

New Jersey Court of Errors and Appeals

SAMUEL RABINOWITZ,
Plaintiff-Respondent,
vs.
BAYARD HAWTHORNE,
Defendant-Appellant.

ON APPEAL.
ACTION AT LAW.

Brief of William Newcorn, for Plaintiff-Respondent.

STATEMENT OF FACTS

The plaintiff instituted suit against the defendant to recover damages for injuries sustained by him by reason of an accident that occurred on the evening of the sixteenth day of April, 1915, in the City of Plainfield, at the intersection of East Second Street and Watchung Avenue, in said City. It was still daylight and the testimony discloses that upon the day in question the plaintiff was driving his horse and wagon along East Second Street in a westerly direction and upon approaching the curb line of Watchung Avenue, he looked first to his left and then to his right, and not seeing anything approaching, proceeded to drive across the roadway of Watchung Avenue. It was admitted in evidence that Watchung Avenue is a street sixty feet wide from curb to curb, running south to north, and that East Second Street runs east to west; that there are two sets of trolley tracks upon Watchung Avenue, equal distance apart in the centre of the road. The testimony disclosing the fact that (page 38) plaintiff had crossed the tracks with his horses head and the hind part of the wagon was in the last track, when the automobile came along and struck the rear part of the wagon, knocking the top of the wagon on top of the hood of the machine and pushing the wagon a distance

of between twenty-five and forty feet, according to the testimony of the different eye witnesses, up Watchung Avenue, before it was stopped, throwing plaintiff out of the wagon into the road bed, where he lay unconscious until removed to a porch on the opposite side of the street, breaking the shaft of the wagon and separating the horse from the wagon, the plaintiff being removed to the hospital, where he remained for eleven days, after which his arm was put in a bandage for five weeks (page 40, lines 20 to 25), and at the time of the trial he still did not have the full use of his arm, although the physician testified that with proper care in the course of a couple of months the arm would be all right again. His injuries, as testified to by the physician in attendance, were a rupture of the ligaments which connect the collarbone with the shoulder blades and contusion over different portions of the body. The wagon was mashed beyond repair and the harness likewise was broken. The jury rendered a verdict for the plaintiff of three hundred and fifty dollars.

In addition to the testimony of the plaintiff and Dr. Corbusier, there was produced at the trial a witness by the name of Sayde C. Moskowitz, who testified that she was walking parallel with the wagon along East Second Street from Church Street, which is one block below Watchung Avenue from where she resides, and that the horse and wagon were going along at a walk and when she arrived at the corner of East Second Street and Watchung Avenue she stopped on the corner in order to permit the wagon to pass (page 20) and the plaintiff's horse had already crossed the second track and his wagon was just about to cross when the automobile came along so fast that it could not stop in time before it went into the wagon, striking it side-wards towards the rear wheel; that there was no warning given and that the wagon was driven a distance of thirty feet down Watchung Avenue, throwing the plaintiff from the wagon and separating the horse from the wagon.

Fred Winn, a witness in behalf of the plaintiff, tes-

tified that he was standing in the doorway of his place of business, which is on the Northwest corner of East Second Street and Watchung Avenue, giving him a clear view of East Second Street in the direction that the plaintiff was coming from and along the southerly direction of Watchung Avenue from which the automobile was coming from; at that time he was standing there talking to two of his employes, Joseph Tobin and Wm. Kunzelman, which doorway is at the point of the intersection of the Watchung Avenue and East Second Street sides of the building, and that he saw the plaintiff approaching from East Second Street, but did not take any particular notice until it came nearly to the corner of Watchung Avenue and that the horse and wagon had crossed the street, the wagon being in the middle of the both tracks when the automobile came along at a high rate of speed and struck the wagon (p. 60, 61) on the side about the rear wheel, driving the wagon sideways up Watchung Avenue for about fifty feet before the automobile was stopped, breaking the top off and throwing the plaintiff out by the force of the impact into the roadway; that there was no signal given by the defendant whatsoever. The witness further testified that he had noticed the automobile when it was about one hundred feet away and that the plaintiff had already proceeded to cross Watchung Avenue when the automobile was 125 feet away. On cross-examination (page 65, L. 22,23) the witness testified that the automobile was going at a rate of thirty miles an hour.

Wm. Kunzelman (page 70) testified that he was standing talking to his employer with another employe in the doorway of the shop and he saw the wagon cross East Second Street and the automobile coming up Watchung Avenue going north and it struck the wagon; that the wagon had already crossed the middle of the tracks and the horse was across the west-bound track and that the automobile was one hundred feet away when plaintiff had proceeded to cross and it was coming along at a high rate of speed, between twenty and

thirty miles an hour, and without any warning struck the wagon, pushing it in front of the building beyond the corner building on Watchung Avenue.

Joseph Tobin (page 77) testified that he saw the collision, that the automobile was running at a rate of speed between thirty and thirty-five miles an hour and that the plaintiff had already proceeded across Watchung Avenue along East Second Street when the automobile, without any warning, struck the wagon broadside towards the rear, driving the wagon down Watchung Avenue a distance of between thirty and forty feet, and also testified that the plaintiff was thrown out of the wagon and what had transpired after.

Harry S. Radin, testified that upon the day in question he was going in a westerly direction on East Second Street on his wheel directly behind the plaintiff and that when the plaintiff had crossed the east track of Watchung Avenue and was proceeding across the tracks on the westerly side of Watchung Avenue in a westerly direction, the automobile struck the wagon on the side about the centre of the same, driving it down Watchung Avenue about thirty or thirty-five feet; that no warning was given by the automobile driver.

Reba Meyers, Daniel H. Keiderling and Sadie Leahy all testified to the position of the automobile and the wagon after the collision and what transpired immediately after.

The defendant, Bayard Hawthorne, testified that he was coming up Watchung Avenue in a northerly direction and after he came up the incline leading to North Avenue, one block below from Second Street, he was going very slow (page 96), and, to use his own words, "The only thing that I can say is that I remember nothing at all except having an impression of this something rushing at me from the right-hand side, this wagon, and my impression is that I never saw that wagon until it came, I should judge, within about ten feet of me. The only thing I did, which I did, of course, in-

tuitively, I switched my wheel around and I caught this man on the left back wheel. He could not tell what rate of speed he was going at because he did not see the wagon (page 97, L. 27, 28, 29).” On cross-examination the defendant testified that he shut down his gas about 200 or 250 feet away and was only going between eight and ten miles an hour (p. 100, L. 17, 18); that he had a clear, unobstructed view of Watchung Avenue for several blocks beyond the place where the accident occurred and that he was only ten feet away from the wagon before he saw it.

The wife of the defendant, Alice W. Hawthorne, under cross-examination, says (p. 108, line 18) that when she first saw the wagon it was all on Watchung Avenue, that the wagon was then off perhaps about eighteen or twenty feet.

Archibald B. Hawthorne, a son of the defendant, under cross-examination, testified that when he saw the horse and wagon the horse was in the centre of the second car track and the wagon was in the middle of the other car track, the front wheels in about the middle of the car track and the rear wheels were about to cross the east tracks and the car tracks were in the centre of the street (page 114), and that they had a clear view up Watchung Avenue.

John Ward, a witness produced by the defendant on cross-examination, testified that the wagon had traveled on the centre of the tracks between the second car track and the automobile was about six feet away, the horse and wagon traveling thirty-six feet in the time it took the automobile to travel six or eight feet.

The defendant-appellant has assigned four reasons that he intends to rely upon for setting aside the judgment, and they will be treated in the order in which they are set out.

LAW.**POINT ONE.**

BECAUSE THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION OF DEFENDANT FOR A NON-SUIT, BUT REFUSED SO TO DO.

The counsel of the defendant moved for a non-suit upon the ground that it appeared affirmatively from the plaintiff's case that the plaintiff had been guilty of negligence contributing to this accident. The evidence of the plaintiff and his witnesses proves conclusively that there was no contribution upon his part to cause the injuries and the court properly decided in ruling upon the question that it was entirely a jury question.

The law is well settled that both parties had a perfect right to be driving upon the public highway of the city and the duty upon each of the parties was to use such reasonable care as reasonable men would under the circumstances that existed there, not only to protect themselves against injuries, but to prevent injuries to other people who were rightfully using the street.

Watchung Avenue, which the plaintiff was crossing at the time when the accident occurred, was a street sixty feet wide from curb to curb. The evidence of the plaintiff and his witnesses show that before attempting to cross Watchung Avenue, the plaintiff stopped to look to his left, in other words, the southerly direction from which a vehicle would be presumed to be coming, and then to the right and had crossed with his horse more than forty-five feet of the roadway before the wagon was struck. After having crossed the first point of danger, to wit, cars or vehicles running in a northerly direction on Watchung Avenue and about to cross the tracks upon which cars or vehicles would be running in a southerly direction, plaintiff looked to the right to see whether anything was coming from the right, or from the north (page 90, L. 12 to 20) when the collision took place.

It must be borne in mind that the evidence of three witnesses showed that the automobile was approaching at a rate of between twenty-five and thirty-five miles an hour and the automobile approaching East Second Street had to run up a depression caused by running underneath the railroad until it passed the corner of North Avenue, one block distant, and it was easy for an automobile going at that rate to travel one hundred to one hundred and fifty feet, while the plaintiff in his wagon was moving between thirty-five to forty feet.

The general principal applicable to the use of the public highways is, that each person must exercise his rights with a due regard to the rights of others in a reasonable and duly careful manner, and it has been held in this State that what constitutes reasonable care usually depends upon the peculiar circumstances of each particular case.

Connelly vs. Trenton &c. Co. 27 Vr. 700.

N. J. Street R. R. Co. vs. Schwartz, 66 N. J. L. 437.

The plaintiff having crossed beyond the middle of the street, thus having obtained the right of way, it was the duty of the defendant to have his machine under such control as to prevent the accident.

Under our trial system, it is held that questions such as this case presents, must be submitted to the jury whenever the testimony is fairly susceptible of an inference consistent with the plaintiff's contention.

Day vs. Donohue, 62 N. J. L. 382.

Consolidated Traction Co. vs. Reeves, 58 N. J. L. 573.

Vrooman vs. Street Railroad Co. 70 N. J. L. 818.

Anderson vs. Public Service Corp. 80 Atl. Rep. 480.

In the case of Consolidated Traction Co. vs. Reeves, above cited, Justice Lippincott in commenting upon the motion for non-suit for that case, stated:

“If, from the facts in evidence, two inferences or conclusions can be reasonably deduced, one favorable to the plaintiff and the other against him, a question then is presented which conclusively calls for the opinion of the jury. This principle is alike applicable to the question of whether negligence, as the proximate and sole

cause of the injury, has been established against the defendant or not."

Pennsylvania Railroad Co. vs. Matthews, 7 Vroom, 531.

The question as to whether the plaintiff contributed to his own negligence was a question of fact, which under proper charge was submitted by the court to the Jury.

POINT TWO.

BECAUSE THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT, BUT REFUSED TO DO SO.

The evidence upon the part of the defendant and his witness was not of such a character to require the trial judge on the whole case to direct a verdict in favor of the defendant. The evidence was calculated to contradict and refute the testimony of the witnesses for the plaintiff, making it to a greater extent a disputed question of facts which were properly submitted by the court with a proper charge for the consideration of the jury.

Upon a request for a direction of a verdict in favor of the defendant, the duty of the trial court is a plain one, the proof must be so clear that no unreasonable conclusion can be legitimately reached before such a peremptory instruction can be given.

Moebus vs. Becker, 17 Vroom, 41.

Railroad Co. vs. Shelton 26 Id. 342.

North Jersey Street R. R. Co. vs. Schwartz, 66 N. J. L. 437.

The testimony of the defendant and his witnesses who had a clear, unobstructed view from the time of reaching the point of North Avenue and Watchung Avenue for several blocks beyond the place where the accident occurred and who did not see the wagon until the machine was six or eight feet from where the wagon was at the time of the collision, proved conclusively the negligence of the defendant.

POINT THREE

BECAUSE THE VERDICT IS CONTRARY TO LAW.

An inspection of the testimony of this case eliminates entirely the question of there being any law question and shows that the case is plainly a question of fact. The point to be determined was whether the testimony of the plaintiff and his witnesses was to be believed, as to the reasonable care exercised by the plaintiff, second as to the negligence of the defendant in driving his car at an excessive rate of speed between twenty-five and thirty-five miles an hour and not having his machine under such control in approaching a street crossing so as to avoid the accident. The rights of the parties upon a public highway were both equal, the duty was just as incumbent upon the defendant to exercise reasonable care for the protection of other users of the road as it was upon the plaintiff.

The plaintiff was lawfully crossing the intersection of the street upon which he was driving. He had crossed the danger point from which to expect any vehicle to approach from the direction that the automobile was approaching from and it was the duty of the defendant while driving his automobile to use care not to injure him.

Kathmeyer vs. Mehl, 60 Atl. Rep. page 40.

POINT FOUR.

BECAUSE THE COURT OVERRULED THE FOLLOWING QUESTIONS:

A. "Q. When a man is coming to a street intersection, do you think it is any more natural to look to the right or to the left?"

It is respectfully submitted upon the part of the respondent that the ruling of the court in not permitting the witness, Sayde C. Moskowitz, to answer

this question, objected to was proper. The question was neither competent, nor material, it called for an expression of opinion or conclusion of the witness, which could only be a mere speculation, hence no error was committed in its exclusion.

Sub-divisions B, C and D will be treated together and are as follows:

B. "Q. What were you averaging a week before the accident?"

C. "Q. What is the average a week?"

D. "Q. Now what is your average earning or what was your average earning, at the time of the accident, a week?"

While counsel for the defendant appellant states in his reasons that the court overruled the questions as objected to, I presume he intended to say that the court admitted the witness Rabinowitz to answer the questions over objection, which rulings of the court it is respectfully submitted, were proper in view of the previous testimony which had been given by the plaintiff.

The witness had testified that he was a huckster and did not keep any books (p. 45, L. 31) and before the accident he made five or six dollars some days and some days he made ten dollars, that is according to the days (p. 46, P. 1 to 5), and that his average a week was thirty dollars. That on Friday he makes ten dollars because that is a good day for fish, and that on Wednesday and Thursday he makes five dollars (p. 46).

The Jury therefore had before them, in detail, how he arrived at an average of thirty dollars per week. The witness further testified that from the thirty dollars per week he earned there was about six dollars expense, therefore the jury had entirely before them all the facts not only how he arrived at his average of thirty dollars per week, but what his net earnings were for the week, and upon which they could predicate the amount to be allowed for loss of time.

The cause of the defendant was not prejudiced up-

on the merits of the case by the admission of this evidence and in the absence of any books, that was the only way that the plaintiff could prove his earnings and it was for the jury to say, as a question of fact, how much credence they gave to his testimony in arriving at their verdict.

Sub-Division E. Q. "What was your wagon worth before it was smashed?"

This question likewise was asked of the plaintiff, which was objected to by counsel for the defendant and objection overruled and the witness permitted to answer the question.

The court did not err in permitting the witness to answer this question in view of the testimony already given by the plaintiff that the wagon had cost him one hundred and thirty-five dollars, that he had the wagon over one year, about fifteen months, had been specially built for his use as a huckster; that he had purchased about a dozen new and second-handed wagons while he was in business and therefore was competent to testify as to the value of the wagon at the time of the accident. (p. 55, L. 19 to 40 Inc), (p. 56 L. 1 to 10).

Our courts have decided that the cost price is some evidence of value, but is not conclusive, therefore the testimony supplemental of the cost, to wit, the length of time that the wagon had been used, the experience of the witness as to values of new and second-handed wagons, certainly laid a foundation as to his qualification to answer the question asked which the court permitted him to answer.

It was for the jury to say, with all the knowledge before them, as to just what weight they should give to his estimate of the value of the wagon at the time of the accident and hence there was no error committed in permitting the witness to answer the question objected to by the attorney of the defendant.

It is therefore respectfully submitted that there is no error in the refusal of the trial judge to grant the defendant a non-suit or a direction of a verdict; that the

verdict is not contrary to law, and that there was no error committed in the overruling or admission of the testimony objected to and that the judgment in favor of the plaintiff should be affirmed.

WILLIAM NEWCORN,
Attorney for and of Counsel
with Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

SAMUEL RABINOWITZ, <i>Plaintiff-Respondent,</i> <i>vs.</i> BAYARD HAWTHORNE, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from Supreme Court.</i>
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Brief of Defendant-Appellant.

This is an appeal from a judgment rendered upon the verdict of a jury in the Supreme Court, Union County Circuit, by which the plaintiff was awarded damages for personal injuries in an action against defendant for negligence in operating an automobile upon a highway so as to collide with plaintiff's wagon.

Statement of Facts.

On April 16, 1915, at Plainfield, New Jersey, plaintiff, a huckster, was driving a horse and wagon in a westerly direction along East Second street (Case, p. 18) and was approaching the east side of Watchung avenue.

Plaintiff was driving in about the middle of the roadway of East Second street (Case, p. 50, l. 10; p. 118, l. 20; p. 27, l. 4).
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East Second street runs east and west and is paved with macadam (Case, p. 62, l. 30). Watchung avenue runs north and south (Case, p. 18, l. 15) and is paved with brick (Case, p. 62, l. 28) and runs straight (Case, p. 75, l. 24). There are two car tracks, close together in the centre of the

street (Case p. 19, l. 1; p. 38, l. 8). Watchung avenue is a main thoroughfare in Plainfield, which plaintiff knew (Case, p. 51, ll. 1-10; p. 53, l. 20; p. 54, l. 13; p. 61, l. 36). Watchung avenue is sixty feet wide and thirty-six feet from curb to curb (Case, p. 38, l. 35). The Court can take judicial notice that each car track is four feet, eight and one-half inches, standard gauge, and that there is a space of about four feet between them.

The present automobile law, effective May, 1915, was not in force at the time of the accident, and the old rule, that traffic on the main thoroughfare had the right of way, applied.

Defendant was driving his automobile north along Watchung avenue (Case, p. 18) on the right or east side of the roadway (Case, p. 62, l. 15; p. 101, l. 10). The collision took place at some point between the middle of the intersection of the streets and the easterly curb line of Watchung avenue, as defendant swung his car around to parallel the plaintiff's wagon, when the latter came out from East Second street on Watchung avenue, in front of him (Case, p. 49, l. 20; p. 34, ll. 10-14; p. 61, l. 13; pp. 96-98; pp. 101-104; p. 111, and pp. 116-117, and pp. 120-121).

The testimony of plaintiff is that he came to Watchung avenue, and before he got to Watchung avenue he stopped three or four minutes and looked (Case, p. 53, l. 40; p. 54, ll. 1-4); that he stopped to look for automobiles (Case, p. 38, ll. 1-4; p. 54, l. 14); that he looked both ways (Case, p. 38, l. 24; p. 49, l. 10; p. 51, l. 12; p. 52, l. 19; p. 53, l. 17) but saw nothing, and the way was clear (Case, pp. 38, 49, 51, 52, 53 and 54), and that after so stopping and looking, he then started to cross (Case, p. 38, l. 10). After coming out upon the brick pavement of Watchung avenue, the plaintiff looked only to the north (Case, p. 39, l.

14; p. 50, ll. 23-40). He was hit crossing the tracks (Case, p. 49, l. 21). There was plenty of light—day light—(Case, p. 52, ll. 34-38) and he could see up and down Watchung avenue (Case, p. 52, l. 40). There was no obstruction to his view (Case, p. 53, l. 4; p. 32, ll. 17 and 25).

There is no evidence that after he stopped three or four minutes before coming out on to Watchung avenue, that plaintiff, when he started out upon the brick pavement, looked to the south or in the direction from which traffic would properly come (i. e. northbound on the right or east side of Watchung avenue). Plaintiff looked only north (Case, pp. 39 and 50).

Plaintiff's witnesses, Meyers, Keiderling and Leahy, did not see the accident. Plaintiff's witness, Moskovitz, stood on the southeast corner of Watchung avenue and East Second street facing north, while the plaintiff's wagon was passing in a westerly direction over the crosswalk in front of her—to the north—this being the crosswalk across Second street on the easterly side of Watchung avenue (Case, p. 19, ll. 14 and 30; p. 24, l. 40; p. 30, ll. 1-30). At that time, turning her head, she saw the automobile on Watchung avenue, fifty feet south of the southerly line of East Second street (Case, p. 32, ll. 1-10).

Plaintiff's witness, Winn, says that when he first noticed the wagon it was approaching toward the east crosswalk of Watchung avenue across Second street and was about ten feet east of that crosswalk (Case, p. 67, l. 38; p. 68, ll. 1 and 35; p. 66, l. 20) and that the automobile was then on Watchung avenue one hundred feet south of the southerly line of Second street (Case, p. 68, l. 35; p. 66, l. 27; p. 60, l. 38; p. 61, l. 1).

Plaintiff's witness Tobin first saw the wagon on Second street when it was fifteen or twenty feet

east of the easterly curb line of Watchung avenue (Case, p. 79, l. 35; p. 80, l. 18) and the automobile was then on Watchung avenue about one hundred feet south of Second street (Case, p. 80, l. 38; p. 81, l. 9).

Plaintiff's witness Radin saw the plaintiff's wagon "just on the verge of going on the crossing" (Case, p. 85, l. 39) "going on to the bricks from Second street" (Case, p. 86, l. 2) when the automobile was on Watchung avenue, one hundred feet south of the southerly line of East Second street (Case, p. 85, l. 33).

Plaintiff's witness Kunzelman, is not a witness to the relative position of the wagon and the automobile until the moment of collision, as he was standing talking and "the first thing I knew, somebody hollered, 'Watch. Look,' or something, and it drew my attention" (Case, p. 71, l. 20) and "I was paying no attention until I was told and when a man gave a warning I looked" (Case, p. 73, l. 33) and "This holler of 'Watch, lookout' is what called your attention to it?" A "Yes, sir" (Case, p. 74, l. 8).

There was no testimony as to plaintiff's looking, other than what is given by himself. Plaintiff's witnesses say that they heard no warning sound or horn by the approaching auto.

The testimony of defendant and his witnesses is that there was light (Case, p. 95); that the automobile was traveling north at a slow or moderate speed (Case, pp. 98, 103, 112, 117) and that a horn was sounded on approaching East Second street (Case, pp. 96, 105, 110, 116, 117, 120); that the wagon came out of Second street at a fast gait, a short distance, such as six to ten feet, in front of the automobile (Case, pp. 96, 97, 100, 106, 109, 111, 113, 120 and 121) that the wagon was traveling on the southerly or wrong side of East Second

street (Case, p. 95) and that the horse was trotting or jogging along (Case, pp. 114, 117); that the plaintiff did not act as if he saw the auto (Case, p. 118).

That when the wagon came out in front of the auto, the defendant switched his machine quickly in an effort to parallel the plaintiff's wagon, and thus minimize the shock of the inevitable collision (Case, pp. 96, 93, 101, 104, 111, 116 and 117); that the headlights on the automobile were uninjured (Case, p. 96) and no one was thrown out (all witnesses).

Grounds of Appeals

The appellant urges substantially three grounds for reversal:

1. That the Court should have granted defendant's motion for a non-suit.
2. That the Court should have granted defendant's motion for a direction of the verdict.
3. Because the Court admitted testimony of the average earnings of the plaintiff without proper facts (Case, pp. 2 and 3).

Brief of the Argument.

The contention of defendant is that as Watchung avenue was the main thoroughfare and East Second street crossed it, there was a duty upon the plaintiff before driving out from the east upon the north-bound roadway of Watchung avenue, to look in the direction from which northbound traffic would come, and to do so when in such a position that he could look effectively. The evidence, which will be considered in detail in the points of this brief, shows that plaintiff, by his own story, stopped for three or four minutes in

Second street before going out upon Watchung avenue and looked up and down and saw nothing, and that he then started out to cross Watchung avenue and looked only to the north and not to the south, which was the direction from which traffic would properly approach, and that he was struck shortly after going out upon Watchung avenue.

At the time that plaintiff's horse and wagon were somewhere between the easterly crosswalk of Watchung avenue over Second street and a point ten or fifteen feet east of that crosswalk, the automobile was in the roadway of Watchung avenue about one hundred feet south of East Second street and from all the testimony, within the range of plaintiff's vision. If plaintiff looked, as he said he did, and saw nothing, defendant's contention is that the facts show conclusively that he could not have looked with the care required by law.

If he went out upon Watchung avenue without looking to the south or in the direction from which traffic was coming, he was clearly for a stronger reason, guilty of contributory negligence. The defendant's contention is that the above state of facts conclusively appears from the plaintiff's own case, admitting every inference of fact that can be legitimately drawn therefrom.

By a parity of reasoning, the same rule is applicable to defendant's motion to direct a verdict.

The other contention of defendant is that the Court allowed the plaintiff to testify to his average weekly earnings although plaintiff kept no books, and his sales as a huckster were very fluctuating and his expenses were apparently a pure guess, and that consequently, there was no proper foundation laid to permit plaintiff to give such testimony.

POINT I.

The plaintiff in the present case was contributorily negligent.

