INDEX FOR STATE OF CASE.

REBUTTAL.

EXHIBITS.

Complaint.

(Filed June 14, 1928.)

New Jersey Supreme Court

BERGEN COUNTY.

WILLIAM L. PATTERSON, JR., *Plaintiff,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law. Complaint.

Plaintiff, residing in the Village of Ridgewood, in the County of Bergen and State of New Jersey, says that:

FIRST COUNT.

1. On or about the 24th day of February, 1927, the defendant, Oliver Surpless, was the owner of a certain automobile.

2. On the aforesaid date, the said automobile was being driven by the said Oliver Surpless, through his servant or agent, the defendant, Stafford Miller, in a general westerly direction in and along Godwin Avenue, at or near the intersection of Doremus Avenue, both streets being public highways in the Village of Ridgewood, County of Bergen and State of New Jersey.

3. On the aforesaid date, the plaintiff was walking across Godwin Avenue at the aforesaid street intersection in a general northerly direction.

4. As the plaintiff was walking across the aforesaid crosswalk, the defendant, Oliver Surpless, carelessly and negligently permitted the said automobile to be operated by his servant or agent, the defendant, Stafford Miller, an unlicensed driver, contrary to the provisions of the Motor Vehicle Act of the State of New Jersey, and the defendant, Oliver Surpless, through his servant or agent, the defendant, Stafford Miller, operated the said car in a careless, reckless and negligent manner, with poor and defective brakes, without making proper observations for pedestrians who might then and there be lawfully using the aforesaid highways, without sounding a warning of the approach of the said car to the said street intersection, and at such a rapid and unlawful rate of speed, that he lost control of the same and drove the said automobile into and against the plaintiff, and plaintiff was hurled to the ground and rendered unconscious.

5. As a result of the premises, plaintiff sustained a fracture of the pelvis, fracture of the jaw, and numerous and severe internal injuries, and was seriously bruised and contused in and about the head, arms, body and legs. His nervous system was also greatly shocked and injured, all of which injuries are of a permanent nature.

6. As a result of the premises, the plaintiff was confined to the hospital and his home for a long period of time and underwent great pain and suffering and will continue to undergo great pain and suffering in the future. Plaintiff was also obliged to expend and incur large sums of money for medical treatment in an effort to cure himself of the injuries so sustained as aforesaid, and will in the future be obliged to expend large sums of money for medical treatment and care on account

of the said injuries. Plaintiff was unable to attend to his business as a real estate broker for a long period of time and sustained a great loss of profits and earnings.

SECOND COUNT.

1. On or about the 24th day of February, 1927, the defendant, Oliver Surpless, was the owner of a certain automobile which was proceeding in a general westerly direction in and along Godwin Avenue, at or near the intersection of Doremus Avenue, both streets being public highways in the Village of Ridgewood, County of Bergen and State of New Jersey.

2. He repeats paragraph three of the first count.

3. As plaintiff was walking across the crosswalk at the aforesaid time and place, the defendant, Oliver Surpless, knowingly permitted the said automobile so owned by him to be then and there under the control and management of an unlicensed, incompetent and inefficient driver, and by reason thereof the said automobile, being a dangerous instrumentality while under the control and management of said inefficient, incompetent and inexperienced person, by the consent and authority of the said defendant, Oliver Surpless, was so negligently, inefficiently and unskillfully operated and controlled that it ran into and against the plaintiff and by reason thereof plaintiff was hurled to the ground and rendered unconscious.

4. Plaintiff repeats paragraphs five and six of the first count.

Plaintiff demands as damages the sum of $50,000.00 on both counts.

ARTHUR C. DUNN,
Attorney for Plaintiff.

Answer.

(Filed October 24, 1928.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

WILLIAM L. PATTERSON, *Plaintiff*, *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law. Answer of Defendants.

Defendants residing in the Village of Ridgewood, Bergen County, New Jersey, say that:

FIRST DEFENSE TO FIRST COUNT.

1. They deny paragraph 1.

2. They deny each and every allegation of paragraph 2.

3. They deny paragraph 3.

4. They deny each and every allegation of paragraph 4.

5. They deny each and every allegation of paragraph 5.

6. They deny each and every allegation of paragraph 6.

FIRST DEFENSE TO SECOND COUNT.

1. They deny each and every allegation of paragraph 1.

2. They repeat paragraph 3 of the first defense to first count.

3. They deny each and every allegation of paragraph 3.

4. They repeat paragraphs 5 and 6 of the first defense to first count.

SECOND DEFENSE TO EACH COUNT.

Defendants were guilty of no negligence that was the proximate cause of the alleged accident set forth in the complaint.

THIRD DEFENSE TO EACH COUNT.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

FOURTH DEFENSE TO EACH COUNT.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to look, listen or otherwise inform himself of the approach of the automobile with which he collided.

FIFTH DEFENSE TO EACH COUNT.

The alleged accident set forth in the complaint was due solely to the negligence of the plaintiff in failing to make proper observations of vehicles on the highway.

COLLINS & CORBIN,
Attorneys of Defendants.

Reply.

(Filed October 24, 1928.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

WILLIAM L. PATTERSON, *Plaintiff,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law. Reply.

Plaintiff denies the second, third, fourth and fifth defenses to each count, set forth in the Answer.

ARTHUR C. DUNN,
Attorney for Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

WILLIAM L. PATTERSON, *Plaintiff,* v. OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law.

Hackensack, N. J., June 24, 1929.

Before—Hon. EDWIN C. CAFFREY, Judge, and a Jury.

APPEARANCES:

For the Plaintiff: ARTHUR C. DUNN, Esq., by JOHN J. BRESLIN, JR., Esq.
For the Defendants: MESSRS. COLLINS & CORBIN, by EDWARD A. MARKLEY, Esq.

(During the examination of the jurors the following question was asked by Mr. Breslin:)

Mr. Breslin: Are any of the members of the jury as it is now constituted stockholders in the Standard Accident Insurance Company?

Mr. Markley: I ask for a mistrial, your Honor, on that. The Standard Accident Insurance Company is not a party to this suit, and I think that question is improper, as attempting to prejudice the jury, on the theory that an insurance company is involved when, as a matter of fact, it is not.

The Court: I deny the motion.

Mr. Markley: Your Honor will allow me an exception.

(A jury was accepted and sworn.)

(Mr. Breslin opened the case to the jury.)

(Mr. Markley opened the case to the jury.)

SUSAN B. CONNERS, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mrs. Conners, where do you live? A. 142 Godwin Avenue.

Q. What town? A. Ridgewood, New Jersey.

Q. How long have you lived there? A. I should think about, I think, seventeen years. A little over that.

Q. Mrs. Conners, do you remember the night of this accident? A. I do.

Q. Where were you? A. I was standing on the corner of Doremus Avenue and Godwin Avenue.

Q. Now, can you tell us what direction Godwin Avenue runs in? A. I would think east and west. I am not very good—I say east and west.

Q. And Doremus Avenue runs the other way? A. Yes, into Godwin, and stops.

Q. It does not run through Godwin, does it? A. No.

Q. I know it is your first experience on the stand. A. I am scared to death.

Q. Yes, I know. That is the reason I am taking it easy. Were you standing around the intersection? I mean, were you standing near it? A. I was standing on the corner.

Q. On the corner. Now, let us get our different directions straight. Paterson is east. We will say

Paterson is in a westerly direction. A. Well, I don't know which direction. I was going to Paterson, and was waiting for the bus.

Q. You were standing on the corner? A. Of Doremus and Godwin.

Q. Were you standing on the northerly side of the intersection or the southerly side? A. Well, I was standing on Mr. Eyre's corner.

Mr. Breslin: Can we stipulate as to that, Mr. Markley?

Mr. Markley: Southwest corner.

Mr. Breslin: Southwest corner of the intersection.

Q. Now, while you were standing there, did you see Mr. Patterson? A. Yes.

Q. Mrs. Conners, prior to the accident did you know Mr. Patterson? A. I wouldn't say I knew him, no. I just know of Mr. Patterson.

Q. You did not know him personally? A. No.

Q. You have not any interest in this case? A. None whatever, except for justice, that is all.

Q. Now, did you see Mr. Patterson that evening? A. As he got out of the cab, yes.

Q. What did the cab do? A. The cab drove up to where we were standing. This gentleman got out. I didn't know it was Mr. Patterson. The gentleman got out. I don't know whether he said, "Good night" or not. He said a word. The cab drove on, turned in to Doremus Avenue, and was right at the corner, and Mr. Patterson started to cross the street. The cab had moved on.

Q. As he started to cross the street did you see anything happen? Did you see anything happen? A. What do you mean by that?

Q. Well, I do not want to lead you?

By the Court:

Q. Did you see an accident? A. Not that minute.

By Mr. Breslin:

Q. Any time after he started to cross the street did you see an accident? A. Yes.

Q. Just tell us in your own words what you saw? A. As I stood there, this gentleman got out of the taxi, and the taxi went on, and Mr. Patterson started to cross the street. As he was pretty nearly to the center of the street,—he was walking almost straight across,—I happened to look up the street. It all happened very quickly. I looked up the street, and I said to my son, "Look at that car coming down."

Mr. Markley: I object to the conversation and ask that it be stricken out.

The Court: Oh, no.

The Witness: You asked me to describe the accident.

The Court: It is part of the *res gestae.*

Mr. Markley: Your Honor will allow me an exception.

The Court: Yes.

Q. And after you said that, what did you see, Mrs. Conners? A. Why, almost in an instant I heard a thud or crash, and I said, "Oh, he has gone into the tree," thinking the driver—

Q. Do not tell us what you thought, Mrs. Conners. Mrs. Conners, do not tell us what you thought. We have to be rather technical at times. A. All right.

Q. After you heard this noise, what did you see after that? A. I saw a body go up in the air and come down with a thud on the ground.

Susan B. Conners, cross.

Q. Mrs. Conners, was it a slight impact? Mrs. Conners, was this impact a slight impact or a heavy impact? A. It sounded very heavy to me.

Q. Now, did you see anything more of the accident? A. No.

Q. Did you hear a horn blown prior to the accident? A. No.

Q. Did you see any other cars right near Mr. Patterson? A. No.

Cross examination by Mr. Markley:

Q. Was there anybody with you, Mrs. Conners? A. My son, Oscar Conners.

Q. C-o-n-n-o-r-s? A. C-o-n-n-e-r-s.

Q. Is your son here? A. Yes, sir.

Q. What is his name? A. Oscar T. Conners.

Q. I do not know whether all the jurors can hear you. A. Oscar T. Conners is my son.

Q. Will you not keep your voice up just a little bit, Mrs. Conners? A. Yes.

Q. How old is he? A. He is eighteen and a half.

Q. Was he going to Paterson with you? A. Yes, sir.

Q. And you and he were standing in front of Mr. Eyre's house, were you? A. Yes, sir.

Q. And you were going to take the bus that would go down past the Ridgewood Station? A. No; we were going to Paterson.

Q. Which way were you going to Paterson? A. We were going through Doremus Avenue, if we could get the bus.

Q. The bus would go through Doremus Avenue, would it? A. Well, that we never know. It sometimes goes one way, and sometimes the other. We were waiting for the bus to Paterson.

Q. Had you taken that bus before, on other occasions? A. Yes.

Q. What? A. Yes, I think so. I very seldom use the bus.

Q. Would the bus come along Godwin Avenue? A. Yes.

Q. And would it come from your left or from your right? A. If it came from the depot and was going to Paterson through Doremus, it would come toward me, and to my right.

Q. From your right? A. No; from my left to my right.

Q. I am trying to find out which way this bus was coming. A. There was no bus coming. We were waiting there.

Q. Which way did you expect it to come? A. From the depot, toward me.

Q. Then was it your understanding that the bus would turn into Doremus Avenue? A. We expected it to, yes.

Q. Sometimes it didn't? A. Sometimes it went on, straight on down, sometimes, very seldom. As a rule we expected to get what we call the Doremus Avenue bus, for Paterson.

Q. Did the bus that would come from the station come from your right and then turn in front of you? A. From my right? Well, possibly, if I was facing Godwin, it would come from my right.

Q. Which way were you facing? A. I was catercorner, standing on the corner.

Q. You were going to get on after it pulled into Doremus Avenue, were you? A. We hoped to, yes.

Q. What? A. Yes.

Q. That is what you expected to do? A. Expected to do.

Q. Were you talking to your son? A. I don't know that I was, specially. We were only there a few minutes.

Q. Do you remember whether you were or not? A. Yes; just as I remarked, I spoke to him about the car coming down. I don't know that I said anything else.

Q. Had you been standing very long? A. Probably five or ten minutes.

Q. Had you seen other cars coming down during the five or ten minutes? A. No, there were not any cars. It was very quiet, and I don't remember seeing any cars except one which came from—stopped on the corner of Doremus and Godwin Avenue, on the opposite side to where we stood. They had a flat tire I was told. I don't know.

Q. Then the only car you saw during the five or ten minutes, you say, during the time you stood there, outside of that one car— A. None except Stafford Miller's.

Q. Except Stafford Miller's car? A. Yes.

Q. Were there any cars in back of his car as it came along? A. I didn't see a sign of any.

Q. Did you see a bus coming in the opposite direction from Stafford Miller's car? A. No.

Q. Did not see any of those? A. I did not see anything at all for a few minutes. It was absolutely almost a blank, except for one car.

Q. You say you were there about five or ten minutes? A. Yes, that is right.

Q. During all that time you saw no other car except the two you mentioned? A. Yes.

Q. On Godwin Avenue, I mean. A. Yes, on Godwin Avenue. It happened to be a time when there was not much traffic, in the winter.

Q. That is a County Road there, is it not? A. Yes, sir.

Q. How near to the corner do you live? A. I

live 142. I live up toward the other corner, near Ackerman Avenue.

Q. Is that the street up one block to your right? A. It is right straight; Ackerman and then Doremus.

Q. If you stood on Godwin Avenue and faced across the street it would be one block to your right? A. To my left.

Q. All right. Now, it was dark at the time? A. Yes; it was February.

Q. A fair night, was it not? A. 7:30, approximately.

Q. Were there stars out? Was it a bright or dark night; rainy? A. I think it was a wonderfully bright night, if I remember correctly.

Q. How far up the road did you see Miller's car, as he came along? A. That I couldn't tell you exactly. It was not very far up; quite a little ways.

Q. Can you give us some idea, Mrs. Conners? A. No, I couldn't—possibly half a block. That would be about all.

Q. Half a block. There is quite a big light there, an arc light? There is a big light on the corner of Godwin and Doremus, is there not? A. Yes.

Q. You say you could see half a block up toward the station? A. Well, I would see lights coming down, certainly.

Q. There were lights on this car, were there not? A. Yes.

Q. You think you saw it half a block away, do you? A. Well, I wouldn't like to say positively. I would think fairly. Maybe not quite so far. There is a curve comes around.

Q. You had no trouble seeing it? A. No. Nor hearing it.

Q. And no trouble hearing it? A. No.

Q. Why could you hear it? Was it making a noise? A. I think you can hear a Ford a fairly good distance.

Q. You did hear this Ford a fairly good distance? A. I wouldn't say that I could hear—yes, I almost would say I could hear it fairly well; it came so quickly.

Q. You heard it and you saw it, did you? A. I would say more, I saw it.

Q. How many feet would you say that half a block would be, approximately? I know you did not measure it. A. I would not even say probably a half block. I would not like to measure. I don't know.

Q. Can you give us any approximate distance? A. No, I would not, no.

Q. How far up is the next block? What is the next block from the station? What is the name of that street? A Pomander Walk.

Q. That is one block nearer the Ridgewood Station than Doremus? A. Yes.

Q. Was it midway between Pomander Walk and Doremus? A. I really don't know. I would not know how to tell you that. When a thing comes into your view you don't know exactly the number of feet.

Q. I am trying to get an approximation of it. You said you saw it, and you could observe by looking. A. I would think a fairly good distance. I would think half way up. I would not be positive. And the lights came around. You can see the lights a very long way.

Q. How far away could you see the lights? A. I don't know. I have never measured it.

Q. A block? A. I don't know how far you could see lights.

Q. That night particularly would you say you saw the lights a block away? A. I don't know whether I could or not.

Q. Did you see them more than half a block, the lights? A. I don't know that.

Q. When you say you could see them a considerable distance, you think about half a block; is that what you mean? A. Possibly.

Q. I am only trying to get your opinion, that is all, Mrs. Conners. A. Yes, I would think we could see possibly half a block, I would think.

Q. Then you watched this car as it came down? A. Yes, I did.

Q. You were not watching Mr. Patterson then, were you? A. Yes, Mr. Patterson. I had taken my eyes from Mr. Patterson, because he was crossing the street, and just as I turned,—you know, those things happen very quickly,—why, this car came very rapidly down the street.

Q. Then you were looking at Mr. Patterson and you were looking at the car too, all the time? A. I did not say so, no.

Q. I am trying to find out whether, when you were looking at this car, you were looking at Mr. Patterson. A. I didn't know it was Mr. Patterson. I watched the man start across the street, and when he got practically towards the middle I noticed that there car coming, and I spoke, and before I hardly had the words out of my mouth the accident occurred.

Q. Do you know where he was in the road when he and the car collided? Did you see that? A. I would say he was—no, I don't know. Mr. Patterson was struck. I thought the—

Q. Not what you thought. A. Pardon me.

Q. That is not good evidence. A. No.

Q. What I want to know is, did you see him and the car collide? A. I wouldn't say that. I didn't know it was Mr. Patterson that was struck.

Q. Do you say now it was he or not; did you see the man? A. I only saw the man in the air, about a little over half way across the street.

Q. Well, which way? A little over half way across the street before he was struck, was he not? A. I couldn't tell you that.

Q. Did you see him when he was struck? A. I only heard the impact.

Q. All right. Did you see it? And if you did not, say "No." I do not want you to say you did. A. I do not know just what you mean. I saw the man thrown up in the air and come down; anly I thought it was the driver thrown out of the car.

Q. Did you see the automobile and the man come together? A. No.

Q. But before they came together you saw the man half way across the street, did you? A. Yes. And then I looked the other way. That is the reason I did not see the—

Q. You looked the other way when he was more than half way across? A. Yes.

Q. And how far over the center was he? Was there a center white line there at the time? A. No, sir.

Q. How far would he be from where the center white line would be, had one been there? Five or ten feet, would you say? A. I don't know.

Q. You do not know how far over? A. I would not know how far he would be over.

Q. How far over was he past the center of the highway; that is what I am asking? A. I really don't know.

Q. Are you sure he was past the center? A. Only

just as I took my eyes from him, I would judge he was past the center. That is all I could tell you.

Q. Do you drive a car? A. Yes, sir.

Q. How long have you been driving a car? A. About eleven years.

Q. And do you drive a Ford? A. No, sir.

Q. Never driven a Ford? A. No, sir.

Q. As this Ford car came along did you know it was a Ford? A. No, sir.

Q. Did not even know that. I will not call it a Ford then. A. Call it anything.

Q. As this car came along you say you did not see any cars in back of it? A. No, sir.

Q. Did you not see three other motor vehicles in back? A. No, sir. I saw nothing.

Q. Two private cars and a bus? A. None. I saw None.

Q. Would you say that they were not there? A. I would say so.

Q. Would you say there was no other car but the Ford? A. No other car.

Q. I mean after the accident. After the accident, as the Ford car came along on Godwin Avenue and approached the point where the accident happened, was there not a string of cars? A. No, sir.

Q. Of which this was the first car? A. No, sir.

Q. You say positively there were no other cars? A. I would say positively.

Q. How far up Godwin Avenue, toward the station, can you see, toward the corner, where you stood? A. I really don't know. I couldn't judge that, because beyond, quite a little ways beyond, as you are told, is a slight curve, and we can see quite a distance.

Q. You can see quite a distance? A. I do not know how many.

Q. You see, we differ on what you mean by quite a distance. That is very indefinite. If you could tell me what you mean by quite a distance, then the jury would get some idea of how far you could see. As you stood on the corner, how far up Godwin Avenue, toward the station of Ridgewood, on Godwin Avenue, could you see? A. I told you I thought I could see half a block.

Q. Is that all? A. I would think so, because, as I told you, there is a slight curve there. You might be able to see further. I would not like to swear to that. When the lights are coming from that direction, you can see them quite a distance. Now, whether that is a half a block or a block I do not know.

Mr. Markley: That is all.

WILLIAM VAN BUSKIRK, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Judge, you are Recorder of the Borough of Ridgewood? A. I am.

Q. How long have you held such position? A. Oh, since 1919, I think, or 1918.

Q. Do you know the defendant in this case, Mr. Surpless? A. I do.

Q. Do you know the defendant in this case, Mr. Miller? A. I do not, personally. I probably had him before me.

Q. Do you recall holding court on March 2nd, 1927, at which session of court both of these de-

fendants appeared? A. I recall holding court on March 2nd, 1927, but I am not sure whether Mr. Surpless appeared or not on that date. I think he did. I think both of them appeared on that day.

Q. Have you the original records with you? A. I have the original complaints.

Q. Were those complaints read to the defendants? A. They were.

Q. Will you read the complaints?

Mr. Markley: I object to that. I would like to look at the complaint first.

(Mr. Markley examines paper.)

I object to the complaint against Mr. Surpless, on the ground that it is immaterial and irrelevant, and has no bearing directly or indirectly on the allegations of this complaint, in this suit, pending before your Honor, being immaterial whether a complaint was made against Mr. Surpless, that he permitted a motor vehicle to be operated without a licensed driver.

The Court: Well, it may become important in case of relationship necessary to be established by the plaintiff, when someone else, other than Mr. Surpless, was driving the car.

Mr. Markley: Well, the point is that it cannot have any binding force here in this court, as between these parties, in this civil action. It is a complaint for a violation of the Traffic Act, in permitting an automobile to be driven by an unlicensed driver. Now, assuming that to be so, it does not prove anything in this case; not material, relevant or competent.

The Court: Is this offered as the basis of a conviction or a plea of guilty?

Mr. Breslin: An admission against the interest, and we respectfully submit, under the authority of Wilson against Brouer, that the admission is evidential.

The Court: If it were simply offered on the basis of a conviction it would not come under Section 1 of the Evidence Act.

Mr. Breslin: It is not offered for that purpose.

The Court: But if there were a plea of guilty, then, being a party defendant, it would be admissible, as an admission of facts which were admitted at the trial, if they were relevant to the issue.

Now, I take it from Mr. Markley's statement that they are relevant to the issue, because they must establish some relationship between the driver of the automobile and the owner of the car.

Mr. Markley: All this complaint says is that the car was permitted or allowed to be operated. That is not any evidence entitled to go in here.

The Court: Suppose the defendant admitted that was so?

Mr. Markley: It is of no evidential value.

The Court: Except for the jury to pass upon, whether or not this man was authorized to drive that car.

Mr. Markley: I made my objection, your Honor. I do not want to be presumptious and argue it any further.

The Court: If it were simply offered as a conviction, then it would not be evidential,

under Section 1, but if it is not offered on the basis of a conviction of crime, but offered rather as an admission of a fact in issue, due to the pleading of guilty by the defendant, then I will admit the testimony to be given in court.

Mr. Markley: There was not any plea of guilty in this case.

The Court: We do not know until we hear the witness's testimony.

Mr. Markley: He was asked to read the complaint. I submit also that the reading of the complaint is improper. If this complaint is evidential, it can be offered in evidence.

Mr. Breslin: I offer both complaints.

Mr. Markley: On the faces of these complaints it appears that the defendant did not plead guilty. On the contrary he did not plead at all. I object to them on that ground.

The Court: We do not know whether he pleaded guilty or made an admission of fact.

Mr. Breslin: I will offer the complaints, if your Honor please.

Mr. Markley: I object to the Surpless complaint on the grounds that I have stated.

The Court: Why not ask this witness what the boy was accused of, and whether the accusation was made?

Mr. Breslin: I thought this would be more concrete for the jury.

Q. Can you tell us, in substance, Judge, what the defendant Miller was charged with, with the aid of this complaint? Just tell us, in substance, what the nature of the complaint was that was made

against Miller. A. The defendant Miller was charged with driving and operating a motor vehicle without a license.

Q. How did he plead to that charge? A. He pleaded guilty.

Q. Can you tell us, in substance, what the nature of the complaint was against the defendant Surpless? A. The nature of the complaint against Surpless was to the effect that he permitted the car to be driven by a non-licensed driver, to which he did not, however, plead guilty; but I found him guilty from the facts as stated.

The Court: No.

By the Court:

Q. Now, what did he say at that time with reference to the operation of the car by Miller?

The Court: I will exclude any reference to conviction. I will permit a conversation if it relates to this issue.

Mr. Breslin: Yes.

The Witness: The question, please.

By Mr. Breslin:

Q. Now, what did Mr. Surpless say on the night of that hearing with reference to the operation of this car by Miller? A. I don't recall. But my recollection—

Mr. Markley: What did you say?

The Witness: I do not recall what he stated, verbatim. But my recollection is that Mr. Surpless at the time was away, and his car was in charge of his daughter, and driven by this defendant Miller at the time, when Surpless was out of the village.

Q. Do you recall anything else that he said? A. I do not.

Mr. Breslin: That is all with Judge Van Buskirk at the present time.

Cross examination by Mr. Markley:

Q. Did you know that Surpless's daughter was away? Was that stated? A. I did not.

Q. That she was away in school or college? Did you know that? A. I did not.

Q. Your recollection is not entirely clear, is it, as to all the facts now? A. Not as clear as it was at the time, no.

Q. But Mr. Surpless did say that he was away, did he not, out of the village? A. Mr. Surpless said that he was away, and regretted the accident very much.

Q. Did he say where he was? A. I think he was up in Canada.

Mr. Markley: That is all.

Redirect examination by Mr. Breslin:

Q. Were any witnesses sworn? A. Not to my recollection, no.

Q. No witnesses sworn? A. My recollection is that there were no witnesses sworn on behalf of either party, excepting the parties who made the complaint.

Q. I show you an entry in the Police Blotter and ask you if this entry is in your writing (handing record to witness)? A. It is not in my writing.

Q. Are you clerk of the court? A. I am not. I am the Recorder of the court.

Q. Who is the clerk? A. Well, there is no official clerk.

Q. You do the clerical work and the— A. I had to prepare the complaints as they come in.

Q. You say that no witnesses were sworn; is that correct? A. To the best of my recollection there were no witnesses other than those and the officer who made the complaint.

Q. Yet you found this man guilty?

Mr. Markley: I object to that, your Honor.

The Court: Sustained.

Mr. Breslin: If your Honor please, I am surprised by the Judge's testimony. The records are all to the contrary as to what he says.

The Court: Well, that is not a proper question based upon surprise.

Q. Now, can you tell us, in substance, again, what Mr. Surpless said at that hearing?

Mr. Markley: May I ask what the Judge is referring to?

The Witness: I am referring to a memorandum which was submitted to me by Mr. Surpless, the day that the complaint was made, or the following day.

Q. Have you that memorandum? A. I have that memorandum.

Q. Have you that with you? A. I have.

Mr. Breslin: May I see it, with your Honor's permission?

The Court: Yes.

(Paper handed to Mr. Breslin.)

Q. Now, you say that Mr. Surpless admitted this memorandum to you? A. I say that Mr. Surpless furnished that memorandum to me.

Mr. Breslin: I will offer the memorandum.

Mr. Markley: No objection.

(Memorandum marked Exhibit P-1.)

Mr. Markley: I think it ought to be read to the jury.

Mr. Breslin: I will read it to the jury.

(Mr. Breslin reads Exhibit P-1 to the jury.)

OSCAR T. CONNERS, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Oscar, how old are you? A. Eighteen and a half.

Q. Do you go to school? A. No, sir.

Q. Are you employed? A. Yes, sir.

Q. Where do you work? A. North Jersey Trust Company of Ridgewood.

Q. Prior to the accident did you know the plaintiff in this case, Mr. Patterson? A. I just knew of him. I didn't know him personally.

Q. Did you ever have any business dealings with him prior to the accident? A. No, sir.

Q. On the night of the accident where were you? A. Standing on the corner of Doremus and Godwin Avenues.

Q. With whom? A. My mother.

Q. Near what house were you standing? A. Mr. Eyre's.

Q. On that night did you see Mr. Patterson? A. Alight from the taxicab.

Q. Which street did the taxicab go in, Oscar? A. When they left the corner?

Q. Yes. A. Doremus Avenue.

Q. Did you see Mr. Patterson after that? A. Yes, I saw him start to cross the street.

Q. After he started to cross the street did you see any automobiles in the vicinity of that street intersection? A. Only one that stopped on the opposite corner.

Q. Was that car in motion or parked? A. Parked. Just drawn up.

Q. Did you see Mr. Miller that night? A. No, sir.

Q. Did you see a Ford car? A. No, sir.

Q. Did you see Mr. Patterson struck? A. Yes, sir.

Q. What did you see? A. I saw Mr. Patterson struck and hurled in the air; and then I turned to my mother, and I looked around, and din't see any more.

Q. What kind of a car struck him? A. I do not know.

Q. Did you go down to the scene of the accident? A. No, sir.

Q. Did you see the car then, which struck him? A. No, sir.

Q. Was any warning given before he was struck? A. I do not know.

Q. Did you hear any? A. No, sir.

Mr. Breslin: That is all.

Cross examination by Mr. Markley:

Q. You were standing with your mother, were you not? A. Yes, sir.

Q. And you did not see the car at all before the collision? A. No.

Q. Is that right? A. Right.

Q. Was it a large car or a small car? A. I did. not see it.

Q. Did you see the same car that collided with Mr. Patterson that your mother saw, or a different car? A. I did not see any car. I just saw the car that hit. Did not see any coming down the street.

Q. Did you see the Cadillac, the big car? A. No, sir.

Q. Did you not see a big car come along afterward? A. No, sir.

Q. You did not see that? A. No, sir.

Q. All you saw was the car that was in the collision? A. Right.

Q. You did not see that at all until the actual moment of the collision? A. Right.

Q. Is that right? A. Right.

Q. And you did not see any of the cars in back of it? A. No, sir.

Q. Come along? A. No, sir.

Q. Were any cars coming in the opposite direction? A. No, sir.

Q. You did not see Mr. Surpless at the time of the collision? A. No, sir.

Q. Which direction were you looking before the collision? A. Looking to my left.

Q. To your left? A. Yes, sir.

Q. As I gather it, you were not paying any attention to a particular car or to Mr. Patterson before the moment of the collision? A. I was looking to my left, in which direction Mr. Patterson was.

Q. But you were not looking in the direction of the car? A. I was looking in the direction of the taxi. That is, where Mr. Patterson got out the taxi, and not up Godwin Avenue.

Q. You were not looking up Godwin Avenue? A. No, not in the direction in which Miller's car was supposed to have come.

Q. So that you knew nothing about Mr. Miller's car until the moment of the contact? A. Right.

NETTIE B. PATTERSON, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mrs. Patterson, you are the mother of William L. Patterson, Junior? A. Yes.

Q. During the month of February, 1927, where did you live? A. 99 Godwin Avenue.

Q. What town? A. Ridgewood.

Q. Is that near the intersection of Doremus and Godwin Avenues? A. Almost directly in front of it.

Q. Mrs. Patterson, do you know the defendant Miller in this case? A. I have seen the boy, but I never knew him personally.

Q. Did you know him before the accident? A. Not any more than just know who he was.

Q. Have you ever talked with him since the accident? A. No. I have never seen him since the accident until I walked into court.

Q. Did you see him on the day of the accident? A. On the evening of the accident, yes.

Q. On the evening of the accident. Did he come to your home? A. Yes.

Q. What if anything did he say with reference to the accident? A. He said he had hit my—

Mr. Markley: Wait a minute. I object to this.

The Court: The question is too broad, because it might discuss matters that would not be binding. You better reframe the

question, because he might make statements which would not bind the other defendant.

Mr. Breslin: I would consent that it be stricken out.

The Court: It is better not to get it in.

Mr. Markley: I do not think that the conversation, no matter what it is, would be binding on Mr. Surpless, until the agency is first proven, and authority to speak.

The Court: Anything that he might say as against himself would be evidential.

Mr. Breslin: If your Honor please, as I understand it, it is solely binding upon himself; Mr. Surpless is not involved at all. I do not want to lead the witness. I do not want to put the words—

The Court: I will permit you—

Mr. Markley: If Mr. Breslin will concede that it is not binding on Mr. Surpless until agency is established—

Mr. Breslin: I do.

Mr. Markley: Then I have no objection to the conversation, as far as being evidence taken against Mr. Miller.

Q. Mrs. Patterson, can you tell us what Mr. Miller said with reference to the accident, which concerned him, nobody else? What did he say about that? A. He said, "I hit your son."

Mr. Breslin: That is all.

Mr. Markley: No questions.

Mr. Breslin: Now, Mr. Markley, I presume there is no dispute as to the ownership of this car? If you want me to prove it I will prove it. It has been admitted in the opening, and reference was made to it two or three times.

Mr. Markley: We admit that Mr. Surpless was owner of the car.

PETER BOUMAN, JR., called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Officer, you are a member of the Police Department of the Village of Ridgewood? A. I am.

Q. You were such during the year 1927? A. Yes.

Q. On the night of this accident did you go to the intersection of Godwin and Doremus Avenues? A. I did.

Q. Did you see the defendant Miller there? A. I did not.

Q. At any time on that night did you see him? A. I did.

Q. Where did you see him for the first time? A. Doctor Bonygne's office.

Q. Did you talk with him with reference to this accident? A. I did not.

Q. At any time subsequent to the accident did you talk with him? A. I did not; not about the accident.

Q. Well, did you talk with him? A. I have met him on the street.

Q. Now officer, did you not tell Mr. Dunn—

Mr. Breslin: I will plead surprise and form my question accordingly.

Q. Did you not tell Mr. Dunn that you talked with Miller, and Miller had told you that he struck this boy and he did not see him until he struck him? A. I don't recall saying a word.

Q. You are a member of the Police Department of the Village of Ridgewood? A. I am.

Q. You were assigned to this case? A. Why, I was not assigned to it.

Q. Well, you went there in the performance of your duties? A. I went there in the performance of duties.

Q. Did you not feel, in the performance of your duties, it was necessary to ascertain facts relative to this accident?

Mr. Markley: I object to this. I do not think a proper basis has been laid for the impeachment of the witness.

The Court: No; he is not trying to impeach him. He is trying to bring something to his mind.

Mr. Markley: It seems to me he is pleading surprise, and now is seeking to neutralize the witness's testimony by trying to cross examine him, in effect, and upset him. I object to that as improper at this time.

The Court: Allowed.

Mr. Markley: Your Honor will allow me an exception.

(Question read as follows: "Q. Did you not feel, in the performance of your duties, it was necessary to ascertain facts relative to this accident?")

A. Why, when I went to Dr. Bonygne—I was told first off, and he told me somebody got hurt. I went down and looked, and there was nobody there. Then I—a young fellow drove up. He said, "He is over in Dr. Bonygne's." So we went over to Dr. Bonygne's, and I met Miller there. I said, "What happened?" He said, "This fellow got struck." I

said, "Who is he?" "I don't know." So I looked him all over. I didn't know—I don't know Mr. Patterson today.

Q. Now, just a minute. Can you tell us what questions you asked Miller with reference to this accident? A. Why, when I—

Q. After he had told you that he had struck this man, what questions did you ask him? A. I took him over to Police Headquarters.

Q. Will you answer that? What questions, Officer? A. I took him over to Police Headquarters, where I questioned him.

Q. What questions did you ask him? A. I asked him, "How did it happen?" He said, "As I was going down Godwin this fellow walks right in the side of the car."

Q. Did he say to you that he did not see Patterson until he struck him? A. He did not.

Q. Did you make such a statement to Mr. Arthur Dunn, here? A. Not to my knowledge.

Q. What do you mean, not to your knowledge? A. Not of my knowledge.

Q. If you made a statement you would remember it, would you not? A. Two and a half years ago.

Q. You did not talk two and a half years ago to Mr. Dunn. You talked to him on Friday with reference to this accident, did you not? A. He came over and—

Mr. Markley: I object to this. It seems to me this is going too far. He has gone on and asked the witness what the conversation was and the witness has given it to him.

The Court: If I remember the first question, he said he did not have any conversation with Mr. Dunn at all.

Mr. Breslin: Yes.

Mr. Markley: If this is to neutralize the witness's testimony, that is one thing. I do not understand that is the position that Mr. Breslin takes.

Mr. Breslin: Yes, that is my position. That is my position exactly. I am surprised at his testimony.

Mr. Markley: If he is neutralizing his testimony so as to make it valueless, and then goes ahead and speculates and asks questions, what was said, he is bound by those answers, it seems to me.

The Court: I think the witness's answer still remains that he did not talk to Mr. Dunn. He is asking now, did he talk to Mr. Dunn on Friday? I do not know what inference the jury is drawing from this man's testimony. Certainly the plaintiff has a right to neutralize an inference which the jury might draw, if it would be unfavorable to the plaintiff.

Mr. Markley: Will your Honor allow me an exception?

The Court: Yes.

Mr. Breslin: I withdraw the question.

Q. Did you not talk to Mr. Arthur Dunn, a lawyer from Paterson, on last Wednesday, with reference to this case? Yes or no. A. That I would be summoned, I talked to him.

Q. Did you talk with him, Officer? A. I sat down and had a smoke with him.

Q. Did you talk with him? A. Talked with him over things, yes.

Q. Did you talk with reference to this accident?

A. He asked me what I knew about it. I told him that I did not know much about it.

Mr. Markley: I object to the question on the ground that it is not binding on us.

The Court: Be specific in your question.

Mr. Markley: We were not present.

Q. Did you not tell Mr. Arthur Dunn, on last Wednesday, when you talked with him with reference to this accident, that Miller had told you that he had struck Patterson and he did not see him until he struck him? Yes or no. A. No.

Q. What did you say? A. No.

Q. No? A. No.

Q. You are positive of it now? A. Positive.

Q. Why did you say a few minutes ago, to the best of your knowledge you had not answered?

Mr. Markley: I object to that.

Mr. Breslin: I will withdraw the question.

Q. Did you see the Ford car at the scene of the accident? A. Why, the Ford car stood about 25 feet from where the pool of blood—

Q. Oh, you saw a pool of blood there? A. That is what I saw.

Q. Was it a small pool or large pool? A. Very small pool.

Q. Very small pool of blood. And you saw the Ford car at the scene of the accident? A. After the accident.

Q. After the accident. Now, you know Mr. Surpless? A. I do.

Q. How long have you known him? A. Oh, a couple of years.

Q. A couple of years. And you know Mr. Miller? A. I know Mr. Miller.

Q. And you know Chief Blackshaw is a good friend of Mr. Surpless, do you not? Yes or no. A. I know he talks with him. That is all I know.

Q. And you are working under Chief Blackshaw, are you not? A. Absolutely.

Q. And you know that Chief Blackshaw is interested in this case on Mr. Surpless's behalf, do you not? A. I do not.

Mr. Breslin: That is all.

Cross examination by Mr. Markley:

Q. You say the car was 25 feet beyond the pool of blood? A. About 25 feet.

Q. And where was the pool of blood on the highway, Officer? A. Practically in the center of the street.

Q. In the center of what street, Godwin Avenue? A. Godwin Avenue.

Q. Where was it with respect to where Doremus Avenue comes into Godwin? A. Why, I should judge 45 or 50 feet below Doremus Avenue.

Q. Would that be west or east? A. West.

Q. In other words, where Doremus Avenue comes into Godwin Avenue, the pool of blood was about 45 feet, you say? A. Westerly.

Q. Would that be west of the southwest corner? A. That would be west of the southwest corner.

Q. And you say the automobile was about 25 feet beyond that? A. Beyond that.

Q. Where was it in the road when you got there? A. Parked on the right hand curb.

Q. At the right hand curb, 25 feet further west? A. Further west.

Q. Than the pool of blood? A. The pool of blood.

Q. Which was in the center of Godwin Avenue? A. In the center of the street.

Mr. Markley: I have some more questions of this witness, but I will keep them for my side of the case, your Honor. That is all for the present.

ISABELLE ACKERMAN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Miss Ackerman, where do you live? A. 120 Godwin Avenue, Ridgewood.

Q. How long have you lived there? A. For about twenty years.

Q. Miss Ackerman, where is your residence with reference to the intersection of Godwin and Doremus Avenues? A. It is the fifth house down.

Q. On the night of this accident where were you? A. Sitting in the library, home.

Q. Pardon? A. Sitting in the library at home.

Q. What, if anything, did you hear? A. I heard a terrible crash.

Q. Did you rush outside? A. No. I went in the other room and looked out the window.

Q. Did you see an automobile there? A. I did.

Mr. Breslin: That is all.

Mr. Markley: No questions.

WILLIAM L. PATTERSON, the plaintiff, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mr. Patterson, where do you live? Talk up loudly so the Judge and Jury can hear you. A. 190 Rock Road, Glen Rock, New Jersey.

Q. How long have you lived in Glen Rock? A. Why, a little over two years.

Q. Where did you live prior to that? A. 99 Godwin Avenue, Ridgewood, New Jersey.

Q. How long have you lived around the vicinity of Ridgewood? A. All my life.

Q. How old are you? A. Thirty years old.

Q. On the night of this accident where were your parents residing? A. 99 Godwin Avenue.

Q. Where were you going that evening? A. Home.

Q. Where were you living? A. At 99 Godwin Avenue.

Q. With whom were you living? A. My wife, mother, and father.

Q. How did you attempt to get home that evening? A. I took a taxicab from Glen Rock to Ridgewood.

Q. Where did the taxicab take you to? A. Took me to the southwesterly intersection of Doremus and Godwin Avenues.

Q. In which direction was the taxicab going? A. Going in an easterly direction.

Q. Did you alight from the taxicab? A. Sir?

Q. Did you get out of the taxicab? A. Yes, sir.

Q. After you got out of the taxicab what did the taxicab driver do? A. He pulled around and started down Doremus Avenue.

Q. Do you know the name of the taxicab driver? A. I did know it, Mr. Breslin, but at the present time he is in the marine merchants, and I could not secure his evidence.

Q. Now, after you got out of the taxicab and started to walk across the street, what, if anything, did you do?

The Court: Let us get the directions.

Q. Where was your mother's house with reference to this intersection? Which way would you have to walk to get to your mother's house? A. I would have—my mother's house is, you might say, diagonally across the street from this intersection, so to reach it it would be necessary for me to cross at the intersection of Doremus and Godwin Avenues, and walk up two numbers to my mother's house, on the northerly side of Godwin Avenue.

Q. Which way would you walk? Would you walk north or south when you crossed the street? A. Directly north.

Q. Where did you get out of your cab? A. At the southwest corner of Doremus and Godwin Avenues.

Q. Where did you cross the street? A. Right at the intersection.

Q. And as you started to cross the street what, if anything, did you do? A. Why, first of all, I waited until the cab started to pull around into Doremus Avenue. Then I looked both ways. I didn't see anything, and—

Q. Just a minute. What kind of a night was it? A. Well, it was, I would say, a dark, dismal night.

Q. What time in the evening was it? A. 7:30.

Q. Now, how far did you get out into the street, if you know, before anything happened? A. Well,

Mr. Breslin, when I am crossing a street, and the way I crossed it that night, I would look to the left for the first half, and I looked to the right after I reached the half, and I had already looked to the right; and after that I don't remember anything.

Q. Did you look in both directions prior to the accident? A. I did, Mr. Breslin.

Q. You do not have to give me all those Mr. Breslins. Was any horn blown by an automobile prior to the accident? A. Not that I heard.

Q. That was 7:30 on the night of February 24, 1927? A. It was.

Q. Where were you, and what was the date when you regained consciousness, or the approximate period of time? A. When I came to in the hospital my mother and my wife told me—

Q. You cannot tell us what they told you. A. That is all I know.

Q. Do you remember what day it was? A. No. I was not thinking of the day, when I woke up.

Q. Well, did it seem like a long time, or just a sleep? A. I couldn't say that either.

Q. All right. What was your business before the accident? A. Real estate.

Q. What was the general condition of your health before the accident? A. Very good, as far as I know.

Q. Had you ever been injured before? A. No, except that I came out from service with a few nervous disorders, and things of that sort, but outside of that—

Q. What were they occasioned by? Were you injured in the war, or what happened? A. I was not exactly injured. I had suffered from a slight amount of gas and shell shock.

Q. Outside of that condition which you received

in the war, your general condition of health was good, or fairly good, would you say? A. I would say fairly good.

Q. When you woke up in the hospital what was the matter with you? A. I was not in any condition then to know what was the matter with me. I couldn't tell you what was the matter with me, until later on, when the doctor explained to a certain extent what my injuries were.

Q. No; you cannot tell us what this doctor explained. Were any bones broken? A. I know I couldn't move.

Q. You could not move? A. No, sir.

Q. How long was it before you could move? A. Well, I would say approximately a month and a half, before I moved to any extent at all.

Q. What did they do to you in the hospital? What kind of treatment did they give you? A. Well, they took me down to the X-ray room three or four different times. And I think it was the day after I woke up they took me up to the operating room, and set my pelvis bone.

