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EXHIBITS.

Exhibit D-1—Statement of John Pape to Investigator, with Alterations made by him. Admitted in Evidence at page 110; Photographic Copy shown at page 135

Notice of Appeal.

(Filed July 22, 1926.)

NEW JERSEY SUPREME COURT.

10

WALTER S. DUNBADEN,

Plaintiff,

vs,

CASTLES ICE CREAM COMPANY, a
corporation, FRED GRUNDMAN
and JOHN NEWMAN,

Defendants.

Action
at Law.

20

To FRANK W. HEILENDAY, ESQ.,
Attorney of Plaintiff.

MESSRS. POMERHENE, LAIBLE & KAUTZ,
Attorneys of Defendant Fred Grundman,

MESSRS. KINKEAD & KLAUSNER,
Attorneys of Defendant John Newman.

30

SIRS:—

PLEASE TAKE NOTICE, that the defendant Castles Ice Cream Company, a corporation, appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the New Jersey Supreme Court in the cause wherein Walter S. Dunbaden is plaintiff and Castles Ice Cream Company, a corporation, Fred Grundman and John Newman are defendants, and also take notice that the said defendant Castles Ice Cream Company, a corporation, states the following grounds of appeal:

40

Notice of Appeal.

10 1. The judgment against the defendant Castles Ice Cream Company, a corporation, was illegally entered on the verdict of the jury in this cause in view of the silence of said verdict as to the defendant Fred Grundman upon whose alleged negligence the liability of said defendant Castles Ice Cream Company, a corporation, is solely predicated in the complaint.

20 2. The verdict in this cause upon which said judgment is entered imports repugnant, contradictory and irreconcilable findings in that the verdict was silent as to the servant Fred Grundman and therefore in law amounts to a verdict in his favor on the issues submitted to the jury and at the same time the verdict was expressly against the defendant Castles Ice Cream Company, a corporation, against whom alleged negligence was solely predicated on alleged negligence of the said Fred Grundman as its servant.

3. The verdict did not meet the issues submitted to the jury by the trial judge.

30 4. The verdict in this cause being silent as to the servant Fred Grundman and therefore in law amounting to a verdict in his favor in view of the issues submitted to the jury, entitled the master, the defendant Castles Ice Cream Company, a corporation, of discharge from liability and therefore to the setting aside of the verdict, and judgment based thereon as against the defendant Castles Ice Cream Company, a corporation.

40 5. The trial judge erred in denying motion made on behalf of said defendant Castles Ice Cream Company, a corporation, for a direction of a verdict in favor of said defendant Castles Ice Cream Company, a corporation.

Notice of Appeal.

6. The trial judge erred in the charge to the jury in so far as said charge said in effect that it was a question of fact for the jury to decide if Grundman was acting at the time of the accident involved in this cause as an employee of the Castles Ice Cream Company, and at that time was acting in the scope of an employment as a servant of the Castles Ice Cream Company, the language of the court on this point being "it is for you to say from the evidence as you have it whether Grundman at that time and on that occasion and at that place was the servant and agent of the Castles Ice Cream Company". And also, "— bearing in mind the law as I have charged you with reference to the Castles Ice Cream Company and the dispute which arose there as to the agency, and the question whether at that time he was the servant of the company. That would be a question for you to decide."

10

20

7. Said judgment is in divers other respects irregular and illegal.

KELLOGG & CHANCE,
Attorneys of Defendant
Castles Ice Cream Company,
a corporation.

30

40

Summons.

(Filed April 6, 1925.)

THE STATE OF NEW JERSEY:

To: Castles Ice Cream Co., a corporation, Fred Grundman and John Newman.

10

YOU ARE SUMMONED to answer the annexed complaint of Walter S. Dunbalden in an action at law in the New Jersey Supreme Court, Union County.

20

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ. and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of the Supreme Court, at Trenton, this twenty-eighth day of November. nineteen hundred and twenty-four.

Edward J. Kelleher,
Clerk.

30 Frank W. Heilenday,
Attorney of Plaintiff,
539 Broadway,
Bayonne, N. J.

Complaint.

(Filed April 6, 1925.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

<p style="text-align: center;">WALTER S. DUNBADEN,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs,</i></p> <p style="text-align: center;">CASTLES ICE CREAM COMPANY, a corporation, FRED GRUNDMAN and JOHN NEWMAN,</p> <p style="text-align: center;"><i>Defendants.</i></p>	}	<p style="text-align: right;">10</p> <p style="text-align: center;">Action at Law.</p>
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Plaintiff, Walter S. Dunbaden, residing in Roselle, Union County, New Jersey, says: 20

First Count.

1. At all times hereinafter mentioned the defendant Castles Ice Cream Company was, and still is, a corporation.

2 On or about November 4, 1924 the said defendant was the owner of an automobile which was being driven along Rahway Avenue, a public highway, in Rahway, N. J. 30

3. Said automobile was negligently and carelessly operated by said defendant through its agent and servant, said negligence consisting in this:

Complaint.

(a) That the said automobile was operated by an incompetent driver;

(b) Said automobile was operated at a high, excessive and unlawful rate of speed;

10 (c) Said automobile did not keep to the right of the center of the road;

(d) The operator of said automobile did not keep a proper lookout for other automobiles upon said highway;

(e) The operator of said automobile did not control the motion thereof so as to avoid striking other automobiles upon said highway.

20 4. By reason of said negligence said automobile ran into another automobile which was proceeding in the opposite direction, and forced said automobile against plaintiff's automobile which was lawfully proceeding along said highway, and in which this plaintiff was riding, and plaintiff was thereby seriously and permanently injured about the head, body and limbs, and his nervous system was shocked and injured; from which injuries, and the results thereof, he was
30 made sick, sore, maimed and disordered, and so continues; he has suffered, still suffers and will continue to suffer in the future great pain and distress and will continue to lose such earnings in the future.

Second Count.

40 1. On or about November 4, 1924 the defendant Fred Grundman operated and controlled an auto-

Complaint.

mobile along Rahway Avenue, a public highway, in Rahway, N. J.

2. Said automobile was negligently and carelessly operated by said defendant, said negligence consisting in this:

(a) Said automobile was operated at a high, excessive and unlawful rate of speed; 10

(b) Said automobile did not keep to the right of the center of the road;

(c) The operator of said automobile did not keep a proper lookout for other automobiles upon said highway;

(d) The operator of said automobile did not control the motion thereof so as to avoid striking other automobiles upon said highway. 20

3. Plaintiff repeats the allegations of paragraph 4 of the first count and makes them a part hereof.

Third Count.

1. On or about November 4, 1924 defendant John Newman operated and controlled an automobile along Rahway Avenue, a public highway, in Rahway, N. J. 30

2. Said automobile was negligently and carelessly operated by said defendant, said negligence consisting in this:

(a) Said automobile was operated at a high, excessive and unlawful rate of speed;

(b) Said automobile did not keep to the right of the center of the road;

(c) The operator of said automobile did not keep a proper lookout for other automobiles upon said highway; 40

Complaint.

(d) The operator of said automobile did not control the motion thereof so as to avoid striking other automobiles upon said highway.

3. By reason of said negligence said automobile ran into plaintiff's automobile which was lawfully proceeding along said highway, and in which this plaintiff was riding, and this plaintiff was thereby seriously and permanently injured about the head, body and limbs, and his nervous system was shocked and injured; from which injuries, and the results thereof, he was made sick, sore, maimed and disordered and so continues; he has suffered, still suffers, and will continue to suffer in the future, great pain and distress, and he has lost his earnings and will continue to lose such earnings in the future.

Fourth Count.

1. Plaintiff repeats the allegations of paragraphs 1, 2 and 3 of the first count and makes them a part hereof.

2. By reason of said negligence said automobile ran into another automobile which was proceeding in the opposite direction, and forced said automobile against plaintiff's automobile which was lawfully proceeding along said highway, thereby wrecking plaintiff's automobile and rendering it unfit for use; and plaintiff was obliged to expend large sums of money in having said automobile towed, paying garage rent, and in making necessary repairs to said automobile.

Fifth Count.

1. Plaintiff repeats the allgations of paragraphs 1 and 2 of the second count and makes them a part thereof.

Complaint.

2. Plaintiff repeats the allegations of paragraph 2 of the fourth count, and makes them a part hereof.

Sixth Count.

1. Plaintiff repeats the allegations of paragraphs 1, 2 of the third count and makes them a part hereof. 10

2. By reason of said negligence, the said automobile ran into plaintiff's automobile, which was lawfully proceeding along said highway, thereby wrecking said automobile and rendering it unfit for use; and plaintiff was obliged to expend large sums of money in having said automobile towed, in paying garage rent, and in making the necessary repairs to said automobile. 20

Plaintiff demands damages

On first count \$5,000.00;
 On second count \$5,000.00;
 On third count \$5,000.00;
 On fourth count \$1,000.00;
 On fifth count \$1,000.00;
 On sixth count \$1,000.00.

Attorney of Plaintiffs. 30

Answer of Castles Ice Cream Company.

(Filed December 17, 1924.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

WALTER S. DUNBADEN,

*Plaintiff,**vs,*CASTLES ICE CREAM COMPANY, a
corporation, FRED GRUNDMAN
and JOHN NEWMAN,*Defendants.*Action
at Law.

20

The defendant, Castles Ice Cream Company, having an office at Perth Amboy, Middlesex County, New Jersey, for answer to the complaint herein alleges as follows:

First Defense to First Count.

1. The first paragraph of the first count is admitted.

30

2. The second paragraph of the first count is admitted.

3. Answering the third paragraph of the first count, this defendant admits that its automobile came into collision with another automobile which was negligently driven and operated, but except as admitted by that statement the third paragraph of the first count is denied.

40

4. Answering the fourth paragraph of the first count this defendant says that while proceeding

Answer of Castles Ice Cream Company.

along the public highway, another automobile ran into the automobile in which the plaintiff was riding and that this defendant has no knowledge or information sufficient to form a belief as to the extent of any injury which the plaintiff sustained, and denies all allegations of the fourth paragraph of the first count not hereby admitted. 10

Second Defense to First Count.

The automobile in which the plaintiff was riding at the time and place of the accident was driven by him and was negligently and carelessly operated, said negligence consisting in this:—

(a) Said automobile was operated by an incompetent driver; 20

(b) Said automobile was operated at a high, excessive and unlawful rate of speed;

(c) The plaintiff who was driving said automobile did not keep a proper lookout for other automobiles upon the highway;

(d) Plaintiff did not control the motion of the automobile he was driving so as to avoid collision with other automobiles upon the highway; 30

(e) Plaintiff drove said automobile when not equipped with proper brakes;

(f) Plaintiff did not make due and reasonably timely application of such brakes as were upon the automobile he was driving.

First Defense to Fourth Count. 40

1 Answering that part of the complaint entitled fourth count, this defendant repeats paragraphs one, two and three of the first defense to the first

Answer of Castles Ice Cream Company.

count as an answer to the first paragraph of said fourth count.

2. This defendant admits so much of the second paragraph of the fourth count as alleges that the automobile of this defendant came into collision
 10 with another automobile which was negligently driven upon the highway, and admits that such other automobile came into collision with that in which the plaintiff rode, but this defendant has no knowledge or information sufficient to form a belief as to the damage done to the automobile in which the plaintiff rode, or as to whether said automobile belonged to plaintiff, and this defend-
 20 ant denies each and every allegation of said second paragraph of the fourth count not hereby admitted.

Second Defense to Fourth Count.

The second defense to the first count is hereby repeated as a second defense to the fourth count.

Answer to the Second, Third and Fifth Counts.

30 As the second, third and fifth counts relate to the alleged negligence of other defendants this defendant makes no answer thereto, other than a denial of each and every allegation thereof, except in so far as said denial is inconsistent with the admissions, denials and allegations contained in other parts of this answer.

Further Defense to the First and Fourth Counts.

40 The accident involved in this action was caused by the negligence of the defendant John Newman as is alleged by the plaintiff in the third and sixth counts of his complaint.

KELLOGG & CHANCE,
 Attorneys of Defendant
 Castles Ice Cream Company.

**Reply to Answer of Castles Ice Cream
Company.**

(Filed January 13, 1925.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

<p style="text-align: center;">WALTER S. DUNBADEN, <i>Plaintiff,</i> <i>vs,</i> CASTLES ICE CREAM COMPANY, a corporation, FRED GRUNDMAN and JOHN NEWMAN, <i>Defendants.</i></p>	}	<p>10</p> <p style="text-align: center;">Action at Law.</p> <p>20</p>
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The reply of the plaintiff to the answer of the defendant Castles Ice Cream Company.

Reply to Second Defense to First Count.

1. Plaintiff denies the allegations of the second defense to the first count.

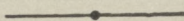
Reply to Second Defense to Fourth Count. 50

1. Plaintiff repeats the allegations of the reply to the second defense to the first count.

Reply to Further Defense to First and Fourth Counts.

1. Plaintiff denies the allegations of the further defense to the first and fourth counts, except as the same are admitted in the complaint herein. 40

FRANK W. HEILENDAY,
Attorney of Plaintiff.



Answer of Fred Grundman.

(Filed December 26, 1924.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

WALTER S. DUNBADEN,

*Plaintiff,**vs,*CASTLES ICE CREAM COMPANY, a
corporation, FRED GRUNDMAN
and JOHN NEWMAN,*Defendants.*Action
at Law.

20

The defendant Fred Grundman, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, answering the complaint, herein alleges as follows:

First Defense to First Count.

1. Upon information and belief this defendant
30 admits paragraph 1 of the first count.

2. Upon information and belief this defendant
admits paragraph 2 of the first count.

3. He denies paragraph 3.

4. Answering the fourth paragraph of the first
count, this defendant says that while driving
along the public highway another automobile ran
into the automobile in which the plaintiff was
riding and that this defendant has no knowledge
40 or information sufficient to form a belief as to the
extent of any injury which the plaintiff sustained,

Answer of Fred Grundman.

and denies all allegations of the fourth paragraph of the first count not hereby admitted.

Second Defense to First Count.

The automobile in which the plaintiff was riding at the time and place of the accident was driven by him and was negligently and carelessly operated, said negligence consisted in this: 10

(a) Said automobile was operated by an incompetent driver;

(b) Said automobile was operated at a high, excessive and unlawful rate of speed;

(c) The plaintiff who was driving said automobile did not keep a proper lookout for other automobiles upon the highway; 20

(d) Plaintiff did not control the motion of the automobile he was driving so as to avoid collision with other automobiles upon the highway.

(e) Plaintiff drove said automobile when not equipped with proper brakes;

(f) Plaintiff did not make due and reasonable timely application of such brakes as were upon the automobile he was driving. 30

First Defense to Second Count.

1. Answering that part of the complaint entitled second count, this defendant repeats paragraphs 1, 2 and 3 and 4 of the first defense to the first count of the complaint as an answer to the first paragraph of the said second count. 40

2. He denies paragraph 2 of the second count.

3. He repeats his answer to paragraph 4 of the

Answer of Fred Grundman.

first count in answer to paragraph 3 of the second count.

Second Defense to Second Count.

The second defense to the first count is hereby
10 repeated as a second defense to the second count.

First Defense to Fourth Count.

1. Answering that part of the complaint entitled fourth count, this defendant repeats paragraphs 1, 2 and 3 of the first defense to the first count in answer to the first paragraph of the fourth count.

20 2. This defendant admits so much of the second paragraph of the fourth count as alleges that the automobile which this defendant was driving came into collision with another automobile which was negligently driven upon the highway and admits that such other automobile came into collision with that in which the plaintiff rode, but this defendant has no knowledge or information sufficient to form a belief as to the damage done to the automobile in which the plaintiff rode, or as to
30 whether said automobile belonged to plaintiff, and this defendant denies each and every allegation of said second paragraph of the fourth count not hereby admitted.

Second Defense to Fourth Count.

The second defense to the first count is hereby repeated as second defense to the fourth count.

40 *First Defense to Fifth Count.*

1. Answering that part of the complaint entitled fifth count, this defendant repeats para-

*Answer of Fred Grundman.**Complaint.*

graphs 1, 2 and 3 of the first defense to the second count as an answer to the first paragraph of the fifth count.

2. This defendant repeats the allegations of paragraph 2 of the first defense to the fourth count in answer to paragraph 2 of the fifth count. 10

Second Defense to Fifth Count.

Second defense to the first and second count is hereby repeated as second defense to the fifth count.

Answer to Third and Sixth Counts. 20

As the third and sixth counts relate to the alleged negligence of another defendant, this defendant makes no answer thereto, other than denial of each and every allegation thereof, except in so far as said denial is inconsistent with the admissions, denials and allegations contained in other parts of the answer.

Further Defense to the First, Second, Fourth and Fifth Counts. 30

The accident involved in this action was caused by the negligence of the defendant John Newman as alleged by the plaintiff in the third and sixth counts of his complaint.

POMERHENE, LAIBLE & KAUTZ,
Attorneys for Defendant Fred Grundman.

Reply to Answer of Fred Grundman.

(Filed January 13, 1925.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

WALTER S. DUNBADEN,

*Plaintiff,**vs,*CASTLES ICE CREAM COMPANY, a
corporation, FRED GRUNDMAN
and JOHN NEWMAN,*Defendants.*Action
at Law.

20

The reply of the plaintiff to the answer of the defendant Fred Grundman.

Reply to Second Defense to First Count.

1. Plaintiff denies the allegations of the second defense to the first count.

Reply to Second Defense to Second Count.

30

1. Plaintiff repeats the allegations contained in the reply to the second defense to the first count.

Reply to Second Defense to Fourth Count.

1. Plaintiff repeats the allegations of the reply to the second defense to the first count.

40

Reply to Second Defense to Fifth Count.

1. Plaintiff repeats the allegations of the reply

to the second defense to the first and second counts.

Reply to Further Defense to First, Second, Fourth and Fifth Counts.

1. Plaintiff denies the allegations contained in the further defense to the first, second, fourth and fifth counts, except as the same are admitted in the complaint herein. 10

FRANK W. HEILENDAY,
Attorney of Plaintiffs.

Answer of John Newman.

(Filed December 24, 1924.)

NEW JERSEY SUPREME COURT. 20
UNION COUNTY.

<p>WALTER S. DUNBADEN, <i>Plaintiff,</i> <i>vs,</i> CASTLES ICE CREAM COMPANY, a corporation, FRED GRUNDMAN and JOHN NEWMAN, <i>Defendants.</i></p>	}	<p>Action at Law.</p>	<p>30</p>
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The defendant John Newman residing in the City of Jersey City, County of Hudson and State of New Jersey, in answer to the plaintiff's complaint, says that: 40

Answer of John Newman.

1. He admits paragraphs 1, 2 and 3 of the first count of the complaint.
2. He denies paragraph 4 of the first count of the complaint.
- 10 3. He admits paragraphs 1 and 2 of the second count of the complaint.
4. He denies paragraph 3 of the second count of the complaint.
5. He denies paragraphs 1 and 2 of the third count of the complaint.
6. He repeats the answers to paragraphs 1, 2 and 3 of the first count of the complaint and makes them a part of the answer to the first paragraph of the fourth count.
- 20 7. He denies paragraph 2 of the fourth count of the complaint.
8. He repeats the answers to paragraphs 1 and 2 of the second count of the complaint and makes them a part of the answer to the first paragraph of the fifth count.
- 30 9. He repeats the answer to paragraph 2 of the fourth count of the complaint and makes it a part of the answer to paragraph 2 of the fifth count.
10. He repeats the answers to paragraphs 1 and 2 of the third count of the complaint and makes them a part of the answer to paragraph 1 of the sixth count.
- 40 11. He denies paragraph 2 of the sixth count of the complaint.

*Answer of John Newman.**First Separate Defense.*

This defendant was not guilty of negligence which was the proximate cause of the accident complained of.

Second Separate Defense.

10

This defendant alleges that the accident referred to in the plaintiff's complaint occurred through the negligence of the operator of the automobile owned by the plaintiff, in that the said automobile was operated by an incompetent driver, at a high, excessive and unlawful rate of speed, and did not keep to the right of the center of the road, and that the operator of the said automobile did not keep a proper lookout for other automobiles upon the said highway, and did not control the motion thereof, so as to avoid striking other automobiles upon the said highway, and the said plaintiff without objection, rode in the said automobile and did not take due care for his own safety. 20

KINKEAD & KLAUSNER,
Attorneys of Defendant John Newman.

30

40

Reply to Answer of John Newman.

(Filed December 24, 1924.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10

WALTER S. DUNBADEN,

*Plaintiff,**vs,*CASTLES ICE CREAM COMPANY, a
corporation, FRED GRUNDMAN
and JOHN NEWMAN,*Defendants.*Action
at Law.

20

The reply of the plaintiff to the answer of the
defendant John Newman.

Reply to First Separate Defense.

1. Plaintiff denies the allegations of the first
separate defense.

30

Reply to Second Separate Defense.

1. Plaintiff denies the allegations of the second
separate defense.

FRANK W. HEILENDAY,
Attorney of Plaintiff.

40

Postea.

(Filed June 19, 1926.)

NEW JERSEY SUPREME COURT.

UNION COUNTY.

<p style="text-align: center;">WALTER. S. DUNBADEN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">CASTLES ICE CREAM COMPANY, a corporation, FRED GRUNDMAN and JOHN NEWMAN, <i>Defendants.</i></p>	}	<p>10</p> <p style="text-align: center;">Action at Law.</p> <p>20</p>
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This cause was tried before Hon. Alfred A. Stein, to whom it had been referred by a Supreme Court Justice, and a jury, at the Union Circuit, on June 2nd, 3rd and 4th, 1926.

The jury returned their verdict as follows:

“We find in favor of the plaintiff Walter S. Dunbaden, and against the defendant Castles Ice Cream Company, a corporation and assess the damages at Five hundred Dollars (\$500.00.”

Dated June 5, 1926.

ALFRED A. STEIN,
Judge.

Statement of Judgement.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

10	WALTER S. DUNBADEN, Plaintiff, <i>vs.</i> CASTLES ICE CREAM COMPANY, a Corporation, Defendants.	} Action at Law.
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STATEMENT.

20

Judgment entered June 19, 1926.

Damages	\$50.00
Costs:	
Attorney	36.00
Disbursements	33.79
	\$569.79

30

EDWARD J. KELLEHER,
Clerk.

40

Testimony.

NEW JERSEY SUPREME COURT.
UNION COUNTY.

<p style="text-align: center;">Tuesday, June 2, 1926.</p> <p>ETHEL DUNBADEN and ALVA DUNBADEN, her husband; CLARA PAQUIN, by John Dunbaden, her next friend, and WALTER S. DUNBADEN,</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>CASTLES ICE CREAM COMPANY, a Corporation, FRED GRUNDMAN, and JOHN NEWMAN,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>10</p> <p style="text-align: center;">Action at Law.</p> <p>20</p>
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Before:

HON. ALFRED A. STEIN, *J.*, and a jury.

For the plaintiffs appears FRANK W. HEILENDAY,
Esq., 30

For the defendant Castles Ice Cream Company
appear KLOGG & CHANCE, Esqrs. (by R. Robinson Chance, Esq.).

For the defendant Fred Grundman appear POMEREHNE, LAIBLE & KAUTZ, Esqrs. (by Gorge P. Laible, Esq.).

For the defendant John Newman appear KINKEAD
& KLAUSNER, Esqrs. (by David M. Klausner, Esq.). 40

(A jury is called and sworn.)

Adjourned to Wednesday, June 3, 1926.

Carl Huber—Direct.

Wednesday, June 3, 1926.

Mr. Heilenday opens for the plaintiffs.

Mr. Chance opens for the defendant Castles Ice Cream Company.

10 Mr. Laible opens for the defendant Fred Grundman.

Mr. Klausner opens for the defendant John Newman.

CARL HUBER, sworn in behalf of plaintiffs.

DIRECT EXAMINATION BY MR. HEILENDAY:

Q. Where do you live, Mr. Huber? A. Roselle.

23 Q. What is your business? A. Automobile mechanic.

Q. Have you bought and sold used Ford cars? A. Yes, sir.

Q. For how long a time? A. About six or eight years.

Q. Do you know the Walter Dunbaden automobile? A. Yes, sir; I do.

Q. Which was damaged in November, 1924? A. Yes, sir.

30 Q. Which was damaged on election day, 1924? A. Yes, sir.

Q. Did you see it shortly before that day?

A. Yes, sir; I worked on the car I think about a week before. I worked on that car about a week before it was damaged.

Q. Are you entirely familiar with the car? A. Yes, sir.

Q. Do you know what model it was, what year?

40 A. Model T.

Q. What year? A. 1921.

Carl Huber—Direct.

Q. 1921? A. Yes, sir.

Q. You are sure it is 1921 or 1922? A. It was 1921.

MR. LAIBLE: I object to his contradicting his own witness. It is leading.

THE COURT: I will allow it.

10

MR. LAIBLE: I withdraw it.

BY THE COURT:

Q. Are you sure that it was 1921? A. I believe it says 1921 on the bill of sale.

Q. It says so on the bill of sale? A. Yes, sir.

Q. Did you see the bill of sale? A. Yes, sir.

Q. Is that the way you arrived at it? A. Yes, sir.

Q. Do you know what year Model T was made in? A. All years are model T. 20

Q. Is there any way you can tell by an examination of the engine itself how or when the car was made? A. By the motor.

Q. Did you look at it? A. I don't remember the motor number.

THE COURT: Go on.

BY MR. HEILENDAY:

30

Q. You say you worked on this car a week before. At that time what did you do on the car?

A. I put in a set of piston rings.

Q. You saw the motor number at that time?

A. Yes, sir. I think I did.

Q. After you got through working on that car, what condition was the car in? A. The car was in very good condition.

Q. Do you know what the value of the car was at that time? A. (No answer.) 40

Carl Huber—Direct.

BY MR. LAIBLE:

Q. Mr. Huber, how many cars have you bought and sold, Ford cars? A. Well, I don't remember just the number, the amount. I think about—

THE COURT: About?

10

A. I will say propably about seventy-five cars.

Q. Are you in the Ford business? A. No, I am not in the Ford business.

Q. Were you ever in the Ford business? A. I did work in the Ford plant in Utica.

Q. I mean in the Ford selling and buying. You have no salesroom? A. No, sir; I have no salesroom.

Q. When was the last time you sold a Ford
20 second-hand car? A. About two months ago.

Q. What model was that? A. Model T.

Q. How about 1924? How many did you sell in 1924? A. I don't quite remember.

Q. How many 1921 cars did you sell in 1924? A. I sold, I think, two or three.

Q. 1921? A. Yes; something like that. Why, I think I sold one, 1923.

THE COURT: This accident happened in
30 1924?

MR. LAIBLE: 1924.

Q. How do you sell them? Do you just buy them, or do you act as agency in handling those sales? A. Why, I buy anything at all. It does not make any difference.

Q. When a man comes to you and wants to buy a Ford car, do you go to the agency, or pick it up?
40 A. I just pick it up at the Ford agencies or anywhere.

Carl Huber—Direct.

Q. You never have had a Ford salesman? A. No, sir; never had a Ford salesman, not myself.

Q. How old was this car at the time, on election day, 1924? A. About three years old, about four years old.

BY MR. HEILENDAY:

10

Q. I asked you what was the value of that car on election day, 1924. A. The value of that car, for the sedan—somewheres around about three hundred dollars.

Q. Three hundred dollars? A. Yes, sir.

Q. Did you see it after the accident? A. Yes, sir; I did.

Q. How soon after the accident? A. I think it was the next day after the accident.

20

Q. What was the value of the car after the accident? A. Why, fifty dollars. That is what I paid for it.

Q. Did you actually buy the car? A. I actually bought the car.

Q. You paid Dunbaden fifty dollars? A. I paid Dunbaden fifty dollars.

Q. That was the market value? A. Yes, sir.

Q. Do you know anything about the reasonable charge for towing that car from the scene of the accident to a garage in Rahway, and from a garage in Rahway to Roselle?

10

MR. LAIBEL: I object. The true measure of damages is the difference in value before and after the accident.

(Argument.)

THE COURT: I will allow the question.

MR. LAIBLE: I pray an exception.

20

THE COURT: Exception allowed.

Exception allowed, sealed accordingly.

ALFRED A. STEIN,
Judge.

Carl Huber—Direct.

Q. Assuming the car was towed from the scene of the accident—do you know where the accident occurred? A. In Rahway.

Q. Assuming it was towed to a garage in Rahway and then from Rahway to Roselle the next day?

10

MR. LAIBEL: I don't think we are responsible for that.

(Argument.)

THE COURT: I will allow the proof of towing to the garage at Rahway.