The evidence has been carefully stated in the Statement of Facts and will not be further referred to in detail except where quotations are necessary.

In *Jewett vs. Paterson Railroad Company*, 33 Vr., 424, at page 430, this Court says:

“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, citing from *McClain vs. Railway Company*, in 116 N. Y., page 464, says:

“The circumstances as represented by the evidence on the part of the plaintiff, warranted the conclusion that by the exercise of the reasonable care which it was the duty of the defendant’s driver to observe, the injury would have been avoided. But this fault on the part of the defendant did not charge it with liability unless the plaintiff was free from negligence contributing to the calamity.” * * *

Page 431: “If by the exercise of reasonable care the plaintiff could have seen the approaching car, and ought to have apprehended the danger of the situation, he was chargeable with negligence, for he was not at liberty to take this doubtful chance of the consequence of crossing the track in the face of danger or in reliance upon the successful attempt of the driver to slacken the speed of his horses. It is peculiarly true of controversies like this

that the defendant's right to a non-suit depends upon the precise facts of each case. An alteration in the conditions may change the result."

The Court then illustrates this by the case of *Consolidated Traction Company vs. Glynn*, 30 Vr., 432. In that case plaintiff assumed, after waiting two or three seconds, that he could walk from the curb across the track, a distance of eighteen and a half feet, before a trolley car, which he had observed approaching him, should run a distance of three hundred feet. Acting upon this assumption, he advanced without again looking toward the car, and was struck. Non-suit was refused as plaintiff's assumption was not unreasonable or so unreasonable as to keep it from the jury. The Court continues further and says if the elements were varied by progressively diminishing the distance that the car had to run and increasing the distance that the man had to walk, we first approach and then cross the line that separates alleged contributory negligence that is debatable by a jury from alleged contributory negligence that is manifest to a judge.

The Court further illustrates by the case of *West Jersey Railroad Company vs. Ewan*, 26 Vr., 574, where Mr. Justice Dixon said, "There is a substantial difference between being surprised by an unforeseen peril and being overtaken by one apprehended and recklessly incurred." In the Jewett case as in the case at bar, the plaintiff realized the necessity of precaution and yet exercised it inadequately.

The Court says that the trial judge has to apply a sliding scale without any convenient or simple rule of successful application further than the general proposition, that travelers on a public

highway must exercise due care. The Court says that this is true that differences in proof result from the nature of the case and that where the rights are relative as in a public highway, the rule that governs them must be flexible enough to avoid the changes of relation.

The case of *Barker vs. Savage*, 45 N. Y., 191, expressly approved by this Court in the *Jewett* case, lays down the rule that it is the duty of a pedestrian (and the same applies to the drivers of vehicles as in the present case) 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. It is also the duty of a pedestrian (and of drivers of vehicles) crossing a street, to look along the street in the vicinity of the crossing and upon both sides thereof for a reasonable distance to avoid danger from approaching teams, *N. Y. Ann. Dig.*, Vol. 4, page 828; 37 *Cyc.*, 273.

In *North Hudson County Railway Company vs. Flanagan*, 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 vs. Conolly Railway Company*, 25 Vr., 518.”

In the last case mentioned (*Sheets vs. Conolly, supra*), the line of approach of the plaintiff toward the car which struck her, was such that each nearly confronted the other. Under the circum-

stances, plaintiff, if she had looked in the direction in which she was going, must have seen the approaching car. It was impossible not to have seen it. Yet she testified that she did not see it until she was struck. The Court holds, at page 520: "The necessary inference is that she was looking in another direction than that in which she was going." Speaking of the duty upon a pedestrian when crossing a street, the Court continues: "He is bound to look in the direction in which he is moving and to observe approaching vehicles."

In *McGrath vs. New Jersey Street Railroad Company*, 37 Vr., page 312, the Court lays down the general rule at page 314: "In crossing a roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles and a like judgment when and how to cross without collision." At page 316, the Court quotes the testimony which is practically on all fours with the testimony at bar and with regard to this, the Court says, page 317: "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 either in motion, or at rest on the track upon which he was about to step. There was no impediment to vision. Unfortunately, the plaintiff was looking away from the car and so did not see it."

"The other conclusion that results from the testimony is that the plaintiff, when he looked to the west before stepping off the curb and saw no eastbound car, must have looked carelessly." The Court then details the testimony so as to show that the front of the car must have been approximately within six feet of the plaintiff when he says he looked, and continues: "It is inconceivable that

this car, when the plaintiff looked toward the west, was not somewhere within the range of prudent observation." The Court disposes of the argument that the failure of the plaintiff to look toward the west while on the crosswalk was unimportant and immaterial by reason of the situation and dangerous speed with which the car came on after it started, and therefore, the plaintiff's inattention was immaterial, by saying: "This argument is too conjectural to be entirely satisfactory." At page 319, after citing the testimony, "This testimony does not tend, in a substantial sense, to 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" and a direction of a verdict for the defendant was affirmed.

In *Ruggieri vs. Public Service Railway Company*, 92 Atl., page 61, this Court considered facts closely resembling the case at bar. The plaintiff was on the sidewalk fifteen feet from where he was struck. A car passed about ten feet away, which plaintiff watched until it had gone seventy-five yards or more, and then started to cross the street. After taking two steps, about five feet, he looked again and while seeing the aforesaid car about eighty yards away, saw no car coming in the opposite direction. He walked ten feet further, about four steps, and was struck by a car coming from the opposite direction, which, therefore, must have covered eighty yards while he took four steps. The Court says that this is so unreasonable as to be incredible and that if the plaintiff looked when only ten 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 that 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 Court cites *Brown vs. Railroad Company*, 68 N. J. L., 618, where Chancellor Magie, speaking for this Court, said:

“When he says that, at that 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 have been able to avoid the collision.”

Without citing further from the cases which amply sustain the above principles of law, it is submitted that the facts in the case at bar come directly within their authority.

The only testimony in the present case as to when and where and how, the plaintiff looked, is furnished by himself.

He says that he was driving west along East Second street and approaching the easterly line of Watchung avenue. Watchung avenue was a main thoroughfare and traffic along Watchung avenue, under the then existing rule of law, had the right of way over traffic on side streets such as East Second street. The plaintiff says that he looked twice.

The first look was just before he got to the easterly line of Watchung avenue, and he says that he stopped right there in East Second street and before his horse had come out upon the brick pavement of Watchung avenue and that he stopped there for three or four minutes stock still, and looked up and down Watchung avenue for automobiles and trolley cars. He says he could see up and down Watchung avenue, that it was daylight; plenty of light, and that he saw nothing, that the way was clear.

After so standing still for three or four minutes, he started across Watchung avenue and, when asked whether or not he looked when his horse came out upon the brick pavement of Watchung and across its easterly curb line, he says, yes, he looked again then to his right, or to the north and continued to look to the north until he was struck, which was shortly after he had come out upon Watchung avenue, and somewhere between the easterly curb line and the centre thereof. He did not look to the south as he came out on Watchung avenue, and the south was the direction from which traffic northbound, on the right side of Watchung avenue, would come.

Plaintiff did not see the automobile which hit him.

This is all the evidence there is in the case as to the precautions taken by plaintiff before driving out upon a main thoroughfare, in a city, with two car tracks in addition to its other vehicular traffic, and there is an entire absence of evidence that he looked to the south from where vehicles would come, at the absolutely essential time, namely, when he was about to come out from East Second street into Watchung avenue, and across its easterly line.

THE EVIDENCE AS TO WHAT PLAINTIFF
WOULD HAVE SEEN HAD HE LOOKED.

All plaintiff's witnesses, who saw the accident, testify that the plaintiff kept moving right along from a point fifteen feet or so east of the easterly curb line of Watchung avenue until the time of accident, thus materially contradicting his statement that he stopped on East Second street and looked up and down Watchung avenue for four minutes. This witness of the plaintiff who saw the automobile and the wagon, testified, as has been set forth in detail in the Statement of Facts, that plaintiff was driving his wagon along East Second street and that when he had reached a point on East Second street, travelling along the middle of the street, about ten or fifteen feet east of the easterly line of Watchung avenue (the plaintiff travelling in a westerly direction), or as one witness says, when he was on the verge of crossing, or on the easterly crosswalk (on the east side of Watchung avenue) and just about to come out upon the brick pavement of Watchung avenue, that the automobile was on the right of the roadway of Watchung avenue proceeding north, and about one hundred feet south of the southerly line of East Second street, although one witness, Moskovitz, says only fifty feet.

Under the authority of the above cases, and particularly of the Ruggieri case, it is submitted that the plaintiff is upon the horns of a dilemma. If he stopped for four minutes, as he says he did, and looked up and down Watchung avenue, and the automobile was only one hundred feet, or perhaps fifty feet away from him, when he started out into Watchung avenue, he must have seen it if he looked with the care and attention required by law.

On the other hand, if he did not stop, as his witnesses testify, but drove right along out into Watchung avenue, his testimony is that, after the started up, and before driving out into Watchung avenue, that he looked only to the north, or his right, and not to the south. He therefore omitted even the perfunctory form of looking to the south, as he was in duty bound to do and was absolutely reckless in driving out into Watchung avenue without looking at all in the direction from which traffic was coming, and toward this automobile which was then within one hundred feet, or less, of him.

If he had looked, as he said he did not, or if he looked in the way and when he said he did, he would certainly have seen the approaching automobile, and his failure in this respect resulted in his driving out in front of it and being struck. His negligence clearly contributed by every fact and inference of fact that can be legitimately drawn from the testimony. The speed of defendant's automobile and failure to warn by its horn (with regard to which we will speak later) conceding the negligence of defendant, did not affect the situation of plaintiff's contributing negligence.

Such was the testimony at the time of the motion for non-suit.

DEFENDANT'S TESTIMONY.

The defendant's testimony in no way helps the plaintiff's case.

It is shown that the wagon came out from East Second street almost directly in front of the automobile and that it came out rapidly, or at least trotting, or on a jog trot, and that no sign of the horse or wagon was observed by the defendant, who was driving and looking ahead, until the

automobile had almost reached East Second Street, when the wagon came out in front of the automobile so close as to render a collision unavoidable, and the defendant attempted to minimize its force by swerving and endeavoring to parallel the plaintiff's wagon, which he was successful in doing. It is also the testimony of the disinterested witness, who observed both the plaintiff and the automobile, that the plaintiff did not appear to be looking.

It is submitted, therefore, that at the time of a motion for a direction of the verdict, it was established by the evidence beyond fair dispute, that the plaintiff was negligent and that his negligence directly contributed to the collision and plaintiff's injury.

The line which separates contributory negligence that is debatable from contributory negligence that is manifest to a judge, had been crossed.

POINT II.

The testimony of the witnesses for the plaintiff is so unreasonable as to be incredible and, as a matter of law, affords no explanation of the occurrence complained of by plaintiff, and expressly negatives any negligence on the part of defendant, from which the collision proximately resulted.

Plaintiff's main witnesses to the facts were the three plumbers, Winn, Kunzelman, Tobin and Radin, who was on a bicycle a block behind the plaintiff.

The three plumbers were standing in front of their store, engaged in a business conversation (Case, p. 63, l. 20; p. 73, l. 30; p. 81, l. 12). Consequently, their attention was not centered upon the passing traffic, as they admit, and their tes-

timony partakes of the vice of a divided attention, or of a recollection originally imperfect and and artificially refreshed. Witness Winn says (Case, p. 60, l. 35):

“I saw this wagon, I didn’t know who was in the wagon at the time, but I seen it coming up Second Street. I didn’t take any particular notice to it until it got nearly to the corner of Watchung Avenue. At the same time— * * * It was coming toward Watchung Avenue from east to west; and I noticed this automobile coming up at a high rate of speed.”

The witness saw the wagon and the automobile practically “at the same time” as he says.

At Case p. 66, l. 11, Winn says:

“Q When the wagon—when the horse, I mean the head of the horse, the first part of the whole wagon and horse, when the head of the horse came in line with the easterly curb of Watchung Avenue, where was the automobile? A The easterly curb?

The Court. The first curb you come to.

Q The first curb. A That would be the north curb, to the right.

Q The east side of Watchung Avenue, take the curb on the east side of Watchung Avenue, and run it right across Second Street. When the horse got to that line, that cross-walk, the easterly cross-walk, on Second Street that is, Watchung Avenue crosses Second Street? A Yes.

Q Where was the automobile on Watchung Avenue? A I should say it was about one hundred feet away.”

At Case p. 67, l. 38, “When I first noticed the wagon it was approaching toward the curb—that is the cross-walk of Watchung Avenue.

Q The east crosswalk? A Yes.

Q How near was it approaching? How near was it to the cross-walk? A Well, I should judge ten feet."

At Case p. 63, l. 36, "Q Really the first time you actually saw it then, to make any note of it, was when it was ten feet away from the crosswalk? A Just about when I seen the automobile coming up."

This witness says that the wagon was traveling about three miles an hour (Case, p. 67, l. 9). He says (Case, p. 62, l. 8 to 15) that the automobile was traveling nearly in the middle of the first track, that is the easterly track on Watchung Avenue. As to the automobile's speed "It was going at least thirty miles an hour" (Case, p. 65, l. 21).

This witness also testifies to the following confusion:

"Q Can you say how far away was the automobile at the time Mr. Rabinowitz had started across Watchung Avenue? A Well, I should judge it was about one hundred feet away when I first noticed the automobile and the wagon" (Case, p. 62, l. 20).

When I first noticed the wagon it was approaching toward the curb * * *

Q The east cross-walk? A Yes.

Q How near was it to the cross-walk? A Well, I should judge ten feet" (Case, p. 67, l. 38; p. 68, l. 1).

Q Where did you first see it? A I seen it, I noticed the automobile when it was about one hundred feet away. * * * About half way down the block" (Case, p. 64, l. 33).

"Q And did you continue to watch the automobile as it approached? A Yes" (Case p. 65, l. 10).

“Q Had you seen the wagon before you saw the automobile? A Well, I couldn't say which one I noticed first” (Case, p. 65, l. 35).

“Q You saw the automobile first? A Well, I believe I noticed the automobile first” (Case, p. 67, l. 17).

“Q And how long did you watch the automobile before you looked at the wagon coming down Second Street? A Well, as I noticed the automobile coming up, why the wagon attracted my attention more when I seen the automobile approaching toward it.

Q How long did you watch the automobile before you saw the wagon? A Well, it was a very short time before it hit it.

Q Two or three seconds? A Yes, I should judge that.

Q And then what attracted your attention to the wagon? A Why, when the automobile hit it.

Q So you didn't see the wagon until the automobile hit it, is that it? A Yes, I did” (Case, p. 67, ll. 20 to 35).

“Q And had you seen the automobile before that time when you saw the wagon ten feet from the cross-walk? A I didn't notice it particularly. As the automobile came up I just casually seen the thing coming up.

Q I thought you said the automobile was the first thing attracted your attention? A Well, I didn't see either one in particular that I had any notice of” (Case, p. 68, ll. 8 to 20).

“Q How long did you look at the automobile before you saw the wagon? A I just kept looking out, and neither one in particular until I noticed that the automobile couldn't get out of the way of the wagon.

Q Had you seen that wagon at any time before it got within ten feet of the east cross-walk of Second Street? A I might have, but I didn't take any particular notice about the wagon.

Q Really the first time you actually saw it then, to make any note of it, was when it was ten feet away from the cross-walk? A Just about when I seen the automobile coming up" (Case, p. 68, ll. 22 to 37).

WITNESS TOBIN.

Q You looked down Second Street and saw this wagon coming. How far away was it when you first saw it? A How far away the wagon was?

Q Yes, how far down towards Church Street? A Well, I should imagine about fifteen or twenty foot, from the curb line of Watchung Avenue east" (Case, p. 79, l. 35).

Q When you first saw him (the plaintiff) he was fifteen feet east of the easterly crossing of Watchung Avenue? A Yes.

Q How long did you watch the wagon approaching? A Probably a couple of seconds" (Case, p. 80, l. 18).

Q When did you change your attention from the wagon, fifteen feet east of the east crosswalk, and transfer it to the automobile coming up Watchung Avenue? A Probably a moment later, a moment or so" (Case, p. 80, l. 38).

Q And the automobile was then how far away? A At what time?

Q When you transferred your attention to it a moment after watching the wagon? A Why, when I first saw the automobile was about, I imagine, one hundred foot from the wagon" (Case, p. 81, ll. 1 to 10).

This witness says the automobile was going thirty to thirty-five miles an hour (Case, p. 78, l. 19). He says the wagon was going "three or four miles an hour, or probably less" (Case, p. 80, l. 17).

Witness RADIN, who was riding on a bicycle some distance behind the plaintiff, says:

"By the Court.

When you first saw it (the automobile) how far away was it? A Well, he was one hundred foot or more.

By Mr. Newcorn.

Q When you first saw him where was Rabinowitz's wagon? A Well, he was just on the verge of going on the crossing" (Case, p. 85, l. 35).

"Q When you say on the crossing, which crossing do you mean? A Going on to the bricks from Second Street" (Case, p. 86, l. 1).

At this time the witness was just turning into Second Street from Church Street, a block away (Case, p. 86, l. 20) and that block was two hundred or three hundred feet long (Case, p. 86, l. 39). This witness says that the horse was walking. Although he was a block away, he could see the horse's feet under the wagon (Case, p. 89, ll. 1 to 15).

Witness KUNZELMAN testifies, "Why, I was standing talking to Mr. Winn and another man employed in the shop, standing in front of the shop and the first thing I know somebody hollered 'watch, look,' or something, and it drew my attention" (Case, p. 71, l. 20).

"Q You were not paying any great particular attention to the traffic, were you, at that time? A I wasn't paying no attention

to the traffic until I was told, and when a man give a warning, I looked" (Case, p. 73, l. 30).

"Q This holler of 'watch, look out,' is what called your attention to it? A Yes, sir.

Q You hadn't seen the wagon coming down Second Street, had you? A I didn't look for the wagon.

Q You didn't see the wagon stop for four or five minutes on the east side of Watchung Avenue? A I wasn't paying no attention to the wagon. The only thing I seen the wagon was standing there a few seconds before the automobile hit it.

Q The wagon was standing there? A No, it wasn't standing there. It was coming along slowly" (Case, p. 74, ll. 8 to 20).

"Q You didn't impress your mind with the details of this very much, did you? A I ain't worried about it a bit" (Case, p. 76, l. 39).

It is submitted that this witness did not see the vehicles long enough before the moment of impact to make his testimony as to their relative positions before the accident and as they approached the intersection, of any value.

This witness continues:

"Q How far had the wagon progressed upon the brick pavement of Watchung Avenue, at the time when you saw it? A As near as I could state in the middle of the car tracks. * * * The wagon was right in the middle. The horse was crossing the west bound track" (Case, p. 71, l. 28).

"The wagon, when I first seen it, the horse was just about on the first track" (Case, p. 74, l. 35).

This witness says the automobile was going twenty to thirty miles an hour (Case, p. 72, l. 5) and the wagon was going three miles an hour (Case, p. 74, l. 28).

“Q Could you see that far or not? * * *

A You can't very well see through a post in front of the shop.

Q There was a post in front of your shop?

A No, right on the angle, where the window is.

Q Were you behind the post? A No, I wasn't behind the post. I was standing right in front of it. But when you stand in front of it there is an angle, if the stand in the doorway that way, to turn around to look up the street, you have to step out” (Case, p. 75, ll. 20 to 30).

Witness Moskovitz does not seem to have really seen anything except just at the moment of collision. She was facing north, standing at the southeast corner of the intersection and was waiting for the wagon to pass in front of her (Case, p. 30, l. 25).

On the basis of this testimony, the head of plaintiff's horse was ten or fifteen feet east of the easterly curbline of Watchung Avenue when the automobile was one hundred feet south of the southerly line of East Second Street. The automobile traveling north on the easterly or northbound car track, would be eleven feet west of the east curbline of Watchung Avenue (this distance is arrived at by subtracting the width of the two car tracks i. e. nine feet, five inches, and the width between them, four feet, from the admitted curb to curb width of Watchung Avenue, thirty-six feet, leaving twenty-one feet seven inches which would make the roadway distance from the car tracks on either curb about eleven feet).

Traveling at the rate of thirty miles an hour, the automobile would cover forty-four feet per second, and would, therefore, pass the point in Watchung Avenue on a line with the advancing wagon in about two and one third seconds. The horse, during this time, traveling at the rate of three miles an hour, or four and four tenths feet per second, travelled ten and two tenths feet, which would bring him about to the easterly curb-line of Watchung Avenue, and would leave a clear eleven feet between the passing automobile and the head of the horse of the advancing wagon. Even if Radin's testimony be taken that the wagon was on the verge of crossing, it would have covered only a little over ten feet out into the roadway of Watchung Avenue, and there would still have been a foot to spare between the head of the horse and the passing automobile.

Consequently, on the testimony of the plaintiff's witnesses, no accident could have happened, and they offer no explanation of the admitted occurrence which in any way involves the negligence of the defendant so as to make him legally liable. The speed of defendant may have been excessive, but according to the plaintiff's explanation, the defendant's speed must have carried the automobile safely past the horse and wagon and the plaintiff therefore, offers no evidence that the speed of defendant was in any way the proximate cause of the accident. Likewise, on the above testimony, if the automobile were proceeding in such a manner that it must have cleared the wagon, which was at no time in its path, there was no necessity for warning, and the failure to blow the horn, if conceded to be a fact, cannot be charged to the defendant as negligence inasmuch as there was no necessity of warning the plaintiff when the automobile was bound to clear him.

It is therefore to be noted that the question of whether a warning was given in this case, comes within the rule laid down in *Holmes v. Pennsylvania Railroad Co.*, 45 Vr. 469, at page 471, where the Court says: "A mere 'I did not hear' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

It is submitted that the above testimony is absolutely unreasonable and incredible and entitled to no weight, whereas the defendant's testimony is reasonable and accounts for the accident in a reasonable and proper manner by showing that the plaintiff carelessly put himself in such a position as to make the collision unavoidable.

POINT III.

The Court erroneously permitted testimony as to plaintiff's average profits.

The testimony is, beginning at page 45, line 15, that plaintiff was idle for ten weeks. That he kept no books (Case, p. 45, l. 32). Without any further foundation whatsoever, the Court allowed the question "What were you averaging a week before the accident?" (Case l. 33) And over objection the answer was (Case, p. 46, l. 1), "Before the accident I make five or six dollars some days and some days I make ten. That is according to the days."

"Q What is the average a week? A
Around \$30."

Witness then proceeds to state that on Fridays he made the ten dollars and on Tuesdays ten dollars, and on Wednesdays and Thursdays, five dollars (Case, p. 46, l. 25), and the Court then

allowed over objection, an answer to the question, "What was your average earning at the time of the accident, a week?" The Court said in reply to counsel's objection, "He ought to know, I suppose, just as a lawyer knows, what he earns" (Case, p. 47, l. 3).

The Court thus fails to distinguish between the character of the profits in a profession such as that of an architect, lawyer, physician, and in a business of buying and selling to an uncertain number of customers, perishable products of fluctuating price on the markets. This man sold fish and vegetables (Case, p. 5, l. 18; p. 44, l. 4). In answer to the Court's question, "Did any expenses have to come out of that?" (Case, p. 47, l. 21) "A Yes, a lot of expenses on it, sure. Had to pay for the ice to keep the vegetables and I got to feed the horse." The Court continues: "Q You said thirty dollars a week? A Yes."

"Q Does that mean what is left after all your expenses are paid, or do the expenses have to come out of that? A Come out, yes."

"Q How much expenses have to come out of that? A About six dollars, five or six dollars" (Case, p. 47, ll. 23-40).

This is all the testimony in regard to the profits made by plaintiff in his business as a huckster, selling fish and vegetables, and upon this, the jury were allowed to speculate and possibly to find that his net profits were the difference between thirty dollars and five or six dollars per week for the ten weeks that he was idle. The objection taken by defendant was that no foundation had been laid for the testimony as to his average net earnings or profits, and that so far as the testimony of the witness went, it was a pure estimate or guess without any items or details of fact, upon which it could be made and as a buying and sell-

ing commercial business, is entirely different from the case of a professional income or the loss of a definite contract obligation.

On the above basis, allowing fifty cents a day for the feed of a horse, that would cost three dollars, and the balance, three dollars or less, deducting for ice, would hardly purchase vegetables and fish which would sell for thirty dollars. The testimony as it stood, should have been excluded until a proper foundation of facts had been laid.

In *Bartow v. Erie Railroad Company*, 44 Vr. 12 at page 13, the Court says:

“To justify a finding of loss of profits as a part of the verdict in a cause, the proof must be such as will show the jury with reasonable certainty, what the profits alleged to have been lost, would have been but for the injury to the plaintiff. Profits must be proved; they cannot be estimated by the jury without data to justify their finding. (*East Jersey Water Company v. Bigelow*, 31 Vr. 201).”