Q. Was it broken? A. Broken, front and rear.

Q. Outside of your pelvis being broken in the front and rear what other bones were broken? A. I had a fractured skull.

Mr. Markley: I object to this, unless the witness knows. Apparently he would not know that.

The Court: He might.

Mr. Breslin: He might.

The Witness: I know I had some head, if that has anything to do with it.

Mr. Breslin: All right. I will consent that it be stricken out, and we will couple it up later on.

Q. You had a sore head? Did you have a sore head? A. Very sore.

Q. Did you have a sore head before the accident? A. No, sir.

Q. What other bones were broken? A. Well, I looked in the hand mirror, and, from the appearance of my nose, it certainly was not straight, by any means.

Q. Well, it was not straight? A. No.

Q. Were you in pain? A. Very much so.

Q. How long did the pain continue? A. I was in pain. In fact, in damp weather I am in pain now.

Q. Besides these injures you have enumerated, do you know of any other parts of your body that were injured? A. Yes. I had a punctured lung; and both of my kidneys were filled with blood.

Q. How long did the blood remain in your kidneys, if you know?

Mr. Markley: I object to that on the ground that the proper foundation has not been laid for it.

The Court: I sustain the objection.

Mr. Breslin: I withdraw it.

Q. What did they do to you in the hospital this day, after they had taken you up to the operating room? A. They started to hoist my feet in the air, set my pelvis bone. After that I was out of my head again for two days. That is all I remember of it.

Q. Were you in pain before they did this operation? A. I was, with the exception of when they gave me a shot in the leg to deaden the pain.

Q. When you came to, after these two days of unconsciousness, did you have anything on your body? A. Yes. I had a plaster cast.

Q. Where did that cast extend from? A. From my knee to my waist.

Q. How long did that cast remain on you? A. Well, I would say between five and six weeks.

Q. Were you in pain during that time? A. If I tried to move to any extent, I was, yes.

Q. And then after they took that cast off, did they give you any other kind of treatment? A. Why, I had a rubber support, that I wore for three or four months after that, and it was necessary for me to walk around on crutches and a cane.

Q. How long were you on crutches and a cane? A. I would say between four and five months.

Q. Now, who was the doctor that attended you at the hospital? A. Dr. Spickers.

Q. Has he attended you since that time? A. Not since. He has not attended me since the day he took the plaster cast off, at my mother's home.

Q. Who has attended you since then? A. Dr. Wassing and Dr. Payne.

Q. How long were you in the hospital? A. Nineteen days.

Q. Did you pay the hospital bill? A. I did.

Q. Do you recall how much you paid? A. No, sir, I don't.

Q. Will this bill refresh your recollection as to the amount (handing paper to witness)? A. Yes. I received this bill in full payment when I left the hospital.

Q. How much was it? A. $282.

The Court: What hospital was that?

Mr. Breslin: Paterson General Hospital.

The Court: $288.

The Witness: $282, your Honor.

Mr. Breslin: $282.

Q. Did you require any nurses? A. Yes. For the length of time that I was in the hospital I had a day and night nurse.

Q. Did you pay the nurses? A. I did.

Q. How much did you pay them? A. $45 a week, each, with board.

Q. After you returned to your home did you have any nurses? A. Yes, sir. I had my—day nurse from the hospital came with me, when I came home, and stayed there for about four weeks after my arrival home. Then I had a practical nurse after that.

Q. Did you pay both of those nurses? A. I did.

Q. What did you pay the practical nurse? A. I think, if I remember correctly, for the time she was there, it was $75.

Q. Now, after you returned to your parents' home and you discarded the crutches, did you require further medical treatment? A. Why, yes. I had to have my pelvis massaged with alcohol, and things of that—to rather—as the doctor explained it, to stimulate the—

Q. Do not tell us what the doctor explained. Just tell us what was done, what the nature of the treatment was. A. Just massage, and things of that sort, to my pelvis bone.

Q. Where did you receive those treatments? A. That was right after the cast had been taken off. Either Dr. Payne came down to the house, or my father drove me up to his office, and I had the treatment there.

Q. Did you go to any other hospitals for treatment? A. Yes, sir. After about—well, I should say five or six months,—I have forgotten the exact date,—I went down, and Dr. Wassing sent me down to the hospital in New York, to see if they could not—

Q. You cannot tell us that. What hospital did you go to in New York? A. I have forgotten the name of it now.

Q. How long were you there? A. Two weeks.

Q. How much did you pay there? Can you tell us offhanded? A. Yes. It was $100 a week.

Q. Then after you were at the hospital where did you go, the New York Hospital? A. I came home again.

Q. Now, how long was it before you were able to do your accustomed work? A. I would say slightly over a year and a half.

Q. What was your business prior to the accident? A. Real estate.

Q. Were you in business for yourself or were you employed by someone? A. I was in business for myself.

Q. How long were you in business for yourself prior to the accident? A. Between a year and a half and two years.

Q. Before you went in the real estate business for yourself had you any prior experience? A. Yes. I was with Proctor L. Bedell and Thomas C. Whitlock.

Q. About how many years have you been in the real estate game in Ridgewood? A. About six.

Q. What were your average yearly earnings prior to the accident? A. Well, I can't remember of any years that I made less than $5,000.

Q. What is the general condition of your health now? A. In weather like this, perfectly O. K.

Q. Do you feel any pain at any time? A. Only during damp and rainy weather.

Q. Do you recall going to any other hospital in Paterson outside of the Paterson General Hospital? A. In Paterson?

Q. Yes. A. Yes, sir. I went to the Barnert Hospital.

Q. What kind of treatment did you receive there? A. Dr. Wassing gave me a lumbar puncture.

Q. How long were you there? A. I believe I was there four days, if I am not mistaken.

Mr. Breslin: That is all for the time being.

Cross examination by Mr. Markley:

Q. What time of the night was this, Mr. Patterson, that the accident happened? A. Around 7:30 in the evening.

Q. Dark? A. Yes, sir.

Q. It was a clear night, though, was it not? A. No, sir.

Q. Was it not a clear, bright night, stars shining? A. No, sir. I was not looking at the sky.

Q. Do you know whether the stars were shining or not? A. From the condition of the weather I don't believe you could see the stars.

Q. You do not think they were? A. No, sir.

Q. You got off, alighted from this taxi, at the southwest corner of Doremus and Godwin Avenues, did you not? A. Yes, sir.

Q. And your father's house, to which you were going, was diagonally across the road, was it not? A. Yes, sir.

Q. Toward the east? A. Yes. In a northeasterly direction.

Q. In a northeasterly direction. If you went straight across the street at the southwest corner, you would not strike your father's house at all, would you? A. Will you repeat that please?

Q. When you got off at the southwest corner, or

you alighted from the taxi at the southwest corner, if you had gone straight across the street in a northerly direction, straight ahead, you would strike your father's property, would you? No. I would miss his house by about sixty-five feet.

Q. There was another house, in other words, between where you stood on the corner, and your father's house, if you went directly across the street? A. If I went directly across the street from where I would land on the northerly side of Godwin Avenue, was one house in between where I landed and my father's house.

Q. So you would have to walk sixty-five feet along the northerly side of Godwin Avenue to strike your father's property? A. Yes, sir.

Q. Did you not walk diagonally across Godwin Avenue? A. No, sir.

Q. Instead of straight across, so that you would strike your father's property on a diagonal line? A. I did not.

Q. Do you remember whether you did or not? A. I certainly do.

Q. You were familiar with the locality? A. Very much so?

Q. You knew that Godwin Avenue was a very much traveled road? A. Yes, I did.

Q. It is a County Road, is it not? A. I couldn't say.

Q. There is a great deal of travel all the time, is there not? A. Well, there are some days, and some days it is lighter; and some days it is heavier.

Q. As you started across Godwin Avenue—how wide would you say Godwin Avenue is? A. I believe it is a fifty-foot street. I would not say for sure.

Q. From curb to curb? A. I never measured it.

Q. What is your best estimate of the width of it, from curb to curb? A. The best way would be for you to measure an ordinary street. You can measure as well as I can.

Q. I am not asking you to measure anything. I am asking you a fact. A. I am sorry. It is an ordinary street; that is all I can tell about it.

Q. Can you give me the approximate width of Godwin Avenue, approximately? A. Yes. I would say around fifty feet.

Q. As you crossed Godwin Avenue, as I understood you, you said you looked to the left. That would be to the west, would it not? A. Yes, sir.

Q. Until you reached the center of the street? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Then, having safely passed to the center of the street, and since traffic from your left would come on the first half of the street that you crossed, you then proceeded to look to the right? A. Pardon? Would you say that again?

(Question read.)

Q. Is that right? A. Yes, sir.

Q. In short, you had passed one half of Godwin Avenue, had you not? A. Yes, sir, I had.

Q. And you had looked down there and you saw nothing? A. I looked up and I saw nothing.

Q. Looked left? A. I looked right.

Q. Did you look left as you crossed the first half? A. Yes.

Q. And you saw nothing? A. I saw nothing.

Q. And you got over to the center of the street; then you looked to your right, did you not? A. Yes, sir.

Q. How far did you walk from the center of

Godwin Avenue to the point where you were struck by the automobile? A. I would say five or six feet.

Q. And were you looking for those five or six feet to your right? A. No, I was not looking to my right. I had already looked when I crossed the center. I looked to my right. Then I went on about my business.

Q. This is what I am trying to find out. A. Yes, sir.

Q. You got to the center of the street; then you walked, you say, how many feet more, before you were struck? A. I would say four or five feet. I didn't count them.

Q. Approximately four or five feet. You mean you had taken four or five steps? A. I should imagine so.

Q. Or do you mean you took only one or two steps? A. I am in no position to say how many steps I had taken, because I was thinking of something else besides an automobile at the time.

By the Court:

Q. Do I understand you took steps or are you referring to ordinary paces? A. Why, ordinary walking steps, your Honor.

By Mr. Markley:

Q. You think you took four or five ordinary walking steps? A. I would say so, yes.

Q. Were you looking while you were taking those steps or not? A. I was not walking with my eyes shut.

Q. I am not asking you whether your eyes were shut or open. I am asking you whether you looked. A. Looking where?

Q. I am asking you. A. I was looking straight ahead.

Q. Did you not look to your right? A. I told you I looked to my right as I crossed the center of the road. Then I minded my business.

Q. I just want to get the facts; that is all. A. Yes.

Q. You looked when you were at the center of the road; then after that you did not look to your right any more? A. No, sir.

Q. But you looked straight ahead, north; is that right? A. Yes, sir.

Q. For four or five steps; is that right? A. From then on until I was hit, yes.

Q. Minded your own business? A. Yes.

Q. You did not look to your right again, did you? A. I didn't think I needed to.

Q. I am not asking whether you needed to or not. I am asking you, did you look to your right? A. No, sir.

Q. So the only time you looked to your right was when you were at the center of the street; is that right? A. Yes.

Q. Then you took four or five steps, and all during that time you looked straight ahead, toward the north? A. Yes.

Q. And not to the east at all? A. Yes.

Q. Are you sure about that? A. Positive.

Q. You say you were not thinking of automobiles? A. No, I was not.

Q. You were thinking about some business matter? A. Yes, sir.

Q. You did not have the idea of an automobile coming along in your mind at all, did you? A. I must have, to a certain extent.

Q. Did you? A. Yes.

William L. Patterson, cross.

Q. What did you mean when you said you were not thinking of automobiles? A. I told you that I was thinking about automobiles, to look to my right and my left before I crossed the street. I said after I looked to my right I went on about my business. I was not thinking about an automobile then.

Q. After you looked to your right, out in the center of the road, you were not paying any attention to automobiles after that, were you? A. No, sir.

Q. You were just thinking about this business matter? A. I was.

Q. And you were looking straight ahead? A. Yes, sir.

Q. So you did not see the automobile at all, did you? A. No, sir, I didn't.

Q. In fact, you did not look for it after you passed the center, did you? A. No; it was not in sight when I passed the center, so I didn't bother any more about it.

Q. The next that you knew, not having seen it or heard it, was when you were struck; is that right? A. The next thing I heard or knew anything about it was when I woke up in the hospital, when somebody said, "Good morning."

Q. You did not even remember being struck then, did you? A. After, no, sir.

By the Court:

Q. Mr. Patterson,— A. Yes, sir, your Honor.

Q. How far could you see, looking to your right? A. I would say, your Honor, you could see approximately 35 to 45 feet, because right at the front of my father's house there is a curve in Godwin Avenue.

Q. You could see 35, or 45 feet? Which is it? A. I would say 35 to 45 feet, your Honor.

Q. Then you took four or five steps, and you were hit after you had passed the center? A. Yes, sir.

By Mr. Markley:

Q. Thirty-five or forty-five, did you say? A. Yes, sir.

Q. At the center of the road? A. Yes.

Q. Of course, you had a less view than that as you took these four or five steps, I suppose? A. No, I wouldn't say I had any less view than that.

Q. About the same? A. I should imagine so.

Q. So at the center of the road, when you looked to your right, you could see about 35 or 45 feet? A. I should think so.

Q. You could see more than that. A. You asked me for an approximate distance. That is my answer.

Q. That you could not see any further than that? A. Yes.

Q. Then you took those four or five steps. You say the view did not increase or become any better to the right? A. Any better in what respect?

Q. To the right, looking to the right? A. After I crossed the center I didn't look to the right.

Q. Did you have any accidents after this one? A. Accidents? I don't get exactly what you mean by the question.

(Question read.)

A. No, sir.

Q. Did you have an accident on an Erie train? A. Yes. I happened to—my foot happened to slip off a wet step, and I skinned my knee. Outside of that—

Q. When was that? A. When was it? I don't know the date. I didn't pay any attention to it at all.

Q. Well, that was after this accident of Mr. Miller, was it not? A. Yes, yes.

Q. Did you have another accident, when you drove your car up on a lawn? Do you remember that? A. Drove my car up on a lawn?

Q. Yes. A. I never drove my car up on a lawn.

Q. Then you say you had no such accident? A. No, sir.

Q. Who treated you for the Erie Railroad accident? A. Nobody treated me. I treated myself. Dr. Bonygne came down to take a report of it. All he did was look at it.

Q. Well, you were examined by Dr. Bonygne, were you not? A. When?

Q. After your railroad accident. A. If you call pulling up my pants leg and looking at a scab on a knee, why, yes, I was examined.

Q. Did you have a bottle of liquor in your pocket on the day of this accident with Mr. Miller's car? A. Yes, sir, I did.

Q. What was it, whiskey? A. Yes, sir.

Q. Do you remember testifying before trial, giving your testimony in this case? A. I remember a couple of attorneys down in Mr. Dunn's office, asking me a lot of questions, yes.

Q. That was in March, 29th, in the forenoon, in the presence of Arthur Dunn, your counsel, was it not? A. Yes, he was there.

Q. And you were asked, "Would you say you had a bottle with you, a bottle of liquor? A. Would I say I had a bottle?

"Q. Yes. A. Not to my knowledge, no, I didn't have anything with me, except the clothes on my

back." Do you remember making those answers? A. Yes, I do remember them.

Q. Now, you say you did have a bottle of whiskey with you, do you? A. Yes, sir.

Q. This testimony was false, then, given in Mr. Dunn's office? A. I would not say it was false. I was so sick and tired of answering questions that I answered anything to get rid of him. I didn't figure that there was anything to it at all.

Q. That is the reason you told us, no, you did not have a bottle of liquor with you? A. Because I figured it was the quickest way out of it.

Q. Do you not think it would have been quicker if you had said, "Yes," instead of denying it? A. Well, possibly may have been, yes.

Q. But you denied under oath that you had a bottle of liquor with you? A. I was not under oath.

Q. Were you not sworn before you gave this testimony? A. What, that I would tell the truth and nothing but the truth?

Q. Yes. A. No, sir.

Q. Were you not sworn by William C. O'Brien, the Supreme Court Examiner, who took the testimony, to tell the truth and nothing but the truth? A. He didn't ask me.

Q. Before you testified? A. He did not ask me any question like that, no.

Q. You do not remember that? A. No. He didn't ask me any question like that.

Q. Are you willing to swear positively here that the Supreme Court Examiner who took this testimony did not swear you before you testified? Is that what you are saying? A. I certainly don't remember it, if he did.

Q. I am asking you, are you going to deny it?

A. All I can say is that I don't remember, because I certainly don't remember it.

Q. Did you not know that when you gave this testimony in your lawyer's office, before a Supreme Court Examiner, that you were testifying in this case? A. I didn't know who they were, except a couple of attorneys. They had sent so many of them I was sick and tired of seeing them.

Q. So many attorneys you had seen about this case? A. Yes.

Q. That is, so many attorneys wanted to take your case? A. No, no; not take it, no. I did not say anything about taking it.

Q. What do you mean, you saw so many attorneys about this case? A. Different people talking of it, doctors and attorneys, and so forth, and so on, that I was sick and tired of telling the story.

Q. When had you seen any other attorneys before this in your case, other than Mr. Dunn? A. Why, I have seen the insurance company's attorney two or three times, and their doctor three or four times, and heaven knows how many times my own doctors.

Q. Whom do you mean by the insurance company attorney? A. They said they represented the Standard Insurance Company.

Q. Who said that? A. The man that spoke to me.

Q. When? A. When? Before this testimony.

Q. Where? A. Well, when they came down to my house; and I have spoken to one in Arthur Dunn's office.

Q. Now, you are saying that purposely, to bring in the insurance company, are you not? A. No, sir, I am not.

Q. Who told you to say that? A. Nobody told me to say that.

Q. Do you not know you saw no other attorney other than the attorney in this case, from our side of the case? A. I certainly do not.

Q. Did Mr. Dunn tell you to say that, to say that when you got on the stand you saw an insurance company attorney? A. He certainly did not.

Q. Did Mr. Breslin? A. No, sir.

Q. Well, you did have a bottle of whiskey in your pocket, did you not? A. I did, yes.

Q. And you did not know you were swearing, under oath, when you gave this testimony, did you? A. I did not, no, sir.

Q. You thought you were just giving a statement, not under oath; is that it? A. Absolutely.

Q. Did Mr. Dunn tell you you were under oath? A. I don't remember anybody saying anything about an oath at all.

Q. Was this bottle of whiskey full or partially full, or empty? A. It was completely full, unless they—because I had it for some people who were coming in that night, and it was completely full.

Q. Do you not know it was half empty? A. It was not half empty, unless somebody else emptied it after I left it.

Q. Did you have any whiskey that night before this accident? A. Not at the night, no.

Q. In the afternoon? A. I had had two or three drinks with a friend around two or two-thirty in the afternoon.

Q. Two or three drinks of whiskey? A. Yes, sir.

Q. Around what time? A. Between two and two-thirty in the afternoon.

Q. And you had some more after that, did you not? A. No, sir, I didn't.

Q. Who was the friend? A. Mr. Neptune. But he is out of town at present.

Q. Where did you have those drinks? A. Down on Lincoln Avenue.

Q. Where; in Ridgewood? A. No. I think it is Hawthorne.

Q. Whose place? A. Meister's.

Q. You had been there the whole afternoon? A. No, sir.

Mr. Breslin: I would like to object at this time.

Hawthorne is in Passaic County, is it not?

The Witness: Yes, I guess it is.

Mr. Breslin: All right.

Mr. Markley: That is all right.

Mr. Breslin: I do not want Chief Blackshaw to get a lot of blame, if your Honor please.

Q. You had been there all afternoon, had you not? A. No, sir.

Q. How long had you been there? A. How long had I been there?

Q. Yes. A I think we were there probably half or three quarters of an hour. And after I had gotten a taxi from my office, I stopped up there to buy the bottle that I was taking home with me.

Q. Stopped up where at your office? A. I said after I left my office in a taxicab, about seven o'clock, I stopped up there to buy that pint that—or half pint, that I took home with me.

Q. Then you went back there; is that what you mean? A. Yes.

Q. You had been there in the afternoon and went to your office, and then you went back to Meister's again; is that it? A. I went back to Meister's again about seven o'clock that night, yes.

Q. Did you have something to drink then? A. No, sir. I just bought the bottle.

Q. When you got the bottle of whiskey did you not have something to drink? A. No, sir.

Q. Are you sure about that? A. Absolutely.

Q. You say you only had two or three drinks of whiskey? A. Yes, sir.

Q. You say you know what treatment you got at the Paterson General Hospital, do you? A. I know what they did to me after I woke up, yes.

Q. Do you know that they gave you treatment for delirium tremens from alcohol?

Mr. Breslin: I object, if your Honor please. I would like to have the date fixed.

Mr. Markley: In the Paterson General Hospital, within two or three days after he got there.

Q. By whom was the treatment rendered and so on?

The Court: What is the question?

(Previous question read as follows: "Q. Do you know that they gave you treatment for delirium tremens from alcohol?")

The Court: Answer yes or no.

A. No, I don't know that they did.

Q. Had you had any treatment for that condition before this?

Mr. Breslin: I object to that as being immaterial.

The Court: Sustained.

Mr. Breslin: This man was in the war. He was gassed.

Mr. Markley: He was not gassed with whiskey.

Mr. Breslin: Well, it may have caused him to use whiskey, because of the gassing he received in the war.

The Court: That is not in this case.

Mr. Breslin: We will show that at the proper time.

Q. Now, you were asked on page 20 of your testimony before trial, before Supreme Court Examiner O'Brien, this question: "Q. Were you drinking that night?" And your answer was, "A. No, sir, I hadn't been drinking that day at all." Did you make such an answer? A. I guess I did, if you have it there.

Q. Well, that was not true, then, was it? A. What, that I had not been drinking that night?

Q. That day. A. The question did not say that day.

Q. Here is what you said. This is your answer I am reading to you. A. Yes, but you wanted to know—

The Court: Just listen to the question.

Q. The answer you made was, "No, sir, I hadn't been drinking that day at all." Now, that was an untruthful answer, was it not? A. Yes, sir.

Q. Why did you make that answer? A. Well, for the same reason I made the other, I imagine. I don't know of any reason. It was not because I wanted to tell an untruth.

Q. Now, you were in another hospital you have not mentioned, were you not, after this accident? A. I don't know. I was in a hospital in New York that I had stated, and forgotten the name. I was in the Barnert, and I was up to the Idle Ease.

Q. Where is that? A. That is up in New Foundland.

Q. You did not mention that, did you? A. I have forgotten whether I did mention it or not.

Q. What did you go there for? A. Dr. Wassing sent me up there to see if Dr. Drake could not get my nerves in shape.

Q. Your nerves were not in very good shape before this accident, were they? A. My nerves had not been in very good shape since I came back from service.

Q. You say they had not been? A. Yes.

Q. Were you engaged in any other business besides real estate? A. When this accident occurred?

Q. Yes. A. No, sir.

Q. Did you keep any books of your real estate business? A. No, I didn't.

Q. Any books at all? A. No, sir.

Q. Of your real estate transactions? A. No, sir.

Q. Even though you never made less than $5,000 a year? A. Yes, sir.

Q. Did you have a real estate office? A. Yes, sir.

Q. Where was it? A. It was 248 Rock Road, Glen Rock.

Q. With anybody else? A. No, sir; myself.

Q. Just your own office? A. Yes.

Q. Have any help in the office? A. No, sir.

Q. Just yourself? A. Well, the store was split in half, and—

Q. I am talking about your half, your office. A. No, there was not anybody in my half except myself.

Q. You did not keep any books of account at all? A. No, sir.

Q. Or any record to show what you earned? A. No, sir.

Q. What were these earnings made on, collection of rents? A. No, sir.

Q. You did not collect any rents, did you? A. No, sir.

Q. Well, the only thing you did was once in a while you sold a house or something; is that what you mean? A. I was selling property in Ridgewood and Glen Rock at the time, and I think if you want to follow it through, you will find that I sold a little bit more often than once in a while.

Q. I mean than when you sold a house. Is that all you carried on in that real estate office? A. No, sir. I leased a house once in a while. Outside of that, leasing and selling, I did not have anything to do with real estate.

Q. And you did not keep any record of the profits you made on a sale? A. No, sir.

Mr. Breslin: If your Honor please, we subpoenaed the doctors for two o'clock. We rest with the exception of the doctors.

The Court: We will adjourn now. Be back a quarter of two.

RECESS.

AFTER RECESS.

ARTHUR C. DUNN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mr. Dunn, you are an attorney licensed to practice law in the State of New Jersey? A. I am.

Q. And you have your offices in what city? A. Paterson.

Q. You are the attorney for Patterson in this case? A. I am.

Q. Did or did you not have a conversation with this police officer, Bouman, on Wednesday, of last week, with reference to this case? A. I did.

Q. Did you have this conversation with him in reference to the preparation of the case? A. I did.

Q. Did or did not this police officer say to you that Miller admitted to him the night of the occurrence that he had struck Patterson and that he did not see him until he struck him?

Mr. Markley: I object to that as incompetent.

The Court: I will allow it for the purpose of neutralizing and limiting his testimony, simply to wipe the slate clean, not as being testimony of the fact. It is simply to neutralize the testimony of the officer.

Mr. Markley: Exception noted.

A. He did.

Q. Now, Mr. Dunn, were you present in the Ridgewood police court, on the hearing of the charge made against Mr. Surpless? A. I was.

Q. What did Mr. Surpless say with reference to the charge that was made against him? A. He said that he was technically guilty.

Mr. Breslin: That is all.

Mr. Markley: No questions.

The Court: I take it you are referring to the charge that—

Mr. Breslin: That Judge Van Buskirk has already testified to, allowing an unlicensed driver to operate his automobile.

I would like to ask your Honor's indul-

gence for just a second. The doctors were to be here at two o'clock. We called them this morning.

The Court: Have you any other witnesses?

Mr. Breslin: That is all. Outside of the doctors, we rest.

The Court: Mr. Markley, have you medical testimony also?

Mr. Markley: Yes.

The Court: Suppose you go on with your facts, and then we will call the doctors when they come?

Mr. Markley: All right.

DEFENDANTS' CASE.

STAFFORD MILLER, one of the defendants, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Miller, how old are you? A. Twenty-four.

Q. Are you the gentleman who was driving the car, one of the cars, that came in contact with Mr. Patterson on the night of February 24, 1927? A. I am.

Q. What kind of a car did you have? A. Ford sedan.

Q. Was it your sedan? A. No.

Q. I wish you would speak up now so all the members of the jury can hear you. You say it was not your Ford sedan? A. No, it was not.

Q. Where did you get it? A. From the garage on the Surpless place.

Q. Where was the garage of Mr. Surpless? A. In the rear of the house.

Q. Where was his house? A. 115 Prospect Street.

Q. In Ridgewood? A. In Ridgewood.

Q. When did you get this Ford car from Mr. Surpless's garage? A. The evening of the day before the accident.

Q. The evening of the day before the accident. That would be on February 23rd? A. Right.

Q. The accident happened on February 24, 1927? A. Right.

Q. Did you ask Mr. Surpless for the car before you took it? A. No, I did not.

Q. Did you ask anybody for permission to use this car before you took it? A. I did not.

Q. Had you ever used this car before? A. No.

Q. Did you ask Mr. Surpless on any occasion, on this occasion or any prior, to use this car? A. No, I had not.

Q. Had you ever had permission to use it before? A. No.

Q. Had you ever driven it before? A. No.

Q. Where did you live in Ridgewood at that time? A. 108 Lincoln Avenue.

Q. And had you a car of your own? A. Yes.

Q. What was its condition at the time you took Mr. Surpless's car? A. It was not in running condition.

Q. So you proceeded down to Surpless's garage and took his? A. That is right.

Q. Did you see anybody at his house before you took it? A. I did not.

Q. Was the garage open? A. It was.

Q. You went in and took the car and drove it? A. Right.

Q. Are you related to Mr. Surpless? A. By marriage.

Q. You are related to him by marriage now? A. Yes.

Q. What is that relationship? A. Son-in-law?

Q. Were you his son-in-law at the time you took the car? A. No.

Q. On February 23, 1927? A. No.

Q. Were you engaged to marry his daughter at that time? A. Yes.

Q. How long had you been engaged? A. A little over a month.

Q. Over a month? A. Yes.

Q. Do you know where Mr. Surpless was at that time that you took the car, in February, 23rd, 1927? A. I understood he was away on a business trip.

Q. Was this daughter at home? A. No; she was at college.

Q. Do you know what college she attended? A. Connecticut College.

Q. That is the girl you were engaged to? A. Yes.

Q. She was at Connecticut College. Where is that? A. New London, Connecticut.

Q. If I understand you correctly, you had neither his permission nor her permission to use this car? A. No.

Q. Did you use it on the night you took it, on February 23rd? A. Yes.

Q. What did you do with it after you had used it that evening? A. Parked it in my driveway.

Q. When you used it did you use it on Mr. Surpless' business at all? A. No.

Q. On your own business? A. On my own.

Q. When you got through with it that evening you say you put it in your driveway? A. Correct.

Q. What did you do the next day? A. Drove it to the station and parked it by the station, and

went to my business in New York; and returned the following evening.

Q. Do you mean the Ridgewood Station? A. Yes.

Q. Of the Erie Railroad? A. Right.

Q. The next morning, February 24th, you drove Mr. Surpless' Ford from your home to the Ridgewood Station? A. Yes.

Q. And left it there all day? A. Yes.

Q. And in the evening you picked it up again on your way back from New York? A. Yes.

Q. And were on your way home at the time this accident happened; is that right? A. That is correct.

Q. As you alighted from the train down at the station and were proceeding home in your car, home for dinner— A. Yes.

Q. Had you transacted any business at all for Mr. Surpless? A. I had not.

Q. Now, as you came along—

Mr. Markley: May I just withdraw this witness for a moment? I meant to put my map in first, and my man was not here. I think he is here now.

The Court: Will he testify as to the map?

Mr. Breslin: I have not any objection to a map going in evidence.

Mr. Markley: I have the man who made it here.

Mr. Breslin: Let us see if we can agree on it.

Mr. Markley: I would like to have him testify to it.

Mr. Breslin: All right. I have not any objection to the map going in. I will take the measurements as they are on that map.

(Witness withdrawn.)

FRANK D. LIVERMORE, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Livermore, at my request, or at the request of one of my assistants you made a map for me? A. I did.

Q. Is this the map you made? A. It is.

Q. Did you make it yourself? A. Partly.

Q. Were you on the ground when the measurements were taken? A. Yes, sir.

Q. Is this map made according to the actual survey? A. Yes, sir.

Q. What is the scale of the map? A. One inch to ten feet.

Mr. Breslin: We did not get the answer.

Q. One inch on this map represents ten feet on the ground? A. Yes, sir.

Q. Does this map show the vicinity of Doremus Avenue and Godwin Avenue in Ridgewood? A. Yes, sir.

Q. Are the conditions there now substantially the same as they were in February, 1927? A. They are.

Mr. Markley: I offer the map.

Mr. Breslin: No objection. I did not have any objection to it five minutes ago.

(Map marked Exhibit D-1.)

Q. Now, referring to this map, Mr. Livermore, have you marked thereon Godwin Avenue by that name? A. Yes, sir.

Q. And am I pointing to it from the word "Godwin" up to "Avenue"? A. You are.

Q. You have put an arrow on here to indicate the points of the compass. The north point is shown by an "N" on the compass, is it not? A. Yes, sir.

Q. East and west on each side; and south would be the other end of the arrow? A. Yes, sir.

Q. Now, then, looking at Godwin Avenue for a moment, and going along in toward the right side of the map, would that be in an easterly direction? A. It would.

Q. And going in a westerly direction would be toward the left of the map, would it not? A. Yes, sir.

Q. Now going in an easterly direction from the left to the right of the map would bring you down to the Ridgewood Station, would it not? A. It would.

Q. And going in a westerly direction, along Godwin Avenue, from the right of the map to the left, would bring you to Doremus Avenue, would it not? A. Yes, sir.

Q. As you show it here? A. Yes, sir.

Q. Now, Doremus Avenue does not cross Godwin Avenue, does it? A. It does not.

Q. It comes in from which side? A. Southerly side.

Q. That is, it comes into Godwin Avenue on the southerly side thereof? A. Yes, sir.

Q. And ends there? A. Yes.

Q. Does not go across? A. No, sir.

Q. Now, you have shown a house here on the southwest corner, have you not? A. I have.

Q. Is that Mr. Eyre's house? A. It is.

Q. That is a bungalow, is it not? A. A story and a half bungalow.

Q. One story and a half bungalow. I show you

a photograph with a bungalow in the upper left hand corner. Can you recognize that as Mr. Eyre's bungalow on the southwest corner of Doremus and Godwin Avenues? A. That is.

Q. Is that a fair picture of Doremus Avenue as it comes into Godwin Avenue? A. It is.

Mr. Markley: I offer the photograph in evidence.

Mr. Breslin: No objection.

(Photograph marked Exhibit D-2.)

Q. Will you not just step over here a minute on this side? Right here, Mr. Livermore, is my stick pointing to the bungalow of Mr. Eyre, is that right? A. That is it.

Q. This bungalow is on this southwest corner, is it not? A. Right.

Q. This is it here. I will mark it with an "X." (Mr. Markley marks map.) Will you step over here a moment? Is this Doremus Avenue coming in? A. This is Doremus, and this is Godwin (indicating).

Q. This is the main street? Godwin, is that a County Road (indicating)? A. Yes, sir.

Q. This is the County Road, known as Godwin, and Doremus runs in from the south? A. Yes, sir.

Mr. Markley: I have some other pictures here.

Mr. Breslin: No objection to any of the pictures going in evidence.

Mr. Markley: I will mark them all in evidence.

(Photographs marked Exhibits D-3, D-4, D-5 and D-6.)

Q. Now, Mr. Livermore, in front of Eyre's house,

crossing the street from the south to the north, and looking to the right, that is, looking down toward Ridgewood Station, in which a car would come westerly, have you correctly shown on this map the manner in which Godwin Avenue turns? A. I have.

Q. In other words, a man standing in front of Eyre's bungalow and looking to his right, to the east, for cars coming west, can you say how far up there you can see?

Mr. Breslin: I object to that, if your Honor please, on the ground that it is argumentative, and it does not give facts and circumstances which existed at the time of this accident.

The Court: I will let him testify as to his ability, of course keeping in mind that this was at night.

Mr. Breslin: At night.

The Court: But he can testify as to the range of visibility.

A. It would depend entirely upon the distance across the street that the pedestrian or other individual might be, going across.

Q. Suppose he was right at the southwest corner and he had gone to the middle of the highway; that is, the middle of the paved road? A. May I have your pointer a moment?

Q. Surely. A. If he were in the center of Godwin Avenue, opposite the westerly sidewalk of Doremus Avenue, he should be able to see east on Godwin Avenue a distance of 250 to 300 feet.

Q. And if he looked at the corner, southwest corner of Godwin Avenue and Doremus Avenue.

how far could he see? A. Up to the top of the hill, just west of the station.

Q. How far would that be, approximately? A. Seven or eight hundred feet.

Q. Now, suppose he was 50 feet; suppose he was on the southerly sidewalk, at the curb, say, of Godwin Avenue, at a point west of Doremus Avenue, west of the southwest corner of Doremus Avenue, 50 feet, what would his view be? A. Possibly 250 feet.

Q. Your map, as I understand it, correctly shows the curve in Godwin Avenue, from Doremus Avenue up to Pomander Walk, and beyond, so far as it appears within the confines of your map, does it? A. Yes, sir.

Q. And does the direction of Godwin Avenue continue right on in the same way, or is there any other curve? A. No, sir; it is straight from a point just east of Doremus Avenue until its terminus near the railroad.

Q. That is about what distance? A. I would say approximately a thousand feet to the railroad.

Q. That is from a point just east of Doremus Avenue? A. Yes, sir.

Q. All the way up to the railroad? A. Yes.

Q. Straight for about a thousand feet? A. Yes, sir.

Q. How wide is Godwin Avenue? I think you have shown it on the map. A. The entire width of the street is 50 feet. The pavement between curbs is 30 feet.

Q. How wide is Doremus Avenue? A. Same thing, at the junction with Godwin Avenue. As it goes south, it widens.

Q. Widens out further on the south? A. Yes.

Cross examination by Mr. Breslin:

Q. This is a built up section of Ridgewood, is it not? A. Yes.

Q. Houses are less than a hundred feet apart? A. Yes, sir.

Q. Those little circles you have here designate trees, is that correct, or are they houses? A. These are trees. These dark dots with irregular lines around them designate trees.

Q. There is an electric light on the southeasterly corner of this intersection, is there not? A. There is.

A Juror: A question, if your Honor please, of this gentleman.

By a Juror:

Q. If a man happened to be more than half way across that road, looking in a right direction, how far east could he see? Take four paces beyond the center. A. It would depend considerably—may I answer this question latterly, sir? It depends very largely on where he may be, that is, if he were over on the east side of Doremus Avenue, on the straight-away. The further he gets to the west of that curve the less distance he can see.

Q. My question is, the west side of Doremus Avenue, crossing in a northerly direction. A. Here?

Mr. Markley: Half way across, I think you said.

The Juror: Four paces beyond.

Mr. Markley: Yes, four paces beyond the center, going north.

The Witness: Well, that depends upon the length of the pace. Four average paces

would be between 10 and 12 feet, bringing in to that point, if I may mark it.

Mr. Markley: Mark it with a little "o."

(Witness marks map with "o.")

The Witness: Your question is how far east could he see?

By the Juror:

Q. How far east could he see? A. He should be able to see a car on the right-hand side of the center of the road for a distance of 150 feet east.

Q. I understand those are trees there, marked in a circle? A. Those are trees between the walk and the curb, yes, sir.

Redirect examination by Mr. Markley:

Q. I forgot about the light. I think I have a picture that shows it. Looking at Exhibit D-3, does that show the electric city light at the intersection? A. It does.

Q. Will you just put a pencil ring around it? A. (Witness marks map.)

Q. And that is on an electric light pole on the southeast corner. You have it marked here on the map, "Electric light," have you not? A. Yes, sir.

Q. And it is an electric light? A. Yes, sir.

Q. The usual arc light? A. Yes, sir.

Recross examination by Mr. Breslin:

Q. Now, these computations that you have made are the result of an inspection made by you in daylight? You have not made any examination at night, have you, as to the distance? Yes, or no. A. This compilation just made here?

Q. No, sir. A. No, sir, they are not made either

time. They are made on the actual conditions, existing conditions, as portrayed on the map.

Q. Do you mean to say a man can see as far on a clear day as he can in the dark of night? Yes or no. A. Further on a clear day.

Q. If it were dark at night his vision would be obscured, would it not? A. It would be obscured by the light; not by any natural obstruction in the street.

Q. He would not be able to see as far at night as on a clear day? A. He could see a light on an automobile.

Q. I am not asking you that. I am asking you whether he would not be less able to see at night, in the dark, than he would be in the day? A. That question is not answerable yes or no.

Q. Now, you told us how far a driver of an automobile, approaching the intersection of Doremus Avenue and Godwin Avenue, could see to the west, if he were within 50 feet of the corner? A. Which corner? A. This corner right here, this intersection. A. East or west side of Doremus?

Q. Looking in a westerly direction, as the operator of an automobile was approaching the intersection, at a distance of 50 feet away from the corner, how far could he see down the street?

Mr. Markley: I have not any objection to the question, but where do you want him to measure in the street? The street is 50 feet wide.

Mr. Breslin: The right-hand side of the street, the side where he is supposed to be. I do not know which side he was on.

A. Look down there between 150 and 175 feet, depending slightly on the position of the car.

Q. As he approached the intersection the length of his vision would increase, would it not? He could see further down the street? A. After he got past Doremus Avenue, going west, there is a short stretch of straight street in there, from which he could see.

Mr. Breslin: That is all.

Redirect examination by Mr. Markley:

Q. This point which you measured for Mr. Breslin, will you mark it on the map? A. Yes.

Q. Put a "B" there. A. (Witness marks map.)

Q. How near is that to the northerly curb? A. Of Godwin?

Q. Godwin Avenue. A. Half way between the center of the road and the northerly curb line.

Q. This center, between the curb of the road and the northerly curb line, you have your point marked "XB"? A. Yes.

Q. And that is 50 feet? A. To the east side of Doremus Avenue.

Q. If continued across the street? A. Yes.

STAFFORD MILLER, resumes the stand, and testifies as follows:

Direct examination by Mr. Markley (continued):

Q. As you came along Godwin Avenue, in which direction were you traveling, Mr. Miller? A. West.

Q. Westerly direction. That is, away from the Ridgewood Station of the Erie Railroad? A. Yes.

Q. As you came past Pomander Walk, down toward where Doremus Avenue runs into Godwin Avenue from the south, about how fast were you going? A. Fifteen to twenty miles an hour.

Q. Were there any cars in line, do you know? A. In front of me or in back?

Q. In front of you. A. No.

Q. Were there any in back of you? A. Yes.

Q. Do you know what cars were in back of you? A. There was a bus and two other cars.

Q. Yes. Now, as you came to the intersection of Doremus Avenue, will you not tell the members of the jury in your own words, just what happened? A. I saw a car drawn up to the curb on the southerly side of Godwin Avenue, and a man came out from in back of this car, and staggered across the street into my front left fender, which threw him off his balance into the road.

I put on my brakes and drew in to the side of the road and parked my car, to get out to assist him, and stop the traffic, which was coming in back. While I was going to the body in the road another car ran over him, evidently a—

Mr. Breslin: I ask that it be stricken out, just what he is about to say, "evidently."

The Court: Yes.

Q. You say another car ran over Mr. Patterson? A. Yes.

Q. Did you see that? A. I saw it, yes.

Q. Could you tell what kind of a car it was? A. It was a heavy car. I thought it was a Cadillac.

Q. You say, as you came along to Doremus Avenue, that a man, I think you said, staggered out from behind a taxicab?

Mr. Breslin: I object to counsel leading.

Mr. Markley: I think he said that already. I am merely leading up to something else. That is what he said.

The Court: He testified to that.

Mr. Breslin: I withdraw the objection.

Q. When this man staggered out from behind the taxicab how far was he from the southwest corner of Doremus Avenue? A. About fifty feet.

Q. Which way? A. West.

Q. In other words, he was fifty feet west of Doremus Avenue when he came out; is that it? A. Yes.

Q. Was the taxicab stopped? A. It had parked to let him out, and continued on its way.

Q. Now, as you came along there on Godwin Avenue, toward Doremus, which side of the road were you on? A. On the right-hand side; the northerly side of Godwin Avenue.

Q. And about where with respect to the center of the road? A. About six feet from the right-hand curb.

Q. Well, the road is thirty feet wide from curb to curb. That would make the center line fifteen feet from the right-hand curb. You were about a foot or two from the center line of the road, would you say? A. My person was, yes.

Q. Then you were on the right of the center, were you, the right of the center of the road? A. Yes.

Q. Your car? A. Yes.

Q. When you saw him stagger out from behind the taxicab what did you do, if anything? A. My lights were on, and I thought he must have seen me, so I—

Mr. Breslin: I object to that.

Q. You cannot say what he must have seen.

Mr. Markley: I consent that it be stricken out.

A. I blew my horn and slowed up. It had no effect.

Q. He continued to come right on? A. Yes.

Q. And you say he ran into your left front fender? A. Right.

Q. How far beyond the point where your fender and he collided did your car stop? A. About fifteen to twenty feet between him—

Q. That is, from the rear of your car? A. Yes.

Q. Was he toward the front of your car? A. The rear.

Q. In other words, the rear of your car was about fifteen or twenty feet, you say, beyond the body? A. Correct.

Q. Where was the body with respect to the center of the road? A. It was on the—the feet were near the center, but the head was back toward the southerly side of the road, the left-hand side of the road.

Q. How far was that point, where this body lay, from the corner, the southwest corner, assuming that that corner was extended out into the road? How far beyond? In other words, how far west of the southwest corner? A. About 50 feet.

Q. Fifty feet west of the corner? A. Yes. At least that.

Q. Now, did he come across Doremus Avenue right at the corner? A. No.

Q. Where was he when you saw him staggering across, as you say? A. He must have been more than 50 feet—

Mr. Breslin: I ask that it be stricken out, "He must have been."

Q. Not "must." How much? What do you approximate the distance as? A. Approximately 60 feet.

Q. Sixty feet west of the corner? A. Correct.

Q. Was there any vehicle coming in the opposite direction at about the time when this collision occurred? A. A bus.

Q. You say there was a bus in back of you? A. Correct.

Q. There were two buses, then? A. Two buses.

Q. And two other cars in back of you? A. In back of me.

Q. Did you say to the mother of Mr. Patterson that you hit him? A. I did not.

Q. Did you have a driver's license at that time? A. No.

Q. That was on February 24, 1927, was it not? A. Yes.

Q. Had you had a license the previous year? A. Yes.

Q. How long had you been driving an automobile? A. Approximately five—four or five years.

Q. Had you had a license in each previous year? A. Yes.

Q. Were you insured? A. No.

Mr. Breslin: Well, now, I ask that that be stricken out, because that has not anything to do with this case,—

The Court: Strike it out.

Mr. Breslin: —whether he is insured or not.

The Court: Strike it out.

Mr. Markley: May I note an exception?

Mr. Breslin: We want to win the case on merit, irrespective of whether there is an insurance company involved or not.

The Court: It is stricken out, Mr. Breslin.

