About half a block. 20

Q. Did you see him put up his hand? A. No.

Q. Did you hear him blow any horn that he wanted the right of way? A. No; there was not any need of it. It was all clear.

Q. Did you blow any horn to show you wanted the right of way? A. No.

RE-DIRECT-EXAMINATION by Mr. Williams: 30

Q. I show you three photographs of an automobile and ask you if you can identify those as photographs of the car that was in this accident? A. Yes; those are three photographs of my car.

Mr. Williams: Mr. Simpson has said he would allow me to offer these photographs in evidence in the absence of the photographer, after reading the testimony given by the photographer at the other trial.

Mr. Simpson: Yes. 40

(Mr. Williams reads testimony as follows:)

Anthony Dato—Cross

ANTHONY DATO, sworn:

Direct-examination by Mr. Williams:

Q. What is your business? A. Photographer.

Q. Where do you conduct your business? A.
534 Bergenline Avenue, West New York.

10 Q. How long have you been a photographer?

A. Four years.

Q. Have you had experience in commercial photography? A. Yes, sir.

Q. Did you take pictures of the car, or automobile, of Mr. Damboldt? A. Yes, sir.

Q. Do you remember when? A. I think it was between September 18 and 20.

Q. Are these the pictures? A. Yes, sir.

Q. Have you the plates? A. Yes, sir.

20 Q. Did you print the pictures yourself? A.
Yes, sir.

Q. Did you print the pictures yourself? A.
Yes, sir.

Q. Have you the plates with you? A. Yes,
sir; right here.

CROSS-EXAMINATION by Mr. Simpson:

Q. Where did you take these pictures? A. In
a garage in 11th Street between Hudson and
30 Palisade Avenue.

Q. Who was present when you took them? A.
Mr. Gildone, the owner of the garage.

Q. You had never seen this car before you took
these pictures? A. No.

Q. You do not know whether it was Damboldt's car you were photographing except what the man in the garage told you? A. Mr. Gildone told me it belongs to a party named Damboldt.

40 Mr. Simpson: I ask to have that
stricken out as not responsive.

Anthony Dato—Cross

The Court: I will strike it out.

Q. You do not know, except from what you were told, that you were photographing this car of Mr. Damboldt's? A. No.

Q. Who asked you to go there? A. Mr. Gil-done, the owner of the garage. 10

Q. What date was it? A. Between the 18th and 20th of September; I do not remember.

Q. When did you make them, in the afternoon? A. Around dinner time.

Q. Who has paid you for making the pictures? A. Mr. Gildone told me "After you have finished making the pictures send them to a person named Mr. Gillen, in Newark.

Q. Who is Mr. Gillen? A. Personally I do not know. 20

Q. Who paid you? A. I was sent a check.

Q. Who paid you? A. I think the American Insurance Company—Casualty Company.

Q. How much did you charge for making the pictures? A. Ten dollars for three views.

Q. Was the car outside? It seems to be in the doorway of the garage. A. Half in and half out.

Q. Was it necessary to put in any particular position? A. Mr. Gildone told me I should—at the time I took the the view I asked him if it was all right, and he said it was all right. 30

Q. Mr. Gildone, the garage man? A. Yes.

Q. It was under his direction you took it? A. Yes. I saw him before I took it.

Photographs offered in evidence and marked D-2, D-3 and D-4.

Oscar Hoehne—Direct

OSCAR HOEHNE, sworn:

Direct-examination by Mr. Williams:

Q. What is your business? A. Contractor.

Q. Do you know the defendant in this case, Mr. Damboldt? A. Yes.

10 Q. Were you in his car on the day of this accident? A. Yes.

Q. Where had you been? A. Pearl River.

Q. Who was with you? A. Mr. Damboldt, Mrs. Damboldt, and Mrs. Kniese.

Q. Where were you sitting in the car? A. On the right side of Mr. Damboldt, in the front.

Q. Had you ridden before with Mr. Damboldt in his car? A. Yes.

Q. How often? A. I should judge about five
20 or six times.

Q. Do you own a car yourself? A. No, sir.

Q. Did you ever drive a car? A. No, sir.

Q. Will you tell what you recall of this accident? A. Yes, sir. We left the house, I believe it was quarter to two, so far as I remember it wasn't two o'clock; about a quarter to two, we left for Pearl River. He said he would take us to Pearl River. "We will be back in time," he says, "for supper. We can still make it." So
30 we made that trip. We went to Pearl River and stopped off at Pearl River for ten or twelve minutes for a cup of coffee. None of us seemed hungry; we just had a cup of coffee at some hotel there; and we started immediately back, and we got back onto East Boulevard, as they call it, within about twelve feet from the crossing when the accident occurred. When the accident occurred Mr. Damboldt and myself got out of the car immediately. Mr. Damboldt went and got
40 some cloth out of the car, and it was about five

Oscar Hoehne—Direct

minutes after the accident before anybody came there. The first party that came was a man in uniform, he looked like a Boulevard policeman, A Boulevard motorcycle policeman, the same uniform they wear. He came there and bent over Mr. McLaughlin and called him by name. It was several minutes before anybody came. The first party that approached us was Mr. Leech, at that time Committeeman of Weehawken. He asked me if I was the owner of the car, the driver I said "No; this man here,"—that was bending over Mr. McLaughlin. He showed me a gold badge. He opened his coat lapel and showed me a gold badge. Then I went to one of the men and asked him who that gentleman was. He said Arthur Leech, the Committeeman who has charge of police and fire of Weehawken. So the next I knew they came along, about twelve minutes after the accident they came around with an automobile. I was hunting for a telephone. It was quite some time before an ambulance came. Then, seeing that poor fellow in a car, I said "Why don't you wait for the ambulance?" They put him in a car and drove him away. With that an officer came along and placed Mr. Damboldt under arrest. One of those fellows in the crowd came to me and said "You had better take some measurements." I took some measurements of the car. After I had completed the measurements, some minutes after Mr. Damboldt was taken to the station house, we shoved the car to the south side of the street; it stood there twenty minutes before they took it to the garage. I objected to that; I said "We are able to take the car to the garage"—

Mr. Simpson: I object to this in the absence of the plaintiff.

Oscar Hoehne—Direct

The Witness: He asked me what I knew and I told him.

Mr. Simpson: I object to this rambling, in the absence of the plaintiff, about all these conversations.

10 The Court: That is not competent.

Q. Mr. Hoehne, do you remember making that turn in the Boulevard just before the scene of this accident? A. Yes.

Q. After that turn had been made what part of the Boulevard was the car driven in—your car? A. Right-hand side going west.

Q. Did the car have a windshield on? A. It has a windshield, yes, sir.

Q. Was the windshield closed or open? A. It was open.

20 Q. Was it dark or daylight? A. No; it was very dark.

Q. What kind of a day was it? A. Very clear day; very sunny day.

Q. When did you first see Officer McLaughlin? A. I seen him just the moment he came from behind several cars that had been coming in the opposite direction, and I seen him shoot from behind the car; there was a little car ahead of him and he shot from behind that little car; I do
30 not know if it was a Ford, but it seemed to me a Ford; it was a small car anyway; that was when I first saw him.

Q. At that time how far was he away from your car? A. I would judge a little more than the length of this room.

Q. Where was he with reference to Highwood Avenue? A. He was west of Highwood Avenue.

Q. How far? A. About a distance from here to the end of this court room.

40 Q. And was he in the Boulevard or in High-

Oscar Hoehne—Direct

wood Terrace? A. Coming down Highwood Terrace, if that is the road that goes down the incline there.

Q. Toward Park Avenue? A. Yes.

Q. What side of Highwood Terrace was he?
A. When I first saw him he was coming the center of the road. 10

Q. After the accident where was the Damboldt car with relation to the north curb of the Boulevard? A. I took the measurements and I believe it was eight feet from the curb and about twelve feet from the crossing.

Q. Twelve feet from what crossing? A. Highwood Avenue there that runs down the hill where the garage is.

Q. Twelve feet which way? A. Twelve feet east. 20

Q. Toward the river wall? A. Toward the river wall.

Q. Whereabouts did the collision occur? A. At that point about twelve feet from the crossing.

Q. Prior to the collision had your car stopped moving? A. Well, we had been coming down that hill slow, and we just about I will say had come to a standstill. 30

Q. At the time of the collision? A. Because we had to make that turn to Hoboken.

Q. Did you see Mr. Damboldt after the accident? A. Yes.

Q. I mean after the day of the accident? A. Yes.

Q. Where? A. I have seen Mr. Damboldt down at his house.

Q. Withdraw that question. Did you see Mr. McLaughlin after the day of the accident? A. Yes. 40

Oscar Hoehne—Direct

Q. Where? A. In the hospital.

Q. Do you remember how long after the accident it was? A. It must have been after the 13th of October.

Q. Why do you say that? A. Because the case
10 had been postponed three times and the day that they set, the day Judge Steuer was on the bench—Recorder Steuer was on the bench, and one of our friends called attention to the 13th day, he said it was unlucky to have the case tried. I said "I am not superstitious."

The Court: Don't go into that.

The Witness: He asked me.

The Court: Don't tell what you said to somebody else.

20 The Witness: That is how I recall it.

Q. It was after that you first saw Officer McLaughlin? A. Yes.

Q. You first saw him in the hospital? A. Yes.

Q. Was Mr. Damboldt there? A. Yes.

Q. Did you hear Mr. McLaughlin say anything about this accident, in the presence of Mr. Damboldt? A. Yes, sir.

Q. What did he say? A. After we shook
30 hands he said not to worry; he said "You are blameless," or something to that effect; not to worry, it would be all right, that he was getting along pretty good.

Q. Was anyone else there beside you and Mr. Damboldt and Mr. McLaughlin? A. Yes; Mr. Raffo.

Q. Who else? A. There was a few others in the room, I believe one of them was his wife. I would not swear to that; I do not know Mrs. McLaughlin, but I was told it was his wife.

Oscar Hoehne—Cross

Q. How long were you there that time? A. I should judge quarter of an hour or more.

Q. Did you see him again after that? A. No, sir; only in the court.

CROSS-EXAMINATION by Mr. Simpson: 10

Q. Did you fix the time of this hospital interview when you testified at the last trial as within a week after the accident? A. Not that I can recall.

Q. Do you remember that time you gave? A. I could not say.

Q. You went there to be a witness at the request of Mr. Damboldt so you could see what Mr. McLaughlin had to say in the event of a suit? A. Decidedly not. 20

Q. Why did you go? You had no business there, did you? A. I assuredly did.

Q. You had not been driving the car that hit him? A. No, sir.

Q. You had no purpose there except to come here and swear what you heard McLaughlin say?

A. Oh, yes; I went there as an act of humanity.

Q. What was the humanity? A. Well, put anybody in my position.

Q. What did you do for him after you got there as an act of humanity? A. Went up to see him and shake hands with him. 30

Q. You thought to look at your visage was an act of humanity? A. Certainly, I think if you are in a car—it was no more than proper.

Q. You thought to look at you would do him good; did you do anything for him; did you send him flowers—anything of that kind? A. No, sir; I did not.

Q. As a matter of fact you went there to be a 40

Oscar Hoehne—Cross

witness to come here and swear the man had said it wasn't your friend's fault? A. No, sir; I swear to Almighty God it is not so.

Q. What is your business? A. Contractor.

Q. Are you actively engaged in business? A.
10 Yes.

Q. Were you at the time you went to the hospital? A. No, sir.

Q. What were you doing, resting then? A. Yes.

Q. When did you go into business again? A. Last July.

Q. How long had you been out of business? A. I should judge about two years; not exactly right out of business; done jobs here and there.

20 Q. Did you see this motor vehicle inspector come to that place at the time of the accident and ask who was driving this car? A. No, sir.

Q. Did you hear the defendant answer "I am"? A. Not the motor vehicle inspector.

Q. I am talking about the motor vehicle inspector. A. No, sir.

Q. Did you see your friend show his card and license, driver's license, to the motor vehicle inspector? A. No, sir.

30 Q. You will swear the motor vehicle inspector wasn't there at all? A. Not at the time that took place.

Q. Are you swearing the motor vehicle inspector was not there? A. Not at that time.

Q. Was he there at any time? A. Not that I know of; I do not remember seeing him.

Q. You never saw him there? A. That might possibly be.

40 Q. You never saw him come up and say "I am a motor vehicle inspector; who is driving this

Oscar Hoehne—Cross

car? Let's see your license?" A. Mr. Leech did that.

Q. I am not talking about Leech; I am talking about this motor vehicle inspector. A. I do not know the gentleman.

Q. You never saw him in your life? A. At 10 the last trial; this the second time, today.

Q. He never came up to the defendant, never saw his license, never put him under arrest? Never handed him over to Rabold? A. No, sir.

Q. Now, about these marks; did you see these marks that Mayor Grauert measured, that led from the rear wheels of your car back 32 feet, to see where the brakes had been put on? A. I saw the marks of our car.

Q. How far did you measure it? A. Thirty 20 feet.

Q. Was it the marks of a car that was braked? A. No, sir; ordinary marks.

Q. It is asphalt pavement there? A. Yes, sir.

Q. What ordinary marks would a car make on the asphalt if it was not braked, so as to hold the wheels? A. Impressions.

Q. Impressions on the asphalt? A. Yes.

Q. This was in September? A. Yes.

Q. It wasn't a warm day, was it? A. Yes, 30 sir; quite a warm day.

Q. Asphalt all soft, I suppose? A. No, sir.

Q. What impressions would your car make, or what did it make on the asphalt if it was not braked, for 32 feet? A. Like any other car would make.

Q. Just an ordinary impression? A. Ordinary impression.

Q. You swore at the last trial these marks were made by a heavily laden truck? A. Not 40 these marks.

Oscar Hoehne—Cross

Q. Until it was called to your attention at the last trial that there was no heavy trucking on that street you said these marks were made by a heavy truck. A. These marks they measured; not the ones I measured.

10 Q. They did not take measurements of the marks of your car? A. No, sir.

Q. What marks did Mayor Grauert and Mr. Leech measure? A. They measured marks according to their own ideas.

Q. What marks did they measure? A. I do not know.

Q. Not marks of your own car? A. Not to my knowledge.

Q. You are testifying to your own knowledge?

20 A. I am testifying to my own affair.

Q. You testified at the last trial the marks they measured were marks made by a heavily laden truck? A. Yes, sir.

Q. Why don't you swear that now? A. I will swear that.

Q. You say now the marks they measured were not the marks of your car? A. No, sir; the marks of some heavy vehicle.

30 Q. When they come in and say these marks that they measured right from the rear wheels of your automobile 32 feet, they are not telling the truth according to you; they measured some other marks? A. I cannot question their testimony.