In the *Bigelow* case just cited, at page 209, the Court says:

“In this State it has been allowed that profits are recovered as damages where they might have been realized and where they are capable of being estimated with a reasonable degree of certainty. (*Wolcott v. Mount*, 7 Vr. 269. *N. J. Express Company v. Nichols*, 4 *Id.* 435).”

In the case at bar, we submit, that no reasonable degree of certainty, either as to amount of income or expenses or of the number of weeks during which income and expenses had been incurred, appears, which would entitle the witness to testify to an average as he was allowed to do.

The case at bar must be clearly distinguished from the cases such as the *New Jersey Express Co. v. Nichols* in 4 Vr. where an architect was allowed to testify to his average annual income, not as furnishing a measure of damage, but to guide the jury in the exercise of that discretion as to the amount of damage which to a certain extent, is vested in the jury. The case of an architect, a lawyer, a physician, whose income depends entirely upon their personal effort is very different from that of a buying and selling business where the fluctuations of the market, the quality of the goods, their perishable nature, the number of customers, fluctuations in demand by the customers and the good judgment of the seller in buying perishable goods so as to meet the demand of customers with a minimum loss, all enter into the problem. These details are susceptible of proof to some degree and proof of them should have been produced before the witness was allowed to testify to his profits, much less to any estimate of average profits.

In the *Standard Amusement Company v. Champion*, 47 Vr. 771, the Court of Errors and Appeals emphasizes the necessity of allowing testimony either by books or, if books are lacking, by the memory of the witness, to the detailed facts from which a computation of net profits or average profits may be made. In that case the Court of Errors held that the trial court should have admitted items of receipts and disbursements kept in detail in books, and that such details were an essential element of proof of substantial damages. The Court says that if the trial Court had admitted this, the admitted dearth of evidence in the case would not have existed. In the present case, there are no books or details of receipt and expenditure whatsoever, and nothing as to

the number of weeks for which the estimates given by plaintiff were effective. There is nothing but a speculative average.

In *Sedgwick on Damages*, 9th Edition, volume 2, page 917, it says:

“Where the facts disclose such a preponderance of the business element over the personal equation, or such an admixture of the two, that the question of personal earnings could not be safely or properly segregated from the returns upon capital invested, the income or profits from a business should not be considered.”

It is submitted that in the case at bar there is an admixture of the personal equation and the business elements and a highly speculative business element, namely, the sale of perishable fruit and fish over a huckster's route.

Mr. Sedgwick on page 916 refers to the case of a peddler, who, on the trial, offered to prove the nature and character of his business, the extent of his loss of time, also what percentage on the goods sold by him in his usual course of business and the loss on interest of money received for the same, and the annual amount of sales. This was properly admitted, but there is nothing comparable to this in the proof of the case at bar.

Mr. Sedgwick says in Volume 1, page 348, “The business may be of such an uncertain nature that its profits never become established,” and cites the case of *Bates v. Warrick*, 47 Vr. p. 108, where testimony as to the “normal Christmas trade” was held too uncertain and speculative.

In 13 Cyc., at page 49, under the general rule that profits as damages are not excluded, the statement appears, “Whenever profits are re-

jected as an item of damages it is because they are subject to too many contingencies and are too dependent upon the fluctuations of markets and the chances of business to constitute a safe criterion for an estimate of damages." This certainly is true of the case at bar. Accepted profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts with present data for a rational estimate of their amount.

It is submitted that the admission of this testimony vitally affected the consideration of the question of damages by the jury, and its admission being erroneous, requires a reversal of the judgment.

POINT IV.

It is respectfully submitted that the judgment should be reversed with costs.

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

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Notice of Appeal.

Notice of Appeal.

Filed October 24, 1915.

New Jersey Supreme Court.

10

SAMUEL RABINOWITZ,

Plaintiff,

vs.

BAYARD HAWTHORNE,

Defendant.

*Notice of
Appeal.*

20

*To William Newcorn, Esq., attorney for plaintiff,
119 West Front Street, Plainfield, N. J.:*

Take notice that the defendant appeals from
the whole of the judgment entered in this cause.

M. CASEWELL HEINE,
Attorney for Appellant.

Dated, October 21, 1915.

30

40

*Grounds of Appeal.***Grounds of Appeal.**

Filed November 17, 1915.

New Jersey Court of Errors and Appeals

10

SAMUEL RABINOWITZ, <i>Plaintiff-Respondent,</i> <i>vs.</i> BAYARD HAWTHORNE, <i>Defendant-Appellant.</i>	}	<i>On Appeal.</i> <i>Grounds</i> <i>of Appeal.</i>
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20

To William Newcorn, Esq., attorney for plaintiff.:

Sir:—

Take notice the following are the grounds of appeal which the defendant-appellant hereby assigns and upon which he will rely at the hearing:

30

1. Because the trial court should have granted the motion of defendant for a non-suit, but refused so to do.

2. Because the trial court should have directed a verdict for the defendant, but refused so to do.

3. Because the verdict is contrary to law.

4. Because the court overruled the following questions:

a. "Q When a man is coming to a street intersection, do you think it is any more natural to look to the right or to the left?"

40

b. "Q What were you averaging a week before the accident?"

c. "Q What is the average a week?"

Grounds of Appeal.

d. "Q Now what is your average earning or what was your average earning, at the time of the accident, a week?"

e. "Q What was your wagon worth before it was smashed?"

M. CASEWELL HEINE, 10
Of Counsel and Attorney for Defendant-Appellant.

20

80

40

Complaint.

Complaint.

Filed July 6, 1915.

NEW JERSEY SUPREME COURT.
UNION COUNTY.

10

SAMUEL RABINOWITZ,

Plaintiff,

vs.

BAYARD HAWTHORNE,

Defendant.

*Action
at Law.*

Complaint.

20

The plaintiff, residing at No. 208 Plainfield avenue, City of Plainfield, County of Union, and State of New Jersey, says:

1. On the twenty-seventh day of April, nineteen hundred and fifteen, the plaintiff was driving a wagon belonging to him along a certain street in the City of Plainfield, known as East Second street, where the said street crosses Watchung avenue.

30

2. On that day the defendant, while driving an automobile along Watchung avenue where the same intersects East Second street, at a high rate of speed and without any warning, negligently drove his automobile against the wagon of the plaintiff in which he was riding, smashing said wagon and causing the horse to run away, dragging the plaintiff out of the wagon into the roadway, breaking his collar bone, cutting his ear, injuring his right hand and causing other wounds and bruises.

40

Complaint.

3. The plaintiff by reason of said collision and said injuries, was taken to the hospital, where he remained for a time, and was prevented from transacting his business from that time up to the present time, and was obliged to spend a large sum of money for doctors and medicine and medical aid in being cured of his injuries, to wit, the sum of one hundred dollars, and was obliged to spend a large sum of money fixing the wagon and harness belonging to him, to wit, the sum of seventy-five dollars, and suffered the loss of the fish, food and vegetables that were in the wagon, amounting to the sum of twenty dollars. 10

4. The plaintiff has not entirely recovered from his injuries and will be put to further expense for medicine and medical aid in being cured of his injuries. 20

Plaintiff demands five thousand dollars damages.

WILLIAM NEWCORN,
Attorney of Plaintiff.

30

40

Answer.

Answer.

Filed July 10, 1915.

NEW JERSEY SUPREME COURT.

10	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p>SAMUEL RABINOWITZ,</p> <p style="text-align: center;"><i>vs.</i></p> <p>BAYARD HAWTHORNE,</p> </td> <td style="width: 10%; vertical-align: middle; text-align: center;"> <p><i>Plaintiff,</i></p> <p><i>Defendant.</i></p> </td> <td style="width: 40%; vertical-align: middle; padding-left: 10px;"> <p style="font-size: 4em;">}</p> <p><i>Action</i> <i>at Law.</i></p> <p><i>Answer.</i></p> </td> </tr> </table>	<p>SAMUEL RABINOWITZ,</p> <p style="text-align: center;"><i>vs.</i></p> <p>BAYARD HAWTHORNE,</p>	<p><i>Plaintiff,</i></p> <p><i>Defendant.</i></p>	<p style="font-size: 4em;">}</p> <p><i>Action</i> <i>at Law.</i></p> <p><i>Answer.</i></p>
<p>SAMUEL RABINOWITZ,</p> <p style="text-align: center;"><i>vs.</i></p> <p>BAYARD HAWTHORNE,</p>	<p><i>Plaintiff,</i></p> <p><i>Defendant.</i></p>	<p style="font-size: 4em;">}</p> <p><i>Action</i> <i>at Law.</i></p> <p><i>Answer.</i></p>		

20 Defendant residing in the City of Plainfield,
County of Union, State of New Jersey, says that:

First Defense.

1. As to the statements contained in paragraph one of the complaint herein, defendant has no knowledge or information sufficient to form a belief.

2. Defendant denies each and every allegation contained in the second, third and fourth paragraphs of the said complaint.

30

Second Defense.

Defendant says that plaintiff contributed to the accident alleged in said complaint by his own negligence.

M. CASEWELL HEINE,
Attorney for Defendant.

Reply.

Reply.

Filed July 15, 1915.

NEW JERSEY SUPREME COURT.

SAMUEL RABINOWITZ,

vs.

BAYARD HAWTHORNE.

10

Reply filed July 15, 1915, by William Newcorn, Attorney.

WM. C. GEBHARDT,
Clerk.

20

30

40

Motion to amend complaint.

NEW JERSEY SUPREME COURT.
UNION COUNTY CIRCUIT.

October Term, 1915.

10

SAMUEL RABINOWITZ,

vs.

BAYARD HAWTHORNE.

*Action at
Law.*

*No. 36 in
List.*

20

Transcript of stenographer's notes of evidence taken in the above entitled cause, before Hon. George S. Silzer, Circuit Court Judge, and a jury, at the court house, in the City of Elizabeth, N. J., on the 14th day of October, A. D. 1915, at 2:45 P. M.

Appearances:

William Newcorn, Esq., for the plaintiff.

M. Casewell Heine, Esq., for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

30

Mr. Newcorn. I desire to amend the first paragraph of the complaint by substituting the date the 16th of April, instead of the 27th, as the date upon which the accident occurred.

40

Mr. Heine. I object to the amendment at this time, simply as a matter of record; that we came here prepared to meet the allegations of the complaint, which are denied, that the accident occurred on the 27th, and we are prepared to show we were not anywhere near this place at that time; and secondly, I object to the amendment at this time, unless the case goes off for the term, and an opportunity is given to reframe the pleadings.

Harold D. Corbusier, direct.

The Court. How would the pleadings be reframed except as to the date?

Mr. Heine. Of course, it is simply as to the date. That is true.

The Court. Your answer would not be any different.

Mr. Heine. No, I presume not. 10

Mr. Newcorn. The answer denies contributory negligence.

The Court. I will allow the amendment.

Mr. Heine. Will your Honor allow me the usual objection?

The Court. I do not understand what you want, Mr. Heine. It is a different date from the one which he has alleged. Those amendments are always made. The only question that comes in it is whether you are prepared to try your case at this time, or whether you prefer to bring all your witnesses back some other day. You now have the jury here. 20

Mr. Heine. I think, perhaps, under the circumstances, I will go on with the case.

Mr. Newcorn opens the case for the plaintiff.

Mr. Heine opens the case for the defendant.

HAROLD D. CORBUSIER, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith: 30

Direct examination by Mr. Newcorn.

Q Doctor, you are a practicing physician in the City of Plainfield? A Yes, sir.

Q As such are you connected with the Muhlenberg Hospital? A I am.

Q In what capacity? A One of the assistant attending physicians and surgeons. 40

Harold D. Corbusier, direct.

Q Do you know the plaintiff, Samuel Rabowitz? A I do.

Q When did you see him first? A I have seen him, the first time I saw him was about the streets in Plainfield. I don't remember the first date.

10 Q Well, when did you see him in connection with—or when did you treat him first? A I assisted in treating him, if I can refer to my notes, the history of the hospital, on April 16th.

By Mr. Heine.

Q Those were made at the time? A These notes were made in the hospital history at the time, April 16th, 1915.

By Mr. Newcorn.

20 Q And what did you treat him for? A I treated him for a rupture of the ligament which connects the collar bone to the shoulder blade, that is, to one of the processes of the shoulder blade.

Q Were there any other injuries? A There were bruises about the shoulder joint.

Q Any other portion of the body? A Contusions. There were some other minor injuries—some other bruises, but I don't recollect exactly where those were.

30 Q Your portion of the treatment was merely in connection with the shoulder, the surgical end of it? A Yes.

Q Was there any other attending physician at the time? A Well, Doctor Murray, who was there, and also a house surgeon, I forget his name now.

Q Doctor Goldman? A Doctor Goldman, that was his name.

40 Q Is Doctor Goldman connected with the institution any more? A He is not connected any more.

Harold D. Corbusier, direct.

Q Do you know where Doctor Goldman is? A I do not.

Q What did you do for him? A He was put to bed and the shoulder was put up in a splint, in a wire splint. This was after a radiograph had been taken of the shoulder to see what the condition was, and he was put up in splints and kept in bed and kept quiet. 10

Q How long was he in the hospital? A He was in the hospital until the 26th of April, 1915; from the 16th to the 26th.

Q Was he discharged as cured at that time? A He was discharged improved, according to the hospital history.

By the Court.

Q What day was he discharged? A April 20 26th.

By Mr. Newcorn.

Q When he was discharged as improved, what was his condition at that time? A He still had pain in the shoulder and in the region of the injury, and discomfort on moving. In fact, his arm was put up, I think, in a splint, because he returned to the clinic, or the out patient department after the 26th, the day that he was discharged from the hospital. 30

Q How many times did he return to the clinic? A I believe I saw him about twice.

Q At intervals apart? A Yes. About a week apart, I should say. I am not absolutely positive.

Q Was his arm in a sling at the time when you saw him at the clinics? A I think it was.

Q Now, when did you examine the arm again? When is the last time you examined his arm? A Today. 40

Harold D. Corbusier, direct.

Q Where? A Right here in the court house.

Q And what condition did you find that should-
er in? A I find that he has a certain amount of
ankylosis, that is, binding down of the shoulder,
and very much atrophy, or wasting away of the
10 muscles about the shoulder and neck, the muscles
that are connected with the arm bone, and also
with the shoulder blade, and there is also a droop-
ing of that shoulder, which is occasioned from the
atrophy or wasting away of the muscles.

Q What have you to say as to whether or not
he has the full use of that arm? A I should say
he didn't have the full use of his arm.

Q Did you endeavor to ascertain whether he
did or did not? A Yes.

Q Is your conclusion based on the result of
20 that examination? A It is.

Q What have you to say whether or no he
can lift his arm over his head, or lift it above the
level of the shoulder? A He can hardly—he
couldn't do it without pain.

Q As the result of this examination, do you
consider that there will be an improvement in
that condition? A That there will be an improve-
ment?

Q Yes? A It depends upon whether he is
30 treated or not, and what treatment he takes.

By the Court.

Q Well, if he is treated properly, doctor, that
is the question, will he improve? A Yes, sir;
if he is treated properly he will improve.

By Mr. Newcorn.

Q In your judgment within what time? A
40 That is a very difficult matter to say in a case
of this kind. Cases about the joint, to give a

Harold D. Corbusier, cross.

prognosis in that case is really quite difficult, and I should say, though, with proper treatment, that he ought to have every use of the arm in a couple of months.

Q Will you define or state for the benefit of the jury what you mean by proper treatment? A Well, in a case—in this case the treatment I would recommend would be massage of the muscles and a gradual, what we call passive motion of the arm, careful manipulation of the arm in order to break up adhesions that have formed there, and also he should receive a baking, that is, hot air, dry air treatment of the shoulder. That would be the ideal treatment. 10

Q Outside of your treatment of Mr. Rabowitz at the hospital and at the clinic, is he or is he not a patient of yours? A No, sir; he is not. 20

Mr. Newcorn. That is all.

Cross-examination by Mr. Heine.

Q The bone itself, the collar bone, or clavicle, was not broken? A No, sir; the bone itself was not.

By the Court.

Q No bones broken, were there, doctor? A No bones broken. 30

By Mr. Heine.

Q You said that at the time he left the hospital he was still suffering pain. Of course, that is a purely subjective symptom, is it not, doctor? A Yes, that is a subjective symptom caused by—

Q Of course, it is caused by it, but it is a subjective symptom? A Of course, it is a subjective symptom. 40

Harold D. Corbusier, cross.

Q And you have to rely on what he says to you in order to get that symptom? A Not necessarily, no.

10 Q But in this case when this man's arm was moved and he said it pained him, you had no actual knowledge of your own whether it did or not, further than his statement, did you? A Oh, yes.

20 Q What was that knowledge? A If you are used to examining patients, you can divert a man's attention, by examining one part and examining—that is, ostensibly examining one part, and then while you are doing that, examining the part that is injured. And if you gradually, on a joint, if you cause pressure, a person will wince, and show that there is pain there, whether they want to or not.

Q Then that wincing is an objective symptom, isn't it? A Yes, but it is involuntary.

30 Q Yes, but it is objective, you can see it? A Yes. It is involuntary, though. I didn't mean to say that he said he had pain. The very fact that a person winces, for instance, if you press over a tender portion, where it is bruised, the muscles will give, there will be a contraction of the muscles and the person cannot control that.

Q But unless you see wincing you have to rely on the statement of the patient? A Unless you do. Or, of course, in cases of a severe bruise or swelling about a joint, there is always pain.

Q Well, that is an inference which you draw from experience, not an actual knowledge, is it? A Well, it is actual experience.

40 Q Well, it is not actual experience. It is an inference which you draw, isn't it? A Yes, but experience—

Harold D. Corbusier, cross.

Q Answer my question, doctor; yes or no? A It is from experience.

Q What is experience, doctor? A Experience is repeated practice of a similar condition.

Q Repeated practice? A Yes.

Q Is there any way in which repeated practice in the observation of subjective symptoms enables you to better know from the patient's own statement that he is suffering pain? A There are other ways of discovering whether the patient has pain or not. 10

Q That is the way you establish your experience, when you speak of a bruise, that, as you say, must cause pain. We all know if I bruise my thumb in the door jamb it is going to give me pain, but you can't tell what is in my mind, how much pain I am suffering, can you? A I wasn't speaking about the measure of pain. I just said pain. 20

Q No, but to the fact of pain? A Yes.

Q You can't tell from my experience, you can't put your personality into mine, and say that I am suffering pain, of your own knowledge, can you, although you may see that thumb black and blue? A I could by examining it, of course. 30

Q You could by examining it? A Yes.

Q How could you examine my mind so as to tell whether or not that was pain? I might be paralyzed. A Any condition of a severe bruise, as I say, pain is always present, and that is one of the symptoms.

Q You don't know that? A One of the cardinal symptoms.

Q You don't know that of your own knowledge, you simply gather that from the statement of the person you are examining? A A person may 40

Harold D. Corbusier, cross.

be deaf, dumb and blind, and you can discover whether they have pain or not.

Q But you can do that by seeing involuntary reaction of a twitch, or some other symptom of that kind, that you can see with your eye? A That is one of the ways.

10 Q And if a man that is deaf, dumb and blind, you can't get any subjective symptom then at all? A But you would know he had pain.

Q How would you know it? A From the contraction of the muscles at the time.

Q That is something you can see with your eye? A Yes.

Q If you don't have any objective symptom, the man who is deaf, dumb and blind cannot communicate a subjective symptom to you? A No.

20 Q Then you can't tell whether he has pain or not? A Yes, you can tell whether he has pain or not.

Q You just said you couldn't, unless you got an involuntary reaction that you could see. A You could tell whether he had pain or not, but not from his symptoms.

Q No, but you can't tell, without seeing a physical manifestation of it, except by statements? A Of course not.

30 Q When a man is deaf, dumb and blind, and you don't get anything that you can see, you can't tell whether he is suffering pain or not? A Oh, no, if you have nothing that you can see, you can't tell.

Q So that subjective symptoms are solely communicated to you, as a medical practitioner, by what the man says to you? A Of course, subjective symptoms.

40 Q That is what we have been talking about all this time? A Yes.

Sayde C. Moskovitz, direct.

Q A joint that is in a cast, or in a sling, or anything of that kind, is bound to be stiff when it is released, isn't it? A Depending upon the length of time.

Q Well, a week or ten days? A Yes, it would be slightly stiff after a week.

Q And after that is used a little while that stiffness works off, doesn't it, doctor? A It does, unless—

Q Unless there is an accident suit, is that it? A Some result of the injury still present.

Q They usually last until the time of trial? A Yes. Sometimes afterwards.

Q You would not give a proportion on that, would you? A No answer.

Q Two months from now, with the muscle massaged, manipulations for adhesions, and baking treatment, will put that man where he was before, in your opinion? A Well, probably. Nobody can give a positive opinion on it. 20

Q That is the probability that you would give as your opinion? A Probability.

Mr. Heine. That is all.

Mr. Newcorn. That is all, doctor.

SAYDE C. MOSKOVITZ, a witness produced on behalf of the plaintiff, being duly sworn according to law on her oath, saith: 30

Direct examination by Mr. Newcorn.

Q Miss Moskovitz, where do you reside? A Plainfield, New Jersey.

Q On what street? A 254 East Second.

Q And how far away was that from the scene of accident? A Two blocks.

Q Do you remember the day of the accident to Mr. Rabinowitz? A Yes, I do. 40

Sayde C. Moskovitz, direct.

Q On the night in question where were you walking? A I was walking on East Second street, going west.

The Court. Was this at a corner this happened?

10 *Mr. Newcorn.* This was on the intersection. She was on East Second street, going west.

The Court. East Second runs east and west?

Mr. Heine. Watchung avenue north and south, approximately, and Second street east and west.

20 *Mr. Newcorn.* The intersection of East Second street and Watchung avenue, and she was coming towards town, that is, going west.

The Court. Which way do you claim that Mr. Rabinowitz was coming?

Mr. Newcorn. He was going east and west, same direction as this witness was going.

The Court. He was coming along East Second street, going from east to west? And which way do you claim that the defendant was going?

30 *Mr. Newcorn.* The defendant was going from the south towards the north, towards Front street.

The Court. And they came together at the intersection of the street?

Mr. Newcorn. At the intersection of the street, after the plaintiff had already crossed the car tracks on the westerly side of Watchung avenue.

40 *The Court.* Is there only one car track there?

Sayde C. Moskovitz, direct.

Mr. Newcorn. Two car tracks.

Mr. Heine. I would suggest as a matter of having it made for us all a little easier in regard to these directions, that we call it Second street. The accident happened on East Second street, but if we call it Second street we will not be confused with having a man walking west on East Second street. Let us call it Second street and Watchung avenue, and then we will have it clear. 10

By the Court.

Q How near were you to the intersection of these two streets when this thing happened? A Why, just about to cross the curb.

Q Of what street? A Of Second street. 20

Q Going north? A Going north.

By Mr. Newcorn.

Q When you arrived—as you were walking westerly on Second street towards Watchung avenue, did you see this Mr. Rabinowitz? A Yes, he was driving on a parallel with me.

Q When you arrived at the curb line of Watchung avenue and East Second street, where was Mr. Rabinowitz? A Why, I had to wait at the curb until he crossed the curb, and he was just about to cross the second track. 30

Q You waited on the curb—on what side of East Second street were you, the southerly or the northerly side? A Southerly.

Q And you had to wait at the curb line of Watchung avenue and East Second street in order to let him pass? A Yes.

Q Did you see what occurred while you were waiting there? A Yes. 40

Sayde C. Moskovitz, direct.

Q Well, now, just state what you saw. A Why, Mr. Rabinowitz's horse had crossed the second track, and his wagon was just about to cross when this automobile came and jammed right into the wagon.

10 Q Did you hear any horn at the time when the collision took place? A No, I did not.

Q You saw the automobile before it went into the wagon? A Just a glimpse of it, yes.

Q And how fast was it riding? A Why, it was riding so fast that it couldn't stop in time before it went into the wagon.

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

20 *The Court.* Yes, I think that ought to be stricken out.

Mr. Newcorn. Well, you don't know whether he could have stopped or not.

Q You say he was going fast? A Yes.

Q What part of the wagon did it strike, the front or the rear? A Why, the rear.

Q Lengthwise or sidewise? A I don't understand your question

30 Q The wagon—the horse was facing—

Mr. Heine. I object to counsel testifying.

Mr. Newcorn. She has testified that the horse had crossed the second track—

By the Court.

Q What part of the wagon did it hit? A The rear.

40 Q Hit the rear wheel, or what part of it, do you know? A Well, I just don't—the whole wagon.

Sayde C. Moskovitz, direct.

Q Was it as far back as the rear wheel? A Well, I should say between the first wheel and the second wheel.

Q And when the automobile collided with the wagon what happened? A Why, the man was thrown from the wagon, the horse was separated from the wagon and the wagon was pushed to one side. 10

Q How far was the wagon pushed? A Approximately thirty feet.

Q Is that thirty feet from the corner?

Mr. Heine. I object to the suggestion to the witness.

A Thirty feet from where it was hit.

Q Now, I am trying to find out just about where was it hit. Taking East Second street at its intersection, where was the wagon, in the middle, or towards either side of the street? 20

Mr. Heine. I object to that unless it is confined to when.