Q. What kind of a night was it? A. A winter's

night, fairly clear; 7:30 at night; the ordinary darkness.

Q. Was the street wet? A. No.

Q. Was there any ice or snow on the ground? A. No, there was not.

Q. The streets were dry? A. They were.

Q. You say it was a clear night? A. Yes.

Q. Your lights were lit? A. They were.

Q. Now, you say another car came along from behind you and ran over Mr. Patterson; is that right? A. Yes.

Q. Did that car stop? A. No.

Cross examination by Mr. Breslin:

Q. In other words, you went into this garage and took the car out without the owner's consent? A. Yes.

Q. Had you ever ridden in the car before? A. Yes.

Q. Who drove the car on previous occasions? A. Miss Surpless.

Q. Did you communicate with Mr. Surpless before you took the car out? A. No.

Q. What condition was the car in, the running condition; brakes in good order? A. Very good.

Q. Very good order. You had your lights on that night? A. Yes.

Q. You traveled over the road before, did you not? A. Yes.

Q. Many times? A. Yes.

Q. You knew it was a well-built-up section, where the houses were less than a hundred feet apart? A. Yes.

Q. You did not have a driver's license? A. No.

Q. And you knew, under the law, at that time, that the legal rate of speed was 12 miles an hour, did you not? Yes or no. A. Yes.

Q. And you were driving your car at a rate of at least 15 miles an hour? A. Yes.

Q. Now, with your brakes in good order, on a clear night, on a perfect pavement, as you had, within how many feet could you bring that car to a stop? A. I really couldn't say. I have never experimented.

Q. Give us some idea. Was it a hundred feet? A. No. Approximately twenty feet.

Q. Approximately twenty feet. Now, as you came down Godwin Avenue, you could see down the street for 150 feet, could you not? You had your lights on? A. Yes.

Q. And how far could you see down the street? A. From what point in the street?

Q. Well, say, from a point fifty feet from the intersection?

Mr. Markley: Fifty feet east?

Q. Fifty feet east of the intersection. A. A hundred feet.

Q. This arc light was lit that night? A. Yes.

Q. Where was the taxicab with reference to your car when you first saw it? How close were you to the taxicab? A. About twenty-five feet.

Q. About twenty-five feet. By the way, you never left the right side of the road, did you; you never left your right side of the road, did you? A. In which direction?

Q. The right side of the road you were driving on, you never left that side of the road at any time? A. No.

Q. In other words, your car was on the right side of the road, past the center of the road, on the right-hand side of the road when the collision between your car and Mr. Patterson took place; is that correct? A. Yes.

Q. In other words, Mr. Patterson had gotten past the center of the road? Yes or no. A. Yes.

Q. You saw this taxicab twenty-five feet away, you saw it slow up, did you not? A. It had already stopped when I saw it.

Q. And the man had gotten out of the taxicab, had he not? A. Yes.

Q. And you were going fifteen miles an hour?

Mr. Markley: Fifteen to twenty.

Q. Fifteen to twenty miles an hour. What did you do, if anything, to prepare for the man crossing the street? A. Blew my horn and pulled in to the right more.

Q. You slowed down, did you not? A. Yes.

Q. What rate of speed did you slow down to? A. I really can't say.

Q. Well, it was less than fifteen miles an hour, was it not? A. Not necessarily. I said I was going between fifteen or twenty miles an hour. If I slowed down, it would not necessarily be below fifteen.

Q. How slow did you come down to, about? A. Approximately fifteen.

Q. About fifteen miles an hour. And that was the slowest that you ever drove the car in Godwin Avenue at that particular time? A. Yes.

Q. On the night of the accident? A. Yes.

Q. Now, you brought your car down to a speed of fifteen miles an hour. Within how many feet do you think you can bring that Ford to a stop with your brakes in good condition? A. Twenty feet.

Q. And the man was 25 feet away from you, was he not? A. Yes.

Q. Did you put on your brakes? A. I did.

Q. You put on your brakes and slowed down? A. Yes.

Q. Did you at any time increase your speed after you put on your brakes? A. No.

Q. You did not decrease your speed, did you, after you put on your brakes? A. Yes, certainly. The brakes decreased the speed.

Q. What did it decrease the speed of the car to? A. I couldn't say.

Q. After the accident, your car was 15 feet away from Patterson, was it not?

Mr. Markley: Fifteen or twenty.

Q. Fifteen or twenty feet away? A. Yes.

Q. How do you explain that, if you brought your car to less than 15 miles an hour, and had your brake working, that you went 15 feet beyond this man? A. When you go to park a car, you are not—when you start to park a car, you are more than six feet from the curb, and you have to bring it in to the curb to park it, in order for this police ordinance; and to do that you have to travel more at a diagonal, so that would cover more than that number of feet.

Q. By the way, what was the length of this Ford car? A. I couldn't say. I don't know what the wheel base is.

Q. In other words, Patterson was 15 feet from the rear of your car, was he not? A. Yes.

Q. When you came down the street, he was about 25 feet away from you. Did you not see him get out of the cab? A. I said the cab was 25 feet away. He had gotten out.

Q. He had already gotten out of it? He was out on the street, was he not, when you first observed him? A. Yes.

Q. When did you next see him? A. When I ran over to pick him up.

Q. In other words, you traveled this 20 feet and did not see Patterson until you went over to pick him up? Is not that correct? A. No, it is not.

Q. If you saw him 20 feet away from you, when was the next time you saw him? A. When he walked into the fender.

Q. He is 20 feet away from you; how far are you from this northerly curb? A. Approximately six feet.

Q. Do you say that he walked into your car? A. I do.

Q. Why did you not pull to the right? Why did you continue to go straight on into him? Why did you not put your brakes on? Why did you not slow down? A. I did.

Q. Did you pull to the right at any time? A. Afterward.

Q. Before the collision, did you pull to the right? A. Yes.

Q. Well, then, Patterson was almost over to this curb, then, was he not? A. Almost.

Q. In other words, Mr. Patterson was over three-quarters of the way across the street when he was struck by your car? A. He was over half way.

Q. Well, now, let us get this straight. You said you were six feet from the curb as you were going along there 15 miles an hour? A. Yes.

Q. And when you saw this man crossing the street, you pulled in to the right; is not that correct? A. In going around the turn, we have to do that.

Q. You did that, did you not? A. Yes.

Q. How close did that bring you to the northerly curb? A. About four feet.

Q. About four feet. After you reached that point, four feet from the northerly curb, you continued in a straight direction, did you not? A. Yes.

Q. In other words, Mr. Patterson was four feet from the northerly side of the street when his body came in contact with your car; is not that correct? A. According to those figures.

Q. You are giving us the correct figures, are you not? A. Yes.

Mr. Markley: You are leaving out the width of the car.

Q. Now, you saw him 20 feet away, and you were 25 feet away; is that correct? A. Yes.

Q. Where was he when you first saw him with reference to the center of the street? He was right about in the center of the street, was he not? A. Yes.

Q. And you saw this man in the center of the street, 25 feet away from you, your brakes in good condition? A. When I first saw him, he had gotten out and had come around the back of the car.

Q. You did see him at one time when he was in the center of the street? A. Yes, certainly.

Q. How near were you to him then? A. Approximately 10 feet.

Q. Then you pulled to the right? A. Yes.

Q. And as you pulled to the right, he ran along with your car; is that what you want us to believe? A. No. I blew my horn, and he walked right into it.

Q. You pulled over to the right-hand curb, did you not? A. No, not all the way.

Q. You pulled close over to it? A. Within four feet.

Q. Within four feet of the northerly curb? A. Yes.

Q. And that is the point of contact, is it not? A. Yes.

Q. Now, your car was going 10 miles an hour. Did you have your brakes on?

Mr. Markley: I object to that. The witness did not say 10 miles an hour.

Mr. Breslin: I will withdraw it.

Q. You were going 20 miles an hour when you first observed him?

Mr. Markley: I object to that. He did not say that either.

Q. How fast were you going? A. Between 15 and 20 miles an hour.

Q. How fast would you say? A. Seventeen or eighteen.

Q. Was it nearer 15 or nearer 20? A. Nearer 20.

Q. Now, you put your brakes on when you first observed him, did you not? A. No. I blew my horn when I first observed him.

Q. Pardon? A. I blew my horn when I first observed him.

Q. You saw him in the center of the street? A. Just about in the center.

Q. And you did not put your brakes on, although you were 25 feet away from him? A. After I blew my horn, I did.

Q. Your brakes did not hold, then, did they? A. Yes, they held.

Q. You do not deny that you put your brakes on when you were 25 feet away from him, and that the rear of your car was at least 15 feet from

his body when you came to a stop, do you? A. No.

Q. You say you were going between 15 and 20 miles an hour? A. Right.

Q. Now, as you were driving along there, you were looking ahead, were you not? A. Yes.

Q. How do you know there were any cars in your rear? A. Because when I brought my car to a stop, I could—I ran out to stop the on-coming traffic, westbound, and I could see them then.

Q. Oh, you could see them then, but they were not at the scene of the accident; they did not have anything to do with the accident, did they, those other cars? A. One of them did, yes.

Q. But the other two cars that you speak of had nothing to do with this accident? A. I placed Mr. Patterson in one of them, and drove him to Doctor Bonynge's.

Q. They did not have anything to do with striking him, did they? A. Two of the three did not, no.

Q. Your car struck him, did it not, first? A. No. He walked in my front left fender.

Q. He came in contact with your car first, did he not? A. Right.

Q. Now, this Cadillac car,—was it a Cadillac car? A. I couldn't swear to that. It was a heavy car.

Q. What kind of a license plate did it have on it? A. I couldn't see it. It was traveling at quite a speed.

Q. You could not see the license plate on the other car? A. At a time like that, no. I was more interested in getting Mr. Patterson, or whoever the form was, in to see a doctor.

Q. Was it an open or a closed car? A. Open car.

Q. An open car. Did it have the curtains up or down? A. I couldn't say.

Q. Did you try to pursue the other car? Did you send any of the people along after the other car that came up on the scene? A. No.

Q. You did not do anything about that, did you? A. I just reported it to the police, that is all.

Q. You had Mr. Surpless' permission to drive this car, did you not? A. No.

Q. What? A. No.

Q. You were keeping company with his daughter, were you not? A. Yes.

Q. And you visited his house quite often? A. Yes.

Q. And you had driven the car on other occasions? A. No.

Q. Do you mean to tell this Court and jury that you never drove that car before? A. Yes.

Q. How many times did you ride in it before? A. Numerous occasions.

Q. Numerous occasions. And you say this girl drove the car all the time? A. Yes.

Q. Is that correct? A. That is correct.

Q. How old is your wife at the present time? A. Twenty-three.

Q. What kind of brakes did the car have? A. I really couldn't say. The usual Ford brakes.

Q. When you had ridden in the car on other occasions, who drove it? A. Miss Surpless.

Q. Miss Surpless. Did she have permission, if you know, to drive the car? A. I really couldn't say.

Q. How often did you visit the Surpless home? A. Well, I was working in New York. I couldn't tell you the exact number of occasions. Quite frequently.

Q. Four or five times a week? A. When I was at home.

Q. Did you stay in New York when you worked there? A. I didn't always work in New York.

Q. Where did you work before that? A. Brooklyn.

Q. Did you stay in Brooklyn? A. I lived—I had a room there.

Mr. Markley: Had a what?

The Witness: I had a room in Brooklyn.

Q. When did you last ride in this car prior to the day of the accident? A. I imagine Christmas Day, as near as I can remember.

Q. And nothing was said at that time to Mr. Surpless about Mr. Surpless letting you have the car? A. No.

Q. Was Mrs. Surpless home? A. I don't know.

Q. Well, Mrs. Surpless was not away at college, was she? A. No.

Mr. Markley: Mrs?

Mr. Breslin: Mrs. Surpless.

Q. She was not away at college, was she? A. No.

Q. You say that you went up to the garage, took the car out, without consulting anybody in the house; is that correct? A. Yes.

Q. Do you mean to say you did not even talk to your prospective mother-in-law about going in and getting this car? A. No.

Q. Do you mean to say that? A. I do.

Q. She was home that night? A. I couldn't say.

Q. Well, the lights were lit that night? A. I couldn't say as to that.

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

Q. What time of the night before did you go up after the car? A. When I got out from New York; approximately seven o'clock.

Q. Then you went directly to the Surpless home. You do not remember whether the lights were lit or not? You never even tried the door to see whether Mrs. Surpless was home, did you? A. No.

Q. And you knew Mrs. Surpless very well; is not that correct? A. That is correct.

Q. Did you make any noise going out, do you know? Pardon me. I withdraw it. This is a Ford. I forgot that.

Q. Did you light up the garage as you took the car out? A. No. I just turned the headlights on in the car.

Q. Did you have the key to it? A. The key was in the car.

Q. Tell us the truth, now. Where did you get the key to the car? A. The key was in the car.

Q. The key was in the car in the garage, waiting for you; is that correct? A. I wouldn't say that.

Mr. Breslin: That is all.

Have you any objection to my putting the doctors on?

Mr. Markley: No, not at all.

PLAINTIFF'S CASE RESUMED.

DR. WILLIAM SPICKERS, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Doctor, you are a physician licensed to practice medicine and surgery in the State of New Jersey? A. Yes.

Q. How long have you been so licensed, Doctor? A. About twenty-two years.

Q. Where is your office at the present time? A. 6 Church Street, Paterson.

Q. How long have you been practicing in Paterson? A. Twenty-two years.

Q. Doctor, are you connected with any hospital? A. Barnert Hospital, in Paterson.

Q. How long have you been connected with the hospital? A. About seventeen years.

Q. Do you specialize in any particular line of work? A. I do; in surgery.

Q. Doctor, you know this Paterson boy? A. I do.

Q. You knew him before the accident? A. Yes.

Q. Treated him before the accident; family physician? A. Yes.

Q. Now, Doctor, subsequent to the accident where was the first place that you saw Mr. Patterson? A. He was in bed at the General Hospital, Paterson.

Q. Do you recall the date of that, Doctor? A. Not exactly. I think it was in February, 1926; something like that; in the spring of 1926.

Q. Do you recall examining him? A. Oh, yes.

Q. What did you find as a result of your first examination?

Mr. Markley: When was that, Mr. Breslin?

Mr. Breslin: I will have to couple that up.

Q. Doctor, I show you a memorandum and I ask you whether or not this memorandum is in your handwriting? A. Yes, it is.

Q. Can you tell us, with the aid of that memorandum, when was the first time you examined

Patterson? A. Well, it was the night of February 24, 1927.

Q. Now, Doctor, can you tell us in a general way what the nature of his injuries was, as you found them that night? A. Well, this man was in an unconscious condition. He was bleeding from the nose. He had injuries to the surface of his skull, together with contusions, and injuries about the hips, and bleeding from the mouth and the nose.

Q. What treatment, if any, did you give him the first night, Doctor? A. Well, he was put on the regular treatment for shock. The man was in shock. His pulse was very slow, and he was unconscious; and he was given magnesium sulphate by rectum.

Q. A little louder. A. The man was treated for shock, the application of heat; and he was given magnesium sulphate by rectum, to try to reduce the blood pressure and to reduce the intracranial pressure. His wounds were attended to, and he was treated in the ordinary way, for a case,—for fracture of the skull.

Q. Was he conscious or unconscious? A. He was unconscious.

Q. Can you tell us, without the aid of your record, how long he was unconscious, or would you have to use the hospital records to refresh your recollection about that? A. Well, I am quite sure that he was unconscious for about twenty-four hours, because it was the next day that I came there that he became conscious, if I remember it.

Q. Then did you make a further examination as to the extent of his injuries? A. I examined the man every day.

Q. Can you tell us in general what parts of his body were injured? Were there any bones broken? A. Yes. He had a fracture of the pelvis.

Q. What do you mean by the pelvis? A. Well, that is the bony part of the—

Q. Just show the Court and jury. A. It is ordinarily spoken of as the hip, but it really is not in the hip. It is the pelvic bone. It surrounds the pelvic organs.

Q. What kind of an injury did he have to the pelvic bone? A. It was fractured.

Q. In how many places? A. One.

Q. What other bones in his body were broken, that you know of? A. Fracture of the skull.

Q. What can you say as to the condition of his lung? A. Well, he was coughing, but I was unable to find any serious trouble with his lung.

Q. How about his kidneys? A. I was of the opinion—I am still of the opinion that he had an injury to his kidney, and was bleeding from that kidney.

Q. Doctor, did you give him any treatment subsequent to the night that you first examined him? After that date did you give him any treatment? A. Oh, yes. I saw him frequently, every day that he was in the hospital, and sometimes two or three times.

Q. Two or three times a day? A. Yes.

Q. And from your experience as a physician would you say that he was in pain? A. Oh, yes. He suffered a great deal of pain.

Q. Now, do you remember what you did to him at a later date? A. After he was in condition so that we could X-ray him,—we suspected that he had a fracture that I have spoken of, of the pelvis, and we found on X-ray examination

that he had a fracture of the pelvic bones, and he was put in plaster.

Q. Where did that plaster extend from, Doctor, and to where? A. It extended from just below the nipples down to the knee, including the thigh.

Q. What treatment, if any, did you give him for this fracture of the skull? A. Well, the usual treatment of fracture of the skull. That is a very conservative form of treatment. Application of ice-bags, trying to reduce the intra pressure by magnesium sulphate, that I have spoken of, by the rectum.

Q. Do you know whether he was taken to his home after he left the hospital? A. He was.

Q. Did you visit him there? A. I visited him there several times.

Q. What treatment did you give him there? A. Well, I think it was at his home that I finally took off his plaster, and I examined his leg, and so forth.

Q. Was he able to walk at that time? A. He was walking with the aid of crutches.

Q. Doctor, when was the last time that you examined Patterson, if you can recall? A. Well, I should say shortly after my removing this plaster cast, which I should say was about eight to ten weeks after the injury.

Q. What can you say as to the nature of his injuries at that time? A. Well, he had improved; he was able to walk about; and his general condition was fairly good, considering the severe injury that he had.

Q. Doctor, what was your charge in this case? A. I don't remember it.

Q. If I show you one of your billheads, will it help you to refresh your recollection? A. That is it. My bill was $478.

Q. Is that a fair and reasonable charge, Doctor? A. Yes, sir.

Q. Doctor, there is a charge of $292 from the Paterson General Hospital for Mr. Patterson's care while he was there. Would you say that was a fair and reasonable charge? A. I certainly would.

Q. Doctor, can you tell us, in your opinion, whether or not the plaintiff has suffered any permanent injuries as a result of this accident? A. Well, this man has given a history of having had several attacks of epileptiform seizures; that is, fits; and had convulsions on two different occasions; and, coming on after the injury, the fracture of the skull, the probabilities are it has some connection with that fracture.

Q. Would you say, Doctor, if this man were engaged in service over-seas, and he had suffered in gas attacks, and if he was hit by an automobile going at an excessive rate of speed, and tossed up in the air, and then taken to the hospital, where he was unconscious, and subsequently placed in a cast, and after the cast was removed, required further medical treatment,—would you say that the accident would in reasonable probability aggravate this condition that he had prior to the accident? A. I should say that it could not possibly do him any good, and would probably be detrimental to his nervous system.

Cross examination by Mr. Markley:

Q. You had a history that he had it prior to the accident, did you not? A. Beg pardon?

Q. Your history showed that he had this nervous condition prior to the accident? A. My history does not show that, no.

Q. Your history does not show that he suffered

from a nervous condition prior to this accident? A. Not in this record, no.

Q. Any record or any history that you have? A. My history that I have taken of him in my office, before he was ever hurt, I know that he was nervous.

Q. You knew that? A. I did.

Q. From the history you had in your office prior to this accident? A. Yes, sir.

Q. What was that history, Doctor? A. The history was that the man had been in the war, in France, been shell-shocked, and was very nervous and depressed.

Q. Yes. What else? A. That is about all. Had domestic troubles, and was nervous over that.

Q. This bill of yours of $478, dated April 10, 1928— A. Yes.

Q. —is that when you ceased your treatment, when you rendered that bill? A. I imagine so.

Q. Have you before you your hospital X-ray records that you had? A. These are they, I think.

Q. Will you not find the X-ray record, please? A. Here is the X-ray. I don't find any description of it.

Q. Now, looking at your record—this was your case, was it not, Doctor? A. It was.

Q. At the hospital? A. It was.

Q. You had charge of it? A. Yes, sir.

Q. Whatever work was done there was done under your direction, was it not? A. It was.

Q. I believe you were asked by Mr. Patterson's father to take charge of the case, were you not? A. Yes.

Q. You had been his doctor prior to that, as you say? A. Yes.

Q. Now, looking at your record of the head for

fracture of the skull, your record shows that your X-ray plates were negative, does it not? A. It says they are apparently negative.

Q. Yes. A. Apparently.

Q. Apparently negative. In other words, the X-ray plates show no fracture of the skull; is not that so? A. Yes. But that does not mean there is not a fracture.

Q. I am asking you what the X-ray showed. A. The X-ray shows, according to the report—you have not asked me to look at the X-ray; but I am answering your question about what the report shows.

Q. Right. A. The report shows that the X-ray of the skull is apparently negative.

Q. That means that there was no fracture according to the report? A. Apparently no fracture.

Q. Well, apparently,— In other words, it is negative as to fracture? A. Well, there seems to be some doubt.

Q. "Plates are apparently negative for fracture." That is what it says with respect to the skull, does it not? A. That is what it says.

Q. Yes. A. But you can use that as you like. I would say there was a little doubt in the man's mind that read it.

Q. Who made that report? A. Dr. Wilkinson.

Q. And who is Dr. Wilkinson? A. He is the X-rayist.

Q. He is the X-ray expert at the Paterson General, is he not? A. Yes, sir.

Q. Do you disagree with his reading of the plate? A. I don't know whether I do or not.

Q. Did you read the plates? A. I made the notation.

Q. What is your recollection now of whether you

agreed or disagreed with Mr. Wilkinson? A. I was rather inclined to think that there was a fracture of the skull, whether I could see it or not.

Q. Did you make any definite diagnosis in that respect? A. I made a diagnosis of fracture of the base of the skull.

Q. Where is your diagnosis in this book, Doctor, your final diagnosis of the case? A. Concussion of the brain, fracture of the pelvis, and contusion of the kidney.

Q. You are reading now from your writing, are you not? A. Yes.

Q. In the record of the Paterson General Hospital, signed by Dr. Spickers. That is you? A. That is I.

Q. That does not show any fracture of the skull here, does it? A. No, but that does not mean that it is not a fracture of the skull. You can't write everything in a final diagnosis.

Q. Your final diagnosis to be recorded when determined, was concussion of the brain, fracture of the pelvis, contusion of the kidney; and you say nothing about a fracture of the skull, do you? A. Not in that part, no.

Q. That was your final diagnosis, was it not? A. It is, according to the record.

Q. Is not the record accurate? A. I still contend that the man had a fracture of the skull. Whether I wrote it as a final diagnosis or not, does not make me change my mind.

Q. Do you not think, Doctor, if you were making a final diagnosis in this case and putting it in the book, your record, as it is here, final diagnosis to be recorded when determined,—do you not think that if you had diagnosed definitely that there was a fracture of the skull, that you would have put

it in your diagnosis? A. I don't know. I can't answer that.

Q. At any rate, you did not, did you? A. It is not there, no. But if you read through the records you will probably find that there is plenty of evidence that this man had a fracture of the skull.

Q. Well, evidence is deceiving, is it not, at times? A. It depends on where you get it from.

Q. In your picture of this case, as you recorded it, as you finally determined it, you did not put it in, did you? A. It is not important. The most important thing is the injury to the brain.

Q. Well, then, you did not put it in because a fracture of the skull was unimportant; is that the reason? A. It is not as important as the injury to the brain.

Q. Is that the reason you left it out? A. No.

Q. Why did you leave it out? A. It just is not in there. The record will show it, if you read it.

Q. Now, did you give this man paraldehyde? A. I think I did.

Q. The record shows you did, does it not? A. Then I must have.

Q. What was that for? A. To quiet him.

Q. What is paraldehyde given for, ordinarily? A. To keep him quiet and reduce his nervousness, make him sleep.

Q. Is not paraldehyde a treatment for a certain known condition? A. It is used for a great many conditions; insomnia.

Q. What is the main thing it is used for? A. To quiet a man from sleeplessness.

Q. What else? A. Nervousness.

Q. What else? A. Any sort of thing,—

Q. Well, it is used— A. —the cause of nervousness.

Q. When there is a chronic case of alcoholism do you give paraldehyde? A. Sometimes; not always.

Q. That is a known treatment for it? A. Not a known treatment. It is not a special treatment.

Q. Is it not a recognized treatment? A. It is a drug that is used to quiet people from any kind of nervous affection.

Q. You do not ordinarily use it in an accident case, do you? A. Oh, yes; frequently use it in fracture of the skull.

Q. And you gave him hyoscine; is that what you call it? A. Yes.

Q. Hyoscine, what is that for? A. That is a nerve depressant.

Q. Do you give those things in delirium tremens? A. Yes, but I didn't in this case.

Q. Did you in this case? A. I did not.

Q. You knew this man before this accident, did you not? A. Oh, yes.

Q. You knew his parents? A. Yes.

Q. For many years? A. A long time.

Mr. Markley: That is all.

Redirect examination by Mr. Breslin:

Q. Now, Doctor, was this man under the influence of liquor when you examined him in the hospital the night of the accident? Yes or no. A. Well, I can't answer anything yes or no. If you want me to tell you the truth, I will tell it to you.

Q. Yes, that is all we want, the truth, the whole truth. A. As far as I could tell, I had no knowledge of liquor. This man was so badly injured, I did not notice any liquor about him. Whether he had it or not I don't know. I was not interested in it.

Q. In other words, Doctor, due to the serious-

ness of his injuries you cannot say one way or the other, whether he was under the influence of liquor or not? A. I was not interested about the liquor. He was hurt enough to try to get him out of his trouble.

Mr. Breslin: That is all.

DR. HANS WASSING, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Doctor, you are a physician, licensed to practice medicine and surgery in the State of New Jersey? A. Yes, sir.

Q. Where is your office? A. 282 Broadway, in Paterson, New Jersey.

Q. How long have you been practicing there? A. Since 1924.

Q. Do you know the plaintiff in this case, William Patterson? A. I do.

Q. Where did you first examine him after the accident? A. At the Paterson General Hospital.

Q. Do you recall the date? A. I believe it was a day after the accident.

Q. Can you tell us what you found as a result of your examination? A. At that time he came out—he just was coming out of the shock and out of the unconscious condition. He just was regaining consciousness again, and still dopey, and in shock, to a certain extent in shock, following the brain concussion.

I examined him as good as I could, with his severe injury, a fracture of the pelvis; made an examination; very difficult; and I talked the case

over with Dr. Spickers, after having examined him, and we decided—

Q. Well, all right. Now, did you—A. —as to what to do.

Q. Did you treat him while he was in the hospital at any time, or did Dr. Spickers have charge of the case? A. Dr. Spickers had charge of the case, and asked me to help him out. By that I mean, to discuss the treatment with Dr. Spickers, and according to these agreements between him and me the treatment was given.

Q. Now, did you see him at his home in Ridgewood after that? A. No, I did not.

Q. You did not treat him in Ridgewood at all? A. No, not in Ridgewood.

Q. What was your charge; do you recall how much your charge was? A. I think it was $70 or $80.

Q. Will that refresh your recollection (handing paper to witness)? A. Yes. That is correct.

Q. What is it? A. $70.

Q. Is that a fair and reasonable charge? A. Yes, I think so.

Q. Did you treat this plaintiff at any other hospital, other than the Paterson General Hospital? A. I did.

Q. Where? A. I treated him at the Barnert Hospital, in Paterson.

Q. After the accident? A. After the accident.

Q. What did you treat him there for? A. It was in November, 27th, I treated him for epilepsy; that means fits. He developed—he had developed fits following the accident.

Q. What treatment did you give him for fits? A. The spinal tap, or lumbar puncture.

Q. Just tell us what that means. What did you

do to him? A. I punctured his—I punctured his spine to take out the fluid, which is called the cerebrospinal fluid, the fluid in which the brain and the spinal cord is suspended, in which the brain is floating. This fluid quite often increases, following brain concussions.

Q. Did he have a concussion of the brain, Doctor? A. He surely had.

Q. Was this treatment you gave him painful, in the Barnert Hospital? A. I don't think so. It was given with local anaesthesia.

Q. How long did he remain there? A. I think two or three days.

Q. Did you treat him after that? A. No.

Mr. Breslin: That is all, Doctor.

Cross examination by Mr. Markley:

Q. Did you follow the case up after that? A. Pardon?

Q. After you had given him this treatment, did you follow the case up at all? A. Yes.

Q. For how long? A. What do you mean exactly by following up? I heard from him over the phone and from his relatives, that he had had no fits any more.

Q. That he had no more fits? A. That he had no more fits after that lumbar puncture.

Q. So that you gave him no more treatment then? A. No.

Mr. Markley: That is all.

Mr. Breslin: We rest, if your Honor please.

DEFENDANTS' CASE RESUMED.

EMIL FENDELANDER, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Fendelander, how old are you? A. Twenty-five.

Q. Were you operating a bus on the evening of February 24, 1927? A. I was.

Q. On Godwin Avenue, approaching Doremus Avenue? A. I was.

Q. In what direction were you operating your bus, Mr. Fendelander? A. West, on Godwin Avenue.

Q. In which direction? West? A. West.

Q. Oh, yes. Whose bus was it? A. Public Service.

Q. As you operated it west on Godwin Avenue, looking at this map you would be coming toward Doremus Avenue, would you (indicating on map)? A. Yes, positively.

Q. As you operated it along that way, did you see anything of this accident? A. I did.

Q. In which Mr. Miller's Ford came in contact with a pedestrian? A. I didn't see Mr. Miller come in contact with the pedestrian, but I seen the accident.

Q. You saw what? A. I saw another car. There was two cars behind Mr. Miller, and a third car that was behind Mr. Miller, he ran over the man in the road.

Q. Well, now, you were not, as I gather it, directly behind Miller's Ford, were you? A. Positively, I was there. There was two cars in between Miller and I.

Q. Two other cars between your car and Miller's? A. Two other cars.

Q. What kind of cars were they? A. Why, they were heavy built cars. As far as I could figure, the one I was following was a Cadillac.

Q. And as you followed these cars were you all in line as you approached Doremus Avenue? A. All in line.

Q. About how fast were you going? A. Well, I was going about twenty.

Q. About twenty miles an hour. As you came down there could you see where Mr. Miller's car was, with respect to the center of the road? A. Why, Miller's car was about four feet from the curb.

Q. Four feet from the right-hand curb? A. Curb.

Q. Well, then, how far would you say he was from the center of the pavement on which you all traveled? A. About two feet.

Q. His car was two feet to the right of the center of the road? A. Yes.

Q. And were you all behind him? A. All behind Miller.

Q. Now, did you hear him sound his horn at all? A. Why, I heard a—three or four horns. They all sounded their horns.

Q. That is, the three cars? A. The three cars.

Q. What did you see then? Just tell the jury what you saw of the accident? A. I was traveling west on Godwin Avenue, coming down. There were three cars ahead of me, and I saw all of these three cars slow up; and the car ahead of me—I was traveling about thirty feet in back of the car ahead of me, and I seen the car that was ahead of me run over Mr. Patterson's body in

the road; and when I got down further, why, I stopped in back of Mr. Miller's car, and I went out and I helped the man into a car, to see that he got to the hospital.

Q. Did you notice where Mr. Patterson's body was on the highway? A. Why, it was right exactly in the center of the road. There was a white line there. It was pretty well worn, but he was laying right on that white line.

Q. Where was he with respect to Doremus Avenue? A. His head was laying towards Doremus Avenue; his feet towards the—in a westerly direction.

Q. In a westerly direction? A. Yes.

Q. How far was his body west of Doremus Avenue? That is, west, say, of this southwest corner? A. Fifty feet.

Q. About fifty feet? A. Fifty feet.

Q. And was there a small pool of blood there where his body lay after he was removed? A. After I picked him up, all I know is that I had blood on my hands and shirt, and arms.

Q. Did you put him in this car with the assistance of somebody else? A. With the assistance of another bus driver.

Q. Did you smell his breath? A. I certainly did.

Q. What did it smell like? A. It smelled very much like liquor, and I am a good judge of liquor.

Q. What kind of liquor? A. Rye.

Q. Rye whiskey. Did you go over to the doctor's office with him? A. I did not.

Q. How far did you go with him; just to the car? A. This car was stopped up around Doremus Avenue, and the other fellow and I carried him

up to Doremus Avenue, to this car, a Chevrolet touring car.

Q. Then you went back to your bus? A. Yes, I went back to my bus and went on.

Q. When the Ford of Mr. Miller came to a stop after the accident, was it up against the curb? A. It was up against the curb.

Q. The right-hand curb? A. The right-hand curb.

Q. And how far was the rear of the Ford of Mr. Miller beyond the body in the center of the road, about? A. Fifteen feet.

Q. Did you know any of these parties before? A. No, sir.

Cross examination by Mr. Breslin:

Q. Now, do you positively say that there was a white line in the center of that street? A. I said there was a white line, but it was worn.

Q. It was clear? A. No, not clear. I didn't say that.

Q. It was kind of smudgy, was it not? A. Yes.

Q. You were looking ahead, were you not? A. Positively.

Q. You watched Miller's car all the time, did you not? A. I was not watching Miller's car, no. I was watching the car ahead of me.

Q. You were not watching Miller's car? A. I was not watching Miller's car.

Q. You did not see Miller's car come in contact with Patterson, then, did you? A. I did not.

Q. What was the number of that car ahead of you? A. I don't know.

Q. Did you get the license plate? A. I did not.

Q. Did you get the county number? Was it H, B or O? A. I did not.

Q. You did not get that? A. I did not.

Q. You do not drink, do you? A. Well, every now and then.

Q. I suppose you like rye? A. I do.

Q. Is that the only kind of liquor that you drink? A. Mostly.

Q. Mostly rye? This man was unconscious, was he not? A. Positively.

Q. How often do you drink? A. Well, that all depends. When I can get a day off.

Q. Then you get drunk that day, I suppose? A. Not exactly drunk. I wouldn't say drunk.

Q. How many drinks do you have on that day? A. It all depends on who I associate with and where I go.

Q. How long have you been drinking rye, that you qualify as an expert on rye whisky?

Mr. Markley: I object to that.

Mr. Breslin: Oh, it is perfectly proper. This man says he thought it was rye.

The Court: An expert perhaps would discriminate.

Q. What kind of rye was it, William Penn or Bourbon? I suppose you can tell us that, can you not? A. No, no.

Q. How long have you been drinking? A. Why, I was born and raised in a saloon, if you want to know.

Q. You were born and raised in a saloon? A. Yes.

Mr. Breslin: Well, that is all from you.

DR. BOYD E. WILKINSON, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Dr. Wilkinson, are you a—

Mr. Breslin: I will admit the doctor's qualifications as an X-ray expert.

Q. You are also an M. D., are you not? A. Yes.

Q. Graduate of what college? A. University of Maryland.

Q. You specialize in X-ray work, do you, Doctor? A. I do, yes.

Q. Are you the official X-ray expert at the Paterson General? A. I have charge of that department, yes, sir.

Q. Have you other connections? A. Yes.

Q. What are they? A. Well, I have an office.

Q. Your own office, where you do you own work? A. And I have a hospital in Suffern. I do some work there.

Q. Your own hospital? A. No.

Q. What is the name of it? A. Good Samaritan Hospital.

Q. Oh, the Good Samaritan in Suffern. Now, I show you what I think is your record, Doctor Wilkinson, of your X-ray examination of the head of Mr. Patterson, the plaintiff in this case, dated March 3, 1927, contained in the official Paterson General Hospital record for 1927, Volume 73800, to Volume 73899. Did you make that record? A. Yes, sir. It should have been signed. I don't know how that came to be. It should have been signed.

Q. There are two pages, page one and page two. You signed the last page? A. Yes.

Q. You took two X-ray pictures, as I understand it, of Mr. Patterson's head, did you not? A. Yes, I took two views of the head, face.

Q. I think your record shows, for possible fracture of the skull? A. Yes, sir.

Q. What was your finding, Dr. Wilkinson? A. Well, the findings were negative.

Q. What does that mean, Doctor? A. Well, that we didn't find any fracture. That is, we couldn't—our plates did not reveal any fracture.

Q. Your plates did not reveal any fracture of the skull, did they? A. No.

Q. Were you asked to be here by Mr. Breslin?

Mr. Dunn: No; I asked him to be here.

Cross examination by Mr. Breslin:

Q. Doctor Wilkinson, it is possible for a man to have a fracture without the fracture showing in the X-ray plates?

Mr. Markley: I object to the question.

Mr. Breslin: I will reframe the question.

Q. Is there a reasonable probability, Doctor, that there may have been a fracture without the fracture showing in the plate? A. Yes.

Redirect examination by Mr. Markley:

Q. So far as you could find, with your experience, and technique, and plates, you could not find any fracture, could you? A. We didn't find any fracture on those films.

Mr. Breslin: With your Honor's permis-

sion I would like to ask the doctor a few questions that I forgot.

The Court: Yes.

Recross examination by Mr. Breslin:

Q. Doctor, did you also take some X-rays of Patterson's pelvis? A. Yes, sir.

Q. I show you and ask you whether or not this is the plate you took? A. Yes, sir.

Mr. Breslin: I will offer the X-ray plate.

Mr. Markley: No objection.

(X-ray plate marked Exhibit P-2.)

Mr. Markley: We concede, if it will save time, that he did have a fracture of the pelvis, as testified to by Dr. Spickers.

Mr. Breslin: I would like the doctor to show the jury where the break was.

Q. Can you describe it in a few words, Doctor?

Mr. Markley: There is no dispute about it.

A. He had a fracture of the pubic bone, on the left side, near the acetabulum.

Q. The acetabulum is a socket of the hip joint? A. Also there is a fracture at the inferior ramus of the same bone.

Q. Then you would say he had a fracture of the rear and front of the pelvis? A. He had a double fracture, yes.

JOHN GALOWITZ, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Galowitz, how old are you? A. Thirty-four.

Q. Were you the operator of a bus on February 24, 1927? A. Yes, sir.

Q. For whom? A. Public Service.

Q. And on February 24, 1927, at about 7:30 P. M., were you operating that bus on Godwin Avenue in Ridegwood? A. Yes, sir.

Q. And in which direction were you operating your bus? A. Going east on Godwin Avenue.

Q. East would be toward the Ridgewood— A. Toward the railroad station.

Q. —Railroad Station of the Erie Railroad, would it not? A. Yes.

Q. Do you know where Doremus Avenue is, where it runs into Godwin Avenue from the south? A. Yes, sir.

Q. As you came toward that, did you see anything of an accident happening? A. Why, yes.

Q. Will you not tell the jury what you saw? A. As I was proceeding along Godwin Avenue, toward the Ridgewood Station, east of Godwin Avenue, why, I was about something like 75 feet away from Doremus Avenue.

Q. That is, from the near corner? A. The southwest corner of Doremus Avenue.

Q. That would be the east corner—you were going east—would it not? A. Exactly.

Q. Go ahead. A. I saw a man walking across the street, right into a car, in the front end of the car, on the left side of the right bumper—left side of the front bumper, rather.

Q. That is, the left front bumper? A. That is it.

Q. You saw the man walk into the left front bumper? A. Yes.

Q. Go ahead. A. Knocking him down. The traffic was following him, and a car pulled out from the rear of him and ran over the body.

Q. Where was this pedestrian, the man who was walking; where was he with respect— How far west of the southwest corner was he? A. I should judge about 45 to 50 feet.

Q. In other words, he was 45 to 50 feet west of the southwest corner of Doremus Avenue? A. From the—yes.

Q. From the southwest corner? A. Yes.

Q. From the crossing? A. He was crossing the street.

Q. Which way? A. North.

Q. Going from the south to the north? A. North.

Q. And as he crossed at that point, west of the southwest corner, 45 or 50 feet, how far over Godwin Avenue had he walked? A. A little past the center of the road.

Q. That is, he was to the north of the center of the road? A. North of the center of the road.

Q. And this car that struck him, or that he came in contact with, what kind of a car was that, do you know? A. It was a pleasure car. I couldn't tell what kind of a car it was.

Q. You do not know whether it was a Ford? A. What do you mean?

Q. The first car. A. Yes, the first car was a Ford.

Q. You knew that? A. Yes.

Q. And you say the car was to the right of the center of the highway? A. The Ford.

Q. The Ford was. How much to the right of the center? How much was it to its right of the center, or how near was it to his right-hand curb? A. I figure about four feet.

Q. From the curb? A. Yes.

Q. From its right-hand curb? A. Yes.

Q. At that time I think you said you were about 75 feet from the corner? A. Yes, sir.

Q. And the man was 45 to 50 feet from the corner; is that right? A. Yes, sir.

Q. So that he was about 25 feet from you then, was he not? A. Yes, sir.

Q. Did you see this Ford stop at all? A. Yes, sir.

Q. And how far past the man's body, who was struck, did it go before it stopped, approximately? A. About 15 feet.

Q. Did you go up to the man, pick him up? A. Yes, sir.

Q. Was it before you went to pick him up that this other car came out from behind the Ford and ran over him? A. Yes, sir.

Q. What did you do with Mr. Patterson, the man who was injured? A. Why, the other driver and I, of the Public Service bus, we helped him in a machine and sent him to a doctor, and we proceeded on our own business.

Q. Did you go over to the doctor's office? A. No, sir.

Q. Did you smell the man's breath at all? A. Yes, sir.

Q. Did it smell of anything? A. Liquor.

Q. Could you tell what kind of liquor? A. No, sir.

Q. But you are sure it smelled of liquor, are you? A. Liquor.

Q. Was he conscious or unconscious? A. He was unconscious.

Q. Did you see the bottle of liquor that he had? A. No, sir.

Q. You did not see that? A. No, sir.

Q. What kind of a night was this? A. Fair.

Q. Was it raining? A. No, sir.

Q. Was it clear? A. Clear.

Q. Now, did you see this Ford car just about the time the collision occurred, or had you seen it before that? A. Just at the time it happened.

Q. Were its lights lit? A. The lights were lit.

Cross examination by Mr. Breslin:

Q. Your lights were lit? A. Yes, sir.

Q. You could see down the street a couple of hundred feet? A. Yes, sir.

Q. Yet you did not see this Ford car until it struck this man 25 feet ahead of you? A. I ain't frequently coming along Godwin Avenue.

Q. I am asking you if you saw Miller's car before it struck Patterson? A. Just before the accident happened, a couple of feet away, that was all.

Q. In other words, you did not see the car until it was within about 30 feet of you? A. Yes.

Q. And you could look down the street for 200 feet? A. Yes.

Q. Nothing in front of you? A. No.

Q. Now, do you know how wide Godwin Avenue is? A. Yes, pretty near. I don't know exactly.

Q. About 30 feet? A. Well, I figure about 40, something like that.

Q. About 40 feet. And at the time Patterson came in contact with Miller's automobile, Miller's automobile was four feet from the northerly curb, was he not? A. Yes.

Q. In other words, Patterson had crossed over half way across the street when he came in contact with the Miller car, had he not? A. Just a trifle over the center.

Q. If the street is 15 feet wide, and this man is

four feet from the curb, that means about 11 feet to the center of the street, does it not? A. Yes.

Q. And you are sure Miller's car came in contact with this man Patterson? A. Yes.

Q. Did you get the number of the other car? A. No, I did not.

Q. Do you know what kind of a car it was? A. I did not take notice what kind.

Q. Did you not see Patterson's body up in the air? A. I seen him off balance, fall in the road.

Q. Now, which car tossed him up in the air? Miller's car, was it not?

Mr. Markley: I object to that. The witness has not said it tossed him up in the air.

The Court: He said he saw him off balance.

Q. When did you see his body go off balance? A. Against the car.

Q. Which car? A. Falling away from the car.

Q. Which car? A. The Ford.

Q. Where did you next see him? A. Laying on the ground.

Q. The Ford car tossed him back into the center of the road, did it not, towards the center of the road?

Mr. Markley: I object to it. He did not say it tossed him at all.

Q. Well, it hit him. Did not the Ford car hit the body of Patterson? Did it not? A. I said he walked into the mudguard.

Q. Well, after he came in contact with the car, was not his body driven back towards the center of the road? A. He fell over in the center of the road.

Q. You did not see Miller's car until the time of the collision, did you? A. Not until this gentleman walked into it.

Q. Well, you did not see Miller's car until Miller's car came in contact with the body of Patterson, did you? A. The Ford?

Q. Pardon? A. The Ford?

Q. Yes. A. Why, just a couple of feet, that was all.

Q. That was all? A. Yes.

Q. Why do you say, then, that Patterson walked into the car, if you only saw Miller's car two feet away? Do you mean he walked the two feet right into the car? Is that right? A. He walked from the cross street over to the north side of the street, and the Ford was going west on Godwin Avenue, and this gentleman walked into the Ford, the front, into the left side.

