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SUPREME COURT OF NEW JERSEY.
MERCER COUNTY.

<p>CAROLINE MAHAN, ADMINISTRA- TRIX AD PROSEQUENDUM OF HARRY B. MAHAN, DECEASED, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ELIZABETH WALKER, <i>Defendant.</i></p>	}	Action at Law.
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NOTICE OF APPEAL.

(Filed October 3, 1921.)

To Martin P. Devlin, Attorney of Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above cause.

HARRY HEHER,
Attorney of Appellant.

Due and legal service of the within notice is hereby acknowledged this 30th day of August, 1921.

MARTIN P. DEVLIN,
Attorney of Respondent.

Summons.

The State of New Jersey to Elizabeth Walker:

You are summoned to answer
(SEAL) the annexed complaint of Caroline
Mahan, administratrix *ad prose-*
quendum of Harry B. Mahan, deceased, in an
action at law in the Supreme Court. And take 10
notice that unless you file your answer to said
complaint with the Clerk of the Supreme Court
at Trenton within twenty days after service upon
you of this writ and the annexed complaint, the
plaintiff may proceed in the suit and judgment
may be entered against you.

Witness, William S. Gummere, Chief Justice
of the Supreme Court, at Trenton, this eighth
day of December, nineteen hundred and nine- 20
teen.

ENOCH L. JOHNSON,
Clerk.

FERGUS A. DENNIS,
Attorney.

30

40

Amended Complaint.

AMENDED COMPLAINT.

(Filed November 9, 1920.)

SUPREME COURT OF NEW JERSEY.

MERCER COUNTY.

10

CAROLINE MAHAN, administratrix
ad prosequendum of Harry B.
Mahan, deceased,

Plaintiff,

vs.

ELIZABETH WALKER,

Defendant.

AMENDED
COMPLAINT.

20 Plaintiff, Caroline Mahan, administratrix *ad prosequendum* of Harry B. Mahan, deceased, of the Township of Lawrence, County of Mercer and State of New Jersey, says that:

(1) On or about the 14th day of September, 1919, Harry B. Mahan, plaintiff's intestate, was lawfully riding a bicycle owned by him along a public highway near the village of Slackwood, Lawrence Township, Mercer County, New Jersey.

30 (2) The defendant at that time was the owner of an automobile or motor car and by her servants or agents was driving said automobile along the said highway and carelessly and negligently drove against and collided with the said Harry B. Mahan, the plaintiff's intestate, who was there lawfully riding upon his bicycle along the said highway and the said collision between the automobile or motor car and the plaintiff's intestate's bicycle was not due to any fault or
40 neglect on the part of the plaintiff's intestate.

Amended Complaint.

(3) By reason of the said collision plaintiff's intestate was thrown from his bicycle and severely injured and crushed in or about his head, body, arms and limbs so that he was sick and sore and remained so until the 21st day of September, 1919, when the plaintiff's intestate, Harry B. Mahan, died as the result of the injuries received from the said collision with the defendant's automobile or motor car. 10

(4) The negligence of the defendant was, that she by her agents or servants was operating the automobile or motor car at a rate of speed higher than was safe for the plaintiff's intestate while using the said highway and that the said defendant failed to give proper notice, warnings and signals so as to warn plaintiff's intestate of his approach on the said highway, and that the defendant did not look and observe the condition of the highway so that he could see the plaintiff's intestate operating his bicycle on the said highway and that the said defendant was operating the said automobile on the wrong side of the said highway, thereby making it unsafe for plaintiff's intestate to make use of the said highway. That the said Harry B. Mahan, plaintiff's intestate, left him surviving his widow, the plaintiff, Caroline Mahan, and eight children, to wit: Alma, age 20 years; Frederick, 18 years; Edna, 16 years; Bertha, 14 years; Henry, 11 years; Charles, 9 years; Raymond, 7 years, and Edward, 3 years, all of whom were dependent upon the said Harry B. Mahan for maintenance and support and all of whom have suffered pecuniary loss by reason of his death. 20 30

(5) That by reason of the death of said deceased the plaintiff has been damaged and suf- 40

Amended Complaint.

ferred a pecuniary loss to the extent of \$20,000, consisting of wages, medicines, doctor bills and pecuniary loss due to the death of the said Harry B. Mahan.

10 (6) That at the commencement of this action the above-named plaintiff was duly appointed administratrix *ad prosequendum* on the 25th day of September, 1919, by the Surrogate of Mercer County for the purpose of prosecuting this suit for the next of kin of the said Harry B. Mahan, deceased, against the said defendant for the said wrongful and negligent acts of the said defendant.

20 (7) That this action has been begun within twenty-four calendar months from the date when the said accident happened which caused the death of the plaintiff's intestate.

(8) Wherefor the plaintiff demands damages against the witness for the sum of \$20,000.

MARTIN P. DEVLIN,
Attorney of Plaintiff.

30

40

Answer to Amended Complaint.

ANSWER TO AMENDED COMPLAINT.

(Filed November 15, 1920.)

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

10

<p>CAROLINE MAHAN, administratrix, &c., of Harry B. Mahan, de- ceased,</p>	}	Action at Law.
<p><i>Plaintiff,</i></p>		
<p><i>vs.</i></p>		
<p>ELIZABETH WALKER,</p>	}	ANSWER TO AMENDED COMPLAINT.
<p><i>Defendant.</i></p>		

The defendant, Elizabeth Walker, residing in the City of Trenton, in the County of Mercer and State of New Jersey, answering the amended complaint filed by the plaintiff, says: 20

1. Paragraph 1 is admitted, except that this defendant avers and says that the plaintiff's intestate in riding upon said bicycle acted in a careless and negligent manner.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied.

4. Paragraph 4 is denied, except as to the statement of the names and ages of the next of kin of said decedent, and as to this defendant has not sufficient knowledge or information to form a belief. 30

5. Paragraph 5 is denied.

6. Defendant is without information as to the statement contained in Paragraph 6 and leaves the same to be proved.

7. Paragraph 7 is admitted. 40

Answer to Amended Complaint.

FIRST DEFENSE.

10 Defendant says that if the said plaintiff's intestate received injuries on the occasion mentioned in the complaint, therein alleged to have resulted in death, the said injuries and the alleged resulting death occurred wholly without fault or negligence on the part of the defendant, and without fault or negligence on the part of any other person which can be lawfully imputed to the defendant.

SECOND DEFENSE.

20 Defendant says that if the said plaintiff's intestate received the injuries on the occasion mentioned in the complaint, and therein alleged to have resulted in death, the said injuries and the alleged resulting death were wholly due to the negligence of the plaintiff's intestate and want of due and reasonable care on his part under the circumstances.

HARRY HEHER,
Attorney of Defendant.

30

40

Certificate of Judge.

SUPREME COURT OF NEW JERSEY.

MERCER COUNTY.

CAROLINE MAHAN, administratrix <i>ad prosequendum</i> of Harry B. Mahan, deceased,	} Plaintiff,	} Action at Law. On Rule to Show Cause.	} 10
<i>vs.</i>			
ELIZABETH WALKER,	} Defendant.	} STATE OF THE CASE.	

I, Frank T. Lloyd, Judge of the Circuit Court, before whom the above case was tried, do hereby certify that the following is a true and correct transcript of the proceedings at the trial of the above case, including all the testimony presented, all motions and rulings made, the charge of the Court, and requests to charge made by the respective parties. 20

FRANK T. LLOYD.
Judge.

30

40

Caroline Mahan, direct.

NEW JERSEY SUPREME COURT.

No. 13, MERCER CIRCUIT.

October Term, 1920.

10	CAROLINE MAHAN, administratrix <i>ad prosequendum</i> of Harry B. Mahan, deceased,	} Plaintiff,	Action at Law.
	<i>vs.</i>		
	ELIZABETH WALKER,	} Defendant.	

20 Transcript of shorthand notes of testimony, etc., taken in the above-stated matter on the trial thereof before Honorable Frank T. Lloyd, Circuit Court Judge, and a jury, at the Court House, Trenton, New Jersey, on Monday, November 15, 1920.

Appearances :

Martin P. Devlin, Esq., for the plaintiff.

Harry Heher, Esq., for the defendant.

(Jury called and sworn.)

(Counsel opened.)

30

CAROLINE MAHAN, the plaintiff, sworn.

Direct examination by Mr. Devlin.

Q Mrs. Mahan, you are the administratrix of your husband, Harry B. Mahan? A Yes, sir.

Q How old are you? A Thirty-nine.

Q You and your husband lived together where? Where were you living on September 13, 1919? A At Slackwood, on the Brunswick
40 Pike.

Caroline Mahan, direct.

Q When did you last see your husband on the 13th day of September, 1919? A Why, in the afternoon.

Q When again did you see your husband? A Saturday night I saw him in the hospital about eleven o'clock.

Q In McKinley Hospital? A Yes, sir. 10

Q He was then living, was he? A Yes; he was living at the time.

Q How many times did you see him before—when did he die? A He died the 21st of September.

Q How many times did you see him between the time he was hurt and the time of his death? A Well, all the week.

Q All the week, each day? A Yes, sir.

Q Was he conscious or unconscious? A He was unconscious. 20

Q All the time? A Yes.

Q He died on the 21st day of September, 1919? A Yes, sir.

Q You did not see how he was hurt or anything, did you? A No.

Q What was his age? A Forty-one.

Q When was he forty-one? A Well, he had passed forty-one.

Q And he would be forty-two on what date? 30
A The 22nd of February.

Q 1920? A Yes, sir.

Q This was in September, 1919, that he died, was it? A Yes, sir.

Q How many in the family have you? A Eight.

Q Eight children? A Yes, sir.

Q Tell me what the ages of those children were at the time of his death. A There is Alma, twenty; Frederick, eighteen; Edna, six- 40

Caroline Mahan, direct.

teen; Bertha, fourteen; Harry, eleven, Charles, nine; Raymond, seven, and Edward is three.

Q What was your husband's occupation? A A ware placer.

Q I beg pardon? A A kiln drawer.

Q How long have you been married? A
10 Twenty-one years.

Q What was the condition of his health? A It was good.

Q What is the condition of your health at present? A Well, it is not very good.

Q I beg your pardon? A My health is not very good.

Q What is the trouble?

Mr. Heher. I object to that.

A Well, it is nervousness.

20 *The Court.* I suppose it would have bearing on the possible duration of the joint lives.

Q You said nervousness? A Yes, sir.

Q Do you know how much wages your husband earned a week? A Thirty dollars.

Q Where did you last see your husband on the 13th before he was hurt? A At home.

Q You live on the Brunswick Pike? A Yes,
30 sir.

Q Your home is there? A Yes, sir.

Q With your eight children? A Yes, sir.

Q How many of those children are working?
A Well, there is only two at the present time.

Q And, of course, you do not work? A No, sir.

Q You have to remain home and look after the family? A Yes, sir.

Caroline Mahan, cross.

By the Court.

Q Which children are working? A Edna and Alma.

Q The two oldest girls? A Yes.

Q What about the boy of eighteen? A He is laid off.

Q You mean he has been working, but he is not working at this time? A No. 10

By Mr. Devlin.

Q On what side of the Brunswick Pike was your home in September, assuming you were going toward Lawrenceville or Princeton, on what side of the road? A On the left-hand side.

Q You are still living there? A Yes, sir.

Q How many of these children go to school? A Five of them. 20

Q Your husband was the one who maintained the family? A Yes, sir.

Q How long had you lived in this house on Lawrence road? A It is over three years now.

Cross examination by Mr. Heher.

Q How old are you now, Mrs. Mahan? A Thirty-nine.

Q How old was your husband when you were married? A We were married in December and he would have been twenty-one in February. 30

Q That was twenty-one years ago? A Yes, sir.

Q Now, Frederick, the oldest boy, has been working until recently? A No; he is not working now.

Q But he has been working? A Yes.

Q Was your husband ill at any time within a year preceding his death? A No. 40

Caroline Mahan, cross.

Q He had not been ill at all? A No, sir.

Q He had not had the attendance of any physician? A No.

Q Did he ever have the attendance of any physician while you were married? A No, sir.

Q Had he worked steadily. A He always
10 worked steadily.

Q Where was he employed at the time of his death? A Well, he was not working at that time.

Q He was not working? A No; and the last place was Lenox's.

Q Lenox, Incorporated? A Yes.

The Court. A pottery?

The Witness. Yes, sir.

Q The Lenox pottery? A Yes.

20 Q When had he discontinued his work there?

A I guess about a month.

Q A month before the accident? A Yes.

Q Did he voluntarily leave or was there another reason why he quit work there? A No; he left on his own accord there.

Q Did he leave because of ill health? A No, sir.

30 Q What was the reason he left? A He asked for more wages.

Q How much was he making at that time? A Thirty dollars a week.

Q How did you know that he was making thirty dollars a week; by what he told you? A No; by what I received.

Q How long had he been working at Lenox, Incorporated, the pottery? A I could not tell you that but I know he worked there quite a while.

40 Q A year? A Oh, I guess it was every bit of that.

Frederick Edgar Udy, direct.

Q Where had he worked previously? A At the Empire.

Q The Empire pottery? A No; the rubber mill.

Q What was the nature of his work there?
A I think he was in the shipping department there. 10

Q Did he leave the Empire to go to the Lenox pottery? A I believe he did.

Q Or was he out of work for some time? A I could not just tell you how it was, now.

FREDERICK EDGAR UDY, sworn as a witness on behalf of the plaintiff.

Direct examination by Mr. Devlin. 20

Q Where do you live? A Slackwood.

Q How old are you? A I will be sixteen the last of March.

Q Where do you work? A Katzenbach's.

Q What do you do? A Clerk.

Q Behind the counter? A Yes, sir.

Q To wait on people? A Yes, sir.

Q How long have you lived in Slackwood?
A About three years, I guess; three or four years. 30

Q Did you know Harry B. Mahan in his lifetime? A Yes, sir.

Q You knew him to see him? A Yes, sir.

Q Did you know him to speak to? A No, sir; I did not know him to speak to.

Q Speak loudly, please. Do you remember the thirteenth day of September, 1919? A Yes, sir.

Q And something happening? A Yes, sir. 40

Frederick Edgar Udy, direct.

Q Where were you at the time? A I was riding up on the Brunswick Pike. I was just about opposite Mahan's house.

Q What were you riding? A In a pony wagon.

Q Who did you have in the wagon with you?

10 A Two or three of my little sisters.

Q How old were they? A Well, at that time I guess it was eight, six and three, or something like that.

Q You were giving them a drive? A Yes.

Q You were driving? A I was driving.

Q What way were you driving? A Toward Princeton.

Q What side of the road were you on? A The right.

20 Q Did you see Mr. Mahan? A Yes, sir.

Q Whereabouts was he with you? A He was just pulling up in back of me.

Q What did you hear and see happen? A I heard the automobile coming up the road.

30 Q What was the noise that you heard? A I heard the motor and when it came over the bridge I heard it come over the bridge and after it came over the bridge I was pulling over on the side, on the dirt off the road, so it could pass, to give it plenty of room, and then I looked back and Mr. Mahan was coming and he put his hand out and started to turn in off the right of the road on to the left.

Q Will you repeat that, please? A After the automobile came over the bridge I pulled over to the right as far as I could off the road, and Mr. Mahan put out his hand and pulled in and the automobile was coming up in back of him.

40 Q Was Mahan on the bicycle? A Yes.

Frederick Edgar Udy, direct.

Q Did he pass you or your wagon and pony?

A He did not pass me. He was right alongside of me.

Q What did you see him do? A I seen him hold out his hand and pull in.

Q Which hand? A The right hand—the left hand, I mean. He was on the right of the road and put out his left hand. 10

Q You were on the right of the road, too? A Yes.

Q When you saw that hand put up what did you see Mahan do? A Turned in.

Q Turned in to what, the right or left? A The left, into his house.

Q Do you know where his house is? A Yes, sir.

Q Where was his house with relation to where you were standing? A Right across the street from me. 20

Q How wide was the macadam or the road at that time, if you know? A The macadam was about twenty feet, I guess.

Q And on each side it was dirt? A Yes.

Q Any pavement? A No pavement.

Q When you saw Mahan put up the left hand can you tell us how far the automobile was away behind him? A Well, I should judge about two hundred feet; somewhere along there. 30

Q As you stood there could you see the machine, the automobile? A Yes, sir; I stopped.

Q You stopped your pony? A Yes, sir.

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

Q Do you know anything about the speed? Have you ridden a bicycle or do you know anything about speeds? A Yes, sir.

Q Have you ridden a bicycle? A Yes, sir. 40

Frederick Edgar Udy, direct.

Q Have you ever driven an automobile? A
No, sir.

Q Have you ridden in one? A Yes, sir.

Q Often? A Quite often.

Q What do you think was the speed of the
automobile that came up the road?

10 *Mr. Heher.* I object. I do not think the
witness is qualified to give any opinion as to
the speed of automobiles.

By the Court.

Q How do you know the speed at which ve-
hicles have been going when you have been using
them or riding in them? A Why, there is a
speedometer on most automobiles.

Q Do you mean you watch the speedometer
20 or what? A Yes, sir.

The Court. You may cross examine if you
want to, Mr. Heher.

By Mr. Heher.

Q How many times have you ridden in an
automobile? A About seventy-five.

Q Whose automobile? A Well, I have rode
30 in my grandfather's and with different people
living around Slackwood.

Q And did you watch the speedometer of that
automobile? A Yes, sir.

Q To determine how fast you were going? A
Yes, sir.

Q Do you think you can tell the speed at
which an automobile is traveling by standing on
the road and watching it? A I could judge.

Q Do you feel you are able to judge pretty
accurately? A Somewhere near it.

40 *Mr. Heher.* That is all.

Frederick Edgar Udy, direct.

By Mr. Devlin.

Q You have also ridden a bicycle? A Yes, sir.

Q How long have you ridden a bicycle? A I have owned one for about four or five years.

Q And you have ridden that pretty well over the county, I suppose? A Yes, sir. 10

Q How fast do you think the machine was going? A Forty miles an hour.

Q What did you see when you saw Mr. Mahan turn out on the road? What did you see happen there? A I seen this automobile come up and it bore to the left as far as it could without hitting the telegraph pole there, and the front wheel of Mr. Mahan's bicycle—the back mud guard of the automobile hit it and pushed it out from under. 20

By the Court.

Q Which side of the automobile? A The right-hand side of the automobile.

By Mr. Devlin.

Q Did I understand you to say that the back mud guard of the right-hand wheel hit the bicycle of Mahan? A Hit the front wheel. 30

Q Of his bicycle? A Yes, sir.

Q And what side of that road was the automobile on then? A On the left-hand side.

Q On its left? A One wheel was off of the concrete and the other side was on the dirt on the side of the road.

Q Repeat that. A The right-hand wheel was on the asphalt and the left-hand wheels were on the dirt. 40

Frederick Edgar Udy, direct.

Q How far was Mahan across the road when he was struck? A About—well, he was almost over; a little over half.

Q Was he on the macadam or off the macadam? A He was on the macadam; he wasn't quite off the macadam top, where the crown of the road starts to slope to the left.

Q How far did the automobile go, or did the automobile travel any distance after striking Mahan's bicycle? A Yes, it went a distance.

Q How far? A About fifty or seventy-five feet.

Q Did you notice who was driving the automobile? A A man with a white shirt; that is all I noticed.

Q Was there any other person in the automobile? A There was a mechanic lying on the running board on the other side.

Q A little louder, please. A There was a mechanic lying on the foot board, on the front mud guard.

Q On which side of the machine was the mechanic lying? A On the left-hand side of the automobile.

Q Was the hood of the automobile open or closed? A It appeared to me as though it was up.

Q The machine, you say, ran about seventy-five feet after it struck the rear wheel? A Yes, sir.

Q When Mahan's front wheel was struck, what happened to Mahan? Did you see? A He just fell over on the road there and just laid there.

Q Did you see him after he fell? A Yes; I was looking at him more than anything else.

Frederick Edgar Udy, direct.

Q Did you see his face? A Well, I could see him lying down there. I couldn't see no mark or blood on him.

Q And he laid there until he was taken away?
A Yes.

Q Were you there until he was taken away?

A Yes.

10

Q Do you know who took him away? A The same automobile.

Q Now, let me direct your attention. Before Mahan crossed the road your little pony and wagon was passing toward Lawrenceville, wasn't it? A Yes, sir.

Q Was there any other wagon or machine in front of you on the road—I mean on the road in front of you, going either way? A I did not notice any.

20

Q What time of the afternoon did this accident happen, about? A About half-past six, I guess.

Q Was it daylight? A Yes, sir.

Q Quite clear? A Yes, sir.

Q Was it a dry or wet day? A Dry.

The Court. What was the condition of light or darkness?

Q Was it daylight? A Yes, sir.

30

Q Quite clear? A Yes, sir.

Mr. Devlin. You see we had daylight saving at the time.

The Court. Are you speaking of daylight saving time all through?

Mr. Devlin. Yes, sir. As a fact, this was about half-past five, standard time.

Q At that point is the road straight or crooked? A Straight.

40

Frederick Edgar Udy, cross.

Q Objects would be clear in front of you? A Yes.

Q The direction from which the automobile came, that is, coming from toward the Trenton section, was that straight, that part of the road? A Yes, sir; it was straight.

10 Q So you could see a clear view up and down? A Yes.

Q And it was straight forward and in front of you? A Yes, sir.

Q When the automobile stopped was the automobile driven back or did the man in it come back? A The man that was driving it jumped out and the automobile went up to the cross road and turned around and came back.

20 Q How far away was he from where he struck Mahan before he jumped out? A About seventy-five feet.

Q He jumped out and came back? A Yes, sir.

Q The other man stayed in and drove the machine around and brought it back? A Yes, sir.

Q Were you there when the man came back, who drove the machine? A Yes, sir.

30 Q Did he say anything? A I heard him say something. I did not pay much attention, though. I was standing there near Mr. Mahan.

Q And he still laid on the road? A A couple of fellows picked him up.

Q He did not move or talk any, though, did he? A No, sir.

Cross examination by Mr. Heher.

Q Where did you live at that time? A Slackwood.

40 Q That is this side of where the accident happened? A Yes, sir.

Frederick Edgar Udy, cross.

Q You were leaving home that day? A I was taking the children out for a ride.

Q And you were proceeding toward Lawrenceville? A Yes.

Q You had gone down the road from Slackwood, over this bridge? A Yes, sir.

Q Mr. Mahan's house was how far from the bridge? A About three hundred and fifty or four hundred feet; something like that. 10

Q On the left-hand side of the road going in the direction of Lawrenceville? A Yes, sir; this side of Lawrenceville.

Q Did you stop your carriage at any time after leaving Slackwood until you reached this point? A No, sir.

Q When did you stop here? A After I seen the automobile or heard it go over the bridge. 20

Q Why did you stop? A Because I wanted to get out of the road and give it plenty of road.

Q You turned to the right? A Yes, sir.

Q Are you sure you stopped? A Yes, sir.

Q Did you hear the horn blow? A No, sir.

Q But you heard the automobile? A Yes, sir.

Q You say you heard the noise of the motor? A Yes, sir. 30

Q And you heard it come over the bridge? A I heard it rattle when it came over the bridge.

Q There is wooden planking on the bridge? A Yes, sir.

Q Every time an automobile drives over it it makes a rattling noise? A Yes, sir.

Q And you heard that rattling distinctly? A Yes, sir.

Q When did you turn around? A I did not turn around. 40

Frederick Edgar Udy, cross.

Q I mean turn your head. A After I stopped. When I was coming up the road and heard the automobile going over the bridge I looked back and pulled in as soon as I seen the automobile was coming.

10 Q You pulled to the right? A Yes; I was off the asphalt.

Q Wasn't your pony still moving? A No, sir; it was standing still.

Q Where was Mr. Mahan at the time? A He was right in the rear of me on the left-hand side. To the left of me, he was, because I was over off the road.

Q Then he was on the right-hand side of the asphalt? A Yes, sir.

20 Q And going in the same direction you were going? A Yes, sir.

Q How far behind you was he when you first saw him? A About fifteen feet.

Q Was that when you had stopped? A No; I looked back then.

Q When you stopped and looked back he was fifteen feet behind you? A Yes, sir. I knew he was going to turn in there and I wanted to give him plenty of the road.

30 Q You knew who was going to turn in? A Mr. Mahan. I knew he lived there.

By the Court.

Q Had you seen him before? A Not that day.

Q How did you know he was behind you? A When I looked back and saw the automobile.

40 Q You had turned off the road then, hadn't you? A No, sir. I looked back and seen the automobile coming when I heard it go over the bridge and I pulled in.

Frederick Edgar Udy, cross.

Q How far was the bridge from where you stopped? A About three hundred and fifty feet.

Q Have you measured it or are you just guessing? A Just guessing.

By Mr. Heher.

10

Q You said three hundred feet a little while ago, didn't you? A I don't think so.

Q When you heard the automobile coming over the bridge you stopped? You turned to the dirt portion of the road first? A Yes, sir.

Q And got clear off the traveled portion of the road? A Yes.

Q And you stopped? A Yes.

Q And looked around? A I looked around before, too. 20

Q When did you look around first? A When I heard it go over the bridge.

Q And you saw Mr. Mahan behind you when? A About fifteen feet back of me when I stopped.

Q When did you see him before that? A When I pulled over.

Q You knew he lived there? A Yes.

Q And you wanted to give him room to turn over? A I wanted to give the automobile room to pass me. 30

Q What did you mean when you said you wanted to give Mr. Mahan room to turn over? A I knew he was going to turn in, and the automobile was coming up the hill, too, and I wanted to give them both plenty of room.

Q There was plenty of room for him to turn in, as far as you were concerned, wasn't there?

A The automobile would be more likely to strike him when he was crossing the road. 40

Frederick Edgar Udy, cross.

Q Even though you stayed where you were you would not prevent Mr. Mahan turning in to his home? A No.

Q Why did you turn over, in order to allow him to turn to the left? A Because I thought I would pull over and give them all the room I
10 could.

Q To give Mr. Mahan all the room you could? A Both of them.

Q You were not in his way? A I was not in anybody's way.

Q The reason you turned to the right was to allow the automobile to pass? A Yes.

Q The road is narrow there? A About twenty feet of asphalt and about forty feet all
20 together.

Mr. Devlin. How much?

The Witness. About thirty-five or forty feet.

Q Did you measure that? A No, sir; I guessed it.

Q Why did you turn to the right if there was plenty of room for an automobile to pass? A I pulled over to give him all the room I could. I knew he was going to pull in there.
30

Q Well, he had plenty of room? A Well, I pulled over, anyway.

Q You say you saw Mr. Mahan before? A Yes; when I looked back.

Q I mean before that day. A Sure.

Q How many times did you see him? A A good many times. He went up and down the road on his wheel.

Q Did you know who he was? A Yes, sir.

40 Q You knew his name? A Yes, sir.

Frederick Edgar Udy, cross.

Q When you looked back and saw him fifteen feet behind you what was he doing? A Riding a wheel on the right-hand side of the road.

Q Did you see him do anything? A I seen him hold out his hand.

Q When he was fifteen feet behind? A Yes sir. 10

Q And then he pulled up alongside of your cart? A Yes, sir.

Q Then he turned in? A Yes, sir.

Q And this automobile was coming up at that time? A Yes, sir.

Q Just show the motion he made with his hand. A (Illustrating.) He held out that hand.

Q His left hand? A Yes.

Q How long did he hold it that way? A A 20 half minute—

Q What say? A Not that much; no; but he held it out time enough for anybody coming up the road to see. He did not hold it out there very long.

Q When you looked back and saw him fifteen feet away, how long did you continue looking back in that direction? A Until I pulled right in. 30

Q Until he pulled right in? A I pulled right in as soon as I saw him.

Q You looked back and turned to your left and pulled in? A Yes.

Q You only looked back an instant? A Yes.

Q And saw that this automobile was coming? A Yes.

Q When you saw it was coming you turned to the right? A Yes, sir; I turned off the asphalt. 40

Frederick Edgar Udy, cross.

Q You were not paying any attention to the man on the bicycle at the time? A When I looked back I seen him hold his hand out.

Q And you saw that a half minute? A I could not say how long it was. It wasn't half a minute; no.

10 Q Well, you said half a minute, didn't you? A I thought that at first, but he couldn't be coming up the road—he pulled in after he held out his hand, and that was fifteen feet in back of me.

Q He pulled in to the left? A Yes; toward his house.

Q How long did you see him keep his hand extended? A While I was looking back at the automobile.

20 Q You only looked and then turned your head and pulled in? A Yes.

Q And he pulled up alongside your cart before he turned? A I was off the road then.

Q When he turned to the left could you see him alongside your cart? A Yes; he was on the right-hand side of the middle portion of the pavement.

30 Q And was he alongside of your cart so you could see him by turning your head to the left? A Yes.

Q Then he turned sharp over? A He made a quarter circle.

Q Where was the automobile at the time he made the quarter circle? A It was coming up the hill.

Q And he went over to the left, did he not? A Yes.

40 Q The front part of his bicycle struck the rear right-hand side of the automobile? A

Frederick Edgar Udy, cross.

Yes; he was turning and the automobile kind of sideswiped him.

Mr. Devlin. Don't describe it with your hands. Use your own language how it happened. The stenographer does not get the hand motions. If you will describe it the best you can in language, what you saw. 10

Mr. Heher. He has a right to supplement his explanation by a description, I think.

Q The front part of the automobile passed his bicycle without touching it, didn't it? A Mr. Mahan wasn't over quite far enough to hit it.

Q He was not over quite far enough to hit it?
A No, sir.

Q Well, that is true; the front part of the automobile, and the center part, did pass him without touching the bicycle at all? A Yes. 20

Q And then the front part of that bicycle and the rear right-hand mud guard came in contact? A Yes; or the rear; I don't know which.

Q What say? A The back part of the automobile, the mud guard or something back there.

Q When that happened he fell off the bicycle to the roadway? A Yes. 30

Q And the automobile was turned to the left of the road? A It was on the left of the road; yes.

Q It was on the left-hand side of the road?
A Yes.

Q You said at first the automobile went between fifty and seventy-five feet, and then you said seventy-five feet. A Well, it was between fifty and seventy-five feet, as near as I could tell. 40

Frederick Edgar Udy, cross.

Q After striking the rear mud guard? A Yes, sir.

Q Where did it stop on the road? A On the left-hand side. He pulled out a little to the right, though.

10 Q It remained on the asphalt part of the pavement? A Yes, he was on the right-hand side of the asphalt when he slowed down.

Q The left side of the road? A The left side of the asphalt.

Q That is, to the left of the crown of the road? A Yes, sir.

Q You did not measure the distance the automobile went, did you? A No, sir.

Q What happened as soon as it stopped? A A fellow got out of it.

20 Q The man that was driving it got out? A Yes.

Q What became of the man that was lying on the mud guard, the mechanic? A He took the car up—the car went up, anyway.

Q Did he fall off the automobile, did you notice? A No, I did not notice. I could not see from the angle the automobile was in.

30 Q He took the car up to the cross roads and turned it around and came back and took Mr. Mahan in the car to the hospital? A Yes.

Q And when it stopped the driver of the car got out and came back to where Mr. Mahan was? A Yes.

Q Now, he was lying to the left of the center of the road, that is, the asphalt portion? A Yes.

Q The bicycle was where? A At that side toward Princeton.

Q Just a little bit beyond him? A Yes, sir.

40 Q The bicycle was near him, wasn't it? A Yes, sir; right alongside of him.

Frederick Edgar Udy, cross.

Q Was the bicycle undamaged? The bicycle wasn't damaged hardly at all. The only thing it done, I think, was a little to the handle bars. It bent them up some way.

Q Did you examine the automobile? A No, sir.

Q You did not see any dents in the right-hand rear mud guard? A No, sir; I wasn't looking at that. 10

Q Have you ever had any experience in measuring distance? A No, sir.

Q Then these estimates you give are only guesses, aren't they? A Well, I know the Battle Monument is 150 feet high, and I have run in races—fifty-foot races.

By the Court.

20

Q How long is as far as from here to the other end of the room? A About thirty or thirty-five feet.

By Mr. Heher.

Q Thirty-five feet from here to the other end of the room? A Thirty feet.

The Court. It depends on what you mean, Mr. Heher. 30

Q I mean from where you are to the other end of the room. A Yes, sir.

Q Thirty feet? A Yes, sir.

Q Are you sure that you did not hear the horn blown? A Yes, sir.

Q You heard the automobile coming? A I heard it coming.

Q You pulled over to get away from it? A Yes, sir. I heard it come over the bridge and 40

Charles Wenzel, direct.

I heard the automobile after it came over the bridge. I heard it coming up the hill.

Re-direct examination by Mr. Devlin.

Q As you saw the automobile come up the road what was its position in the road? Was it
10 on the right, left or center? A It was about in the center coming up after it went over the bridge, in the center of the road.

Q What side of the road was the bicycle on after Mahan was thrown from it? A The left-hand side of the asphalt.

Re-cross examination by Mr. Heher.

Q In coming over the bridge it is necessary to keep to the center, is it not? A Well, you
20 cannot get too close to the edge.

Q It is a narrow bridge? A Yes.

Q The road is narrow there? A Yes, sir; and after it got over the center of the bridge it was in the center of the road, too.

Q In the center of the asphalt? A I did not see it exactly when it was coming over the bridge. I heard it and then looked back.

Q And it was in the center of the asphalt portion of the road? A Yes, sir.
30

Q Which you say is about twenty feet wide? A Yes, sir.

CHARLES WENZEL, sworn as a witness on behalf of the plaintiff.

Direct examination by Mr. Devlin.

Q What is your name? A Charles Wenzel.

Q Where do you live? A Slackwood.

40 Q What is your occupation? A German.

Charles Wenzel, direct.

Q What? A My occupation?

Q Yes; what do you work at? A Truck driver.

Q What did you work at before that? A Team driver.

Q Did you know Mahan, the deceased, Harry B. Mahan? A Yes. 10

Q He was your brother-in-law? A Yes, sir.

Q How far from his home do you live? A I live right there.

Q Near his home? A Right in the same house.

Q You live in the same house? A Yes, sir.

Q Do you remember September 13, 1919, last year? A Yes, sir.

Q Did you see Mahan that day? A Yes, sir. 20

Q What time in the evening was it? A About seven o'clock.

Q About seven o'clock in the evening? A Yes, sir.

Q Where were you? A Sitting on the porch.

Q Now, tell us what you saw. A I was sitting on the porch smoking a cigarette there. I generally do sit there pretty near every night when it is nice and warm. And I saw Mr. Mahan putting out his hand ready to turn in, and this car was coming up there pretty good speed and when Mr. Mahan was ready to turn in this fellow pulled around in front of him; instead of turning to his right he pulled in front of him, but he couldn't make it and he sideswiped Mr. Mahan and knocked him out in the road. 30

Q Did you see Mahan before he turned in?
A Yes, sir. 40

Charles Wenzel, direct.

Q What side of the road was he riding on?

A The right-hand side.

Q His right? A Yes, sir.

Q Going toward Lawrenceville? A Yes.

Q Did you see the boy, Udy, who was on the stand before you? A Yes.

10 Q Where was he? A Pulled off the road, in the ditch there.

Q Where was he with his pony, or who was with him? A He had some little girls in there, I think.

Q When you first saw the automobile how far was it away? A About 300 feet; something like that.

Q You say you are a truck driver? A Yes, sir.

Q That means you can drive an automobile?

20 A Yes, sir.

Q How far was the automobile away, as far as you can judge, when you at the same time saw Mahan on the road? A About 250 feet.

Q What did you see Mahan do? A All I seen him do was put out his hand.

30 Q Which hand? A The left hand, ready to turn in to his own home; and I was sitting there and this machine come along and sideswiped him and knocked him right off the wheel.

Q How far was he across the road before he was struck? A He was over half way across the road.

Q What part of the machine struck Mahan? A The back part; the right-hand mud guard.

40 Q Do you know what part of Mahan's bicycle or of Mahan was struck by it? A I do not know where he was struck. I was sitting on the left-hand side from him, but I seen him sideswiped and knocked off the wheel.

Charles Wenzel, direct.

Q Into the road? A Yes.

Q Are you familiar with the speed of machines? A Yes.

Q What speed would you say the automobile came up the road at? A He was riding about forty or fifty miles an hour, because I never heard an engine hum without he goes that fast.

Q Was that engine humming? A Yes. 10

Q Did you notice the hood? A No; I did not.

Q How many men were in that machine? A I only seen one.

Q What was he doing when you saw him? A He was watching, looking down toward the mechanic on the mud guard.

Q Where was the mechanic? A Riding on the mud guard.

Q On what side of the machine? A The left-hand side. 20

Q And the other man you saw looking down, was he driving the machine? A The man I saw; yes, sir.

Q And looking down? A Looking down.

Q Do you know who that man was? A No; I do not.

By the Court.

Q Do you mean he was looking down when the accident happened? A Yes, sir. 30

By Mr. Devlin.

Q Do you know if the hood of the machine was open or closed? A I could not say.

Q After Mahan was struck how far did the machine go? A Why, it never slackened down—it just slackened down, and after that slack-

Charles Wenzel, direct.

ened down he threw himself out of the car and rolled in the weeds like a rubber ball.

Q Which fellow? A Buckley, and the mechanic slipped in and took the wheel right away, because if he hadn't took the wheel the car would have run in the trees there or something.

10 Q Is Buckley in court today? A I could not say.

Q Did anybody come back after he hit Mahan? A After he hit Mahan I went out to get the right number.

Q Who did you see? A I walked out to the road to get the number, and when I walked out to the road Buckley threw himself out of the machine. He seen I had him and I walked out to him and coming down he said, "What is the matter with that man?" And I said, "Nothing is the matter after you killed him." And he said, "Oh, God! Don't tell me that." And I said, "There he is." And I said, "Where are your eyes?" He didn't say no more to me.

20

Q Did the machine come back? A Yes.

Q Did you see the man that brought it back? A Yes.

Q Did you say anything to him? A No, sir.

30

By the Court.

Q Where was the machine, the automobile, when Mahan turned to cross? A It was just crossing the bridge, just the other side of the bridge.

Q When he started to cross? A Yes.

Q Do you mean it covered the distance, and more, from the bridge to him before it hit him?

A Yes, sir.

40

Charles Wenzel, cross.

Mr. Devlin. I did not get the answer and I do not think the jury did.