Mr. Newcorn. At the time of the collision.

By the Court.

Q Just before the moment of contact what part of East Second street was the plaintiff's wagon? A Just in the middle of the block. The trolley tracks. 30

Q Middle of the street? A Yes.

Q You say the wagon was pushed over? A Yes.

Mr. Heine. I object to that.

By the Court.

Q Did it go over on its side, or stay up? A The wagon? 40

Q Yes. A Over on its side.

Sayde C. Moskovitz, direct.

Q What time did it topple over? Where was it at the time it went over? A The wagon?

Q You say it went thirty feet. A Well, the automobile, the jar of the automobile just pushed it away over.

10 Q What time during that journey did it fall over? A I don't understand the question.

Q Well, did it fall over at the moment the automobile struck it, or did it fall over after the automobile got through pushing it, or between? A I don't remember.

By Mr. Newcorn.

Q Where was the automobile when the wagon stopped? A When the wagon stopped?

20 Q Yes. That is, after the collision? You say the wagon was pushed thirty feet. Now, where was the automobile when they stopped it? A The automobile stopped, yes.

Q I know, but where? A Why, after it crossed the block.

By the Court.

Q Did it go as far as the wagon, or further? A No, it didn't go as far as the wagon.

30 *By Mr. Newcorn.*

Q How much space was there between the two?

Mr. Heine. When? I object.

Mr. Newcorn. Well, when they both stopped.

A I don't remember.

Q You say you don't remember? A No.

40 Q Can you tell me what house is on the corner, on the northwest corner of Watchung avenue and East Second street? A Why, there is a row there, and the first one is taken up with a store,

Sayde C. Moskovitz, direct.

plumber's store, and the next one is taken up by a manicurist's parlor.

Q And the row is known as what row? A The Hand row, I think.

Q Taking the position of Hand's row, or Hand's flats, where was the automobile? A After the collision? 10

Q After the collision, when it was stopped? A Why, in front of the manicurist's parlor.

Q And the manicurist's parlor was how far from the corner? A Second from the corner.

Q Second house from the corner?

By the Court.

Q On Watchung avenue? A Watchung avenue.

By Mr. Newcorn. 20

Q You say the plaintiff was pulled out of the wagon, or thrown out? A Thrown out.

Q And did you see him after the thing happened? A Why, I didn't see him. I just heard him.

Q You just heard him. Did you go over there? A I tried to get a glimpse of him, but couldn't.

Q What was done with him, if you know? A Why, he was taken on the porch, on the opposite side of the street, and was laid down there on the porch. 30

Q Whose porch was it? A I don't know the people. I think Chrones live there.

Q Is this in the Hand row? A No. Opposite side of the street.

Q That was on the opposite side to where the collision took place? A Yes.

Q How long was he there, if you know? A I don't remember. Quite some time. 40

Sayde C. Moskovitz, cross.

Q Where were you going at the time? A I was going to Miss Meyers home.

Q And where in relation to the collision was the Meyer home? A Why, two houses up from the collision, two or three houses up Watchung avenue.

10 Q And on which side of the street, the south—the east or the west of Watchung avenue? A East side.

Q Do you know what became of Mr. Rabino-witz after he was taken to the porch? A He was taken to the hospital.

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

Q You didn't see him afterward? A No.
20 *Mr. Newcorn.* Take the witness.

Cross-examination by Mr. Heine.

Q Miss Moskovitz, where were you going that night? A I was going to the home of Miss Meyers.

Q That is this third house up on Watchung avenue? A Yes.

Q You had come along Second street on the southerly side? A Yes.
30

Q Is that correct? A Yes.

Q And then as you got to the corner, which would be the southeast corner—if you don't follow these directions, just call my attention to it, I want you to be sure that you know what I mean, handling these directions is sometimes confusing; you were on the southeast corner, and you were about to cross Second street to go up to Miss Meyers' house? A Yes.
40

Q So that you were facing north? A Yes.

Sayde C. Moskovitz, cross.

Q They were building a postoffice, weren't they, on the southeast corner at that time? A Why, they hadn't started to build it yet. Just torn the old foundation down.

Q There was a foundation that was being taken out, there was a fence up to keep people from falling in, and so on? A Yes. 10

Q Was that fence taller than your head? A No.

Q How tall a fence was it? A There was no fence around there at all of any—just a rail, probably, around the old foundation.

Q Probably? Don't you know what was there? A I don't remember exactly.

Q Do you know whether there was a rail, or a fence? A There was no fence. That is torn down now, they started to build. 20

Q I know, but this night you were going up with Miss Meyers was there a rail or a fence there? A A rail.

Q How much of a rail? A Just one board all around.

Q On posts? A On posts, yes.

Q Were there any of the walls of the old building standing? A No, there were not.

Q And the excavation was down; I mean, there was a hole there? A Yes. 30

Q By the sidewalk? A Yes.

Q And was there an open space between this board and the level of the sidewalk, so that anybody could fall in? A Why, no. There was the rail around there.

Q I know, but the rail was just one board, you say. A Yes. It was fastened on posts all around.

Q How wide a board? A About six inches.

Q And where was this board, down on the level of the sidewalk? A No. 40

Sayde C. Moskovitz, cross.

Q Or up at the top of the posts? A Top of the posts.

Q Was the space between the board as it ran along the top of the posts, and the sidewalk, open?

A I think so, yes.

10 Q So that anybody could have fallen into the excavation? A There is always a light there on the corner.

Q What kind of a light? A Electric light. You could easily see there was a hole there, and you were not supposed to get near there.

Q Just this one rail, one six-inch board, on a post around this excavation? A Yes.

20 Q As you came along Second street you were looking in which direction as you approached Watchung avenue? A West.

Q Looking west? A Southwest, about.

Q Then as you started to turn north and step off the curb, this wagon came along and prevented your going across? A Exactly.

Q And about when you started to step into the curb, did you look to your right, from the direction in which wagons would come? A I don't understand your question.

30 Q Well, as you turned north to go up on Watchung avenue, you came down the sidewalk in a westerly direction, and then turned north, and as you turned north to go across the street, then this wagon came along so that you didn't have time to get in front of it? A Yes.

Q How far away from you was the wagon when you first noticed it, so that you stopped and waited for it to go by? A Oh, it was right close.

40 Q If you had stepped out the horse would probably have hit you, would he? A No, he was going slowly.

Sayde C. Moskovitz, cross.

Q Yes, but I mean if you had stepped out and he had kept on going he would probably have hit you pretty quickly? A No, he wouldn't. He was in the middle of the road. I could see that far.

Q Did you step out on the curb to wait for him to go by? A No, I waited.

Q You stayed on the curb. A Yes. 10

Q And you stayed on the curb, didn't you, to protect yourself from being hurt or injured? A Yes.

Q By this wagon driven by Mr. Rabinowitz. As the space cleared and the wagon passed along, you stepped across? A About to, yes.

Q Started to go across? A Just about to.

Q You were about to go. Didn't you step out into the gutter? A I was just looking around the corner until he passed me. 20

Q Looking around where? A I was looking southwest.

Q Looking south? A You can see south from the corner.

Q What were you looking south for when you were looking out for a wagon coming in front of you to the north? A I just looked until he passed.

Q Were you looking north until he got passed? A No, I knew he was going past. I looked south. 30

Q How did you know when he got through going past? A I could hear that much.

Q So you trusted to your ear as to when to cross the street, and took a look as a sort of extra precaution, somebody coming around the corner, and get you there? A Not exactly an extra precaution. I just happened to look.

Q You were going up to Miss Meyers' house, weren't you? A Yes.

Q And you were waiting for a wagon to get past in front of you? A Yes. 40

Sadye C. Moskovitz, cross.

Q What on earth made you look around behind you? A Just happened to look, that was all.

Q And when you looked did you see an automobile coming up the street forty miles—or coming up fast? A Yes, I did.

10 Q And how far away was that down the street when you saw it? A Why, it was right close to the corner.

Adjourned until tomorrow, Friday, October 15th, 1915, at 9:30 A. M.

SADYE C. MOSKOVITZ, resumed.

Cross-examination continued by Mr. Heine.

20 Q Miss Moskovitz, when we stopped last night I think you were looking north, weren't you? A I think so.

Q The way you were going with Miss Meyers. You usually look in the direction in which you are going, don't you? A Sometimes. When a vehicle is passing, no sense of looking at the vehicle. I usually look around.

30 Q But if you are going to someone's house, and that is up on the street, you are walking up that street, you look ahead of you, don't you, as a general rule, when you are walking along the sidewalk? A Yes, on the sidewalk.

Q And you had no idea on this evening there was going to be an accident, did you? A Not at all.

Q Your mind was intent upon going up to Miss Meyers'? A Yes.

40 Q And as you approached Watchung avenue, walking along the southerly side of Second street, you were looking west along Second street, weren't you? A West, yes.

Sayde C. Moskovitz, cross.

Q Did you see any other vehicles down Second street? A Why, which way, going which way?

Q I mean further west than you? A Yes.

Q Beyond Watchung avenue? A Yes.

Q Did you see some vehicles down on Second street there as you walked along? A Yes.

Q Did you pay any particular attention to them? A No. They didn't concern me. 10

Q Just saw that they were there? A Yes.

Q And did you notice—when did you first notice this wagon that was coming along, Mr. Rabinowitz's wagon, that was coming along Second street in the same direction that you were going?

A Oh, he was driving on a parallel with the way I was walking, all the way down the block.

Q When did you first become aware that there was a wagon coming along Second street the same way you were going? A Oh, a block before Watchung avenue. 20

Q What is the next street? A Church street.

Q And you live east of Church street, do you?

A Yes.

Q You heard Mr. Rabinowitz coming when you passed Church street? A Yes.

Q Where was he when you passed Church street, opposite you, or was he still further east of you? A Well, he was just about opposite. 30

Q And you two walked along together, did you? A Yes.

Q He being parallel with you? A Yes.

Q So that as you walked that whole block from Church street to Watchung avenue the horse stayed right beside you? A Yes, sir.

Q You walked as fast as the horse? A The horse was walking slowly.

Q When you got to the corner of Watchung avenue and wanted to make the turn north, am I right? A Yes. 40

Sayde C. Moskovitz, cross.

Q You had to wait until this horse went on along past you, didn't you? A Yes.

Q How close had the horse and wagon been to you while you were walking along on Second street? A Well, the horse was in the middle of the block.

10 Q Middle of the street, you mean? A Yes.

Q You don't mean the middle of the block, do you? A The middle of the roadway.

Q As you came along Second street just before you turned north on Watchung avenue, did you see the automobile? A Why, I had to wait for the wagon to pass.

20 Q Yes, but before you turned north, and stood there facing north waiting for the wagon to pass, did you see the automobile? A I turned south. I looked south.

Q But you were going north, weren't you? A I was going north.

Q And you waited for the wagon to pass north, did you? A Yes.

Q And were you looking at the wagon while you were waiting for it to pass? A No.

30 Q You were looking south while you were waiting for the wagon to pass? A I looked south. All around.

Q How long did you stand looking around at the four points of the compass? A Well, until the vehicle passed. It was walking slowly.

Q Which way were you looking when the vehicle passed? A Why, I just happened to be glancing south at the time.

Q Which vehicle do you refer to? A To the wagon.

40 Q You happened to be glancing south when the vehicle passed? A Yes.

Sayde C. Moskovitz, cross.

Q How did you know the vehicle had gotten past? A I just happened to glance south to see if any automobile was coming.

Q How did you know that the vehicle got past the wagon? A I could hear that.

Q Then you crossed the street, or were going to cross the street that night guided by your sense of hearing alone? A Why, yes. 10

Q Did the wagon make such a noise when it was walking so slowly? A It had iron wheels.

Q What kind of pavement is there on that street? A On Watchung avenue is macadamized pavement.

Q And what on Second street? A I don't know what kind of pavement.

Q Isn't that macadam, too? A No.

Q What is it, asphalt? A No. It is just a road. 20

Q Don't you know what it is like? A I don't know.

Q You live right near there, don't you? A I don't know what kind of a road you call it.

Q Well, what is it? A It is a tarred road.

Q A tarred road? A Yes.

Q This wagon walking along quietly beside you made so much noise that you could hear when it got past you? A Yes. 30

Q What attracted your attention to the south? A Why, it was natural to see if a machine or anything was coming to turn into Second street before I crossed.

Q It was natural? A Yes.

Q But you were not going to cross Watchung avenue, were you? A I was going to cross Second street to Watchung avenue.

Q And that is why you looked south? A Yes, the machine—anything was liable to come. 40

Sayde C. Moskovitz, cross.

Q And where did you see the automobile? A Saw the machine coming.

Q Where was it when you first saw it? A Why, it was about, I should judge about fifty feet from Watchung avenue.

Q Fifty feet south? A Yes.

10 Q Mr. Rabinowitz driving right along there beside you, up on his wagon, he could see it, too, couldn't he? A What is that?

Q Mr. Rabinowitz, driving right alongside you, he could see it, too, couldn't he? A I don't know about what he could see.

Q There was nothing to prevent him, was there? If you could see it, on the sidewalk, he could see it sitting up on his wagon, couldn't he? A The wagon was closed in.

20 Q Closed in in front? A Well, no. The sides were all closed in.

Q Couldn't he look out the side? A I don't know about what he could do.

Q There was plenty of space for him to see out the sides, wasn't there? A There was plenty of space, yes, but I don't know what he did.

Q Was it solid sides, cover the wagon solid? A Yes.

30 Q Wasn't there a pole on this, posts, a kind of a little archway on either side of the wagon, at the side, right opposite the driver's seat? A I don't think so.

Q If Mr. Rabinowitz was sitting on the seat of this wagon that was walking along right beside you, and you both came to this Watchung avenue at the same time, don't you think that he could see down Watchung avenue as well as you could? A Why, it is according to which side of the seat he was sitting on. If he was sitting right, it
40 would be a little more difficult for him to see south.

Sayde C. Moskovitz, cross.

Q Why would it? A Because he would have to lean away out, if the wagon was closed.

Q He would have a longer angle to look south if he were sitting further to the right than if he were sitting up close to the left, wouldn't he, because the side would be in his way, whereas, if he would get over to the right he would have a long view down? A It would be perfectly natural for him to look out the left, if he was sitting on the right side. 10

Q It would be natural for him to look to the left? A If he was sitting on the right side it would be natural for him to look out the right side.

Q When a man is coming to a street intersection, do you think it is any more natural to look to the right, or to the left? 20

Mr. Newcorn. I object to this line of examination.

(Question repeated by stenographer.)

The Court. I will overrule the question.

Mr. Heine. Will your Honor allow me an objection?

The Court. Yes.

Exception allowed—sealed accordingly. 30

Judge.

Q When this wagon was finally upset, where was it on the street in relation to Watchung avenue and Second street, the intersection? A From the place of the collision? Why, the wagon wasn't upset.

Q It wasn't upset? A No.

Q I thought you said it was knocked over. A The hood was knocked off. 40

Sayde C. Moskovitz, cross.

Q The hood was knocked off? A Yes.

Q Where was in when it was hit, in the car track, was that what you said? A The horse had already crossed the car tracks.

10 Q Which car track was it, the east or the west car track? A West, and both car tracks were right close together. And the wagon was just about to cross.

Q Well, where was the wagon, on the east car track? A No. It was just between. Just about between.

Q Do you mean to say there is room for the wagon between the car tracks there? A Well, half way between the east and the west.

20 Q Was any of the wagon over on the west car track? A Yes.

Q How much of it? A I don't know about that.

Q You said after the automobile hit the wagon there was a space between the automobile and the wagon. They were not stuck together like that, were they, after they had stopped? A I don't remember about that.

30 Q I thought you said when the automobile had stopped pushing the wagon there was a space between them. A I don't remember.

Q That is what you said here yesterday, that there was a space between them, when the whole thing was over, the collision had stopped and everything was stationary again, the wagon was not up touching the automobile, is that right? If that is not right you can correct it now. I want to get at the fact. A I say I don't remember.

40 Q Well, it is correct that the automobile struck the wagon between the first and second wheels, as

Sayde C. Moskovitz, cross.

you said, between the front and the hind wheels?

A Yes.

Q And pushed it along, is that right, about thirty feet? A About.

Q And when it got through pushing it, was the automobile still up against the wagon, or was there a space between them? A I don't remember. 10

Q You don't remember that? A No.

Q How far from the middle of Second street was the wagon when the automobile got through pushing it? A I don't understand that question.

Q Take the middle of Second street, take a line down the middle of Second street, east and west? A Yes.

Q Where was the wagon in relation to that line when the automobile got through pushing it? 20

A When the automobile got through pushing it?

Q Yes. A Well, it was about thirty feet.

Q Thirty feet from where? A From the middle of the block.

Q You mean the middle of the pavement in the street? A From the middle of the crossing, the intersection of the two streets.

Q From the middle of the intersection? A Yes. 30

D Do you mean by that the middle of Second street or the middle of Watchung avenue? A It was in the middle of Watchung avenue and Second, both.

Q Right at that point in the middle? A Right at that point, yes.

Q About thirty feet from there? A Thirty feet.

Q Were any of the people in the automobile thrown out? A I don't think so. 40

Sayde C. Moskovitz, cross.

Q Don't you know? A I don't remember that.

Q Well, you were there and saw it? A Well, I don't remember clearly.

10 Q Well, you remember it all about the horse and the wagon going by, and listening for the wagon to go by. Can you remember whether anybody was thrown out of the automobile? A I don't remember.

Q What were you looking at then? A I was looking at the wagon at the time. I don't remember any—

Q Did you stay there afterwards? A Yes, sir; I did. I don't remember whether people were thrown out—

20 Q Didn't you see whether anybody was thrown out of the automobile? A I didn't see, no.

Q Can't remember that? A I can't remember it.

Q Are you related to Mr. Rabinowitz? A I didn't know the man at all.

Q You didn't know the man at all? A No. I never seen him before.

Q Were you subpoenaed here to-day? A Yes, I was.

30 Q When did you first talk to Mr. Newcorn about this case? A I don't remember.

Q Well, a long while ago? A Quite a long time ago, yes.

Q How did you come to meet Mr. Newcorn? A Meet Mr. Newcorn? What do you mean?

The Court. About this case?

Q About this case, I mean. A I didn't meet Mr. Newcorn personally about this case at all.

40 Q Who did you speak to? A A man by the name of Mr. Rothberg.

Samuel Rabinowitz, direct.

Q Is he in Mr. Newcorn's office? A Not at the present time, I believe.

Q Was he then? A He was then, yes.

Q How did you come to meet Mr. Rothberg about this case? A Why, Mr. Rothberg had heard that I saw some parts of the accident, and called me in there. 10

Q He came to talk to you about it? A Yes, he did.

Q And then did you talk to Mr. Newcorn about it? A No, I didn't.

Q Talk to anybody else but Mr. Rothberg? A No, I didn't.

Q Until you came here and went on the stand? A No, I didn't.

Q Never had any conversation with Mr. Newcorn about what you had seen, or anything? A I gave Mr. Rothberg—dictated to Mr. Rothberg a statement of what I had seen, and Mr. Newcorn probably seen that. 20

Mr. Heine. That is all.

Mr. Newcorn. That is all.

SAMUEL RABINOWITZ, the plaintiff, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Newcorn. 30

Q Mr. Rabinowitz, you are the plaintiff in this action? A Yes.

Q Are you the plaintiff in this action, the man who brought this suit? A Yes.

Q Where do you live? A I live in Plainfield.

Q What street? A 532 West Third.

Q What is your business? A I am a huckster, a peddler.

Q And on the sixtenth day of April, 1915, towards evening, where were you? A I was in 40

Samuel Rabinowitz, direct.

Plainfield, I was driving my horse through Second street, and came in through East Second street, going to the west. Before I came into Watchung avenue I looked around in both directions of the street to see if there is any automobile or any cars coming along.

10 Q Go a little slow, and clearly. A Not having seen nothing coming, the track was clear, so I started to cross Watchung avenue; when I had the tracks crossed, with my horse's head in the side of Second street, and the hind part of the wagon was on the last track, from Watchung avenue, so that automobile came along and knocked right in the wagon. and that top, from the wagon, I suppose, came down and struck right in my head and knocked me unconscious.

20 Q When you approached Watchung avenue and East Second street, what did you do before you crossed the street? A Before I crossed Watchung avenue?

Q Before you crossed Watchung avenue. A I looked around in both directions of the street.

Q Did you see any automobile coming from the south? A I didn't see nothing at all. There was clear track. Nothing was on both sides.

30 Q How wide, if you know, is Watchung avenue, from curb to curb?

Mr. Heine. We will admit that it is sixty feet. The map shows that.

A I guess about thirty-six feet across.

Mr. Newcorn. Sixty feet from sideline to sideline. You also admitted that there are two tracks, cars going north and south?

Mr. Heine. Yes.

40 *Mr. Newcorn.* In the centre of the brick pavement.

Samuel Rabinowitz, direct.

Q After you had crossed, after you had driven upon the Watchung avenue side, did you again look?

Mr. Heine. I object to that as leading.

The Court. Yes. I do not think you ought to lead him, Judge. Let him tell just what happened. 10

Mr. Newcorn. I will withdraw the question.

Q What did you do again after you had already driven upon the brick pavement? A Well, I looked on the right hand side, anything coming from the right hand, or from the north.

Q And when did you look upon the right hand side? A When I crossed the tracks.

Q After you had crossed the tracks? A After I crossed the tracks of Watchung avenue, yes. 20

Q What happened to you after the collision took place? A After I got up? They took me to the hospital there.

Q What happened to you, if you know? A Well, I got hurt here in my head.

Q No, no. When the wagon and the automobile came together what happened to you? A Well, I find myself, I was laying on the floor across the—on Meyers' porch there, I guess it was. 30

Q Do you remember anything transpired between the time the collision took place and you found yourself on the porch on the opposite side of the street? A I remember I waked up.

By the Court.

Q. Before you woke up, did you remember anything, that is what he wants to know? A No, I don't remember at all, because I was knocked out, unconscious. I couldn't remember. 40

Samuel Rabinowitz, direct.

By Mr. Newcorn.

Q Where were you taken to from Meyers' porch? A Well, they took me up in a taxicab down to the hospital.

Q And who was with you? A A young girl by the name of Becky Meyers, I guess her name is, she was with me in the automobile.

Q The lady was sitting down there in the seat? A Yes, that is the one.

Mr. Newcorn. Stand up, Miss Meyers.

A That is the girl.

Q You say you were taken to the hospital? How long did you stay in the hospital? A I stayed in the hospital eleven days.

Q When you were discharged from the hospital what was your condition? A Well, I was all bandaged up like this, all bandages around mine arm. I had it bandaged up for five weeks.

Q What were your injuries? A Injuries was collarbone on that side broken.

Mr. Heine. I object to going into the technical side of the injuries. The physican is competent to do that. I do not think this witness is.

The Court. He can tell what he found himself.

Mr. Heine. Prays exception.

Exception allowed, sealed accordingly.

Judge.

A I had my hand all cut up in here. I was hanging on to the lines of the horse. It must be. Then in here I was bruised right in here. That side I got struck. And then my side all bruised up, all mine body.

Samuel Rabinowitz, direct.

Q Were these wounds better when you left the hospital? A The hand was better.

Q How about the arm? A The arm is still sore yet.

Q How about when you left the hospital? A It was all bandaged up, I told you. I had it in a bandage. 10

Q How long was it kept in the bandage? A I had it for five weeks.

Q Who took off the bandages? A Dr. Corbusier.

Q At the expiration of the five weeks? A After I went down to the clinic and he took it off.

Q How many times did you go to the clinic? A I was about four times to the clinic. 20

Q And what is the condition of your arm at the present time as far as use in connection with your business? A Well, I can't do no hard lifting at all, a little lift I can, but nothing hard. I can't lift about one hundred and fifty pounds, or two hundred pounds as I used to. I can't lift it up.

Q Just show the jury just how far you can lift your arm? A I couldn't lift that arm. That is all it goes up. I couldn't bring it over my head like this. When I turn around like this here, then it pains in the muscles, you know. 30

Q What happened to your wagon? A The wagon was all smashed up.

Q When did you see the wagon again? A When I got out from the hospital I seen the wagon.

Q Who had charge of the wagon when you saw it? A Oh, there was—I sent it—it was in the livery stable.

Q In the livery stable? A Yes, the horse and wagon was in the livery stable. 40

Samuel Rabinowitz, direct.

Q How much did it cost to fix up the wagon, if you had it fixed up? A Well, I had a couple of blacksmiths to give me an estimate. One of them asked me fifty dollars, and the other forty dollars.

Mr. Heine. I object to what they asked him.

10

A I asked the blacksmith.

Mr. Heine. I object to the estimate unless he paid it.

The Court. Unless what?

Mr. Heine. I object to what was estimated. The question involved is what it cost him. Not what it was estimated it would cost him. If he wants proof of an estimate, it would be proof of the man who saw the condition of the wagon and can testify to what would be necessary to do. This is the man who is the plaintiff. I do not think he can estimate it.