Q. Of course the Ford struck him? A. I didn't say it struck him.

Q. Did he not come in contact with the Ford car? You do not want me to say the Ford hit him, do you? All I want to know is whether or not his body and the Ford came in contact; that is all. A. He walked into the mudguard.

Q. Will you answer my question? Did the car—

Mr. Markley: I object to it.

The Court: That is an answer.

Mr. Markley: I think he has answered it.

Q. How fast was the car going? A. Well, I couldn't say over twenty miles an hour.

Q. Well, it was going twenty miles? A. I figure about twenty.

Q. About twenty miles an hour, and you know, and you knew at that time, that it is a well built

up section, where the houses are less than a hundred feet apart, did you not? A. Yes.

Q. Pardon? A. Yes, I said.

Redirect examination by Mr. Markley:

Q. With respect to traffic coming in the opposite direction, were you paying any particular attention to it then? A. I was watching the road, where I was going.

Q. You were going in the opposite direction, were you not? A. I was going in the opposite direction.

Q. Did you know that there was a string of traffic coming in the opposite direction? A. I seen the traffic, yes.

PETER BOUMAN, JR., called as a witness on behalf of the defendants, having been previously duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Officer Bouman, you were on the stand this morning? A. Yes, sir.

Q. When you arrived at the scene of the accident had the body of Mr. Patterson been removed therefrom? A. Yes.

Q. Did you ascertain where it had been taken? A. Why, I did. They said to a doctor's office.

Q. Did you go to the doctor's office? A. I tried to locate where he was taken.

Q. Did you? A. I finally located where he was, and I went over.

Q. A little louder, please. A. I say I finally found where he was, and I went over.

Q. Was that Dr. Bonynge's office? A. Dr. Bonynge's office.

Q. Where is Dr. Bonynge's office in Ridgewood? A. Prospect Street.

Q. And how far from the scene of this accident, in the neighborhood of Doremus and Godwin Avenue; how far away? A. Practically a quarter of a mile.

Q. And did you proceed there? A. I did.

Q. Where were you when you first received notice that an accident had happened at Doremus and Godwin Avenues? A. Wilsey Square, Ridgewood.

Q. How far is that away from the scene of the accident? A. At least a thousand feet.

Q. In which direction? A. West.

Q. How did you go to the scene of the accident? A. Automobile.

Q. When you went to Dr. Bonynge's house, was Dr. Bonynge there? A. Yes.

Q. Was Mr. Patterson there? A. Yes.

Q. Did you try to obtain his identification, as to who Mr. Patterson was? A. Why, I did.

Q. How did you do that? A. I said to the doctor, I said, "Who is it"? "I don't know." So we looked in his pockets and pulled out some papers and cards, and a bottle of liquor.

Mr. Breslin: I object to any further testimony unless it is shown affirmatively these clothes belonged to Patterson; unless they connect him up in some way. This man is brought into a doctor's residence. There might be other coats around there.

Q. Was his coat still on him? A. His coat was still on his body.

Mr. Breslin: I withdraw the objection. I thought it was an overcoat.

The Court: Proceed.

Q. In taking out the papers you say you also found a bottle? A. Bottle of liquor, and papers, and a few cards, with Mr. Patterson's name on them.

Q. Now, this bottle, was it full or half full, or how? A. Practically full; a little out.

Q. Some out of the top? A. A little.

Q. What pocket was it in? A. Inside coat pocket.

Q. What did you do with the bottle? A. Took it over to Police Headquarters.

Q. Where did you put it, or to whom did you give it over there? A. Left it with the man in charge of the desk.

Q. While you were looking for these identifications upon Mr. Patterson's body did you smell his breath? A. I did.

Q. Did it smell after anything? A. Why, some kind of liquor.

Q. Was the odor strong or weak, or how? A. Very strong.

Q. When you took this bottle that was partly consumed, over to Police Headquarters, to whom did you give it? A. To a man in charge of the desk.

Mr. Breslin: I object to that. The testimony is not that it was partly consumed. The testimony is that it was practically filled.

The Court: He indicated how much; about two inches out.

Mr. Breslin: I object to the question on the ground that it is not based upon the evidence in this case.

Mr. Markley: I said partially consumed.

I do not know how I could describe it any more accurately.

The Court: Perhaps the characterization may be he did not get a full bottle.

Mr. Markley: Well, he said he did. He testified that he did. I will change the characterization.

The Court: The witness indicated about two inches out of the bottle.

Mr. Markley: Yes. All right. We will not quarrel about our description of that bottle.

Q. All I am trying to find out is what did you do with the bottle? You said you gave it to the lieutenant over at the desk there? A. Brought it to headquarters.

Q. Who was the lieutenant? A. The lieutenant was not there. Mr. Stack was there.

Q. Was it given to him? A. Given to him. I laid it on the window-sill.

Q. I think I asked you this. Did you notice—I think you did testify to a blood spot in the road, did you not, this morning? A. There was a blood spot.

Q. And its position I think you told me.

The Court: He testified to that.

Mr. Markley: Cross examine.

Cross examination by Mr. Breslin:

Q. Now, just tell us his condition when you saw him in Dr. Bonynge's office? What was the matter with him that you could see? A. They had him laying on the chair, out in a chair there, and he was bleeding from his mouth, and it was running in his coat pocket.

Q. In other words, he was bleeding quite a lot, was he not? A. Bleeding fairly.

EUGENE WAGENHEIN, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Are you a member of the police force of Ridgewood? A. Yes, sir.

Q. Are you a lieutenant of police? A. Yes, sir.

Q. On the night of this accident when Mr. Patterson was injured, in the neighborhood of Doremus Avenue and Godwin Avenue, did you go down there? A. No, sir, I did not. I was on desk duty at the time.

Q. How did you know of it? A. I received a telephone call from Patrolman Bouman, from Dr. Bonynge's office.

Q. Officer Bouman is the officer who was just on the stand? A. Yes, sir.

Q. And you, having received a telephone call from him at headquarters,— A. At headquarters, yes, sir.

Q. —what did you do, if anything? A. Why, he told me that—

Mr. Breslin: I object to what he said.

Q. You cannot tell us what he said to you. But as a result of what he said to you, what did you do? A. I received the call, and asking for the ambulance.

Q. What did you do?

The Court: Did you send the ambulance?

Q. Did you send the ambulance? A. There was not a driver around. The Chief walked in, and I explained to the Chief what happened.

The Court: Did the ambulance go out?
The Witness: Yes, sir.
The Court: Who took it?
The Witness: I took the ambulance out.

Q. You took the Ridgewood ambulance? A. Yes, sir.

Q. Down to where, Dr. Bonynge's office? A. Dr. Bonynge's office.

Q. Did you operate it? A. Yes, sir.

Q. When you got to Dr. Bonynge's office was Mr. Patterson there? A. He was.

Q. What did you do? Tell us. A. I waited there until he got ready to be taken out in the ambulance.

Q. Did you go in the house? A. I did.

Q. Did you have occasion to smell the man's breath? A. I did.

Q. Did you see the bottle? A. Yes, sir.

Q. Well, now, did you smell anything on his breath, Lieutenant? A. Whisky.

Q. Did you see the bottle? A. I did.

Q. Was the bottle filled or half filled, or what? A. There had been some taken out.

Q. Now, then, did you have Mr. Patterson put in your ambulance? A. Yes, sir.

Q. And where did you take him? A. Drove him to the Paterson General Hospital.

Q. Did you drive it over there? A. Yes, sir.

Q. Did you see that bottle of whisky subsequently? A. I saw the bottle of whisky at Dr. Bonynge's, and saw it at headquarters when I got back.

Cross examination by Mr. Breslin:

Q. What kind of whisky was it? A. I can't tell, sir. It was whisky.

Q. He was unconscious, was he not, in Paterson? A. Yes, sir.

Q. And he was bleeding, was he not? A. Yes, sir.

FRED J. BLACKSHAW, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Are you the Chief of Police of Ridgewood? A. Yes, sir.

Q. And have been how long? A. Nine years. It will be nine years next month.

Mr. Breslin: I will admit the Chief's qualifications.

Mr. Markley: Thank you very much.

Q. How long have you been a policeman? A. Thirty-three years.

Q. The night of this accident, on February 24, 1927, to Mr. Patterson, did you go down to the scene of the accident? A. No, sir.

Q. Were you at police headquarters? A. After the accident.

Q. Did you see this bottle of whisky when it was brought in?

Mr. Breslin: I object to it unless they connect it up in the proper way.

Mr. Markley: I think I have coupled it up.

Mr. Breslin: A bottle of whisky. There is

no reference as to who brought it in, as to whom it was given to, or anything else.

The Court: Are you not wasting time?

Mr. Breslin: I think we are wasting about fifteen minutes. If they have the liquor, let them produce it.

Mr. Markley: I am going to account for it. That is the purpose of putting the Chief on the stand.

Mr. Breslin: Oh, you have not the bottle?

Mr. Markley: Unfortunately, no, we have not.

Mr. Breslin: Then I want to find out why you have not. I will withdraw the objection.

Mr. Markley: That is what I am going to bring out for you, if you only give me a chance.

The Court: All right.

Q. Did you see that bottle that night, Chief, that was brought in? A. Yes, sir.

Q. By the officer? A. No. The bottle was already there. The officer had left when I came back from my supper. The telephone—can I go on and explain this?

Mr. Breslin: Go ahead and say anything you want. I know you will not say anything but the truth. Go ahead.

A. (Continuing.) The telephone call came in, an urgent case, from Dr. Bonynge's, and I was working a little short handed, and I ordered Lieutenant Wagenheim to drive the car, while I remained in headquarters. And then the bottle was brought in, and it was on my desk, possibly a third out of that

bottle. Do you want me to tell now what became of the bottle?

Q. That is what I would like to have you tell, Chief. A. From that time on, why, before I knew anything of this case, the Village of Ridgewood built a new police headquarters. Consequently we had to move. And during the move there was that and a lot of other stuff that had been so old that it had been lost. So that is how I can account for that bottle of liquor.

Cross examination by Mr. Breslin:

Q. Chief, Officer Bouman testified that it was practically full. Now you are sure, when you saw it,— A. There was about a third.

Q. You do not know where that third went in the meanwhile, do you, Chief? A. I don't.

Mr. Breslin: That is all.

THOMAS PARKER, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Parker, what is your business? A. I am a gardener.

Q. Whom do you work for? A. Mr. Gardiner.

Q. I cannot hear you. A little louder. A. Work for Mr. Gardiner. I am a gardener, and I also work for Mr. Gardiner.

Q. Do you work for anybody besides Mr. Gardiner as a gardener? A. Once in a while.

Q But your main work is for Mr. Gardiner, is it? A. Yes.

Q. Where is his place? A. Franklin Avenue, Ridgewood.

Q. Now, then, do you know the plaintiff in this action, Mr. William L. Patterson? Say yes or no. We cannot take the shake of your head. A. All I know about young Mr. Patterson—

Mr. Breslin: Now, I object to this witness telling what he knows. He may tell all that he knew about Mr. Markley or somebody else.

Q. I do not want you to tell all that you know, because that would not do. We just want you to tell this. I just want to know, first, do you know Mr. Patterson, to see him? A. Yes. Yes, sir.

Q. All right. Now, did you see him in an accident in the spring of 1928? A. Yes.

Q. Where? A. Murray Avenue.

Mr. Breslin: I object to all this as being immaterial.

The Court: No; he is claiming injuries.

Mr. Breslin: I will withdraw the objection.

Q. Did you see him in an accident in the spring of 1928? You said yes, I think. Where? A. In Murray Avenue, alongside of Frederick Smith's house. He went right through the hedge there.

Q. He went right through the hedge? What happened to the car? A. We helped him get it out.

Q. What happened to the car before you helped get him out?

Mr. Breslin: I object to what happened to the car. This is only an attempt to influence the jury.

The Court: The only purpose of admit-

ting this is on the question of damages. In other words, it may be that injuries were suffered in the second accident that might be part of the permanent injuries.

Mr. Markley: What I am trying to bring out is—I do not want to say, your Honor—that something did happen to the car.

The Court: I think we can have the nature of the accident, and let the jury determine from that probably the nature of the injuries at that time.

Q. You say the car went through the hedge, do you not? A. Yes.

Q. Whose hedge? A. Frederick Smith.

Q. Then what happened to the car? A. We took it out.

Q. Did it stay on its wheels? A. Yes.

Q. Or did it turn over?

Mr. Breslin: The witness answered it did stand on its wheels. Mr. Markley is trying to have him say something he did not say. I object.

Mr. Markley: I am not trying to have him say anything. I want the facts.

The Court: I will allow it.

Q. What did you say about that? A. He just went right toward the hedge with the car. The car did not turn over, off the wheels, at all. It went right through the hedge on Murray Avenue.

Q. What did you do then? A. We helped to pull him out.

Q. Where was he? A. He was standing to one side of the car, on Murray Avenue, him and another young man.

Q. Was he thrown out of the car when it went

through the hedge? A. Well, I wasn't there when it happened.

Q. When did you go there? A. About five or ten minutes after it happened.

Q. Were you not there when the car went through the hedge? A. Yes,—no, not when it went through the hedge. It was through the hedge when I got there.

Mr. Breslin: I ask that all his testimony be stricken out.

Mr. Markley: I consent to it.

The Court: Strike all of this testimony out.

Mr. Breslin: No questions.

(Adjourned to tomorrow, July 25, 1929, at 10:00 A. M.)

Hackensack, N. J., July 25, 1929,
10:00 A. M.

TRIAL RESUMED.

WILLIAM C. O'BRIEN, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Are you a Supreme Court Examiner? A. I am.

Q. You are not connected with our office in any way? A. No, sir.

Q. Where is your office? A. 207 Market Street, Newark, New Jersey.

Q. And did you take the testimony of the plaintiff, William L. Patterson, in this case, before trial? A. I did.

Q. Did you take it how? A. Stenographically.

Q. Shorthand? A. Yes, sir.

Q. And then did you transcribe your shorthand notes? A. I did.

Q. Into a record? A. Yes, sir.

Q. And did you then certify that record? A. I did.

Q. Now, I produce what appears to be the testimony of William L. Patterson, the plaintiff in this action, taken before you as a Supreme Court Examiner, at the office of Arthur Dunn, Romaine Building, Paterson, on March 2nd, 1929, and ask if that is your transcription of William L. Patterson's testimony? A. It is.

Q. And that is your certificate there at the end of it? A. It is.

Q. Did you sign it? A. I did.

Q. Is that a correct transcript of your stenographic notes? A. It is.

Q. I notice on page 2 of this testimony you have "William L. Patterson, Jr., being duly sworn upon his oath by the Examiner, testified as follows:" Did you examine him on his oath? A. I swore him. I did not do the examining.

Q. I mean, did you first swear him before he testified? A. Yes, sir.

Q. To testify under oath? A. Yes, sir.

Q. You did administer that oath, did you? A. I did.

Mr. Markley: I offer this testimony in evidence.

Mr. Breslin: Objected to.

The Court: Why?

Mr. Breslin: Well, he has admitted that he made certain statements before the Examiner.

The Court: The examination before trial is evidential.

Mr. Breslin: All right.

(Examination before trial marked Exhibit D-7.)

Cross examination by Mr. Breslin:

Q. Did you have a bible there when you administered the oath to him? A. I did not.

Mr. Breslin: That is all.

Redirect examination by Mr. Markley:

Q. How did you swear him? A. I asked him to hold his right hand up, and repeat the oath after me.

Q. What was the oath that you gave him? A. "Do you solemnly swear the testimony you give will be true and correct to the best of your ability, so help you God?"

Q. And did he swear? A. He said, "I do."

Q. Did he hold up his right hand? A. He did.

Recross examination by Mr. Breslin:

Q. Just a few other questions. Do you remember the date of this examination? A. Not offhand.

Q. How long did the examination take? A. I should say about forty minutes.

Q. About forty minutes? A. Yes.

Q. And during the forty minutes he was under constant questioning by a representative from Mr. Markley's office, was he not? A. The entire forty minutes were taken up with questions and answers.

Q. And he was the only witness examined that day? A. He was.

Q. You are not a doctor, are you? A. No.

Q. You do not know whether this man was nervous or not that time, do you? A. Well, I was busy taking my notes. I didn't look at him.

Redirect examination by Mr. Markley:

Q. I show you page 21, and ask you whether there was also an examination by Mr. Dunn? A. Yes; some questioning by Mr. Dunn.

Q. Was Mr. Dunn present while these questions were being asked? A. He was.

Q. Was he present when the oath was administered? A. He was.

DR. HENRY A. BONYNGE, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Dr. Bonynge, are you a doctor of medicine? A. I am.

Q. What degree do you hold? A. M. D.

Q. Of what college of medicine are you a graduate? A. College of Physicians and Surgeons, Columbia University.

Q. How long have you been practicing? A. Twenty-four years.

Q. Are you connected with any hospitals? A. I do my private work at the Paterson General Hospital.

Q. Where is your office, Doctor? A. Ridgewood, New Jersey.

Q. Did you have occasion, on the evening of February 24th, 1927, to examine William L. Patterson, at your office? A. I did.

Q. And he was brought there, I believe, by some police officer of Ridgewood, was he not? A. He was.

Q. Tell the jury what you found from the examination you made then. A. The police officers carried this man in about 7:45. They had to carry him in, because he was unconscious. His clothes were very much the worse for wear. They looked as though he had been in some kind of an accident. And I laid him out on the table, and found by examination of his pupils, that his pupils were unequal. His pulse was fair, somewhat small and thready; showed evidence of shock. You could elicit no pain, on account of his unconsciousness. And found that his breath was very offensive, to the extent that it practically soon permeated the whole room.

Q. How? With what? A. Liquor.

Q. You say it permeated the whole room? A. Yes.

Q. Go ahead. A. I saw that his condition was quite serious at the time, so did not know that he was a hospital case; so I gave him a hypodermic or two, to prevent shock, and produce stimulation, and ordered the ambulance, and had him removed to the Paterson General Hospital at once.

Q. Do you know whether a bottle of liquor was found on his person? A. It was taken from his pocket.

Q. And what were the contents? Did it fill the bottle or no? A. The bottle was about two-thirds full. The cork was in place.

Q. Was the bottle broken at all? A. Not at all.

Q. You say the cork was in? A. Yes.

The Court: Doctor, what was the size of the bottle?

The Witness: As far as I can recall, roughly,—I wouldn't guarantee it—it looked to me to be about a pint bottle.

Q. You sent him to the Paterson General, and I understand that you were released of the case by his parents? A. My position was such that I could not proceed to the hospital to look after the injured, so I called one of my colleagues who lived in the City of Paterson and asked him to go over and call upon him and look after him until my return. I didn't return until midnight, at which time there was a communication from the—one of the doctors' offices in Paterson, saying the family would like to have a certain physician to take care of him; and I transferred the case over by phone to him; so that I only saw him in my office at the time.

Q. Was that Dr. Spickers' office? A. Yes.

Q. That the family asked to have the case transferred to him? A. Yes.

Q. Did you have any occasion in January or February, 1928, to examine Mr. Patterson, the plaintiff? A. I did.

Q. Where was that examination? A. At his home on Godwin Avenue, Ridgewood.

Q. What was the occasion for that examination? A. He had been injured, I believe, while getting off—

Mr. Breslin: I ask that it be stricken out unless he knows.

The Court: He can testify to what the plaintiff said.

A. (Continuing.) I called upon him.

Mr. Markley: I do not quite understand your Honor.

The Court: The objection is to what he thought to be the case. I said I would sustain the objection to that, and let the doctor

testify as to what the plaintiff had said to him.

Q. What did the plaintiff say to you on that occasion when you examined him, in the early part of 1928? A. He had been injured by a fall, getting off a train, and I examined him for the Erie Railroad.

Q. Did you make a general examination of him then? A. I did.

Q. Did he say what injury he got in falling from the train? A. He had had—I believe, some bruises, but I found no evidence of injury at the time of the examination.

Q. You made a general examination of his entire body? A. Yes.

Q. And you found no evidence of injury at all at that time? A. No.

Q. Did you have him walk? A. He walked; away around the room, yes.

Cross examination by Mr. Breslin:

Q. Now, Doctor, can you say whether or not Patterson had a fractured skull when he was brought in your office? A. I could not.

Q. Doctor, is it not a matter of fact that alcohol exhilarates the pulsation? In other words, if a man has been drinking a lot of liquor his pulse is pretty high, goes up, speeds up; is not that correct? A. If he has not any shock.

Q. As a general rule is it not correct, Doctor? A. Up to a certian point, and then it begins to slow. It depends upon the man.

Q. Doctor, as a practical proposition does not alcoholic liquor key up your pulse, or increase your pulsation? A. It increases the volume and the pulsation.

Q. Now you said that his pulse was pretty fair, did you not? A. Yes.

Q. There was not anything unusual about his pulse, was there, Doctor? A. I said it was small and thready, I believe.

Q. Small and thready? A. Yes.

Q. And, Doctor, is it not a fact that because he had this small pulse, that that would be more indicative of a fractured skull than of intoxication? A. Not necessarily a fractured skull, any more than it could be of shock; of any injury.

Q. In other words, there were greater symptoms there of shock or of a fracture than there were of intoxication? A. At the time, in my office, yes.

Q. Now, Doctor, when you treated him for the Erie Railroad, you were the Erie Railroad physician? A. I did not treat him. I only examined him.

Q. Well, you examined him for the Erie Railroad. And, by the way, you are the examining physician for the Erie Railroad in Ridgewood? A. In Ridgewood, that is right.

Q. And he claimed he had a little scrape on his knee? A. Some minor injury.

Q. You did not find any injury at the time you went there, did you? A. No.

Q. Now, Doctor, just describe his condition again when he was brought into your office? He was bleeding from the mouth, was he not? A. I can't recall whether he was bleeding from the mouth or not.

Q. Well, he was bleeding, Doctor? A. Well, I will take your say-so.

Q. Well, Doctor, you examined him? A. I did.

Q. And you remember very distinctly about the

liquor, but you do not remember about the bleeding, Doctor? A. Maybe I don't.

Q. You know Mr. Surpless, do you not, Doctor? A. Yes, I know Surpless.

Q. How many years have you known him? A. Well, I have known Mr. Surpless, I guess, twelve or thirteen years.

Mr. Breslin: That is all, Doctor.

Redirect examination by Mr. Markley:

Q. Are you his family doctor? A. I am not.

Q. You are a resident of Ridgewood? A. I am.

Q. And he is? A. He is.

WILLIAM VAN BUSKIRK, called as a witness on behalf of the defendants, having been previously duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Judge Van Buskirk, Mr. Dunn, the attorney here, went on the stand yesterday and said that when Mr. Surpless, the defendant, appeared before you, he said that he was technically guilty of the charge, before you. Did he make any such statement before you? A. He did not, to my knowledge.

Q. Now, I show you the complaint which you produced here yesterday against Oliver B. Surpless. Is that the only complaint that was on file with you against him? A. It is.

Q. There was no other complaint? A. No other complaint.

Mr. Markley: I offer that in evidence.

Mr. Breslin: If it is the complaint for

allowing an unlicensed driver to operate a car, I have no objection.

Mr. Markley: That is the same one you had yesterday.

Mr. Breslin: Well, that is before the jury.

Q. That was the only complaint you had, was it not? There was only one complaint? A. Only one complaint.

Q. And this is it? A. That is it.

Q. That is the one you produced yesterday for Mr. Breslin? A. That is the one I produced yesterday.

(Complaint marked Exhibit D-8.)

Cross examination by Mr. Breslin:

Q. According to your records yesterday this man was found guilty and fined $50 and costs, of this charge?

Mr. Markley: I object to that as not the proof yesterday; and, secondly, it is not cross examination. I do not know of any such proof yesterday.

Mr. Breslin: Mr. Markley has opened up the door. Surely, I can go into that. It is a question of truth as to what happened there. Mr. Dunn says one thing and Judge Van Buskirk says another. I want to find out how this man was found guilty, if no witnesses were sworn, and if no testimony was taken. We have a right to go into those facts.

The Court: There was testimony that he was found guilty, but I would not permit the complaint to go in.

Mr. Markley: Your Honor would not per-

mit that proof to go in, that he was found guilty. All your Honor left in, as I remember it, was that he made an admission; that was all.

The Court: I will allow the counsel to go into the conversation in its entirety, but I am not permitting the complaint to go in, as I said before, on the basis of evidence of conviction of crime, because it does not come under Section 1 of the Evidence Act.

Mr. Markley: No.

The Court: But by consent of counsel the complaint is in, and the difficulty has been avoided, so far as the rule is concerned. Therefore, I will permit an examination with reference to a complaint, because it is now evidence.

Mr. Markley: The complaint is in evidence. The question of whether he was convicted or not is immaterial, and is not in evidence.

If your Honor please, I want to make a further objection to this, on the ground that it is not cross examination. The only point that I called the witness for was, first, to deny what Mr. Dunn said, which he has done specifically and categorically, that Mr. Surpless did not say that he was technically guilty. It was for the mere purpose of contradiction. Secondly, I offered the complaint merely for the purpose of showing the charge was made and complaint was made, because, assuming that Mr. Dunn's testimony is true, for the sake of the argument, for a moment, I wanted to show what he was technically guilty of, so that we

might see the scope of it and not go beyond it.

Now, this is not cross examination, and it is incompetent, irrelevant and immaterial, and therefore I object to it.

The Court: I will permit counsel to go into conversations had as affecting this witness's credit.

Mr. Markley: Your Honor will allow me an exception.

Mr. Breslin: That is the purpose of the question.

Mr. Markley: Only as affecting his credit?

The Court: That is all. In other words, we have a sharp line of conflict, Mr. Dunn making one statement, and Judge Van Buskirk making another. Therefore, counsel is privileged to go into what the entire conversation was at that time.

Mr. Markley: Your Honor will allow me an exception.

Mr. Breslin: Will you read the question?

(Question read as follows: "Q. According to your records yesterday this man was found guilty and fined $50 and costs, of this charge?")

The Court: I will sustain the objection to that question.

Mr. Breslin: I will withdraw that question.

Q. You presided at the hearing, did you not?
A. I did.

Q. As Recorder of the Borough of Ridgewood?
A. As Recorder of the Village of Ridgewood.

Q. Village of Ridgewood. No witnesses were

sworn? A. No witnesses were sworn, other than the complaining witness.

Q. Pardon? A. The only witness that testified was the officer who made the complaint, and the defendant.

Q. Did the defendant testify? A. The defendant testified, to my recollection, yes.

Q. Well, you said yesterday that no witnesses were sworn?

Mr. Markley: I want to object to this on the same grounds I urged in the beginning, without repeating them, if I may, your Honor.

The Court: I overrule the objection.

Mr. Markley: Your Honor will allow me an exception.

Q. You said yesterday that no witnesses were sworn?

Mr. Markley: It is the same question. Note my objection and exception.

A. I don't recall that the defendant was sworn.

Q. You heard the evidence, did you not? A. I heard the evidence, yes.

Q. And on the evidence you rendered a judgment, did you not? A. On the evidence I rendered a judgment.

Q. There is no doubt in your mind that Mr. Surpless was there at the time of the hearing?

Mr. Markley: We admit it.

A. None whatsoever.

Mr. Breslin: I have a right to ask the witness. That is all.

ROBERT G. EYRE, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. Mr. Eyre, where do you reside? A. 104 Godwin Avenue, Ridgewood.

Q. How old are you, sir? A. Forty-nine.

Q. Are you the Mr. Eyre who lives in and owns the bungalow as shown in this Exhibit D-2? A. Yes, I live there.

Q. That is your home, is it not? A. That is my home.

Q. And was it on February 24th, 1927? A. It was.

Q. Have you looked at this map yesterday afternoon after court? A. I have.

Q. Is that the house that is shown on the map marked D-1 with the "X"? A. It is.

Q. On the southwest corner of Doremus and Godwin Avenues? A. It is.

Q. Were you home on the evening of February 24th, 1927? A. I was.

Q. And did you see this accident? A. I did not.

Q. How long after did you go out? A. About five minutes.

Q. When you went out on the street was Mr. Patterson's body still there? A. There was nobody there. His body was not there in the street.

Q. His body was not there? A. No.

Q. Did you see a small pool of blood in the center of the street? A. I did.

Q. Where was that small pool of blood with respect to the southwest corner, your corner of Doremus Avenue and Godwin Avenue? A. It was approximately opposite the entrance of my home, the hedges.

Q. The entrance to your home is shown by a dotted line, is it not? A. This is the walk here (indicating).

Q. In other words, as you go to the front of your one story and a half brick bungalow, the dotted lines on the map indicate the entrance or walk to your home, from Godwin Avenue? A. That is right.

Q. Now, you say the body was out in the center of the road, about opposite that hedge? A. About opposite that hedge, about the center.

Q. How far would you say that is from the southwest corner? A. Oh, I should say in the neighborhood of 50 to 55 feet.

Q. Now, have you had occasion to make observations from that point up Godwin Avenue toward the station, in an easterly direction? A. Many times.

Q. Will you not tell the jury what observation you can make from there? A. Why, if you stand on the southwest corner of Godwin Avenue, you could see clear up to the crest of the hill.

Q. How far is that, Mr. Eyre? A. Oh, pretty nearly three-tenths of a mile.

Q. Is that as far as the station? A. No.

Q. Not quite. A. The station—you can't see that.

Q. Suppose you were standing at the curb, back 50 feet from the southwest corner, or about at a point on the sidewalk which would be within the lines of your driveway, if it was extended over the sidewalk? A. You could see approximately the same distance, on account of that curve.

Q. In other words, the curve is, if you stand there, to the left, is it not? A. No,—well, it all depends on—

Q. Does not the map show it the way it curves? A. That is the way it curves.

Q. Can you tell me on here which of these lots is that of Mr. Patterson, Sr., that is, the plaintiff's father's property? A. (Witness indicates.)

Q. This one? I will mark that "Patterson."

(Counsel marks "Patterson" on map.)

Q. Did you see this taxicab stop over here, outside of your bungalow, anywhere? A. I did not.

Q. What kind of night was it, Mr. Eyre? A. Clear.

Q. Is Godwin Avenue a County Road? A. It is.

Q. Is it a much traveled road? A. Very much.

Cross examination by Mr. Breslin:

Q. The houses are less than a hundred feet apart; it is a well-built up section? A It is.

Q. Now, Mr. Eyre, if you were at a point 50 feet from the intersection of Doremus Avenue and Godwin Avenue, and you were going in a westerly direction, and you were approximately ten feet from the curb, how far to the west could you see down Godwin Avenue? A. Why, you could see about five or six hundred feet.

Q. Did you see Mrs. Conners the night of the accident? A. I did.

Q. She came into your house, did she not? A. She came into our house, yes.

OLIVER B. SURPLESS, one of the defendants, called as a witness on behalf of the defendants, being duly sworn, testifies as follows:

Direct examination by Mr. Markley:

Q. It has been testified here, Mr. Surpless, by Mr. Dunn, the attorney, that when you appeared

before the Judge in Ridgewood, that you said you were technically guilty of the charge made there against you. Did you say that? A. No, sir.

Q. Did you say you were guilty at all before the Judge? A. No, sir.

Q. What did you say? A. I said I had been away in Canada, on a business trip, and felt I was totally innocent.

Q. There has been presented here a memorandum dated March 2nd, 1927, bearing your initials, "O.B.S."? A. Yes, sir.

Q. Marked P-1. Did you give that to the Judge? A. Yes, sir.

Q. As your understanding of the situation at that time? A. Absolutely.

Q. Now, how old are you, Mr. Surpless? A. Fifty-nine in September.

Q. And where do you reside? A. In Ridgewood. 115 Prospect Street.

Q. How long have you resided there? A. Eighteen years.

Q. On February 24th, 1927, were you in Canada? A. In Montreal.

Q. Were you there on business? A. Yes, sir.

Q. And how long had you been there? A. About five or six days.

Q. Was your daughter, who was engaged to Mr. Miller, the other defendant in this case, at home? A. No, sir.

Q. Where was she? A. At New London, at College.

Q. What college? A. At the Connecticut College for Women.

Q. When had she returned there last before this accident? A. Well, she was home for Christmas and New Year's.

Q. Then she went back? A. Then she went back.

Q. Now, did you have a Ford automobile in the garage on your property, where you resided? A. Yes, sir.

Q. Did you have another car? A. Yes, sir.

Q. What was that? A. A Peerless car.

Q. Did you keep that also in your garage? A. Yes, sir.

Q. Do you drive a car yourself? A. Yes, sir.

Q. Did your daughter drive? A. Yes, sir.

Q. Had you permitted either of those cars to be driven by anyone else? A. No, sir.

Q. Had you ever permitted either the Ford or the Peerless to be driven by Miller? A. No, sir.

Q. Had he ever driven it, to your knowledge, prior to this occasion? A. No, sir.

Q. Now, did you give him permission to use the Ford car or the Peerless— A. No, sir.

Q. —on this occasion, when this accident happened? A. No, sir.

Q. Did he ask you for your permission? A. No, sir.

Q. Were you there when he took the car out the night before the accident? A. I was in Montreal.

Q. Did you know he was going to take your car? A. No, sir.

Q. Did you ask him to perform any errand prior to the time you went away? A. No, sir.

Q. Or to take your car to go on any business for you? A. No, sir.

Q. When did you return from Montreal? A. The night of the—the night following the night of the accident.

Q. Was that the first you knew of it? A. Yes, sir.

Q. Did you know whether or not Miller operated an automobile? A. Yes, sir.

Q. Did he have one of his own? A. Yes, sir.

Q. Had you ever ridden with him in his automobile? A. Yes, several times.

Q. What kind was it? A. Overland.

Q. And had you observed his driving? A. Yes, sir.

Q. What kind of a driver was he?

Mr. Breslin: Objected to.

The Court: I sustain that objection.

Mr. Markley: Your Honor will allow me an exception. May I ask one or two other questions along that line, just to preserve my right, whatever it may be? I understand in this case that they charge Mr. Miller with being an incompetent and inexperienced driver. Of course there is no proof of that in this case.

The Court: Well, until the evidence which requires you to rebut it,—of course, standing alone, that question would be improper. If evidence were offered to show that, then, of course, I would permit you to rebut the inference; but there is no proof of that.

Mr. Markley: I was only offering it in the event that your Honor might assume that there was some proof that he was inexperienced or incompetent.

Mr. Breslin: I will withdraw the objection, because we feel that, under the evidence, there is very strong evidence of his incompetency. I withdraw the objection.

The Court: All right. Proceed.

Mr. Markley: What was the question?

(Question read as follows: "Q. What kind of a driver was he?")

A. Very careful.

Q. How long had he driven an automobile, to your knowledge? A. I should say four or five years.

Q. And had he had a license in the year previous to this? A. Yes, sir.

Q. Did you know that he did not have a license for 1927? A. No, sir.

Q. In riding with him, had you observed any act of inexperience or incompetency? A. No, sir.

Q. Had he driven any other vehicle before he drove an automobile for four years prior to the accident? A. Yes. I remember he did drive a motorcycle before he drove an automobile.

Cross examination by Mr. Breslin:

Q. Mr. Surpless, did you at any time make a complaint against this man Miller for taking the car without your consent? Yes or no. A. No.

Mr. Markley: I object to that.
The Court: He has answered.
Mr. Markley: Go ahead.

Q. This man had taken the car out of that garage without your consent; is that correct? A. Yes, sir.

Q. And at no time did you make a complaint against him? A. No, sir.

Q. Did you or your wife, or any member of your family, ever report the car to the police as stolen? A. No, sir.

Q. Your wife was home at the time you were in Montreal, was she not? A. She was home for several days. She was away at the time of the car being taken.

Q. Oh, she was away? A. Yes.

Q. How did you know your daughter was up in

Connecticut if you were in Montreal? A. My daughter was away at college steady, and if she had been home we would have known about it, you bet.

Q. Your wife was not home, was she? A. I think she was home two days after I left. Then she was away.

Q. But not at the time of the accident? A. No, she was not.

Q. How long before that had she left home? A. I would say either one or two days.

Q. You felt innocent of this charge, did you not? A. Absolutely.

Q. You were found guilty; you paid a fine, did you not? A. I paid a fine, I think, yes.

"Q. If you considered yourself innocent and you were forced to pay a fine, why did you not appeal the case to a higher court?"

Mr. Markley: I object to that as immaterial to this case.

The Court: I will allow it.

Mr. Markley: Your Honor will allow me an exception.

Q. Why did you not appeal the case to a higher court? A. I never gave it a thought.

Q. The charge was read to you, was it not, in court that day? A. Yes.

Q. Were you sworn that day before Judge Van Buskirk? Did you testify under oath? A. Yes, I think,—I remember holding my hand up, yes.

Q. You say that Miller drove a motorcycle before he drove an automobile? A. Either before or about the same time, yes.

Q. And of course he drove the motorcycle very carefully too, did he not? A. Well, I would say yes. I never heard of anything being wrong.

Q. How often did he come around to your house; about how many times a week? A. You mean—

Q. To call on your daughter? A. Well, he could not come around very often, because she was at college.

Q. I mean when she was at home. A. Why, possibly every other night.

Q. And how long had he been keeping company with her before they were married? A. They went to school together, and I would say possibly they had been going together—I don't know what you mean by "company," but they were going together for possibly about five years.

Q. And during that period of five years you never saw him drive this Ford car? A. No, sir.

"Q. Now, this Ford car was a family car, was it not, for the convenience of the family?"

Mr. Markley: I object to that as immaterial in this case.

The Court: I will allow it.

Mr. Markley: Exception.

A. (Continuing) Yes, of course.

Q. And your daughter used to drive your wife around in the car? A. Yes.

Q. Does your wife drive? A. She has not driven for, I should say, six months. I suppose I could say no to that. I don't know.

Q. At the time of the accident did she drive? A. Yes.

Q. Did she drive the Ford? A. No, she never drove the Ford, no.

Redirect examination by Mr. Markley:

Q. When was your daughter married, Mr. Miller? A. Mr. Surpless, you mean.

Oliver B. Surpless, recross.

Q. When was your daughter married? A. To Mr. Miller?

Q. Yes. A. On April 11th, 1929, this year.

Q. This year? A. Yes.

Mr. Markley: That is all.

By the Court:

Q. Mr. Surpless, how long had you had this Ford? A. Let us see. We bought it in 1924, in July or August, 1924. Well, that would be about, to 1927, —would be about two and a half years.

Q. Do you know what mileage was on it at the time? A. No, sir, I do not remember, Judge.

Recross examination by Mr. Breslin:

Q. You know it was in good running condition? A. Fine.

Q. Brakes were good? A. Yes, sir; absolutely.

Q. Do you drive a car, Mr. Surpless? A. Yes.

Q. If you were driving along Godwin Avenue on a clear night, with the pavement dry, at the rate of 20 miles an hour, within how many feet could you bring that Ford to a stop?

Mr. Markley: I object to that question.

The Court: Sustained.

Mr. Breslin: That is all.

Mr. Markley: That is our case.

PLAINTIFF'S REBUTTAL.

WILLIAM C. PATTERSON, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mr. Patterson, where do you live? A. 99 Godwin Avenue, Ridgewood, New Jersey.

Q. And how long have you lived in Ridgewood? A. Twenty-seven years.

Q. What is your business? A. Electrical inspector.

Q. And where is your business? A. New York City.

Q. Mr. Patterson, you are the father of William Patterson, the plaintiff in this case? A. I am.

Q. On the day subsequent to this accident did you have occasion to go to police headquarters in Ridgewood? A. Subsequent?

Q. A day after? A. Yes.

Q. Do you recall what time you got there? A. About 8:30 in the morning, or 9 o'clock.

Q. Did you talk with Chief Blackshaw there? A. I did.

Q. Did you see a bottle of whiskey there? A. I did.

Q. Was that bottle partly filled, or just what was its content? A. Totally filled, and the cork had never been pulled out of the bottle Chief Blackshaw presented to me.

Q. Totally filled? A. Absolutely full.

Mr. Breslin: That is all.

Mr. Markley: That is all.

HAROLD C. MONEYPENNY, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mr. Moneypenny, where do you live? A. Bloomfield, New Jersey.

Q. Did you have occasion to go to the Police Headquarters of Ridgewood on the day after this accident? A. I did.

Q. With whom did you go? A. My father-in-law, Mr. Patterson.

Q. You are related to Mr. Patterson? A. Yes, sir.

Q. You are a son-in-law of his? A. Son-in-law.

Q. Did you see Chief Blackshaw there? A. I did.

Q. Did you see a flask of whiskey there? A. I did.

Q. Was the flask partly or— What was the percentage of content in the flask?

Mr. Markley: The alcoholic content?

Mr. Breslin: No.

Q. The quantity, not the quality; just the quantity. A. It was a full half pint.

Q. A full pint bottle? A. A full half pint bottle.

Q. Not a pint bottle? A. Not a pint.

Cross examination by Mr. Markley:

Q. Did you examine it; did you examine the bottle? A. No, sir.

Q. Did you open it? A. I just saw it in Chief Blackshaw's hands.

Q. You did not smell it? A. No, sir.

Q. And were you here yesterday? A. I was not.

Mr. Markley: That is all.

SUSAN B. CONNERS, recalled, in rebuttal, testifies as follows:

Direct examination by Mr. Breslin:

Q. Mrs. Conners, you have lived on Godwin Avenue in Ridgewood for how many years? A. Seventeen,—about seventeen.

Q. And since 1927, to your knowledge, has there ever been a white line in the middle of Godwin Avenue?

Mr. Markley: I object to that as not proper rebuttal.

Mr. Breslin: One of the drivers testified to that.

The Court: One of the witnesses testified —the first bus driver testified that there was a white line, which was mostly faded out.

Mr. Markley: Not up there where she lives.

Mr. Breslin: Oh, yes.

The Court: She can say at the point of the accident.

Mr. Breslin: At the point of the accident.

Mr. Markley: I withdraw the objection.

Q. Has there ever been a white line near the scene of the accident? A. No.

Cross examination by Mr. Markley:

Q. Was there any white line on Godwin Avenue? A. Up near the depot.

Mr. Breslin: May it please the Court, the plaintiff rests.

Mr. Markley: If your Honor please, I respectfully move for a direction of a ver-

dict in favor of the defendant, Oliver Surpless, on the following grounds:

"First, on the ground that the automobile in this accident was not operated by him or by his agent and servant, acting within the scope of his employment by Mr. Surpless;

"Second, on the ground that said automobile was operated by the defendant Stafford Miller upon his own business, and not on any business for Mr. Surpless;

"Third, on the ground that the relationship of master and servant did not exist as between Mr. Surpless and Mr. Miller, the defendant, at the time of this accident; that, on the contrary, the evidence is uncontradicted, at the most, the very most, that Mr. Miller merely had permission to use the car.

"Fourth, I move for a direction of a verdict in favor of Mr. Surpless, on the ground that the doctrine of the case of Wilson *v.* Brouer, 97 N. J. L. 482, does not apply to this case, because there the unlicensed driver was inexperienced and had no knowledge as to the operation of an automobile, to the knowledge of the owner thereof; and the theory of that case was based on the knowledge of the owner, that he was permitting his automobile to be operated by a person who had never driven an automobile, had no knowledge as to the driving of it, and who was to use it for the purpose of learning how to drive.

"Fifth, I move for the direction of a verdict in favor of Mr. Surpless on the ground that at the time of this accident the plain-

tiff Patterson was guilty of contributory negligence as a matter of law;

"Sixth, on the ground that Patterson is guilty of contributory negligence as a matter of law because he admitted that he only looked once in the center of the highway and did not again look to his right, the direction from which the vehicular traffic was coming, although he says he took either four or five steps from the center of the road toward the north."

On those grounds, if your Honor please, I respectfully move for a direction of a verdict in favor of the defendant Surpless.

Now I would like to argue the points in the Brouer case, if your Honor wishes to hear me.

The Court: You may.

(Argument.)

Mr. Markley: I submit that with respect to the question of agency, there is no evidence here that Mr. Miller was the agent or servant of Mr. Surpless, and there is no evidence here that he was an incompetent or inexperienced driver. There is no evidence here that the unlicensed driver was incompetent. And on these grounds, as well as on those that I have argued, I ask your Honor respectfully for a direction of a verdict in favor of the defendant Surpless.

The Court: Of course we have to view this in the light that proof of ownership raises two presumptions; first, that the driver was the agent or the servant; and, secondly, that he was engaged in his master's business. I am not at all unmindful of the line

of cases which preceded Okin *v.* Essex Sales Company, and several of the others, which hold that that presumption may be rebutted.

However, we have in this case a fact question, which has been brought about by the conflict of testimony with respect to the admission. As I pointed out when the evidence was offered, I would not permit any evidence of a conviction of Mr. Surpless because it was not a crime and, therefore, it did not come under Section 1 of the Evidence Act, but I would permit a statement which, it is contended, was a plea of guilty, as an admission of fact material to the case.

Now, Recorder Van Buskirk has testified that there was no such admission, and Mr. Surpless himself testified to that; and then, on the other hand, we have Mr. Dunn, who testified that Mr. Surpless said he was technically guilty. Technically guilty of what? Of the accusation read to him, that he permitted his car to be used by one who had no license?

It is true that the mere faliure to use the license is not evidence of negligence *per se*, any more than the converse would be true, that because a man had a license it would of necessity follow that he was not negligent, because we know the contrary is the fact.