Q. Did they measure your marks or some other marks. A. They measured some other marks.

Q. Now, where did you see this police officer first? A. Which police officer?

40 Q. How many were there that were hit? A. Oh! The man that was hit?

Oscar Hoehne—Cross

Q. Yes. A. Where was he?

Q. Yes; when you first saw him. A. I should judge he was a little beyond the length of this room away when I first saw him.

Q. Did you see him put up his hand? A. No, sir.

Q. You say when the vehicles were coming together you were about at a stop; is that what you testify? A. Yes, sir. 10

Q. What do you mean by about at a stop; that you had practically come to a stop; you were still in motion? A. Just coming to a stop to make that turn to Hoboken.

Q. Do you mean coming to a stop or that you had stopped? A. Just practically stopped.

Q. You were at the end of your motion at the instant of the collision? Is that what you mean? A. Just stopped. 20

Q. Is that what you mean, that you were at the end of your motion at the instant of the collision? Is that what you mean? A. Yes, sir.

Q. What part of your car came in contact with the motorcycle? A. He hit the bumper and also crashed into the radiator.

Q. What happened to him when he struck the bumper? A. He hit the bumper and then run right into the radiator and fell over the side of the radiator onto the pavement. 30

Q. Had the brakes been put on your car; did you see Mr. Damboldt putting the brakes on? A. I did.

Q. How far from the point where the collision occurred? A. Just about, I should judge, a few seconds.

Q. How many feet would your car go, a lot of feet, in a few seconds? A. When he put the brakes on? 40

Emma Damboldt—Direct

Q. Yes. A. I do not suppose over a few feet, because he was gliding down the hill.

Q. Not 32 feet? A. He was gliding down the hill.

Q. It was not 32 feet away; it was only a few feet? A. I do not know anything about brakes; I do not own a car, I do not know about a car.

Q. At any time were you going thirty or thirty-five miles an hour as the motor vehicle inspector says you were going when he followed you from Union Street? A. Positively not.

 EMMA DAMBOLDT, sworn:

20

Direct-examination by Mr. Williams:

Q. Are you the wife of Mr. Damboldt? A. Yes, sir.

Q. Were you in this car on the day of the accident? A. Yes, sir.

Q. What part of the car were you in? A. On the right side in the back, right side.

Q. In the back on the right side? A. Yes.

Q. What did you see of the accident? A. We
 30 was on the Boulevard making the turn going to
 Hoboken, and I talked to Mrs. Kneise, and then
 at once the car stopped and I looked up and I
 saw first a little Ford sedan coming in the middle
 of the road; then I saw the officer coming straight
 ahead, and he looked at us and we looked at him.
 He had his motorcycle. He looked and looked and
 I hollered, "The man must be—what the fellow
 will do now?" So he came in to us; he bumped
 into us; and then one second his body came over
 the hood and fell on my side, and I saw his leg off.
 40 That is all I saw—his leg off.

Emma Damboldt—Cross

Q. At the time the motorcycle hit the automobile was the automobile moving or standing still? A. No; we were stopped; we stopped.

Q. As you came down the hill after making the turn were you going fast or slow? A. Slow; we always go slow. 10

Q. After the accident did you get out of the car? A. No; I could not move myself when I saw his leg off. I sit down until we went to the police station.

Q. Did Mrs. Kneise get out of the car? A. No; we sit there; we was shaking, you know.

Q. Did Mr. Damboldt get out of the car? A. He went right away out and took a rag out of the car and tied his leg and he said, "My leg begins to hurt me"—Mr. McLaughlin. 20

Q. Did Mr. Hoehne get out of the car? A. Yes; and we two stayed in the back.

Q. How long were you there after the accident? A. It took maybe fifteen minutes.

Q. You had been riding all the afternoon, had you? A. Yes. Nearly every day.

Q. No; I mean this particular day. A. Yes.

Q. How long had your husband had that car? A. April.

Q. April of the same year? A. Yes; yes. 30

CROSS-EXAMINATION by Mr. Simpson:

Q. You did not know anything about the accident until you say the man ran into your car? A. Yes.

Q. That was the first thing you knew, when he ran into your car? A. I saw him coming. He looked at us and we looked at him.

Q. How far away did you see him? A. Maybe twenty feet.

Q. How long had your car been stopped when 40

Emma Damboldt—Cross

- you first saw him? A. It stopped maybe a second or two.
- Q. Was your car moving at the time you first saw him? A. No; the car was stopped still.
- Q. And he was twenty feet away from you? A. 10 Yes; I saw him—
- Q. You have said that already. He was twenty feet away from you? A. Yes.
- Q. Was he in a direct line? A. He came straight, you know.
- Q. So from twenty feet away he ran straight into you? A. Yes.
- Q. Was that the first time you saw him, when he was twenty feet away? A. Yes.
- Q. You did not see him a block and a half away? 20 A. I looked up and the car was stopping.
- Q. You did not see him a block and a half away, did you? A. No, sir.
- Q. You happened to look up and you saw a man twenty feet away ride directly into your car? A. Yes.
- Q. Was your car going thirty or thirty-five miles an hour before this accident? A. We never go so fast.
- Q. Were you going thirty or thirty-five miles 30 an hour before this accident? A. No, sir.
- Q. Where were you sitting? A. On the right side.
- Q. In the back? A. Yes.
- Q. Anybody with you? A. Mrs. Kneise.
- Q. Were you talking with this lady? A. Yes.
- Q. Were you interested in your conversation with her or were you looking out? A. She said to me, "We are in the neighborhood where a friend of ours lives"; then the car stopped and 40 we looked.

Anthony Raffo—Direct

Q. Wasn't it the way the car stopped suddenly that made you look up? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Williams:

Q. When you saw Mr. McLaughlin twenty feet 10
away was your car moving or standing still? A.
Our car stand still.

ANTHONY RAFFO, sworn:

Direct-examination by Mr. Williams:

Q. You did not see this accident, did you? A. 20
No, sir.

Q. You were not in the car? A. No, sir.

Q. Were you with Mr. Damboldt when he went
to the hospital? A. Yes.

Q. And saw Mr. McLaughlin? A. Yes, sir.

Q. Do you know about when that was? A.
Well, I could not just say; no.

Q. Do you know what month it was in? A. No,
sir; I do not.

Q. What hospital was it? A. North Hudson.

Q. Did they go in your car? A. Yes. 30

Q. Did you go up into the room with Mr. Dam-
boldt? A. Yes.

Q. Did you hear Mr. McLaughlin say anything
about the accident? A. Yes.

Q. What did he say? A. When we entered the
room I introduced Mr. Damboldt as the party he
had the trouble with, who met with the accident,
and Mr. McLaughlin says, "Well," he says, "I
don't want you to lose any sleep over this matter;
it was no fault of yours." He says, "I blame 40
the fault of this on a fellow that was right in front

Anthony Raffo—Cross

of me in a Ford car." He says, "I was following him up and he was crowding me to the curb and to avoid an accident that way," he says, "I pulled out on the other side of him and ran into you"—Mr. Damboldt.

10 Q. Was that all he said? A. That is all.

Q. Who was there beside you and Mr. Damboldt and Mr. McLaughlin? A. There was a couple of ladies there. Mrs. McLaughlin was there and some other lady.

Q. How long were you there? A. I judge about fifteen or twenty minutes.

Q. Did you go there again? A. Yes.

Q. How long after the first time? A. Well, that I could not say, just how long after.

20 Q. Did you see Mr. McLaughlin again? A. Yes.

Q. Did he say anything the second time about the accident? A. Well, just saluted one another, that was all—"Hello."

Q. What did he say the second time? A. He didn't say much the second time. He said that he was not allowed to talk; his orders was not to say nothing; he was not allowed to talk.

Q. How long did you stay the second time? A. About two or three minutes, I guess.

30 Q. Who was there the second time beside you and Mr. Damboldt and Mr. McLaughlin? A. His wife was there and a doctor came in.

CROSS-EXAMINATION by Mr. Simpson:

Q. You can give the whole conversation between Mr. McLaughlin and the defendant, but you cannot remember when the visit was? A. No.

Q. How is it if the conversation is so clear to you you do not remember when it was? A. I wasn't interested in it.

40 Q. You are able to give this conversation better

Anthony Raffo—Cross

than the defendant. A. I was there when it was spoken.

Q. How did you come to go to the hospital; were you a witness too? A. No, sir.

Q. How did you happen to go? A. I just happened to meet Mr. Damboldt accidentally that afternoon. 10

Q. What was your business? A. At that time I was out of business entirely.

Q. What was your business before that? A. I used to run a saloon at First and Garden.

Q. Near where this defendant lived? A. Yes.

Q. You knew him very well? A. Yes.

Q. Where did you meet him accidentally? A. On the corner of First and Garden.

Q. You did not know McLaughlin? A. No, sir. 20

Q. What business did you have going to the hospital unless it was to be a witness against McLaughlin, to say he had made statements against himself? A. I never said anything like that.

Q. You do not go to hospitals for pleasure; do not go to see the sick and suffering for amusement? A. No.

Q. What business did you have at that hospital unless it was to tell what he said? A. I tell you how I came to go there, by— 30

Q. Don't call me "boy." A. I never mentioned the word "boy."

Q. Just tell me how you came to go, unless it was to be a witness. A. I met Mr. Damboldt corner of First and Garden Street. He told me he was going to the hospital that afternoon to visit Mr. McLaughlin and I says to Charlie—Mr. Damboldt—I said, "Is your car all right again?" He says, "No." I said, "How are you going?" He says, "I am going in the trolley car." I said, "If you don't mind I will take you up there in 40

Anthony Raffo—Cross

my car.” He said, “All right.” That is how I came to go there.

Q. You went upstairs; you did not wait downstairs? A. No, sir.

10 Q. You could not have been a witness if you had waited downstairs? A. I did not go there with the intention of being a witness.

Q. Are you in business now? A. Yes; bowling alley and pool parlor on Washington Street, Hoboken.

Q. Who began this conversation that you say you heard? A. Which conversation?

Q. The one you testified to about a Ford. A. Mr. McLaughlin.

Q. Who? A. Mr. McLaughlin.

20 Q. No one said anything to him; he just volunteered this? A. Yes.

Q. He was the first person that mentioned a Ford? A. Yes.

Q. He went on to describe the accident, told the defendant he was trying to get out of the way of a Ford? A. Yes.

Q. The defendant hadn't said anything about a Ford, had he? A. No, sir; he hadn't.

30 Q. What time of the day was it that this occurred, this conversation? A. I judge around two or half-past two in the afternoon.

Q. Did you take him to the hospital in your car more than once? A. Twice.

Q. What kind of a car is your car? A. Willys-Knight.

Q. Did you ask permission from the physician or anybody to talk to this man whose leg had just been crushed? A. No.

40 Q. Did you ask permission of the nurse? A. No, sir.

Catherine Denzer—Direct

Q. Didn't ask anybody's permission? A. No, sir.

Q. How long were you there the second time?
A. A couple of minutes.

Q. Did either of the three of you give him any flowers? A. I believe Mr. Damboldt fetched him up a basket of fruit. 10

Q. When was that? A. I ain't sure whether it was the second or the first time. I am not sure.

Q. The second time you didn't get much, did you? A. Much what?

Q. Conversation. A. There was no conversation.

Q. The second time did you ask any physician if you could talk to him? A. No, sir.

Q. Did you know whether the man was under the influence of morphine, codein or bromides? A. No, sir. 20

Q. You did not know anything about that? A. No, sir.

CATHERINE DENZER, sworn:

Direct-examination by Mr. Williams:

Q. Where do you live? A. 713 Boulevard East, Weehawken. 30

Q. Did you live at that place on the day of this accident? A. I did.

Q. 1921? A. I did.

Q. Did you see the accident? A. I did.

Q. Where were you? A. On the second floor in the window.

Q. Will you point out on the map where 713 Boulevard East is? A. Here (indicating).

Q. Pointing to the square marked "713". Will 40

Catherine Denzer—Direct

you tell what you saw of this accident? A. I will. On the 14th day of September there was a funeral procession on Boulevard East, consisting of about five cars. The next thing I saw was Mr. Damboldt's car coming down Boulevard East, slowing
10 down as it got near to Duer Place, I should judge about fifteen feet from Duer Place. They came almost to a standstill when Officer McLaughlin shot over from the southwest side of the street, heading on to Mr. Damboldt's machine, hitting him in the right, or on the right I should say. His vehicle was still in motion when he dropped off over the radiator hood. There was a young man came from the opposite side of the street and stopped off the vehicle.

20 Q. Was the automobile proceeding from what has been called in this case the river wall? A. Proceeding from Boulevard East.

Q. Was the automobile proceeding from the river wall in the direction of Park Avenue? A. Yes.

Q. In what direction was the motorcycle proceeding? A. From the southwest corner of Highwood Terrace.

30 Q. Where did these two machines collide with reference to Highwood Avenue? A. Why, fifteen feet this side of Boulevard East from Duer Place.

Q. Where is Duer Place? A. Duer Place is right on the corner of Boulevard East—right on our corner.

Q. Where is Duer Place with respect to Highwood Avenue? A. This side. There is a point where Highwood Avenue—there is a point where the firehouse sets on and the other side is Duer Place.

40 Q. Which side of the Boulevard was the car

Catherine Denzer—Cross

traveling on when you saw it? A. Mr. Damboldt's car?

Q. Yes. A. On Boulevard East; on the north-east side, on the right.

Q. Where were these cars that you think were a funeral procession? A. They came from High-wood Avenue. 10

Q. Were they on the Boulevard when you saw them? A. They were; that was what attracted my attention.

Q. Which way were they proceeding? A. Proceeding Boulevard East.

Q. That is they were going toward the river wall? A. They were.

Q. Where was Officer McLaughlin's motorcycle when you first saw it? A. I saw him on the southwest corner of Highwood Avenue coming down at a rapid rate of speed, and he made quite an out-curve shooting on, head-on collision in Mr. Damboldt's car. 20

Q. When you say coming down do you mean from the direction of Park Avenue to the river wall? A. Yes.

CROSS-EXAMINATION by Mr. Simpson:

Q. What do you say your name is? A. Mrs. George B. Denzer. 30

Q. Were you married before this marriage? A. I was.

Mr. Williams: I object.

Mr. Simpson: This is on the question of credibility.

The Court: Proceed.

Q. Your are divorced? A. I was.

Q. What was the name of your first husband?
A. Mr. Aldoretta. 40

Catherine Denzer—Cross

Q. In that litigation weren't the Weehawken police involved? A. Not that I know of.

Q. Weren't they witnesses either for or against you? A. Not that I know of.

Q. Who was the petitioner in that proceeding,
10 you or your former husband? A. We were both.

Q. Who was the divorce granted to? A. To my husband.

Q. Haven't you made statements you were going to get square with the Weehawken police because they testified in that case against you? A. No, sir.

