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New Jersey Court of Errors and Appeals

GEORGE F. POOL, *Plaintiff-Appellant,* *vs.* RUFUS DONALDSON BROWN, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Essex County Circuit Court.*

BRIEF OF PLAINTIFF-APPELLANT.
FACTS.

This suit was brought by the plaintiff, George F. Pool, to recover damages for injuries sustained from being hit by defendant's automobile. The plaintiff was attempting to cross Halsey street, Newark, New Jersey, from the east side at a point where the cross-walk would have been if the pavement had not been asphalt, where the same is intersected by Bleecker street. Plaintiff testified that he was on the east side of Halsey street and endeavored to cross over to the west side along a direct line with the south curb of Bleecker street, *i. e.*, on the cross-walk (Case, page 12, line 6). There was standing at the curb to plaintiff's right a top or covered wagon, and on plaintiff's left an automobile. (Case, page 10, line 30.) Plaintiff in crossing the street passed between this standing automobile and wagon. Before he left the curb he looked in both directions north and south and saw no automobile, but he saw only a slow moving wagon coming from the north. (Case, page 37, lines 21-34.) (Case, page 38.)

The plaintiff was walking on a cross-walk for he was in direct line with Bleecker street sidewalk, but

the pavement of Halsey street is asphalt (Case, page 10, line 5; Case, page 12, line 6.). As the plaintiff reached the center of Halsey street (Case, page 9, line 39; page 10, line 1) and at the end of the covered wagon, he again looked north and saw only the slow moving wagon in the center of the street about forty or fifty feet beyond, and this wagon was coming very slowly (Case, page 12, line 16; Case, page 39, line 20), and he then looked south and saw a wagon about forty or fifty feet away (Case, page 11, line 1), and while looking south and before he could look north again he was hit by the defendant's automobile coming from the north (Case, page 44, line 11; Case, page 45, line 25). The plaintiff did not see the automobile until he was hit (Case, page 12, line 20). He did not see or hear anything of the automobile. He heard no signal or warning (Case, page 12, line 33). He heard no horn blown (Case, page 13, line 9). He heard no shouting or hollering (Case, page 51, line 9; line 19).

Miles Fagan, a witness for the plaintiff, testified that there was no signal given (Case, page 83, line 25; Case, page 87, line 33). On this state of facts the Trial Court directed a non-suit on the grounds that there was no evidence to go to the jury as to the negligence of the defendant and that the plaintiff himself was contributorily negligent. From the granting of the non-suit the plaintiff appeals.

LAW AND ARGUMENT.

A pedestrian and the driver of a vehicle have reciprocal rights and obligations in using the public streets of the city, each has a lawful right to use the same without incurring injury from the other. Each must use due care so as not to injure the other, and also to protect himself. Whether or not a pedestrian or the driver of a vehicle is negligent or guilty of

contributory negligence is ordinarily a question of fact under all circumstances for the jury.

Turner vs. *Hall,* 74 N. J. L., 214.

Hennessey vs. *Taylor,* 76 N. E. (Mass.), 224.

Huddy "On Automobiles" (3rd Ed.) page 182, Sec. 149.

Rodgers vs. *Phillips,* 92 N. E. (Mass.), 327.

"Footmen, as well as vehicles, have a right to use the streets. Drivers of automobiles should act in view of this rule and in anticipation that pedestrians may be present upon the street, especially at crosswalks * * *. So, while footmen must use ordinary reasonable care for their own safety, and cannot recover for an injury to which their own negligence is approximately contributed, it has been held that they are not bound to be continuously looking and listening for automobiles upon the penalty of being conclusively held guilty of contributory negligence as matter of law."

Elliott—Roads and Streets, Vol. 2, Section 1123.

It is the province of a Court to treat these questions as questions of law only when the facts warrant the jury finding only one way. If, on the other hand, the jury could possibly find either way, even if there is slight evidence to warrant such finding, the Court should not take the case from the jury no matter what may be the Court's own opinion concerning the facts.

POINT I.

THE DEFENDANT IN THE PRESENT CASE WAS NEGLIGENT.

There is a duty encumbered upon every driver of an automobile while using the public streets of the city to carefully operate his car and to give the proper warnings to others who may at the same time be lawfully using the streets. The failure to so operate his car, or to give such warning, is negligence. This is especially true where the driver is passing an intersecting street where it is more likely a pedestrian might be crossing.

Gross vs. *Foster,* 118 N. Y. Supp., 889.
Duter vs. *Sbaren,* 81 Mo. App., 612.
Miller vs. *New York Taxicab Co.,* 120 N. Y. Supp., 899.

In the present case, the defendant was passing an intersecting street and gave no signal or warning of any kind, although his car was coming around Hahne & Company's vehicle which was at the curb. In the case of *Lampe* vs. *Jacobsen,* 90 Pac. (Wash.), 654, the Court held on a state of facts very similar to the present case that there was sufficient evidence of the negligence of the defendant to go to the jury. The facts of that case were as follows:

> "Plaintiff was on the sidewalk on the east side of First avenue, at its intersection with Marion street in the City of Seattle. First avenue runs north and south or approximately so. He walked north along the sidewalk some twenty or thirty feet from the corner, and then stepped into the street, and started in a northwesterly direction, diagonally across First avenue. After taking a few steps from the sidewalk, he was struck by defendant's automobile, which was going in a northerly or northeasterly direction * * *."
>
> "Respondent claims that there was no horn

sounded or other warning given of the approach of the automobile, and this is corroborated by several witnesses. The Chauffeur testified that he sounded the horn in approaching Marion street, which crosses First avenue, a distance south of where the accident occurred. He says that the plaintiff walked directly in front of his machine, and he did not see him until within four or five feet, and it was then too late to stop * * *."

"Plaintiff testified that, as he started from the corner of the street he looked up and down, but saw no automobile; that he then walked along a few steps and started across the street, his attention at that time being upon three street cars, one going in one direction and two in the other upon two tracks near the middle of the street; and that he did not see or hear the automobile until it struck him. * * *."*

"Appellant contends that there was not sufficient evidence to go to the jury upon the question of defendant's negligence, and also urges strenuously that the evidence shows contributory negligence on the part of the plaintiff. The operation of an automobile upon the crowded streets of a city necessitates exceeding carefulness on the part of the driver. Moving quietly as it does, without the noise which accompanies the movements of a street car or other ordinary heavy vehicles, it is necessary that caution should be continuously exercised to avoid collisions with pedestrians unaware of its approach. The speed should be limited, warnings of approach given, and skill and care in its management so exercised as to anticipate such collisions as the nature of the machine and the locality might suggest as liable to occur in the absence of such precautions. The pedestrian also must use such care as the ordinary prudent man would use under like cir-

cumstances. As before stated, there was much conflict as to the details of the occurrence which resulted in plaintiff's injury; but we think there was ample testimony to go to the jury upon the question of defendant's negligence and plaintiff's contributory negligence, and that the record is such that we cannot disturb the jury's conclusions thereon."

In the case of *Hennessey* vs. *Taylor,* 76 N. E. (Mass.), 224, the Court under similar circumstances decided the negligence of the defendant was a question for the jury.

The case of *Miller* vs. *New York Taxicab Co.,* 120 New York Supp., 899 (decided by the Supreme Court, appellate term of New York), is a case almost identical with the present case. The decision of the case is as follows:

"The plaintiff was run down by an automobile of the defendant company on Second avenue, at its intersection with East Fifty-fourth street, in the Borough of Manhattan, City of New York, and brings this action to recover damages for injuries so received. Her complaint was dismissed at the close of her case."

"It appears from her own testimony and that of several other witnesses that the accident occurred as the plaintiff and her companions were crossing Second avenue on the northerly crosswalk from east to west and as the plaintiff was between the westerly car tracks. The plaintiff and all the other witnesses, who were crossing the avenue together, testified that they looked both up and down the avenue before they went upon the tracks, but saw no car or automobile. Each of them denied having seen the automobile until the moment of the collision."

"From this testimony plaintiff was entitled to go to the jury. Her case was that, being upon

the crosswalk, where she had an equal right with the defendant (Barker *vs.* Savage, 45 N. Y., 191, 6 Am. Rep., 66; Young *vs.* Herrmann, 119 App. Div., 445, 104 N. Y. Supp., 72), and exercising due care, she was struck by an automobile which none of the witnesses had seen until the moment of the collision, although they had taken particular pains to look for it. This state of facts is conceivable, and made out a *prima facie* case of negligence against the defendant, and of freedom from contributory negligence on the part of the plaintiff. Whether or not the testimony was credible was for the jury to say in the first instance. The judge could set their verdict aside if he was dissatisfied with it, but he could not dismiss the complaint when the evidence on its face made out a case for the plaintiff. Colt *vs.* Sixth Ave. R. R. Co., 49 N. Y., 671; Place *vs.* N. Y. C. & H. R. R. R. Co., 167 N. Y., 345, 60 N. E. 634; Lewis *vs.* Erie R. R. Co., 105 App. Div., 292, 94 N. Y. Supp., 765; Reilly *vs.* Troy Brick Company, 184 N. Y., 399, 77 N. E., 385."

"The judgment should therefore be reversed and a new trial ordered, with costs to appellant to abide the event. All concur."

It is to be noted in the present case that there was an obstruction between the plaintiff and the north. This put an extra duty on the defendant to take care that no pedestrian using the crosswalk at the intersection of the streets would come from behind the obstruction and be injured. For one thing there should have been a warning given.

POINT II.

THE PLAINTIFF IN THE PRESENT CASE WAS NOT CONTRIBUTORILY NEGLIGENT.

He was in the exercise of due care. He was endeavoring to cross an asphalt street on the direct line of the sidewalk of an intersecting street. He was, as it were, on the cross-walk. He testified that he looked, before starting across the street, in both directions, and also while crossing the street and saw nothing or heard nothing to warn him of any danger. This does not show any contributory negligence. But it does show the defendant's automobile was coming at a great rate of speed, because it was not in the line of vision.

In the case above cited, *Lampe* vs. *Jacobsen,* the Court decided that there was ample testimony to go to the jury upon the question of the contributory negligence of the plaintiff. The Court held in that case that it was not error for the trial court to leave the question of contributory negligence of the plaintiff to the jury.

In the case of *Tiffany & Co.* vs. *Drummond,* 168 Federal, 47 (Circuit Court of Appeals, Second Circuit, 1909), one of the assignments of error relied upon was that the court below should have directed a verdict in favor of the defendant on the theory that the plaintiff was himself negligent. The facts in this case are as follows:

> "The plaintiff did not continue on the cross-walk, but angled north so as to reach the opposite side of the street about seventy feet above the corner. He looked both ways for approaching vehicles as he started, but upon his own testimony it is not quite clear how often he looked south after he started, became engrossed in the enterprise of crossing the torn-up roadbed of the northbound track; certainly he did not so look a

few seconds before the accident or he would have seen the automobile which struck him. *But the* question of his negligence under all the circumstances is clearly one for the jury to pass upon under proper instructions as to his rights and obligations."

In the case of *Kathmeyer* vs. *Mehl;* New Jersey Supreme Court, 60 Atl., 40, the court decided as follows on the question of contributory negligence:

"The next ground upon which the verdict is attacked is that the plaintiff himself was negligent. The evidence showed that he was standing in the roadway conversing with a friend, who had stopped his wagon at the point where the accident happened, for the purpose of engaging in conversation with the plaintiff. We see nothing negligent in the plaintiff's action. Certainly he had no reason to suppose that, merely because he was standing in the roadway, he would be run down by the recklessness of the driver of an automobile. He was lawfully there, and any person using the highway was bound to take notice of him, and to use care not to injure him, and the plaintiff had a right to assume that this would be done."

In the case of *Turner* vs. *Hall,* 74 N. J. L., 214, the Court decided that a young boy catching ball on the street was not guilty of contributory negligence, when he was hit by an automobile.

In the case of *Shapleigh* vs. *Wyman,* 134 Mass., 118, it was decided that the question of due care on the part of the plaintiff was properly submitted to the jury. The facts of that case were as follows:

"The plaintiff passed down the southerly side of Granite street in Haverhill to certain flagstones, at a point where Granite street, Essex street and Locust street form a junction; that

she saw nothing in her way and stepped on the flagstones with the intention of passing over to Locust street; that when she got halfway across Essex street, while on the flagging, she felt the wheels of the plaintiff's carriage strike her on the right arm; and that she was then thrown down and injured by the wheel. On cross examination, she testified that, when she reached the flagging, she looked straight ahead; that she did not look up or down Essex street, but followed the flagging, looking straight ahead; that she did not see the defendant's horse or wagon before she was struck, and did not know which way it came from; that there was nothing to prevent her looking up and down Essex street; and that it was not her business to do so. This evidence of the plaintiff with regard to the care she used before she stepped on the flagging, and while on the same, was not modified or contradicted by any evidence in the case." * * *

* * * *

"At the close of the plaintiff's evidence, the defendant asked the judge to rule that there was no evidence of due care on the part of the plaintiff. But the judge ruled that the question of due care on the plaintiff's part was for the jury; and the defendant excepted. The defendant then introduced evidence of care on his part; and asked the judge to rule that the plaintiff was not entitled to recover."

"The jury returned a verdict for the plaintiff; and the defendant alleged exceptions." The Court said:

> "'We have heretofore held that the decisions as to the degree of care required at a railroad crossing do not afford a proper test of the care which is demanded of one, who,

> in passing from one side to the other of a public street or way, must necessarily have suitable regard to the vehicles lawfully traveling thereon. The same degree of watchfulness is not required as when a railway train, which is usually run at a higher rate of speed, and is confined to a track from which it cannot deviate; and cannot be checked suddenly, except with difficulty and hazard, has a right to use a particular portion of the highway.' "

Tynan vs. *Union Railway*, 114 Mass., 83.
Bowser vs. *Wellington*, 126 Mass., 391.

"The mere fact that the plaintiff did not look up or down Essex street, but straight ahead, when she stepped upon the flagging stones to cross, is not conclusive of a want of due care on her part, which contributed or may have contributed to the accident."

Williams vs. *Grealy*, 112 Mass., 79.
Schrenfeldt vs. *Norris*, 115 Mass., 17.

"Had she done so, it does not appear she could have seen the vehicle by which she was injured, nor indeed that it was in Essex street at the time."

A pedestrian is not known, as a matter of law, when lawfully using the public highways, to be continuously looking or listening to ascertain if automobiles are approaching, under the penalty that upon his failure to do so, if he is injured, his own negligence must be conclusively presumed.

It not being the duty of a pedestrian, when crossing a street or walking in a highway, constantly to be on the outlook for the approach of automobiles, *it is for the jury* to determine how far a failure to observe the amount and kind of travel is indicative of such

want of care as will bar a recovery by one injured by an automobile.

Buscher vs. *New York Transp. Co.*, 94 N. Y. Supp., 798.

Spina vs. *N. Y. Transp. Co.*, 96 N. Y. Supp., 270.

Gerhard vs. *Ford Motor Co.*, 119 N. W. (Mich.), 904.

Arseneau vs. *Sweet*, 119 N. W., 46.

Hennessey vs. *Taylor*, 76 N. E. (Mass.), 224.

The plaintiff in the case at bar did all that a pedestrian in like circumstances could be required to do under the law in the exercise of due care.

POINT III.

THE PLAINTIFF HAS MADE OUT A *PRIMA FACIE* CASE. It was said in the case of *Miller* vs. *New York Taxicab Co.*, 120 N. Y. Supp., 899 (cited *supra*) which was a case almost identical with the present case:

> "This state of facts is conceivable, and made out a *prima facie* case of negligence against the defendant and of freedom from contributory negligence on the part of the plaintiff. Whether or not the testimony was credible was for the jury to say in the first instance."

To be sure, the mere happening of an accident of itself does not make a *prima facie* case and negligence must be proven. But when the facts are that a pedestrian is crossing on a cross-walk at an intersecting street and has looked carefully along the street in both directions and sees no danger and hears no warning and is hit by an automobile, the pedestrian was *prima facie* exercising due care and did all that the law required of him. The automobile on the pedestrian's testimony came suddenly upon him at an inter-

secting street without warning, and this shows *prima facie* negligence of the driver of the automobile.

The statements of the Court in some of the New Jersey cases to the effect that pedestrians in similar circumstances either did not look or else look carelessly have no application to the present case. In those cases, the evidence showed where the car was, how fast it was going, and how many stops it made and these facts were brought by the testimony of several witnesses. In the present case, by the testimony of the plaintiff, the duty is thrown upon the defendant to explain and thus it becomes a jury question. In the present case there are several possible inferences which the jury might have been justified in drawing from the plaintiff's testimony.

First, the automobile may have come from around the wagon which was slowly moving from the north. This could well be as a matter of fact and it would only take a fraction of time to accomplish it. In the second place, the jury might have inferred that the automobile swung in from behind the covered wagon which was standing to the north of the plaintiff and which the plaintiff had just passed. The plaintiff could not be in a position to see the automobile and yet it could be upon him within a few seconds.

If any greater degree of care is demanded of a pedestrian in crossing a street on a cross-walk at an intersecting street than was exercised in the present case, *then a pedestrian could never cross a street in safety and could never recover if he was injured.* The plaintiff in the present case exercised due care on the facts and from all the facts the jury should be permitted to draw its own inferences both as to the negligence of the defendant and the contributory negligence of the plaintiff. As was seen in the case of *Turner* vs. *Hall,* 74 N. J. L., 214, at page 215:

> "Upon a motion to non-suit on the ground of contributory negligence, where the alleged neg-

> ligence must be deduced from facts and circumstances in evidence, the question is usually one for the jury, and the motion will be refused unless it is established by the evidence, beyond fair debate, that the plaintiff was negligent, and that the negligence directly contributed to the injury complained of."