In this very narrow question which presents itself to me I will have to deny your motion.

Mr. Markley: Your Honor will allow me an exception.

Now may I move for a direction of a verdict in favor of the defendant Stafford Mil-

ler, on the ground that the plaintiff Patterson was guilty of contributory negligence as a matter of law?

The Court: I will deny that motion.

Mr. Markley: Your Honor will allow me an exception.

(Mr. Markley summed up the case to the Jury.)

(Mr. Breslin summed up the case to the Jury.)

(The Court charged the Jury as follows:)

The Court's Charge.

The Court: Ladies and Gentlemen of the Jury, you have been empaneled to try this issue of fact joined between William L. Patterson, Jr., and Oliver Surpless and Stafford Miller. The suit is based upon an accident that occurred on the 24th of February, 1927, when the defendant Miller was driving an automobile in a westerly direction on Godwin Avenue, and the plaintiff was crossing from the south side to the north side of that street. The plaintiff claims that as the result of the actual negligence on the part of the driver of this car he sustained these injuries, and the defendant Surpless has been joined because he was the owner of the automobile.

Now at the outset I might point out to you that you are to decide this case on the evidence. The fact that the Court has made certain rulings should in no wise influence you, because, in keeping with the law as the Court understands it, these questions were ones of fact that are to be decided by a jury.

The plaintiff claims, as I said before, that the negligence of this driver was the proximate cause of his injuries. From the testimony of himself and the testimony of the physicians, he suffered severe injuries. Doctor Spickers said that he suffered from a fractured skull, and there is evidence in the case that there was a broken pelvis; and, in addition to that there was considerable blood in the kidneys, which, taking it in all, necessitated confining him at the hospital for a considerable time, and a course of treatment. The plaintiff was placed in a plaster cast, and then it was necessary for him to use crutches; and I think he claims, as the result of his disability, he lost a year or a year and a half's work, and that his average earnings were about $5,000 a year. He is suing for the injuries sustained at that time, plus the medical expenses and his loss of earnings, together with pain and suffering which he endured as the result of this accident; "and he is also claiming permanent injury, I believe, on the theory of nervousness.

"There is testimony that prior to this accident he suffered somewhat as the result of being gassed, and shell shock. While a defendant is only responsible for such damages as his act can be looked upon as being the proximate cause of, yet if there be a disease or a condition which has been aggravated by the negligence of a defendant, of course that aggravation is a proper matter for consideration by you."

Now the plaintiff has the burden of proof in this case of establishing negligence. The mere happening of an accident itself raises no presumption of negligence. On the contrary, the law presumes against negligence. Therefore, the plaintiff, to re-

cover, must establish, by a fair preponderance of evidence, his contentions in his case.

"We have heard very little from the plaintiff himself with respect to the accident. I think he testified that he alighted from the taxicab and proceeded to cross to his father's home, where he resided. He said he looked to the left before he left the sidewalk, or the curb, and then proceeded to the center, and then took some steps beyond that, and looked to his right. He said he did not see the automobile, and then he was struck. He really does not know very much about the accident."

Mrs. Conners testified, and she was in the vicinity, and said she heard a thud; and I think a Miss Ackerman said that she lived some four or five doors away from the scene of the accident, and she was attracted by the sounds.

The defendant Miller, on the other hand, said that he was proceeding on the right side of the street, going in a generally westerly direction, and that there were several cars in line, and that the defendant walked into the side of his car, and he staggered, fell to the ground, and then another car, which he believed to be a Cadillac, came up from behind him and ran over the body of the plaintiff. With respect to the other car running over the plaintiff, he is corroborated by other witnesses who were in line or going in the same direction as the defendant Miller; and I think there was another witness, a driver of a bus, who was going in the opposite direction, who testified in substance to that fact.

'So, therefore, looking at this case, you must look to all of the evidence to determine whether or

not an act of negligence has been committed by the driver of this car."

As you have heard before, in the course of your service as jurors, we cannot define negligence with any degree of precision, because each case will determine itself; but the best we can do is to ask you to consider all of the evidence, in determining whether or not the driver of this car was acting as a reasonably prudent man, under the circumstances then existing.

Now you heard his testimony with respect to the location of the road while driving, his speed, the application of the brakes, and the point where he stopped the car. Considering those facts will help you in arriving at a conclusion as to whether or not the driver of this car was negligent.

Mr. Surpless was in Canada, according to the testimony, and there is no evidence to contradict that. There is no proof in the case that he was in this car or anywhere near it at the time of the accident. He is charged as a defendant because he was the owner of the car, and, under the law, proof of ownership of an automobile raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then his servant, the driver, and that such driver was acting within the scope of his employment. However, that is merely a presumption, which can be rebutted by testimony; and you have heard the evidence, and of course it is for you to say whether or not the presumption that has been raised by force of law has been rebutted, from the testimony.

Mr. Miller testified that the night before the accident he went to the garage of Mr. Surpless, and he took this car; that he took it without permission or consent of Mr. Surpless or anyone in his family.

I think the testimony was, by some of the witnesses, that this car was for the use of Mr. Surpless' daughter, and I think he himself testified that it was a family car. So, therefore, in order to fix liability upon Mr. Surpless you must find from the evidence that there was some relationship between Mr. Surpless and Mr. Miller, of which I will speak later, which put him in the relationship of master and servant. By that we mean, doing something on behalf of or for Mr. Surpless.

Now, as I said before, the witnesses for the defense, including Mr. Miller himself, testified that the injury came about as the result of the Cadillac, or this other car referred to by some of the witnesses as a heavy car, running over the plaintiff. Well, now, if the evidence warrants you in finding that the negligence of Mr. Miller was the proximate cause of this man being placed in the position of danger, and you find that it was because of the accident that he was put in a position of danger, which resulted in his injuries, of course if you can trace the injuries and hold that the act of Mr. Miller was the primary cause, then, irrespective of the fact that another car intervened, and that intervention was not such as to break the causation between the first act and the subsequent injury, then of course Mr. Miller would have to respond in damages.

The upper courts of our State have said, speaking of the relationship of master and servant as to third persons:

"It is not essential that any actual contract should subsist between the parties or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract

between the servant and the master, yet such contract may be either expressed or implied. 'The real test as to third persons, * * * is whether the act is done by one for another, * * * with the knowledge of the person sought to be charged as master with his assent, expressed or implied, even though there was no request on his part to the other to do the act in question.' "

So in order to hold Mr. Surpless we must come squarely within that rule.

"What was he doing for Mr. Surpless? What was he doing with the knowledge of Mr. Surpless? Now, there is no evidence in the case with respect to that, other than the testimony of both defendants, and they have testified that the car was taken out of his garage without permission, or even acquiescence, on the part of Mr. Surpless, and that there was nothing being done for Mr. Surpless by Mr. Miller.

There is in this case another factor, which I might say was the only factor which was the one that guided me in permitting you to pass upon the question of Mr. Surpless' liability at all. That related to the hearing at the police court. The complaint against Mr. Miller has been offered in evidence by consent. Of course, the fact that he was convicted is not at all conclusive on you as being evidence of the negligence or the liability on the part of Mr. Surpless. What presented a conflict of testimony to Mr. Surpless' liability was the variance between the testimony of Mr. Surpless, Recorder Van Buskirk, and Mr. Dunn. There was offered in evidence by consent too, a memorandum written by Mr. Surpless with respect to his course of conduct relating to the use of his car. In addition to that Mr. Dunn testified that Mr. Surpless

said, after hearing the accusation read against him, that he permitted the use of this car by an unlicensed driver, that he was technically guilty; and I permitted this case to go to you, with respect to Mr. Surpless, because that raised a fact question. In other words, we distinguish between a conviction and an admission of the fact. Now, he said Mr. Surpless admitted he was technically guilty of the accusation, and that accusation was that the driver of this car drove without a license. Then you have as against the testimony of Mr. Dunn the testimony of Mr. Surpless and the testimony of Recorder Van Buskirk. Mr. Surpless, I think, said he made no such statement, and I think Mr. Van Buskirk said he had no recollection of it. So, of course, as to what was said being in evidence in this case, and being a fact question, you must decide it.

If you conclude, keeping in mind the test that I laid down with regard to the rule of master and servant, from the evidence, that there was no relationship here, if you feel that there was no authorization, no permission, either expressly or impliedly, or any of the other elements that I have pointed out, then, of course, you ought to render a verdict in favor of Mr. Surpless."

Now, with respect to the driver of the car, of course, we have a different situation. The theory of liability upon which the plaintiff seeks to hold Mr. Surpless is permitted upon the doctrine that one who actually owns a car and permits another to do something for him, must respond in damages for negligent acts. That, of course, has no application to the driver of the car himself. "He is charged with negligence by reason of his own course of conduct. What did he do that was neg-

ligent? What did he do with respect to that affirmatively or by an omission? What did he do with respect to driving the car, or did he fail to do anything, under the circumstances? Considering all of that can you spell out negligence?"

If you conclude from the evidence that the defendant Miller was not guilty of negligence, of course in that event your verdict ought to be in favor of the defendant Miller. Now, on the other hand, if, from the evidence, you conclude that this accident was occasioned by the sole act of the plaintiff himself, and his sole act was the primary cause of his injury, then, of course, in that event, you ought to decide in favor of the defendants. On the other hand, if you conclude that the defendants, or either of them, were guilty of negligence, and you also conclude that, taking that negligence of the defendants, or either of them, in conjunction with the plaintiff's own course of conduct, and find that the plaintiff himself was guilty of contributory negligence, then, in that event, your verdict ought to be in favor of the defendants.

There has been testimony in this case with respect to the condition of the plaintiff. You have had evidence with respect to condition of intoxication. While I do not recall any evidence that the man was intoxicated, yet there has been evidence presented, and you are asked to draw an inference that he was intoxicated. Now, you have a sharp conflict of testimony with respect to the question of liquor in this case. The plaintiff himself said he had a couple of drinks that afternoon; he stopped at a saloon or some other place at Hawthorne and purchased this bottle of liquor. He said that he did not take a drink from it, nor did he have any drinks at this time, which he fixes ap-

proximately, about seven o'clock, when he left this place in Hawthorne. As against his testimony you have the testimony of some witness who said that there was an odor of liquor on his breath. Doctor Bonynge said that the liquor was taken from his pocket by a police officer, at his office, and the bottle was two-thirds filled. He said he thought it was a pint bottle. Then you have testimony with respect to the custody of this liquor after that. I think the evidence was that it finally came into the hands of Chief Blackshaw. Mr. Moneypenny and Mr. Patterson, Sr., have testified that they saw the liquor at the Chief's office, and the bottle was filled and the cork was in there. So you see you have a conflict of testimony with respect to that, and that solution is yours.

The case has taken considerable time to try, and your sworn duty is to decide the case on the evidence. I could elaborate more on this, but counsel for both sides have submitted many requests which embody, in some instances, the correct principle of law, and I will now charge the requests as presented, as in my judgment being the proper rule of law.

With respect to the first request of the plaintiff, I have already charged it. The second I have already charged.

The third: "3. In all cases in which any person undertakes or authorizes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons known or unknown, the law *ipso facto* imposes as a public duty the obligation to exercise such care and skill.

"It is true we believe that automobiles are not generally held to be dangerous instrumentalities

per se, certainly when carefully and intelligently handled they are not usually dangerous to other persons using public highways with due care. But their great power, weight and speed endow them with dangerous potentialities and when not handled carefully by competent persons they become, under certain conditions, highly dangerous instrumentalities and a public menace."

"4. Now, the Motor Vehicle Act, in one of its provisions, provides that

"No person shall hereafter drive an automobile or motorcycle upon any public highway in this State unless licensed to do so in accordance with the provisions of this act * * * nor shall any person be licensed to drive automobiles until such person shall have passed satisfactory examination as to his ability as an operator, which examination shall include a test of the knowledge on the part of said person of such portions of the mechanism of automobiles as is necessary in order to insure the safe operation of a vehicle of the kind or kinds indicated by the applicant."

"5. Another provision of the Act (this is No. 5 of the requests):

"No person owning a motor vehicle registered as provided for in this act shall allow such vehicle to be operated by a non-licensed driver."

Another request:

"6. Danger reasonably foreseen at the time of acting, is the established test of negligence. It is precisely upon this element of discoverable danger that public statutes or ordinances act. When the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned 'the ordinary prudent man' and through

him the defendant in a civil action whose conduct must always coincide with this common law criterion. Such danger therefore does not have to be proved by the plaintiff since there is no longer room for a reasonable difference of opinion for by his breach of the statute the defendant through his common law conscience is charged with knowledge that if injury ensues, he will have acted at his peril."

No. 7 I will charge:

"7. A violation of the Motor Vehicle Act does not of itself constitute negligence. These statutes carry their own penalties, but what our courts have said is this: These acts, these statutes, constitute warnings to people operating motor vehicles, that it is dangerous to act other than in accordance to those statutes, those rules, which the legislature has laid down for the guidance of the drivers of motor vehicles, and danger reasonably to be foreseen is a test of negligence."

Another provision, which is referred to in Section 8 of the requests to charge, I also charge:

"8. In places where houses are on the average less than 100 feet apart, pedestrians shall have the right of way over vehicles at any street crossing."

Nine:

"9. When a pedestrian and an automobile moving in different directions, approach such a crossing"—this does not apply, because it is not at a crossing. I will not charge that.

Ten:

"10. Every motor vehicle must be equipped with a horn or signaling device and the operator of the same shall give reasonable warning of his approach whenever necessary to insure the safety

of other users of the highway, and before passing any vehicle he may overtake, or pedestrian using any part of the highway other than the sidewalk, also at curves and intersecting highways where the view of approaching vehicles is obscured." Of course, I charge you that.

I charge you eleven.

"11. The following rate of speed may be maintained but should not be exceeded upon any public street in this State by one driving a motor vehicle:

"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 an average less than 100 feet apart."

I have read to you, as part of these requests, several references to the Motor Vehicle Act. Of course, as indicated in one of them, the mere violation of a motor vehicle act, in itself, does not constitute negligence, any more than a strict observance of the act, of itself, would be an answer to a charge of negligence. The law has said, however, that in considering the case where there are violations of the Motor Vehicle Act, you may consider the violations as circumstances in the case.

One of the contentions raised by the plaintiff in this case is that a driver of a car was an unlicensed driver. I charge you, as a matter of law, that, itself, is not negligence *per se*. Our Court of Errors and Appeals has said, with respect to the use of an automobile:

"Where the evidence tends to show that the owner of an automobile expressly authorized a beginner, who had no driver's permit, and who, to the knowledge of the owner, knew nothing of the

operation of an automobile, to run it down the streets of a populous city for the purpose of learning how to operate it, the liability of the owner for an injury to a pedestrian, caused by the operator's want of knowledge and skill, is a question for the jury."

Now in this case, with respect to Mr. Miller, while it is true he had no license, there is evidence in the case that he had been driving an automobile and a motorcycle for some four or five years, and he had driven an Overland car. So you see, you have to consider this in determining whether or not he was a skillful driver.

As I said before, one of the allegations and one of the contentions raised by the plaintiff is that he was not a skillful driver, and that he was not a skillful driver to the knowledge of Mr. Surpless. Now, if you accept the testimony of the plaintiff, that he was not a skillful driver, as I said before, the mere fact that he did not have a license would not *per se* render him unskillful, nor would it *per se* render him negligent, because negligence must be established; and while the fact that he did not have a license spells a violation of the Motor Vehicle Act, and may be considered as a circumstance by you, that alone is not sufficient, unless you can say that his want of skill was the proximate cause of this man's injury.

I have some requests of the defendants. The first request I will deny. The second request I will deny. The third request I will deny. The fourth I will deny. The fifth I will deny. The sixth I will deny. The seventh I will deny. The eighth I will deny. The ninth I will charge in part:

"9. The fact that Miller was operating the automobile at the time, when he did not have a

driver's license, does not render the defendant Surpless liable to the plaintiff for the operation of the automobile, even though it was owned by Surpless, unless it appears that Miller was acting as the servant or agent of Surpless at the time of the accident, or unless it appears that the defendant Surpless knowingly permitted his automobile to be operated by an inexperienced and incompetent driver." I so charge you. I refuse to charge the balance of that request.

The tenth I will deny.

The eleventh:

"11. The fact that the automobile of the defendant Surpless was being operated by a driver who was not licensed will not charge either the owner or operator with liability for injury or damage caused by its operation on the highway, where such omission of duty had no causal connection with the injury or damage." I so charge you.

The twelfth I will charge with some modification:

"12. The operation of a car by an unlicensed driver does not render the owner of the car or the operator thereof a trespasser and outlaw on the highway, and the owner of the car who permitted it to be operated by an unlicensed driver would not be liable, because of that fact alone, neither would the driver for any injury caused by it irrespective of negligence in the operation of the car or of contributory negligence on the part of the injured, in this case, the plaintiff."

The thirteenth I have already covered, and I will refuse to charge. The fourteenth I will deny. There are two fourteens. I will call one 14-A. I deny that. Fifteen I will deny. Sixteen I will deny. Seventeen I will deny. Eighteen I will

deny. The nineteenth I will deny. The twentieth I will deny. The twenty-first I will deny. Twenty-two I will also deny. Twenty-three, twenty-four, I deny.

Twenty-five:

"25. If you find that any witness has intentionally testified falsely in any material respect then you have a right to disbelieve his entire testimony, because you have the right to conclude that if he intentionally testified falsely in one particular, he might intentionally testify falsely in many particulars." I charge you that on that point. The rest I refuse to charge.

The twenty-sixth I will deny. The twenty-seventh I will deny. The twenty-eighth I will deny. The twenty-ninth I will deny; and the thirtieth I will deny.

I have a supplemental request from the plaintiff:

"Even if the plaintiff was intoxicated, that by itself would not charge him with contributory negligence nor confer any right upon the driver of an automobile or any other vehicle to run him down. If the driver of a vehicle observes a drunken man in the street he is duty bound to exercise the same degree of reasonable care that he would in the case of a child or helpless person. Whether or not the plaintiff walked in front of the automobile is a jury question, and the jury in determining that question has a right to consider the credibility of the testimony of the driver and in that regard take into consideration the influence which might exert itself on his mind to shield himself from consequence which might ensue to his detriment by having caused the injuries to the plaintiff through excessive speeding of the car which he was operating." Of course, with respect to that charge, we

have no evidence in the case that the driver of this car knew that the plaintiff was under the influence of liquor or, in fact, knew he had anything to drink. The defendant Miller, if I recall it, testified only as to the condition of the breath of the plaintiff Patterson, and I think he said that he staggered. Now, whether these point to observations of intoxication on the part of the defendant, of course you will have to decide that.

Now, coming again to the question of contributory negligence, as I pointed out to you before, even if the defendants or either of them, were guilty of negligence, yet if the plaintiff were guilty of contributory negligence, of course he could not recover, despite the negligence on the part of the defendants.

Speaking of contributory negligence, our Court of Appeals has said this:

"To disentitle the plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately contributed to defendant's negligence that caused his injury."

Now you have had the benefit of able counsel in this case, who have reviewed the testimony; and while there has been a considerable number of witnesses who have given evidence, yet, so far as the happening of the accident itself is concerned, that has been within the mouths of a few. You have before you the testimony of the witnesses. You have in evidence a map, together with the other facts. And I might say that in determining the facts it is exclusively your function to weigh the evidence. You have a right to consider the interest of a witness, in giving value to his testimony. What interest has the plaintiff in this case,

or what interest have the defendants? Or what interest have the eye-witnesses, or the other witnesses who came upon the scene? In other words, in arriving at the value of evidence, you have a right to consider the interest that anyone has in the outcome of the case, and consider that interest in determining the value of any such testimony.

This case is important to the defendants. It is important to the plaintiff, because he has sustained injuries. We are not to determine an issue such as this upon sympathy on behalf of the plaintiff, who has sustained the injuries, nor are we to be sympathetic in our attitude toward the defendants because of the circumstances. This case is to be decided strictly on the merits. You are privileged to make all proper inferences from the testimony that the facts warrant. As I said several times, you are the sole judges of the facts, and the burden of determining the facts rests on you. After you have concluded the facts, then apply the principles of law that have been given you by the Court.

If you conclude that the plaintiff has made out a case, then your judgment will be in such sum as will compensate him, in keeping with the evidence that you have heard as to his injuries. On the other hand, if you are satisfied that the defendants, or either of them, are not liable, the fact that this man has sustained injuries should nowise influence you. If you conclude that the plaintiff has not sustained his burden, irrespective of the fact that he has sustained serious injuries, your verdict ought to be in favor of the defendants. On the other hand, if you conclude he has made out a case, then your verdict should be, as I said before,

in such a sum as to compensate him, both with respect to his loss of earnings, his medical expenses, and with a view of making him whole as best you can, with reference to his physical injuries.

You may take the case.

(The Jury retired.)

Mr. Breslin: No exceptions on behalf of the plaintiff.

Mr. Markley: I take an exception to the refusal of the Court to charge the requests as presented by the defendant. To make it clear I am noting an individual exception to your Honor's failure to charge each one of the requests that I submitted which your Honor declined.

I also take an individual exception to each request of the plaintiff which your Honor charged, including the supplemental request which your Honor charged at the end. I take an exception to that.

I note an exception to that part of your Honor's charge wherein your Honor said that the plaintiff could not recover against the defendant Surpless unless the defendant Miller was acting as the agent or servant of the defendant Surpless at the time of the happening, on the ground, first, that that was a question for your Honor to decide, on the uncontradicted evidence; and, secondly, that it was improperly submitted to the jury.

I note an exception to that part of your Honor's charge wherein your Honor said that the jury could allow damages for permanent injury with respect to nervousness.

Also to that part of your Honor's charge wherein

your Honor said that the jury could allow plaintiff damages for the aggravation of his nervous condition.

Also to that part of your Honor's charge wherein your Honor said that the plaintiff could recover if the defendant was guilty of any act of negligence.

Also to that part of your Honor's charge, wherein your Honor said that the only thing that guided your Honor in submitting the case to the jury was the fact that there was a dispute as to whether or not Mr. Surpless had pleaded technically guilty to the charge against him in the Recorder's Court of Ridgewood, on the ground that that evidence and that conflict was not of such a character as to raise a jury question, but, on the contrary, the question of liability of Mr. Surpless was still a Court question, in spite of the fact that Mr. Dunn testified that Mr. Surpless said before the Recorder that he, Surpless, was technically guilty of the charge against him there.

Also to that part of your Honor's charge wherein your Honor stated that if the defendant did say that he was technically guilty of the charge against him in the Recorder's Court, that that raised a jury question as to whether or not he was liable to the plaintiff in this case.

The Court: I do not think I said that.

Mr. Markley: I may not have quoted that exactly. I will take an exception to whatever your Honor said on that.

The Court: To whatever I said you may have an exception.

Mr. Markley: Also to that part of your Honor's charge wherein your Honor said that if there was no authorization and no permission by Surpless to Miller, to operate the car, then the plaintiff could

not recover as against Surpless, whereas, if there was, he could recover.

Also to that part of your Honor's charge wherein you said, "What did he do that was negligent? What did he do that was not negligent?"

Also to your Honor's reading of the language of the case of Wilson *v.* Brouer to the jury as a rule of law to be applied in this case, wherein your Honor said that if the owner of a car knowingly permitted an unlicensed driver who did not know how to operate the car, to drive it, and injury resulted from the negligence of that driver, the owner would be liable, on the ground that that instruction, taken from Wilson *v.* Brouer, is not applicable to this case, because here the only evidence was that the driver Miller was an experienced, careful driver.

Also to that part of your Honor's charge where your Honor said that the plaintiff could not recover as against Surpless unless there was a want of skill on the part of Miller, and unless that want of skill was the proximate cause of the accident, on the ground that there was no evidence of any want of skill on the part of Miller.

The Requests to Charge of the Defendant Oliver Surpless, which the Court refused to charge, or refused to charge as presented, are as follows:

"1. In the complaint in this case the plaintiff alleges that the defendant, Oliver Surpless, carelessly and negligently permitted his automobile to be operated by his servant or agent, the defendant, Stafford Miller, an unlicensed driver, contrary to the provisions of the Motor Vehicle Act of the State of New Jersey. I instruct you that there is no testimony in this case that the defendant Oliver Surpless carelessly and negligently permitted his said

automobile to be operated by Stafford Miller. The uncontroverted proof is that the defendant, Stafford Miller, had been operating an automobile for years, and had been licensed in the years prior to 1927 to operate an automobile but that in 1927, on February 24, 1927, when this accident happened, he had not yet applied for or obtained his license to drive. There is no evidence that the defendant, Stafford Miller, was an incompetent or an inexperienced driver, or that he did not know how to operate an automobile. I therefore charge you that you cannot find the defendant Oliver Surpless liable in this case to the plaintiff because he carelessly and negligently permitted his said automobile to be operated by said Stafford Miller.

"2. I instruct you that there is no testimony in this case that the defendant Oliver Surpless knowingly permitted his said automobile to be under the control and management of an unlicensed, incompetent and inefficient driver at the time of this accident.

"3. I instruct you as a matter of law that there is no evidence in this case that the defendant Oliver Surpless knowingly permitted his automobile to be under the control and management of an incompetent and inefficient driver at the time of this accident.

"4. I charge you as a matter of law that the automobile of the defendant Oliver Surpless at the time and place of this accident was not a dangerous instrumentality.

"5. I instruct you as a matter of law that there is no evidence in this case that the defendant Stafford Miller was acting for the defendant Oliver Surpless as his agent or servant.

"6. I instruct you as a matter of law that you cannot find that at the time and place of this acci-

dent any relation of master and servant existed as between Oliver Surpless and the defendant Stafford Miller.

"7. I charge you as a matter of law that the relation of master and servant did not exist between the defendant Oliver Surpless and the defendant Stafford Miller, and therefore you cannot find any verdict in favor of the plaintiff as against the defendant Oliver Surpless on the theory that the said car was being operated on the business of the said Surpless or by his agent and servant for him.

"8. The proof is uncontroverted in this case that the defendant Miller took the Ford automobile of the defendant Surpless from the latter's garage in Ridgewood, Bergen County, N. J., while the said Surpless was in Canada and while the daughter of Surpless was in school at New London, Conn. for the purpose of using it on the business of the said Miller and not on the business of the said Surpless, and that the said Miller did use it on his own business and was so using it at the time of the accident. He was not doing any act for the said Surpless or performing any service or employment for him at the time of the accident. I therefore charge you as a matter of law that the relationship of master and servant did not exist between Surpless and Miller, and no recovery can be had against the defendant Surpless on that theory.

"9. The fact that Miller was operating the automobile at the time, when he did not have a driver's license, does not render the defendant Surpless liable to the plaintiff for the operation of the automobile, even though it was owned by Surpless, unless it appears that Miller was acting as the servant or agent of Surpless at the time of the accident, or unless it appears that the defendant Surpless knowingly permitted his automobile to be operated by an inexperienced and incompetent driver.

Since there is no evidence proving that Miller was operating the car as the agent and servant of the defendant Surpless, and upon the business of the said Surpless, and since it further appears that there is no evidence that he was an inexperienced or incompetent driver, your verdict must be for the defendant Surpless and against the plaintiff.

"10. There is no testimony in this case that the defendant Surpless had knowledge that the defendant Miller knew nothing of the operation of an automoblie. On the contrary, the proof is uncontradicted that Miller did know how to operate an automobile, and had been operating one for years. There is no evidence that he was a beginner in the operation of an automobile. I therefore instruct you as a matter of law that no liability of the defendant Surpless can be predicated upon the fact that his automobile was being operated by an unlicensed driver."

The Requests to Charge of the Defendants Oliver Surpless and Stafford Miller, which the Court refused to charge, or refused to charge as presented, are as follows:

"12. The operation of a car by an unlicensed driver does not render the owner of the car or the operator thereof a trespasser and outlaw on the highway, and the owner of the car who permitted it to be operated by an unlicensed driver would not be liable, neither would the driver for any injury caused by it irrespective of negligence in the operation of the car or of contributory negligence on the part of the injured, in this case, the plaintiff.

"13. The fact that the car was being operated by a driver who had no driver's license is immaterial, unless the failure to have a driver's license

is in itself a breach of duty resulting in injury to the plaintiff.

"14. In this case there is no proof that the failure of the driver to possess a driver's license contributed to or caused the accident. It was merely a condition attending the collision, not a cause of it. I therefore instruct you as a matter of law that liability on the part of the defendants Surpless and Miller cannot be predicated on the ground that Miller did not have a driver's license.

"14-A. I further instruct you as a matter of law that no liability can be predicated on the failure of Miller to have a driver's license because there is no evidence that his failure to have a driver's license had any causal connection with the injury or damage suffered by the plaintiff.

"15. The plaintiff cannot recover against the owner or the operator of the automobile merely because the driver did not have a driver's license unless the failure to have a driver's license was a proximate cause of the accident.

"16. I charge you as a matter of law that the failure to have a driver's license was not a proximate cause of the accident, and therefore you cannot find any verdict against the defendants on that ground.

"17. I instruct you as a matter of law that there is no evidence that the defendant Miller was an incompetent driver.

"18. I instruct you as a matter of law that there is no evidence that the defendant Miller was an inexperienced driver.

"19. If the plaintiff was guilty of contributory negligence then he cannot recover, and your verdict must be for the defendants.

"20. If the defendant Miller was negligent and

if the plaintiff Patterson was also negligent, and both of their negligences contributed to the happening of this accident, then the plaintiff cannot recover, and your verdict must be for the defendants.

"21. The burden of establishing each and every part of the plaintiff's case rests upon him, and he must establish his case with respect to both liability and damages by the greater weight of the evidence. If he has failed so to do then your verdict must be for the defendants.

"22. If the evidence is evenly balanced then the plaintiff cannot recover and your verdict then must be for the defendants.

"23. Even if the defendant Miller was negligent still if his negligence was not the proximate cause of this accident, the plaintiff cannot recover and your verdict must be for the defendants.

"24. The plaintiff testified that he did not look to his right, which would be to the east, the direction from which Miller's car came, until he reached the center of the highway, and then he looked but once, and continued to cross the northerly half of Godwin Avenue, taking three or four steps without looking at all. In considering whether he was guilty of contributory negligence, you should consider whether a reasonably prudent person crossing the highway would have looked but once in the center of the highway, and not again, especially when the plaintiff testified that he had a view of only thirty-five or forty-five feet to his right when he looked in the center of the highway.

"25. If you find that any witness has intentionally testified falsely in any material respect then you have a right to disbelieve his entire testimony, because you have the right to conclude that if he

intentionally testified falsely in one particular, he might intentionally testify falsely in many particulars. You have a right to conclude that he is not entitled at your hands to any credit.

"26. In weighing the testimony of the witnesses, you have a right to consider the interest that they have in the outcome of the case. The plaintiff is very much interested because he is seeking a verdict at your hands. Likewise the defendants are interested parties. Outside witnesses who testified should also have their credibility weighted at your hands to determine how much credit you should give to each witness.

"27. The fact that counsel for the defendants made a motion addressed to me for a direction of verdict in their favor should not be considered by you in arriving at your verdict. Neither should my denial of that motion. Neither have any weight and should be given none in your consideration of the facts. That motion and my decision upon it was addressed merely to the law and not to the facts. I did not decide any of the facts. The reason I denied that motion was that I thought a jury question was presented instead of a law question for me to pass upon. You have a right to bring in a verdict in favor of both defendants notwithstanding my denial of that motion if you conclude that there is no liability.

"28. The amount for which the plaintiff has sued is not a criterion as to the amount that he may be entitled to, if any. That is merely a limit placed by the attorney who brought the suit on the amount of damages asked, beyond which you cannot go. It is for you to say if you come to the question of damages how much, if anything, you should give and the amount sued for should not be a guide or criterion as to how much you should

give. That should be based solely on the testimony which you believe and which is supported by the greater weight of the evidence.

"29. This suit is not against an insurance company. The only parties to this suit are the plaintiff William L. Patterson, Jr., and the defendant Oliver Surpless and defendant Stafford Miller. There is no proof in this case that either the defendant Surpless or the defendant Miller is insured. To give a verdict on the theory that either defendant is insured would be most unfair, unjust and detrimental to the interests of the defendants, as well as contrary to your oaths as jurors and my charge to you as to the law that is to govern you in reaching your verdict. Even assuming that the defendants were insured. That fact gives you no right to bring in a verdict against them. It has no bearing in this case at all. The very fact that you may bring in a verdict against these defendants might destroy any insurance that they may have. You do not know. Neither do I. You do not know the amount of the insurance or whether it will cover an accident or whether it will not. In this case for instance, the very fact that Miller was driving without a license might prevent any insurance from covering this accident. Dismiss entirely from your minds the question of any insurance, and decide this case solely on the rules of law which I have given you. Any verdict that you may render against the defendants or either of them will be against them personally and not against any one else.

"30. There is no evidence of any permanent injury suffered by the plaintiff and you should therefore make no allowances on the theory that there is a permanent injury."

Defendants' Requests to Charge.

(Filed June 25, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

WILLIAM L. PATTERSON, JR.,
Plaintiff,

v.

OLIVER SURPLESS and STAFFORD MILLER,
Defendants.

Action at Law.

REQUESTS TO CHARGE OF THE DEFENDANT OLIVER SURPLESS.

1. In the complaint in this case the plaintiff alleges that the defendant, Oliver Surpless, carelessly and negligently permitted his automobile to be operated by his servant or agent, the defendant, Stafford Miller, an unlicensed driver, contrary to the provisions of the Motor Vehicle Act of the State of New Jersey. I instruct you that there is no testimony in this case that the defendant Oliver Surpless carelessly and negligently permitted his said automobile to be operated by Stafford Miller. The uncontroverted proof is that the defendant, Stafford Miller, had been operating an automobile for years, and had been licensed in the years prior to 1927 to operate an automobile, but that in 1927, on February 24, 1927, when this accident happened, he had not yet applied for or obtained his license to drive. There is no evidence that the defendant, Stafford Miller, was an

incompetent or an inexperienced driver, or that he did not know how to operate an automobile. I therefore charge you that you cannot find the defendant Oliver Surpless liable in this case to the plaintiff because he carelessly and negligently permitted his said automobile to be operated by said Stafford Miller.

2. I instruct you that there is no testimony in this case that the defendant Oliver Surpless knowingly permitted his said automobile to be under the control and management of an unlicensed, incompetent and inefficient driver at the time of this accident.

3. I instruct you as a matter of law that there is no evidence in this case that the defendant Oliver Surpless knowingly permitted his automobile to be under the control and management of an incompetent and inefficient driver at the time of this accident.

4. I charge you as a matter of law that the automobile of the defendant Oliver Surpless at the time and place of this accident was not a dangerous instrumentality.

5. I instruct you as a matter of law that there is no evidence in this case that the defendant Stafford Miller was acting for the defendant Oliver Surpless as his agent or servant.

6. I instruct you as a matter of law that you cannot find that at the time and place of this accident any relation of master and servant existed as between the defendant Oliver Surpless and the defendant Stafford Miller.

7. I charge you as a matter of law that the

relation of master and servant did not exist between the defendant Oliver Surpless and the defendant Stafford Miller, and therefore you cannot find any verdict in favor of the plaintiff as against the defendant Oliver Surpless on the theory that the said car was being operated on the business of the said Surpless or by his agent and servant for him.

8. The proof is uncontroverted in this case that the defendant Miller took the Ford automobile of the defendant Surpless from the latter's garage in Ridgewood, Bergen County, N. J., while the said Surpless was in Canada and while the daughter of Surpless was in school at New London, Conn., for the purpose of using it on the business of the said Miller and not on the business of the said Surpless, and that the said Miller did use it on his own business and was so using it at the time of the accident. He was not doing any act for the said Surpless or performing any service or employment for him at the time of the accident. I therefore charge you as a matter of law that the relationship of master and servant did not exist between Surpless and Miller, and no recovery can be had against the defendant Surpless on that theory.

9. The fact that Miller was operating the automobile at the time, when he did not have a driver's license, does not render the defendant Surpless liable to the plaintiff for the operation of the automobile, even though it was owned by Surpless, unless it appears that Miller was acting as the servant or agent of Surpless at the time of the accident, or unless it appears that the defendant Surpless knowingly permitted his automobile to

be operated by an inexperienced and incompetent driver. Since there is no evidence proving that Miller was operating the car as the agent and servant of the defendant Surpless, and upon the business of the said Surpless, and since it further appears that there is no evidence that he was an inexperienced or incompetent driver, your verdict must be for the defendant Surpless and against the plaintiff.

10. There is no testimony in this case that the defendant Surpless had knowledge that the defendant Miller knew nothing of the operation of an automobile. On the contrary the proof is uncontradicted that Miller did know how to operate an automobile, and had been operating one for years. There is no evidence that he was a beginner in the operation of an automobile. I therefore instruct you as a matter of law that no liability of the defendant Surpless can be predicated upon the fact that his automobile was being operated by an unlicensed driver.

REQUESTS TO CHARGE OF THE DEFENDANTS OLIVER SURPLESS AND STAFFORD MILLER.

11. The fact that the automobile of the defendant Surpless was being operated by a driver who was not licensed will not charge either the owner or operator with liability for injury or damage caused by its operation on the highway, where such omission of duty had no causal connection with the injury or damage.

12. The operation of a car by an unlicensed driver does not render the owner of the car or the operator thereof a trespasser and outlaw on the highway, and the owner of the car who permitted

it to be operated by an unlicensed driver would not be liable, neither would the driver for any injury caused by it irrespective of negligence in the operation of the car or of contributory negligence on the part of the injured, in this case, the plaintiff.

13. The fact that the car was being operated by a driver who had no driver's license is immaterial, unless the failure to have a driver's license is in itself a breach of duty resulting in injury to the plaintiff.

14. In this case there is no proof that the failure of the driver to possess a driver's license contributed to or caused the accident. It was merely a condition attending the collision, not a cause of it. I therefore instruct you as a matter of law that liability on the part of the defendants Surpless and Miller cannot be predicated on the ground that Miller did not have a driver's license.

14. I further instruct you as a matter of law that no liability can be predicated on the failure of Miller to have a driver's license because there is no evidence that his failure to have a driver's license had any causal connection with the injury or damage suffered by the plaintiff.

15. The plaintiff cannot recover against the owner or the operator of the automobile merely because the driver did not have a driver's license unless the failure to have a driver's license was a proximate cause of the accident.

16. I charge you as a matter of law that the failure to have a driver's license was not a proximate cause of the accident, and therefore you cannot find any verdict against the defendants on that ground.

Defendant's Requests to Charge.

17. I instruct you as a matter of law that there is no evidence that the defendant Miller was an incompetent driver.

18. I instruct you as a matter of law that there is no evidence that the defendant Miller was an inexperienced driver.

19. If the plaintiff was guilty of contributory negligence then he cannot recover, and your verdict must be for the defendants.

20. If the defendant Miller was negligent and if the plaintiff Patterson was also negligent, and both of their negligences contributed to the happening of this accident, then the plaintiff cannot recover, and your verdict must be for the defendants.

21. The burden of establishing each and every part of the plaintiff's case rests upon him, and he must establish his case with respect to both liability and damages by the greater weight of the evidence. If he has failed so to do then your verdict must be for the defendants.

22. If the evidence is evenly balanced then the plaintiff cannot recover and your verdict then must be for the defendants.

23. Even if the defendant Miller was negligent, still if his negligence was not the proximate cause of this accident, the plaintiff cannot recover and your verdict must be for the defendants.

24. The plaintiff testified that he did not look to his right, which would be to the east, the direction from which Miller's car came, until he reached the center of the highway, and then he looked but once, and continued to cross the north-

erly half of Godwin Avenue, taking three or four steps without looking at all. In considering whether he was guilty of contributory negligence, you should consider whether a reasonably prudent person crossing the highway would have looked but once in the center of the highway, and not again, especially when the plaintiff testified that he had a view of only thirty-five or forty-five feet to his right when he looked in the center of the highway.

25. If you find tht any witness has intentionally testified falsely in any material respect then you have a right to disbelieve his entire testimony, because you have the right to conclude that if he intentionally testified falsely in one particular, he might intentionally testify falsely in many particulars. You have a right to conclude that he is not entitled at your hands to any credit.

26. In weighing the testimony of the witnesses, you have a right to consider the interest that they have in the outcome of the case. The plaintiff is very much interested because he is seeking a verdict at your hands. Likewise the defendants are interested parties. Outside witnesses who testified should also have their credibility weighted at your hands to determine how much credit you should give to each witness.

27. The fact that counsel for the defendants made a motion addressed to me for a direction of verdict in their favor should not be considered by you in arriving at your verdict. Neither should my denial of that motion. Neither have any weight and should be given none in your consideration of the facts. That motion and my decision upon it was addressed merely to the law and not

to the facts. I did not decide any of the facts. The reason I denied that motion was that I thought a jury question was presented instead of a law question for me to pass upon. You have a right to bring in a verdict in favor of both defendants notwithstanding my denial of that motion if you conclude that there is no liability.

28. The amount for which the plaintiff has sued is not a criterion as to the amount that he may be entitled to, if any. That is merely a limit placed by the attorney who brought the suit on the amount of damages asked, beyond which you cannot go. It is for you to say if you come to the question of damages how much, if anything, you should give and the amount sued for should not be a guide or criterion as to how much you should give. That should be based solely on the testimony which you believe and which is supported by the greater weight of the evidence.

29. This suit is not against an insurance company. The only parties to this suit are the plaintiff William L. Patterson, Jr., and the defendant Oliver Surpless and defendant Stafford Miller. There is no proof in this case that either the defendant Surpless or the defendant Miller is insured. To give a verdict on the theory that either defendant is insured would be most unfair, unjust and detrimental to the interests of the defendants, as well as contrary to your oaths as jurors and my charge to you as to the law that is to govern you in reaching your verdict. Even assuming that the defendants were insured. That fact gives you no right to bring in a verdict against them. It has no bearing in this case at all. The

very fact that you may bring in a verdict against these defendants might destroy any insurance that they may have. You do not know. Neither do I. You do not know the amount of the insurance or whether it will cover an accident or whether it will not. In this case, for instance, the very fact that Miller was driving without a license might prevent any insurance from covering this accident. Dismiss entirely from your minds the question of any insurance, and decide this case solely on the rules of law which I have given you. Any verdict that you may render against the defendants or either of them will be against them personally and not against any one else.

30. There is no evidence of any permanent injury suffered by the plaintiff and you should therefore make no allowances on the theory that there is a permanent injury.

COLLINS & CORBIN,
Attorneys of Defendants.

SAERMAN PLACE

AVENUE

POMANDER WALK

GODWIN
TO MIDLAND PARK

AVENUE

DOREMUS
TO GLEN ROCK

1½ STORY BRICK
BUNGALOW

SCALE 1"=40'

Exhibit P-1.

March 2nd, 1927

In answer to summons writer appeared at the Recorders Court in Ridgewood at 9:00 o'clock, the morning of March 2nd, 1927 and was charged with violation of Motor Vehicle Act due to Stafford S. Miller of Ridgewood having driven a Ford Sedan the property of my daughter but registered in my name, thru Godwin Ave. on February 24th.

On Hon. Judge Van Buskirk's question regarding my answer to the charge I stated that I wished to express regret at the occurrance and stated that it was difficult to know how to plead as at the time of the occurrance I was absent and in Montreal, Canada for a week on business. I therefore felt that I was innocent of the charge, also would have supposed he had a license as before. The Judge thereupon stated I had at least given silent consent to the use of the car and while the violation was technical, he had had other similar cases and had assessed a fine of $50.00 which would apply in my case with costs. The writer thereupon paid the charges.

O. B. S.

Exhibit D-1.

(See map following.)

Exhibits D-2 to D-6.

(See photographs following.)

Exhibit D-7.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

WILLIAM L. PATTERSON, JR.,
Plaintiff,

v.

OLIVER SURPLESS and STAFFORD MILLER,
Defendants.

Transcript of stenographic notes of the testimony of William L. Patterson, Jr., the Plaintiff in the above entitled matter as taken at an examination before trial by William C. O'Brien, a Supreme Court Examiner of New Jersey, at the office of Arthur Dunn, Esquire, Romaine Building, Paterson, New Jersey, on the second day of March, A. D., 1929 at 11:15 A. M. in the forenoon in the presence of Arthur Dunn, Esquire, counsel for the Plaintiff and James Leonard, Esquire (Collins & Corbin, Esqs.), counsel for the Defendants.

It is stipulated and agreed by and between counsel for the respective parties that the examination be conducted without recourse to the statutory Court Order and the testimony of the witness be taken down stenographically and afterwards reproduced in typewriting, the signature of the witness to his said testimony being waived.

WILLIAM C. O'BRIEN,
Supreme Court Examiner of N. J.

Exhibits.

WILLIAM L. PATTERSON, JR., being duly sworn upon his oath by the Examiner, testifies as follows:

Direct examination by Mr. Leonard:

Q. What is your full name, Mr. Patterson? A. William Lawrence Patterson.

Q. Where do you live? A. Well, I live at 190 Rock Road, Glen Rock, New Jersey.

Q. How old are you? A. Thirty years.

Q. Do you remember the twenty-fourth day of February, 1927? A. Yes, sir.

Q. Is that the day you met with the accident? A. Yes, sir, it is.

Q. As the result of this accident you are suing Oliver Surpless and Stafford Miller through your attorney, Arthur C. Dunn? A. Yes, sir.