Q. You have not made any such statements? A. No; never.

Q. That you were going to get square with the
20 Weehawken police because they testified against you in the divorce action in which your husband had secured a divorce from you? A. Why should I when I did not know anything about it?

Q. I simply ask you if you ever made those statements? A. No.

Q. How long have you lived in this house where you say you saw this accident from? A. Four years.

Q. Where were you in this house? A. Second
30 floor.

Q. Were there trees between you and the accident? A. We have two trees on the terrace.

Q. How high are they? A. Not any higher than the first story.

Q. Not any higher than the first story, you say. Does your house show on any of these pictures, or do those tree show on any of these pictures? A. Not on this one (indicating).

Q. Is that (indicating) the stone wall, the wall
40 surrounding your house? A. The house does not show here; here is the stone wall.

Catherine Denzer—Cross

Q. How far back from the stone wall is your house? A. I could not tell you.

Q. Is it a hundred feet back? A. I could not tell you.

Q. Which window were you in? A. On the second story, a window facing to the south and west. 10

Q. When you saw the automobile of the defendant was it in motion or standing still? A. It was moving so slowly you could say it was at a standstill.

Q. How far did it move before the collision? A. It did not move at all so far as I know.

Q. You say it was moving slowly? A. It just came to a standstill.

Q. When you saw it it was coming to a standstill? A. I believe so. 20

Q. How long after that was it that you saw the collision? A. I saw it the instant it happened.

Q. As this vehicle was moving, the motorcycle, you say, ran into it? A. Yes.

Q. Had you had Mr. Damboldt under your observation before you saw it slowing down? A. Yes.

Q. How long? A. That I cannot say. As the funeral went on I saw this funeral procession down Boulevard East. 30

Q. Where was the automobile of the defendant when you first saw it? A. Coming down Boulevard East; I cannot say how far up.

Q. Three or four hundred feet? A. I cannot say that.

Q. But you did see it at some point before this point of the collision? A. Yes.

Q. Where was the policeman on the motorcycle when you first saw him? A. Coming over from the southwest corner. 40

Catherine Denzer—Cross

Q. How far from the point of the collision. A. About seventy-five feet on an angle.

Q. How far from this automobile did he start to make his turn? A. I do not know that.

Q. Did you see him put up his hand? A. No.

10 Q. Did you hear any horn blown? A. No, sir.

Q. Were your windows up or down? A. Open.

Q. What was it that attracted your attention to this automobile before the collision? A. As I followed this funeral going up Boulevard East, I happened to see this car coming down slowly, bringing the car to a standstill. As to whether they put on the brakes I cannot tell you.

Q. Where was the funeral procession at the time of collision? A. It had proceeded on quite
20 away up the Boulevard.

Q. Had it gone on up out of your sight? A. Yes.

Q. When you speak of the Boulevard do you mean the extension of the Loop or the Loop itself? A. No; the straight Boulevard.

Q. How far is your house from the river wall? A. That I cannot tell you; I haven't the slightest idea.

Q. How long a time do you think occurred from
30 the time you first saw the officer on the motorcycle until the time of the impact? A. It happened all so quickly I could not tell, you, because the officer was going so fast when he jammed his vehicle into this car, and that car—the motorcycle—ran into the radiator and stood there still in motion until Officer McLaughlin became weak for blood and toppled over the hood into the side of the car.

Q. How long was he there before he toppled over from the "weakness of blood"? A. I have
40 not the slightest idea of that.

Q. Can you tell this jury how many seconds

Oscar Hoehne—Direct

elapsed from the time you first saw this automobile until as you say the policeman ran into it? A. Oh, that I do not know. I was a little bit excited when I saw the accident.

10

OSCAR HOEHNE, re-called:

Direct-examination by Mr. Williams:

Q. Mr. Hoehne, do you know Mrs. Kneise, the other occupant of this car? A. Yes.

Q. Do you live in the same house with her now? A. Yes.

Q. Is she ill? A. Yes.

Q. Is she ill in bed? A. Yes; with pleurisy. 20

Defendant rests.

Therese E. Downey—Direct

REBUTTAL

THERESE E. DOWNEY, sworn:

Direct-examination by Mr. Simpson:

10 Q. What is your occupation, Miss Downey? A. Graduate nurse.

Q. Were you a nurse in the North Hudson Hospital when McLaughlin was admitted? A. I was not at the hospital when he was admitted; I was called to take care of him.

Q. When were you called to take care of him? A. They called me about six o'clock on the evening of September 14.

20 Q. Have you charts of the hospital there containing your own memoranda? A. I have the charts here containing both mine and the night nurse's, the record we keep for all cases.

Q. Referring to your own memorandum will you tell me whether or not you administered any opiates to him? A. Yes; I did.

30 Q. Will you tell the jury what opiates you administered? A. Morphine sulphate, grains one-quarter, and one one hundred and fiftieth of a grain of atropine, twice on the night of his admission, once at 8:15 and again at 10:30.

Q. When was the next? A. The next was administered the next day, also by myself; a quarter of morphine, at about eleven o'clock in the morning.

Q. Just go on and give us the history of the opiates during the time he was in the hospital until he was discharged, testifying from your own memorandum. A. May I refer to the chart?

40 The Court: Yes; your own memorandum that you made yourself. A. I gave him the first two, the first evening, and on the 16th at 11:30 a. m. he

Therese E. Downey—Direct

had sodium bromide, grains fifteen. At three p. m. he had sodium bromide, grains fifteen. At 8:15 p. m. on the evening of the 16th, he had codein sulphate, grains one-quarter, and again at 9:15 codein sulphate, grains one-quarter.

Q. I want to cover up to a period of two weeks after he came there. A. He had bromides until the day he was discharged from the hospital. 10

Q. When was that? A. On the 8th of November.

Q. Those bromides are for what—for sleeping? A. Yes.

Q. How long a time did he have this other stuff that you say? A. He had morphine for two weeks alternately, not all the time.

Q. Alternately for two weeks he had morphine? A. Yes. 20

Q. And he had bromides until the day he left the hospital? A. He had them twice the night he left—not that I gave him, but he had it at night.

Q. Now, I want you to confine your testimony to the record you made. A. He did not have any during the day.

Q. Does it show anything on the 20th?

Mr. Williams: What about the night of the 19th? A. He had it on the night of the 19th. It is unusual to give opiates during the day—it is usual to give them at night so that they can sleep at night. 30

Q. Have you finished now with that answer? A. Yes.

Q. Were you there on the night of the 19th? A. No.

Q. How do you know what he had on the 19th in the night? A. This record is kept of all hospital patients.

Q. Is your knowledge based on the record you 40

Therese E. Downey—Cross

did not make as to the 19th? A. Yes; because the doctor leaves orders with me.

Mr. Simpson: I move that that be stricken out.

The Court: Strike out as to the night
10 of the 19th.

Q. I will ask you again to confine your testimony to the record you made. Does that record show anything in the way of opiates on the 20th by you?

A. No; not on the 20th.

CROSS-EXAMINATION by Mr. Williams:

Q. Did you make these memoranda you have testified to? A. Yes, some of them. Some are made by the night nurse. It is the regular hos-
20 pital record.

Q. You testified as to the 15th and 16th of September? A. Yes.

Q. When you so testified were you testifying from memoranda made by you? A. On the night of the 14th when he was admitted I stayed for the night and day, so both the 14th and 15th were my records although it was night and day.

Q. Was the 16th your record? A. Yes.

Q. Is there a record of his getting any opiate on the 17th? A. No; he hadn't anything but bro-
30 mides on the 17th.

Q. What do your records show as to the 18th—in your record, I mean? A. I cannot remember exactly from memory.

The Court: Look at your records that you made yourself.

Q. Look at your records. A. On the 18th, did you say?

Q. Yes. A. On the 18th he had bromides at
40 2 p. m.

Therese E. Downey—Cross

Q. Does your record show that? A. Yes; it is here in my writing.

Q. In my questions I want you to confine yourself to your record, not someone else's. Does it show anything on the 19th in the way of opiate?

A. No.

10

Q. On the 21st? A. No.

Q. On the 22d? A. No.

Q. On the 23d? A. No, not in the day time.

Q. On the 24th? A. No.

Q. On the 25th? A. Yes.

Q. What did he have on the 25th? A. He had codein sulphate, grains a quarter.

Q. And that appears from your records? A. Yes.

Q. On the 26th? A. No; he had nothing on the 26th.

20

Q. You said you were called on the 14th of September? A. The night of the accident I believe was the 14th, if I remember correctly.

Q. About what time? A. About 6 p. m.

Q. And what makes you say it was about 6 p. m.? A. Because I know it was 6. They called me immediately after he was admitted to the hospital and he was admitted about 6 p. m.

Q. Do you know when this accident happened? A. I do not know, but he was admitted according to the hospital records at 6 o'clock in the evening.

30

Q. Are you testifying again from records rather than from your own knowledge? A. I was not there when he was admitted. I am testifying as to the time he was admitted; according to the hospital records he was admitted at 6 p. m.

Q. Of your own knowledge you do not know when he was admitted? A. No; they called me between six and five minutes after six.

40

Anna McLaughlin—Direct

Q. Who called you? A. The night supervisor at the hospital.

Q. Why are you so particular about the time, between six and five minutes after six? A. Between six o'clock and five minutes after six.

10 Q. Why are you able to say it was within those five minutes? A. Because I was just ready to go out when they called me and I went immediately to the hospital instead.

Q. What is the significance of the fact you were just about to go out? A. I had a dinner engagement that evening and I was just dressed and ready to leave when I got the call.

Q. And you are very sure that the call for you was not later than 6:05 p. m.? A. No; not accord-
20 ing to my clock.

Q. What? A. According to my clock it was not later.

Mr. Simpson: I want to offer the evidence of the defendant given at the first trial to which I directed his attention, on page 44: "Q. When did you next see Mr. McLaughlin? A. Up in the hospital, while he was in bed. Q. How long after the accident was that? A. I judge about a
30 week."

ANNA McLAUGHLIN, sworn:

Direct-examination by Mr. Simpson:

Q. You are the wife of the plaintiff? A. Yes.

Q. How long have you been married to him? A. Fourteen years.

Q. Were you present at the hospital at the visit
40 of the defendant and these two men to your husband? A. Yes; I was.

Anna McLaughlin—Cross

Q. When was that with reference to the accident? A. About four days after.

Q. Did you hear any such conversation as related by these two men, one of whom said your husband told him he was attempting to avoid a Ford which crowded him over into such a position that the accident was inevitable? A. No; he was not able to talk. 10

Q. What was his condition? A. He was expected to die that night.

Q. That was four days after the accident? A. Yes.

Q. There was no such conversation so far as you know? A. No.

Q. Did they have any with you? A. No; just "How do you do?" 20

Q. How long were they there? A. Not very long.

Q. Were you there the second time they came? A. Yes.

Q. What occurred the second time? A. They did not stay; they just looked at him and walked out again.

Q. Did not have any conversation? A. No.

Q. At any time did they ask your permission or the doctor's permission to have a conversation with your husband? A. No. 30

CROSS-EXAMINATION by Mr. Williams:

Q. What time of day was this? A. I could not say just what hour; I think it was in the afternoon.

Q. If you are so sure of what was not said why aren't you sure of the time? A. I was too upset to pay any attention to the clock.

Thomas McLaughlin—Cross

Q. You were upset about your husband's condition? A. Yes.

Q. But you were not too upset to know exactly what he didn't say? A. I do not remember him talking to those people at all.

10

THOMAS McLAUGHLIN, re-called:

Direct-examination by Mr. Simpson:

Q. It has been testified here by the defendant and two other men that sometime after the accident they had a conversation with you and the defendant says that you told him not to worry, that
20 it was not his fault; one of his witnesses says you said there was a Ford, whose fault it was, which was crowding you over into such a position that you were compelled to run into this car. Was there any such statement by you at all? A. Not that I remember; I was in no condition.

Q. How long after the accident before you actually came to, was it? A. It must have been a week or more before I realized anything, realized that my leg was off.

30 Q. Do you remember their first visit to you or the second visit; do you remember the first visit at all? A. Not that I remember.

Q. Do you remember the second visit when they came and went out again? A. Yes; they came in and went out.

CROSS-EXAMINATION by Mr. Williams:

40 Q. What did you mean by your testimony this morning then on your direct-examination that you could not remember what you said to them on the first visit, you were under an opiate?

Motion for Direction of Verdict

Mr. Simpson: That is what he says now.

A. That is what I say now.

Mr. Simpson: If he said anything.

Q. What did you mean by your testimony this morning on direct-examination that you could not remember what you said to them on the first visit because you were under an opiate? A. I do not believe I said anything different on this last question to that. I don't remember anything. 10

Q. You do not think that statement is inconsistent with your testimony just given that you do not remember what happened for a week? A. Something of that sort. I would not say a week. I cannot just remember how long it was; it may have been a week; it may have been eight days; it may have been only six days. I do not know; it was in the neighborhood of a week. 20

Testimony closed.

Mr. Williams: I move for a direction of a verdict on the same grounds outlined in my motion for a nonsuit, viz., it now appears by the greater weight of the evidence, first, that the plaintiff being in a place of safety voluntarily put himself in a place of danger, and secondly that in addition to that he was guilty of contributory negligence as a matter of law in failing to use the safeguards that he admits he had and admits that he did not use, viz., a braking device on his car which he says could have stopped the car within its own length, coupled with the testimony most favorable to his side, viz., that he saw this car directly in front of him six feet away. Now, it seems to me that that testimony, which is not contradicted or disturbed in any way, is not only conclusive but it being undisputed makes it a matter of law and not a ques- 30 40

Charge

tion of fact. There is no question of fact involved or no dispute in the facts as I see it. For those two reasons I submit there should be a direction of a verdict for the defendant.

10 The Court: No; I think this case is purely a jury question. If the jury think contributory negligence on the part of the plaintiff caused the accident that relieves the defendant of responsibility, but it is a question for the jury to say.

Adjourned to Jan. 19, 1923.

Charge

20 Members of the Jury: This case has been so ably tried and so carefully argued by counsel that I doubt very much if I can help you any by referring to the testimony more than in a general way; but I want to call your attention to the general features of this case and the law which applies to it.

30 The plaintiff was a police officer of Weehawken and was operating a motorcycle at the intersection, or near the intersection of the Boulevard and Highwood Terrace about six o'clock in the evening of September 14, 1921. The defendant was the owner of and was operating an automobile upon the Boulevard on the same day. A collision occurred between these two motor vehicles, as a result of which the plaintiff's leg was so badly injured that it had to be amputated.

The plaintiff claims that this collision was due to the negligence of this defendant in operating his automobile and brings this suit to recover the damages which he sustained by reason of this collision.

40 The defendant, however, denies liability and

Charge

claims that the collision was due to the negligence of the plaintiff and not to any negligence on his part, and he also contends in his pleadings that the accident was due to contributory negligence on the part of this plaintiff.