20

The Court. I think that is so, Judge.

Mr. Newcorn. The witness says, as a matter of fact, the wagon was never fixed. I just want to explain—

The Court. The point Mr. Heine makes is that the testimony is not admissible. It is merely hearsay of somebody who told him. The man himself would be the best witness, and then he could cross-examine him, too.

30

Mr. Newcorn. I see the point.

Q What happened to the harness? A The harness was all broke up, the time the horse got away from the shaft, I suppose, he broke off the cross piece was smashed up, and all parts of the harness was all broke.

40

The Court. That testimony will be stricken out as to the estimate.

Samuel Rabinowitz, direct.

Mr. Heine. I move to strike that out.

The Court. Yes.

Q How much did the harness cost you? A
Cost me twenty-three dollars.

Mr. Heine. I object to that. The cost is
not—

10

The Court. It is some evidence of value.

Mr. Heine. It is some evidence.

Q How long did you have the harness A
About eight months.

Q What was it worth at the time of the acci-
dent?

Mr. Heine. I object, unless this man is
qualified as an expert on harness.

The Court. You had better find out.

20

Special cross-examination by Mr. Heine.

Q How much harness have you ever bought?
A Myself?

Q Yes? A I am a harness-maker by trade.

Q A harness-maker by trade? A Yes.

Q How long have you been engaged in that
trade? A How long?

Q How long have you been engaged in that
trade? A I have been working at that trade for
the last fifteen years.

30

The Court. I will admit the question.

Direct examination (continued).

By Mr. Newcorn.

Q How much was your harness worth at the
time it was hurt? A At the time it was hurt
from eighteen to twenty dollars. I didn't have
that harness long. About eight months.

40

Samuel Rabinowitz, direct.

Q What did you have in the wagon at the time the collision took place? A Oh, I had some stuff left there.

Q What kind of stuff? A Some vegetables, some few produce down there, fruit.

10 Q What became of that? A I don't know what became of it. Went to waste, I suppose.

Q What was the value of that? A Oh, it wasn't worth anything. Around about ten dollars or so. Wasn't much.

Q Have you spent any money for the doctor? A Yes, I go see doctor once in a while.

By the Court.

20 Q He wants to know if you have spent any money for the doctor? A Oh, not much. Except I paid in the hospital.

By Mr. Newcorn.

Q How much did you pay in the hospital? A About thirteen dollars. Thirteen dollars and twenty-five cents, I believe. I ain't sure. I think about \$13.25.

Q How much did he say that was? A About thirteen dollars and twenty-five cents, I guess.

30 Q Did you pay the physician anything? A I had Dr. Peters, and I have seen Dr. Hughes.

By the Court.

Q How much did you pay the doctors? Oh, about four dollars.

By Mr. Newcorn.

Q Altogether four dollars? A Yes.

40 Q The rest of the treatment was furnished by the physician at the hospital? A At the hospital, yes.

Samuel Rabinowitz, direct.

Q Who was it treated you at the hospital? A Doctor by the name of Goldman.

Q Where is Dr. Goldman now, if you know? A I don't know. He ain't in the hospital there now.

Q Did you try to get him? A Yes. But he is away now.

Q Could you find out where he was? A I think he left. He went for Germany, I believe. 10

Q How many weeks were you unable to work? A I was laid up ten weeks.

Q And during the ten weeks did you do anything? A No, didn't do anything.

Q What are your earnings a week?

Mr. Heine. I object on the ground that this man is not—that is not the proper way to prove profits of a business. 20

The Court. What is the proper way?

Mr. Heine. Ascertain by the man's books.

The Court. It does not appear that he has any books.

Mr. Heine. Well, until it is shown that he has not—

The Court. You will have to take it as it comes.

By the Court. 30

Q Do you keep any books? A No, I don't keep no books in my business.

Q What were you averaging a week before the accident?

Mr. Heine. Will your Honor allow me an objection.

Exception allowed, sealed accordingly.

Judge. 40

Samuel Rabinowitz, direct.

A Before the accident I make five or six dollars some days, and some days I make ten. That is according to the days.

By Mr. Newcorn.

10 Q What is the average a week? A Around *thirty dollars.

Mr. Heine. I object to that on the ground from the previous answer it appears the profits were so fluctuating that an averaging was practically without books.

The Court. I will overrule the objection.

Mr. Heine. Allow me an objection.

Exception allowed, sealed accordingly.

20

Judge.

Q You say that you earn some days ten dollars and some days eight? A Yes.

Q What days do you refer to that you earn ten dollars? A Well, on Friday, the day of Friday I will make generally about ten dollars, because that is a good day for fish, for Friday, sell a lot of fish on Friday, everybody eats fish, and then on Tuesday—

30 Q What days do you earn five dollars? A About Wednesday and Thursday.

Q Now, what is your average earning, or what was your average earning at the time of the accident a week?

40 *Mr. Heine.* I object to that, on the ground there has no foundation been laid, and no proper evidence from which any such average can be made. And it appears to be a pure guess or estimate, without any foundation, on the part of the witness.

Samuel Rabinowitz, direct.

The Court. Why do you say that, that it appears to be a pure guess? The man says that is what he earns. He ought to know, I suppose, just as a lawyer knows what he earns.

Mr. Heine. I do not believe he does.

The Court. Then he is not a good lawyer, or not a good business man anyway. I will admit it.

Mr. Heine. Allow me an objection.

Exception allowed, sealed accordingly.

Judge.

(Question repeated by stenographer.)

A Thirty dollars a week.

By the Court.

Q Did any expenses have to come out of that?

A Yes, a lot expenses on it, sure. Had to pay for the ice to keep the vegetables. And I got to feed the horse.

By Mr. Newcorn.

Q The question the judge asked you, out of the average earnings, that is from the money which you earned, do any expenses come out? A Oh, yes.

By the Court.

Q You said thirty dollars a week? A Yes.

Q Does that mean that is what is left after all your expenses are paid, or do the expenses have to come out of that? A Come out, yes.

Q How much expenses have to come out of that? A About six dollars, five or six dollars.

Samuel Rabinowitz, direct.

By Mr. Newcorn.

Q Did you have any other expenses?

The Court. Do you mean in connection with his profits?

Mr. Newcorn. No.

10 Q As the result of the collision.

The Court. Call his attention to what you have in mind, because he is away off on the other subject now.

Q Did you pay anything for the care of the horse while you were in the hospital? A Yes. I had a colored man to take care of him.

Q How much did you pay?

20 *Mr. Heine.* I object to that on the ground that it is not a proper and proximate loss, and as not specifically alleged in the complaint as special damage.

The Court. Is it in your complaint, Judge?

Mr. Newcorn. There are other expenses, and also has laid out considerable sums of money, and will lay out considerable sum of money, is the allegation in the complaint.

30 *Mr. Heine.* Nothing in the complaint to direct our attention to any such claim.

Mr. Newcorn. I am not suing for the loss of the use of the horse. But that was an expense.

The Court. There does not seem to be any claim for this, Judge.

40 *Mr. Newcorn.* I will withdraw the question, if there is no claim laid. I would ask leave to amend, but it is too trivial to take up the time of the court. Take the witness.

Samuel Rabinowitz, cross.

Cross-examination by Mr. Heine.

Q Why didn't you look, when you were coming, when you came out into Watchung avenue that night? A From where?

Q Yes. A From where? I was going in Watchung avenue. Before I get into Watchung avenue I look around. 10

Q Didn't you see anything? A No, sir.

Q Nothing? A Nothing at all.

Q Everything was clear? A Clear tracks on both sides.

Q Then you went ahead? A Yes, I was driving to get across.

Q Then the next thing you knew you were banged? A What? 20

Q The next thing you knew you were hit? A When I went across, yes, the tracks.

Q When you were going along west on Second street that night? A Going west.

Q Yes. A Yes.

Q You were whipping up your horses, weren't you? A Whipping?

Q Whipping? A No. Going slow.

Q You were going home, weren't you, after your day's route? A Yes. The horse was tired. You can't whip a horse when a horse is tired. Drive twenty-five miles a day. 30

Q Twenty miles a day? A Yes.

Q And you were not in a hurry to get home? A No, I wasn't in a hurry at all. I was going slow gait.

Q When you were coming along there were you asleep? A No, sir, I don't sleep. When I drive a horse I don't sleep. I be very careful. I sleep all night. 40

Samuel Rabinowitz, cross.

Q How far from the left hand curb of Second street were you driving when you were coming along west? A I was in the centre of the tracks in the middle of Watchung avenue.

10 Q That is, in the middle of Second street, understand me now, I am asking you how you were driving on Second street? In the middle of the street? A In the middle; yes, sir.

Q Did you see this young lady walking along beside you? A Which young lady?

Q This Miss Moskovitz who testified a minute ago? A No, sir; I don't know her at all. I never seen her before.

Q No. I mean on that night did you notice her? On the night when you were driving along there did you notice her? A No, sir.

20 Q Did you see her coming along there all the way from Church street to Watchung avenue, walking on the sidewalk there right beside you?

A I didn't see her. I was looking to the north.

Q You were looking to the north? A I was looking to the north and an automobile came along from the north.

Q The automobile that hit you came from the south? A Yes, he hit from the south, on the left hand.

30 Q Why didn't you look down towards the south? A I didn't expect an automobile come along on the wrong side of Watchung avenue and hit me.

Q Didn't expect him to come along? A No. I was looking on the right hand side.

Q You were looking north all the time? A On the north, yes. Maybe an automobile came from the north.

40 Q So if anything came down from the north?
A Yes.

Samuel Rabinowitz, cross.

Q Didn't you know that Watchung avenue is the main thoroughfare in Plainfield? A Yes, sir; I know, that is the reason I looked.

Q Didn't you expect to find some vehicles going along, a trolley car, or other vehicles coming along Watchung avenue that night? A I looked before I came into Watchung avenue, I told you. 10

Q You did? A Yes, sir.

Q You looked south before you came into Watchung avenue? A Before I came in I looked both sides of the street, both directions.

Q And you didn't see anything? A No, sir; not a thing.

Q No trolley car? A No, sir; not a thing. Clear track on both sides.

Q How far did you drive before you were hit, about how many feet? A About twenty-five feet. 20

Q About twenty-five feet? A Yes, I crossed about twenty-five feet on Watchung avenue before I got hit.

Q I am speaking of a line; the easterly line of the curb on Watchung avenue, do you understand that, what I mean? A No.

Q This is Second street going up and down this way, see, and this is Watchung avenue. A Yes. 30

Q And this paper here is the intersection, the place in between the street. Now, the tracks are running up and down that way. A Four tracks there.

Q You were running along this way (indicating). A From the east to the west.

Q This end of the paper is the curb line on the east side of Watchung avenue, do you understand that, this is where the curb is? A Yes. 40

Samuel Rabinowitz, cross.

Q And from here to there is the middle of the street, the paper is the middle of the street. A lend me a pencil and I can tell better.

The Court. The first curb that you came to.

Q The first curb that you came to.

10 *Mr. Newcorn.* Use the word "gutter."

Q When you came to the gutter on Watchung avenue, the first gutter?

By the Court.

Q Before you crossed the street? A Before I crossed Watchung avenue?

By Mr. Heine.

Q Yes. Then you looked both north and south?

20 A Yes, sir; both sides.

Q Are you sure of that? A I am sure.

Q And you didn't see anything in the way?

A No, sir.

Q And then you went about twenty-five feet and you were hit? A And I was hit then; yes, sir.

The Court.

30 Q What time of day or night was this?

Mr. Heine. About six-thirty or six-forty.

Q Dark? A No, it is daylight yet. When I came in, was about twenty minutes past six when I came into Watchung avenue.

By Mr. Heine.

Q And you had plenty of light to see? A Oh, yes, plenty of light.

40 Q You could see down Watchung avenue and you could see up Watchung avenue? A Yes, sir.

Samuel Rabinowitz, cross.

Q And you didn't see this girl walking beside you this whole block? A No, I didn't.

Q Your wagon was covered in at the side, wasn't it? A Well, it has two small curtains, was rolled up.

Q The curtains were rolled up so that you could see out either side? A It is a covered wagon, you know, top wagon. 10

Q Were there curtains in front? A In front, curtains on both sides were up, the little small curtains.

Q You don't know how fast that automobile was going, because you didn't see it? A No, I couldn't tell you. I haven't seen the automobile at all.

Q Didn't you know that when you came to a street like Watchung avenue, that has a lot of traffic going out to the first and second mountain and so on, that you had to be careful crossing there? A I told you I was looking before I went into Watchung avenue. 20

Q You didn't have the right of way across there. A I stopped before I came into Watchung avenue and I looked.

Q You stopped the horse and wagon before you got to Watchung avenue? A Yes, sir; and then I looked around. 30

Q Then you looked all around? A All around, and I didn't see nothing.

Q And you didn't even see that girl? A I haven't seen no girl at all.

Q That is funny. A I haven't seen a girl. I ain't looking at girls. I got mine wife.

Q How long did you stop there looking around? A About five minutes. About three or four minutes. 40

Samuel Rabinowitz, re-direct.

Q You don't mean that, five minutes? A Yes, about three or four minutes, yes.

Q Right with your horse there in Watchung avenue? A Yes, sir—I stopped on Second street. Not Watchung avenue.

10 Q On Second street. Where was your horse, had your horse got out on Watchung avenue? A In Second street. I stopped before I came into Watchung avenue, I told you.

Q You stopped for the purpose of looking up and down, did you? A Yes, sir; to look around for automobiles.

20 Q You looked up and down for about five minutes and there was nothing there? A I looked around, and there was nothing there, because there was a lot of traffic there, and I haven't seen nothing.

Re-direct examination by Mr. Newcorn.

Q How much did that wagon cost you? A The wagon? Cost me—

Mr. Heine. Wait a minute.

A I got bills for it, how much I pay for it.

30 *Mr. Heine.* I object on the ground that the cost of the wagon is of such slight evidential value, under the pleadings, that there should be testimony as to the condition of the wagon by somebody that knows something about it at the time. Its condition before and after the accident. The only way to prove damage to the wagon, is to show its condition before and after the accident, and for some wagon man to testify to how much it would cost to replace it in the same condition it was.

40 *The Court.* Our Supreme Court has decided that the value of the—the cost price is

Samuel Rabinowitz, re-direct.

some evidence of value, but, of course, it must be followed up by showing how long after that the wagon was in existence, and what its condition was.

Mr. Newcorn. I intend to produce that.

The Court. It is simply some evidence. It is not conclusive. I will admit it and allow an exception. 10

Exception allowed, sealed accordingly.

Judge.

Q How much did that wagon cost you? A The wagon before—

Q The one that got smashed. A That cost me \$135.00.

Q How long had you had it? A I have it over a year. 20

Q Over a year? A Yes, about fifteen months I drove that wagon. I have got to have special wagon, you know, for huckster. Big body, nine foot long, big wagon.

Q You used it pretty well? A A Yes, sir; driving it.

Q How many wagons have you purchased new and second hand since you have been in business? A Oh, quite some. 30

Q How many? A Oh, say about a dozen, maybe.

Q A dozen? A Yes.

Q What was your wagon worth before it was smashed?

Mr. Heine. I object on the ground this witness is not shown to be in the wagon business. He may be a harness maker.

(Question repeated by the stenographer.) 40

Reba B. Meyers, direct.

The Court. I will allow it. I will allow an objection.

Exception allowed, sealed accordingly.

Judge.

10 A About seventy-five dollars.

Q Did you have it fixed? A No, sir.

Q Did you have the wagon fixed? A No, I didn't. Wasn't worth while fixing, because was all smashed up.

Mr. Newcorn. That is all.

Mr. Heine. That is all.

20 REBA B. MEYERS, a witness produced on behalf of the plaintiff, being duly sworn on her oath, according to law, saith:

Direct examination by Mr. Newcorn.

Q Miss Meyers, where do you live? A Watchung avenue, Plainfield.

Q How far from where this collision took place? A About seventy-five feet.

Q On which side of the street? A On the right hand side going north.

30 Q That is on the east side of Watchung avenue? A Yes.

Q On the sixteenth day of April did you see a collision between an automobile and a wagon? A No, I did not, but I was out in the backyard, and as a rule we generally hear every horn that blows—

Mr. Heine. I object to what they generally heard up there.

The Court. Yes. Strike that out.

40 A I was out in the backyard, and I heard a crash. I went out and I saw the automobile

Reba B. Meyers, direct.

standing, and a wagon on the right hand side, and a man was lying on the ground. I stayed around a little while and someone said to call a doctor. I went and called a doctor, and I went and called Dr. Pittis, but he was not in. So I went out again and meanwhile Dr. Zeglio happened to pass, and he advised to take him to the hospital. At that time Mr. Rabinowitz was lying on the porch on the corner—on the right hand side going north, on Mr. Croner's porch, and I stayed a little while there until somebody—the doctor advised to take him to the hospital. There was no one to take him to the hospital, until a cabman from Blair's stable happened to pass in a machine. I asked him if he would take him to the hospital. He said he would. Then the policeman asked who would go with him. There were a number of men around, but not one would offer to go, so I said I would go. I went to the hospital and waited a while there until the doctor and nurse came in. They dressed Mr. Rabinowitz. And there was a bleeding wound on his shoulder, and I waited for a while, until they examined him, and then I went home.

Q When you came out from your yard, where was the automobile and wagon standing? A The automobile was standing in the middle of the road, and a lady was sitting in the machine and the wagon was on the other side of the road.

Q What part of the wagon was on the other side? A Why, the body part of it.

By Mr. Heine.

Q What do you mean by road? A Well, the automobile was on the other side of the road, on the left hand side going north.

Q Which road?

Reba B. Meyers, direct.

By the Court.

Q What street? A Watchung avenue.

By Mr. Newcorn.

10 Q Let me understand you. You say that you know the neighborhood there, identify it. In front of what place? A Well, the wagon was standing near Mrs. Mason's house on Watchung avenue, that is the second house from where the man was lying on the porch.

Q And where was the automobile? A Near Winn & Higgins' store there, near the lamp post.

Q How far from the corner? A How far from the corner was the wagon, do you mean?

20 Q Yes. Well, was the machine? A The machine was about ten feet from the corner, about, and the wagon was on the other side, the opposite side.

Q Do you know whether the wagon had been moved after the collision took place before you saw it?

Mr. Heine. I object on the ground she said she was in the backyard.

30 *The Court.* Yes, she could not state about that.

A No, I didn't see that.

Q How long did it take you to get out? A Well, I heard a crash, and there weren't very many people out on the street at the time, so evidently soon after the accident happened.

40 Q Where was Rabinowitz when you came out? A Well, he was lying on the street, and just then two men picked him up, and brought him over to the porch. I waited until they put him on the porch, and then I went in to telephone.

Frederick Winn, direct.

Q What was his condition at the time when you saw him on the porch? A He was unconscious.

Q Where was the horse? A The horse was standing near the wagon. He was unhitched, though.

Mr. Newcorn. Take the witness.

10

Cross-examination by Mr. Heine.

Q You don't know anything about how this smash-up took place, you were out in the yard? A No, I do not.

Mr. Heine. That is all.

Mr. Newcorn. That is all.

FREDERICK WINN, a witness produced on behalf of the plaintiff, being duly sworn on his oath, according to law, saith: 20

Direct examination by Mr. Newcorn.

Q Mr. Winn, where do you live? A I live 734 East Sixth street.

Q And what is your business? A I am in the plumbing and heating business.

Q And where is your place of business? A Corner of Watchung avenue and Second street. 30

Q Which corner of the street is it? A It is the northeast corner.

Q What kind of a front have you? A All glass front, a corner front with all glass.

Q And your store faces in which direction? A It faces east.

Q The east in relation to Watchung avenue?
A Yes.

Frederick Winn, direct.

By the Court.

Q Looked out on Watchung avenue towards the east? A I looked out on Watchung avenue from west to east.

By Mr. Newcorn.

10 Q From west to east. In addition to there, have you or have you not a view of either side of Watchung avenue? A Yes.

Q Which side? A You look mostly to east, from my place, and up Second avenue.

Q And up Second? A Yes.

Q You say east. That is what I am trying to find out. In relation to Watchung avenue how does that street run? A Watchung avenue, you
20 say, south to north.

Q Have you, from your store, any observation of any part of Watchung avenue north or south? A Yes. More south than north.

Q On the sixteenth day of April where were you about six-twenty? A I was standing in the doorway of my store at the time.

Q Who was with you? A There was two other employees of mine were standing there and I was talking to them.

30 Q What was their names? A Joseph Tobin and William Kunzelman.

Q Did you see Mr. Rabinowitz? A Yes.

Q Just state exactly what you saw from the time you saw Mr. Rabinowitz. A I saw this wagon, I didn't know who was in the wagon at the time, but I seen it coming up Second street. I didn't take any particular notice to it until it got nearly to the corner of Watchung avenue. At the same time—

40 Q Which corner do you allude to? A That was on the northeast corner I noticed the wagon

Frederick Winn, direct.

first. It was coming toward Watchung avenue from east to west; and I noticed this automobile coming up at a high rate of speed. I couldn't judge what speed it was going at, I am not a very good judge of that, but as soon as I noticed it I thought this automobile couldn't avoid hitting this wagon. The wagon, when he hit it, was about 10 in the middle of the track, and he hit the wagon right in the middle of the wagon.

Q Which middle track was it? A The middle of both tracks. I should say that he drove the wagon fifty feet directly to a left angle up Watchung avenue to the curb, and followed the wagon right straight until it come to a stop.

Q And what was the position of the wagon and the automobile when it came to a stop? A 20 They both were right together there. The wagon, it broke the top off. The top broke right off, and when the automobile hit the wagon the man was thrown out with the terrible shock, that threw the man right out in the sreet. I didn't take any notice of the man, much, but I watched the wagon and automobile go up the street.

Q What did the automobilist do as he was approaching? You saw him before the collision took place, did you? A Didn't do anything.

Q Was there any signal given, or warning? A 30 No, sir. No signal whatsoever.

Q And you say that he came at what you consider a high rate of speed? Do you see many automobiles go by on Watchung avenue? A Yes. I should say there was mostly all the time is more or less automobiles going past there all the time.

Q Now, you say the wagon was between the tracks. Where was the horse at the time of the collision? A The horse I should say was partly 40 across the second track, and the wagon was about in the middle of the two tracks.

Frederick Winn, direct.

Q In the middle of the two tracks? A Yes, sir.

Q What side of the street was the automobile at the time of the collision took place, going north?

A The automobile was in the middle of the first track, that is north.

10 Q You say the first track. Do you mean the west track or the east track, that is the right hand track or the left hand track going towards Front street? A The right hand track going towards Front street.

By Mr. Heine.

Q Is that the east or the west track? A That is the east track.

By Mr. Newcorn.

20 Q Can you say how far away was the automobile at the time Mr. Rabinowitz had started across Watchung avenue? A Well, I should judge it was about one hundred feet away when I first noticed the automobile and the wagon.

Q Mr. Rabinowitz had already started then, at that time, you say, to cross Watchung avenue? A Yes.

Q Watchung avenue is paved how? A Brick pavement.

30 Q And East Second street is paved how? A Macadam.

Q Had he left the macadam pavement at the time when you first noticed the automobile, which you say was one hundred feet away? A It was about one hundred feet, I should judge. About halfway in the middle of that block.

Q Who removed the wagon? A I couldn't say. I didn't notice that.

40 *Mr. Newcorn.* Take the witness.

Frederick Winn, cross.

Cross-examination by Mr. Heine.

Q Were you in your store or outside? A Standing outside.

Q Outside of the door? A Outside of the door.

Q Out on the sidewalk? A No, not on the sidewalk. There is a little space outside about three or four feet, it is on the corner. It is a corner entrance, and there is a little space there of three or four feet. 10

Q The entrance faces diagonally across the two corners? A Yes.

Q The corner is at right angles and the entrance is across that way, and you were standing right outside in that little triangle outside of your front door? A Yes, sir. 20

Q What were you talking about with these two men? A Why, we were talking about business.

Q Something important? A Well, pertaining to my business.

Q How were you three men standing when you were there, as to your facing? Which way were you facing, north, east, south, or west? A I was facing east.

Q And which way was Mr. Tobin facing? A He was facing east, I should judge, looking towards, kind of towards me. 30

Q Was he to the right or left of you? A He was to the left of me.

Q He was to the left of you and where was Mr. Kunzelman? A He was on the other side.

Q To the right of you? A To the left of me. Both were to the left of me.

Q He was the other side of Mr. Tobin? A Yes, sir.

Q Were you all there facing east? A All three facing east. 40

Frederick Winn, cross.

Q And were you standing erect, or turned toward each other? A Standing erect.

Q Who was talking? I mean who had the conversation just before this accident? Were you talking to them, or were they talking to you? A I can't recall that.

10 Q Weren't you turned toward each other, facing each other somewhat? A No.

Q You were not standing up there side by side all facing east in a row? A We were standing in a row, just kind of looking out easterly. I couldn't say whether one had their head turned or not. But I seen the accident that occurred.

