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New Jersey State Library

Complaint.

(Filed Jan. 4, 1926.)

ESSEX COUNTY CIRCUIT COURT

GERTRUDE G. HARBER and WILLIAM J. HARBER, her husband, Complainants, vs. FRED T. GRAHAM, Defendant.	}	Action at Law. Com- plaint.	10
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Gertrude G. Harber and William J. Harber, both of the City of East Orange, Essex County, New Jersey, hereby complain of the defendant, Fred T. Graham, and allege: 20

First Count.

1. The defendant, Fred T. Graham, on or about the 2nd day of October, 1925, was the owner and operator of a certain automobile then and there being operated on a public thoroughfare from the Town of Irving, Massachusetts, to the Town of Miller's Falls, Massachusetts, in which said automobile, at the time and place herein referred to, the complainant, Gertrude J. Harber, became a passenger at the invitation of the defendant, Fred T. Graham. 30

40

RECORDED AND INDEXED

Complaint

2. It thereupon became and was the duty of the defendant Fred T. Graham, to exercise reasonable care and caution in the operation and management of said automobile, yet, notwithstanding the duty thereby imposed upon him, the said defendant so negligently and carelessly and unskillfully operated the said automobile in which the said complainant was then and there riding and propelled and drove the same at such an excessive rate of speed that the said automobile ran off of the road and into a ditch with great force and violence, and the said complainant was thereby greatly hurt, bruised and injured and her face cut from and over the right eye and down over her nose and upper lip and her left leg broken and her right eye injured, which scars and injuries are of a permanent and lasting nature.

3. The said complainant by reason of said injuries, lost a great quantity of blood and became and was sick, sore, lame and disordered, and has suffered and will suffer in the future from the result of said injuries.

4. By reason of said injuries, said complainant was confined at a hospital at Greenfield, Massachusetts, for a long period of time and underwent great pain, both of body and mind from which she still suffers and in the future will suffer.

By reason of the premises, the complainant, Gertrude J. Harber, claims damages to the amount of \$25,000.

*Complaint**Second Count.*

1. Complainant, William J. Harber, residing in the City of East Orange, Essex County, New Jersey, is the husband of complainant, Gertrude J. Harber, and by reason of said injuries sustained by the said Gertrude J. Harber, was obliged to and did expend divers large sums of money for doctors and medicines in endeavoring to cure his said wife of the injuries, bruises and wounds sustained by her through the carelessness and negligence of the said defendant, Fred T. Graham, and will in the future be obliged to spend divers large sums of money to cure his wife of the wounds and injuries sustained as aforesaid, to wit, the sum of \$1,000.

2. That by reason of the injuries sustained by the said Gertrude J. Harber, this complainant was deprived of the society and comfort of his said wife and in the future will be deprived of her society through the negligence and carelessness on the part of the said defendant as hereinabove set out.

3. By reason of the aforesaid injuries, this complainant says that he has sustained damages in the amount of \$5,000, and therefore brings this suit against the defendant, Fred T. Graham.

JOHN A. BERNHARD,
Attorney for Complainants.

Amendment to Complaint.

ESSEX COUNTY CIRCUIT COURT.

10	GERTRUDE G. HARBER and WILLIAM J. HARBER, her husband, Plaintiffs, vs. FRED T. GRAHAM, Defendant.	}	Action at Law. Stipulation.
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It is hereby stipulated that the second paragraph of the complaint be amended after the word "violence" as follows: The said plaintiff, Gertrude G. Harber, as result thereof, was greatly hurt, bruised and injured, sustaining a lacerated wound of nose and right eye lid, extending from left side of nose near angle of eye down near nose tip and up along the right side of the nose and across the upper eye lid; bruises of right hip; fracture of left wrist; lacerated wound four inches long, on shin of left leg; wrench of structures about the right ankle; cut under chin; bruised forehead, which scars and injuries are of a permanent and lasting nature.

It is further stipulated that the words complainant and complainants in the complaint should be amended to read plaintiff and plaintiffs.

Dated, January 23rd, 1926.
 JOHN A. BERNHARD,
 Attorney for Plaintiffs.
 JOHN L. RIDLEY,
 Attorney for Defendant.

Answer.

(Filed Jan. 23, 1926.)

ESSEX COUNTY CIRCUIT COURT.

10	GERTRUDE G. HARBER and WILLIAM J. HARBER, her husband, Complainants, vs. FRED T. GRAHAM, Defendant.	}	Action at Law. Answer.
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The defendant, residing in the City of Detroit, State of Michigan, for his answer to the complaint of the complainants herein, answering the first count, denies paragraphs 1, 2, 3 and 4 of the first count.

SEPARATE DEFENSE.

Complainant was guilty of contributory negligence.

FOR A FURTHER SEPARATE DEFENSE TO THE FIRST COUNT THE DEFENDANT ALLEGES:

That the complainant herein alleges that she was a guest in the automobile of the defendant; and the law of the State of Massachusetts as set forth in the decisions of the highest court of said state is that where the relationship of host and guest arises between plaintiff and defendant, plaintiff must plead and prove gross negligence upon the part of the defendant be-

Answer

fore any recovery can be had, and complainant does not plead such gross negligence in this complaint.

10 ANSWERING THE SECOND COUNT: Defendant denies paragraphs 1, 2 and 3 of the complainant's second count.

SEPARATE DEFENSE.

Complainant's wife was guilty of contributory negligence.

20 FOR A FURTHER SEPARATE DEFENSE TO THE SECOND COUNT THE DEFENDANT ALLEGES:

30 That the complainant's wife herein alleges that she was a guest in the automobile of the defendant; and the law of the State of Massachusetts as set forth in the decisions of the highest court of said state is that where the relationship of host and guest arises between plaintiff and defendant, plaintiff must plead and prove gross negligence upon the part of the defendant before any recovery can be had, and complainant does not plead such gross negligence in this complaint.

JOHN L. RIDLEY,
Attorney for Defendant.

Verdict and Judgment.

Verdict for defendant was rendered December 23, 1927, by a jury after trial before Judge Nelson Y. Dungan, Essex Circuit Court, Newark, N. J.

Judgment for defendant was entered thereupon on Dec. 23, 1927, being the judgment from which this appeal is taken. 10

Notice and Grounds of Appeal.

(Filed March 20, 1928.)

ESSEX COUNTY CIRCUIT COURT. 20

GERTRUDE G. HARBER, <i>et al.</i> , Plaintiffs-Appellants, vs. FRED T. GRAHAM, Defendant-Respondent.	}	Action at Law. Notice and Grounds of Appeal.	30
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To the Clerk of Essex County Circuit Court,
Robert Carey, Esquire, Defendant's Attorney:

Take Notice, that plaintiffs herein appeal to the New Jersey Court of Errors and Appeals from the judgment entered herein in favor of the defendant and against the plaintiff, and from every part of said judgment. 40

Notice and Grounds of Appeal

THE GROUNDS OF APPEAL ARE:

- 10 1. That the Court erroneously charged defendant's eighth request to the jury: "If the accident occurred through the exercise of poor judgment by the defendant—the defendant is entitled to a verdict, as the exercise of poor judgment does not constitute gross negligence"; whereas under the Massachusetts decisions in evidence poor judgment may constitute gross negligence, and there is nothing to the contrary in such decisions, nor in any other decisions. This part of the charge was excepted to.
- 20 2. That the Court erroneously charged defendant's eleventh request to which exception was taken. This was error, as stated in the following ground.
- 30 3. That the court erroneously charged defendant's eleventh, twelfth, and thirteenth requests, to the jury, also stating as follows: "Of course, that states correctly the rule of law" and, "So that, unless there be evidence in the case from which you can find it to be established that they were engaged in a mutual enterprise, then the court ought not to charge these requests. However, if there be such evidence, then the requests are proper and I charge you that they correctly state the law." Whereas such requests do not correctly state the law; the law being that unless the mutual enterprise involved some kind of control or management or supervision of the car by the injured party, the mere "common enterprise" referred to in the 11th, 12th, and 13th requests, does
- 40

Notice and Grounds of Appeal

not end the case nor entitled defendant to a verdict. This point of the charge was excepted to.

4. The facts were undisputed and the judgment in favor of defendant was contrary to such undisputed facts. 10

5. That the judgment is contrary to law, and the undisputed facts entitle plaintiffs to a judgment.

The foregoing constitute the grounds of appeal, and appellants claim that all the foregoing constitute errors in the cause, and that the court erred in charging the jury as above, regardless as to whether appellants stated reasons as to the erroneous character are sufficient; the jury ought not to have been charged as above set forth; and appellants claim that such charges constitute reversible error. 20

Yours, etc.,

WM. H. OSBORNE,
Attorney and Counsel for
Plaintiffs-Appellants. 30

Stipulation, Read to the Jury on the Trial.

ESSEX COUNTY CIRCUIT COURT.

10	GERTRUDE G. HARBER and WILLIAM J. HARBER, her husband, Plaintiffs, vs. FRED T. GRAHAM, Defendant.	}	Action at Law. Stipulation.
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20 Whereas the plaintiffs' attorney has served upon the defendant's attorney a notice of the taking of the depositions in Massachusetts, and whereas it is the desire of the respective attorneys to shorten the time that it will take to record said depositions, it is therefore stipulated as follows:

1. That Miss Thyera A. Allen, nurse of Montague City, Massachusetts, will testify that she rendered a bill for \$126.00 which was a reasonable charge for the service rendered to the plaintiffs.

30 2. That Sister Superior or the superintendent of Farron Memorial Hospital of Montague City, Massachusetts, will testify that a bill of \$123.00 was rendered for services rendered and that it is a reasonable charge.

40 3. That James W. Carr, automobile repair man of Greenfield, Massachusetts, will testify that he examined the automobile owned by the defendant immediately after the accident and that the damage was confined to the front end of the car.

Deposition of James J. Lawlor

It is understood between the attorneys for the respective parties that this stipulation may be used in the place and stead of the testimony of these witnesses.

W. H. OSBORNE, Attorney for Plaintiffs.	10
ROBERT CAREY, Attorney for Defendant.	

Deposition, Read to Jury on Trial.

ESSEX COUNTY CIRCUIT COURT.

20	GERTRUDE G. HARBER, and Wm. J. HARBER, her husband, Plaintiffs, vs. FRED T. GRAHAM, Defendant.	}	Action at Law. Deposition of James J. Lawlor.
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Saturday, August 13, 1927, 10 A. M. 30

It is stipulated by counsel on both sides that the testimony of Dr. Lawlor, the witness herein, need not be signed.

JAMES J. LAWLOR, sworn.

Direct-examination by Wm. H. Osborne:

Q. Where do you reside? A. Millers Falls. 40

Q. And is that where your office is? A. Yes, practice medicine in Millers Falls.

Deposition of James J. Lawlor

Q. What is your business? A. General practice.

Q. Of medicine? A. And surgery.

Q. How long have you been such? A. Six years.

10 Q. And during that time have you been admitted to practice in the State of Massachusetts? A. For the past six years.

Q. Connected with any hospital? A. On the staff of both hospitals. Farren Hospital and Franklin County Hospital.

Q. Do you know Mrs. Harber, the plaintiff? A. Yes, I do.

Q. Is she in this court room? A. She is.

20 Q. Did you ever treat her, do you remember anything about treating her on or about October 2, 1925? A. I do, some time in October, I don't know just the date.

Q. Did you know her before? A. No.

Q. Where did you first see her? A. I saw her in Millers Falls at the home of William Dorsey.

Q. Who is William Dorsey? A. A man who resides on the state road in Millers Falls.

30 Q. Do you know how she happened to be there? A. Yes.

Q. How? A. She was injured in an auto accident right outside his house.

Objected to by Mr. Simpson.

Q. What was her condition when you saw her? A. She was very badly shaken up, with multiple lacerations. You want the whole of it?

40 Q. Yes, I do. A. Can I refer to my notes? I copied them from the hospital records.

Deposition of James J. Lawlor

By Mr. Simpson:

Q. Did you copy them? A. Yes.

Q. Did you keep them yourself? A. Yes, I made them out at the time, that is the operating chart. 10

Q. This is a copy? A. Yes.

Q. In referring to this record does it refresh your recollection? A. I thought I remembered it all, but I wanted to be sure, so I went in and read the record.

Q. Was the operating record you read in your handwriting? A. Yes.

Q. You may refer to it. A. I didn't copy it verbatim. 20

Q. Well, then, just a minute. Can you say that in referring to that hospital record and referring to this paper you think you will be testifying from your memory? A. Absolutely.

Q. And everything you testify to by referring to this paper you will remember now as having taken place at that time? A. Yes; had a lacerated wound of the nose, starting below the inner angle of left eye, running down to near the tip of nose, across the bridge, up along right side of nose to inner angle of right eye, then across the upper eye lid of right eye to outer angle of right eye; I think that is clear. The flap of nose can be lifted up and wounds of eye lids exposed right eye ball; there is an abrasion of the chin two inches square, an abrasion across the forehead; there is an abrasion at the outer angle of left eye, bruise on left hip; also fracture of styloid process of left radius, lacerated wounds on left leg over tibia four inches long and wrench of right ankle. 30 40

Deposition of James J. Lawlor

Q. What is the process of the left radius that you mentioned? A. Styloid process—at the end of the radius there is a—

Q. What part of the body? A. The arm, near the wrist.

10 Q. What did you say was the matter? A. Fracture.

Q. Do you remember about when in October this was? A. I think it says here, I have here notes on Harber case, October 2nd, so that must be the date.

Q. What year does it say? A. 1925.

20 Q. Now, what did you do with reference to Mrs. Harber? A. I got there and I put a piece of gauze over her nose, as I remember, or she had a piece over, and put her in my car and took her to the hospital, to the operating room, did a repair job.

Q. You say a repair job, what did you do? A. I put twenty-five horse-hair stitches in the nose following down the line of laceration over to the edge of the right eye, and cleaned up the chin, put dressings on where needed.

30 Q. What did you do with reference to the other injuries? A. I did nothing about the arm because I knew nothing about it until the next day, when she complained, I sent her down for an X-ray.

Q. Were there any further operations performed by you after October 2nd? A. Only setting the arm.

40 Q. How long was she in the hospital, do you remember? A. Twenty-one days, three weeks.

Q. What hospital? A. Farren Hospital.

Deposition of James J. Lawlor

Q. How many times did you see her in all? A. I saw her every day, at the beginning, twice a day.

Q. Did you do anything further during these visits with reference to these wounds? A. Cleaned them up every day, when needed, took 10 out the stitches.

Q. Did you see her to treat her after she left the hospital? A. No, she went to Newark.

Q. Now, did you have any conversation with the defendant, Fred T. Graham, about this accident? A. Who is that, the brother?

Q. Yes. A. I talked quite a lot to him.

Q. When did you have the first conversation with him? A. On the way over in the car we 20 talked about it all the time.

Q. Was that on October 2nd? A. Yes.

Q. What did he say? A. I haven't got notes; it is just from memory, I know he took the blame for it.

Mr. Simpson: I object.

Q. No, what he said? A. He said he was coasting down that hill and I think he said he 30 thought he was coming to a bridge, or something along that line.

Q. Do you remember anything else he said? A. I know he said he was up all night the night before and he was in a hurry to get to Greenfield or some place.