You have heard the witnesses produced by the plaintiff and the witnesses produced by the defendant and their account of how this accident occurred, and the witnesses differ. It becomes your duty to decide from this evidence how the accident occurred. It is your duty also where the evidence of witnesses differs to such an extent that you cannot make their stories agree, to determine the weight which you will give to the testimony of the witnesses and the credibility of the various witnesses. In determining that you may take into consideration whether it appears from the testimony that a witness has made statements at other time or times differing from the story he details on the witness stand. You are the sole judges of what the evidence has been and the weight and the credibility of the various witnesses that you have heard. That is your province.

The plaintiff had a right to operate his motorcycle upon the roads of this State, and the defendant had the same right, to operate his automobile upon the same roads. Both the plaintiff and the defendant were under the duty of observing the provisions of the laws regulating the use of motor vehicles upon such roads and highways. The rights of the plaintiff and the defendant in the use of the highways were equal. It was the duty of both to exercise reasonable care for the safety of themselves and for the safety of other persons lawfully using the highway.

The Legislature of this State has provided certain regulations which should be observed by

Charge

motor vehicle drivers operating such vehicles upon the highways of this State, and part of those regulations relate to speed. The motor vehicle act provides, among other things: "A speed of one mile in five minutes where such street or highway passes through the built-up portion of a city, town, township, borough or village, where the houses are on an average less than one hundred feet apart;" and I understand in this case it is admitted that the houses there are less than one hundred feet apart. "Elsewhere, and except as otherwise provided in subdivisions 1, 2 and 3 of this section"—and they do not apply to this case—"a speed of thirty miles per hour; provided, however, that nothing in this act contained shall permit any person to drive a motor vehicle recklessly or at a speed greater than is reasonable, having regard to the traffic and the use of highways, or so as to endanger the life or limb or to injure the property of any person."

The traffic act provides, among other things, that "a vehicle shall keep to the right, and when the improved portion of a road is of sufficient width, the vehicle shall keep to the right of the centre of such road, except when passing a vehicle ahead." And, again, the latter act provides: "In turning while in motion, or in starting to turn from a standing still position, signal shall be given by extending the whip or hand, or by operating an adequate mechanical device indicating the direction in which the turn shall be made."

But mere violations of these provisions of the Legislature will not charge the defendant with negligence or the plaintiff with contributory negligence, for this suit is not brought to recover a penalty for violation of these acts, but violation of these acts, if you find there was such violation

Charge

or violations in this case, should be considered by you in determining the question of negligence of the defendant or contributory negligence of the plaintiff, for the Legislature has by the passage of these acts added additional elements to be considered by a jury in determining the question of negligence and the question of contributory negligence. 10

The defendant was bound to operate his automobile as a reasonably prudent man would have operated it under like circumstances.

If you find that the accident was due to the negligence of this defendant and that such negligence was the proximate cause of the plaintiff's injury, then the plaintiff can recover in this suit, unless you find that the plaintiff was guilty of what the law terms, contributory negligence, that is negligence on his part that contributed to this accident. 20

The plaintiff was under the duty of operating his motorcycle as a reasonably prudent person would have operated it under like circumstances. He was a traffic officer. Police officers are not exempted from the operation of laws limiting the speed of vehicles on the public highways, unless they are engaged in the apprehension of violators of the provisions of the motor vehicle act. It is the duty of a police officer operating a motorcycle to exercise reasonable care in its use for the safety of other persons lawfully using the highway. The right of a traffic policeman in the use of the street is not exclusive, and he cannot wilfully or carelessly collide with another vehicle lawfully using such street. 30

If the plaintiff fails to establish by a preponderance of the evidence that the defendant failed in the performance of some duty which he owed to 40

Charge

the plaintiff, then you will find a verdict for the defendant. If you find from the evidence that the proximate cause of the plaintiff's injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict
10 for the defendant.

So, members of the jury, after considering all the evidence—and as I have said before, you are the sole judges of what the witnesses have sworn to; it is not what counsel may recollect the evidence has been, but you must be the sole judges of what you say these various witnesses have testified to—if you find that the plaintiff was negligent and that his negligence contributed to the accident, then he cannot recover even if you
20 should find that the defendant was also guilty of negligence, for under the laws of this State contributory negligence is a defense to an action of this kind. If you find the defendant was not negligent but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover. However, if you find from all this evidence that the proximate cause of the collision
30 which resulted in this accident to the plaintiff was the negligence of this defendant and that the plaintiff was not guilty of contributory negligence, then the plaintiff is entitled to a verdict at your hands and you should proceed to determine the amount of that verdict, for a verdict for the plaintiff, if he is entitled to a verdict, must be for money damages. The general rule in a case of this character is that the plaintiff, if entitled to recover at all, is
40 entitled to a sum that will compensate him for the injury resulting from such an accident. In this case there has been no claim for loss of wages,

Charge

as I understand the evidence, but the plaintiff is entitled, if entitled to anything, to be compensated for the pain and suffering that he underwent as a result of this collision. That is not an arbitrary sum, but it is a sum which you should arrive at by taking into consideration the length of time the plaintiff has suffered and the extent of that suffering, and taking that into consideration then, if the plaintiff is entitled to a verdict, he is entitled to such sum as you as reasonable men think would compensate him for the pain and suffering which he underwent. 10

He is also entitled, if entitled to recover at all, in addition to the pain and suffering, to be compensated for the permanent disability which is the result of the accident. He has lost his leg. He will go through the balance of his life without that leg; and he is entitled to be compensated for that loss, if he is entitled to recover anything. 20

These two elements, the loss of his leg and the pain and suffering that he underwent as a result of this accident, are the two elements which you should consider in determining the amount of the plaintiff's verdict, if you find the plaintiff can recover.

If, however, you find that the accident was not caused by the negligence of this defendant, or if you find that the accident, while due to the negligence of the defendant, was partly caused by the contributory negligence of the plaintiff, then the plaintiff cannot recover even if he has suffered great physical pain as a result of this accident and has also lost his leg. 30

These, gentlemen of the jury, are the questions which you have to solve.

Charge

I have been requested to charge certain principles of law, and I will dispose of them now.

The first request I have already charged.

The second I have already charged.

10 The third: "The fact that the defendant is partially insured should not influence you in arriving at your verdict." The question, gentlemen of the jury, of insurance has nothing to do with this case. Whether the defendant was insured or was not insured has no bearing whatever; and as far as I recall there is no direct evidence on that subject.

The fourth I refuse to charge otherwise than as I have charged. The fifth I have already charged. The sixth I have charged. The seventh I have charged in substance, and I refuse to charge other
20 than I have charged. The eighth I refuse to charge otherwise than I have charged.

Now, members of the jury, take this case, consider the evidence carefully, apply the rules of law that I have laid down for your guidance, and then after applying the rules of law to the evidence, whatever verdict you arrive at, arrived at in that way and manner, will be a proper verdict.

30 There was a motion to nonsuit and a motion to direct a verdict, both of which were refused by the Court. There is no indication of how you should decide this case or what the Court thinks of the merits of the case. That was simply the decision of the Court that under the law as it appears to the Court this is a question for a jury to decide and not one that should be taken away from the jury. In other words, the decisions of those motions simply had the effect that you gentlemen should decide the case and not the Court.

Charge

Mr. Besson: I desire an exception to the Court's refusal to charge any of the eight requests submitted on behalf of the defendant in the language in which they were submitted.

Mr. Williams: In addition I would like to except to that part of the charge in which Your Honor said, if I correctly wrote it. "If you find that the injury was caused by the contributory negligence of the plaintiff and the defendant was not negligent, then your verdict must be for the defendant;" my point being that "and the defendant was not negligent" is not a necessary element for the finding for the defendant. 10

The Court You may take exception to what I said on that point. I do not think I used that exact language, but you may take exception to what I said. 20

Defendant's Requests to Charge

1. If the plaintiff fails to establish by a preponderance of the evidence that the defendant failed in the performance of some duty which he owed to the plaintiff, then you must find your verdict for the defendant.

2. The rights of plaintiff and defendant in the use of the highway were equal; it was the duty of both to exercise reasonable care both for the safety of themselves and for the safety of other persons lawfully using the highway.

3. The fact that the defendant is partially insured should not influence you in arriving at a verdict.

4. Police officers are not exempted from the operation of laws limiting the speed of vehicles on public highways.

5. It is the duty of a police officer operating a motorcycle to exercise reasonable care in its use both for his own safety and for the safety of other persons lawfully using the highway.

6. The right of a traffic policeman in the use of the streets is not exclusive and he cannot willfully and carelessly collide with another vehicle lawfully using the street.

7. If you find by a fair preponderance of the evidence that the proximate cause of the plaintiff's injury was his own negligence, then you must find your verdict for the defendant.

8. If you find that the plaintiff was driving on the left side of the street in the direction he was travelling, and that he was proceeding at excessive speed at the time of the accident, then you are entitled to infer that he was guilty of negligence.

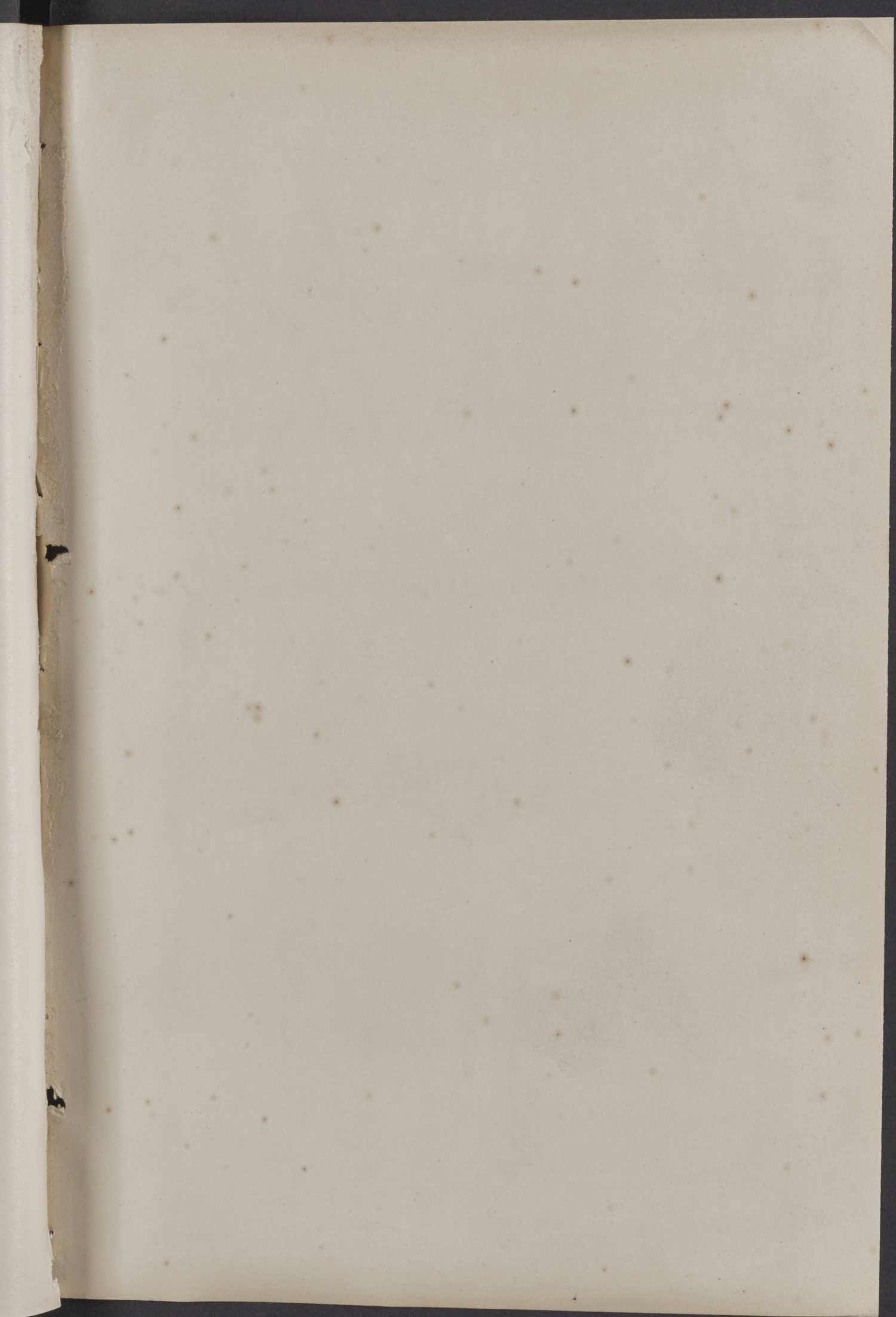


COWAN
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Exhibit P-1

Exhibit P-2





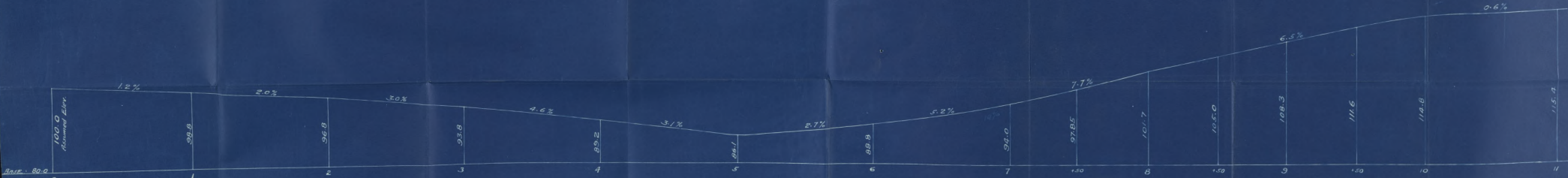
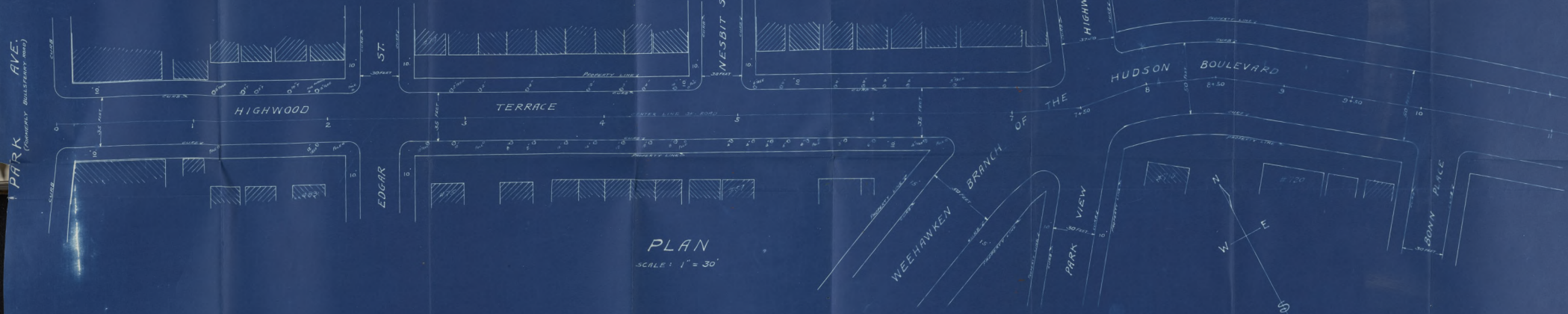
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A-221

MAP SHOWING PLAN AND PROFILE OF HIGHWOOD TERRACE AND WEEHAWKEN BRANCH OF THE HUDSON BOULEVARD TOWNSHIP OF WEEHAWKEN, HUDSON COUNTY, N.J.