20 Q Yes, I understand that. What I want to get at is whether or not either of these men were standing in front of you, or to the side of you. A No, they were standing on the side. You couldn't be standing in front of each other, the space there isn't enough.

Q But when three people talk they sometimes talk in a little group. A No.

Q You weren't doing that? A No.

Q You were lined up three in a row and decided whatever you were saying? A Yes, sir.

30 Q What attracted your attention to this automobile first? A I noticed the automobile coming up.

Q Where did you first see it? A I seen it, I noticed the automobile when it was about one hundred feet away.

Q That would be half way down— A About half way down the block.

Q What is the next street? A North avenue.

40 Q What attracted your attention to it one hundred feet away? A Well, nothing particularly, only I just seen—

Frederick Winn, cross.

Q Just happened to see an automobile coming along? A Just happened to see it.

Q Had you noticed this wagon of Rabinowitz before you noticed the automobile? A Well, I didn't take any particular notice of it, no.

Q And did you continue to watch the automobile as it approached? A Yes. 10

Q Second street? A Just interested kind of.

Q Just kept your eye on it? A Yes. I noticed it.

Q Well then, when was it you looked down Second street and saw the wagon coming? A As the automobile approached closer, of course, I noticed that the automobile was coming at such a speed I thought that the wagon couldn't—

Q How fast would you say it was going? A Well, I couldn't say. 20

Q Twenty miles an hour? A It was going at least thirty miles an hour. I couldn't say as to the exact time.

Q You would say it was at least thirty, would you? A I should say that.

Q At least thirty miles an hour? A At least thirty miles an hour.

Q And the fact of the speed at which the automobile was traveling was what really attracted your attention to it, was it? It was shooting towards you so fast? A It was coming at the wagon. 30

Q Had you seen the wagon before you saw the automobile? A Well, I couldn't say which one I noticed first, I noticed the automobile coming down, and when it come—approaching the wagon, I thought the wagon couldn't get out of the way in time.

Q Was the wagon going at a walk? A Walking. 40

Frederick Winn, cross.

Q Slowly? A Yes.

Q He didn't drive to Watchung avenue, whipping his horse, or anything like that? A No, sir; I didn't notice.

Q Was the horse going at an actual walk? A Yes, sir; at an actual walk.

10 Q Not a trot? A No.

Q When the wagon—when the horse, I mean the head of the horse, the first part of the whole wagon and horse, when the head of the horse came in line with the easterly curb of Watchung avenue, where was the automobile? A The easterly curb?

The Court. The first curb you come to.

20 Q The first curb. A That would be the north curb, to the right.

Q The east side of Watchung avenue, take the curb on the east side of Watchung avenue, and run it right across Second street. When the horse got to that line, that cross-walk, the easterly cross-walk, on Second street, that is, Watchung avenue crosses Second street? A Yes.

Q Where was the automobile on Watchung avenue? A I should say it was about one hundred feet away.

30 Q How many miles an hour would you say that horse was walking? As fast as a man could walk on the street? A That was walking very slow. I couldn't say how fast he was going.

Q Would you say he was going two or three miles an hour? A I couldn't say that. He was walking really slow. We will say about that. Couldn't walk three miles an hour—

40 Q When you walk, ordinarily you walk about three miles an hour, don't you? I mean, isn't that a fair walk? A Just about. You have to walk very fast to walk a mile in twenty minutes.

Frederick Winn, cross.

Q Well, I mean as big as you are. A Well I have timed myself on about a mile, and I know if you walk a mile in twenty minutes, you are walking pretty good.

Q You think this horse was traveling about three miles an hour in your best judgment? A Just about. 10

Q You were able to watch the wagon and the automobile both at the same time, weren't you? A No. Couldn't look at both at the same time. I naturally glanced from one to the other as the automobile approached.

Q You saw the automobile first? A Well, I believe I noticed the automobile first.

Q That is your recollection, is it? A That is my recollection. 20

Q And how long did you watch the automobile before you looked at the wagon coming down Second street? A Well, as I noticed the automobile coming up, why the wagon attracted my attention more when I seen the automobile approaching toward it.

Q How long did you watch the automobile before you saw the wagon? A Well, it was a very short time before it hit it.

Q Two or three seconds? A Yes, I should judge that. 30

Q And then what attracted your attention to the wagon? A Why, when the automobile hit it.

Q So you didn't see the wagon until the automobile hit it, is that it? A Yes, I did.

Q Where was it when you first saw it? A When I first noticed the wagon it was approaching toward the curb—that is the crosswalk of Watchung avenue.

Q The east crosswalk? A Yes. 40

Frederick Winn, cross.

Q How near was it approaching? How near was it to the crosswalk? A Well, I should judge ten feet.

Q And had you seen the automobile before that time when you saw the wagon ten feet from the crosswalk? A I didn't notice it particularly. As
10 the automobile came up I just casually seen the thing coming up.

Q Just casually seen what, the automobile? A The automobile.

Q I thought you said the automobile was the first thing attracted your attention? A Well, I didn't see either one in particular that I had any notice to, only I said that the automobile—

Q You didn't see anything until they hit, is that about the size of it? A Yes, I seen the
20 automobile.

Q You saw that first. How long did you look at the automobile before you saw the wagon? A I just kept looking out, and neither one in particular until I noticed that the automobile couldn't get out of the way of the wagon.

Q And the wagon couldn't get out of the way of the automobile? A Neither one.

Q Neither one? A No.

Q Had you seen that wagon at any time before
30 it got within ten feet of the east crosswalk of Second street? A I might have, but I didn't take any particular notice about the wagon.

Q Really the first time you actually saw it then, to make any note of it, was when it was ten feet away from the crosswalk? A Just about when I seen the automobile coming up.

Q How long had you watched that automobile coming up then before you noticed the wagon? A
40 Well, just as I said before, about three seconds I should judge. It was going at such a speed.

Frederick Winn, cross.

Q It didn't hit the horse? A It didn't hit the horse.

Q It didn't knock the horse down? A It hit the wagon and drove the wagon right away from the horse. Broke the harness.

Q Broke the coupling of the shafts under the wagon? A Yes. 10

Q Anybody in the automobile thrown out? A I didn't see anybody thrown out.

Q Well, do you know whether anybody was thrown out? A I didn't see anybody thrown out, I answered.

Q Was there anybody thrown out? A I didn't see anybody thrown out.

Q Did you look? A Yes.

Q You would have seen if anybody had been thrown out? A I didn't see anybody. 20

Q You would have seen if anybody had been thrown out? A It hit the wagon and I didn't see anybody thrown out.

Mr. Heine. I move to strike that out.

Q You were there? A Yes, I was there.

Q And if anybody had been thrown out of that automobile, you would have seen it, wouldn't you? A Well, if I had seen them going out, I suppose I would, but I didn't see anybody thrown out. 30

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

Q If anybody had been thrown out of that automobile you would have seen it, wouldn't you?

A I didn't see anybody thrown out of the automobile.

Mr. Newcorn. Answer the question.

Q What are you fencing about? 40

Frederick Winn, cross.

By the Court.

Q Would you have seen it if such a thing had happened? A I suppose I would. I was looking right at the automobile.

By Mr. Heine.

10 Q Was there anybody thrown out? A I didn't see anybody thrown out, I said.

Mr. Heine. I would like to have the witness answer the question.

The Court. He cannot tell what he did not see.

A I didn't see anybody thrown out. What other way do you want me to answer the question?

20 Q Is ask you if anybody had been thrown out would you have seen it? A I didn't see anybody, I said.

The Court. He said he saw no one thrown out, and that was because he was not looking at that time. I do not know how much clearer you can get it.

Q You saw the collision? A I saw the collision.

30 Q You saw the whole collision until it was all over? A Yes.

Q Did you see anybody thrown out of that automobile? A I didn't see anybody thrown out of that automobile.

Q Then there wasn't anybody thrown out, was there? A Couldn't have been.

Mr. Heine. That is all.

Mr. Newcorn. That is all.

William Kunzelman, direct.

WILLIAM KUNZELMAN, a witness produced on behalf of the plaintiff, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Newcorn.

Q Mr. Kunzelman, where do you live? A 35
Regent street, North Plainfield. 10

Q In North Plainfield, is that right? A Yes,
sir.

Q On April sixteenth, where were you employed? A Mr. Winn, Winn & Higgins.

Q Are you the gentleman he referred to standing talking with him? A Yes, sir.

Q Just state as briefly as possible to the jury all you saw happen there that night. A Why, I was standing talking to Mr. Winn and another man employed in the shop, standing in front of the shop and the first thing I know somebody hollered, "watch, look," or something, and it drew my attention, and I see a wagon crossing Second street, and an automobile coming north, and it hit him. 20

Q How far had the wagon progressed upon the brick pavement on Watchung avenue, at the time when you saw it? A As near as I could state in the middle of the car tracks, between the two car tracks, the east and west bound tracks. 30

Q That is, his wagon was over the west bound tracks? A The wagon was right in the middle of them.

Q And where was the horse? A The horse was crossing the west-bound track.

Q Already across, or just crossing? A Just crossing, as near as I would state.

Q And how far away was the automobile when you first saw it? A I should judge one hundred feet. 40

William Kunzelman, direct.

Q One hundred feet away. And what have you to say in regard to the speed with which the machine was approaching? A I don't know. I aint a very good judge of speed. Probably between twenty and thirty miles an hour.

10 Q You see automobiles running on the streets of Plainfield? A Yes, sir.

Q And in relation to the average travel of machines there, what have you to say in regard to the travel of this machine?

Mr. Heine. I object to the comparison between the average travel of machines in Plainfield. Its localities are different.

Mr. Newcorn. I will withdraw the question.

20 Q When the collision took place how far from the place of the collision was the automobile stopped? A I should judge between thirty and fifty feet. I wouldn't say just what between them, but I know it was thirty and between fifty.

Q From the middle or from the intersection of the street? A From the place where he was hit until he stopped.

30 Q Winn & Higgins' store is on the northeast corner. What building is in the rear of the store? A I don't get you. Why, I think Mr. Hand owns the building in the rear of the store.

Q What kind of a building is it? A It is a brick building, possibly.

Q That part of the building in the rear of the store? A On Second street?

Q No, on Watchung avenue? It it residential or business? A It is a residential building along on Watchung avenue.

William Kunzelman, cross.

Q In relation to the very next residence, where was the machine?

Mr. Heine. On which street, judge?

Mr. Newcorn. On Watchung avenue.

A It was on Watchung avenue. The machine stopped, as near as I could say—

10

Q In front of where? A In front of the second house from the corner?

Q Where was the wagon when the machine stopped? A Part of the wagon was on the front of the machine.

Q On the front of the machine. Who separated the machine, if you know? A I know nothing about it. Just as soon as he fixed them I seen the fellow go, and was gone. Just as soon as I seen the fellow fall out I beat it.

20

Q What do you mean by beat it? A I go away from it?

Q Didn't want to help? A I didn't want to know anything about it.

Q Didn't want to be a witness? A No.

Mr. Newcorn. That is all.

Cross-examination by Mr. Heine.

Q You three men were talking about your affairs there, weren't you? A Yes, sir.

30

Q You were not paying any great particular attention to the traffic, were you, at that time? A I wasn't paying no attention to the traffic until I was told, and when a man give a warning, I looked.

Q Who hollered to look or watch? A I don't know. I wouldn't say whether it was Mr. Winn or Mr. Tobin, but either one of them.

Q One of them said what? Where were you standing, with your back— A I was looking

40

William Kunzelman, cross.

right out. There was only one way to stand, because you couldn't stand the other way in the door, and we were looking right down the street, right across ways, to see the whole thing.

Q This holler of "watch, look out," is what called your attention to it? A Yes, sir.

10 Q How long before the accident was that? A Why, I suppose there was a space of probably three or four seconds.

Q You hadn't see the wagon coming down Second street, had you? A I didn't look for the wagon.

Q You didn't see the wagon stop for four or five minutes on the east side of Watchung avenue? A I wasn't paying no attention to the wagon.
20 The only thing I seen the wagon was standing there a few seconds before the automobile hit it.

Q The wagon was standing there? A No, it wasn't standing there. It was coming along slowly.

Q How many miles an hour? A I should judge it was coming along three miles an hour, or four miles an hour. What a horse walks.

Q The horse was walking? A The horse was walking.

30 Q Was this wagon, when your attention was called, or you heard this exclamation "watch," was the wagon then east of the curb, of the easterly curb across the Second street, on Watchung avenue? A The wagon, when I first seen it, the horse was just about on the first track, and he just crossed over to the middle track, when he was hit.

Q So it was just a second or so before he was hit that you saw it? A Just about three or four
40 seconds. Probably long enough for a horse to move ten feet.

William Kunzelman, cross.

Q That automobile was then, just before you saw it, about half a block away? A Just about a half a block. Just about to the edge of where the new postoffice lot is.

Q It might have been further away? Are you sure it wasn't more than half a block away? A I am not sure. I wouldn't say it was over one hundred feet. 10

Q Might that automobile, might that not have been down as far as North avenue? A No, it wasn't down to North avenue at all.

Q Could you see it in the light of the drug store down there on the corner of Second avenue? A No, you couldn't see it in the light of the drug store, hardly.

Q Could you see that far or not? A I don't know whether I could or not, from where I was standing. I doubt it. 20

Q Could not see that far? The street does not make a curve? It is a straight street, isn't it? A It is a straight street. You can't very well see through a post in front of the shop.

Q There was a post in front of your shop? A No, right on the angle, where the window is.

Q Were you behind the post? A No, I wasn't behind the post. I was standing right in front of it. But when you stand in front of it there is an angle, if you stand in the doorway that way, to turn around to look up the street, you have to step out. 30

Q That angle only went about one hundred feet down the street? A You could probably see one hundred or one hundred and fifty feet. I know I didn't see him over one hundred feet away.

Q How long is that block between there and North avenue? A I don't know. I suppose it is probably eight building lots. Probably two hun- 40

William Kunzelman, cross:

dred or two hundred and fifty feet between the blocks.

Q Anybody thrown out of the automobile? A Not that I know of.

10 Q And the horse was knocked down or was not knocked down? A I wouldn't say whether the horse was knocked down. I don't remember. I remember the horse was cut loose, because when I went there, say the horse stood here, and the automobile was down below.

Q Down partly towards the south? A The automobile just took and cut the wagon right loose from the horse.

20 Q Where was the horse when he was standing there, on the curb, on the sidewalk, or on the street? A That was standing in the street, towards the sidewalk, over toward our shop more.

Q You didn't see it knocked over? A I wouldn't say the horse was knocked over.

Q Didn't see the— A I didn't see the horse fall down. He was standing when I seen him.

Q And you saw it from the time of the collision until they stopped? A I seen the wagon. I was watching the wagon. I wasn't watching for the horse.

30 Q Do you think the horse could have been knocked down and got up again? A Probably could have been knocked over and got up again. I don't say he could. Probably he was, but I didn't see him.

Q You think he probably was knocked down? A I didn't tell you I thought he was probably knocked down. I seen him when he was standing up. I don't say that he wasn't or that he was.

40 Q You didn't impress your mind with the details of this very much, did you? A I aint worried about it a bit.

Joseph Tobin, direct.

Q I didn't ask you that. You didn't impress your mind with the details very much? A No, sir; I did not.

JOSEPH TOBIN, a witness produced on behalf of the plaintiff, being duly sworn on his oath, according to law, saith: 10

Direct examination by Mr. Newcorn.

Q Mr. Tobin, where do you live? A 422 Schooner avenue.

Q In April, 1915, where were you employed? A Winn & Higgins.

Q The night of the accident, did you see the accident? A I did.

Q Where were you standing just before the accident occurred? A Why to the best of my knowledge we were standing right in the doorway of the shop, at the office. 20

Q Did you see the accident? A I did.

Q Did you see the plaintiff approaching in his wagon on Second street? A I noticed him.

Q When did you notice him first? What was his position when you first noticed him? A Why I just noticed him coming along, going west on Second street.

Q Did you notice the automobile? A Not at that time, I didn't. 30

Q Where was the position of the wagon at the time you first noticed the automobile? A Why—well, the horse, I think, was just about at the first track crossing going west

Q And how far off was the automobile at that time? A Well, I should judge about probably one hundred feet.

Q What was the position of the wagon at the time when this collision took place? A What was the position? 40

Joseph Tobin, direct.

Q Yes. Where was the wagon? A Why, I should judge it was around in the middle of the car track.

Q And where was the horse? A It passed over the centre. I imagine it was on the west side.

10 Q On the west side track? A Yes.

Q Did you hear any warning given by the automobile? A No, I did not.

Q How fast was the automobile approaching the corner when you first saw it? A How fast was it approaching?

Q Yes. How fast was the automobile approaching the corner when you first saw it? A Well, to the best of my knowledge, I should imagine about thirty to thirty-five miles an hour.

20 Q Where was the wagon struck? A Why, I should imagine—

Q Never mind your imagination. A Well, it was struck right broadside.

Q By broadside you mean between the front and the rear wheel on one side? A It might have been I think—right directly in the rear wheel, or it might have been fully in the centre of the wagon, I couldn't—you know, getting a thing like that, you can't say exactly.

30 Q What happened to the wagon when it was struck? A Why, it went down Watchung avenue there for about thirty or forty foot.

Q What was sending it down? A I don't know. About thirty horse power behind it I guess, thirty or forty.

Mr. Heine. I move to strike out the witness's guess as to horse power. Too much imagination.

40 *Mr. Newcorn.* I will consent to strike out that part.

Joseph Tobin, cross.

Q Where was the wagon when the automobile stopped? A Why, the automobile had driven right into the wagon, and the wagon was just like sitting right on the hood of the machine, or part of it anyway. I know that I stood there when some of the men were lifting the wagon off the hood. 10

Q Where was the plaintiff lying? A Where was the gentleman here?

Q Yes. A Why, he was laying in the road at that time.

Q Near where? A Well, he wasn't quite as far as the wagon. He had been thrown out of the wagon, and the wagon had been pushed further.

Q And the wagon and machine were beyond where he was lying? A Yes. 20

Mr. Newcorn. Take the witness.

Cross-examination by Mr. Heine.

Q Was the horse knocked down? A Not to the best of my knowledge it wasn't.

Q That is all we are asking, is the best of your knowledge.

Mr. Newcorn. We will admit the horse was not knocked down.

Mr. Heine. I do not want you to admit anything. 30

Q Was the horse knocked down? A I don't know.

Q You looked down Second street and saw this wagon coming. How far away was it when you first saw it? A How far away the wagon was?

Q Yes, how far down towards Church street? A Well, I should imagine about fifteen or twenty foot, from the curblin of Watchung avenue east. 40

Q And going slow? A Yes.

Joseph Tobin, cross.

Q How slow, two or three or four miles an hour? A Well, I should imagine just about as fast as a man could walk.

Q Well, how fast can a man walk, according to your imagination? A I am no authority on that.

10 Q Well, three miles an hour? A Possibly.

Q You seem to be an authority on automobile speed, but not on pedestrianism. Do you ride in an automobile most of the time? A No.

Q Well, can you ascertain the speed with which this horse was walking? A Why, I should imagine probably about three or four miles an hour, or probably less.

Q When you first saw him he was fifteen feet east of the easterly crossing of Watchung avenue?
20 A Yes.

Q How long did you watch the wagon approaching? A Well, I just happened to notice him at that time. I was standing right facing him.

Q How long did you continue to notice him? A Well, I couldn't just tell you that.

Q Well, can you give us some idea? Was it just a second or so, or two minutes? A Well, it was possibly, I don't know. Probably a couple of seconds. I don't know just exactly. It hap-
30 pened a long while ago.

Q Little bit hazy on the details, are you? A Well, on a question like that I would be.

Q What attracted your attention to the automobile? A By just looking in that direction.

Q Were you able to see the automobile at the same time? A Hardly.

Q When did you change your attention from the wagon, fifteen feet east of the east crosswalk, and transfer it to the automobile coming up Watchung avenue? A Probably a moment later, a
40 moment or so.

Joseph Tobin, cross.

Q And the automobile was then how far away?

A At what time?

Q When you transferred your attention to it a moment after watching the wagon? A Why, when I first saw the automobile was about, I imagine, one hundred foot from the wagon.

Q Half way down the block? A Well, yes. 10

Q Were you talking to Mr. Kunzelman and Mr. Winn about some business matters at this time?

A Yes. We were talking about business matters, but I don't know just at this present time.

Q But you were still looking around—I don't know what they were about, but you were still looking around, you were not paying very strict attention to what you were talking about, were you? A Why, I don't just—I couldn't just recall at that time. I know that is what we went there, to talk over some business matters. 20

Q And you were all three standing facing east?

A Well, yes, we was facing kind of northeast. Was opposite looking towards the new Postoffice building.

Q Is that northeast or southeast? A Southeast I mean.

Q And you were all in a row, you weren't in a group? A Well, I couldn't just recall. 30

Q What? A I couldn't just recall. Just how we were standing at that time.

Q Can't you recall whether you were grouped around in a little group, or whether you were standing in a row, all three in a row? A No, we were not grouped around.

Q Were you standing next to Mr. Winn? A Well, I couldn't just tell you that. I think I was.

Q And then when Mr. Kunzelman wanted to talk to Mr. Winn he had to talk across you, 40

Joseph Tobin, cross.

didn't he? A Well, it is only a very narrow space there, you know, just about three could stand, so he wouldn't have to talk very far to do that.

10 Q That is the way it was? You were not around in front of them at any time? A In front of who?

Q In front of Mr. Winn and Mr. Kunzelman? A No, not to the best of my knowledge.

Q Did you see anybody thrown out of the automobile? A I did not.

Q Was anybody thrown out? A I didn't see anybody thrown out.

Q Are you under subpoena? A Yes.

20 Q Who did you talk with about this case? A Talked to nobody.

Q Not anybody at all? A Why, some man from Mr. Newcorn's office come out to me with some kind of a slip to see if I would sign it.

Q What did you do, did you sign it? A I signed nothing.

Q What did he talk to you about? A He just asked me merely what I seen at that time.

Q And you told him? A I told him nothing, and I refused to sign anything.

30 Q You didn't tell him anything? A No.

Q Then did he go away? A Why, he just simply wrote my name on a piece of paper, and I don't know what he thought at the time, but I told him nothing, nor signed nothing.

Q Then did you talk to Mr. Newcorn after that? A No, sir. First time I seen Mr. Newcorn since that was when I come here in Elizabeth.

40 Q Since when? A Since—well I don't know. I haven't probably seen him in three or four months, but I never spoke to him on that subject.

Joseph Tobin, cross.

Q You never talked to the Judge about this case? A No.

Q Or told him what you knew, or what you were going to testify to? A No.

Q When he put you on the stand he didn't know what you were going to say? A I don't know. 10

Q You never told him about how the accident happened, did you? A Well, the only conversation we ever had regarding the accident was yesterday afternoon walking from here down to the station.

Q Then he asked you—talked to you about it, did he? A Well, he didn't ask me, no. I merely was talking on the subject.

Q How did the conversation begin yesterday afternoon? A Well, the subject was brought up, that is all. 20

Q Who brought it up? A Well, I brought it up.

Q How did you bring it up? What did you say? A Why, I just merely asked him would it be possible—if it was necessary for me to stay here, to put me on the witness stand so I could get away.

Q What did he say? A Well, he said he didn't think it would be possible to do that. 30

Q Did you tell him anything about how the accident happened then? A Well, I only told him at that time that we were conversing at the accident.

Q Who began to converse about the accident? A That is a pretty hard matter.

Mr. Newcorn. I do not know that this is material. I object to it. Not that I have any objection if he tells you all that we talked 40

Harry S. Radin, direct.

about. But simply taking up the time of this court and jury with something that does not concern it.

10 Q This wasn't Judge Newcorn you talked to several months ago when they gave you a slip to sign? A No.

Mr. Heine. That is all.

HARRY S. RADIN, a witness produced on behalf of the plaintiff, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Newcorn.

Q Mr. Radin, you live in the city of Plainfield? A I do.

20 Q On the evening of April sixteenth did you see Mr. Rabinowitz in his wagon? A I seen him just before he was hit, when he was on the tracks, and the auto hit him.

Q Where were you? A I was coming home on my wheel, on a bicycle. Going home.

Q What street were you on? A I was on East Second.

30 Q In front of him or behind him? A Behind him.

Q And how far had Mr. Rabinowitz crossed Watchung avenue? A Well, he was on the track. I couldn't say just how far.

Q He was already on the track? A He was on the track.

Q And you saw the automobile strike the wagon? A Yes.

Q What part of the wagon did it strike? A Struck him right in the center.

40 Q Straight in the centre of the wagon? How far did it carry the wagon? A Well, it carried

Harry S. Radin, direct.

him about three doors, maybe thirty or thirty-five feet.

Q And where was the horse? A Well, the horse broke loose and someone grabbed him, after Mr. Rabinowitz fell out, and grabbed the horse; he stood near the curb there of Mr. Winn's.

Q The relative position of the wagon from where the horse was standing, was it north or south of the horse? A Why, it was beyond him. North.