There was an added circumstance in the present case. The plaintiff looked in both directions before starting to cross the street and also when he had passed the covered wagon which was standing to the north of the plaintiff. It was at the intersection of two streets and the plaintiff was on the cross-walk. There surely was a special duty upon the defendant to use care and certainly a signal or warning of some kind under the circumstances should have been given. There was none given. Thus it is a jury question. The court erred in granting the non-suit on either or both of the two grounds, the question of evidence of defendant's negligence and the question of evidence of plaintiff's contributory negligence.

For the above reasons we respectfully submit that there should be a new trial.

Respectfully submitted,

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GEORGE F. POOL,
Plaintiff-Appellant,

vs.

RUFUS DONALDSON BROWN,
Defendant-Respondent.

Action at Law

On Appeal from Essex County Circuit Court.

Brief of Defendant-Respondent.

Statement.

Corrections of Facts as Stated by Plaintiff-Appellant.

Plaintiff-appellant, in his brief, speaks of Bleecker street as a street intersecting Halsey street. This is not a fact as Bleecker street is a bisecting street, running into Halsey from the west and stopping there (Case, p. 39, l. 13). "Q There is no crossing on that street? A No, the street stops there."

There is a great difference where two streets intersect and where one street merely bisects one side of a street into which it runs.

Statement of Facts.

Plaintiff came out of Hahne's store on the easterly side of Halsey street and walked north (Case, p. 10) passing an auto which was standing along the easterly curb of Halsey street, facing north toward Central avenue. Plaintiff was then walking north on the easterly sidewalk of Halsey street. When plaintiff reached a point where this auto,

standing along the curb, was five or six feet to the south of him (Case, p. 12) he turned to the west, intending to go west on Bleecker street. When plaintiff made this turn to the west, one of Hahne's covered top wagons was backed up to the east curb of Halsey street, three or four feet to the north of him (Case, pp. 10, 11, 41). This wagon extended out into the roadway of Halsey street in a westerly direction about twelve feet from the east curb (Case, p. 11). Plaintiff, just before he left the sidewalk, and when he was on the easterly curb of Halsey street, looked to the north and saw no vehicles coming south in the roadway of Halsey street (Case, p. 36) except a team, coming slowly south in the middle of the street and then thirty or forty feet away (Case, pp. 36, 37). He could see the width of Halsey street for thirty or forty feet north toward Central avenue (Case, pp. 37, 38). At p. 38, l. 28, he says: "Well, I simply glanced up and did not see anything there. I do not know whether you would call it particular, yes, might say particular notice." At p. 39, l. 32: "I did not stop entirely still, I kind of slowed up, glanced up and saw nothing but this wagon which was coming very slow pace."

When plaintiff got just to the front of the wagon (Case, p. 11) on a line with the front of it (Case, p. 39), about twelve feet west of the east curb of Halsey street (Case, p. 39), he looked to the north (Case, pp. 11, 39, 42, 45), he says, p. 39, l. 20: "Well, I took particular notice to look around the covered wagon," and p. 45, l. 31: "I took a good look up north and then stepped out, and as I stepped out I looked south." He saw nothing except this team coming along Halsey street in the middle which he had seen when he looked from the sidewalk and he could see to Central avenue or further (Case, pp. 11, 43, 40, 42, 45, 37, 38). This team coming slowly south in the middle of Halsey

street was then about thirty or forty feet north of him (Case, pp. 37, 42, 11).

As plaintiff stepped out from beyond the front of the wagon, two or three feet—one step he says—he was hit (Case, pp. 40, 43, 45, 12, 39). Halsey street is thirty feet wide from curb to curb and Bleecker about the same width (Case, pp. 10 and 13), and Central avenue is about two hundred feet north of Bleecker street (Case, p. 87, l. 9). There is no evidence in the case as to the speed of the automobile.

Plaintiff and his witness Fagan say they heard no horn but plaintiff did not deny that defendant at the time of the accident said that they did not have time to blow their horn but they hollered (Case, p. 51, l. 38).

Plaintiff was injured on December 19, 1912. Suit was commenced on May 18, 1914. Non-suit was granted on May 14, 1915. Substitution of attorneys was had on January 29, 1916 and notice of appeal was served on January 29, 1916.

Brief of the Argument.

It is submitted that while the rights of a pedestrian and a driver of a vehicle using the public highway are reciprocal, that the plaintiff in this case did not use such care as the law requires a reasonably prudent man to do to protect himself from injury, and that the action of the plaintiff was so flagrantly careless, and proof of any negligence of defendant so utterly lacking, that the line was crossed which separates contributory negligence as a debatable proposition for a jury from contributory negligence which is manifest to the court (*Jewett* v. *Paterson Ry. Co.*, 33 Vr. 421, at p. 431).

Under the rule of law in the case of *Ruggieri* v. *Public Service Ry. Co.*, 92 Atl. Rep., p. 61, it is

submitted that there was conclusively shown negligence on the part of the plaintiff, contributing to the accident.

Distinguishing the Cases cited by Plaintiff-Appellant.

The cases cited by the appellant in his brief are mainly from the jurisdictions of New York and Massachusetts, but we submit that even these cases do not bear out the proposition contended for by the appellant. The first group of cases, two in New York and one in Missouri, cited on page 4 of appellant's brief, deal with the question of an intersecting street and with a failure to give warning. In the case at bar we have not an intersecting street but a bisecting street with the pedestrian coming from the side which is not bisected, and as to the question of warning, as the court said in its decision of the case (Case, p. 91): "But what is the purpose of a horn? It is to be sounded at street crossings, and where the person driving the automobile has reason to apprehend some one may be crossing; or, in other words, the horn is to be used when there is somebody to be warned of the approach of the automobile; when the automobilist sees somebody in the line of progress of the automobile, or where he has reason to apprehend from the attitude of people near the line of progress of the automobile, that they will cross if not warned. Nothing of that kind appears in this case. In fact, the contrary appears. Until the very instant of the collision no one appeared in front of the automobile, a possible obstacle to its approach, and no one was in view so that the driver of the automobile could have reason to apprehend that someone—the plaintiff, in this case—might become an obstacle in the progress of the machine." The Court then proceeds to show that

even if this be assumed, the contributory negligence of the plaintiff barred his recovery.

The same opinion applies to the next case cited by appellant, namely, *Lampe* v. *Jacobsen,* a Washington case. There there was an intersecting street. In that case also, while the plaintiff walked along the sidewalk several feet before stepping off into the street, there was no intervening obstruction such as the Hahne wagon from behind which plaintiff suddenly stepped into the roadway, but the chauffeur in the Washington case had, apparently, a clear view of the plaintiff from the time he stepped off the sidewalk. Further, the Washington court apparently holds a driver of an automobile to a rule of "exceeding carefulness" which is more stringent than the rule of reasonable care applied in this State. In the Washington case also, the plaintiff took a few steps from the sidewalk before he was struck, whereas, according to the plaintiff in the case at bar, he was struck at the end of his first step out beyond the wagon (Case, pp. 40, 43, 45).

The New York case of *Miller* v. *Taxicab Co.,* cited on page 6 of appellant's brief, is distinctly contrary to the law in this State as laid down in the case of *Ruggieri* v. *Public Service, supra.*

Furthermore, the law of New York in a later case than the Miller case, lays down substantially the same rule as the Ruggieri case in this State. *Larner* v. *New York Transportation,* 133 N. Y. Supp. 743, where the Court says: "He says that he was looking for a trolley car or wagon, that he saw a car approaching thirty-five or forty feet away, but no wagon or automobile, although it is certain, if the automobile struck him as soon as he stepped down from the platform, it must have been between him and the trolley car, and in plain view all the time. To meet the requirements of the law, one must look with the purpose of finding

out, and it is inconceivable that, if the plaintiff had looked, with this purpose, he should not have seen this taxicab immediately in front of him. All that can be said from the evidence is that the plaintiff was struck by a taxicab and injured. No negligence of the defendant is shown, no freedom from contributory negligence is even fairly suggested by the evidence." To the same effect is *O'Reilly* v. *Davis,* 136 App. Div. 386, where the plaintiff testified that before stepping on a roadway frequented by automobiles, he looked and did not see anything coming, although he had an unobstructed view of two hundred feet, and that he was struck by an automobile before he had walked five feet. This testimony implies that the machine was going one hundred twenty miles an hour, and this impossibility shows that he did not look with the care demanded by the law and he cannot recover.

The Miller case relied upon by plaintiff is, therefore, not the law of New York under such circumstances as those disclosed in the case at bar. The Miller case is further distinguishable in that other witnesses than the plaintiff testify that they looked and saw no automobile until the moment of collision, thus furnishing corroboration for the plaintiff, which is entirely absent in the case at bar. Also it involved an intersecting street and no obstruction.

The reasoning of appellant on page 7, which he has placed in italics, contrary to the rule, that the fact that there was an obstruction to the north of plaintiff laid an extra duty upon defendant omits to emphasize the extra duty laid upon the plaintiff to look and to look carefully before suddenly coming out into a roadway from behind an obstruction which extended twelve feet out into that roadway. On the question of contributory negligence, the case of *Tiffany* v. *Drummond* in the Second Federal Circuit is distinguishable from the case at

bar because in that case the plaintiff was out in the open street for some little time engrossed in the enterprise of crossing the torn up roadbed and it was properly left to the jury as to whether or not the defendant should not have seen him.

The deduction of appellant at the top of page 8 of his brief, that great speed was shown by the facts in this case, is conclusively negatived by the plaintiff's own testimony, for if the automobile traveled from a point beyond the team fifty or sixty feet north of the plaintiff, or further up toward Central avenue, it must have covered a distance of more than fifty feet in a second or while the plaintiff was taking one step, which is incredible, and further, if such had been the case, and if the automobile had been traveling at that incredible speed, it could not have been stopped after plaintiff was struck, as the plaintiff says it was, so that he lay right opposite its rear wheel (Case, p. 69, l. 8). "When the car stopped, I was about opposite, as I remember, about opposite the back wheel." And he was not dragged (Case, ...).

The Kathmeyer case, decided in our Supreme Court, cited page 9 of appellant's brief, is not at all in point, as the plaintiff there, was standing in the roadway and perfectly visible to the approaching driver, which is very different from plaintiff coming out suddenly from behind an obstruction.

The same is true of the Turner case in 74 Law cited by appellant, and also the Massachusetts case of Shapleigh, where the plaintiff was out in the middle of the street, at a junction of three streets and perfectly visible to approaching drivers.

The citations from the Massachusetts authorities on pages 10 and 11 of appellant's brief that the law applicable to railroad crossings and the degree of care to be used in crossing same is not neces-

sarily applicable to crossing highways is entirely beside the issue which is the degree of care required by this plaintiff in suddenly coming out into the highway from behind an obstruction from the side of a street, along which vehicles are standing, and not at an intersection. It is true, as appellant argues, that a pedestrian need not be continuously looking out, but if there ever is a time when there is a duty upon him to look, it is when he steps out from behind an obstruction and close to it, as he did in the case at bar, and the New York, Massachusetts, and Michigan cases cited on page 12 of appellant's brief fall into the classes which have been distinguished.

Take for example the case of *Gerhard* v. *Ford Motor Company*. That was a case where the plaintiff got down from a delivery wagon, took some packages from it and was walking along in the middle of the road beside it, when the defendant's automobile came up behind him and struck him in the back and pushed and dragged him a distance of sixty-six feet, after which the machine ran about one hundred feet before stopping. An attempt to distinguish a case dealing with such facts, from the case at bar, need not be made to this court.

The reference of appellant on page 13 to New Jersey cases which hold that pedestrians in similar circumstances did not look or else looked carelessly, as having no application to the case at bar, is noteworthy chiefly as an effort to dodge such a controlling case as that of *Ruggieri* v. *The Public Service*, (*supra*).

We also dissent from plaintiff's view that the duty of explanation falls upon the defendant. It seems to us that it rests upon the plaintiff and as to the possible inferences which appellent mentions on page 13, we submit as follows:

1. Take appellant's first proposed inference that that automobile came around the wagon which

was in the middle of Halsey street, it must have come from a distance of more than two hundred feet in a second, as plaintiff says at page 43: "Q Well, how far could you see toward Central avenue past that truck (around which the automobile supposedly might have come), how many feet? A Well, I could see all the way to Central avenue." The plaintiff also says he could see the width of the street for thirty or forty feet and at page 11, l. 9, that this truck was the only thing he saw from where he was to Central avenue or further. He also says on page 44, l. 36, that he could see the roadway to the west of the wagon for sixty feet north of him, and it is submitted that an inference that an automobile traveling at a speed of at least sixty feet a second could not make a turn around a wagon on a thirty-foot street, and the evidence conclusively shows that it was not going at any such speed for it stopped before it passed him, after striking him, and it therefore must have been within his view when he looked.

The same reasoning applies to any possible inference that the automobile swung in from behind the covered Hahne wagon to the north of the plaintiff. It is also to be noticed that if the automobile had swung in from behind the Hahne wagon, its easterly side would have been headed slantwise to the southwest and would have been further out from the end of the Hahne wagon than the plaintiff was. If, after swinging from behind the Hahne wagon it had straightened out, it must have been within the plaintiff's view when he looked.

The plaintiff was struck one step, three feet, after he stepped beyond the westerly end of Hahne's wagon. This took a second or less and the plaintiff must have been in a position to have seen the automobile which struck him, if he looked at all. It is not a question of a few seconds as appellant argues on page 13. Plaintiff was not out in the

roadway a few seconds before the automobile struck him, which would mean three or four steps, he walked out immediately in front of or into the side of the automobile which must have been within his view. Attention is called again to the mis-use by appellant of the word intersection on page 14.

As the Court said in granting the motion to non-suit (Case, p. 90): "It seems to me that if there ever was a case in which the jury had nothing upon which to base their verdict except the mere happening of the accident, it is this case."

Point I.

The plaintiff was guilty of negligence contributing to the accident.

Halsey street is a north and south street about thirty feet wide from curb to curb and paved with asphalt. Its westerly side is bisected by Bleecker street opposite the rear of Hahne's store. Plaintiff came out of Hahne's store and walked north along the easterly side of Halsey street until he reached a point opposite the southerly line of Bleecker street, along which he desired to go. There were standing along the easterly curb of Halsey street, opposite Bleecker street, an automobile, side to the curb, facing north, and about nine feet north of the north end of this automobile one of Hahne's wagons backed into the street, its front about twelve feet out into the roadway, and the horse swung around facing north. The plaintiff selected a point between this automobile and this wagon, as the place where he would cross Halsey street. He started across about six feet north of the automobile and three feet south of the wagon and proceeded out a distance of twelve feet which brought him in a line with the westerly end of the wagon.

Up to that point he was protected by the wagon on the north, which was a covered wagon and which concealed him from the view of any vehicle approaching from the north. His further progress across Halsey street would be in the open and as he stepped out from behind Hahne's wagon, he was almost in the middle of the street and the duty was upon him to make observations of the traffic on Halsey street so that he might safely cross. That there was such an obligation upon him he apparently recognized. He says before leaving the sidewalk that he looked to the north and saw no vehicle in the roadway of Halsey street except a team coming slowly south in the middle of the street, then about fifty or sixty feet away to the north, and that this was the only vehicle between him and Central avenue, a street two hundred feet away.

When he reached the end of Hahne's wagon, and before stepping out into the open, he again looked to the north and says he could see the full width of the roadway for sixty feet and that there was no vehicle other than the slow going truck. He then took a step, looking to the south as he did so, and was immediately struck from the north by the defendant's automobile, or ran into it. The automobile came to a stop and plaintiff was lying in the roadway by its rear wheel.

It is submitted that the plaintiff failed to look with such care as the law requires or he would have seen the automobile and avoided the accident.

In *Ruggieri* v. *Public Service Ry. Co.*, 92 Atl., 61, plaintiff after looking, took two steps, ten feet, when he was struck by a car which he saw was not within eighty yards of him when he looked. In the case at bar plaintiff took one step and was struck by defendant's automobile which he says was not within sixty feet of him when he looked.

The Court says in the Ruggieri case, page 61:

"This is so unreasonable as to be incredible, for if the plaintiff had looked when only 10 feet from the track, as he said he did, he would have seen the car, and the only inference is that he did not look, or if he did, that he would have seen the car so near as to surely strike him, if he continued to walk toward it. But he says he did not see the car, so he is not within the line of cases where the pedestrian, seeing an approaching car, exercises his judgment as to his ability to cross safely. In this case the car must have been within his vision if he had looked, and the fact that he did not see it is a demonstration that he did not look with reasonable effectiveness, such as was required of him under the circumstances, and he was therefore guilty of such contributory negligence as required a non-suit, the refusal of which was error. In the case of Brown *v.* Railroad Co., 68 N. J. Law, 618, 54 Atl. 824, Chancellor Magie speaking for the Court of Errors and Appeals, said: 'When he says that, at the time, he could see no trolley car in sight, he conclusively establishes that he did not then make the observation which duty required of him, because, if he had done so, he would undoubtedly have discovered the approaching car, and would have been able to avoid the collision.' "

In *North Hudson County Ry. Co.* v. *Flannagan*, 28 Vr., 696, at page 698, the Court says:

"The rule is perfectly well settled that a person crossing a street on foot is bound to look out for approaching vehicles and if, neglecting to do so, he is hurt, he will be considered to have contributed to the injury by his negligence and will be barred from recovery from the person who inflicted it—Sheets *v.* Connolly Railway Company, 25 Vr., 518."

In *Jewett* v. *Paterson Railroad Company,* 33 Vr., 424, at page 430:

> "There is nothing about the act of a pedestrian on a public highway to take the case of a traveler who is injured by collision with any vehicle, out of the usual rule that a plaintiff's contributory negligence is ground for non-suit. This is true whether the vehicle does or does not move on rails."