Q. Is that all you remember about the conversation on that day? A. I know he said he 40 was driving fast; I don't know how fast he said he was driving, he said he was up all night the night before and he had made a long trip

Deposition of James J. Lawlor

and he was in a hurry to get to Greenfield where he could rest, and coasting down that hill and I think he said he thought he was coming to a bridge when he saw the fence.

10 Mr. Simpson: I object to so much as says he was driving fast.

Q. Did you have any other conversation with reference to this on any other day? A. He was around two or three days and I don't know, we talked off and on about it.

20 Q. Do you remember anything he said? A. I remember one thing distinctly, he said when the case came into the hospital, he said to me, "I want this bill taken care of, I think the thing is my fault, and I am going to pay the bills and you get the best doctor you can." And I said: "You have the best doctor you can have."

Mr. Simpson: I don't think it is admissible, but it may go in.

30 Q. What is your bill for all these services? A. I think I have rendered a bill to Lawyer Hayes in town, for my work at the time. I think it was \$235.

Mr. Simpson: Isn't there a stipulation on that?

Mr. Osborne: I don't think so.

40 Q. What do you say your bill is? A. I haven't a copy; I suppose that somebody will eventually pay me for keeping me from going abroad August 9th, that is when I was going.

Deposition of James J. Lawlor

Q. Don't let's get into that, that is entirely different. The point is, what is your bill for services rendered to Mrs. Harber while you treated her? A. \$235.

Q. Is that a reasonable bill for the services rendered? A. I think it is very reasonable. 10

CROSS-EXAMINATION by Mr. Simpson:

Q. What are the items of your bill, Doctor? A. My visits, I didn't look that up, it has kind of gone by, setting the arm, after treatments, repair job on the nose.

20 Q. Did you just make a flat charge? A. I don't think I did. I think I made an itemized bill, that is two years ago, I haven't thought about it since.

Q. You visited her twenty-one times? A. Over twenty-one times, I think, because sometimes at the beginning there were two calls a day.

Q. You don't remember what your total visits were? A. No.

30 Q. What do you charge a visit? A. Five dollars over there.

Q. In the Farren Hospital? A. Yes, it is seven miles from Millers.

Q. You live in Millers Falls? A. Yes.

Q. And the Farren Hospital is in Turners Falls? A. Montague City.

Q. There are physicians of high standing in Montague City or Turners Falls who could have taken care of her? A. Certainly.

40 Q. And the charge there would have been \$3 a visit? A. I think \$4 a visit from Greenfield.

Deposition of James J. Lawlor

Q. Isn't Turners Falls nearer? A. No, I think Greenfield is nearer, anyway, it's a toss-up.

Q. And those visits—one of those visits was setting the fracture? A. Yes.

10 Q. What kind of a fracture? A. Complete fracture.

Q. Displacement? A. I haven't looked at the X-ray since, but the X-ray plate is in evidence if you want you can get it printed.

Q. You don't recollect whether there was a displacement? A. The chances are there was not, that is a probability, I couldn't go on record as saying that.

20 Q. You didn't see the accident? A. No, I did not.

Q. Did the defendant Graham tell you where the accident happened? A. Yes, the accident happened right outside the house, the fence was broken, the car was there.

Q. Outside what house? A. This Dorsey house.

Q. In Millers Falls? A. Yes.

30 Q. Where is the Dorsey house? A. About a mile outside the town, going towards Orange.

Q. Over by the paper mill? A. The paper mill isn't on the state road.

Q. The paper mill is down in the valley? A. Yes.

Q. And the car was going west? A. Coming from Orange to Greenfield, I guess that is west.

40 Q. Do you remember what time of the day the accident happened or what time you were called? A. Something tells me around 4:30, but I don't know.

Deposition of James J. Lawlor

Q. What was the condition of Mrs. Harber when you last attended her? A. Well, her condition, as far as my work was concerned, was pretty good, she was still nervous and complaining of gas, couldn't sleep and those things.

Q. Did you put the arm in splints? A. Yes. 10

Q. Had you taken the splints off before she left Millers Falls? A. I don't remember whether I did or not; it was three weeks. I have a feeling I did not, but I couldn't say. It was only three weeks, I couldn't say I did or didn't.

Q. It was a good union so far as you could see? A. I didn't have it X-rayed, but I imagine it was. 20

Q. And the wound over the nose and eye healed up in a satisfactory manner? A. Yes, very nice.

Q. So you could take the stitches out? A. I took the stitches out the second or third day, wasn't healed when I took them out.

Q. She was perfectly able to travel at the end of the three weeks? A. As I just said to you she was nervous, I don't know how she was at the end of three weeks. 30

Q. She did travel? A. I don't know whether she went to Greenfield and stayed a while or whether they took her home by auto, it is two years ago.

Q. You didn't see her after she left the hospital? A. No, I did not.

Q. In your opinion it wasn't necessary for you to see her after she left the hospital? A. 40 It was necessary for some doctor to see her.

Deposition of James J. Lawlor

Q. You know of no reason why you shouldn't treat her if she stayed in the neighborhood? A. If she had stayed in Montague, I would have, as I remember they were anxious to get home and I let her go and had some doctor see her.

10 Q. It was safe in your opinion to go? A. Yes, it it wasn't, she wouldn't have gone.

Q. This Mr. Graham is a brother-in-law of Mrs. Harber? A. I don't know what he is to her.

Q. Didn't you say he was a brother-in-law? A. I think he is her brother, I am not sure.

Q. Her brother, and she was riding with Mr. Harber? A. She was riding with Mr. Graham.

20 Q. Mr. Graham, I mean.

Testimony of Witnesses Produced on Trial.

ESSEX COUNTY CIRCUIT COURT.

Thursday, December 22, 1927.

30

GERTRUDE G. HARBER and WILLIAM J. HARBER

vs.

FRED T. GRAHAM.

} Action at
Law.

40

Before Hon. Nelson Y. Dungan, J., and a jury.
For the plaintiffs appears William H. Osborne.
For the defendant appears Robert Carey.

Plaintiffs' Witness, Gertrude G. Harber, Direct

GERTRUDE G. HARBER, sworn in behalf of plaintiffs.

Direct-examination by Mr. Osborne:

Q. You are the plaintiff in this suit? A. Yes, sir. 10

Q. Do you remember this accident that happened to you in October, 1925? A. Yes, sir.

Q. How long before that had you been married? A. Four weeks.

Q. What is your husband's name? A. William J. Harber.

Q. Is he in court? A. Yes, sir.

Q. And is he your co-plaintiff in this case? A. Yes, sir. 20

Q. Before this accident happened did you get any word from your brother, the defendant, about taking a trip? A. Yes, sir.

Q. How did you get that word, in the first place? A. He wrote me a letter.

Q. What became of that letter? A. It was destroyed.

Q. Who destroyed it? A. I did. 30

Q. When was it destroyed? A. A few days after I received it.

Q. Why was it destroyed? A. I never keep letters of any kind.

Q. Did the destruction of that letter have any connection with your claim or with the fact that you were going to try a case, or anything of that kind? A. No, sir; I didn't know anything about any case or accident. 40

Q. Did you place any particular significance on that letter when you destroyed it? A. No, sir.

Q. Did you destroy it to conceal anything from

Plaintiffs' Witness, Gertrude G. Harber, Direct

any jury? A. No, sir; I didn't know anything about a jury.

Q. What did that letter say with reference to this trip?

10 Mr. Carey: I would like to examine this witness about the loss of that letter first.

The Court: You may do so.

By Mr. Carey:

Q. You say you received one letter from your brother? A. I received several letters.

20 Q. You had a general correspondence with your brother? A. I don't know if it was a general correspondence. It was two or three times he wrote me about the trip. He asked me to go with him. It related somewhat to my marriage and about my vacation and wanted to know if I was so situated that I could go with him.

30 Q. Were you not asked this question at the last trial: "Q. Do you remember any conversation with your brother about taking a trip, or anything about a trip?" And didn't you answer: "We had written to each other about my taking a vacation in New Hampshire and having him go with me for company"? A. No, sir.

Q. Didn't you testify to that at the last hearing? A. If that is what you have there I must have testified to it.

40 Mr. Osborne: I would like to know whether those facts were stated in Judge Carey's question or in her answer.

Plaintiffs' Witness, Gertrude G. Harber, Direct

Mr. Carey: I have just read your question and her answer from the transcript and I drew attention to that fact. I am asking the witness a question.

10 Q. "Do you remember any conversation with your brother about taking a trip or anything about a trip?" And didn't you answer: "We had written to each other about my taking a vacation in New Hampshire and having him go with me for company." A. Well, that is foolish. I had spent the whole month in New Hampshire, for me to want a vacation in New Hampshire again.

20 The Court: The question is, did you make that answer the previous time?

The Witness: I don't know whether I did or not. I am telling Judge Carey the facts in the case.

30 Q. I think I will repeat the question so there will be no question about it. Did you so testify before Judge Mountain in this court house on the 11th day of October, just two months ago? A. Did I testify?

Q. Yes? A. I did; yes, sir.

Q. Then there must have been several letters that passed back and forth between you and your brother? A. I presume there were. They didn't all pertain to the trip, my marriage and my home and various things.

40 Q. There were several letters? A. Yes, sir, there were several letters that passed between us.

Q. Don't you remember my asking you where those letters are two months ago, and didn't

Plaintiffs' Witness, Gertrude G. Harber, Direct

you say you didn't know? A. I know you objected to my mentioning letters and asking to have it taken out of the testimony.

10 Q. Do you remember that? A. Yes, sir; you got right up and you said you wouldn't permit me to mention the letters and I said there was no other way of communication.

Q. Didn't I ask you where those letters were and didn't you say you didn't know, two months ago?

Objected to.

20 Q. Isn't this in response to a question by Mr. Osborne; isn't this the only explanation made about those letters at the last trial: "Q. What did he say outside of a letter about going? A. He couldn't say anything because we had to write because he was in Detroit. Q. Have you his letters here? A. No, I haven't." You didn't say then that the letters had been destroyed or any of them? A. You didn't ask me if they had been destroyed.

30 Q. I am talking about your examination by your own counsel when you were asked if you had those letters here? A. Well, I didn't have them here.

Q. And then didn't I object to the proof of contents of a letter unless the letter was shown? Didn't I state I would like to see the letter and was anything further said about it, your counsel or you at the trial, about the destruction of the letters? A. I don't know.

40 By Mr. Osborne:

Q. When had you had this vacation with your family?

Plaintiffs' Witness, Gertrude G. Harber, Direct

The Court: Do you want to abandon the subject that you asked?

Mr. Osborne: No.

10 Q. When had you had this vacation with your family? A. I was the whole month of August in New Hampshire, and in Springfield, Mass., and with my relatives and my people.

Q. Where did your people live? A. Most of them in New Hampshire.

Q. Where do you live? A. In East Orange.

Q. What is your address? A. 10 Summit Street.

Q. This accident happened on September 22, 1925? A. Yes, sir.

20 Q. And in the month you had had a vacation with your family? A. Yes, sir; all the month of August.

Q. And you were married when? A. The 29th day of August.

Q. You say you received some letters from your brother. Were you then corresponding with your brother during that summer? A. Surely.

30 Q. I understand you to say, in answer to Judge Carey, that one or more of your letters related to taking a vacation, of having taken a vacation with your family? A. Yes, sir.

Q. One or more relating to the fact that you were married? A. Yes, sir.

Q. The letter I am referring to, if there was such a letter, is the letter referring to this trip, was there such a letter? A. Yes, sir.

40 Q. Was there more than one letter relating to this trip? A. I don't know whether there was more than one.

Plaintiffs' Witness, Gertrude G. Harber, Direct

Q. There was one that you wrote? A. There were, and I answered it, and then he wrote back again, after I was married, and I had changed my home to East Orange from Massachusetts when I found out how I was situated.

10 Q. How long before this accident did you get a letter from your brother relating to this trip? A. About the 19th or 20th of September.

Q. About ten days before the accident? A. Yes, sir.

Q. Have you destroyed that letter since the last trial? A. No, sir.

20 Q. When was that letter destroyed? A. We were stopping with friends in East Orange until our home was ready and I destroyed everything that was of no consequence.

Q. Do you keep letters written by your brother? A. No.

Q. Do you keep letters from your mother and sisters? A. Not unless there is some of consequence.

30 Q. Are you sure you got a letter about this trip? A. Yes, sir.

Q. What did that letter say about taking a trip with your brother?

Mr. Carey: I object to that as incompetent, irrelevant and immaterial. There is no proof of the destruction of the specific letter.

40 The Court: The objection is overruled. Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

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A. He wrote that he hadn't had a vacation for several years, he had bought a new car, and he wanted to go up to New Hampshire. He also wanted to go to Massachusetts regarding some property he had there and he particularly wanted to go east on a third trip, he didn't want to take it alone, and he didn't know anybody else available that had the time to go with him that I had and he asked me to go on the trip to New Hampshire. 10

Q. Where did you meet your brother? A. In Albany, New York.

Q. When, about? A. On Monday.

Q. How many days before the accident? A. About three days, three or four days—three days, I think. 20

Q. Did he meet you with his car? A. Yes, sir.

Q. From then on you drove somewhere. Where did you go? A. We drove through New Hampshire.

Q. Saw your people? A. Yes, sir.

Q. The same people that you had had a vacation with that summer? A. Yes, sir; the only people that we had. 30

Q. Where were you going when the accident happened? A. We were leaving New Hampshire. He had some message that he had to get right back to Detroit and he was to leave me in East Orange and he was to proceed to Detroit.

Q. You were proceeding back from New Hampshire? A. Yes, sir.

Q. Where did this accident happen? A. Millers Falls, Mass. 40

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Q. When he met you in Albany was there anything particular said about taking you on this trip between you and him? A. Well, he was awfully glad to have company.

10 Q. Did he say that? A. Yes, sir; we hadn't seen each other for two years and it was nice to be together again.

Q. Did he tell you where he was going on this trip? A. Yes, sir.

Q. Outlined the trip to you? A. Yes, sir.

Q. You say the accident happened at Millers Falls? A. Yes, sir.

20 Q. As you approached Millers Falls were you on any hills in that vicinity? A. There is nothing but hills through that country.

Q. Did you have any conversation while going down any hill in that vicinity with your brother? A. Yes, sir; on the hills he coasted his car, he would throw the clutch out and coast the car.

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

Q. Were you familiar at that time with running a car? A. Yes, sir.

30 Q. You say that on some of these hills he had thrown out his clutch and coasted? A. Yes, sir.

40 Q. Did you say anything to him? A. Yes, sir, I told him that I thought it was very dangerous and he didn't realize the danger of the hills there in New England, always having driven a car around Detroit where the roads are straight and flat, and so forth, and it seemed to be a novelty to him to coast the car, and he said something about he was master of the car and I didn't have anything to worry about.

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Q. Where were you sitting? A. Right alongside of him in the front seat of the car.

Q. How long before the accident occurred did that conversation occur? A. Probably ten minutes, five minutes—ten minutes—a hill or two before that. 10

Q. Did you come to any hill finally? A. Yes, sir.

Q. Tell the jury what happened from the time you started down that hill until the time the accident occurred? A. It is a very long hill and winding and he threw the clutch out and I was frightened—

Mr. Carey: I ask that that be stricken out. 20

The Court: The last part will be stricken out.