Q. What was the reasonable charge for towing this car to the garage in Rahway? A. I should say about fifteen dollars.

20

Q. How soon after the accident did you buy the car? A. I think about a month after.

Q. What would be the reasonable charge for storing that car for a month?

MR. LAIBEL: I object.

THE COURT: Objection sustained.

MR. HEILENDAY: I withdraw the question.

Q. Now, what was the reasonable charge of towing that car from Rahway to the Dunbaden house in Roselle? Do you know where he lives? A. Yes, sir.

30

MR. LAIBEL: I object to that.

THE COURT: Objection sustained.

MR. HEILENDAY: I will ask for an exception.

THE COURT: Exception granted.

Exception allowed, sealed accordingly.

40

ALFRED A. STEIN,

Judge.

Carl Huber—Cross.

CROSS EXAMINATION BY MR. LAIBLE:

Q. How did you arrive at the figure of three hundred dollars as the value of this car? A. Why, the car was in pretty good condition, in perfect condition.

Q. What was the value of the 1921 car new, in 1921, when it was purchased? A. I think it was somewhere around six hundred dollars. 10

Q. A car depreciates a certain amount the first year, does it not? A. Yes, it does if it is not repaired.

Q. It depreciates as a second hand value every year, does it not? A. It does.

Q. That is a certain percentage, is it not? A. It is. 20

Q. How much is it the first year? A. Well, that is according to the use the car has had.

Q. In buying and selling second-hand cars, you have a certain percentage of depreciation at the end of the first year, that is, about forty or fifty per cent? A. Yes, sir.

Q. The second year ten per cent added every year thereafter, is it not? A. Yes, sir.

Q. That would bring the depreciation of this car down approximately between sixty and seventy per cent, is that right? A. That is about right. 30

Q. If a car was worth six hundred dollars new in 1921, it would be worth about two hundred dollars in 1924, would it not? A. It all depends upon the condition the car is in, that is, if you buy the car. That is the way I figure.

Q. Isn't there a book published by the Second Hand Mart of Chicago? A. Yes. 40

Carl Huber, Re-Direct—Walter Dunbaden, Direct.

Q. Did you ever see that book? A. Yes, sir.

Q. Did you examine that book for 1921 cars in 1924? A. Yes, I have.

Q. Isn't it true that this car of 1921 would be only worth around two hundred dollars in 1924? A. Yes, sir.

10 Q. As a second-hand appraisal? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. HEILENDAY:

Q. Would not the fact that you made repairs to this car, put it in first-class condition, make a difference in the market value of the car?

MR. LABEL: I object.

20 THE COURT: He has already testified to that in his cross-examination.

MR. HEILENDAY: I withdraw the question.

WALTER S. DUNBADEN, one of the plaintiffs, sworn in his own behalf, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

3 Q. Walter, where do you live? A. 408 Stockton Avenue, Roselle.

Q. What is your business? A. At the present time I am in the creosoted lumber business.

Q. On election day, 1924, were you driving an automobile? A. I was.

Q. Where had you been that day? A. Asbury Park.

Q. On the way home from Asbury Park to Roselle, did anything happen to the automobile? A. It did. My automobile was demolished.

40 Q. Yes, or no? A. Yes.

Q. Whereabout was it? A. On Rahway Avenue.

Walter S. Dunbaden—Direct.

Q. Coming from where to where? A. Coming from Asbury Park to Roselle.

THE COURT: In what direction was that?

THE WITNESS: Northerly at that point, I think.

Q. You were driving north? A. That is right. 10

Q. Who was in the car with you? A. Miss Paquin, my brother and his wife.

Q. What kind of car was this? A. Ford sedan, two door.

Q. And the front seat is a split seat? A. Yes, sir.

Q. You were sitting on the — A. Left hand side. Miss Paquin was on the right.

Q. In the rear seat, who was there? A. My brother and his wife, Alva and Ethel. 20

Q. Who else was in the party that day? A. My mother and father, Mrs. Pape and Mr. Pape.

Q. Were they also in an automobile? A. They were.

Q. Where was that automobile? A. It was to my rear.

Q. Coming down to the time of the accident: What time of day was it? A. I would say it was about five-twenty. 30

Q. Was the traffic or road clear? A. The traffic was very heavy.

Q. Were you going fast or were you going slow? A. I was going slow.

Q. What kind of car was immediately in front of your car? A. Cadillac.

Q. Did you observe the car in front of the Cadillac? A. In front of the Cadillac was a Ford roadster. 40

Q. Do you know who owned that? A. I know now it was Castles Ice Cream Company.

Walter S. Dunbaden—Direct.

Q. That was the Castles Ice Cream Company roadster? A. That is right.

Q. Do you know who was in that car? A. To my knowledge there were two men.

Q. Do you know the name of the driver? A. Fred Grundman.

10 Q. You do not know the name of the other man? A. No, sir; I could not obtain it.

Q. How was the driver dressed? A. The driver as I recall, was in overalls, as was the other man.

Q. Both men were in overalls? A. Yes, sir.

Q. Did you notice traffic coming the other way, coming towards you, near that spot? A. There was traffic in both directions.

Q. Did you see the Buick automobile of Mr. Newman? A. Not until it collided with the car of Castles.

Q. Getting down to the time of the collision. You were following the Castles Ice Cream car two cars behind? A. That is correct.

Q. Did you see the Castles Ice Cream Company car do anything before the collision? A. I saw it turning out.

Q. Which way? A. Evidently to the left to pass the truck.

20 Q. Towards the centre of the street? A. Yes, sir.

Q. What did the Buick do? A. The Buick swerved left.

Q. Came to the centre? A. It did.

Q. Did you see the Cadillac? A. I did.

Q. Where was that? A. It was to my left hand and in the centre of the road.

Q. Do you know what part of the two cars came together? A. From my position it looked to me like the wheels collided.

40

Walter S. Dunbaden—Direct.

Q. Immediately after the collision, which way did the Castles Ice Cream Company car go? A. It swerved to the left.

Q. Did it stop in the road or off the dirt? A. After I saw the car it was off the road, that is, in the part to the left hand side of me.

Q. Immediately after the accident, which way did the Buick go? A. The Buick car, after the first impact, came to the left-hand side of the road and right into me.

10

Q. (BY THE COURT:) That is the Newman car? A. Yes, sir. The Cadillac car stopped for a second and then he went straight ahead.

Q. When the Cadillac stopped, what did you do? A. I brought my car to a stop.

Q. Immediately after the impact, the Cadillac car went which way? A. It went to the north.

20

Q. It kept right on? A. Straight ahead.

Q. At the time, where were you? A. When I was hit I was at a standstill.

Q. What kind of car was yours? A. Two door Ford sedan.

Q. What year? A. To my knowledge it was a 1922 car.

Q. Was it in good condition prior to the accident? A. Yes, it was.

30

Q. How was it immediately after the accident? A. Immediately after the accident it was completely destroyed.

Q. What happened to it? Was the glass broken or what? A. The left hand wheel was knocked entirely off the rim. The bumper was broken into three pieces. The front mudguard was cork-screwed. It was twisted so tightly. The front lamp was off. The front panels of the glass were both demolished. The left-hand window pane and the right were both destroyed.

40

Walter S. Dunbaden—Direct.

Q. What about the frame? A. The frame was twisted into knots.

Q. What happened to the car after that? A. After that the car was left there until the policeman came along and ordered it off the road.

10 Q. Did you have it taken off the road? A. I did.

Q. Where did you have it taken? A. To a garage in Rahway.

Q. Did you pay them for towing it? A. I did.

Q. After it was towed to the garage in Rahway, what became of the car after that? A. It was stored over-night and brought to Roselle the next day.

20 Q. Did you pay the garage for storage? A. I did.

Q. Did you pay for towing it from the garage to your home? A. I did.

Q. How long after that did you sell the car? A. Just about a month later.

Q. Were you endeavoring to sell it right off? A. I was just holding it in case this thing came up.

30 Q. You eventually did sell it? A. To Carl Tuber.

Q. How much did you sell it for? A. Fifty dollars.

Q. Did anything happen to you in regard to injuries? A. Well, I had skin taken off from the knuckle on my right hand.

Q. Which hand was injured? A. My right.

40 Q. How long did it take before that hand healed up. A. I had scars on there for about two weeks.

Q. Did you have any pain? A. My fingers were stiff for three or four days.

Walter S. Dunbaden—Direct.

Q. Were you able to work? A. Well, I did. I had to go to work.

Q. You did not lose any time? A. I didn't lose any time through it. No, sir.

Q. What happened to Miss Paquin? A. Miss Paquin got cut over the right eye, cut about the face, her hands were cut and I believe her ribs were bruised. 10

Q. What about Mr. and Mrs. Dunbaden. Were they injured? A. My brother was cut on the head and his right hand was injured. My sister-in-law was knocked unconscious and bruised.

Q. At that time Mrs. Dunbaden was working? A. Yes, she was.

Q. Do you know whether she lost any time from work after the accident? A. She lost about ten days. 20

BY THE COURT:

Q. Alva and Ethel Dunbaden are your brother and sister-in-law? A. That is correct.

BY MR. HEILENDAY:

Q. Did you see the cuts and bruises on your brother and sister-in-law? A. I did. 30

Q. Miss Paquin, what happened to her after the accident? A. After the accident, I took her out of my car and placed her in another car. We took her and my mother to a hospital along with myself.

Q. When you got to the hospital, did you see what they did to Miss Paquin? A. I did not stay at the hospital. I went back to the scene of the accident.

Q. Miss Paquin remained in the hospital with your mother? A. That is right. 40

Walter S. Dunbaden—Direct.

Q. Did you pay the hospital bill or did someone else pay it? A. My mother paid it at that time.

Q. Did you go to Dr. Dennin with Miss Paquin? A. I made one trip to the doctor with Miss Paquin.

10 Q. Did you pay the doctor? A. I paid him.

Q. How much? A. Five dollars.

Q. That was on November 16th you went to the doctor? A. Yes, sir.

Q. What day did this accident happen? A. November 4, 1924.

Q. What was the condition of Miss Paquin from November fourth to the sixteenth? A. Miss Paquin was in bed for at least a week at the doctor's orders.

20 Q. When she got out of bed did she go out or did she stay in the house? A. She had to stay in the house.

Q. Prior to that she was working? A. She had been working, yes.

Q. Did you see any stitches on her eye? A. I did.

Q. How many? A. Five.

30 Q. After the stitches were removed was anything else put on her eye? A. Wire clamps or steel clamps were put on the wound.

Q. Was her eye bandaged? A. Her eye was bandaged for about a month.

Q. And were her hands bandaged? A. Her hands were bandaged for about a month, I should say.

Q. Is there anything the matter with her eye or hands now? A. Her eye and hands both show scars.

40 Q. Did you go to the police station with the driver of this Castles Ice Cream Company car? A. We were all taken to the police station.

Walter S. Dunbaden—Direct.

Q. You went there? A. I did, yes, sir.

Q. Did you observe his condition? A. I did.

Q. What was his condition in regards to sobriety? A. His condition to me indicated that he was under the influence of liquor.

Q. How did he talk and how did he act? A. He acted in a very brusque manner. 10

THE COURT: What was this driver's name?

THE WITNESS: Fred Grundman.

Q. Did you notice his companion? A. His companion was entirely under the influence of liquor.

Q. When they got to the police station, who was it demanded that the doctor examine them? A. I said the doctor should examine him. 20

Q. When the doctor examined him, were you present? A. The doctor examined him in my presence.

Q. Was there any discussion about how many drinks he had had? A. He admitted having several drinks about 12:30.

Q. What time was this discussion? A. At this time it was about six o'clock, somewhere around there. 30

Q. In his presence and in your presence, did the doctor say anything about his having drink in him?

MR. LAIBEL: I object to that.

THE COURT: I will allow it.

Q. Did you hear the doctor say anything to Grundman in his presence and in your presence, about his having drink in him? A. The doctor said there was no question about his having 40

Walter S. Dunbaden—Direct, Cross.

drink. He was not sufficiently under the influence of liquor at that time to be unable to drive a car.

Q. What was he examined for? A. To determine whether he was intoxicated and unfit to drive a car.

10 Q. Was it for the purpose of having him arrested?

MR. LABEL: I object.

THE COURT: I sustain the objection.

Q. Were the police officials around at the time the examination was made? A. Yes, sir.

CROSS EXAMINATION BY MR. CHANCE:

20 Q. When you first saw this Buick belonging to Mr. Newman, it was about fifty feet from you, wasn't it? A. That is correct.

Q. And you first saw it almost the instant of the contact between that and the Ford roadster, did you say? A. That was the first time I did see it.

Q. And you brought your car to a stop almost instantly, did you? A. Immediately upon the impact of the other two cars.

30 Q. How far would you say you were or went between the time you saw the Buick swing out to his left and the time when you came to a stop? A. Not more than the length of my car.

Q. How long is that? A. I should say about eight feet.

Q. Then the Buick, between the time of the contact between it and the Ford roadster and the time of the contact of Newman's Buick and your car travelled about forty-two feet? A. About

40

Walter S. Dunbaden—Cross.

forty feet, somewhere around there. I could not say exactly.

Q. Approximately forty feet Newman's Buick travelled? A. That is right.

Q. And when Newman's Buick hit your car, did it hit it very gently? A. It did not.

Q. How did it hit it? A. It hit me at the speed that he had been coming along the road. I could not say what that speed was. 10

Q. Was there anything else besides the force of the contact of Newman's Buick coming into your car, that you know of, that entered into the smashing and damaging of your car that you told us about? A. There was nothing to impel his car at any more speed than it was going, to my knowledge. 20

Q. You said traffic was very heavy, didn't you? A. I did.

Q. How many cars, about, would you say, were in that vicinity, just about the time your car and Newman's car came together? A. I could not say how many cars there were.

Q. Could you give any approximation? A. Why, no. We had been in traffic for at least half a mile back. When we hit into the cross-road at the railroad bridge, it increased. I cannot say how many cars were on the road there. 30

Q. There were a great many of them, weren't there? A. There were.

Q. They didn't, any of this great many cars, interfere or in any way enter the course of Newman's touring car over that forty-two feet, between where that hit the Castles Ice Cream car and where it hit your car? A. I suppose there were cars in back of him the same as in back of me. 40

Walter S. Dunbaden—Cross.

Q. You did not see any other car knock him, make him go faster, did you? A. No, sir.

Q. Now I notice that you said after you saw the Castles Ford roadster it was off the road. How long after or before the contact between the Castles car and the Newman's car was it that
10 you saw the Castles car? A. As soon as we were hit, I took Miss Paquin to the hospital and came right back again. At that time the car was off the road.

Q. How far was the hospital from there? A. I didn't then know where it was.

Q. It was some considerable distance? A. About five minutes' ride.

Q. It was five minutes afterwards that you saw
20 the Castles car off the side of the road? A. Five to ten minutes.

THE COURT: You don't know how it got there, do you?

THE WITNESS: No, sir.

CROSS EXAMINATION BY MR. LAIBLE:

Q. You said when you got to the police station, the doctor, after examining Mr. Grundman, said
30 that he was fit to drive a car? A. I said that, while he had been drinking, he was not sufficiently under the influence of liquor not to be able to control a car.

Q. You spoke of Mr. Grundman's companion? A. That is correct.

Q. You don't know whether he was his companion? A. He was in his car.

Q. Just because he was riding in the car, you
40 call him a companion? A. I tried to secure his name. Well, naturally—

Walter S. Dunbaden—Cross.

Q. You don't know whether Mr. Grundman knew him or whether he was a helper there or who he was, do you? Not actually. only your conclusion? A. Only from his conversation.

Q. Not Mr. Grundman? A. Not Mr. Grundman. He told me he did not know the man.

Q. There was a Cadillac car in front of you? 10
A. That is correct.

Q. What kind of Cadillac was that? A. Sedan.

Q. A sedan? A. I think it was a sedan. I don't recall.

Q. You were directly behind? A. Yes, sir.

Q. So you did not see the Ford ahead of you? The Cadillac barred your view? A. It barred my view. I saw the Ford in the middle of the road at the time of the collision. 20

Q. That road is not very wide, is it? A. I would say it is wide enough for four passenger cars to travel.

THE COURT: At what point in Rahway Avenue was this?

THE WITNESS: I do not know.

THE COURT: Was it in RaRhway?

WITNES: I learned later from the police man that it was near Jacques Avenue. 30

Q. There was a big truck ahead of the Newman car? A. There was a truck to the opposite side of the car.

Q. Coming toward you? A. Yes, sir.

Q. That was what kind of a truck? A. I think it was a green-bodied Mack.

Q. Was it a five ton truck? A. I did not look at it enough to tell you.

Q. It was a large truck? A. Yes, sir. 40

Walter S. Dunbaden—Cross.

Q. That was coming on the right side of the road on the paved street, was it not? A. It was coming on the opposite side from me.

Q. It was on the paved portion of the road? A. Yes, sir.

30 Q. And then Newman's car came around that truck, is that right? A. When I first saw the Newman car, it was at the point of the collision. At that time the truck was passing me.

Q. Isn't it a fact that when you first saw it was when the two cars came together? A. That is what I told you.

Q. The fact that the Cadillac stopped is what made you stop? A. The Cadillac showed its stop light; that is why I stopped.

40 Q. Then you happened to notice these cars together? A. I saw these cars hit.

CROSS EXAMINATION BY MR. KLAUSNER:

Q. What is your address? I did not get your address, Mr. Dunbaden? A. 408 Stockton Avenue, Roselle.

30 Q. I just understood you to say that as the collision between the Newman automobile and the Castles automobile took place, the Mack truck was passing you? A. Was passing me.

Q. What part of the Mack truck was at your wheel at the time the collision took place? A. I could not say; I was too busy taking care of my own car.

Q. You do know that the Mack truck was actually passing you at the time you saw the collision take place? A. I do.

40 Q. Traffic was heavy at both sides? A. That is right.

Walter S. Dunbaden—Cross.

Q. And as you were going, you were going in a northerly direction? About how wide would you say that road was, approximately in feet, if you know? A. I don't know.

Q. Was there a white line in the center, do you know? A. I don't recall a white line.

Q. As you were driving along, were you nearer the center of the roadway or nearer the right of your roadway? A. I was about a foot in from the right hand side. 10

THE COURT: One foot from the extreme right of the pavement?

THE WITNESS: Yes, sir.

Q. That is a paved road with dirt on both sides, no sidewalks? A. I don't believe there were sidewalks there. 20

Q. And the houses there are more than one hundred feet apart? A. I don't recall seeing anything but a garage in that vicinity.

Q. It is open country? A. That is right.

Q. About how far from the center of the roadway would you say you were driving at the time you saw the collision between the Castles car and the Newman car take place? A. I would say there was at least a car's distance between my car and the center of the road. 30

Q. About how far from you was the Mack truck at that time to your left? A. I think a car could have stopped in between us.

Q. Just about a car's width, wasn't it? A. A car's width.

Q. So that the Mack truck then would have been right close to the center of the road. The left side of the Mack truck, or what you say was the left side of the Mack truck was a few feet 40

Walter S. Dunbaden—Cross.

from the center of the road? A. I think the Mack truck was plenty on his own side.

Q. A few feet? A. From the center of the road, but on his own side.

10 Q. You say there was about a car's width between your car and the Mack truck and the left side of it was a few feet from the center of the road. Is that so? A. Yes, sir; that is right.

Q. As you were driving along, was the Cadillac directly in front of you? Was the left side directly in line with your left side? A. I would not say that. His car was a wider car.

Q. Would you say the left side of the Cadillac was nearer the center of the road than the left side of your car? A. I would.

20 Q. And the Ford car was in front of the Cadillac? A. That is right.

Q. The Ford of the Castles Ice Cream Company? A. Yes, sir.

Q. How far in front of your car approximately was the Cadillac car? A. I would say, oh, about half a car's length, at least.

THE COURT: Nine feet, six feet?

30 THE WITNESS: I would say at least eight feet.

Q. Approximately six to eight feet? A. Yes, sir.

Q. Approximately how many feet was the Castles Ice Cream car in front of the Cadillac car? A. I could not say. I did not see it until it swerved out.

40 Q. You say then that the Castles Ice Cream Company car swerved out to the left? A. That is correct.

Walter S. Dunbaden—Cross.

Q. And the Cadillac car was closer to the center of the road and your car? A. It was.

Q. In swerving to the left, what part of the Castles Ice Cream car struck the Newman car?

A. From where I observed it, I would say the wheels came together.

Q. The two left wheels came together? 10

THE COURT: You didn't actually see it?

THE WITNESS: I didn't look to see what part of the cars came together.

THE COURT: From the position you saw them. That is your conclusion?

THE WITNESS: Some portion of the wheel

Q. Did you see the movement of the Castles Ice Cream Company car immediately after the collision? A. No, I did not. I was too busy waiting for the collision that I knew was going to happen. 20

Q. What collision? A. Between the Buick and my own car.

Q. As the two, the Buick and Castles, the Buick being Newman's car, came into collision, you kept looking at the two cars? A. That is right.

Q. Did you notice what happened to the Castles' car? A. No, I did not, because immediately there was no sooner their collision than the Buick swerved and hit into me. 30

Q. No sooner did their collision take place, the Newman car immediately turned left? A. That is right.

Q. And as it immediately turned left, how far from the center of the road was your car? A. My car had not moved from the time of their collision. 40

Walter S. Dunbaden—Cross.

Q. You say the Newman car immediately turned left? A. That is right. I would not say took a ninety degree angle. It turned oblique.

Q. As it turned left, your car went forward a little? A. My car didn't.

10 Q. How far behind the Mack truck would you say Newman's car was at the time of the collision between the Newman car and the Castles car? A. I would not begin to say.

Q. Approximately. A. Well, that occurred just at dusk. I couldn't judge the distance.

Q. It wasn't necessary to have lights? A. Yes, it was. I had lights on my car. Most all the cars in line had lights.

Q. They all had lights? A. Yes, sir.

20 Q. Did you have your lights bright or dim? A. I don't recall what I had mine.

Q. Did you notice whether Newman's car had lights? A. I don't recall whether he did or not.

THE COURT: Does the Ford carry dim lights?

WITNESS: Yes, on the magneto.

30 Q. All the cars had lights as you recall? A. I couldn't tell what the Ford had. We were going in the same direction.

Q. You say as the Castles car and the Newman car came into collision, that the Mack truck was passing you at the time? A. That is right.

Q. What space was there between the back of the Mack truck and the front of the Buick, approximately? A. I would say maybe thirty-five feet wide or forty feet.

40 Q. You want us to believe that there were thirty-five or forty feet open space between Newman's car and the Mack truck? A. I believe so.

Walter S. Dunbaden—Cross.

Q. And traffic was heavy? A. Yes.

Q. But on your side between cars there was approximately only six to eight feet distance? A. That was between my car and the car ahead of me. I don't know how much space was ahead of them.

Q. You saw the Castles Ice Cream car in front of the Cadillac? A. I didn't. 10

Q. At the time of the collision, how far in front of the Cadillac was it? A. I couldn't say. It was on an angle.

Q. Approximately? A. From the point of collision to my car, there was approximately fifty feet.

Q. There were forty feet, in your opinion, from Newman's car to the Mack truck? A. I would say so. 20

Q. And then immediately after the collision, Newman's car obliquely at an angle, turned over on your side of the road. Is that so? A. Hit me; that is right.

Q. Right after the collision between the Castles' car and the Newman car, did you notice what happened to any of the persons in the Newman car? A. I went to the hospital, as I said before, immediately after the accident. 30

Q. You were there for about a minute or two? A. Five or ten minutes, I suppose.

Q. At the scene of the accident, before you went to the hospital? A. I didn't waste any time in getting Miss Paquin to the hospital.

Q. In what automobile did you go? A. Some man drove up and volunteered to take us there.

Q. You didn't notice what happened to any of the occupants of Newman's car? A. Not immediately. 40

Walter S. Dunbaden—Cross.

Q. How soon after the collision did you come back from the hospital, that is, from the time you left, went to the hospital and came back, what space of time had elapsed? A. I should say ten minutes.

10 Q. Who went to the police station? A. The drivers of the cars.

Q. That is Grundman? A. Grundman, Coleman and myself and I think Newman, the man with Grundman, and my brother and I believe Mr. Pape was there.

Q. Did you all go in one car? A. I think there were two cars.

20 Q. How many police took you to the police station? A. I think there was one policeman and a special officer.

Q. When you came to the police station, did you notice the condition of Newman or Coleman? A. Just what do you mean?

Q. I understood you to say that Grundman looked as though he were intoxicated.

MR. CHANCE: I object to that as improper premise to a question.

THE COURT: Objection sustained.

30 MR. KLAUSNER: We withdraw the question.

Q. With reference to the companion of Grundman——

MR. LAIBLE: I object to the use of the word "companion".

THE COURT: That was the characterization of the witness, I believe. You had him explain what he meant by that.

40 Q. With reference to the man who was in the car with Grundman, what was his condition?

Walter S. Dunbaden—Cross, Re-Direct.

MR. CHANCE: I think that is immaterial.

THE COURT: He has already told us what his condition was.

CROSS EXAMINATION BY MR. CHANCE:

Q. You were asked in the cross-examination of the last counsel about the big truck that was passing you. Was this truck, which was passing you, going in the same direction you were, or in the opposite direction? A. In the opposite direction. 10

Q. By "passing you" you don't mean the same way? A. He was going south as I was going north.

Q. Did you notice whether there was any parked car on the same side of the road as the Castles car and your car were going? A. No, sir. 20

Q. You mean there weren't any or you didn't notice? A. I didn't notice.

Q. How many people were in Newman's car when you saw it coming towards you? A. I could not say.

THE COURT: You mean you couldn't say; you did not notice?

THE WITNESS: I didn't notice. 30

Q. How many did you see in there? A. I believe there were three men, two women and a baby.

RE-DIRECT EXAMINATION BY MR. HEILENDAY:

Q. This mysterious man, do you know whether Grundman knew him?

MR. CHANCE: I object. It is immaterial.

Q. Do you know that Grundman knew him? 40

THE COURT: I will allow that question.
A. I asked him his name.

Walter S. Dunbaden—Re-Direct, Re-Cross.

THE COURT: In the presence of Grundman?

THE WITNESS: In the presence of Grundman he said "Ask Fred; he knows."

Q. Whom did he indicate? A. Fred Grundman.

10 Q. Fred Grundman heard him say "Ask Fred; he knows"? A. Yes.

RE-CROSS EXAMINATION BY MR. LAIBLE:

Q. You have also testified before whether you asked Grundman and Grundman did not know?

MR. HEILENDAY: I object to that.

A. I didn't.

20 Q. Did you ask Grundman whether he knew him? A. I don't actually believe I asked Grundman that.

Q. Did Grundman say he knew him? A. No, he didn't say so.

Q. Did he say he didn't tell him? A. He didn't say that either.

Q. You didn't ask him whether he knew him? A. No.

30 Q. How did you come to ask this fellow for his name? A. He was staggering all over the place and I wanted to know who he was. I didn't know at the time whether he was the driver of the Castles' car or not. I asked him. He said "Ask Fred; he knows who I am."

Q. How long after the accident was it that you went to the police station?

MR. HEILENDAY: I object.

THE COURT: I will not allow that.

40 MR. LAIBLE: I pray an exception.

Walter S. Dunbaden—Re-Cross.

THE COURT: You get no exception to the rulings of the Court, keeping the trial within reasonable bounds.

MR. LAIBLE: I pray an exception to the disallowance of the question.

THE COURT: You will get no exception to that. 10

MR. LAIBLE: May I pray an exception to your Honor's refusal?

THE COURT: You may not.

RE-CROSS EXAMINATION BY MR. CHANCE:

— Q. Didn't you state in answer to questions some time since you have been on the witness stand this morning, that Mr. Grundman said he didn't know this man who was with him? Didn't you say a little while ago that Mr. Grundman said he didn't know this man? A. Mr. Grundman did— 20

THE COURT: Did you say that in your testimony.

THE WITNESS: I don't recall that I did say it.

Q. Didn't Mr. Grundman tell you that he didn't know this man? A. Mr. Grundman told me that he had picked him up down the road a little ways and was giving him a lift. 30

Q. Did you see anything of this man? A. I did. 40

Q. What describe what you saw? A. I should

Alva Dunbaden—Direct

ALVA DUNBADEN, one of the plaintiffs, called in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

- 10 Q. Where do you live, Mr. Dunbaden? A. At the present time 408 Stockton Avenue, Roselle.
 Q. Are you married? A. Yes, sir.
 Q. Were you at the date of this accident? A. Yes, sir.
 Q. And living with your wife? A. Yes, sir.
 Q. What is her name? A. Ethel.
 Q. What is your occupation? What is your business? A. Accountant.
- 20 Q. You were riding in this automobile of your brother's? A. Yes, sir.
 Q. How did you happen to get a ride that day? A. My brother invited me to a trip to Asbury Park.
 Q. Did he invite your wife also? A. Yes, sir.
 Q. How about Miss Paquin? A. I believe he invited her also.