The Court proceeds to cite at length and with approvel *McClain* v. *Railway Company,* 116 N. Y., page 464 and *Consolidated Traction Company* v. *Glynn,* 30 Vr. 432 and *West Jersey Railroad Company* v. *Ewan,* 26 Vr., 574, where Mr. Justice Dixon says, "There is a substantial difference between being surprised by an unforeseen peril and being overtaken by one apprehended and recklessly incurred."

Can there be anything more reckless than was the action of plaintiff in the case at bar, in stepping out from behind this wagon without making more than a perfunctory observation which failed to disclose the approaching automobile which should have been apparent to him had he looked with a seeing eye.

In the Jewett case the Court adopts the rule of *Barker* v. *Savage,* 45 N. Y., 191, that it is the duty of a pedestrian to look in both directions at street and road crossings to ascertain whether any vehicles are approaching and if so, their rate of speed and how far from the crossing, when there may be danger from approaching vehicles, although the traffic may be trifling, and it is also his duty to look along the street in the vicinity of the crossing for a reasonable distance to avoid danger from approaching teams.

In *McGrath* v. *New Jersey Street Railway Company,* 37 Vr., page 312, the Court uses language

at page 317, peculiarly applicable to the case at bar:

> "Two conclusions seem inevitable: one is that if the plaintiff, just before the accident, had not been inattentive to his surroundings he must have seen this eastbound car within a few feet of him."

In the McGrath case after reviewing the testimony at page 319, the Court says that it did not "prove that the car was moving at a speed so high as to be perilous to a careful pedestrian, or make probable the hypothesis that if the plaintiff had not been negligent, he would, nevertheless, have been hurt." This is true for a stronger reason in the case at bar, as there is no evidence of speed of the automobile, and the proposition that if plaintiff had not been negligent, he would not have been hurt, is practically established by the plaintiff's own case.

In the case of *Newark Passenger Railway Company* v. *Block,* 26 Vr., 605, the Court says at page 612:

> "So it may also be generally said that if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made."

It is certain that if the plaintiff in this case, instead of continuing out beyond the obstruction, had delayed until he made a careful observation in both directions, he would not have been struck, and disregard of this reasonable prudence was the cause of the accident.

It is submitted that plaintiff, on his own evidence, shows himself conclusively to have been guilty of contributory negligence and the non-suit was properly granted.

Point II.

There is no proof of negligence on the part of defendant.

There is no evidence in the case as to the speed at which the automobile was traveling, other than an inference which the plaintiff seeks to draw from the plaintiff's statement that the automobile was not in sight when the plaintiff stood at the westerly end of Hahne's wagon, and that it struck him as he took one step beyond the wagon. Plaintiff contends from this that the automobile must have traveled a very great distance in that second or less of time.

Plaintiff's own testimony is, however, that the automobile, when he looked at the westerly end of the wagon, must have been anywhere from sixty to two hundred feet away from him, and yet after he was struck, and although he was not dragged, it was stopped before the rear wheel had passed him. This testimony is absolutely an impossibility, as it would require a machine traveling sixty feet a second or more—a speed of over forty miles an hour—to stop within less than its own length.

The only other inference is, since it stopped in so short a distance, that it must have been traveling at a very much slower, and so far as the testimony goes, a perfectly legal speed. This latter inference, in favor of the defendant, is much more credible and reasonable than the one contended for by plaintiff. As the Court says on Case, p. 90, l. 35, "There is absolutely no testimony in the case as to whether this automobile was proceeding at the rate of a mile an hour or twenty miles an hour."

As to the question of warning, or failure to give warning, there is some evidence that the defendant hollered at the plaintiff, as has been pointed out, when the plaintiff came suddenly out from behind

the wagon. The plaintiff says he heard no warning, and his witness Fagan says he heard none. Fagan, however, was not certain whether there was a shout or not (Case, p. 37, l. 32) and he was engaged in talking with a fellow employee and had been so engaged for ten minutes, at the easterly end of the Hahne wagon toward the sidewalk (Case p. 86, l. 20) where he stood with his back to the roadway. This testimony is subject to the rule in *Holmes* v. *Pennsylvania Railroad,* 45 Vr., 469, as it would equally justify a finding that a horn was blown as that a horn was not blown and the failure of the witness to hear it may have been due to the fact that his attention at the time, was entirely fixed upon some other matter, as he says it was. The same is true of the plaintiff.

Further, as previously noted, and as stated by the Court in granting the non-suit (Case, p. 91), "There was no situation disclosed to the defendant approaching the wagons standing along the easterly curb of Halsey street, which required the giving of any warning as there was no one visible in the highway in the path of the automobile or about to enter upon the clear space in the highway ahead of the automobile, and the need for warning became evident to the defendant, only when the plaintiff stepped out from behind the wagon." As the testimony shows by the admission of plaintiff, there was not time to blow the horn, but defendant hollered, in other words, defendant exercised due care under the conditions which suddenly presented themselves.

Point III.

It is respectfully submitted that the Court properly granted a motion to non-suit and that the judgment entered thereon should be affirmed.

M. CASEWELL HEINE,
Attorney for and of Counsel with Defendant.

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TESTIMONY.

Notice of Appeal and Grounds of Appeal.

Filed January 29, 1916.

Essex County Circuit Court.

GEORGE F. POOL, *Plaintiff-Appellant,* *vs.* RUFUS DONALDSON BROWN, *Defendant-Respondent.*	*Action at Law.* *On Appeal.* *Notice of Appeal and Grounds of Appeal.*

To W. Casewell Heine, Esq., Attorney of Defendant:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

First. Because the trial court non-suited the plaintiff.

Second. Because the trial court granted a non-suit for the reason that the plaintiff was guilty of contributory negligence.

Third. Because the trial court granted a non-suit for the reason that it appeared that plaintiff did not use due care and it did not appear the defendant was negligent.

Dated Newark, N. J.,
January 24th, 1916.

Respectfully submitted,

PEIRCE & HOOVER,

Attorneys and Counsel with Plaintiff-Appellant.

Endorsement.

Endorsed:

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. POOL,
Plaintiff-Appellant,
vs.
RUFUS DONALDSON BROWN,
Defendant-Respondent.

Action at Law.
On Appeal.
Notice of Appeal and Grounds of Appeal.

PEIRCE & HOOVER,
Attorneys of Plaintiff,
763 Broad St.,
Newark, N. J.

Due and legal service of a copy of the within notice is hereby acknowledged this 29th day of January, 1916.

M. CASEWELL HEINE,
Attorney for Defendant-Respondent.

Judgment Record.

Rufus Donaldson Brown, defendant in this case, was summoned to answer unto George F. Pool, the plaintiff therein, in an action at law upon the following complaint;

Complaint.

Filed May 18, 1914.

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. POOL, *Plaintiff,*	*Action at Law.*
vs.	
RUFUS DONALDSON BROWN, *Defendant.*	*Complaint.*

Plaintiff, George F. Pool, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. On or about December 19, 1912, the defendant, Rufus Donaldson Brown, was in the possession, management and control of a certain automobile, then being operated and driven by said defendant by his servant, through and along Halsey street, a public highway near Bleecker street, in the said City of Newark, under the direction of the said defendant, and within the scope of and in the course of said servant's employment by the said defendant.

2. On the day and year last aforesaid, at the place aforesaid, the said defendant, by his said servant, did so carelessly and negligently manage and operate said automobile and improperly and wrongfully guide and

propel the same, and drive the same at an unsafe and dangerous speed, and fail and neglect to properly drive, operate, guide and control the speed of the said automobile, and fail to keep a proper and reasonably careful outlook for persons being upon or crossing said highway in front of said automobile, and fail to give due or timely warning of the approach of the same to persons being upon and crossing said highway, and fail to use due and proper care to avoid colliding with or running into persons lawfully being in and upon or crossing said public street or highway; that by means of the premises, and of the negligence, default and mismanagement of the said defendant by his said servant, and without any fault or negligence on the part of the said plaintiff, the said automobile, while going in a southerly direction on the said Halsey street, near Bleecker street, at a dangerous speed, was, with great force and violence, run into and against and collided with the said plaintiff, George F. Pool, then and there lawfully being upon and crossing said Halsey street, in front of said automobile, and he was thereby violently thrown to the pavement of said Halsey street and the said automobile and the wheels thereof ran upon and over the said plaintiff.

3. As a result the bones of plaintiff's left foot and ankle were broken and his right leg was greatly bruised, cut and injured, and he received other bodily injuries, and his nervous system was greatly shocked and shattered, and he underwent great pain and suffering and has been permanently injured.

4. As a result of said injuries said plaintiff has been, is, and in the future will be, hindered and prevented from carrying on and attending to his necessary and lawful business and affairs by him to be performed and attended to, and lost and was deprived of, and in the future will be deprived of divers profits and

advantages which he might and otherwise would have derived, earned and gained, and was obliged to expend a large sum of money, to wit, the sum of $200 in and about endeavoring to be cured of his said injuries, and also a large sum of money, to wit, the sum of $300 for services and attendance in and about the performance of work he otherwise could and would have performed, and the sum of $50 in and about replacing his clothing which was torn and destroyed in the said accident, and he was thereby otherwise greatly injured and damnified.

Plaintiff demands $10,000 damages.

BEECHER & BEDFORD,
Attorneys of Plaintiff.

Answer.

Filed, as within time, June 10, 1914.

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. POOL, *Plaintiff,* vs. RUFUS DONALDSON BROWN, *Defendant.*	*Action at Law. Answer.*

Defendant, Rufuss Donaldson Brown, residing in Maplewood, County of Essex and State of New Jersey, says that:

1. He admits the first paragraph of the complaint.

2. He denies the second paragraph of the complaint, except that he admits that on December 19th, 1912, plaintiff collided with defendant's automobile on Halsey street, near Bleecker street, in Newark.

3. As to the statements contained in the third paragraph, defendant has not knowledge or information sufficient to form a belief.

4. As to the statements contained in the fourth paragraph, defendant has not knowledge or information sufficient to form a belief.

DEFENSE.

Defendant alleges that any injuries sustained or suffered by the plaintiff, at the time or on the occasion in the complaint referred to, were caused by the negligence of the plaintiff in failing to exercise due care in the premises, by recklessly and heedlessly and carelessly attempting to cross Halsey street without due

regard to the ordinary danger of traffic and not looking to apprehend approaching vehicles and suddenly appearing on the highway from behind an obstruction and running into and colliding with the defendant's automobile in such a manner that it was impossible for defendant to avoid said collision.

M. CASEWELL HEINE,
Attorney of Defendant.

Reply.

Filed, as within time, July 10, 1914.

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. POOL, *Plaintiff,* *vs.* RUFUS DONALDSON BROWN, *Defendant.*	*Action at Law.* *Reply.*

Plaintiff, George F. Pool, says:

FIRST REPLY TO DEFENSE.

He denies every allegation in the defense contained in the answer.

SECOND REPLY TO DEFENSE.

Plaintiff denies that the injuries sustained by him were caused by his negligence in failing to exercise due care in the premises, and recklessly and heedlessly and carelessly atempting to cross Halsey street without due regard to the ordinary danger of traffic, and

denies that he failed to look to comprehend approaching vehicles, and denies that he suddenly appeared on the highway from behind an obstruction and ran into and collided with defendant's automobile in such a manner that it was impossible for defendant to avoid said collision, and avers that the said accident and injuries were caused as set out in the complaint herein without any fault or negligence on the part of the said plaintiff and while plaintiff was in the exercise of due care.

BEECHER & BEDFORD,
Attorneys of Plaintiff.

Postea.

This action was tried before Judge Dungan with a jury, in the presence of the counsel of the respective parties, at the Essex County Circuit, on May 13, 1915.

Note.

By consent of Peirce & Hoover, attorneys of plaintiff-appellant, and M. Casewell Heine, attorney of the defendant, testimony of the three physicians, Doctors Charles L. O'Neil, Walter S. Washington and George B. Gale, and also all the exhibits, are omitted from this State of Case.

ESSEX CIRCUIT COURT.

GEORGE F. POOL
vs.
RUFUS D. BROWN.

Transcript of shorthand notes of testimony taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., May 13, 1915.

Before Hon. Nelson Y. Dungan, Judge, and a jury.
Beecher & Bedford for plaintiff.
W. Casewell Heine for defendant.
Jury drawn and sworn.
Mr. Beecher opens for plaintiff.
Mr. Heine opens for defendant.

GEORGE F. POOL, sworn for the plaintiff.

Direct examination by Mr. Beecher.

Q Mr. Pool, where do you live?
A 29 First street, Newark.
Q How long have you lived in Newark?
A About twenty years.
Q The last twenty years. How old were you at the time of this accident?
A Fifty-seven.
Q On what date, and what hour of the day, did it occur?
A On the 19th of December, 1912, between three and four o'clock.
Q (*By the Court.*) Morning or afternoon?
A Afternoon.
Q (*By Mr. Beecher.*) And at what point, or location, did the accident take place?

A About in the center, or a little west of the center, of Halsey street, opposite Bleecker.

Q And how was the location as to Hahne & Company's store?

A Why, I had just come out of the back door of the store, and walked a few steps north, to avoid an automobile that stood there waiting for somebody, and then was going to cross the street to go up Bleecker.

Q Where did that automobile stand that you have just mentioned?

A It stood south, I went between the wagon and automobile, the automobile was on the south of where I went through.

Q Locate that automobile as to the curb, the east curb of the street, of Halsey street. Was the automobile standing north or south, or across the street, or how?

A It stood along the curb, with the front end towards Central avenue, or north, and I crossed in front of that.

Q And how far were the east wheels from the east curb of Halsey street?

A It stood right up along the curb.

Q Close to the curb?

A Yes.

Q Will you state whether or not there was anything else in the street? Was there a top wagon there?

A A top wagon that belonged to Hahne & Company, that just carries goods from the store to the warehouse, which is just across New, about a short block, and it stands there to load and unload most all day.

Q I want to locate it at the time you were hurt.

A It stood north of me as I went through, I went through at the south side of the wagon.

Q Well, describe how it stood.

A It stood backed up to the curb, with the horse turned towards Central avenue, or north; and I started to go through, and as I got just to the front of this wagon I looked north, and I saw about 40 or 50 feet in the center of the street, a team wagon, two horses, and a colored man driving on a high seat, and that is the only thing I saw from there to Central avenue, or further; that seemed to be the only thing on that block; and as I had plenty of time to cross before that, I looked the other way, and saw a wagon about 40 or 50 feet away, the lower side, as you might say, clear, and I had plenty of time to walk through before the wagon coming from the north—

Mr. Heine. I object to that, as to what he had plenty of time to do.

The Court. That will be stricken out.

Q I want to ask you a question about that wagon of Hahne & Company, was there a horse attached to it?

The Court. He said there was.

Q Did you state which way that horse was standing, or how?

The Court. Towards Central avenue, he said.

Q Now, about what was the length of that wagon, that top wagon, of Hahne & Company? How far did it extend into the street from the curb?

A Twelve feet, more or less, within an inch or two of 12 feet.

Q How far north of you was it at the time you were crossing, or passing it, when you went across the street, about?

A I didn't understand it.

Q (*By the Court.*) How near were you to the wagon?

A Probably 3 or 4 feet, or 5 feet, along in that neighborhood.

Q South of it?

A South of it, yes, pretty close to it.

Q (*By Mr. Beecher.*) How near to you at that time was the automobile which you say was standing along the curb?

A Oh, probably 5 or 6 feet below me, not very far.

Q Can you give us about the line that you were taking when you crossed the street, as to the south curb of Bleecker street?

A I was about in a direct line with Bleecker street.

Q With the curb of Bleecker street?

A Yes, with the south curb.

Q Well, now, you say you saw this wagon at the north, and another vehicle at the south; what happened then?

A Why, I thought my way was clear, I saw nothing coming from the north, except this team wagon, which was coming very slowly, and I stepped out to go across, and I did not see the car until it struck me, and it knocked me down, struck me with the front end, knocked me down, and ran over—knocked my right leg, and ran over my left foot.

Q When it knocked you down which way did you fall?

A Knocked my head back toward the store somewhat, or in a southeasterly direction, not exactly east, but southeast.

Q You say the "store." Do you mean Hahne's store?

A Yes.

Q Did you hear any signal, or warning, of an automobile?

A No, I did not see or hear anything.

Q Do you know whether any warning was given?

A Well, they got out and picked me up, and I could not stand at first, they had to hold me.

The Court. Oh, no no; just repeat the question.

(Question read.)

A When they picked me up I said to them—

Q (*By the Court.*) No, no; do you know whether it was given or not, not what somebody said?

A I said, "You didn't blow your horn"; I said that to them, they said, "No, but we hollered as soon as we saw you."

Q (*By Mr. Beecher.*) What I want to know is whether the auto that hit you, whether the horn was blown?

A I didn't hear it.

Q Well, do you know whether anybody blew the horn, or not? Can't you answer the question?

The Court. He said he didn't hear it.

Mr. Beecher. That might be, and yet—

The Court. That is certainly as far as he can go; we can judge whether he was in a position to hear it or not; he didn't even see the automobile.

Q How wide is Halsey street at the point where you were injured?

A About 30 feet.

Q How wide is Bleecker street at its junction with Halsey?

A I suppose about the same width; I never measured.

Q About 30 feet?

A About 30 feet, I should think.

Q How wide is the—did you mean to give the width of the roadway without the sidewalks when you said Halsey street was 30 feet?

A I mean from curb to curb.

Q And the same thing is true of Bleecker street, from curb to curb?

A Yes.

Q About how wide are the sidewalks?

A Eight feet, probably, more or less.

Q Did you suffer any other injury at the time you were struck except what you have stated?