The Witness: I don't like to talk to anybody when they are driving and I don't want anybody to talk to me.

Q. Tell us what occurred? A. Being frightened— 30

Q. Will you just testify to what happened? A. He disengaged the clutch of the car and threw the clutch out and we were driving fast, and as we did, the car was gathering momentum. I looked at the speedometer and it was forty miles and about a thousand feet ahead of us was this double curve.

Was there anything to obscure this curve a thousand feet ahead? A. No; it was all open. 40

Q. Tell us what happened. A. And the car was gathering momentum all the time and this

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curve was ahead and he just drove the car off the side of the road and went over rocks and little small growths, and so forth, oh, a hundred feet or more, and finally it came right up in a culvert, a little sort of a ditch, and buried the front of the car in the embankment and trees there that was growing in this little ditch.

10 Q. Do you know what happened to you? A. Yes, sir, very well.

Q. What did happen to you? A. When the car stopped my head went through the windshield and the side of the car pushed over like that (illustrating), and my foot was caught in under the seat, and my nose went through the instrument board and pushed the instrument board up, and this wrist was broken and my face was terribly cut all through here, and when I regained consciousness I couldn't get out of the car I was so stunned, and my nose was all lifted off my face and this big bloody mass of nose was all over here and the blood was streaming all over my clothes and everything.

20 Q. Will you tell me whether this car was in gear or out of gear going down? A. It was out of gear.

30 Q. Did you look at the speedometer? A. Yes, sir.

Q. What speed did the car obtain? A. When I looked at the speedometer it was just past forty miles an hour, not up to forty-five, but just past forty.

40 Q. Had you reached the curve when the car went off the road? A. No, sir.

Q. How far were you from the first turn? A. I should judge we were 125, 150 feet.

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Q. Did your car go straight, did it continue its course when it went off the road? A. I don't understand that question.

Q. Was this road more or less straight going down or was it curved? A. It was straight and in the curve was a double curve. 10

Q. There was a curve down at the bottom of the hill? A. Yes, sir.

Q. You were going in a certain direction? A. Yes, sir.

Q. When the car left the road did your car change its direction or go straight ahead? A. Straight ahead.

Q. Why was it that if the car went straight ahead and the road was straight it didn't continue to go on the road? A. The road was just the slightest little bend in the road and the car shot right this way, almost parallel with the road, and, of course, when the car stopped, we were almost at that bend, when the car finally pulled up in this ditch. 20

Q. Do you know of your own knowledge from what you then saw whether your brother put his foot on the brakes or tried to stop the car in any way? A. No, sir, he didn't. 30

Q. Did you ever have a conversation with him afterwards in which he said anything about the brake? A. Yes, sir.

Q. Just tell us briefly what that conversation about the brake was? A. They took me to the hospital that night and the next morning he came in and he stood at the foot of the bed and he spoke very badly about the accident, of course, and I said, "How did it happen?" And he said, "My God, I didn't even have my foot 40

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on the brake—I don't know how it happened—I didn't even have my foot on the brake. I had my foot on the gas." Of course, that didn't make the difference. He said, "If I had my Dodge car this wouldn't have happened." This was a new car we had.

Q. You were taken where? A. To the Farnen Memorial Hospital, Montague City.

Q. Did you have a doctor there? A. The same doctor had treated me there.

Q. Did he do anything to your face? A. Yes, sir, he put twenty-five stitches in my eyelid and in my nose.

Q. You told the jury about what happened to your face at that time. What other injuries did you have? A. My wrist was broken and I had a very severe laceration of what I call the shin bone, on the bone between the knee, which afterwards became infected and was very, very sore, and had to be dressed all the time. My elbow was injured and my right hip was injured. I had this cut on my chin, and the skin was all taken off my forehead, and this eyebrow was almost completely wiped off and my face was all skinned and my lips were all cut with glass.

Q. I am going to ask you to step down before the jury and show them where this cut was on your face and where you say this scar is on your face at the present time. Will you please do that? A. (Witness leaves the witness stand and stands before the jury.) Here and back through the nose and back to the side, down through here (indicating).

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Q. From your own observation, is that scar visible when you look in the mirror? A. Yes, sir, always.

Q. Does that scar have any different appearance with reference to the health you may be in? A. Yes, sir.

Q. What is that difference? A. Some days it is all wrinkly and livid looking, and very prominent, and when I am out in the cold days it is a terrible line around my nose and my nose is very sensitive to the cold and the scar is and other days it seems nice and smooth as can be.

Q. Does that scar have any effect upon your feelings? A. It certainly does.

Q. How long were you in the hospital? A. Three weeks.

Q. You had how many doctors there? A. The doctor who administered ether and Dr. Lawlor, who did the repair work on my face.

Q. How long were you under the doctor's care there? A. The whole three weeks.

Q. Did you have a private room? A. I had a private room—there are no private rooms there.

Q. Did you have any nurses? A. Yes, sir, I had a special nurse.

Q. How long were the bandages on your face, or weren't there any bandages on your face? A. There was a bandage on my nose for about eighteen days; on the rest of my face for about a week.

Q. How long were the bandages on your legs and wrists? A. My arm was in splints for four weeks and the bandage on my leg, I

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guess was on probably seven or eight weeks because of this infection, we couldn't get it to clear up.

Q. How about your forehead? A. It wasn't a bandage; it was a little dressing.

10 Q. Your forehead, did you have a bandage there? A. Yes, for about three or four or five days.

Q. At the end of this time, two or three weeks, did you leave the hospital? A. Yes, sir.

Q. Then where did you go? A. My husband came and took me back to East Orange.

20 Q. After you got back to East Orange how long were you confined to the house? A. I was in the house for about a week on account of my arm and my leg was sore where it got caught under the seat; I was ashamed to go out in the street, everybody looked at me and I waited for about two weeks when the splints were off and I went out again.

30 Q. How long was it before this scar got cured to its present condition? A. It looked very bad for eight or nine months and I tried to have something done to it and I called Dr. Wallhauser in Newark and he said I mustn't touch it—

Q. At the end of eight or nine months you went to some doctor about it? A. Yes, sir.

Q. Since that time has elapsed since the accident has it been in its present condition, did the doctor do anything to it? A. No; he said to let nature take its course.

40 Q. Nature has taken its course? A. Yes, sir.

Q. Since that time has it appeared to you as

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it has appeared ever since? A. Yes, about the same.

Q. How is the cut on your leg now? A. Oh, that is all right.

Q. And the scars or bruises or the cuts on your face, are they all healed up? A. Yes, sir. 10

Q. And the broken ribs? A. Yes, sir.

Q. What did you feel in the hospital outside of this face, did you have any other bruises or anything else on your body? A. I was so lame and bruised I couldn't move or anything.

Q. When were you able to resume your household duties, after you came back from the hospital, how many weeks? A. Well, after we had my sister stay with me and take care of me and she stayed with me until the 1st of January and did the work. 20

Q. Did you do the work after the 1st of January? A. Yes, sir, with some help.

Q. Did your husband come to you, right after this accident? A. Yes, sir, my brother got in touch with him.

Q. He came? A. He came up the next day.

Q. How many times was he at the hospital to see you? A. He was there about five times in all, I think. 30

Q. What was his business at that time? A. He was a traveling salesman for a gold concern in Newark and New York.

Q. What is his business now? A. He has a business of his own manufacturing jeweler.

Q. Where is his business? A. 515 Fifth Avenue, New York. 40

Q. Did your brother at the hospital come to

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see you more than once? A. Yes, he stayed a good part of that night of the accident and he was there early the next morning, and he stayed until my husband got there.

10 Q. Did he have anything further to say about how this accident happened other than you have already told us? A. When I was in the car, Dr. Lawlor came to the scene of the accident and my brother was supporting me in the back seat and he told Dr. Lawlor that he lost his head and went to sleep, and he asked the doctor if it was possible for a man to fall asleep, and Dr. Lawlor said it was possible.

20 Q. Did your brother give any reason for being asleep? A. He had been out the best part of the night before and he was very, very tired, and he had driven about twelve hundred miles in three or four days and he was very, very tired.

Q. What have you got to say, if anything, about your nervous condition as the result of this accident and since the accident?

30 Mr. Carey: I object as to the result of this accident.

Mr. Osborne: I will strike that out.

Q. Were you well before this accident? A. Yes, sir.

Q. Did you have any nervous trouble? A. No, sir.

40 Q. What has been your condition since this accident, the last two months? A. I was terribly nervous.

Q. Can you describe what happened to you because of your nerves? A. I had this happen

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to my stomach, that keeps coming—it is just like something tearing my stomach out.

Q. Did you have that before the accident? A. No, sir.

10 Q. How do you sleep nights? A. I slept terribly for a long, long time, after the accident. It is all right now.

Q. Do you sleep pretty well nights now? A. Fairly. If I am not tired, I sleep all right.

Q. Is there any other nervous trouble you have outside of this nervous trouble? A. Just general nervousness.

Q. What do you mean by general nervousness? A. Now? 20

Q. Nervous now, how does your case differ from anybody else? A. I am just nervous, but mostly it is my stomach that bothers me. When I am tired and nervous there is this pain that comes to my stomach.

Q. How often do you get tired? A. Depending on what I am doing, and so forth.

Q. You have, as a matter of fact, gained in weight, have you or haven't you? A. I have 30 gained in weight since I was in the hospital, but I am just about the same weight as I was.

Q. Before? A. Just about.

Q. Beyond the condition of what you call your nervousness, and which, among other things, you say makes you frequently tired, and which also you say affects your stomach, beyond that and beyond this scar on your face, do you see any other permanent or present result from this 40 accident? A. One very great form of nervousness that I have, this eyelid twitches, where the

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tissue was broken around the eyebrow, just seems to be—

Mr. Carey: I object to that as a conclusion of the witness.

10 Q. Tell us not what the eyelid seems to, but what the eyelid does? A. It twitches and pulls here where this scar is.

By the Court:

Q. You are speaking of the right eye? A. Yes, sir, the injured eyelid.

By Mr. Osborne:

20 Q. Is your eyesight good? A. Yes, sir.

Q. Is your eyesight just as good as it was before the accident? A. I wear glasses now.

Q. You didn't before the accident? A. No, sir.

Q. How old are you? A. Thirty-eight, almost.

CROSS-EXAMINATION by Mr. Carey:

30 Q. Your eyesight is just as good now as it ever was, isn't it? A. No, it isn't. I wish it was.

Q. When did you begin to wear glasses? A. About a year ago last June, I think.

Q. You say you are thirty-eight now? A. Yes, sir.

Q. You were married two years ago what month? A. August.

40 Q. Up to that time you had lived in Massachusetts, yes, sir.

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Q. When you say you were on a vacation before in the New England States, you were living up there? A. I was living in Massachusetts, yes sir.

Q. Up right near Rochester and all those towns up there? A. No, sir. 10

Q. They are in New Hampshire? A. No, sir.

Q. You were living in what part of Massachusetts? A. Boston.

Q. You knew that whole country very well? A. Yes, sir.

Q. Your brother had lived up there, too? A. He lived in New Hampshire.

Q. And he knew that country pretty well, didn't he? A. No, sir, he had never driven up around the Mohawk Trail. 20

Q. He knew the New Hampshire country? A. Years ago, he had no car and he only knew those little towns.

Q. He had lived up there for years? A. Yes, sir.

Q. And he went to Detroit on business and then you hadn't seen him for nearly two years? A. Yes, sir. 30

Q. You got here all right? A. Yes, sir.

Q. You got out all right? A. Yes, sir.

Q. And your weight is the same as it was before the accident, about? A. Yes, sir.

Q. And your color that you have is natural? A. Yes, sir.

Q. Your brother, you say, had been away for nearly two years out in Detroit and you had gotten married and your husband was going away, wasn't he, on a business trip through the 40

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New England States? A. Yes, sir; he was going west first. After we were married, Mr. Harber was to make the trip west.

Q. And then he was coming back and take a trip through the New England States? A. Yes, 10
sir.

Q. And you figured that it would be nice to have a vacation with your brother? A. Yes, sir, I thought it would be nice to see my brother. I was fed up on this vacation stuff in New Hampshire.

Q. You are sure about that? A. Yes, sir.

Q. And you and your brother corresponded and discussed the question of whether you and he wouldn't have a vacation together? A. He 20
discussed my taking a trip with him, and I said I would like to see him and go with him.

Q. You met him up in Albany? A. Yes, sir.

Q. Wasn't this trip planned by you and your brother to go up and see your aunts and uncles up in the country there? A. No, it was planned by him.

Q. Didn't I ask you at the last trial: "You 30
didn't go to Albany only to meet your brother, but visited your aunts and uncles?" Didn't you answer, only two months ago in this court house, "Yes, sir"? Do you remember that? A. I don't remember that.

Q. You don't remember for two months back? A. I don't remember.

Q. Were you not asked this question: "You 40
wanted a little vacation"? Didn't you answer "Yes, sir"? A. I don't remember what I answered in the last trial.

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Q. If you did answer that two months ago, is it true? A. I am telling you what is true just now.

Q. Did you want a vacation? A. No, sir, I didn't want a vacation, I wanted to see my brother. 10

Q. Didn't you answer that question: "So you thought you and your brother would have a vacation together?" And didn't you answer "Yes"? A. I don't remember.

Q. Isn't it a fact that you wanted your vacation together and didn't you say in answering that question two months ago in this court house? A. It wasn't a vacation to me.

Q. Were you asked this question: "That is 20
how you came to be together? A. Yes, sir"? A. If that is what you have there of course the stenographer must have had it right. I don't remember myself.

Q. And you were asked this question: "You knew he was going on his vacation among your relatives?" And didn't you answer, "Yes, sir"? A. I don't remember what I answered. 30

Q. Were you not asked this question by me: 30
"That is why you and your brother went together up there?" and you answered, "Yes"? A. It was why I met him.

Q. He bought his new car? A. Yes, sir.

Q. You didn't have your car up there? A. No, sir.

Q. You had a car? A. Yes, sir.

Q. Where was it, in East Orange? A. Yes, sir.

Q. You were going to use his car because it 40
was a new car? A. Yes, sir.

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Q. If he didn't have a new car, you would have used your car? A. We wouldn't take that trip with my car. I had only had a little Ford. There wouldn't have been anything for him to come down in, if he hadn't had a new car.

10 Q. You think the only thing that made him come east because he had this new car? A. Yes, sir.

Q. When he met you with that new car, you knew he had been driving a car for several years? A. Yes, sir.

Q. How many years did you know he had been driving a car? A. Two or three years.

20 Q. You have been driving a car longer than that, haven't you? A. I have been driving a car for three or four years.

Q. You got in this car in Albany and then you started across from where to Albany? A. We started to cross Massachusetts State.

Q. Right through Massachusetts, the way you turn up to Rochester and New Hampshire, and you went to Athol first? A. We stayed over night in Athol.

30 Q. Whom did you stay with? A. Mr. and Mrs. Hamilton.

Q. You stayed there all night? A. Yes, sir.

Q. And you went across the Berkshire Hills? A. Yes, sir.

40 Q. You had to climb the Berkshire Hills across Albany. Did you go through North Adams or did you go north of that? A. We went through North Adams.