The Court. He said, "Yes."

By Mr. Devlin.

Q Then Mahan's body was taken to the hospital? A Yes. 10

Q Who took him to the hospital? A Mr. Buckley and the mechanic and two other gentlemen.

Q Had you talked with Mahan that day before—when was the last time you saw Mahan that day? A At dinner time.

Q What hour was that? A About half-past twelve.

Cross examination by Mr. Heher. 20

Q You were living at the house at that time? A Yes, sir.

Q How long had you been seated on the porch before this occurred? A About twenty minutes.

Q What was the first thing that attracted your attention? A I looked out in the road. I heard that car coming down the road, and humming. 30

Q Where was the car when you saw it? A Just the other side of the bridge.

Q It had not reached the bridge? A The other side of the bridge.

Q From you or what? A The other side from me.

Q Then it had not reached the bridge at that point? A Yes, sir.

Charles Wenzel, cross.

By the Court.

Q Counsel asks whether it had come up to the bridge at the time you first saw it. A It was the other side of the bridge.

Q Does that mean it had not yet reached the bridge? A No; it was across it.

10

By Mr. Heher.

Q Then he had left the bridge when you first saw him? A Yes.

Q Did you hear the car going over the wooden planking of the bridge? A Yes, sir.

Q Was that what attracted your attention? A No; I heard him coming down the hill.

Q You said you did not see him until after he passed the bridge. A What drew my attention, I heard him coming down the hill. We can look up to the hill there. The motor was humming.

20

Q As soon as you heard the motor humming you looked? A Yes.

Q The bridge is at the bottom of the hill? A Yes.

Q You come down the hill from Slackwood and the bridge is at the foot of the hill, and then you ascend toward Lawrenceville, toward Mahan's house? A Yes.

30

Q When you heard the motor you looked? A Yes.

Q You saw the car? A Yes.

Q Which side of the bridge was it on? A On the other side of the bridge. I didn't pay no more attention to him after I heard it coming.

Q Had it crossed the bridge? A Yes.

40

Charles Wenzel, cross.

By the Court.

Q You say you saw it the other side of the bridge. What we want to know is which side of the bridge was the car on when you first saw it, your side or the side away from where the accident happened? A The side away from where the accident happened; and then I heard it hit the bridge and then I looked again and that is when this accident happened. 10

By Mr. Heher.

Q When you heard the car go over the wooden planking you looked and saw it coming? A Yes.

Q Where was Mr. Mahan on his bicycle? A He was coming up on the right-hand side of the road. 20

Q How far from the bridge? A I should judge about 300 or 350 feet.

Q How far is the house where you live from the bridge? A I should judge pretty near 400 feet.

Q Then he was near the house? A Yes.

Q Where was it when you first saw the carriage? A He was turned off in the ditch to the right. 30

Q Had he stopped? A Yes.

Q Did you notice the carriage coming up the hill? A Yes.

Q Where was it when you first saw the carriage? A About half way up from the bridge up to my house.

Q When did he turn off toward the right and stop? A Just as soon as he saw Mr. Mahan coming up the road I seen him stop there. 40

Charles Wenzel, cross.

Q As soon as he say Mr. Mahan or the automobile? A No; when he saw Mr. Mahan.

Q How do you know he stopped as soon as he saw Mr. Mahan? A He must have.

Q Why did he stop then? A He knowed this man was going to turn in and I suppose he
10 stopped.

Q There was plenty of room for Mr. Mahan to turn in—

Mr. Devlin. I object. I think that is argumentative.

The Court. That is a matter of observation.

A Why, when Mr. Mahan was coming up the right-hand of the road—

The Court. The question is whether there
20 was plenty of room for him to turn in without the wagon turning off.

The Witness. Well, yes; there was.

Q Then he did not turn over to the right in order to left Mr. Mahan into his property, did he? A I couldn't say properly about that. I know he wanted to give him room.

Q How do you know that? A When anybody puts out their hand I either slacken down
30 or go around to the right.

Q This young man in the carriage was ahead of Mahan? A Yes.

Q Why would he turn over to the right when Mr. Mahan put out his hand?

Mr. Devlin. I object to that. Isn't that a matter of argument?

The Court. I think it is.

Mr. Heher. The witness says he did that
40 in order to let Mr. Mahan get in there.

Charles Wenzel, cross.

By the Court.

Q You do not know, of course, what was in the mind of the boy. That is obvious.

Mr. Heher. I wanted to know whether he concluded that or whether it is something the boy told him.

10

The Court. Ask how he knows.

By Mr. Heher.

Q How do you know this young man in the carriage turned to the right and stopped in order to let Mr. Mahan turn in to his property? A Why, the way Mr. Mahan put out his hand and turned in to his home; I guess the boy judged the machine would come around to his right and he wanted to give the machine more room.

20

Q That is your conclusion? A Yes.

Q At the time the boy turned to the right and stopped where was the automobile? A Coming up the hill.

Q It had passed the bridge? A Yes.

Q And Mr. Mahan was directly behind the pony cart? A Yes.

Q Proceeding in a straight direction on the right-hand side of the road? A Yes.

30

Q How far behind the carriage was he at the time the carriage pulled in and stopped? A Why, about twenty-five or fifty feet.

Q How far from the carriage was Mr. Mahan at the time that he turned to the left in order to cross the road? A He was almost alongside of the carriage then.

Q He had not reached it, though? A Yes, sir; he was right by the back wheel of the carriage.

40

Charles Wenzel, cross.

Q He had not actually reached it, but he was behind it? A Yes, sir.

Q How long did he hold his hand out? A I couldn't say; about a second or something like that.

10 Q He just put it out and pulled it in? A Well, he held it there until he got almost half way across the road.

Q I mean before he made the turn to the left? A He didn't hold it out before he made the turn. As soon as he was ready to make the turn he put his hand out.

Q As soon as he started to make the turn he held his hand out? A Yes.

Q And he held it there until he was half way over the road? A Yes.

20 Q You are sure he did not put out his left hand until he started to make the turn to his left? A He made the turn to the left and then he put out his hand.

Q Then as he was ready to make the turn to the left he held out his hand and held it out until he was half way across the road? A Yes, sir.

Q This automobile blew a horn? A No, sir.

Q You are sure of that? A No, sir.

30 Q You heard the noise? A Yes, sir.

Q And that noise continued until the accident happened, didn't it? A Yes, sir.

Q How fast did you say it was going? A Close to forty or fifty miles an hour.

Q Was it forty or fifty? A It was close between forty and fifty miles an hour.

Q Have you driven automobiles? A Yes.

Q How long? A Going on four years.

Q Trucks? A Yes, and cars, too.

40 Q Is not putting out the hand a signal used to indicate to automobiles behind that there is

Charles Wenzel, cross.

a vehicle or something in front that requires them to slow down? A Yes, sir.

Q That does not mean a man is going to suddenly turn to the left short of a cross walk? A No, sir; when a man throws out a signal you are supposed to slacken down and see what he intends to do.

10

Q Isn't the putting out of the hand used as a signal to show the man in front is slowing down, as a signal to those behind to slow down? A They are supposed to slacken down; I know that.

Q Does not that indicate there is a vehicle in front which has slowed down? A Yes, sir.

Q And there was in front of Mr. Mahan at the time this pony cart, this wagon, which had stopped in the road? A Yes, sir.

Q As an automobilist, is that signal ever used to indicate that the driver of a vehicle is going to suddenly cut across from the left to the right of the road? A No.

20

Q Did you see what part of the automobile came in contact with Mr. Mahan's bicycle? A Why, it sideswiped him and knocked him off the wheel.

Q Which side of the automobile? A The right-hand side.

30

Q Are you sure of that? A Yes.

Q Do you remember being interviewed by Clarence Preston, a detective from the prosecutor's office? A Yes.

Q You know him? A Yes.

Q And you gave a statement to him? A Yes.

Q Didn't you tell him at the time it was the left-hand side of the automobile hit Mr. Mahan?

A No, sir.

40

Charles Wenzel, cross.

Q Are you sure of that? A Yes, sir.

Q Could you see which side of the automobile came in contact with the bicycle? A Yes, sir.

Q At the time that the automobile and the bicycle came together the automobile was on
10 the left-hand side of the road? A Yes, sir.

Q That is to the left center? A Yes.

Q Now, this asphaltum there, constituting the center of the roadway or the roadway proper, is how wide? A Oh, I should judge about thirty or thirty-five feet; something like that.

Q That is only a guess. You have never measured it? A No.

Q And there is on either side of the asphalt dirt or gravel shoulders of the road, isn't there?
20 A Yes, sir.

Q The road is narrow there, as roads go? A Yes.

Q It is not a wide road? A Not very wide.

Q And the bridge is a narrow bridge? A Two machines can pass on it.

Q But there will not be any leeway between them, will there? A Oh, yes; about two feet between.

Q Well, it is customary for machines in taking
30 that bridge to go right over the center, isn't it? A Yes.

Q Now, at the time the automobile approached Mr. Mahan on his bicycle, and at the point where Mr. Mahan turned from the right of the road to the left, the automobile was on the left center of the road? A Yes, sir.

Q This happened where, with reference to your porch? A Right in front of the porch;
40 right in front of the house.

Charles Wenzel, cross.

Q The house is how far back from the roadway? A Oh, I should judge about twenty feet.

Q The front part of the automobile passed Mr. Mahan and his bicycle without striking either, didn't it? A Yes.

Q His front wheel come in contract with the rear right-hand mud guard? A Yes, sir. 10

Q And he was thrown to the road? A Yes, sir.

Q Mr. Mahan was in the center of the road after he fell; he was lying in the center of the road? A Yes, sir.

Q And his bicycle was right near him? A Yes, sir.

Q Neither of them was thrown any distance? A No, sir.

Q Were you able to observe just what happened when the bicycle hit the automobile? A What do you mean? 20

Q Did Mr. Mahan spin around on his bicycle and then drop to the road? A No; it just threw him.

Q But he was not thrown any distance? A No; not much.

Q The automobile continued for how long after that? A What do you mean?

Q It kept on moving? A Yes, and they went up to the cross road and turned around and came back. 30

Q Well, it stopped before it went up and turned around, didn't it? A No; it did not.

Q You mean to say, then, that after the automobile and the bicycle came together the automobile kept on to the cross roads and came back? A When Mr. Buckley seen I had him Mr. Buckley threw himself out of the machine and they changed wheels, because if they had not 40

Charles Wenzel, re-direct.

changed wheels the car would have run into something.

Q Mr. Buckley threw himself out of the machine? A Yes.

Q Right out on the ground while it was going? A Yes.

10 Q Where was the mechanic? A He jumped in and took care of the wheel.

Q At the time of the accident he was on the left-hand front mud guard? A Yes.

Q And he was adjusting some mechanism underneath the hood? A Yes.

Q And do you mean to say after this happened Mr. Buckley threw himself out of the car? A They changed.

Q Having the car going? A Yes.

20 Q Mr. Buckley went out of the machine? A Yes.

Q Did he fall on the ground? A Yes.

Q And then came back to where you were? A I walked up to him.

Q The automobile continued to the cross roads, driven by the mechanic, and turned around and came back? A Yes.

Q How far is the cross roads from your house? A I should judge about 400 feet.

30

Re-direct examination by Mr. Devlin.

Q What signal do you give when you want to go to the left side of the road? A I put out my hand and give him the signal that I am going to slacken down.

Q How wide is the—

The Court. Does not the statute regulate that?

40 *Mr. Devlin.* I am not so certain about that.

Charles Wenzel, re-direct.

The Court. Just a moment. I think there is a provision here about turning— Well, go on with your examination.

Q At that point can you tell us how wide the road is? A About twenty-four to thirty feet; something like that.

Q Do you mean the whole road, or what? A 10
The whole road.

Q The whole road, macadam and all? A
Yes, sir.

Q Did you at all observe the condition of the road between your house and Lawrenceville, in that direction? A What do you mean by that?

Q Could you see up the road between your house and the Lawrenceville direction? A Yes, sir.

The Court. Part of the third section provides if they turn while in motion or starting to turn from a standing position, signal shall be given by indicating with the whip or hand the direction in which the turn is to be made. That is the third section of the Traffic Act. 20

Q Will you state whether there was any automobile or vehicle on the road between your house and the point or direction of Lawrenceville? A No, sir. 30

Q Did you observe that? A Yes, sir.

Q From your house, or Mahan's house to the point at the bridge, which is in the direction of Trenton, can a person in the road get a full view of the road? A Yes, sir.

Q How about from your house and the direction leading to Lawrenceville, is the road at that point straight? A Yes, sir.

Charles Wenzel, re-cross.

Q Can you obtain a full view of it? A Yes, sir.

Q A man in the center of the road? A Yes, sir.

10 Q Are you able to tell on what portion of the road was this automobile driving as it came down? A Toward the center of the road on the left-hand side.

Q Do you mean by that on the left-hand side of the center? A Yes, sir.

Q Did I understand you to say on cross examination that the driver was looking at the—
A Mechanic.

Q —mechanic? A Yes, sir.

20 Q Do you know what the mechanic was doing? A He was fixing something in the engine there. He was adjusting the carburetor, I guess; I don't know what it was.

Q Do you know if the hood was up? A No, sir.

Q The mechanic was lying down on the left-hand side of the machine? A Yes.

Re-cross examination by Mr. Heher.

Q Do you say you saw Mr. Buckley looking at the mechanic? A Yes, sir.

30 Q When did you first see that? A As soon as I seen Mr. Mahan put out his hand and turn in I seen Mr. Buckley looking down there. He wasn't paying much attention to where he was driving.

Q At the time you saw Mr. Mahan put out his hand you saw Mr. Buckley looking at the mechanic? A Yes, sir.

40 Q Didn't you tell Mr. Preston that Mahan was off the road when struck? A Almost off the road.

Charles Wenzel, re-cross.

Q Was almost off the road when struck, and the machine hit him on the left-hand side of it, about the center? A About the center? No.

Q Didn't you tell Mr. Preston that? A No.

Q What did you tell him? A I told him the machine sideswiped him; that is all I told him.

Q Did you tell him which side of the machine sideswiped him? A Yes; I told him the right side. 10

Q You remember talking to Mr. Preston? A Yes, sir.

Mr. Heher. That is all.

(Dr. Frank G. Scammell, called as a witness on behalf of the plaintiff.)

(No response.)

(Mr. Fergus A. Dennis, called as a witness on behalf of the plaintiff.) 20

(No response.)

Mr. Devlin. I have the American Experience Table of Mortality here, issued by the Mutual Life Insurance Company of New York, and the table of mortality for forty-one is twenty-seven years and forty-five hundredths, and for forty-two, twenty-six years and seventy-two hundredths.

Mr. Heher. All right. 30

Mr. Devlin. Then it is admitted that the period of longevity for a man at forty one is 27.45, and for a man at forty-two—this man was between the ages; he was seven months over forty-one—at forty-two it is 26.72, considering him to be in normal health.

I have no further testimony until I get these two witnesses.

Dr. Frank G. Scammell, direct.

Dr. Scammell will be here about half-past three, I think, and Mr. Dennis, who is an important witness in the case, will not be here until about three o'clock.

The Court. Will he testify to the accident?

10 *Mr. Devlin.* No; he will testify to the connection between the ownership and the operating of the machine.

The Court. Oh, yes.

Mr. Devlin. Which we have to establish.

The Court. Yes.

DR. FRANK G. SCAMMELL, sworn as a witness on behalf of the plaintiff.

20 *Direct examination by Mr. Devlin.*

Q Doctor, you are the County Physician of this county? A Yes, sir.

Q And have been for a number of years?

A Yes, sir.

Q Do you remember holding an autopsy on the body of Harry B. Mahan in McKinley Hospital? A I do, sir.

30 Q What did you find on examination of the body? Did you make notes of it? If you have the notes you can refresh your memory from the notes. A I think it was on September twenty-first that I examined this man, who had a history of being in the hospital for—I cannot say just how long; it was a question of a few days. His external examination showed that he had a slight brush burn on his left cheek, as if he had grazed some hard object. He had no other bruises of any nature about his body. The

Dr. Frank G. Scammell, direct.

internal examination showed that he had a slight hemorrhage underneath the scalp in the front portion of his head on the right side over what we would commonly term the forehead; that is, in this region here (indicating). He also had a very slight hemorrhage on his brain underneath the skull, and the skull at this point over the right forehead showed what we call a linear fracture; that is just a straight-line fracture of a little over two inches in length. The rest of the organs of the body were in a normal condition, with the exception of the kidneys, which showed some slight engorgement; but outside of that the autopsy showed very plain to me that the man had died from some external injury resulting in this fracture of the skull with the hemorrhage of the brain.

10

Q Tell us what death was due to. A It was some external injury. I could not say what caused it, from the autopsy.

20

Q What wounds on the body caused death? A The head injury caused death.

Q Was the skull fractured? A It was.

Q What point in the skull? A In the front portion, the frontal portion of the skull, in the region of the forehead.

30

Q You spoke of hemorrhages. What part did those hemorrhages play in the man's death?

A They played an important part, because they were indicative to me that the injury, which had been sufficient to fracture the skull, had caused those same hemorrhages of the brain.

Q And the hemorrhages caused death? A Yes.

Q And the body you found all right, except for the kidneys? A The kidneys showed some

40

Dr. Frank G. Scammell, cross.

slight engorgement, which might be indicative of some kidney trouble.

Q From the standpoint of what you saw would you say whether it was serious or not? A They were serious as far as the kidneys were concerned, but I do not think they were the
10 paramount cause of his death. I think the cause of death was the injuries to the head.

Q What about his health? A I would say his health would be impaired.

Q Was that condition you found in the kidneys a condition that would be cleared up? A I could not say about that.

Cross examination by Mr. Heher.

Q What was the specific trouble with the kidneys, doctor? Were you able to determine? A From a pathological standpoint it looked to me as if he had had some acute kidney condition.
20

Q Do you mean Bright's disease? A Acute Bright's disease; yes, sir.

Q Were you able to determine, then, how long he had been in that condition, or do you mean by "acute" that it had occurred immediately? A I mean by "acute" that it was not
30 a very lasting condition, not a long continued condition.

Q It had recently set in? A I believe so.

Q The accident would not be responsible for that, would it? A I could not say that. Sometimes we have kidney involvement, but whether the accident is the sole cause of it or whether it precedes the accident it is hard to determine.

Dr. Frank G. Scammell, cross.

By the Court.

Q Doctor, would there be any connection between the head injury and the kidney condition?

A No, sir.

Q It would have to be to some portion of the body near the kidneys? A If it was indicative of the kidney injury his head injury would be so diffused that he would have a hemorrhage over the main portion of the brain and not in the locality he had the fracture.

10

By Mr. Heher.

Q What were the probabilities of his recovering from acute Bright's disease, in his age? A The possibility of a person recovering from an acute Bright's disease is rather guarded. They do recover from it.

20

Q Is it curable? A It is.

Q Is a cure probable in an ordinary case of Bright's disease? A In acute conditions; yes.

Q Does the condition clear up or entirely disappear? A It clears up. We do not have any knowledge that it entirely disappears.

Q And the kidney trouble is still there even after it clears up? A He always has some disturbance there.

30

Q That has a tendency to greatly shorten life, doesn't it? A It does.

Q A kidney condition of that sort? A It does.

Q In your judgment, from your examination of this man, do you think there was any connection between this kidney condition and the blow sustained in another part of the body? A I do not think so.

40

Dr. Frank G. Scammell, re-direct—re-cross.

Q You think it was an actual condition that had set in? A I think so.

Re-direct examination by Mr. Devlin.

Q When you say "acute" you mean it had suddenly set in? A Yes.

10 Q And likely would that disappear under treatment? A I think so.

Q After the effects disappeared his life would resume its normal way? A I think so; yes, sir.

Q It is an uncommon thing for a man to have an acute attack of Bright's disease and be all right again? A It is not; no, sir.

Re-cross examination by Mr. Heher.

20 Q You say it is not uncommon? A No, sir.

By Mr. Devlin.

Q And to live his life just the same as if that had not happened? A If he would be guarded in a number of things he might.

By Mr. Heher.

30 Q But that kidney condition continues and subsequent attacks are likely, are they not? A They are very likely.

Q And the result is that life is shortened considerably? A Yes.

By Mr. Devlin.

Q Did you know the age of this man? A He was a young man. I could not tell the exact age.

40 Q Assume he was forty-one and a half years old. In that condition what would his chances

Dr. Frank G. Scammell, re-cross

be for it clearing up all right? A Well, I would say that he would be—well, his chances of clearing up completely would be somewhat impaired. But it might continue over a long period of time and he might live a normal life and die from some other cause.

Q As you say, it would not be indicating death near at hand or due to that? A Well, I would not say that he could not die from such a condition as he had in his kidney, because we do find persons who do die from kidney conditions, who had kidneys similar to this man. 10

Q But in a great many cases they live all right? A Well, I would not say that. The ones that get well from acute Bright's disease, we don't have a post mortem condition to inspect, when they clear up. The only ones we can be guided by are the ones that do not clear up, and we do have an opportunity of inspecting them. 20

By Mr. Heher.

Q Isn't the acute condition generally fatal, doctor? A It generally is; yes, sir.

(Fergus A. Dennis, called as a witness on behalf of the plaintiff.) 30

(No response.)

Mr. Devlin. Mr. Dennis has not appeared yet, your Honor.

The Court. Can you go on, Mr. Heher?

Mr. Heher. Yes, I can; but I want to make a motion when Mr. Devlin rests.

The Court. I suppose that motion is connected with this testimony? 40

Dr. Frank G. Scammell, re-cross

Mr. Devlin. Mr. Dennis will connect the agency of the driver of the car with the owner.

Mr. Heher. My motion does deal with that.

10 *The Court.* Yes. At present there is no proof whatever of the connection of the man Buckley to the defendant. Do you know anything about Mr. Dennis? Have you any information about him?

Mr. Devlin. He was to be here at three o'clock.

The Court. Have you heard anything as to his whereabouts?

20 *Mr. Devlin.* No; he went to Princeton to attend to a matter. He was to be here at three o'clock. He was to get the two o'clock car from Princeton.

The Court. Possibly Mr. Heher will admit he would testify, if you will state what he would say—

Mr. Heher. I would like to hear what he has to say about statements made by Mr. Buckley.

30 *Mr. Devlin.* He will testify to statements made by the owner of the machine to the effect that Mr. Buckley went there to get the machine and bring the machine home. It connects the agency and the principal.

The Court. Well, of course, that is very important.

Mr. Devlin. Yes; it is important to both sides. He was the first attorney in this case.

40

Dr. Raymond S. Seiber, direct.

The Court. Can you put on testimony, Mr. Heher, as to the accident itself, without dealing with the question of agency?

Mr. Heher. Yes, I can put on some testimony, provided my rights in the matter for a motion for non-suit are preserved.

Mr. Devlin. There is no objection to that from me. 10

DR. RAYMOND S. SEIBER, sworn as a witness on behalf of the defendant.

Mr. Heher. Of course, I want it clearly understood that in proceeding with the defense I am not waiving my right to move for a non-suit.

Mr. Devlin. Oh, yes. 20

Direct examination by Mr. Heher.

Q Doctor, you are a practising physician of the City of Trenton? A I am.

Q And have been for how long? A Since 1911.

Q You are a graduate of what institution? A Hahnemann Medical College, Philadelphia.

Q And you graduated in what year? A 30
1909.

Q You have practised medicine since then? A I was a year interne in McKinley Hospital, and then three months in Pennsylvania and came back to practising in Trenton here in January, 1911. I was two years in the army.

Q With that exception you have practised here continuously? A Yes.

Q You are connected with the staff of McKinley Hospital? A Yes. 40

Dr. Raymond S. Seiber, direct.

Q And were two years ago, in September? A I was.

Q Were you in the hospital when Harry B. Mahan was brought there? A I was.

Q What time of the evening was he brought there? A I really forget what time it was.

10 Q Do you remember the date? A September 13, 1919.

Q Have you the records showing the history of that case? A I have.

Q Have you got them with you? A I have.

Q Those records are the original hospital records? A The original chart; yes, sir.

Q And the notations and statements on that chart were made on the dates— A On the dates they are written; yes.

20 Q Were they made by you? A No; the analysis put on the records in the chart, and the examination of the urine was done by the statistician in the laboratory.

Q Who made the analysis? A It was a woman at that time. She made the analysis.

Q Do you recall her name? A Miss Harriet Matthews.

30 Q Is she still at the hospital? A No; she is up at the Princeton Hospital.

Q What was the condition, the physical condition, of Mr. Mahan when he was brought to the hospital on September 13th? A Well, he was a very thin man and he was unconscious when I saw him in the hospital that night—in the evening it was.

Q Did you make an examination of him when he came in? A I did.

Q Will you tell us what you found?

40 *Mr. Devlin.* One moment.

Dr. Raymond S. Seiber, direct.

By Mr. Devlin.

Q Are you telling what you found from your own recollection or from these records? A From my recollection.

Q You have not used those records to refresh your memory? A No; because what I am going to tell is not on the records. 10

Q Have you used those records for the purpose of refreshing your memory? A No, sir; I brought them here, thinking that the Court would want to look them over.

Q I am asking, did you use them for the purpose of assisting you to tell what you are now going to tell? A No; because what I am going to tell now is not on the records.

Q Did you use these records to assist you to answer the questions you are now being asked? A No; I did not. 20

By Mr. Heher.

Q State what your examination disclosed at that time. A He was lying on a table in a little operating room in McKinley Hospital, and he was unconscious. He was not restless at that time. He just laid there and was breathing naturally. I don't recall seeing any signs of any external injury. 30

Q Did you find any bruises? A Not that I can recall; I did not see any.

Q If you had found any bruises would you mention them on this record in the hospital? A Yes.

Q Is there any record of bruises? A No; there is not.

Q What else did you find? A The man was unconscious, and from the history of the injury he was put to bed and put under observation. 40

Dr. Raymond S. Seiber, direct.

10 Q Did you take any X-ray photographs of his head? A Yes; X-rays had been taken; I cannot tell you the date that they were taken, but the plate was on a plate which I could not find at McKinley Hospital. I saw it after it was taken, and the doctor that took the picture said there wasn't any fracture—

Mr. Devlin. I object. Do not tell what the doctor said.

Q Did you see the plates? A Yes.

Q Did they disclose any fracture? A Not to my knowledge. I am not any expert in reading X-ray plates.

Mr. Devlin. Then I ask that the answer as to what they disclosed be stricken out.

20 *By the Court.*

Q Do you mean by that you do not know? A Oh, I could read some plates of evidences of fracture.

By Mr. Heher.

Q But you could not see any evidence of fracture on these plates?

30 *Mr. Devlin.* I object to that because this man said he was unable to read plates.

By Mr. Devlin.

Q I guess it is not part of your business to read plates? A No.

By the Court.

40 Q Is that a special line that would require expert knowledge? A I should think so.

Dr. Raymond S. Seiber, direct.

Q And you do not feel qualified to express an opinion on it? A No.

The Court. Well, Mr. Heher, perhaps he should not tell about that.

By Mr. Heher.

Q Where are those plates now? A I could not say. 10

Q Who made them? A I do not remember the doctor.

Q Aren't they kept as part of the hospital records? A They generally are; yes. All those things are kept.

Q They were made in the hospital? A Yes, sir.

Q What was the condition of this man otherwise, as you observed him, upon examination during the time he was there? A During the time that he was in the hospital? 20

Q Yes. A Well, his urine was sent to the laboratory and report came back that he—

Mr. Devlin. I object to the report.

The Court. Yes. You can only tell what you know yourself.

Q Did a report come from Miss Matthews? A Well, then, the doctor would have to examine the urine personally, then? 30

Q Well, this report came from Miss Matthews? A A written report on a hospital form came down from the laboratory and was attached to the chart.

Q Is that report here? A Yes.

Q Will you identify it? Have you got the records here? A I have (producing papers). 40

Dr. Raymond S. Seiber, direct.

Q Will you point out this report to which you have reference? A That was the one of the 15th of September.

Q Is that the only report that came? A No; three days later there was another report.

10 Q Where is that report? A Further on in the chart, where the safety pin is.

Q This report you have now reference to is dated September 15, 1919? A Yes; the first one.

Q And the second report? A September 18, 1919.

Q Are they the only two reports that were made? A Of the examination of the urine?

Q Yes. A Yes.

20 Q Who took the specimens of the urine? A The nurse. I do not know what nurse it was.

Q Under whose supervision were those specimens taken? A By the head nurse. If she does not take them she tells one of the nurses under her to get a specimen of urine for the laboratory. It is done in every case that comes in the hospital.

Q And then an analysis is made by— A By the party in charge of the laboratory.

30 Q It was made in each of these cases by Miss Matthews? A Yes.

Q You had nothing at all to do, yourself, with the work in the laboratory in this case? A No. All we do—the report comes down on that printed form and is attached to the chart, and when we doctors go to the hospital to look over the chart and the patient we see the examination there.

40 Q What do those reports indicate his condition was?

Dr. Raymond S. Seiber, direct.

Mr. Devlin. I object to that.

Mr. Heher. I want to get the medical testimony from the reports and produce the nurses later.

The Court. You will undertake to prove by the nurse—

Mr. Heher. Yes; I expect to get her. I did not know until this moment it was made separately. I expect to subpoena her tonight. 10

The Court. That would be two, undoubtedly: Miss Matthews and the nurse who actually got the urine.

Mr. Heher. Yes.

The Court. Well, it is somewhat embarrassing to take it in that form, because by some possibility it might not be substantiated, and then the evidence already goes to the jury on a state of facts which are not proven. If the doctor could come back in the morning— 20

Q You could come back in the morning, couldn't you, doctor? A At what time?

Q Ten-thirty or ten-twenty. A I would have to give up my school work for the morning. 30

By the Court.

Q You are a school examiner? A Yes, sir; I am required to attend two hours a day.

By Mr. Heher.

Q In the city schools? A Yes.

Q Can't you arrange to have some one take your place for tomorrow morning? A There is no one to take my place— 40

Dr. Raymond S. Seiber, direct.

The Court. Let me suggest you take his testimony before the stenographer and then read it or not, as the testimony may develop.

Mr. Heher. That is agreeable to me.

10

The Court. You can go in the side room and let the doctor's testimony be taken and predicated upon these reports, on the assumption they will be proven, and if they are proven the testimony will be read; otherwise, not.

Mr. Devlin. All right.

The Court. I do not think any embarrassment could come from that on either side.

20

(Court, counsel and witness retired and the examination of the witness proceeded in the absence of the jury.)

(Previous question read, as follows: "Q What do those reports indicate his condition was?")

30

The Court. Mr. Heher, I do not think the reports will ever get in evidence. I think you will have to re-form that. The women themselves will have to testify to what they did, and the result of it, and then on the assumption these women will testify so and so the doctor's testimony can be predicated.

Q What did you find Mr. Mahan's condition was? A Well, the night he came in he was unconscious, lying on an operating table in a little operating room in McKinley Hospital. He was unconscious and I put him to bed for observation.

40

Q What did you find his kidney condition to be after these analyses—

Dr. Raymond S. Seiber, direct.

The Court. Mr. Heher, have you the report there? You will have to frame it in hypothetical form, I think. Suppose I suggest: Doctor, if you found the specific gravity to be 1,028 and reaction alkaline; color, reddish yellow; sediment, thick, stringy; casts, negative; many epithelia; bacteria present; many cells; mucous present; blood, many cells; trace of acetone; 1.5 per cent. albumen; sugar, negative; cystolic; blood pressure, 120— 10

The Witness. Well, that was just added. I took the blood pressure myself. That was not in the report.

Q Has that any bearing on this— A It showed that he did not have any intracranial pressure. 20

The Court. Do you want to incorporate that in the question, Mr. Heher?

The Witness. That has no bearing on the urinary report.

Q Has it any bearing on the kidney condition? A I would not say it had.

The Court. Now, Mr. Heher, predicate it on those facts. What do you want to ask him? 30

Q What would you say the condition of Mr. Mahan's kidneys were at that time? A All I know is what I saw in that report.

By the Court.

Q What does it indicate in the matter of health? A It indicates some inflamed kidneys; some inflammation of the kidneys, Bright's disease; and also, I will say it showed he had 40

Dr. Raymond S. Seiber, direct.

some inflammation of the bladder, cystitis, because there was pus present in the urine.

By Mr. Heher.

Q Now, you have testified with reference to the matters contained in the report of September 15th. Another report came to your notice, under date of September 18th? A Yes.

Q Was there any change in the condition of the man's kidneys at that time, in your judgment? A The albumen was still present.

Mr. Devlin. Suppose you read the facts of the other report.

Q Assume that on September 18, 1919, the analysis of the urine taken from Mr. Mahan showed a specific gravity of 1,020; reaction, acid; color, dark amber; casts, negative; epithelia, few; bacteria, negative; pus cells; mucous present; blood, negative; acetone, negative; albumen present; sugar, negative. What, in your judgment, was the condition of his kidneys at that time? A Well, it showed that there was still some inflammation present.

Q What is the specific name for this kidney affection, doctor? A Bright's disease; acute Bright's disease or chronic Bright's disease.

Q It may be either? A It may be either.

Q Were you able to determine whether or not he had chronic or acute Bright's disease? A No; because I did not know the man. I had no knowledge of how long he had it.

Q Now, you attended the post mortem examination made by Dr. Scammell? A Yes; I was there.

Q Did you observe the condition of the man as disclosed by that examination? A Yes; I looked on and saw what was present.

Dr. Raymond S. Seiber, direct.

Q What did you find to be the condition of his kidneys at that time? A Congested.

Q Indicating what? A Indicating some inflammatory condition. They were inflamed.

Q Did they indicate Bright's disease? A Well, you could not positively say it was Bright's disease unless it was put under the microscope. 10

Q Well, based on those examinations and tests you had made, were you able to say from what you observed at the post mortem whether or not he had Bright's disease?

Mr. Devlin. Well, let him say—give the name of the disease, please.

The Witness. Inflammation of the kidney.

Q Isn't there some specific name for this particular condition? A Bright's disease. 20

By the Court.

Q Doctor, was this acute or chronic? A I was not able to determine that, your Honor, because I hadn't had the man under observation only since the 13th of September.

Q What are the causes of a condition such as has been read to you in the question previously put? A Well, some of the causes are—

Q Let me put it in another form: Could they come from injury or not? A Well, I don't think they could. That is my personal opinion. 30

Q How serious were they, in the matter of health. Assuming the conditions that you found, that have been described in the question put, to exist, how serious were they with reference to his health? A Oh, I would think the seriousness of it would be very much enlarged if the man would not be treated or would not go on a diet. 40

Dr. Raymond S. Seiber, direct.

Q Well, speaking generally, with the average man, what would be the effect on his general health? A It would be somewhat of an impairment to his health.

Q Did you observe him all the time he was in the hospital? A I did.

10 Q Was he conscious or not? A The second or third day he would answer questions, but he was in somewhat of a subconscious state, you would call that. He was not himself. He was not conscious, but he would answer questions.

Q Do you mean his mind was not clear? A His mind was not clear.

By Mr. Heher.

20 Q What, in your judgment, was the likelihood of his condition proving fatal; that is, the condition of his kidneys, aside from the injury to the head, if you are able to state that? A Well, we are not always able to tell how long a man is going to live with any disease of the internal organs.

30 Q What are the probabilities of surviving with acute Bright's disease? A Well, lots of times, under treatment, the symptoms disappear, but my opinion is that later on the kidney trouble shows up.

Q Then in your judgment Bright's disease is not curable?

Mr. Devlin. I object to that as leading.

Q Well, what is your judgment about the curability of Bright's disease, doctor? State it in your own way. A Incurable.

40 Q What is the difference between the acute and chronic stage of the disease? A As to the kidneys themselves?

Dr. Raymond S. Seiber, cross.

The Court. One is of long standing and the other is recent?

The Witness. Yes; and there is more destruction of tissue in the kidneys in the chronic.

Q Are the acute attacks fatal or not, as a rule? A Sometimes they are and sometimes they are not. 10

Q Does this condition have a tendency to shorten life, this kidney condition that you found in Mahan? A Yes.

Q To what extent? A It is hard to say.

Q Did you notice anything unusual about this man when he was brought to the hospital, beside the unconscious condition? A Well, I smelled his breath.

Q What did that indicate? A That he had had some alcohol in him. I could not say how much. 20

Q Were you able to determine his condition in that respect at the time or not? A No.

Q You simply smelled the odor of alcohol? A Yes.

Mr. Heher. That is all.

Cross examination by Mr. Devlin.

Q Doctor, the condition you found in these reports I will speak of, because the other cross examination we will conduct outside—the condition you found in these reports you say indicated Bright's disease to you, or inflammation of the kidneys? A Yes, sir. 30

Q That cleared up quite some between the two reports, didn't it? The second report, I notice, was different from the first. A Well, there was albumen present in the second and 40

Dr. Raymond S. Seiber, cross.

also the other one. The bladder condition cleared up.

Q The other features of it cleared up quite some? A Yes.

10 Q Do you know what was the cause of these other features being in the first report in the first place? I notice the mucous, and the urine was a reddish amber—reddish yellow—and in the next report it was a dark amber. The same person made both reports, I presume? Now, what would bring the reddish amber and then change it? A Diet will change the color of the urine.

Q Did the diet affect the color in this report?

20 A I would think it did, because when he came in the hospital he had no doubt been eating all kinds of food, and after he was in the hospital awhile he was not able to take it.

Q Well, there were only two days between the first and second report. A The 15th was the first report and the 18th was the second one.

Q Then he was two days in the hospital on the 15th. Now, there is a change in the second report. What do you attribute that change to?

A I would think from not eating heavy foods.

30 Q And was that change for better or worse in the kidney condition? A With the absence of that pus it was better.

Q What brought about the presence of the pus? Do you know? A Why, to my knowledge, I would say it was inflammation of the bladder.

40 Q And could you tell what brought about the inflammation of the bladder? Would the injuries that he received on the 13th have any effect on any part of that report that you got on the 15th? A I would not say it had.

Dr. Raymond S. Seiber, cross.

Q That mucous and those things, it would not affect that at all, eh? A No.

Q Now, his kidney condition improved, then, in those days between the 15th and the 18th?

A The albumen—the quantitative test was not made in the second.

Q And the quantity makes the difference, does it not? A Yes. 10

Q Do you know why the quantity was not put down the second? A No; I do not.