A Yes, I suffered with my head.

Q How was your head hurt?

A I struck the back of my head when I fell, knocked down.

Q Well, was there any cut, or swelling, anything of the kind?

A Yes, sir.

Q Well, give it to us; state fully what it was.

A A cut, or break in the skin, so that it was sore to the touch, and there was an outward sore, as well.

Q How about the swelling, did it swell?

A Not very much, no.

Q What kind of pavement is the roadway on Halsey street at that point?

A Asphalt, I think.

Q After you were knocked down where were you taken?

A 50 Sussex avenue.

Q How far away from the place of the injury is that?

A Five or six blocks.

Q How did you get there?

A The party that knocked me down picked me up and took me there.

Q Who is that, the defendant, Mr. Brown?

A Yes.

Q How many people were in the auto that hit you?

A Well, three, that I know of; I don't know whether there were any more, or not.

Q What did Mr. Brown do after he took you to the place you have mentioned?

A His brother-in-law, I understood it was, was with him—

Mr. Heine. I object to what he understood.

The Court. That will be stricken out.

A (Continued.) He helped me out of the car, took me in the office, and then says, "I want to give you my name and address, and also Mr. Brown's," a broth-

er-in-law, I understood him, and so they left their name and address with me at the place where they took me.

Q You saw the defendant, Mr. Brown?

A Yes, I sat on the seat with him.

Q Did he make any statement in regard to the accident at the time you were hit?

A Nothing except he wanted to take me to the hospital when he picked me up, and I said, "No, I don't want to go," he insisted upon it, and he said, "You are frightened, you are hurt a great deal worse than you think for, but you are frightened, and don't realize it"; and he insisted on taking me there; I said, "No, I don't want to go"; then he wanted to take me to a doctor, I said, "No, take me to my place of business, and I will see about it afterwards."

Q Did he say anything about what occurred before you were knocked down, or immediately at the time?

A No, simply I said to him, "You didn't blow your horn," but he said, "No," he didn't see me in time, but he hollered, that is all he said.

Q You were left there by the defendant at 50 Sussex avenue, wasn't it?

A Yes.

Q What did you do then?

A I went home after that.

Q How long after the defendant left you at Sussex avenue did you go home?

A Probably an hour.

Q What was your condition after you reached home?

A Well, my foot commenced to swell very much, and I bathed it with some liniment to take the soreness out, and so the next morning I thought it was fully as well as I could expect; and the neighbors came to see me, and said, "Why, you ought to have a doctor"; I said, "No." "Well," they said, "look at the condition of your foot, you ought to have a doc-

tor"; I said, "Well, you couldn't have an automobile run over it without hurting it a little bit, I think it is only bruised."

Mr. Heine. I object to what the neighbors said, and move to strike that out.

The Court. What the neighbors said will be stricken out.

Witness. There was a doctor next door, and so I called him in.

Q What was the doctor's name next door?

A Dr. O'Neil.

Q When did you call Dr. O'Neil?

A He made an examination of the foot and said he thought there was—

Q When did you call Dr. O'Neil?

A I think it was the next day after.

Q You are married, are you not?

A Yes, sir.

Q Was your wife home when you were taken to your house after the accident?

A Yes, sir.

Q Did she do anything for you?

A Well, waited on me a little, bathed my head, and looked after that.

Q What did she do?

A She washed my head off, and put something on it. I forget what she put on it; washed it off where it had bled a little.

Q And what was your condition during the night, and until Dr. O'Neil saw you, as to whether you suffered pain, or not, or how you were?

A I sat up in a chair all night with my foot on another chair. Of course, it hurt me quite a good deal.

Q Well, when Dr. O'Neil came what did he say, or do?

A He said he thought there was some bones broken in the foot, and I told him no, I thought not, and he

made an examination, he said, "It is pretty much swollen, I can't tell exactly, but I am pretty sure there is bones broken there."

The Court. Now, Mr. Pool, you should not state what the doctor said to you; only what you did as the result of what he said.

Q What did he do for you?

A Well, he said if it was not better the next day he wanted to have an X-ray taken.

The Court. That will be stricken out.

Q Now, tell what Dr. O'Neil's treatment was, and what he did for you?

The Court. Not what he said to you, what he did.

A Well, he took me down to have an X-ray taken of it. I don't know how to express myself, but he said my foot was very much swollen, and he thought some bones were broken, and that I might be laid up—

Mr. Heine. I object to what he said, and move to strike it out.

The Court. That will be stricken out.

(*To the witness.*) All that you are saying is absolutely stricken from the record, if you state what the doctor said to you. You must not state what he said to you; you can state what he did.

A He took me down to Dr. Baker's, and had an X-ray taken of me, and there found there was two bones broken.

Mr. Heine. I object to what the doctor found by this witness.

The Court. That will be stricken out, what they found.

Witness. And a green fracture, they called it.

Mr. Heine. I object, and move that that be stricken out.

The Court. It will be stricken out.

Q Go ahead, state what the doctor did for you.

The Court. I think you had better question him, because witnesses do not very often understand that it is improper for them to state what was said to them by others.

Q I want to know what the doctor did for you, Dr. O'Neil, on account of this accident, Mr. Pool.

The Court. Took him down to Dr. Baker's, and had an X-ray.

Q But you have not told us what—that is, I did not hear, if you did—you have not told us what he did when he first came to you at the house, upon the first visit.

A Yes.

Q Now, what did he do then? Did he do anything before you went to Dr. Baker's?

A Simply examined it.

Q Did he prescribe any treatment or anything of that kind?

A Took me down to see Dr. Baker, and had an X-ray taken of it.

Q How long was that after the accident?

A I think that was the 23d.

Q Of what?

A Of December.

Q How long after the accident?

A Four days, I should think.

Mr. Heine. I believe we have agreed that we use these X-rays.

Q Mr. Pool, you had these made on whose direction, Dr. O'Neil's or the defendant's doctor?

A Dr. O'Neil.

Q That was on December 23d?

A I think the 23d.

Mr. Heine. There is no objection to these, Mr. Beecher.

Mr. Beecher. You agree that these photographs, four of them, are taken from plates that were made by Dr. Baker, of the plaintiff's left ankle, do you, Mr. Heine?

Mr. Heine. Yes, left ankle and lower bones of the left leg.

Mr. Beecher. And that they were taken on December 23, 1912.

Mr. Heine. Yes.

Mr. Beecher. I offer these in evidence.

Said photographs marked Exhibit P. 1 and Exhibit P. 2.

Mr. Beecher. I also offer in evidence two other photographs of a plate taken of the plaintiff's left ankle on December 23, 1913.

Q The defendant requested these to be taken, did he not?

A Yes, sir.

Q And you went there at the defendant's request, and Dr. Baker took them on that day?

A Yes, sir.

Said photographs marked Exhibit P. 3 and Exhibit P. 4.

Mr. Beecher. It is admitted they are photographs taken about a year after—

Mr. Heine. I did not admit that; I admitted the photographs.

Mr. Beecher. Of the same injury of the plaintiff's left leg, or ankle?

Mr. Heine. No, I don't admit that; I admit those are photographs of the left leg taken on the date that you state; this injury, or some other injury, is not part of the admission.

Q Now, after you had these photographs taken, marked P. 1, who treated you for this injury?

A Dr. O'Neil.

Q What did he do for you?

A He put on three different casts, and came to see me; that is about all; gave me some medicine.

Q How soon after you had the photographs taken did he put on the first cast?

A The next day after, I think.

Q When did he put on the second one?

A Well, I don't just remember.

Q Well, you can approximate it, I suppose?

A Well, the bill shows; it is on the bill.

Q And did he put on any more than three?

A I think it was three.

Q When did he put on the third?

A I could not tell you.

Q Can't you tell how far apart they were?

A No; he had it down on his bill.

Q After Dr. O'Neil's first visit how long did he continue to treat you, or attend you?

A Well, I think along in April some time.

Q April following the December of the injury?

A Yes; but then I went to see him several times at his office, but I think it was along in April, his last visit to the house.

Q Mr. Pool, I show you some bills of Dr. O'Neil's; there is one, June 1, 1913, and attached to it the items of June 1, 1913, amounting to $76—

Mr. Heine. I object to that.

The Court. I overrule the objection.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Did Dr. O'Neil render you this bill of $76 for services to you on account of this accident?

A Yes.

Q Will you state what this list of items that is attached to the bill for $76, what are they?

Mr. Heine. Objected to as immaterial and irrelevant.

The Court. I sustain the objection.

Mr. Beecher. I offer this bill, and the paper of items which make up the bill attached to it in evidence.

Mr. Heine. I object to that as immaterial, incompetent, irrelevant, and not properly proved.

The Court. I will look at it.

(Paper handed to the Court.)

Mr. Heine. May I see it, your Honor?

The Court. Yes, sir.

(Papers handed to defendant's counsel.)

The Court. The bill and statement will be admitted, not as evidence of the services rendered, but of the amount of the bill rendered to the plaintiff. If other evidence is not given of the services rendered a motion may be made to strike it out.

Mr. Heine. I would like to have noted an objection on the ground that the papers offered in evidence—

The Court. No, it is only the first and second papers that are offered. The Court will not admit the other papers.

Mr. Heine. The further objection that these papers offered in evidence contain statements such as "Pott's fracture of right foot," and so forth, of which there is no evidence at the present time.

The Court. The jury will be instructed that as evidence of those facts it must be disregarded.

Mr. Heine. On the further ground that the fact that a physician renders a bill to a patient is not evidence of the services rendered, or reasonable value of the services.

The Court. It will be admitted.

An exception to this ruling is noted by the defendant as ground of appeal.

Said papers marked Exhibit P. 5 and Exhibit P. 6.

Q Did Dr. O'Neil make you all the visits that are mentioned, and on the date of those two papers, the bill and the items?

Mr. Heine. Objected to as improper.

The Court. I will sustain the objection.

Q Now, tell us about how many visits Dr. O'Neil made to you, and whether you made any to him, or not, on account of this injury?

A I think I went to see him probably half a dozen times, five or six times.

Mr. Heine. I move to strike out what he probably did.

The Court. It may remain.

Q You say those two papers are one a bill and the other the items rendered to you by Dr. O'Neil for services to you; will you look at those and state, if you can, whether he made all the calls on the date there given on you for this injury in the course of treatment?

Mr. Heine. Objected to as improper—

The Court. I sustain the objection; it is not his memorandum, and he has no right to use it.

Q Now, Mr. Pool if I understand you, there were three casts put on, and how your condition as to being able to get around from the time of the injury for some time after?

A I went on crutches to about the middle of April.

Q About the middle of April, 19—following the accident, is that right?

A Yes.

Mr. Heine. What is that, 1913, or 1912?

Witness. 1913.

Q How much of the time did you use those crutches?

A All the time.

Q Could you get around without them?

A Never walked without them.

Q Well, after you laid aside the crutches how was your condition?

A I walked with a cane for probably a month.

Q And after that what can you say as to your ability to get around, and as to the effect of this injury?

A Yes, I could get around, not very fast, slowly. Sometimes if I gave my ankle a little twist I go very lame for awhile, it seems to slip back, something slips back in place, something of the kind, and I can walk all right.

Mr. Heine. I object to what seems to do, "seems to slip back in place," and move to strike it out.

The Court. It may remain.

Q Now, state whether you suffered any other effect from this injury except as you have described.

A Very dizzy at times, I have had bad spells, a number of them, fall down, faint away.

Q What occasioned your fainting away, and falling down?

Mr. Heine. I object to that as calling for a conclusion of the witness.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A On account of my head.

Q What causes, as far as you know, you to feel faint, and fall, faint away?

Mr. Heine. I object to that.

The Court. You had better ask him if he knows.

Q Do you know?

Mr. Heine. I object to that on the ground that this witness is incompetent to answer it, being a medical question, and further, it calls for a conclusion.

The Court. You may answer it yes, or no, do you know what causes you to have these dizzy spells, and fall down, and faint away?

Witness. Yes.

Mr. Heine. Your Honor will allow me an objection to that?

Q What was it, what causes it?

Mr. Heine. The same objection, on the ground this witness is incompetent to state, and further, it calls for a conclusion.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Dizziness.

Q When did you have these fits of dizziness and falling?

A I have not any date.

Q Well, give it as near as you can, about how long after the injury, Mr. Pool?

A Well, right along after, but I am getting worse; I can't look up, and throw my eyes down quickly, if I do something comes black before me, and I lose my senses.

Q Has that continued from the time of the injury up to the present time?

A Yes.

Q About how often do you have these spells?

A Sometimes once a week, and sometimes I will go two or three weeks, depends on the position that I am placed in.

Q What other doctors have you had, if any, besides Dr. O'Neil?

A Dr. Gale.

Q To treat you. When did he begin to treat you?

A Along in June, about the middle of June.

Q What year?

A Last year.

Q 1914?

A Yes.

Q Has he treated you this year?

A Yes; he treated me right along until—

Q Why did you go to Dr. Gale for treatment?

A Well, I had a bad spell up where I stay a good deal, 28 Bridge street, and I was over half an hour coming to, they called up three different doctors and they thought I was never coming to—

Objected to.

The Court. That will be stricken out. You were asked why you had Dr. Gale.

A (Continued.) And this friend of mine was acquainted with Dr. Gale, and said he thought he would be a good one to look after me, and if he was in my place he would do it, so I went to him on his recommendation.

Q What has he been treating you for?

A Nervous trouble.

Q Anything about the head?

A Yes.

Q Well, what?

A Well, about my dizziness, bad spells I had.

Q He has been treating you for nervousness and dizziness?

A Yes.

Q Has he examined your leg? Has he treated you for that?

A No, he has never treated my leg.

Q How old were you at the time of this accident?

A Fifty-seven.

Q What was your business, and what had it been for several years?

A I have always dealt in coach horses.

Q How many years?

A Ever since I was sixteen years old.

Q That has been your business all your life, has it?

A Yes, in connection with farming; I have farmed some.

Q And all that time you have been doing business in Newark, have you?

A Yes, and New York and Brooklyn.

Q Prior to this accident on December 19, 1912, had you had any—what was your condition of health?

A The best it could be, I think I never had a doctor since I was fourteen or fifteen years old, never had a headache, toothache or earache, no rheumatism, never had any ache or pain; never called a doctor since I was young; at that time I think I had pneumonia.

Q About the troubles which you have described, have you had any other trouble except the dizziness in the head, the lameness in the leg, and these fainting spells and falling occasionally?

A No.

Q I mean since the accident, since then have you had any other accident, since this one about which I have asked you?

A Yes, a slight accident.

Q Well, tell us about that, when was it?

A Last June, I think it was.

Q June, 1914?

A Yes. I was driving along—at least, the man in with me was driving—and leading a horse behind the wagon, and the fender of a trolley car struck the horse that I was leading, his foot, his leg behind, and he started, made a jump, jumped on the wheel, and mashed the wheel down, and the driver and I fell out.

Q Which wheel?

A The right wheel, back.

Q Any other injury to the wagon?

A Yes, that made the horse go.

Q The horse got away?

A Yes.

Q And what happened to you, were you hurt?

A Only a little scratch on my leg below my knee; otherwise I wasn't hurt at all; I didn't fall out, I was just tumbled out.

Q What is that?

A I didn't fall out hard, the wheels mashed down, and fell down, and was scratched here.

Q Where was that scratch?

A On the left leg, just below the knee.

Q Did it increase, or affect the injuries I have asked you about this morning?

Mr. Heine. Objected to on the ground this witness is not competent to answer that question.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Nothing to do with that; didn't increase it, nor affect it in any way.

Mr. Heine. I move to strike out the answer as a conclusion of the witness.

The Court. I decline to strike it out.

Q Did you have a doctor for that?

A No, sir, I did not. The doctor—

Q Did you call a doctor for this June, 1914?

Mr. Heine. I would like to have the witness finish his answer. He started to say "Doctor" something, and stopped.

The Court. I think the answer was finished.

Q Did a doctor see you?

A Dr. Gale was sent to see me by the Public Service.

Q But did you call a doctor?

A I did not.

Q Did Dr. Gale do anything for you for that injury?

A No; he looked at it, examined it, said it was

doing all right, didn't amount to anything, it was doing all right.

The Court. That will be stricken out.

Q Now, what were your earnings before the accident of December 19, 1912, about?

A Anywhere from—

Mr. Heine. I object to that as irrelevant, incompetent, not pleaded as an element of special damage in this case.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A As near as I can tell from $25 to $50 a week.

Q For, say, about two years prior to the accident—

Mr. Heine. Objected to as too remote.

(Question withdrawn.)

Q How long before the accident were your earnings about $25 a week?

Mr. Heine. Objected to as incompetent, irrelevant and immaterial.

The Court. I overrule the objection.

A Well, $25 a week until I got hurt. Is that the way you ask?

Q (*By the Court.*) How long had they been that much?

A Probably two or three years.

Mr. Heine. The same objection, if your Honor please.

The Court. The objection will be noted.

Q You mean that those are net, or gross earnings?

A Net.

Mr. Heine. I object on the ground that it is not the proper way to prove profits of business. If a man is employed by somebody his wages would be competent evidence, but to undertake to have a man state without any foundation being laid for it the net profits of a business over a

period of three or four years prior to the accident, I think, is immaterial, incompetent and irrelevant.

The Court. The objection will be sustained. That ground of objection was not made before.

Q Did you have to employ anybody after this injury on account of your condition resulting from it?

Mr. Heine. I object to that on the ground if the profits of a man's individual business are to be proven they should be proven in the regular way by showing gross and net earnings and receipts.

The Court. This would seem to bear upon the question of expenditure. I will overrule the objection.

Mr. Heine. Subject to the right to move to strike it out unless it is connected?

The Court. Yes. The question is whether you were obliged to employ anybody?