Q North towards Front street? A Towards Front.

Q Where did you see Mr. Rabinowitz? A He was out. I seen him throwed out, and when he was dragged I seen him in the road there.

Q Did you walk over after the machine stopped and see where the wagon was? A Why, yes.

Q Where was the wagon? A Right on the hood of the engine, or the machine.

Q As you approached Watchung avenue did you see this automobile? A Well, I seen him coming, yes.

Q From where? A Coming from North avenue, from the station, I should judge.

Q How far off was he? A Well, he was about in the middle of the block. Neighborhood of one hundred or ten or fifteen feet.

By the Court.

Q When you first saw it how far away was it? A Well, he was one hundred foot or more.

By Mr. Newcorn.

Q When you first saw him where was Rabinowitz's wagon? A Well, he was just on the verge of going on the crossing.

Harry S. Radin, cross.

Q When you say on the crossing, which crossing do you mean? A Going on to the bricks from Second street.

Q On the brick? A Yes.

Q Did you hear any horn or any other signal?

A No horn that I could hear. Any sound there
10 was I didn't hear.

Mr. Newcorn. Take the witness.

Cross examination by Mr. Heine.

Q How far along East Second street had you been riding that evening? A I come in from the block between there—

Q From Church street? A Come from Church street.

Q When you turned around into Second street
20 from Church, did you see Rabinowitz's wagon on Second street. A I did.

Q How far from you was it? A Well, he was just on the verge going to the crossing, the first I turned in there.

Q You turned in right behind him? A Yes. I come from Church street. Not behind him then.

Q You turned in from Church? A I come in from Church.

Q Where was this wagon? A Just coming
30 on to the crossing of Second—or Watchung avenue. Just on the verge of crossing.

Q You mean on the east side of Watchung avenue? A Yes.

Q Just got to the east side of Watchung avenue when you turned in from Church? A Yes.

Q How long is that block? A Block ain't very long.

Q Well, about how many feet? A I couldn't
40 judge. I suppose maybe two hundred, or neighborhood of three hundred feet.

Harry S. Radin, cross.

Q Is it a business section, or dwellings? A Why, it is nothing but dwellings. It is all dwellings.

Q And those dwellings are on both sides of Second street? A Yes.

Q The new postoffice is up at the corner of Second and Watchung avenue? A Yes.

10

Q So that when you turned in from Church on to Second, you could not see down Watchung avenue, could you? A I couldn't see down until I got down near to that lot, and then I could see across to North avenue.

Q When you got down where? A The lot where they are putting up the postoffice.

Q How many feet is that lot on Second street? A I don't know. I never measured it.

20

Q Well, about how many? A I couldn't tell.

Q It isn't half a block? A No. About quarter of a block.

Q When you turned into Second street from Church, Rabinowitz was just coming, as you say, on Watchung avenue? A He was just about at the crossing, yes. Not on the crossing.

Q You could not see, from where you turned into Second street from Church, you could not see down Watchung avenue, because the buildings were in the way? A Not until I got to the lot. There is only about two houses, three houses.

30

Q You say that block is only three houses long? A I said there is only three houses on that block on that side.

Q On the south side? A On the left hand side what I was coming on.

Q How long did it take you to get from where you turned into Second street—. A I couldn't tell you that. It don't take you very long with a wheel to get anywhere.

40

Harry S. Radin, cross.

Q Wait. How long did it take you from where you turned into Second street down to the lot on which the new postoffice is going up? A Not over a minute and a half, or two minutes at the most. Didn't take long with a wheel.

10 Q During that time did you watch Rabinowitz?
A Why, no. Why should I.

Q Then the first thing that attracted your attention to him was the crash of the collision? A Well, I couldn't help avoiding seeing it when he was on the track. That is what attracted attention, seeing the automobile coming into him.

Q You didn't see the automobile before he struck the wagon? A Certainly I did.

20 Q How could you if these buildings were in the way? A Do you suppose the automobile was behind there all the time? He had to come down Watchung avenue. It didn't take me long to get down there.

Q You said a minute or two minutes. A Well, an automobile can travel a good ways in a minute.

30 Q When you were looking down at Rabinowitz's wagon, just as it was starting to cross Watchung avenue, you were a minute behind him in time? A Yes.

Q That minute had elapsed before you saw the automobile, before the automobile came into your range of vision. A Well, I say a minute. It might not have been a minute. I just simply rode my wheel down. I didn't keep no time.

Q Were you riding fast? A Riding along ordinary. No, not fast.

40 Q Could you judge of Rabinowitz's speed from where you were? A Well, the horse was walking. I couldn't judge the speed.

Daniel H. Keiderling, direct.

Q Did you see the horse walking? A The horse was walking, yes.

Q Could you see the horse? A Why, certainly.

Q From behind the wagon? A Can't you see a horse's feet back of a wagon? I saw him ahead of me when he was riding. 10

Q I am not asking you that. I am asking you whether you looked under the wagon and saw his feet? A Yes, I could tell.

Q You saw his feet from behind, under the wagon. A Yes.

Q The automobile was coming up Watchung avenue? A Yes.

Q When you first saw it, it was one hundred feet south of Second street? A I should judge around that. 20

Q And where were you then on Watchung avenue? A I was right at the vacant lot. Right behind what is his name?

Q Right behind what? A I was just about twenty or twenty-five feet from the corner. Right behind Rabinowitz when he was struck.

Mr. Heine. That is all.

DANIEL H. KEIDERLING, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith: 30

Direct examination by Mr. Newcorn.

Q Mr. Keiderling, you reside in the city of Plainfield? A Yes, sir.

Q How far from the scene of this collision? A Why, I was standing about three hundred and fifty foot.

Q Away from the collision? A From the collision; yes, sir. 40

Daniel H. Keiderling, direct.

Q From the fire house? A No. Just beyond the fire house.

Q On East Second street? A Yes, sir.

Q What attracted your attention that night?
 A Why, I was just coming out of place of business for supper, and I just stepped out in the
 10 road and I heard the collision. With that I ran up Second street and Watchung avenue, and at the time I run by the fire house I hollered to the boys, come on, I said, there is an accident. And we ran up there and I got up there at the corner, the automobile had hit the wagon, that I didn't see, but they were there together.

Q What do you mean they were there together?

A The automobile and the wagon were both together. The automobile had shoved hard enough
 20 to raise part of the wagon up on hood of the automobile.

Q Where were they standing? How far from the corner were they standing? A The automobile?

Q Yes, the automobile and wagon? A The automobile was about thirty foot, I should judge, and the wagon was just ahead of the machine.

Q Do you know who took the wagon off of the hood? A Yes, sir; I helped take the wagon off
 30 of the automobile.

Q Where was Rabinowitz at that time, this man? A Oh, he was lying in the track.

Q Was he conscious or unconscious? A He was unconscious.

Q You took the wagon off. Can you state what the condition of the front of the wagon was?

A Well, the front of the wagon was simply broken loose from the horse.

Q That is the shaft part? A The shaft part.
 40 There was one piece of shaft was fastened to the

Sadie Leahy, direct.

horse, and the other shaft and the rest of it was fastened to the wagon. Underneath the wagon was somewhat broken, it drove the left hind wheel against the side of the wagon and made it very hard to move the wagon. And the top also was broken, the two posts were broken right off the wagon, and it left the top lie down on the side. The top had to be lifted up off the wheel before it could be moved. 10

Cross-examination by Mr. Heine.

Q The top itself wasn't smashed, was it? A Bows were broken.

Q Bows were broken? A Yes, sir.

Q Otherwise it was right? A No, sir. The sides of the wagon—sides of the top were broken also. 20

Q The accident itself, the actual collision you didn't see? A No, sir.

Mr. Heine. That is all.

Mr. Newcorn. That is all.

SADIE LEAHY, a witness produced on behalf of the plaintiff, being duly sworn according to law on her oath, saith: 30

Direct examination by Mr. Newcorn.

Q Miss Leahy, where do you reside. A 126 Watchung avenue, Plainfield, New Jersey.

Q In relation to the intersection of East Second and Watchung avenue how far is that from the corner? A Why, it is about thirty feet, I guess.

Q How many? A From where I live to Second street? 40

Q Yes. A I guess about thirty feet.

Sadie Leahy, direct.

Q On the night of this collision did you see any part of it? A I didn't see any.

Q Did you know about it? A No.

Q Did you hear anything at all that attracted your attention that night? A Why, I just heard this crash.

10 Q Did you go out? A Why, I didn't go out right away.

Q How soon did you go out? A I had a call on the telephone and I answered it, and then I went out.

Q Well, how soon after you heard the crash? A I guess about five minutes.

Q Did you see the automobile? A Yes.

Q Know where it was standing? A Yes.

20 Q Did you see the wagon? A Yes.

Q Do you know where that was standing? A Yes.

Q Where was the automobile standing? A Right directly in front of my house, second house from Second street.

Q And the wagon? A The wagon was right ahead of the automobile.

Q Detached or attached? A Detached.

30 Q Had already been moved? A Yes. The hood had been removed. The top of the wagon had been removed from the automobile.

Q You saw that? A Yes.

Mr. Newcorn. That is all.

Mr. Heine. That is all.

Mr. Newcorn. That is our case.

Plaintiff rests.

Motion for non-suit.

MOTION FOR NON-SUIT.

Mr. Heine. I move for a non-suit on the ground that it appears affirmatively from the plaintiff's case that the plaintiff has been guilty of negligence contributing to this accident. The plaintiff is practically the chief and only witness to the actual facts of the accident. There were some witnesses who, from their position, testified, but the very fact of their position in which they were indicates that their testimony is not as reliable as that of the plaintiff. The plaintiff is to be charged by his own statement and account of the way this accident took place. That is, he came down Second street at a walk, slowly, and knowing the traffic conditions, that he had no greater right at that intersection than any other vehicle, knowing also that he was on a side street, and that the main thoroughfare or artery of traffic was Watchung avenue, that he approached there, he says he stopped his horse and looked. Now, I assume charitably that there is exaggeration in the statement when he said he stopped five minutes. He probably does not mean that. He said he stopped five minutes and looked up and down. He is exaggerating it. But taking the statement that he looked, he clearly and without any doubt has testified that he looked north and south, that he looked in a southerly direction from which the automobile came, and that looking in that direction he saw nothing. He says the curtains on the side of his wagon were up, so that he was in a position, and did see, and could see, and saw no automobile coming. And that was

10

20

30

40

Motion for non-suit.

10 when he was just about coming upon the east-
 erly roadway, north bound roadway of Wat-
 chung avenue. And yet he admits that he was
 struck almost immediately thereafter. Now,
 if that is the case, he cannot have looked
 with the care which the law requires that
 a man shall observe in taking observations
 for the purpose of governing his conduct
 upon a highway. And I think the case, this
 Ruggieri case vs. The Public Service, de-
 20 cided by the Court of Errors and Appeals
 in last October, your Honor probably is
 familiar with it, it is almost on—the figures
 are to a certain extent slightly different, but
 they are very similar, and on the strength
 of that case, there is another case, I meant
 to have the copy of it made, in the Atlantic
 Reporter, where Judge Bergen has given a
 decision which practically follows this. It is
 not reported in our State reports, but it is in
 the Atlantic Reporter. I can secure it later.
 My assistant was to bring it here. I base
 this motion for a non-suit solely on this Rug-
 gieri case and this subsequent decision of
 Judge Bergen's, which is following it.

30 *The Court.* I think it is a jury question. I
 will deny the motion and allow an exception.
 Exception allowed, sealed accordingly.

Judge.

Bayard Hawthorne, direct.

DEFENDANT'S CASE.

BAYARD HAWTHORNE, the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

Q Mr. Hawthorne, you are the defendant in this case? A I am, sir. 10

Q Where do you reside? A 733 Sherman avenue, Plainfield, New Jersey.

Q You have driven an automobile? A Yes.

Q How long? A Since the fifth of last December.

Q Do you recall on this occasion when you were in collision with the wagon of this plaintiff, Mr. Rabinowitz? A I would not know Mr. Rabinowitz. 20

Q I mean the plaintiff. Now, will you just tell the jury as you started up Watchung avenue where you came from and where you were going? A I came from Stryker's garage, which was right around the corner from Watchung avenue and Fourth street.

Q Talk up. A I came from Stryker's garage, which was around the corner in Fourth street, just off of Watchung avenue, and I proceeded around the corner into Watchung avenue and proceeded west—north, I should say, on the west side—east side of Watchung avenue, the right hand side going up. I came up Watchung avenue on the right hand side of Watchung avenue, proceeding north. This happened—I came up there about quarter of seven at night. It was perfectly light. Not necessary to have any lights to see. Perfectly daylight. It was on the sixteenth of April. And as I got up a little incline under the railroad bridge, I just got enough speed up, enough gas 30 40

Bayard Hawthorne, direct.

to get up this little incline, and as I got up on the top I shut my gas down on my car so that between the point of North avenue and one block to Second street, where the accident occurred, I was going very slowly indeed. The only thing I can say is that I remember nothing at all except
 10 having an impression of this something rushing at me from the right hand side, this wagon, and my impression is that I never saw that wagon until it came, I should judge, within about ten feet of me. The only thing I did, which I did, of course, intuitively, I switched my wheel around and I caught this man on the left back wheel, so that after this thing was over the only damage to my car was a broken bumper wheel, and a broken
 20 right mud guard—at least, not broken, but bent, and the axle of my car was slightly bent. The damages to the car amounted to about eight dollars. And the head of the automobile was absolutely unscratched. My lights were never injured in any manner or shape, cracked, or anything else, and the impact was not very—

Q Talk louder. As you were coming up the street there did you give any signal of your approach?

30 *Mr. Newcorn.* I object.

A I blew my horn; yes, sir.

Q How far from Second street, as you were going on Watchung avenue, were you, when you gave this warning by blowing your horn? A I should think, I should imagine that I was about maybe seventy-five or one hundred feet from the crossing, somewhere around there.

40 Q What kind of a horn have you? A Well, I have—I don't know what the horn—it is a horn the Hupmobile furnish. I don't know what the name of it is.

Bayard Hawthorne, direct.

Q Does it make a good loud noise? A Makes a good loud noise. Rather a disagreeable noise.

Q As you came along Watchung avenue, just before you got to Second street, did you observe any vehicle on Watchung avenue in front of you, or ahead of you?

Mr. Newcorn. I object. The question is leading. 10

The Court. I will permit it. You may answer the question.

A I did not.

Q And as you approached the southerly line of Second street, just state when you first saw the wagon in which this plaintiff was riding? A When I first saw the wagon I should say it must have been not more than ten or twelve feet from me. It seemed to rush right on top of me like that. I hadn't a chance to do anything, except to switch my wheel, which I intuitively thought was the best thing to do. There was no time to take any action at all. 20

Q Was the wagon in which the plaintiff was riding, what rate of speed was it proceeding? A Well, I didn't see the wagon. I can't tell you that at all.

Q It came out in front of you? A The only time I saw the wagon was immediately in front of me. The impression I derived was the wagon must have been going fast, because it came so suddenly. 30

Mr. Newcorn. Never mind the impression.

Q As it came out in front of you was it going fast or slow? A I should say it was going fast.

Q Did you notice the driver, as he came out in front of you, doing anything, did you have time to notice it? A No, I did not. 40

Bayard Hawthorne, direct.

Q You bore to the left in an endeavor to parallel that wagon so as not to strike him? A I endeavored as well as I could, the instantaneous action I had to take, I endeavored to minimize that by striving to strike the man parallel, and not strike him broadside, and possibly knock his wagon over, is what I wanted to prevent.

10 Q Was that impact against his wagon very great? A I should not say so.

Q Describe the position of the car, your car, and of the wagon after the moment of impact? A Well, as I recollect, after the accident occurred my car was switched around slightly to the left, and the wagon was in just about the same position. My bumper being on the left hand side of the back wheel of the wagon, and the cover had come down over my hood, the top of the wagon.

20 Q The top of the wagon? A Had fallen down over the top of the hood of my car. Someone came out and removed that obstruction.

Q How far did your machine travel after you struck the wagon? How many feet? A It didn't seem to me to travel at all. The minute I struck the wagon my engine stalled, my whole mechanism went out of commission, just stopped like that.

30 I stopped in speed.

Q And when you stopped that way, what part of the intersection of Second avenue and Watchung were you at? A Well, I should say that I was just about in the—possibly in the center of the street at the time, the front of my car turned possibly over the first of the east track; over the east track, probably the hood was—or the radiator was about, I should say, on the west track.

40 Q This plaintiff's wagon then came along on the southerly side—came out from the southerly

Bayard Hawthorne, cross.

side of Second street on to Watchung avenue? A I presume it is the southerly side. It came out from my right hand on the east.

Mr. Heine. That is all. Cross examine.

Cross examination by Mr. Newcorn.

Q Mr. Hawthorne, this was a new car you were driving, was it not? A No, sir. It was not a new car. It was a new car for me, but it was a demonstrator's car I had bought. 10

Q It was a new car for you. Had you ever driven a car before? A Oh, yes.

Q For how long a time? A I had driven about thirty-seven hundred miles before that.

Q I ask you how long a time had you driven a car? A From the fifth of December. Of course, preceding that time I had driven a car from the January preceding in order to familiarize myself with driving a car, before I bought one. 20

Q You were coming, you say, up Watchung avenue, and in a northerly direction? A Yes, sir.

Q Is that correct? A That is correct, sir.

Q If I understand you correctly, you say that when you went underneath the railroad and up the hill leading to Watchung avenue, at the junction of North and Watchung avenue, you shut off your gas? A I shut down my gas. I always leave enough gas to keep me from stalling. that is all. 30

Q How far away was that from the corner of East Second street? A From where I shut my gas down?

Q Yes. A Well, that I can't say, but I should say that I started to shut my gas down possibly twenty-five feet the other side of North avenue.

Q On the other side of North avenue? A How far that is to Second street I don't know. 40

Bayard Hawthorne, cross.

Q You don't know the distance from North avenue and East Second street? A No, I don't know how far that is.

Q Nor you cannot approximate it, is that it? A Well, I wouldn't care to attempt to approximate it. I will do so if you want me to.

10 Q Is it two hundred feet? A I should say it was two hundred feet, or two hundred and fifty feet, maybe.

Q Two hundred and fifty feet from East Second street. And when you shut down your gas at what rate were you going? A Well, I should say that I was going somewhere between eight and ten miles an hour.

Q Eight and ten miles an hour? A I was going very slow indeed.

20 Q You had a clear unobstructed view from where—when you came up on the hill at North avenue to the Y. M. C. A. on the corner of Front street, is that correct? A Do you mean straight ahead of me?

Q Straight ahead. A Yes, I had an unobstructed view.

Q You had a clear, straight view for several blocks, is that correct? A Quite correct.

30 Q You didn't see the wagon until you ran into it? A I did not. I will say within a space I should say about ten feet away the wagon was before I saw it.

Q You saw the wagon ten feet away? A I was about ten feet, I should say, from the wagon, before I saw it at all. It seemed to rush right upon me.

40 Q And at the time when the wagon—when you did see it was not the wagon upon the car tracks at the time? A That I really couldn't say, sir.

Q You can't say that? A I don't know that.

Bayard Hawthorne, cross.

Q Don't you know that— A No, I do not know, because when I saw the wagon I was so particularly interested in trying to avoid a collision that I couldn't possibly say where the wagon was. I couldn't say that to save my life.

Q What part of the roadway were you when you first saw the wagon? A I was on the right hand side of the street, sir. 10

Q On the right hand side of the street? A Yes, sir.

Q How— A Watchung avenue, going north.

Q You struck the wagon between the front and the rear wheels, did you not, sideways? A My impression is, sir, that I struck the wagon on the left hind wheel.

Q On the left hind wheel? A On the hub, that is what I endeavored to do, is to swing my car around so as to strike the wagon in a parallel position to the way the wagon was going, in order to minimize any damage to the wagon. 20

Q This blotter is the wagon. Is this the side you were going? A Which way is the wagon pointing? Is this the front of the wagon?

Q This is the front of the wagon, and the horse, and there are two wheels on the side. A Yes.

Q Is this the wheel you say you struck? A That is my impression I did. That is what I aimed to do, was to run parallel with the wagon. 30

Q Then the point from the front of the wagon and the horse had got beyond where your automobile was at the time when the collision took place, according to your impression? A I don't know that. I just saw this wagon and I switched my wheel around to go parallel with it. I can't say what position the horse was in, or the wagon, with respect to my automobile. I just saw the vision of this wagon, that is all I saw. 40

Bayard Hawthorne, cross.

Q But you did strike the rear hind wheel? A I think I did.

Q You say you were going eight or ten miles an hour. Have you ever tried, Mr. Hawthorne, stopping your machine when traveling at the rate of eight or ten miles an hour? A I don't think I can answer that question, Judge.

Q You can answer whether you did try it or not? A In order to answer your question I would have to be enabled to look at my speedometer when I was stopping my machine, to find out how fast I was going, and that I can't answer.

Q Do you mean to say you can't tell us now how fast you were going? A My impression is that I was going between eight and ten miles an hour.

Q But you didn't look at your speedometer at the time? A No.

Q You still can answer the question which I asked you a moment ago, which is, have you ever tried stopping your machine, while you were going at a rate of eight or ten miles an hour? A I may have done so many times, without knowing it. I don't know. I have never done it as an experiment, if you mean that.

Q Do you know where the machine was stopped, or where you stopped the machine after the collision? A As I recollect, the machine was stopped about possibly in the center of the intersection of Second street and Watchung avenue, right in the middle of the tracks, of the street there.

Q In the same place where the collision took place? A Yes, just about in the same place. And as we stood there a policeman came up and said, here, get out of here, there is a trolley car

Bayard Hawthorne, cross.

coming up here, and he grabbed hold of the machine, and some bystanders and moved my machine across up the roadway beyond the left hand side of the street, beyond the intersection of Second street and Watchung avenue, right opposite the plumber's shop, and left it there.

Q Mr. Hawthorne, isn't it a fact that occurred in front of Miss Leahy's house on Watchung avenue? A I don't know where Miss Leahy's house is. 10

Q Well, she has testified, and you have heard her testimony, the door next to the Winn & Higgins' plumbing shop on Watchung avenue. A Is that on the north—

Q That is on the northwest side of Watchung avenue. Isn't it a fact that occurrence occurred in front of her house, when a Main Line car was coming down to go to the station? A Well, that I don't know. I know immediately after the accident, when the machine stopped, a policeman came up and said, here, you have got to get out of here, and move out of this place, there is a trolley car coming. And some bystanders took my machine and pushed it, and as it was not in speed and couldn't be driven, and pushed it out of the way on the left hand side of the track. 20

Q Did you have a bumper in front of your car? A Yes, sir. 30

Q And that bumper was broken, you say? A It was bent. The bumper itself was bent, and the bolts, one of the right hand bolts were broken.

Q The wagon was smashed up? A That I don't know. I don't know in what condition the wagon is at all.

Q It was fastened on to your car? A The wagon was not fastened on my car. 40

Bayard Hawthorne, re-direct—re-cross.

Q Wasn't the top of the wagon— A The top of the wagon fell upon the top of my hood, yes.

Mr. Newcorn. That is all.

Re-direct examination by Mr. Heine.

10 Q When you swung around the front of your car to—came in to the rear wheel, or rear axle, or whatever it may have been of that wagon, you were traveling in the same direction as the wagon?

A At the time that I swung I was, yes.

Q As you struck the—just before you struck you came into him on the side? A I switched around that way in order to parallel the wagon.

20 Q So that you were endeavoring to parallel as you came into contact with the rear of the wagon? A Yes, sir.

Re-cross examination by Mr. Newcorn.

Q When you say you tried to parallel, was it not in order to get to the rear of the wagon so as to pass him? A No, sir. My object in paralleling the wagon was to minimize the collision that I thought was inevitable when I saw this thing in front of me.

30 Q You knew that there was a collision coming? A I certainly did.

Q And instead of stopping your machine you tried to swing around, is that it? A I tried—instead of striking the man at right angles, I tried to parallel him, so that I would not knock his wagon over, which I certainly would have done if I hadn't done that.

Mr. Newcorn. That is all.

Alice W. Hawthorne, direct.

ALICE W. HAWTHORNE, a witness produced on behalf of the defendant, being duly sworn according to law on her oath, saith:

Direct examination by Mr. Heine.

Q Mrs. Hawthorne, you are the wife of the defendant, Mr. Hawthorne? A I am. 10

Q Who has just testified. Were you in the car with him at the time of this accident in April? A I was.

Q And what part of the car, where were you riding in the car? A In the back seat on the right hand side.

Q Was anybody else in the car? A Yes. Mr. Hawthorne and my son Archie.

Q Where was your son riding in the car? A On the right hand side in the front seat. 20

Q Next to the driver, his father? A Yes.

Q Do you recall coming up Watchung avenue on that evening? A I do.

Q As you were approaching Second avenue? A Yes.

Q After you came under the railroad bridge? A Very well.