Q And quantity is really necessary before you could tell much about the kidney condition. Is not that so? A Yes.

Q Now, the quantity test in the albumen being necessary, do you know of any reason why it was left out? A No; I do not.

Q Then your second report is not such a report as you could give an opinion on? A Except as to the patient being better or worse. 20

Q In other words, your second report is of no value to you so far as telling whether this man's condition was better or worse? A The kidney condition?

Q I am confining it strictly to that. A Yes.

Q Then the second report is out of the case and does not aid you in the kidney condition? A No; it does not. 30

Q Now, you say that the man was never himself clear again from when you saw him until he died? A He was not.

Q How many times did you see him, doctor? A Every day.

Q And he was still either unconscious or what you call sub-conscious? A Sub-conscious.

Q That means the man did not know what he was doing, although he answered questions automatically? A Yes. 40

Dr. Raymond S. Seiber, cross.

Q The questions he answered you are satisfied he did not reason at all? A Yes.

Q His process of reasoning was not working? A No.

Q Then so far as realizing his condition was concerned he was really unconscious all the time? A I do not think you can call a man totally unconscious if he answers questions. He could tell me his name.

Q He answered them automatically. In other words, he could not reason; he was not clear? A He was not able to reason.

Q Then you would not call him conscious at any time, would you? A Well, there is conscious, sub-conscious and unconscious.

Q Well, but you would not call him conscious at any time you saw him? A Not clearly conscious; no.

Q Can you give me a definite answer on that? Would you call the man conscious any time you saw him from the time of being injured until he died? A One day I would.

Q Was he clear then? A No.

Q What name would you give to his condition if it was not clear and yet you considered him conscious? What name would you give to that condition? A Well, a foggy memory.

Q For whatever he did or said you would not consider him liable, would you? A No; I would not.

Q Because of the reason he was not clear; is that right? A Yes.

Q Did you make any examination of him outside of the reports that you received? Did you make any examination of him at all, physically? A I did.

Dr. Raymond S. Seiber, cross.

Q When? A Why, the second day he was in I took the blood pressure.

Q What does that blood pressure indicate to you? A It indicates that there was no intracranial pressure; no pressure inside of the skull.

Q Does the fact that a man remains unconscious who has had a blow or fallen indicate something wrong in the head? Suppose a man fell or got hit and he remains unconscious and does not clear up, does not that indicate to you that there is something wrong in the head, a fracture or concussion or something? A A fracture or concussion; yes. 10

Q Now, the fact that he remained in this condition for this period of time, did that cause you to make any examination of him other than the kidneys? A The blood pressure examination, and his nervous condition. 20

Q And you found the blood pressure not indicative of any wrong— A It was not indicative of any pressure symptoms.

The Court. That would throw no light on the fact there was a fracture, would it? This is a low pressure, is it not?

The Witness. Just about normal. 30

By the Court.

Q Would that or not throw any light on whether or not there had been a fracture or suffusion of blood through the— A If he had a high blood pressure then it would be indicative of fracture with compression on the brain.

Q What does this pressure indicate with respect to the condition of the brain? A It 40

Fergus A. Dennis, direct.

showed there was no brain compression. There was nothing causing the brain to be compressed.

(Adjourned until Tuesday, November 16, 1920, at ten-twenty o'clock in the forenoon.)

10

Trenton, N. J., November 16, 1920.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court. You may proceed. Now, who was on the stand.

Mr. Heher. The doctor was, on cross examination.

20

The Court. Yes. Now, do you want to call the other witness, to identify this report, before the doctor goes on?

Mr. Heher. Yes, but the doctor has that report and he is not here yet.

The Court. Mr. Devlin, did you have a witness yet to connect the defendant?

Mr. Devlin. Yes, sir; Mr. Dennis.

30

The Court. I think it better to put him on, then.

FERGUS A. DENNIS, called as a witness on behalf of the plaintiff.

Mr. Devlin. Here is the doctor now.

The Court. Gentlemen, it would be better to have the plaintiff's case completed, I think, before we go any further.

40

(The witness was sworn.)

Fergus A. Dennis, direct.

Direct examination by Mr. Devlin.

Q Mr. Dennis, your home is in Princeton, New Jersey? A Yes, sir.

Q And you are a counsellor-at-law of this state? A Yes sir.

Q Of how many years? A 1894, I think, I was admitted as counsellor. 10

Q You were retained as counsel in this case in 1919? A Yes.

Q How many days after this accident occurred? The accident occurred on Saturday, the thirteenth. A Either that afternoon or Monday of the next week.

Q That would be the fifteenth? A Yes.

Q Do you know Mrs. Elizabeth Walker? A I do now; yes.

Q You met her? A Yes. 20

Q And visited at her home? A Yes.

Q Do you know Mr. Buckley, who sits over here? A Yes.

Q Did you see Mrs. Walker at her home? A Twice.

Q Did you see her at her home? A I saw her at her home twice.

Q The first time what did you say to her and she to you? A I told her I had learned she was the owner of the car that had caused the accident, and she said, yes, she owned that car, and she knew about it, and Mr. Buckley, her son-in-law, was out with the mechanic trying the car out; that it had been in the repair shop and she had it repaired and they were out on the road testing it out. 30

Q Was anything said about her sending him there? A I do know know that she said she sent him. I asked Mrs. Walker if Mr. Buckley 40

Fergus A. Dennis, cross.

was the man who drove the car for her, and she said, yes.

Q What else was said at the time? A We had a talk about the condition of the family.

Q What family? A Mrs. Mahan's family, and the children and their ages, and Mrs. Walker expressed herself as wanting to do anything that she could do, but she would have to see Mr. Buckley.

Q Her son-in-law? A Yes.

Q What else was said? A I do not know just what was said, Mr. Devlin.

Q I mean, what thoughts were conveyed. I do not expect you to be able to repeat the language, but can you repeat the thoughts that passed between you and Mrs. Walker? A Well, we talked about the accident and I insisted it was their fault, that the machine was on the wrong side of the road, and she said Mr. Buckley would see me soon. I do not know any further than that.

Q What time of the day did you visit her? A I think it was in the afternoon.

Q Did you see her again? A Yes.

Q When? A That was after Mr. Mahan died.

Q That was after the twenty-first of September? A After his death. I think he died about eight days after the accident.

Q Where did you see her? A At her home.

Q Did you have a talk with her? A Very short, indeed. She referred me to her lawyer, Mr. Heher.

Q What did you say to her or she to you? A I told her I came up to see what she was going to do in the matter of the accident; that Mr. Mahan was dead, and she said I would have to

Fergus A. Dennis, cross.

see Mr. Heher, who had charge of the case for her.

Q Did she and Buckley visit you? A I think it was Wednesday night after the accident Mr. Buckley had a talk with me. He and Mr. Heher and one or two other gentlemen came out to Slackwood and saw me on the roadside and had a short talk with me, and Mr. Buckley insisted I was unduly alarmed about the condition of Mahan, that he had been assured by his doctor he would get around all right, and he would do everything he could to take care of it. 10

Q Was anything said by you to Mr. Buckley or by Mr. Buckley to you about the driving of the car? A No. Mr. Buckley said he was driving the car.

Q Was anything said by Mr. Buckley about the operation of the car, or by you to him? A No; I think not. Most of the talk was about Mr. Mahan, and I said I had learned at the hospital that he was very badly hurt, and Mr. Buckley disagreed with me as to that. 20

Q Was anything said by Mr. Buckley as to how the accident occurred? A I think not.

Q You are not the counsel in this case now, and you gave a substitution to me sometime ago, practically about eight months ago? A Yes. 30

Q The tenth of May, 1920, you signed a substitution in this case? A I don't remember what date it was.

Q (Showing witness paper.) Just refresh your memory there. A Yes; that is right.

Cross examination by Mr. Heher.

Q How long after the accident did you see Mrs. Walker the first time? A Well, it was 40

Fergus A. Dennis, re-direct.

either Monday or Tuesday afternoon. I am not sure.

Q The accident occurred on what day of the week? A Saturday, as I recollect it.

Q You saw her at home? A Yes.

10 Q Was anyone present? A I think it was Mr. Buckley's wife was in the room part of the time and part out. I think she admitted me to the home.

Q What did she say to you about the car? A Mrs. Walker?

Q Yes. A She said it was her car and had been in the repair shop.

Q Did she say how long? A No; not that I recall.

20 Q What else? A And that Mr. Buckley and the mechanic were out with the car trying it out, seeing if it was all right, or words to that effect. That was what she told me about it. She said that the car had been in the repair shop and that Mr. Buckley and the mechanic at the time the accident happened were out on the road.

Q Were out on the road trying it out? A Or testing it out.

30 Q Do you remember just what she said? A I don't remember whether it was trying it or testing it; but Mr. Buckley and the mechanic were out with the car after the repairs had been made to try it.

Re-direct examination by Mr. Devlin.

Q Was anything said about Mr. Buckley bringing the car home? A Not that I recall; no, sir.

40 *Mr. Devlin.* That is all. You admit these are the rules of the Court of Chancery?

Fergus A. Dennis, re-direct.

Mr. Heher. Yes.

Mr. Devlin. I suppose you want to object to this.

Mr. Heher. Yes; I object to the competency of it.

The Court. What is it that is offered? 10

Mr. Devlin. The table of the value of a dollar, as used by the Court of Chancery, for the longevity of a man forty-one to forty-two years old. That is what I want to offer. I will not say anything more about it, because I will not detail the figures excepting the Court allows it.

The Court. How can that be available here?

Mr. Devlin. For this reason: I have proven the average expectancy of life. Now— 20

The Court. Yes; I appreciate its relevancy if it is competent, but its competency is the question.

Mr. Devlin. That is what I am coming to, your Honor. It is for the jury to get the means or basis of estimation of money loss. There are several things they must do. They must find out how much of his earnings would go to his family apart from what it would take to maintain himself. Then they have to find the value of a dollar that would be paid today by them, that would not be due for five, ten, fifteen or twenty years. 30

The Court. Is not that an arbitrary thing which is fixed by the Court for the determination of values of estates? 40

Frederick Edgar Udy, cross.

Mr. Devlin. No, your Honor. This is based on two things. It is based on the longevity of life, on the American Experience—

The Court. Yes, but is it not based on interest rates?

10 *Mr. Devlin.* It is based on the value of a dollar not to be paid until twenty years hence, with deductions from it.

The Court. Yes, but is it not based on the value of a fluctuating thing?

Mr. Devlin. Yes, but the dollar, nevertheless, has a unit value in commerce and the value of that unit sometimes is higher or lower, according to its purchasing power.

(After discussion.)

20 *Mr. Devlin.* I will not continue the discussion. If your Honor thinks it is not admissible I will not press the offer.

We rest.

Mr. Heher. If the Court please, I would like to have permission to recall the witness Frederick Edgar Udy, to ask one question.

30 *Mr. Devlin.* Do you call him as your witness?

Mr. Heher. No; on cross examination.

FREDERICK EDGAR UDY, recalled.

Cross examination continued by Mr. Heher.

40 Q Will you describe the carriage in which you were riding on the day this accident occurred? A A four-wheeled carriage, a pony wagon.

Motion for a Non-suit.

Q Was there a top to it? A No top; it just had a back and had a side.

Q How high was the back? A About up to my shoulder.

By Mr. Devlin.

Q Was it a little small carriage for a pony? 10
A Yes.

Q It was not a large wagon? A No, sir.

Mr. Devlin. That is all.

Mr. Heher. If the Court please, I want to make a motion for a non-suit on the ground there is no evidence, first, to establish the relationship of principal and agent between the defendant and the driver of the automobile. The only testimony in the case now as to the admission of ownership is the testimony of Mr. Dennis that in a conversation he had with Mrs. Walker the second or third day after the accident she said Mr. Buckley had been out testing the car in company with the mechanic, but that is not any admission at all. That is merely a statement from her to the witness as to what Mr. Buckley had actually been doing at the time, and necessarily a statement as to information which had come to her from others, either from Mr. Buckley or some one else, because admittedly she was not on the scene of the accident and could not know except from hearsay what he was doing at the time. I submit that is not any evidence at all; it is merely a statement of a fact which had come to her knowledge after the accident had occurred, merely a statement of information within her possession. 20
30
40

Motion for a Non-suit.

The Court. Does it not mean more than that, however, as coming from a party? Is it not the adoption of the information as her own and the assertion of it which becomes at least evidential in the case?

10 *Mr. Heher.* I think not. I think it is a statement to the witness as to what Mr. Buckley was doing, from the information she had received at the particular time, and it cannot be a ratification of his act.

The Court. I would not so regard it. I think if it is evidential it must be evidential upon the theory of her own relationship to him.

(After argument.)

20 *The Court.* I suppose it does not yet appear in this case what relation the mechanic bore to the owner. The inference, I suppose, to be drawn, would be that for some purpose of the owner the car was being worked upon for the purpose of perfecting it or correcting some of its bad condition.

I do not think that the case is so clear that I ought to direct a non-suit. I will note an exception.

30 *Mr. Heher.* My motion for non-suit also goes to the absence of negligence on the part of the defendant and to contributory negligence on the part of the decedent. I ask a non-suit on both of those grounds.

The Court. Yes; I will decline to non-suit on all those grounds, and note an exception.

Mr. Heher. May I have an exception?

40 *The Court.* Yes.

Priscilla Chapman, direct.

PRISCILLA CHAPMAN, sworn as a witness
on behalf of the defendant.

Direct examination by Mr. Heher.

Q You reside in Pennington, New Jersey?
A I do.

Q You were a nurse at McKinley Hospital
some time last year. A I was. 10

Q Were you there when Harry B. Mahan was
taken to the hospital? A Yes.

Q Do you recall when it was? A I don't
remember exactly what date.

Q Were you one of the nurses in charge of
Mr. Mahan when he was in the hospital? A I
had charge of the floor that he was a patient on.

Q How long was he confined to the hospital?
A I don't remember just how long. 20

Q Can you tell us approximately? A I
don't remember.

Q Was there another lady there at the time,
Miss Matthews? A Yes.

Q What was her position? A She was the
technician.

Q And her duty was to make analyses of va-
rious things that called for examination in the
hospital? A It was. 30

Q Did you take to her any specimens for the
purpose of analysis? A Yes.

Q Pertaining to the case of Mr. Mahan?

Mr. Devlin. I object to that. Let the
lady tell what she did.

Mr. Heher. I am asking about this case.

Mr. Devlin. That is all right. She was
the nurse in charge and she should know
what she did without your leading her to
testify for her. She knows what she did. 40

Priscilla Chapman, direct.

She did the work, but let her tell what she did and how she did it.

10 Q Tell what you took to Miss Matthews pertaining to the case of Mr. Mahan. A Well, I had charge of the floor that the patient was on, and there was a specimen ordered to be sent to the laboratory.

Q A specimen of what? A Of urine; and a specimen was taken in a sterilized bottle and a sterilized piece of cotton put in the top of it and sent to the laboratory to Miss Matthews and that is our usual procedure.

Q On how many occasions did that occur?

A There was more than one, but I don't remember just how many.

20 Q Were there at least two, then? A Yes; there were at least two, but I don't remember whether there was any more or not.

Q When the analysis was made by Miss Matthews what was the procedure with reference to her reporting her findings? A She brings back a slip to my desk and I attach it to the chart.

Q Did you attach it to the chart pertaining to that case? A Yes.

30 Q What is this booklet? A This is our chart.

Q Pertaining to whose case? A To Mr. Mahan's case.

Q Now, will you point out on that chart and attached to that chart the reports you have just testified to?

Mr. Devlin. I submit that before you do that you put on evidence of the report, who made the analysis.

40 *Mr. Heher.* I cannot do everything at once.

Priscilla Chapman, cross.

Mr. Devlin. Yes, but suppose you do that before you do this.

The Witness. This is my writing.

Mr. Devlin. Just a minute.

The Court. She may tell whether that is a report that she received.

Mr. Heher. That is what I am asking her. 10

The Witness. This is the report.

The Court. That you received?

The Witness. Yes.

Q You are referring to the report dated September 18, 1919? A Yes.

Q That was the report handed you by whom? A By Miss Matthews.

Q And attached by you to the chart? A Yes, sir. 20

Q Now, I show you another paper dated September 15, 1919, and ask what that is. A This is another report on the same order.

Q Given to you by Miss Matthews? A Given to me by Miss Matthews, and this is my writing.

Cross examination by Mr. Devlin.

Q The report that you wrote on there—you say you were over the floor? A I had charge of the floor. 30

Q You received the order from whom to take this specimen? A Dr. Seiber.

Q From him? A Yes, sir.

Q Did you re-deliver that order to some one else to execute or did you execute it? A I did not execute it personally.

Q Who did? A I don't remember just which one did. 40

Priscilla Chapman, cross.

Q And you are unable to state, then, except by hearsay— A I know it was sent.

Q I beg pardon? A I know it was sent.

Q You know the order was given? A Yes.

Q Do you know who you gave it to? A I don't remember just which one.

10 Q How many were on the floor? A I don't remember that.

By the Court.

Q Did you see the sample taken, madam? A Yes.

Q You saw it taken? A Yes, in the bottle.

Q And you in turn handed it to Miss Matthews? A It was taken to Miss Matthews.

20 Q Who took it? A I don't remember just who took it up, but I remember seeing the bottle with the specimen in.

Q Yes, but it is important that we know whether Miss Matthews got the material which you extracted or had extracted. Did you see it delivered to her hand or not? A No; I did not see it delivered right to her hands, because the nurse in charge don't usually do that.

Q That is to say, don't do what? A They don't deliver the specimens personally.

30 Q Well, somebody does. Who does it? A I don't remember who did that.

Q No, but who does do it? A The orderly did it usually. I do not know whether he did it that day or not.

By Mr. Devlin.

Q Did you see the specimen taken from Mahan? A I saw the specimen, yes.

40 Q I did not ask you that. A No; I did not see it obtained from the man.

Priscilla Chapman, re-direct.

Q Do you know who did take it? A I told you I don't remember who took it.

Q At present you don't know who took it? That is your position? A Yes.

The Court. Well, Mr. Heher, is it worth while to pursue this further unless you can get the connecting links? 10

Mr. Heher. I would like to ask a few more questions.

The Court. Yes.

Re-direct examination by Mr. Heher.

Q Is there any record in the hospital showing who took these specimens and who actually delivered them from one to the other? A No; the orders are given and they are executed by the people who work on the floor at the time. 20

Q When the specimen is taken is there any mark of identification placed on the bottle? A Yes; always. A label is put on the bottle and the specimen is there and the day that it was taken.

Q Was the necessary label on this bottle? A Everything was on the bottle or it would not have been sent by me. I see that is all done and sent to the technician. 30

Q And it was all done in each of these two cases involving Mr. Mahan? A It was all done as it should have been done.

Mr. Devlin. I submit you should not lead by saying it was all done—and she answered by saying it was all done as it should be done.

Mr. Heher. I think there is enough evidence in the case for the jury to pass upon, 40

Priscilla Chapman, re-direct.

touching whether or not these particular specimens were taken from this patient.

10 *The Court.* No; I think not. You see, we have no evidence whatever that the material was, in the first place, taken from him, consequently that it was delivered to Miss Matthews. It all rests upon whether or not the directions to do it were carried out.

Mr. Heher. I do not know of any additional evidence that is possible under the circumstances.

The Court. No. She leaves that quite in the dark, who the parties were who did it.

Q Do you know who took these specimens, Miss Chapman? A I do not remember who did the work.

20 Q Is there any record from which we could ascertain who actually did it? A I do not think there is, on those specimens.

Q Do those remain in the hospital for any length of time? A Not after they are used and the examination is made; they are sterilized and sent back to the floors with no labels on them.

Q They are taken off after they are sterilized? A They are taken off by the sterilization.

30 Q At that particular time is there any system by which the person who took the sample may be on the records? A No, sir; not that I know of. The reports are made by the nurse in charge, and the nurses who do the work on the charts do that work.

Q Here is "Supervising nurse." Is that what you were? A I had charge of the floor.

Q You directed those under you to do certain particular things, and then did them? A
40 They did them.

Priscilla Chapman, re-direct.

Q And no record was kept except the record on the table? A Not that I can recall.

Mr. Heher. I submit that it is impossible to get any further or additional evidence on this question.

The Court. Yes; I assume you are about—

Mr. Heher. The usual practice followed in that hospital has apparently been followed in this case, and I think it is, under the circumstances, a question for the jury. 10

The Court. Well, Mr. Heher, I think that the hospital records themselves would not be admissible. They are not a public record in any sense; they are private records of a public or semi-public institution, and it would be a very dangerous thing, I think, to have them introduced without identification. 20

Mr. Heher. I do not intend to offer the records. I merely wanted the privilege of—

The Court. There is no connection shown between the urine taken from the man—first, that it was taken from him, and, secondly, that it was ever tested. Both those questions are left in the dark.

Mr. Heher. Of course, I intend to call another witness as to the testing. 30

The Court. Yes, but she would not be able to identify it as coming from him.

Mr. Heher. She could identify these specimens as coming from Mrs. Chapman.

The Court. Yes, but Mrs. Chapman did not deliver them, unfortunately. She does not even know whether they were delivered by one of the nurses or the orderly; the orderly usually did it. 40

Harriet E. Matthews, direct.

Mr. Heher. I suppose Miss Matthews can identify it by the label on the bottles.

10 *The Court.* Yes, but you do not get to the man, you see. That is a mere statement of a third person which, without a right to cross examine, it would be dangerous to introduce.

Mr. Heher. Of course, there are circumstances the jury have a right to determine.

The Court. You see, an expert's report is not admissible. He must himself be called. If you think there is an answerable question on it I will be glad to rule on it, and I will give you an exception.

20 *Mr. Heher.* I want the benefit of a ruling, but I will have to call Miss Matthews and then the doctor, because there is nothing on which I can get a ruling.

The Court. Unless it be on the introduction of the doctor's testimony, already given, unless it is predicated upon this examination.

Mr. Heher. Yes, but I think I should have the testimony of Miss Matthews in the record.

30 *The Court.* Yes; that is an element.

HARRIET E. MATTHEWS, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Where do you reside, Miss Matthews? A Princeton Hospital, Princeton, New Jersey.

40 Q What position have you at the Princeton Hospital? A Superintendent.

Harriet E. Matthews, direct.

Q Were you at McKinley Hospital in the year 1919? A I was.

Q Were you there when Harry B. Mahan was a patient at the institution? A I was.

Q Do you recall when it was? A I do not.

Q What was your position at McKinley Hospital? A I was technician. 10

Q Your duties were to do what? A To examine any specimens that were sent to me.

Q To make the necessary analysis and report? A Yes.

Q Did you have any specimens coming to you purporting to be taken from Mr. Harry B. Mahan? A I did.

Q On how many occasions?

Mr. Devlin. I submit he should not lead the witness with a question of that character. 20

The Court. Of course, it assumes something that is not yet in proof.

Mr. Heher. I said, "Purporting to come." That was my question.

The Court. Oh, yes. All right.

A I know there was one. I do not know how many more. It has been too long ago for me to remember. 30

Q Well, I show you this booklet. What is that? A That is the medical record in McKinley Memorial Hospital.

Q Pertaining to whom? A Pertaining to Mr. Harry Mahan.

Q Was it made under your supervision? A No, not this report. I had nothing to do with the nursing.

Q I call your attention to this paper dated September 15, 1919, and ask what that is. A 40

Harriet E. Matthews, direct.

That is a report of the uranalysis of Mr. Mahan, delivered to the nurse in charge of the floor on which he was a patient by me.

Q Is that report in your own handwriting?

A That is my own handwriting.

Q Is that your signature? A Yes.

10 Q Upon what was that report based? A I do not understand the question.

Q Did you make an analysis previous to making a report?

Mr. Devlin. I object to that. Ask her what she did.

Q What did you do before making that report? A I received a specimen of urine in a bottle which was stoppered with cotton, labelled with Mr. Mahan's name and the date, and those
20 specimens were sent to the laboratory. I do not know by whom it was brought because I would get in to my position about eight-thirty, and a good many times the specimens were already there for me; but I know it was labelled with his name and the date, and I made the examination and made this report.

Q And that correctly stated the results of your analysis? A It did.

30 Q Now, I show you another report dated September 18, 1919, and ask what that is. A That is a report of uranalysis of Mr. Mahan, made by me and delivered to the nurse in charge on the floor.

Q That is your handwriting? A Yes.

Q What did you do previous to making that report? A I received a specimen which was labelled with Mr. Mahan's name and the date of collection and examined the specimen.

40 Q You analyzed it? A I did.

Harriet E. Matthews, direct.

Q Does that report correctly state the result of your analysis? A It does.

Mr. Heher. That is all.

Mr. Devlin. Do you intend to offer the report on this testimony?

Mr. Heher. No; I do not want to offer the report now. 10

Mr. Devlin. I object until he establishes that the urine was taken from this man.

By the Court.

Q You do not know whose it was except from the label? A I do not.

Q You have no personal knowledge as to from whom it was taken? A I do not.

The Court. Counsel is simply perfecting his offer, which he has a right to do. 20

Mr. Devlin. I am objecting now to the testimony with regard to this question.

The Court. Yes.

Mr. Heher. That is all, Miss Matthews.

Now, in order to get a ruling I want to offer the testimony of the doctor, taken out of the presence of the jury yesterday, and I think there were some matters— 30

The Court. Some is competent and some is not. That which pertains to the hypothetical question based upon the report of Miss Matthews I should overrule. The other testimony, so far as examination of the deceased man's body, is competent, of course. You gentlemen can probably agree on what to leave out and what to put in.

Mr. Devlin. I was going to offer this suggestion, that the doctor testified in there 40

Dr. Raymond S. Seiber, direct.

10 yesterday very largely on the question from these reports, and it was understood the reports would make a foundation for his testimony when offered here. Now, a very small part of his testimony was given from the general condition which your Honor detailed. Perhaps it would be well to have the doctor restate his testimony on that line.

The Court. Yes; it would save time, I think.

Mr. Devlin. I think it would be confusing and that it would save time to re-examine the doctor.

20 *The Court.* Then it is understood that all of his previous testimony is to be disregarded, so far as it pertains to his examination.

Mr. Heher. The rest of the testimony, taken out of the presence of the jury, is to be disregarded.

The Court. Yes; so far as it pertains to the examination, and this testimony is to be given in substitution.

30 DR. RAYMOND S. SEIBER, recalled.

Direct examination by Mr. Heher.

Q Doctor, I show you these reports, dated September 15 and September 18, 1919, and I ask you whether you made any diagnosis of the condition of Harry B. Mahan on the days of these reports?

40 *Mr. Devlin.* I object for the reason that the foundation has not been laid by the authenticity of these reports upon which he could base an opinion.

Dr. Raymond S. Seiber, direct.

The Court. I have practically overruled the question. I will sustain the objection and note an exception.

Q Were you able to diagnose his condition on any other information which came to your knowledge except the information contained in these two reports? A What condition do you mean? 10

Q Well, the condition of his kidneys?

Mr. Devlin. I object to that.

The Court. Counsel has an entire right to find out anything the doctor observed as to his condition both while in the hospital before his death and at the post mortem after his death.

(Last two questions and answer read.)

A No; I could not. 20

By the Court.

Q You could not tell anything about his kidneys before his death? A Not unless the report of the examination of the urine were made.

Q Leaving out the report, you could have no judgment about it? A I could not.

By Mr. Heher. 30

Q At the time he was brought in did you observe anything unusual about this man's condition other than unconsciousness, due to the fall or the injury? A Well, his breath seemed to me to smell of alcohol.

Q Can you describe to us just in what degree that was? A No; I could not.

Q Well, was it slight or otherwise? A I would say it was well marked. 40

Dr. Raymond S. Seiber, direct.

Q How long was that odor noticeable? A I really don't know when I noticed it.

Q Did you make any examination of him at the time other than taking note of the condition of his breath, to determine his condition?

A I went through the usual procedure, as the
10 neurological examination, to test his nerves and reflexes and the like.

Q What did you find? A I found that his knee jerks were exaggerated. That showed that the nervous system was excited and more or less unsettled due to the injury.

Q Did this examination indicate anything else? A No; no more than I have stated.

Q After his death you attended the post mortem examination of Dr. Scammell? A Yes;
20 I was there.

Q Did you participate in the examination? A No; I did not.

Q You observed everything that was done? A I was there, looking on.

Q Did you make any examination of his kidneys? A I just happened to look at them. I did not touch them at all.

Q What did you observe from the post mortem as to the condition of his kidneys? A They
30 were congested.

Q What does that congestion indicate? A Some inflammation.

Q Will you be a little more specific, doctor? What did this inflammation indicate in the way of a specific disease? A Well, it points to Bright's disease.

Q Were you able to tell whether it was chronic or acute? A No; I was not.
40

Dr. Raymond S. Seiber, direct.

Q Would it be possible to tell from the post mortem examination whether it was chronic or acute?

Mr. Devlin. I object to the question. I think anything is possible.

The Court. The question is not objectionable.

10

Q Would it, doctor? A I don't think it could unless you examined it by a microscope.

Q I presume if you had the history of the case you could give a more definite conclusion on whether it was chronic or acute? A Yes; I would say the history would give me more information.

Q Did the post mortem examination indicate whether or not he was suffering seriously from Bright's disease at that time? A Well, I don't know, only that the kidneys were congested.

20

Q Well, is that in the early, or what stage of Bright's disease does congestion result? A Both, but principally in the early stage.

Q What effect does Bright's disease have on the length of life? A It tends to shorten life.

Q To what degree? A It is hard to say.

Q What is the usual run of Bright's disease? What is the average period during which a man survives with the disease? A I really don't think there is any average.

30

Q Well, can you give us some rule by which we can go ourselves, doctor?

Mr. Devlin. I submit when he answers the first question negatively he cannot answer the second one.

40

Dr. Raymond S. Seiber, direct.

By the Court.

Q Doctor, is it a fatal disease or not? A Yes.

Q Is it so regarded in the profession, as incurable? A Yes.

10 Q Now, what is its own term? What is its own term of life? What is the duration? In other words, how long does Bright's disease last? And what counsel wants to know is what would be the effect on the human organism. A Well, it tends to shorten life, but when it comes to giving any length or duration—

Q Is it a disease of years or months or what? A Well, of years, I would say.

By Mr. Heher.

20 Q You cannot give us any more information than that? A No; I could not.

By the Court.

Q What is its effect upon the effectiveness of the organism itself? A Of the kidney?

30 Q No; the whole body; the whole man. What is the effect on his activities—any? A Oh, yes; it weakens him down, and the most important fluids of the body, the albumen of the blood, the kidneys pass off; it has a weakening effect.

Q What effect has that upon his physical hindrance or activity? A It is a hindrance.

By Mr. Heher.

Q You say it is a disease of years. Hasn't it resulted fatally in a short time?

40 *Mr. Devlin.* Objected to as leading.

Dr. Raymond S. Seiber, cross.

The Court. That is leading.

Q Well, is there any specific—

The Court. Can you not be a little more definite than that, doctor? Can you not tell us whether those years be many or few?

The Witness. Well, it depends lots of times on a person's habits and the treatment they are receiving whether it is a few years or a longer number of years. 10

Q Doesn't it depend also on the intensity of the attack, of the disease? A Sometimes it does.

Cross examination by Mr. Devlin.

Q Doctor, what school of medicine did you come from? A Hahnemann Medical College, Philadelphia. 20

Q How long have you been practicing? A I graduated in 1909 and have been practicing in Trenton since 1911.

Q Have you had many cases of Bright's disease? A Quite a few.

Q In the case of this man here how long was he in the hospital? A Mr. Mahan, do you mean?

Q Yes. A He was in eight days. 30

Q Did you make a personal examination of him in that time? A The night he came in I did; the evening he came in.

Q What did that examination consist of? A It consisted of going through the neurological examination to determine whether the man was suffering with any fracture of the skull.

Q I beg your pardon, but at least I do not understand when you use a term like that, "neurological," and I do not think the jury does, 40

Dr. Raymond S. Seiber, cross.

either. Will you detail what you did? A Well, I examined the condition of his eyes and the extent of his unconsciousness.

Q What did you do? A Tried to arouse him, examined his eyes—

10 Q What did you do to examine his eyes? A To look at the pupils?

Q You opened them? A Yes.

Q And looked at the pupils? A Yes.

Q Go ahead. A To determine whether there was any pressure on the brain.

Q What did you find? A I found they were equal at that time.

Q What does equality indicate? A That there isn't any one-sided pressure on the brain.

20 Q Does it indicate any pressure at all when you find eyes equal? A No, sir.

Q What else did you do? A Examined his knee jerks.

Q What did you do to the knees to get those jerks? A Well, you lift up the knee and tap right below the kneecap and test the reflex.

Q That is, the leg springs up? A Yes.

Q What did that indicate? A That was exaggerated and indicated that the brain or nervous system was excited, due to the injury.

30 Q What else did you do to him? A I scraped the bottom of his feet to see if his big toe bent back.

Q That is, you scraped the sole of the naked foot? A Yes; I scraped it this way (illustrating) with a pin.

Q What did you find? A I found that the big toe bent back and the other little toe was bent forward.

40 Q What did that indicate? A That indicated that his spinal cord was all right.

Dr. Raymond S. Seiber, cross.

Q What else did you do? A I examined his—felt around his abdomen and tapped his abdomen to find if there was any injury there, to the organs.

Q What did you find? A I did not find any injury.

Q What else did you do? A I looked over his head to see if there were any cuts, and did not find any. 10

Q Did you find any cuts on the face at all? A No.

Q Did you find it bruised? A Not that I remember.

Q Were you here when Dr. Scammell testified? A Yes.

Q Did you hear him say he saw a brush burn on the face of the man, on the left-hand side? A I heard Dr. Scammell say that. 20

Q A brush burn is where the skin rubs against a hard substance and comes off? A Yes.

Q For instance, you slip along the sidewalk—did you see that? A Not that I remember.

Q If it was there do you think you would have seen it? A I think I would; yes.

Q Then you think it was there, but you don't remember it? A I don't say that. I said I did not remember seeing it. 30

Q Do you think it was there? A I do not know. I don't remember seeing it.

Q You heard Dr. Scammell testify it was there, and after hearing him do you think maybe it was there and you do not remember seeing it?

A Well, I don't remember seeing it.

Q Well, do you say it was there?

Mr. Heher. I object to that as argument. 40

Dr. Raymond S. Seiber, cross.

The Court. The present questions are competent enough. I do not think you have a right to refer to other testimony and ask the witness to in any way characterize it. I think this question is admissible.

10 Q Will you answer the question? A I don't remember seeing it.

Q Now, was there anything else that you did in the line of examination? A That evening, do you mean?

Q Yes, sir. A That is about all.

Q He was unconscious that evening? A Yes.

Q Did you see him the next day? A I did.

20 Q What did you find his condition the next day? A The next day he would answer questions when you asked him. I remember correctly and very distinctly also he told me his name when I asked him.

Q Did you have to arouse him? A Yes.

Q What do you do when you arouse a man?

A He was in a sub-conscious state.

Q When you arouse a man what do you do?

A Talk to him and push him.

30 Q Push him with your hand in this fashion (illustrating)? A Well, I perhaps touched him on the face.

Q Moved the shoulder? A I don't remember how I did it.

Q Do you shake them? A Just like you arouse a sleeping person.

Q And after you did that you got some answers? But he did not talk voluntarily? You had to arouse him, didn't you? A Yes, sir.

Q When you let him alone he simply lapsed into a seemingly unconscious condition? A Yes.

40 Q Did you visit him the next day? A Yes.

Dr. Raymond S. Seiber, cross.

Q What did you find the condition the next day? A About the same as the second day—the day previous.

Q Did you visit him the next day? A Yes.

Q What did you find that day? A I took his blood pressure then.

Q What did you find that to be? A It was practically normal, showing there was no— 10

Q It showed normal. What was his condition the next day?

Mr. Heher. Let him tell what it was. You interrupted him.

Mr. Devlin. No, I didn't.

The Witness. I said it showed normal.

Q That day he was still in this unconscious state? A Yes, and restless. 20

Q The next day did you visit him again? A I did.

Q What was the condition the next day? A Restless and thrashing around the bed, wanting to get up.

Q Unconscious? A Unconscious.

Q What was he the next day? A The same.

Q Was he that way until he died? A Yes.

Q Do you remember the day he died? A The twenty-first. 30

Q Do you remember what time of the day he died? A I don't remember.

Q You saw him that day? A Yes.

Q Did you examine the head at all? A I did.

Q You did not find anything in the head? A No.

Q Did you hear Dr. Scammell testify that he found a fracture on, I think, the right part of 40

Dr. Raymond S. Seiber, cross.

the head, here (indicating)? A I heard him say that; yes.

Q Did you see that fracture at the autopsy?

A I don't remember it.

Q Did you take any interest in the autopsy or just were you an onlooker? A I was just
10 an onlooker.

Q You did not take any scientific interest in it at all? A No.

Q Now, you said something about smelling liquor on him. You would smell liquor if he had one drink before he was hit? A Yes.

Q Of if some one spilled it across his face, whether he drank it or not, you would smell it just the same, wouldn't you? A Yes.

Q Now, doctor, assuming that this man was
20 forty-one years old, so far as is known was apparently in good health, the father of eight children, and worked at fairly hard physical work, what have you got to say about his kidney condition now? A In what respect?

Q Well, in respect to how much would it affect a man forty-one years old, the father of eight children, who had never been ill and had done reasonably hard physical work since he
30 was a man, and still continued to do it, and you saw a kidney condition at the autopsy—what do you think the effect of that kidney condition on that man was? A I don't know.

Q Do you think it would be very serious or would it not? A It would be a hindrance to him in his work.

Q It would not be such a hindrance as it would be to a man who had been debilitated or a man who had been devitalized by illness, would it? A Well, I could not say that.
40

Dr. Raymond S. Seiber, cross.

Q Well, isn't it true that a man whose vitality is low, that disease hurts him more than a man whose vitality is high? A Oh, yes.

Q Well, assuming a man's vitality was good, as I have described it, from manhood, who worked hard, and with that picture in front of you, would you say that the kidney condition would be very serious, if he had a good vitality? 10

A It would be serious even if he had a good vitality.

Q Well, but would it have the same effect on him as if he had a low vitality? A Well, I do not know much about the man.

Q I am asking you a hypothetical question. Assuming he had a low vitality, it would have a worse effect, would it not? A Yes, it would, if his vitality was low.