Q. Will you, in your own words and to your best recollection and memory tell us how the accident occurred? A. Why yes, at the time the accident took place I was living with my mother and father, my wife and I were living with my mother and father at the time, 99 Godwin Avenue, that is, just about directly across from the intersection of Doremus, and I called my wife on the 'phone about fifteen minutes before. We had an engagement that evening so in order to keep it I took a cab from Glen Rock and drove around Lincoln Avenue and came up Godwin in an easterly direction toward the Ridgewood Station. I stopped diagonally across the street from my father's house and he let me out and I paid him off and waited till he pulled away from the curb and started across the street. I didn't hear any signalling or anybody coming and it was a little dark and misty, I didn't see any lights of any approaching cars

or anything, I looked both ways and I didn't hear any signal of the approaching car by a horn or anything of that sort, and that is the last I remember.

Q. What was the condition of the weather that night? A. Well, it was a little dark, it would be something exactly the way this evening will be if it keeps up the same kind of weather till about seven o'clock, it would be the same kind of an evening.

Q. What time was it, do you remember? A. A little after seven.

Q. You say it was misty and raining, was it? A. Well, I wouldn't say exactly, it is a little too far back to say whether it was raining or not. In fact, the entire day, that is, in the afternoon anyhow—well, today is just remindful, the same kind of weather that that day was, it wasn't dry, moonlight and all the stars going, or anything like that. As I say I started to cross the street and I looked both ways and I didn't hear any warning or see any approaching cars of any sort.

Q. Do you remember where you were coming from that night? A. Yes, from my office in Glen Rock.

Q. Whereabouts did this accident happen? A. Right at the intersection of Doremus and Godwin.

Q. You say your father's home was on Godwin Avenue? A. Yes, diagonally across the street from where I got out of the cab.

Q. This other car that is supposed to have hit you, came up Godwin Avenue, in which direction? A. I haven't the slightest idea where it came from, all I can say is from the direction I was headed when the carcas was picked up, it must have been coming from the Ridgewood Station.

Q. Were there many cars on the road that night, do you remember? A. Not that I saw, no.

Q. As far as you know the car that you came in which was a taxi, as I understand— A. Yes, it was a taxi.

Q. That was the only car on the road as far as you remember? A. That was the only one I noticed, yes, I won't say it was the only one on the road but it was the only one that I noticed.

Q. To the best of your recollection? A. Yes.

Q. What are the lighting conditions around there, do you remember? A. There is just a small street light on the corner fastened on a telegraph pole, on the corner of Doremus and Godwin, and, of course, the street has the street lights along it every certain number of telegraph poles, but they are not over bright, by any manner of means.

Q. Is that the main street there, do you know? A. Yes, it is, there are two main streets there, Godwin and Franklin.

Q. Where is Franklin? A. About two blocks north of Godwin.

Q. Does Doremus Avenue, does that cross both sides of Godwin? A. No, Doremus Avenue is a south to north street and it runs into Godwin Avenue, you might say facing the house next to my father's house, on Godwin, and that is termination of it.

Q. Therefore, I believe Godwin runs east and west? A. Godwin runs east to west, yes.

Q. On what side does Doremus Avenue end up on? A. The southerly side.

Q. Is that the side that you got off on? A. That is the side that I got off on, yes, sir.

Q. And you would have to walk across the street? A. I would have had to walk across the

street to get to my father's house, that is, my father's house is on the northerly side, facing south.

Q. Right near the corner? A. Yes, it is right diagonally across the street from the corner of Doremus and Godwin.

Q. Do you remember where this taxi drew up? A. Yes, right in front of Mr. Ayre's house. His is on the diagonal corner.

Mr. Dunn: Designate Mr. Ayre's house by the corner.

A. It would be the southwest corner.

Q. Do you know in what direction your taxi had come from, was it coming up east on Godwin Avenue? A. It was going east on Godwin.

Q. And you got off at the southwest corner? A. Yes, sir.

Q. Where did you say your father's house was? A. Right directly across the street, right over here (indicating).

Q. That would be northeast? A. Yes, that would be a northeasterly direction, yes.

Q. You say then the taxi drew right up to the corner? A. Yes, right in front of Mr. Ayre's house.

Q. That— In what way did you go then after you left the taxi? A. I paid him off and waited till he pulled around the corner and started across the street.

Q. In which direction, do you remember? A. Northerly direction, I was going across to my father's house so I would have to go in a northerly direction.

Q. Did you get across? A. No, I didn't get across, I started across the street.

Q. Are there cross roads there or pavements? A. Sidewalks?

Q. Yes. A. Oh yes, there are sidewalks there.

Q. From what you already stated I imagine that you walked directly north? A. Yes, I walked directly north after I got out of the cab.

Q. And then you would walk— A. Just turn and walk up to the corner of my father's lawn and go into the house then the way I have always gone into his place for the last twenty-five years. So there wouldn't be any reason I would change it that night.

Q. You don't remember being hit? A. No, sir. I remember getting out of the cab and starting across the street and after that everything is blank, I know nothing from then on.

Q. You didn't hear any warning of any kind? A. No, sir, not a bit, I didn't see any approaching light or hear any warning of any sort.

Q. When was the first time after this accident you remember anything? A. That is something I can't definitely say. As far as I can understand I was unconscious from between—well, it was twelve days or two weeks that I was unconscious, I couldn't say exactly. I may have come out for a couple of minutes or something like that.

Q. Then you will say you didn't know anything from the time of this accident until about two weeks later? A. About two weeks later would be a correct statement, I think.

Q. I presume you were in the hospital when you came to and realized where you were? A. Yes, I was in the Paterson General when I came to.

Q. How long did you stay there, do you remember? A. I would say it was around five or six weeks.

Q. Do you know what they treated you for there or do you remember what part of your body was

hurt? A. It would be a darn sight easier to tell you what part wasn't hurt than the parts were hurt.

Q. Well, give me the major injuries. A. Well, as far as Dr. Spickers told me, I don't know exactly, my pelvis bone was broken through here, front and back. He said both kidneys were filled with blood.

Mr. Dunn: Indicating near the center of the pelvis.

A. The left lung filled with blood, fractured skull, hemorrhage of the brain, broken nose, broken jaw, and fractured right arm.

Q. What doctor treated you, do you remember? A. Why as far as—I don't remember anything about the visit, but they say that Dr. Bonning of Ridgewood did something for me, that he got an ambulance to send me down to the Paterson General but after I got down to the Paterson General my mother and father wouldn't have anyone treat me but Dr. Wassing and Dr. Spickers.

Q. And they were your doctors right along? A. Right up until several months ago.

Q. I presume you paid the expenses in this case? A. I have with the exception of Dr. Spickers' bill.

Q. Can you give me an idea of what your expenses have been with reference to medical bills and expenditures along that line? A. Yes, I guess they are all included in there but this (indicating paper).

Q. What is not included you can give me an idea of what you haven't paid or what is due. A. Yes, I can do that.

Q. Give me an idea, say for instance, have you paid the hospital bill? Enumerate what that is?

A. Yes, I have trained nurses here, $268.00. I had a day and night nurse, while I was in the hospital and then I had to take one of the nurses home with me when I was moved up to my mother's home.

Q. Does that cover at the hospital and your home too? A. Yes, that would cover both.

Q. That is the total amount of expenditures of the four nurses? A. Well, no, that is the trained nurses, I had to have a practical nurse long after that, it cost me $75.00.

Q. Is that the final cost of that, practical nurse, $75.00? A. Yes, sir. Then I have $283.00 for the hospital.

Q. That is $283.00? A. $283.00, yes.

Q. Was that the final bill? A. Yes, that is the final bill for the hospital, and $468.00 for Dr. Spickers.

Q. Have you paid that bill? A. No, I haven't paid Dr. Spickers' bill, and I haven't paid Dr. Bonning's, yet, that is $25.00, Dr. Wassing's bill was $103.00, that is all paid, and Dr. Payne, $20.00. $15.00 for medicines, Cartage and use of a hospital bed, $20.00.

Q. Is that going up to the operating room? A. No, I had to take a hospital bed up to my home and use it up there. Is that all you want?

Q. Any expenditures at all? A. Well, then I had—I wouldn't want to say absolutely, it was four or five weeks, I think, at the hospital that Dr. Wassing sent me to down in New York.

Q. Give me an idea to the best of your recollection, to your memory. A. I couldn't tell you what the cost was, I know at the present time the bill as far as Dad is concerned is between thirty-four and thirty-five hundred dollars, that he has

been paying, my hospital bill and other bills for the simple reason I haven't been able up to several months ago to take care of any business at all, so he has probably got a better idea of what the actual expenses were than I have.

Q. This thirty-four hundred dollars you just stated, does that include—do you mean to say that covers all the hospital bills? A. Oh no, all those other things outside of Dr. Spickers' bill I took care of myself out of my own personal account. Arthur and I figured it up that my expenses with everything else outside of Dr. Spickers' bill, although we have Dr. Spickers' bill added in here, came to $1,697.00. That was my own personal expenditure.

Q. Well, you have an itemized statement to cover that $1,600.00? A. Yes, I have it right here.

Q. Well, did you give me all those figures there? A. Well, all except the nurses'. The nurses here, I have their actual salary down here, but I have to have the nurses' board.

Q. What was that? A. That would amount to $45.00. Then I have to have board and room for my wife and myself for eight weeks, that was $200.00.

Q. Well, we will come to those expenses later. What I want to get in this group is your medical expenses. A. I know in the hospital in New York it cost Dad $100.00 a week outside of the other attention I might have received there, outside of Dr. Wassing.

Q. How many weeks were you there? A. Between four and five, I wouldn't want to say absolutely, either a month or five weeks.

Q. You were a patient over in this hospital? A. Yes, I was a patient.

Q. What hospital was it? A. I haven't got the name of it now, it is a nerve hospital that Dr. Wassing sent me to, I have forgotten the name of it, it is up around 100th Street.

Q. How soon after you left the Paterson Hospital did you go to this New York Hospital? A. Oh, I would say it was around seven months afterwards because after I got out of the Paterson General Hospital I was around on crutches and a cane for about between five and six months, on crutches and a cane.

Q. And then after that time you went to— A. Then it was, I should imagine about two or three months, maybe a little longer, after that, that I went down to the Nerve Hospital in New York.

Q. Would that be in 1928 then?

Mr. Dunn: Where were you on Christmas, 1927, do you remember?

A. If I am not mistaken I was home.

Q. Then I guess that would bring you into 1928 you were in the hospital in New York? A. Yes, I guess it was, I have been in so darn many of them in the last two years that I am all bawled up as far as dates are concerned.

Q. When you left this hospital in New York was that the final hospital you were to? A. No, then I was still under treatment from Dr. Wassing and just about ten months ago he sent me up to Idle Ease Inn, up in Newfoundland.

Q. How long were you up there? A. If I am not mistaken I would say just about three months. I wouldn't say positively. I wouldn't want to make an absolute statement.

Q. What were the expenditures up there? A. If I am not mistaken, I may be wrong, I didn't

pay the bill up there, Dad took care of the bills entirely.

Q. Have you any idea? A. I imagine they were about the same as they were down at the other hospital, about $100.00 a week.

Q. After you came out of that hospital? A. After I came out of that hospital I laid around for about a month and then I have been endeavoring to do whatever I could possibly do to try and bring the two ends together.

Q. Do you remember the last time you were in a hospital? A. Do I remember the last time?

Q. Yes. A. You mean up at Idle Ease?

Q. Well, you were in a hospital some time last year, I believe? A. Yes, it was just about ten months ago, I was up at Idle Ease.

Q. Would that make that around May or June, do you remember? A. No, I think it was either—it was near or the middle of September when I left Idle Ease.

Q. Then from the time of this accident up until September of 1928, you have been in and out of more or less hospitals all the time during that time? A. Yes, I have, I have been under doctors' care most of the entire time.

Q. When you left the hospital in September did you go home? A. Yes.

Q. What was the condition of your health then? A. The doctor said everything was fine then.

Q. Were you able to get around without crutches or cane? A. Oh yes, I haven't had to use a crutch or a cane from about, well, about six months after I got out of the Paterson General Hospital.

Q. What was the condition of your health previous to this accident? A. Excellent.

Q. Do you remember the last time you were to a doctor? A. The last time I was to a doctor?

Q. I mean previous to this accident. A. Previous to this accident? I think the last time I was to a doctor was when I was in the army, I don't remember being to one since the time I got out of the service, up until this time, at least I can't remember of anything ailing me so I would have to go.

Q. Are you still taking treatments from doctors? A. No, sir, I am not, not now.

Q. Would you say that when you left this hospital in September and went home, is that the last time that you were under the treatment of doctors? A. Yes, sir, I would, that is the last time I have been under treatment.

Q. What is the condition of your health today? A. From all indications everything is fine, as far as I know and as far as the doctors say, as far as their statements go, everything is fine.

Q. To the best of your recollection and knowledge of the expenditures in this case offhand give me an idea of what you think you spent. A. Actually spent?

Q. Yes.

Mr. Dunn: For what purpose, just medical expenses?

Q. Yes, just medical expenses. A. Just the medical expenses?

Q. Yes. A. That would be a hard thing to figure out.

Mr. Dunn: Well, you can figure out what you probably paid yourself.

A. Well, I know what it actually cost me but I

couldn't say what it had actually cost Dad for medical expenses.

Q. Well, have you an idea, I just want a rough figure to work on. A. Well, I would say between Dad and myself, the medical expenses alone have cost us somewhere around $4,000.00.

Q. You think the total amount of your bill up to date has been around $4,000.00 for medical expenses? A. For medical attention, yes.

Mr. Dunn: That includes the hospital?

A. That includes the hospital, yes.

Q. That includes the X-rays and everything possible in the medical line? A. Along medical lines.

Q. Now, I believe you mentioned something about paying board for yourself and wife? A. Yes, I had to pay board and room, that was directly after I got out of the Paterson General Hospital, that was $200.00.

Q. That was while you were living at home? A. Home?

Q. That was while you were living at home? A. Yes.

Q. You have no children, have you? A. No, sir.

Q. At the time this accident occurred what business were you in or where were you employed? A. Real estate.

Q. Were you in business for yourself? A. Yes, sir.

Q. Where was your office, do you remember? A. 248 Rock Road, Glen Rock, it isn't there now but it was there at that time.

Q. How long were you in this business? A. Well, I had been in for myself at that time for about a year and a half.

Q. What would you figure that your weekly in-

come was? A. Well, I have never been in the real estate game, I made less than $6,000.00.

Q. Do you want to figure it around that basis that your whole income was around $6,000.00? A. It always has been, lots of times it has been over that, but I am taking the lowest figure of any that I made in the six years I have been in the game.

Q. The year and a half you were in that business and previous to that I am under the impression that you worked for someone else? A. Yes, I worked for other brokers before this.

Q. Are you employed at the present time? A. At the present time, yes, I have been employed. At the present time there is a reorganization going on and I don't know whether I am going to be in Philadelphia or New York but I have been employed by the United Motor Service in Philadelphia.

Q. How long have you been employed there? A. Just about three and a half months.

Q. Were you employed previous to this? A. No, sir, I wasn't.

Q. Three and a half months ago was the first time you were employed since this accident? A. Yes, sir, it is.

Q. What are you getting there? A. $200 a month.

Q. Are there any other expenditures that you know in this case? What about your clothes, were your clothes ruined that night? A. Yes, I will say they were, all my clothing were ruined. We figured it up to amount to $170.

Q. $170? A. Yes, that was the suit, overcoat, hat, shoes, etc.

Q. You say previous to this accident your health was—you were in good condition? A. Yes, sir, I was.

Q. Were you in an automobile accident previous to this one? A. Yes, I was in several.

Q. Were you injured? A. No, I didn't get hurt.

Q. Were you in an accident during 1928? A. 1928? No, sir.

Q. Were you examined by Dr. Boyne for the Erie Railroad? A. Dr. Bonning, you mean.

Q. Yes, is that his name? A. Yes, that wasn't an automobile accident. I slipped on a wet step down at the Jersey City Depot when I was getting on the Erie train and just made a small cut on my knee and made a small rip in my pants.

Q. Do you remember what part of the year that was? A. No, I don't, I didn't pay any attention to it, he came around actually as a surprise to me, I didn't even know it had been reported. The fellow down at the depot asked me for my card and I gave him my card, I didn't think anything about anyone coming around and he came around as a total surprise.

Q. Would you say that was around February, 1928? A. I wouldn't like to say because I didn't even pay enough attention to know what date it was.

Q. Right after this accident you were in no condition to know who helped you into the doctor's office or where you were taken or anything else? A. No, sir, I didn't know a thing about it.

Q. And you don't know whether any other car hit you after the first one hit you, do you? A. I don't know anything except when I started to cross the road, after that my memory is a blank until I woke up in the Paterson General Hospital.

Q. Previous to this accident you arrived there by taxi and you say you came from your office? A. Yes, I came from my office down in Glen Rock.

Q. Were you drinking that night? A. No, sir, I hadn't been drinking that day at all, I had something to drink the day before that but I hadn't anything to drink that night at all.

Q. Would you say you had a bottle with you, a bottle of liquor? A. Would I say I had a bottle?

Q. Yes. A. Not to my knowledge, no, I didn't have anything with me except the clothes on my back.

Q. In April of 1928 were you in the hospital at Hackensack? A. No, sir.

Q. Were you ever treated for delirium tremens? A. No, sir.

Q. At the present time you are not under the treatment of a doctor? A. No, sir.

Mr. Leonard: I think that's all.

Cross examination by Mr. Dunn:

Q. As to the permanent result of this accident, do you know, have you talked to the doctors about that at all? A. No, I haven't said anything to them except that Dr. Spickers and Dr. Wassing and probably five or six other doctors that have gone over me in the last eight or nine months and as far as I know everything is all right, I don't know of anything.

Q. They haven't made any report to you of any kind, have they? A. No, they haven't made any report to me at all.

Mr. Dunn: That's all.

Redirect examination by Mr. Leonard:

Q. You are not lame in any way, are you, as the result of this accident? A. No, I am not lame, I still have a sign back here where my two pelvis bones didn't match up exactly, outside of that—

Q. Does that interfere with your walking? A. No, it doesn't.

Q. Your nose is broken, I believe? A. Yes.

Q. Does that interfere with your breathing? A. I have never noticed anything, I don't know of anything.

Q. What about your kidneys, if I remember correctly you said something before about them being full of blood and your lung being full of blood. A. Since the accident from what Dr. Wassing said he was fortunate enough in some way or another to clear that up.

Q. And you have a broken arm? A. Just a fracture.

Q. How is that? A. That is all right, it isn't causing me any trouble.

Q. Does that injury to the pelvic bone, seeing that it is around your private, does that interfere with the cohabitation? A. Not that I know of, you never can tell that, I suppose.

Q. What would you say with reference to that? A. I don't know what to say, if you are talking about getting an erection I would say yes, but as far as any other results, I don't know.

Q. You can still do that? A. Yes.

Mr. Leonard: That's all.

Mr. Dunn: That's all.

I hereby certify that the foreging is a true and accurate transcript of testimony in the above entitled matter as taken stenographically by me at the time, place and date hereinbefore set forth.

WILLIAM C. O'BRIEN,
Supreme Court Examiner of N. J.

Exhibit D-8.

(Published by DEPARTMENT OF MOTOR VEHICLES.)

3/2/27. Defendant made statement, failing to plead "guilty" or "not guilty," but by reason of statement made was adjudged "guilty" and Fined $50.00 and costs $3.00.

COMPLAINT.

FOR VIOLATION OF SUBDIVISION 12 OF SECTION 14, CHAPTER 208, P. L. 1921.

STATE OF NEW JERSEY, PETER BOUMA, *Prosecutor,* *v.* OLIVER B. SURPLESS, *Defendant.*	D. L. 377248 C. L. B1301 N. J. COMPLAINT.

State of New Jersey, }
County of Bergen, } ss.:

Personally appeared before the subscriber, PETER BOUMA, (Police Officer), who being duly sworn according to law, on his oath says that on the 24th day of February, A. D. nineteen hundred and twenty-seven one OLIVER B. SURPLESS of 115 Prospect Street, of the Village of Ridgewood, in the County of Bergen, and State of New Jersey, did violate the provisions of subdivision twelve of section fourteen of an act of the Legislature of the State of New Jersey entitled, "An act defining motor vehicles and providing for the registration of the same and the licensing of the drivers thereof;

fixing rules regulating the use and speed of motor vehicles; fixing the amount of license and registration fees; prescribing and regulating process and the service thereof and proceedings for the violation of the provisions of the act and penalties for said violations," approved April eighth, A. D. nineteen hundred and twenty-one, in the following respect, to wit: that on said 24th day of February, A. D. nineteen hundred and twenty-seven said OLIVER B. SURPLESS was the owner of a motor vehicle registered as provided in the above mentioned act, and did on said 24th day of February, at Godwin Avenue, Ridgewood, in the County of Bergen and State of New Jersey, allow such motor vehicle to be operated by a non-licensed driver, to wit, by one STAFFORD S. MILLER of #108 Lincoln Avenue, of Ridgewood in the County of Bergen and State of New Jersey, contrary to and in violation of said subdivision twelve of section fourteen of said act and against the form of said statute.

Deponent therefore says that the said OLIVER B. SURPLESS has incurred the penalty of one hundred dollars and prays that the said OLIVER B. SURPLESS may be apprehended and dealt with according to law.

PETER BOUMA.

Sworn and subscribed before me this 28th day of February, A. D. nineteen hundred and twenty-seven.

WILLIAM VAN BUSKIRK,
Recorder.

Order of Substitution.

(Filed June 28, 1928.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

WILLIAM L. PATTERSON, JR.,
Plaintiff,

v.

OLIVER SURPLESS and STAFFORD MILLER,
Defendants.

Action at Law.
Order of Substitution.

Upon the annexed consent of Messrs. Collins & Corbin, attorneys of record of the defendant, Stafford Miller:

It is on this 28th day of June, 1929, ORDERED that Howard F. McIntyre be and he hereby is substituted as the attorney of record of the defendant, Stafford Miller.

Rule actually entered this 28th day of June, 1929.

On Motion of
HOWARD F. MCINTYRE,
Attorney of Defendant, Stafford Miller.

We consent to the entry of the above order.

COLLINS & CORBIN.

Rule for Judgment.

(Entered July 8, 1929.)

This case was tried before Judge Edwin C. Caffrey, to whom the same was referred by the Supreme Court Justice presiding, with a jury at the Bergen Circuit on June 24th and 25th, 1929.

The jury rendered a general verdict against both of the defendants and in favor of the plaintiff, for five thousand dollars ($5,000).

Whereupon it is adjudged that the plaintiff William L. Patterson, Jr., do recover of the said defendants Oliver Surpless and Stafford Miller the sum of Five Thousand Dollars damages together with his costs which have been taxed at the sum of Seventy-four dollars making in the whole the sum of Five thousand and seventy-four dollars.

$5,000.00	
74.00	
$5,074.00	

Judgment signed and entered July 8, 1929.

WM. S. GUMMERE,
C. J.

Judgment.

(Entered July 8, 1929.)

NEW JERSEY SUPREME COURT.

WILLIAM L. PATTERSON, JR.,
Plaintiff,

v.

OLIVER SURPLESS and STAFFORD MILLER,
Defendants.

Action at Law.
Judgment on Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of five thousand dollars, besides costs to be taxed *nisi*.

Entered July 8, 1929.

On motion of

ARTHUR C. DUNN,
Attorney.

$5,000.00	
74.00	
$5,074.00	

Notice of Appeal of Oliver Surpless.

(Filed July 15, 1929.)

NEW JERSEY SUPREME COURT.

WILLIAM L. PATTERSON, JR., *Plaintiff,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law. Notice of Appeal.

To—ARTHUR C. DUNN,
Attorney of Plaintiff.

TAKE NOTICE that the defendant, Oliver Surpless, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated June 29, 1929.

Respectfully yours,

COLLINS & CORBIN,
Attorneys of Defendant Oliver Surpless.

Service acknowledged July 8, 1929.

ARTHUR C. DUNN,
Attorney of Plaintiff.

Notice of Appeal of Stafford Miller.

(Filed July 15, 1929.)

NEW JERSEY SUPREME COURT.

WILLIAM L. PATTERSON, JR., *Plaintiff,* v. OLIVER SURPLESS and STAFFORD MILLER, *Defendants.*	Action at Law. Notice of Appeal.

To—ARTHUR C. DUNN,
Attorney of Plaintiff.

TAKE NOTICE that the defendant, Stafford Miller, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated June 29, 1929.

Respectfully yours,

HOWARD F. MCINTYRE,
Attorney of Defendant Stafford Miller.

Service acknowledged July 8, 1929.

ARTHUR C. DUNN,
Attorney of Plaintiff.

Grounds of Appeal of Oliver Surpless.

(Filed August 27, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM L. PATTERSON, JR., *Plaintiff-Respondent,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants-Appellants.*	Action at Law. Grounds of Appeal of the Defendant-Appellant, Oliver Surpless.

The appellant, Oliver Surpless, states the following grounds of appeal:

1. The trial court refused to direct a mistrial when thereunto moved, although said mistrial should have been directed because counsel for the plaintiff asked the jurors, as the jury was being drawn, the following question:

> "Mr. Breslin: Are any of the members of the jury as it is now constituted, stockholders in the Standard Accident Insurance Company?"

2. The trial court refused to strike out the conversation of the witness, Susan B. Conners, as follows:

> "I looked up the street and I said to my son, 'Look at that car coming down.'"

3. The trial court admitted the following question to the witness Arthur C. Dunn:

"Q. Did or did not this police officer say to you that Miller admitted to him the night of the occurrence that he had struck Patterson and that he did not see him until he struck him?"

4. The trial court struck out the answer "no" to the following question: "Q. Were you insured?" addressed to the witness Stafford Miller.

5. The trial court admitted the following question to the witness Oliver Surpless:

"Q. If you considered yourself innocent and you were forced to pay a fine, why did you not appeal the case to a higher court?"

6. The trial court admitted the following question to the witness Oliver Surpless:

"Q. Now, this Ford car was a family car, was it not, for the convenience of the family?"

7. The trial court refused to direct a verdict in favor of the defendant-appellant, Oliver Surpless, when thereunto moved, whereas said motion should have been granted for one or more of the following reasons urged in support thereof:

"First, on the ground that the automobile in this accident was not operated by him or by his agent and servant, acting within the scope of his employment by Mr. Surpless;

Second, on the ground that said automobile was operated by the defendant Stafford Miller upon his own business, and not on any business for Mr. Surpless;

Third, on the ground that the relationship of master and servant did not exist as be-

tween Mr. Surpless and Mr. Miller, the defendant, at the time of this accident; that, on the contrary, the evidence is uncontradicted, at the most, the very most, that Mr. Miller merely had permission to use the car;

Fourth, I move for a direction of a verdict in favor of Mr. Surpless, on the ground that the doctrine of the case of *Wilson* v. *Brouer,* 97 N. J. L., 482, does not apply to this case, because there the unlicensed driver was inexperienced and had no knowledge as to the operation of an automobile, to the knowledge of the owner thereof; and the theory of that case was based on the knowledge of the owner, that he was permitting his automobile to be operated by a person who had never driven an automobile, had no knowledge as to the driving of it, and who was to use it for the purpose of learning how to drive;

Fifth, I move for the direction of a verdict in favor of Mr. Surpless on the ground that at the time of this accident the plaintiff Patterson was guilty of contributory negligence as a matter of law;

Sixth, on the ground that Patterson is guilty of contributory negligence as a matter of law because he admitted that he only looked once in the center of the highway and did not again look to his right, the direction from which the vehicular traffic was coming, although he says he took either four or five steps from the center of the road toward the north."

8. The trial court charged the jury:

"And he is also claiming permanent injury, I believe, on the theory of nervousness. There is testimony that prior to this accident he suffered somewhat as the result of being gassed, and shell shock. While a defendant is only responsible for such damages as his act can be looked upon as being the proximate cause of, yet if there be a disease or a condition which has been aggravated by the negligence of a defendant, of course that aggravation is the proper matter for consideration by you."

9. The trial court charged the jury:

"We have heard very little from the plaintiff himself with respect to the accident. I think he testified that he alighted from the taxicab and proceeded to cross to his father's home, where he resided. He said he looked to the left before he left the sidewalk, or the curb, and then proceeded to the center, and then took some steps beyond that, and looked to his right. He said he did not see the automobile, and then he was struck. He really does not know very much about the accident."

10. The trial court charged the jury:

"So, therefore, looking at this case, you must look to all of the evidence to determine whether or not an act of negligence has been committed by the driver of this car."

11. The trial court charged the jury:

"What was he doing for Mr. Surpless? What was he doing with the knowledge of

Mr. Surpless? Now there is no evidence in the case with respect to that, other than the testimony of both defendants, as they have testified that the car was taken out of this garage without permission, or even acquiescence, on the part of Mr. Surpless, and that there was nothing being done for Mr. Surpless by Mr. Miller.

There is in this case another factor, which I might say was the only factor which was the one that guided me in permitting you to pass upon the question of Mr. Surpless's liability at all. That related to the hearing at the police court. The complaint against Mr. Miller has been offered in evidence by consent. Of course, the fact that he was convicted is not at all conclusive on you as being evidence of the negligence or the liability on the part of Mr. Surpless. What presented a conflict of testimony to Mr. Surpless's liability was the variance between the testimony of Mr. Surpless, Recorder Van Buskirk, and Mr. Dunn. There was offered in evidence by consent too, a memorandum written by Mr. Surpless with respect to his course of conduct relating to the use of his car. In addition to that Mr. Dunn testified that Mr. Surpless said, after hearing the accusation read against him, that he permitted the use of this car by an unlicensed driver, that he was technically guilty; and I permitted this case to go to you, with respect to Mr. Surpless, because that raised a fact question.

In other words, we distinguish between a conviction and an admission of the fact.

Now, he said Mr. Surpless admitted he was technically guilty of the accusation, and that accusation was that the driver of this car drove without a license. Then you have as against the testimony of Mr. Dunn the testimony of Mr. Surpless and the testimony of Recorder Van Buskirk. Mr. Surpless, I think, said he made no such statement, and I think Mr. Van Buskirk said he had no recollection of it. So, of course, as to what was said being in evidence in this case, and being a fact question, you must decide it.

If you conclude, keeping in mind the test that I laid down with regard to the rule of master and servant from the evidence, that there was no relationship here, if you feel that there was no authorization, no permismission, either expressly or impliedly, or any of the other elements that I have pointed out, then, of course, you ought to render a verdict in favor of Mr. Surpless."

12. The trial court charged the jury:

"He is charged with negligence by reason of his own course of conduct. What did he do that was negligent? What did he do with respect to that affirmatively or by an omission? What did he do with respect to driving the car, or did he fail to do anything, under the circumstances? Considering all of that can you spell out negligence?

13. The trial court charged the following request of the plaintiff:

"The third: '3. In all cases in which any person undertakes or authorizes the

performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons known or unknown, the law *ipso facto* imposes as a public duty the obligation to exercise such care and skill.

It is true we believe that automobiles are not generally held to be dangerous instrumentalities *per se*, certainly when carefully and intelligently handled they are not usually dangerous to other persons using public highways with due care. But their great power, weight and speed endow them with dangerous potentialities and when not handled carefully by competent persons they become, under certain conditions, highly dangerous instrumentalities and a public menace.' "

14. The trial court charged the following request of the plaintiff:

"4. Now the Motor Vehicle Act, in one of its provisions, provides that:

'No person shall hereafter drive an automobile or motorcycle upon any public highway in this State unless licensed to do so in accordance with the provisions of this act * * * nor shall any person be licensed to drive automobiles until such person shall have passed satisfactory examination as to his ability as an operator, which examination shall include a test of the knowledge on the part of said person of such portions of the mechanism of automobiles as is necessary in order to insure the safe operation of a vehicle of the kind or kinds indicated by the applicant.' "

Grounds of Appeal of Oliver Surpless.

15. The trial court charged the following request of the plaintiff:

"5. Another provision of the Act (this is No. 5 of the requests):

'No person owning a motor vehicle registered as provided for in this act shall allow such vehicle to be operated by a non-licensed driver.'"

16. The trial court charged the following request of the plaintiff:

"6. Danger, reasonably foreseen at the time of acting, is the established test of negligence. It is precisely upon this element of discoverable danger that public statutes or ordinances act. When the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned 'the ordinary prudent man' and through him the defendant in a civil action whose conduct must always coincide with this common law criterion. Such danger therefore does not have to be proved by the plaintiff since there is no longer room for a reasonable difference of opinion for by his breach of the statute the defendant through his common law conscience is charged with knowledge that if injury ensues, he will have acted at his peril."

17. The trial court charged the following request of the plaintiff:

"8. In places where houses are on the average less than 100 feet apart, pedestrians shall have the right of way over vehicles at any street crossing."

Grounds of Appeal of Oliver Surpless.

18. The trial court charged the jury:

"Now in this case, with respect to Mr. Miller, while it is true he had no license, there is evidence in the case that he had been driving an automobile and a motorcycle for some four or five years, and he had driven an Overland car. So you see, you have to consider this in determining whether or not he was a skillful driver.

As I said before, one of the allegations and one of the contentions raised by the plaintiff is that he was not a skillful driver, and that he was not a skillful driver to the knowledge of Mr. Surpless. Now, if you accept the testimony of the plaintiff, that he was not a skillful driver, as I said before, the mere fact that he did not have a license would not *per se* render him unskillful, nor would it *per se* render him negligent, because negligence must be established; and while the fact that he did not have a license spells a violation of the Motor Vehicle Act, and may be considered as a circumstance by you, that alone is not sufficient, unless you can say that his want of skill was the proximate cause of this man's injury."

19. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"1. In the complaint in this case the plaintiff alleges that the defendant, Oliver Surpless, carelessly and negligently permitted his automobile to be operated by his servant or agent, the defendant, Stafford Miller, an unlicensed driver contrary to the provisions of the Motor Vehicle Act of the State

of New Jersey. I instruct you that there is no testimony in this case that the defendant Oliver Surpless carelessly and negligently permitted his said automobile to be operated by Stafford Miller. The uncontroverted proof is that the defendant, Stafford Miller, had been operating an automobile for years, and had been licensed in the years prior to 1927 to operate an automobile, but that in 1927, on February 24, 1927, when this accident happened, he had not yet applied for or obtained his license to drive. There is no evidence that the defendant, Stafford Miller, was an incompetent or an inexperienced driver, or that he did not know how to operate an automobile. I therefore charge you that you cannot find the defendant Oliver Surpless liable in this case to the plaintiff because he carelessly and negligently permitted his said automobile to be operated by said Stafford Miller."

20. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"2. I instruct you that there is no testimony in this case that the defendant Oliver Surpless knowingly permitted his said automobile to be under the control and management of an unlicensed, incompetent and inefficient driver at the time of this accident."

21. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"3. I instruct you as a matter of law that there is no evidence in this case that the defendant Oliver Surpless knowingly permit-

ted his automobile to be under the control and management of an incompetent and inefficient driver at the time of this accident."

22. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"4. I charge you as a matter of law that the automobile of the defendant Oliver Surpless at the time and place of this accident was not a dangerous instrumentality."

23. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"5. I instruct you as a matter of law that there is no evidence in this case that the defendant Stafford Miller was acting for the defendant Oliver Surpless as his agent or servant."

24. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"6. I instruct you as a matter of law that you cannot find that at the time and place of this accident any relation of master and servant existed as between Oliver Surpless and the defendant Stafford Miller."

25. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"7. I charge you as a matter of law that the relation of master and servant did not exist between the defendant Oliver Surpless and the defendant Stafford Miller, and therefore you cannot find any verdict in favor of the plaintiff as against the defendant Oliver Surpless on the theory that the said car was being operated on the business

of the said Surpless or by his agent and servant for him."

26. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"8. The proof is uncontroverted in this case that the defendant Miller took the Ford automobile of the defendant Surpless from the latter's garage in Ridgewood, Bergen County, N. J., while the said Surpless was in Canada and while the daughter of Surpless was in school at New London, Conn. for the purpose of using it on the business of the said Miller and not on the business of the said Surpless, and that the said Miller did use it on his own business and was so using it at the time of the accident. He was not doing any act for the said Surpless or performing any service or employment for him at the time of the accident. I therefore charge you as a matter of law that the relationship of master and servant did not exist between Surpless and Miller, and no recovery can be had against the defendant Surpless on that theory."

27. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"9. The fact that Miller was operating the automobile at the time, when he did not have a driver's license, does not render the defendant Surpless liable to the plaintiff for the operation of the automobile, even though it was owned by Surpless, unless it appears that Miller was acting as the servant or agent of Surpless at the time of the accident, or unless it appears that the defendant

Surpless knowingly permitted his automobile to be operated by an inexperienced and incompetent driver. Since there is no evidence proving that Miller was operating the car as the agent and servant of the defendant Surpless, and upon the business of the said Surpless, and since it further appears that there is no evidence that he was an inexperienced or incompetent driver, your verdict must be for the defendant Surpless and against the plaintiff."

28. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"10. There is no testimony in this case that the defendant Surpless had knowledge that the defendant Miller knew nothing of the operation of an automobile. On the contrary the proof is uncontradicted that Miller did know how to operate an automobile, and had been operating one for years. There is no evidence that he was a beginner in the operation of an automobile. I therefore instruct you as a matter of law that no liability of the defendant Surpless can be predicated upon the fact that his automobile was being operated by an unlicensed driver."

29. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"12. The operation of a car by an unlicensed driver does not render the owner of the car or the operator thereof a trespasser and outlaw on the highway, and the owner of the car who permitted it to be op-

erated by an unlicensed driver would not be liable, neither would the driver for any injury caused by it irrespective of negligence in the operation of the car or of contributory negligence on the part of the injured, in this case, the plaintiff."

30. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"13. The fact that the car was being operated by a driver who had no driver's license is immaterial, unless the failure to have a driver's license is in itself a breach of duty resulting in injury to the plaintiff."

31. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"14. In this case there is no proof that the failure of the driver to possess a driver's license contributed to or caused the accident. It was merely a condition attending the collision, not a cause of it. I therefore instruct you as a matter of law that liability on the part of the defendants Surpless and Miller cannot be predicated on the ground that Miller did not have a driver's license."

32. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"14-A. I further instruct you as a matter of law that no liability can be predicated on the failure of Miller to have a driver's license because there is no evidence that his failure to have a driver's license had any causal connection with the injury or damage suffered by the plaintiff."

Grounds of Appeal of Oliver Surpless.

33. The trial court refused to charge the following request of the defendant, Oliver Surpless:

> "15. The plaintiff cannot recover against the owner or the operator of the automobile merely because the driver did not have a driver's license unless the failure to have a driver's license was a proximate cause of the accident."

34. The trial court refused to charge the following request of the defendant, Oliver Surpless:

> "16. I charge you as a matter of law that the failure to have a driver's license was not a proximate cause of the accident, and therefore you cannot find any verdict against the defendants on that ground."

35. The trial court refused to charge the following request of the defendant, Oliver Surpless:

> "17. I instruct you as a matter of law that there is no evidence that the defendant Miller was an incompetent driver."

36. The trial court refused to charge the following request of the defendant, Oliver Surpless:

> "18. I instruct you as a matter of law that there is no evidence that the defendant Miller was an inexperienced driver."

36-A. The trial court refused to charge the following request of the defendant, Oliver Surpless:

> "19. If the plaintiff was guilty of contributory negligence then he cannot recover, and your verdict must be for the defendants."

37. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"20. If the defendant Miller was negligent and if the plaintiff Patterson was also negligent, and both of their negligences contributed to the happening of this accident, then the plaintiff cannot recover, and your verdict must be for the defendants."

38. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"21. The burden of establishing each and every part of the plaintiff's case rests upon him, and he must establish his case with respect to both liability and damages by the greater weight of the evidence. If he has failed so to do then your verdict must be for the defendants."

39. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"22. If the evidence is evenly balanced then the plaintiff cannot recover and your verdict then must be for the defendants."

40. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"23. Even if the defendant Miller was negligent still if his negligence was not the proximate cause of this accident, the plaintiff cannot recover and your verdict must be for the defendants."

41. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"24. The plaintiff testified that he did not

look to his right, which would be to the east, the direction from which Miller's car came, until he reached the center of the highway, and then he looked but once, and continued to cross the northerly half of Godwin Avenue, taking three or four steps without looking at all. In considering whether he was guilty of contributory negligence, you should consider whether a reasonably prudent person crossing the highway would have looked but once in the center of the highway, and not again, especially when the plaintiff testified that he had a view of only thirty-five or forty-five feet to his right when he looked in the center of the highway."

42. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"26. In weighing the testimony of the witnesses, you have a right to consider the interest that they have in the outcome of the case. The plaintiff is very much interested because he is seeking a verdict at your hands. Likewise the defendants are interested parties. Outside witnesses who testified should also have their credibility weighted at your hands to determine how much credit you should give to each witness."

43. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"27. The fact that counsel for the defendants made a motion addressed to me for a direction of verdict in their favor should not be considered by you in arriving

at your verdict. Neither should my denial of that motion. Neither have any weight and should be given none in your consideration of the facts. That motion and my decision upon it was addressed merely to the law and not to the facts. I did not decide any of the facts. The reason I denied that motion was that I thought a jury question was presented instead of a law question for me to pass upon. You have a right to bring in a verdict in favor of both defendants notwithstanding my denial of that motion if you conclude that there is no liability."

44. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"28. The amount for which the plaintiff has sued is not a criterion as to the amount that he may be entitled to, if any. That is merely a limit placed by the attorney who brought the suit on the amount of damages asked, beyond which you cannot go. It is for you to say if you come to the question of damages how much, if anything, you should give and the amount sued for should not be a guide or criterion as to how much you should give. That should be based solely on the testimony which you believe and which is supported by the greater weight of the evidence."

45. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"29. This suit is not against an insurance company. The only parties to this suit are the plaintiff, William L. Patterson, Jr., and

the defendant Oliver Surpless and defendant Stafford Miller. There is no proof in this case that either the defendant Surpless or the defendant Miller is insured. To give a verdict on the theory that either defendant is insured would be most unfair, unjust and detrimental to the interest of the defendants, as well as contrary to your oaths as jurors and my charge to you as to the law that is to govern you in reaching your verdict. Even assuming that the defendants were insured. That fact gives you no right to bring in a verdict against them. It has no bearing in this case at all. The very fact that you may bring in a verdict against these defendants might destroy any insurance that they may have. You do not know. Neither do I. You do not know the amount of the insurance or whether it will cover an accident or whether it will not. In this case for instance, the very fact that Miller was driving without a license might prevent any insurance from covering this accident. Dismiss entirely from your minds the question of any insurance, and decide this case solely on the rules of law which I have given you. Any verdict that you may render against the defendants or either of them will be against them personally and not against any one else."

46. The trial court refused to charge the following request of the defendant, Oliver Surpless:

"30. There is no evidence of any permanent injury suffered by the plaintiff and you should therefore make no allowances on the theory that there is a permanent injury."

Grounds of Appeal of Oliver Surpless.

47. The trial court charged the following supplemental request of the plaintiff:

"'Even if the plaintiff was intoxicated, that by itself would not charge him with contributory negligence nor confer any right upon the driver of an automobile or any other vehicle to run him down. If the driver of a vehicle observes a drunken man in the street he is duty bound to exercise the same degree of reasonable care that he would in the case of a child or helpless person. Whether or not the plaintiff walked in front of the automobile is a jury question, and the jury in determining that question has a right to consider the credibility of the testimony of the driver and in that regard take into consideration the influence which might exert itself on his mind to shield himself from consequence which might ensue to his detriment by having caused the injuries to the plaintiff through excessive speeding of the car which he was operating.' Of course, with respect to that charge, we have no evidence in the case that the driver of this car knew that the plaintiff was under the influence of liquor or, in fact, knew he had anything to drink. The defendant Miller, if I recall it, testified only as to the condition of the breath of the plaintiff Patterson, and I think he said that he staggered. Now, whether these point to observations of intoxication on the part of the defendant, of course, you will have to decide that."

48. The trial court instructed the jury as follows:

"Speaking of contributory negligence, our Court of Appeals has said this:

'To disentitle the plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately contributed to defendant's negligence that caused his injury.'"

Dated August 27, 1929.

COLLINS & CORBIN,
Attorneys of Defendant-Appellant,
Oliver Surpless.

I consent to filing as within time.

ARTHUR C. DUNN,
Attorney of Plaintiff.

Grounds of Appeal of Stafford Miller.

(Filed August 27, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM L. PATTERSON, JR., *Plaintiff-Respondent,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants-Appellants.*	Action at Law. Grounds of Appeal of the Defendant-Appellant, Stafford Miller.