THE COURT: Do you know?

- 30 THE WITNESS: I know he did.

- Q. Was Miss Paquin living at the same house that day? A. Not at the same time. I have moved since. At the time of the accident I lived at 519 Chestnut Street, Roselle.
 Q. Your brother took you all to Asbury Park and then took you home again? A. Right.
 Q. Did you see anything of this collision between the Castles Ice Cream Company car and
 40 Newman's car? A. I did.
 Q. Just describe what you saw. A. I should

Alva Dunbaden—Direct.

say about fifty feet ahead to my left I saw the cars of Newman and Grundman collide.

THE COURT: Where were you riding in the car?

THE WITNESS: I was riding in the back.

THE COURT: Right side?

10

THE WITNESS: Right hand side.

THE COURT: Who was next to the driver?

THE WITNESS: Miss Paquin on his right.

My wife was to my left. There was a car immediately in front of us. When this crash happened, it hesitated, put on the stop light and went straight ahead, leaving us behind, and the Buick car crashed into us.

Q. Your car stopped or was going a little? 20

A. It was at a complete standstill.

Q. Neither one of these cars got out of line, as far as you could see, the Castles' car or the Newman car? A. Well, I didn't notice the Buick car get out of line. It seems to me that the Ford turned to the left of the road, and the accident happened on the left of the road, I would say.

Q. Immediately after the accident, what was the condition of the occupants of your car? A. 30
My wife sitting alongside of me was unconscious and Miss Paquin, she was in a heap, one eye cut. I saw the blood spurt from her eye. Someone said they thought she had an eye knocked out. My finger felt like a hand, and I also had a cut on the right side of my head.

Q. What finger of yours was it that was injured?

A. This small finger on the left hand.

Q. You had a cut on your hand? A. Right 40
here, from a piece of flying glass (indicating).

Alva Dunbaden—Direct.

10 Q. Did you go to the hospital? A. No, I got out of the car and asked Newman if he had a license. He showed me the license and Coleman, who was driving the car also produced a license. At the same time he said the Ford had hit him and he lost control of the steering wheel and he hit us.

Q. That is what Newman said? A. That is what Newman said.

Q. You have told us about your talk with Newman. Did you talk with Grundman as to the accident? A. When I saw Grundman, he said he didn't hit me; the Buick hit him.

20 Q. Did you have any further talk with Grundman about where he was going? A. Yes, he said he was on his way—he told me he worked for Castles Ice Cream Company and that he was on his way to their place in Newark.

Q. How was he dressed? A. In overalls.

Q. Did you go to the police station with Grundman? A. I did.

Q. Did you observe his condition? A. Yes, he was apparently in an intoxicated condition.

30 THE COURT: Just tell what you observed, please.

THE WITNESS: I observed that he looked as though he were in an unfit condition.

THE COURT: That is giving your conclusion. How did he act and what did he say?

THE WITNESS: I don't recall what he said.

Q. How did he talk? What was his manner of speech? A. He wasn't very fluent.

40 Q. His tongue was twisted up?

MR. LAIBLE: I object to that as leading.

Alva Dunbaden—Direct.

Q. What else did you observe that would lead you to believe he was under the influence of liquor? A. I believe my brother and also Mr. Newman asked the police captain or sergeant in charge there to produce a doctor as they felt this fellow was intoxicated and they demanded an investigation. 10

THE COURT: How did he walk?

THE WITNESS: I don't recall how he walked. He did not do much walking when I saw him.

THE COURT: What was it that gave you the thought that he might be under the influence of liquor?

THE WITNESS: When the policeman first appeared on the scene, he said to me, those two men in the Ford are drunk. 20

MR. CHANCE, MR. LAIBLE and MR. KLAUSNER: We object.

THE COURT: Would you say, for example, that one of the counsel are intoxicated?

THE WITNESS: I would have to get close to them and smell their breath.

THE COURT: You would have to see how they acted and talked and if they smelled of liquor? 30

THE WITNESS: I would say this fellow showed from every point that he was under the influence of liquor.

THE COURT: From what point?

THE WITNESS: From the point of his conversation at the police station.

THE COURT: What was it he said that made you think he was under the influence of liquor? 40

Alva Dunbaden—Direct.

THE WITNESS: When the police took his statement, he was all confused in his answers. He also admitted in there that he had been drinking.

10 Q. They sent for a physician. Did he then examine him? A. Yes, sir.

Q. As to whether he was drunk? A. Yes.

Q. What did Grundman say? A. He said he had had two or three drinks around noon time.

Q. You started to tell the Court about what the policeman said to you. If Grundman was there, I would like to hear what the policeman said.

MR. LAIBLE: I object.

20 Q. Was Grundman there at the time? A. I don't think so.

Q. You cannot tell unless Grundman was present. Did the policeman look through the car? A. He did.

Q. Do you know what he was looking for? A. He was looking for liquor.

Q. Did he find any? A. He did not find any.

30 Q. Now we are getting back to the injuries. You told us about what injuries occurred. I want to get down to the accident and the seriousness of these injuries. How long did your finger continue to pain you? A. At least two weeks.

Q. As a result of that you were unable to fulfill some engagements you had for work? A. I have an orchestra and play the piano and I was unable to work for two engagements.

40 Q. How much money did you lose as a result of this? A. About fifteen dollars.

Alva Dunbaden—Direct.

Q. Did you have actual jobs at that time? A. I had them at that time.

Q. Your wife was also injured, wasn't she? A. Yes, sir.

Q. What injuries did she sustain? A. She was knocked unconscious, receiving a severe nervous shock and suffered headaches and nervousness for a long while after. 10

Q. Prior to the accident, did she complain of headaches and nervousness? A. Never to my recollection.

Q. How soon after the accident did she have these pains in the head and nervousness? A. At least three or four months.

Q. At the time of the accident, was your wife working? A. Yes, sir. 20

Q. What was her business? A. Designer.

Q. Do you know how much she got a day? A. Ten dollars.

Q. How many days did she lose? A. Nine.

Q. Was she paid or was she docked? A. She did not get paid.

Q. So she lost ninety dollars in salary? A. Yes, sir.

Q. Was your wife able to do housework immediately after the accident? A. Not for at least three weeks. 30

Q. Did you go some place to board? A. I boarded with my mother for two weeks.

Q. How much did you pay for board? A. Paid fifteen dollars a week.

Q. That is seven and a half dollars for each one of you? A. Yes, sir.

Q. That would be thirty dollars for the two weeks? A. Yes, sir; thirty dollars. 40

Ayva Dunbaden—Direct.

Q. How about clothing? Was anybody's clothes damaged? A. Miss Paquin's clothes were all damaged.

10 Q. What was the condition of Miss Paquin in regard to injuries. How was she injured and where? A. She suffered a severe laceration of her eyelid, also she was cut on the right hand and on her knee.

Q. Was anything done to this cut on the eye? A. She was taken to the hospital and sewed up. She had a stitch in her hand and was bandaged for a month or two afterwards.

Q. Did you pay the hospital bill or did someone else? A. My mother paid it.

20 Q. She had stitches put on her eye-lid? How many stitches. A. Five of them.

Q. After they were removed, she had something else put there? A. Metal clamps.

Q. How long were they there? A. A couple of weeks.

Q. Were her eyes still bandaged a long time after this, or her hand bandaged? A. Yes, sir.

30 Q. Was she able to go to work? A. I think it was two weeks expired before she was able to return to work.

Q. Do you know whether she had to remain in bed? A. Yes, sir.

Q. How long was she in bed? A. Ten days at least.

Q. Then she stayed in the house? A. Yes, sir.

Q. You told us about your wife's headaches, she had no other external injuries? A. She had a severe bruise on her back.

40 Q. Did you see the bruise? A. Yes, sir.

Q. Did she complain of pain there? A. There was considerable pain there.

Alva Dunbaden—Direct, Cross.

Q. How long did she complain of pain there?

A. It must have been two weeks before that disappeared.

Q. During that time she was incapacitated from doing her housework? A. Yes, sir.

CROSS EXAMINATION BY MR. CHANCE:

10

Q. How long after this accident was it that Mrs. Dunbaden had a baby? A. Well the baby was born on June 8th. That was about seven months after the accident.

Q. She had not had any headaches before? A. She had not complained of any.

Q. There is no doubt in your mind that the place where the Buick and the Ford roadster of the Castles Ice Cream Company came together was fifty feet away from where your car came to a stop? A. I estimate it was at least that far ahead of it, not from where our car came to a stop. We probably moved ahead a few feet.

20

Q. How far ahead would you say you moved? A. Not more than ten feet. Probably they were forty feet from the point of the original crash.

Q. Mr. Newman's Buick travelled at least forty feet, did it, between the time that that and the Castles Ford came together? A. I would say so.

30

Q. What can you say as to whether it was a violent collision that occurred between Newman's Buick and the car in which you were riding, or whether it was a light contact? A. I would say it was a rather violent contact, and it would have been worse if we had been moving along. We would probably have overturned.

Q. Smashed hard enough into you to make a

40

Alva Dunbaden—Cross.

total wreck of the car you were riding in, didn't it? A. Yes, sir.

10 Q. How far ahead of you was the Cadillac when you first saw the Buick? A. Well, the Cadillac, we were running probably 6 or 7 feet behind it there, and when we first noticed the Buick and the collision, it was probably the same distance.

Q. Was this Cadillac an open or closed-car? A. Closed car.

Q. You were seated in the back seat on the right hand side, is that correct? A. Yes, s'r.

Q. You did not notice where the Castles' car went immediately after the contact, did you? A. When I got out of the car, I went—

20 Q. Immediately when the contact between the Buick and the Castles Ice Cream Company car took place, your attention was directed to the Buick? A. es, sir.

Q. You didn't see the Castles' car until after it was standing still? A. That is right.

CROSS EXAMINATION BY MR. LAIBLE:

Q. Did you notice whether there were any cars parked? A. I didn't notice any in the immediate neighborhood.

30 Q. You didn't take notice? A. No, I did not take notice.

Q. This Buick—did you notice whether it was a big seven passenger car? A. In my opinion, it was a big seven passenger, an old model.

Q. And the car you were riding in was a sedan? A. A Ford sedan.

Q. And you were on the right rear side? A. Yes, sir.

40 Q. Was your car to the left side of the Buick? A. The Buick was coming this way.

Alva Dunbaden—Cross.

Q. Was your car, the car you were riding in, nearer the right hand side of the road than the Buick? A. I would say it was about half way between. We were riding in the middle of the right hand side of the road.

Q. Where was the Buick riding, nearer to the center? A. The Buick was coming in the other direction. 10

Q. I meant the car ahead of you, the Cadillac. Was your car nearer to the right hand side than the Cadillac? A. We were probably right in line with it. The Cadillac is a little bit wider. We were right in line with it.

Q. Is it a little bit higher? A. Yes, I guess it is.

Q. What kind of a day was this? A. It was a very fine day. 20

Q. It was getting dusk? A. It was getting dusk.

Q. Your lights were on? A. Yes, sir; our lights were on.

Q. Did you notice where the truck was? A. The truck, as my brother testified, passed us when the crash occurred.

Q. When the crash occurred, that is when the truck was passing? A. Yes, sir. 30

Q. When the Buick hit you, that is when the truck was passing? A. Yes, sir.

Alva Dunbaden—Cross.

CROSS EXAMINATION BY MR. KLAUSNER:

Q. Did you hear as well as see the crash, or did you just hear the crash between the Castles' car and the Newman car? A. We heard it and our attention was probably directed to it by the
10 noise.

Q. You heard the crash? A. We heard the crash.

Q. You looked at the car just as the two came together? Is that so? A. Yes, sir.

Q. You say your car was going along in about the center of the right hand side as you were going in a northerly direction? A. Right.

Q. You saw the Newman car and the Castles Ice Cream Company car come together? A. Yes,
20 sir.

Q. When they came together, did I understand you to say that it happened on the left side of the road? A. Our left side, yes, sir.

Q. That means that Newman's car was on his right going in the opposite direction?

MR. CHANCE: I object to that.

Q. When you say on the left side of the road, that is to your left, is that so? A. To our left.

30 Q. Would you say that the collision took place to the left of the center of the road? A. I would sir.

Q. Have you ever driven a car? A. No, sir.

Q. As soon as your collision took place, did you get out of your automobile? A. I did.

Q. Did you notice the motion of the Castles Ice Cream Company car immediately after its collision with the Newman car? A. No. I did not
40 because I talked with Newman.

Alva Dunbaden—Cross.

Q. The crash between the Newman car and the Castles Ice Cream Company car took place? A. yes, sir.

Q. Did you notice what happened to the Castles Ice Cream car immediately after the crash? A. No, sir.

Q. When you got out of the car, how soon thereafter did you look in the direction of the Castles car? A. Immediately after I had questioned Newman to see if he had a license. 10

Q. You got out of the car? A. Yes, sir.

Q. How soon after did you look at the Castles Ice Cream Company car? A. I would say not more than two minutes after.

Q. When you looked at it, where was it? 20

MR. CHANCE: I object to that as immaterial.

THE COURT: I will allow it.

A. It was off the road into the field there on the other side of the road.

Q. In the field? A. Yes.

Q. How far off the road? A. Seven to eight feet.

Q. Was the whole car off the road? A. The whole car was about seven or eight feet off the cement part of the road. 30

Q. When your car came into contact with the Newman car, did either car travel any distance immediately thereafter you came into collision? A. Yes, sir.

Q. How far did your car move after that? A. We were probably pushed back three or four feet.

Q. Were you pushed back off the road? Did you get on the dirt road at all? A. We were still on the cement road. 40

Alva Dunbaden—Cross.

Q. So that both cars, the Newman car and your car, were on the cement road when you got out of your car? A. Yes, sir.

Q. What part of Newman's car was damaged? A. His right-hand side.

10 Q. Just what part of his right-hand side? A. His right-hand lamp and the right-hand side of his radiator, they crashed into our left-hand side.

Q. What part of your car was damaged? The front part? A. The front part towards the left side.

Q. How soon after the accident did the doctor examine Grundman? A. At least forty minutes.

20 Q. How long did it take you to go from the scene of the accident after you left the scene of the accident, to go to the police station? A. The trip only took probably three or four minutes.

Q. Then they called a doctor and it took about forty minutes before the doctor came? A. The accident happened about 5.25. We didn't get to the police station until eight minutes after six.

Q. It was eight minutes after six when you got to the police station? A. Yes, sir.

30 Q. How long were you in the police station before the doctor came? A. Probably ten minutes.

Q. Then it was about twenty minutes after six when the doctor came? A. Yes, sir.

Q. The accident happened about 5:20 or 5:25? A. Right.

40 Q. Prior to the collision between the Buick owned by Newman and the Castles' car did you notice whether or not the course of the Buick car was other than straight? A. I did not notice.

Mrs. Ethel Dunbaden—Direct.

MRS. ETHEL DUNBADEN, one of the plaintiffs, called in her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

Q. Mrs. Dunbaden you are the wife of Alva Dunbaden? A. I am. 10

Q. And Walter is Alva's brother? A. Yes.

Q. On election day were you invited in Walter's car? A. I was.

Q. Did he give you a ride some place? A. Yes, sir; to Asbury Park.

Q. Coming home were you in the car? A. I was in the car, yes.

Q. On the back seat with your husband? A. On the left hand back seat. 20

Q. Did you see anything of this collision between the Newman and the Castles car? A. No, I did not pay any attention to the traffic.

Q. Did you hear the crash? A. No, I didn't.

Q. What is the first thing you heard or saw? A. The first thing I know I woke up on the seat in a dazed condition.

Q. That was after the Newman car had struck you? A. Yes, sir. 30

Q. You didn't go to the hospital? A. Yes, I did. When I woke up, our friend Mrs. Pape was there and she said—

MR. LAIBLE: I object to what she said.

A. I did go to the hospital.

Q. You went to the hospital? A. Yes, sir.

Q. Did Miss Paquin also go to the hospital?

A. I went by myself with the ambulance men. 40

Q. You went in the ambulance? How long did

Mrs. Ethel Dunbaden—Direct.

you stay in the hospital? A. I just stayed a few minutes while Dr. Galloway examined me.

Q. At the time of the accident were you working somewhere? A. I was working.

Q. What was your business? A. Dress designer.
10 er. Blouses and dresses.

Q. How much did you get a day? A. Ten dollars a day.

Q. As a result of the accident, were you incapacitated from your work? A. I was. Dr. Galloway absolutely told me to stay in bed for three days.

Q. After three days what did you do then? A. I was still sick. I had to go to bed off and on until I got back to work.
20

Q. How long a time were you incapacitated for work? A. Nine days I wasn't working.

Q. Did you get paid ninety dollars for that time? A. No, sir.

Q. Your boss deducted it from your wages? A. He did.

Q. Tell us where you were injured. What pain did you suffer, if any? A. I was hurt on the top of the head and on the side and the pain was excruciating. For three days I simply could not stand up, and my back, there was a bruise on the left side of my back.
30

Q. Before this accident did you have any pain? A. No, I never suffered at all.

Q. How was your condition previous to this accident? A. Very good.

Q. After the accident did you have any headaches? A. I did. I lost a great deal of weight. My health was not nearly so good.
40

Mrs. Ethel Dunbaden—Direct.

Q. How much did you weigh before the accident? A. I was taking on weight very nicely. I had gotten nice and stout and then afterwards I got thin, very thin, until the baby came.

Q. For how long a time did you suffer from pains in the head or from nervous shock? A. Well I know it was three months that I really suffered very badly, and after that it never was exactly right, for three months it was very bad.

10

Q. Your infant was born in June, was it? A. Yes, sir.

Q. After three months the pain left you? A. It wasn't so hard. I could work. For those three months I couldn't work very satisfactorily. I did go back and forth to help out.

Q. Did this pain come with your condition of pregnancy or was it due to the accident? A. No, I was a perfectly healthy woman.

20

Q. Was there a bruise on your back for some time? A. Yes, it did stay a long time.

Q. How long? A. A couple of weeks. It didn't last. Just a coagulation of blood.

Q. You and your husband were obliged to go and board some place? A. He had to be taken care of and I stayed with Mrs. Dunbaden his mother.

30

Q. Do you know how much board you paid there? A. Fifteen dollars a week for the two of us.

Q. That is thirty dollars for the two weeks? A. Thirty dollars for the two weeks.

Q. Did you have any clothing that was ruined or damaged? A. No, there were no blood stains on the clothing.

40

Mrs. Ethel Dunbaden—Cross.

CROSS EXAMINATION BY MR. CHANCE:

Q. You had been consulting Dr. Dennin prior to the happening of this accident, hadn't you?

A. No, I was under the care of my mother.

10 THE COURT: You did not have a physician?

THE WITNESS: No.

THE COURT: Because of your condition?

THE WITNESS: It was not necessary.

THE COURT: At the time of the accident you were pregnant?

A. THE WITNESS: Yes, sir.

THE COURT: You had been consulting a doctor about it?

20 THE WITNESS: My mother is a practicing physician. My mother practices and I was under her care.

Q. Your mother is a nurse? A. My mother is an obstretical nurse. She is a mid-wife.

Q. Was this child that you were carrying at the time of this accident your first child? A. Yes, sir.

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Clara Paquin—Direct.

MISS CLARA PAQUIN, one of the plaintiffs, called in her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

Q. How old are you, Miss Paquin? A. Twenty years. 10

Q. At the time of the accident, were you invited in Mr. Dunbaden's automobile? A. I was.

Q. How long a time prior to the accident had you know Mr. Dunbaden? Walter I am talking about? A. About a week or ten days.

Q. He took you down to Asbury Park, and Mr. and Mrs. Dunbaden were in the back seat? A. Yes.

Q. On the way home did you see anything of the accident? A. I saw the two cars when they met. 20

Q. You saw the Newman car collide with the Castles Ice Cream Company car? A. I saw the smash-up.

Q. You saw the Newman car collide with your car or did you see the Castles car collide with your car? A. I saw both.

Q. Whereabouts did this collision take place in regard to the center of the road? A. I will say it was about in the middle of the road. 30

Q. Did you see either of the cars get out of the line, the Castles car or the Newman car? A. No, I did not.

Q. How did you know it was about the middle of the road where they came together? Where were you sitting? A. I was sitting on the right hand side, on the front seat.

Q. Immediately after the collision of the two 40

Clara Paquin—Direct.

cars, the Newman car struck your car, is that right? A. Yes.

Q. You were going, or were you stopped? A. We were stopped.

Q. There was another car in front of you, wasn't there? A. Yes.

10 Q. And that was the Cadillac we have been talking about? A. I believe it was.

Q. You saw a car in front of you, between you and the Castles car? A. Yes, sir.

Q. As a result of this collision, you were injured? A. Yes.

Q. Where? A. I had a very severe cut on my right eye and my face was cut, too, and my hands were cut and my nose, and I was injured in my
20 side.

Q. At the time of the accident, were you living with your parents or living away from your parents? A. Away.

Q. What were you doing with your earnings, keeping them or giving them to your parents? A. Keeping them.

Q. You were working? A. As secretary.

Q. How much were you getting a week? A. Twenty-five dollars a week.

30 Q. For how long were you incapacitated from work? A. Two weeks.

Q. You lost two weeks' wages? A. Yes.

Q. Was any of your clothing damaged or ruined? A. Most of it was.

Q. Just give us the items. Did you have a coat on? A. A coat and a dress.

Q. What was the matter with the coat? A. I had to have that cleaned, of course, it wasn't nice
40 afterwards. It cost me six to eight dollars to have

Clara Paquin—Direct.

it cleaned. My dress was ruined. I believe I paid around thirty-five dollars for it. I lost the hat.

Q. And your hat? A. That was about thirteen dollars.

Q. What else? A. I believe I cleaned up the rest so that I could wear it. I lost a ring too. 10

Q. You mean you lost the entire ring or the setting? A. The setting.

Q. What kind? A. Sapphire.

Q. How much was that worth? A. It was a gift. I think it was valued at thirty-five dollars.

Q. Who gave it to you? A. My father.

Q. You said you had an injury to your right eye? 20

THE COURT: She said the right eye.

Q. Did you have that stitched up? A. Yes, at the hospital.

Q. How many stitches did they put in? A. Five.

Q. Then they applied a bandage? A. Yes.

Q. How long a time did the stitches stay in? A. I don't remember. I think I went up the following week. The doctor came the following week to examine me. 30

Q. The stitches were then taken out? A. They were taken out the week after that.

Q. After the stitches were removed, what else did they put in? A. Clamps.

THE COURT: Do you wear a scar now over your right eye?

THE WITNESS: Yes.

Q. For how long a time did you have to wear 40

Clara Paquin—Direct.

a bandage over your eye? A. Up until about Christmas time.

Q. This happened November 4th; that would be about seven weeks? A. Yes, sir.

Q. You remained away from work for two weeks? A. Yes.

10 Q. These five weeks, did you go to the office with your face and eye bandaged? A. Yes.

Q. How about your hand? A. That was bandaged as long as my eye was.

Q. Is there a scar there now? A. Yes.

MR. HEILENDAY: Hold it up so the jury can see it.

20 THE COURT: Remove your hat and show the jury your scars, if you care to. Step down and show it to them.

(Witness exhibits scars to the jury.)

Q. How about your knees? Were they also scarred? A. Yes, sir.

Q. Are they still scarred? A. Yes.

Q. Did Mrs. Dunbaden see those scars? A. Yes.

30 Q. Did she see them? A. After the bandages were removed, she did.

Q. Did you go to Dr. Dennin on November sixteenth? A. Yes.

Q. Did he treat you for these injuries? A. He did.

Q. You stated something about an injury to the side. What side was that? A. Left.

40 Q. How long was that painful? A. That seemed to be worse than all the others. I would say for about two months.

Q. Did you have pain every day or intermit-

Clara Paquin—Direct, Cross.

tently? A. It seemed to pain when I wanted to move or breathe for about three weeks. After that it was not so bad.

Q. And did you have any pain in the hand where you had the cut? A. No; no pain beyond that of not being able to use it for a while.

Q. For how long a time were you unable to use it? A. Well, about ten days after I went back to business. 10

Q. You were doing a different sort of work? A. I was just in the office. I didn't do much work.

Q. How about your knees? Did you have pain in them? A. Yes, I could not walk.

Q. For how long a time did you have that pain? A. Oh, about a week. 20

Q. For how long a time were you confined to your bed? A. Ten days, a week or ten days.

Q. After you got out of bed, were you confined to the house for some time? A. I stayed for the balance of the two weeks.

Q. Did you pay this ten dollars to the hospital? A. Mrs. Dunbaden paid it.

Q. Did you pay it back? A. Not yet.

Q. You still owe the money? A. Yes, sir. 30

Q. You paid Dr. Dennin? A. No, I did not.

Q. You still owe that to the Dunbadens? A. Yes, sir.

CROSS EXAMINATION BY MR. CHANCE:

Q. Did you notice how fast the Castles Ice Cream Company Ford car was going before the accident? A. Why, I didn't see it until the accident.

Q. You did see the contact between the Ford and the Buick ahead of you, didn't you? A. Yes. 40

Clara Paquin—Cross.

Q. Do you say they were fifty feet away from your car when that took place? A. I don't know much about distance. I would say they were about that.

10 THE COURT: Did you see how far the cars travelled after they collided?

THE WITNESS: No, I did not.

Q. You did not see the Buick car at all between the time that that hit the Castles Ice Cream Company car and the time it hit you? A. I saw it coming towards us and hit us.

Q. How far did you see the Buick go? A. I don't know. I don't know much about distance.

20 Q. Can you tell us in this court-room? A. No, I couldn't.

Q. Can't you give us an idea at all? A. I know it was a short distance. I don't know how many feet.

CROSS EXAMINATION BY MR. LAIBLE:

Q. You say your coat cost six or eight dollars to clean? A. Yes, sir.

30 Q. And that the dress could not be cleaned? A. No; it was ruined.

Q. How old was that dress, or was it a new dress? A. Why, I had gotten it two weeks before.

Q. What was the thirteen dollars for? A. The hat. I lost my hat.

Q. That was a new hat? A. Yes, I had just come down to New York about a week before, two weeks before, so I had to buy new clothes.

Q. You were living about how long in Roselle? A. About a week or ten days.

40 Q. Where is your home town? A. Malone, New York.

John Henry Pape—Direct.

JOHN HENRY PAPE, sworn as a witness on behalf of the plaintiffs, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

- Q. Mr. Pape, you live in Roselle? A. I do not.
- Q. Did you at that time? A. At that time I lived in Philadelphia. 10
- Q. You had one of these cars? A. I had my own car.
- Q. You were taking some of the parties along? A. I did.
- Q. You were all in one party, the Dunbadens and you? A. Yes.
- Q. Who was in your car? A. My mother and Mr. and Mrs. Dunbaden.
- Q. That is Alva's mother and father? A. Yes, sir. 20
- Q. You were following Walter's car? A. At the time of the accident not directly. There was one car in between his car and mine.
- Q. From Asbury Park up until this took place you had been following it? A. Yes.
- Q. One car got in between you? A. At the crossroads there, just as you come to the Pennsylvania railroad, a car come from the direction of New Brunswick and came in behind. 30
- Q. How far from Walter's car were you behind? A. I should say forty or fifty feet.
- Q. Did you see the impact between your car and the Castles car? A. I did.
- Q. Did you see either of the cars get out of line? A. No. I was in the center of the road at that time. I saw the impact between the Buick and the Ford roadster.
- Q. You were out further towards the center 40

John Henry Pape—Direct.

than Walter was? A. I was right in the center to my right.

Q. What were you trying to do? A. I was trying to get in back of Dunbaden.

10 Q. Where did the collision occur as regards the center of the road? A. Right in the center of the road, the first collision.

Q. Did you see which parts of the two cars came together? A. The left-hand side of each car, the left hand wheels.

Q. As a result of this collision, the Newman car struck Walter's; is that right? A. Yes.

Q. Demolished it? A. Yes.

20 Q. What happened to the Castles car? Which way did that go? A. It turned the Castles car in an easterly and westerly direction, right in the center of the road. After the accident it was pushed off the road to the south of the road, facing south.

Q. Do you mean it was turned at right angles to the traffic? A. Yes.

Q. Did you see Grundman immediately after the accident? A. Not immediately after the accident.

30 Q. How soon thereafter? A. I would say a few minutes.

Q. Did you notice his condition? A. No, sir.

Q. Did you render any first aid to the injured? A. No, sir. I stayed right there.

Q. You attended to the removal of the car, did you? A. I stayed there until both cars were taken away.

Q. Did you see the injuries to the members of the Dunbaden party? A. I did.

40 Q. What was the condition of Miss Paquin?

John Henry Pape—Direct, Cross.