Q Than with a man who had been the victim of illness or disease of some kind? A Yes. 20

Q You observed this man for about a week, doctor. Did you ever talk to his wife about him? A I never saw his wife.

Q Did you ever make any inquiry as to the previous condition of his health and life to enable you to diagnose this case while he was in the hospital? A No; I did not.

Q Would that have assisted you, do you think, if you had made some inquiry from his wife or those who knew his home conditions, about his previous health, his occupation, his methods of living? Would that have assisted you, do you think, to diagnose the condition he had for seven or eight days? A No, because his injury was paramount. 30

Q True; but you have given us a lot of testimony here and you say that those tests indicated that no pressure existed; in other words, 40

Dr. Raymond S. Seiber, re-direct.

that he was not suffering from any fracture. Is that true? A He was not suffering with any brain compression.

Q A brain compression is due to either fracture or concussion? A No; it can be caused by other things.

10 Q And what? A Brain tumors.

Q You found in your tests no evidence of brain pressure coming from brain tumors or fractures or concussion; is that right? A I found none.

Q Not finding that would it not have helped you some to have inquired from his wife and family as to his habits and method of life, and so forth? A I do not think so.

20 Q Isn't it a fact with any disease as a rule that the doctor generally inquires as to the habits, life and other things, so as to get the picture when the thing exists? A When they think it has any bearing on a case they do.

Q You do not think it had any bearing? A I do not think so.

Q You knew this man had been in an accident? A I knew he was in an accident; yes.

30 Q And you knew your examination did not exhibit, as you said, a single symptom indicating that his brain was being pressed, or a brain pressure. Is that true? A Yes.

Q And you did not think that some information or knowledge about his life and habits would have assisted you to discover the condition of the disease? A No; I did not.

Re-direct examination by Mr. Heher.

40 Q Doctor, you were asked whether or not this man's vitality was high or low would mean anything in the matter of life. Do you mean that

Dr. Raymond S. Seiber, re-direct.

if his vitality was low the duration of life would be much shorter than if it was high? A Oh, yes.

Q Can a man's vitality be good if he has Bright's disease? A Not extra good; but it just depends on the extent of the disease.

Q If there are other diseases complicating the situation the vitality might be lower than if he had only Bright's disease; is that what you mean? A Repeat the question. 10

Q If there were other diseases beside Bright's disease his vitality might be lower than if he had a Bright's disease? A Yes.

Q Can a man have high vitality and suffer from Bright's disease at the same time? A If it is in a certain time.

Q Is Bright's disease a progressive disease? A Yes, sir. 20

Q It gets worse all the time? A Yes.

Q Now, assuming that a man did laborious work, as counsel for the plaintiff assumed, that of kiln drawing—do you know what that is? A I have never seen it done.

Q Have you any idea what it is? A Taking ware out of the kiln.

Q Taking saggars of ware out of a kiln where it has been fired? A Yes; I suppose so. 30

Q That is laborious labor, isn't it? A I should think it was.

Q Assuming this man followed that occupation, what would be the effect of Bright's disease upon his capacity to do that work? A Well, I really don't know what would be the effect on him, because I did not know him. 40

Dr. Raymond S. Seiber, re-cross.

By the Court.

Q What would be the effect generally? A It would be a hindrance to him in heavy work.

By Mr. Heher.

10 Q What effect would this heavy work have on the progress of the disease? A It would just depend on his diet and treatment.

Q Well, you said on your examination that if special care was taken of a man suffering from that disease he might live some time. A He would live longer; yes.

Q Would he live longer than if he did not have that care taken? A Yes.

20 Q Could a man engage in that laborious work of kiln drawing and suffer from Bright's disease without serious impairment of his physical condition? A I should think so, if he refrained from certain foods and took certain medicine.

Re-cross examination by Mr. Devlin.

Q Do you know that Bright's disease follows in persons of certain habits more than others? Do you know that? A Yes, I do.

30 Q Is it true that Bright's disease follows people of habits other than those that follow physical efforts? A Not necessarily.

Q Well, I say is it true that Bright's disease generally follows people of habits, who do not use much physical effort in their labors? A I don't know.

40 Q Is it a disease that follows generally people who eat richly and drink richly and do not exercise sufficiently? A Not always.

John Hitchen, direct.

Q No, but I say, does it follow that? I do not say always. Generally isn't that true? A Sometimes; yes.

Q Isn't it true that you find less Bright's disease among men who, for instance, use hammers and do heavy physical work, and use picks and shovels and do work in the outside open air—you don't find much kidney trouble among those people, do you? A I do not know. 10

Q From your experience isn't that true? A I can't remember whether they include that class of workmen or not.

Q Well, from your experience as a doctor and your education as one, doesn't it all point to that fact; in other words, that Bright's disease is not a disease that follows men and women who have hard physical labor and exercise in the open air? Isn't that true? A You find it in all walks of life and all occupations. 20

Q In other words, it is a disease that is due to over-eating and over-drinking without sufficient exercise? Doesn't it follow that? A Not always.

Q I know not always, but doesn't it seldom follow people who have been sparing of food and do heavy physical labor? A They have it sometimes. 30

JOHN HITCHEN, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Where do you live, Mr. Hitchen? A Slackwood.

Q And you have lived in Trenton how long? A About nine years, I suppose. 40

John Hitchen, direct.

Q Where are you employed? A Trenton car shops.

Q What is your occupation there? A Boiler maker helper.

Q Were you on the Brunswick Pike— A I was.

10 Q --on the day that Mr. Mahan met with this accident? A Yes, sir.

Q Do you remember what day it was? A The thirteenth of September.

Q What year? A 1919.

Q You were with someone on that day, weren't you? A Yes, sir.

Q With whom were you? A Andrew Richardson.

20 Q Did he live near you? A Yes, sir; right across the street.

Q What were you doing on that day? A Just taking an afternoon walk.

Q Walking along the road? A Yes, sir.

Q In what direction? A Toward Lawrenceville.

Q And you had reached what point when you saw Mr. Buckley and his automobile? A I was right over the bridge.

30

By the Court.

Q Were you going the same way the car was going? A Yes, sir.

By Mr. Heher.

Q That is the Shabacunk Creek bridge? A Yes.

Q Do you know where Mr. Mahan lived? A Yes.

40

John Hitchen, direct.

Q Do you know Mr. Mahan? A No, sir; not to see.

Q But you know now where he lived? A Yes.

Q Where was his house with reference to the bridge? A Why, it was on the Lawrenceville side, going to Lawrenceville. 10

Q On which side of the road, right or left? A The left hand.

Q Beyond the bridge? A Yes, sir.

Q How far? A I could not tell you that.

Q Were you on the bridge when you saw Mr. Buckley? A No, sir; I was over it.

Q Then you were going toward Mr. Mahan's house? A Yes, sir.

Q Which side of the road were you on? A On the right-hand side. 20

Q Did you see Mr. Mahan on his bicycle? A Yes, sir. 20

Q When did you see him the first time? A He passed us.

Q On which side of the road was he? A On the right-hand side.

Q You were all going in the same direction? A Yes.

Q Did you see this pony cart? A No, sir.

Q You did not notice the cart? A No, sir. 30

Q I mean this horse or pony cart driven by the— A I did not see it until after they picked the man up.

Q How far from the bridge were you when Mr. Buckley's automobile passed you? A I guess we were just on the edge of it then.

Q Did you observe anything about the car? A No, sir.

Q Anything special? A No, sir.

Q Did you see the mechanic? A No, sir. 40

John Hitchen, direct.

Q Did you hear any signal? A Yes, sir.

Q What kind of a signal? A A horn.

Q From whose automobile? A Mr. Buckley's.

Q Where was the automobile when you heard the horn? A Just coming across the bridge.

10 Q Did you have to leave your position in the roadway? A No, sir.

Q And the automobile passed you without your moving? A Yes, sir.

Q Could you tell anything about the speed of the automobile? A No, sir.

Q Well, was there anything about it that attracted your attention; that is, about its speed? A No, sir; only the noise.

Q What kind of a noise? A Well, he had
20 his cut-out on; that is all.

Q Well, was it going fast or slow? A I could not tell whether it was going past the speed limit or not. I do not know the speed limit.

Q No, but as cars usually run how was it going? A I guess just like any other car, I suppose.

Q Was it going faster than cars usually go? A No, sir; not as I could see.

30 Q Was there anything about the speed of this car or anything else about the car that attracted your attention? A No, sir.

Mr. Devlin. I object to that, with regard to speed. I think if the man does not know the speed he ought to stop at that. He has not been able to tell the speed or even give comparisons.

Q Did you see the accident? A No, sir.

Q Did you see Mr. Mahan turn from the right
40 to the left of the road? A No, sir.

John Hitchen, direct.

Q What did you next see? A All I seen was the man lying there and we ran up and helped carry him in the car; that is all.

Q Where was the automobile? A It kept on going.

Q How far did it go? A Up to a lane and turned around and came back again. 10

Q It went up to the crossroads and turned and came back? A Yes, sir.

Q Did it stop at all after passing Mahan? A I could not tell you that; I did not take particular notice.

Q You saw the man in the road and later on you saw the automobile going up to the crossroads and turning around and coming back? A No, sir.

Q You do not know whether it stopped— 20

Mr. Devlin. I object. You are leading the witness and he is your own witness. Allow him to say what he saw. The questions are all leading.

Mr. Heher. Well, object to them, then.

Mr. Devlin. I will object, but I do not want to do it constantly.

The Court. Gentlemen, there is nothing pending. The questions have all been answered. 30

Mr. Heher. Cross examine.

By the Court.

Q You did not see the accident, did you? A No, sir.

Q Nor how it occurred? A No, sir.

Andrew Richardson, direct.

Cross examination by Mr. Devlin.

Q Mr. Hitchen, did I understand you to say that the horn was blown on the other side of the bridge? A It was just coming over the bridge.

10 Q That is, before they reached you the horn was blown? A Yes, sir.

Q They hadn't got to the bridge? A They were just coming over the bridge.

Q It was not blown after that, that you heard? A What is that?

Q After that you did not hear it? A I heard the noise but I didn't hear the horn, no. I didn't take notice, though.

Q You and your friend were not paying attention to anything on that road? A No, sir.

20 Q You were just engrossed in your own company and in your walk? A Yes, sir.

Q And if you saw things, you did not notice them? A Yes, sir.

Q That is true? A Yes, sir.

ANDREW RICHARDSON, sworn as a witness on behalf of the defendant.

30 *Direct examination by Mr. Heher.*

Q Where do you live, Mr. Richardson? A Slackwood.

Q Where are you employed? A Thermoid Rubber Company.

Q You have lived in Trenton how many years? A Well, I have spent my whole life in Trenton.

40 Q Do you recall the day Mr. Mahan met with this accident on the Brunswick Pike? A I do not know the date, or exactly the date.

Andrew Richardson, direct.

Q But you were on the road that day? A I was.

Q Do you remember when it was, approximately? A Oh, about a year ago, I should judge.

Q Were you with Mr. Hitchen? A I was.

Q Where were you going that day, or in what direction were you going? A Toward Princeton, I should say. 10

Q Taking a walk? A Yes, a walk.

Q What time in the evening was it? A It was after supper; I know that.

Q What was the condition of the road? A Why, the road was dry.

Q It had not rained? A No; it had not rained.

Q How about the lights; was it daylight or dark? A Daylight I should say. 20

Q Were the lights on automobiles lit at that time? A No, they were not.

Q It was not necessary to have them lit? A It was not necessary.

Q When did you first observe Mr. Buckley's automobile on the road, and where were you? A We were just over the bridge.

Q That is the bridge crossing the Shabacunk Creek? A Yes, sir. 30

Q Do you know where Mr. Mahan's house is located? A I do.

Q On which side of the road? A The left-hand side, toward Princeton.

Q How far from the bridge? A I should judge about three hundred or four hundred feet; something like that.

Q It sets back from the roadway? A It sets back from the roadway a ways. 40

Andrew Richardson, direct.

Q How far? A Oh, about twenty-five or thirty feet, I should judge.

Q Now, you had crossed the bridge and the automobile passed you? A We were on the other side of the bridge when the automobile passed us.

10 Q What position in the roadway was the automobile, when it passed you? A On the right-hand—well, I should judge, laying over to the middle after passing the bridge.

Q And you were on which side of the road? A The right-hand side.

Q You were on the right-hand side? A The right-hand side of the road.

Q Did you see Mr. Mahan? A He passed us on his bicycle.

20 Q Did you see the pony cart and pony? A Well, they passed us up on the road a ways; that is before we were on the bridge.

Q After going over the bridge did you notice the pony and cart? A I did not.

Q Did anything occur that attracted your attention? A No; only the accident; that was the only thing. We did not see that; it was after it was over.

30 Q You did not see the accident? A We did not.

Q Were you facing that way? A I was facing that way.

Q But you don't know how it occurred? A I do not know.

Q Did you see Mr. Mahan turn from the right of the road to the left? A I did not.

Q Did you hear any noise of the automobile? A Only the motor was about the only thing I
40 heard.

Andrew Richardson, direct.

Q What sort of noise was the motor making?

A I could not tell you.

Q Did you hear anything else? A Nothing at all, only the horn before it passed us.

Q Well, did you hear the horn? A Before it passed us.

Q How far were you from the bridge when the automobile passed you? A Oh, we just got over the bridge. 10

Q How long before the automobile passed you did you hear the horn? A I could not say.

Q Did you hear the horn distinctly? A We heard the horn.

Q Did you hear the horn again? A Not after it passed us; we didn't pay no attention to it then.

Q You paid no attention to it? A No, sir. 20

Q Did you pay any attention to the speed of the car? A No.

Q Well, can you give us some idea about how it was running? A What do you mean?

Q The automobile. Can you give us any idea about how it was running, fast or slow? A I could not say about that. About like any other car on the road.

Q What is that? A About the same as any other car on the road at that point, I should judge. 30

Q Now, was there anything about the speed of the car which you noticed? A No; nothing at all.

Q It did not move any different than any other car?

Mr. Devlin. I object to that as leading.

Q Did you see Mr. Mahan lying in the roadway? A I seen him lying in the road. 40

Andrew Richardson, cross.

Q What became of the automobile? A It went up and turned around and came back as we were picking Mahan up.

Q Did you notice whether the automobile stopped before it went up to the crossroads? A I did not notice.

10 Q You do not know whether it did or not? A No, sir.

Cross examination by Mr. Devlin.

Q The horn that was sounded was sounded before the machine passed you? A Yes, sir.

Q And that was sounded on the Trenton side of the bridge, or the side toward Trenton? A The Trenton side of the bridge.

20 Q And you were on the right side of the road? A Yes.

Q Your hearing was just as good after the automobile passed you as it was before? A No doubt it was.

Q If the horn had been sounded after it passed do you think you would have heard it? A Well, I do not know.

30 Q Your hearing was as good, and if it had been sounded you think you would have heard it if it had been sounded after it passed you as you did before it passed you? A Yes, if we were paying attention to it.

Q The fact is that you and your friend were engrossed in your walk and the conversation you had? A Yes.

Q And you were not giving any notice to anything. You were seeing things but not noticing them. A Yes.

Q And the only time your attention was taken was when you learned somebody was hurt?

40 A Yes.

James P. Walker, direct.

Q Before that you had not given anything any notice excepting you were enjoying your company and your walk? A That is true.

Q After you saw Mahan in the road did you see the automobile? A I did not notice the automobile.

Q I mean after you saw Mahan in the road did you notice the automobile? A Oh, yes; because we helped to put him in the automobile. 10

Q Did the automobile run far after it hit Mahan? A I do not remember.

Q Did you see it turn at the crossroads? A I did not notice it.

JAMES P. WALKER, sworn as a witness on behalf of the defendant. 20

Direct examination by Mr. Heher.

Q Mr. Walker, what is your position? A Civil engineer, Mercer County's Engineer's office.

Q Did you make a map of the roadway and of the Shabacunk Creek bridge on the Brunswick Pike? A I did.

(Map placed on easel.)

Q Will you just come down here and explain this map to the Court and jury? A (Witness goes to map.) 30

Q (Indicating on map.) Now, this indicates the roadway? A This is the small scale plan that indicates the roadway and shows in a general way the location of the houses and the roads and the Shabacunk Creek Bridge, with the distances from the various points.

Q The distance from the Shabacunk Creek to the Mahan house is how many feet? A 503 40

James P. Walker, direct.

feet from the end of the bridge to the center of the house.

10 Q What is the width of the roadway from the creek to the house? A The clear width of the roadway is thirty feet, shown on this larger scale in detail in order to show the widths in the vicinity; and there is a six-foot graded earth shoulder on each side of the road, and an eighteen-foot asphaltic concrete road; and directly in front of the house and for some little distance each way it is eleven feet in the one case on the left-hand side nearest the house as you went out to the edge of the slope in front of the lane of this property, and on the other side to the edge of the woods, and there is some little slope rising here and the road is cut through. (Indicating.)

20 Q On that side there is nothing but woods? A There is nothing but woods; and then there is a slight embankment there that runs up probably three feet.

Q And on this side (indicating) that is the only house? A That is the only house between the bridge and that road.

Q And the rest of it is woods? A Yes.

30 Q What is the slope from the roadway on each side of the center of the road? A That is a very small slope. It is a slope that is not dangerous to run on. You could ride right over it very well along here; you could ride right over to this ten feet to the edge of the hedge from the embankment through which the road is cut; and on this side (indicating) you could ride to the edge of the grass.

40 Q The asphaltum is eighteen feet and the shoulder is six feet? A Six feet is the graded width it was built with the road. Now in this

James P. Walker, cross.

part it happens on this particular section of road it is also good for travel. I would say you could travel on it to that thirty feet clear width it was graded at the time the road was built.

Q Is the roadway the same width all the way down to the creek? A All the way down to the creek.

Q Eighteen feet asphaltum and six feet shoulder on each side? A Yes, down to where it narrows in where the bridge is. 10

Q And this additional width you speak of? A That does not carry all the way. Where the road runs in the valley it is a little marshy, but where it is in the cut this extra width occurs.

Q Now, that road slopes down toward the creek on each side? A Yes.

Q So there is a hill this way and a hill that way? (Indicating.) A Yes. 20

Cross examination by Mr. Devlin.

Q Mr. Walker, this road here you say is thirty feet? A Yes.

Q That is thirty feet macadam? A No; it is eighteen feet asphaltic concrete with a six-foot gravel shoulder on each side.

Q That makes a thirty-foot road? A Thirty feet clear and graded. 30

Q This (indicating) is the Shabacunk Creek bridge? A Yes.

Q Down toward this bridge here you go to Lawrence? A Yes; it is down grade to the bridge.

Q And the creek is in a hollow? A Yes.

Q What is this, the house of Mahan? A That is the house; yes; the only house.

Q And the distance is 503 feet; is that right?

A Yes, sir. 40

James P. Walker, cross.

Q And the distance—what is this 938 on here? A That is to these roads; there is the lane on one side and the road on the other side.

Q Is that 938 from this point (indicating) or the house? A From the house.

10 Q Then from the house to this road is 938 feet. Is that right? A Yes, sir.

Q This map is drawn with a hundred feet to the inch scale? A Yes, sir.

Q What is the object of these little maps here? A To show in greater detail the location immediately in front of the house, and also down to the bridge. It was not possible on a small scale map; otherwise you would have a great big sheet.

20 Q How wide is the bridge of the Shabacunk Creek? A There is a clear roadway in the bridge of sixteen feet, and it only narrows in at the abutment as shown there, and beyond the end of the bridge you have the thirty feet.

Q How wide in fact is the rideable part of the bridge? A Sixteen feet.

Q And the grade runs down both ways? A Both directions.

30 Q Have you any idea what distance it is from here (indicating) to this point (indicating)? A Well, that point is indefinite; that isn't anything up there. I just drew it out. I could have continued indefinitely there until it comes into Trenton.

Q The only place you use the scale is between these points? (Indicating.) A Yes.

Q That (indicating) is not to scale at all? A No, sir.

Q I understand the scale is to be used from this point (indicating) to this point (indicating)?

40 A Yes.

Mrs. Elizabeth Walker, direct.

Q Is the scale used here (indicating), too? A Yes; one inch to twenty feet.

Q When did you make the map, Mr. Walker?

A Last night I drew the map.

Q Are conditions the same there as they were a year ago, do you know? A Yes, I should say absolutely to all intents and purposes, exactly the same. 10

Q Did you locate any telegraph pole down here anywhere? A I did not locate any. There is a line of telegraph poles.

Q Did you locate any anywhere between the house and the bridge? A Oh, there is about two or three poles in that stretch there.

Q Did you locate them? A No, sir; they are well back off the road.

Q They don't impede the use of the road, do they? A No. 20

Q In other words, if they had been on the road you would have put them there? A Oh, yes. They were back off the six-foot shoulder.

Q But they were not on the road or you would have put them there? A They were on the road right of way but not on the clear width of the road.

Q When you made the map was yesterday? A I made the map last night from the survey. 30

ELIZABETH WALKER, the defendant, sworn.

Direct examination by Mr. Heher.

Q Mrs. Walker, you are the defendant in this case? A Yes.

Q You are the owner of the automobile driven by your son-in-law, Mr. Buckley? A Yes, sir. 40

Mrs. Elizabeth Walker, direct.

Q Now, on the day that this accident occurred—do you recall the day? A Very well; yes.

Q Do you remember what day of the month it was? A The thirteenth of September.

Q Last year? A Yes. On Saturday.

10 Q On that day what did you direct Mr. Buckley to do with your car? A Well, the car was not running right and I told him to take it down to Smith's, to his repair shop, and have it repaired.

Q Who was Smith? A Why, he was a young man that had been working on the car different times.

Q Did he keep a garage? A Yes; on Olive alley.

20 *Mr. Heher.* Stand up, please, Mr. Smith.

Q Is that the young man? A That is the young man.

Q He kept this garage on Olive street? A Yes.

Q What time did Mr. Buckley leave with the car? A I could not say just what time. He went after dinner.

30 Q Did you see him again until after the accident? A No.

Q When did you first learn of the accident? A On Monday.

Q What say? A I don't know just what day. I do not know whether it was Sunday or Monday.

Q Did you learn of it the day it occurred, or the night of the day it occurred? A No; not that day.

40 Q Did you know of it until the next day? A No.

Mrs. Elizabeth Walker, direct.

Q Where do you keep your automobile? A We have a garage at 109 Spring street.

Q Was the car returned to your garage that day?

Mr. Devlin. If she knows.

Q Yes, if you know? A I could not say about that because sometimes he would leave it there several days and I did not bother to ask. 10

Q Did you know that Mr. Buckley was using the car on the roadway to test it? A No, I did not know. I did not know it would have to go out of the shop after it went there.

Q Did you give him any authority to test the car on the—

Mr. Devlin. I object to that as leading.

Mr. Heher. I have not finished the question. 20

Mr. Devlin. That is all right. You have gone far enough. "Did you give him any authority," is purely leading.

The Court. Let the question be finished. I do not think it is leading.

Q Did you give him any authority to test the car on the Brunswick Pike or any other roadway?

Mr. Devlin. I object to that as leading. 30

A No; I did not.

Mr. Devlin. When I object, Mrs. Walker, please do not answer until the Court rules.

The Court. Well, we must get ahead, of course, Mr. Devlin. It is necessary to direct the witness' attention to some specific thing.

Mr. Devlin. I submit that as far as he can go is to ask her what she directed Buckley to do. 40

Mrs. Elizabeth Walker, direct.

The Court. She has already said she told him to take it down to the repair man. I suppose she could be asked whether she gave any other directions or not.

Q Did you give any other instructions— A No; I did not.

10 Q —or directions to Mr. Buckley, except to take the car down to the repair man? A No, I did not give any other.

Q When did you first know that the car was returned to your garage? A I could not say. I did not bother about it.

Q You did not hear of the accident that day? A No. I could not remember when it was brought back.

Q Do you recall the visit made by Mr. Dennis to your house? A I do, very well.

Q Did you tell him then that Mr. Buckley was out testing the car? A I said they were working on the car. I did not say they were out testing it. I said they were working on the car, and if it was out I supposed that was the reason.

Q Now, you told him that it was your car? A Yes.

Q And that it had been in the repair shop?

A Yes.

30 Q Did you have any information as to the testing of the car on the roadway until after the accident happened?

Mr. Devlin. I object to that as leading. He can ask what information she had about the car and what had been done with it.

(Last question read.)

The Court. I think she may answer that.

Q Did you? A No; I did not know the car
40 was out.

Mrs. Elizabeth Walker, cross.

Q Where did you think the car was?

Mr. Devlin. I object to what she thought.

A I thought—

Mr. Devlin. One moment. I object to that.

The Court. Yes. I do not think that is important.

Mr. Heher. That is all.

10

Cross examination by Mr. Devlin.

Q Mr. Buckley usually drives for you, doesn't he? He is your son-in-law? A Yes.

Q And, Mrs. Walker, he had been using the car that day, hadn't he? A No; he had not been using it; it was out of repair.

Q How is that? A He had not been using it because it was out of repair.

20

Q What was the last day before that it had been used, if you know? A I don't recollect.

Q But you told him to take the car down and have it repaired? A Down to the repair shop; yes.

Q To Mr. Smith, on Olive street? A Yes.

Q And Mr. Buckley is your usual driver; he drives the car when you or the family want to go out? A Yes.

30

Q He lives at your home? A He lives with me; yes.

Q He is married to your daughter? A Yes, sir.

Q Do you know when the car was brought to the garage? A No; I do not.

Q Since this accident have you learned when it was brought there? A No; I have not heard anything of it.

40

Mrs. Elizabeth Walker, cross.

Q Did you enquire from anyone, Mr. Buckley or Mr. Smith, when the car came home? A No; I never do when it is out.

Q On account of this accident happening did not that cause you to enquire and ask when the car came home? A No; I did not ask.

10 Q And you don't know now what evening or day the car was brought to its home garage? A No.

Q Do you remember the first time you were out riding after this accident happened? A No; I don't recall.

Q Have you used it since the accident happened? A Used what, the car?

Q This car. A Yes.

20 Q But you cannot remember how soon or how late after the accident happened? A No; I do not.

Q Have you more than one car? A That is all.

Q I beg pardon? A Only one.

Q How long had you been without riding or using the car before it went to the repair shop? A Well, I could not say.

30 Q Do you know how long you had been without riding after it went to the repair shop? A No.

Q Have you received a bill, or did you ever receive a bill, for the repairs you put in the car? A Why, I always pay them; yes.

Q I know that, of course. A Yes; I do.

Q I would like to know if you received a bill for these particular repairs. A Well, I suppose it has been charged with others.

40 Q You cannot identify those repairs? A No, not that particular one.

Mrs. Elizabeth Walker, re-direct.

Q You don't remember what the nature of the repairs were? A No, because I didn't know nothing about the car.

Re-direct examination by Mr. Heher.

Q Is Mr. Buckley employed by you? A He is. 10

Q Well— A Well, in a way, just for the family, and we all get pleasure out of it.

Q Well, Mr. Buckley has employment of his own? A He has.

Q Where does he work? A At the Malleable Iron Works.

Q The Trenton Malleable Iron Works? A Yes.

Q What is his position there? A Well, I do not know. He is assistant— 20

Q How long has he worked there? A I think it is two years. It is over a year anyway. I cannot say just how long.

Q Before he went to the Malleable Iron Works he worked somewhere else? A Yes; he worked out at the Turbine.

Q So he always had employment of his own?

Mr. Devlin. I object. Quit leading the witness. 30

Q Was he employed by you as a chauffeur at the time this accident happened? A No; he was not. He just runs the car for the pleasure of the whole family.

Q And he lives in your household with his wife? A Yes.

Q And he always has lived with you? A Ever since Mr. Walker died; nine years.

Mrs. Elizabeth Walker, re-cross.

Re-cross examination by Mr. Devlin.

Q How long have you owned an automobile, how many years? A Well, nine years. Of course, two or three years before Mr. Walker died we had one.

10 Q Since Mr. Walker's death who has operated the machine? A No one but Mr. Buckley.

Q He does all the operating and he has been able to operate one for about nine years? A Twelve years.

Q He knows quite a good deal about a machine, too, I suppose? A I think so.

Q And the place you say he worked in—I think one was the Turbine? A Yes.

Q That is a machine shop, isn't it? A Yes.

20 Q It is a high-class machine shop in this district? A Yes.

Q What is the other place he worked? A The Malleable Iron.

Q Is that a machine shop, too? A I could not say about that.

Q But he always did the driving for the family? A He has always driven the car.

30 Q Does anyone else in the family drive the car? A No—excuse me. My daughter has driven it.

Q But not steadily? A No, sir.

Q The driver of the family is Mr. Buckley? A Yes, sir.

Q And he does the driving? A Yes, sir.

Q And you own the car? A Yes, sir; I own the car.

40 (At 12:35 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

Miss Theresa Walker, direct.

MISS THERESA WALKER, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Miss Walker, you are a daughter of the defendant? A I am.

Q And you reside with her on Spring street? 10
A I do.

Q Were you at home when Mr. Dennis called, after this accident to Mr. Mahan? A Yes; I was home.

Q Were you in attendance at the conversation between Mrs. Walker and Mr. Dennis? A I was.

Q Will you state what that conversation was?
A We explained to Mr. Dennis just what Mr. Buckley told us, how the accident had happened, that they had been out on the pike testing the car. 20

Q You explained that to him? A Yes; we explained that to Mr. Dennis.

Q What else was said? What was Mr. Dennis there for? Did he tell you? A I think he came because he held us responsible.

Q Did he say he wanted anything when he came in? A No, he did not say he wanted anything. 30

Q He came there to talk it over? A To talk it over; and we told him we did not know really anything about the accident, only what Mr. Buckley had told us after the accident.

Q Did your mother or you say anything else to him? A I don't remember.

Q When your mother told him how she understood the accident happened, and told him what she understood Mr. Buckley and the mechanic were doing at the time the accident hap- 40

Miss Theresa Walker, cross.

pened, did she tell him where she got the information? A She said she only knew what Mr. Buckley told her; that was all that she knew; that he had better talk with Mr. Buckley.

10 Q Did she say anything to Mr. Dennis as to whether she knew what Mr. Buckley and the mechanic were going to do before they did it?

A No; she did not say.

Q Did Mr. Dennis ask her what she knew? A No; I don't think he did.

Q Did Mr. Dennis ask your mother whether she considered herself responsible for the accident?

Mr. Devlin. Objected to as leading.

20 Q Have you told us all that was said between Mr. Dennis and your mother? A I think I have.

Cross examination by Mr. Devlin.

Q What time of the day was this? A That Mr. Dennis called?

Q Yes. A About noon time.

Q Do you remember on what day of the week? A I think it was Wednesday.

30 Q Do you remember how many days it was after the accident? A No; I think it was Wednesday.

Q Do you know when the car was brought home? A No; I don't just remember.

Q I did not hear you. A I am not sure when it was brought home.

Q Do you know when it was brought home? Do you know how soon after it was brought home? A No.

Mrs. Elizabeth Walker, direct—cross.

By the Court.

Q Was the date of the accident Thursday? A No; Saturday.

By Mr. Devlin.

Q Saturday, the 13th of September. I think that is the day, isn't it? A Yes; Saturday. 10

Re-direct examination by Mr. Heher.

Q Do you know whether Mr. Dennis had more than one conversation or meeting with your mother? A He was there only once at the house.

Mr. Heher. I want to recall Mrs. Walker for just one question.

20

MRS. ELIZABETH WALKER, the defendant, recalled.

Direct examination by Mr. Heher.

Q Did you have more than one conversation or meeting with Mr. Dennis? A No, sir.

Q Only the one? A Yes, sir.

Q And that was the meeting attended by your daughter, Theresa Walker? A Yes, sir. 30

Cross examination by Mr. Devlin.

Q Didn't Mr. Dennis see you again and you say to him, "I will send you to Mr. Buckley," and whatever Buckley would say or do would be all right? A No, sir.

40

Francis J. Buckley, direct.

FRANCIS J. BUCKLEY, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Mr. Buckley, where do you reside? A 56 Spring street.

10 Q You are employed where? A At present at the Trenton Malleable Iron Company.

Q What is your occupation there? A Assistant superintendent.

Q How long have you been employed there? A Two years this coming February.

Q Before that where were you employed? A At the Wright-Martin plant in New Brunswick, and previous to that, the DeLaval Steam Turbine Company.

20 Q In what capacities? A Assistant production supervisor in both plants.

Q You are a son-in-law of Mrs. Walker? A I am.

Q When were you married? A 1906.

Q Have you lived with your mother-in-law since your marriage? A No, sir; only since the decease of Mr. Walker.

30 Q When was that? A May, 1911.

Q During that time you have operated this automobile, or an automobile, for Mrs. Walker? A Yes, sir.

Q Has she had an automobile ever since 1911? A Yes; that car was purchased by Mr. Walker previous to his death, and it still remained in the family.

Q Was it this same car? A No, sir.

40 Q How long was this car in the family? A Since March of 1915.

Francis J. Buckley, direct.

Q In what capacity did you operate this car which was in the Walker family since you have lived there?

Mr. Devlin. I object to the question as leading. Let him say what the facts are.

The Court. I think that is a construction, Mr. Heher.

10

Mr. Heher. I will withdraw it.

Q Under what circumstances did you operate this automobile that was in the Walker family?

Mr. Devlin. I object to that, also.

The Court. He may tell us under what circumstances.

A Simply being the only person in the house that was capable of driving the car, who had a driver's license, it naturally fell to my lot to operate it on the occasions that the family wanted to go out.

20

Q Were you ever employed by Mrs. Walker as a driver or chauffeur? A No, sir.

Q Now, on the day that this accident occurred, September 13, 1919—was that the date?

A Yes, sir.

Q You did something with this automobile?

A Yes, sir.

Q What did you do, and at whose direction did you do it? A On rides previous to the day of the accident the car was not running properly, and upon talking it over with Mrs. Walker she directed that I take this car to John Smith, who ran a garage on Olive street, to make the necessary repairs to have the car run correctly.

30

Q She asked you on what day to do that?

A Well, I could not tell you the exact day. We had been out the Sunday previous to that and it was not running as it should run.

40

Francis J. Buckley, direct.

Q You took the car to the garage on what day? A On Saturday.

Q Did you talk to her that day? A Yes; I spoke to her that noon time.

Q What did she say to you? A She said, "I would advise you to bring it down to John Smith's and let him overhaul it."

10

Mr. Devlin. I object to that.

By the Court.

Q Was this before or after the car was sent to the garage? A Before.

The Court. That is competent, what she said—what the defendant said to the witness. In other words, what instructions, I suppose, she gave him.

20

Mr. Heher. Yes.

By Mr. Heher.

Q Go ahead and relate what she said at the time. A She advised me to take the car to Smith's garage and let him repair it.

Q You say, "advised" you? A Yes, sir. She told me to take it to John Smith's garage and let him repair the car; that he knew the car.

30

Q Had he repaired this car before? A He had thoroughly overhauled it; tore the motor completely out of the car.

Q You took the car there? A To his shop on Olive street.

Q At what time on Saturday? A I should judge around one o'clock.

Q Did you remain at his place while the car was there? A I watched him—I watched him overhaul the particular part that was not running properly.

40

Francis J. Buckley, direct.

Q What part was it? A The magneto.

Q That was in front of the car under the hood? A In front of the car under the hood; yes, sir.

Q How long was he working on the car before you left the garage? A All the afternoon.

Q What time did the car leave the garage? 10
A It was around half-past four or quarter of five.

Q You were there all the time? A Yes, sir.

Q Under what circumstances was the car taken from the garage? A Do you want me to lead up from the point of it being overhauled?

Q Yes. A The magneto had not been running properly, owing to the fact that the jamb nut which supports the winding of the magneto was running eccentric, which caused a short, in other words, and it would not fire properly. 20

Q Did you know that before the car was taken down? A No, sir. I knew it was not firing properly, but I did not attribute it to that fact.

Q And this was discovered by whom? A By Smith, when he took the magneto apart.

Q You are telling us now what he found? A Yes, sir.

Q All right. A Naturally, the adjusting of the carburetor previous to finding that short in the magneto required the carburetor to be re-adjusted. 30

Q Now, will you state for the information of the jury what the carburetor is—what its function is in an automobile? A It was necessary for the carburetor to have the air regulation as well as the gas regulation adjusted so they are uniform and combust properly upon the spark making its entrance from the spark plug into 40

Francis J. Buckley, direct.

the cylinder; and the magneto was a high-speed Zenith magneto; and there are two adjustments on the carburetor, one, a high-speed adjustment, and one low-speed adjustment, and the trouble was on the low-speed adjustment the car would not fire properly, and it would choke up when it was at low speed.

10 Q What do you mean by "low speed"? A In traveling along the highway, if any obstacle should be in the way, and you should remove your foot from the accelerator, the car would immediately start to throb and misfire, and when you went to pick up again the car would not—the mixture was not proper, so that the combustion was normal, and it would not start off as it should.

20 Q When the car was running fast it was all right? A It was all right, because the momentum—

By the Court.

Q Was this true before you took it to the shop? A Yes, sir.

30 Q Do you mean by that it would miss on low speeds? A Yes, sir; on account of the high speed of the magneto that is in direct line with the main line of the armature, the winding of the magneto, and if the speed was great it would not run eccentric as it would in idling, and then it would come in contact with the side of the magneto.

By Mr. Heher.

Q Go ahead and relate what occurred that afternoon. A And upon Mr. Smith's advice—
40 he said, "I cannot properly adjust the carbure-

Francis J. Buckley, direct.

tor standing here in the garage, because it is not pulling on a direct load." He said, "It must be taken out on the road." And he said, "Will you drive it?" And I said that I would, he and another man being the only two in the garage; that left the other man remain at the place to look after the place.

10

Q That is after he had worked on the carburetor? A Yes.

Q After he had worked on the carburetor and magneto? A Yes, sir.

Q You left the garage then? A Yes.

Q Who was driving? A I was driving at the time of the accident. I don't recall whether he was driving out or whether I was. I changed off with him. I don't recall whether I drove it from his garage out the Brunswick Pike or whether he drove it out. I am not positive of that.

20

Q Where is Olive street in Trenton? A Olive street lays between Montgomery and Stockton, one street south of Perry.

Q Then you proceeded through the streets of Trenton out to the Brunswick Pike? A Yes, sir; out Brunswick avenue.