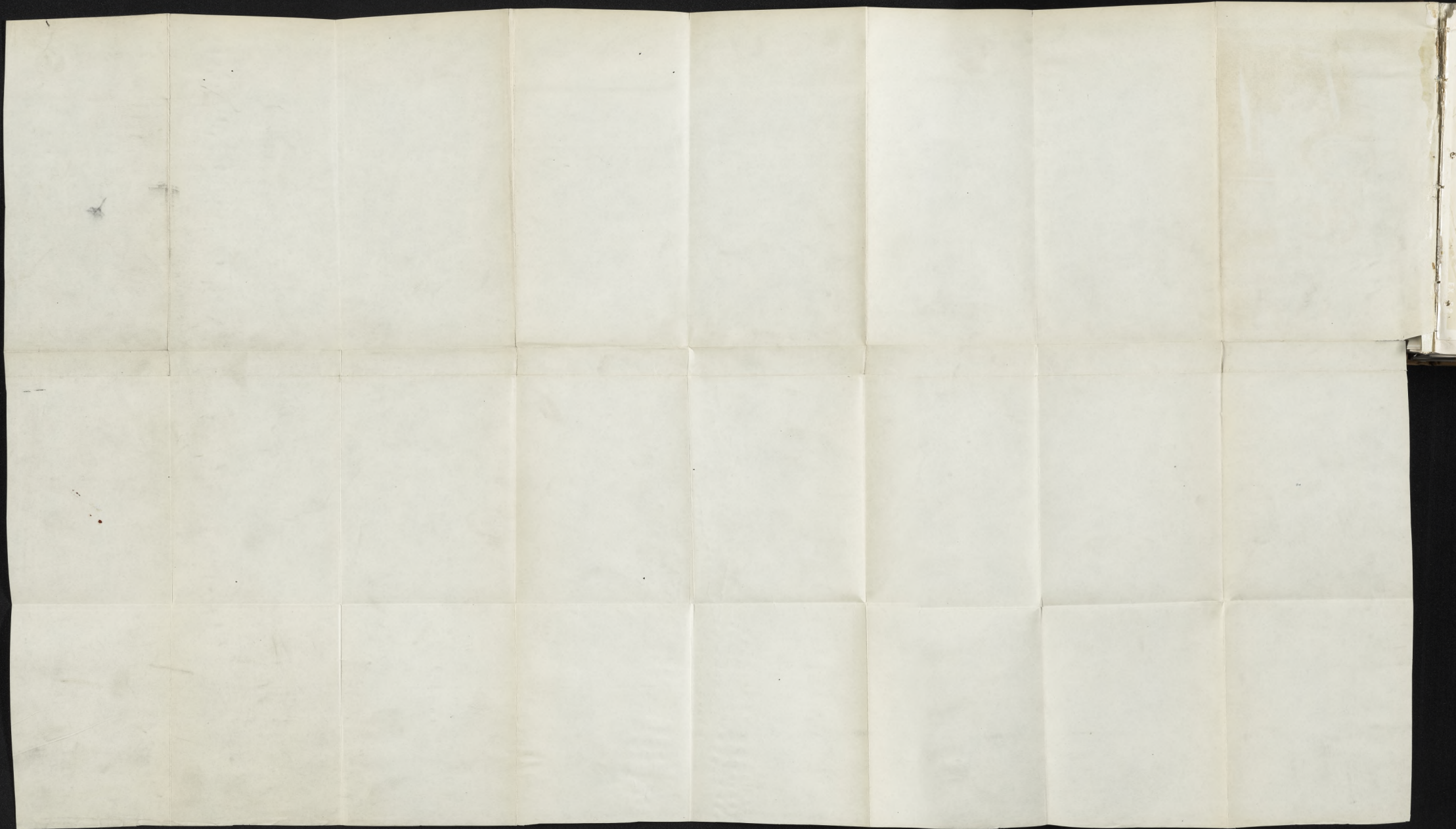
APRIL 1922

Joseph L. Maulsbey
CIVIL ENGINEER AND SURVEYOR
527 UNION ST. WEST HAVEN, N.C.
TEL. UNION 1546.



PROFILE OF HIGHWOOD TERRACE AND WEEHAWKEN BRANCH OF HUDSON BOULEVARD

Hor. 1" = 30'
Vert. 1" = 10'





OFFICE

B. GILARD

GARAGE
& MACHINE S

MOTOR
NASH
TRUCKS

EX. 2

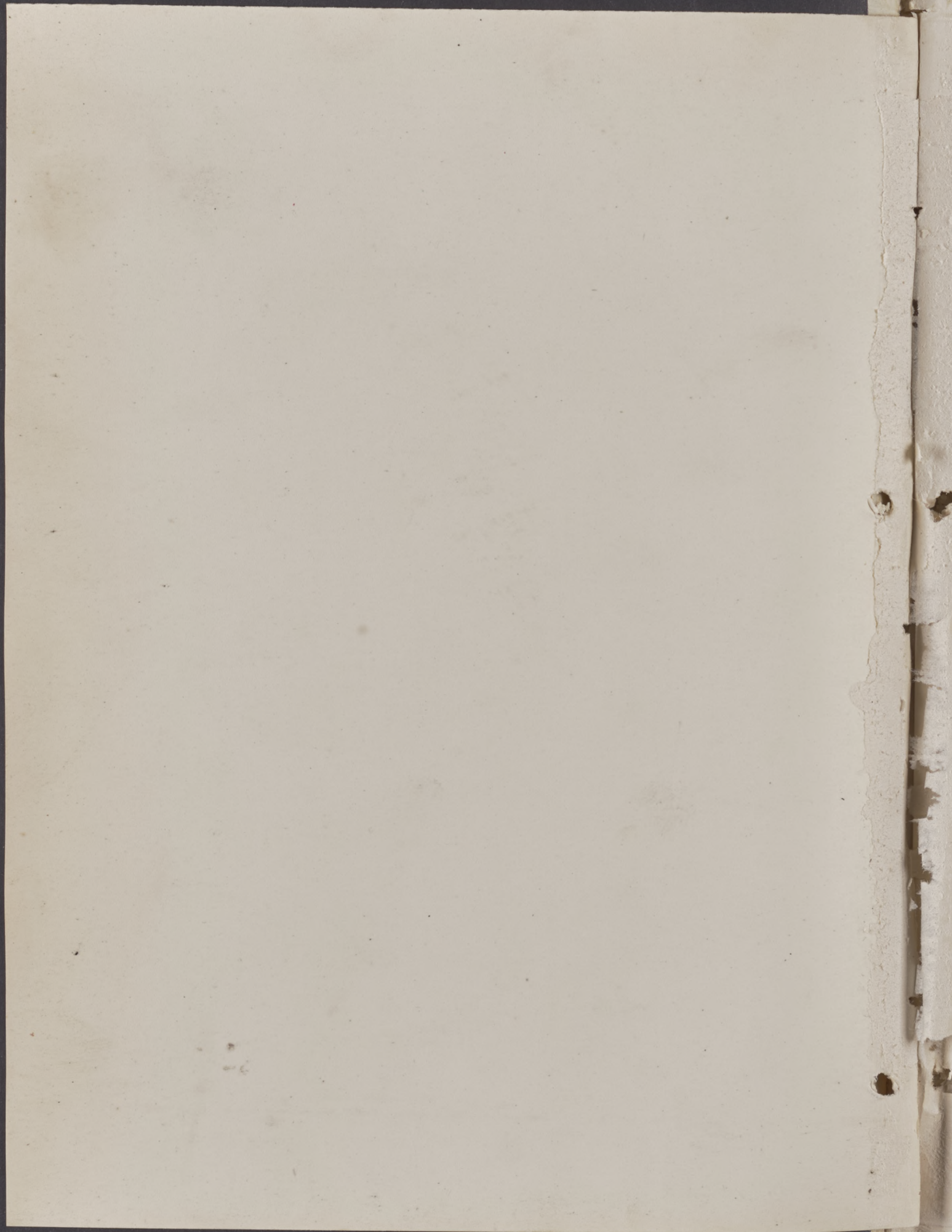
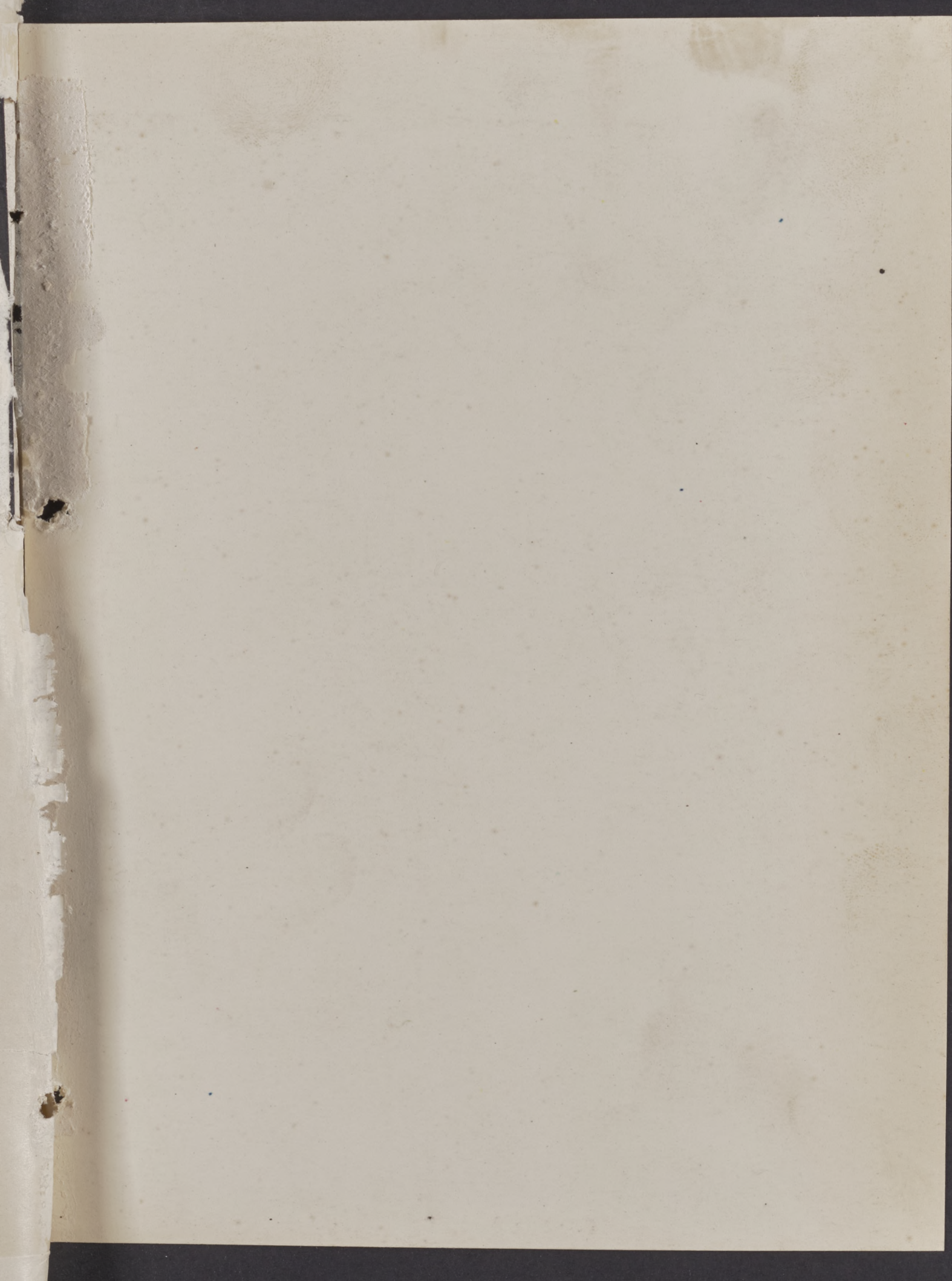


Exhibit D-2

Exhibit D-3





EX. D3.



N.J. - 1921
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EX-D-4

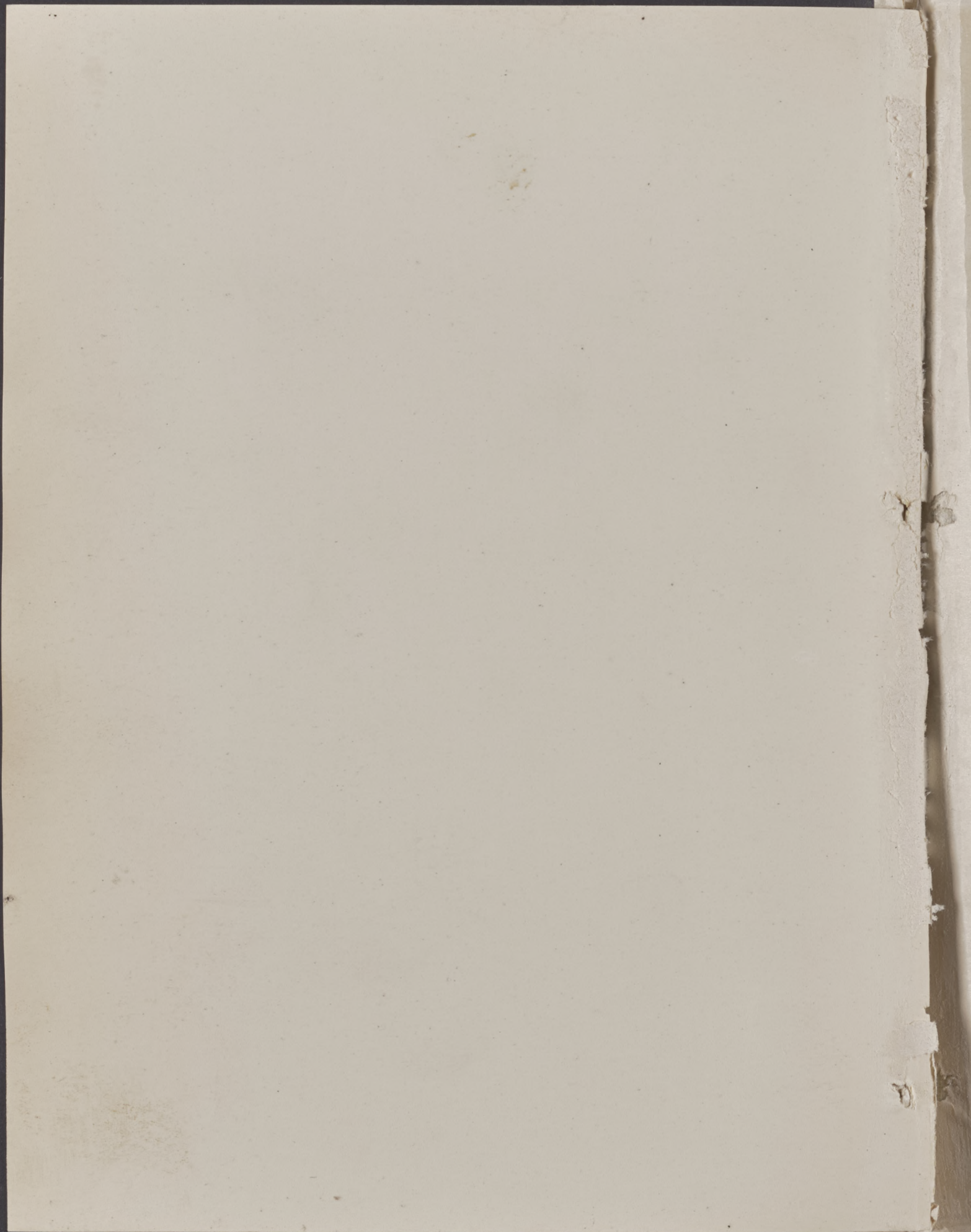


Exhibit D-4

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New Jersey Court of Errors and Appeals

THOMAS McLAUGHLIN,
Plaintiff-Appellant,

v.