Q Do you recall whether or not any warning was given, or horn blown, as you approached Second street? A I remember distinctly that the horn was blown more than once. 30

Q And how far were you from Second street when that was blown. A Well, I should say possibly half way between Second street and North avenue, the first time.

Q And it was blown again, you say? A Yes.

Q And as you got right up to—as you approached Second street were you looking ahead of you, could you see ahead of you from where you sat? A Oh, yes indeed. 40

Alice W. Hawthorne, direct.

Q And was there any other vehicle on Watchung avenue as you approached Second street, and came close to the southerly side of Second street?

A I didn't see any other except a wagon coming from the—coming from East Second street, and from the time I saw that wagon until the time it
10 was in front of our car I don't believe it was more than one second, and it was going quite rapidly. And the next thing I knew it was in front of our car and Mr. Hawthorne had turned his wheel and tried to avoid running into it, for I saw him do that myself.

Q Turned the wheel to the left? A Yes. Because we were going very slowly, and he thought he would have time to get across the track.

Q Never mind what he thought. Your husband turned the car to the left and then you struck this Mr. Rabinowitz's wagon which had come out in front of you? A Yes.
20

Q Was it a very violent blow, a hard blow, or not? A Well, I shouldn't say it was violent as it might have been very easily.

Q What happened when your car struck the wagon? How far did the car travel after the moment of striking? A Well, I should say possibly fifteen feet.
30

Q And then stopped? A Yes, sir.

Q And when it had stopped, when you were stopped still, where was the automobile and the wagon in relation to the car tracks, and the center of Watchung and Second street? A We were on them, on the tracks.

Q How long did you remain in that position with your car and the wagon stopped? A Quite a short time, because someone came and moved us off, so the trolley could go by.
40

Alice W. Hawthorne, cross.

Q Was anybody thrown out of your automobile? A No one.

Q Did you at any time see the wagon up on top of the hood of your machine? A No. I remember that I saw the top of the wagon tumbling, and it seemed to shake like that (indicating), but I don't remember that any of it fell on the hood of our machine, but I think they were sort of locked together, the car and the wagon. 10

Q And they stayed that way? A Yes.

Q And when they came and moved you off the track shortly after the accident what did they do with the car? A They took us on the left hand side of Watchung avenue going west.

Q And where in relation to Second street? A The car was stalled anyway, and they just pushed us over there. 20

Q How far up Watchung avenue did they push the car? A Not any distance at all. Just across the track. Just almost parallel to where we were.

Q You were in the left hand roadway of Watchung avenue, that is where they left you? A That is where they left us.

Q And above Second street, were you? A Yes, just a little bit. Not much.

Mr. Heine. Cross examine. 30

Cross examination by Mr. Newcorn.

Q Were you paying any attention at all that night to your husband driving the car? A Well, yes; I always do. I always keep my eyes open and I am always interested in going along.

Q You were sitting in the rear seat? A Yes. And the cover was down.

Q Top up or down? A Down.

Q Who was sitting alongside of you? A No one. 40

Alice W. Hawthorne, cross.

Q Your son was sitting with your husband?

A Yes.

Q How fast was your husband traveling that night? A Well, not more than eight miles an hour at that time.

10 Q You ride frequently in an automobile? A Yes.

Q And you know that eight miles an hour in a machine is down to an ordinary walk of the machine? A Yes, I know it is very slow.

Q Very slow indeed. How far off from Second street was it that you first saw the wagon?

A Nearly all of the wagon, when I first saw it, was on Watchung avenue.

20 Q The wagon was already on Watchung avenue when you saw it? A Yes.

Q And how far away were you at the time when you first saw the wagon on Watchung avenue?

A Well, it is pretty hard to tell that. I don't think I can say.

Q Well, was it one hundred feet? A One hundred feet?

30 Q Middle of the block? A No, because as I remember there was some fence, or something of that kind on the corner of Watchung avenue that would have shut it out anyway.

Q What do you mean there was a fence? A Well, there was something there. I can't say positively what it was, but there seemed to be something there on that corner.

Q Would it shut off your view of anything crossing Watchung avenue? You had a direct view clear to Front street? A Yes.

40 Q You say you saw this wagon already on Watchung avenue. I am asking you how far away was the machine at the time when the wagon

Alice W. Hawthorne, cross.

was on Watchung avenue? A Well, I should say perhaps eighteen or twenty feet.

Q Eighteen or twenty feet? A As far as I can tell, yes. I am not very good about judging that.

Q Nothing to have stopped you from seeing the horse and wagon entering, or trying to cross Watchung avenue there? A Well, I didn't see the wagon, and whether there was anything there or not, that I can't positively say, but I think there was something there at the corner that would have obstructed the view of the wagon until it was pretty nearly on Watchung avenue. 10

Q You don't know whether there was anything or not, Mrs. Hawthorne, do you? A I wouldn't—

Q That would obstruct the view, I will qualify that? A I wouldn't positively say so. 20

Q Now, isn't it a fact, Mrs. Hawthorne, that all that was there was a few posts with a rail on the top all around? There was a clear view down from that corner, right down Second street, or from Second street to Watchung avenue? A I can't say that positively.

Q You didn't notice it at all, and had no particular reason to notice it? A The first thing I saw was the wagon, and it was going very fast. And the next thing I knew the collision had happened. 30

Q But when the wagon was going very fast, when you saw it, he was already upon the brick pavement of Watchung avenue, is that correct? A I can't say that all of the wagon positively was, but when I first saw it, it was right there, as I say, almost in front of our car.

Q In the middle of the block? A No, not in the middle of the block, not when I first saw it. It was towards Second street. 40

Archibald Hawthorne, direct.

Q Well, at the intersection of Watchung avenue and East Second street? A Well, it was somewhere between the car track and the other side of Second.

10 Q And the other side of the street. By the other side you mean the west side? A The other side of Watchung avenue towards Second avenue, on Second.

Mr. Newcorn. That is all.

Mr. Heine. That is all.

ARCHIBALD HAWTHORNE, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

20

Q Mr. Hawthorne, you are a son of the defendant? A Yes, sir.

Q Were you in the automobile that night when the accident happened? A Yes, sir.

Q Do you remember—you live at home in Plainfield? A Yes, sir.

Q Go to school there? A Yes, sir. Neale school.

30 Q Do you remember coming to Watchung avenue that night in April when the accident happened? A Yes, sir.

Q Do you remember hearing any warning given by your father? A No, sir. I gave the warning—do you mean the horn?

Q Yes. A Yes, sir.

Q Where were you sitting in the car that night? A In the front seat.

Q Which side? A Right hand side.

40 Q As you were coming up Watchung avenue towards Second street were you able to see along Watchung avenue quite a distance ahead of you?

Archibald Hawthorne, direct.

A Well, the car is a very low car, and some kind of a fence or something there, and you couldn't see very well.

Q Couldn't see very well. In which direction?
A East.

Q Yes, but as you were coming along north on Watchung avenue you could see right straight ahead of you, couldn't you? A Oh, you could see right ahead of you, yes. 10

Q Was there anything on the roadway ahead of you as you approached Second street? A Well, I just first—

Q As you approached, as you were coming up from North avenue, was there anything on the roadway ahead of you? A Not until we reached Second street, no. 20

Q Just as you got to Second street what happened? A The wagon came out of Second street and before we could do anything we were into it.

Q Which side of Second street did it come out of, was it nearer the southerly curb, or did it come from the lower side of Second street? A Well, it was just about in the center.

Q Did it come right across—what speed was the wagon going, was it going fast or slow? A Well, it was going pretty fast. 30

Q Was the horse trotting? A Yes.

Q Going faster than a walk, you are sure of that? A Yes.

Q Sure it was going faster than a walk? A Yes.

Q What was done, or what happened after the wagon came out in front that way, what did your father do with the car? A Father turned his wheel to go along parallel with the wagon and soaked the wagon in the back wheel. 40

Archibald Hawthorne, cross.

Q Did the wagon come up on top of your hood, or anything like that? A The top of the wagon broke off and fell over on the hood of the car.

Q And then fell on the car? A No. It stayed right on the hood.

10 Q That is the top part of the wagon? A The top.

Q Where was the car and the wagon in relation to the car tracks on Watchung avenue when you stopped after the collision? A Well, it was just about in the center of the car track going west.

Q That is the west side of the car track? A Yes.

20 Q You were still in the roadway of Second street when you were stopped? A Well, when we hit the wagon in the center of Second street it moved about eighteen or twenty feet.

Q And then you stopped? A Yes.

Q Did anything happen immediately after that? A We weren't there very long before some man came out and moved us over to the left hand side.

Q Moved the wagon and the car and everything off the track? A Yes.

30 Q Was your car going fast or slow as it approached Second street? A Well, we were going. I guess, between eight and ten miles an hour.

Q Sure about that? A Yes.

Mr. Heine. Cross examine.

Cross examination by Mr. Newcorn.

Q Archie, you were busy talking to your father when you were riding along? A No, sir.

40 Q What were you doing? A Sitting in the front seat looking—

Archibald Hawthorne, cross.

Q Looking over the hood? A Well, I was looking at that fence around the hole there where they moved that house, or something, and I couldn't see anything coming along Second street.

Q What kind of a fence was that? A I don't just remember what kind of a fence it was. It was some kind of a thing. Posts. 10

Q And had a narrow strip of wood on top all around? A I don't remember that exactly.

Q And you were looking in that direction then? A Well, that was about midway in the middle of the block.

Q When you were in the middle of the block. Did you see the horse's head coming out from East Second street? A No, sir.

Q And you didn't see the wagon following the horse? A No, sir. 20

Q But you did see the horse and the wagon when it was in the middle of the car tracks? A I didn't see the horse and wagon until it was about six feet from us, when we were just about to hit it.

Q Six feet from you, is that right? A Yes.

Q And when you saw it six feet from you where was the horse and wagon at the time? A Well, the horse was about in the center of the two car tracks, and the wagon was just about in the middle of the other car track, the front wheels about in the middle of the other car track, and the back wheels were on the right hand side. It was right under the wagon. 30

Q The rear wheels were in which track? A On the right hand side of the track, the cars running west.

Q That is the easterly tracks? A Yes, sir. 40

Archibald Hawthorne, cross.

Q The last wheel had already gone beyond to the easterly track? A Well, it was just about to go on.

Q How long was that horse, if you know? A I don't know how long he was.

10 Q Well, how long was the wagon? A Well, I couldn't just say that because I am not much on distances. I don't know exactly how long the wagon was.

Q But you are sure that the rear wheels were about to cross the easterly tracks? A Yes, sir.

Q And the tracks are in the center of the street? A Yes.

Q And that was the first that you saw the horse and the wagon? A Yes, sir.

20 Q You had a clear view clear from North avenue up to front street? A Yes, sir.

Q And you didn't notice it before that? A No, sir.

Q You say this horse was running? A No, he wasn't running. He was trotting.

Q How many feet did this horse travel while you traveled the six feet? A Well, I couldn't say that exactly. I don't know.

30 Q Well, did he travel six feet? A No, I don't think he did travel six feet. We went to turn the car, and as we turned the car we went along with him.

Q Who are we, Archie? A Well, my father, then, sir.

Q Well, now, do you know what your father intended to do? A Yes, sir.

Q How? A Because I saw what he did.

Q You saw what he did. A Yes, sir.

40 Q But you don't know what he intended to do? A Yes, sir.

Archibald Hawthorne, cross.

Q How is that? A I know just what he intended to do. He intended to go along with the wagon so as he would miss it, because he turned his wheels to go along with the wagon.

Q The time when he attempted to do that he was six feet from the wagon? A No. Because we were going along a little bit, you know. We weren't standing perfectly still. 10

Q You were closer yet? A We weren't standing absolutely still. We were moving and the wagon was out in the road.

Q You were nearer than six feet when you tried to make the turn, is that right? A We kept moving. Yes.

By the ninth juror.

Q Mr. Hawthorne, I would like to know something about the locality there. Is the level of North avenue higher than the level of Second street, I mean, that in going from North avenue toward Second street, that you are going down hill? A Yes, sir. 20

Q Is that the case? A North avenue is just about level with Second street.

Q It is about level? A Yes, sir.

Mr. Newcorn. The declivity that is testified to is from North avenue down to Fourth street, underneath the railroad. That is the depression. But coming from North avenue towards Front street it is level. 30

John Ward, direct.

JOHN WARD, a witness produced on behalf of the defendant, being duly sworn according to law on his oath, saith:

Direct examination by Mr. Heine.

10 Q Mr. Ward, where do you live? A 629 West Fourth street, Plainfield, New Jersey.

Q Do you remember on the night of the sixteenth of April an accident happening, that Mr. Rabinowitz's wagon and this automobile of Mr. Hawthorne's were in collision? A I do.

Q Where were you at that time? A I was standing on the corner of Watchung avenue and Second street.

Q Which corner, north or— A Southwest corner.

20 Q On the southwest corner, that is opposite the— A In front of the butcher shop.

Q And this plumbing store of Winn & Higgins' is right across the street on the northwest corner? A Yes.

Q Did you notice any of the men standing out in front of Winn's place that night? A I did not.

30 Q Just tell us what you saw, as you stood there on that southwest corner, immediately before the accident, just tell the jury what you saw? A While I stood there on the corner waiting for a car to go home, I seen this automobile coming up and I heard, "toot, toot," like that, of the automobile, you know, signal from the automobile. I happened to look coming down Second street and there come a man driving a gray horse. I said to myself if one or the other don't stop there is going to be a collision. So neither one seemed to slack up until they got approximately closer, and then the automobile slackened up and he seen that the accident was unavoidable, and he swerved to his left, and he caught the wagon with
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John Ward, direct.

his left hand mud guard, the top fell over on the hood, and I helped to shove him back, and the man fell out on the street. Then two or three fellows ran up, I don't know where they all came from, but three or four fellows ran up there at the time, and I said to them, I said, I asked the people in the automobile if they had a blanket, or something to put under the man's head, and they said no, they didn't have anything in the automobile to put under the man's head. Well, I said, don't leave him lay here, and we took him and put him over on the stoop and sent him down to the grocery store and then notified an officer. 10

Q When you saw this man driving the gray horse up Second street, how far down Second street was he when you first saw him? A Well, I should judge he was as far as, well, say thirty-five or forty feet from the corner. 20

Q Was he going fast or slow? A Coming a reasonable jog gait, just jogging along.

Q Jog or trot? A Just jogging along.

Q What you call a jog trot? A Yes.

Q You heard the horn blow? A I did.

Q As the automobile came towards Second street? A I did.

Q Was the automobile going fast or slow? A Well, I should say he was going at a reasonable rate. Moderate rate of speed. 30

Q That is a level street going along there? A Yes, sir. Both going moderate rate of speed.

Q What was the character of this fence or building across the street, on the southeast corner? A Well, they were just commencing then to excavate there for the new building. And there was boards put up along there, and there was something that was nailed to, and had signs on, and you know, for the theatre, and like of that. 40

Q Did you see when the wagon came out from

John Ward, cross.

Second street on to Watchung avenue, was it still jogging right along? Did it stop at all, or just jog right on? A No, it didn't stop at all. It seems as if it didn't see the automobile, because it didn't act as if it saw, you know, any danger at all. Had he seen any danger at all he could very
10 well have swerved to his right and have avoided the collision.

Q When this man was jogging along with his horse, was he on the lower side of Second street, or the upper side? Was he on the southerly or the northerly side of Second street as he came toward Watchung avenue? A He was coming—.

Q He was coming west? A Coming west. From the east to the west.

Q Was he on his right or on his left? A Well,
20 as near as I can remember it now, I think he was about the center of the driveway.

Mr. Heine. Cross examine.

Cross examination by Mr. Newcorn.

Q Mr. Ward, what is your business? A At the present time I am working around gardening, and such as that. Generally useful man.

Q Work for Mr. Hawthorne? A No.

Q Never worked for Mr. Hawthorne? A Not
30 at all.

Q In gardening? A No.

Q Looking after the furnace? A No.

Q Where did you say you lived? A 629 West Fourth street.

Q You say you were standing on the southwest corner of Watchung avenue to take the car? A I was.

Q In which direction were you going? A
40 Going home.

Q Waiting for a Fourth street car? A I was.

John Ward, cross.

Q Did the car stop on the southwest corner, or did it stop on the—that is—or on the northwest corner? A Supposed to stop on the northwest corner.

Q On the northwest corner? A Yes.

Q And you were waiting on the southwest corner? A I was standing there. I had ample time to stand there and wait, and I could walk across the corner and take the car on the other corner. 10

Q The car you were waiting for was expected to come on the track nearest to you? A It was.

Q And would come from Front street running towards North avenue and pass Second street, is that right? A Yes, sir. 20

Q Were you facing down in the direction from which you expected the car to come? A I was standing on the corner.

Q Well, I am asking you which way were you facing? A What do you mean?

Q You say you were standing on the corner of Watchung avenue and East Second street. Now, I am asking you which way were you facing? A When? 30

Q Either north, south, east or west, just before the accident? A I was standing, well, when I stand on the corner, and there is no obstruction between me, naturally you can see all four corners. There is nothing to obstruct my view.

Q You can see East Second street back of you? A I wasn't—no, I couldn't see that.

Q You say naturally you could see the whole four corners? A In front of me, yes. I say I stand on one corner here, I can see all four corners. 40

John Ward, cross.

Q The point I asked you was whether you were facing East Second street, or facing towards Front street, or North avenue, or Park avenue?

A I was facing Watchung avenue.

Q You could see north and south on Watchung avenue? A I could see north and south on Watchung avenue, and east on Second street.

Q Now, you say you heard an automobile blow a horn? A Yes, sir.

Q What kind of a horn was it? A I don't know. It was an automobile horn. I don't know the names of the machine horns.

Q What kind of a sound did it make? A "Toot, toot," something like that.

Q Did you turn around to look at the automobile? A Didn't need to turn.

Q You could see the automobile coming? A Didn't need to turn.

Q And you didn't even turn around? A No.

Q Where was the wagon at the time when this automobile—? A Approaching west on Second street.

Q Had it already entered the brick pavement?

A Why, no, not when the horn blew, it had not entered the brick pavement.

Q Which were you watching? Before it entered on the brick pavement did you see the wagon again? A How is that, please?

(Question repeated by stenographer.)

Mr. Newcorn. Strike that out. I will reframe the question.

Q Did you see the wagon enter upon the brick pavement? A I did.

Q And how far away was the automobile at the time when the wagon entered upon the brick pavement? A Well, it was very close approximate. It was very close on to it.

John Ward, cross.

Q What do you mean by close? A Well, I should say it wasn't over eight or ten feet away from it.

Q Only eight or ten feet? A No. It wasn't more than eight or ten feet away from the wagon when it struck.

Q How many feet had the wagon travelled before the collision took place? A Well, it had travelled to the centre of the—well, not exactly—well, the front wheels to the centre of the—

Q Of the car tracks? A Between the two car tracks. The front wheels were between the two car tracks.

Q The front wheels were between the two tracks? A Yes.

Q That is a thirty-six foot wide street, is it? A I don't know. I don't know how wide it is.

Q Just indicate in this court room just about the distance that the horse and wagon had travelled before you saw the automobile six or eight feet away?

The Court. That is, from the edge of the brick pavement.

Q From the curb line? A Well, I should judge to be as far as from here over to the first row of chairs there?

Q Which row? A The first, where the gentleman is sitting.

Q Where Mr. Coriell sits? A I should judge it would be about that distance. I should judge the brick pavement would be from here over about to there (indicating).

Q And the wagon travelled that distance, with the horse jogging fast, in the same time that the automobile travelled the six or eight feet that you

Motion for direction of verdict.

say it was distant, is that right? A I figure that is pretty near right.

Mr. Newcorn. That is all.

Mr. Heine. That is all.

DEFENDANT RESTS.

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MOTION FOR DIRECTION OF VERDICT.

Mr. Heine. I will renew my motion for a direction of verdict.

The Court. I will deny that.

Mr. Heine. Prays exception.

Exception allowed; sealed accordingly.

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Judge.

Adjourned until 1:30 P. M.

AFTERNOON SESSION, 1:30 P. M.

Mr. Heine sums up the case for the defendant.

Mr. Newcorn sums up the case for the plaintiff.

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Charge to Jury.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

October Term, 1915.

SAMUEL RABINOWITZ.	}	<i>Action at Law.</i>	10
<i>vs.</i>		<i>No. 36 in the</i>	
BAYARD HAWTHORNE,		<i>List.</i>	

Charge to the jury by Hon. George S. Silzer,
Circuit Court Judge, as follows:

Gentlemen of the Jury:

On the twenty-seventh of April, 1915, the auto-
mobile of the defendant came in collision with
the wagon of the plaintiff at the corner of Wat-
chung avenue and Second street, Plainfield, and
the plaintiff now seeks to recover damages for
the injuries which he alleges he received at that
time. 20

The mere fact that there was an accident does
not give any right to recover. There must be
more than the mere fact that there was an acci-
dent, and the plaintiff's claim here is based upon
the theory that there was negligence on the part
of the defendant in the operation of his machine
at that time. You want to know, of course, what
were the rights and duties of the parties in that
situation. Both parties had a perfect right to be
where they were, that is, driving upon the public
highways of the City of Plainfield. And they also
had certain duties to perform when they were in
that situation; they were to use such reasonable
care as reasonable men would under the circum-
stances that existed there, not only to protect 30
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Charge to Jury.

themselves against injury, but to prevent injury to other people who were rightfully using the street.

10 The plaintiff's allegation of negligence is that the defendant operated his car so rapidly, and in such a careless manner, that he was negligent, and that that negligence caused this injury. So you see that is your first problem; did the defendant, in the operation of this car, or did he not, exercise that care which a reasonably prudent man would under the circumstances that existed there. That is the problem. If Mr. Hawthorne did exercise the care which a reasonably prudent man would, then that is the end of the case and your verdict would be no cause of action, because
20 you see it is based upon the idea that the man was negligent, and if he was not negligent then, of course, there is no action. On the other hand, if you find that he was negligent, that he did not use the care that a reasonably prudent man would in operating a machine at that point, then you would come to the second proposition in the case, that is, what did the plaintiff do at that point. As I have already told you, the plaintiff also had some duties, and those were also to exercise reasonable care, not only for his own safety, but for the
30 safety of other people, as he drove across the street. So your second problem is, did the plaintiff contribute to this injury, was the plaintiff negligent, did the plaintiff exercise that care which a reasonably prudent man would in approaching a place of that kind, and did he exercise the faculties that he had to see whether there was anything approaching. If you find that the plaintiff did not exercise the care which a reasonably
40 prudent man should, and was guilty of negligence, and that negligence contributed to the injury,

Charge to Jury.

then, of course, he could not recover. You see the theory of that is that no man can recover for his own carelessness. So that if you find that Mr. Rabinowitz was also careless, then there could not be any recovery. On the other hand, if you find that he was not, then the situation is changed. If you find that they were both careless, then there can be no recovery. If you find that Mr. Rabinowitz was careless, and that that carelessness contributed to the accident, there can be no recovery. But, on the other hand, if you find that Mr. Hawthorne was careless and that Mr. Rabinowitz was not, then you come to the question of damages.

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In this case the elements of damage are the bodily injury that was sustained, the pain and suffering that the plaintiff had, the effect on his health, according to whether that was permanent or temporary, and I think it is conceded in this case that it will not be permanent beyond the two months that the doctor spoke of. You also have a right to consider the expense that was incidental to attempts to cure him of his injuries, and the pecuniary loss which he sustained through inability to attend to his business; that, of course, would not be of a permanent nature beyond the time that is already stated.

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On all of these matters, both as to the amount of loss or damage, and as to the question of liability, you are the sole judges, you are not obliged to take what any man swears to, but that which you believe to be the truth; there is considerable conflicting testimony here between the parties and you are the ones to measure it and see who tells the truth, and what is justice between the parties.

So just to reiterate briefly, so that you may have it as a last thought, if you find that Mr. Haw-

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Verdict.

thorne was not negligent, then and there is no cause for action. If you find that Mr. Rabinowitz was negligent, then there would be no cause of action. If they were both negligent, there would be no cause of action. But, on the other hand, if you find that Mr. Rabinowitz did all that a reasonably prudent man could and should do, but that Mr. Hawthorne was negligent, then you assess the damages under the rules that I have already outlined to you.

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Any corrections, gentlemen, before the jury retires?

You may retire, gentlemen.

Verdict for plaintiff for \$350.

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POSTEA.

This case was tried before Judge George S. Silzer and a jury at the Union County Circuit on the fourteenth and fifteenth days of October, 1915.

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Rule for Judgment.

Judgment.

NEW JERSEY SUPREME COURT.

SAMUEL RABINOWITZ,

Plaintiff,

vs.

BAYARD HAWTHORNE,

Defendant.

*Action at
Law.*

On Postea.

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It is ordered that judgment of three hundred fifty dollars damages be and the same hereby is entered in favor of plaintiff and against defendant, together with the sum of sixty-seven dollars and fifty-seven cents, costs, amounting in all to the sum of four hundred seventeen dollars and fifty-seven cents.

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Entered October 19, 1915, on motion of William Newcorn, attorney.

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Journal

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