Q What did you do there? A Rode out with me driving as far as Slackwood Corner and came back as far as the intersection of the line of the Princeton road and the New Brunswick Pike.

30

Q That is a distance of how far? A About three-quarters of a mile.

Q You went out the Brunswick Pike three-quarters of a mile and came back to the city line again? A Back to the city line again.

40

Francis J. Buckley, direct.

Q What was Smith doing at the time? A He was sitting in the car at the time, alongside of me, in the seat.

Q After you got back to the city line after going to Slackwood what did you do? A On driving slow again in the low speed to determine
10 whether she properly mixed or not, that is, as far as the spark and gas were concerned, she started to flutter again and spit out of the carburetor, and I told him it wasn't right yet.

Q At what speed did you travel from the city line to Slackwood and back? A He directed me not to go over eighteen miles an hour, because he could not adjust the low-speed adjustment going at that speed. He directed me to go between fifteen and eighteen miles an hour.

Q Tell us what speed you traveled from the city line to Slackwood and back. A We just varied between fifteen and eighteen miles an hour. At no time did we go over eighteen miles
20 'an hour.

Q When you came to the city line what did you do? A We found it was spitting—the air valve was spitting—and we came around and went back again, and he asked me to open the
30 cut-out. I did not care to open the cut-out going through a town, knowing that it was against the law.

Q What is the cut-out? A That is the muffler, which allows a real loud—well, it really gives you the full impact of the combustion from your cylinders direct.

By the Court.

Q You mean the noise of the explosion?
40 Yes.

Francis J. Buckley, direct.

By Mr. Heher.

Q You mean it makes a loud noise? A Yes, sir.

Q At the exhaust? A Yes; out of the muffler.

Q Now, when you went out the pike was the cut-out open? A It was open so it would be very plain and distinct to his hearing as he lay on the running board. 10

Q When did he get on the running board? A Just before we entered Slackwood going out.

Q Now, Slackwood, of course—you understand the direction of this map? A Yes, sir.

Q (Indicating.) Slackwood is in this direction? A Yes.

Q And you came down toward Slackwood? A Yes. 20

Q When you got to Slackwood he was on the— A He was on the left-hand front fender.

Q Did you stop the car for him to get in that position? A Yes.

Q In what position was he in the car or on the car from Slackwood on down to where the accident occurred? A The same position.

Q Resting? A Resting simply on the fender. 30

Q Lying on it or what? A Lying on it; there was nothing to hold on to.

Q What position was the hood in? A The hood was resting up on top of the car.

Q So the motor was exposed on that side? A The motor was exposed; yes, sir.

Q And Smith was engaged in doing that, while lying on the fender? A Smith was adjusting the low speed of the Rayfield (?) carburetor, which is situated on the left-hand front 40

Francis J. Buckley, direct.

side of the Winton car, below the intake manifold.

Q Was he in the same position at the time the accident occurred? A He was in the same position until I swerved—

10 Q We will come to that in a moment. He did not change his position from the time he got on the hood until the accident occurred? A No, sir.

Q Now, you went down the Brunswick Pike at what speed until you reached the bridge? A Practically coasting down the incline from Slackwood to the bridge.

Q At what speed were you going? A Not over eighteen miles at any period because he directed me not to exceed that.

20 Q Did he give you any additional instructions about the operation of that car while on this trip down the Brunswick Pike? A No, sir. It was understood I was to go simply between those two speeds, fifteen and eighteen miles an hour.

Q How was that understanding arrived at? A In this respect: That the low speed adjustment could not be properly taken care of unless I really remained underneath that speed. If I had exceeded that I would have went into the high speed adjustment.

30

Q How did you know that? A By looking at the speedometer.

By the Court.

Q How did you know that you ought not to go beyond eighteen miles for that reason?

The Court. I suppose that is clear. He has already said Smith told him not to do it

40

Francis J. Buckley, direct.

above that; that he could not adjust it if he got over that.

A Smith told me to adjust it.

By Mr. Heher.

Q As you approached the bridge did you make any change in your speed? A No. 10

Q (Referring to map.) You came along here, and what did you observe at the time you reached the bridge? A Just previous to reaching the bridge I seen two young men that were walking on the right-hand side of the road.

Q Are you able to identify those men? A Yes.

Q Were they the two— A Mr. Hitchen and Mr. Richardson.

Q You saw them on the witness stand this morning? A Yes, sir. 20

Q In which direction were they proceeding? A They were proceeding toward Princeton.

Q On which side of the road were they? A The right-hand side.

Q At the time you reached the bridge where were they? A They were in single file; they were not walking alongside of one another. One was preceding the other, and they had turned around and were walking backwards upon, I suppose, hearing my horn, and then they turned around as I went past. 30

Q Did you blow your horn? A I blew my horn, yes, sir.

Q Where were you when you blew your horn? A About a hundred feet from them when I blew my horn.

Q Where were they, with reference to the bridge? A They were right at the bridge; they were only partly across the bridge. 40

Francis J. Buckley, direct.

Q When you blew your horn? A I was this side of the bridge and before I reached the bridge I blew my horn upon seeing them in the road.

Q Was the cut-out working then? A The cut-out was still on. It was on until the accident happened.

10 Q At the time you reached the bridge which side of the bridge were these two young men on? A The right. One had just got a few feet over the bridge and the other was partly on the bridge.

Q Then they were between the bridge and Mr. Mahan's house? A Yes.

Q Did you see Mr. Mahan on the bicycle? A I saw a man I did not know at the time riding a bicycle on the right-hand side of the road.

20 Q Where was he when you reached the bridge? That is, how far from the bridge was he on the road? A I should judge about 300 feet.

Q What say? A I imagine he was about 300 feet, just a trifle over half way between the house and the bridge.

Q Did you know Mr. Mahan? A No, sir.

Q Did you know that he lived in this house? A No, sir.

30 Q Had you ever seen him before? A I never seen him before.

Q Now, just relate in your own way what happened from that point on. A After passing both of these young men on the road I was driving in the center of the road and I blew my horn again so as to notify both the man on the bicycle and the carriage that was in front of the man on the bicycle—

40 Q You saw the carriage in front? A I saw the carriage in front.

Francis J. Buckley, direct.

Q Did you know who was in the carriage? A I did not know; no, sir.

Q How far was that ahead of the man on the bicycle? A I should judge there was at least twenty-five or thirty feet the man was in back of the buggy.

Q Had the carriage reached a point opposite the house at the time you crossed the bridge? A No; it was this side and in fact the wagon was moving when I seen it, and also the man on the bicycle. 10

Q Go ahead and tell what you did? A I blew my horn to give both the driver of the vehicle and also the man on the wheel a notification that I was coming and I kept right on going, not realizing for one moment that any one was going to cut right out into me or in front of me or anything of that kind. I did not see any man put up his hand and give any warning that it was his intention to go one way or the other; and just as I got practically right on top of Mr. Mahan and the front of the car was— while it may not have been on a parallel line with the front of his bicycle, he suddenly turned his wheel into the right-hand side of the machine, and I immediately threw my car to the left-hand side of the road to avoid coming in contact with him. 20 30

Q Where did he come in contact with your machine? Do you know? A With my rear right-hand fender.

Q When you turned to the left what became of Smith? A Smith went off very suddenly. I know I made a very quick turn.

Q At that time he was resting where? A Simply lying on the fender. 40

Francis J. Buckley, direct.

Q And he went off the fender? A He went off the fender very quickly.

Q Did he fall? A I do not know whether he fell off, but he went off very quickly. I took it for granted I threw him off with this sudden impulse.

10 Q You do not know whether it was voluntary or involuntary? A You see, he did not have anything to hold on to.

Q Did he get up? A Yes.

Q Was he injured? A No; he didn't have marks on him.

Q What did you do with your car? A Just as soon as I heard the impact or the noise of the bicycle I pulled up the car and stopped and got out of the machine and in coming back from where I stopped the machine to see the man
20 there was a man walked up to me and he said, "Have you got a pencil and paper?" And I said, "What for?" And he said, "I want to mark down this license number." And I said, "You don't have to mark down any license number, for I am the man driving the car and I am not running away."

Q Was that man Wenzel, who testified before? A Yes, sir; that was the man. And
30 Smith got up and came over to me and I said, "John, for God's sake run this machine up the road and turn it around and let us take this man to the hospital." And I ran over to where this man was, and as soon as I got there these two young fellows that had crossed the bridge were there as quickly as I was.

Q And you took him to the hospital? A Smith stopped the car right on the roadway and we placed the man upon the rear seat of the car and Smith drove to McKinley Hospital.
40

Francis J. Buckley, direct.

Q After hearing Mr. Mahan's bicycle come in contact with your rear fender within what space did you stop your automobile? A I drew the car up about twenty feet and then, naturally being on the left-hand side of the road and obstructing traffic, I pulled over to the right-hand side in front of this buggy. I started again and pulled over to the right-hand side. 10

Q Is that where you got out? A That is where I got out and the machine stood still.

Q And is that where Smith got in? A That is where Smith got in.

Q He drove up to the cross roads? A He drove up to the head of the woods and turned the car around and came back.

Q And you took Mr. Mahan to the hospital? I got into the machine and the two young men placed Mr. Mahan on the back seat of the car and Smith drove to the hospital. 20

Q Did any one use any alcohol in treating Mr. Mahan on the road that day? A There was nothing at all given him; no.

Q Is it true that you were thrown or jumped out of the machine? A I got out of my own volition and I stopped the car and came back and the car stood right in the roadway. 30

Q Did you or Smith exchange positions at the driver's wheel while the car was in motion? A No, sir.

Q You were not thrown to the ground? A I was not thrown out, but I stopped the car and got right out of the machine.

Q Were you looking at the mechanic or at the exposed part of the engine at the time this accident happened? A No, sir; I was not looking at either one. It was not necessary. 40

Francis J. Buckley, direct.

Q Were you concerned at all in the doing of this repair work? A No. I was simply driving and looking—

10 Q Did Mr. Smith give you any instructions on the way down from Slackwood, down the road, from his position on the fender? A He did not say a word to me; no, sir.

Q At what distance can your horn be heard when it is blown? A At least a thousand feet.

Q What kind of a horn is it? A It is one of the largest Klaxon horns that is made.

Q What became of the car after you took Mr. Mahan to the hospital? A The car was brought back to Smith's garage.

Q By whom? A By Smith; Smith driving.

20 Q And it remained there until when? A The following day.

Q When it was taken where? A It was taken from Smith's garage and placed back in Mrs. Walker's.

Q By whom? A By me.

30 Q Did you examine the automobile to see whether there were any marks on the rear fender? A There was a slight dent in the rear fender which looked like—I thought it must have been a handle bar that struck it.

Q Were those marks on the car or the fender before this accident? A There was never any mark on the fenders. It never struck anything.

Q Were there ever any marks on the automobile indicating any collision or contact? A No; because the car had recently been refinished.

Francis J. Buckley, direct.

By the Court.

Q Where do you say that mark was? A On the rear right-hand fender.

Q What part of it? A On the radius where the fender starts to make its turn to cover the top of the wheel.

Q Front or back? A On the front part of the fender; on the front radius of the fender. 10

By Mr. Heher.

Q I show you three photographs and ask you what those are? A Photographs which I took of the car last summer.

Q Of Mrs. Walker's automobile? A Yes, sir.

Q These photographs were taken by you? A By me. 20

Q And taken of the car at what time with reference to the accident? A They were taken after the accident.

Q How long after? A They were taken, I believe, some time in June or July and the accident happened in September, 1919.

Q Was the fender in the same condition then that it was at the time of the accident or after the accident? A The fender has never been taken off the car. 30

By the Court.

Q The question is whether it was in the same condition. A It is in the same condition. It was slightly bent; it had a nick or dent where the handle bar must have struck it, that was simply hammered out, that is all. It was crudely hammered out. It was never taken off and put in a press or anything. 40

Francis J. Buckley, direct.

By Mr. Heher.

Q These photographs were taken in June and the accident happened in September? A In September.

10

Mr. Heher. Do you object to the photographs on account of the difference in time?

Mr. Devlin. If he says the fender is the same, that is all.

Mr. Heher. I offer the photographs in evidence.

Mr. Devlin. Is it the purpose of the photographs to show the fender?

Mr. Heher. Yes, and to show the car.

20

(Three photographs offered in evidence are marked, respectively, Exhibit D. 1, Exhibit D. 2 and Exhibit D. 3.)

The Court. That is all the testimony in the case, isn't it, that the collision was with the rear fender?

Mr. Devlin. Yes, sir.

By Mr. Devlin.

Q Can you point out the mark for me? A Yes, sir.

30

Q Will you do so? A (Indicating on photograph.) You see that imperfection there?

Q Yes. A That is it.

Q As if that line didn't connect? A Yes, sir.

By Mr. Heher.

40

Q Did Mr. Mahan put out his left hand at any time before making the turn? A He did not put out his hand until after he had started

Francis J. Buckley, cross.

to cross right directly into the side—to cross the road.

Q Then he had— A He was simply going ahead in a straight line and just as I reached right at—practically alongside of him, he suddenly swerved his bicycle in and across the road and at the same time put out his left hand.

10

Q At the instant he made the turn? A After he had made the turn he put out his hand.

Q Did he put out his hand at any time while he was moving in a straight line along the road?

A I did not notice it.

Q When you saw him make the turn is that when you made your turn to the left? A I was driving and naturally watching both the man and the wagon, or seeing them riding along. I was riding slow and I—and I allow a space of about six or seven feet to intervene between the right-hand side of the machine and the obstacles I am passing.

20

Q Where was the bicycle with reference to your automobile when he made the turn to the left? How near was your automobile to the bicycle? A The front part of the car was practically parallel with his rear wheel.

Q What distance separated the automobile from the bicycle? I mean from the side of the car to the bicycle? A Well, six or seven feet I allowed in going past him.

30

Q One witness spoke of the engine humming. That has reference to the cut-out? A That has reference to the cut-out; yes, sir.

Cross examination by Mr. Devlin.

Q How long have you driven a car, Mr. Buckley? A Nearly twelve years.

40

Francis J. Buckley, cross.

Q Are you a machinist by trade? A No, sir.

Q You understand the mechanism of a car, don't you? A Yes, sir.

Q You know a great deal about them? A I know something.

10 Q Outside of operating a car have you had any experience in the mechanism of a car? A In what respect?

Q I mean have you any experience in becoming acquainted outside of the operation of a car? A From personal vision of the tearing down and rebuilding of a motor.

Q You have seen engines taken down and rebuilt? A Yes.

Q In other words, you know pretty well the structure of an automobile engine? A Yes, sir.

20 Q How long have you known the structure of automobile engines? A Twelve years.

Q And I suppose without a doubt you know a good deal about a car? A Yes, sir.

Q When a car is wrong you can come pretty near locating the trouble. Is that right? A I can tell you very nearly where it is at; yes.

Q Can you do the mechanical work of repairing? A If I was obliged to; yes.

30 Q Then you are a pretty well informed man about the get up and care of an automobile engine? A Yes.

Q And you are on familiar terms with automobile engines? A Yes.

Q Am I safe in considering that you would be more than above the average man who drives a machine? A I would not say so; no, sir.

Q I mean the average man called a chauffeur—you would have more knowledge about an engine and operation than he would, wouldn't you?

40 A It depends on what you term a chauffeur.

Francis J. Buckley, cross.

Q Well, you know more about an engine than the average operator of a car? A I know quite some about an engine.

Q Yes. Your mother-in-law told you to take the car down and get it fixed? A Yes, sir.

Q How long had the car been wrong? A For about eight months previous to that.

Q What had been the trouble? A The car had gradually been running down from January of 1919. The magneto was taken to Hutchinson's storage battery place on South Warren street, whom in my mind, at least, was supposed to be pretty well versed about the mechanism of a magneto, and the magneto was taken there for the purpose of thoroughly cleaning, not repairing, but simply cleaning and oiling preparatory to being replaced in the car after being assembled. The magneto never worked properly from that period on.

Q Was that all the trouble in the car, magneto trouble? What other trouble did the engine have? A Carburetor.

Q When was the time those two troubles developed that you had to bring it to a place to get it fixed? A It had been brought back there on two or three occasions previous to that for the same purpose.

Q What was the last day you had it out previous to going to the repair shop? A I could not tell you. I don't drive it every day.

Q What particular trouble did you take it to the repair shop for? A Just the carburetor and the magneto.

Q How long had those two troubles been connected with that car? A Off and on, as I said before.

Q For how long? A Eight months.

Francis J. Buckley, cross.

Q Those are troubles—did they prevent the operation of the car, those troubles? A It did not prevent the operation of it, but it prevented it in this respect, that it did not run properly, not to suit me.

10 Q It prevented the normal operation, but you could run the car and it was not the best operation? A You could run the car.

Q Had Smith ever worked on this car before? A Yes, sir.

Q How long before that had he worked on it? A Previous to the accident.

Q How long, if you can remember? A I say previous to the accident.

Q How long previous to that? The day of the accident you had it there? A Yes.

20 Q And previous to that had you brought it to Smith? A He had had it on two or three occasions for different things.

Q But for these two troubles? A Oh, no.

Q You did not have it there for those troubles? A Well, we had it there. He tried to find out what was the trouble.

30 Q What is the method of finding out the trouble? Is there any method? A The method we first employed, as I said before, it was brought to Hutchinson. Hutchinson could not overcome it by his own personal supervision in Smith's garage, and it was brought to Herson and also still remained in the same condition.

Q I mean when you brought it to Smith what was the method used? At that time before the accident what method did Smith use to locate the trouble? A Removed the coil which is the distributor.

Q What else? A Rewired it.

40 Q Rewired it? A Yes, sir.

Francis J. Buckley, cross.

Q What else? A That is all. He tried to overcome the short circuit in that manner.

Q Where was the car that Saturday you brought it to Smith's? A Previous to it being at Smith's?

Q Yes. A At home in the garage.

Q Where is the garage at? A In the rear of 109 Spring street. 10

Q Is that at your home? A No, sir.

Q You brought the car there at what hour in the day? A Around one o'clock, I should judge.

Q After a conversation with Mrs. Walker, and at her direction you brought the car down there to have it fixed? A Yes.

Q Is that right? A Yes.

Q You took it to Smith's. At what hour did you get there? A Right after I had my lunch; shortly after one o'clock, perhaps. 20

Q And you saw Mr. Smith? A Yes.

Q He went to work on the car? A Yes.

Q And you remained in the shop? A Yes.

Q All the time? A Yes.

Q Did you lend any assistance? A No.

Q You did not lend any assistance? A No.

Q What was your purpose in remaining in the shop? A To learn something which both Hernon and Hutchinson could not find out. 30

Q Your purpose was to watch the operation? A Yes.

Q The operation was finished about what hour? A The discovery of the armature winding running eccentric in the magneto proper was discovered and placed back in the car I should judge around between half-past three and four o'clock.

Q Was that the completing of the work then?

A No. 40

Francis J. Buckley, cross.

Q Was the job done? A No, sir.

Q What remained to be done? A The adjustment of the carburetor, which had been completely upset in trying to adjust it to suit the magneto which was then running eccentric.

10 Q Did you remain until the carburetor was done? Did you remain with Smith until the carburetor was finished? A It was not finished. He could not adjust it in the garage.

Q After you fixed the magneto what was then done by Smith to the car? A He said we must take the car out on the road.

Q And then what happened? A He said, "Will you drive it?"

Q And you drove the car? A I said, "Yes; I will drive it for you."

20 Q You remained there? A I stood there watching him; yes.

Q Now, when you were driving the car, what did he have to do? What was his job? A To arrange the set screw on the slow side of the Rayfield carburetor.

Q How far would you have to drive it for that purpose? A Sometimes you might drive an hour and sometimes two hours.

30 Q Do you know the hour you took the car out of Smith's place? A I should say around five o'clock, sometime.

Q You drove the car and Smith's job was to adjust some screw. Is that right? A Yes.

Q If I am wrong in this, correct me, for I do not know a thing about automobiles. A That is right.

40 Q Where was he placed while you were driving—where was he sitting? A He placed himself on the front left-hand fender.

Francis J. Buckley, cross.

Q That is on the left of the car, hanging over the fender? A At what time, Mr. Devlin?

Q I mean, when you left the garage. A He sat in the seat beside me when we left the garage.

Q What was he to do about this carburetor that he could do sitting beside you? A He sat beside me to find out whether or not it was firing properly, and upon reaching the Brunswick Pike— 10

Q No; we haven't got there yet. I want to get what his job was to sit beside you. What did he do there? A He sat beside me for the purpose of listening whether the cylinders properly fired or not.

Q Couldn't he have taken the wheel and driven that car and heard those cylinders just as easy as if he hadn't had the wheel? A Yes; he could. 20

Q How long did you drive with him sitting beside you? A Until we had went out of the city limits.

Q Could you tell what point that was? A The intersection of the Princeton and Brunswick avenue road.

Q Did he still sit beside you? A No; I stopped the car and he got out of his own volition and placed himself on the front left-hand fender, after raising the hood. 30

By the Court.

Q Raising it up on the same side? A Yes, sir.

By Mr. Devlin.

Q And he raised the hood? A Yes. 40

Francis J. Buckley, cross.

Q What then was done with the car? A He started to adjust the carburetor.

Q Was the car operated; was it running? A He started to adjust it, if I remember rightly, standing still, and he could not get it, and he said, "You will have to drive the car. You drive and I will try to adjust it."

10 Q And he laid over looking at the car? A Yes.

Q How long did he lay over in that position before he got the adjustment made? A We didn't have it yet.

Q How long did he remain in that position attempting to make it? A Well, I could not tell you just exactly. The length of time that it would take us to go from where we were up there until we reached the scene of the accident.

20 Q I got the impression you had gone and taken a trip and come back again. A We had.

Q Tell me the first trip you made with Smith. A The first trip we made we rode out as far as the Slackwood Corner proper.

Q You started about five o'clock or half-past four, didn't you? A It was around half-past four.

Q Who drove the car? A Where from?

30 Q From Smith's garage to the first trip you made. Who drove the car? A Well, I am not really positive whether he did or whether I did.

Q What did he do on that job, anyhow? What was he doing? A He was doing the work.

Q Then, if he was doing the work—on this first trip you were driving, weren't you? A I don't recall whether I was driving or not.

Q If you were driving what was he doing?
40 A I went with him to accompany him for my

Francis J. Buckley, cross.

own satisfaction to know whether the car was running right or not.

Q You brought the car out first to look after this carburetor? A Yes; that was the intention.

Q Now, when you left the garage, did he sit beside you and you drive the car or did you sit beside him and he drive? A I don't recall. 10

Q Who was to do this work of examining or keeping tabs on the part of the machinery that was wrong? A Smith.

Q Then if he was to do that isn't it a natural consequence that you would do the driving? A If an adjustment is made someone has to drive.

Q Then isn't it an actual fact you were driving? A If he was adjusting the carburetor while it was in motion I done the driving. 20

Q What did you say about going on the first trip out Brunswick avenue? A To Slackwood and came back.

Q Yes; who drove all the way? A I don't know. Smith drove part of the time and I drove the balance of the time.

Q Who did the adjusting of the carburetor? A Smith. 30

Q Did you come back to the garage from the first trip? A No, sir.

Q Where did you come to? A Down there nearly to the intersection of the Princeton and Brunswick road again.

Q When you got to that point what condition was your carburetor in as to repair? A It was not running right.

Q It was not running to suit you? A No, sir. 40

Francis J. Buckley, cross.

Q It didn't suit neither you nor Smith? A No, sir.

Q On the way on the first trip did Smith lie along the fender with the hood up listening and watching the operation of the particular part?

A Now, what time?

10 Q Any of the time did he do that? A I believe he did.

Q And while he did that you did the driving? A Yes.

Q Now, you came back to the point you have mentioned, and the repair did not suit you? A No, sir.

Q You went out again and you were still driving? A Smith said, "We haven't got that adjustment yet. I will have to try to get it."

20 Q You knew that, I suppose, from your experience, as well as he did. A Yes, sir.

Q And you turned around and proceeded to drive again? A The car was turned around and he said, "You will have to drive and I will have to lie on the running board again."

Q You knew the nature of this difficulty yourself? A Yes, sir.

Q And you knew the kind of adjustment that was necessary to be done? A Yes.

30 Q And you knew by the sound of the machinery when it was all right and when it was all wrong? A Yes.

Q Now, you started on the ride on which this accident happened. You were doing the driving? A Yes.

Q And Smith was on the running board, lying on the fender? A Lying with his back resting on the fender.

40 Q And was he looking in at the engine working? A Sure.

Francis J. Buckley, cross.

Q Was this machine of yours a left-hand or right-hand-drive machine? A Left-hand.

Q Then, practically, you and he were on the same side of the machine? A We were.

Q And you both could see the engine from that point? A No; I could not.

Q You could not? A No, sir.

Q He was lying there looking at the engine? 10

A Yes.

Q And as the machine was going, did he use any tools or touch it in any manner? A Nothing but his fingers. It wasn't necessary to use anything else.

Q To do this adjusting? A Just a set screw.

Q And you could see the operation he was doing from where you were sitting? A No.

Q You could not see it? A No.

Q Where is the photograph of the machine? 20

A (Producing photograph.) There it is.

the hood? A The carburetor, the adjustment of the carburetor is on a line with the chassis, which supports the body.

Q You were on the left-hand side of that machine, weren't you? A Yes, sir.

Q Now, from where you were sitting driving, and the engine hood up, couldn't you see the engine? A You could see the engine, but not in where he was adjusting it. The only thing you could see is the fan revolving. 30

The Court. Mr. Devlin, I guess you are speaking about conditions that he probably could not see.

By the Court.

Q The carburetor is at the base of the engine? A Yes.

Q And that would be hidden by the cowl and 40

Francis J. Buckley, cross.

By Mr. Devlin.

Q And on this Mr. Smith was working all the time? A Yes, sir.

Q Now, when you got out on the road at what speed do you think you were operating?

10 A Between fifteen and eighteen miles an hour, with the levers set for that speed, not working by any foot accelerator.

Q You mean the levers of the machine set for that speed? A The levers are set so you can remove your foot from the foot accelerator and not exceed that speed.

Q You know I do not know much about automobiles, and if you just say it was set for that speed that goes with me. When you got to this point, to this bridge at Shabacunk Creek, what was the position of the two of you in the machine? A Smith was lying on the fender and I was driving.

Q That is down hill, isn't it—a down grade? A Before you reach the bridge.

Q And as you go over it is an up grade? A Yes.

Q In other words, the bridge is in a hollow and on each side is the hill? A Yes.

30 Q As you came down there you had the cut-out on? A Yes.

Q Is that what you call the "chug, chug, chug"? A Yes.

Q That was working all the way, wasn't it? A Yes.

Q That could be heard quite a distance, couldn't it? A Yes.

Q You blew your horn when you got to the bridge? A Yes.

40 Q That is right, isn't it? A Yes.

Francis J. Buckley, cross.

Q You blew for the two young men who were on the road? A Yes.

Q You were about the center of the road, taking that bridge? A Yes.

Q That bridge was about sixteen feet wide? A Yes.

Q The road is about eighteen feet macadam with a six-foot shoulder on each side? A At least that; yes, sir. 10

Q As you crossed the bridge where were you in the road? A In the middle.

Q Do you think you were a little on the left or plumb in the middle? A About in the center.

Q You blew your horn on the Trenton side of the bridge. Is that right? A Yes.

Q After you got over the bridge who did you blow your horn for? A For the man on the bicycle and also the wagon. 20

Q Before you got over the bridge who did you blow for? A For the two young men on the road.

Q You did not see the others at that time, did you? A You could see straight ahead, yes, sir.

Q Then you drove on up, and you are sure you were not going over eighteen miles an hour? A Yes. 30

Q And you think you still kept in the center of the road? A Yes.

Q Now, was Mahan on the right of the road deep or shallow? Was he well on his right or deeply on his right? A He was about on the edge of the asphalt.

Q Then he was deep on the right. Where was this pony and buggy with the children in? A About half on the asphalt. 40

Francis J. Buckley, cross.

Q Which was more to the center, Mahan or the pony? A If I remember correctly, Mr. Mahan was about on an even line with the outside wheel of the buggy.

10 Q Was he on the outside of the pony or the inside of the pony? A That would make him on the outside of the pony.

Q He was on the pony's left, then? A He would be if he was on a parallel line with that wheel.

Q And he was on your right? A Yes, sir.

Q That is right, is it? A Yes.

Q You were, then, you think, in the center of the road? A I won't say I was directly in the center on passing them. I always bear over to the left, and I know I allowed no less than
20 six feet to intervene.

Q You saw him all the way coming down the road; you had him in your eye all the way coming down the road? A No.

Q You did not? A No, sir.

Q Why not? A Not all the way down the road.

Q From the bridge, I mean. A Absolutely, yes. I had nothing else to do but look for them.

30 Q You were not looking for the engine? A No.

Q You were not interested in the work that Mr. Smith was doing at all? A I could hear that. I did not have to look.

Q Now, you came down this road perfectly straight and Mahan and this pony were before you all the time? A I could see them.

40 Q If you say you saw them, all right. Your engine or cut-out was chugging all the way. Is that right? A It was chugging, yes.

Francis J. Buckley, cross.

Q The nearer you got to these people the louder it was to them. That is true, isn't it? A To those as we were approaching them, yes.

Q The wind was blowing with you, the same way you were going, was it? A I don't know.

Q Am I to understand that these people heard this noise—or Mr. Mahan—those plain noises, the chugging, and he turned right out in front of your machine? Is that right? A He turned out very quickly in front of me. 10

Q You had all these noises accompanying you, and your horn, you had a good horn, and in the face of all that fact Mahan turned deliberately in front of your machine? Am I right? A Yes.

Q As he turned in front of your machine how far do you think you were away from him when he started to turn, how many feet? A I said before the front of my machine was not quite on a parallel line with the rear of his rear wheel. 20

Q And as he turned you swung, too? A I swung to my left.

Q And you swung in over the six-foot shoulder on the left, and around on the eleven feet of soil in front of the house and tried to head him off or save an accident? A I never left the road. 30

Q How far on the left did you go on the road? A As far as I can recall, I simply swerved to the shoulder section of the road on the left-hand side. As far as I know my right-hand wheel always remained on the asphalt.

Q And you went up the road how far before you stopped? A Just as soon as I heard the click, knowing that the man had turned in to me, and my trying to avoid him, I knew something must have happened. 40

Francis J. Buckley, cross.

Q What distance do you think you went up the road after the contact with him? A No more than twenty feet.

Q Then you brought your machine to a stop?
A A dead standstill, and then Mr. Smith took the wheel and turned it and brought it back
10 again.

By the Court.

Q I understood you to say you brought it nearly to a stop on the same side and then crossed over to the right so the traffic would not be interfered with, and stopped it? Is that right? A Yes, sir; that is correct.

By Mr. Devlin.

20 Q Did you know you had hit this man or he had hit you? Did you know you had had a collision with him? A I knew from the noise I heard that either I had hit him or he hit me. I knew that as soon as he turned in to me. I knew if I remained straight forward I would have run over the man. I could not turn to my right because the wagon was on my right. I knew the only resort was to immediately turn to
30 my left.

Q You have testified that wagon was down deep in the dirt part of the road off the macadam. A I said it was on the right-hand side of the road.

Q Yes, and you said, if I understood you, that it was down deep on the right-hand side of the road and the bicycle was on its left. This was only a little pony and wagon for a children's toy; is that it? A It was, as far as I
40 can recall, a standard buggy with the top up.

Francis J. Buckley, cross.

Q Mr. Udy testified it was a little wagon he and his sisters used for playing. A I know what I seen, Mr. Devlin.

Q You heard him testify. Maybe that refreshed your memory. A No, it did not.

Q What condition were the brakes on your machine? A Normal, I would say.

Q Going at eighteen miles an hour, assuming that you apply all the brakes in that machine, within what distance could you stop it? A It would be at least twenty-five or thirty feet.

Q You think you could? A It depends on the weight of the car.

Q Well, now, you know that car. You have been operating a machine for about twelve years, and you have operated this particular car since it was bought? A Yes, sir.

Q You know it; you had experience in testing the brakes of it, and so forth? A Yes.

Q Taking that car of yours and going at fifteen miles an hour, within what distance could you by the application of all the brakes stop it? A Going fifteen miles an hour?

Q Yes. Assuming your speed is fifteen miles an hour—and you say you were going between fifteen and eighteen— Assuming your speed is between fifteen and eighteen miles an hour, within what distance could you stop the car by the application of all brakes? A All brakes.

Q All brakes. Add that comment. I would not say applying all brakes. If you mean the emergency brake—

Q I am asking the question. If you cannot answer it say so. A If you mean the emergency brake and foot brake combined, all right.

Q Assuming your car is going between fifteen and eighteen miles an hour, within what distance

10

20

30

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Francis J. Buckley, cross.

can you stop it by the application of all your brakes? A I would not say within twenty feet, with that car.

Q What is the name of this car? A It is a Winton Six.

10 Q Isn't it true you could stop within ten feet, with all the brakes? A No, sir.

Q You could if you injured the car? A If you hit a pole; yes.

Q Now, without injuring the car couldn't you stop it within ten feet? A No, sir.

Q Assuming you are going eighteen miles an hour within what distance could you stop a car by the application of all the brakes? A It depends on your brake lining.

Q You have said your brakes were all right. A I said normal.

20 Q That is all right, isn't it, normal? A No, sir.

Q What is the meaning of "normal" to you? A It depends.

Q It means an ordinary condition, doesn't it? A Yes.

Q You said that car is normal. A Yes.

Q I assume that is an ordinary condition, neither too good or too bad. A Yes.

30 Q Now, assuming that car to be a normal car and you are going eighteen miles an hour within what distance can you stop it by the application of all brakes? A I would say I could stop that car between twenty and twenty-five feet.

Q In other words, after you hit this man you returned, and you did not think you had hurt him, did you? A I did not know.

40 Q You deny this conversation that Wenzel says you had, don't you? A The only conversation I ever had with Wenzel was appertaining

Francis J. Buckley, cross.

to a pencil and paper to write the license number down.

Q Didn't he run after you to get the number and didn't he say to you, "Do you know you have hit a man?" And you said to him, "No; I don't think I have." Then he said to you, "Come back and see. I think you have killed him." And you said, "My God! It isn't that bad, is it?" A Mr. Devlin, I did not wait long enough to hold a conversation with anybody. No, sir. 10

Q Didn't Wenzel ask you what you were doing with your eyes? A No, sir.

Q He did not ask that question? A No, sir.

Q When the man was taken to McKinley Hospital who drove the car to the hospital? A Smith.

Q Were you a little nervous about the accident? A I certainly should be; yes. 20

Q And that was the reason you did not drive, wasn't it? A No; not necessarily so.

Q Wasn't that the real reason you didn't drive? A No; because Smith was the man that turned the car around and drove it down and headed it toward the hospital.

Q You didn't drive any more that day, did you? A No. 30

Q The reason being that you were naturally nervous about it. Is that right? A I felt for the man, certainly.

Q No, but nervousness over the matter happening? A No; not over it happening. I felt for the man.

Q You had the accident and that unstrung you, didn't it? A Surely.

Q Smith drove the car to the hospital? A Yes. 40

Francis J. Buckley, cross.

Q Did you go to the hospital with this man?

A Yes, sir.

Q You did? A Yes, sir.

Q Then, after you left the hospital, where did you go? A Drove back to Mr. Mahan's home and informed his family as to the extent
10 of the injuries.

Q And then where did you go? A Proceeded back to Smith's garage, where the car was placed in his garage.

Q Who drove there? A Smith.

Q That was Saturday. How long did the car remain in Smith's garage? A Until the following day, Sunday.

By the Court.

20 Q Why was it taken back to Smith's garage?
A To allow anyone who wanted to inspect the car—it was down in the center of the town, and to allow anyone who cared to see it to inspect it just as quickly as possible after the accident. I went from there to the police department.

Q Let me understand: Where does Mrs. Walker live? A On Spring street.

Q In Trenton? A Yes, sir.

30 Q And the car would be brought into Trenton when it was brought home? A Yes, sir.

Q The sole object in leaving it at Smith's was to let people see it if they wanted to? A That is where it was taken; and, of course, the work was not completed on the car and it was taken back.

40 Q That is what I wanted to know, whether it was taken back there solely for the purpose of letting people see it, or whether it was to complete the work. A No; the work was not complete.

Francis J. Buckley, cross.

By Mr. Devlin.

Q Mrs. Walker's home is on Spring street?

A Yes.

Q The garage is on Spring street? A Yes.

Q Smith's garage is where? A Olive street.

Q How far is Olive street from Spring street?

A Well, I should judge it is twelve minutes' walk. 10

Q What distance would you say, a half a mile? A About that.

Q The way this carburetor was adjusted was by the fingers, wasn't it? A Yes.

Q Now, the car was brought out of your garage on Saturday about one o'clock; is that right? A Yes.

Q What time was it brought back on Sunday to your garage? A Not before Sunday afternoon. 20

Q Can you tell me the time? A No.

Q You don't know the time? A No.

Q When was the car first used after Smith was through with it? A I don't recall just that.

Q What work was done on the car that you know of on Sunday? A Nothing at all, as I know of.

Q When you brought the car back the work was complete, wasn't it? A No. 30

Q What was lacking? A Do you mean after the accident?

Q Yes. A It never ran right.

Q Then there was nothing more done on the car as far as you know? A Not as far as I know.

Q The car was left in the garage of Smith for the purpose of allowing any of the police officers who desired to inspect it to do so, is that right? A Yes. 40

Francis J. Buckley, cross.

Q And as soon as the time for inspection had expired the car was brought home to its own garage, on Sunday afternoon; is that right? A I brought it home; yes.

Q What hour did you bring it home? A I don't know.

10 Q Nothing more was done on the car? A Not at that time.

Q You went out with Smith and you drove or assisted in trying to adjust this carburetor, and it was brought there on Saturday and left there until Sunday for inspection, and nothing was done and it was brought home on Sunday afternoon? A It was brought home on Sunday afternoon.

20 Q Was it left there and no work done? A As I described it left there.

Q For inspection? A The car was brought back Saturday night and left in his garage and left to remain there until the following day.

By the Court.

30 Q Was it your intention to drive on home with the car if the carburetor had worked all right that afternoon? A It would have been if it had been running properly; yes.