CHARLES DAMBOLDT,
Defendant-Respondent.

On Appeal
from Supreme
Court.

BRIEF FOR PLAINTIFF-APPELLANT.

This is an appeal from a judgment in an automobile accident case. The plaintiff was a motorcycle policeman, riding along a public highway, and a car driven by the defendant collided with him, injuring him so that his leg was amputated. Damages were recovered in the amount of \$19,000 and reduced to \$16,000 on rule to show cause.

The case was argued on appeal in the Supreme Court and the Supreme Court reversed the judgment on one ground only—that there was a mischarge as to contributory negligence. The language of the Supreme Court was as follows:

“The learned trial judge said, ‘If you find that the accident was due to the negligence of this defendant and that such negligence was the proximate cause of the plaintiff’s injury, then the plaintiff can recover in this suit, unless you find that the plaintiff was guilty of what the law terms contributory negligence, that is negligence on his part that contributed to this accident.’ He then said, ‘If you find from the evidence that the proximate cause of the plaintiff’s injury was his own negligence and that the defendant was not negligent, then

1. Notes - to state the case for best
2. Notes supporting the Respondent

of course you must find a verdict for the defendant,' and 'If you find the defendant was not negligent but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover.'"

"We think these latter portions of the charge instructed the jury that it could not find the plaintiff guilty of contributory negligence unless the defendant was free from negligence. This is not the law. The defendant may have been negligent yet if the plaintiff had contributed to his injury in such a way that if he had not been negligent he would have received no injury from the negligence of the defendant, he cannot recover, notwithstanding the defendant's negligence."

Argument.

The Supreme Court decided that the Trial Court misdirected the jury on the question of contributory negligence. But the language which the Supreme Court referred to was not an instruction as to contributory negligence; it was a charge as to a situation contended for by the defendant, that the automobile of the defendant was standing still and plaintiff ran into it. The Trial Court correctly charged the law of contributory negligence and then went on to say:

"If you find from the evidence that the proximate cause of the plaintiff's injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant."

The defendant contending that the sole negligence was that of plaintiff.

This is severed from the text of the charge and made to appear as if it was the only thing said on contributory negligence, but if the Trial Court's

charge is looked at in its entirety, it will be seen that the Court correctly charged as to the duty of the plaintiff as to contributory negligence, and commenting on the situation contended for by defendant as to the cause of the accident, used the language characterized by the Supreme Court as error. But this was not the instruction on contributory negligence, because the Court plainly charged:

“If you find that the plaintiff was negligent and his negligence contributed to the accident, then he cannot recover even if you should find that the defendant was also guilty of negligence, for under the laws of this State contributory negligence is a defense to an action of this kind.”

The Supreme Court takes four lines out of such a charge and makes them stand by themselves and says it was a misdirection; yet these four lines must be read in connection with the rest of the charge, because it is the contention of the defendant that the injury was caused solely by the negligence of the plaintiff, who ran into the standing automobile. The Court charged the law to be that if it was his own negligence and there was no negligence on the part of the defendant, of course he could not recover. Then the Court went on to charge as to contributory negligence. If four lines can be taken out of a charge and all the rest of the matter of the charge waived, then there are very few charges which would submit themselves to the acid test.

The Supreme Court says that the Trial Court incorrectly charged in one place and correctly in another part and the jury could not tell which was right. If that was so, that would be proper ground for reversal, but that is not the fact. This was a

correct charge. It is not a case where the correct law is stated in one part of the charge and incorrectly in another, and the jury left to find out which is correct, but a complete statement of the charge sets forth a complete statement of the law, that the plaintiff could not recover if guilty of contributory negligence, even in the case of the negligence of the defendant, because the plaintiff, before he can recover, must show negligence of the defendant, and the case must fail if it appears there was contributory negligence on the part of the plaintiff. The argument of defendant's brief that part of the charge is incorrect and part is correct fails when it is seen that the part denominated as incorrect is really the heart of the part denominated as correct and is part of the charge. It is very easy to take three or four lines of a charge without the context and say it does not completely state the law. Of course, it doesn't. It would be a remarkable case in which a complete statement of the law could be made in four lines.

Veodor v. Veodor, 89 L., 427.

So long as the law is stated correctly and intelligently, the ultimate test of the soundness of instructions to the jury is, not what the ingenuity of counsel can at leisure work out the instructions to mean, but how and in what sense, under the evidence before them and the circumstances of the trial, would ordinary men and jurors understand the instructions as a whole.

Kargman v. Carlo, 90 Atl., 292; 85 N. J. L., 632.

An excerpt from instructions to a jury upon which error is assigned must be read in connec-

tion with the context, and if, when so read, no error appears, the excerpt alone will not support an assignment of error.

Schoeffler v. Philipsburg Horse Car R. R. Co., 100 Atl., 199; 90 N. J. L., 235.

It is respectfully submitted that the judgment of the Supreme Court should be set aside and the judgment of the Hudson County Circuit Court should be affirmed.

Respectfully submitted,

ALEX. SIMPSON,
Attorney and of Counsel for
Plaintiff-Appellant.

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Appeal Printing Co., 22 Thames St., N. Y. City

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Note bottom of page.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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| THOMAS McLAUGHLIN, Plaintiff-Appellant, | } On Appeal From Supreme Court. | 10 |
| vs. | | |
| CHARLES DAMBOLDT, Defendant-Respondent. | | |

BRIEF FOR RESPONDENT.

Introduction. 20

This is an appeal from a judgment of the New Jersey Supreme Court, reversing a judgment of the Hudson County Circuit Court and awarding a *venire de novo*. The action was instituted in the Circuit Court by Thomas McLaughlin, a motorcycle policeman, the plaintiff-appellant, hereinafter called the plaintiff, against Charles Damboldt, a retired delicatessen storekeeper, the defendant-respondent, hereinafter called the defendant, to recover for injuries alleged to have been received by said McLaughlin by reason of a collision between the motorcycle he was riding and the automobile of the defendant Damboldt. The verdict was nineteen thousand (\$19,000.00) dollars but was subsequently reduced by the trial

The references are to Case Book used in Supreme Court and ordered to be furnished to this Court to supplement Case Book furnished by the Appellant in this Court. 40

Note bottom of page.

court to sixteen thousand, five hundred (\$16,500.00) dollars on a rule to show cause reserving exceptions and the right to appeal.

Annexed to the printed case, as exhibits, are a copy of a map of *locus in quo*, together with certain photographs thereof, as well as photographs of the Damboldt car. The map shows
 10 both the lay-out of the streets and the profile of the street upon which the accident occurred. Reference may be had to this map in connection with the narration of facts given below.

Statement of Facts.

About 6 P. M. on Sept. 14, 1921, Thomas McLaughlin, a motorcycle policeman, age thirty-nine years of the Township of Weehawken, Hudson County, New Jersey was riding his four
 20 hundred lb. Harley-Davidson motorcycle Easterly on Highwood Terrace, Weehawken, New Jersey, intending to turn into Highwood Avenue (p. 15, lines 1, &c.).

Charles Damboldt, a retired delicatessen storekeeper and his wife and two friends, Oscar Hoehne and Mrs. Kniese were driving Westerly
 30 on Boulevard East, Weehawken, New Jersey their destination being Hoboken, New Jersey (pg. 74). According to his own statement McLaughlin was riding a new motorcycle the brakes of which were in perfect order, at the rate of six (6) miles an hour (pgs. 24 and 25). At this speed he said he could stop his motorcycle within its own length (p. 25, line 3). While passing along Highwood Terrace he observed

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Note bottom of page.

the approach of the Damboldt car at a rapid rate of speed, (p. 22, line 20 &c.). He variously states that it was on the right hand side of the Boulevard East and the center of Boulevard East (p. 22, line 38; p. 23, line 21). He estimated the speed about twenty-five (25) miles an hour and having determined to pass in front of it, he threw up his right hand as a signal for Damboldt to stop, and proceeded, as he says, to make the turn from Highwood Terrace into Highwood Avenue where he was going to get a supply of gasoline and oil (p. 21, line 30) for his motorcycle (p. 25, line 21). He testified making this turn at the rate of six (6) miles an hour and that the car continued its rapid approach and that he threw out his right hand, caught the radiator of the car (p. 18, lines 36 &c.) and that his motorcycle then struck the front of the car and he slid over the radiator and mudguard and fell on the other side of the automobile, as the result of which collision he lost his right leg (see also p. 85). At the time of the collision he was eight feet east of Highwood Avenue on Boulevard East (see p. 28, lines 12-30).

In order to fix the position of the car and to show that its brakes had been applied shortly before the impact of the collision, plaintiff produced former Mayor Grauert and Mayor Leech, both of the Township of Weehawken, who reached the scene of the accident a short time after, to establish the existence of certain track marks such as would be made by rubber tires of an automobile on a pavement at a time when the brakes were very suddenly applied. Mayor

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Note bottom of page.

10 Grauert testified that the track marks were about 32 feet in length (p. 56, lines 1-40, pp. 58 and 59, also p. 50, lines 1-40 &c.) that they were parallel to the curb of Boulevard East and that the front wheel of the car, which was standing still at the time he arrived on the scene of the accident, was then 8 feet from the curb, that the rear wheels of the car fitted exactly into these tracks, the rear portion of the tracks he said was about 12 feet from the curb, although at the previous trial he had testified to 8 feet. Boulevard East was a street about 50 feet wide.

20 McLaughlin testified that at the time of the accident no other vehicle was in the street but his own and the Damboldt touring car and that he had a clear and undisturbed view. The testimony of Mayor Leech was that the front wheel of the car was about 8 feet from the curb. It is undisputed that the Nash Touring car was so badly injured by the accident that it could not be moved from the spot on its own power; (p. 77, line 38) and that from the time of the collision to the time that it was towed to the garage for repairs no change was made in its position so that by the time former Mayor 30 Grauert and Mayor Leech made their measurements there had been no change in the position of the car (p. 50, lines 1-40 &c.).

The testimony of Mr. Damboldt which is uncontradicted shows that the touring car was on Boulevard East and the front wheels were 15 feet from Highwood Terrace. This testimony is of the utmost significance and places the position of the car on the map as being the point

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Note bottom of page.

where the letter "S" appears in the word "Hudson" (p. 76, lines 1-10).

Damboldt's version of the accident was that the plaintiff McLaughlin was passing from Highwood Terrace along Boulevard East and suddenly trying to pass around and get ahead of a line of cars travelling Easterly on Boulevard East and apparently making no observation and going at a high rate of speed, suddenly encountered the Damboldt's touring car, striking the radiator with great violence, McLaughlin's body passing completely over the top of the hood (p. 74, line 34; p. 75, line 14). 10

There is nothing in the testimony of McLaughlin or any other witness, except that of Mayor Leech and former Mayor Grauert, showing the location of the touring car at the point of impact. *Except that the testimony of McLaughlin shows that at the time of the collision he was eight feet east of Highwood Avenue on Boulevard East* (p. 28, lines 12-30). The defendant and the witness Hoehne also testified that Hoehne took measurements of the location of the touring car immediately after the accident and that his measurements showed that there was eight feet distance from the curb and twelve feet east of the intersection of the Boulevard with Highwood Avenue (p. 77, lines 17-40). *This testimony of Damboldt and Hoehne as to the location of the car was uncontradicted.* 20 30

It is difficult to understand how the motorcycle policeman in making his turn from Highwood Terrace to Highwood Avenue got into a position eight or twelve feet East of Highwood

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Avenue when it was his plan to turn into that street.

10 Plaintiff had an opportunity to contradict this testimony, if untrue, but failed to do so and his own testimony and the testimony of his witnesses do not locate the car at any point west of Highwood Avenue. It is significant that Mrs. Cath-
erine Denzer, a disinterested witness who lived in the house on the northeasterly corner of Boulevard East and Highwood Avenue observed that McLaughlin came rapidly from behind a line of automobiles passing east and suddenly ran into the front of Damboldt's touring car going west (p. 107, line 30; p. 108, line 20). She also places the position of the car as being on Boulevard East (p. 109, line 3).

20 At the close of plaintiff's case a motion for non-suit was made on the ground that plaintiff's testimony indicated that he was guilty of contributory negligence, contributing to the cause of the accident and which consisted in his wilful act in going from a place of safety and putting himself in a place of danger, and in his wilful failure to use the safeguards which he admits he had and did not use, viz., a braking device by which he says he could have stopped his motor-
30 cycle within its own length, and a motion to direct a verdict on similar grounds, both motions being denied, these matters being fully set forth in the record and notice of appeal. Exceptions were also taken to the court's refusal to allow certain questions; to the court's refusal to charge some of defendant's requests as submitted and the court's charge to the jury.

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Note bottom of page.