The appellant, Stafford Miller, states the following grounds of appeal:

1. The trial court refused to direct a mistrial when thereunto moved, although said mistrial

should have been directed because counsel for the plaintiff asked the jurors as the jury was being drawn, the following question:

> "Mr. Breslin: Are any of the members of the jury as it is now constituted, stockholders in the Standard Accident Insurance Company?"

2. The trial court refused to strike out the conversation of the witness, Susan B. Conners, as follows:

> "I looked up the street and I said to my son, 'Look at that car coming down.'"

3. The trial court admitted the following question to the witness Arthur C. Dunn:

> "Q. Did or did not this police officer say to you that Miller admitted to him the night of the occurrence that he had struck Patterson and that he did not see him until he struck him?"

4. The trial court struck out the answer "no" to the following question: "Q. Were you insured?" addressed to the witness Stafford Miller.

5. The trial court admitted the following question to the witness Oliver Surpless:

> "Q. If you considered yourself innocent and you were forced to pay a fine, why did you not appeal the case to a higher court?"

6. The trial court refused to direct a verdict in favor of the defendant-appellant, Stafford Miller when thereunto moved, whereas said motion should have been granted for the following reason urged in support thereof, to wit:

"The plaintiff Patterson was guilty of contributory negligence as a matter of law."

7. The trial court charged the jury:

"And he is also claiming permanent injury, I believe, on the theory of nervousness.

There is testimony that prior to this accident he suffered somewhat as the result of being gassed, and shell shock. While a defendant is only responsible for such damages as his act can be looked upon as being the proximate cause of, yet if there be a disease or a condition which has been aggravated by the negligence of a defendant, of course that aggravation is a proper matter for consideration by you."

8. The trial court charged the jury:

"We have heard very little from the plaintiff himself with respect to the accident. I think he testified that he alighted from the taxicab and proceeded to cross to his father's home, where he resided. He said he looked to the left before he left the sidewalk, or the curb, and then proceeded to the center, and then took some steps beyond that, and looked to his right. He said he did not see the automobile, and then he was struck. He really does not know very much about the accident."

9. The trial court charged the jury:

"So, therefore, looking at this case, you must look to all of the evidence to determine whether or not an act of negligence has been committed by the driver of this car."

Grounds of Appeal of Stafford Miller.

10. The trial court charged the jury:

"He is charged with negligence by reason of his own course of conduct. What did he do that was negligent? What did he do with respect to that affirmatively or by an omission? What did he do with respect to driving the car, or did he fail to do anything, under the circumstances? Considering all of that, can you spell out negligence?"

11. The trial court charged the following request of the plaintiff:

"4. Now the Motor Vehicle Act, in one of its provisions, provides that

'No person shall hereafter drive an automobile or motorcycle upon any public highway in this State unless licensed to do so in accordance with the provisions of this act * * * nor shall any person be licensed to drive automobiles until such person shall have passed satisfactory examination as to his ability as an operator, which examination shall include a test of the knowledge on the part of said person of such portions of the mechanism of automobiles as is necessary in order to insure the safe operation of a vehicle of the kind or kinds indicated by the applicant.'"

12. The trial court charged the following request of the plaintiff:

"6. Danger reasonably foreseen at the time of acting, is the established test of negligence. It is precisely upon this element of discoverable danger that public statutes

or ordinances act. When the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned 'the ordinary prudent man' and through him the defendant in a civil action whose conduct must always coincide with this common law criterion. Such danger therefore does not have to be proved by the plaintiff since there is no longer room for a reasonable difference of opinion for by his breach of the statute the defendant through his common law conscience is charged with knowledge that if injury ensues, he will have acted at his peril."

13. The trial court charged the following request of the plaintiff:

"8. In places where houses are on the average less than 100 feet apart, pedestrians shall have the right of way over vehicles at any street crossing."

14. The trial court refused to charge the following request of the defendant, Stafford Miller:

"12. The operation of a car by an unlicensed driver does not render the owner of the car or the operator thereof a trespasser and outlaw on the highway, and the owner of the car who permitted it to be operated by an unlicensed driver would not be liable, neither would the driver for any injury caused by it irrespective of negligence in the operation of the car or of contributory negligence on the part of the injured, in this case, the plaintiff."

Grounds of Appeal of Stafford Miller.

15. The trial court refused to charge the following request of the defendant, Stafford Miller:

> "13. The fact that the car was being operated by a driver who had no driver's license is immaterial, unless the failure to have a driver's license is in itself a breach of duty resulting in injury to the plaintiff."

16. The trial court refused to charge the following request of the defendant, Stafford Miller:

> "14. In this case there is no proof that the failure of the driver to possess a driver's license contributed to or caused the accident. It was merely a condition attending the collision, not a cause of it. I therefore instruct you as a matter of law that liability on the part of the defendants Surpless and Miller cannot be predicated on the ground that Miller did not have a driver's license."

17. The trial court refused to charge the following request of the defendant, Stafford Miller:

> "14-A. I further instruct you as a matter of law that no liability can be predicated on the failure of Miller to have a driver's license because there is no evidence that his failure to have a driver's license had any causal connection with the injury or damage suffered by the plaintiff."

18. The trial court refused to charge the following request of the defendant, Stafford Miller:

> "15. The plaintiff cannot recover against the owner or the operator of the automobile merely because the driver did not have a driver's license unless the failure to have a

driver's license was a proximate cause of the accident.

19. The trial court refused to charge the following request of the defendant, Stafford Miller:

"16. I charge you as a matter of law that the failure to have a driver's license was not a proximate cause of the accident, and therefore you cannot find any verdict against the defendants on that ground."

20. The trial court refused to charge the following request of the defendant, Stafford Miller:

"17. I instruct you as a matter of law that there is no evidence that the defendant Miller was an incompetent driver."

21. The trial court refused to charge the following request of the defendant, Stafford Miller:

"18. I instruct you as a matter of law that there is no evidence that the defendant Miller was an inexperienced driver."

22. The trial court refused to charge the following request of the defendant, Stafford Miller:

"19. If the plaintiff was guilty of contributory negligence then he cannot recover, and your verdict must be for the defendants."

23. The trial court refused to charge the following request of the defendant, Stafford Miller:

"20. If the defendant Miller was negligent and if the plaintiff Patterson was also negligent, and both of their negligences contributed to the happening of this accident,

then the plaintiff cannot recover, and your verdict must be for the defendants."

24. The trial court refused to charge the following request of the defendant, Stafford Miller:

"21. The burden of establishing each and every part of the plaintiff's case rests upon him, and he must establish his case with respect to both liability and damages by the greater weight of the evidence. If he has failed so to do then your verdict must be for the defendants."

25. The trial court refused to charge the following request of the defendant, Stafford Miller:

"22. If the evidence is evenly balanced then the plaintiff cannot recover and your verdict then must be for the defendants."

26. The trial court refused to charge the following request of the defendant, Stafford Miller:

"23. Even if the defendant Miller was negligent still if his negligence was not the proximate cause of this accident, the plaintiff cannot recover and your verdict must be for the defendants."

27. The trial court refused to charge the following request of the defendant, Stafford Miller:

"24. The plaintiff testified that he did not look to his right, which would be to the east, the direction from which Miller's car came, until he reached the center of the highway, and then he looked but once, and continued to cross the northerly half of Godwin Avenue, taking three or four steps without looking at all. In considering whether

he was guilty of contributory negligence, you should consider whether a reasonably prudent person crossing the highway would have looked but once in the center of the highway, and not again, especially when the plaintiff testified that he had a view of only thirty-five or forty-five feet to his right when he looked in the center of the highway."

28. The trial court refused to charge the following request of the defendant, Stafford Miller:

"26. In weighing the testimony of the witnesses, you have a right to consider the interest that they have in the outcome of the case. The plaintiff is very much interested because he is seeking a verdict at your hands. Likewise the defendants are interested parties. Outside witnesses who testified should also have their credibility weighted at your hands to determine how much credit you should give to each witness."

29. The trial court refused to charge the following request of the defendant, Stafford Miller:

"27. The fact that counsel for the defendants made a motion addressed to me for a direction of verdict in their favor should not be considered by you in arriving at your verdict. Neither should my denial of that motion. Neither have any weight and should be given none in your consideration of the facts. That motion and my decision upon it was addressed merely to the law and not to the facts. I did not decide any of the facts. The reason I denied that

motion was that I thought a jury question was presented instead of a law question for me to pass upon. You have a right to bring in a verdict in favor of both defendants notwithstanding my denial of that motion if you conclude that there is no liability."

30. The trial court refused to charge the following request of the defendant, Stafford Miller:

"28. The amount for which the plaintiff has sued is not a criterion as to the amount that he may be entitled to, if any. That is merely a limit placed by the attorney who brought the suit on the amount of damages asked, beyond which you cannot go. It is for you to say if you come to the question of damages how much, if anything, you should give and the amount sued for should not be a guide or criterion as to how much you should give. That should be based solely on the testimony which you believe and which is supported by the greater weight of the evidence."

31. The trial court refused to charge the following request of the defendant, Stafford Miller:

"29. This suit is not against an insurance company. The only parties to this suit are the plaintiff William L. Patterson, Jr., and the defendant Oliver Surpless and defendant Stafford Miller. There is no proof in this case that either the defendant Surpless or the defendant Miller is insured. To give a verdict on the theory that either defendant is insured would be most unfair, unjust and detrimental to the interests of the defend-

ants, as well as contrary to your oaths as jurors and my charge to you as to the law that is to govern you in reaching your verdict. Even assuming that the defendants were insured. That fact gives you no right to bring in a verdict against them. It has no bearing in this case at all. The very fact that you may bring in a verdict against these defendants might destroy any insurance that they may have. You do not know. Neither do I. You do not know the amount of the insurance or whether it will cover an accident or whether it will not. In this case for instance, the very fact that Miller was driving without a license might prevent any insurance from covering this accident. Dismiss entirely from your minds the question of any insurance, and decide this case solely on the rules of law which I have given you. Any verdict that you may render against the defendants or either of them will be against them personally and not against any one else."

32. The trial court refused to charge the following request of the defendant, Stafford Miller:

"30. There is no evidence of any permanent injury suffered by the plaintiff and you should therefore make no allowance on the theory that there is a permanent injury."

33. The trial court charged the following supplemental request of the plaintiff:

" 'Even if the plaintiff was intoxicated, that by itself would not charge him with contributory negligence nor confer any right

upon the driver of an automobile or any other vehicle to run him down. If the driver of a vehicle observes a drunken man in the street he is duty bound to exercise the same degree of reasonable care that he would in the case of a child or helpless person. Whether or not the plaintiff walked in front of the automobile is a jury question, and the jury in determining that question has a right to consider the credibility of the testimony of the driver and in that regard take into consideration the influence which might exert itself on his mind to shield himself from consequence which might ensue to his detriment by having caused the injuries to the plaintiff through excessive speeding of the car which he was operating.' Of course, with respect to that charge, we have no evidence in the case that the driver of this car knew that the plaintiff was under the influence of liquor or, in fact, knew he had anything to drink. The defendant Miller, if I recall it, testified only as to the condition of the breath of the plaintiff Patterson, and I think he said that he staggered. Now, whether these point to observations of intoxication on the part of the defendant, of course you will have to decide that."

34. The trial court instructed the jury as follows:

"Speaking of contributory negligence, our Court of Appeals has said this:

'To disentitle the plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately

contributed to defendant's negligence that caused his injury.'"

Dated August 27, 1929.

HOWARD F. MCINTYRE,
Attorney of Defendant-Appellant,
Stafford Miller.

I consent to filing as of time.

ARTHUR C. DUNN,
Attorney of Plaintiff.

New Jersey Court of Errors and Appeals

WILLIAM L. PATTERSON, JR., *Plaintiff-Respondent,* *v.* OLIVER SURPLESS and STAFFORD MILLER, *Defendants-Appellants.*	Action at Law. On Appeals from Supreme Court.

BRIEF IN BEHALF OF THE DEFENDANTS-APPELLANTS.

1.

Statement of the Case.

The appeals of the defendants bring before this Court for review a judgment of the Supreme Court in favor of the plaintiff and against the defendants in the sum of $5,000 and costs (p. 215) in an action wherein the plaintiff sought to recover damages for personal injuries sustained by him as a result of an automobile accident on February 24, 1927, in the Village of Ridgewood, Bergen County, New Jersey.

The plaintiff was crossing Godwin Avenue on foot walking from the south side to the north side of the street when he collided with the left front fender of a Ford automobile going in a westerly direction on Godwin Avenue. The automobile was operated by the defendant Miller and owned by the defendant Surpless.

The action was tried at the Bergen Circuit on June 24, 1929. At the close of the case counsel for the defendants moved for a direction of verdict in favor of each (pp. 154, 157). These motions were denied and exceptions noted (pp. 157, 158). During the course of the trial, certain exceptions were taken to the rulings of the trial judge; also exceptions were taken to the charge. The grounds of appeal bring up for review the rulings preserved by these various exceptions. This brief is submitted on behalf of both appellants. We shall hereinafter refer to the appellants as defendants and to the respondent as plaintiff.

2.

Grounds of Appeal.

The principal ground urged in support of a reversal for the defendant Surpless is that he was not responsible for the operation of the automobile at the time of the accident. The car was taken from the garage at the rear of his residence in Ridgewood by the other defendant, Miller, for the latter's own purposes and he was operating it on his own business at the time. While the defendant Miller was engaged to the daughter of the defendant Surpless, the daughter was away at college, Surpless was in Canada on business and Miller obtained neither the consent nor the permission of any member of Surpless's family to use the car. Miller had not driven it on previous occasions. He took it without the knowledge of Surpless or anyone authorized to speak for him. Miller was an experienced driver, having operated automobiles for many years.

The second ground upon which reversal is sought applies to both defendants, namely, that the plaintiff Patterson, who admittedly had a num-

ber of drinks of whiskey, was guilty of contributory negligence as a matter of law. His testimony shows that he failed to look to his right, the direction from which the automobile came, at any time after he left the center of the street, but, on the contrary, he looked straight ahead and did not know what he came in contact with until he came to after the accident. Although he had a splendid view to the right he at no time saw the automobile, which demonstrates that he either did not look, or, if he looked, he did so negligently.

The other grounds of appeal can be readily ascertained by referring to the filed grounds of appeal in the record. Some of those grounds will not be argued and may, therefore, be regarded as abandoned (pp. 219, 239).

3.

BRIEF OF THE ARGUMENT.

I.

The trial court should have directed a verdict in behalf of the defendant Oliver Surpless on the ground that the relation of *respondeat superior* did not exist between him and the defendant Miller.

This ground was urged in support of the motion for a direction of verdict in various forms as follows (p. 154, line 40, to p. 155, line 35):

> Mr. Markley: If your Honor please, I respectfully move for a direction of a verdict in favor of the defendant, Oliver Surpless, on the following grounds:
>
> "First, on the ground that the automobile in this accident was not operated by him or by his agent and servant, acting within the scope of his employment by Mr. Surpless;

"Second, on the ground that said automobile was operated by the defendant Stafford Miller upon his own business, and not on any business for Mr. Surpless;

"Third, on the ground that the relationship of master and servant did not exist as between Mr. Surpless and Mr. Miller, the defendant, at the time of this accident; that, on the contrary, the evidence is uncontradicted, at the most, the very most, that Mr. Miller merely had permission to use the car;

"Fourth, I move for a direction of a verdict in favor of Mr. Surpless, on the ground that the doctrine of the case of Wilson *v.* Brouer, 97 N. J. L. 482, does not apply to this case, because there the unlicensed driver was inexperienced and had no knowledge as to the operation of an automobile, to the knowledge of the owner thereof; and the theory of that case was based on the knowledge of the owner, that he was permitting his automobile to be operated by a person who had never driven an automobile, had no knowledge as to the driving of it, and who was to use it for the purpose of learning how to drive."

Exception was duly noted to the refusal of the trial judge to direct a verdict (p. 157, line 35). This exception is preserved in the seventh ground of appeal (p. 220, line 25, to p. 221, line 25).

The defendant Stafford Miller, the operator of the car, testified it was a Ford Sedan which he had taken from the garage in the rear of the home of the defendant Surpless at 115 Prospect Street in the Village of Ridgewood (p. 63, line 30, to p. 64, line 10).

On February 23, 1927, the evening before the accident, he took the car without asking Mr. Surpless or anyone connected with him for authority or permission to do so. He had never used this car before and never had previous permission to use it or drive it. He had a car of his own which was

not in running order on February 23, 1927. The garage was not locked; neither was the Ford. He was no relation to Mr. Surpless, but was engaged to marry his daughter, the engagement having existed for a month at the time of the accident. Mr. Surpless was not at home at the time of the accident, but away on a business trip. His daughter, to whom Miller was engaged, was in New London, Connecticut, as a student at the Connecticut College. Miller had neither her permission nor Surpless's to use the car (p. 64, line 10, to p. 65, line 30).

After taking this Ford Sedan on the night of February 23, 1927, Miller used it on his own business and then parked it in the driveway of his own home until the next morning. He then drove it to the railroad station at Ridgewood, parked it at the station and went to his place of business in New York (p. 65, line 35, to p. 66, line 10). Upon his return in the evening to the Erie Railroad station at Ridgewood he again got in the Ford and was operating it on his way to his home when the accident happened (p. 66, lines 10-20). At no time had he transacted any business of any kind for the defendant Surpless, the owner of the car (p. 66, lines 20-25).

Miller had been a licensed automobile operator for four or five years previous to the accident, but in 1927, on February 24th, when this accident happened, he had not yet applied for or obtained his license (p. 79, lines 15-25). Miller testified on cross examination that he had taken the automobile from the garage without the owner's consent (p. 80, line 20). He had ridden in this Ford car on previous occasions, but it was always operated by Miss Surpless (p. 80, lines 20-30). He did not even communicate with the defendant Surpless before taking the car (p. 80, line 30). The Ford car was

in very good condition, according to Miller, and the brakes were in good order (p. 80, line 30). When Miller took the car from the garage he did not light the garage lights, although he turned on the headlights of the car. The car was not locked (p. 90, lines 20-30).

The defendant Surpless testified that he had resided in Ridgewood, at 115 Prospect Street, for eighteen years. On February 24, 1927, he was in Montreal, Canada, on business and had been there about four or five days (p. 145, lines 20-30). His daughter, engaged to the defendant Miller, was at New London, Connecticut, at the Connecticut College for Women. She had returned there after the Christmas holidays at the beginning of 1927 (p. 145, lines 30-40). Mr. Surpless maintained two automobiles on his premises, one a Ford Sedan, and another, a Peerless car. Both were in the garage at the rear of his home. He operated these cars himself; likewise his daughter. He had never permitted either of his cars to be operated by anyone else. He had never given permission to Miller to operate either car, and he had never operated either car to the knowledge of Surpless. He had not been asked for permission by Miller to operate either car, either before or at the time of the accident. He knew nothing of the fact that Miller was going to take the car. He did not ask Miller to do any errand or any business for him. Surpless returned from Montreal the night following the accident and that was when he first heard of it. He knew that Miller had an automobile of his own and that he operated it. He had ridden with Miller in the latter's automobile on several occasions prior to the accident and had observed Miller's ability as a driver and he testified that Miller was a very careful driver. He knew that Miller had a license for four or five years prior to the accident

and did not know that Miller did not have any license for 1927. In riding with Miller he observed nothing that would indicate that he was inexperienced or incompetent. He knew that prior to operating automobiles, Miller had operated a motorcycle (p. 148, lines 1-20). Miller did not come to his house very often while his daughter was at college. When she was home from college he came about every other night (p. 150). Surpless' wife also operated an automobile (p. 150, lines 30-40). The Ford Sedan was purchased in the summer of 1924 and was in good condition. The brakes were in good condition (p. 154, lines 1-30).

Because of its importance, we are giving the testimony of Mr. Surpless verbatim, with respect to his denial of any authority or permission given to Miller to operate Surpless' automobile. It is uncontradicted and undisputed and is as follows (p. 146, line 10, to p. 148, line 20):

> Q. Now, did you have a Ford automobile in the garage on your property, where you resided? A. Yes, sir.
>
> Q. Did you have another car? A. Yes, sir.
>
> Q. What was that? A. A Peerless car.
>
> Q. Did you keep that also in your garage? A. Yes, sir.
>
> Q. Do you drive a car yourself? A. Yes, sir.
>
> Q. Did your daughter drive? A. Yes, sir.
>
> Q. Had you permitted either of those cars to be driven by anyone else? A. No, sir.
>
> Q. Had you ever permitted either the Ford or the Peerless to be driven by Miller? A. No, sir.
>
> Q. Had he ever driven it, to your knowledge, prior to this occasion? A. No, sir.
>
> Q. Now, did you give him permission to use the Ford car or the Peerless— A. No, sir.
>
> Q. —on this occasion, when this accident happened? A. No, sir.

Q. Did he ask you for your permission? A. No, sir.

Q. Were you there when he took the car out the night before the accident? A. I was in Montreal.

Q. Did you know he was going to take your car? A. No, sir.

Q. Did you ask him to perform any errand prior to the time you went away? A. No, sir.

Q. Or to take your car to go on any business for you? A. No, sir.

Q. When did you return from Montreal? A. The night of the—the night following the night of the accident.

Q. Was that the first you knew of it? A. Yes, sir.

Q. Did you know whether or not Miller operated an automobile? A. Yes, sir.

Q. Did he have one of his own? A. Yes, sir.

Q. Had you ever ridden with him in his automobile? A. Yes, several times.

Q. What kind was it? A. Overland.

Q. And had you observed his driving? A. Yes, sir.

Q. What kind of a driver was he? A. Very careful.

Q. How long had he driven an automobile, to your knowledge? A. I should say four or five years.

Q. And had he had a license in the year previous to this? A. Yes, sir.

Q. Did you know that he did not have a license for 1927? A. No, sir.

Q. In riding with him, had you observed any act of inexperience or incompetency? A. No, sir.

Q. Had he driven any other vehicle before he drove an automobile for four years prior to the accident? A. Yes. I remember he did drive a motorcycle before he drove an automobile.

The foregoing is a summary of all of the testimony in the case with respect to the point that

Miller had no permission or authority of any kind to operate the Ford Sedan of Surpless. Mere permission or authority to use the car would not be sufficient to charge Surpless with liability on the theory of *respondeat superior,* unless the automobile was being operated on the business of Surpless. It is also undisputed and uncontradicted that it was not being operated by Miller on any business of Surpless. The law is settled that under such circumstances there is no liability on the part of the owner of the automobile to respond in damages to a third person even though the automobile may have been operated negligently by the driver.

Evers v. *Krouse,* 70 N. J. L. 653;
Doran v. *Thompsen,* 76 N. J. L. 754;
Jennings v. *Okin,* 88 N. J. L. 661;
Cronecker v. *Hall,* 92 N. J. L. 453;
Karas v. *Burns Bros.,* 94 N. J. L. 62;
Mahan v. *Walker,* 97 N. J. L. 304;
Okin v. *Essex Sales Co.,* 103 N. J. L. 218; affirmed on the opinion below, 138 Atl. 922;
Armstrong Rubber Co. v. *Erie,* 103 N. J. L. 579.

The trial court conceded that there was no evidence of agency or of the relationship of *respondeat superior,* unless it was to be inferred from the fact that the plaintiff's attorney, Arthur Dunn, testified that in the Recorder's Court of the Village of Ridgewood, Surpless stated that he was technically guilty of permitting his automobile to be operated by an unlicensed driver. The trial court said (p. 157, line 35):

> "In this very narrow question which presents itself to me, I will have to deny your motion (for a direction of verdict)."

Likewise, in his charge to the jury on the question of relationship of master and servant existing between Surpless and Miller, the trial court said (p. 161, line 20, to p. 164, line 30):

> Mr. Surpless was in Canada, according to the testimony, and there is no evidence to contradict that. There is no proof in the case that he was in this car or anywhere near it at the time of the accident. He is charged as a defendant because he was the owner of the car, and, under the law, proof of ownership of an automobile raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then his servant, the driver, and that such driver was acting within the scope of his employment. However, that is merely a presumption, which can be rebutted by testimony; and you have heard the evidence, and of course it is for you to say whether or not the presumption that has been raised by force of law has been rebutted, from the testimony.
>
> Mr. Miller testified that the night before the accident he went to the garage of Mr. Surpless, and he took this car; that he took it without permission or consent of Mr. Surpless or anyone in his family. I think the testimony was, by some of the witnesses, that this car was for the use of Mr. Surpless' daughter, and I think he himself testified that it was a family car. So, therefore, in order to fix liability upon Mr. Surpless you must find from the evidence that there was some relationship between Mr. Surpless and Mr. Miller, of which I will speak later, which put him in the relationship of master and servant. By that we mean, doing something on behalf of or for Mr. Surpless.
>
> The upper courts of our State have said, speaking of the relationship of master and servant as to third persons:
>
> "It is not essential that any actual contract should subsist between the parties or that compensation should be expected by the ser-

vant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either expressed or implied. 'The real test as to third persons, * * * is whether the act is done by one for another, * * * with the knowledge of the person sought to be charged as master with his assent, expressed or implied, even though there was no request on his part to the other to do the act in question.'"

So in order to hold Mr. Surpless we must come squarely within that rule.

"What was he doing for Mr. Surpless? What was he doing with the knowledge of Mr. Surpless? Now, there is no evidence in the case with respect to that, other than the testimony of both defendants, and they have testified that the car was taken out of his garage without permission, or even acquiescence, on the part of Mr. Surpless, and that there was nothing being done for Mr. Surpless by Mr. Miller.

There is in this case another factor, ***which I might say was the only factor which was the one that guided me in permitting you to pass upon the question of Mr. Surpless' liability at all.*** That related to the hearing at the police court. The complaint against Mr. Miller has been offered in evidence by consent. Of course, the fact that he was convicted is not at all conclusive on you as being evidence of the negligence or the liability on the part of Mr. Surpless. What presented a conflict of testimony to Mr. Surpless' liability was the variance between the testimony of Mr. Surpless, Recorder Van Buskirk, and Mr. Dunn. There was offered in evidence by consent too, a memorandum written by Mr. Surpless with respect to his course of conduct relating to the use of his car. In addition to that Mr. Dunn testified that Mr. Surpless said, after hearing the accusation read against him, that he permitted the use of this car by an unlicensed driver, that he was technically guilty; and I

permitted this case to go to you, with respect to Mr. Surpless, because that raised a fact question.

In other words, we distinguish between a conviction and an admission of the fact. Now, he said Mr. Surpless admitted he was technically guilty of the accusation, and that accusation was that the driver of this car drove without a license. Then you have as against the testimony of Mr. Dunn the testimony of Mr. Surpless and the testimony of Recorder Van Buskirk. Mr. Surpless, I think, said he made no such statement, and I think Mr. Van Buskirk said he had no recollection of it. So, of course, as to what was said being in evidence in this case, and being a fact question, you must decide it.

If you conclude, keeping in mind the test that I laid down with regard to the rule of master and servant, from the evidence, that there was no relationship here, if you feel that there was no authorization, no permission, either expressly or impliedly, or any of the other elements that I have pointed out, then, of course, you ought to render a verdict in favor of Mr. Surpless."

The complaint in the Recorder's Court is Exhibit D-8 (p. 212). In it, the complaint made against Surpless was as follows (p. 213, lines 10-25):

> that on said 24th day of February, A. D. nineteen hundred and twenty-seven said OLIVER B. SURPLESS was the owner of a motor vehicle registered as provided in the above mentioned act, and did on said 24th day of February, at Godwin Avenue, Ridgewood, in the County of Bergen and State of New Jersey, *allow* such motor vehicle to be operated by a non-licensed driver, to wit, by one STAFFORD S. MILLER of #108 Lincoln Avenue, of Ridgewood in the County of Bergen and State of New Jersey, contrary to and in violation of said subdivision twelve of section fourteen of said act and against the form of said statute.

The recorder noted on the original complaint (p. 212, lines 1-10) that Surpless made a statement, but failed to plead "guilty" or "not guilty" but by reason of statement made, was adjudged "guilty." The recorder, William Van Buskirk, was called as a witness by the plaintiff and testified that Surpless said in the Recorder's Court that he was away in Canada and that he regretted the accident very much. No witnesses were sworn (p. 24); yet the recorder found Surpless guilty. The recorder referred to a memorandum which was submitted to him by Mr. Surpless which he produced (pp. 25 and 26) and it was offered in evidence by the plaintiff (p. 26). It is Exhibit P-1 and reads as follows (p. 194):

March 2nd, 1927

In answer to summons writer appeared at the Recorders Court in Ridgewood at 9:00 o'clock, the morning of March 2nd, 1927 and was charged with violation of Motor Vehicle Act due to Stafford S. Miller of Ridgewood having driven a Ford Sedan the property of my daughter but registered in my name, thru Godwin Ave. on February 24th.

On Hon. Judge Van Buskirk's question regarding my answer to the charge I stated that I wished to express regret at the occurrance and stated that it was difficult to know how to plead as at the time of the occurrance I was absent and in Montreal, Canada for a week on business. I therefore felt that I was innocent of the charge, also would have supposed he had a license as before. The Judge thereupon stated I had at least given silent consent to the use of the car and while the violation was technical, he had had other similar cases and had assessed a fine of $50.00 which would apply in my case with costs. The writer thereupon paid the charges.

O. B. S.

The recorder testified Surpless did not plead "guilty" (p. 23, lines 10-20) and his record on the original complaint made at the time proves that he is right (p. 212, lines 1-10). Surpless also testified that he did not plead "guilty" but on the contrary merely submitted the memorandum quoted verbatim above (p. 145). Notwithstanding that both the recorder and Surpless positively testified that Surpless did not say that he was technically guilty of the charge against him, nevertheless Mr. Arthur Dunn, the plaintiff's attorney, testified (p. 61) that in the Recorder's Court Surpless said he was technically guilty of the charge made against him (p. 62, line 30). Dunn was "pinch hitting" as a witness to get the case to the jury. That testimony was categorically denied not only by Surpless but by the recorder. However, even assuming that Surpless did say in the Police Court that he was technically guilty of permitting his automobile to be operated by an unlicensed driver, which is the most that can be said for Dunn's testimony, such an alleged admission is far afield of the testimony necessary to charge Surpless as the operator of the car at the time of the accident. In short, it does not prove at all that the relation of master and servant existed at that time. Counsel for the plaintiff on the trial relied on the case of *Wilson* v. *Brauer*, 97 N. J. L. 482, in order to get this case to the jury, but that case is clearly distinguishable from the case at bar. There, the operator of the automobile, a beginner who had no driver's permit and who, to the knowledge of the owner, knew nothing of the operation of an automobile, was authorized by the owner to run it upon the streets of a populous city for the purpose of learning how to operate it. This Court held that under such circumstances a question of fact was presented for the jury, as to the liability

of the owner for the operation, which rested, first, on the ownership of the car by the owner, and second, upon the *combined* negligence of the owner in permitting an unlicensed and inexperienced driver to operate the car, and the negligence of that operator in running the automobile upon the sidewalk and into the plaintiff.

In the case at bar, as shown, *supra,* the defendant did not turn his car over to an inexperienced, unlicensed driver, but to an experienced driver, who, according to the owner's knowledge, had had a license to operate a car for four or five years, and who, according to the owner's knowledge, which is uncontradicted and undisputed, was an experienced, careful operator, and that man, Miller, was operating the automobile on his own business. The most that can be said about the alleged admission of Surpless that he permitted his car to be driven by an unlicensed driver, is that he "allowed" the car to be operated. In short, he gave permission to an *experienced* driver to operate the car on that driver's personal business. The authorities cited, *supra,* plainly hold that mere permission given to a stranger to operate an automobile, does not make the owner liable, unless the car is being operated on the owner's business.

In *Muller* v. *W. Jersey & Seashore R. R. Co.,* 99 N. J. L. 186, this Court held that the mere fact that a motorist had neither an owner's license nor a driver's license, did not prevent recovery against the defendant for the negligence of the latter, if the automobile was being operated by an experienced driver, and the failure to have a license to operate and a license to own a car, was not negligence resulting proximately in the accident. A man may have a license and still be an inexperienced driver. On the other hand, a man may

have no license for a particular year and yet be an experienced, careful driver and have been licensed for years prior.

The case of *Wilson* v. *Brauer,* 97 N. J. L. 482, dealt with a situation where the owner permitted a beginner who knew nothing about an automobile, to operate it for the purpose of learning how to drive it, at a time when the beginner had no license to operate, to the knowledge of the owner, and to the knowledge of the owner knew nothing about the operation of an automobile. *The negligence of the owner consisted in permitting such a person to run an automobile upon the streets of a populous city for the purpose of learning how to operate it,* and liability was predicated on that negligence plus the negligence of the driver in operating the car upon the sidewalk and into the plaintiff. The case is clearly distinguishable from the case at bar.

Even where the driver is the chauffeur of the owner, but uses the car on his own business, there is no liability upon the part of the owner, even though it is operated with his permission.

> *Cronecker* v. *Hall,* 92 N. J. L. 450;
> *Jennings* v. *Okin,* 88 N. J. L. 661;
> *Okin* v. *Essex Sales Co.,* 103 N. J. L. 218; affirmed on opinion below, 138 Atl. 922.

In the case last cited, the Supreme Court and this Court sustained a directed verdict in favor of the owner of a motorcycle where it appeared by the uncontradicted proof that the owner's employee had departed from the mission upon which he was sent and it was held that because of the deviation, the relation of master and servant did not exist at the time of the collision. At page 219, TRENCHARD, J., speaking for the Supreme Court, said (italics ours):

"Of course, proof of defendant corporation's ownership of a motorcycle driven on a public highway raises a presumption of fact that such motorcycle was in the possession of the defendant through its servant or agent, the driver, and that such driver was acting within the scope of his employment. *But both or either of these presumptions may be overcome by uncontradicted proof to the contrary; and if so overcome by uncontradicted proof that the motorcycle was not being used by the owner's servant or agent within the scope of his employment, then a motion for a direction of a verdict for the defendant owner will be granted. Tischler* v. *Steinholtz,* 99 N. J. L. 149; *Mahan* v. *Walker,* 97 *Id.* 304; *Cronecker* v. *Hall,* 92 *Id.* 450; *Missell* v. *Hays,* 86 *Id.* 348; *Doran* v. *Thomsen,* 76 Id. 754.

"Now, in the instant case, the record discloses that William Martin was operating the defendant's motorcycle when the accident happened, and as the result of the accident he was killed. But it further discloses *without contradiction* that at nine-fifteen on the morning in question, Martin was directed by David A. Depue, the president of the defendant company (his employer), to take a brake lining cutter from the company's place of business, 87 Halsey Street, Newark, New Jersey, to Barone & Tordell, at Valley and Forest Streets, Orange, New Jersey, to wait for the cutter to be repaired, and bring it back as soon as possible. It further shows, likewise, without contradiction, that after waiting a few minutes only, he left Barone & Tordell's shop without the tool, about five minutes before the repair job was completed, and never returned, and that the place where the accident happened was in *West Orange,* more than a mile from Barone & Tordell's shop and northwest of it, not in the direction of his employer's place of business, but in the opposite direction, where he had no business for his employer, the defendant.

> "As pointed out in *Cronecker* v. *Hall, supra,* a case in the Court of Errors and Appeals on all fours with this, in view of this *uncontradicted proof* that the driver of the motorcycle had disobeyed his employer's instructions, and deviated from the business he was directed to pursue, his use of the motorcycle was his own use, and the relation of master and servant was thereby terminated, and therefore the direction of a verdict was proper. The judgments will be affirmed, with costs."

The case at bar is squarely within the rule of law laid down in *Okin* v. *Essex Sales Co., supra,* which was affirmed by this Court not only in that case, but also in the case of *Cronecker* v. *Hall,* 92 N. J. L. 450 and numerous other cases.

We, therefore, respectfully submit that the narrow ground upon which the trial judge submitted the case to the jury was insufficient to justify such submission, for assuming that what Mr. Dunn said was true, that Surpless said in the Police Court that he was technically guilty of permitting his car to be operated by an unlicensed driver, that was not sufficient to make out the relationship of master and servant, especially when he did not know the driver was unlicensed but believed that he was as in previous years. In order to prove that the relation of *respondeat superior* existed, it was necessary to go further and prove at least under the case of *Wilson* v. *Brauer,* 97 N. J. L. 482, that the owner, Surpless, knew that Miller was a beginner; that he had no driver's permit and that to the knowledge of Surpless, Miller knew nothing about the operation of an automobile, and that Surpless permitted Miller to operate it upon the streets of a populous city for the purpose of learning how to operate it. There is no such proof in the case at bar. On the contrary, the uncontradicted proof is that Miller was an experienced au-

tomobile operator and that he had been licensed for four or five years, and through inadvertence failed to obtain his license in 1927, the accident having happened on February 24th of that year.

The recent case of *Wilson* v. *Mason,* 147 Atl. (N. J. S.) 235 is likewise dispositive of the question.

We respectfully submit that the trial court erred in refusing to direct a verdict in favor of the defendant Surpless, and for that reason the judgment below should be reversed as to Surpless and a *venire de novo* ordered.

II.

The trial court should have directed a verdict in behalf of both defendants on the ground that the plaintiff was guilty of contributory negligence as a matter of law.

Motions for direction in behalf of both defendants were urged on that ground (p. 155, line 35, to p. 156, line 5; p. 157, line 40, to p. 158, line 10). Exceptions were duly noted to the refusal to direct (p. 157, line 35; p. 158, line 10). These exceptions are preserved in the grounds of appeal (p. 220, line 25, *et seq.;* p. 240, line 35, to p. 241, line 5).

The testimony of the plaintiff himself as to the care exercised by him in attempting to cross the public highway, proves clearly that he was guilty of contributory negligence as a matter of law. The accident happened on Godwin Avenue in the Village of Ridgewood, Bergen County, about 7:30 P. M. on February 24, 1927. It was a dark, dismal night (p. 39, line 30, to p. 40, line 20). The plaintiff testified he alighted from a taxi at the southwest corner of Doremus and Godwin Avenues (p. 46, line 30). The defendants' map, Exhibit D-1,

clearly presents the location of the accident, which was testified to in detail by the civil engineer who made it, namely, Frank D. Livermore (p. 67). Also, the defendants' photographic exhibits very plainly show the *locus in quo*. Doremus Avenue runs into Godwin Avenue from the south and stops at the south curbline of Godwin Avenue. It does not run across Godwin Avenue and does not run north of Godwin Avenue. In short, it comes to an end on the south side of Godwin Avenue. The north side of Godwin Avenue, opposite Doremus Avenue, presents an unbroken line of curb except for driveways leading into various garages at the rear of the houses on the north side (pp. 68, 69).

Godwin Avenue is a county road (p. 69, lines 20-30). The bungalow on the southwest corner owned by the witness, Eyre, called by the defendant, has an "X" placed upon it in the picture (p. 69, lines 20-30). In front of Mr. Eyre's house and crossing from the southwest corner of Doremus Avenue to the north side of Godwin Avenue, as the plaintiff was crossing, there would be an unobstructed view to the east of approximately seven hundred or eight hundred feet (p. 70, line 40, to p. 71, line 10). A pedestrian having reached the center of Godwin Avenue on a straight line from the southwest corner, walking from south to north, would still have a view to the east of from two hundred fifty to three hundred feet (p. 70, lines 30-40). Godwin Avenue continues straight from a point just east of Doremus Avenue until its terminus at the railroad station, a distance of about a thousand feet (p. 70, lines 20-30). Godwin Avenue is fifty feet wide while the width of it from curb to curb is thirty feet. Doremus Avenue has the same width (p. 71, lines 30-40). If the pedestrian walking from the southwest corner of Doremus Avenue toward the north side of Godwin Avenue had proceeded

to a point four paces beyond the center of Godwin Avenue, he would still have a view to the east of a hundred and fifty feet (p. 72, line 20, to p. 73, line 20). A large electric light is right at the southeast corner of Doremus and Godwin Avenues (p. 73, lines 20-30). These measurements were made from actual conditions and an automobile light would be clearly visible at night for the distances testified to by the engineer (p. 74, lines 1-20).

With the foregoing measurements and views in mind, we shall return to the testimony of the plaintiff himself. He alighted at the southwest corner from a taxi and proceeded to cross on a direct line from south to north, the width of Godwin Avenue. He was very familiar with the neighborhood, having resided there for some time. He knew it was a much travelled road (p. 47, lines 20-35). As he proceeded across this fifty-foot street (30 feet from curb to curb) he did not look to his right, the direction from which the defendant's automobile was approaching, until he was at the center of the highway, but on the contrary, looked only to his left. When he was at the center of the highway, he, for the first time, looked to his right. After having thus looked to his right he did not again look to his right at all, although he took four or five steps forward before the collision actually occurred (p. 48, line 20, to p. 49, line 20). He merely looked straight ahead—neither to the right nor to the left. His testimony in that respect is important and we therefore quote it verbatim (p. 49, line 25, to p. 52, line 30):

> By the Court:
>
> Q. Do I understand you took steps or are you referring to ordinary paces? A. Why, ordinary walking steps, your Honor.

By Mr. Markley:

Q. You think you took four or five ordinary walking steps? A. I would say so, yes.

Q. Were you looking while you were taking those steps or not? A. I was not walking with my eyes shut.

Q. I am not asking you whether your eyes were shut or open. I am asking you whether you looked. A. Looking where?

Q. I am asking you. A. I was looking straight ahead.

Q. Did you not look to your right? A. I told you I looked to my right as I crossed the center of the road. Then I minded my business.

Q. I just want to get the facts; that is all. A. Yes.

Q. You looked when you were at the center of the road; then after that you did not look to your right any more? A. No, sir.

Q. But you looked straight ahead, north; is that right? A. Yes, sir.

Q. For four or five steps; is that right? A. From then on until I was hit, yes.

Q. Minded your own business? A. Yes.

Q. You did not look to your right again, did you? A. I didn't think I needed to.

Q. I am not asking whether you needed to or not. I am asking you, did you look to your right? A. No, sir.

Q. So the only time you looked to your right was when you were at the center of the street; is that right? A. Yes.

Q. Then you took four or five steps, and all during that time you looked straight ahead, toward the north? A. Yes.

Q. And not to the east at all? A. Yes.

Q. Are you sure about that? A. Positive.

Q. You say you were not thinking of automobiles? A. No, I was not.

Q. You were thinking about some business matter? A. Yes, sir.

Q. You did not have the idea of an automobile coming along in your mind at all, did

you? A. I must have, to a certain extent.

Q. Did you? A. Yes.

Q. What did you mean when you said you were not thinking of automobiles? A. I told you that I was thinking about automobiles, to look to my right and my left before I crossed the street. I said after I looked to my right I went on about my business. I was not thinking about an automobile then.

Q. After you looked to your right, out in the center of the road, you were not paying any attention to automobiles after that, were you? A. No, sir.

Q. You were just thinking about this business matter? A. I was.

Q. And you were looking straight ahead? A. Yes, sir.

Q. So you did not see the automobile at all, did you? A. No, sir, I didn't.

Q. In fact, you did not look for it after you passed the center, did you? A. No; it was not in sight when I passed the center, so I didn't bother any more about it.

Q. The next that you knew, not having seen it or heard it, was when you were struck; is that right? A. The next thing I heard or knew anything about it was when I woke up in the hospital, when somebody said, "Good morning."

Q. You did not even remember being struck then, did you? A. After, no, sir.

By the Court:

Q. Mr. Patterson,— A. Yes, sir, your Honor.

Q. How far could you see, looking to your right? A. I would say, your Honor, you could see approximately 35 to 45 feet, because right at the front of my father's house there is a curve in Godwin Avenue.

Q. You could see 35, or 45 feet? Which is it? A. I would say 35 to 45 feet, your Honor.

Q. Then you took four or five steps, and you were hit after you had passed the center? A. Yes, sir.

By Mr. Markley:

Q. Thirty-five or forty-five, did you say? A. Yes, sir.

Q. At the center of the road? A. Yes.

Q. Of course, you had a less view than that as you took these four or five steps, I suppose? A. No, I wouldn't say I had any less view than that.

Q. About the same? A. I should imagine so.

Q. So at the center of the road, when you looked to your right, you could see about 35 or 45 feet? A. I should think so.

Q. You could see more than that. A. You asked me for an approximate distance. That is my answer.

Q. That you could not see any further than that? A. Yes.

Q. Then you took those four or five steps. You say the view did not increase or become any better to the right? A. Any better in what respect?

Q. To the right, looking to the right? A. After I crossed the center I didn't look to the right.

The question presented is whether the plaintiff was guilty of contributory negligence as a matter of law in failing to make the proper observation. The plaintiff positively testified that he only had a view to his right on the night of the accident, which he said was a dark, dismal night (p. 39, lines 30-40), of thirty-five to forty-five feet (p. 51, line 35, to p. 52, line 20). Yet he made but one observation to his right and that was when he was at about the center of the highway crossing from south to north. He also testified that another reason why he had such a poor view up Godwin Avenue was that there was a curve in the road in Godwin Avenue right in front of his father's house, which appears on the map D-1 and is marked with the word "Patterson," that marking having been made at the trial (p. 51, lines 30-40; p. 144, lines 1-10). In

short, a curve in the road and a dark, dismal night prevented the plaintiff from seeing more than thirty-five to forty-five feet as he crossed this much-travelled county road, and yet he made but a single observation which he said was made at the center of the road when he had only that limited view and then he proceeded to take four or five steps and while he was taking those steps at an ordinary walk, he looked straight ahead to the north and paid no attention to his right or to his left. The automobile of the defendant was proceeding in a westerly direction on the right-hand side of Godwin Avenue within a few feet of the curb. All of the witnesses agree that it was on its right side and that it stopped within a few feet of the accident.