A. Well, when she was taken from his car, the blood was rushing from her eye. It looked as though her eye had been knocked out. That is all I could see at the time on account of the hour being dusk.

Q. Some passing automobile volunteered to take her and Walter to the hospital? A. Yes, sir. 10

Q. How about Mrs. Dunbaden? Mrs. Ethel Dunbaden? A. Mrs. Dunbaden was taken to the hospital. The ambulance came from the hospital and took her.

Q. Do you know how long these people suffered from these injuries? A. Mrs. Dunbaden was a week or ten days, and Miss Paquin suffered about two weeks.

Q. Did she have bandages on her eye, hands and face? A. Yes, sir. 20

CROSS EXAMINATION BY MR. CHANCE:

Q. There was a truck that this Buick was turning out to pass, coming towards you, wasn't there?

MR. KLAUSNER: I object to that. There is no such testimony by the witness. 30

THE COURT: I will allow the question Answer it yes or no.

A. There was a truck on that side of the road. I do not know whether the Buick was attempting to pass him or not.

Q. The Buick was nearer to the center of the road than the truck, wasn't it? A. Yes, sir.

Q. How wide was that truck? A. I don't know.

Q. Can't you give us an idea? A. A great big truck. I couldn't say how wide it was. 40

Q. Can you indicate in the court-room the ap-

John Henry Pape—Cross.

proximate width as you recall it? A. No, I could not.

Q. Is that your signature (handing paper to witness)? A. Yes.

Q. That is your signature? A. Yes, sir.

10 Q. These marks, were they made before you signed, these alterations in there? A. I don't know whether it was made before or after I signed. I can't recall now that was done about —well, shortly after the accident.

MR. CHANCE: I would like to have this statement marked for identification.

(Marked Exhibit P-1 for identification.)

20 Q. Will you look at these alterations and see if that refreshes your recollection as to whether they were made before signing? They were made before signing, weren't they? A. I cannot recollect now.

Q. Can't you recollect whether they were made on the same day that you signed the statement? A. They were made on the same day, yes, sir.

30 Q. Those alterations that are in here were intended by you at the time to so correct the statement as to reveal what was then your recollection of it, weren't they? A. I don't understand that.

THE COURT: Why were the corrections made?

THE WITNESS: The statement as originally made up was not correct.

THE COURT: So you made corrections to correct it?

THE WITNESS: Yes, sir.

40 THE COURT: Is that statement correct now?

THE WITNESS: Yes.

John Henry Pape—Cross.

CROSS EXAMINATION BY MR. KLAUSNER:

Q. Who asked you for this paper?

MR. CHANCE: I object. It is immaterial if he says it is correct.

THE COURT: If it isn't correct, what difference does it make? I will allow that question. 10

A. The gentleman who came to see me, this representative of the Castles Ice Cream Company.

MR. CHANCE: I withdraw my objection.

Q. Did he tell you his name? A. He may have told me at the time, but I cannot recall. 20

Q. In whose handwriting is this statement? A. It is in his own handwriting.

Q. Who wrote it up? A. The representative.

Q. Did you dictate it? A. It was already written when he showed it to me.

Q. When he came to you, this was already written up? A. Already written.

Q. He told you he was a representative of the Castles Ice Cream Company and gave you this paper and asked you to sign it? A. Yes, sir. 30

Q. Was this written out before he asked you about the accident? A. Already written.

THE COURT: When did you make the corrections?

THE WITNESS: At the time there where he read it over to me.

THE COURT: Before you signed it?

THE WITNESS: I cannot recall whether all the corrections were made before or some made afterwards. 40

J. H. Pape, Cross—Mrs. Elizabeth Pape, Direct.

CROSS EXAMINATION BY MR. LAIBLE:

Q. After you signed it, that was the correct statement as to how the accident happened, with these alterations in it?

THE COURT: That is what he said.

10

MRS. ELIZABETH PAPE, called as a witness in behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

Q. You were in your son's car at the time the accident happened? A. Yes, sir.

20 Q. Did you see anything of the accident or not? A. I didn't see anything of it.

Q. You know something about the injuries? A. Yes, sir.

THE COURT: Whom did you nurse?

THE WITNESS: Both Miss Paquin and Mrs. Dunbaden. I stayed there for ten days.

Q. Had you been nursing for hire prior to the injuries? A. Oh, yes.

30 Q. What was the value of your services as a nurse? A. Twenty-five dollars a week.

Q. How many weeks did you spend nursing? A. I only spent a week and a half.

Q. Thirty-seven dollars and fifty cents? A. Yes, sir.

CROSS EXAMINATION BY MR. CHANCE:

Q. You did that free because you were a friend of the family? A. No.

40 Q. You got paid? A. I did it because they had no one else to help them out.

Q. You did not make any charge for it? A. Yes, I did, because I am a poor widow woman.

PLAINTIFFS REST.

Dr. Alvin R. Eton—Direct.

DR. ALVIN R. EATON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHANCE:

(The doctor's qualifications are admitted by all counsel.) 10

Q. Dr. Eaton, you made an examination of the plaintiffs in this case, the several Dunbadens and Miss Paquin? Will you just tell us the result of your examination in each case? A. Mrs. Dunbaden had an injury to her head and left hip, which was followed by disability for two weeks. She shows no evidence of injury at this time.

Q. When was that? A. February 6, 1925. She 20
was pregnant at the time of the accident and the pregnancy continued. Mr. Alva Dunbaden, examined on the same day, said he had a wound at the left side of the head, probably an abrasion, no scar; also had a contusion on the little finger of the right hand. No evidence of injury and he followed his occupation. Miss Clara Paquin, aged 19 or 20, has a linear scar on the upper eyelid. The scar runs from the upper part of the lid. 30
Two-thirds of the scar is in the folds of the lid and one-third of the scar is evident. She also has a scar on the back of the right hand and one on the left hand on the upper side. These scars are all healed. No other evidence of injury at that time. Mr. Walter Dunbaden suffered an abrasion of the knuckle of his right hand. This is healed and shows no evidence of injury. He says he lost one day from his business.

Q. Were any of these people suffering from 40
any permanent disability which incapacitated

Dr. Alwin R. Eaton—Cross.

them from work? A. Not at the time I examined them.

Q. That was when? A. In February, 1925.

CROSS EXAMINATION BY MR. HEILENDAY:

10 Q. Just what do you mean, those scars were all healed up? A. They were covered with skin.

Q. The scar tissue that is evident? A. The wounds were healed.

Q. The scars are going to be a permanent disfigurement? A. The scars will be permanent.

Q. It is worse in the case of a young lady nineteen years old than it would be in a young man?

MR. CHANCE: I object to that.

20 A. I cannot determine that. A scar is a scar.

Q. Assuming that a comely young lady has a scar on her knee, and another on her eye and hands, isn't it worse in her case than in the case of a boy of nineteen?

MR. CHANCE: I object to that.

30 Q. This scar on the eye you say two-thirds is invisible and one-third is visible? And the scars on the hands and knees are visible, is that right?
A. Yes, sir.

RECESS TO 1:35 P. M.

AFTER RECESS.

40 MR. CHANCE: I offer to read into evidence the deposition of Edward H. Kaus, taken pursuant to stipulation by counsel in all of the three cases.

Deposition of Edward H. Kaus—Read.

DEPOSITION OF EDWARD H. KAUS (Read):

Q. What is your present address? A. My present address is Mount Hermon, Massachusetts.

Q. Where did you reside November 4th, 1924? A. I did reside in Woodbridge, New Jersey, at 134 Grove Avenue, November 4, 1924.

10

Q. Were you driving an automobile on St. Georges Avenue or Rahway Avenue, in Rahway, New Jersey, on November 4, 1924? A. On November 4th, 1924, I was driving an automobile on St. George avenue or Rahway avenue, New Jersey,

Q. What time of the day were you driving on said avenue? A. Rather late in the afternoon—perhaps 5:30.

Q. In what direction were you driving on said avenue? A. I was driving from Rahway south-east, towards Woodbridge.

20

Q. In what kind of of an automobile were you driving on said avenue on said date? A. I was driving in a Star automobile.

Q. While you were driving an automobile on St. Georges Avenue or Rahway Avenue in Rahway, New Jersey, on November 4th, did you see a collision between an automobile going in the same direction you were going and a Ford sedan travelling in the opposite direction? A. Yes. I did.

30

Q. At the time of the happening of said accident, who was riding in the automobile with you? A. My mother, Mrs. Sophie Kaus, and my sister, Elizabeth.

Q. At the time of the happening of said accident, where in the automobile which you were driving were you and the other occupants seated?

40

Deposition of Edward H. Kaus—Read.

A. I was seated at the wheel, driving; my mother and my sister were on the rear seat.

Q. At the time of the happening of said accident, how near was the automobile which you were driving to the right hand side of the road?

10 A. The car which I was driving was approximately three feet away from the right-hand side of the road.

Q. At the time of the happening of said accident, how far were you away from the place of collision? A. At the time of the accident, I was about thirty feet away from the place of collision.

Q. What kind of automobile was it that collided with the Ford sedan travelling toward your car? A. It was a Buick.

20 Q. How far from its right-hand side of the road was the car which collided with the Ford sedan when the accident occurred? A. The car which collided with the Ford was about ten feet from the right-hand side of the road.

Q. At the time of the happening of the accident were there any vehicles parked along the side of the road in the vicinity of the accident? A. In the immediate vicinity there was one automobile parked on my right-hand side outside the travelled part of the road.

30 Q. If any vehicles were parked along the side of the road were the same at your right or left hand side of the road? A. It was on my right-hand side of the road.

If any vehicles were parked along the side of the road, what kind of vehicles were they? A. I cannot state the make of automobile.

40 Q. If any vehicles were parked along the side of the road how far did they extend toward the middle of the road? A. It did not extend to-

Deposition of Edward H. Kaus—Read.

ward the middle of the road at all. It was outside the main travelled portion of the road.

Q. What was the course taken by the automobile which collided with the Ford sedan coming toward your car prior to the happening of the accident? A. I was following a large truck at a distance of about twenty feet when the Buick car passed me on my left and pulled up in front of me and behind the truck. The Buick next attempted to pass the truck, but seeing that there was a Ford roadster coming against it, slowed down and attempted to get back into line behind the truck.

10

Q. At the time of the happening of the accident what was the speed of the car which collided with the Ford sedan coming toward your car? A. At the time of the happening of the accident, the Buick was travelling at the rate of about fifteen miles an hour.

20

Q. Just prior to the happening of the accident what was the speed of the car which collided with the Ford sedan coming toward your car? A. I should estimate it was going at the rate of between twenty-five and thirty miles.

Q. Did you observe any automobiles immediately prior to the happening of the accident and traveling in the same direction you were going beside the automobile which collided with the Ford sedan which was coming in the opposite direction? A. No, I do not remember seeing any, except the large truck which the Buick attempted to pass.

30

Q. If your answer to the last question is in the affirmative describe the course taken by the automobile which collided with the Ford sedan as respects that taken by the other automobile which had been travelling ahead of you and in the direc-

40

Deposition of Edward H. Kaus—Read.

tion just prior to the happening of the accident?

A. The Buick passed my car and ran for a few moments ahead of me and following the truck. Next, the Buick attempted to pass the truck on its left, but found this impossible owing to the Ford roadster and Ford sedan coming against the Buick from the opposite direction.

10 Q. What were the respective speeds of the Ford sedan involved in the collision at the time of the happening of the accident? A. I am unable to state the speed of the Ford sedan prior to the accident, but at the time of the accident I should estimate its speed at thirty miles.

20 Q. When the Ford sedan and the car which collided with it came to rest after the accident, what were their respective positions? A. The Ford sedan and the Buick came together not quite head-on, both cars being on the Buick's left-hand side of the road.

30 Q. When the Ford sedan and the car which collided with it came to rest after the accident, what were their respective conditions? A. Both the Ford sedan and the Buick were badly damaged; the radiators of both cars were badly crushed; the windshields and mud-guards were smashed; neither car was in condition to be run.

Q. At what speed were you travelling when the collision between the Ford sedan and the car travelling ahead of you occurred? A. I was travelling at the rate of about fifteen miles.

40 MR. CHANCE: This disposition is by Edward H. Kaus, and sworn to "Franklin S. S.," February 9, 1926, before S. Allen Norton, Notary Public.

Miss Elizabeth Kaus—Direct.

MISS ELIZABETH KAUS, called as a witness in behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHANCE:

Q. You are the sister of Edward Kaus, whose deposition we have just been reading, are you? 10

A. I am.

Q. Were you riding in the car driven by your brother when this accident happened? A. Yes, sir.

Q. Where were you seated in your brother's Star sedan? A. I was on the left hand side of the rear seat.

Q. And who else was in there? A. My mother was sitting next to me and my brother was alone in the front driving the car. 20

Q. What time of the day do you recall this accident to have been? A. It was towards evening. I don't just recall what time.

Q. Did you see the cars come together? A. I did.

Q. What kind of cars were they that you saw involved in the accident? A. Well, I saw the Ford roadster and the Buick. There was another car but I didn't know what kind of car that was. 30

Q. You were going toward what place? A. We were going toward Woodbridge.

Q. Going toward home? You live in Woodbridge? A. Yes, sir.

Q. Prior to the accident did you see the Buick which is involved in this accident? A. Yes, sir.

Q. Just tell the jury what you saw of the conduct of that Buick from the time you first saw it up until the time of the happening of the accident. 40

Miss Elizabeth Kaus—Direct.

10 A. Well, there was a big truck just ahead of us and the Buick passed our car and came between the truck and our car, and then it passed the truck, or attempted to pass the truck, and probably would have gotten by but there was a car parked on the right hand side of the road, and the truck swung out just a little bit and grazed against the Buick.

Q. What car? A. The big truck, and then the Buick swung over and hit a Ford roadster which was coming, hit it right in the wheel and the roadster swung over and hit the back fender of our car.

20 Q. What became of the Buick after that? A. Then the Buick, after hitting the roadster, the Buick came in contact with another car, I didn't notice what kind of a car this was.

Q. When the Buick was grazed by the truck, which side of the Buick was it that was thus grazed, the right hand side or left? A. The right.

Q. The right hand side? A. Yes, sir.

Q. Which side of the truck was it that grazed the right hand side of the Buick? A. The left hand side.

30 Q. How wide was this big truck you have just described? A. I don't know how wide it was. It as a very large truck.

Q. At the time the Buick and the roadster came together, was the Buick on its right hand, side of the street or its left hand side of the street?

40 MR. KLAUSNER: I object. It is in the form of a leading question.

A. Well, it was just about in the middle.

Miss Elizabeth Kaus—Direct.

Half of it, it was more on the left hand side of the street, I would say.

Q. And what can you say as to the speed at which the Buick started to pass around on the left hand side of the truck?

MR. KLAUSNER: I object to that.

10

Q. How long have you been riding around in automobiles? A. I don't know.

THE COURT: Quite some time?

THE WITNESS: Yes, sir.

THE COURT: Have you any opinion at all as to the speed of cars?

THE WITNESS: Not much.

Q. Was the Buick going slow or fast? A. It was going pretty fast in order to pass the truck, but it slowed down when it saw the cars coming in the other direction. 20

Q. At the time of the actual contact between the Ford roadster and the Buick, it wasn't going as fast as it was when it turned around to the left of the truck? A. No, sir.

Q. As you were coming up to the place where the Buick turned out to the left, had the Buick previously passed your car? A. Yes, sir. 30

Q. How far back from the place of the accident was it that the Buick passed your car? A. Well, it passed our car and then it was gone for about two minutes before it attempted to pass the truck.

THE COURT: It passed?

THE WITNESS: No, it didn't.

Q. Where was the truck at the time the collision between the roadster and the Buick took place? A. The truck kept right on. It didn't even stop. 40

Miss Elizabeth Kaus—Direct, Cross.

Q. Can you give us any idea how far it was from the right hand side of the Buick to its right hand side of the road at the time it came into collision with the Ford roadster? A. It was toward the left of the road.

10

CROSS EXAMINATION BY MR. LAIBLE:

Q. Miss Kaus, where did you live at the time of the accident? A. In Woodbridge.

Q. Do you live there now? A. Yes, sir.

Q. You were coming from Woodbridge? A. No, we were coming from South Orange.

Q. You were going to Woodbridge? A. To Woodbridge.

20

Q. You didn't know any of the parties involved in this accident? A. No, sir.

CROSS EXAMINATION BY MR. KLAUSNER:

Q. How old are you? A. Seventeen.

Q. You say that the Buick grazed the truck? A. Yes, sir.

Q. And right after that the collision took place? A. Yes, sir.

30

Q. Just about how soon after it? A. Well, it hit the Ford roadster first and then I don't know how soon after it hit another car that was coming toward Rahway.

THE COURT: What was that?

THE WITNESS: I don't know how soon after.

THE COURT: I understood you to say that the Buick pulled out ahead of your car and turned in to get in line.

THE WITNESS: Yes, sir.

40

THE COURT: Then he attempted to pull out alongside the truck and to pass the truck. Is that right?

Miss Elizabeth Kaus—Cross.

THE WITNESS: Yes, sir.

THE COURT: It didn't pass the truck, did it?

THE WITNESS: No.

THE COURT: Why?

THE WITNESS: Because the truck went out to the left a little bit and grazed the Buick. 10

Q. What happened to the Buick then? A. The Buick went toward the left of the road and hit the Ford roadster.

Q. In which these people were riding? A. No. The Castles Ice Cream Ford roadster.

Q. Was it grazed, did you say? A. Yes, sir.

Q. What do you mean by that? A. They just touched a little bit. 20

Q. They touched? A. Yes.

Q. So that— A. So that the force of the truck just sent the Buick to the left of the road.

Q. Immediately after the force of the collision sent it to the left, that is when the accident took place? A. That is when he hit the Ford. After he hit the Ford, he hit another car.

Q. So that it was really the force of the contact, in your opinion— 30

MR. CHANCE: I object to her opinion.

Q. On grazing they actually touched each other. Is that so? A. Yes, sir.

Q. And the truck touched the Buick; at that time they were beside each other, weren't they? A. Yes, sir.

Q. When the Buick grazed the truck how far was the front of the Buick beyond the rear of the truck? Do you understand my question? A. No, sir. 40

Miss Elizabeth Kaus—Cross.

Q. The truck is going in a certain direction?

A. Yes.

Q. And the Buick, you say, was coming up behind him and tried to pass it and grazed it so that the right side of the Buick grazed the left side of the truck. Is that so? A. Yes, sir.

10 Q. And then the truck turned left? A. No, the truck kept right on going.

Q. But the grazing forced the Buick out. A. To the left.

Q. And immediately right after the grazing, the accident with the Castles' car took place? A. Yes, sir.

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

20 Q. So that the truck was just a few feet in front of the Buick car when the accident took place with the Castles car? A. Yes, sir.

Q. Did you notice what happened to the Castles' car after it was hit? A. Well, the car swung over and hit the back fender of our car.

Q. Hit the back fender? A. Yes, sir.

Q. It swung around your car? A. No, it was riding on the left side of the road and it swung over to the right side of the road.

30 Q. And what did it do? It struck the back of your car? A. Yes, because our car kept right on going and it swung over and hit the back fender of our car.

Q. Then what happened? A. We stopped our car and the Castles' car stopped, and it was right back of our car, then, on the side of the road.

Q. You think, you say? A. It was.

40 Q. Did you see what happened, to the Buick after it passed the Castles' car? A. Well, it smashed with another car that was in the middle of the road, all smashed up.

Miss Elizabeth Kaus—Cross.

THE COURT: Was it shown here before, what make of car this was? A. The Castles' Ice Cream Company car?

MR. CHANCE: A Ford roadster.

THE COURT: It is understood that the Castles Ice Cream Company man was driving the Ford roadster and the plaintiffs were riding in a Ford sedan. 10

Q. Did you say that the Castles Ice Cream Company car was a Ford roadster? A. Yes, sir.

Q. What I want to make clear is, as I understand you, that the Buick tried to pass the truck and grazed the truck? A. Yes, sir.

Q. And the force of that pushed the Buick over and immediately it struck another car? A. Yes, after it struck the Ford roadster. 20

Q. It first struck the Ford roadster? A. Yes, sir.

Q. How soon did it strike the Ford roadster after it grazed the truck? Right away? A. Right after it swung over to the left side of the road.

Q. Then it went on and struck the Ford sedan? A. Yes, sir.

Q. Do you know how far it went between the time it struck the Ford roadster and the Ford sedan? Have you any idea? A. No, I haven't any idea. 30

Q. How far behind the Buick were you at the time of the accident? A. Well, I would say about—

Q. I mean the accident with the Castles Ice Cream Company car, the Ford roadster? A. Well, when the Ford roadster hit us—

Q. Just answer the question. How far behind the Buick were you when the Buick collided with the Ford roadster? Do you understand my ques- 40

Miss Elizabeth Kaus—Cross.

tion? A. I could not say how far it was.

Q. You were directly in back of it, weren't you? There were no other cars between your car and the Buick? A. No, there were no cars.

Q. So that you were behind the Buick? The first car behind the Buick? A. Yes, sir.

10 Q. Could you tell us approximately, how many feet behind the Buick you were? A. I couldn't say.

Q. Could you tell us how far you were behind the truck when the Buick hit the Ford roadster when they came into collision? A. A distance of about one car, I think.

Q. Your car was behind the truck a distance of about one car? A. About that.

20 Q. About one car when the Buick hit the Ford roadster? A. Yes, sir.

Q. That was the truck that had been in front of the Buick? A. Yes, sir.

CROSS EXAMINATION BY MR. HELENDAY:

Q. You say there was a car parked on the right? How far did that extend out into the paved portion of the road? A. I don't think it extended on the paved portion of the road at all.

30 Q. There was no occasion for the truck or the Buick or any other car to get off to the left of the road? The road was clear?

MR. CHANCE: I object.

Q. Was there any other obstruction in front of these cars which made them get off to the left? A. No.

40 Q. Outside of this parked car? A. None that I could see.

Q. At the time of the collision the Buick car was in the center of the road?

Miss Elizabeth Kaus—Cross.

MR. CHANCE: I object.

Q. Isn't that what you said, at the time of the collision the Buick was in the center of the road? The Buick car that collided with the Castles' car was in the center of the road. That is what you said, isn't that so? A. Yes.

Q. You were behind in the Star car? A. Yes, sir.

Q. The Buick was in front of you, in the center of the road? A. That is right. No, we were at the right side of the road.

Q. Assuming that the road is from here to the end of the desk (indicating) you were at the right side of the road? A. Yes.

Q. Will you come down and place these books here and tell us just where the Buick was at the time of the collision just immediately before the impact between the Castles' and the Buick? A. The truck was about there (indicating) and the Buick came out this way (indicating).

Q. Place your book where the Castles' car was. A. By the time the Buick was in the middle of the road, the Castles' car had swung over like that and hit our back fender.

Q. You said that the Buick struck the Castles' car before it struck you? A. It passed the truck and it struck the Castles' like this (indicating) and then it hit our back fender.

Q. When the Buick was in the center of the road it struck the Castles Ford, didn't it, the roadster? A. Yes.

Q. Was that in the center of the road at the time it was struck? A. Well, it wasn't exactly in the center; it was more to the left of the road.

Q. To the left of the center of the road? A. Yes, sir.

Miss Elizabeth Kaus—Cross.

Q. Do you know what parts of the automobile came together, the front or the rear? A. Well, it was the front wheel of the roadster came in contact with the front of the Buick, I think.

10 Q. After that the roadster kept on going your way and struck the rear of your fender, is that right? A. Yes, sir.

THE COURT: Did you see this Ford strike the car that these people were riding in, Mr. Dunbaden and the rest of these people?

THE WITNESS: Well, I saw the two cars come together but I did not know who was in them, or what cars they were. I knew it was a Ford.

20 THE COURT: You saw a Ford sedan there?

THE WITNESS: No. I just saw it after it hit the Ford, the car hit another car, that is all I know.

THE COURT: After the Buick hit the Ford roadster, then you saw the Ford roadster hit another car?

THE WITNESS: No, the Buick hit another car.

30 THE COURT: Did you see the Ford roadster hit any car?

THE WITNESS: The Ford roadster hit our back fender.

THE COURT: Besides your car, did you see it come in contact with any other car?

THE WITNESS: No, sir.

40

Dr. George E. Galloway—Direct, Cross.

DR. GEORGE E. GALLOWAY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHANCE:

Q. You are a duly licensed and practicing physician of this state, and were you in November, 1924? A. Yes, sir. 10

Q. You were practicing at that time in the vicinity of Rahway? A. Yes, sir.

(Dr. Galloway's qualifications are admitted.)

Q. On that day late in the afternoon were you at the police station in Rahway? A. I was.

Q. Were you there asked to make an examination of Mr. Grundman? Stand up, Mr. Grundman.

That gentleman? A. Yes, sir. 20

Q. And the examination you were to make was for what purpose? A. To find out whether he was under the influence of liquor or not.

Q. What time of day was this examination? A. In the afternoon, I think.

Q. Do you recall, particularly, as to what hour the examination took place? A. I do not.

Q. Was he under the influence of liquor when you examined him? A. He was not. 30

CROSS EXAMINATION BY MR. HELENDAY:

Q. Who asked you to make the examination?

MR. CHANCE: I object.

THE COURT: I will allow it.

A. I don't know anything about it. I received a call from the police station.

Q. What did your examination consist of? A. 40
The usual routine—

Dr. George E. Galloway—Cross.

Q. We are not familiar with that. What did it consist of? A. First, for coordination, with his muscles, if he could touch certain things. Then swaying, whether he swayed or not standing with his eyes closed. I don't remember what other tests I put him through.

10 Q. You put him through quite a long series of tests? A. Not a long test. Two or three different things.

Q. Now, there was some occasion for you to put him through this test. You could not tell without it whether he was intoxicated or sober? A. I did not trust my impression.

Q. By looking at me could you tell, without putting me to this test, whether I was drunk or sober? A. No, sir.

20 Q. Did you talk to Mr. Grundman to see whether he had been drinking or not? A. No, sir.

Q. Didn't you say, "Now, Grundman, tell the truth. You have been drinking, haven't you?" A. I don't remember that.

Q. Do you want to deny you said it? A. No, sir.

Q. Didn't he say "Yes, I have been drinking?" A. He might have.

30 Q. Did you say, "Although this man has been drinking, he is not so far intoxicated as to be unable to drive a car." A. That was my diagnosis. I didn't make an official diagnosis as to whether he was intoxicated or not.

THE COURT: Did you smell any liquor on him, doctor?

THE WITNESS: I don't remember.

Mrs. Sophie Kaus—Direct.

Mrs. SOPHIE KAUS, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHANCE:

Q. You are the mother of the young lady who was on the stand a little while ago? A. Yes, sir. 10

Q. You were in your Star sedan at the time this accident happened, weren't you? A. Yes, sir.

Q. Just tell the jury what you know about this accident, what you saw, in your own way. A. I can't tell much because I was very nervous.

Q. Just tell us. A. I am a very nervous woman. When we came down the road, there was so much traffic I didn't expect it and I told my boy to be careful. 20

THE COURT: Not what you told your boy. Tell us what you saw.

A. (Continuing) I didn't see much. We just went and when we went in back of the truck, I told him to keep back because I was afraid of traffic. After that a big car came ahead of us. Of course, there was enough space for one more car between the truck and our car. This car went in and tried to get ahead of the truck. There was a crash, that is all I know. I was so nervous I didn't see anything and then came the crash and the bump against our car. After that I went out of the car. I didn't go where all the people were. I went on the side. I saw the damaged car in back of us. That is all. Then I talked to my boy to go home because I was nervous. 30

Q. When the car turned out beside the truck, 40

Mrs. Sophie Kaus—Direct, Cross.

was it on its left hand side of the road or was it on the right hand side. A. We were exactly behind the truck on the right hand side.

Q. The car that turned out to pass the truck was where? A. To the left hand side.

10 Q. Do you recall whether it got to the left hand side of the road, or remained on the right hand side of the road? A. I don't know. I think the left hand side to pass the truck.

Q. Was it a little truck? A. It was a big truck.^d We were travelling a good while behind it and I thought we could get out.

Q. You were driving a long time behind it? A. My boy was driving.

20 Q. How long had the Buick car been between you and the big truck? A. I can hardly tell that. I don't know exactly how long it was.

CROSS EXAMINATION BY MR. KLAUSNER:

Q. Mrs. Kaus, you were sitting in the back of the car? A. Yes.

Q. You weren't particularly watching the Buick car, were you? A. No.

30 Q. And you weren't particularly watching whether it went to the right or left, were you? A. I saw that it tried to get over the truck, ahead of the truck. I saw so much that the Buick went out to get ahead of the truck.