A I did, because I was not able to get in and out of a wagon and drive unless somebody was with me.

Mr. Heine. I move to strike out the reason given as a conclusion of the witness.

The Court. It may remain.

An exception to this ruling is noted by the defendant as ground of appeal.

Q How much did you pay this man that drove for you since this accident?

A $12 a week.

Q How much have you paid him all together?

A I had him four weeks, I think, then I gave up.

Q Taking the whole time since the accident have you been able to earn anything?

A I have not.

Q Why not?

Mr. Heine. I object to that as calling for a conclusion of the witness.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Not safe for me to go around.

Mr. Heine. I move to strike that out as a conclusion of the witness.

The Court. It will be stricken out.

Q Were you able to drive horses?

A It was dangerous for me to go alone because I would be apt to have a bad spell any time, and it was not safe for me to go alone.

Mr. Heine. I move to strike that out.

The Court. I think it may remain.

An exception to this ruling is noted by the defendant as ground of appeal.

Q In your business that you have been carrying on for several years before this accident, what is it necessary to do, if anything, in the handling of horses, in your buying and selling, in your line of horse dealing?

A I buy them green in the country, make them up, and break them to the city sights.

Q Who did that before the accident?

A I did.

Q Did you have anybody else to help you, or do it for you?

A No.

Q Never had?

A Never, did my own driving.

Q And after the accident what was necessarily done in that respect?

A I could not drive. I could hold the lines, but if they should turn around short and upset me I could not jump out, and if they got frightened at a trolley car I could not get out and hold them by the head; it was not safe for me to drive.

Mr. Heine. I move to strike that out as a conclusion, and the former part of the answer as pure hypothesis on the part of the witness.

The Court. The answer may remain.

An exception to this ruling is noted by the defendant as ground of appeal.

Q How did this accident affect you as to getting in and out of a wagon and handling yourself in driving, or managing a horse and wagon in your business?

A I did not feel it safe, the condition of my foot, and getting in and out, and also getting these dizzy spells.

Mr. Heine. I move to strike out the answer.

The Court. It will be stricken out.

Q Do not state anything but the facts, never mind what you think about it. Now listen to this question, please. How did this injury affect you, if at all, in connection with the handling and managing of the horses in a wagon, or otherwise?

A It made me awkward.

Q Suppose you had a horse hitched to a wagon, and you were breaking him, a country horse, after the accident how did the injury affect you as to that matter?

A I could not get out of a wagon quickly, and my dizziness bothered me.

Q What is the basis, or the ground, of your calculation when you say that you lost, for the last two or three years before this accident, the profits which you made of about $25 a week, how did you make these profits?

The Court. You misunderstood his answer, he did not say that.

Q What is the basis of your profits of $25 a week that you say you made before the accident?

Mr. Heine. Objected to as improper, and in-

cluding facts not in evidence, on the ground there has been no established profit shown here.

The Court. He said his earnings were $25 a week, and when asked whether that was gross, or net earnings, he said net, so I suppose we have to regard that as profit.

(Question read.)

Mr. Heine. At what time? I think we ought to specify the time.

Mr. Beecher. For a year or two before the accident.

Mr. Heine. I object to the year or two.

Q Say for a year before the accident.

A I know I only have two bills against me, and it cost me $25 a week to live.

Mr. Heine. I move to strike out the testimony on the ground that the basis is entirely improper.

The Court. Perhaps it is a little too soon to move to strike it out. If it appears that that is the only basis for his testimony it will be stricken out.

Q How do you make out that you got $25 to $50 a week for, say, about a year before the accident, in your horse business?

A I say I only have two bills that are not paid, and it cost me $25 to live.

Q Do you buy, or sell, horses, or what do you do out of which you made the profits?

A Oh, I buy and sell.

Q Well, go into the detail of that a little; show how you made a profit on buying and selling; what you did, and so on.

A Well, I bought as cheap as I could and sold them for all I could. I sold a pair of horses here in Newark—

Q Can you mention any cases within the last year before the injury where you made a certain profit on

any particular transaction? Go into the matter as fully as you can.

A I bought a horse just before I was hurt for $250 and sold him for $400.

Q And how long was that before you were hurt?

A Well, only a year, probably, eight or ten months.

Q And what did you do with him, how did you come to get such an increase on him?

A Well, I broke them in, and fixed them up so that they looked different when I sold them than they did when I bought them, and a fancy horse, just as a man fancies, one man might say he wasn't worth $300, and another might give you $500, just as he liked.

Mr. Heine. I move to strike that out as incompetent and irrelevant.

The Court. That is almost a matter of general knowledge, isn't it?

Q Did you ever match up horses?

A I did. The first pair I ever mated I was only sixteen years old, and my father gave me a colt, and I—

The Court. Oh, no, no.

Q That is too far back, confine yourself to a couple of years.

A I mate them and sell them.

Q Is it true sometimes you get a large price in mating a horse over what you are able to buy a horse for single?

A Yes, sir.

Q Go on and tell us about it.

A I bought a pair of horses I sold here in Newark for $1,600, I had them two weeks, and I sold them for $1,800.

Q That was what time?

A About six years ago.

Mr. Heine. Objected to as too remote, and I move to strike it out.

The Court. It will be stricken out.

Q You ought to keep it within the last two or three years?

A I haven't done much within the last two or three years.

Q I am asking before the injury, take that period, about as near as you can get to it, can you give us any other instance of that kind?

A I gave you an instance a little while ago.

Q Do you keep any books?

A I do not.

Q Have you kept any for the last three or four years?

A Never; never kept any.

Q Why not?

A Well, I don't know why.

Q Your business consists of cash, does it?

A Always sell for cash, sometimes for a note, but as a rule for cash.

Q You say you have never been sick before this accident, never had a doctor since you were sixteen years old; what are your habits of life as to drinking, smoking, and so on?

A I never touch a glass of—

Mr. Heine. I object to that as immaterial, irrelevant and incompetent.

The Court. I overrule the objection, you may ask it.

A (Continued.) I never touched a glass of liquor or whiskey in my life, never smoked but half a cigar, never chewed tobacco, I have a pretty good appetite, eat pretty hearty, go to bed early.

Q Habits very regular?

A Yes, sir.

Q And have been all your life, have they?

A Always.

Mr. Beecher. That is all.

Mr. Heine. I move to strike out all the evi-

dence as to profits of $25 to $50 a week on the ground there has been no foundation laid. Apparently the only basis of the witness's testimony is he estimates his household expenses at $25 a week, and has been able to pay them; and there is only one transaction within a year of the accident upon which any proper basis of profit could arise.

The Court. If nothing further appears I will be inclined to strike it out. I will hold it for the present.

Cross examination by Mr. Heine.

Q Mr. Pool, where had you been on the 19th of December, the day of the accident?

A I had been downtown, and came through Hahne's store, stopped there awhile, and then was going home—to my place of business.

Q Had you purchased anything in Hahne's?

A No.

Q Why did you go into Hahne's on that day?

A I used to stop at the harness department to talk to a friend of mine that was the manager of the harness department, he often gave me tips, some coachman had been in there to buy something, and wanted to buy a horse, and I got very intimate with him, we would sometimes sit and talk awhile. I had just left him and went out the back of the store.

Q Where were you going, Mr. Pool?

A I was going up to 50 Sussex avenue, going up Bleecker street.

Q And how many of Hahne's wagons were lined up along the curb there that afternoon when you came out?

A One.

Q Only one wagon there?

A Yes.

Q And this other automobile, along the easterly curb?

A Yes. I think there were automobiles further down, probably 50 or 60 feet, there may have been, and there may not have been, but I think there was.

Q (*By the Court.*) When you say further down, you mean south?

A I mean south, yes.

Q (*By Mr. Heine.*) When you came out of Hahne's entrance there were you nearer the north, or south, end of the Hahne building on Halsey street?

A Well, pretty well towards the north of the building.

Q And you walked down the sidewalk in a southerly direction, did you?

A No, northerly, as I came out of Hahne's.

Q You walked north until you came to this automobile?

A Yes.

Q And you turned to your left around this automobile?

A Yes.

Q And north of it?

A North of it, yes.

Q And between the automobile and the Hahne wagon?

A Yes.

Q Did you look as you were on the sidewalk to see whether there were any other wagons of Hahne's lined up north of the one that you went south of? Do you follow me in that direction?

A Yes.

Q Well, were there any, or not?

A I did not notice them.

Q Can you be certain whether or not there were wagons north of the one by which you went?

A Yes.

Q You can be certain of that?

A Yes.

Q Were there other vehicles in that direction?

A No, not excepting the wagon coming down the street.

Q Then, looking up the street from the sidewalk, before you attempted to pass alongside of the wagon, you could see the street up as far as Central avenue?

A No, I don't know that I could, there might have been something further, quite a ways up where this automobile place there is, there may have been automobiles there, I am not sure.

Q Do you remember whether or not there were any other vehicles upon the easterly curb, between where you stood on Halsey street and Central avenue, when you came out of Hahne's store that night?

A There wasn't any other close by.

Q What would be the nearest?

A Not within 30 or 40 feet.

Q Would that be beyond the extremity of Hahne's store?

A Yes, sir.

Q How far along the roadway toward Central avenue could you see before you attempted to pass alongside this wagon?

A I could see the width of the street for thirty or forty feet away.

Q How far away towards Central avenue was this wagon that was coming along driven by a negro?

A Probably 30 or 40 feet when I got in front of the wagon to look around.

Q No, while you were looking up the street, while you were on the sidewalk, how far away was this wagon driven by a negro?

A Probably 10 feet further up than it was when I stepped to the front of the wagon.

Mr. Heine. I move to strike that out as not responsive.

Q How far away from you toward Central avenue was this oncoming truck driven by a negro that was coming slowly down Central avenue?

A Perhaps 50 feet more or less.

Q How far was the intersection with the southerly line of Central avenue?

A I don't know; half a block, or more.

Q Was this truck half-way to Central avenue?

A No, it was closer by.

Q Fifty or 60 feet would be your best judgment?

A Yes, sir.

Q And how fast was it traveling?

A On a slow walk.

Q To which curb was it nearer?

A About in the center of the street.

Q Was there any other vehicle in the roadway before you had started to cross the street besides this wagon?

A Not that I saw.

Q You are positive that there were no other Hahne wagons along the easterly curb, except the one alongside which you crossed?

A Yes.

Q You are positive about that?

A Yes.

Q Did you take particular pains to notice the vehicles along that easterly curb north of you?

A Well, I simply glanced up and did not see anything there, I don't know whether you would call it particular, yes, might say particular notice.

Q You did take particular notice?

A Yes.

Q So that you can now at this time be certain there were no other Hahne wagons there along that easterly curb?

A Yes.

Q Which side of Bleecker street were you heading for, the north, or south?

A South side of Bleecker.

Q And when you started to cross the street beside this Hahne wagon, you were about opposite the north curb line, were you?

A No, right opposite the south curb of Bleecker street.

Q That is, you walked north until you came to a place about opposite the south curb of Bleecker street?

A Yes.

Q And, naturally, walking north, you passed the full length of this automobile which was along the easterly curb?

A Yes.

Q Why didn't you cross over to the south of that?

A Less dangerous to go straight across than it would be to go catercornered across.

Q There is no crossing on that street?

A No, the street stops there.

Q Wasn't it more dangerous to walk between an automobile and big covered wagon, than it was to walk—

A Well, I took particular notice to look around the covered wagon.

Q Where were you standing in the roadway when you took that particular look?

A About on the line with the front part of the wagon.

Q That would be how many feet from the easterly curb of Halsey street?

A About 12 feet.

Q So you stood stock still about 12 feet from the easterly curb of Halsey street, and looked in a northerly direction on Halsey street, did you?

A I did not stop entirely still, I kind of slowed up, glanced up and saw nothing but this wagon which was coming very slow pace, and I thought there would be time enough to get across the street before it reached me, and then I looked the other direction and there wasn't anything coming but a wagon, maybe 50 or 60 feet away.

Q And when you were looking in a southerly direction this automobile came from the north and hit you?

A Yes.

Q How far away from the front of this Hahne wagon, that would be the westerly end of it as it stood at right angles to the curb, how far away from the front of that Hahne wagon were you when you were struck?

A Probably a couple of feet.

Q Two feet, or 3 feet, which?

A Well, I think probably between 2 and 3 feet; I just stepped out about one step.

Q Just stepped out one step?

A Yes.

Q When you were struck from behind?

A On the side.

Q Before you went behind this Hahne wagon can you be certain there wasn't this automobile very visibly on Halsey street roadway?

A There wasn't any automobile that I could see at all.

Q Then on Halsey street between this slow moving wagon coming south, and the wagon behind which you went, you are sure there was no automobile in the roadway?

A I am sure there wasn't any in the roadway that I seen.

Q Can you be certain there wasn't any car in that space between the wagon behind which you went and this other moving truck?

A There might have been one right behind the big wagon—there may have been one behind the wagon I walked to the south of; I imagine it must have been behind the one that I walked ahead of.

Q You say you imagine it must have been behind this Hahne wagon. Now, Mr. Pool, assuming that to be the easterly side of Halsey street (drawing diagram on blackboard) and this Hahne wagon turned in like that, with the horse pointing north, is that correct, the way it stood?

A I get kind of little mixed on the point of the compass.

Q That is Central avenue up here.

A Yes, all right; which is north?

Q Off there where Central avenue is.

A Yes.

Q Now Hahne's store is on this side here; understand that?

A Yes.

Q And this wagon of Hahne's is standing out here so it can be loaded in the back?

A Yes.

Q With the horse turned north like that?

A Yes.

Q And I understand that you said about 6 feet from this wagon here, you started to go out?

A Well, it might be a little bit more than that; 8 feet, probably.

Q And an automobile was coming up like this?

A Yes.

Q (*By the Court.*) You said before 3 or 4 feet south of the wagon?

A Three or 4 feet south, I went; I thought he said the automobile.

Q (*By Mr. Heine.*) The automobile was 6 or 8 feet south?

The Court. He said the automobile was 5 or 6 feet south of him, and that he was 2 or 3 feet south of the wagon; 3 or 4 feet, I should say.

Q You were 3 or 4 feet south?

A From the wagon, yes.

Q So this distance from the wagon to the auto would be about 8 feet?

A Yes, or more.

Q And you went across here about 3 feet from that wagon?

A Three or 4 feet, probably 4 feet.

Q You went out right across like that from the sidewalk?

A Yes.

Q Having come north?

A Yes.

Q And this over here is Bleecker street?

A Yes.

Q And when you came off this sidewalk and started out across there, you looked down in this direction towards Central avenue, and saw a truck coming down that street, about in the middle, a slow moving truck?

A Yes.

Q And from the point where you stood on the sidewalk down to that—

The Court. Why don't you make the truck?

Q You say this truck was about 50 feet down, did you?

A It was when I was on the sidewalk, but when I came to the front of the wagon—

Q When you were on the sidewalk?

A Yes. I haven't measured it; it was along about that neighborhood.

Q That truck was, from where you started to cross, 50 feet. Now when you stood there on the sidewalk looking in that direction could you see the roadway, the entire roadway of Halsey street, between where you intended to cross and where that truck was?

A Before I started from behind the wagon?

Q When you were over here, before you started, on the sidewalk?

A Yes, I could see the truck.

Q Was there any automobile, or vehicle of any kind, on Halsey street, moving in a southerly direction, between this point of the street where you were about to cross, and that moving truck?

A No vehicle, no.

Q You are sure of that?

A Yes.

Q So there was 50 feet of clear highway there that you had to cross?

A When I was in front of the truck.

Q No, before you started to cross.

A Yes, about that, I think.

Q And was there any vehicle on the east curb of this street further north than a point opposite where that truck was when you were standing on this sidewalk?

A No, I think not.

Q Well, how far could you see towards Central avenue past that truck, how many feet?

A Well, I could see all the way to Central avenue, if there wasn't any automobile standing along the automobile place; that I don't just remember, whether there was any automobile further along, or not.

Q You remembered a minute ago that there were no Hahne wagons along here?

A Yes.

Q But you thought there might be some other automobiles along the curb?

A Yes.

Q How far away from the point in the sidewalk where you were standing was this automobile place where you think there might have been some other automobiles?

A Sixty or 80 feet.

Q So you could see Halsey street for about 80 feet from the point where you were standing?

A Yes.

Q When you were two feet west of the end of that Hahne wagon you were hit?

A In that neighborhood.

Q In the neighborhood of two feet?

A I would think so.

Q Where did you stand when you looked up the street in that direction?

The Court. He said he did not stand.

Q Where were you when you looked north?

A That is about on a line with the front part of the wagon.

Q Well, now, where shall I mark it? Right there (indicating)?

A Yes, about there, or a little further out, perhaps.

Q A little further out, like that? Is that right?

A I would say so.

Q Did you look north first, or did you look south first?

A I looked north first.

Q And when you looked north what did you see?

A Saw a team, wagon, that is all I saw.

Q And how far could you see in a northerly direction along Halsey street when you looked north from a point just outside of the end of this Hahne wagon?

A Well, the truck there obstructed the view down the middle of the street.

Q Obstructed the view of the middle of the street?

A Yes.

Q How far out—how far west of you was the easterly side of that truck when you stood there at the end of that wagon?

A How far west?

Q Yes?

A Nearly on the line.

Q Nearly on a line?

A Yes.

Q Then the truck would be over here (indicating)?

A Yes.

Q Could you see the roadway on the west of that truck when it came toward you?

A Well, yes, some.

Q How much of it? How far north?

A Well, I don't know, probably 60 feet.

Q And was there any vehicle coming towards you

in a southerly direction, towards you, on the west side of that truck?

A Nothing but this truck coming towards me at all.

Q Could you see down Halsey street, that is, north of Halsey street, on the easterly side of that truck?