Plaintiff testified that at the time of the accident he had a bottle of whiskey in his pocket (p. 53, lines 20-30; p. 54, lines 1-10). During the course of the afternoon he had had two or three drinks of whiskey (p. 56, lines 30-40). The bottle he had in his pocket was full (p. 56, lines 20-30). The drinks that he had in the afternoon were taken at Meister's place in Ridgewood (p. 57, lines 1-20). He had been to Meister's place twice during the course of the afternoon (p. 57, lines 20-30). He stopped there on his way home just prior to the accident and then purchased the bottle of whiskey which he had in his pocket (p. 57, lines 30-40).

The defendant Miller testified that he operated the Ford Sedan in a westerly direction on Doremus Avenue (p. 75, lines 30-40). As he came to the intersection of Doremus Avenue he saw a car (which was the taxicab of the plaintiff) draw up to the curb on the southerly side of Godwin Avenue and a man (the plaintiff) came out from in back of the car and staggered across the street into the left front fender of the defendant's car.

The plaintiff then lost his balance and fell in the center of the highway and was run over by another car, also going westerly, which came from the rear of the defendant's car. This other car was a Cadillac (p. 76, lines 1-40). When the plaintiff staggered out from behind the taxicab on the southwest corner, he was fifty feet south of that corner (p. 77, lines 1-10). The plaintiff's car was on its right-hand side of Godwin Avenue, about six feet from the curb (p. 77, lines 1-20). In short, the left side of the car was a foot or two to the right-hand side of the center of the road (p. 77, lines 1-30). The lights of the plaintiff's car were on and when the plaintiff staggered out the defendant blew his horn. It had no effect and the plaintiff continued to stagger on and walked into the left front fender. The defendant stopped his car in 15 to 20 feet (p. 78, lines 1-15). After the accident the plaintiff's body lay in the center of the highway, fifty feet south of the southwest corner of Doremus and Godwin Avenues (p. 78, lines 1-30).

Fendelander was operating a bus in a westerly direction on Godwin Avenue and was in the immediate rear of the Ford Sedan which Miller was operating. He testified that there were two cars following Miller and his bus was third. It was a public service bus (p. 104, lines 1-40). He saw the Cadillac pull out from behind Miller's car and run over the plaintiff after he fell in the center of the road (p. 104, lines 30-40). Miller's was the head car in the line of traffic and they were only going about twenty miles an hour (p. 104, lines 1-15). Miller's car was about four feet from the right-hand curb and about two feet to the right of the center of the highway (p. 105, lines 1-30). He also heard the horn blown three or four times (p. 105, line 30). He said the three cars ahead of him

slowed up and he slowed up and then that he looked out and saw this other car run over the plaintiff, and at the time, the plaintiff's body was in the center of the highway on the white line at a point fifty feet west of the southwest corner of Doremus Avenue and Godwin Avenue (p. 106, lines 1-20). He helped to pick the plaintiff up and put him in an automobile and was assisted by another bus driver. Fendelander said he could clearly smell rye whiskey on the breath of the plaintiff (p. 106, lines 30-40; p. 108, lines 1-40).

Galowitz, the other bus driver (p. 112), was also operating a Public Service bus but in an easterly direction (p. 112, lines 10-20). As he proceeded east and when he was about seventy-five feet west of Doremus Avenue he saw the plaintiff walking across the street right into the front end of the defendant's automobile. The plaintiff walked into the left front fender. He was knocked down and another car pulled out of the line in back of the defendant's car and ran over him. At the time the plaintiff was forty-five to fifty feet west of the southwest corner of Doremus Avenue and was crossing from south to north (p. 112, line 30 to p. 113, line 20). At the time he walked into the left front fender he was past the center of the highway and on the defendant's right side thereof (p. 113, lines 20-25). The defendant's automobile was on its right-hand side, about four feet from its right-hand curb (p. 113, lines 30-40). The bus which Galowitz was operating was only twenty-five feet from the plaintiff when the accident happened. Galowitz saw the defendant's Ford stop in fifteen feet (p. 114, lines 10-15). Galowitz assisted in the carrying of the plaintiff and put him in an automobile. The plaintiff had the smell of liquor on his breath at the time (p. 114, lines 30-40).

Dr. Henry Bonynge, a leading physician and surgeon of Bergen County, was the doctor to whom the plaintiff was taken for first aid. Plaintiff was brought to his office at Ridgewood Avenue (p. 132, lines 20-40). He found that the plaintiff had a very offensive odor of liquor on his breath, so much so that the odor permeated the entire room (p. 133, lines 1-20). The plaintiff also had a bottle of liquor in his pocket which was two-thirds full. The bottle was not broken and the cork was inserted. It was a pint bottle of whiskey (p. 133, lines 20-40).

The police officers, Bouman (p. 119, line 20, to p. 120, line 10), Wagenhein (p. 123, lines 20-40), and Blackshore (pp. 124, 125) all testified clearly to the bottle of whiskey; in fact, that part of the whiskey was consumed.

It will be noted that the proof is uncontradicted, for the plaintiff himself admits that he had had a number of drinks of whiskey during the course of the afternoon and that immediately preceding the accident he had stopped at the liquor shop and bought a bottle of whiskey which he had in his pocket at the time. The only question disputed, is whether any part of that particular bottle had been consumed. It is also undisputed and uncontradicted that the defendant's automobile was on its right-hand side of the street and that the defendant's automobile was within a few feet of the plaintiff as he staggered out from behind the taxi which brought him to his home, to a position in front of the defendant's automobile. In short, he got out of the taxicab on its right-hand side, walked around the rear of the taxi and into the defendant's automobile as it came along. The fact that the defendant's automobile was not going fast, is demonstrated by the fact that it stopped within fifteen feet. It was uncontradicted that the

defendant's automobile was only a few feet from the plaintiff when it came out from behind the taxi which was pointed in the opposite direction.

The question presented is whether the plaintiff was guilty of contributory negligence. The uncontradicted facts as proven are so demonstrative in their character that the mere statement of them would seem to be sufficient to charge the plaintiff with contributory negligence as a matter of law. The authorities are uniform that under circumstances such as those presented in the case at bar, the trial court should have directed a verdict in favor of the defendants.

In the recent case of *Cady* v. *Trenton & Mercer, etc., Traction Co.*, 104 N. J. L. 572, this Court sustained a judgment of nonsuit where the facts proven were substantially the same as those in the case at bar. In that case, the plaintiff, Jennie Cady, was crossing from the south to the north side of State Street in the City of Trenton, at or near the point where the street is intersected by Chancery Lane, another public highway. As she was crossing, she was struck by a westbound trolley car. As she started to cross she looked to see whether any vehicle was coming and seeing none, proceeded to cross the street at the crosswalk. After she had crossed the first track and had crossed one of the rails of the second track, she was struck, and that is all she knew. She further testified on cross examination that she looked to the east and to the west and saw no car or machine on the street and after she started to cross she never looked again for vehicles in the street. State Street at the point where the accident occurred was 36 feet wide from curb to curb. The trial judge granted the nonsuit on the ground that the plaintiff, under the evidence adduced by her, was guilty of negligence contributing to her injury and there-

fore was barred of any recovery. This Court, in a unanimous affirmance, speaking through KALISCH, J., at page 574, held (italics ours):

> "For the appellant it is argued that this judicial action of the trial judge was erroneous, because the question, whether or not the appellant was guilty of negligence contributing to her injury under the evidence in the cause, was a factual question for a jury to determine. In support of this contention counsel cites numerous cases of negligence decided by this court, as holding, under such circumstances as were developed by the testimony in the instant case, that the question of the negligence of the plaintiff was for the decision of a jury. The facts of the cases cited and relied on by counsel of appellant are not parallel to the facts of the present case, and are readily distinguishable therefrom.
>
> "The legal rule which must control is, that where the facts and circumstances are of such a character that reasonable minds may reasonably differ as to the fair inferences or conclusions to be drawn from such set of proven facts or circumstances, as to whether or not plaintiff exercised reasonable care for his or her own safety, a question is invariably presented for decision by a jury. *Mumma* v. *The Easton and Amboy Railroad Co.*, 73 N. J. L. 653. This was not the situation of the present case on review.
>
> "The sixth headnote of the case of *James* v. *Delaware, Lackawanna and Western Railroad Co.*, 92 N. J. L. 150, a case decided by this court, reads: 'Contributory negligence is present in a given case when the injured person by his own negligence has contributed to the injury in such a way that, but for his negligence, he would have received no injury from the negligence of the other party.'
>
> "*So, in the instant case, it is quite clear that if the appellant had paid due regard to her own safety and had not walked blindly across the street, she would have observed the on-*

coming car, before she reached and crossed the first track, and thus have avoided being injured through the negligence of the respondent's servant."

So in the case *sub judice,* it is quite clear that if the plaintiff had paid due regard to his own safety and had not walked blindly across the street, he would have observed the oncoming car before he reached and crossed the center of the street and taken three or four steps beyond the center, and thus he would have avoided being injured through the negligence of the defendant.

The plaintiff in the case at bar is being judged (as the plaintiff in the *Cady* case was) by his own testimony of what he did. That testimony is undisputed and uncontradicted.

In *Morril* v. *Morril,* 104 N. J. L. 557, this Court reiterated the well settled rule that where in the trial of an action for negligence there are no disputed facts, there is nothing of an issuable character for the jury to decide and it devolves upon the Court to declare the judgment which the law imposes. In another recent case, *Sharpe* v. *P. S. Ry. Co.,* 103 N. J. L. 583, the Supreme Court sustained a judgment of nonsuit where the plaintiff testified that as he was riding a motorcycle toward the intersection of two streets, "he kind of looked to the right" and sounded a little exhaust whistle that he had rigged up temporarily on his motorcycle. Without looking to the south in the direction from which the trolley car was approaching, he proceeded to cross the intersecting street without stopping or reducing his speed. He was proceeding west while the street car was proceeding north so that he had the right of way. Nevertheless, the plaintiff was nonsuited. The point we make with respect to this case is that because of the lack of observation it was held that the plain-

tiff was guilty of contributory negligence as a matter of law. The Court reiterated the settled rule in the leading case of *N. J. Express Co.* v. *Nichols*, 33 N. J. L. 434, that if upon the evidence adduced it shall clearly appear that such (contributory) negligence does exist and that it has a causal relation to an injurious accident, the question becomes one of law for the Court. The case now before the Court is stronger than either of the foregoing cases, because here the plaintiff admitted that he did not look to the right, the direction from which the automobile approached, except on one occasion, as he momentarily stood in the center of the highway and that thereafter he looked ahead and did not look either to his left or his right at any time because his mind was on other business. His testimony is uncontradicted that for four or five steps he paid absolutely no attention at all to his surroundings although he had a view to his right of only thirty-five to forty-five feet. As Justice KALISCH says in the *Cady* case, *supra*, had he used reasonable care, he would "have avoided being injured through the negligence of the defendant."

Still another case directly in point is *Hubbard* v. *Atlantic Coast Electric Co.*, 91 N. J. L. 299, where the plaintiff testified that he first looked to the south and then to the north before crossing. He did not again look to the south and was struck by a vehicle coming from the south. It was held by this Court that a court question and not a jury question was presented and that the plaintiff was guilty of contributory negligence as a matter of law. This Court in a unanimous opinion reversing the trial court, speaking through BLACK, J., at page 300 held (italics ours):

> "How long the plaintiff continued to look north, after looking south, before he proceeded to cross the track does not appear, but

it must have been some little time. It was long enough for him, watching the approaching car from the north, and unable to decide from its speed whether it would stop or not, to see it reduce its speed and come to a stop, at the switch, and long enough for a car approaching from the south to have come within his range of observation if he had looked in that direction. The track was comparatively straight at that point for a considerable distance, *and certainly a sufficient period had elapsed to have required another observation to the south before attempting to cross the track. This duty he failed to perform. We think his conduct was not that of a reasonably prudent man concerned for his personal safety, and this is the measure of his duty. He must use his powers of observation before crossing a trolley track, which is a place of danger.* There being no disputed fact, and giving to the plaintiff's testimony the most favorable conclusion that may be drawn from the facts, we think a court question and not a jury question was presented, that the plaintiff was clearly guilty of contributory negligence. It was, therefore, error for the trial court to refuse the defendant's motions."

The duty cast upon a pedestrian crossing a highway in the face of approaching vehicular traffic has been repeatedly defined by this Court in *McGrath* v. *North Jersey St. Ry. Co.*, 66 N. J. L. 312, 313. This Court reiterated the rule in the following language:

"The trial judge took a correct view of the legal rule. A pedestrian, while walking in the highway, is bound to be careful. The law is settled, though its application is not always easy. In *Newark Passenger Railway Co.* v. *Block*, 26 Vroom 605, a case decided in 1893, Mr. Justice MAGIE, in delivering the opinion of this Court, said:

"'We must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances. From this rule it may be said in general that one who passes on foot along a sidewalk or path of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case doubtless the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed—it cannot be so quickly stopped or diverted from its course; a street car cannot deviate from its track; while the passer on foot may quickly stop, turn aside, or even retrace his steps.'

"The rule thus stated governs the relation of a pedestrian to all vehicles. It is true that a trolley car has characteristics of its own. It is a large, smooth-running vehicle of great weight. Its momentum is therefore high, even when its velocity is low. On the one hand, it cannot deviate from its track. On the other hand, its rate of speed is under prompt control. These peculiarities, however, are not criteria by which trolley cars are set apart, for legal treatment, in a class by themselves. They are merely circumstances that have sometimes to be taken into account in applying the general rule to a particular case."

Other cases are *Pool* v. *Browne,* 89 N. J. L. 314, 316, 317. *Ervin* v. *Traud,* 90 N. J. L. 289, 290.

We therefore respectfully submit that in the case at bar the trial judge erred in refusing to grant the defendant's motion for a direction of verdict.

III.

The trial court should have granted a mistrial when thereunto moved by the defendants because the plaintiff brought in the question of whether or not the defendants were insured. The trial court also erred in refusing to permit the defendants to show they were not insured.

We have combined these two grounds because they necessarily go together. When the jury was drawn, counsel for the plaintiff asked them whether any of them were stockholders of the Standard Accident Insurance Company. Only one object was sought by the asking of this question, namely, to prejudice the case of the defendants in the eyes of the jury. Exception was duly noted to the refusal of the Court to correct the false position in which the defendants were placed (p. 7, line 30, to p. 8, line 10). The plaintiff also in testifying, again deliberately brought in the alleged insurance carrier of the defendants when he testified that he had been talking to attorneys of the Standard Accident Insurance Company (pp. 55, 56). Counsel for the defendants on examination of the defendant, Miller, attempted to correct this erroneous impression which was given to the jury with respect to insurance, by asking Miller when he was on the stand, whether or not he was insured (p. 79, lines 25-40). The objection to this testimony rather naively made by counsel for the plaintiff was (p. 79, lines 35-40):

> "We want to win the case on merit, irrespective of whether there is an insurance company involved or not."

The trial judge struck out the answer of Miller that he was not insured and exception was duly noted to such ruling (p. 79, line 35). The foregoing exceptions are preserved in the grounds of appeal of both defendants (p. 219, lines 20-30; p. 220, lines 10-15; p. 239, line 40, to page 240, line 10; p. 240, lines 25-30).

While ordinarily in an accident case the question whether or not the defendant is insured is immaterial, still, we submit in the case at bar, where counsel for the plaintiff as well as plaintiff himself have deliberately brought into the case that question for the purpose of prejudicing the jury's minds against the defendants on the theory that the jury would more quickly give a verdict against an insurance company than it would against an individual, the defendants who are not insured ought to be permitted to show that fact to wipe out any such prejudice that might exist in the minds of the jury.

In the next point we deal with the refusal of the trial judge to charge one of the defendants' requests which was submitted on the question of insurance or the lack of it for the purpose of keeping prejudice out of the case. The trial judge refused to charge that request.

IV.

The trial court should have instructed the jury, as requested, that there was no evidence that an insurance company was involved in this action and that no verdict should be rendered because of the intimation that there might be insurance to cover the verdict.

The request in question was No. 29 and is as follows (p. 192, line 25, to p. 193, line 20):

> 29. This suit is not against an insurance company. The only parties to this suit are the plaintiff William L. Patterson, Jr., and the defendant Oliver Surpless and defendant Stafford Miller. There is no proof in this case that either the defendant Surpless or the defendant Miller is insured. To give a verdict on the theory that either defendant is insured would be most unfair, unjust and detrimental to the interests of the defendants, as well as contrary to your oaths as jurors and my charge to you as to the law that is to govern you in reaching your verdict. Even assuming that the defendants were insured, that fact gives you no right to bring in a verdict against them. It has no bearing in this case at all. The very fact that you may bring in a verdict against these defendants might destroy any insurance that they may have. You do not know. Neither do I. You do not know the amount of the insurance or whether it will cover an accident or whether it will not. In this case, for instance, the very fact that Miller was driving without a license might prevent any insurance from covering this accident. Dismiss entirely from your minds the question of any insurance, and decide this case solely on the rules of law which I have given you. Any verdict that you may render against the defendants or either of them will be against them personally and not against any one else.

The denial of this request was duly excepted to (p. 172, line 20; p. 175, lines 10-20). This exception is preserved in the grounds of appeal (p. 236, line 40, to p. 248, line 30). We submit that the request was proper and the jury should have been so instructed. This is especially so in view of what occurred during the trial as narrated in the previous point. The plaintiff's counsel was permitted to ask the jury whether they were in any way connected with the Standard Accident Insurance Company. The plaintiff was permitted to testify that he had talked to the attorneys for the Insurance Company of the defendants. The defendants were not permitted to testify that they were not insured. Finally, the trial court refuses to eliminate from the case the question of insurance by instructing the jury that that feature was not to enter into their consideration and decision.

The statement contained in the request that there was no proof in the case that either defendant was insured, was strictly accurate. Further, the statement that the insurance company was not a party to this suit and any verdict given on the theory that either defendant was insured would be unfair and unjust, was eminently proper. It is impossible to understand why this request, which uniformly is charged by trial judges under such circumstances as existed in the case at bar, was refused.

We respectfully submit that the trial court erred in refusing to give the quoted instruction to the jury.

V.

For these reasons we respectfully submit that the judgment below should be reversed and a *venire de novo* awarded.

February Term, 1930.

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New Jersey Court of Errors and Appeals

William L. Patterson, Jr., Plaintiff-Respondent, vs. Oliver Surpless and Stafford Miller, Defendants-Appellants.	Action at Law. On Appeals from Supreme Court.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE CASE

This is an appeal to review a judgment of the Supreme Court in favor of the plaintiff and against the defendants, in the sum of $5,000., and costs, rendered in an action for damages for personal injuries sustained by the plaintiff, a pedestrian, as a result of being struck by an automobile owned by the defendant, Surpless, and driven by the defendant, Miller, on February 24th, 1927, in the Village of Ridgewood, Bergen County, New Jersey.

The accident occurred at the intersection of Godwin Avenue and Doremus Avenue, a built up section where houses are less than 100 feet apart, both of which streets are main thoroughfares in the Village of Ridgewood. Godwin Avenue runs in a general easterly and westerly direction, Doremus Avenue in a general northerly and southerly direction. The plaintiff was walking along the westerly crosswalk in a northerly direction and proceeding across Godwin Avenue from the south-

west corner of the intersection of these streets to the northerly side of Godwin Avenue, Doremus Avenue, being a butt end street at this point. Godwin Avenue at the street intersection is 30 feet in width from curb to curb. The plaintiff had walked a few feet beyond the center line of Godwin Avenue when the automobile which was proceeding along Godwin Avenue in a general westerly direction at a speed of 15 to 20 miles an hour, struck him and rendered him unconscious. After receiving first aid treatment he was removed to the Paterson General Hospital where he regained consciousness 24 hours later and underwent treatment. As a result of the accident he sustained a double fracture of the pelvis, fracture of the skull, concussion of the brain and injury to his kidneys. Afterwards he underwent several attacks of epileptiform seizures and convulsions, which were, in the opinion of physicians, probably connected with the fracture of the skull. He was in a plaster cast for five or six weeks following the accident and was obliged to use crutches and a cane in walking for a period of four to five months after the accident. page 43, line 1. Subsequently, he received treatment at the Barnert Hospital, page 46, line 10, and also in a New York Hospital, page 45, line 5. His medical expenses, including hospital bills and physicians' fees amounted to approximately $1400. The physicians testified p. 95 l. 10, that the epileptiform seizures were permanent injuries which probably had some connection with the fracture of the skull.

The plaintiff was engaged in the real estate business at Ridgewood, p. 45, l. 30, and his earnings were $5,000 per year.

The action was tried at the Bergen Circuit on June 24th, 1929, and a verdict of $5000 was rendered in favor of the plaintiff against both defendants, which we insist was fully justified by the evidence and we therefore contend that this appeal should be dismissed.

I.

THE TRIAL COURT PROPERLY REFUSED TO DIRECT A VERDICT IN BEHALF OF THE DEFENDANT OLIVER SURPLESS.

The complaint filed in this cause, page 1, sets forth two causes of action (1) in which the defendant Surpless is charged with negligence on the theory of respondeat superior in that he was the owner of the automobile which ran into the plaintiff as a result of the negligent operation of the same on the part of his servant or agent, the defendant, Miller; (2) charges the defendant Surpless with negligence on the theory that he, the owner of an automobile, a dangerous instrumentality while under the control and management of an inefficient, incompetent and inexperienced person, permitted and allowed the same to be operated by the defendant Miller, an unlicensed, incompetent and inefficient driver, page 3.

The defendant, Surpless, was the owner of the automobile, page 31, a Ford car, which was used for the convenience of the family, page 150, l. 20 to 30.

The defendant Miller, had been courting the daughter of the defendant Surpless for five years, was engaged to marry her, and when she was

home visited her at her house four or five times a week, page 89, l. 1; that he had ridden in this car on previous occasions with her, page 80, and on April 11th, 1929, was married to her, see page 150, ls. 10 to 20 and p. 151 ls. 1 to 10.

The automobile operated by the defendant, Miller, was taken from the garage in the rear of Mr. Surpless' house by Miller on the night before the accident, p. 64, l. 10, without obtaining permission from anyone. The defendant Surpless testified that he was in Montreal at the time of the accident, p. 145, l. 30, and that his daughter was at College at New London, Connecticut, l. 35, and that the first he knew of the accident, was when he returned home on the night following the accident, page 146, l. 40.

The defendant Miller testified that he did not know whether Mrs. Surpless was home at the time he took the car, page 89, l. 21, that he did not try the door to see whether she was home, page 90, l. 10, that about seven o'clock in the evening he went to the garage which was open and took the car, the key of which was in the car, page 90, l. 20. He used the car on that night, parked it in the driveway of his home, page 65, l. 35, and the following day parked it at the station while he went to New York, page 65, l. 40, and when he returned from New York, was driving home from the Erie R. R. Station when the accident occurred, p. 66, ls. 10 to 20.

A complaint was made by Peter Bouman, police officer of Ridgewood, against Oliver Surpless, p 11, for a violation of subdivision 12 of Section 14, Chapter 208, Pamphlet Laws of 1921, generally known as the Motor Vehicle Act, for allowing the

automobile owned by him to be operated by the defendant Miller, a non-licensed driver at the time of the accident, p. 212, and a complaint was also entered against the defendant, Miller, for operating a motor vehicle without a license, contrary to the statute. Both defendants were summoned to answer these charges on March 2nd, 1927, before the Recorder of the Borough of Ridgewood, page 20, l. 1.

The defendant Miller pleaded guilty to the complaint against him p. 23, l. 1.

The defendant Surpless testified that the charge was read to him p. 149, l. 31; that he did not plead guilty p. 145, l. 10; that he felt totally innocent and paid the fine of $50. that was imposed upon him, p. 149, l. 20, without appealing the sentence.

The Recorder, page 24 l. 28 testified that Mr. Surpless did not plead either "guilty" or "not guilty"; that no witnesses were sworn, but that he found Mr. Surpless guilty of the charge set forth in the complaint, p. 23, l. 15, and a fine of $50. was imposed upon the defendant Surpless, p. 212.

Arthur C. Dunn, page 62, testified that he is an attorney at law and that he was present at the hearing at the Ridgewood Police Court and that Mr. Surpless had said that he was technically guilty, p. 72, l. 30. Recorder Van Buskirk testified, p. 23, ls. 10 to 20, that he did not plead guilty to the charge, but that he found him guilty from the facts as stated. Later, l. 30, when pressed as to what Mr. Surpless did say at the hearing, said "I don't recall," page 24, l. 30. When asked "were any witnesses sworn", he testified "not to my recollection, no".

"Q. No witnesses sworn? A. My recollection is that there were no witnesses sworn on behalf of either party, excepting the parties who made the complaint.

"Q. I show you an entry in the Police Blotter and ask you if this entry is in your writing (handing record to witness)? A. It is not in my writing.

"Q. Are you clerk of the Court? A. I am not. I am the Recorder of the Court.

"Q. Who is the Clerk? A. Well, there is no official clerk.

"Q. You do the clerical work and the —A. I had to prepare the complaints as they come in.

"Q. You say that no witnesses were sworn; is that correct? A. To the best of my recollection there were no witnesses other than those and the officer who made the complaint."

At this point in the examination the witness produced a memorandum to which he was referring, Exhibit P-1, page 194, written by the defendant Surpless, and describing in the past tense the version Mr. Surpless wished to have placed upon the transaction before the Recorder. Subsequently Recorder Van Buskirk was again placed upon the stand by the defendant, p. 137, l. 25, p. 140, testified that no witnesses were sworn other than the complaining witness, and when further pressed as to what transpired testified that the only witness that testified was the officer who made the complaint and the defendant.

"Q. Did the defendant testify? A. The defendant testified, to my recollection, yes."

and further pressed, l. 20,

"Q. You said yesterday that no witnesses were sworn. A. I don't recall that the defendant was sworn.

"Q. You heard the evidence, did you not? A. I heard the evidence, yes.

"Q. And on the evidence you rendered a judgment, did you not? A. On the evidence I rendered a judgment."

On page 212, in the handwriting of the Judge is a memorandum "defendant made statement failing to plead 'guilty' or 'non guilty', but by reason of statement made was adjudged guilty and fined $50 and costs $3.00.

Counsel for plaintiff was obliged to plead surprise at the testimony of Recorder Van Buskirk, p. 25, l. 20, as well as the testimony given by Peter Bouman, Jr., the police officer, page 31, l. 35, both of whom subsequently testified, in behalf of the defendant, page 137, l. 20, and p. 118, l. 20.

The defendant, Miller, testified, p. 76, l. 20, that the impact took place within fifty to sixty feet west of Doremus Avenue, and that after his car came in contact with the plaintiff he continued on a distance of fifteen feet before his car came to a stop, p. 78, l. 10. That after the impact another car ran over the plaintiff and that in addition to the second car there were two busses and two other cars at the scene of the accident, p. 79, l. 5.

Mrs. Conners, a disinterested witness, stated that the accident occurred at the intersection and that there were no other cars in the vicinity, to which fact she testified, p. 9, l. 2; p. 13, l. 20; p. 18, ls. 20 to 30, in which testimony, her son who is also a disinterested witness, corroborates her, p. 28, l. 25, and also the plaintiff, p. 39, ls. 30 to 40, which testimony clearly shows that the credibility of the defendant Miller was seriously attacked, and was a question to be passed upon by the jury.

A further example of the improbability of the testimony given by the defendant Miller, is his response to the question, p. 83, l. 15.

> "Q. How do you explain that after you brought your car to less than 15 miles an hour and had your brake working, that you went 15 feet beyond this man? A. When you go to park a car you are not—when you start to park a car you are more than 6 feet from the curb, and you have to bring it into the curb to park it in order for this police ordinance; and to do that you have to travel more at a diagonal, so that you would cover more than that number of feet."

It is incredible for any reasonable person to believe that the operator of an automobile who had just collided with a person with such force that the crash was heard by a person living five houses away from the scene of the accident would be thinking of police regulations about parking his automobile at such a time.

The credibility of both the defendants, Miller and Surpless, and the improbability of their storic

were questions of fact which were questions for the jury to pass upon.

Under the above testimony the action of the court in refusing to direct a verdict in favor of the defendant, Oliver Surpless, was justified.

On a motion to direct a verdict for the defendant, the truth of the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom, is admitted. See Liss v. Public Service Railway Co. 141 Atl., page 1.

Under Tischler v. Steinholtz, 122 Atl. p. 880, proof of defendant's ownership of an automobile driven on a public highway raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then through his servant the driver and that such driver was acting within the scope of his employment. These presumptions, or either of them, may be overcome by uncontradicted proof to the contrary, but if the evidence is contradictory or reasonably subject to contradictory interpretations, the question of liability is for the jury, and a motion for a direction of a verdict should not be granted. In that case, the Court held that the evidential value of the defendant's testimony was much shaken on cross examination, and that the case was properly submitted to the jury in view of that fact, following the doctrine laid down in Crowell v. Padolsky, 120 Atl. 23.

Judge Donges, in Hart v. Brusnahan, 137 Atl. 845, a similar case, states the rule in the following

language: Where such doubt is thrown upon the truth of the owner's denial of agency as to leave the mind in doubt a jury question is raised. Citing Crowell v. Padolsky, supra. And this rule is based upon sound considerations as otherwise a mere denial must conclude the court, and, inasmuch as a plaintiff is not in possession of the evidence to contradict the statement, injustice would necessarily follow. Where such doubt is manifest that a court cannot say there is no question of the truth of the defendant's testimony on that point the jury should be permitted to decide and where there is a mere contradiction so shaken as to raise doubt the verdict ought not to be disturbed.

Under the rule laid down by the above cases, we contend that the evidence interpreted in the light of the rule laid down by Liss v. Public Service Railway Co., was sufficient to raise a reasonable doubt in the mind of the Judge as to whether the testimony offered on behalf of the defendant was sufficient to overcome the presumptions raised against the defendant under the case of Tischler v. Steinholtz, and that therefore, he properly denied the motion for a direction of a verdict.

The defendant Surpless admitted that the car was a family car, used for the convenience of the family and that the defendant Miller had been keeping company with his daughter for a number of years and visiting the home four or five evenings a week and was now married to her. He testified that he had never given permission to Miller to drive the automobile and further that he did not plead guilty to the charge of violating the

Motor Vehicle Act by permitting an unlicensed driver to operate his automobile, and that he paid the fine without objection, although innocent.

The divergent versions of what transpired in the Recorder's Court, the only point of contact between the defendant Surpless and the plaintiff, or his representatives, are sufficient to throw doubt over the entire testimony of the defendant Surpless.

The Recorder sitting as Magistrate under the Motor Vehicle Act, was obliged to hear and determine such complaints of violations of the Motor Vehicle Act as might be brought before him, and upon conviction to impose the penalty prescribed by the statute upon the person so convicted.

The defendent Surpless testified that he did not plead guilty to this charge, and although no witnesses were sworn as the Recorder testified in the first instance, the Recorder claimed that he convicted the defendant and imposed a fine of $50 on him. Later, when pressed on cross examination, and the Recorder seeing the fallacy in his testimony, namely, that he had convicted a person without having any evidence before him of the violation charged, tried to shift his story, claiming that the complaining witness had testified and later by going so far as to state that the defendant testified. While on the stand, p. 25, it was discovered that the Recorder was testifying from a memorandum, Ex. P-1, which he stated had been submitted to him by Mr. Surpless, the defendant, on the day that the complaint was made, or the following day. An inspection of P-1 shows that it is written in the past tense, subsequent to the hear-

ing, and clearly shows that at the hearing there was a discussion as to how Mr. Surpless was going to plead to the charge, and clearly demonstrates the fact that no witnesses were sworn, corroborating the testimony of Mr. Dunn that Mr. Surpless had stated that he was technically guilty of the charge of permitting an unlicensed operator to drive an automobile owned by him, and contradicting the direct testimony of Mr. Surpless that he never permitted Mr. Miller to drive his automobile and especially not at the time of this accident, and also the testimony of the defendant Miller, who stated that he never received permission to operate the automobile from the defendant Surpless.

Under the case of Liss v. Public Service Railway Co., on this motion, the testimony favorable to the plaintiff must be taken as true. If the testimony of Mr. Dunn is true, and it must be so considered in dealing with the motion to direct a verdict, then the defendant Surpless and the defendant Miller were either in error or were falsifying as to what transpired before the Recorder, and if they, or either of them, were in error in this respect, the Judge had a right to believe that they or either of them were in error in other respects, and he would have the further right to believe that they or either of them were falsifying in all respects, applying the maxim "Falsus in uno, falsus in omnibus." Addis v. Rushmore, 74 N. J. L. 649; Clark v. Public Service, 91 Atl. 83.

Therefore under the ruling set forth in Crowell v. Padolsky, 120 Atl. 23, and Tischler v. Steinholtz, supra, the Court properly left to the jury the determination as to whether the discredited

testimony of the defendants was sufficient to overcome the presumptions raised by law against the defendant Surpless,namely, that the defendant Miller was operating the automobile as the servant of the defendant Surpless, and within the scope of his employment.

Considering the motion as directed at the second count, charging the defendant Surpless with negligence in permitting an automobile to be operated by an incompetent driver, under the doctrine enunciated in Wilson v. Brawer, 97 N. J. L. 482, the defendant Surpless admitted that at the time of the accident the defendant Miller did not have a license to operate a motor vehicle in compliance with the Motor Vehicle Act. For the purpose of motion to direct a verdict they must concede that the car was being operated by Miller, with the permission of the defendant Surpless.

In Wilson v. Brawer, 97 N. J. L. 482 the owner of an automobile was held to be negligent in knowingly permitting it to be operated by a person wanting in knowledge or skill on the principle enunciated in Van Winkle v. American Steam Boiler Co. 52 N. J. L. 247.

The Legislature of the State of New Jersey, in section 10-1, of the Motor Vehicle Act, P. L. 1921, Chapter 208 has provided that no person other than one who has satisfactorily passed an examination as to his ability as an operator shall drive an automobile upon the public highways of this State, and in subdivision 12 of Section 14, that no person owning a motor vehicle shall permit it to

be operated by a non-licensed driver. In Evers v. Davis, 86 N. J. L. 196 at 204, the following rule is laid down: When the Legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, it has in this regard forewarned the ordinary prudent man and through him the defendant in a civil action whose conduct must always coincide with this common law criterion. Such danger therefore does not have to be proved by the plaintiff since there is no longer room for reasonable difference of opinion, for by his breach of the statute the defendant through his common law conscience is charged with knowledge that if injury ensues he will have acted at his peril.

Before permitting one to operate an automobile it is the duty of the owner under the Motor Vehicle Act to determine whether the operator is qualified in keeping with the standard set forth by the Legislature, and if he fails to perform that duty and acts in violation of the statute, he acts at his peril. The defendant in this case having acted at his peril in permitting an unlicensed operator to drive his automobile under the doctrine of Wilson v. Brower was compelled to show as a matter of fact that the driver of the car was a competent person to handle an automobile and the competency of the driver therefore became a question of fact. The only evidence to show that the defendant Miller was a competent driver was given by the defendant Miller and the defendant Surpless. the two defendants in this action. Their credibility was severely attacked throughout the case and their testimony in regard to the competency of the

defendant Miller to operate an automobile was not binding either on the court or the jury. There was ample evidence concerning the happening of the accident from which the jury could infer that the defendant Miller was an incompetent driver. The Court therefore properly left the competency of the driver Miller to operate a motor vhicle as a question of fact to be passed upon by the jury.

We therefore insist that the action of the trial court in denying the motion for the direction of a verdict was justified.

II.

THE TRIAL COURT PROPERLY REFUSED TO DIRECT A VERDICT IN BEHALF OF BOTH DEFENDANTS ON THE GROUND THAT PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Under the case of Liss v. Public Service, supra, the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom must be taken to be true.

In Cady v. Trenton & Mercer Traction Corp., 104 N. J. L. 572, this Court laid down the rule that "the legal rule which must control is that where the facts and circumstances are of such a character that reasonable minds may reasonably differ as to the fair inferences or conclusions to be drawn from such set of proven facts or circumstances, as to whether or not plaintiff exercise reasonable

care for his or her own safety a question is invariably presented for decision by a jury."

The testimony of the plaintiff himself, shows that he drove in a taxicab in a general northerly direction along Godwin Avenue and alighted therefrom at the southwest corner of Godwin and Doremus Avenues, p. 38, l. 30. The taxicab, after he alighted, made a right hand turn into Doremus Ave. After the taxicab started he proceeded to cross Godwin Avenue, a street 30 feet in width from curb to curb, in a northerly direction at the intersection, in all of which he was corroborated by Mrs. Susan B. Conners, a disinterested witness, p. 10, l. 10 and Oscar T. Conners, p. 27, ls. 1 to 10, likewise a disinterested witness.

Mr. Paterson testified p. 39, l. 30 "first of all I waited until the cab started to pull around into Doremus Avenue, then I looked both ways and did not see anything," line 40.

> "Q. How far did you get into the street before anything happened? A. Well, Mr. Breslin, when I was crossing the street, I looked for the first half, and looked to the right after I had reached the half, and I had already looked to the right, and after that I don't remember anything.
>
> "Q. Did you look in both directions prior to the accident? A. I did, Mr. Breslin."

Mrs. Conners testified, p. 10, l. 20, that she looked up the street and said to her son, "look at that car coming down." She heard a thud or crash then said, "Oh, he has gone into a tree", and

then, line 40, I saw a body go up in the air and come down with a thud on the ground; page 11, line 3, the impact she heard sounded very heavy to her; p. 17, l. 10, she saw the man in the air a little over half way across the street, in which testimony she is corroborated by her son, Oscar T. Conners, p. 27, line 20.

Miss Isabel Ackerman, the lady who lived the fifth house down from the corner, page 37, l. 25, testified that she heard a terrible crash and saw the automobile.

Page 48, l. 30, on cross examination, plaintiff testified that he looked to the right and that as he got to the center of the street he again looked to the right and within approximately three or four feet he was struck as described by Mrs. Conners and her son, and hurled into the air and rendered unconscious, recovering consciousness in the hospital about twenty-four hours later, p. 92, l. 35.

The defendant Miller, testified that he was proceeding about 15 or 20 miles an hour as he approached the intersection, a location where houses are less than 100 feet apart, and page 76, l. 10, that he saw a car drawn up to the curb on the southerly side of Godwin Avenue, and a man came out from in back of this car and staggered across the street into his front left fender, which threw him off his balance into the road, and that while in the road another car ran over him, and that the rear of his car was at least 15 feet from the body of Paterson after the accident. None of the witnesses could identify this "phantom" car nor give any satisfactory explanation as to what became of it, or why no one pursued it.

The defendant Miller, testified that Patterson's body after the accident was in the center of the road, p. 78, line 20.

From this testimony it is apparent that in all, the plaintiff did not travel a distance of more than 15 to 20 feet from the time he left the curb at the southwest corner until the time that he was struck by the automobile of the defendant. He has testified that he made at least two observations to his right, the direction from which the defendant's automobile came, before he was struck and rendered unconscious. Godwin Avenue, looking in an easterly direction from the intersection of Doremus and Godwin Aves., hase quite a sharp curve bearing to the north, a short distance east of Doremus Avenue as shown on the map and photographs.

The plaintiff testifies p. 51, l. 35, that he could see approximately 35 to 40 feet looking in an easterly direction from the center of the road because of the curve in Godwin Avenue.

The defendant Miller, admitted that he did not see the plaintiff until within 25 feet of him, p. 82, l. 38, and that from a point 50 feet east of the intersection he could only see 100 feet, page 81, line 22. In short, the field of vision of the plaintiff as he proceeded across the street was very limited and the further he proceeded the less it became because of the nature of the curve in the roadway.

Under the circumstances disclosed by the testimony and the fair inferences and conclusions to be drawn therefrom there is ample testimony to

sustain the Court in its refusal to direct a verdict on the grounds of contributory negligence under the cases cited above.

The defendants in their brief referred to the bottle of whiskey which was in the pocket of the plaintiff at the time of the accident, page 53, lines 20 to 30, which he testified was full, p. 56, lines 20 to 30, and infer from that testimony that plaintiff was intoxicated.

The testimony of Mr. William C. Patterson, page 152, l. 35, shows that he received the bottle of liquor from Chief Blackshaw on the morning following the accident and that it was totally filled and that the cork had never been pulled out, in which he is corroborated by Harold C. Moneypenny, line 30. The only evidence in regard to drinks that the plaintiff had taken was that from the plaintiff himself, page 56, line 30, wherein he admitted that he had two or three drinks of whiskey about 2 or 2:30 in the afternoon on the day of the accident which was not denied.

There is a statement contained in plaintiff's brief that it is undisputed that the defendant's automobile was within a few feet of the plaintiff as he started out from behind the taxi, which is untrue.

The testimony of Mrs. Conners page 9, line 35, shows that the cab had moved on prior to Mr. Patterson crossing the street. The testimony of her son, Oscar T. Conners, pag 27, line 1, to the fact that he started to cross the road after the taxicab had turned into Doremus Avenue, and the testi-

mony of the plaintiff, page 38, line 40, all show that the taxicab had turned into Doremus Avenue before the plaintiff started to cross the street and that the defendant's automobile was not a few feet away from the plaintiff when he came out from the taxi.

The case of Cady v. Trenton & Mercer Traction Corp., 104 N. J. L. 572, cited by the defendant, is not applicable to this case because of the difference in the circumstances. In that case, "while the rain came down in an awful downpour, she held an umbrella directly over her head and crossed the street holding the umbrella firmly over her head and did not make any observation while crossing the street", while three other witnesses testified that while crossing the street she held the umbrella down in such a position that it obscured her vision from the direction in which the car came which struck her, a statement of facts entirely inconsistent with the facts shown in this case, where the plaintiff in walking a distance of 15 to 20 feet made at least two different observations to his right, the direction from which the automobile came which struck him.

The case of Sharpe v. Public Service Railway Co., 103 N. J. L. 583, also cited, is inapplicable. The facts in that case show that the plaintiff, without looking to the south, and the direction from which the trolley car was approaching, he proceeded to cross First Street without stopping or reducing his speed. As he neared the north bound east track, his motorcycle ran into the side of the passing trolley car and close to its rear end.

It further appeared that the trolley car was in plain sight which circumstances are entirely different from the case at bar.

In the cited cases the plaintiff made absolutely no observation whereas in the present case, at least two observations were made by the plaintiff in proceeding a short distance across the street, which he did before being struck.

The case of Hubbard v. Atlantic Coast Electric Co. 91 L, 299, is no tsimilar to the present state of facts. In that case the streets were straight and a clear vision for long distances might be obtained, and no observation was made for a long interval of time prior to the accident. In this case the street was curved and at least two observations made while plaintiff was proceeding a distance of 15 or 20 feet. And in McGrath v. North Jersey Street Railway Co. 66 N. J. L. 312, the injured person made no observation after he left the curb.

III.

THE TRIAL COURT DID NOT ERR IN MAKING THE RULINGS COMPLAINED OF.

The first exception noted under Point III is in regard to questions asked the jurors before they were sworn, which is permissible in civil cases and under P. L. 1911, page 220.

The case of Gibbs v. Barton, 130 Atl. p. 439, and Stile v. McLean, 138 Atl. 119, hold that such matters are within the discretion of the trial court,

whose action will not be interfered with unless it is apparent that the discretion was abused, which is not so in this case.

In regard to the charge plaintiff deliberately brought in the alleged insurance carrier, an inspection of the testimony, p. 55, will disclose that this information was elicited by the insistent cross examination on the part of the defendant's counsel, and the charge that the information was deliberately brought by the plaintiff is untrue. Counsel did not see fit to move to strike out the answer as not responsive and cannot now object to the same. The action of the trial court in striking out the answer of the defendant Stafford Miller to the question propounded him by the counsel of the plaintiff, "are you insured" was entirely proper as question and answer were entirely irrelevant to the issue involved.

IV.

THE TRIAL COURT PROPERLY REFUSED TO CHARGE THE REQUEST SET FORTH UNDER THIS HEAD.

If there was no proof in the case that the defendant Surpless or the defendant, Miller, were insured as is stated in this request to charge, then it was unnecessary for the defendant to call upon the Court to bring that fact to the attention of the jury.

In addition it incorporates a statement of the fact that because Miller was driving without a license it might prevent any insurance from cover-

ing this accident, a matter absolutely irrelevant to the proper trial issue. Therefore the request to charge not being one applicable to the evidence adduced at the trial was properly denied by the trial judge.

V.

For these reasons we respectfully submit that the Court was justified in refusing to direct a verdict in favor of the defendants, and that the judgment below should be affirmed.

Respectfully submitted,
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