Q. And that is all hilly, winding country, all through there? A. Yes, sir.

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Q. Fine roads, though, aren't they? A. Some of them are.

Q. Some of them are very good? A. I wouldn't say.

Q. All macadam or asphalt? A. Yes, but there are a lot of them that haven't, too. 10

Q. All state roads? A. Yes, sir.

Q. Isn't it a wonderful state road all the way from Albany to Athol? A. No, sir, it is not.

Q. Isn't it the main road from Albany to Boston? A. There is a lot of it very old fashioned, very bad; some of the roads are narrow.

Q. Most of them are the regulation country road? A. The old-fashioned country road. 20

Q. You drove on it most of the way from Albany to Athol? A. Yes, sir.

Q. And you drove from Athol to Rochester through that same kind of country? A. The country is quite different.

Q. It is a little flatter than it is from Albany over? A. Yes, sir.

Q. The same type of country? A. No, sir. 30

Q. Not quite so rolling? A. Not nearly so rolling.

Q. It is rolling? A. Yes, sir.

Q. The roads went through the valleys and all through that beautiful country? A. Yes, sir.

Q. How far did you ride from Athol up to Rochester? A. We rode from Athol to Rochester.

Q. How far is that? A. Probably 160—I don't know, over a hundred miles. 40

Q. About 160, isn't it? A. About that, I guess.

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Q. You know that country well? A. Yes, sir.

Q. You have been over that country lots of times? A. Yes.

Q. But I mean generally, then, when you get to Rochester at your aunt's house, you stay there a couple of days, don't you? A. Yes, sir. 10

Q. Did you ride around the country at all? A. A little bit.

Q. It is rolling country up there? A. No, he was very tired by that time.

Q. And he was tired and you were tired and he wanted to rest? A. He wanted to rest, he had been driving.

Q. Riding gets tiresome? A. You see, he had driven pretty near a thousand miles. 20

Q. You stayed in Rochester two days? A. Yes, sir.

Q. Your husband appeared at Rochester, didn't he? A. Yes, about two days, I believe.

Q. And your husband spent the evening there, didn't he? A. He didn't spend the evening. He was there about an hour.

Q. He came up from Boston or where? A. He came from Portsmouth, New Hampshire. 30

Q. He stayed about an hour and he went about his trip? A. Yes, sir.

Q. And he was there and your brother and your husband, and everybody was happy? A. Yes, sir.

Q. Everybody happy and loving each other as far as you knew. The next day you started on the big trip? A. We left Rochester Friday morning. 40

Q. It was the day after your husband left? A. Yes, sir.

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Q. You were going to go with your brother, were you not? A. Yes, sir.

Q. And both going to the same place and for the same purpose, to get home? A. Yes, sir. My husband tried very hard to have us go down with him. My brother wanted to see the Mohawk Trail. He had never seen it. I sort of wanted to be with him because Mr. Harber had to stay off again in Boston. 10

Q. You wanted to go with your brother, didn't you? A. Yes.

Q. And you went on with the trip, you and your brother, and you were driving down there through the beautiful Berkshire Hills? A. When? 20

Q. That next day, Friday morning. A. We hadn't gotten to the Berkshire Hills.

Q. You were riding all through the Berkshires, all through that section? A. They don't call them Berkshires until you get to Greenville.

Q. What do they call them? A. I don't know I may be wrong about it. I always think of the Berkshires being around North Adams. 30

Q. These were hills, no matter what you called them? A. Yes, sir.

Q. So you came down through the beautiful hills on the 2nd day of October? It was a beautiful day? A. The next day.

Q. How many miles did you drive that day? A. I should say pretty nearly two hundred.

Q. Did you make pretty good time all day? A. Yes. 40

Q. You had to make pretty good time to cover 200 miles? A. Yes, sir.

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Q. What time did you start in the morning?

A. We left ten minutes past eleven. Dover Square.

Q. Where were you going to stay, in Greenville? A. Yes, sir.

10 Q. And you hadn't reached Greenville? A. No, sir.

Q. What time in the day did the accident happen? A. About five o'clock.

Q. You had been driving with your brother all day, making good time in order to get to Greenville in the evening? A. Yes, sir.

Q. And your brother had been driving all day? A. Yes, sir.

20 Q. Seated right alongside of you? A. Yes, sir.

Q. And he had a Dodge car before that? A. Yes, sir.

Q. The method of operating a Dodge is a little different from the Buick? A. I don't know anything about the Dodge.

Q. You are driving along there at five o'clock and you and your brother both perfectly happy?

30 A. Yes, sir.

Q. Up to that minute you loved him perfectly? A. Yes, sir.

Q. You do now? A. Yes, sir.

Q. There is nothing the matter between you and your brother, is there, now? A. No, sir.

Q. He has visited your home since this accident? A. Yes, sir.

40 Q. You remember that, don't you? A. Yes, sir.

Q. While you and your brother were riding

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down you say you came to some hill—you came to a lot of hills, didn't you? A. Yes, sir.

Q. How many hills did you go up and down that day? A. I don't know.

Q. Hundreds of them? A. Plenty of them.

10 Q. So the hills were nothing unusual in that trip, were they? A. No.

Q. In fact, that whole trip is just a continuation of fields and slight hills and curves and turns through that beautiful country? A. Yes, sir.

Q. And you had run all day without any trouble? A. No, sir.

Q. Suddenly at five o'clock, at 5:10, the car ran off the road, didn't it? A. Yes, sir.

Q. You didn't know it was going to run off the road until it ran? A. No, sir.

Q. You didn't expect it to run off the road, did you? A. No, sir.

Q. And you are an experienced driver, are you not? A. I drive.

Q. Driving down this grade, whatever it was, suddenly the car went off the road and then it ran down along parallel with the road in sort of a gully on the side of the road, didn't it? A. Yes, sir.

Q. And up to that time you never expected you were going off the road? A. No, sir.

Q. If you did, you would have yelled, wouldn't you? A. Yes, sir.

Q. When the car ran off the road did it shoot off sideways or just slide off? A. We left the road. The road came turning a little tiny bit that way; the car wasn't exactly parallel. I don't know how you would express that, but it was almost parallel with the road.

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Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. How long did it run along the road? A. A hundred feet or so.

Q. Whoever was driving the car kept it steady going down there? A. Yes, sir.

10 Q. Then it stopped in some soft ground or mud, didn't it? A. Yes, sir, and trees.

Q. There was sort of a clearing there? A. There was some quite big trees where the car landed because he couldn't get the door open.

Q. Right alongside of the car? A. Yes, sir.

Q. And those trees grew right up to the side of the road? A. No, they are closed up quite away except in this little ditch.

20 Q. Above that it was all clear? A. Yes, sir, it was all clear.

Q. And the car came to a sudden stop and that is when your injuries came, is that right? A. Yes, sir.

Q. You went to the hospital and your brother went with you? A. Dr. Lawlor took me to the hospital. They sent for him.

Q. Your brother arranged that? A. No, sir, Mr. and Mrs. Dorsey arranged it.

30 Q. It happened right diagonally from Mr. Dorsey's house? A. Yes, sir.

Q. And they took you over to Dorsey's? A. Yes, sir.

Q. And they asked for a doctor and telephoned Dr. Lawlor? A. Mrs. Dorsey telephoned for two doctors.

Q. You heard her calling? A. She was calling and talking.

40 Q. You were there with a lot of blood on your face and you felt pain? A. I was stunned. I didn't feel much pain.

Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. You knew what they were doing, of course? A. Oh, yes.

Q. When you were there listening to what they were doing the doctor came and then you went to the hospital? A. Yes, sir.

Q. What is the name of that place? A. 10 Montague City.

Q. A small town? A. Yes, sir.

Q. They have a very comfortable little hospital up there? A. Wonderful, comfortable.

Q. And your brother went with you? A. He went in Dr. Lawlor's car.

Q. And you went there and had the stitches put in? A. Yes, sir, my brother had to have some stitches. 20

Q. And you were cut in the same accident? A. Yes, sir.

Q. But you were cut worse than he was? A. Yes, sir.

Q. Your brother stayed there until your husband came up, didn't he? A. He stayed there until Monday or Tuesday.

Q. Your brother stayed three or four days? A. As I remember. 30

Q. And then your husband came up? A. My husband came the next day.

Q. And the day after your husband came you left the hospital, didn't you, or two days after? A. I wasn't out of bed for more than a week after I got to the hospital.

Q. You went to a lawyer's office up there just about a week after you got in the hospital, didn't you? A. No, sir, it was about two weeks. 40

Q. Are you sure about that? Wasn't it a week or ten days at the most? A. It was ten days anyway.

Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. You are sure of that? A. Yes, sir, because I wasn't out of my bed for at least five or six days.

Q. Were you not walking around the hospital grounds in about a week? A. No, sir.

10 Q. Didn't you walk around the hospital grounds every day? A. After two weeks I took a little walk with my nurse, yes, sir.

Q. In three weeks you were well enough to come home? A. I was very lame, and I couldn't walk without someone helping me along.

Q. You walked around those hospital grounds almost every day? A. With the support of the nurse and my sister was there with me.

20 Q. How did you go to the lawyer's office? A. Miss Allen, my nurse, called a taxicab and took me in it.

Q. You walked down and stepped in the taxi? A. They have an elevator there.

Q. And you left the hospital to go to a lawyer's office. How far away was the lawyer's office? A. I guess it is three or four miles.

30 Q. Three or four miles? A. I don't know exactly what it is.

Q. Then you got out of the taxicab and went into the lawyer's office, didn't you? A. Yes, sir.

Q. What floor was his office on? A. I couldn't tell you.

Q. Wasn't it on the second floor of a building? A. I don't know.

40 Q. It was the first lawyer's office you had ever been to? A. I don't remember whether it is the first one or not.

Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. Don't you know you climbed upstairs to a lawyer's office three miles from the hospital? A. I don't know how many stairs.

Q. Did you go upstairs? A. Yes, sir, we did.

Q. You think you did? A. Yes, sir.

Q. And the lawyer's name was Lawlor, the same as the doctor's? A. Yes, sir, but not spelled the same. 10

Q. Never mind. I just asked you the same as the doctor's. Just let me draw your attention that two months ago here, again on that subject, speaking about the visit to the lawyer; "Q. Your nurse took you while you were sick"? That was right, wasn't it? Did you testify to that at the last trial? A. I must have if you have it down here. 20

Q. I ask you to tell this jury whether you didn't testify to that in this courtroom? A. You are telling them you have the testimony there and I can only remember.

Q. Do you remember whether you testified to that that day? A. There was so much I testified to that day, it was so much of an ordeal I can't remember. 30

Q. Were you not asked: "Your nurse took you while you were sick"? A. Yes, sir.

Q. Took you out of the hospital, you were up and around at that time? A. I was.

Q. Next question: "How many days was that after the accident?" Didn't you answer: "I should say a week or ten days"? A. That was wrong if I said that.

Q. Then were you not asked this question: "A week or ten days after you went to the hospital you were up and around in the hospi- 40

Plaintiffs' Witness, Gertrude G. Harber, Cross

tal." Didn't you answer to that question, "Yes, sir"? A. I was up and around in the hospital ten days afterwards.

Q. "You were up and around and your nurse took you to a lawyer?" Answer: "Yes, sir."

10 Question: "How did you come to go to the lawyer?" Answer: "My husband wrote me a letter and said I should see a lawyer." Is that right? A. Yes, sir, that is what he did.

Q. After seeing this lawyer how much more time did you spend in the hospital, around there?

A. Until my face was healed and the patches were off my face.

Q. And your face was healed? A. Yes, sir.

20 Q. And then you came home? A. Yes, sir.

Q. And the cut on your chin was gone? A. The scab was there.

Q. There is no mark of it now? A. Yes, sir, right under my chin. I can feel it with my finger.

Q. Show it to the jury.

(Witness leaves witness stand and exhibits face to jury.)

30 Q. It has healed up perfectly, hasn't it? A. It has healed.

Q. You said you had a talk with your brother afterwards? A. Yes, sir.

Q. You weren't mad at him? A. I wasn't mad, but I felt terribly about my face. I couldn't help feeling that the whole thing could have been avoided.

40 Q. If it hadn't happened? A. Yes, sir.

Q. And you say he said that if he had had his old Dodge car it wouldn't have happened?

A. Yes, sir; that he couldn't find the brake.

Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. You don't know of any reason that your brother would have had of doing you any injury? A. No, sir.

Q. Your brother wasn't drinking that day, was he? A. Not that I know of. I didn't know if he had been drinking. 10

Objected to.

The Court: The answer may remain.

Q. You were with him all day, were you not? A. Yes, sir.

Q. When you looked at this speedometer, when did you look at this speedometer? A. When he threw the clutch out on the car. 20

Q. What? A. When he threw the clutch out and started coasting the car.

Q. That was the time he went off the road? A. Probably a minute or half a minute before.

Q. Are you sure about that? Were you not asked this question at the last trial: "Before he went off the road did you notice it?" Referring to the speedometer. Answer: "Well, almost as we went off the road." That was your answer at the last trial? A. I must have if you have it there. 30

Q. Is that correct, did you notice the speedometer as you went off the road? A. I call it half a minute, to myself.

Q. Were you not asked this question: "Almost as you went off the road? A. Within a few feet or so." Is that the reason you gave? A. I don't get that.

Q. Were you not asked this question: "Almost as you went off the road didn't you notice the speedometer," and didn't you answer: "Within 40

Plaintiffs' Witness, Gertrude G. Harber, Cross

a few feet or so"? A. I don't remember what the question was or what I answered. I can't remember.

Q. Were you not asked this question: "That was forty miles an hour? A. Yes, sir. Q. Are you sure about that? A. Absolutely. Q. It was not any faster? A. Not when I looked at the speedometer. Q. That was just as it was going off the road? A. A car length or two." Isn't that right? Did you testify that way in this court house just two months ago? A. If it is there it must be what I testified.

Q. Was it true or wasn't it, that you noticed the speedometer just as you were leaving the road a car length before leaving the road? A. You know—

Q. I want to know what you are testifying to? A. It was almost at the time.

Q. After this accident and you came home to your home in East Orange, when was the first time you ever saw a doctor after that? A. Two or three days after.

Q. Where? A. In my home in East Orange.

Q. How many times did you see a doctor within the next six months? A. I should say probably five or six times.

Q. You saw a doctor five or six times in the next six months. When you got back to your home in East Orange you were able to take care of your affairs, were you not, your household affairs? A. No, I wasn't.

Q. How long did it take you? A. I had my arm in splints for a week after I got home.

Q. And after that it was out of splints and it was all right? A. It wasn't all right. It was almost helpless for another week.

Plaintiffs' Witness, Gertrude G. Harber, Cross

Q. Isn't it a fact that the only thing you saw the doctor for after you got home was to take the arm out of splints? A. Yes, sir, that is what I saw him for, to take care of my arm.