On defendant's appeal to the Supreme Court that court reversed the judgment of the Circuit Court for errors in the trial judge's charge, and awarded a *venire de novo*. From this judgment the plaintiff who was the respondent in that court appeals to this court. Of the points which follow hereafter, points one (1) and two (2) are in answer to the plaintiff's contentions in this court and points three (3) to six (6) inclusive cover grounds of appeal in the record, briefed and argued by the defendant on his appeal to the court below, which he is entitled to argue in this court upon the authority of *State v. Verona*, 93 N. J. L. 389, 108 Atl. 250; *Thompson et al. v. City of East Orange*, 109 Atl. 340; *State v. Metzler*, 110 Atl. 922; *Birtwistle v. Public Service Ry. Co.*, 112 Atl. 194; *Diamond Mills paper Co. v. Leonard Hygiene Ice Co.*, 113 Atl. 139; *State v. Belkota*, 113 Atl. 143; *State v. Fischer*, 113 Atl. 608; *Klinert v. Hutchinson*, 121 Atl. 742, 743.

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The references are to Case Book used in Supreme Court and ordered to be furnished to this Court to supplement Case Book furnished by the Appellant in this Court. 40

POINT I.

The Supreme Court committed no error in holding the portions of the Trial Judge's Charge erroneous and prejudicial to the defendant, and reversing the Judgment and awarding a venire de novo. The defendant was entitled to an unequivocal statement from the Trial Judge as to the law.

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The portions of the trial judge's charge to the jury held erroneous in the court below read:

"If you find from the evidence that the proximate cause of plaintiff's injury was his own negligence and that the defendant was not negligent, then, of course, you must find a verdict for the defendant.

20

"If you find the defendant was not negligent, but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course, the plaintiff cannot recover."

The Supreme Court said of these portions of the charge:

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The appellant further contends that he was prejudiced by portions of the court's charge to which exceptions were duly taken. We are of the opinion that in this respect the appellant's contention is well founded. The learned trial judge said, "If you find that the accident was due to the negligence of this defendant and that such negligence was the proximate cause of the plaintiff's injury, then the plaintiff can recover in this suit, unless you find that the plaintiff was guilty of what the law terms contributory negligence, that is negligence on his part that contributed to this accident". He then said, "If you find from the evidence that the proximate cause of the plaintiff's injury

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was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant", and "If you find the defendant was not negligent—but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover".

We think these latter portions of the charge instructed the jury that it could not find the plaintiff guilty of contributory negligence unless the defendant was free from negligence. This is not the law. The defendant may have been negligent, yet if the plaintiff had contributed to his injury in such a way that if he had not been negligent he would have received no injury from the negligence of the defendant, he cannot recover, notwithstanding the defendant's negligence. 10

It is said by the respondent that the trial court charged correctly on the subject of contributory negligence in the passage first above quoted. Assuming this to be so it does not cure a misstatement of the law in another part of the charge because it is impossible to tell whether the verdict of the jury might not have been the result of the erroneous portion of the charge. In the present case the jury might have found that the plaintiff was guilty of contributory negligence had it not been for the court's instruction that in order to do so the defendant must have been free from negligence. 20 30

This case is one of great importance to each of the parties. Each is entitled to an unequivocal statement from the trial judge as to the law. This we feel the appellant did not have. The judgment will be reversed and a *venire de novo* issued.

Counsel for the appellant now for the first time contends and argues that the instruction 40

first above quoted, and held erroneous in the court below was not an instruction upon the law of contributory negligence at all but was an instruction upon a situation contended for by the defendant, at the trial, that the accident in question was caused by the sole negligence of the plaintiff and was, therefore, an instruction upon the law of negligence rather than upon the
10 law of contributory negligence, and that as an instruction upon the law of negligence, it was a sound exposition of the law. Assuming for the purpose of the appellant's point that is so, and that the instruction is one upon negligence rather than upon contributory negligence, the question then arises, did the jury perceive the distinction, if in fact one could be drawn, between the terms "negligence" and
20 "contributory negligence", as applied to plaintiff, or were they misled into treating the instruction as one upon contributory negligence rather than upon negligence? Certainly it is not unreasonable to assume that if men learned in legal terminology, as were the Justices who sat in the court below, were misled (as plaintiff's attorney says they were) into treating the instruction as one upon contributory negligence rather than negligence, that the jury composed
30 as it was, of laymen who have little or no familiarity with legal expressions and who are unable to draw fine legal distinctions, and who mostly hear the term "negligence" when applied to a plaintiff in an accident case called "contributory negligence", were not also misled into regarding the instruction as upon "contributory negligence" rather than "negligence".

It is also significant that in no part of the
40 Judge's charge, is the distinction between "neg-

ligence" and "contributory negligence" as applied to a plaintiff, made plain to the jury.

But after all, it can make little or no difference how the instruction was treated by the jury or the court below, for, even assuming that a distinction can be drawn between negligence and contributory negligence as applied to a plaintiff, and that the instruction complained of was an instruction upon the subject of negligence as distinguished from contributory negligence, and was so treated by the jury, we submit that the instruction was still erroneous and prejudicial to the defendant, for it required the existence of plaintiff's negligence, even if the proximate cause of his injury to concur with the absence of negligence on the part of the defendant to bar a recovery. In other words, it was calculated to lead the jury to believe that negligence on the part of the plaintiff even if the proximate cause of his injury would not exculpate and free the defendant unless he, the defendant, was free from negligence on his part. This is certainly the law. If the plaintiff's injury was the proximate result of his own negligence he was debarred from recovery and it was not necessary for the jury to find that the defendant was free from negligence. Defendant may have been negligent but this would not entitle the plaintiff to recover unless such negligence on the part of the defendant was the proximate and efficient cause of the injury to the plaintiff. *Kelson v. Public Service Ry. Co.* (Ct. of E. & A., 1920), 110 Atl. page 919 and cases therein cited.

The learned trial judge's charge clearly authorized the jury to find for the plaintiff, even if his injury was the proximate result of his own negligence, if the defendant was at all negligent and even if the defendant's negligence had

no connection whatever with the plaintiff's injury, or in other words the jury could not free the defendant if there was any negligence on his part, no matter how slight, although that negligence did not cause the injury to the plaintiff, and although the plaintiff's injury was solely and proximately the result of his own negligence.

10 As to the second portion of the trial judge's charge we deem it sufficient to say that it is open to the same objections as the first portion of the charge.

The instructions complained of regarded either as instructions upon negligence or contributory negligence are erroneous in law, and the fact that the true rule may have been stated in other parts of the charge does not cure the error. It is well settled that where a legal proposition a court's charge is material and erroneous, 20 and is properly excepted to, the legal presumption is that it produced prejudice, though in other parts of the charge the true rule was stated. It would be impossible to tell by which the jury was governed. It must be, beyond doubt, that the error challenged, did not prejudice for the court to say it was not sufficient ground for reversal.

30 In *Armour & Co. v. Joseph Russell* (Cir. Ct. of Appeals 8 Circuit) 144 Fed. 614, 6 L. R. A. (New Series) page 602 at page 606 Judge Sanborn speaking for the Circuit Court of Appeals for the Northern District of Iowa said:

40 "And the vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed. *St. Louis, 1 M. & S. R. Co. v. Needhan*, 3 C. C. A. 129, 147, 10 U. S. App. 339, 52 Fed. 371, 377; *St.*

Louis & S. F. R. Co. v. Farr, 6 C. C. A. 211, 216, 217, 12 U. S. App. 520, 56 Fed. 994, 1000."

In the case of *State v. Sahagian*, (Sup. Ct. of N. J. Feb. 21, 1923) 119 Atl. at 781, Mr. Justice Katzenbach, said, in dealing with errors contained in ~~the~~ ^a trial of judge's charge:

"The jury is not required to determine what part of a contradictory charge is correct." 10

Under the topic "Instructions" in 14 Ruling Case Law, Paragraph 72 at page 813, the text writer says:

"* * * But while an instruction which is inaccurate or incomplete may be cured by subsequently supplying the defect or accurately stating the law, yet if it is erroneous, in that it states the wrong rule by which the jury are to be governed, it is not cured by another instruction stating the right rule as it is impossible to tell by which rule the jury was actually controlled in reaching its verdict. * * *

Mr. Justice Bergen in the case of *State v. Sandt*, 111 Atl. 651, 95 N. J. L. 49, said, in dealing with an erroneous charge:

It is so ambiguous that it manifestly tended to mislead the jury. That other parts of the charge on this subject were correct does not cure the trouble, for a jury is not required to determine what part of a contradictory charge is correct. The part of the charge objected to is unsound in law and prejudicial to the defendants." 30

In *Brown et al. v. Public Service Ry. Co.* (Court of Errors and Appeals of New Jersey, 40

June 18, 1923), Chancellor Walker, speaking for that court said:

“This case falls within the rule that where two distinct propositions are charged, one correct and the other erroneous, the jury cannot decide which is right, and there is, consequently, reversible error in the record. *Collins v. Central R. R. Co. of N. J.*, 90 N. J. Law, 593, 101 Atl. 287.”

10

The same rule is also enunciated in the following N. J. cases: *Burnett v. State*, 60 N. J. L. 255; 37 Atl. 622; *State v. Fitzgerald*, 72 Vt. 142; 47 Atl. 403; 12 Cyc. 656, 657; *State v. Tapack*, 72 Atl. 962; 78 N. J. L. 208; *Collins v. Cent. R. R. Co. of N. J.* (Ct. of E. & A. of N. J.) 101 Atl. 287;

For cases in other jurisdictions see, *St. Louis, I. M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 377; *Choctaw, O. & G. R. Co. v. Holloway*, 52 C. C. A. 260, 114 Fed. 458; *Richards v. United States*, 99 C. C. A. 401, 175 Fed. 944, and cases cited; *Mutual Reserve L. Ins. Co. v. Heidel*, 88 C. C. A. 477, 161 Fed. 539, and cases cited.

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POINT II.

If the Judgment of the Supreme Court can be Sustained upon any Legal Ground, the Judgment should be Affirmed.

In 2 Cyc. p. 221, it is said:

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“An appellate court is not confined to the grounds assigned by the court below for its decision, but may sustain a judgment on grounds other than those assigned by the lower court.”

In *McCarty v. West Hoboken*, 93 N. J. L. p. 247 Chancellor Walker delivering the opinion for the Court of Errors and Appeals said:

“The question to be determined upon review in an appellate court is always as to the propriety of the judicial action of the court below, and not the soundness of the reason which prompted it. *Gillerpie v. Ferguson*, 78 N. J. L. 470; 74 Atl. 460; *Sadler v. Young*, 78 N. J. L. 94, 75 Atl. 890; *Brientall v. Sadler*, 82 N. J. Law, 405, 81 Atl. 819; *Pierson v. N. Y. S. & W. R. Co.*, 83 N. J. Law, 661, 85 Atl. 233; *McAndrews & Forbes Co. v. Camden*, 78 N. J. Eq. 244, 78 Atl. 232.” 10

“It must be perfectly obvious that if the court below reached a right conclusion, even if upon a wrong reason, the judgment should not be disturbed.”

Other cases in New Jersey following the rule above stated are: 20

Weisel v. Merchant's National Bank, 85 N. J. L. p. 253; *Henera v. Manhattan Elec. Supply Co.*, 85 N. J. L. p. 248; *Solomon v. Public Service Ry. Co.*, 92 Atl. p. 942; *McMichael v. Horay*, 90 N. J. L. p. 142; *Biash v. Palisade Realty Co.*, 90 Atl., 1118, 86 N. J. L., 238.

It is therefore immaterial whether the court below treated the instructions held erroneous as upon contributory negligence rather than negligence. If the instructions are at all erroneous or if the reversal by the court below can be sustained on any of the other grounds assigned by the defendant in the court below, or upon any other legal ground, the judgment should be affirmed. 30

Note bottom of page.

POINT III.

The Plaintiff's Negligence Contributed to the Accident.

The résumé of the testimony given above indicates indubitably that the plaintiff controlled
10 the situation in which the accident occurred.

The measurements taken after the accident, located without contradiction the defendant's car at the time of the collision in a position on Boulevard East on the Northerly side of this street which was fifty feet wide from curb to curb; eight feet from the northerly curb and twelve to fifteen feet East of Highwood Avenue. The position of the car thus described is illus-
20 trated on a little sketch which is annexed to the brief in aid of this argument.

An analysis of plaintiff's testimony reveals the following important admissions:

(1) Plaintiff on his motorcycle, from a point on Highwood Terrace, observed defendant's Nash touring car on Boulevard East, fifty feet or more distant (p. 17, line 25).

30 (2) That at the time of making this observation, plaintiff was travelling at six miles an hour and could stop his motorcycle, a new Harley-Davidson, with brakes in perfect working order, within its own length (p. 23, line 38 &c.).

(3) That he says he observed defendant's touring car travelling at a rapid speed on Boule-

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vard East and observing this fact, instead of remaining in a position of safety, he threw up his right hand as a signal for the touring car to stop and proceeded directly into the path of the touring car (p. 16, lines 20 &c.; p. 17, lines 21 &c.; p. 24, lines 32 &c.).

The position of the Damboldt car at the point of collision, indicates clearly that the Damboldt car was in a position in which the driver had a lawful right to have it. The only evidence of negligence on his part, *which evidence was in dispute*, being that he was driving at a speed in excess of twelve miles an hour. On the other hand, there has been no contradiction of the position of the Damboldt car East of Highwood Avenue at the time of the collision, in fact the testimony of Leech and Grauert, substantiates its location and no satisfactory explanation is given by the plaintiff for his being on the wrong side of the street at a point eight or twelve feet East of the cross street at the time the collision occurred. It is true that there are circumstances in which the driver or rider of a vehicle might be justified in being on the wrong side of the street, but in the situation at bar, plaintiff said there were no other vehicles in the street, but the Damboldt car and his own, and although he had the complete width of a fifty foot street in which to maneuver, he nevertheless chose to ride right into the path of the Damboldt car. It is difficult to conceive of a planier case of negligence which contributed to the injury in such way that if the plaintiff had been guilty

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of no such negligence, he would have received no injury at the hands of the defendant. It may be possible that it was the purpose of the plaintiff to maneuver himself into Highwood Terrace, but the situation of the vehicles at the time of the collision, indicates that if this was the case, he was performing this maneuver in an unusually careless fashion. It is contended that this situation is controlled by the well settled principles of the law of the negligence as announced by the Court of Appeals in the case of *Pennsylvania R. R. Co. v. Righter*, 42 N. J. Law 180 at 183, in which Mr. Justice Reed, speaking for the court said:

“It is settled, as a part of this rule, that the negligent act of the plaintiff must contribute, proximately, to the injury, else the right of the plaintiff to recover will not be defeated by such act.