Q If no accident had happened and the carburetor and the mechanism was working right? A The only thing I would do would be to drive back to Smith and get his bill and pay him for the work done on the car. That would be my only reason. I would have to go back to his garage in order to leave him out.

Francis J. Buckley, cross.

By Mr. Devlin.

Q All the work was done on the car? All the work that could be done was done, isn't that right? A All that could be done previous to the accident was done, but not all the work—

Q You did not get the carburetor fixed, but all the work was done that he could do? A All was done that could be done up to the very moment of the accident, but it was not completed. 10

Q Then why did the car go home on Sunday if it was not completed? Why didn't you leave it there? A For the simple reason — why, I brought it home?

Q Yes; on Sunday. A The man didn't work on Sunday and I brought the car home and left it home, and the car was not taken out for some period after that. 20

Q But you brought the car originally to Smith's to be fixed. A Yes.

Q Now, you say after you had operated on it, you and Smith, for a number of hours, that still it was not fixed? A That is true.

Q Then why did you bring it home on Sunday afternoon, if it was not fixed? A (No response.) 30

By the Court.

Q Had Smith gone as far with it as he could? A He had, Judge. The only way we could make the car run properly was by actual road test.

Q Yes; that you have been giving. Now, I am asking whether or not Smith, at the time of the accident, had gone as far as he could in repairing it? A No, sir. He could by further road tests. 40

Francis J. Buckley, cross.

Q Now, counsel wants to know, if you took it back for further repairs, why you took it away without getting those repairs? A I did not care for the car to go out after the accident to make any more tests, for fear something else might happen of the same sort.

10 *By Mr. Devlin.*

Q You knew that was the only way the test could be made or the repairs made? A Yes.

Q Now, then, why didn't you leave it there and have the job finished if it was not finished? A Because I did not care to repeat the same thing that had happened.

Q But this car could have been fixed upon the same operation without a repeating? A No, sir.

20 Q You didn't think someone had to be hurt every time you tested the car? A No.

Q Then, upon the car being subject to the same test, the work could be completed? A Yes.

Q Now, in the face of that fact, why did you bring the car home on Sunday or any other day before it was fixed? A Because I said it was good enough and to let it go.

30 Q Then the car was repaired? A It was not repaired; no, sir.

Q Then, if it was not repaired answer me again— A It was not repaired to my satisfaction.

Q But it was repaired good enough for you to bring home and operate, is that right? A It was good enough to run the same way before I put it in there.

40 Q You hadn't it then done to your satisfaction for the time being? A No.

Francis J. Buckley, cross.

Q Then why did you bring it home? A (No response.)

Q Now, Mr. Buckley, isn't it the truth of the fact that when you brought that car down you expected with the assistance of the automobile man to take that car out on the road and fix it in about an hour and a half? A No. I had no idea how long it would take. 10

Q And wasn't your purpose in staying in that garage during the whole operation to have it done before you left and bring the car home again? A No, sir.

Q So that you could bring the car home and use the car for the family riding on the following Sunday? A No, sir.

Q Wasn't that your purpose? A No, sir.

Q Can you then explain what other purpose you had in staying at this garage and assisting and looking on at the work that you had to pay for or that Mrs. Walker had to pay for? A Nothing more than being interested in something that two men in the City of Trenton who are reputed to be experts, could not overcome. 20

Q Then assuming that was the interest in it, how do you explain your playing the part of doing the fixer's work and driving the car to make the test of the carbureter, instead of his doing his own driving or getting his own driver? A It would have made no difference whether he had driven or not; I would have accompanied him for the satisfaction of knowing whether it was running properly or not. 30

Q Well, the only way you could tell was by sound because you could not see the part? A You could not tell by sound in that seat.

Q Then what value was it if you could not see it or hear it? A In the first place you 40

Francis J. Buckley, cross.

could not hear it because it is not permissible to drive in the city limits with the cut-out open.

Q Then, why didn't you let him get his own driver, if this car was left in his charge? A As a matter of courtesy to a man who was willing to do that work immediately as soon as you brought it in.

10 Q He was being paid for the work, wasn't he? A Sure.

Q And your time has value to it, hasn't it, the same as mine? A Not on a Saturday afternoon.

Q Driving isn't any novelty to you, is it? A No, sir.

Q Nothing like seeing a new piece of mechanism fit together? A It was fitted.

20 *By the Court.*

Q Did you get this eccentric fixed in the magneto? A Yes.

Q Then the only remaining difficulty was to adjust the carburetor? A The adjusting of the carburetor, which had been upset by numerous people trying to adjust it.

Q And it was a matter of adjustment? A Yes.

30 Q And that could only be done on the road? A That could only be done on the road, by direct pull.

Q Then, why did you take the car back to the shop? A I do not know why—

Q Why would the car be brought back to the shop under those circumstances if the thing it was taken there for had been corrected and the carburetor could only be adjusted on the street?

40 A If you recall my testimony I said we first went out to Slackwood and returned to the inter-

Francis J. Buckley, cross.

section of Brunswick and Princeton avenue roads and I said, "That is not running entirely to my satisfaction yet," and said we would have to try to adjust it better; and on the second trip out we had the accident. It had been partly adjusted but when we drew up close to any obstacle in front the car would buckle and jerk as if there was a lot of firing and either one of the six cylinders would refuse to fire, which caused that sudden lurch, and that was the part we wanted to overcome. 10

Q Well, that was the carburetor adjustment?

A Yes, sir.

Q Was it your intention if the carburetor adjustment was all right, to drive on home after leaving him at his place? A In that event, and not having the accident, it was my intention to return him to his place of business, which I have always done, and have him make out the bill and pay him for the work which he had completed. 20

Q Then do I understand now that the car was or was not returned there for any purpose but to leave it there for inspection? A The car was returned there, but knowing, of course, that it was running but not running entirely to my satisfaction, I felt after the accident I would take it home and leave it go as it was. I was just simply disgusted with the car and its condition. 30

By Mr. Devlin.

Q You spoke something about returning for the bill, if you had no accident? A Yes.

Q Did not Mr. Smith send his bills to Mrs. Walker? A I paid him on Sunday.

Q Did not Mr. Smith send the bills to Mrs. Walker? A No. 40

Francis J. Buckley, re-direct—re-cross.

Q You heard Mrs. Walker testify she paid bills whenever the amount was sent to her? A Yes.

Q Did you hear Mrs. Walker testify to that? A I do not know as I was paying particular attention to what she testified.

10 Q Do you drink, Mr. Buckley? A Very rarely, I do occasionally, yes.

Q Did you have any drink that day? A No, sir.

Q You are sure about that? A Absolutely.

Re-direct examination by Mr. Heher.

Q Mr. Buckley, will you give the width and length of that car? A The car is 132—

20 *By the Court.*

Q What is the car? A A Winton Six, forty-eight and six-tenths horsepower; the large size Winton; the A. L. A. M. rating is forty-eight and six-tenths.

Q What is the wheel base? A 132 inches.

Q And the tread? A I believe the standard is fifty-six inches.

30 Q And outside the tread would be what? A The extreme width of the car, I believe, is five feet six or five feet nine, from the extreme outside of the car to the opposite side.

Re-cross examination by Mr. Devlin.

Q You mean the width across the front of the car this way—

By the Court.

40 Q From the outside of the fender to the outside of the other fender. A To the outside of

Clarence F. Preston, direct.

the other fender is either five feet six or five feet nine.

By Mr. Devlin.

Q You could drive it in a six foot space, could you? A I would not want to.

10

CLARENCE F. PRESTON, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Mr. Preston, you are in business here in Trenton? A Yes, sir.

Q You were a county detective until recently? A Yes, sir.

Q When did you sever your connection with the prosecutor's office? A In May of this year.

20

Q Were you acting as a county detective in September, 1919? A Yes, sir.

Q Were you detailed to investigate this accident which occurred, resulting out of which Mr. Mahan sustained injuries? A I was called to the First District Police Station.

Q On what date? A I forget the date.

Q Was it the day of the accident? A Yes, sir; that evening.

30

Q Do you remember what day of the week it was? A No, sir.

Q You were called to the station the evening after the accident? A Yes, sir.

Q What did you do? A When I got there I met Buckley and he told me he had an accident—

Q Never mind that. You got the story from him? A Yes.

Q Did you meet Charles Wenzel? A Yes, sir.

40

Clarence F. Preston, cross.

Mr. Heher. Stand up, Wenzel.

Q Is that the man? A Yes, sir.

Q Did you get a statement from him? A Yes, sir.

10 Q Did he say Mahan was almost off the road when he got struck and the machine struck him about the center? A Yes, sir.

Q Did you make a report of that? A Yes.

Q Immediately? A Yes.

Q And presented it to the prosecutor? A Yes, sir.

The Court. How was that again, Mr. Heher?

Mr. Heher. "Mahan was almost off the road when struck and the machine hit him, the left side of it about the center."

20

Cross examination by Mr. Devlin.

Q Was that all he said to you? A No, sir.

Q I will refresh your memory and connect that with the rest of the story. Did he say, "I am Mahan's brother-in-law; he married my sister"? A Yes, sir.

30 Q "When in front of the house Harry put out his hand and turned toward the house and this guy in the machine didn't slacken down or nothing. This guy was going at a good rate of speed—"

Mr. Heher. I object.

The Court. Anything that may throw light on a statement he made is competent but that would not justify an examination on wholly distinct matters.

Mr. Devlin. I am reading the whole interview as it was taken.

40

Clarence F. Preston, cross.

The Court. Yes, but that may not have any bearing on this statement.

Mr. Devlin. If I do not connect this, I will ask to have it stricken out.

The Court. Let me see the statements that you have there.

Mr. Devlin. (Producing papers.) There is a copy of the statement from the prosecutor's office. I want to read this whole thing here (indicating). 10

The Court. No. I do not think that would be cross examination, Mr. Devlin.

Mr. Devlin. Well, you see he makes a rebuttal there where he asks the question.

The Court. You see this line of examination must necessarily be very limited and must also be cross examination. It simply pertains to whether or not a given thing which the witness denied on the stand was said. Now, any part of the statement that throws light on that particular statement, I think is competent, but beyond that, not. 20

Mr. Devlin. What I want to clear up—I will state my purpose and see if it is admissible. What he read in that question was, "Mahan was almost off the road when struck and the machine hit him, the left side of it, in about the center, and he fell to the road." That does not show which side of the road he was almost off, the left side or the right side. Now, I offer the preceding paragraph to show what side. That was my object. 30

The Court. Let me read it, in view of that.

(The Court examines paper.) 40

Clarence F. Preston, cross.

The Court. Well, I suppose it might have some possible bearing on it.

Mr. Devlin. That is my purpose.

Mr. Heher. May I have an exception?

The Court. Yes, take an exception.

10 Q Now, Mr. Preston, he said—Fred Wenzel—
“I saw an automobile coming from the—” No.
“I am Mahan’s brother-in-law, he married my
sister. When in front of the house Harry put
out his hand.” Did he say that? A Yes.

Q “And turned toward the house and this
guy in the machine didn’t slacken down or noth-
ing.” Did he say that? A Yes, sir.

20 *Mr. Heher.* It is understood, of course,
that my objection and exception goes to each
one of these questions.

The Court. Yes. The only important
question there is what side the machine and
the wagon were on, as throwing light upon
what is meant by “the side of the road.”

Mr. Devlin. Yes, sir.

The Court. Of course, this is simply rep-
etition of the witness’ own testimony, prac-
tically.

30 Q “This guy was coming at a good rate of
speed, about thirty-five miles an hour and he
couldn’t slacken down—”

Mr. Heher. Objected to.

The Court. I do not think that part is
admissible. The only part that is admis-
sible, I think, is the part that shows where
he was on the road.

Mr. Devlin. That is the preceding para-
graph, then.

40

Clarence F. Preston, cross.

Q "I saw the automobile coming from the direction of Slackwood and it was on the right-hand side of the road." Did he say that? A Yes, sir.

Q "Just ahead was the buggy that was standing on the right-hand side of the road in the gutter, and behind the buggy was Harry Mahan, he was riding a bicycle." Did he say that? A Yes. 10

Q "When in front of the house, Harry put out his hand—"

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

The Court. That is part of your cross examination.

Mr. Heher. Well, if the Court please, that is not the question I asked him. I asked him, "Mahan was almost off the road when it struck and the machine hit him, the left side of it." 20

Q "When in front of the house Harry put out his hand and turned toward the house." Did he say that? A Yes, sir.

Mr. Devlin. I think with the aid of the map and the other testimony they will see what side of the road was meant. 30

The Court. I think it is admissible in an explanatory way.

Mr. Heher. My exception is noted, of course, to each question?

The Court. Oh, yes; note an exception to each question.

John B. Smith, direct.

JOHN B. SMITH, sworn as a witness on behalf of the defendant.

Direct examination by Mr. Heher.

Q Mr. Smith, where do you reside? A 121 North Warren.

10 Q How long have you lived in Trenton? A All my life.

Q You are an automobile mechanic? A Yes, sir.

Q How long have you been a mechanic? A Seven years.

Q What are your qualifications along that line, machinist? A Well, repairing.

Q You have worked in garages in Trenton? A Yes, sir.

20 Q For seven years? A I have worked three years for myself.

Q For the last three years you have been engaged in business for yourself? A Yes, sir.

Q Where in Trenton? A 216 Olive street.

Q Is that your place of business now? A Yes, sir.

30 Q And was that your place of business in September, 1919? A Yes, sir.

Q Now, was the car of Mrs. Walker taken to your establishment in September, 1919? A Yes, sir.

Q You remember the date? A Saturday, September 13th.

Q What day was it with reference to the time of the accident to Mr. Mahan? A September 13th.

John B. Smith, direct.

By the Court.

Q What time of the day was it brought there?

A The car was brought to my shop at one o'clock.

By Mr. Heher.

Q By whom? A Mr. Buckley. 10

Q What repairs were you directed to make to the car? A I was to make the car run correctly at low speed.

Q You were to do what? A I was to make the car run right at low speed.

Q What do you mean by "low speed," or what is meant in the trade by the term "low speed"? A From ten to twenty miles an hour.

Q From whom did you get your instructions as to the repairs you were to make to this car? 20

A Mr. Buckley.

Q And how did you examine the car immediately? A Yes.

Q And start to work on it? A Yes.

Q How long did you work on it? A Until around five o'clock in the afternoon.

Q What did you find was the trouble with the car? A I found out the magneto was not working right. 30

Q How about the carburetor? A That wasn't working right either.

Q Was there anything else wrong with it? A No, sir.

Q Did anyone assist you in doing this work? A Not that I remember.

Q Mr. Buckley remained in the shop? A He remained there.

Q What was he doing? A He was watching me do the job. 40

John B. Smith, direct.

Q He spent his time watching you do the work? A Yes.

Q At the time you started this work did you know how long it would take to do it? A I did not know.

10 Q Did you know before you started to examine it what the mechanical defect was? A No, sir.

Q What is customary when a car is brought in for repairs—to make an examination first? A Yes, sir.

Q Was anything said about how long the car was to remain in your shop? A No, sir.

Q Now, at five o'clock or thereabouts, you finished the work as you thought, at the time? A Yes.

20 Q Then you did what? A I asked Mr. Buckley to take the car outside and test it.

Q You asked Mr. Buckley to do that? A I told him to.

Q Just tell the jury what you told Mr. Buckley. A I told Mr. Buckley it would be necessary to take the car out and adjust it on the road.

30 Q What else did you say, if anything? A I don't remember anything.

Q Did you ask him to do anything? A I asked him to drive the car so I could work on it.

Q You left the shop together? A Yes, sir.

Q Who was driving then? A I don't remember just now.

Q To what point in Trenton did you go? A We went out Brunswick avenue on the Brunswick pike.

40 Q Where did you go on the Brunswick pike? A We went out to Slackwood and turned

John B. Smith, direct.

around and came back and the car was still working wrong.

Q Came back to where? A Back to the city line.

Q Who was driving it? A Mr. Buckley.

Q Where were you? A I was sitting in the car with him then. 10

Q On the front seat? A Yes, sir.

Q You were observing the operation of the car? A Yes, sir.

Q When you got back to the city line you say it was not working right, and you decided to do something? A Decided to turn around and come back.

Q On the Brunswick pike? A Yes.

Q Who was driving then? A Mr. Buckley.

Q Where were you, on the front seat? A Yes. 20

Q How far did you go in that position? A A short ways up the road, and I told him to stop so I could adjust the carburetor while the car was in motion.

Q At what point in the road did you make that request? A Maybe a hundred yards from where we started.

Q Where with reference to Slackwood? A We were this side of Slackwood. 30

Q You had not reached Slackwood? A Not yet.

Q Then what did you do? A I raised the hood and rode on the running board and the fender to work on the motor.

Q And then the car was in movement? A Yes; he ran the car.

Q And you went down the road? A Yes.

Q Did it continue down to the point of the accident without stopping? A Yes. 40

John B. Smith, direct.

Q With you lying on the fender? A Yes.

Q Which fender was it? A The left front.

Q How fast did the car run down the road?

A I gave him instructions not to run faster than fifteen or eighteen miles an hour, to make the necessary adjustment.

10 Q Could you make the adjustment you desired to make if the car went faster than that?

A No, sir.

Q Did the car go faster than that? A No, sir.

Q Would you have been in a safe position on the front of his fender if it had been going forty miles an hour?

Mr. Devlin. I object to that. That is a matter of argument, how safe his position would have been.

20

The Court. No; that would be a matter of fact.

Mr. Devlin. Anyone can tell just as well as he could. It would depend on how he held on whether he would be safe or not.

The Court. I suppose an expert could tell what the vibration would be, that an ordinary person could not. I suppose the object is to find out how much vibration there would be.

30

(Last question read.)

A No, sir.

Q Did you while riding or resting on the fender while the car was moving down the Brunswick pike take any special precautions to hold on? Did you grab any part of the machine? A No, sir.

40 Q What were your hands doing? A I was working of the carburetor.

John B. Smith, direct.

Q With both hands? A No, sir; one hand.

Q Which hand? A The right hand.

Q What was the other hand doing? A Just laying on the running board, on the mudguard.

Q Were you holding the mudguard so you would not fall off? A I was holding the hood rest, where the hood goes down. 10

Q Was it necessary at the speed at which that car was traveling to hold on it to keep from falling off? A No, sir.

Q Now, when you got down the Brunswick pike—(referring to map) you understand this road. Here is Shabacunk Creek—you know where that is? A Yes.

Q And here is the bridge and Mr. Mahan's house. A Yes.

Q Here is the crossroads? A Yes. 20

Q Now, do you recall coming to the point where the bridge was? A Yes, sir.

Q Did you see anyone in the road? A No, sir. I was not looking in the road at all.

Q What about the cut-out of this automobile? A I told him to have that open so I could hear the motor.

Q You told Mr. Buckley to have the cut-out open so you could hear the sound of it? A Yes, sir. 30

Q Now, was the horn blown? A He blowed the horn before he got to the bridge and after he left the bridge.

Q What sort of a horn is on this car? A Klaxon.

Q At what distance is this horn audible, under ordinary circumstances? That is, at what distance can you hear the horn? A You can hear it one hundred yards at least. 40

John B. Smith, direct.

Q And was this horn in good working order at the time? A Yes, sir.

Q Could it be heard above the sound of the cut-out? A Yes, sir.

Q Now, you did not see these two young men, Hitchen and Richardson, on that road? A No, sir.

10 Q Did you see Mr. Mahan on the bicycle? A No, sir.

Q Did you see the boy in the carriage? A No, sir.

Q Just tell, after you reached the bridge, in your own way, what happened. A We crossed the bridge and when he was starting up the hill the car made a quick swerve to the left, which Mr. Buckley did to avoid hitting Mr. Mahan, and when he did so, I slid off the running board on

20

the ground. Q Did you slide off voluntarily or involuntarily? A I can't just recall.

The Court. Did you say intentionally or not?

Q Were you thrown off or did you get off yourself? A Yes, sir. I did not have a good hold.

30 *By the Court.*

Q You mean you fell off by the movement of the car or stepped off? A By the movement of the car. It made a quick swerve to the left and then back to the right and that let me slide off the running board. I didn't have a good hold and I was not looking for the turn.

By Mr. Heher.

40 Q Were you injured? A No, sir.

John B. Smith, direct.

Q Did you have any scratches? A No.

Q Did you get up right away? A Yes.

Q Did the car leave the road? A No, sir.

Q Were you acquainted with the asphalt portion of the road and the shoulders on the side?

A Yes.

Q The testimony is the asphaltum is eighteen feet wide, and six feet shoulders on the side. Now, with reference to the asphaltum, how far did the wheels go to the left? A The wheels were on the gravel; that is where I slid; on the gravel.

10

Q How about the right wheels? A They were well on the macadam.

Q What became of the car after you got up?

A The car stopped.

Q And then what? A Then he pulled over to the left again and I turned the car around.

20

Q He pulled the car where? A He pulled the car to the right, I mean, to avoid blocking traffic and he got out of the car.

Q What did you do? A I went up and turned the car around.

Q You went up to where? A To the top of the hill, to the crossroads, and turned the car around and came back.

30

Q You took Mr. Mahan to the hospital? A Yes.

Q Then when you got on the ground did you see Mr. Mahan in the roadway? A Yes.

Q What part of the road was he lying on? A The left-hand side.

Q How far from the center? A He was to the extreme left as far as I remember.

Q To the left of the center? A No, to the left side of the road.

40

John B. Smith, direct.

Q Was he on the macadam? A Just about off of it.

Q Where was the bicycle? A Right alongside of him.

Q Did you see him when you came back? A Yes, sir.

10 Q Were there any bruises or scratches on him? A No, sir.

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

Q Now, do you remember from the bridge on up to where the accident happened, how fast the automobile was going? A The same speed, as far as I remember.

Q What do you mean by "the same speed"?

A Around thirteen or eighteen miles an hour.

20 Q Are you quite sure it was not going faster?

A Yes, sir.

Q You have driven automobiles, I presume?

A Yes, sir.

Q For how many years? A Nearly seven years.

Q You know the speed of automobiles? A Yes, sir.

30 Q We you able to determine from the workings of the carburetor, as you examined it going down the road, how fast the machine was going?

A Almost.

Q You could? A Nearly.

Q What say? A Not exactly.

Q But could you tell approximately? A Yes, sir.

Q Could you have made this test if the automobile had gone faster than eighteen miles an hour? A I could not have made that adjustment.

John B. Smith, cross.

Q Did you succeed in making the adjustment? A I had the coil working fairly good when the accident happened.

Q And at the time the accident happened you were finishing the adjustment? A I was still working on it.

10

Cross examination by Mr. Devlin.

Q Are you a machinist by trade? A No, sir.

Q Was automobile repairing the first mechanical work you ever did? A Yes, sir.

Q And you worked around automobiles for seven years? A Yes, sir.

Q And you know a great deal about an engine and its operation in that time, I suppose? A Yes, sir.

20

Q You make your living at it? A Yes, sir.

Q When this machine arrived in your garage, what time was it that day? A Around one o'clock.

Q What was supposed to be the trouble with it? A It did not work right at low speed.

Q And what was supposed to be with that portion of the working? A The magneto was not working right.

30

Q Is that a separate piece of mechanism? A Yes, sir.

Q You don't have to run a machine to fix that, do you? A No, sir.

Q Now, was the magneto the only trouble with the machine? A No, sir.

Q What was the other trouble? A The carburetor.

Q That is the trouble you have to operate the machine to fix? A Yes, sir.

40

John B. Smith, cross.

Q Can it be fixed at all without the machine being operated? A Not good.

Q Not good? A Not right.

Q In other words, could the machine be fixed up or run in the shop, raised off the floor and run? A You could adjust it that way, but you
10 would not have any pulling power against it.

By the Court.

Q The idea is you must put the load on in order to determine its working? A Yes, sir.

By Mr. Devlin.

Q You have to do that? A To make a good job at it.

20 Q Can you make a good job without it? A No, sir.

Q You cannot do it? A No, sir.

Q Are you sure about it? A Yes, sir.

Q Now, you found out the trouble with the magneto and you fixed it? A Yes, sir.

Q Mr. Buckley remained with you all the time? A Yes, sir.

Q Did he give you any help? A A little bit.

30 Q In other words, he was helping fix the machine? A Yes, sir.

Q What help did he give you? A He helped turn the motor over while I timed the gears.

Q He helped to turn the motor over? A Yes.

Q Is that all? A That is all.

Q What was he doing there? A Just looking my work over to see what the trouble was.

Q He was there about three hours and a half? A Yes, sir.
40

John B. Smith, cross.

Q When you got the magneto fixed you had the carburetor to fix? A Yes.

Q What did you do to that, before you started the machine, anything? A We tried to adjust it in the garage.

Q Could you do it? A No, sir.

Q You found you could not do it? A No, **10**
sir.

Q And then what? You took it outside? A Yes, sir.

Q And Buckley drove the machine? A Yes, sir.

Q And when you got outside, how far did you go before you got down to working with this carburetor? A At the New Brunswick Pike.

Q And Buckley drove you out there and you sat beside him, is that right? A I am not positive whether I drove that far or not. **20**

Q You are not positive whether you drove that far or not? A No, sir.

Q Well, what were you doing, do you think, if you were not driving? A Sitting alongside of him.

Q What were you doing, as you sat there, taking in the machinery or looking at the machine? A Listening to the motor. **30**

Q Well, the only thing wrong with this motor as I understand now was the carburetor, is that true? A Yes.

Q And you knew that was wrong. You did not need any more sounds to tell you that, did you? A No, sir.

Q In other words, your job was to get down and get hold of this particular screw, is that right? A Yes.

Q And adjust it? A Yes, sir. **40**

John B. Smith, cross.

Q Now, so far as the sound was concerned, you had all the information the sound could give you? A Yes.

Q And your job was to get at the mechanism, is that true? A Yes, sir.

Q Now, you said Buckley drove you up—

10

By the Court.

Q Mr. Smith, there was nothing wrong with this carburetor except the adjustment? A That is all.

Q On the Rayfield carburetor there are two adjustments, a low and high speed? A Yes, sir.

Q A little turn screw on the bottom for the low speed? A No; this is an older carburetor; this is a different model.

20

Q It is a question of turning that until you get the right mixture and you have to have your engine hot to do it? A Yes.

Q Isn't that a matter of only two or three minutes? A Sometimes it is.

Q You have the high speed adjustment all right? A The high speed was adjusted all right.

30

Q What do you mean by saying "sometimes"? A Sometimes you would get a carburetor adjusted all right and sometimes you can't.

Q If you can adjust it at all you can do it in a very short time? A Not always.

Q Why not? Isn't it simply a case of turning until you get the right result? A Yes, sir. It is a fine adjustment on that Rayfield carburetor and you have trouble getting it.

Q You tell by the sound? A By the way the car pulls.

40

John B. Smith, cross.

Q You don't tell by the sound of the explosions? A You can tell by that. That will give you some information.

By Mr. Devlin.

Q When the adjustment was made then the car was all right, wasn't it? Is that right? A I did not finish the adjustment. 10

Q I did not ask you that. If you would just try to give attention to my questions we will get the answer. I say, when the adjustment is made, the car is all right? A Yes, sir.

Q And from what his Honor has asked you I get it that this adjustment is manipulating a screw until certain conditions exist to tell you the car is going all right. Is that right? A Yes, sir. 20

Q And when this screw has reached the point and the effect of the reaching is such as to give you a condition of normality in the engine, then the work is done, is that true? A Yes.

Q And you started out at half-past four with Mr. Buckley?

Mr. Heher. He said about five o'clock.

Q You started out between half-past four and five o'clock for the purpose of doing that one act that would finish the job, is that right? A Yes, sir. 30

Q Now, isn't it true that as a mechanic you considered that job finished when you started out and that you would get that carburetor working all right inside of a few minutes if you hit on a road where you got the speeds? A I didn't know how long it would take.

Q No one knows how long things will take sometimes, but in the ordinary course of events 40

John B. Smith, cross.

with that automobile, the work on that machine was completed and in the ordinary course of events, the carburetor would have been adjusted inside of a few minutes? A Yes.

Q And for all intents and purposes you considered that the automobile was finished when you took it on the road? A It was not finished.

Q With the exception of that one thing? A Yes.

Q And that one thing under the ordinary circumstances could be done in three minutes once you hit a place where you could get the test? A Yes.

Q And this car proved the exception, didn't it? A Yes.

Q When this car came home on Saturday after the accident—it was taken home by Buckley on Sunday, wasn't it? A Yes, sir.

Q And it was not touched by you after he left it on Saturday evening until this? A Yes, sir.

By the Court.

Q Did you do anything between the time of the accident and the time the car was taken home? A No, sir; I did not.

30

By Mr. Devlin.

Q Has this question of the carburetor not been an afterthought with you since this accident happened? A What do you mean?

Q I mean hasn't this carburetor question been talked about for the purpose of the legal posture of this case? A No, sir.

Q Is has not? A No, sir.

Q Has no one spoken to you about the necessity of that? A Not that I can remember.

40

John B. Smith, cross.

Q Has any one spoken to you about the need of the facts showing that this car was not completely fixed? Has any one talked to you about the importance of that in this case? A No, sir.

Q You find, as an experienced mechanic, don't you, that the carburetor adjustment you are speaking of is done inside of a very few minutes in most cars? A Yes. 10

Q And isn't it most remarkable that you found an exception in this car? A No; it is not remarkable.

Q Well, it is remarkable, isn't it, if you find in the average car it is done in a very few minutes? A Yes.

Q Well, isn't it remarkable if you found in this car—

Mr. Heher. I object. That is argumentative and it has been asked three or four times and answered. 20

The Court. I do think, Mr. Devlin, you have pretty well exhausted it.

Mr. Devlin. Well, I will get it go.

Q If you had not had Buckley, how would you have tested the car? A I would have run it myself.

Q Is that the way you would have done it? A Yes, sir. 30

Q How would you manage to adjust this carburetor alone? A I would have had my mechanic with me?

Q You would have gotten another man? A Yes.

Q You went first to the city limits and came back again and started out this Brunswick Pike? A Yes, sir.

Q And this cut-out was open? A Yes, sir. 40

John B. Smith, cross.

Q And you had that held open for the purpose of giving you information? A Yes, sir.

Q And this cut-out can be heard a good distance away—it makes some noise? A When it is pulling hard, yes.

Q It is about as good as a horn, isn't it? A
10 Sometimes.

Q What do you think the speed was? A Eighteen miles an hour. That is what I told him to run the car.

Q I meant to ask you what do you think the speed was? A Around eighteen miles an hour.

Q Well, do you get that from what you told him or what you actually experienced from hanging on to the fender? A Well, that is from actual experience.

Q You ran down the pike and you heard the
20 horn blow once? A Yes.

Q Did you hear it blow the second time? A Yes.

Q What is it that makes you remember the horn blowing? A Because the horn is on the inside of the motor under the hood.

Q And you got a large benefit of it by lying down near it? A Yes, sir.

Q Did you have the hood or cover up? A
30 Yes, sir.

Q What were you doing there, were you manipulating the screw? A Yes, sir.

Q The machine was brought home afterwards? A Yes.

Q Have you driven many cars? A Yes, sir.

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

Q And you are familiar with brakes and things? A Yes.

40

John B. Smith, cross.

Q How were the brakes on this car, in pretty fair condition? A First-class.

Q They were about fair—they were in first-class? A They were in good shape.

Q Now, assuming that the car is going at fifteen miles an hour, within what distance could it be stopped by applying all the brakes? A 10
Twenty and eight-tenths feet.

Q Did you ever make that test? A Yes, sir.

Q Now, then, assuming that the car is going at eighteen miles an hour, within what distance can it be stopped by the application of all the brakes by the driver? A Twenty-six feet.

Q Assuming it was going at ten miles an hour, within what distance can it be stopped by the application of all the brakes? A Nine and seven-tenths.

Q You did not see the road at all where this thing happened? A I was not looking at the road; no. 20

Q Are you sure this car was running at high speed instead of low? A How is that?

Q Are you sure the car was not going at a high rate of speed instead of eighteen miles an hour? A Yes, sir.

Q How was the road there? A Good.

Q Was it a good road down this pike to the creek and up? A The bridge was very rough. 30

Q After you hit over the bridge, how was it? A Good.

Q And coming down it was pretty good? A Yes.

Q One is down grade and the other is up? A Yes, sir.

John B. Smith, re-direct.

Re-direct examination by Mr. Heher.

Q Mr. Smith, did you ever work on a Winton car? A Yes, sir.

Q Except this one? A No, sir.

10 Q Was there another Winton car in Trenton at that time except this one? A I don't know.

Q You first went to Slackwood and then returned to the city line? A Yes, sir.

Q And you decided to go back, did you not? A Yes, sir.

Q What was the condition of the car which caused you to turn back? A It wasn't right yet.

Q In what respect was it not right? A We still had a miss at low speed.

20 Q Now, this turning of the screw to adjust it did not adjust it up to that point, did it? A No, sir.

Q Now, the Klaxon horn that is connected with this automobile is located where, in connection with the carburetor? A I think it is below the carburetor on the chassis.

Q How far? A About ten inches from the carburetor.

30 Q Then as you were resting on the fender, while the car was proceeding out the Brunswick Pike, the horn was how far above your head? A About a foot.

Q What sort of a sound does this Klaxon horn make? A Loud.

Q Shrill? A Yes, sir.

Q Now, these measurements of stopping distances which you have given on cross examination are standard measurements? A Yes, sir.

Q Based upon what? A Upon brake lining.

40 Q New standard brake lining? A Yes, sir.

John B. Smith, re-cross.

Q You say that for eighteen miles an hour the stoppage should be in twenty-six feet? A Yes, sir.

Q That, of course, assumes that the brake lining is new and in perfect condition, doesn't it? A The brake lining will last quite awhile.

Q I say, that assumes it was in first-class condition? A Yes. 10

By the Court.

Q Does that mean dragging the wheels? A No, sir.

Re-cross examination by Mr. Devlin.

Q I think you said that Mahan's body was lying on the left of the road? A Yes, sir.

Q It was not on the dirt? A Part of it. 20

Q Where was the other part of the body? A As near as I can remember it was about half on the macadam and half on the dirt.

Q Then he was on the full left of the macadam? A Yes.

Q And the macadam is eighteen feet on that road, the dirt six feet on each side? A Yes, sir.

Q Now, you have told us that a car would stop in how many feet—twenty-six feet—going eighteen miles an hour? A Yes, sir. 30

Q Can you give us any idea of the time? A No, sir; I cannot.

Q Let me help you a little bit and you may. Do you know that a car going a mile a minute travels eighty-eight feet a second? A No, sir; I do not.

Q Well, that is true. A car going at twenty miles an hour travels twenty-nine feet a second. 40

John B. Smith, re-cross.

That is going twenty miles an hour. If a car going at eighteen miles a car can be stopped in twenty-six feet, it is true that it can be stopped in a little over one second. Isn't that true? A I do not know about the time.

10 Q Well, I figured the distance for you. You remember, a car going a mile a minute travels eighty-eight feet a second. That is a matter of figures. A car going at twenty miles an hour travels a third of that, or a little over twenty-nine feet. Now, if you can stop a car going eighteen miles an hour in a distance of twenty-six feet, you stop that car in one second and a small fraction of a second, isn't that right?

Mr. Heher. Is counsel instructing the witness or asking questions?

20 *Mr. Devlin.* I am not instructing the witness. It is a matter of computation.

Mr. Heher. Yes, but the jury can figure it just as well as you.

Mr. Devlin. I am calling his attention to it and asking him what he means by it.

30 Q Then I am to understand that a car can be stopped in one second and a fraction, going eighteen miles an hour? A You are, if the time is right.

The Court. Mr. Devlin, aren't you wrong? The car is constantly slowing down as it reaches the point of ultimate stoppage. If it is going eighteen miles an hour at the start and nothing at the end in the intervening part it is going at all speeds.

(After discussion.)

40 *Mr. Devlin.* I asked the witness if he knew the time because I have seen them

Francis J. Buckley, direct.

tested for time and distance, and that is why I put the question to him. That is all.

Mr. Heher. I want to recall Mr. Buckley for one question.

FRANCIS J. BUCKLEY, recalled on behalf of defendant. 10

Direct examination by Mr. Heher.

Q Mr. Buckley, you testified on your examination that the width of your car was either five feet six or five feet nine? A Yes; five feet nine.

Q You say it is five feet nine? A Five feet nine.

Q Did you examine that car and measure the width of it? A I did, yes. 20

Q When did you do that? A This morning.

Q And you have a little diagram here which shows the width and length of the car? A Yes, sir.

Mr. Devlin. What is the width?

Mr. Heher. Five feet nine inches.

Q And seventeen feet long? A Seventeen feet long.

Q And five feet nine inches wide in the front? That is the entire width from fender to fender? 30

A Yes.

Q The fender is the— A Extreme outer point.

Q The extreme outer point on each side? A Yes, sir.

Mr. Heher. We rest.

The Court. Have you anything further, Mr. Devlin?

Mr. Devlin. Just a little rebuttal. 40

Frederick Wenzel, direct.

FREDERICK WENZEL, sworn as a witness
in behalf of plaintiff in rebuttal.

Direct examination by Mr. Devlin.

Q You are a brother of Charles Wenzel who
was on the stand? A Yes, sir.

10 Q Do you remember the day your brother-
in-law was killed? A Yes, sir.

Q The 13th of September—or rather the day
he was hit; pardon me. Do you remember where
you were that day? A Yes, sir.

Q Where were you? A I was at the ball
game. I was playing at the Turbine Field.

Q You were a ball player? A Yes.

Q What team were you playing? A Bash's.

Q What time did the game end? A About
a quarter of five.

20 Q Did you see your brother-in-law, Mahan?
A Yes; he waited for me until I got dressed.

Q Did he have his bicycle with him? A Yes,
sir.

Q What was his condition as to sobriety? A
He was sober.

Q What time do you think he parted from
you? A Six o'clock.

Q About six o'clock when he parted from
you? A Yes, sir.

30 Q Did you know where he was going? A Go-
ing home.

Q Now, can you describe where the baseball
field is that you were playing on that day and
saw him? A Yes, sir; Turbine Field.

Q Can you describe it with relation to the
point of your brother-in-law's home on the Law-
rence road? What way would you go on a bi-
cycle to reach it? A Come up this way and
up Mulberry street and up Brunswick avenue
40 to the Brunswick Pike.

Frederick Wenzel, cross.