Q. You say your sister was staying there with you for a time? A. Yes, sir. 10

Q. Did she live with you? A. She and I had always lived together in Massachusetts.

Q. She was living with you at that time? A. I can't recall that yes or no.

Q. Where was your sister living at that time? A. She had no home.

Q. Your home was her home, wasn't it? A. Our home had been broken up in Massachusetts. 20

Q. She came down to East Orange to stay with you? A. Yes, sir, she came from Detroit.

Q. How long did she live with you—months, didn't she? A. I know she left between Christmas and New Years.

Q. Your brother afterwards came to East Orange from Detroit? A. Yes, sir.

Q. And your sister is living with him? A. Yes, sir. 30

Q. They are living together? A. Yes, sir, but just recently she had lived with me.

Q. She lived with you for a long while continuously. Since then she has been living with your brother? A. Since last October.

Q. And your sister and brother are perfectly friendly today, are you not? A. We are good friends, yes.

Q. You said about being nervous. You drive a car, don't you? A. Yes, sir. 40

Q. You have been driving a car for the last year? A. Yes, sir.

Plaintiffs' Witness, Gertrude G. Harber, Cross

- Q. You got a new car after this accident?
 A. Eight months after the accident.
 Q. Eight months after the accident you bought a new car? A. My husband did.
 Q. And you have been running it ever since?
 10 A. Yes, sir.
 Q. Almost every day? A. Very nearly.
 Q. Driving around Newark? A. I drive if I have to, yes, sir.
 Q. You drive wherever you want to in Newark, don't you? A. I am least nervous when I drive the car than anything else I do.
 Q. You drive it all over Newark, don't you?
 A. Yes, sir.
 20 Q. And you drive in New York at times?
 A. I haven't yet, no, sir.
 Q. Have you ever driven to New York? A. I have never, downtown, in the traffic. I have driven it up at 125th Street.
 Q. You drove up there? A. Just once.
 Q. You had no trouble driving there? A. No, it was this summer.
 Q. And you have no trouble driving through
 30 Newark? A. I avoid it if I can.
 Q. You drove down here two or three times when this case was on with your own car? A. We left it beyond the New Hall of Records, Nelson Place.
 Q. A good parking place? A. Yes, sir.
 Q. And you drove down every morning and drove back? A. I wouldn't say every morning.
 Q. Did you drive down this morning? This
 40 is a beautiful morning. A. I don't know exactly why I didn't. I haven't driven for a week.

*Plaintiffs' Witness, Gertrude G. Harber,
 Re-direct*

- Q. Because the case was coming on? A. Yes, sir. I never had any idea what a terrible ordeal it is.
 Q. If it wasn't for the case you could drive the car anywheres? A. I have been nervous
 10 since the accident.
 Q. The last time you drove down your car—
 A. The case was only on one day.
 Q. Wasn't it on two days and didn't you drive down? A. I didn't the next morning.
 Q. Wasn't it on the calendar four days? A. No, not every day.
 Q. Didn't you testify so at the last trial?

Objected to.

20

RE-DIRECT EXAMINATION by Mr. Osborne:

- Q. You were on a hill before this accident happened, it happened on a hill? A. Yes, sir.
 Q. Was it light or dark? A. It was light.
 Q. You said that your brother put his clutch
 30 out. Where were you on this hill when he put his clutch out, how near to the place of the accident, how near to the top or the bottom of the hill? A. I couldn't tell you in feet, but it was very shortly before the car went off the road.
 Q. When did he put the car in neutral? A. When he disengaged the clutch to put the car in neutral.
 Q. When did he start to coast? A. When he
 40 put the car in neutral.

*Plaintiffs' Witness, Gertrude G. Harber,
Re-direct*

Q. How close to the place of this accident? A. The car went so terrifically fast at that speed I couldn't tell you in feet, but it was just half a minute or so.

10 Q. You started at the top of the hill; is that right? A. Yes, sir.

Q. And then there was a down grade? A. Yes, sir.

Q. From the top of this hill to the place of this accident how far was it? A. It is a very, very long grade. I should say the grade is pretty nearly a mile.

20 Q. What speed was he going down that hill before he disengaged the clutch? A. Well, we had been driving fast all day.

Objected to.

The Court: That will be stricken out. Answer the question responsively.

Q. What speed was he going down the hill? A. Forty miles.

30 Q. Were you able to judge what speed it was at that time? A. Yes, sir.

Q. How far had he gotten along this hill when you saw he disengaged his clutch? A. Probably two-thirds of it.

Q. How far was the scene of the accident from that point? A. I don't think I can just say in linear measurement. It was probably a hundred feet or more.

40 Q. Do you know what a hundred feet is? A. It is about—it is the length of this courtroom.

The Court: The courtroom is sixty-seven feet.

*Plaintiffs' Witness, Gertrude G. Harber,
Re-direct*

By the Court:

Q. I understood you to say that half a minute before he went off the road he disengaged the clutch; is that your recollection of it? A. It was very shortly; it was a very short space of time. 10

Q. Forty miles an hour for half a minute, you would go just exactly a quarter of a mile. I am wondering whether he was that far away? A. I wouldn't say so, no, sir.

By Mr. Osborne:

Q. Were you still going on the down grade when he disengaged his clutch? A. Yes, sir. 20

Q. Were you still on the down grade when he put his car—

Objected to as leading.

Q. What have you to say about the grade when he disengaged his clutch?

Mr. Carey: I object to that. Counsel has been all over that. 30

A. It is a good sharp grade hill.

Mr. Osborne: At this point I will read the testimony of Dr. James J. Lawlor, which was taken by stipulation.

(Mr. Osborne reads same to the jury.)

Plaintiffs' Witness, William J. Harber, Direct

WILLIAM J. HARBER, sworn in behalf of plaintiffs:

Direct-examination by Mr. Osborne:

- Q. You are one of the plaintiffs in this case?
 10 A. Yes, sir.
 Q. You are the husband of the other plaintiff?
 A. Yes, sir.
 Q. Where do you live? A. 10 Summit Street, East Orange.
 Q. What is your business? A. I am in the jewelry business, jewelry manufacturing business.
 Q. Are you in business for yourself? A. Yes,
 20 sir.
 Q. Where? A. 516 Fifth Avenue, New York.
 Q. Before October 2nd, 1925, did you have any conversation with Mr. Fred Graham, the defendant? A. Yes, sir, I did.
 Q. Where did you meet him or see him? A. I happened to be in Detroit.
 Q. Where did he live at that time? A. Detroit, Michigan.
 30 Q. What were you in Detroit for? A. On a business trip.
 Q. Where did you see him in Detroit? A. Statler Hotel.
 Q. How did you happen to see him? A. He 'phoned to me. He knew I was in town and he 'phoned to me.
 Q. Was there any conversation relating to any proposed trip of his coming east? A. He came
 40 down and I invited him to lunch with me and he told me that the object of his trip was that he was anxious to make a trip east on a vaca-

Plaintiffs' Witness, William J. Harber, Direct

tion, that he had bought himself a new car and he didn't want to make the trip alone, and he asked my permission if I would allow Mrs. Harber, my wife, to take part of the trip with him. I reluctantly consented.

- Q. You told him he could? A. Yes, sir. 10
 Q. What was the next that you knew about an accident or anything? Where were you on October 2nd? A. On October 2nd, I arrived in New York, the morning of October 2nd.
 Q. And did you find out somebody sent word to you? A. When I arrived in my office—
 Q. Did you find out on October 2nd? A. Yes, sir, through a telegram. 20
 Q. What did you do? A. I took a noon train.
 Q. Did you arrive in Millers Falls or Montague City where the hospital was? A. Yes, sir.
 Q. Did you see your wife in the hospital? A. Yes, sir.
 Q. Did you see Fred Graham? A. I saw him later.
 Q. How much later? A. After I visited my wife at the hospital I saw him probably an hour or an hour and a half later. 30
 Q. At the hospital or somewhere else? A. Somewhere else.
 Q. What conversation did you have with him, if any? A. I saw my wife at the hospital and after I saw her I went down to Greenville, where I had met him, and I asked him—demanded an explanation of what had happened.
 Q. What did he say? A. He said, "I am very, very sorry about this accident." He said, "I was tired and I had been driving very hard and 40

Plaintiffs' Witness, William J. Harber, Direct

I was anxious to get to Greenville to put up for the night," and he explained—

Q. Did he say how the accident happened? A. Yes.

10 Q. What did he say? A. He said he was coasting down a steep and dangerous grade and when he got to the bottom of this grade or hill he saw two curves ahead of him and lost his head and he deliberately drove his car into one of those curves, and he was very sorry, and I said to him, "You have a very good reason for feeling sorry, you must realize that what has happened, that my wife is scarred up for the rest of her natural life, and it will make a great difference in her opinion, and words fail me of how I feel towards you."

Q. Tell us anything he said. A. He said he was very sorry and it was all his own fault, and he was driving down this steep and dangerous grade, he saw those two curves ahead of him, he lost his head, he deliberately drove into one of those curves.

30 Q. Did he say how he was operating his car? A. He said he was coasting his car down this hill.

Q. Did he have anything further to say about that operation? A. No more than he was sorry.

Q. Did you visit her up there off and on? A. My recollection is that I was up there about five times.

40 Q. You went back and forth to New York? A. From all different parts of the country that I happened to be in traveling at that time.

Q. How long was she there? Did you bring her home? A. She was there three weeks. I brought her home myself.

Plaintiffs' Witness, William J. Harber, Direct

Q. At the hospital you saw what she had, nurses, doctors, private room, and so forth? A. Yes, sir, I had all of that.

Q. After she got home what was her condition, as far as you observed it? A. That she was intensely nervous. 10

Q. What was her condition, as far as the scar on her face was concerned? A. The scar was quite prominent.

Q. Do you go on trips? A. Yes, sir.

Q. You live with your wife in East Orange? A. Yes, sir.

Q. And you see her frequently? A. Yes, sir.

Q. Can you tell this jury about that scar, from your observation? A. As I said before, I noticed that the scar makes her intensely nervous and has made a great difference in her appearance. 20

Q. Is the scar visible to you? A. It is visible to me.

Q. It is visible to the same extent always? A. There seems to be days when it is not quite as prominent as it is others. 30

Q. Has anybody reimbursed you for these doctors, nurses, hospital bills that we have been talking about? A. No, sir.

Q. In traveling to and from this place seeing your wife, what did it cost you to make these trips?

Objected to.

Objection sustained.

Plaintiffs' counsel prays an exception to this ruling of the Court. 40

Exception noted as ground of appeal.

Plaintiffs' Witness, William J. Harber, Direct

CROSS-EXAMINATION by Mr. Carey:

Q. What day did you get up there, October 2nd? A. Yes, sir.

10 Q. The day of the accident? A. The day after the accident.

Q. You saw your brother-in-law that day? A. That night.

Q. That was October 3rd? A. That is right.

Q. And did you say your brother-in-law said to you that he tried to go down a steep grade? A. That is my recollection.

Q. You haven't got a copy of what he said to you anywheres? A. No, sir.

20 Q. You didn't mention a steep grade at the last trial? A. I don't remember what I said at the last trial.

Q. Did you say at the last trial your brother-in-law said that he was traveling at an excessive speed over a dangerous and winding road, is that what you said at the last trial? A. Yes, sir, I believe I said that.

30 Q. At this time you say he was driving down a steep grade, coasting. You didn't mention coasting at the last trial? A. It would be impossible for me to remember this word for word.

Q. When you were on the witness stand two months ago you didn't use the word "coasting" at all, did you? A. I don't remember whether I did or not.

Q. Did your brother tell you he was very sorry the accident happened? A. Yes, sir.

40 Mr. Osborne: I will offer in evidence the testimony of Mr. and Mrs. Harber taken at the last trial.

Plaintiffs' Witness, Jeannette Graham, Direct

Mr. Carey: I will object to its admission.

The Court: Objection sustained.

JEANNETTE GRAHAM, sworn in behalf of plaintiffs: 10

Direct-examination by Mr. Osborne:

Q. You are a sister of Mrs. Harber, one of the plaintiffs, and a sister of Fred T. Graham, the defendant? A. Yes, sir.

Q. And you live with your brother, the defendant? A. Yes, sir. 20

Q. Where? A. 96 Ninth Avenue, East Orange.

Q. In 1925 were you living with your brother in Detroit? A. I think in September, 1925, I went there to keep house for him while he took a vacation.

Q. Where was your home in 1925? A. Until my sister was married my home was in Boston with her and after she was married I went to Detroit. 30

Q. Did your brother reside in Detroit at that time? A. Yes, sir.

Q. Did you live permanently in Detroit, or temporarily? A. Temporarily.

Q. Then in September you came on to New England or some place? A. No, after my sister was married—

Q. You came to visit your sister after she was married? A. I was just on here two or three days. 40

Plaintiffs' Witness, Jeannette Graham, Cross

Q. She was married when? A. In August, 1925, the 29th, and I went to Detroit the first of September.

Q. Where were you on October 2, 1925? A. In Detroit.

10 Q. Did you come on east after that? A. I came the Sunday after the accident.

Q. Did you see your sister after the accident? A. Yes, sir.

Q. Did you see the automobile? A. Yes, sir.

Q. What was the condition of the automobile? A. The front part of it smashed up, the part was broken that the body rests on, the lamps were broken and the front fenders were more or less broken and the windshield and the instrument board was broken and bent.

Q. Did you talk to your brother-in-law about this accident? A. Yes, I did.

Q. Up there at the hospital? A. Going from Greenville to the hospital.

Q. Did he say anything about this accident? A. Yes, he did.

Q. What did he tell you? A. He told me that he was coasting down a long grade, the car was going pretty fast, and he saw this double curve ahead and he knew he couldn't make it—he was afraid he couldn't make it, lost his head and deliberately drove off the road.

CROSS-EXAMINATION by Mr. Carey:

Q. You said that he was driving down this steep grade and he saw the curve and he deliberately drove off the road? A. Yes, sir.

Plaintiffs' Witness, Jeannette Graham, Cross

Q. Are you sure he used the word "deliberately"? A. Yes, sir, I am positive.

Q. You didn't write that down? A. No, sir.

Q. Did you talk with your brother about this case last night? A. Not very much.

Q. I say did you talk with your brother about this case last night? A. Very little.

Q. You ate dinner with him last night? A. No, sir, I didn't.

Q. The night before? A. No, sir, I haven't for a month.

Q. Before that you did? A. Yes, sir.

Q. And you and he are very friendly, you and your brother? A. Yes, sir, we are friendly.

Q. Right this minute? A. Yes, sir.

Q. And he and your sister are very friendly? A. Yes, sir.

Q. Were you at your sister's house the day the summons was served on your brother? A. I don't understand you.

Q. Were you at your sister's house the day the summons was served on your brother at his sister's house in East Orange? A. No, sir, I wasn't there.

Q. Weren't you there that day? A. No, sir, I wasn't.

Q. Of course, you didn't see the accident and you don't know anything about it? A. No, sir.

RE-DIRECT EXAMINATION by Mr. Osborne:

Q. You have talked with your sister and brother about this accident, haven't you? A. Yes, sir.

Defendant's Witness, Fred T. Graham, Direct

Q. Never made any secret about it, did you?
A. No, we didn't.

PLAINTIFFS REST.

10 Mr. Carey: I move for a nonsuit against
the plaintiffs on the ground that there is
no negligence established, as far as this
defendant is concerned, as far as the law
is applicable to this case. I call your
Honor's attention to the cases which I
submitted. I say that the plaintiff and
defendant were engaged in a common en-
terprise and that there was contributory
negligence in any event. She was riding
20 alongside of her brother, knew how he
ran the car, and made no suggestion as to
what was done and was perfectly satisfied
up until the happening of the accident.