A Well, not very far.

Q How many feet?

A Because I was on a line with the truck; the truck was nearly in the center of the street, and the street is 30 feet wide, and the truck is about 12 feet, and when I stepped out that would be about the center of the street.

Q You stepped out directly in the center of the street?

A Yes, almost.

Q And that truck was how far away from you, the front of that truck, the horses?

A Well, about 30 feet, I should think; maybe 40 feet. I saw them when I was in front of the wagon.

Q This distance here would be 30 to 40 feet?

A Yes, in that neighborhood.

Q And when you stood at that point in the roadway there was no vehicle between you and the truck on Halsey street, was there?

A Nothing except the wagon.

Q And you immediately turned around and looked south; that is, you turned your head?

A I took a good look up north, and then stepped out, and as I stepped out I looked south, because you could see without looking, with a glance, there wasn't anything there close, for the space was all vacant.

Q There was nothing south, as you were looking south you were struck?

A Yes.

Q Right at about that point, or a step or two—

A Yes, that is right.

Q How many feet? A foot, or two feet?

A Well, two feet, probably; maybe three feet, as I should think.

Q We will put that distance in there as two feet, about?

A Yes, about.

Q Between where you looked and where you were struck?

A Yes.

Q Did you notice whether or not there was an automobile on the southwest corner of Bleecker and Halsey streets?

A Yes.

Q There was an automobile?

A I think so.

Q How was it standing? Out from the curb, or along the curb?

A Along the curb, I think.

Q An automobile standing along here, then?

A Yes.

Q Was there another standing on the north corner there?

A That I don't know.

Q Was there any vehicle that you could observe on the west curb north of Bleecker?

A On the west?

Q Yes, on this west side of Halsey street, north of Bleecker?

A No, I don't know as there was.

Q This wagon is about 12 feet long, you said, or more?

A Yes.

Q Did your knee come in contact with the hub of that automobile?

A I don't know; the front part struck me.

Q You know what I mean by the radiator; did the radiator strike you?

A I don't know anything about automobiles at all.

Q Was it your right, or left, leg that was struck?

A My right leg was struck, but the left foot—

Q Was it struck at the knee?

A Well, a little below the knee.

Q And when you were first hit there by the machine you say that they hollered at you?

A Yes. Excuse me; I got hit on the knee a little, too.

Q On your right knee?

A On my right knee.

Q As well as your left?

A A little on my right knee, as well as 4 or 5 or 6 inches on the leg, below the knee; the right leg.

Q On the right leg 5 or 6 inches below the knee?

A Yes; enough to knock the skin off; but it wasn't very serious.

Q Did you fall in the roadway?

A I got knocked down.

Q Your body went down on the roadway?

A Certainly did.

Q And did the automobile—what was the position, or relation, of the automobile to your body as you were on the roadway lying down?

A I was almost across, crossways, with the automobile.

Q Crossways. You mean your feet were nearer to the automobile—

A My right leg was nearer the automobile than my left one.

Q Your body was lying out at right angles from the automobile, I think you said, in a southeast direction?

A I think so, yes.

Q You were thrown back this way (illustrating)?

A Yes.

Q The machine did not go over your legs, or body, did it?

A Over my left leg.

Q What part of the leg?

A The ankle.

Q Do you know what part of the automobile went over the left leg?

A I do not.

Q Any other part of your body?

A No.

Q Did the front wheel go over the left leg, or the rear wheel?

A The front wheel.

Q Can you be certain whether or not any of the automobile, any wheel of the automobile, either front or rear left wheel, went over your right leg, or right knee?

A No.

Q What part of the automobile, if you know, struck your right knee?

A I don't know.

Q Well, can't you tell me whether or not you were hit by the front of the automobile coming that way, or whether you were hit by the side of it going along that way?

A I was hit by the front.

Q You were hit by the front of this automobile?

A Yes.

Q You know what the front of an automobile—it is a Ford automobile—broad, square front?

A I don't know Fords from any other.

Q Well, a Ford automobile has got a square front they call the radiator.

A Yes.

Q And the wheels on either side here, with mud-guards over them. Was it the front of that box-like front of the automobile that struck you?

A That I don't know; you see I was looking south when the automobile struck me.

Q You say you were thrown on your back, or on your face?

A Well, on my back.

Q Thrown on your back?

A That is sort of side and back both.

Q And were you thrown in front of the automobile, or were you thrown to the side of it?

A I think—well, not exactly east, but southeast.

Q (Indicating.) Taking that as the front of the automobile, south, the mud-guard came out like that on either side, the front hub right under it like that, now can you tell me whether it was the side or front of that wheel that hit you?

A I cannot.

Q Can you tell me in which direction—I will mark it down for you—your body laid when you first went down on the pavement?

A Well, as I remember, it was southeast.

Q Your body, then, you say, would be thrown in this direction (indicating)?

A About like that, I think.

Q This being the head, here?

A Yes.

Q And your right—you were on your back?

A Yes.

Q And your right—or your left foot—you say this wheel went over you left foot?

A Yes.

Q You did not go under the machine, did you?

A No.

Q At no time was your body under the body of the car?

A No.

Q Your body was always clear of the car?

A Yes.

Q As far as you know; you are unable to state what part of that machine struck you?

A Yes.

Q But you do feel certain that your left foot went under the wheel?

A Yes.

Q Didn't you make a statement to the people that got out of that machine that you did not think the wheel had gone over you?

A No, I don't think I made that statement.

Q Didn't you tell Mr. Brown, or someone else in that car, when you got up, that you thought you were all right, and looked to see if there was any mark of a wheel on your shoe, and you could not find any?

A No, I didn't look.

Q Sure about it?

A Because, when I got up—

Q No, just yes or no; you did not?

A No.

Q And isn't it a fact that you did not want to be taken to any physician, or hospital, said you were not hurt?

A Yes, sir.

Q Said "Just take me down to my place of business"?

A Yes, sir.

Q And they took you down Sussex avenue?

A Yes, sir.

Q And it is a fact, is it not, that you did not want to call in a doctor the next day?

A Yes, sir.

Q When did you go down to 50 Sussex avenue after this injury in connection with your business?

A Well, about two weeks, probably; might have been a little sooner, or a little longer, but I think it is about two weeks.

Q And since that time you have been giving pretty much attention to business?

A No, sir.

Q The fact that you had to go around on crutches is what has prevented you?

A Yes.

Q That only lasted for about two weeks, didn't it?

A Lasted from December until the middle of April.

Q You heard these men in the automobile holler, or shout, did you not, just before you were struck?

A No, sir, I did not.

Q Just at the time you were struck did you hear any noise?

A No, I didn't hear them holler at all.

Q Are you hard of hearing at all?

A No, I don't think I am.

Q Has your hearing always been good, normal?

A It has been a little—since I have been hurt it has been a little dull.

Q But before you were hurt your hearing was excellent?

A Yes, sir.

Q And you feel certain that you would have heard a shout, or holler, as you say, if the people in this automobile had shouted, or hollered to you?

A Yes, sir.

Q You are positive, are you, that no holler or shout was given by these people in the car?

A I didn't hear any.

Q You didn't hear it?

A No, sir.

Q Did you tell Mr. Brown, when he told you that they hollered at you, that you had not heard the holler?

A No, I did not.

Q Did you deny the fact that he had hollered at that time?

A No.

Q What did you say to Mr. Brown when—

A I said, "You didn't blow your horn"; he said, "We didn't see you in time, but we hollered."

Q Did you deny at that time that he hollered?

A No.

Q Did you make any statement to him about hollering?

A I did not.

Q Who was the friend that introduced you to Dr. Gale?

A Mr. Hays.

Q Who is Mr. Hays?

A One of the firm of the Newark Horse Company.

Q Where is their place of business?

A Bridge street.

Q Bull's Head Stables, it is?

A No.

Q And when was it that Mr. Hays recommended Dr. Gale to you?

A The day that Dr. Gale came to see the scratch on my leg for the Public Service; he was well acquainted with Dr. Gale, and he got acquainted with him, I think, through some business matter, and he said "He is an awful nice man, and understands"—

Q You never had met Dr. Gale until he came to examine you for the Public Service, had you?

A No.

Q When did he come to examine you for the Public Service?

A There at the stable.

Q And while he was examining you for the Public Service Mr. Hays recommended him as a mighty nice man?

A Yes.

Q You never have found anything to the contrary, I presume?

A No, sir.

Q Did you continue Dr. O'Neil's treatment after Dr. Gale became your physician?

A No, I think not.

Q Was there any period that elapsed when you were not under medical treatment between the employment of Dr. Gale and the discharge of Dr. O'Neil?

A I don't know as I discharged Dr. O'Neil, exactly.

Q Well, what did you do with him?

Mr. Beecher. I object to the question, because it embraces a statement of fact that is not in the case.

By the Court.

Q What did you do?

A I followed Dr. O'Neil's treatment.

Q I understood you to say in your direct testimony that Dr. O'Neil treated you until April, 1913?

A Yes.

Q And that Dr. Gale was employed in June, 1914?

A Yes.

Q Now, between those two dates did you have any medical treatment?

A No, I don't think I went to see Dr. O'Neil after that—yes, I did go to see him after April—did you say April? Yes, I did go to see him after that, because Mr. Beecher went up with me to see him when we had this last photo taken, and that was taken in September when the company wanted to—

Q Well, that was for the purpose of this trial, I presume?

A No, he treated me after that, because he made an examination.

By Mr. Heine.

Q After April, 1913, did Dr. O'Neil treat you for this injury?

A Yes.

Q How many times?

A I don't remember, not very often.

Q Well, twice?

A Yes, two or three times.

Q March 11th is the last date?

A He has treated me since.

Q Treated you since this accident, for this injury?

A For my dizziness, for my head.

Q How many times has Dr. O'Neil treated you since March 11, 1913?

A Well, three or four times.

Q Any more than that?

A I don't think more. And those have been at my office.

Q With the exception of those four visits at most, you have had no medical treatment between March 11, 1913, and June, 1914?

A No.

Q And you went about your business during that period?

A I didn't do anything.

Q Did you try to do any business during that period?

A No, I did not.

Q Why didn't you try?

A My head was in such condition I could not do anything.

Q Didn't you think it was advisable to call in a doctor about that condition?

A Well, yes, might have been.

Q If you were not able to do business why didn't you have a doctor come in and see what was the matter with you?

A Well, I knew what was the matter with me, because Dr. O'Neil had told me what was the matter with me, and I had taken some of his medicine for that.

Q Then you were hit by a trolley car of the Public Service?

A Yes, well I wasn't hit.

Q The wagon was hit, and you were thrown out?

A The horse jumped on the wagon.

Q When was that accident?

A That was in June some time; I think about the 1st of June.

Q So immediately after you were hit by the Public Service you got another doctor?

A Yes.

Q And you have had Dr. Gale ever since?

A Yes.

Q Down to the time of this trial?

A Yes.

Q And did you settle your case of injury with Dr. Gale in connection with this Public Service accident?

A Well, what little they gave me, yes, sir; they tore my clothes.

Q And scratched you up a little bit?

A Well, the scratch didn't amount to much.

Q They gave you how much?

Mr. Beecher. One moment. I object. We are not trying that case.

The Court. I sustain the objection.

Q (*By the Court.*) It was, then, after you were injured as a result of the trolley car running into the horse that you employed Dr. Gale?

A Yes.

Q (*By Mr. Heine.*) How often have you seen Dr. Gale since June, 1914?

A I don't know exactly how often; he has never sent me in a bill.

Q About how many times have you seen him? Do you go to his office?

A Yes, I always go to his office.

Q How many times have you been since June, 1914?

A Probably a dozen.

Q Was medical attendance by Dr. Gale any condition of the settlement with the Public Service?

A No, sir.

Q Are you sure you did not make arrangements with Dr. Gale that if you settled with the Public Service he would give you free medical treatment?

A No, sir.

Q No such thing was mentioned, I presume?

A No, sir.

Q Can you remember, or estimate, the number of times that you have been to Dr. Gale's office since June, 1914?

A Probably a dozen.

Q A dozen times?

A Yes.

Q And how many times did you go immediately after the accident on the Public Service?

A Well, I did not go in some time after the accident.

Q On the Public Service?

A No, but I don't know how long.

Q You began suit against this defendant within three days after the accident with the Public Service, did you not?

A No, sir.

Q Just about that time, was it not, that you started suit against the defendant?

A I did not start any suit; they came to see me.

Q Who came to see you?

A Why, the adjuster, whoever you might call, or their agents, came to see me.

Q Yes, the agent of this defendant. And you started suit about May, 1914, did you?

A I didn't start any suit.

Q Who started the suit?

A Nobody.

Q How is it in court here then?

Mr. Beecher. He does not understand what you are talking about, Mr. Heine.

The Court. He means this suit.

Witness. Oh, this suit?

Q Yes.

A Yes, I started this suit; I thought you meant the Public Service.

Q You told me that case was settled.

A Well, they gave me a little for tearing my clothes; it wasn't very much.

Q Then you started this suit against this defendant about the time you were injured by the Public Service, didn't you?

A Mr. Beecher can tell you when he started it.

Q Can't you remember when it was started?

Mr. Beecher. I object, the record shows.

The Court. The papers show it was started the 12th day of May, 1914.

Q When was the first time, after the injury by the Public Service, that you went to see Dr. Gale after this introduction, when he examined you?

A Probably a couple of weeks.

Q What did you go to see him for then?

A For my nervous trouble, or my bad head.

Q Had you spoken to him about this nervous trouble, or bad head, at the time he examined you for the Public Service Corporation?

A No.

Q You didn't say anything about it at that time?

A No.

Q Did you mention the fact you had had a previous accident to Dr. Gale at that time?

A I think he asked me if I had.

Q He asked you if you had, naturally, in taking a history of your case, and you told him you had this accident?

A I think I must have.

Q Did you say anything to him then about dizziness, or falling, or fainting fits?

A I don't think I did; I don't remember.

Q Did you tell him the facts of the injury?

A I don't think he asked me anything about this case at all.

Q And what did you tell him in regard to your dizziness, or head trouble, when you went to him two or three weeks later?

A Well, I told him how I was, and the bad spells that I had.

Q Did you tell him that the Public Service would likely be sued unless your condition was taken care of by them in addition to your settlement?

A No.

Q You didn't make any additional claim against the Public Service, did you, for this dizziness?

A I did not.

Q You were sure that was occasioned by the previous accident by this defendant?

A I know it.

Q You know it, you are sure of that?

A Yes, sir.

Q And you went and told Dr. Gale that you were sure that this bump against the side of this defendant's automobile caused this trouble, and not being thrown out of the wagon by the Public Service?

A I didn't say anything to him about this accident.

Q When you went to him two weeks after the accident did he know you had just started a law suit against this defendant?

A No.

Q You did not mention it to him?

A I don't think I mentioned it to him until now, that I started a suit.

Q Did you ever discuss with him the accident and the amount of your damages in this case, or what his testimony in regard to them would be, or anything of that kind?

A He came up to see—

The Court. You may answer the question yes or no.

Q (Question read.)

A Yes.

Q When did you have such a discussion?

A Well, about a week ago.

Q What was said about this case?

Mr. Beecher. I object to that, your Honor.

The Court. I will overrule the objection.

A Well, he said most to Mr. Beecher; he met me at Mr. Beecher's office, and what was said he directed his conversation to Mr. Beecher.

Q He made an examination of you at Mr. Beecher's office?

A No, he made an examination of me at his office.

Q Then he came up with you to Mr. Beecher's office?

A No, he met me at Mr. Beecher's office; he had met me many times before.

Q Yes, ten or twelve visits, you said?

A Yes.

Q You are sure not more than twelve times during that period?

A I would not be sure, but in that neighborhood.

Q And it was two weeks before this case came up for trial that he made this examination at his office?

Mr. Beecher. "His," whose?

Q The doctor's office.

A He made a partial examination when I first went to him, but he made a thorough examination just a few days before we went to Mr. Beecher's office.

Q That was when this action was about to come to trial?

A Yes.

Q He made a more thorough examination this last time, just before the trial, then he did the previous occasion, did he?

A Yes.

Q Have you had any other doctor examine you than Dr. Gale, or Dr. O'Neil?

A Yes, sir.

Q Who was that doctor?

A Dr. Washington.

Q Also of the Public Service?

A No.

Q Did he examine you for the Public Service?

A No, sir.

Q When did he make his examination of you?

A Last week, I think it was.

Q How did you come to have Dr. Washington examine you?

A It was suggested by Dr. Gale.

RECESS.

Q When did Dr. Washington first treat you, Mr. Pool?

The Court. I understand him to say he just examined him. Did he treat you?

Witness. No, sir.

Q When did he examine you?

A Last Thursday or Friday; Thursday, I think it was.

Q And did you request Dr. Washington to examine you yourself, or was it by advice of counsel?

The Court. He said before lunch that Dr. Gale advised him to go to him. He may answer you.

Q Answer, please.

A Dr. Gale advised me to have Dr. Washington.

Q And when did Dr. Gale advise you to have Dr. Washington to examine you?

A Probably four or five days, or a week, before he did examine me.

Q And did Dr. Gale state to you why he desired to have Dr. Washington examine you?

A He did not.

Mr. Beecher. I object to that.

The Court. He says he did not state.

Q Why did you have Dr. Washington? Why did

you submit yourself to examination by Dr. Washington?

Mr. Beecher. I object to that; there has been no examination in regard to Dr. Washington's connection, that he has done anything more than examine him.

The Court. The objection will be overruled, although I understand the question to have been answered. You may answer the question.

Q (Question read.)

A Because Dr. Gale thought it would be best; advised me to.

Q And after this examination have you seen Dr. Washington, or been treated by him?

A No, sir. I saw him once.

Q When?