Q How would you get in the baseball field to Mulberry street? A I do not know the name of the street.

Q But the Turbine Field is out near the Interstate Fair Grounds? A Yes, in that direction.

Q The Interstate Fair Grounds are about two or three miles from here? A Yes, sir. 10

Q And then you come in, I think it is East Clinton avenue or Nottingham Way. A Yes.

Q And strike Clinton street on Mulberry street and up to the Lawrence road to reach home? A Yes, sir.

Q Do you know if he had any particular duty when he got home to do? A Yes, sir; he went home.

Mr. Heher. I object to that. 20

The Court. I do not see how he could know it unless he had been told.

Mr. Devlin. The reason I asked the question was because I understand he was familiar with his habits.

The Court. That would not be admissible.

Mr. Devlin. That is all. I just wanted to rebutt this testimony on the question of liquor. 30

Cross examination by Mr. Heher.

Q What time did you discontinue the ball game that day? A A quarter of five.

Q And Mr. Mahan was at the ball game? A Yes.

Q All afternoon? A Yes.

Q On the Turbine Field? A Yes, sir.

Q Did he leave immediately? A No, sir; he waited until I changed my clothes. 40

Frederick Wenzel, cross.

Q What time was it? A About five o'clock we left the field there and went to the Empire Tire and talked there until six o'clock.

Q Where is the Empire Tire? A At the corner of Nottingham Way and Mulberry street.

Q You mean the Empire Rubber Company?

10 A Yes.

Q You and he stayed there until six o'clock?

A Yes.

Q How do you remember that? A Because I remember it. He asked where I was going and I said downtown, and I asked him to come on downtown and he said, "No, I've got to go on home."

Q What makes you think you stayed there an hour? A We were talking about the game.

Q Are you sure it was an hour? A Yes.

20 Q Did you look at your watch when you left?

A No, sir.

Q You know what time you started? A Yes.

Q How? A I asked a man what time it was.

Q You stayed there one hour and talked about the game and no one else was there? A No one else was there.

Q And then he started up Mulberry street?

A He started up Mulberry street.

30 (Adjourned until Wednesday, November 17, 1920, at 10:15 o'clock in the forenoon.)

Motion for Direction of Verdict.

Trenton, N. J., November 17th, 1920.

(Case resumed pursuant to adjournment.)

(Appearances as before noted.)

The Court. Now, Mr. Devlin, you may proceed with the case.

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Mr. Devlin. We rest.

The Court. Are both sides through?

Mr. Heher. Yes.

(Testimony closed.)

Mr. Heher. If your Honor please, I want to move for a direction of verdict.

The Court. Gentlemen, will you come inside?

(Court and counsel withdrew.)

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Mr. Heher. My motion for a direction is upon the ground that the evidence discloses no negligence either on the part of the owner or driver of the automobile; and second, on the ground of contributory negligence of the decedent himself, and third, on the ground there is no evidence, or, rather, the evidence produced discloses that the relationship of principal and agent did not exist between Mrs. Walker and the driver of the machine, or the mechanic at the time the accident happened.

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(After argument.)

The Court. The case is not free from difficulty at all, but I am inclined to think it is one where I ought to submit it, and of course there are other questions in the case. There is the very serious question of liability, apart from the question of relationship, and I do not think that is a law question. I think both of these ques-

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Motion for Direction of Verdict.

tions are contributory negligence and negligence in the driver are jury questions. If part of this testimony is believed the car was far enough away to fully justify a man in starting across and giving warning of his doing so; and, on the other hand, if other testimony is accurate, it was the most foolhardy thing in the world.

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Mr. Devlin. Yes, then he committed suicide, practically. There is no question about the car working.

The Court. I think, gentlemen, on the whole case I must submit it. I agree that it is very close. I will note an exception.

Mr. Heher. I ask an exception.

The Court. Yes.

Mr. Heher. If your Honor please, I would like to have permission to offer the map in evidence.

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The Court. Oh, yes.

(Map referred to is marked Exhibit D. 4.)

(Mr. Heher summed up for the defendant.)

(Mr. Devlin summed up for the plaintiff.)

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Charge to Jury.

CHARGE.

The Court (LLOYD, J.). Gentlemen of the jury: This is the first case of your service in the court and introduces to you one of the trials which come within the category of and are known as civil cases, that is, cases involving property or personal rights as distinguished from criminal responsibilities. I do not need to remind you that the jury and the Court are here as agencies purely for the purpose of giving justice between the parties who come before us. The oath that each of us has taken is a solemn one. The jurors' oath is that they will well and truly try the issue joined and a true verdict render according to the evidence. That implies, of course, that every case must be disposed of on the proofs that are adduced in the trial. There are certain principles of law which come into play and it is the duty of the Court to instruct the jury what those rules of law are, and it is the duty of the jury to accept those rules as laid down by the Court as binding on the jury. There are other questions, known as questions of fact, which go to the jury and the truth of which the jury will pass upon.

I think it is well in every case for the Court to define to the jury just what the issues that come before them are. In some cases there may be but one; in others there may be more than one; there may be several. I think it is the duty of the Court to call them to the attention of the jury so that when they retire they may have clearly defined in their minds just what problems present themselves for their solution, remembering that the instruction which the Court gives on the law is to be their guide from a legal standpoint.

Charge to Jury.

10 This case comes to you as a concrete one between two individuals. By that I mean two parties, neither of whom is an artificial party. The plaintiff is the administratrix of a deceased man and, as such, is claiming damages for herself and the next of kin which were sustained by reason of the death of Mahan, for whom the administratrix now stands.

The action is one that is provided by statute. It did not exist at common law. When one person through negligence destroyed the life of another there was no surviving action to the members of the family or next of kin. The legislature, recognizing the injustice of such a rule, modified the common law so that a right of action is given to the administrator for the benefit of the widow and next of kin.

20 As such the plaintiff comes to this Court and asks for damages against the defendant, Mrs. Walker, upon the theory that her automobile in the hands of her agent negligently caused the death of the plaintiff's husband.

30 The circumstances are somewhat peculiar. The defendant was not in possession of this car at the time the accident happened. It was being driven by the defendant's son-in-law. Perhaps the very first question that ought to engage your attention is whether the son-in-law stood in the place of the defendant and was her servant in the running of that car at the time this accident happened, the law being that a master or employer is responsible for the acts of the servant of employee within the lines of the service given to him. So that at the very threshold of this case you must determine whether or not the driver of the automobile, Buckley, at the time the accident happened, was within a service that had

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Charge to Jury.

been committed to him by Mrs. Walker. It has appeared in the case that Buckley was a member of the family; that the automobile was one that he practically exclusively drove. He did not stand, however, in the relation of an employed chauffeur, and his general relation of driving the car carried with it no responsibility for this accident. It must be found that responsibility exists in the special facts of this case. 10

It is for you to determine whether Buckley at the time the accident happened was performing an act fairly within the contemplation of the service for which he had been engaged.

A number of facts in this case are not in dispute. There is dispute as to the specific instruction given by Mrs. Walker to Buckley with respect to the car, and for your enlightenment I am going to read some of the passages of the testimony to refresh your memory as to just what has been said regarding that instruction. 20

Mr. Dennis was called and asked a number of questions concerning an interview between himself and Mrs. Walker, and in his testimony he said this conversation took place:

“Q The first time what did you say to her (Mrs. Walker) and she to you? A I told her I had learned she was the owner of the car that had caused the accident, and she said yes, she owned that car, and she knew about it, and Mr. Buckley, or her son-in-law, was out with the mechanic trying the car out; that it had been in the repair shop and she had it repaired and they were out on the road testing it out. 30

“Q Was anything said about her sending him there? A I do not know that she said she sent him. I asked Mrs. Walker if 40

Charge to Jury.

Mr. Buckley was the man who drove the car for her and she said yes."

Later on in the examination Mr. Dennis said:

10. "A She said it was her car and had been in the repair shop. * * * And that Mr. Buckley and the mechanic were out with the car trying it out, seeing if it was all right, or words to that effect. That was what she told me about it. She said that the car had been in the repair shop and that Mr. Buckley and the mechanic at the time the accident happened were out on the road, were out on the road trying it out or testing it out."

Buckley testified:

20. "Q What did you do and at whose direction did you do it? A On rides previous to the day of the accident the car was not running properly, and upon talking it over with Mrs. Walker she directed that I take this car to John Smith, who ran a garage on Olive street, to make the necessary repairs to have the car run correctly.

"Q Did you talk to her that day? A Yes; I spoke to her that noontime.

30. "Q What did she say to you? A She said, 'I would advise you to bring it down to John Smith's and let him overhaul it.' * * * She told me to take it to John Smith's garage and let him repair the car; that he knew the car."

Later, in the cross examination of Buckley, occurred the following:

40. "Q Your mother-in-law told you to take the car down and get it fixed? A Yes, sir."

Charge to Jury.

That is, in substance the testimony as to the inception of Buckley getting the possession of the car and taking it down to the garage.

Mrs. Walker and her daughter, when they were called, said in substance that they told Mr. Dennis that this was information, that they were simply giving him information they had received from Buckley as to what happened on the road and how it happened. That is probably the truth, because Mrs. Walker was not there and evidently she must have gotten the information from some one. 10

The car was placed in Smith's hands for repair and Smith worked on it from some time in the early afternoon to later in the day, and then the car was taken out. Both Smith and Buckley testified that it was taken out at Smith's request, Buckley driving in order that Smith might adjust the carburetor, which it was claimed, could not be adjusted with the motor running in the shop, and that while they were out on a second round of running the accident happened. 20

The rule of *respondeat superior*, that is, the responsibility of the superior for the acts of a subordinate or servant, is embodied in the law but the law exacts that the act complained of must be within the scope of the service in which the servant is engaged. 30

It is for you to extract from all of this evidence the exact relation in which Buckley stood to Mrs. Walker at the moment of time when the accident happened. If he was her servant, acting within the scope of the service given to him, then she would be responsible for his acts—not necessarily legally responsible in this case for a verdict, because there are other questions in the 40

Charge to Jury.

10 case, but she would be in a general sense responsible for his acts. If Buckley's service was simply to take the car to the mechanic and the mechanic, after working on it for a time, for his own purposes asked Buckley to run the car out for him, and he did so, then you can see that that would be a service, if that was all, for which Mrs. Walker would not be responsible, if that was the only relation she had to it.

20 So that the first question, as I have already indicated to you, that presents itself is whether Buckley at the time of the accident, under the evidence, fairly, justly and of right was found to be in the service of Mrs. Walker and within the scope of it. If he was not that ends the case and you need not go any further; your verdict would be for the defendant. If he was acting within the scope of a service given to him by Mrs. Walker as his master, then two very important questions are presented to you in the case before you reach the question of compensation.

30 The first is, was this accident due to the negligence of Buckley in running the car? I may say to you that the burden of proving the relation between Mrs. Walker and Buckley rests upon the plaintiff. The law does not exact of a party in civil litigation the same degree of proof that it requires in criminal actions. You may have learned that in all criminal proceedings it is necessary to prove one guilty beyond a reasonable doubt before guilt can be concluded. In civil cases it is sufficient if the total proofs in the case preponderate in favor of the proposition, the first proposition in this case being the one of relationship as between master and ser-

Charge to Jury.

vant, and the second one, the negligence of Buckley, if the second one arises.

There is a singular unanimity of testimony about certain parts of this proof with respect to the actual happening of the accident itself. In the first place, it is conceded that there were three vehicles on the road—the car driven by Buckley, the pony cart or wagon and the bicycle being ridden by the deceased. The pony cart had passed over the bridge which you have heard discussed and saw delineated on the map, and behind the pony cart was the car, the witnesses not agreeing as to just how far, but back of it. The deceased was riding his bicycle. These two were on the right-hand side of that road; Buckley was coming back of them both and going in the same direction. He also had crossed the bridge. The deceased turned his bicycle to cross the road at a point somewhere near and perhaps opposite his own home, and to go into his own home you may fairly assume. He put up his hand—and there is a dispute as to just where he did that, but that he put up his hand as a signal there is no doubt. He started to cross the road and before he had completely cleared the hard surface of the road the front wheel of his bicycle came in contact with the rear right fender of the automobile.

The testimony also shows that the automobile was being driven by Buckley; that a part of the hood was raised and that Smith, the mechanic, was lying on the fender or running board giving attention to some mechanism in the engine.

So far there is practically no dispute in the testimony. It is perhaps an unusual case of unanimity of testimony and proof. But there are marked divergences and these divergences

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Charge to Jury.

are the elements in the case that demand your close attention, and they involve two questions, one that I have already referred to, of the negligence of Buckley, and another to which I will now refer, namely, the alleged negligence of the deceased himself.

- 10 It is necessary, gentlemen, to point out to you what the law is with respect to liability in the event of negligence combining. You have perhaps already inferred that if the negligence of the defendant's servant, within the scope of his service, caused the death of this man, and that alone, that there would be liability. But the law also declares that if one complaining, whether by himself or those who come after him representing him, as the plaintiff does in this case, of negligence in another is also guilty of negligence bringing about his own injury or death
- 20 there can be no recovery at his hands or at the hands of those who survive. It does not make any difference as to the degree of negligence. You cannot measure that in such a case as this. The law says that if any negligence on the part of the deceased contributed to bring about the misfortune which overtook him then he and those who come after him are precluded from any recovery.
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It is these two questions to which your attention should be very closely directed, both now and when you reach the jury room, if you reach the question of negligence at all.

- In a general way the plaintiff's testimony is that while the bicycle was traveling on the right-hand side of the road and was about to turn off across the road into a lane or avenue leading to the house of Mahan the defendant's car was a long distance up the road. Udy, the young
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Charge to Jury.

boy, who testified, said it was two hundred feet back of him. Wenzel did not exactly state, as I recall, the distance that he claimed the car was, but said that the automobile was about three hundred feet away when he first saw it. He said Mahan put out his left hand and the automobile was beyond the bridge when Mahan tried to cross. And they testified to a considerable rate of speed. Udy said the automobile was going forty miles an hour, and Wenzel said it was going forty to fifty miles an hour and that it came up and the collision occurred. The defendant's testimony tends to show that the car was going at a very much less rate of speed, fifteen to eighteen miles an hour. Nothing has appeared in the case, so far as I recall, as to just what the nature of this country is, but an automobile in the open county is permitted under the law to go thirty miles an hour. On the subject of speed it has a bearing upon the conduct of Buckley in his movement; it has a bearing upon the conduct of Mahan in turning off; it has a bearing upon the controlability of the automobile and what one would be justified in doing with a car approaching at any given speed.

But the testimony on behalf of the defendant is more than that. The testimony in this case shows conclusively that the accident happened by a collision between the front wheel of the bicycle and the rear right-hand fender of the automobile. It also shows conclusively that while the automobile was running along a man was lying on the fender and running board, on that side of the car, out of the seat. Both Smith and Buckley testify to the rate of speed which they say the car was going, and they say it was necessary to go at a low rate of speed because

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Charge to Jury.

of the thing that Smith was doing. Some of the plaintiff's witnesses say that Smith was on that side of the car. I think it was described in some places as on the running board and in others on the mud guard, but the two are apparently closely connected. You have a right to take into
 10 consideration the natural probabilities as well as the sworn testimony of witnesses, and in this case you may ask yourselves would a man drive a car at forty or fifty miles an hour with another man lying on the running board. That is a question that occurs to me and I pass it on to you for your consideration.

If this accident happened by reason of the negligence of the driver of the car, acting within the scope of his service for Mrs. Walker, if such
 20 service existed at the time, what is there to be said about the action of Mahan himself? You will observe that the accident was a collision between the front wheel of the bicycle and the rear fender of the automobile. Was his turning under the circumstances an act of prudence, of reasonable care, or was it an act of negligence? If Mahan was negligent, then no matter how negligent Buckley was and no matter in what service he might have been there would be
 30 no liability, because, as I have already said to you, the law of contributory negligence precludes and forbids a jury rendering a verdict for one who himself has been negligent, thereby producing an injury to himself, or any claim on behalf of those who come after him.

If your conclusion in this case shall be that the death of Mahan resulted as a direct consequence and as the natural result of the negligence of Buckley, and find that Buckley at the
 40 time was within the scope of a service that had

Charge to Jury.

been committed to him by Mrs. Walker, and due to that alone, you reach the question of damages.

Damages in a case of this kind are not for bereavement; they are not for personal feelings or wounded or broken hearts; the law cannot mend them and it cannot compensate for them. All it can do and all it does do is to compensate for the money loss, the pecuniary loss, which has been sustained by the widow and children. In reaching a conclusion on such an amount many elements are essential for the jurors' consideration. In the first place, the law says that an award of a sum which shall represent the present value of the loss to the widow and next of kin shall be the standard. It does not mean that a jury can compute all that the family would have received up to the time of his death and make that the amount of the award, because you see at once that would be giving both that which is and that which is to come and putting it all into a sum at this moment which would not in the course of natural events be paid at this time, but would be accumulated over a period of years or whatever might be the duration of the relationship when the benefit would accrue, and that is perhaps a most important element of consideration in this class of cases. It is the present value of the loss which the law says must be the basis of award.

Mahan appears to have been making thirty dollars a week. He had a number of children, some of whom were under age; I mean by that, of tender years; and others who were older. Mahan was forty-one years of age and his wife a little younger. He was a drawer in the potteries. Evidence has been adduced in the case to indicate that his health was good before the

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Charge to Jury.

10 accident happened. There has also been evidence introduced in the case that there was a diseased condition of the kidney which might have an important bearing upon both the duration of his life and the condition of subsequent health which might easily have an effect upon the earning power.

Besides death, of which you have had some statistics given to you in the mortality tables, and which must overtake us all, there are many vicissitudes which occur in the relation of families. Men become incapacitated; they may be injured; the family relation may change. Many, many things occur which are essential for the jurors' consideration in determining what are the vicissitudes which probably lie in the path-
 20 way of one situated as was the deceased here.

Gentlemen, I do not think that I can go further in this case. I want to impress upon you the underlying idea, if you reach that phase of this case, that it is the present value of the loss, and you must remember that in a verdict rendered today it is anticipating payments to come. If you go to a bank to get your note discounted the bank says to you that it will take out so much per cent. up to maturity. If it is three months,
 30 six months, nine months or a year it is proportioned. When it runs into long periods of time the present value of such an ultimate amount would be very much less. They would give you very much less for a note falling due ten years from now than they would for a note falling due six months from now. It is that same idea that runs through this form of assessment and it is highly important.

40 In addition to that you will have to remember that the man himself must live and that his own

Charge to Jury.

expenses come out of his earnings and have to be deducted from anything which the family would get, including his necessary expenses and whatever would be reasonable for his personal pleasures and enjoyments.

Before you reach the question of damages in this case at all you will take up and carefully consider the other three questions: First, has the plaintiff by a fair preponderance of the proof established to you that Buckley at the time of the accident was in the service of Mrs. Walker, and was within the scope of that service in the act that he was doing? If he was not that ends the case, there is no need to go further. If he was, then pass to the question of his conduct on this occasion. Was his conduct that of negligent management of the automobile under the circumstances or was it not? If it was not then again you need go no further with the case. If it was then you determine whether Mahan's own conduct was that of a negligent man in attempting to cross at a time when he ought not to and when it was obviously dangerous to do so. The law required that if this automobile was passing it should do so on the left side. It required that one riding a bicycle, as one driving an automobile, shall keep to the right when another is passing. It is for you to find under all the circumstances whether Mahan in attempting to cross was or was not guilty of negligence which helped to or wholly brought about his own unfortunate death. If you find any one of these question against the plaintiff your verdict is one of no cause of action. It is only in the event that you find them all in favor of the plaintiff that you reach the question of damages that I have already discussed.

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Charge to Jury.

Mr. Heher, I have a number of requests. I do not know whether I have covered them or whether I have not.

Mr. Heher. Number 5 I do not think you have covered specifically.

The Court. I think it is sufficiently covered.

10 *Mr. Heher.* And Numbers 7 and 8 are of the same character.

The Court. I think that those requests, Numbers 5 and 7, leave out exclusive possession and control. There is such a thing as joint possession and control. At all events, I think I have sufficiently covered those two. Now, the eighth, is that the last one?

Mr. Heher. There are 11 and 12 that I think ought to be charged.

20 *The Court.* Gentlemen of the jury, I am asked to charge you certain requests, which I think are the law. Perhaps I have sufficiently covered them, but if not I will make sure of it and charge them now.

30 "8. If you find that the driver, Buckley, had authority from the defendant only to take the automobile to the repair shop and return it when the repairs had been made, and that his act in driving the car along the Brunswick Pike, for the purpose of testing its machinery, was without authority from the defendant, and without her knowledge or consent, you must find a verdict for Mrs. Walker."

That is obviously true. I think I have already said that to you.

Mr. Heher. Now 11 and 12.

40 *The Court.* "11. If you find that the driver, Buckley, in the operation of the automobile, acted with due care and caution, and the collision

Exceptions to Charge.

resulted because decedent put out his hand too late to inform Buckley of his intention to cross to the left side of the road, you must find a verdict for Mrs. Walker.

“12. You must take into consideration, among other things in the case, the time when decedent put out his hand, and whether it was too late to inform Buckley of his intention to cross the road and to enable him, in the exercise of due care, to avoid the collision.” 10

Those, I think, are accurate statements of the law and I charge them.

Are there any exceptions that counsel want to bring to my attention before the jury goes out?

Mr. Devlin. I want to take an exception to that part of the charge in which your Honor said, “Responsibility must be found in the special facts of the case—.” I did not get the rest of it, but I want to except to it. 20

The Court. Yes.

Mr. Devlin. And also: “If he took the car to the mechanic and the mechanic requested him to take it out”—I suppose take it out for testing; I could not get it all, you know—“then she would not be responsible.” I want to take an exception to that. 30

The Court. Yes.

Mr. Devlin. Now, the charge as to the negligence of Buckley, the negligence of Buckley in operating the car, I will ask an exception to that, to the failure to include with that all the other facts in the case.

The Court. Yes.

Mr. Devlin. And also I ask an exception to the charge in the failure to include on the ques- 40

Exceptions to Charge.

tion of agency all the other facts with regard to agency.

The Court. Yes.

Mr. Devlin. And I ask an exception to the eighth request of the defendant, as the Court has charged it.

10 *The Court.* Yes.

Mr. Devlin. And I ask an exception—I cannot just name it; it is the last part of the damage charge; if they reach the point of damages—it is on your Honor's failure to include in the damages the element of his earning capacity as it is. Your Honor spoke of the incidents and vicissitudes of life.

The Court. Yes, and I mentioned the fact that he was earning thirty dollars a week.

20 *Mr. Devlin.* I want to except to it because the mortality table, as I understand it, the element of damages is based on—to what your Honor said as to the vicissitudes of life I want to except.

The Court. Yes.

Mr. Devlin. Because I take it it is speculative and the average is the most certain thing.

30 *Mr. Heher.* I except to this statement in the charge: "There is a dispute as to the specific instruction given to Buckley by Mrs. Walker with respect to the use of the car." I presume that would be in connection with an exception to the refusal to direct a verdict.

The Court. Yes. You may go gentlemen.

(The jury retired.)

Defendant's Requests to Charge.

Defendant's counsel requested the Court to charge as follows:

1. The burden is on the plaintiff to show you that the driver, Buckley, at the time of the collision with decedent, was the servant and agent of the defendant.

2. If you find that the driver, Buckley, was not the servant and agent of the defendant, at the time of the collision with decedent, you must find a verdict for Mrs. Walker. 10

3. Assuming that you find that the driver, Buckley, was the servant and agent of the defendant at the time in question, the burden is still on the plaintiff to show you that he, the driver, was acting within the scope of his employment at the time of the collision.

4. Assuming that you find that the driver, Buckley, was the servant and agent of the defendant, if you find that he, the driver, was not acting within the scope of his employment at the time of the collision, you must find a verdict for Mrs. Walker. 20

5. If you find that the defendant's automobile was in the possession and control of the repairman, Smith, at the time of the collision, you must find a verdict for the defendant. 30

6. The mere fact that Buckley was driving the automobile at the time of the accident does not fix any responsibility to pay damages on Mrs. Walker. To find a verdict against Mrs. Walker, you must find that at the time of the accident Buckley was her servant and agent in the operation of the automobile, and that he was acting within the scope of his employment.

7. If at the time of the collision the defendant's automobile was in the possession and con- 40

Defendant's Requests to Charge.

trol of the repairman, Smith, and in its operation the driver, Buckley, acted under the direction of said Smith, you must find a verdict for the defendant.

10 8. If you find that the driver, Buckley, had authority from the defendant only to take the automobile to the repair shop and return it when the repairs had been made, and that his act in driving the car along the Brunswick Pike, for the purpose of testing its machinery, was without authority from the defendant, and without her knowledge or consent, you must find a verdict for Mrs. Walker.

20 9. In passing decedent on the road it was Buckley's duty under the law to pass on the left, even if it would take him across the center line of the road to the left side.

10. The giving by decedent of the statutory signal, by putting out his hand, is not necessarily all that decedent was required to do in the exercise of due care to avoid the collision. If you find that decedent was guilty of negligence contributing to his injury and death, you must find a verdict for Mrs. Walker, even though he did put out his hand in the manner testified.

30 11. If you find that the driver, Buckley, in the operation of the automobile, acted with due care and caution, and the collision resulted because decedent put out his hand too late to inform Buckley of his intention to cross to the left side of the road, you must find a verdict for Mrs. Walker.

40 12. You must take into consideration, among other things in the case, the time when decedent put out his hand, and whether it was too late to inform Buckley of his intention to cross the road and to enable him, in the exercise of due care, to avoid the collision.

Postea.

POSTEA.

(Filed November 23, 1920.)

NEW JERSEY SUPREME COURT.

MERCER CIRCUIT.

10

CAROLINE MAHAN, administratrix <i>ad prosequendum</i> , of Harry B. Mahan, deceased,	} Plaintiff,	} Action at Law.
<i>vs.</i>		
ELIZABETH WALKER,	} Defendant.	

This case was tried before Circuit Court Judge Frank T. Lloyd, with a jury, at the Mercer County Circuit Court, on November 17, 1920. 20

The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of six thousand and sixty-two (\$6,062) dollars and fifty (\$.50) cents.

FRANK T. LLOYD,
Judge.

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Judgment.

	CAROLINE MAHAN, administratrix <i>ad prosequendum</i> , of Harry B. Mahan, deceased,	} Plaintiff,	} Action at Law. ON POSTEA.
	<i>vs.</i>		
10:	ELIZABETH WALKER,	} Defendant.	

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of six thousand sixty-two dollars and fifty cents, besides costs to to taxed nisi.

Entered November 23, 1920.

On motion of

20:	MARTIN P. DEVLIN, <i>Attorney.</i>
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30:

40:

Rule to Show Cause.

RULE TO SHOW CAUSE.

(Filed December 14, 1920.)

SUPREME COURT OF NEW JERSEY.

MERCER COUNTY.

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CAROLINE MAHAN, administratrix <i>ad prosequendum</i> , of Harry B. Mahan, deceased,	} Action at Law.
<i>Plaintiff,</i>	
<i>vs.</i>	} RULE TO SHOW CAUSE.
ELIZABETH WALKER, <i>Defendant.</i>	

A verdict having been rendered in favor of the plaintiff in the above-entitled cause, and application for this rule having been made by the above-named defendant within six days after the rendition of said verdict, and the Trial Court being of the opinion that the propriety of the verdict should be reviewed by the Supreme Court, and that certain of the defendant's exceptions should be reserved;

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It is, on this twenty-second day of November, nineteen hundred and twenty, on motion of Harry Heher, attorney for said defendant,

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ORDERED, that the plaintiff show cause before the Justices of the Supreme Court, at the State House in the City of Trenton, on the third Tuesday of February next (1921), at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the verdict rendered in the above-entitled cause should not be set aside and a new trial granted, on the following grounds:

1. That said verdict is against the evidence.

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Rule to Show Cause.

2. That said verdict is against the weight of the evidence.

3. That said verdict is contrary to the charge of the Court.

10. And it is further ordered, that all the exceptions of said defendant to the refusal of the Trial Court to grant defendant's motion for non-suit, on the ground that there was no evidence to establish the relationship of master and servant or principal and agent between the defendant and the driver or person in charge of the defendant's automobile, and that the alleged negligence of the driver or person in charge of said automobile could not be imputed to defendant; to the refusal of the Court to direct a verdict in favor of the defendant at the close of the whole case upon the same ground; to the rulings of the Court, with respect to the admission and exclusion of evidence, and to the charge of the Court, be and the same are hereby reserved.

FRANK T. LLOYD,
Judge.

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Reasons.

REASONS.

(Filed.)

SUPREME COURT OF NEW JERSEY.

MERCER COUNTY.

10

CAROLINE MAHAN, administratrix <i>ad prosequendum</i> , of Harry B. Mahan, deceased,	} On Rule to Show Cause.
<i>Plaintiff,</i>	
<i>vs.</i>	} REASONS.
ELIZABETH WALKER, <i>Defendant.</i>	

The defendant hereby assigns as the reasons why the verdict in this cause should not be set aside and a new trial granted, the grounds specified in the rule to show cause herein, and upon which the same was allowed, as follows:

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1. That the said verdict is against the evidence.
2. That the said verdict is against the weight of the evidence.
3. That the said verdict is contrary to the charge of the Court.

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HARRY HEHER,
Attorney of Defendant.

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NEW JERSEY SUPREME COURT.
FEBRUARY TERM, 1921

CAROLINE MAHAN, ADMX.,

vs.

ELIZABETH WALKER.

OPINION.

(Filed June 16, 1921.)

10

On Rule to Show Cause to Mercer Circuit.

Argued February Term, 1921; decided June Term, 1921.

Harry Heher, for the Rule.

Martin P. Devlin, *Contra.*

Argued before Trenchard, Minturn and Kalisch, J.J.

The opinion was rendered by MINTURN, J.:

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The rule was granted to bring up for review a verdict obtained in the Mercer Circuit, in favor of plaintiff for \$6,062.50 for the death of plaintiff's husband, while riding a bicycle on the Lawrence Road, by being struck as he was turning into his home from the road by the defendant's automobile. Plaintiff's intestate resided on the left side of the road in a house that stood alone in a country district. He had been riding on the right of the road, and turned to pedal into his premises. At that time defendant's automobile attempted to pass him on the left side, approaching from his rear. The front of the auto passed safely, but plaintiff's intestate's wheel collided with the rear mud guard of the auto, and plaintiff's intestate was thrown, causing a fracture which superinduced his death.

20

The auto was driven by defendant's son-in-law, who was taking it from a repair shop, with defendant's knowledge, and the repair man was upon the car at the

front fender observing the action of the motor, or the carburetor, and there was testimony that the driver of the machine was, to some extent at least, also engaged in observing the action of the motor, which was exposed to view, the hood having been thrown back for that purpose.

The road was thirty feet in width and arched at the center, causing a slope at either side. Some distance to the rear existed a bridge over a creek, and defendant's act of crossing the bridge was distinctly audible at the point where plaintiff's intestate turned to the left. A pony cart occupied by two boys preceded the plaintiff's intestate, and when they heard the noise at the bridge they turned to the right to avoid the oncoming motor car. They saw the deceased at that time put out his hand indicating, according to the law of the road, his intention of turning to the left. At that time the auto was about two hundred feet from the deceased, and proceeding at forty miles an hour. The auto continued to proceed to the left of the turning bicycle, and after the accident passed seventy-five feet beyond the point of casualty before it was stopped. This situation was supported by a plentitude of testimony, and presented the basis for a verdict based upon defendant's negligence in operation, if the jury credited the proof, which they apparently did. When the deceased gave the statutory signal of his intention to turn to the left, it was the duty of the defendant to use reasonable care to so control the car as not to injure the deceased. This he might have done by slowing up, or by passing to the rear of the deceased, as the law of the road required him to do, if the deceased had continued on without turning. Their rights in such situation were correlative, the deceased having the right to turn into his home, using reasonable care in so doing, and the defendant having the right to pass him exercising reasonable care and observation, and incidentally observing the law of

the road, if he could do so reasonably under the circumstances, in order to avoid a collision.

Winch v. Johnson, 92 L. 219;

Paulsen v. Klinge, *Id.* 99;

Daly v. Case, 88 L. 295.

The disputed facts in such a situation are always for the jury, and the case was properly submitted to them on that ground.

The question of the driver's agency as the representative of the defendant also presented a jury question. 10

Missel v. Hayes, 86 L. 348.

We have examined the question of damages, but we are in no position to say from the amount of the verdict that under the facts the verdict was the result of either mistake, passion or prejudice, which factors upon this application present the only ground upon which we can legally consider the question of excessive damages.

Bowes v. Public Service Ry. Co., 110 Atl. 99.

The rule will, therefore, be discharged.

SUPREME COURT OF NEW JERSEY.
MERCER COUNTY.

	CAROLINE MAHAN, ADMINISTRA- TRIX AD PROSEQUENDUM OF HARRY B. MAHAN, DECEASED, <i>Plaintiff,</i>	} On Rule to Show Cause.
	<i>vs.</i>	
10	ELIZABETH WALKER, <i>Defendant.</i>	}

ORDER DISCHARGING RULE TO SHOW
CAUSE.

(Filed June 21, 1921.)

20 The rule to show cause in this case having been argued by counsel in the February Term of this court, and the court having heard the arguments of counsel and having considered the same,

It is thereupon ordered that the rule to show cause in the above stated cause be and the same is hereby discharged, with costs to the plaintiff.

Entered this 21st day of June, 1921.

On motion of

MARTIN P. DEVLIN,
Attorney and of Counsel with Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CAROLINE MAHAN, ADMINISTRA- TRIX AD PROSEQUENDUM OF HARRY B. MAHAN, DECEASED, <i>Plaintiff-Respondent,</i> <i>vs.</i> ELIZABETH WALKER, <i>Defendant-Appellant.</i>	}	Action at Law.
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GROUNDS OF APPEAL.

The appellant states the following grounds of appeal:

1. The trial court erroneously refused to grant defendant's motion for a nonsuit at the close of the plaintiff's case, on the ground that there was no evidence to establish the relationship of master and servant, or principal and agent, between the defendant and the driver or person in charge of the defendant's automobile, at the time of the commission of the grievances alleged in the complaint. 20

2. The trial court erroneously refused to grant defendant's motion for a nonsuit at the close of plaintiff's case, on the ground that the alleged negligence of the driver or person in charge of the defendant's automobile at the time in question could not be imputed to the defendant.

3. The court erroneously refused to direct a verdict in favor of the defendant at the close of the whole case, upon the ground that there was no evidence to establish the relationship of master and servant, or principal and agent, between the defendant and the driver or person in charge of the defendant's automobile at the time of the commission of the grievances alleged in the complaint. 0

4. The court erroneously refused to direct a verdict in favor of the defendant at the close of the whole case,

upon the ground that the alleged negligence of the driver or person in charge of the defendant's automobile at the time in question could not be imputed to the defendant.

5. The court erroneously charged the jury as follows:
"There is a dispute as to the specific instruction given by Mrs. Walker to Buckley with respect to the car."

HARRY HEHER,
Attorney of Appellant.

New Jersey Court of Errors and Appeals

CAROLINE MAHAN, Administratrix ad prosequendum of Harry B. Mahan, deceased, <i>Plaintiff-Respondent.</i>	} Action at Law. On Appeal.	10
vs. ELIZABETH WALKER, <i>Defendant-Appellant.</i>		

BRIEF FOR PLAINTIFF-RESPONDENT. 20

This case was tried before Judge Frank T. Lloyd with a jury at the Mercer County Circuit Court on November 17, 1920. The jury rendered a verdict for the plaintiff in the sum of \$6,062.50. On December 14, 1920, a Rule to Show Cause was taken and exceptions especially reserved.

The question of the weight of the evidence and the amount of the verdict was argued before the February term of the Supreme Court, 1921, and the Rule to Show Cause was dismissed and an opinion was filed in the Supreme Court on June 16th, 1921. The plaintiff now takes an appeal on the reserved exception of law. 30

STATEMENT OF THE FACTS

Plaintiff's decedent was injured on the Lawrence Road between six and seven o'clock (daylight saving time) on Saturday evening, September 13th, 1919, by an automobile owned by the defendant Elizabeth Walker, but driven by Frances J. Buckley, a son-in-law and a member of the household of Elizabeth Walker, and who also had been exclusive driver of the machine for about nine
10 years preceding the accident.

The decedent lingered from the 13th of September in an unconscious state until the 21st of September, when he died from a fracture of the skull. His age was about forty-one and one-half years. He left him surviving a widow and eight children, ranging in age from three years to twenty years, three of whom are working.

On the 17th day of November, 1920, the case was tried before Judge Lloyd and a jury at the Mercer Circuit, and a verdict was returned for the plaintiff for the
20 sum of \$6,062.50. The material testimony for the plaintiff was given by the following witnesses:

Frederick Edgar Udy (S. C., p. 13), a boy sixteen year old, stated he was riding with his little sisters in a small pony cart on the day in question on the Lawrence Road; that he heard an auto coming down grade and over the bridge, and that he pulled in to the right side of the road, which was thirty feet wide (18 ft. asphalt and 6 ft. on either side gravel shoulder) and stopped the pony. Mahan, who was riding on his bicycle, rode up
30 on his left; that he turned around and saw an automobile about 200 ft. away, and as he turned back his head he saw Mahan raise his left hand as a signal to the automobile and then turn his bicycle to go across the road to his home on the opposite side; he said the machine was going at the rate of about 40 miles per hour; that no horn was blown or signal given by the automobile driver; that the machine was on the left-hand side of the centre of the road, and as Mahan and his bicycle rode over to the left

side of the road to his home, the machine swung to the left and the right rear fender of the machine hit the front of Mahan's bicycle and knocked him down on the road; the machine then run up about a distance of about 75 ft. slowed up to a stop and the driver got out and the other man took the machine and drove it up to the cross-road and turned around and came back, and Mahan was then taken up, put in the machine and taken to the hospital.