The motion will be denied.

Defendant's counsel prays an exception
to this ruling of the court.

Exception noted as ground of appeal.

30 Mr. Carey: I offer in evidence the de-
cisions I have practiced.

Mr. Osborne: No objection.

FRED T. GRAHAM, defendant, sworn in his
own behalf:

40 *Direct-examination by Mr. Carey:*

Q. Where do you live? A. 96 Ninth Avenue,
East Orange.

Defendant's Witness, Fred T. Graham, Direct

Q. What is your business? A. Marti Radio
Company.

Q. You are a brother of one of the plaintiffs
in this suit? A. Yes, sir.

Q. And a brother-in-law of the other plaintiff?
A. Yes. 10

Q. The plaintiff and you and your sister are
very friendly? A. Friends, yes.

Q. Always have been? A. Yes, sir.

Q. You are now this very minute? A. Yes.

Q. You and your brother-in-law are not quite
so friendly? A. Not quite, no, sir.

Q. The day of this accident you were riding
in your car? A. Yes, sir. 20

Q. And your sister was with you? A. Yes,
sir.

Q. And you had been riding all day? A. Yes,
sir.

Q. What time did you start? A. I think it
was around eleven o'clock, probably 10:30 in the
morning, the date of the accident.

Q. Where did you drive from? A. Rochester,
New Hampshire. 30

Q. Who is at Rochester that you know? A.
I have relatives there.

Q. Had you been visiting relatives there, you
and your sister? A. Yes, sir.

Q. And you had been traveling through there
three or four days? A. Yes, sir.

Q. It was a new car? A. Yes, sir.

Q. You had been driving a Dodge car? A.
Yes, sir. 40

Q. What was this? A. A Hupmobile.

Q. You drove over the hills from Athol? A.
Yes, sir.

Defendant's Witness, Fred T. Graham, Direct

Q. From Athol up to Rochester you didn't have any trouble? A. No, sir.

Q. Where did you have your first trouble when the accident happened? A. At the time of the accident, yes, sir.

10 Q. And the kind of country you had been going through was pretty much the same all day? A. Yes, sir.

Q. Winding roads, all open country, wasn't it? A. Yes, sir.

Q. No big cities up there? A. Not of any size, no, sir.

Q. You didn't pass through a single city? A. Yes, sir.

20 Q. Which? A. Country towns.

Q. I mean, no cities at all? A. No.

Q. Running out to the place where this accident happened were you perfectly sober? A. Yes, sir.

Q. You hadn't been drinking at all? A. No, sir.

Q. And you and your sister were happy as you were going along? A. Yes, sir.

30 Q. Everything was all right? A. Yes, sir.

Q. And looking at the beautiful scenery, and the scenery was beautiful in October? A. Yes, sir.

Q. How about the roads? A. The average country roads.

Q. Paved? A. Yes, sir.

Q. A shoulder off to the side? A. Yes, sir.

40 Q. You remember the accident, don't you? A. Yes, sir.

Q. Up to the time of the happening of this accident did you expect any accident?

Defendant's Witness, Fred T. Graham, Direct

Objected to.

Objection sustained.

Q. Did you see anything up to that time that warranted you in believing that you were going to have an accident? 10

Objected to.

Objection sustained.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

Q. When you were riding just before the accident were you riding along? A. Yes, sir.

Q. Anything abnormal about the way you were riding at that time? A. Not that I recall, no. 20

Q. If there was anything you would recall it, wouldn't you? A. Yes, sir.

Q. Tell us just what happened. A. We were coming down this hill, had the clutch out. When I got down to the foot of it the car left the road.

Q. What made you leave the road? A. I don't know.

Q. Did you see anything that would cause you to leave the road? A. No. 30

Q. Anything unusual? A. No, apparently not; no reason.

Q. Did you examine the road afterwards to see? A. No, I didn't examine it particularly.

Q. Did you find any sand there? A. Yes, there was some sand there.

Q. Is that where you went off the road? A. Yes, sir. 40

Q. Was there anything to make you go off the road except the sand as you could see? A. Not that I remember, no.

Q. Had you lost control of the car?

Defendant's Witness, Fred T. Graham, Direct

Objected to.

(Question withdrawn.)

Q. Was there anything that you could see there that caused you to go off the road except the sand? A. No.

10 Q. You didn't try to drive off the road? A. No.

Q. You were not trying to drive into the trees? A. No, sir.

Q. There were no side roads that you could branch off of there? A. No, sir.

Q. When you found yourself going off the road what did you do? A. It happened so suddenly there wasn't anything to do.

20 Q. Did you stop the car? A. It stopped itself very abruptly.

Q. The car didn't turn over, did it? A. No.

Q. When your car stopped and you went off the road you got out? A. Yes, sir.

Q. Did you help your sister over to the house? A. Yes, sir.

30 Q. And then telephoned for the doctor? A. Mrs. Dorsey.

Q. Did you have any cuts yourself? A. Yes, sir.

Q. Where? A. One over the eye and one on my chin.

Q. Did you go to the hospital with your sister? A. Yes, sir.

Q. Did you have your cuts treated, too? A. Yes, sir.

40 Q. And your sister was treated? A. Yes, sir.

Q. And you stayed there how long? A. Not very long; possibly two hours.

Defendant's Witness, Fred T. Fraham, Cross

Q. How long did you stay there in town after the accident? A. I believe three days.

Q. In the meantime your brother-in-law had come up, hadn't he? A. Yes, sir.

Q. And have you sent for your sister who was in Detroit? A. Yes, sir.

10 Q. There was no quarrel between you and your sister about anything? A. No.

Q. Did you tell your brother-in-law that you were driving down the hill at a reckless speed or anything like that? A. I don't recall that.

Q. You would recall it if you did?

CROSS-EXAMINATION waived.

PLAINTIFFS REST.

DEFENDANT RESTS.

Mr. Carey: I would like to read one page of testimony.

The Court: The rule is that counsel may read any evidence taken at the former trial for which he has laid the foundation. That is, where the witness testified or states he don't remember, then if there be any related testimony, any other bearing upon the same subject, then the other side may read that relating testimony. It is admitted that the testimony from which you are reading is the testimony taken at the former trial?

Mr. Osborne: Yes.

Mr. Carey: I am reading from page 33 of the testimony.

For instance as to going to the lawyer's office, a question was:

"Q. Who took you? A. The cab, with my nurse.

"Q. Your nurse took you while you were sick? A. Yes.

10 "Q. Took you out of the hospital? A. I was up and around at that time.

"Q. How many days was that after the accident? A. I should say a week or ten days.

"Q. A week or ten days after you were up and around the hospital? A. Yes.

"Q. You were up and around and the nurse took you to a lawyer? A. Yes.

20 "Q. Who told you to go with the nurse to that lawyer? A. My husband wrote me a letter and said I was to see a lawyer."

On page 34:

"Q. In other words, after the first week you were in the hospital you were able to walk all around the building? A. Yes, sir."

On page 39:

30 "Q. You say you noticed that car as it was going that day at the time of the accident? A. Yes, sir.

"Q. How far before it went off the road did you notice it? A. Well, almost as we went off the road.

"Q. Almost as you went off the road? A. Almost, within a few feet or so.

"Q. That was forty miles? A. Yes.

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

40 "Q. It wasn't any faster than that? A. Not when I looked at the speedometer.

"Q. That was just as it was going off the road? A. A car length or two before, possibly.

"Q. A car length or two before? A. Perhaps fifty or a hundred feet—it happened so quickly."

In relation to the trip:

"Q. You met your brother to visit your aunts and uncles? A. Yes. 10

"Q. You wanted a little vacation? A. Yes.

"Q. So you thought you would have your vacation together? A. Yes.

"Q. That is how you came together? A. Yes.

"Q. You were fond of your brother? A. Yes.

"Q. He was fond of you? A. Yes.

"Q. You knew that he was going on a vacation and you both wanted to have that vacation together up in New England among your relatives? A. Yes. 20

"Q. That is what made you and your brother go up there? A. Yes.

"Q. Your brother was going to bring his car, and of course, you didn't bring your car because you didn't have yours with you? A. No.

"Q. Your brother said he would bring his car? A. Yes."

Mrs. Harber, on page 49, recited a conversation she had with her brother, in which he said: 30

"Gert, my God! I couldn't even find the brake on the other car. If I had my Dodge instead of this new Hupmobile this never would have happened. I am very, very sorry."

DEFENDANT RESTS.

PLAINTIFFS REST. 40

Mr. Carey: I move for the direction of a verdict on the ground that there has no gross negligence been shown here, so far as this defendant is concerned. The fair weight of evidence on that subject-matter is in favor of the contention of the defendant, and there is nothing here under the pleadings in this case to warrant any findings by either of the plaintiffs against the defendant on the charge of negligence, having in view the law that is applicable to the case, or any other charge, and, secondly, it is clearly and absolutely apparent that these people were there on a common venture and being engaged in a common venture there is no action of one against the other accruing out of the operation of the common venture. There the evidence is fairly conclusive, and if there was negligence, that the plaintiff would be guilty of contributory negligence, being a well experienced operator of a car riding along and seeing nothing that was wrong in the operation of the car, making no complaint of anything at the time of the accident, and, in view of those facts, I submit that on those three grounds we are entitled to the direction of a verdict.

The Court: The motion will be denied.

Defendant's counsel prays an exception to this ruling of the court.

Exception noted as ground of appeal.

The Court charges the jury as follows:

Charge of the Court.

DUNGAN, J.:

Gentlemen of the jury. Before touching upon the facts and law, I want to say that you are not to be influenced at all in the decision of this case by the refusal of the Court to nonsuit the plaintiff and direct a verdict in favor of the defendant, as you have heard the defendant's attorney request, as the denial of these motions means that there are facts for the jury to decide and that it is not a matter of law for the Court to decide, and those motions are not to be considered by you at all in your consideration of this case.

The plaintiff and defendant are sister and brother. During the latter part of December, 1925, shortly after the marriage of the sister, who is the plaintiff, they went on an automobile ride, starting at Albany and ending at Rochester, New Hampshire, where they spent two or three days and then started to return on Friday morning, October 2nd. Sometime between five and six o'clock that afternoon there was an accident. The brother lost control of his automobile and it ran off the right side of the road, bumping over rocks, against trees, and finally ending up in a ditch or a brook and damaging the automobile and injuring the sister of the defendant, and the sister brings this suit against her brother alleging that the accident resulted because of his negligence in the operation of the automobile.

We are not concerned in the consideration of this case with the fact that the parties to this suit are brother and sister, except incidentally,

Charge

nor are we concerned with the motives which actuated the sister in bringing this suit against her brother, notwithstanding the fact that the best of relations and feelings seem to exist between them at the present time, as well as at the time of the accident, but the question with which we are concerned is whether or not the sister has proven her case, as the law requires, by the greater weight of the evidence which has been produced here in this court before you.

In New Jersey the law is that where a person invites another to ride in his automobile he owes to such person, whether a member of his family or otherwise, the duty of exercising reasonable care in its operation, and if he fail in that duty, as the result of which injury occur to the passenger, he is negligent and ordinarily liable in damages to such person for such injury and its consequences.

Negligence, as defined by the courts of New Jersey, is the failure to exercise that degree of care which careful and prudent persons ordinarily exercise under the same or similar circumstances and conditions; but that is not the law in Massachusetts where this accident occurred, and our courts have said that in regard to the merits and rights involved in actions, the law of the place where they originated is to govern; so, if the plaintiff could not have recovered in the State of Massachusetts, she should not be permitted to recover here. If she could have recovered there, she can recover in this state, and the decisions of the courts of the State of Massachusetts hold that a person riding in an automobile as an invited guest

Charge

and injured by the negligence of the owner who was driving such automobile cannot recover damages of its owner and operator unless it appear by the evidence that there was gross negligence in its operation, emphasizing the word "gross," and gross negligence has been defined by the courts of the State of Massachusetts, as follows, quoting from the case of Altman v. Aronson, a Massachusetts case reported in 121 N. E. Reporter, page 505, at page 506: "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence, is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is something less than the wilfull, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence. It falls short of being such

Charge

reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure." This definition does not possess the exactness of a mathematical demonstration, but it is now what the law now affords. Following that suggestion, as was stated in the argument of Judge Carey, there may be some difficulty in determining just where the line should be drawn between ordinary negligence, gross negligence or wilful negligence. In wilful negligence it is required that the person who is charged with it, in order to be found guilty, must have been shown to have done what he did purposely and intentionally. There is no proof in this case which will warrant a finding that what Mr. Graham did was done purposely and intentionally and that he had a purpose to injure his sister and himself. Gross negligence falls short of that, as defined by the courts of Massachusetts, but it must be greater than ordinary negligence as defined by the courts of that and other states. So the question, therefore, is whether or not the evidence, by its greater weight, shows not that the defendant was guilty of negligence, ordinary negligence, or that he was guilty of wilful negligence, but that he was guilty of gross negligence as defined by the courts of Massachusetts in the decision from which I have just quoted.

Mrs. Harber says that as they were approaching Millers Falls and going down quite a long

Charge

hill her brother threw out his clutch and the car coasted. She said she told him some ten minutes before that, that he did not realize the danger of those hills because he was accustomed to drive in more level territory, and that she thought it was very dangerous to coast down these hills. So if she is right about it, the effect of that was to warn him of the danger of what he was doing, that it was dangerous, but he said he was master of the car and that she did not have anything to worry about. She says this was a winding hill and that he was driving fast, and that shortly before, almost at the same time, she looked at the speedometer and found that he was driving at forty miles an hour down this hill with his clutch disengaged, and then suddenly something happened. As they were approaching this curve, not yet to the main part of the curve (she said that the road swerved at that point a little to the left), the car went straight ahead off the road quite a considerable distance, I think she said a thousand feet, and at another time I thought she said a hundred feet—whatever she said you will remember—over rocks, past trees, and into this ditch with such a force as to damage the forward part of the car, break the windshield and the instrument board and to injure both the occupants.

Mr. Graham, when called in his own defense, admits that he was driving down that hill with his clutch disengaged. He says he does not know what caused the automobile to leave the ground. He said there was some sand there at about the place where the car went off.