If in spite of his negligent act, the injury would have occurred by means of the negligent conduct of the defendant, or if the injury is disconnected from his act by an independent cause, then there is no legal contribution to the injury. *Moore v. Central R. R. Co.*, *supra*; *Van Horn v. Central R. R. Co.*, 9 Vroom, 133; *Sper. & Red. on Neg. Sec. 33*; *Whart. on Neg. Sec. 331*.

It is also settled that the comparative degrees of the negligence of the respective parties will not control the question of liability, but that if the plaintiff, in any degree, proximately contributed to the injury, he cannot recover. *Drake v. Mount*, 4 Vroom, 441; *Haslan et al. v. M. & E. R. R. Co.*, Id. 147; *Sper & Red. on Neg. Sec. 37*; *Whart. on Neg. Par. 334*.

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It is also settled that if the case presents a fairly debatable question whether the plaintiff's negligent conduct so contributed, the solution of that question is for the jury; *but if it clearly appears that such conduct did contribute to the production of the injury, the court should control the case and direct a non-suit.*

The case book shows that appropriate motions for non-suit and for the direction of a verdict were made on behalf of the defendant, based upon the contributory negligence of the plaintiff and that this defense was properly set forth in the pleadings. (See C. B., pages 72 and 73 for motion to non-suit; pages 121 and 122 for motion to direct a verdict.)

Upon the uncontradicted testimony as it appears in the record of this case, *it is contended that there was no jury question;* the colliding vehicles were not at a crossing point at the time of the collision but were on the Hudson Boulevard, eight, twelve or fifteen feet east of Highwood Avenue. The unexplained presence of the plaintiff in this situation, it is contended, so clearly showed him guilty of contributory negligence, that the ruling of the trial court in submitting the question of contributory negligence to the jury was erroneous and constitutes a reversible error.

A non-suit should have been granted or a verdict should have been directed for the defendant.

The court's alleged erroneous ruling on this point is assigned in the 4th, 5th, 7th and 8th grounds of appeal set forth in the Notice of Appeal (pages 2 and 3).

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POINT IV.

The Trial Court's Charge Was Erroneous.

The court's attention is invited to the 9th reason for appeal set forth in the Notice of Appeal, page 3, which challenges the sufficiency
 10 of the following portions of the trial court's charge to the jury:

“If you find from the evidence that the proximate cause of the plaintiff's injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant.”

This portion of the charge is set forth on page 126 of the printed case, lines 2 to 10 inclusive.
 20

Timely exception was taken to this portion of the charge as is set forth on page 129, lines 8 to 20 inclusive. The error in this statement being clearly pointed out to the judge in the following colloquy:

“Mr. Williams: In addition I would like to except to that part of the charge in which Your Honor said, if I correctly wrote it,
 30 ‘If you find that the injury was caused by the contributory negligence of the plaintiff and the defendant was not negligent, then your verdict must be for the defendant’; my point being that ‘and the defendant was not negligent’ is not a necessary element for the finding for the defendant.

The Court: You may take exception to what I said on that point. I do not think I used that exact language, but you may take exception to what I said.”
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It appears from the foregoing that the trial court not only refused to correct the error but took the view that he didn't think that he used that exact language. In addition to this, the trial court emphasized the same proposition by stating it in another way later in his charge as is set forth on page 126 at line 24, where he said:

“If you find the defendant was not negligent but that the plaintiff collided with the defendant's automobile while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover.”

10

The foregoing statement was manifestly erroneous and although no exception was taken to this last proposition, nevertheless it shows that the court made the same error in two different places in the charge.

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It is contended that the vice in the portion of the charge excepted to, lay in the fact that the court required the existence of plaintiff's negligence to concur with the absence of negligence on the part of the defendant to bar a recovery; in other words, it was calculated to lead the jury to believe that negligence on the part of the plaintiff would not exculpate the defendant unless defendant was free from negligence on his part.

30

It may be urged that the correct rule was stated in other portions of the charge, but it is contended that the situation is governed by the proposition of law stated by Judge Sanborn in the case of *Armour & Co. v. Joseph Russell* (Cir.

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Ct. of App.) 144 Fed. 614, 6 L. R. A. New Series, page 602 at page 606, where it was said:

10 “And the vice of a wrong rule in a charge of the court is not extracted by the fact that the right rule was also given therein, because it is impossible to tell by which rule the jury was governed. *St. Louis, 1 M. & S. R. Co. v. Needham*, 3 C. C. A. 129, 147, 10 U. S. App. 339, 52 Fed. 371, 377; *St. Louis & S. F. R. Co. v. Farr*, 6 C. C. A. 211, 216, 217, 12 U. S. App. 520, 56 Fed. 994, 1000.”

In the case of *State v. Sahagian* (Sup. Ct. of N. J. Feb. 21, 1923), 119 Atl. 780 at 781, Mr. Justice Katzenbach, said, in dealing with errors contained in the trial of a court charge:

20 “* * * for the jury is not required to determine what part of a contradictory charge is correct.”

Under the topic “Instructions” in 14 Ruling Case Law, Paragraph 72 at page 813, the text writer says:

30 “* * * *But while an instruction which is inaccurate or incomplete may be cured by subsequently supplying the defect or accurately stating the law, yet if it is erroneous, in that it states the wrong rule by which the jury are to be governed, it is not cured by another instruction stating the right rule as it is impossible to tell by which rule the jury was actually controlled in reaching its verdict. * * **”

Mr. Justice Bergen in the case of *State v. Sandt*, 111 Atl. 651, 95 N. J. L. 49, said, in dealing with an erroneous charge:

40 ———
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“It is so ambiguous that it manifestly tended to mislead the jury. That other parts of the charge on this subject were correct does not cure the trouble, for a jury is not required to determine what part of a contradictory charge is correct. The part of the charge objected to is unsound in law and prejudicial to the defendants.”

10

It is contended that the charge in the case at bar was erroneous and tended to mislead the jury and that it was of such a nature that a consideration of the charge *in toto* does not cure the situation, it being, as has already been pointed out, impossible to determine what rule was used by the jury as its guide. For this reason it is submitted the judgment should be reversed.

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POINT V.

The Trial Court's Refusal to Charge Defendant's Seventh Request, was Erroneous.

Attention is invited to the Eleventh ground of appeal, page 3, as well as to the Seventh 30 of defendant's requests to charge, set forth on page 130, and the exception to the refusal to charge, as submitted on p. 129, lines 1-4 inclusive. The defendant's seventh request to charge was as follows:

“If you find by a fair preponderance of the evidence that the proximate cause of the plaintiff's injury was his own negli-

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gence, then you must find your verdict for the defendant.”

It would appear that the trial court, instead of charging this request in the language submitted, charged the jury as follows:

10 “If you find from the evidence that the proximate cause of the plaintiff’s injury was his own negligence and that the defendant was not negligent, then of course you must find a verdict for the defendant.” (See p. 126, lines 2-10 inclusive.)

It also appears on p. 126 at line 24 that he charged the jury as follows:

20 “If you find the defendant was not negligent but that the plaintiff collided with the defendant’s automobile, while it was standing there and without any negligence on the part of the defendant, then of course the plaintiff cannot recover.”

30 It is submitted that this manner of stating the proposition was far different from the Seventh request to charge, as submitted by the defendant and that it followed as the necessary consequence, that the jury was misled to the prejudice of the defendant. It is contended that this ruling constituted a reversible error.

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POINT VI.

The trial court erred in refusing to charge the defendant's eighth request.

Attention is invited to the 12th Ground of Appeal, page 4, which is based upon the refusal of the trial court to charge the defendant's eighth request, which was as follows: 10

"Because the trial court, although requested to do so, refused to charge the jury as follows:

'8. If you find that the plaintiff was driving on the left side of the street in the direction he was travelling, and that he was proceeding at excessive speed at the time of the accident, then you are entitled to infer that he was guilty of negligence.' "

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Timely exception was taken to the court's refusal to so charge. (See p. 129, lines 1-4, p. 128, lines 20 and 21; also p. 130, line 37.)

This request was hypothetical in its nature. It did not assume merely facts in issue. In dealing with such instructions, the text writer in 14 Ruling Case Law, Topic "Instructions" Par. 13, page 741, said, *inter alia*:

"* * * An instruction, however, which 30 merely applies the law to hypothetical facts, and submits to the jury the question whether the facts hypothetically stated are true, is not an instruction as to matters of fact. Neither is an instruction of this character, where it does not assume as true any fact in issue, does not undertake to state the testimony, or in any way convey to the jury the court's opinion of the testimony."

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Again the text writer under the same topic, in 14 Ruling Case Law at Par. 41, page 772, &c., said:

10 “The court may instruct the jury as to the law of the case and leave them to apply the law to the facts. Or the court may instruct the jury as to the law on a hypothetical statement of facts and submit to the jury whether such facts are proved, if the statement fairly presents the case shown in evidence and embodies in plan and succinct language the true principles of law applicable to the facts as developed on the trial. Such an instruction is not objectionable as a charge on the facts. *And if there is any evidence, though slight, tending to support them, a party is entitled to have the law expounded on a hypothetical statement of this character.*”

20

It is submitted that the substance of this request to charge was entirely correct and if the hypothetical state of facts described in the request to charge, existed, the jury was entitled to infer therefrom that the plaintiff was guilty of negligence.

30 The uncontradicted facts of the case showed the location of the defendant's car on the right side of the Hudson Boulevard described as Boulevard East, eight feet from the Northerly curb and from eight, twelve or fifteen feet East of the Highwood Avenue corner. The photographs of the Damboldt car, annexed to the printed case, show the imprint of the wheel of the motorcycle in the radiator of the car, as well as the demolition of the bumper. It is

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self-evident from the uncontradicted location of the car, that the motorcycle must have been travelling on the left hand side of the street in the direction in which it was travelling and that either or both of the vehicles must have been going rapidly. If the jury found that it was the motorcycle that was travelling at excessive speed on the left hand side of the street 10 in the direction in which it was going, it was certainly entitled to infer therefrom that the plaintiff was guilty of negligence.

It is contended that the defendant was entitled to the benefit of this request to charge and the refusal of the trial court to do so, constituted a reversible error.

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POINT VII.

The Judgment of the Supreme Court should be Affirmed for the Reason Stated by the Supreme Court or for One or More of the Other Grounds of Appeal or Reasons for Reversal Assigned by the Defendant in the Court Below.

Respectfully submitted,

SAMUEL D. WILLIAMS, 30
Atty. for Defendant-Respondent.

SAMUEL D. WILLIAMS,

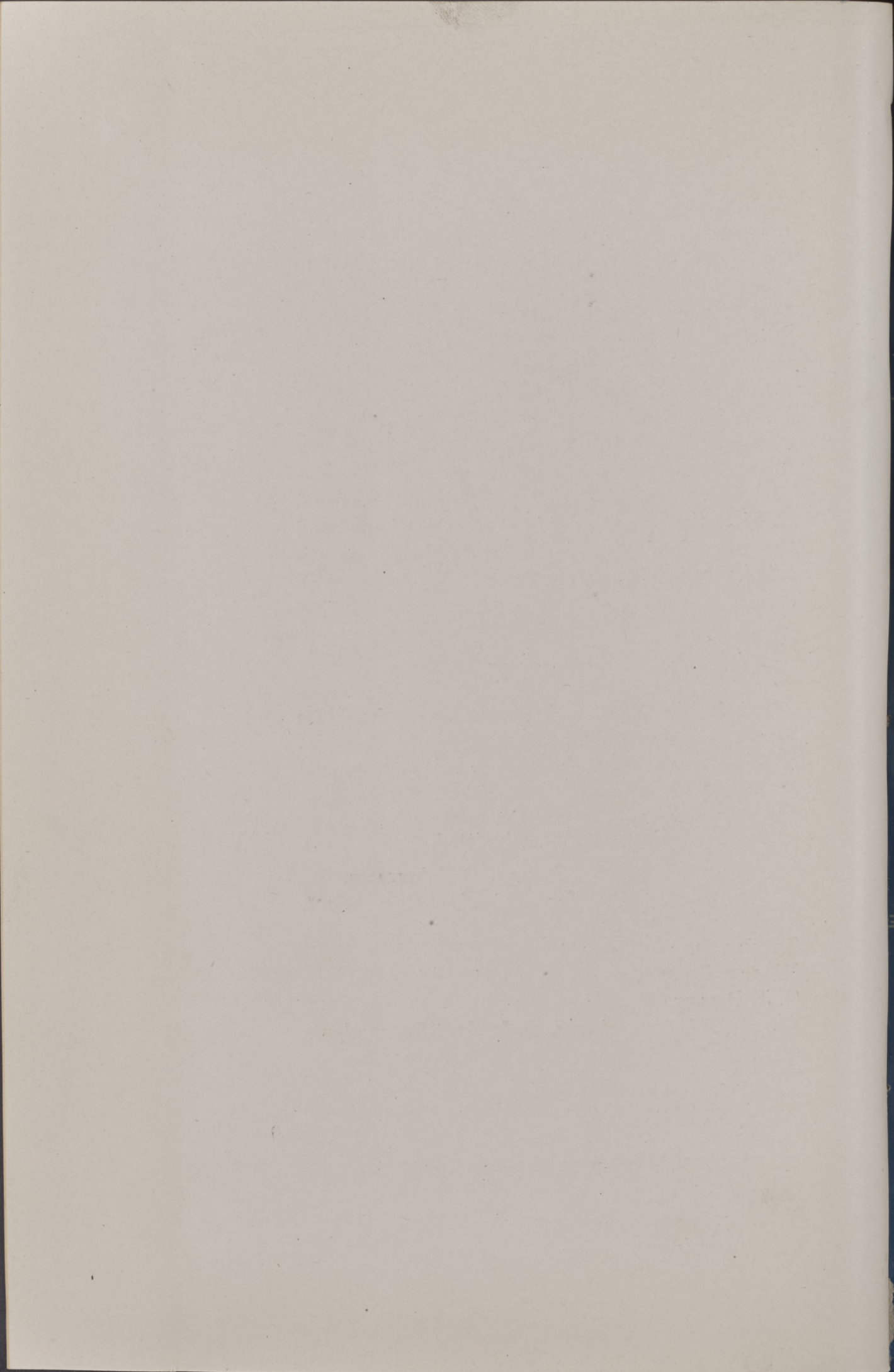
HARLAN BESSON,

O. J. PELLET,

Of Counsel with Defendant-Respondent.

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#713
DENZER'S
HOUSE

#717

12 FT. 8 FT. DAMBOLDT CAR

37-50

PROPERTY LINE

HUDSON BOULEVARD

CENTER LINE OF ROAD

HIGHWOOD TERRACE

BRANCH OF

THE

7+50

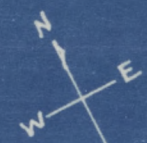
8+80

CURB 2

PROPERTY LINE

#710

#720



TRACED FROM ORIGINAL MAP

Scale 1"=30'

By Joseph G. Maulbeck