Q. Did you go over this case with anybody before you came here to testify, Mrs. Kaus? A. No, sir. I was away.

Q. Did you discuss this case with anybody? A. No.

40 Q. You didn't talk with anybody about it? A. No.

Q. You have never spoken to anybody from the

Fred Grundman—Direct.

date of the accident down until to-day, have you?

A. Not as I know, but with my family, of course.

Q. You talked it over with them as to how the accident happened? A. Well, we had to tell when we got home, yes.

Q. You talked it over, just how the accident happened; is that so? A. Yes. 10

FRED GRUNDMAN, one of the defendants, called on behalf of Castles Ice Cream Co., being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CHANCE:

Q. In November of 1924 by whom were you employed? A. Castles Ice Cream Company. 20

Q. What was the kind of work you did for the Castles Ice Cream Company? A. Route driver.

Q. What does a route driver do? A. He sells ice cream to stores.

Q. As he goes to sell it to stores as you went to sell it to stores, what kind of a vehicle did you use, if any? A. Five and a half ton Packard.

Q. Were you riding in that five and a half ton Packard when this accident happened? A. No, sir. 30

Q. Where was the route that you had at that time? A. Staten Island.

Q. Did you make any deliveries in the City of Rahway on that day? A. No, sir.

Q. How was your pay regulated at that time? A. Commission.

MR. KLAUSNER: I don't see how this is material, how his pay is regulated.

THE COURT: I cannot tell exactly as yet. 40

MR. KLAUSNER: I object to that.

Fred Grundman—Direct.

THE COURT: He has answered the question.
The objection comes too late.

Q. How was the commission that you were paid regulated? A. Ten cents on a gallon.

Q. That was the only compensation that you received? A. That is all.

Q. What time of the day did your work cease on election day, the day of this accident? A. About four o'clock, half past four.

Q. At the time of the accident had you completed your day's work? A. Yes, sir.

Q. Where were you going at the time of the accident? A. Home.

Q. Where is your home? A. It was at 65 Columbia Street, Newark.

Q. At that time it was that? A. Yes, sir.

Q. Has the Castles Ice Cream Company a plant in the City of Newark? Or did it have it on that day? A. Yes, sir.

Q. Where? A. Irvington, 19 Loretta Avenue.

Q. Were you going there? A. No, sir.

Q. Did you state to Alva Dunbaden or any of the rest of the Dunbaden party immediately after this accident that you were on your way to the Newark plant of the Castles Ice Cream Company? A. No, sir.

Q. Were you going any other place before you went home? A. No, sir.

Q. Now, at the time of the accident, who was with you in this Ford roadster? A. I don't know who he was. He was a fellow I picked up in Perth Amboy who wanted to go to East Orange. I told him I would ride him as far as Newark.

Q. Had he ever been a helper of yours or the Castles Co. to your knowledge? A. No, sir.

Fred Grundman—Direct.

Q. Had you ever seen him before, to your knowledge? A. I think I saw him once.

THE COURT: Is the ownership of the car by the Castles Ice Cream Company denied in the pleadings?

Q. This Ford roadster was owned by the Castles Ice Cream Company, wasn't it? A. Yes. 10

Q. Did you have permission to take it to carry you home that night? A. Yes, sir; they loaned it to me to ride back and forth.

Q. Coming back to this fellow who was with you, did he, in any wise, interfere with the driving of the car by you at the time of the happening of this accident? A. No, sir.

Q. At the time of the happening of the accident, where were you? A. On Rahway Avenue, Rahway. 20

Q. Just suppose you turn around and tell this jury just how this accident did happen and what you know about it. A. I was coming along St. George's Avenue, Rahway, this side of the Pennsylvania bridge—I don't know how far I was up the road—while I was driving along, a car came out, passed me and hit my left front wheel and hub cap and took the wheel out of my hand. I had a Ford runabout and it turned me on the left side of the road. I stopped, and then this car that hit me, collided with a Ford sedan, I found out later. 30

Q. When you were hit, what kind of car was it that hit you? A. A Buick.

Q. Where was this Buick when you first saw it? A. I don't know. I didn't see him until he was on top of me, it happened so quickly.

Q. Was he on his right side of the road or his left side, or the center? A. About the center, I 40

Fred Grundman—Direct.

guess it was. He tried to get between my car and the truck.

Q. What can you say as to his speed and your speed at the time he hit you? A. I was going fifteen miles an hour.

10 Q. How fast was he going? A. He was going about the same.

THE COURT: Did I understand you to say that your car didn't strike anybody?

THE WITNESS: I have been told it touched.

THE COURT: Do I understand you that your car didn't strike any other car?

THE WITNESS: The Buick and I came together.

20 THE COURT: After that.

THE WITNESS: I was told after that that I touched the fender on a Star car.

Q. If you did touch the Star car, did you hit it violently or otherwise?

MR. KLAUSNER: I object.

THE COURT: He said he touched the fender of the Star car. You say you were told that?

THE WITNESS: Yes.

30 Q. Were you under the influence of liquor at the time this accident happened? A. No, sir, I was not. I was examined by a physician.

THE COURT: Without the examination by a physician, the question is, were you under the influence of liquor?

THE WITNESS: I was not.

40 THE COURT: You would know it if you were?

THE WITNESS: Certainly.

Fred Grundman—Direct, Cross.

Q. This fellow who was in the car did not give you a drink, did he? A. No, sir.

Q. What sort of a truck was this that the Buick was attempting to pass? A. It was a big van, one of those Philadelphia moving vans.

Q. How wide would you say that was? A. I don't know. I think six or eight feet. 10

Q. Why didn't you stop your car before the Buick hit you? A. I didn't have a chance. He came along so quickly. It stopped itself.

Q. Where did he come on to you so quickly from? A. From behind the truck.

Q. When he came out so quickly from behind the truck, what part of his car hit you, and what part of your car hit his? A. The left front wheel in both cars. 20

Q. I don't suppose you saw what he did to the other car, did you? A. No, not until afterwards.

CROSS EXAMINATION BY MR. LAIBLE:

Q. What part of the road were you driving on? A. Right hand side. ..

Q. Which side of the road were you driving on? A. The right hand side.

Q. How far from the right hand side of the paved portion of the road? A. I don't know. A foot or a foot and a half. 30

CROSS EXAMINATION BY MR. KLAUSNER:

Q. You were a foot or a foot and a half from the right hand side of the road? A. Yes, sir.

Q. How wide is your Ford roadster? A. I don't know. Five foot, I guess.

Q. How wide is the paved portion of the road? A. I have no idea. 40

Q. How many cars can pass? A. Three, I guess.

Q. You say you could not stop your car be-

Fred Grundman—Cross.

cause he suddenly came out from behind of the Mack truck? A. He hit me unexpectedly, Yes.

Q. How far was the Mack truck away from the place where you collided with the Buick car? A. Just passing me.

10 Q. Approximately how many feet?

THE COURT: After the car passed you could you tell how many feet it passed you? ,

THE WITNESS: I didn't notice.

THE COURT: Did you look back and see?

THE WITNESS: No.

Q. Had he passed you? A. Yes, he was just passing me.

20 Q. After the collision between your car and the Buick don't you know of your own knowledge whether you struck the Star car? A. No, I didn't pay any attention to it. I went back and saw the other accident.

Q. You paid absolutely no attention to the Star car? A. No, I didn't. They hadn't much damage.

30 Q. How far did you go after the collision with the Buick? A. Turned right around and took the wheel out of my hands, the back wheels were on the concrete pavement and the front wheels were in the dirt.

Q. The front wheels were in the dirt when you stopped? A. Yes.

Q. You say that the Ford roadster is owned by the Castles Ice Cream Company. Does it have it's name on it, too? A. No, it is a salesman's car.

Q. Did you use it every night coming to and from work? A. I used to.

40 Q. On that particular day where did you quit working? A. Perth Amboy.

Q. You had left Perth Amboy for your home? A. Going to Newark.

Fred Grundman—Cross.

Q. What distance did you travel from the time that the truck passed you and the time of the collision between your car and the Buick? A. I don't remember. It is a year and a half ago.

Q. You don't remember that far? A. No.

CROSS EXAMINATION BY MR. HELENDAY:

10

Q. Where did you keep this car at night? A. In front of my house.

Q. Out in a public street at night? A. No, in an alley.

Q. Where did you keep it overnight until the morning?

THE COURT: Don't answer that. ,
(Argument.)

MR. KLAUSNER: If your Honor please, in order to protect the interest of my client, I think it is important to prove the agency.

20

THE COURT: Where he kept the car at night?

MR. KLAUSNER: In this respect, that it would be evidential of the fact as to whether or not he would still be considered as being in the employ of the Castles Ice Cream Company at the time of the accident.

30

THE COURT: It was their car, admitted to be their car, driven by him and loaned by the Castles Ice Cream Company to him to go back and forth from work.

Q. Mr. Chance asked you about one statement. I am going to ask you about the other statement. Did you tell Dunbaden you were making your daily trip between the plant of the Castles Ice Cream Company at Perth Amboy and the plant of the Castles at Newark? A. I didn't. I have nothing to do with the Newark factory.

40

Introduction of Statement of John Pape.

MR. CHANCE: I would like to offer this statement of Mr. John Pape that was marked for identification.

MR. KLAUSNER: I object to that.

THE COURT: On what grounds?

10 MR. KLAUSNER: I don't see how that would be material in any event, the statement made by him, unless it was shown under what circumstances it was made.

THE COURT: It was shown this morning how he came to make it. What is the object of the offer?

MR. CHANCE: The object of the offer is to prove—

20 THE COURT: To prove that the witness at some time made a different statement than he made then.

MR. CHANCE: Particularly with respect to the Buick car and its conduct.

MR. KLAUSNER: I would like to have an opportunity to put Mr. Pape on the stand and examine him as to how that correction was made, and exactly what those statements are.

30 THE COURT: He has already told how he made it. As to what the corrections are, the paper speaks for itself.

MR. KLAUSNER: I object because it calls for a conclusion.

THE COURT: I will allow the statement for the purpose it was offered. I will allow you an exception.

Exception allowed, sealed accordingly.

ALFRED A. STEIN,
Judge.

40

(Statement of Mr. John Pape marked Exhibit D-1.)

Henry Coleman—Direct.

THE COURT: The paper is allowed on the grounds given in the offer and may be read to the jury.

(Exhibit read to the jury.)

MR. CHANCE: This is signed by Mr. Pape on each page.

MR. CHANCE: Defendants rest.

MR. LAIBLE: We rest.

THE COURT: The Castles Ice Cream Company and Fred Grundman have rested.

10

HARRY COLEMAN, sworn on behalf of the Defendants, testified as follows:

DIRECT EXAMINATION BY MR. KLAUSNER:

20

Q. Mr. Coleman, where do you live? A. 116a Palisades Avenue.

Q. Jersey City? A. Yes, sir.

Q. You are a friend of John Newman, the defendant in this case? A. Yes, sir.

Q. On the day of the accident were you driving this Buick car? A. Yes, sir.

Q. What kind of a car was it, and how many passengers? A. Five.

30

Q. Touring car? A. Yes.

Q. Who else was in the car with you and how were they seated? A. There was Jack Newman in the front and me, Jack Sheridan and his wife, and child, and another woman and her child.

THE COURT: John Newman was in the car?

WITNESS: Yes.

THE COURT: The owner?

WITNESS: Yes.

40

Q. Mr. Newman was in the front seat beside you? A. Yes, sir.

Q. There was Mr. Sheridan and his wife and

Henry Coleman—Direct.

their child, and another lady and her child in the rear? A. In the rear.

Q. The two children were in the laps of the women? A. Yes, sir.

10 Q. On this particular day where were you bound for? A. Keansburg.

Q. You are blind in one eye? A. Yes, sir.

Q. And you passed the test for a driver's license? A. Yes, sir.

Q. The right eye of yours is the bad one? A. Yes, sir.

Q. It is a left hand drive, this Buick car, isn't it? A. Yes, sir.

Q. Will you please tell the jury and the Court and all of us about it, how this accident happened? A. Going towards Keansburg about five
20 o'clock, I should judge, I was following this truck up from the place over where the railroad goes across the road in Rahway. I followed it up until I guess it was twenty minutes and now I see this Ford roadster coming down in the middle of the road and I was about, I will say, about two foot or two and a half foot from the middle of the road when all of a sudden he swung toward me and hit the front left wheel and drove the wheel
30 out of my hands. It nearly broke the steering knuckle. Then it went around, my back and went off the road about eight feet, and I swung across the road. The wheels just turned that way into this Ford sedan.

THE COURT: You ran into the Ford sedan?

THE WITNESS: I did.

THE COURT: After you had come in contact with the Ford roadster?

40

THE WITNESS: Yes, sir.

Henry Coleman—Direct.

Q. What part of your car came into contact with the Ford sedan? A. The right front wheel.

Q. Your front wheel hit what part of the Ford sedan? A. The front of the Ford sedan.

Q. How far behind the truck were you when the Ford roadster struck your car? A. About ten or fifteen feet. 10

Q. From the truck? A. From the truck.

Q. On which side of the road were you when the collision took place with the Ford roadster? A. On the right side.

Q. Did the Ford roadster go to the left of the center of the road before it came into contact with your car? A. No, he was right almost opposite me when he swung it over, the car.

Q. He swung how? A. Towards my car, towards the left. 20

Q. Did he cross the center of the road in order to do that? A. Yes, sir; he had to cross the center of the road.

Q. How far from the center of the road would you say was the left hand side of your car? A. About two and a half foot.

Q. Did you at that time or any other time prior to the accident attempt to pass the truck? A. No, sir; there was a big line of traffic coming up. I couldn't pass it, and I had children in the car, besides. 30

Q. You had children in your car? A. Yes, sir.

Q. After the collision, did you go over and speak to Mr. Grundman? A. I went to Mr. Dunbaden first.

Q. Mr. Dunbaden. And then what did you do? A. We went over to Grundman.

Q. What did you say to Grundman and what did Grundman say to you? A. I asked him for 40

Henry Coleman—Direct.

his license and Grundman told me to get out of here when I asked him for his license.

Q. He refused to give you his license? A. He refused to give me his license.

Q. Then what happened? A. Did a police officer come upon the scene? A. About forty
10 minutes later—there was a fire that night.

Q. He came about forty minutes later? A. He came about forty minutes later.

Q. Did you and Mr. Grundman then go to the police station? A. Yes, sir.

Q. In your opinion just tell us how Grundman acted? A. He acted like he didn't care. He just stood there when I asked him for his license. He said, "Get out of here."

20 Q. Did he act as though he were drunk?

MR. CHANCE: I object to that.

A. Yes.

Q. Tell us what his condition in the police station was. What did he say with reference to his drinking? A. He said he had two or three drinks.

Q. What happened to Newman at the time the collision took place between your car and the
30 Ford roadster? A. He was thrown out of the car on his back.

Q. On the side of the road? A. Right to the side of the road.

THE COURT: That was Grundman's companion?

MR. KLAUSNER: No, Mr. Newman.

Q. He was sitting right beside you prior to the
40 accident? A. Right beside me.

Q. Did you for a period of about fifteen minutes before the collision of the Ford roadster attempt to turn left and pass any automobiles? A. No, sir.

Henry Coleman—Cross.

CROSS EXAMINATION BY MR. CHANCE:

Q. Did you pass a Star sedan? A. No, sir.

Q. Did you see any Star sedan in the vicinity of the accident? A. No, sir.

Q. Neither before nor after the accident? A. No, sir. He wasn't there with his license if he got hit. 10

Q. You only had one eye at the time of the accident as well as now? A. Since I was two years old.

Q. Where did you come from and where were you going? A. Coming from Jersey City and on the way to Keansburg.

Q. What time were you to get to Keansburg? A. Not any special time. We only went for a ride. 20

Q. Came back the same day? A. We were coming back about—after we got there we were going to stay for a couple of hours and come back again in the morning.

Q. How far away from you was this Ford roadster when you first saw it? A. About fifty to one hundred feet.

Q. Fifty to one hundred feet, was it? A. Yes, sir. 30

Q. How about the Ford sedan, how far away from you was that when you first saw it? A. I couldn't say how far that was when I first seen the sedan. I was about ten feet from the roadster.

Q. You were ten feet from the roadster? A. When I first saw the sedan.

Q. In how long a space could you have stopped your car at the speed you were going when you first saw the roadster? A. Stopped the car? I didn't try to stop the car until after it hit me; 40

Henry Coleman—Cross.

then I put on both brakes and she stopped within about nine feet.

Q. Didn't you make any application of your brakes at all before he hit you? A. No, I didn't expect him to hit me. He had the whole road to himself.

10 Q. Who did? A. Grundman.

Q. Where was the truck at the time? A. The truck was on the right of the road.

Q. Were there any other automobiles there besides the truck and Grundman and you? A. No, sir; only the Ford sedan in back of the roadster.

Q. That is all the traffic you saw in that neighborhood at the time of the accident? A. There was a line.

20 Q. He didn't have the whole road to himself? A. There was nobody in front of him.

Q. Was there anybody in front of you? A. The truck.

Q. How far ahead? A. About ten or fifteen feet.

Q. You were right back of the truck, or were you out in the middle of the road in back of him?

A. Right back of the truck about even with him. The truck is wider.

30 Q. The truck was wider than your car, was it? A. Yes.

Q. It had a closed body on, too? A. Yes, sir.

Q. You couldn't see through the closed body? A. No, sir. I was fifteen feet in back of him. That gave me a chance to see out on the other side of the road.

Q. How fast did you say you were going? A. Between fifteen to eighteen miles an hour.

40 Q. In how many feet could you have stopped your Buick at that speed on that roadway on that

Henry Coleman—Cross, Re-Direct.

evening? A. Five feet, I should judge, at eighteen miles.

Q. Why didn't you stop in five feet? A. After I hit him?

Q. Before you hit him. Why didn't you stop? A. Why didn't I stop? He was coming up on the other side of the road and I didn't have anything to stop for until he swung over. Then I had to stop. 10

Q. Was he just abreast of you when he started to turn over? A. He was just almost abreast of me and the wheel swung sudden. I didn't have any chance to stop then.

Q. Did you see where he went after he struck you? A. He went around the back of my car and off the road. 20

Q. He turned from the right hand side of you over directly to his left, hit your left hand front wheel and then swung around in back of you? A. Swung around the back.

Q. He didn't upset, did he? A. My car almost upset.

Q. Almost you said? A. Yes, sir.

Q. Going fifteen miles an hour you almost upset? A. He hit the front wheel and drove it right under the car. 30

RE-DIRECT EXAMINATION BY MR. KLAUSNER:

Q. Did you hit the truck at all? A. No, sir.

Q. Did you turn out at all? A. No, sir.

Q. To pass the truck? A. No, sir.

Q. At no time prior to the happening of this accident, did you turn out any time prior to this accident to the left of this truck?

MR. KLAUSNER: I object to "or any time prior to the accident." 40

John A. Newman—Direct.

Q. Right before the happening of this accident, had you turned to your left at all? A. No, sir.

Q. You were continuing straight ahead on your right hand side of the road? A. Following the truck.

10 Q. How close to your right hand side of the road were you? A. About a foot and a half.

Q. How long had you continued for a foot and a half from your right hand side of the road? A. About ten or fifteen minutes, I should judge.

Q. Fifteen minutes you had been driving one foot from the right hand side of the road? A. A foot and a half.

Q. It didn't—it couldn't have been more than a foot and a half? A. No, sir.

20

JOHN A. NEWMAN, one of the defendants, called in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUSNER:

Q. Where do you live, Mr. Newman? A. 61 Concord Street, Jersey City.

30 Q. Are you the owner of the automobile which Coleman was driving on the date of the accident? A. I am.

Q. Who was in the car at the time of the accident, in your car? A. Mr. and Mrs. Sheridan and her little child, a little baby about four years old, and Mrs. McTurker with another child about four years old. Mr. Coleman was driving and I was sitting on the front seat.

Q. The others were in the rear? A. Yes, sir.

40 Q. Prior to the happening of this accident, how far behind the truck was your car? A. I should judge about eight or ten feet. It wasn't close to

John A. Newman—Direct, Cross.

it. There was quite a distance between.

Q. And for a period before the happening of the collision between your car and the Ford roadster did Coleman attempt to turn left to pass the truck at all? A. No, he did not.

Q. At any time did Coleman, did your Buick, attempt to pass the truck? A. Oh, no. 10

Q. When the collision took place, your car was on the right hand side or on the left hand side of the road? A. It was on the right hand side of the road.

Q. What happened to the Ford roadster just prior to the collision? Did you see the Ford roadster prior to the collision? A. I didn't see the Ford roadster until it hit us.

Q. When the Ford roadster hit you, what happened to you? A. I was thrown completely out in the middle of the road on my back. 20

Q. On the pavement, in the dirt? A. On the asphalt pavement.

Q. Did you see what happened to the Ford roadster? A. After I got up I looked around and saw the Ford roadster on my side of the road over on the dirt part of the road.

CROSS EXAMINATION BY MR. CHANCE: 30

Q. When you were following the truck, how far from the right hand side of the road would you say you were proceeding before the accident? A. I should judge about one and a half feet or two feet.

Q. How long had your Buick car been proceeding about that distance from the right hand side of the road? A. Quite a long space of time. I should say about twenty or twenty-five minutes, to my knowledge. 40

Q. Did you see anything of the Star sedan? A. No, I did not.

John A. Newman—Cross, Re-Direct.

Q. You don't remember whether you passed that or not? A. No, sir; I didn't pass anything with women and children in the car.

THE COURT: What has that got to do with children?

10 THE WITNESS: Their lives are pretty precious.

THE COURT: Why can't you pass a car? Your driver said the same thing. Suppose you have women and children in your car. You would trail along behind another car for miles then, for that reason alone, would you?

THE WITNESS: I think so, yes.

RE-DIRECT EXAMINATION BY MR. KLAUSNER:

20 Q. How fast was the truck going, do you know?
A. I guess it was going at the same speed we were going.

Q. How fast was that? A. It was about fifteen miles an hour.

Q. Most of the cars around you travelled at that rate of speed? A. Yes, there was a line of traffic.

30 THE COURT: You were seated in this car beside the driver. Do you mean that when you got to Rahway Avenue that all the way down you did not attempt to turn at any time?

THE WITNESS: Not to my knowledge, Your Honor, no.

THE COURT: You stayed right in the traffic?

THE WITNESS: Had to.

THE COURT: Do you remember turning out any place along the line?

40 THE WITNESS: No, I don't.

John J. Sheridan—Direct Cross.

JOHN J. SHERIDAN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KLAUSNER:

Q. Where do you live? A. 179 Palisades Avenue. 10

Q. On the day of this accident, were you in the Buick automobile owned by Mr. Newman? A. Yes, sir.

Q. Who else was in the car at the time? A. Harry Coleman was driving the car; my wife and child, and a lady by the name of Mrs. McTurker and her child.

Q. Who was sitting besides Coleman? A. Mr. Newman. 20

Q. Where were you sitting? A. Directly behind Mr. Newman on the right hand side.

Q. Just prior to the accident for a period say of ten or fifteen minutes, did your car make any attempt to pass any other cars? A. Not that I seen.

Q. You saw the cars? A. Yes, sir.

Q. Did you see the truck in front of your car? A. Yes, sir.

Q. How far in front of your car was the truck just prior to the collision with the Ford roadster? 30

A. Oh, I don't know. About ten feet, I guess.

Q. Did your car at any time come even with the truck? A. No.

CROSS EXAMINATION BY MR. CHANCE:

Q. How many passengers did this Buick car you were riding in seat? A. Five.

Q. Is that all? A. Yes, sir. 40

Q. How many were in it? A. Seven. Two

John J. Sheridan—Cross.

children three years old sitting on their mothers' laps.

Q. Where were you seated? A. I was seated on the right hand side.

Q. Alongside of you was your wife? A. My wife and the other lady.

10 Q. With a baby in her lap? A. Yes, sir.

Q. The other person in the back was Mrs. Mc-Turker and her baby in her lap? A. Yes, sir.

Q. Were you engaged in any conversation prior to the happening of this accident? A. No, sir.

Q. Were you watching the road? A. I was looking out on the right hand side.

Q. What did you see on your right hand side when you looked out? A. Just the dirt road and the trees.

20 Q. Were you looking at the edge of the road? A. I didn't watch anything particularly.

Q. How far from your right hand edge of the road were you when you were looking out there?

A. I couldn't say. I guess about two feet.

Q. Did you look ahead part of the time? A. Sometimes, yes, sir.

Q. What is the last thing you remember seeing before this accident? A. I seen this truck in front of us for quite a few blocks.

30 Q. How many blocks did you see this truck ahead of you? A. I cannot say. It was ahead of us for quite a while. Fully ten minutes.

Q. As a matter of fact, you weren't paying much attention and were sort of leaving that to the fellow running the car? A. Yes, sir.

MR. KLAUSNER: That is our case.

DEFENDANTS REST.

Walter S. Dunbaden, in Rebuttal—Direct, Cross.

WALTER DUNBADEN, recalled on behalf of the Plaintiffs, testified as follows:

DIRECT EXAMINATION BY MR. HEILENDAY:

Q. Immediately after the accident, did you have a conversation with Grundman, in which he said he was on his way from the Castles plant in Perth Amboy to the plant of the Castles Ice Cream Company in Newark? 10

MR. CHANCE: I object to that. It is misleading.

MR. HEILENDAY: Grundman denied that conversation.

THE COURT: If it is for the purpose of affecting his credibility I will allow it. 20

Q. Did he say that or not? A. Yes, sir.

Q. Did he also say "I am making my daily trip between these two plants?" A. He did.

CROSS EXAMINATION BY MR. LAIBLE:

Q. When did he say that? A. Immediately upon my return from the hospital and when I got in contact with Grundman.

Q. How did he come to say that? A. I asked him for his license card and I saw his registration card and his chauffeur's license. 30

Q. He was going to the plant at Newark, he said, and he was making one of his daily trips? A. He told me he made daily trips between Perth Amboy and Newark with that.

Q. With what car? A. He didn't mention any particular car.

Q. Did he tell you he made daily trips between Perth Amboy and Staten Island? A. No. 40

Motion for Direction of Verdict.

MR. CHANCE: I move for a direction of verdict on behalf of the Castles Ice Cream Company upon the ground that under the evidence in this case, it appears that this man Grundman was a man working on a commis-
 10 sion and not an employee in the sense of a servant, and upon the further ground that at the time of the happening of this accident, regardless and outside of the question whether he was to blame or not, he was not engaged in the business of the Castles Ice Cream Company.

(Argument.)

THE COURT: It is a question for the jury
 20 to say whether or not on this occasion Grundman was driving the car as the servant and agent of the company, or whether he was driving it as an individual. I will allow it to go to the jury.

MR. CHANCE: Will you grant me an ex-
 ception?

THE COURT: I will grant you an exception.
 Exception allowed, sealed accordingly.

30 ALFRED A. STEIN,

Judge.

(Mr. Klausner sums up for the defendant,
 John Newman.)

(Mr. Laible sums up for the defendant, Fred
 Grundman.)

(Mr. Chance sums up for the defendant, Castles
 Ice Cream Company.)

(Mr. Heilenday sums up for the plaintiffs.)

40 (ADJOURNED TO THURSDAY JUNE 4, 1926
 AT 9:30 A.M.)

Charge.

Court's charge to the jury by HON. ALFRED A. STEIN, Circuit Court Judge, as follows:

Gentlemen of the Jury: You have been sworn in the trial of three separate cases, one by Clara Paquin by her next friend John Paquin, one by Ethel Dunbaden and Alva Dunbaden, her husband, and the third by Walter S. Dunbaden. All of these actions are commenced against the Castles Ice Cream Company, a corporation, Fred Grundman, and John Newman. So you will be obliged to render three separate and distinct verdicts—in other words, a verdict in each case, either for the plaintiffs or the defendants or for some one of the defendants as the case may be—after you have considered all the evidence and applied the law as charged by the Court. 10
20

It is not my thought at the present that I shall discuss with you the evidence adduced in the case, but if in the course of my charge I should refer to any evidence or attempt to recall evidence, you will not be bound and should not be bound by the Court's recollection of what the evidence was. You will depend upon your own recollection of what it was and be guided by that and not by anything I may say about it, because if the Court refers to evidence it is done for the convenience and for the purpose of aiding the jury, not for the purpose of telling the jury what it was; so you will please remember that. 30

These actions grew out of one and the same happening. The plaintiffs were riding in the car of Walter Dunbaden on St. George Avenue in the City of Rahway on the fourth day of November, 1924. As you have already learned from the evi- 40

Charge.