Charge

She says he did not put on the brakes. He does not say that he did because he said it happened so quickly that there was nothing to do, and when asked if he stopped the car; he said the car stopped itself. The testimony of the plaintiffs and the defendant is the only testimony you have in this case of the occurrence except the testimony of the admissions subsequently made by the defendant to other people, which I shall not quote nor shall I comment upon them. That, however, may be considered by you in determining the question of liability involved in this case, and, if you decide that the evidence preponderates that Mr. Graham was guilty of more than ordinary negligence, even though his conduct fell short of a wilful, intentional injury, that he was guilty of gross negligence which resulted in the injury to his sister, she and her husband are entitled to your verdict. Of course, his right to recover depends on her right to recover. If you decide that gross negligence has not been shown and that she is not entitled to your verdict, then neither is her husband entitled to your verdict; but if you decide that Mrs. Harber should have your verdict, then she is entitled to such damages as will compensate her for the injury which she received, for her subsequent pain and suffering, for her disability, and for her disfigurement, if she is disfigured. She had a broken arm. That was put in a cast and she had it in that condition for about four weeks I think she said. She had bruises about her body, many places, and lacerations, but the most serious lacerations, as I have understood her

Charge

testimony, were those upon her legs and her face. This lacerated leg became infected and she said it was bandaged, and it was seven or eight weeks before that healed. The laceration upon her face involved the nose and one eye, and the doctor says that laceration required twenty-five stitches. She was in the hospital three weeks when these wounds upon her face healed, and then she returned to her home, but the scar which is over the nose and eyes she claims to be permanent and to be a disfiguring scar, for which a good-looking woman, or any woman, or a man, for that matter, is entitled to be compensated for. There are five disfiguring scars, so that if you decide that she is entitled to your verdict, she is entitled, as I have already told you, to compensation for the injuries which she has sustained and for the disfigurement. If she is entitled to your verdict, then her husband is entitled to compensation for loss of services and the society of his wife and the amount of money which he has expended in an attempt to cure his wife's condition and alleviate her suffering, and those charges are admitted to be reasonable and are \$478.

The plaintiffs' requests have been charged in the main charge, except No. 3, which is withdrawn.

As to the defendant's requests I have charged them with the exception of the fifth, which I decline to charge.

The sixth I have charged.

The seventh I will charge:

"The mere happening of the accident does

Charge

not establish evidence or proof of any negligence—gross or otherwise.” That I charge you.

The eighth I will charge:

10 “If the accident occurred through the exercise of poor judgment by the defendant—the defendant is entitled to a verdict, as the exercise of poor judgment does not constitute gross negligence.”

I decline to charge the ninth request.

I have covered the tenth.

20 The eleventh: “If the jury find that the plaintiff and the defendant were engaged in a common enterprise at the time of the accident, then regardless of any question of negligence, the defendant is entitled to a verdict.” That I charge you.

The twelfth is:

30 “If the jury find that the plaintiff were away on a common purpose—the spending of their vacation together and the car of the defendant was being used for the mutual accommodation of the parties in the development of their common purpose, then the defendant is entitled to a verdict.”

The thirteenth:

“If the jury find that the plaintiff and defendant were engaged in a common enterprise—of course that ends the case and the defendant is entitled to a verdict.”

40 Of course, that states correctly the rule of law, but the difficulty I have with those requests is that the testimony of the plaintiff was that she had previously been a month on a vacation in New Hampshire. She expected to be married

Charge

and she married the latter part of August and she was then living with her husband in Orange. She said she had not seen her brother for a couple of years, that he had been engaged in business in Detroit. He wrote that he wanted to take a vacation in Massachusetts and New Hampshire and asked her if she would not go along with him. She said that she wanted to see her brother, and it was discussed between her husband and her, and it was finally decided that she should go with him, and she did go, not by any request on her part, but at his request. The mere fact that she did go with him and that they were mutually enjoying the trip and the society of each other, under those circumstances, standing alone, does not make a situation where they were engaged in a mutual enterprise. It does not appear that at that time she had any control of the operation of the automobile. The brother controlled the automobile—that is, he was driving it and it was his automobile. She had ten minutes before warned him or spoke to him about the driving down hill with his clutch out, and the mere fact that at the moment of the accident she was not protesting about the speed or the fact of his driving without the clutch, would not prevent her from recovering if she did all that an ordinarily careful and prudent person would naturally do to curb the speed or to change his method of driving. So that unless there be evidence in the case from which you can find it to be established—because that is a defense—that they were engaged in a mutual enterprise, then the Court ought not to charge these requests. How-

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Charge

ever, if there be such evidence, then the requests are proper, and I charge you that they correctly state the law.

(The jury retires.)

10 Mr. Carey: I take exception to the Court's refusal to charge the several requests submitted by me in the language of the requests or substantially.

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

Exception noted as ground of appeal.

Mr. Carey: I take an exception to the failure of the Court to charge each request separately.

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

Exception noted as ground of appeal.

Mr. Carey: And also an exception to that part of the Court's charge wherein the Court omitted to charge requests No. 11, 12 and 13.

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

Exception noted as ground of appeal.

30 Mr. Carey: And to the Court's characterization of the testimony and the effect of it in the case as bearing upon these particular requests, and the legal principle applicable.

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

Exception noted as ground of appeal.

40 Mr. Carey: I want to take an exception to the Court's charge wherein the Court defines the law of New Jersey as applicable to this case upon the ground that the expression of the law of New Jersey, it being in some respects different than the law of Massachusetts appli-

Charge

cable to the case, may tend to prejudice the jurors and to cloud in their minds the meaning of the words "Gross negligence" as expressed in the Massachusetts authority.

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

Exception noted as ground of appeal.

Mr. Osborne: I desire to except to your Honor's charging defendant's requests Nos. 8, 11, 12, and 13 under any circumstances.

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

Exception noted as ground of appeal.

20 *Defendant's Requests to Charge.*

1. State the law of Massachusetts fixing liability or nonliability in the defendant.

2. Define gross negligence.

3. If the defendant was not guilty of gross negligence the defendant is entitled to a verdict.

4. The burden of proof to show the defendant was guilty of gross negligence is upon the plaintiff and unless established by a preponderance of the evidence the plaintiff is not entitled to a verdict. 30

5. If the jury find the plaintiff was acquiescent in the manner of the operation of the car at the time of the accident the defendant is entitled to a verdict. 40

6. If the jury should find the accident was caused by ordinary negligence in the operation of the car as distinguished from gross negligence the defendant is entitled to a verdict.

Charge

7. The mere happening of the accident does not establish evidence or proof of any negligence—gross or otherwise.

10 8. If the accident occurred through the exercise of poor judgment by the defendant—the defendant is entitled to a verdict, as the exercise of poor judgment does not constitute gross negligence.

9. In order to admit of any recovery against the defendant in any event the defendant must have been found to have been engaged in an absolute reckless disregard of the right of the plaintiff.

20 10. Every right of the plaintiff husband to recover is entirely dependent upon the plaintiff wife's right to recover.

11. If the jury find that the plaintiff and the defendant were engaged in a common enterprise at the time of the accident, then regardless of any question of negligence, the defendant is entitled to a verdict.

30 12. If the jury find that the plaintiff were away on a common purpose—the spending of their vacation together and the car of the defendant was being used for the mutual accommodation of the parties in the development of their common purpose, then the defendant is entitled to a verdict.

40 13. If the jury find that the plaintiff and defendant were engaged in a common enterprise—of course that ends the case and the defendant is entitled to a verdict.

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"Brief"
May, 1928

To be argued by
Wm. Hamilton Osborne.

NEW JERSEY COURT OF ERRORS AND APPEALS

GERTRUDE G. HARBER and WILLIAM J. HARBER, her husband,
Plaintiffs-Appellants,

vs.

FRED T. GRAHAM,
Defendant-Respondent.

Action at law.
On appeal from judgment after verdict for defendant.

BRIEF OF PLAINTIFFS-APPELLANTS.

Appeal from judgment after verdict for defendant by jury in Essex Circuit Court under charge by Judge Nelson Y. Dungan, in a negligence case to recover damages sustained by Gertrude G. Harber while riding at invitation of Fred T. Graham in his car which he was driving. There is no question of contributory negligence in the case. It is not a collision case and no other car was involved; defendant's car drove off the road at a curve. The accident happened in Massachusetts and is subject to the "gross negligence" rule (See definition of gross negligence, p. 79 of Case on Appeal; complaint, p. 1; verdict and judgment, p. 7; notice and grounds of appeal, pp. 7, 8, 9).

The grounds of appeal are based upon the Court's charge (see grounds, p. 8, and charge, p. 84, fols. 10, 20-40; p. 85, fol. 40; p. 86, fol. 1) to

the jury that "if the accident occurred through the exercise of poor judgment by the defendant, the defendant is entitled to a verdict" and "if plaintiff and defendant were engaged in a common enterprise at the time of the accident, then regardless of any question of negligence the defendant is entitled to a verdict."

(See plaintiffs' exceptions thereto, p. 87, fols. 10-20.)

1.

Grounds of appeal relied upon.

Appellants rely upon the first, second and third grounds set forth on page 8. The last paragraph of the grounds (p. 9, fol. 20) is to be read in connection with the three first grounds of appeal, since a thorough examination of the decisions demonstrates that the "common enterprise" rule applies *only* to cases involving the negligence of a third person, as, in case of collision with another car.

For the rest, grounds 4 and 5 are not argued here since they involve no error upon the part of the Trial Judge, and are relied upon only to the extent that this Court will afford relief where facts are undisputed, and where undisputed facts entitle a party to judgment. No motion for directed verdict in favor of plaintiffs was made on the trial.

2.

But for the charge of the Court that the exercise of poor judgment cannot constitute gross negligence, the jury might well have found in favor of the plaintiffs.

(See the definition of gross negligence in Court's charge, p. 79, and fuller definition by the same Massachusetts case set forth in later point in this brief.)

The facts are undisputed. The sole witness for defendant was defendant himself (pp. 68-73).

He had been riding all day; it was around 10:30 in the morning that they started out; it was a new car, Hupmobile, whereas he had been driving a Dodge; they drove over hills (p. 69); "we were coming down this hill, had the clutch out; when I got down to the foot of it the car left the road" (p. 71, fol. 20); there was some sand there (p. 30); he does not recall telling his brother-in-law (plaintiff husband) that he was driving down the hill at a reckless speed (p. 73, fol. 10) *but he does not deny it.*

In fact defendant does not deny anything that any of plaintiffs' witnesses say.

Plaintiffs' witnesses say:

Plaintiff Gertrude G. Harber (p. 46):

"Accident happened 5 o'clock afternoon (p. 25) on September 22, 1925 (p. 27), at Miller's Falls, Massachusetts (p. 28); on the hills defendant coasted his car, he would throw out the clutch and coast the car; 'I told him that I thought it was very dangerous and he didn't realize

the danger of the hills there in New England, and he said he was master of the car and I didn't have anything to worry about' (p. 29). This conversation occurred five or ten minutes before the accident, a hill or two before that; then they reached the hill of the accident and (p. 29) 'it is a very long hill and winding and he threw the clutch out and we were driving fast, and as we did the car was gathering momentum I looked at the speedometer and it was forty miles and about a thousand feet ahead of us was this double curve, nothing to obscure it; the car was gathering momentum all the time and (p. 30) this curve was ahead and he just drove the car off the side of the road and went over rocks and so forth and finally it came right up in a culvert, a ditch, and buried the front of the car in the embankment, my head went through the windshield' and she was badly injured (p. 30, fol. 30); going down the hill the car was out of gear; when she looked at the speedometer it was past 40 miles an hour, not up to forty-five (p. 30, fol. 40); the car left the road before the curve was reached, and about 125 feet before (p. 31, fol. 30); the defendant did not put his foot on the brakes (p. 31, fol. 40); defendant said next morning: 'My God, I didn't even have my foot on the brake—I don't know how it happened—I didn't even have my foot on the brake. I had my foot on the gas. If I had my Dodge car this wouldn't have happened' (p. 36, fol. 10); 'He told Doctor Lawlor at the scene of the accident that he had lost his head and went to sleep; he said he had been out the night before and he was very, very tired and he had driven about twelve hundred miles in three or four days and he was very, very

tired (p. 57). It was daylight (p. 58); he was going down the hill forty miles an hour, he disengaged his clutch when he had gotten two-thirds down the hill; it was a good sharp grade hill.' "

Plaintiffs' witness, Dr. Lawlor (p. 15, fol. 30):

"Defendant said, 'He was coasting down that hill and I think he said he was coming to a bridge; he said he was up all night the night before and he was in a hurry to get to Greenfield or some place; I know he said he was driving fast and he said he was up all night the night before and he had made a long trip and he was in a hurry to get to Greenfield where he could rest, and coasting down that hill and I think he said he was coming to a bridge when he saw a fence' (p. 18), the accident happened right outside the Dorsey house, the fence was broken, the car was there, happened sometime around 4:30."

Plaintiff husband, William J. Harber, says (p. 61, fol. 30):

"Defendant said, 'I am very, very sorry about this accident; I was tired and I had been driving very hard and I was anxious to get to Greenville to put up for the night' (p. 62), he said he was coasting down a steep and dangerous grade and when he got to the bottom of this grade or hill he saw two curves ahead of him and lost his head and he deliberately drove his car into one of those curves, and he was very, very sorry (p. 62, fol. 20), he said he was very sorry and it was all his own fault, and he was driving down this steep and dangerous grade, he saw these two curves ahead of him, he lost his head, he deliberately drove into one of those curves."

Plaintiffs' witness, Jeannette Graham, says (p. 66):

"Defendant told me he was coasting down a long grade, the car was going pretty fast, and he saw this double curve ahead and he knew he couldn't make it—he was afraid he couldn't make it, lost his head and deliberately drove off the road."

Under the Massachusetts cases, "gross negligence" is for the jury.

Massaletti vs. Fitzroy, 228 Mass. 487, 118 N. E. 168.

In *Burke vs. Cook*, 141 N. E. Rep. (Mass.) 585, the Court found that the accident was caused by some unseen object right in the road which tore the tire from the wheel while the car was going 35 miles an hour; the road was straight. Held not gross negligence.

We are not attempting to quote Massachusetts law under this point, but merely to indicate that the Massachusetts cases leave the matter to the jury as we leave ordinary negligence cases to the jury. *Massaletti vs. Fitzroy*, 228 Mass. 487, 118 N. E. 168, contains a long discussion of the entire question.

The point we do make here, is that the Trial Court in the instant case very properly left the matter to the jury (his charge contained fatal error, as we believe).

On the undisputed evidence, the jury here could easily have found "gross negligence" to exist on the part of a man who admittedly *was warned well in advance about the dangerous character of the hills, who fell asleep at the*

wheel, who was driving very fast downhill, who was coasting down a long, steep, dangerous, curving hill, who could see, had he looked, a dangerous curve 1,000 feet ahead, who disengaged his clutch and kept his car out of gear while going down, who drove all the way downhill at 40 miles an hour, or if, not all the way, then who increased his speed as he went down and maintained that speed at a distance of little less than a quarter of a mile from the curve he approached, who never put his foot on the brake, but put it on the gas, who said he lost his head, who approached a fully visible curve at such a speed that he could not negotiate the curve, but had to deliberately drive off the road and smash his machine and smash up his guest.

The jury could have found gross negligence from all that. The jury did not have the chance so to find, because the Court charged them that if the accident was due to poor judgment, the defendant was entitled to a verdict, as poor judgment could not constitute gross negligence.

It is within the range of possibility that under such a charge the jury might well consider that every act of negligence was due to the exercise of poor judgment.

For the law on this charge, see later point of this brief.

3.

But for the charge of the Court that if defendant and his guest were engaged in a joint enterprise, the verdict must be for the defendant, the jury might have found for the plaintiffs.