A That was last Monday.

Q At his office, or where?

A At his office.

Q Why did you go to his office last Monday?

A To pay him for the examination.

Q And you paid him?

A Yes, sir.

Q Your friend who recommended Dr. Gale to you made that recommendation at the time Dr. Gale came to examine you after your Public Service accident?

A Probably a week or so after that.

Q But he made no recommendation prior to the examination by Dr. Gale for the Public Service accident?

A No.

Q You said that your general health has always been good; isn't it a fact that in your business you are exposed a good deal to the weather, riding about the country?

A Yes, sir.

Q Looking for stock?

A Yes, sir.

Q And you have been engaged in that occupation for many years; frequently took long drives, did you not?

A Yes, sir.

Q In cold weather?

A Yes, sir.

Q Haven't you found, as years have gone by, that you have kind of stiffened up by reason of the exposure to the weather, and long drives?

A No, sir; I felt as good as I did when I was twenty-five years old until I got hurt.

Q You never noticed, at the end of any of these drives, after you got along in the fifties, any rheumatic pains, or anything of that kind, after you had taken these long drives?

A Never had a rheumatic pain in my life.

Q When did you first notice this sensation of dizziness?

A The next day after I was hurt.

Q When did you feel it again after that?

A I was that way all the time for probably a week after I was hurt.

Q How often have those sensations of dizziness recurred after that first week?

A Sometimes oftener than others.

Q Well, about how often?

A Sometimes once a week.

Q What would the average be from the end of the first week after the accident down to the present time?

A Well, I have slight dizzy spells every day, but severe dizzy spells may be once in two weeks on an average, maybe once a week, maybe once a month.

Q Well, which is it, once a week, or once a month, on the average, a severe spell, how often?

A Once in two weeks.

Q And you suffer from slight dizzy spells once a day since the accident?

A Yes, sir.

Q And severe dizzy spells once every two weeks?

A Yes, sir.

Q And of how long duration are those severe spells?

A Well, the severest I had—

Q On the average, how long duration are they?

A From half an hour to five minutes.

Q You never had a doctor before this accident?

A No, sir.

Q You would know, would you not, if your condition of health required medical attendance?

A I think so.

Q That is before the accident, if you had needed a doctor you would have called him?

A Yes.

Q And the same is true, is it not, since the accident?

A Yes, sir.

Q When you felt that you needed a doctor you called him in?

A Not always.

Q Why not?

A Well, in the first place, they doctored me some, and I didn't seem to get any better, and I didn't feel under the circumstances, when I wasn't making a dollar, running up three or four or five hundred dollars doctor bill, probably it would wear off.

Q And you felt that way from April, 1913, when you finished with Dr. O'Neil, to June, 1914, when you began doctoring with Dr. Gale?

A Yes, sir.

Q Although you were having these dizzy spells?

A Yes, sir.

Q You didn't think it necessary to have medical attendance?

A No.

Q When did you retain Mr. Beecher in this case, Beecher & Bedford?

A I forget how long it was.

Q Well, about when?

A Nearly a year, I should think; eight months, probably, before he started suit.

Q Started suit in May, 1914; about the winter, then, of 1913, was it?

A Yes. Those dates are not exact.

Q Well, you say in the winter of 1913; was it about August, 1913?

A I think maybe it was.

Q You said that the Public Service merely paid you for your clothes after the accident in which you were thrown from your wagon, is that correct?

A That is all.

Q Had a suit of clothes ruined, did you?

Mr. Beecher. I object to that, I don't see why we should get into the trial of that case, what amount the Public Service paid has to do with this particular case.

The Court. The objection will be overruled.

Q Answer, Mr. Pool?

A Yes.

Q What was the matter with them, were they cut, or were they muddied, or what was the matter with them?

A They was torn, the knees torn, they were scraped pretty well.

Q What part of the suit was scraped pretty well?

A Well, my shoulder.

Q What caused that scraping of the shoulder of your suit?

A Just merely being slid off the wagon, off the wagon seat onto the ground.

Q Were you thrown on the ground, were you flat on the ground?

A Yes, I was flat on the ground.

Q How high was this wagon seat of the wagon on

which you were riding and from which you were thrown?

A Probably 18 inches to 2 feet.

Q Above the ground?

A From the seat to the surface of the street.

Q Two feet?

A Yes.

Q What kind of a wagon was it?

A An open wagon, a sale wagon, similar to a run-about, no top to it; the body is low.

Q How high from the ground is the hub of the wheel?

A Well, probably eighteen inches, in that neighborhood.

Q How far above the hub of the wheel was the floor of the wagon?

A Right down to the axle.

Q Right down on the axle, just above the axle?

A Yes.

Q How far above the wagon floor was the seat?

A Well, in the neighborhood of eighteen inches to two feet.

Q So that would be three feet or more, to where you were sitting, above the ground?

A Well, no, no; it wasn't that much.

Q Eighteen and eighteen make thirty-six, don't they?

A Yes, but the wheel was off.

Q What wheel was off?

A The wheel was mashed down.

Q Yes, but before the wheel was mashed you were three feet or more above the ground?

A Probably, yes.

Q And you were thrown on the ground?

A I wasn't thrown on the ground off the seat, the wheel was mashed down, let the body down sideways, made the seat slanting, and I slid off the seat on the

ground; I was thrown on the boy; the boy struck the ground and I struck the boy.

Q Did your head strike the pavement?

A No, sir.

Q Are you sure of that?

A Yes, sir.

Q What did your head strike?

A It didn't strike anything.

Q Could you get flat on the ground without your head striking, touching anything?

A I didn't lay flat on the ground.

Q What did you lay on?

A I laid on the boy.

Q How old was the boy?

A The boy was probably seventeen or eighteen years old.

Q How tall was he?

A Probably five feet six or something.

Q And how tall are you?

A Probably about six feet.

Q Then you overlapped the boy?

A No, I didn't; I slid off the seat.

Q And your head went off first?

A My shoulder, or body, was off first.

Q So you went out this way (illustrating) your feet following on down out of the wagon?

A Not exactly, because I didn't have my feet hanging out of the wagon.

Q You were practically upside down?

A Not exactly.

Q You were on a slant, weren't you?

A Yes, sir.

Q With your feet up and head down?

A No, my head wasn't down.

Q Where was it?

A It wasn't down lower than my body.

Q It was lower than your feet, wasn't it?

A No, sir, because my feet started eighteen inches below my body, before I started.

Q Then after your head got out of the wagon and started down towards the street, your feet stayed in the same position, or did they start too?

A Certainly not, all started together.

Q Which got to the bottom first, your head or feet?

A I think both got there about the same time.

Q That doesn't agree with your previous statement that your feet were up above your head?

A Excuse me, I didn't say my feet were above my head.

Q When you were on the ground?

A No, sir.

Q Then, as I understand it, your body laid perfectly horizontal, like that (illustrating), and came out of the wagon and struck the ground so that neither your head nor feet was one above the other?

A I was on the boy.

Q You say your feet and head was on the same level?

A Yes, I think maybe my feet were the lowest.

Q So you struck the ground feet first, did you?

A Excuse me; to explain it to you, I wasn't thrown out, I slid out, the wheel was mashed down, and I slid off the seat.

Q Did you slide feet first or head first?

A Both together.

Q Then you slid sideways?

A Yes, sir.

Q And you say your head did not come in contact with the pavement at all?

A No, sir.

Q Was there considerable jar when you struck the pavement?

A No, sir.

Q Just a soft, gentle, settling down, as it were?

A Just a slide off.

Q And in this soft and gentle slide you ruined this suit of clothes?

A Yes, sir.

Q When you say you scraped the shoulder on the wagon, as you call it?

A Well, as I slid off the wagon the horse that was drawing the wagon went on, and he kind of shoved us on the ground; it shoved my knee on the ground, but my body and shoulders wasn't flat on the ground at all; it shoved the boy and myself both along a little ways, a couple, or three feet, probably.

Q And that is what ruined your clothes?

A Yes.

Q Dragging on the ground?

A Well, I didn't drag on the ground so very far, but I struck my knees, dropped on the ground, and I tore my pants, and some part of my coat some how.

Q If you were lying on the boy all the time, he didn't touch your coat, did he?

A I probably rolled off him.

Q When you rolled off the boy did your head hit the ground?

A No, sir.

Q When you were being dragged on the ground was the boy under you or not?

A Under me.

Q When the dragging stopped was he still under you?

A I kind of scrambled off the top of him.

Q You got considerably bumped in that side, didn't you?

A No, sir.

Q You bumped enough to tear your clothes, didn't you?

A Yes, sir.

Q This diagram here, where you pointed your head, this automobile went over your left ankle, is that right?

A Yes, sir.

Q Did the rear wheel go over you?

A I think not.

Q Did the rear wheel clear you or did it stop before it got to you?

A I don't know.

Q When the car stopped.

A I was about opposite, as I remember, I was about opopsite the back wheel.

Q When the car stopped your feet were opposite the rear wheel as near as you can recall it?

A Yes.

Q You came out one of the doors of Hahne's store which was south of the standing auto on the east curb, is that right?

A Yes, sir.

Q How far south of the southerly end of this auto was the door you came out of?

A Well, I think the north door of the back entrance would be about on a line with the auto.

Q You came out of that door?

A I came out of it.

Q You came out of the door opposite this line here (indicating)?

A Yes, about there.

Q And you said that you did not want to go across the street south of that auto for some reason I have forgotten, what was it?

The Court. Did not want to go diagonally across.

Q Did not want to go diagonally across, is that it?

A Yes.

Q When you looked north and found there were no vehicles or machines on the east curb there, beyond this Hahne wagon, why didn't you go around north of the Hahne wagon?

A That would bring me beyond the south walk, to cross.

Q Beyond the south of Bleecker street?

A Yes.

Mr. Beecher. Mr. Heine, may I ask you which way that auto is standing over there (indicating)?

Q Which way was that standing, this auto here, which way was it headed?

A I think that was headed south.

Q In this direction?

A Yes, sir.

Q And this one was headed north (indicating)?

A Yes, sir.

Re-direct examination.

Q Is that auto headed south that Mr. Heine has located here in the right position as you saw it, as to the curb?

Mr. Heine. Objected to on the ground this witness is not qualified to testify as to the traffic rules of this city.

Q (Question read.)

A I think so.

The Court. The answer will be stricken out. The objection will be sustained.

Mr. Beecher. I did not ask him as to the traffic rules, I asked him if the auto was located in the correct spot; I want to know whether it stood as near the curb as that represents, or further away?

The Court. That may be answered. I did not understand your question.

Q Do you understand the question? You may answer it.

A It stood close to the curb, as I remember, very close to the curb, anyhow, it might have been a few inches away, or a foot away, close to the curb.

Q How many doctors have examined you for the defendant?

A Well, a doctor came to see me from the—

The Court. Just the number you are asked, the number.

A Four.

Q How many times—four different doctors have examined you for the defendant, do you say that?

A I guess there was only three.

Q How many times has each doctor who has examined you for the defendant made examinations?

A Well, one came from New York twice.

Q The same doctor?

A The same doctor twice, and then under the instruction of—

The Court. You are just asked the number.

Witness. Dr. Baker I consider one.

Mr. Heine. I object to what the witness considers.

Q That is when Dr. Baker made an X-ray upon the direction of the defendant, is it?

A Yes. And the doctor that examined me yesterday.

Q Dr. Satchwell?

A Yes, sir.

Q When was that? Yesterday?

A Yes.

Q (*By the Court.*) So you have had three examinations, and one X-ray on behalf of the defendant?

A Yes.

Re-cross examination.

Q Did this horse you were leading at the time the Public Service car hit you belong to you?

The Court. That is not re-cross examination upon anything that has been asked.

MINNIE POOL, sworn in behalf of plaintiff.

Direct examination by Mr. Beecher.

Q Mrs. Pool, you are the wife of the plaintiff, Mr. Pool?

A I am.

Q You have been married about sixteen years?

A About that.

Q Do you remember the injury that your husband received on the 19th of December, 1912?

A Yes, sir.

Q That injury is said to have occurred about three or four o'clock in the afternoon—

Mr. Heine. Objected to as leading.

Q Now, how long after that did you see him?

A Between five and six.

Q Five and six that afternoon?

A Yes.

Q Well, what was his condition when you saw him? Where was he?

A Well, slightly bruised on the head—

Q I meant what place did you see him, at your house?

A At my home, yes.

Q And what was his injury, so far as you saw?

A Well, the injury to the head and leg.

Q Which leg?

A The left.

Q And whereabouts on the head?

A (The witness indicates.) Back here.

Q The jury cannot hear you, Mrs. Pool. You place your hand on your head again, please.

A About there (indicating).

Q On the back of the head?

A Yes.

Q And just near the base of the brain?

A Yes.

Mr. Heine. I move to strike that out.

The Court. It will be stricken out.

Q Will you locate it?

A Back here, back there. I washed it, took care of it, until the doctor came.

Q What was his condition for a day or two after the time you speak of when he was brought home?

Mr. Heine. Objected to on the ground there is nothing in evidence to show he was brought home; there is evidence he walked home, or went home in the usual way.

The Court. Proceed.

Q Well, when he came home what was his condition, when he came home?

A Very nervous state, to be sure; I don't know why he would not be, receiving such a shock as that.

Mr. Heine. I move to strike out the characterization by the witness.

The Court. It will be stricken out.

Q Only state what you saw, the facts. As to whether he was in bed, or about the house, what do you say?

A I put him to bed, after I undressed him.

Q And how long did he remain in bed?

A Long after, until the doctor came.

Q When did the doctor come?

A The next morning.

Q What was his condition as to whether he was able to get about, or not, the next day?

A The doctor said he could use his own judgment about that, he could stay in bed, or sit in a chair.

Q Was he able to get about? How soon after the injury was he able to get about?

A About the house?

Q Yes.

A A month or so after, I should think.

Q Will you go on and describe how he got about after the injury?

A Of course, I assisted him always; he had the crutches, to be sure.

Q How long did he use the crutches?

A Probably four months.

Q How did he get about after that?

A Walked with a cane.

Q How long?

A I should judge about—well, it was quite a while.

Q How many weeks?

A Well, about six weeks, I should think.

Q What was his condition of health before this injury?

A He was comparatively healthy, never had a doctor in his life.

Q During the sixteen years that you knew him had he ever been troubled with dizziness?

Objected to as leading.

A Never, not to my knowledge.

The Court. The answer may stand.

A Never had a headache in his life, not as long as I have known him.

Q That is sixteen years?

A Yes, sir. It is longer than sixteen years.

Q How long?

A About twenty; we have been married sixteen years.

Q And did you ever know of his having attacks of nervousness, or of falling?

Mr. Heine. Objected to as leading.

The Court. I will sustain the objection.

Q Did he ever have any sickness during the time that you knew him?

A Never.

Q Or any infirmity or trouble of any kind?

A None whatever.

Q Prior to this accident?

A Prior to the accident.

Q And you may state his condition, as you know it, from the time of this accident up to the time when he had an accident on account of a trolley car, or in connection with a trolley car.

A Of course, after this attack with the automobile it left him very irritable.

Mr. Heine. I move to strike out the answer as a conclusion of the witness.

The Court. The answer may stand.

An exception to this ruling is noted by the defendant as ground of appeal.

Q And what else can you say as to his condition after this auto accident up to the time of the other?

A Very sick spells, sick to his stomach, nauseated almost every morning, especially when he arose, had to hold his hand on his head before he could get out of his bed. I have taken care of him in those bad spells.

Q How often did those bad spells occur, otherwise than in the morning, when he was in bed?

Objected to as leading.

Q If you know.

A Well, he had very bad spells on the street; they would have to bring him home; then, of course, I had to go for the doctor. He would come out of them and be sick, possibly, for a week or so, could not retain his food, sick to his stomach.

Q What else can you say, if anything, with regard to his condition from the auto accident up to the other; from the time he was hurt by the automobile up to the time of getting out of the wagon?

A Well, that did not amount to anything, that accident was not of any account at all.

Mr. Heine. I move to strike out that answer as a conclusion of the witness.

The Court. It will be stricken out.

Q Now, Mrs. Pool, I didn't ask you about how

that accident occurred, or what was the effect of it; I was asking you about the other, the auto accident, from the time the auto accident occurred up to the time the other took place.

A Mr. Pool was always under treatment.

Q Who treated him during the time I speak of?

A Dr. Charles O'Neil.

Q Now, do you know about the trolley accident, I will call it, did you know about that?

Mr. Heine. Objected to as irrelevant.

The Court. I overrule the objection.

An exception to this ruling is noted by the defendant as ground of appeal.

A That didn't amount to anything.

Mr. Heine. I move to strike that out.

The Court. It will be stricken out.

Q Did you observe what that injury was?

A A slight bruise on the leg.

Mr. Heine. I move to strike out the word "slight," as a conclusion.

Q Which leg?

A I am not quite sure.

Q Did you do anything for it?

A Well, bathed it with liniment, that is all; it didn't keep him in the house.

Mr. Heine. I move to strike that out as calling for a conclusion.

The Court. It may stand.

An exception to this ruling is noted by the defendant as ground of appeal.

Q How long before it was entirely well, if it did get well?

A Three or four days.

Q And did he have a doctor for it? Did your husband call a doctor to treat it?

A No, sir; he did not.

Q Did he have any doctor other than the trolley company's doctor?

A Not that I know of.

Q Did you observe whether that injury had any effect as to the automobile injury, one way or the other?

Mr. Heine. Objected to on the ground this witness is not competent to answer that question, calling for a medical answer.

The Court. The objection will be sustained.

Q Now, after the trolley car accident what was the condition of your husband as compared with his condition after the auto accident, and before the trolley accident; I want to find out how—

Mr. Heine. I object to counsel annotating the question.