10 dence, there were quite a number of automobiles on the highway at the point where this accident arose on that day. The plaintiffs were driving in a northerly direction, and as I understand it, toward this city on the right-hand side of the road, and were situated in a line of cars so that there were some cars ahead and some behind. As nearly as I got the picture from the evidence, that same condition prevailed on their left where the cars were rolling in a southerly direction toward Asbury Park.

20 It is the claim of the plaintiffs that Fred Grundman was operating a Ford car, which it is admitted as I understand it belonged to the Castles Ice Cream Company; and that Mr. Newman, the other defendant, was seated beside Harry Coleman, who was operating Newman's car; and that at a point in Rahway on St. George Avenue which has been described to you, it is the claim of the plaintiffs that the car of the Castles Ice Cream Company operated by Grundman, came in contact with the left front hub on the wheel of the car of Newman; and that as a result of this contact while Grundman driving the Castles Ice Cream car was attempting to pull out of line to

30 pass vehicles going in the same direction ahead of him, the contact caused them to lose control of their respective cars and the Castles Ice Cream car, driven by Grundman, ran into the Ford sedan of the plaintiffs, causing this injury.

40 Now, the defendant Grundman, who drove the Castles Ice Cream car, denies that this thing happened in that way. He claims that the Buick sedan, driven by the driver of Mr. Newman, collided with him, and that it was the Newman car that ran into the car of the plaintiffs.

Charge.

In substance that is as I understand it. There may be some other portions of it that you will recall, and it is your duty to do that. This action is based upon the theory of the failure to discharge a duty on the part of one or both of these defendants which the plaintiffs claim was owing to them at that time and place. And as a matter of law there was a duty on the part of Grundman operating the Castles Ice Cream car. I will have something more to say later as to the claims in reference to the ownership of the cars, rather the agency of the man Grundman for the defendant Castles Ice Cream Company. The duty which these defendants owed at that time was the duty of reasonable care in the operation of their cars. 10

Now, by reasonable care in law is meant such care as a reasonably prudent person would use at the time, the place, and the circumstances. If these defendants or either of them failed to discharge that care that would be negligence, but it is the duty of the plaintiff before he can successfully maintain his action (and that applies to all of the plaintiffs) not only to show that there was a failure to discharge a duty—in other words, that there was negligence on the part of the defendant, that the defendants did not use the reasonable care which was incumbent upon them to use at the time, place, and circumstances—but that it was the failure to discharge that care, it was the negligence of the defendants, which was the proximate cause of the injury which they sustained. The burden is on the plaintiffs to prove to you by a fair preponderance of the evidence that it is not only the negligence of the defendants which caused this injury but that that negli- 20 30 40

Charge.

gence was the proximate cause of the injury.

10 These plaintiffs were riding by invitation of Dunbaden, and I do not understand that there is any claim made in this case, so far as the evidence is concerned at least, that there was any contributory negligence on the part of the plaintiffs. They were where they had a right to be, on the right-hand side of the road driving their car, and so if the defendants or either of them were negligent and it was that negligence which was the proximate cause of the injury which these plaintiffs sustained, the plaintiffs would be entitled to recover.

20 It is not disputed that Harry Coleman drove Newman's car and that Newman was in the car with him, and I do not understand it is seriously disputed that on that occasion at that time and place he was acting as the agent and servant of Newman; and if he was negligent and did not use the care that was required to be used by him at that time and place and under those circumstances, Newman would be responsible. The negligence of Coleman would be the negligence of Newman.

30 With reference to Castles Ice Cream Company there is somewhat of a different claim made. They insist that Grundman was not the agent and servant of the company at that time.

40 The ownership of the car which he was driving is not disputed. The company admits through its counsel that it was their car. Under the law where a car is being driven on the highway the presumption is that it is driven by the person driving it in and about the business of the owner, but that presumption may be overcome by proof to the contrary. The evidence on that point as I

Charge.

recall it was that Grundman was employed as a commission salesman for the Castles Ice Cream Company; that his work was ended I believe at four o'clock in the afternoon; that the company furnished him with the car which it was said was loaned to him for the purpose of going to and fro, as I understand it, from his work; and on the day in question it was his testimony that he was coming from the shore and going to New-
ark. He said that. There was some other testi-
mony as to admissions that he was supposed to have made to the plaintiffs with reference to how he was operating that car on that day and where he was going with it. He himself said that the car was loaned to him to go back and forth from his work.

It is for you to say from the evidence as you have it whether Grundman at that time and on that occasion and at that place was the servant and agent of the Castles Ice Cream Company. If he was Castles Ice Cream Company would be responsible if he was negligent as I have defined negligence to you, and if the negligence as you have it defined to you was the proximate cause of the injuries.

When you come to consider the whole case you will find from the evidence as you recall it that the defendants Grundman and the Castles Ice Cream Company and Newman give different versions as to how this thing happened. They do not differ in this respect—that the plaintiffs' car was damaged in a collision and that the plaintiffs or some of them were injured. That much seems to be admitted by all hands, but as to whose fault it was, that is the thing that is very much in dispute.

Charge.

I am not going to attempt to recall to you the testimony offered by the various defendants as to how this thing happened. You will have to remember that and find which of the defendants or whether all of the defendants were negligent on that occasion in such way as to cause this accident. If you find that both defendants were negligent and that their negligence was the proximate cause of this accident. why, they are both responsible, bearing in mind the law as I have charged you with reference to the Castles Ice Cream Company and the dispute which arises there as to the agency and the question whether at that time he was the servant of the company. That would be a question of fact for you to decide.

20 So, gentlemen, if you come to the question of damages, and after you have arrived at the conclusion of who it was that is responsible, or if all of the defendants are responsible, then you will arrive at what is fair compensation for each of these plaintiffs for the injuries they sustained. and also of course what is the damage that was done to the property of Walter Dunbaden, who was the owner of this Ford car. You will recall the evidence of the various plaintiffs as to the injuries which they sustained. Such of them as were personally injured are entitled to recover for their pain and suffering, both mental and physical, whatever that was. They would be entitled to recover such sums of money as they lost in wages, such sums as they were obliged to expend in endeavoring to become cured and relieved of their pain and suffering.

40 Now, I will say to you that there seems to be no claim made that this plaintiff Ethel Dunbaden, the wife of Alva Dunbaden, even though she was

Charge.

pregnant at the time, suffered anything because of that condition unless it was mental anguish. There was some testimony that the child was born within seven months, but I recall nothing further being said of any condition unusual in character by reason of that birth, rather premature though it was testified to have been. There was evidence that she in her condition was worried about this accident. That would be natural, and as I have already said to you, you are entitled to award damages for mental anguish as well as physical suffering where one has been actually injured. 10

Now, other than that I know of no claims made for damages except on the part of the husband of Ethel Dunbaden, who I believe made his claim for some medical services and some medicine. Of course, the husband is entitled to recover the monies that he paid in that respect. So when you come to the question of the suit of Ethel Dunbaden and the husband Alva you have two plaintiffs to deal with. Give to her such damage as she is entitled to receive by way of fair compensation as I have explained it to you, and give a separate judgment for the husband for such monies as he was obliged to expend in having his wife cured. 20 30

So you see, gentlemen, after all this is a question of fact for you to determine. You will be called upon to weigh this evidence and to apply the law as charged by the Court. You have no right to invade the province of the Court so far as the law of the case is concerned. That you must take from the Court. And I have no right to invade your province as jurors to decide facts for you. That is your exclusive right. We cannot 40

Charge.

invade the province of one another, so that no matter what your conception may be as to the law you must take that from me. If I make any mistake in that regard there is a remedy which the plaintiffs as well as the defendants will have.

10 So now you will retire, gentlemen, and consider your verdict.

Now, gentlemen, my attention is called by counsel to a statement which he claims I made in the beginning of my charge to the effect that it was the claim of the plaintiffs that the Castles Ice Cream Company car driven by Grundman collided with the car of the plaintiffs whereas it was the reverse of that. There is no claim made that that happened, but that the Newman car ran
20 into the car of the plaintiffs by reason of the contact that it had with the car of the Castles Ice Cream Company driven by Grundman.

That is the reason why I said in the beginning of my charge you are to remember what the evidence was. We do at times make notes for our own convenience and we do at times from the bench endeavor to help the jury by reference to those notes, but I made none in this case. You are the judges of the facts. I am reminded and it seems
30 to be so, that this was an error.

I explained to you gentlemen that you are trying three suits and that is what you are doing, but in the suit brought by Ethel Dunbaden there will be, if there is a verdict for the plaintiffs, a verdict separately for the husband as I explained to you in my charge. That is one of the three suits.

You will take the case now, gentlemen.

40 MR. CHANCE: I except to the part of the Court's

Charge.

charge wherein the Court said in effect that it was a question of fact for the jury to decide if Grundman was acting at the time of this accident as an employe of the Castles Ice Cream Company and at that time was acting in the scope of an employment as a servant of the Castles Ice Cream Company. There are two places in the charge where that is said in effect, and I except to the remarks of the Court on that subject in both places, it being my point that it was a question of law and as a matter of law that Grundman at the time of the accident was not a servant of the Castles Ice Cream Company but was a sort of independent contractor or commission man; and furthermore that even if he be considered as an employe or servant with the Castles Ice Cream Company when he was engaged on his work, his work was ended for the day and he was then on his own business.

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Postea.

(Filed June 10, 1926.)

NEW JERSEY SUPREME COURT.

10	WALTER S. DUNBADEN, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> CASTLES ICE CREAM COMPANY, a Corporation, FRED GRUNDMAN, and JOHN NEWMAN, <div style="text-align: right;"><i>Defendants.</i></div>	} at Law. Action Postea.
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20 This case was tried before Judge Alfred A. Stein, with a jury in the Union Circuit, to whom it had been referred by a Supreme Court Justice holding the Union Circuit on June 3rd and June 4th, 1926.

The jury rendered a general verdict against the plaintiff and in favor of the defendant Fred Grundman.

30 ALFRED A. STEIN,
Judge.

40

John
Ray
witness
17/19/24

(1)
Statement of Mrs. John
Elizabeth Cape, 1521 E. Pike
W. 15th St., Chilo, Pa.

I, ~~John~~ John Cape,
proprietor, having affixed
my name to a Ford sedan,
in which were also
riding Mrs. & Mrs. John
Dunbar, of 408
Stockton Ave., Rowley,
W. J., and
John Ray
about 5 o'clock on
Nov. 14th, 1924, we were on

our way back from
Lynchburg, Pa. & were driving
John Cape & John Ray

on the main st. and
were following another
(Ford sedan) and quit
a head of the car we
were following was
a car driven by
Walter S. Dunbar, of
408 Stockton Ave., Rowley,
W. J.

There was a truck
coming towards us on
the left - and ~~we~~
a touring car ~~was~~
at the time ~~we~~
withy out to pass the truck
~~and~~ ~~we~~ ~~at~~ ~~the~~ ~~time~~
~~and~~ ~~we~~ ~~at~~ ~~the~~ ~~time~~

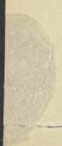
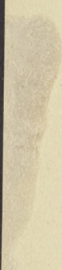
~~we~~ ~~at~~ ~~the~~ ~~time~~ ~~we~~
~~we~~ ~~at~~ ~~the~~ ~~time~~ ~~we~~
XXXX collided with
another car going the
same direction as we
John Cape

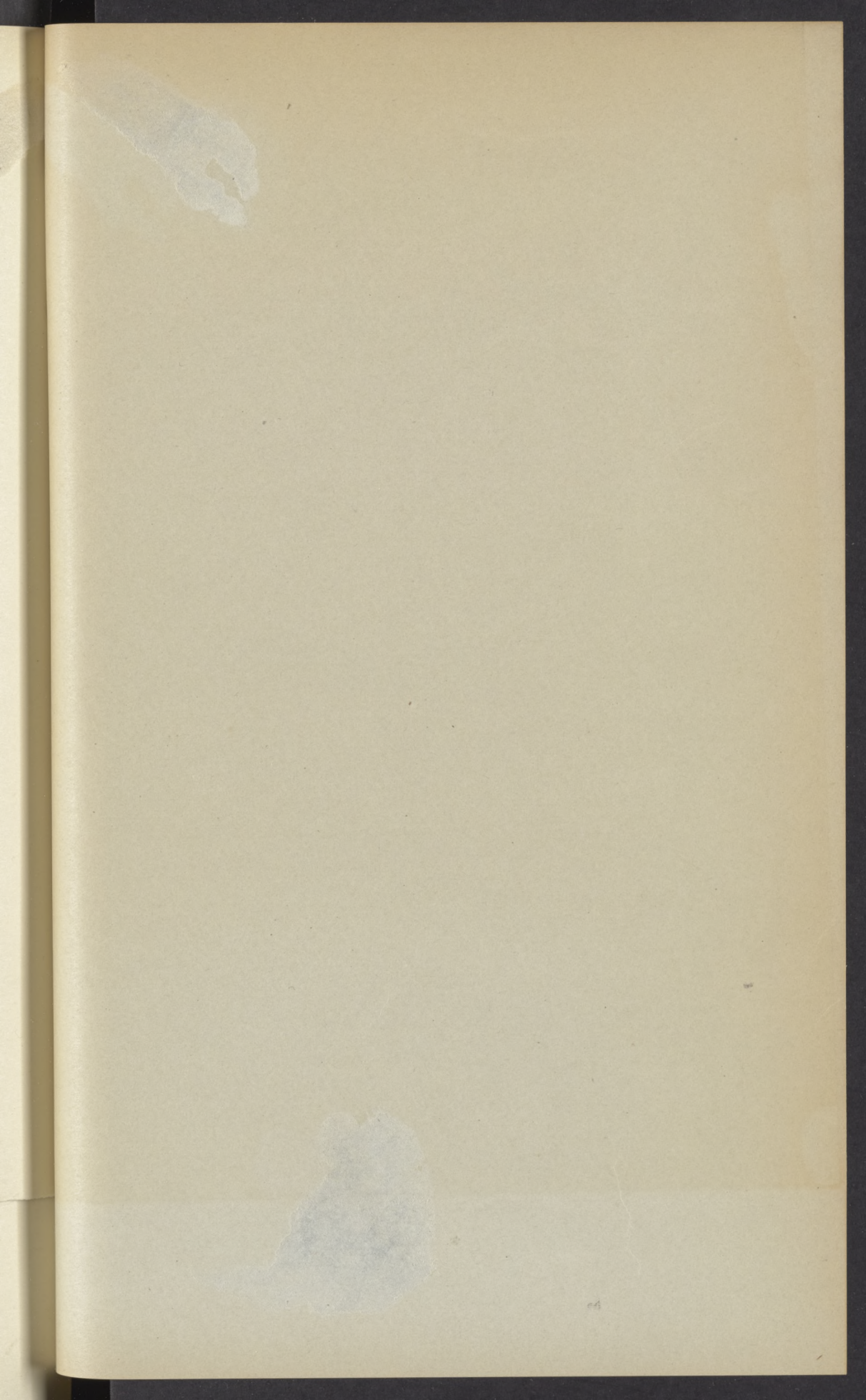
were. Then when
touring car did not seem
it he started to left and
collided with the
car driven by Walter
Dunbar, sitting in on the
We said being going
slowly because we were
in a line of traffic.

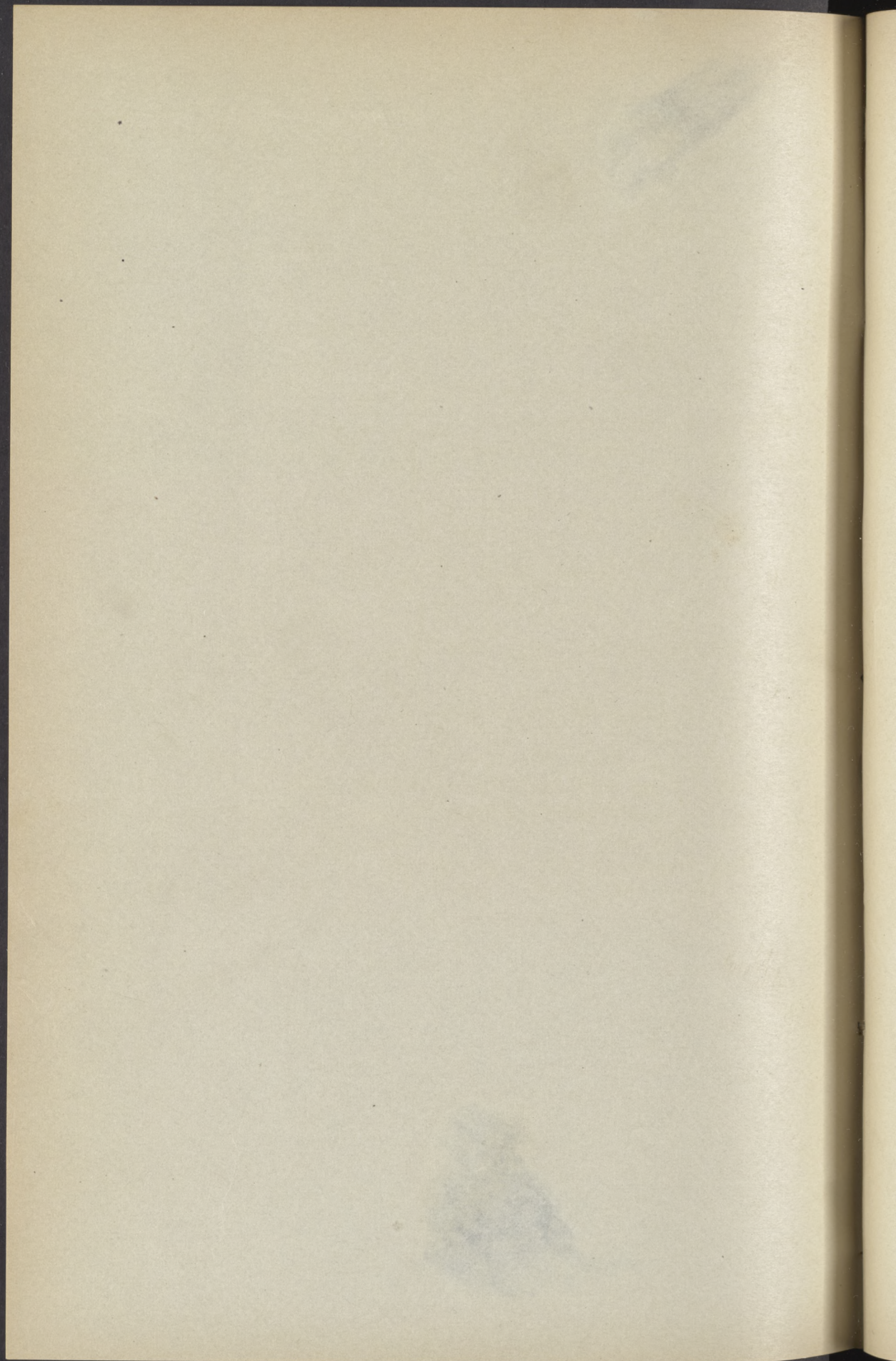
When the accident
happened it was about
five o'clock, and people
were just beginning to
put on their auto lights.
There were turned on
at once. The light on
Dunbar's car.

John Cape

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man in Newman's Buick car in a southerly direction. The Ford roadster driven by Grundman and the Buick car in which Newman was being driven collided. Newman claimed that it was Grundman's fault and Grundman claimed that it was Newman's fault. Immediately after the collision and while the cars were still in motion, they having side swiped each other, the

10 Buick car swung to the left of the road and came in contact with the Ford sedan driven by Walter Dunbaden. At no time did the Ford roadster driven by Grundman come into contact with the plaintiff's car.

Walter Dunbaden and his three passengers, each brought suit. In each of these suits three defendants were named, that is, the Castles Ice Cream Company, Newman in the Buick, and Grundman in the Ford roadster. The allegation of the complaints was that the Ford roadster was owned by the Castles Ice Cream Company. This was admitted. A further allegation was that Grundman was driving the Ford roadster on the business of, and as an employee of the Castles Ice Cream Company and the doctrine of respondeat superior was invoked to hold the Castles Ice Cream Company. This was denied. The facts supporting this denial will be referred to later.

30 The three cases were tried together before Judge Stein and a jury at the Union Circuit and each of the four plaintiffs recovered a verdict. In each instance this verdict was against the Castles Ice Cream Company but was silent as to the alleged employee of the Castles Ice Cream Company, Grundman, and also as to the defendant Newman.

40 After the entry of postea by the plaintiff,

NEW JERSEY COURT OF ERRORS
AND APPEALS.

WALTER DUNBADEN,)
)
Plaintiff-Respondent,)
)
vs.)
)
CASTLES ICE CREAM COMPANY,)
a corporation,)
)
Defendant-Appellant,) Action at Law.
)
and)
)
FRED GRUNDMAN and JOHN NEWMAN,)
)
Defendants-Respondents.)

BRIEF FOR DEFENDANT-RESPONDENT, JOHN NEWMAN.

The facts in this case are as set forth by the appellant, Castles Ice Cream Company, with the exception of those as to the relations between Fred Grundman and the Castles Ice Cream Company, and as to those facts, we do not believe it is necessary for us to discuss, in order to have this case decided with reference to John Newman.

Since the verdict was against the Castles Ice Cream Company but silent as to Fred Grundman and as to John Newman, a judgment should therefore be entered in favor of John Newman as well as Fred Grundman, upon the grounds advanced by the appellant, Castles Ice Cream Company, in its brief.

Even if this is not so, still, if the decision is wrong as to the Castles Ice Cream Company, a venire de novo should be directed only as to the Castles Ice Cream Company, for the decision in this case is separable, since this is an action against joint tort feasons in which the verdict was rendered against one of them, the Castles Ice Cream Company. See Rule 147 of the Rules of the Supreme Court, *Mærsdorf vs New York Telephone Co.*, 84 N. J. L. 749, *Hagy vs. Hafner*, 86 N. J. L. 502, *Dumphy vs. Thompson*, 130 Atl. 639, *Doherty*

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MEMORANDUM

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vs. Public Service Railway Co., 126 Atl. 466.

Therefore, the judgment in this case should be rendered in favor of John Newman and the judgment appealed from should be affirmed as to John Newman.

Respectfully submitted,

Kinkead & Klausner,

Attorneys for, and of Counsel with

Defendant, John Newman.



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NEW JERSEY COURT OF ERRORS
AND APPEALS.

WALTER DUNBADEN,
Plaintiff-Respondent

vs.

CASTLES ICE CREAM COMPANY, a
corporation,
Defendant-Appellant,

and

FRED GRUNDMAN and JOHN NEWMAN,
Defendants-Respondents.

Action at Law
BRIEF FOR DEFENDANT-RESPONDENT,
JOHN NEWMAN.

KINKBAD and KLAUSNER,
Attorneys for, and of Counsel
with Defendant, John Newman,
586 Newark Avenue,
Jersey City, N. J.

Grundman's attorneys procured another. (Case p. 134.)

The defendant Castles Ice Cream Company conceiving that the verdicts in favor of the three plaintiffs other than the plaintiff in the present action were excessive, procured rules to show cause which are pending, on the sole ground of the excessiveness of the verdict. Those rules expressly reserved in those cases the same questions which are presented in this case. 10

Very briefly stated these questions are, first, that the verdict being in legal effect in favor of Grundman and against the Castles Ice Cream Company will not support the judgment in this case, whereby there is error on the face of the record, and secondly, that not only was it not proven that Grundman was engaged upon the business of the Castles Ice Cream Company, but in fact it was proven that he was not so engaged and that therefore irrespective of repugnancy of the verdict and its silence in regard to the defendants Grundman and Newman there is reversible error in the record. This point is the basis of a motion for direction of verdict to the refusal of which exception was duly taken and also of exceptions to the Judge's charge. 20

The facts as to the relations between Fred Grundman and the Castles Ice Cream Company are as follows: The Castles Ice Cream Company owned a five and half ton Packard truck which was kept at Perth Amboy, and they also owned ice cream. They made an arrangement with Grundman whereby they furnished Grundman with this five and a half ton Packard truck and the ice cream, and Grundman went from Perth Amboy to Staten Island and there sold along his route so much of the ice cream as he could and collected the pay therefor. On the amounts col- 30 40

lected he got commissions of ten cents a gallon. This was his only compensation. On the day of the accident he had finished his route, had brought back the Packard five and a half ton truck and put it in the garage of the Castles Ice Cream Company at Perth Amboy. This was about four o'clock. The Castles Ice Cream Company also owned a Ford roadster and they allowed Grundman to use this Foard roadster in going home. Grundman had finished his day's work at four o'clock and in going home was on his own business and not on the business of the Castles Ice Cream Company. The accident happened at about six o'clock.

Upon the above stated facts as to the relations between Grundman and the Castles Ice Cream Company two contentions were raised at the trial, first, that Grundman was an independent contractor, and secondly, that whether he was an independent contractor or not he was not at the time of the accident engaged in any service or work for the benefit of the Castles Ice Cream Company.

Grounds of Appeal.

The grounds of appeal stated are:

1. The judgment against the defendant Castles Ice Cream Company, a corporation, was illegally entered on the verdict of the jury in this case in view of the silence of said verdict as to the defendant Fred Grundman upon whose alleged negligence the liability of said defendant Castles Ice Cream Company, a corporation, is solely predicated in the complaint (for verdict, see Case, p. 23, for statement of judgment see Case, p. 24).

2. The verdict in this cause upon which said judgment is entered imports repugnant, contradictory and irreconcilable findings, in that the verdict was silent as to the servant Fred Grundman and therefore in law amounts to a verdict in his favor on the issues submitted to the jury and at the same time the verdict was expressly against the defendant Castles Ice Cream Company, a corporation, against whom alleged negligence was solely predicated on alleged negligence of the said Fred Grundman as its servant (for Verdict, see Case, p. 23). 10

3. The verdict did not meet the issues submitted to the jury by the trial judge.

4. The verdict in this cause being silent as to the servant Fred Grundman and therefore in law amounting to a verdict in his favor in view of the issues submitted to the jury, entitled the master, the defendant Castles Ice Cream Company, a corporation, of discharge from liability and therefore to the setting aside of the verdict, and judgment based thereon as against the defendant Castles Ice Cream Company, a corporation (for Verdict see Case, p. 23). 20

5. The trial judge erred in denying motion made on behalf of said defendant Castles Ice Cream Company, a corporation, for a direction of a verdict in favor of said defendant Castles Ice Cream Company, a corporation (Motion for direction denied, Case p. 124). 30

6. The trial judge erred in the charge to the jury in so far as said charge said in effect that it was a question of fact for the jury to decide if Grundman was acting at the time of the accident involved in this cause as an employee of the Castles Ice Cream Company, and at the time 40

was acting in the scope of an employment as a servant of the Castles Ice Cream Company, the language of the court on this point being "it is for you to say from the evidence as you have it whether Grundman at the time and on that occasion and at that place was the servant and agent of the Castles Ice Cream Company." And also,—**10** "bearing in mind the law as I have charged you with reference to the Castles Ice Cream Company and the dispute which arose there as to the agency, and the question whether at the time he was the servant of the company. That would be a question for you to decide." (Excerpts excepted to are in Case p. 129, ll. 21-34, and p. 130, ll. 14-19, respectively.)

20 7. Said judgment is in divers other respects irregular and illegal.

POINTS.

First Point: The judgment is based upon a verdict which imports repugnant, contradictory and irreconcilable findings.

Second Point: The verdict did not meet the issues submitted to the jury by the trial judge.

30 **Third Point:** The trial judge erred in denying the motion for direction of verdict made on behalf of defendant Castles Ice Cream Company.

Fourth Point: The trial judge's charge was not in accordance with law.

Argument.

POINT I.

The judgment is based upon a verdict which imports repugnant, contradictory and irreconcilable findings.

The verdict was against the defendant Castles Ice Cream Company and silent as to the defendants Fred Grundman and John Newman. After seeing the witnesses and hearing the evidence we would not feel very much astray in saying that the jury probably decided this case on the idea that the Castles Ice Cream Company had the money, let them pay, but the verdict must be measured by legal rules of construction. In this situation the pertinent law as to the meaning of the verdict is:

“Where, in an action against several defendants, the jury finds against one or more, but is silent as to the others, the verdict will be construed as a finding in favor of the defendants ignored.” 22 Encyc. of Pl. & Pr. 959.