While it is true that plaintiff's statement is to the effect that she was purely and simply an invited guest (p. 60, fol. 40; p. 61, fols. 1-10; and p. 27, fol. 10),

"he wrote he hadn't had a vacation for several years, he wanted to go to New Hampshire and Massachusetts, he didn't want to take the trip alone, and he didn't know anybody else available that had the time to go with him that I had and he asked me to go on the trip to New Hampshire,"

and while the Court inclined to her view that she had had plenty of vacation, had had plenty of visit with her family, and wanted to get back to her husband (wed only a few weeks before), and that she was accommodating her brother and he was not accommodating her, in going on this trip, and while the Court so expressed itself in a properly guarded manner (see the whole of p. 85), yet there is enough in the cross-examination of plaintiff (p. 22, fol. 30; p. 23; p. 40, fol. 30; p. 41, fols. 10-30), relating to the pleasure she must have had in taking this trip "through the beautiful Berkshire Hills," etc., possibly to leave the jury in doubt as to whether this was or was not what is called a "common enterprise," and if the jury thought it was, then the Court

told them that they must find for the defendant.

Hence, *but for the Court's charge on that point*, the jury might have found for the plaintiffs.

4.

Did the jury believe that the accident was caused merely by poor judgment, or did they believe the plaintiff and defendant were engaged in a common enterprise, or both?

If they believed either they must find for the defendant. If they believed that the accident was due to gross negligence, and not due to poor judgment, they were only halfway through; if they further believed that the plaintiff and defendant were engaged in a common enterprise, then gross negligence became immaterial; they must find for the defendant. If, on the other hand, they believed that there was no common enterprise, but that there was poor judgment, then they must find for defendant. If they believed both they must find for defendant.

The law is, as demonstrated later, that poor judgment may well be the very essence of any degree of negligence; and the law is, as demonstrated later, that the doctrine of "common enterprise" does not apply to cases of this kind but only to cases where the negligence of a third party ("imputed negligence" cases) is involved, and even then, only where some kind of control over the machine rests in the guest.

It was error to charge the jury that, if the accident occurred through the exercise of poor judgment by the defendant, the defendant is entitled to a verdict, as the exercise of poor judgment does not constitute gross negligence.

(See charge, p. 84; ground 1 of appeal, p. 8.)

Let the Court note that counsel on both sides are agreed on two propositions: 1. That plaintiff must show gross negligence. 2. On the definition of gross negligence under the Massachusetts cases.

The Massachusetts decisions do not justify the above charge.

Fogg vs. N. Y., N. H. & H. R. R., 223 Mass. 444, 446; 111 N. E. Rep. 960.
Tuttle vs. St. Ry., 239 Mass. 553, 556; 132 N. E. Rep. 360.
Rundgren vs. St. Ry., 201 Mass. 156; 87 N. E. 189.

Those cases sustain the following proposition:

“One placed in sudden danger is held responsible for error of judgment, if his own negligence contributes to cause the emergency.”

See in this connection, *Landry vs. Herbert*, 137 Atl. Rep. 97 (Supreme Court of Vermont, April, 1927) involving an automobile case like the instant case, citing those Massachusetts cases in support of that doctrine.

The United States Supreme Court in *The Germaine*, 196 U. S. 589, at page 596, holds:

“It is a *mistake to say*, as the petitioner does, that if a man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The notion that care ‘should be coextensive with the judgment of each individual’ was exploded long ago in an English case (*Vaughan vs. Menlove*, 4 Scott 244; 18 Eng. Rul. Cas. 715) and since that decision there seems to have been little or no doubt upon the subject.

“There is *no basis* in the law for a doctrine that negligence does not exist where the person responsible for an accident uses his best judgment. As observed by the Supreme Court of the United States, ‘The standard of conduct, whether left to the jury or laid down by the Court, is an external standard, and takes no account of the personal equation of the man concerned.’ Where a person of ordinary prudence could have foreseen that some injury would likely result from a particular act of negligence, one charged with such an act will be liable for the consequences, though he could not have foreseen the particular injury that actually did result.”

White's Supplement to Thompson's Commentaries on Negligence, Vol. VII (1907), §28, p. 9.

Citing:

Oceanic Steam Navigation Co. vs. Aitken, 196 U. S. 589.
Drum vs. Miller, 135 North Carolina 204; 65 L. R. A. 890.

See the following *Massachusetts case*, decided by *U. S. Circuit Court of Appeals*, First Circuit, February 20, 1928; *Pepper vs. Morrill*, 24 Fed. Rep., 2nd series, pages 320-324, holding:

"In action for injuries sustained when automobile belonging to plaintiff's husband, and which defendant was driving as husband's agent, *crashed through fence and struck telegraph pole in making turn at fork in highway, finding that defendant was guilty of gross negligence and that plaintiff was in the exercise of due care, sustained.* Plaintiff, while riding with her husband as guest in his automobile when automobile traveling at high speed crashed through fence and into telegraph pole in turning at fork in highway, had right of action for gross negligence against defendant, to whom husband had entrusted driving of car and who was at the time acting as his agent or servant, *even if plaintiff's husband was negligent in calling out to defendant to turn to the left at the fork in question.*"

In that case, it appeared that the man who drove the car was a guest of the husband and wife; but the husband got tired of driving and asked the guest to drive; the guest drove fifty miles an hour; she warned him; just before the accident they reached a descending grade; she thought she noticed an increase in speed; there was a fork in the road here, and the husband said to the defendant, "Turn to the left, Jack," and then the accident occurred. There was a hill just before reaching the scene of the accident from West Brookfield; the hill was straight about halfway down and a curve started to the left about halfway down to the bottom; there is a fork in the road; at this fork the hill still descended, not so much; at the fork in the road there was a state fence, and two or three lamp posts; this car had broken the fence, the lamp posts and sideswiped

the fence, and there was a big telegraph pole into which the car crashed; the top and front side of the car were completely wrecked. "*It seemed that the car had started down the Ware road, and the driver suddenly turned to the left onto the Springfield road.*" The Court said that the accident occurred because the defendant, driving at an excessive rate of speed, attempted to turn from the Ware road onto the Springfield road when too close to the fence; and that even if her husband was responsible for directing the defendant so to turn, she, the wife, still had a right of action against the defendant.

Now if any case exhibits the exercise of poor judgment, that case exhibits it. The driver in that case was driving fast, but he had had no accident until, upon the exercise of judgment to turn to the left at the fork, the accident happened. If he had not followed that poor judgment the accident would not have happened. His poor judgment in turning onto the road he should have gone upon, at a time when he was going fast, constituted his gross negligence.

See *Goble vs. Delaware R. Co.*, 3 N. J. L. J. 176, where Court holds:

"What is negligence? It is easy, of course, to say in a general way, it is an omission of duty; it is a violation of the obligation which enjoins care and caution in what we do. It ordinarily excludes design, and hence a man, however honest he may be, *cannot excuse himself from the consequences of not doing what he ought to have done by saying: 'Why, I did not act, because I did not think there was any danger.'* *It was his duty to*

think, and if he fails to use the efforts or take the precautions which an ordinarily prudent man would employ in like circumstances, he is guilty of negligence."

There are cases where a negligent person, using judgment, is excused, but they are all cases where a sudden emergency arises, not from his own act but from the act of someone else, where he is innocently placed in a position where he must act at once. There an error of judgment is excused. But those cases do not apply to a case like ours.

Landry vs. Hubert, 137 Atl. Rep. 97.
Fogg vs. N. Y., N. H. & H. R. R., 223 Mass. 444, 446; 111 N. E. 960 and other Massachusetts cases there cited.

"Gross negligence," even under the Massachusetts rule, differs in *degree only* from ordinary negligence. *Judgment* is nothing but thought, care, prudence. To say that a man may exercise bad judgment and be free from gross negligence is to ignore the Massachusetts decisions defining "gross negligence."

See *Burke vs. Cook*, 141 N. E. 585, and *Altman vs. Aronson*, 121 N. E. Rep. 506, both being decisions of Massachusetts Supreme Court relied upon by the defendant's counsel on the trial, from which the Court charged the jury on gross negligence:

"Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act of omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very

great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes *all* negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence. But it is *something less than the wilful, wanton and reckless* conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence, or which renders a defendant in rightful possession of real estate liable to a trespasser whom he has injured. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in *degree* of inattention while *both* differ in *kind* from wilful and intentional conduct which is or ought to be known to have a tendency to injure. Gross negligence does not imply wilful conduct, either actual or constructive."

Note from the foregoing Massachusetts definition of "gross negligence," that gross negligence is the absence of care, of diligence, a forgetfulness of legal obligation, a small amount of watchfulness and circumspection, that it involves lack of prudence, and is in the same class with ordinary negligence, differing *only in degree*. Certainly *poor judgment* under that definition may amount to gross negligence.

common enterprise, would be to put a premium on careless driving. Even where a third party is charged with negligence, the cases hold that the injured party must have been in such position that he could somehow control the car in which he was a passenger.

7.

It is respectfully submitted that the judgment should be reversed and a new trial ordered.

We believe the Court's charge on both points, poor judgment, and common enterprise, was erroneous. If either was error, we are entitled to reversal.

Respectfully,
WM. HAMILTON OSBORNE,
Counsel for Plaintiffs-Appellants.

91 MAY. 7. 1928

New Jersey Court of Errors and Appeals

GERTRUDE G. HARBER and WIL-
LIAM J. HARBER, her husband,
Plaintiffs-Appellants,

v.

FRED T. GRAHAM,
Defendant-Respondent.

Action at Law.
On Appeal.

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

This case comes up on appeal from a judgment entered in the Essex County Circuit Court, after verdict by the jury in favor of the defendant. The suit was instituted to recover damages alleged to have been sustained by the plaintiff, Gertrude G. Harber, as the result of an automobile accident. The accident occurred in Massachusetts. The plaintiff and the defendant are sister and brother. The car was being driven by plaintiff's brother, and the accident was caused by the car running off the road.

It is conceded that the case is governed by the law in Massachusetts. The decisions of the courts of the State of Massachusetts hold that a person riding in an automobile as an invitee, who receives an injury caused by the negligence of the owner who is driving said automobile, cannot recover damages of its owner and operator, unless

it appears by the evidence that there was *gross negligence* in its operation.

Altman v. Arensen, 121 N. E. Rep. 505;
Massaletti v. Fitzrey, 118 N. E. Rep. 168;
Burke v. Cook, 141 N. E. Rep. 585.

The Court properly charged the law as it existed under the decision of the Courts of Massachusetts (cited cases). The only grounds of appeal argued are to the alleged error in the Court's charge.

Plaintiff in his brief relies only upon the first, second and third grounds of appeal.

POINT I.

There is no error in the charge of the Court.

A reading of the Court's charge shows that Judge DUNGAN fairly submitted the questions in the case to the jury.

Appellant's first argument that the Court erred in charging the jury that the exercise of poor judgment cannot constitute gross negligence. Counsel for appellant, while admitting that the Court very properly left the determination of the case to the jury, contends that the jury did not have the chance to find gross negligence from the facts in the case, "because the Court charged them that if the accident was due to poor judgment, the defendant was entitled to a verdict as poor judgment cannot constitute gross negligence." This relates to the charge by the Court of the defendant's eighth request to charge (p. 84).

It is elementary that in considering a Court's charge, it is necessary to consider the charge as a whole and not to pick out one portion of the charge standing alone.

We submit that the eighth request to charge is a proper charge. The exercise of poor judgment does not constitute gross negligence under the Massachusetts law.

The Court charged the jury on page 80 that gross negligence as defined by the courts of Massachusetts, must be greater than ordinary negligence, so the Court charged the jury:

"So the question, therefore, is whether or not the evidence, by its greater weight, shows not that the defendant was guilty of negligence, ordinary negligence, or that he was guilty of wilful negligence, but that he was guilty of gross negligence as defined by the courts of Massachusetts in the decision from which I have just quoted."

And on page 79 the Court charged the jury as to what constituted gross negligence of the decisions of the Massachusetts Courts, quoting particularly from the case of *Altman v. Aaronson*, 121 N. E. Rep. 505, at page 506:

"Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. It is materially more want of care than constitutes simple inadvertence. It is an act of omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence, is in gross negligence magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence.

But it is something less than the wilful, wanton and reckless conduct which renders a defendant who has injured another liable to the latter even though guilty of contributory negligence. It falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from wilful and intentional conduct which is or ought to be known to have a tendency to injure."

It is difficult to see how the Court could more correctly state the law of Massachusetts and present the question to the jury for its determination as to whether upon the testimony produced before it, the jury could determine whether the defendant was guilty of gross negligence or not. Further towards the end of his charge on page 82, the Court charged the jury as follows:

"That, however, may be considered by you in determining the question of liability involved in this case, and, if you decide that the evidence preponderates that Mr. Graham was guilty of more than ordinary negligence, even though his conduct fell short of a wilful, intentional injury, that he was guilty of gross negligence which resulted in the injury to his sister, she and her husband are entitled to your verdict."

How can it be said that the Court took away from the jury the right to determine as to whether or not the accident was caused through the gross negligence of the defendant, simply because he charged a request by the defendant that the exercise of poor judgment does not constitute gross negligence.

Likewise, as to the action of the Court in charging the defendant's 11th request and 13th request relating to the law as to common enterprise.

The Court on page 84 after charging the 11th and 13th requests, followed them up by charging the jury as follows:

"Of course, that states correctly the rule of law, but the difficulty I have with those requests is that the testimony of the plaintiff was that she had previously been a month on a vacation in New Hampshire. She expected to be married and she married the latter part of August and she was then living with her husband in Orange. She said she had not seen her brother for a couple of years, that he had been engaged in business in Detroit. He wrote that he wanted to take a vacation in Massachusetts and New Hampshire and asked her if she would not go along with him. She said that she wanted to see her brother, and it was discussed between her husband and her, and it was finally decided that she should go with him, and she did go, not by any request on her part, but at his request. The mere fact that she did go with him and that they were mutually enjoying the trip and the society of each other, under those circumstances, standing alone, does not make a situation that they were engaged in a mutual enterprise. It does not appear that at that time she had any control of the operation of the automobile. The brother, controlled the automobile—that is, he was driving it and it was his automobile. She had ten minutes before warned him or spoke to him about the driving down hill with his clutch out and the mere fact that at the moment of the accident she was not protesting about the speed or the fact of his driving without the clutch would not prevent her from recovering if she did all that an ordinary careful and prudent person would naturally do to curb the speed or to change his method of driving. So that unless there is evidence in the case from which you can find it to be established—because that is a defense

—that they were engaged in a mutual enterprise, then the Court ought not to charge these requests. However, if there be such evidence, then requests are proper, and I charge you that they correctly state the law.”

CONCLUSION.

An examination of the testimony in the case will demonstrate that the question as to whether or not the accident was caused as the result of gross negligence on the part of the defendant, was properly left to the jury for determination. The jury saw the witnesses, saw their conduct on the stand and after weighing the testimony, found a verdict for the defendant. This Court has repeatedly held that where there is a question of facts to be determined, that it will not interfere with the finding of the jury, this Court not having before it the witnesses, and the opportunity of seeing them give their testimony, and not having before it the conduct of the witnesses on the stand. Particularly should this apply where the suit is instituted by a sister against a brother, where as in this case, the testimony shows that the most friendly and kindly feelings exists between them, and they were the only witnesses to the accident.

It is respectfully submitted that the question of fact having been properly submitted to the jury and their having found a verdict for the defendant that this Court will not interfere with that finding by the jury.

It is respectfully submitted that the judgment below should be affirmed.

No. 91, May Term, 1928.

CAREY & LANE,
Of Counsel with Respondent.

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