The Court. Do you understand the question, Mrs. Pool?

Witness. I did not quite understand it.

Mr. Beecher. I will ask another.

Mr. Heine. I would like an answer to that question.

The Court. The question is withdrawn.

Q Mr. Pool was hurt by the auto, and then this trolley car accident occurred, then after the trolley accident I want to know if you observed any difference in his condition afterwards, as compared with the one before?

A The auto was the one that caused the damage.

Mr. Heine. I move to strike out the answer.

The Court. It will be stricken out.

Q I want to know if you observed any difference in his condition before and after. Did you observe any difference between those times as to his condition, as before and after the trolley accident?

A Of course, he was nervous, to be sure, left him very nervous.

Q Which left him nervous, which accident?

Mr. Heine. I object to that question.

The Court. After which accident was he nervous, I assume you mean.

Mr. Heine. I object to that as an improper question to this witness.

The Court. The question may be answered.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Did you get the question?

A No, I did not.

Q (*By the Court.*) After which accident did he appear nervous?

A Why, after the auto accident.

Q (*By Mr. Beecher.*) Well, now, after the trolley accident how was his condition?

A Well, he was nervous, and being treated for nervousness.

Q And from the time he had this auto accident right up to the present time will you state what his condition has been, so far as you know.

Mr. Heine. Objected to on the ground the witness has already testified in detail.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A Very nervous and irritable, which he never was before.

Q As to these spells, for how long a period have they continued?

Mr. Heine. Objected to as leading.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A For a week.

Q During what period of time do they cover?

Mr. Heine. I object to the question as leading.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A From two to three or four days.

Q What do you mean, two to three or four days?

A Well, that he couldn't eat anything, couldn't retain anything on his stomach.

Q How about his business, can you state whether he was able to attend to that or not?

Mr. Heine. Objected to.

The Court. The objection will be sustained. It may be proper to ask whether he did attend to his business; the ability to attend to it may be a question this witness is not qualified to answer.

Q Did the plaintiff attend to his business after he was hurt by the auto, and up to the present time?

A No, he did not.

Q Did he attend to his business always before that time?

A Always.

Q Why didn't he attend to it since?

Mr. Heine. Objected to as calling for a conclusion.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A He wasn't capable to.

Q Did you say he was not able to attend to his business?

A Not when he was hurt, surely not.

Mr. Heine. I move to strike that out as a conclusion of the witness.

The Court. It may stand.

An exception to this ruling is noted by the defendant as ground of appeal.

Minnie Pool, cross.
Miles Fagan, direct.

Cross examination by Mr. Heine.

Q Didn't he attend to business at all after the accident?

A He did not, no, sir.

Q When he was hurt by the trolley car he was out with a horse, wasn't he?

A Yes.

Q Do you know what he was doing with the horse when he was leading it behind the wagon?

A I really don't know.

Q Do you know whether or not he was pleasure riding with the horse?

A He was not.

Q Would you think he was attending to some business at that time?

A I think so.

MILES FAGAN, sworn for the plaintiff.

Direct examination by Mr. Beecher.

Q Mr. Fagan, how old are you?

A Forty-nine this month.

Q Who do you work for?

A Hahne & Company.

Q How long have you worked for them?

A Twenty-two years.

Q Continuously for the last twenty-two years?

A Yes, all but the time I was sick.

Q How long were you sick?

A Well, sick with the rheumatism for a week or so.

Q Otherwise you worked right along for Hahne & Company?

A Yes.

Q And what has been your work? I mean, in connection with horses and wagon?

Mr. Heine. Objected to as leading.

The Court. If it is objected to you had better change it.

Q Well, what do you do, then?

A I cart furniture back and forth from the warehouse to the store.

Q What kind of horse and wagon do you use?

A Did use at the time of the accident a half van, which is a box wagon which averaged one-half of a van.

Q Give us the dimensions as near as you can.

A Well, it is about twelve feet long, a covered box wagon.

Q How wide is the top?

A Well, about seven feet high.

Q And do you remember the time of the accident, December 19, 1912?

A I do.

Q Was that wagon standing in the street?

Mr. Heine. Objected to as leading.

The Court. The objection is sustained.

Q You have described a certain wagon, was there anything in connection with the wagon—was there anything hitched onto the wagon?

Mr. Heine. Objected to as leading.

The Court. I overrule the objection.

Q What was the condition of the wagon as to whether it was hitched up or not?

The Court. I overruled the objection; did you mean to withdraw the question?

Mr. Beecher. I did not know I was repeating the same question.

Q (Question read.)

Mr. Heine. Objected to unless the time is specified.

The Court. You may answer.

An exception to this ruling is noted by the defendant as ground of appeal.

A The wagon was backed up on the east side of Halsey street.

Mr. Heine. I move to strike that out as in no way connected with this accident.

The Court. The motion will be denied.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Did you see the accident?

A I did.

Q Do you know Mr. Pool, the plaintiff?

A I did not know him personally at the time of the accident, no, sir.

Q Have you known him since the accident?

A I have, yes, sir.

Q At the time of the accident was the wagon which you have spoken of standing—do you know where the wagon which you have spoken of was standing at the time Mr. Pool was hurt?

A The wagon I was driving?

Q Well, do you know what wagon was in Halsey street at the time Mr. Pool was hurt?

A Yes, sir, the wagon I was driving.

Q Well, what was that?

A It was backed up to the curb on the east side of Halsey street in front of the elevator.

Q Now, describe the location of that wagon and the position of the horse, if there was a horse attached to it?

A The wagon was backed towards the east side of Halsey street, facing west on Bleecker, and it was on a line with the curb of Bleecker street, the south side of Bleecker street, and my horse was turned towards the north.

Q Now, what time in the day was that, about?

A It was after three o'clock.

Q In the afternoon?

A In the afternoon.

Q Now, will you state what you saw of the accident to Mr. Pool?

A I saw him get hit with the automobile.

Q Will you describe his position at the time he was hit?

A He was standing with his face toward Bleecker street, or walking, I don't know which.

Q And where was he as to the position of the wagon at that time?

A He was about four feet, or five feet south from my wagon, front of my wagon.

Q Did you see what hit him?

A An automobile, a small black automobile.

Q Do you know what make of automobile it was?

A I do now, but I didn't know at the time.

Q Now, when did you first see that small black automobile?

A When it hit Mr. Pool.

Q Did you see it before then?

Mr. Heine. Objected to on the ground the witness has stated he did not see it until it hit him.

The Court. The objection is overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

A I did not.

Q Do you know whether any signal was given, or not?

A There was none.

Q Do you know whether anybody called out, or hollered or not?

A I did not hear anybody.

Q Do you know what part of the automobile hit Mr. Pool?

A On the side.

Q Tell us about it.

A Well, it seemed that the north side part of his body the machine hit him.

Q Did you observe what effect the contact of the automobile had on Mr. Pool when it hit him?

A No, I did not; I turned my head when he got hit, I thought the man was killed.

Mr. Heine. I move to strike out what the witness thought.

The Court. It will be stricken out.

Q Did you do anything? Where were you standing when you saw him hit?

A At the rear of the tailboard of my wagon, talking to the elevator man.

Q About where?

A South side of the wagon.

Q Did you see whether or not Mr. Pool fell when he was hit?

A No, I did not.

Q When the automobile hit him?

A I did not see the way he fell, no.

Q No, I say whether or not he fell.

Mr. Heine. Objected to on the ground that he has already testified he turned away his head when he was struck.

The Court. The objection will be overruled.

An exception to this ruling is noted by the defendant as ground of appeal.

Q Did you understand?

A Yes, I understand.

Q What do you say?

A I said when the automobile hit him that I turned my head, I was nervous, and I didn't want to see him get hurt, I am awful nervous that way when I see an accident.

Q What did you say you thought about he was going to be killed, or something like that?

The Court. That was stricken out, Mr. Beecher.

Q Why did you turn your head away?

A Because I tell you I thought the man was killed.

Mr. Heine. I move to strike that out.

The Court. It will be stricken out.

Q Did you have an elevator man in your store? That is, did Hahne & Company employ an elevator man in their store?

A Yes, sir.

Q On that side, near Halsey street?

A On that side, on the north side elevator.

Q That would be on the east side of Halsey street, wouldn't it?

A East side, on the north side.

Q And is he living?

A No, he is dead.

Q When did he die?

A Two years ago.

Q Do you know whether he saw the accident or not?

A He did.

Q When were you talking to this elevator man on the day of the accident as you have stated?

Mr. Heine. I object to that on the ground the witness has already stated he was talking to him at the time the accident happened.

Q (*By the Court.*) Is that correct?

A That is right.

Q The man you were talking to is the one you say has died since?

A He is dead.

Cross examination by Mr. Heine.

Q Where were you standing talking to the elevator man?

A I was on the walk on the rear end of the tailboard of my wagon.

Q On what end of your wagon?

A On the south end tailboard.

Q But on the east end of the whole wagon, next to the curb?

A Yes.

Q And was the elevator man on the sidewalk?

A He was right on the back end of the tailboard.

Q On the wagon, or on the sidewalk?

A One foot on the tailboard of my wagon.

Q You were both on the tailboard then?

A No, I was on the sidewalk, and he was on the sidewalk with one foot on the tailboard of the wagon, he was resting his foot.

Q Was he standing north or south of you?

A He was standing north of me.

Q And in which direction were you facing?

A I was facing him.

Q Then you were facing north?

A Facing a little bit north, yes.

Q How long had you been talking there together?

A Well, maybe ten minutes.

Q Had anything come out of the store to be put in the van during that ten minutes?

A No, sir; my helper was upstairs with the other car, getting goods out.

Q You take these cars up on the elevator and roll them out on the sidewalk?

A Freight elevator, yes, sir.

Q And you were waiting for him to come down?

A Yes, sir.

Q And the elevator man was waiting to get the signal, I suppose?

A He ran the other car.

Q You are familiar with the neighborhood around there, aren't you?

A Yes, sir.

Q And you were standing about opposite to Bleecker street?

A Bleecker street.

Q Northerly or southerly curb line of Bleecker street?

A Southerly curb line.

Q How many feet would it be from that southerly curb line of Bleecker street up to Central avenue, north?

A How many feet?

Q Yes, feet.

A I ain't much of a figurer on that; probably 200 feet.

Q And did you notice, or when you were talking with the elevator man, did you hear any shout, or holler, of men's voices?

A No, I did not.

Q You would not be sure there was not such a noise, would you?

A I am sure there was no horn blown.

Q I didn't ask you about that, can you be sure, or not—

Mr. Heine. I move to strike out that answer as not responsive.

The Court. It will be stricken out.

Q Can you be positively sure, or not, whether or not there was not a hollering, or men's voices raised in a shout?

A Yes, I am positive.

Q You are positive that you didn't hear it?

A I didn't hear it.

Q But there may have been a shout that you did not hear?

A I did not hear it.

Q But there may have been a shout you did not hear?

A That I don't know.

Q Of course not, so you would not swear positively that there was not a holler, or shout at that point, at that time?

A I would, that I didn't hear it.

Q You say Mr. Pool was about five feet out from your wagon when he was hit?

A About that, four or five feet.

Q Therefore you had your back to him, didn't you?

A Not when he got hit I didn't, I just happened to turn my head at the time he was struck.

Q Did a holler or anything, cause you to turn your head?

A No.

Q Why did you turn your head at that particular moment?

A I don't know why I done it; I just happened to turn it, I do that often.

Q And when you turned it you saw him struck?

A I saw him struck.

Q He was struck right at that time that you turned?

A Pretty near, yes.

Q Can you see a person five feet south of you by just turning your head?

A Yes, in the day time.

Q How far around would you have to turn it to see a man standing five feet behind you?

A I suppose I would have to turn half-way.

Q What caused you to turn your head half-way around?

A I don't know; I do it often when I stand there talking, I look up Bleecker street.

Q Well, you had to look further around than Bleecker street to see Mr. Pool?

A Well, he attracted my attention when he stood there, or walked, I don't know which.

Q He attracted your attention when he stood there?

A Yes, sir, and the automobile—

Q How long had he been standing there?

A He wasn't standing there a second at the time I see him.

Q How did he attract your attention then, standing there, if he had only been standing there a second?

A I didn't—at the time I see him the automobile came along and hit him.

Q The whole thing happened at once?

A At once, so far as I could see.

Q Then he did not attract your attention before he got struck by the auto?

A He did, yes.

Q How long before?

A Just the time he got struck, he attracted my attention, just about a second or so.

Q You turned your head far enough around to see him four or five feet south of your wagon?

A He was about four or five feet when I see him get hit.

Q And how far out beyond the end of your wagon in the street was he?

A Well, he was about three feet, or so.

PLAINTIFF RESTS.

Mr. Heine. I would ask a direction at this time that the evidence concerning loss of profits from business, and so forth, be stricken out, in accordance with your honor's ruling that unless further evidence were adduced the motion would be granted.

(Argued.)

The Court. Without being able to point out precisely the testimony referred to in the motion, which should be done when testimony is stricken out, I shall decline to strike it out, but I shall instruct the jury that there is no evidence upon which they may base a finding of loss of profits in the business in which the plaintiff was engaged at the time of his injury.

Mr. Beecher. Will your honor grant me an exception?

The Court. I am simply stating what will be

done; the present ruling is in your favor, but when I have done it, you may have an exception.

Mr. Heine. For the purpose of the record I ask for an exception to the denial of the motion to strike out.

An exception to the ruling of the court is noted as ground of appeal.

Mr. Heine. I move for a nonsuit on the ground of contributory negligence on the part of the plaintiff, and also on the ground that no negligence on the part of the defendant has been proven.

(Argued.)

The Court. Courts are constantly saying to the jury, in cases of this kind, that their verdict must be founded upon a finding of negligence; that the mere happening of the collision, and the consequent injury of the plaintiff, is not of itself sufficient to warrant a verdict in favor of the plaintiff; and it seems to me that if there ever was a case in which the jury had nothing upon which to base their verdict, except the mere happening of the accident, it is this case. I have not lost sight of the decision of the Court of Errors and Appeals in the case of Dickinson *vs.* Erie, 90 Atlantic, 305, the first syllabus of which is "The trial judge is only justified in granting a nonsuit, or directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case, and the weight of conflicting testimony must always be submitted to a jury for their consideration and determination," but I cannot see what there is in this case which the court could leave to the jury upon the question of negligence, certainly not upon the question of speed, because there is absolutely no testimony in the case as to whether this automobile was proceeding at the rate of a mile an hour, or twenty miles an hour.

The only other thing which there is is the failure to sound the horn. The testimony is that no horn was sounded. But what is the purpose of a horn? It is to be sounded at street crossings, and where the person driving the automobile has reason to apprehend some one may be crossing; or, in other words, the horn is to be used when there is somebody to be warned of the approach of the automobile; when the automobilist sees somebody in the line of the progress of the automobile, or where he has reason to apprehend from the attitude of people near the line of progress of the automobile, that they will cross if not warned. Nothing of that kind appears in this case. In fact, the contrary appears. Until the very instant of the collision no one appeared in front of the automobile, a possible obstacle to its approach, and no one was in view so that the driver of the automobile could have reason to apprehend that some one—the plaintiff, in this case—might become an obstacle in the progress of the machine. But assuming that this last subject that I have mentioned might present a possible question—which I am not willing to concede—yet, I think there can be no question but that, under the case which has just been handed me by the attorney for the defendant, and which I have previously read, that the plaintiff did not use that degree of care which devolves upon a person in crossing a street where vehicles, and particularly automobiles, are going forth and back. He says that he looked, and that he could see up that street thirty or forty feet; he says that he did not stop, that he was going all the time; his words are "When I looked I was about on the line with the front of the wagon, I did not stop, glanced up, saw the wagon, then I looked south, and as I was looking south the automobile ran into me;" and he says

he was only two or three feet in front of the wagon; it could not have been but an instant, a fraction of a second. If he had looked in such a way as to make looking effective, he must have seen that automobile; and looking before he passed the front of that wagon would not have been a compliance with the law; because there are many decisions holding that the observation must be made at a point where it will be effective; and it seems to me that no verdict could stand that the plaintiff in this case made his observation at a point where the making of the observation would have been effective, because, if he had, he would have seen the automobile, and would not have been struck by it.

On both these questions I regard the point made by the defendant as being well taken, and the nonsuit, therefore, will be granted, and an exception to that ruling as ground of appeal will be noted upon the minutes.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Judgment.

Circuit Court Judgments, Book 93, page 107.

GEORGE F. POOL,
Plaintiff,

vs.

RUFUS D. BROWN,
Defendant.

Judgment entered May 14th, A. D., 1915.

Costs, $49.18.

Judgment on non-suit in the above entitled action at law was rendered on the fourteenth day of May, A. D., nineteen hundred and fifteen in favor of the said defendant, Rufus D. Brown, and against the said plaintiff, George F. Pool, for the sum of forty-nine dollars and eighteen cents, cost of suit.

Judgment entered and signed, May 14th, A. D., 1915.

WM. S. GUMMERE,
Judge.

Substitution of Attorneys.

Filed January 29, 1916.

ESSEX COUNTY CIRCUIT COURT.

GEORGE F. POOL, *Plaintiff,* *vs.* RUFUS DONALDSON BROWN, *Defendant.*	*Action at Law.* *Order of Substitution.*

Application for this purpose having been made, and the attorneys of the plaintiff consenting thereto, it is on this 29th day of January, A. D., 1916, ordered that Peirce & Hoover be and they hereby are substituted as attorneys of record for the plaintiff in the above entitled cause in the place of Beecher & Bedford, Esqs.

Let the foregoing order be entered.

FREDERIC ADAMS,
Circuit Court Judge.

We consent to the above.

BEECHER & BEDFORD,
Attorneys of Plaintiff.