For the foregoing proposition the following cases are cited:

- Howard vs. Johnson*, 91 Ga. 319; 30
Westfield Gas Co. vs. Abernathy, 8 Ind. App. 73;
Kinkler vs. Junica, 84 Tex. 116;
Mo. Pac. vs. Kingsburg, 25 S. W. 322;
Gulf & C. R. Co. vs. James, 73 Tex. 12;
Lawson vs. Robinson, 68 Kan. 737;
Taylor vs. Houston & C. R. Co. (Tex.) 180 S. W. 260;
Wabash R. Co. vs. Kelley, 127 Ill. App. 265; 40

- Wabash R. Co. vs. Humphrey*, 127 Ill. App. 334;
Daimond State Telephone Co. vs. Blake,
 105 Md. 570; 66 Alt. 631;
Philips vs. Geiser Mfg. Co. 129 Mo.
 396; 107 S. W. 471;
Chicago &c. R. Co. vs. McMonegal, 73
 10 Neb. 580; 103 N. W. 305;
Sterick vs. No. Pac., 39 Wash. 501; 81
 Pac. 999;
James vs. Evans, 149 Fed. 126;
Evans vs. Freeman, 149 Fed. 1020;
Cox vs. Ellsworth, 150 N. W. 197; 97
 Neb. 392;
Ivanhoe Furnace Corp. vs. Crowden,
 Admx. 110 Va. 387; 66 S. E. 63;
Schmidt vs. Chicago, 144 Ill. App. 512;
 20 88 N. E. 275.

The rule has been applied in cases involving various circumstances.

In *Genner vs. Yates*, 61 Neb. 100; 84 N. W. 596, the verdict was against one defendant and nothing was said about the other defendant. Said the Court:

30 "The verdict is anomaly; it is irreconcilable with itself; it is in effect a declaration by the jury that material allegations of the petition are both true and false."

In *G. C. & S. F. Ry. Co. vs. James*, 73 Texas, page 12, an action was for damages against three defendants for malicious prosecution. The verdict was against one of the three defendants without mentioning the others. The court said:

40 "The verdict, by necessary implication, found in favor of the defendant Snyder and Spillane (the defendants not named in the verdict)."

In *Westfield Gas & Milling Co. vs. Abernathy*, 8 Ind. App. 73, the judgment was against the gas company and a gravel company, but made no mention of other defendants. The case involved injuries received by a driver of a horse which became frightened and precipitated the driver into an unguarded ditch in process of digging by the defendants. There were exceptions by the defendants not mentioned in the judgment, but no motion for a new trial or to modify the judgment was made. The lower court said that the judgment should be against all defendants and they corrected the verdict of the jury. The defendants not mentioned in the verdict of the jury at that time made a motion in arrest of judgment against them. The upper court said that the refusal to grant the motion of these defendants in arrest of judgment was error. In the course of the opinion it is said:

“Our construction of the verdict is that it is a finding against the Westfield Gas & Milling Company and the Nobleville & Eagle Gravel Company, and in the sum of \$1,500. and it is a finding of not guilty in favor of the other defendants.”

In *James vs. Evans*, 149 Fed. 136, a sealed verdict of the jury was as follows:

“We, the undersigned, the jury in the above stated case, find in favor of the plaintiff for the sum of dollars and against Henry G. Freeman, Jr., one of the defendants.”

There was another defendant by the name of James not mentioned in the verdict. At page 139 the court said:

“The verdict rendered by the jury May 3, 1905, was not only against Freeman but in effect, though not in form was a verdict in favor of James.”

In *Kinkler vs. Junica*, 84 Texas, 116; 19 S. W. 359, the action was against seven defendants and the verdict against four of them without mentioning the others. The action was against directors of a corporation to recover deposits of money made on false representations. The judgment was entered against four of the seven defendants in favor of the other three. The court said at page 361:

10

“It is contended that the verdict does not authorize the judgment. The effect of the verdict was a finding in favor of the remaining defendants, and judgment was properly entered in their favor.”

20

Without going into further details of the authorities which show that the rule is of general application in various kind of cases, its application makes it apparent that the verdict sub judice, being silent as to Fred Grundman, in law imports a finding in his favor; that is, that he was not guilty of the negligence charged against him. Hence under the power to mould a verdict into legal form the trial Judge had a right to sign the postea in favor of Grundman. Now the only charge of negligence against the defendant Castles Ice Cream Company, being that it was negligent in the operation of its car by its servant (who is Fred Grundman), the verdict against the Castles Ice Cream Company imports a finding that the driver, Fred Grundman, was negligent. The complaint and the evidence show no other suggestion of negligence claimed against Castles Ice Cream Company than the alleged negligence of the driver of its car, Fred Grundman. In other words, the only basis of liability on the part of Castles Ice Cream Company is the application of the doctrine of respondeat superior.

30

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The jury by absolving Grundman in effect say Grundman was not negligent and by holding the Castles Ice Cream Company liable, in effect say that Grundman was negligent. Such results are repugnant and irreconcilable. To use the words of *Genner vs. Yates* above mentioned, "the verdict is an anomaly, it is irreconcilable with itself."

In *Indiana Nitro Glycerine & Torpedo Co. vs. Lippincott Glass Co.*, 75 N. E. 649, reversing 72 N. E. 193, it is said: 10

"A verdict for plaintiff against the master alone in an action against the master and his servant for negligence of the latter is self contradictory."

In *Frascone vs. Lounderbacker*, 138 N. Y. Supp. 370, and the same plaintiff against the Standard Oil Company, 102 N. E. 1103; 208 N. Y. 631, it is held that a verdict against a master is inconsistent with a verdict exonerating his servant by whose negligence the injury was inflicted. 20

Such a verdict comes under the rule recognized in *Turner vs. Beatty*, 24 N. J. L. 644, that a repugnant verdict is void, and also *Lanning, et ux. vs. Trenton & Mercer City Traction Co.*, 134 Atl. 444, that inconsistent and irreconcilable findings vitiate a verdict. 30

The distinction which exists in *Furey vs. Reid Ice Cream Company*, 126 Atl. 462, and *Goekel vs. Erie*, 126 Atl. 466, is absent from this case. In both of those cases the allegation against the defendant against whom the verdict was rendered was of a broader nature than the allegation in the case on review. In both of those cases the complaints went further than allegations of liability on the part of the master because of the acts or defaults of the co-defendant servant. 40

They alleged acts or defaults distinct from those of the servant named as defendant. In the Furey case the negligence alleged as to defective brakes maintained by the defendant Reid Ice Cream Company went beyond the duty of the driver in that case, and in the case against the Erie Railroad Company the complaint alleged breach by the railroad of greater and distinct
 10 duties than those resting upon the engineer. In the case now under review, however, as stated above, the sole basis of claim made against the Castles Ice Cream Company was the alleged negligence of the co-defendant servant in the operation of its automobile. In the above mentioned case of *Goekel vs. Erie R. R.*, 126 Atl. 444, query is made as to the validity of the verdict against one defendant but negative as to
 20 the other where the doctrine of respondeat superior applies. That is the very question for determination of this appeal. It was raised in *Benitto vs. Erie R. R. Co.* (June, 1918, Sup. Ct.) but that case was decided on other grounds. We find no later New Jersey case dispositive of it and cannot believe any New Jersey decision can hold that a master is liable for the negligence of a servant where it is found in the same verdict that such servant is not negligent.
 30 The absence of controlling New Jersey decisions renders a reference to authorities elsewhere helpful. While there seem to be cases in one or two remote jurisdictions that hold otherwise,

“according to the weight of authority where a master and servant are sued jointly in an action based solely on the tortious conduct of the servant, and the servant is
 40 acquitted, there can be no recovery against the master. A verdict against the master and acquitting the servant is equivalent to

a finding that no cause of action exists and will not support a judgment against the master, and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict." 39 C. J. page 1367, note 75, where many cases are cited.

In 30 L. R. A. (N. S.) 404 and 9 L. R. A. (N. S.) 880 are notes: "*Effect of verdict for servant in actions against master and servant for servant's negligence or misfeasance.*" In the 30 L. R. A. (N. S.) 404 note it is said: 10

"The cases very generally sustain the rule laid down both in the McGinnis case and in *Southern R. Co. vs. Harbin*, that a verdict exonerating the servant in an action brought against the master and the servant for personal injuries caused solely by the misfeasance of the servant requires an acquittal of the master also." 20

A very illuminating case is *D. B. Loveman vs. Baylis*, 160 S. W. 841, Ann. Cases 1915 C 187 (Supreme Court of Tennessee). The effect of a verdict in favor of a servant is stated at page 842.

"When the master sued solely for misfeasance or non-feasance on the part of his servants, being liable for their conduct under the doctrine of respondeat superior, a verdict, permitted to stand in favor of such servants, either in an action where they are sued, with the master, or in a prior action, entitled the master to a discharge from such claimed liability. This rule is supported by the great weight of authority. * * * (Numerous cases are then cited)." 30

"We are also referred to the doctrine that in actions against joint tort feasons a judgment may be rendered against all of them or any one of them. But that doctrine has no application to a case like the one before" 40

us. Where the master is not present and participating, or has no other direct relation to the wrong or injury but is only liable because of the doctrine of respondeat superior, he does not occupy the position of a joint wrongdoer."

A differentiation of the general doctrine is then pointed out:

10 "The last proposition leads to the statement of a differentiation of the general doctrine, we have been considering, to the following effect. If the evidence shows liability of the master on grounds other than the misconduct of his servant, he may be held notwithstanding a verdict in favor of the servant."

20 *Feury vs. Reid Ice Cream Co.* (above mentioned) comes under this differentiation because the co-defendant driver in that case was not in charge of brakes, as does *Goekel vs. Erie* (above mentioned) because the railroad had other duties than those of the engineer co-defendant.

The effect of some of the cases may be mentioned as follows:

30 Verdict for servant exonerates master from liability under respondeat superior. Cal. *Fimple vs. So. Pac.* 177 Pac. 871; *Thompson vs. So. Pac.*, 161 Pac. 21.

Fla. Syl 1, *Williams vs. Hines*, 86 So. 695.

40 "Where the common law rule prevails unmodified by statute the weight of authority supports the holding that in an action against a principal or master, and his agent or servant for damages resulting solely from the negligence of the agent or servant, acting as such, a verdict of the jury exonerating the agent or servant, exonerates the principal or master. They are in no sense joint tort feasons, but the basis of liability

of the principal or master is the well known doctrine of respondeat superior."

Ga. In *So. Ry. Co. vs. Harbin*, 68 S. E. 1103; 30 L. R. A. (N. S.) 404, the L. R. A. syl. reads as follows:

"In an action against a railway company and its servant to recover damages for the homicide of the plaintiff's son, solely in consequence of the servant's misfeasance, where a verdict is returned finding the servant not liable but finding in favor of the plaintiff against the railway company, such verdict should be set aside and a new trial granted." 10

(As stated above a note to same effect follows the report of this case in 30 L. R. A. (N.S.) 404.)

Iowa. In *Maine vs. Jas. Maine & Son Co.*, 201 N. W. 20, syl. 1: 20

"Where the servant is not liable there can be no liability of master under the doctrine of respondeat superior."

At page 21 of said report it is said:

"The liability of the employer for the negligent acts of his servant is based upon the familiar doctrine of respondeat superior. *Unless the servant is liable there can be no liability on the part of the master. This has been repeatedly held in cases where both were sued and the verdict was against the employer only.*" (Italics ours.) 30

Ind.

"Where an action against a railroad company and its engineer for the death of a traveler struck by a train at a crossing was based on the negligent failure of the engineer to give the statutory signals and the jury found in favor of the engineer but against the company, a judgment could not be rendered against the company." 40

Childress vs. Lake Erie & W. R. Co.,
105 N. E., 467, 182 Ind. 251.

Neb.

10 “Where, in a joint action against a railroad company and an employee to recover damages for alleged negligence of the employee in conduct within the line of his duty, there is a verdict in favor of the latter that is free from error and supported by the evidence there should be a judgment for the railroad company also, though on the same record and in the same case there may be a verdict against it. (1905) *Chicago, St. Paul, M. & O. Ry. Co. vs. McManigan*, 103 N. W. 305, 73 Neb. 580, modified *Chicago, St. P. M. & O. R. Co. vs. McManigan* (1906), 107 N. W. 243, 73 Neb. 580.”

of

20 N. Y. In *Pangborn vs. Buick Motor Co.* (N. Y. Court of Appeals), 105 N. E. 423; 211 N. Y. 228: Suit against a company and its chauffeur, verdict in favor of chauffeur and against company. Verdict set aside, the court saying:

30 “If Grounall (the chauffeur) was not negligent and liable in this action there was no conceivable basis for recovery against the appellant. We think the verdict as a whole was equivalent to one finding no cause of action against the appellant. As has already been pointed out, the only claim of liability against it was based on the alleged negligence of the employee. The primary and absolutely essential facts to be found by the jury before any liability could be visited on the appellants were that the driver of the machine was negligent and that the plaintiff was free from negligence. The two defendants did not stand upon the same plane of liability as might some times happen where an action has been brought against two alleged tort feasons and where a verdict might with entire propriety be rendered relieving one and holding the other. The appellant’s liability was purely
40 of a derivative or secondary character on the theory of respondeat superior, and when

the jury found that the employee was free from tortious conduct or that the plaintiff was guilty of contributory negligence, the facts were settled which necessarily led to a verdict of immunity so far as appellant was concerned, and the verdict should have been in its favor. There was then left no support for or consistency in a verdict against the employer."

Wash. In *Doremus vs. Root*, 23 Wash, 710, 54 L. R. A. 640, 63 Pac., 572, which was a suit brought against Root and the Railroad company, for which he was working, to recover damages for a negligent act of Root's resulting in an injury to the plaintiff, *a verdict returned against the railroad company which was construed by the court to be a verdict of not guilty as to Root*, and a judgment was entered in his favor against the plaintiff for costs. An appeal was taken by the railroad company, and it was urged that a judgment in favor of Root, the agent whose alleged negligent act caused the injury, precluded a judgment against the railroad company, his principal; which contention was sustained. The court, in passing upon the question, said:

"In such an action, whether brought against the employer severally or jointly with the employee, the gravamen of the charge is, and must be, the negligence of the employee; and no recovery can be had unless it be proved and found by the jury that the employee was negligent."

Thus the verdict in this case which, properly construed, imports a finding that the alleged servant Grundman was not negligent, and the repugnant, contradictory and irreconcilable finding that this alleged master, Castles Ice Cream Company, was negligent because he was negligent, is no legal basis for a judgment against Castles Ice Cream Company.

POINT II.

The verdict did not meet the issues submitted to the jury by the trial judge.

10 The trial judge submitted to the jury three suits, in each of which there were three defendants separately charged with negligence. A technically proper verdict would have stated expressly as to whether the jury found for or against the other defendants, Fred Grundman and John Newman, in each of the three cases. While, as shown above, the silence of the verdict as to the defendants Grundman and Newman is to be construed as a verdict in favor of the defendants thus ignored (22 Encyc. Pl. & Pr. 959), if this were not so, the verdict would not meet the issues of the liability of Grundman and Newman and
20 would lack that responsiveness to the issues said to be necessary in the case of *Stewart vs. Fitch & Boyden*, 31 N. J. L., page 17, and *Middleton vs. Quigley*, 12 N. J. L. 352, both of which are to the effect that a verdict must respond to all the issues or it will be set aside, or a judgment rendered upon it will be reversed.

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POINTS III and IV.**(Argued together.)****Point III. The trial judge erred in denying motion for direction of verdict.****Point IV. The trial judge's charge was not in accordance with law.**

These points are argued together because they both involve the issue of whether there was a jury question under the evidence, that is, whether the court should have granted the motion to direct a verdict or should have denied that motion and told the jury, as he did, that it was a question of fact for them whether the defendant Grundman at the time of the accident was an employee of the Castles Ice Cream Company. The fifth ground of appeal raised the issues involved in these three points.

It was admitted that the automobile driven by Fred Grundman belonged to the Castles Ice Cream Company, but the testimony shows that the driver was not an employee in the legal sense but was an independent contractor, and that, even if the driver's relationship with the defendant Castles Ice Cream Company, under the evidence, could be construed in general to be that of servant and master, at the time of the accident he was not acting as a servant of the Castles Ice Cream Company. The evidence which relates to the status of this driver follows:

"Q. In November of 1924, by whom were you employed? A. Castles Ice Cream Company.

"Q. What was the kind of work you did for the Castles Ice Cream Company? A. Route driver.

"Q. What does a route driver do? A. He sells ice cream to stores.

"Q. As he goes to sell it to stores as you

went to sell it to stores, what kind of a vehicle did you use, if any? A. Five and a half ton Packard.

"Q. Were you riding in that five and a half ton Packard when this accident happened? A. No, sir.

"Q. Where was the route that you had at that time? A. Staten Island.

10 "Q. Did you make any deliveries in the City of Rahway on that day? A. No, sir.

"Q. How was your pay regulated at that time? A. Commission.

"MR. KLAUSNER: I don't see how this is material, how his pay is regulated.

"THE COURT: I cannot tell exactly as yet.

"MR. KLAUSNER: I object to that.

"THE COURT: He has answered the question. The objection comes too late.

20 "Q. How was the commission that you were paid regulated? A. Ten cents on a gallon.

"Q. That was the only compensation that you received? A. That is all.

"Q. What time of the day did your work cease on election day, the day of this accident? A. About four o'clock, half past four.

"Q. At the time of the accident, had you completed your day's work? A. Yes, sir.

"Q. Where were you going at the time of the accident? A. Home.

30 "Q. Where is your home? A. It was at 65 Columbia Street, Newark.

"Q. At that time it was that? A. Yes, sir.

"Q. Has the Castles Ice Cream Company a plant in the City of Newark. Or did it have that day? A. Yes, sir.

"Q. Where? A. Irvington, 19 Loretta avenue.

"Q. Were you going there? A. No, sir.

40 "Q. Did you state to Alva Dunbaden, or any of the rest of the Dunbaden party, immediately after this accident, that you were on your way to the Newark plant of the Castles Ice Cream Company? A. No, sir.

"Q. Were you going any other place before you went home? A. No, sir.

"Q. This Ford roadster was owned by the Castles Ice Cream Company, wasn't it? A. Yes.

"Q. Did you have permission to take it to carry you home at night? A. Yes, sir; they loaned it to me to ride back and forth.

"Q. You say that the Ford roadster is owned by the Castles Ice Cream Company. Does it have its name on it, too? A. No, it is a salesman's car. 10

"Q. Did you use it every night coming to and from work? A. I used to.

"Q. On that particular day, where did you quit working? A. Perth Amboy.

"Q. You had left Perth Amboy for your home? A. Going to Newark.

"Q. Where did you keep this car at night? A. In front of my house.

"Q. Out in a public street at night? A. No, in an alley. 20

"Q. Where did you keep it over night until the morning?

"THE COURT: Don't answer that. (Argument.)

"MR. KLAUSNER: If your Honor please, in order to protect the interest of my client, I think it is important to prove the agency.

"THE COURT: Where he kept the car at night? 30

"MR. KLAUSNER: In this respect, that it would be evidential of the fact as to whether or not he would still be considered as being in the employ of the Castles Ice Cream Company at the time of the accident.

"THE COURT: It was their car, admitted to be their car, driven by him and loaned by the Castles Ice Cream Company

"Q. Mr. Chance asked you about one state-
to him to go back and forth from work. 40

ment. I am going to ask you about the other statement. Did you tell Dunbaden you were making your daily trip between the plant of the Castles Ice Cream Company at Perth Amboy and the plant of the Castles at Newark? A. I didn't. I have nothing to do with the Newark factory. (Page 103, l. 19, to page 104, l. 34; p. 105, ll. 10-15; page 108, ll. 34-44; page 109, line 10 to the bottom of the page.)

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In 17 A. L. R. 621 and 29 A. L. R. 470, are notes on "Liability of employer for injuries inflicted by salesmen or collectors as affected by question whether a servant or an independent contractor". But we need not go beyond our own jurisdiction for an elucidation of the distinction between an ordinary servant and an independent contractor.

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In *Otmar vs. Perry*, 94 N. J. L. 73, 75, it is said:

"The distinction in the relationship is thus defined. The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done."

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Applied to the situation revealed by the foregoing testimony, it will appear that the Castles Ice Cream Company did not retain over its driver Grundman any direction as to the manner in which he did his work. Grundman took a five and a half ton truck on a route in Staten Island and sold ice cream to stores, and the only thing that Castles Ice Cream Company was interested in was the result accomplished.

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Even if Grundman's relation in general had made him a servant rather than an independent

contractor, he was using the Ford roadster at the time of the accident on his own business and not on the business of the Castles Ice Cream Company. As appears by the testimony above, while engaged in his work, he used a five and a half ton Packard, and not a Ford roadster (p. 103, l. 28); his route was in Staten Island and not in Rahway where the accident happened (p. 103, l. 33); on the day of the accident, his work ceased about four o'clock or half past four, and at the time of the accident he had completed his day's work (p. 104, ll. 11-15); it was admitted by all that the accident happened in the neighborhood of six o'clock. In 22 A. L. R. 1397, 48 L. R. A. (N. S.) 662, and L. R. A. 1916a, 957, are notes on "Liability of owner for injuries by automobile while being used by servant or third person for his own business or pleasure". The gist of such notes is that the owner is not liable while the servant is engaged in his own business. This is the rule in New Jersey.

In *Doran vs. Thompson*, 76 N. J. L. 754, it was said that, to make the alleged master liable,

"The act must be done for the purpose of executing the master's orders and doing his work, while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master."

In *Paiewonsky vs. Joffe*, 129 Atl. 142, it is said:

"Of course, a master is ordinarily liable to answer in a civil suit for the tortious act of his servant, if the act had been in the course of his employment in his master's service. Whether so done or not must depend upon the facts of each particular case." Citing *Doran vs. Thompson*, 77 N. J. L. 445 and *Michael vs. Southern Lumber Co.*, 127 Atl. 580.

and in the same opinion, at the bottom of page 143, and at top of page 144, it is said:

10 "Now, as we have seen, in a civil suit such as this, the master is responsible for any wrong done by the servant with the master's authority, either expressed or implied *for the purpose of executing the master's orders and doing the master's work.* Of course the liability of the master ceases whenever his servant or agent pursues any line of conduct outside the scope of his employment and *not prompted by any benefit or accommodation to the master or the master's interests.*" (Italics ours.)

20 It all of these cases it is recognized, as held in *Lynch vs. Kaltenbach*, 4 N. J. Misc. 97, that benefit to the master is necessary to hold the master liable. So far as the Castles Ice Cream Company was concerned, it was no benefit to the company for Grundman to go home in its Ford roadster, rather than for him to have gone on one of the trolley cars of the Public Service Fast Line from Perth Amboy to Newark, or on the train or in any other way he saw fit. Because they loaned him a car does not make them liable. But if the use of the roadster had been considered part of Grundman's pay, it would be
30 unique to say Castles Ice Cream Company would be liable for what Grundman did with his pay. But the testimony is that his commission was his only pay (p. 104, l. 10). The benefit was all to Grundman, to whom the roadster was loaned (p. 105, l. 13).

40 That Grundman had consent to take the car which was loaned to him was immaterial. Ever since *Doran vs. Thompson*, above mentioned, the notion that consent to take an automobile imposes a liability on one who gave such consent, has had no abiding place in the New Jersey law.

The distinction which exists in *Depue vs. Salmon Co.*, 92 N. J. L. 550, that the transportation there involved was beneficial to the master, does not exist in the present case. The distinction in that case arises from the fact stated in the opinion as follows:

“The object was to enable him (the driver) to reach his place of employment at an earlier hour than he otherwise could. The manager of the company, George G. Salmon, testified that at the time of year when the accident happened, their work was heavy and the employee had to be there earlier than the ordinary working hour.” 10

That is not the present case. There was nothing about the ice cream business which made it necessary for the driver to reach his work in November earlier than the ordinary business hours, and the testimony is that the driver's day's work was done at four o'clock—that is, about two hours before the accident. In short, Grundman was benefiting himself when using the loaned Ford roadster, not the Castles Ice Cream Company. Accordingly, the Castles Ice Cream Company is not responsible for his conduct, and the motion for a direction should have been granted. Its denial was reversible error, as was the charge to the jury that it was for them to say if, at the time of the accident, Grundman was on the business of the Castles Ice Cream Company. 20 30

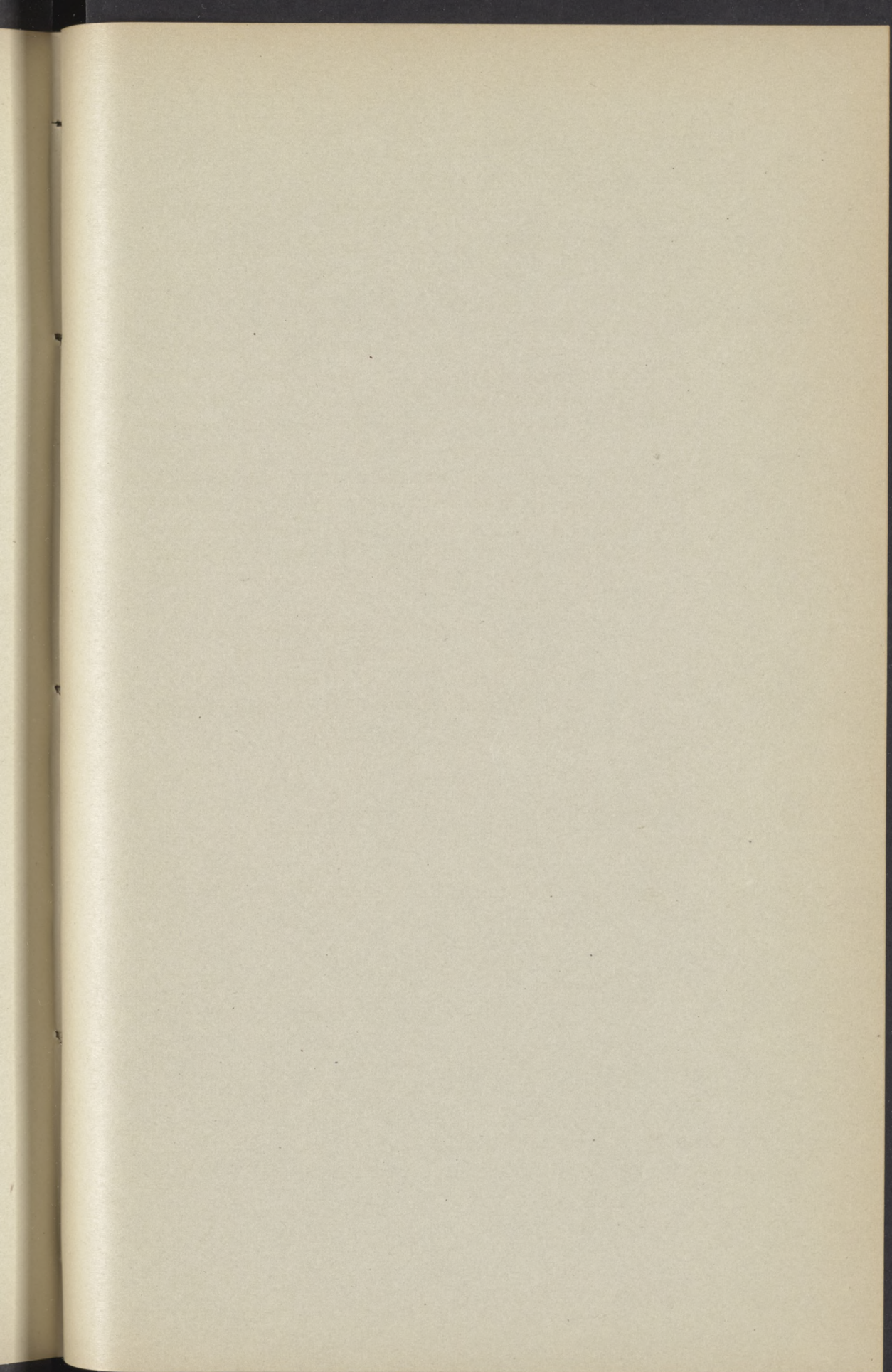
Conclusion.

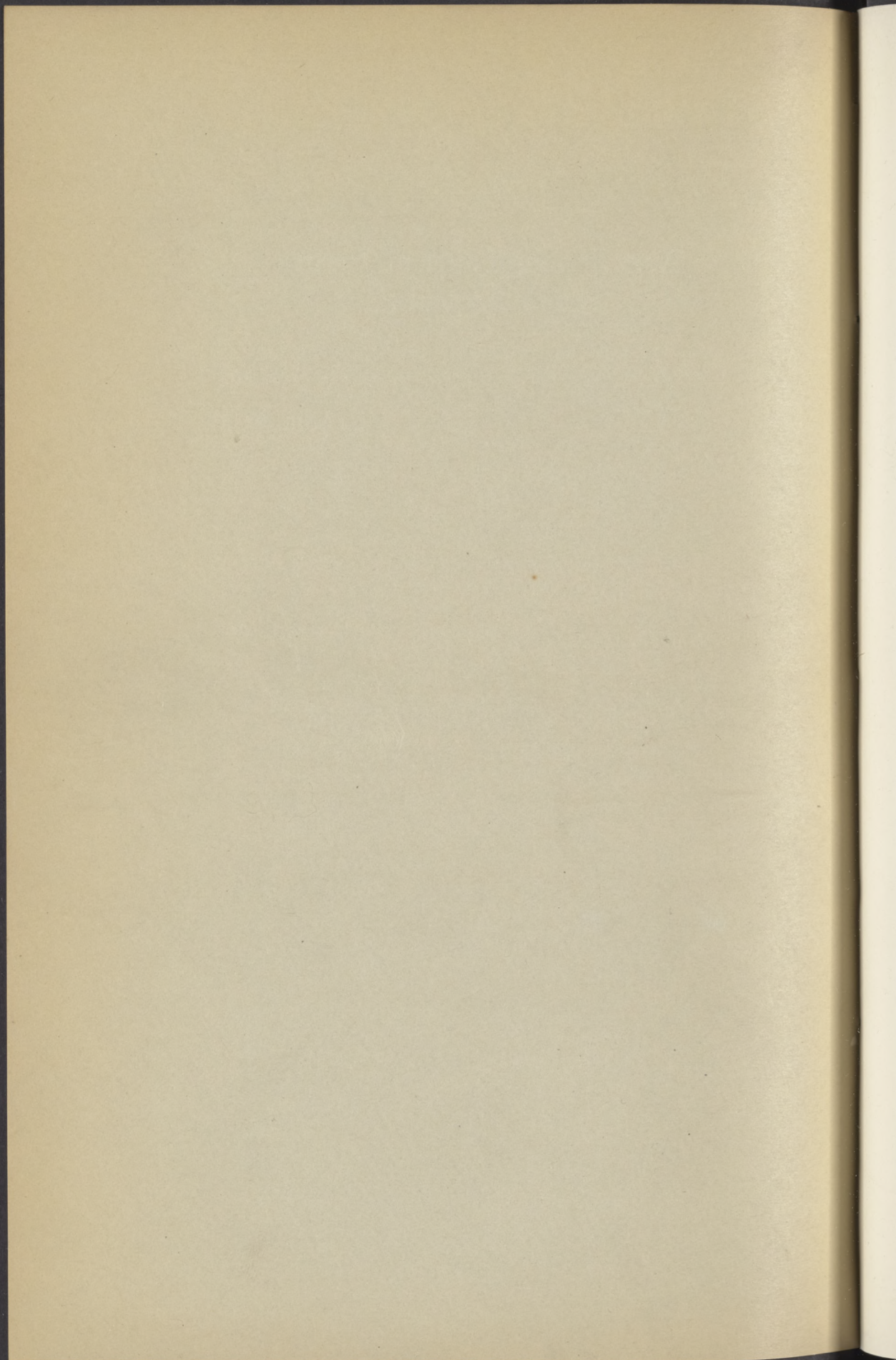
10 The judgment is based upon an illegal verdict, a verdict which imports a finding that the defendant Castles Ice Cream Company was negligent by an agent, Fred Grundman, and at the same time imports an inconsistent, repugnant and irreconcilable finding that said Grundman was not negligent. Furthermore, the trial judge left a question of law to the jury and erred in denying the motion for direction of verdict on the ground that, at the time of the accident, the Castles Ice Cream Company's Ford roadster was not being driven by one then acting as a servant of the Castles Ice Cream Company. Therefore, the judgment appealed from should be reversed.

20 Respectfully submitted,
KELLOGG & CHANCE,
Attorneys for and of Counsel with
Defendant Castles Ice Cream Company.

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New Jersey Court of Errors and Appeals

WALTER DUNBADEN,
Plaintiff-Respondent,

vs.

CASTLE'S ICE CREAM COMPANY,
a Corporation,
Defendant-Appellant,

and

FRED. GRUNDMAN and
JOHN NEWMAN,
Defendants-Respondents.

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ACTION AT LAW.

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BRIEF FOR PLAINTIFF-RESPONDENT FACTS

There are some very important omissions and some inaccuracies in the statement of facts in the brief of appellant.

The accident occurred at 5:20 or 5:25 P. M. (p. ~~66~~, l. 34; p. ~~33~~, l. 30), and not at 6 o'clock as stated in appellant's brief. The significance of the time will be pointed out later.

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The Ford roadster driven by the defendant Grundman, mentioned in the second paragraph of the brief, was owned by the defendant Castle's Ice Cream Company. This roadster and the Buick car belonging to defendant Newman did not "side-

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swipe" each other as stated in the brief. The wheels came together (p. ~~79~~⁴⁷, l. 10), and they collided violently.

10 As a result of this violent collision between the Castle's Ice Cream Company car and the Buick car, the Buick swung across the road and crashed into plaintiff's Ford sedan (p. ~~44~~⁴⁷, ll. 34-40; p. ~~79~~⁴⁷, l. 32), wrecking the same, (p. ~~67~~³⁵, ll. 34-42), and severely injuring the occupants of plaintiff's car, (p. ~~87~~³⁵, ll. 30-35).

20 The plaintiff and his three passengers each brought suit. Each complaint contained a separate count against each of the three defendants, the Castle's Ice Cream Company, Fred. Grundman, the driver of the Castle's car, and John Newman, owner of the Buick.

The count again the Castle's Ice Cream Company alleged that the Ford roadster was owned by the Castle's Ice Cream Company and was being operated by Grundman as agent of the Castle's Ice Cream Company. There was also an allegation in the complaint against the Castle's Ice Cream Company, as follows:

30 (a) The said automobile was operated by an incompetent driver, (p. ~~52~~³⁷ l. ~~37~~¹).

The testimony in support of this allegation of negligence appears under Point III of this brief.

40 Throughout its brief, the appellant has entirely ignored this charge of negligence against the Castle's Ice Cream Company, and has erroneously stated that the only theory upon which the Castle's Ice Cream Company could be held liable was upon the doctrine of respondeat superior.

On page 3 of its brief, the appellant also erroneously states the facts concerning the relations between Castle's Ice Cream Company and Fred. Grundman. The Castle's Ice Cream Company did not furnish *Grundman* with ice cream except as he was to deliver their ice cream to their customers; nor did *he* collect the pay for such ice cream. Nor is there any evidence that he received commissions *on the amounts collected*. The only testimony concerning the relationship between the Castle's Ice Cream Company and Grundman is the testimony of Grundman himself, which is found on page ~~133~~¹²³ of the state of the case. That testimony shows that Grundman was employed by the Castle's Ice Cream Company as a route driver, selling ice cream to stores, using a 5½-ton Packard truck; his route being in Staten Island, and his pay being regulated by commission, and being ten cents on the gallon.

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Although Grundman testified that he had finished his work as a route driver and was going home in the Ford roadster which the Castle's Ice Cream Company gave him to go back and forth to work, there was also testimony that at the time of the accident he was still wearing his overalls, (p. ~~66~~³⁷, ll. 12-14; p. ~~88~~⁵⁶, l. 23), and he stated to the plaintiff and to Alva Dunbaden that he worked for the Castle's Ice Cream Company and that *he was on his way from their plant at Perth Amboy to their plant in Newark, and that he was making his daily trip between the two plants*, (p. ~~88~~³⁶, l. 20; p. ~~155~~¹²³, ll. 10-20).

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At the trial Grundman admitted that the Castle's Ice Cream Company had a plant in the City of Newark, (p. ~~136~~¹⁰⁴, l. 22). He also admitted that he quit work as a route driver in Perth Amboy, (p. ~~140~~¹⁰⁸, l. 40).

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When asked the question: "You had left Perth Amboy for your home?" he answered: "*Going to Newark,*" (p. ~~140~~¹⁰⁸, l. 42).

10 The defendant Grundman entered a postea erroneously stating that the jury rendered a general verdict against the plaintiff and in favor of the defendant Fred. Grundman. Plaintiff made application to Judge Stein, the trial judge, to strike out said postea on the ground that it was improperly entered because the jury did not render a verdict against the plaintiff and in favor of the defendant Fred. Grundman; but, on the contrary the jury made no finding either for or against the defendant Grundman. Said application is still pending, the trial judge having requested counsel to submit briefs.

20 In order that the exact verdict of the jury would be before this Court, a certificate was obtained from the trial judge, certifying exactly what verdict was rendered by the jury. That certificate is as follows:

30 "I, ALFRED A. STEIN, the Judge before whom this case was tried, do hereby certify that the Clerk's record of the verdict of the jury was as follows:

" 'We find for the plaintiff and against the defendant Castle's Ice Cream Company, a corporation, and assess the damages of the plaintiff Walter S. Dunbaden in the sum of \$500.00 and so say they all.'

(Signed)

"ALFRED A. STEIN."

A R G U M E N T

POINT I.

The Verdict Does Not Import Repugnant, Contradictory or Irreconcilable Findings.

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The appellant has entirely ignored the charge of negligence against the Castle's Ice Cream Company because of its failure to engage a competent driver of its automobile. Throughout its brief the appellant erroneously states that the company is chargeable *only* with the negligence of the driver, and that the *only* basis of liability is upon the doctrine of respondeat superior.

Numerous cases are cited in support of the rule that where, in an action against several defendants, the jury finds against one or more, but is silent as to the others, the verdict will be considered as a finding in favor of the defendants ignored. Upon examination of the cases cited, it will be found that most of them do not deal with the relationship of master and servants at all, and that the verdict was held good as against the one defendant held responsible.

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In the case of *Genner vs. Yates*, 61 Neb. 100, from which a portion of the opinion is quoted on page 8 of appellant's brief, the verdict was in favor of *one defendant against another defendant*, based on evidence which was the same as to both defendants. That is why the court said that the verdict was irreconcilable with itself.

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Several of the cases cited by the appellant support the view that where the master and servant are sued jointly in an action based *solely* on the tortious conduct of the servant, and the servant

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is acquitted, there can be no recovery against the master.

10 The reason for this rule is that the master's liability is secondary, based wholly on the doctrine of respondeat superior, and that when the relations between the master and servant are left undisturbed, the master has the right to recover over against the servant for any liability imposed upon the master by the misconduct of the servant; but if the servant is exonerated in an action between him and the injured person, this status is destroyed and the master prevented from such recovery.

20 The following cases hold, that in an action against master and servant jointly based solely on the doctrine of respondeat superior, the master may be held liable although the servant is acquitted:

Buskirk v. Caudill, 181 Ky. 45; 203 S.W. 864.

Weil v. Hagan, 166 Ky. 750; 179 S.W. 835.

Illinois Cent. R. Co. v. Outland, 160 Ky. 714; 170 S.W. 48.

30 Chesapeak, etc. R. Co. v. Dawson, 159 Ky. 296; 167 S.W. 125.

Illinois Cent. R. Co. v. Murphy, 123 Ky. 787; 97 S.W. 729.

Van Gundy v. Packard Motor Car Co. (Kan.) 219 Pac. 503.

40 The reason for this rule is that the plaintiff is entitled to his verdict which the jury gave him,

and if he fails to get a verdict against another person also responsible, ~~the~~ plaintiff may be aggrieved but the defendant is not.

There is a third class of cases holding that failure of the jury to return a verdict against the servant is no ground for setting aside a judgment against the master. 10

Benson v. Southern Pac. Co., 177 Cal. 777; 171 Pac. 948.

Whitesell v. Joplin, etc. R. Co., 115 Kan. 53; 222 Pac. 133.

Meltzner v. Raven Copper Co., 47 Mont. 351; 132 Pac. 552. 20

Dalby v. Shannon, 139 Va. 488; 124 S. E. 186.

Bon v. Eastern Motor Co., 94 N. J. L. 34.

Feury v. Reid Ice Cream Co., 126 Atl. 462.

See also *Dumphy v. Thompson*, 130 Atl. 639.

The reason for this rule is that the failure of the jury to find as to the servant is not to be considered as a finding of absence of negligence on his part, but should be regarded as no finding as to him, and that on such a verdict the case stands as to the servant as if it had never been tried, and the master has whatever right it ever had against him. 30

In *Bon vs. Eastern Motor Company*, 94 N. J. L. p. 34 (supra), the judgment against the master alone was affirmed.

In *Feury vs. Reid Ice Cream Company*, 126 Atl. 462 (supra), there was a verdict against the master alone, and the Court stated that the situation was as though there had been a mis-trial as to the servant, and that the master was not injured by the failure of the jury to make any finding as respects the guilt of the driver, especially as the master was charged with negligence in failing to have the brakes of the car in good order. (There was some slight evidence, "perhaps not very strong," to show that the brakes were out of order).

In *Dumphy v. Thompson*, 130 Atl. 639, there was a verdict in favor of the defendant against one of the plaintiffs, and a verdict in favor of two of the plaintiffs. The Court said:

"We cannot perceive on what legal principal the defendant can avail herself of the failure of the jury to find a verdict in favor of the infant (plaintiff), and for that reason be entitled to have the verdict in favor of the plaintiff's set aside."

Because of the fact that accidents are becoming very numerous wherein the servant is joined as a defendant with the master, the best rule to adopt is undoubtedly the one which holds that a verdict against the master is good although the verdict is silent as to the servant. In such cases it is clearly the intention of the jury to hold the owner liable, and the intention of the jury should always be considered. The owner has no right to the presence of the servant as a party defendant, and the plaintiff may discontinue the action against the servant at any time. Whatever right the master may have against the servant because of the latter's negligence will be preserved, be-

cause the case against the servant has never been fully tried and the situation is as though there had been a mis-trial, as stated in Feury vs. Reid Ice Cream Company (supra). If all such verdicts were to be set aside, litigation would be increased. If the servant does not appear and answer the complaint, and the plaintiff proceeds to trial and obtains a judgment against the master, which verdict would, of course, be silent as to the servant, no one will contend that such a verdict is invalid. 10

However, in the present case, the evidence shows liability of the master on grounds other than the misconduct of the servant, as the proof was overwhelming that the master was negligent in entrusting its automobile to an incompetent driver. Consequently, as stated above, the master will be held liable notwithstanding a verdict in favor of the servant. 20

Goekel v. Erie Railroad Co., 126 Atl. 446.

Feury v. Reid Ice Cream Co., 126 Atl. 462 (supra).

The only difference between the present case and the case of Feury vs. Reid Ice Cream Company is that in the present case the master is charged with negligence in failing to employ a competent driver, while in the Feury case the master was charged with negligence in failing to have the brakes of the car in good order. In the present case, the evidence was overwhelming that the servant was incompetent; while in the Feury case, there was some slight evidence, "perhaps not very strong," that the brakes were out of order. 30

POINT II.

The Verdict Was In Accordance With the Charge of the Court.

10 Any supposed inconsistency or error in the verdict was waived by defendant's failure to request that the jury be instructed to find either for or against Grundman.

The court charged the jury, (p. ~~157~~¹²⁵, ll. 15-19):

20 "All these actions are commenced against the Castle's Ice Cream Company, a corporation, Fred. Grundman, and John Newman. So you will be obliged to render three separate and distinct verdicts—in other words, a verdict in each case either for the plaintiffs or the defendants *or for some one of the defendants as the case may be * * * **"

Counsel for the Castle's Ice Cream Company did not take any exception to this charge.

30 He did not request the Court to charge that the jury could not find a verdict against the Castle's Ice Cream Company unless they also found a verdict against Grundman.

40 Even assuming that there was no evidence of the negligence of the Castle's Ice Cream Company in placing an incompetent driver in charge of its automobile, and that this company could not be held liable except upon the doctrine of respondeat superior, and further assuming for the sake of argument that the failure of the jury to find a verdict either for or against Grundman was equivalent to a finding in his favor, still Castle's Ice Cream Company cannot complain of the ver-

dict against it. Such verdict was in accordance with the charge of the court that the jury might find in favor of some one of the defendants.

In *Pangborn vs. Buick Motor Co.*, 211 N. Y., page 228, cited on page 16 of appellant's brief, *the verdict was contrary to the instruction of the Court.* 10 01

In *Chicago, St. Paul, M. & O. Ry. Co. vs. McManigan*, 103 N.W. 305, also cited on page 16 of the appellant's brief, the Court instructed the jury that they were at liberty to find in favor of either party and against the other, and they accordingly rendered a verdict in favor of the servant and against the plaintiff, but in favor of the plaintiff and against the master. *The instruction was excepted to.* 20 02

In *Frascone vs. Louderback*, 138 N. Y. Supp. 370, (cited on page 11 of appellant's brief), the court charged the jury that the verdict might be for the plaintiff against both defendants, for the plaintiff against one defendant and in favor of the other, or in favor of both defendants against the plaintiff. The jury rendered a verdict for the plaintiff as against the defendant Standard Oil Company. The Court said: 30 03

"Counsel should have requested the Court to charge that there could not be a verdict against the defendant company unless they found against the individual defendant."

In *Benson vs. Southern Pacific Company*, 177 Cal. 777, 171 Pac. 948 (supra), the Court said:

"Respondent claims that if the defendants desired to take advantage of the jury's failure 40 04

10 to bring in a verdict for or against the defendant employee, the attention of the Court should have been called to the matter at the time when the verdict was rendered in order that it might have been corrected before the jury was discharged. * * * * In the case of Van Damme vs. McGilvray Stone Co., 22 Cal. App. 191, 133 Pac. 995, the jury brought in a general verdict against the defendant, but 'the jury declined to answer' the question specifically submitted as to whether or not the employees, for whose negligence the plaintiff sought to hold the defendant were negligent. *It was held that the error was waived by a failure to request that the jury be directed to find on that issue. For the same reason it must be held that the defendants waived the error, if any, committed here.*"

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POINT III.

The Verdict Met the Issues Submitted to the Jury By the Trial Judge.

30 The Castle's Ice Cream Company was charged with negligence in operating its automobile by an incompetent driver.

40 The question as to whether Grundman was an incompetent driver was sharply litigated. In fact, this was one of the most important issues raised at the trial. Although the Castle's Ice Cream Company did not introduce any evidence, except that of Grundman, in an endeavor to prove that Grundman was not its agent, the company called Dr. Galloway as its witness in an attempt to prove that Grundman was competent to drive

the automobile. By its verdict, the jury found that the Castle's Ice Cream Company was negligent in entrusting its car to this intoxicated driver on the afternoon of Election Day. The company knew that traffic was very heavy on the afternoon of Election Day (a holiday) on the road from Perth Amboy to Newark, which is one of the most heavily travelled roads in the State of New Jersey. From the evidence, the company was chargeable with knowledge that Grundman was too intoxicated to operate its automobile.

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Grundman finished his route and returned the Castle's Ice Cream Company truck to the company's plant at Perth Amboy at about 4:30 P. M. on Election Day. He had been drinking during the day. He admitted to Mr. Coleman that he had had two or three drinks, (p. ~~46~~⁴⁴, l. 27). At the police station, when he was examined, he admitted that he had had several drinks about 12:30 (p. ~~71~~³⁷, l. 25).

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Notwithstanding the fact that Grundman had been drinking and was intoxicated, the Castle's Ice Cream Company placed him in charge of its automobile, and allowed him to operate same along the main road from Perth Amboy to Newark on a holiday, when the traffic was extremely heavy, (p. ~~63~~³³, l. 32). As the accident occurred at 5:20 or 5:25 P. M., which was shortly after Grundman had left Perth Amboy, and as there was no evidence that he had obtained any liquor on the way, he must have been intoxicated at the time he left the Castle's Ice Cream Company plant. He testified that the man who was in the automobile with him at the time of the accident did not give him a drink, (p. ~~133~~¹²⁷, l. 1). The police searched Grundman's car for liquor, but did not find any, (p. ~~90~~⁵⁸, ll. 25-29).

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The accident was caused by Grundman suddenly swinging the Castle's Ice Cream Company car to the left toward the heavy Buick car containing seven passengers. He struck the front wheel of the Buick with such force that the steering wheel was driven out of the hands of the driver of the Buick car, and, "it nearly broke the steering knuckle," (p. ~~144~~¹¹², ll. 28-32). Some idea of the speed with which Grundman operated appellant's car, may be obtained from the fact that after the collision, the car driven by Grundman continued around the back of the Buick car and went off the road about eight feet, (p. ~~144~~¹¹², l. 31).

After the accident, Grundman was taken to the police station. A telephone call was sent to Dr. Galloway, requesting him to call at the police station for the purpose of examining Grundman, (p. ~~144~~⁹⁷, ll. 18-38).

This physician did not reach the police station until 6:20, (p. ~~96~~⁶⁶, l. 32)—which would be about one hour after the accident. During this time Grundman had an opportunity of sobering up.

When the physician arrived, he had to put Grundman through a series of tests to determine whether he was drunk or not, as the physician could not trust his impression, (p. ~~130~~¹⁰⁰, ll. 10-17).

This physician says he did not talk to Grundman to see whether he had been drinking or not. He "don't remember" whether he said to Grundman: "Now, Grundman, tell the truth, you have been drinking, haven't you?" But he will not deny that he said it, (p. ~~130~~¹⁰⁰, ll. 20-26). Asked whether Grundman did not say: "Yes, I have been drinking," the physician answers: "He might have." (p. ~~130~~¹⁰⁰, l. 28).

The physician stated: "Although this man has been drinking, he is not so far intoxicated as to be unable to drive a car." He did not make an official diagnosis as to whether Grundman was intoxicated or not, (p. ~~132~~¹³², ll. 30-35). Asked by the Court: "Did you smell any liquor on him, Doctor?" the witness answered: "I don't remember." 10

The testimony of the plaintiff was that Grundman was under the influence of liquor, (p. ~~71~~³⁷, ll. 8-10). At the examination before Dr. Galloway, Grundman admitted that he had had several drinks at about 12:30, (p. ~~71~~³⁷, l. 26).

Dr. Galloway said that there was no question about Grundman having been drinking, (p. ~~71~~³⁷, l. 40). 20

Alva Dunbaden testified that Grundman was intoxicated, (p. ~~88~~⁸⁶, l. 27; p. ~~88~~⁸⁷, l. 32). When the police took Grundman's statement he was all confused in his answers. He also admitted that he had been drinking, (p. ~~86~~⁸⁶, ll. 1-5). He said that he had had two or three drinks around noon time, (p. ~~86~~⁸⁸ l. 12).

After the collision between the Castle's Ice Cream Co. Ford roadster, driven by Grundman, and the Buick car, the Castle's Ice Cream Company car swung over and hit the back fender of a Star car in which Miss Kaus was riding, (p. ~~129~~⁹⁷, l. 29). Grundman did not even know that he had struck this Star car, (p. ~~128~~¹⁰⁶, ll. 13-28). 30

The witness, Henry Coleman, testified that Grundman acted as though he was drunk. At the police station, Grundman admitted that he had had two or three drinks, (p. ~~116~~¹¹⁴, ll. 20-27). 40

POINT IV.

Appellant Cannot Complain Because the Jury Did Not Find Either in Favor of or Against Its Servant.

10 A verdict, in an action against master and servant, against the master only, must be considered as a finding of joint liability unless there is something in the record which prevents that conclusion, as all intendments are in favor of the verdict.

Benson v. Southern Pac. Co., 177 Cal. 777; 171 Pac. 948 (supra).

20 "The omission to find in favor of or against the other defendants is not a ground for a venire de novo. Such a motion will not be sustained because there was an omission to find upon some of the issues."

22 Enc. of Pl. & Pr. 959, citing Board vs. Pearson, 120 Ind. 426.

"The presumption always arises that the jury has found all the facts necessary to support the verdict."

30 22 Enc. of Pl. & Pr. 959.

POINT V.

At the Time of the Accident, Grundman Was the Agent of the Appellant Castle's Ice Cream Company.

40 It was admitted that the company furnished its

driver Grundman with the automobile in question for the purpose of going back and forth from his work. The answer of the Castle's Ice Cream Company admits that *its* automobile came into collision with another automobile, (p. 12, ll. 9-~~14~~).

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The appellant did not allege, or attempt to prove, that Grundman was an independent contractor. 10

No official of the appellant was called to prove the relationship between Grundman and the company. The only evidence produced by the appellant to prove that Grundman was not its agent was the testimony of Grundman himself. But the answer of Grundman, (p. 121, l. 15) states:

the suit brought by plaintiff passengers, which suit was tried with this case, states:

"3. This defendant admits that the automobile which he was driving as the agent of the defendant Castle's Ice Cream Company came into collision with another automobile 20

* * * " (p. 21, l. 15) of *State of Case in Ethel Dunbaden, et al. against some defendants, in the Supreme Court, on rule to show cause.*

Grundman testified that the automobile was a salesman's car which was furnished to him by the company for use in going back and forth to work, (p. ~~128~~¹⁰⁸, ll. 33-39; p. ~~137~~¹⁰⁸, ll. 10-15). He also testified that the Castle's Ice Cream Company had a plant in Perth Amboy and that they also had a plant in Newark, (p. ~~136~~¹⁰⁴ l. 22). 30

At the time of the accident Grundman was dressed in overalls, (p. ~~26~~³⁴, ll. 13-14; p. ~~28~~⁵⁶, l. 23). He said to Alva Dunbaden that he worked for the Castle's Ice Cream Company and that he was on his way to their place in Newark, (p. ~~28~~⁵⁶, l. 20). Grundman told the plaintiff that he was on the way from the Castle's Ice Cream Company plant in Perth Amboy to the plant of the Castle's Ice 40

Cream Company in Newark, and that he was making his daily trip between these two plants, (p. ~~13~~ ll. 10-23).

10 Upon this evidence the jury was certainly justified in finding that Grundman was on his way from the plant of the appellant in Perth Amboy to their plant in Newark, and, therefore, that he was their servant at the time of the accident. Although Grundman's answer specifically stated that he was driving the automobile as the agent of the Castle's Ice Cream Company, (p. 21, l. 15), the appellant did not call any witnesses to deny that Grundman was operating its automobile as its agent.

State of case in Ethel Dumbkin against some Defendants in Supreme Court

20 Proof of ownership of an automobile in the possession of a servant raises a presumption that the servant was acting within the scope of his employment. Where the proof is contradictory, or subject to contradictory interpretations, the question becomes one for the jury.

Mahan vs. Walker, 97 N. J. L. 304.

Spelde v. Galtieri, 130 Atl. 526.

Venghis v. Nathanson, 127 Atl. 175.

30 Michael v. Southern Lumber Co., 127 Atl. 580.

“Where the facts presented are as consistent with the theory of agency as with that of independent contractor, the burden is upon the one asserting the independency of the contractor to show the true relationship of the parties.”

Dishmann v. Whitney, 121 Wash. 157, 209 Pac. 212, 29 A. L. R. 460.

14 R. C. L. 78.

3 R. C. L. Supp. 168.

4 R. C. L. Supp. 873.

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Case in Grundman same facts as in case

In Points 3 and 4 of its brief, appellant seems to contend that Grundman, the route driver of the appellant, was an independent contractor. No cases are cited in support of this novel proposition. It would be no more absurd to characterize as an independent contractor a route driver of the Castle's Ice Cream Company, than it would be to say that the route drivers of the milk companies delivering the morning milk are independent contractors. In both cases the route drivers use the trucks of the master in making deliveries of commodities belonging to the master, at prices fixed by the master, to the master's customers, along the route designated by the master, the master being at liberty to discharge the route drivers at any time. In both cases, the pay is fixed by commissions. Were Grundman an independent contractor he would not have received "commissions"; he would have received "profits."

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Appellant further argues that if Grundman was not an independent contractor, he was using the appellant's automobile in his own business at the time of the accident. As stated above, there was a conflict of evidence as to whether Grundman was making his daily trip between the Perth Amboy plant of the appellant and their plant at Newark, or whether he was on his way home. Even assuming, for the sake of argument, that Grundman was on his way home from work, the courts of this State have said that the relationship of

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the master and servant continues while the servant is using the master's automobile in going back and forth to work.

Depue v. Salmon Co., 92 N. J. L. 550.

10 Cicalese v. Lehigh Valley R. R. Co., ^{N. J.} 75₁ Law, 897-900.

Lewis v. National Cash Register Co., ^{N. J.} 84₁ Law, 598; 86 Atl. 345.

20 Even assuming that Grundman was on his way home, it was certainly for the jury to say whether the appellant was or was not benefited by providing an automobile for its route driver Grundman to use in going back and forth from his work. By means of this automobile, Grundman was certainly able to reach his work earlier in the morning and to devote more time to serving appellant's customers on the route. If Grundman were obliged to rely upon trolley cars in going to and from his home in Newark to the plant of the appellant in Perth Amboy he would necessarily have to finish his route sooner so as to make up the time lost in going to and from appellant's plant by trolley.

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CONCLUSION

For the reasons above stated, the judgment should be affirmed.

FRANK W. HEILENDAY,

Attorney for and of Counsel with Plaintiff-Respondent.

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