Charles Wenzel (S. C., p. 30), the brother-in-law of the deceased, said he was sitting on the front porch of the home of the deceased, which is on the left-hand side of the road going to Lawrenceville. He saw the machine coming down the hill before it reached the bridge over the creek, which is about 600 or 800 ft. from the home of the deceased. He said the speed of the machine was between 40 and 50 miles per hour. He saw the deceased, coming up the road on his bicycle, put out his left hand and start across the road into his home. The auto was coming down on the left-hand side of the road, Buckley was driving, and Smith, the mechanic, was on the fender with the hood up, with his face toward the engine. He says Buckley was sitting on the left-hand side looking at the engine or the mechanic. He saw the machine swing to the left, and the rear right wheel of the machine hit Mahan and throw him to the road. He says when he first saw the machine after he saw Mahan he thought it was about 300 feet from him, and that Mahan was more than half way across the road to his home, when he was side swiped and knocked off his bicycle. Said the machine's speed slackened down and Buckley rolled out of the machine and the mechanic took his place at the wheel. That he walked out in the road to get the number of the machine and met Buckley coming down the road and Buckley asked: "What was the matter with that man," and he said, "Nothing is the matter after you killed him," and Buckley said: "O God, don't tell me that," and he said "There he is," and also said "Where are your eyes," to which Buckley made no answer. Said that the auto-

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mobile did not blow any horn. He knew the machine was coming fast by the way the engine was humming. The machine run for about 75 or 100 ft. then it slowed and stopped and then it drove to the cross-roads and turned around. Says (S. C., p. 46) that when he saw Mahan put out his hand that Buckley, the driver, was looking down at the mechanic and not paying any attention to where he was driving.

10 Dr. Scammell (S. C., p. 48), said that Mahan died from linear fracture of the skull, which is a straight line fracture, a little over 2 inches in length.

Fergus A. Dennis (S. C., pp. 72-73), counsellor-at-law, lives in Princeton, N. J. Said he visited Mrs. Elizabeth Walker, the defendant, either on Saturday, the day of the accident, or on Monday after.

“Q. Do you know Mr. Buckley, who sits over here? A. Yes.

Q. Did you see Mrs. Walker at her home?

A. Twice.

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Q. Did you see her at her home?

A. I saw her at her home twice.

Q. The first time what did you say to her and she to you?

A. I told her I had learned she was the owner of the car that had caused the accident, and she said, yes, she owned that car, and she knew about it, and Mr. Buckley, her son-in-law, was out with the mechanic trying the car out; that it had been in the repair shop and she had it repaired and they were out on the road testing it out.

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Q. Was anything said about her sending him there?

A. I do know that she said she sent him. I asked Mrs. Walker if Mr. Buckley was the man who drove the car for her, and she said yes.”

(S. C., p. 76).

“Q. What did she say to you about the car?

A. Mrs. Walker?

Q. Yes. A. She said it was her car and had been in the repair shop.

Q. Did she say how long?

A. No; not that I recall.

Q. What else?

A. And that Mr. Buckley and the mechanic were out with the car trying it out, seeing if it was all right, or words to that effect. That was what she told me about it. She said that the car had been in the repair shop and that Mr. Buckley and the mechanic at the time the accident happened were out on the road. 10

Q. Were out on the road trying it out?

A. Or testing it out.

Q. Do you remember just what she said?

A. I don't remember whether it was trying it or testing it; but Mr. Buckley and the mechanic were out with the car after the repairs had been made to try it."

Testimony for the defendant consisted of the following witnesses: DR. SIEBER (S. C., p. 55), physician attending the hospital; PRISCILLA CHAPMAN (S. C., p. 81) and HARRIET E. MATTHEWS (S. C., p. 88), nurses at the hospital. Physician and nurses testified to the physical condition of the deceased during the week from the 13th to the 21st in the hospital to the date of his death. 20

JOHN HITCHEN (S. C., p. 107), a witness for the defense, testified that the automobile passed him at or near the bridge. Was unable to tell the speed of the machine. The horn was blown for him before the machine reached the bridge; did not see the accident happen, but saw the man lying in the road. Said the automobile kept on going up until the lane or cross-roads and turned around and came back again. 30

Did not hear any horn blown after the automobile crossed the bridge. (S. C., p. 111).

ANDREW RICHARDSON (S. C., p. 112), who was in company with John Hitchin, said a horn was blown before it reached the bridge and passed them; did not hear any horn blown after it passed them. Said the machine run as other cars go on the road. Said the machine went up and turned around and came back.

10 JAMES T. WALKER (S. C., p. 117), civil engineer, testified as to the road being 18 ft. asphalt with shoulder on each side of 6 ft.; said that the bridge crossing the creek was in the hollow and from each side the road was up grade. Said it was 503 ft. from Mahan's house to the bridge.

20 ELIABETH WALKER (S. C., p. 121), the defendant and owner of the automobile, testified that she owned the car; Frances J. Buckley did all the driving; that the car was not running right and she told Buckley to take it down to Smith's, to his repair shop, and have it repaired. Said she told Mr. Dennis that they were working on the car, and if it was out she supposed that was the reason. Said she did not know the car was out being tested. Buckley was her son-in-law, and that Buckley lived at her home and he had driven the car for the family. Said she was not able to tell when the car was brought home or the first time she had ridden in it after the accident. Said Buckley runs the car for the pleasure of the family and has done so for nine years, and that Buckley exclusively did all the operating.

30 THERESA WALKER (S. C., p. 129), daughter of the defendant, testified that Buckley was the driver for the family. Did not know when the car was brought home after the accident.

FRANCES J. BUCKLEY (S. C., p. 132), testified that he lived with Mrs. Walker from about 1911, that he operated the automobile for the family. He is the only one capable of driving a car and he held the driver's license. He said that on rides previous to the accident the car was not running properly; talked it over with Mrs. Walker. She told him to take the car to John

Smith on Oliver Street to make repairs. Took the car on Saturday about noon time. He said she advised him to take the car to Smith's Garage and have them repair it. He did so and remained at Smith's while the car was being repaired and took the car from the garage between 4:30 and 5 o'clock in the afternoon. Said after the magneto was fixed the carburetor had to be adjusted; had to be taken out on the road; drove the car in company with Smith along the streets of Trenton and drove it as far as the intersection of the Princeton Road and the Brunswick Pike, a distance of about three-quarters of a mile; when he came to the city line he turned around, the car was spitting, went back again and drove out towards Slackwood in the direction of Princeton, and that the mechanic was on the left hand fender with the hood up adjusting the carburetor and kept that position until the accident happened. Said he was going about 15 or 18 miles an hour. Said he blew his horn at Hitchen and Richardson about 100 ft. from the bridge. Said he saw a man riding on a bicycle on the right-hand side of the road about 300 ft. from him; said he was driving in the centre of the road and he blew his horn to notify the man on the bicycle and the people in the carriage in front of him. Said he did not see the man put out his hand and give warning or do anything to indicate that he was going one way or the other until he was right near Mahan, almost in line with his bicycle, when Mahan suddenly turned his wheel into the right hand side of the machine; said he turned his car to the left hand side to avoid colliding with him; said that bicycle hit his rear right-hand fender, said that Smith fell off the running board; said he ordered Smith to drive the machine up and turn it around and take the man to the hospital. Said he stopped his machine within about 20 feet. Denied he was looking at the engine or the mechanic when he was driving up the road; said in cross-examination he had driven a car for twelve years, was well acquainted with structure of automobiles, and could

do repairing himself. Said he took the car to the repair shop to adjust the trouble with the magneto and the carburetor; said that Mrs. Walker directed him to bring the car down and have it fixed; said he remained in the shop with the mechanic all the time he was fixing it, watching him do it. Said he took the car out of Smith's place around 5 o'clock and that he drove it. Said he was riding in the middle of the road, and that when he tried to avoid hitting Mahan, swung his car to the left hand side
 10 but the rear wheels he thought remained down in the asphalt. Said Smith drove the car back to Smith's garage. Said the car was brought to the garage of Smith's instead of the owner to allow the public to inspect it. (S. C., p. 169).

He said that there was nothing more done on the car so far as he knew, and the car was brought to the garage of the defendant on the following day, Sunday, and on testimony on the case further to show that any repairs had been done to the car from that day to the day of
 20 trial. (S. C., p. 171).

He said he left the car in Smith's on Sunday to finish the fixing, admitted the car had not been fixed and repaired further; he brought it home Sunday and gave no explanation for so doing. (S. C., p. 172).

He said the car was fixed and they could do nothing more and to let it go at that. (S. C., p. 175).

JOHN B. SMITH (S. C., p. 182), owner of garage. Mr. Smith said he was on the fender with the hood up examining the engine and did not see any of the conditions preceding the accident or the accident when it occurred, the first he knew he fell off the automobile as the car
 30 swerved; said he took the car after it stopped and drove to the top of the cross-roads, turned the car around and came back and took Mahan to the hospital. Said Mahan's body was lying on the left hand side of the road. Said he was on the extreme left and his bicycle was lying along side of him.

Said that Buckley (S. C., p. 192), remained with him all of the time until the machine was fixed and that he first fixed the magneto; said that Buckley was helping him to fix the machine for about 3½ hours which was all the time consumed in repairs. (S. C., p. 195).

Took the car out to adjust the carburetor which is done by turning a particular screw, the car was all right when this adjustment was made. Said they started out between 4:30 and 5 o'clock and when the carburetor was adjusted that would finish the job. (S. C., p. 196). 10

Said that the work was finished all but the adjustment of the carburetor which requires road operation.

Said that he thought the speed was about 18 miles an hour. Said that the horn was blown after they crossed the bridge. Testified that when, after bringing Mahan to the hospital, he brought the car to his garage, but no other work was done on the car and then the car was taken away from his garage on Sunday, by Buckley and no work was done on the car since. (S. C., p. 196).

Testified that the work of adjusting the carburetor could be done in three minutes, but that this car was an exception. 20

A QUESTION IN THE CASE IS, WAS THE PLAINTIFF, DECEDENT, NEGLIGENT IN CROSSING THE ROAD AFTER GIVING THE PROPER WARNING? THIS, I THINK, IS SETTLED BY THE FOLLOWING CASES:

In the case of *Daly v. Case*, 88 N. J. L. 295, C. of E. and A., the Court held: 30

“Where the driver of a horse and wagon, proceeding on the right side of the road, when about to turn into a private roadway, extended his whip about three feet beyond his wagon to indicate his intention, was run into by an automobile, proceeding from behind, without signal or other indication of its approach—Held, that the question as

to the negligence of the defendant and the contributory negligence of the plaintiff was for the jury, and that a non-suit was error."

In the case of *Smith v. Barnard*, 82 N. J. L. 468, C. of E. and A., the Court held:

10 "The law of the road relating to the passing of one vehicle of another one ahead and moving in the same direction does not relieve the driver of the former from the duty resting on him of using reasonable care to observe and avoid other vehicles, including those going in the opposite direction."

In the case of *Fox v. Fox*, 84 N. J. L. 726, C. of E. and A., the Court held:

"A motion for a non-suit admits the truth of the plaintiff's evidence and of every inference of fact that can be legitimately drawn therefrom, but denies its sufficiency in law."

20 "Unless it is established by the evidence beyond fair debate that the plaintiff was negligent and that the negligence directly contributed to the injury complained of, the motion to non-suit or direct a verdict will be denied."

"A pedestrian has a right to cross a street at a point not a cross-walk, and in doing so is bound only to use reasonable care for his safety."

30 "A pedestrian crossing a street was under no legal duty to anticipate any action by the chauffeur of a motor truck that would imperil her safety, and, having an equal right in the street, was not bound to look behind her, without a warning that it was intending to pass her on the left-hand side of the street."

To the same effect *Winch v. Johnson*, 92 N. J. L. 219; *Poulson v. Clinge*, 92 N. J. L. 99.

**THE APPELLANT STATES THE FOLLOWING
GROUNDS OF APPEAL AS EXCEPTIONS TAKEN AT
THE TRIAL, AND ALSO SPECIALLY RESERVED.**

1. THE TRIAL COURT ERRONEOUSLY REFUSED TO GRANT DEFENDANT'S MOTION FOR A NON SUIT, AT THE CLOSE OF THE PLAINTIFF'S CASE, ON THE GROUND THAT THERE WAS NO EVIDENCE TO ESTABLISH THE RELATIONSHIP OF MASTER AND SERVANT, OR PRINCIPAL AND AGENT, BETWEEN THE DEFENDANT AND THE DRIVER OR PERSON IN CHARGE OF THE DEFENDANT'S AUTOMOBILE, AT THE TIME OF THE COMMISSION OF THE GRIEVANCES ALLEGED IN THE COMPLAINT. 10

2. THE TRIAL COURT ERRONEOUSLY REFUSED TO GRANT DEFENDANT'S MOTION FOR A NON SUIT, AT THE CLOSE OF THE PLAINTIFF'S CASE, ON THE GROUND THAT THE ALLEGED NEGLIGENCE OF THE DRIVER OR PERSON IN CHARGE OF THE DEFENDANT'S AUTOMOBILE, AT THE TIME IN QUESTION, COULD NOT BE IMPUTED TO THE DEFENDANT.

3. THE COURT ERRONEOUSLY REFUSED TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT, AT THE CLOSE OF THE WHOLE CASE, UPON THE GROUND THAT THERE WAS NO EVIDENCE TO ESTABLISH THE RELATIONSHIP OF MASTER AND SERVANT, OR PRINCIPAL AND AGENT, BETWEEN THE DEFENDANT AND THE DRIVER OR PERSON IN CHARGE OF THE DEFENDANT'S AUTOMOBILE, AT THE TIME OF THE COMMISSION OF THE GRIEVANCES ALLEGED IN THE COMPLAINT. 20

4. THE COURT ERRONEOUSLY REFUSED TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT, AT THE CLOSE OF THE WHOLE CASE, UPON THE GROUND THAT THE ALLEGED NEGLIGENCE OF THE DRIVER OR PERSON IN CHARGE OF THE DEFENDANT'S AUTOMOBILE, AT THE TIME IN QUESTION, COULD NOT BE IMPUTED TO THE DEFENDANT. 30

5. THE COURT ERRONEOUSLY CHARGED THE JURY AS FOLLOWS:

"THERE IS A DISPUTE AS TO THE SPECIFIC INSTRUCTIONS GIVEN BY MRS. WALKER TO BUCKLEY WITH RESPECT TO THE CAR."

Reasons one, two, three and four raise the question as to the responsibility of the defendant for the acts of her son-in-law, the driver of the machine, Frances J. Buckley.

The testimony on the part of the plaintiff by Mr. Fergus Dennis, who visited the defendant the day of the accident or the Monday following, at which time she said she owned the car, she knew about the accident, that her son-in-law, Mr. Buckley, was out with the mechanic trying the car out, that it had been in the repair shop, and that they were on the road testing it out. As against this testimony there was the testimony of Mrs. Walker, who testified that the car was not running right and she told Buckley to take it down to the repair shop and have it repaired. She denied telling Mr. Dennis that he was out testing the car.

The evidence of the defendant on this question is that Mrs. Walker directed Buckley to take the car to the garage and make the necessary repairs and have the car run correctly. This would indicate that there is no doubt but that Buckley took the car to the repair shop for the defendant. According to Buckley's own testimony he remained in the shop while the car was being repaired. According to the testimony of Smith, the garage man he was with him and assisted in the repairs. And according to Buckley's own testimony he, Buckley, was a man with more than the average knowledge about the mechanism of an automobile.

It is admitted by Buckley and Smith that the magneto was thoroughly repaired and the only other thing to fix was the carburetor. That the adjustment of the carburetor is regulated by a screw and the most satisfactory way of adjusting it is to take the automobile out on the road and run it.

We submit that the car was never was out of the control of Mrs. Walker. She directed Buckley to take it down to Smith's repair shop and have it repaired. (S.C. p 122 line 10 also p 133 line 30, p 134 line 1-30)

Buckley took the car down, stayed with Smith, who was repairing it and assisted in the repairs. (S.C. p 192 line 30)

When the repairs were completed went out with Smith on the road and made two trips testing the car. After the accident the car was brought back by Smith to Smith's garage, no other repairs were done on it. Buckley went on Sunday to get the car and he, Buckley paid the bill to Smith. (S.C. p 175 line 30-40)

That Buckley had experience and technical knowledge of the mechanism of automobiles and engines of other descriptions. (S.C. p 150 line 10, 151)

From these facts there was at least an inference for the jury to draw whether or not the car was in the control of Mrs. Walker, and that Smith, the garage man, who repaired the car with the assistance of Buckley was also her servant.

In the case of Redstrake vs Swzyze 52 N.J.L. 129 in which the facts were as follows: Redstrake, defendant below owned the house in front of which were shade trees standing on the sidewalk. Redstrake employed two men to trim the trees and while the trimming was going on a limb fell on a wire and bent it down but Redstrake tied the wire up with a rope. Sometime after Redstrake hired another man to trim the trees and the man in doing so cut a limb from one of the trees which fell on the wire and bent it down. Before the limb was removed the wife of the plaintiff came along riding in a buggy and the wire cut the top

of the buggy and broke it and caused damage. Redstrake was present part of the time while the last man was trimming the tree. In this case the question of independent employment was raised but the court held:

"An employer who seeks to bring himself within this rule, in a case which presents prima facie an employment as master and servant, must by proof establish the facts essential to its applicability."

And further in the opinion on page 131 the court said:

"There is nothing in the present case to suggest, in the remotest degree, that the man whom the defendant employed was in the exercise of an independent employment. The circumstances that he was to cut the trees for the wood instead of for cash, indicates merely the mode of his payment; it throws no new light upon the nature of his employment. Indeed, the presumption arising from this mode of payment militates against the notion of an independent employment in respect to which the employer has surrendered all control; the parts of the tree to be cut must have been at the election of the employer, else the workman might take the whole tree as his compensation for trimming it. And the question of control over the work, while not conclusive in all cases upon the question of service, is to be regarded as a test of the greatest importance."

Cases sustaining this view are: *Eggs vs Church*, (125.59 Atl.Rep 446); *Linnohan v Rollins* (137 Mass.123); *Sadler v Hollock* (6 N.H. 570); *Quarman v Burnett* (6 N.H. 499); *Hourke v White Moss Colliery Co.* (21 L.R. 205); *Donovan v King*, (1 L.R. 629) (1893); *Singer Mfg. Co. v John* (122 U.S. 518); *Lawrence v Shipman*, 39 Conn. 586; other N. J. cases on other side of this leaf. (over)

Evan vs Lippincott

47 N. J. L. p. 192.

Hardey vs Del. L. & N. R. Co.

54 N. J. L. 505 and

59 N. J. L. 35

All repairs that could be done in the shop were done by 4:30 in the afternoon. Smith and Buckley started out with Buckley driving and made one trip up to the Brunswick Pike, then came back again to the city line and made a second trip in which the accident happened.

The fixing of a carburetor is frequently the matter of only a few minutes, but Smith claimed that this car was an exception and the time took longer.

After the hitting of the deceased by Buckley, Smith, who previously had been on the running board, took charge of the running of the car, drove up the road and turned, took the deceased to the hospital and brought the car in company with Buckley to Smith's garage, instead of Mrs. Walker's. Sunday, the next day, Buckley brought the car from Smith's garage to Mrs. Walker's garage. Smith and Buckley both admit that after the car was brought to Smith's garage that no repairs of any kind had been done on the same. (S. C., p. 196.)

This constitutes the evidence of the case as to the responsibility of Mrs. Walker for the act of Buckley, the driver. There is no doubt that Buckley assisted in the repairs. There is no doubt the repairs would compel them to adjust the carburetor, which had to be done on the road. They had been on the road from 4:30 to 7 o'clock in the evening at the time of the killing of the deceased. The car was in charge of Buckley, all of the time. It was a question for the jury whether or not they found that Smith, the repair man, was the servant of Mrs. Walker. The car was sent to him to fix and Buckley was with him and helped him do the fixing, thereby inferring that the repairs to the car were in control of Buckley. *Redstrake v. Swayze*, 52 N. J. L. p. 129 C. of E. and A.

The evidence here indicates that Buckley was acting within the scope of the authority conferred upon him by Mrs. Walker to have the car repaired and run correctly. It may be urged by the defendants that the repairs for the car were not finished, and that the car was in the

*Insert pp 13a-18b
13c-13d*

custody of Smith, the repair man, but the facts of the testimony are that no repair was done to that car after it was brought back to Smith's garage. And there is no testimony that any repairs were done to that car from the day of the accident, the 13th day of September, 1919, until the 17th day of November, 1920 the date of the trial. But it is an undisputed fact that there were no repairs done on the car.

10 We submit, that under these facts, Buckley was acting within the scope of his authority to have the car repaired in the first place. And in the second place we submit that the car had been repaired and it was in Buckley's custody, being tried out and being brought home to Mrs. Walker.

It may be said that she did not authorize him to bring it home, but we submit the evidence was that for nine years he did the driving exclusively for the family. He brought the car to the repair shop, and it is a reasonable inference that he was the only one to bring it home, when
20 the repairs had been completed, and we submit that the jury could find that the repairs were completed.

The defendant no doubt relies on a line of cases in this state and opinions by the Court of Errors involving the relation of master and servant or principal and agent, such as exist in the facts of the case at bar

We submit those cases have no relation and will discuss those cases in their order as follows:—

Evers v. Krouse, 70 N. J. L. 653 C of E. and A.

30 This was a case where a minor son of the defendant was sprinkling a lawn and in a spirit of mischief turned the hose on a horse and wagon. The horse took fright and ran away from which injury ensued. The Court held:

“An act done by a servant while engaged in the work of his master, but entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or

mischievous purpose of the servant, is not in any sense the act of the master; and, for injuries resulting to a third person from such an act, the servant alone is responsible."

The difference between this case and the one at bar is that there was no spirit of mischief, no deviation from the instructions of the defendant, which instructions were to take the car and have it fixed.

In the case of *Doran v. Thomsen*, 76 N. J. L. p. 754, C. of E. and A. This case was where a daughter of defendant was accustomed to drive defendant's automobile and with three friends she took the car out for her own pleasure. The machine was not on any errand or business for the father. There was no evidence to show that the daughter was employed to run the machine but she and her brother drove it when they felt like it. The day the accident occurred the owner had no knowledge that the machine was out. 10

1. "Where a father was possessed of an automobile which he kept upon his premises and his daughter, about nineteen years of age, was accustomed to drive it, and did so whenever she felt like it, asking permission to use it when the father was at home, but when not at home took it sometimes without permission, there being no proof that the daughter was actually employed by the father, to operate the machine—HELD, in an action against the father, where the daughter in using the machine for her own pleasure in driving her personal friends, negligently injured a person in the highway, that such proof was not sufficient to constitute the daughter the servant or agent of the master, and that a motion for a direction of a verdict for the defendant should have prevailed." 20 30

2. "An act by a servant not malicious is within the principle that to render a master liable for

the negligent act of the servant such act must be within the scope of the employment."

3. *"To render the master liable for the negligent act of the servant the act must be done for the purpose of executing the master's orders and in doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master."*

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In this case the owner of the automobile did not even know it was out on the day of the accident, its being out was not due to the order of the defendant nor to any specific instructions given by him, nor on any mission for his benefit.

Jennings v. Okin, 88 N. J. L. p. 659 C. of E. and A.

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In this case the owner of the automobile and also a theatre in course of erection, directed his son to go to the building operations and examine the signal lights. On his return he met two friends, took them in the car for the purpose of enabling them to catch a train to New York City and was in the opposite direction from that in which he was directed to go by the defendant, when the accident occurred.

This case was allowed to go to the jury but was reversed because the court ruled out a conversation that was deemed material.

30

"The defendant directed his son to take defendant's automobile and visit a locality where defendant was engaged in erecting a building, for the purpose of seeing that lamps indicating the existence of street obstructions were lighted. The son, instead of performing his errand and returning, delayed for some hours in the neighborhood with friends, and thereafter undertook to carry two of his friends in the automobile to one of the railroad depots in the city, which was

located in a direction nearly opposite to the route which he might have taken upon a direct return to the father's home. While making this trip to the railroad depot, the automobile collided with the plaintiff, who brought suit against defendant for the damages resulting therefrom. The trial developed the fact that as one of the invitees was about to enter the car, the son of defendant made some statement as to their destination. This testimony the court overruled and excluded 10 as hearsay. HELD: that the conversation so excluded was material as part of the *res gestae*, which presents an exception to the general application of the heresay rule."

The facts of this case also present a deviation from the instructions and direction of the defendant.

In the case of *Cronecker v. Hall*, 92 N. J. L. p. 450 C. of E. and A.

The defendant instructed his servant, Brown, to bring his family to Philadelphia in the automobile and leave 20 the car in the city to prepare it for the southern trip. On the way to Philadelphia, Brown fancied the machine was in some respect defective and telephoned to the defendant that he could not proceed further. The defendant directed him to put his family on the train and bring the car to be overhauled. Instead of doing this the servant brought the car back to Avalon and used it for driving his own personal friends for his own purposes. During this drive the collision took place, injuries were inflicted for which suit was brought. The 30 court held:—

"Directed by his employer to take his automobile to Philadelphia for repairs from Egg Harbor the employe took it back to Avalon from where he had taken it that day. He kept it there two days without the employer's knowledge, and while driving it in the country with two people, and while racing at a high rate of speed

with another car, collided with plaintiff's car which was trying to avoid him. HELD: that having disobeyed his employer's instructions and deviated from the business he was directed to pursue, his use of the car was his own use, and the relation of master and servant was thereby terminated. HELD ALSO: that the direction of a verdict for the defendant was proper."

10 This case is also one where the servant of the defendant disobeyed instructions and deviated from the course of his employment.

Eldridge v. Calhoun, 112 Atl. Rep. p. 340 C. of E. and A. decided November 15, 1920.

The facts in the case are that on the day of the accident the defendant was absent from home. The superintendent of the farm directed Cassidy to take two of his friends in the car to Trenton.

20 It is admitted in this case that the superintendent and the driver disobeyed the positive instructions given by the employer and started on a mission not for the benefit of the employer. The court held:

30 "Where the superintendent of defendant's farm contrary to her orders relative to her automobile directed defendant's chauffeur to take the car and convey him and his visitors on a journey, during which, through the negligent operation of the car by the chauffeur, passengers in another car were injured, defendant is not liable for such injuries; the chauffeur, in using the car without the order of defendant, having deviated from his employment, and terminated the relation of master and servant despite the order of the superintendent."

It will be observed that the above cases all are cases in which the driver of the car had either disobeyed the instructions of the employer or was not performing any service that was for the benefit of the master or for the benefit of both the master and the servant.

THE RULE APPLIED IN THOSE CASES CANNOT BE APPLIED TO THE CASE AT BAR. NOT BECAUSE OF ANY DIFFERENCE IN THE LAW BUT BECAUSE OF THE DIFFERENCE IN FACTS AND HENCE THE DIFFERENT APPLICATION OF THE LAW

We submit that the defendant is liable under the rule laid down by the Court of Errors and repeated in the case of *Eldridge v. Calhoun*, 112 Atl. Rep. p. 340 C. 10 of E. and A. in which the court says:

“The test requires it should appear that the service performed was for the benefit of both the master and servant.”

This rule is applied in the case of *Klitch v. Betz*, 89 N. J. L. p. 348, C. of E. and A. when the court says on p. 352:

“For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master’s business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible.” 20

“To rebut the presumption of liability of a master for damage consequent upon the negligent act of a servant, done within the scope of the latter’s employment, it must be shown either that the act was purely wanton or that it was not performed in furtherance of any duty within the actual scope of the servant’s authority. *Rhinesmith v. Erie Railroad Co.*, 76 N. J. L. 783.” 30

and also reaffirmed by the Court of Errors and Appeals in *Depue v. Salmon Company*, 92 N. J. C. of E. and A. 550.

It is claimed that the defendant is not responsible because her son-in-law, the driver of the machine, was not acting within the scope of his authority. The undisputed facts of the case on this question are:

1. That Buckley, the driver of the machine, was the only one of the family that held a driver's license, drove
10 the machine, and he had done so for nine years.

2. That she directed him to take the machine down to the garage and have it fixed.

3. That he stayed in the garage while the repairs were being done and assisted in the repairs; that he was driving the machine from the time it left the garage up until the time of the accident.

4. That no other repairs had been done on the automobile of any description after it left the garage to go out on the road to be tested and driven by Buckley, the
20 son-in-law, up to the day of trial of this case.

5. It was inferred by the evidence and open for the jury to conclude, whether or not the repairs on the car were completed and whether or not the fact that the car was brought to Smith's garage on the day of the accident was due to nervousness of Buckley who had been driving, and whether the car was completely repaired and Buckley, the driver, was testing the car to see if it was up to expectations, and whether or not after receiving the express directions to take the car and have it fixed,
30 staying with the car during the repairs and assisting in the same, going out on the road with the car and bringing it home, were implied within the express instructions given by the defendant, Mrs. Walker.

These undisputed facts and inferences show the act done by Buckley was in obedience to the express order of the defendant in the execution of her business; within the scope of the order as directed; was warranted by the express and implied authority conferred upon him

and instructions given. The circumstances under which the machine was repaired and driven unquestionably establish the responsibility of the defendant. This is in accord with the application of the principles of law in the following cases:

In the case of *Missell v. Hayes*, 86 N. J. L. p. 348 C. of E. and A. The facts of this case are almost parallel with the case at bar. In the case at bar, Buckley, the son-in-law, lived with the family for years preceding the accident. He was the only one who could drive the car and the only one in the family who had a license, and at the time of the accident was on a mission expressly directed by the owner of the machine, Elizabeth Walker, who is a widow, and no doubt come within the application of the rule as expressed in the syllabus of the case of *Missell v. Hayes*. 10

1. "In a suit against a father for his son's negligence in operating the father's automobile on the public highway, where it appeared that the automobile was for the use of the father's family and that at the time of the accident the son was driving and the father's wife and daughter were in the automobile, and that all three were members of the father's immediate family, it was held to be a jury question whether the son was the father's servant on the father's business, in which case the father would be liable, or whether as all the other testimony alleged, the son was going to call on a friend, and his mother and sisters were accompanying him on his invitation and as his guests. 20 30

2. *Doran v. Thomson*, 76 N. J. L. 754, distinguished. *Klitch v. Betts*, 89 N. J. L. p. 348 C. of E. and A.

This was a case where a doctor was in the employe of the defendant and while in the employe extracted a tooth from the plaintiff's jaw and later the defendant treated the injured jaw of the plaintiff and the court said that the defendant had ratified the acts of his servant

and was liable in damages. The court sustained the verdict as being the proper application of this principle of the law of master and servant

It may be urged that since that time the doctrine in syllabus

10 2. "Where a servant is acting within the scope of his employment, and by his negligence causes injury to a third party, the master will be responsible, although the servant's act was contrary to his master's orders."

has been modified by the later case of *Cronecker v. Hall*, 92 N. J. L. p. 450 C. of E. and A. decided November 18, 1918, but if it has been modified then the case of *Ferris v. McCardle*, 92 N. J. L. p. 580 C. of E. and A. decided March 31, 1919 seems to have brought the rule back to the original place for the facts of the *Ferris-McCardle* case are as follows:

20 "That the duty of the driver for the defendant was to drive and care for the automobile, that he did not live with his master, that when he was kept in service late in the day his habit was to drive to his home to get his supper, then take the auto to the garage and wash it; that if he had time to wash it before supper he drove directly to the garage and did so, and that this method was known to and acquiesced in by his master; that on the day in question he had been driving defendant's wife and left her at his residence late in the afternoon, and on his way to

30 the garage went to his home to get his supper and before he reached his home the accident happened."

There was no express direction given to the driver to go to his home for supper as there was in the case at bar yet the court held:—

"It was the practice of a servant in driving an auto from his master's residence to a garage some distance away, to stop at his home for supper

when he had been driving for his master until late in the day, and after supper to take the auto to the garage and wash it. This practice was known to the master and, as he testified, accepted by him as a matter of course. As the servant was, late in the day, driving the auto from the master's residence to the garage, he deviated from the most direct course in order to go to his home for supper and before reaching his home, ran into and killed the plaintiff's intestate. The court 10 was requested by the defendant to instruct the jury that neither permission, express or implied, allowing the driver to stop at his home for supper, on his way to the garage, or acquiescence in the practice, constituted the driver the servant of defendant while driving home, and if the accident happened while driving home for supper, the defendant was entitled to a verdict even though he permitted it to be done, or acquiesced in the practice. HELD: that the request was properly denied." 20

In the case of *Depue v. Salmon*, 92 N. J. L. 550, C. of E. and A. the facts were that the servant of the defendant was on his way home after his days' work was done. By arrangements between him and his employer, the defendant, he was entitled to use the automobile to take him to his home at night and from his home to business in the morning. The object was to enable him to reach his place of employment at an earlier hour than he otherwise would. The court held: 30

"The relation of master and servant continues during the carriage of the servant to and from his work, when done by the master or with his consent, where, from the character of the service such transportation is beneficial both to the master and the servant."

In the case of *Ben v. Eastern Motor Company*, 94 N. J. L. p. 34, Supreme Court.

The facts of the case were that the driver of the machine demonstrated and sold automobiles for the defendant company and his compensation was a commission on sales; that he was expressly authorized by the company to demonstrate and sell machines and while after finishing a demonstration he ran into the automobile of the plaintiff. The court held:

10 1. "Where plaintiff's automobile was damaged in a collision with another automobile, the fact that he first brought suit against the driver alone constitutes no reason for dismissing the action as to the defendant owner, whom, before trial, the plaintiff had caused to be added as a party defendant by service of summons and amended complaint."

20 2. "It was open to the trial judge, sitting without a jury, to find that one authorized to demonstrate and sell an automobile for the defendant owner on commission, who negligently ran into and damaged the plaintiff's car, while driving to the defendant's place of business after having finished such demonstration, was the servant or agent of the defendant, and that the defendant is liable for such injury."

If the jury believed the defendant instructed Buckley to take the car to have it repaired on the testimony of Mr. Dennis as to her knowledge and approval of the fixing and testing of the car, then she is liable under the doctrine of the case of *Wendelken v. N.Y. S. W. R. R.*
30 Co. 88 N. J. L. p. 270, C. of E. and A.

This was a case where a raid was conducted under the direction of Stone, the general superintendent, who was directing men to take up some track and other men opposed him. The men taking up the track imprisoned the men in opposition. The court held the defendant was not only liable of compensatory but also punitive damages on the theory that by implication and expression such acts are approved before or after they are com-

mitted and the authority for the same are the cases of *Formann v. Consolidated Traction Co.*, 63 N. J. L. 391; *Peterson v. Traction Company*, 71 N. J. L. 296; *Shallcross v. West. Jersey & Seashore R. R. Co.*, 75 N. J. L. 395.

We respectfully insist and submit that the defendant is liable for the acts of Buckley from the moment he left her home with the automobile until the moment it was returned.

The next point made by the appellant.

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5. THE COURT ERRONEOUSLY CHARGED THE JURY AS FOLLOWS:

“THERE IS A DISPUTE AS TO THE SPECIFIC INSTRUCTOINS GIVEN BY MRS. WALKER TO BUCKLEY IN RESPECT TO THE CAR.”

We submit that there was a dispute and that what the court did was to place all the disputed facts in evidence before the jury, and this he did in his charge beginning at page 211, line 20, to page 213, line 15, State of the Case. 20

Not only did the court do this, but the court gave the defendant the benefit of that discussion by saying that the defendant's statement was probably true.

We submit that on the reading of the whole charge with the explanation included it was most favorable to the defendant for the reasons that the court overlooked in its charge the important fact that Buckley had assisted in repairing the car, that the car had no further repairs after it was brought back to Smith's garage after the accident, and that Buckley brought the car home. 30

These facts, so important to the plaintiff, were totally omitted by the court in his charge to the jury.

Hence, we submit the defendant, instead of being wronged, was favored by the charge both as to this specific point and the general charge.

Under the law of this State when the evidence shows the state of facts from which opposing inferences can be drawn, the function of the jury is to draw the inferences, but in this case the facts were such that there was only one reasonable inference which reasonable men could draw, and that inference was the liability of the defendant.

Respectfully submitted,

MARTIN P. DEVLIN,
*Attorney and Counsel of the Plaintiff-
Respondent.*

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NEW JERSEY
Court of Errors and Appeals.

CAROLINE MAHAN, ADMINISTRATRIX AD PROSEQUENDUM OF
HARRY B. MAHAN, DECEASED,
Plaintiff-Respondent,
vs.
ELIZABETH WALKER,
Defendant-Appellant.

On Appeal from
Supreme Court.

Brief for Defendant-Appellant.

This action was brought to recover the pecuniary loss sustained by the widow and next of kin of Harry B. Mahan, who died on September 21, 1919, as the result of injuries sustained, it was alleged, in a collision with defendant's automobile on September 14, 1919. The plaintiff recovered a verdict for \$6,062.50.

Upon motion of the defendant a rule to show cause was allowed upon the grounds that the verdict was against the weight of the evidence and contrary to the charge of the court, with an express reservation of the defendant's exceptions to the refusal of the court to grant defendant's motion for a nonsuit, on the ground "that there was no evidence to establish the relationship of master and servant, or principal and agent, between the defendant and the driver or person in charge of the defendant's automobile, and that the alleged

negligence of the driver or person in charge of said automobile could not be imputed to the defendant; to the refusal of the court to direct a verdict in favor of the defendant at the close of the whole case upon the same ground; to the rulings of the court with respect to the admission and exclusion of evidence, and to the charge of the court." (Case, pp. 229-30.) This rule to show cause was subsequently discharged.

While the propriety of the trial court's refusal to nonsuit and direct a verdict in favor of the defendant on the fundamental ground that the relationship of master and servant did not exist between the plaintiff and the driver of the automobile, in the transaction of which the plaintiff complained, was discussed in the opinion of the Supreme Court, that question was not raised in the Supreme Court either in the brief or at the oral argument, but was purposely reserved for the consideration of this court.

The sole question, therefore, to be determined by this court is whether the relationship of master and servant existed between the defendant and the driver of the automobile, and in connection therewith whether the trial court committed legal error in charging the jury that there was dispute as to the specific instruction given by defendant to the driver of the automobile with respect to the car when it was placed in his possession for the purpose of repair. Exception was duly taken to the refusal of the court to nonsuit and direct a verdict, and to the charge in the particular mentioned. (Case, pp. 79-80; pp. 207-8; p. 211, l. 18; p. 224, l. 29.)

POINT I.

A NONSUIT SHOULD HAVE BEEN GRANTED BECAUSE THE RELATIONSHIP OF MASTER AND SERVANT BETWEEN DEFENDANT AND THE DRIVER WAS NOT ESTABLISHED AT CLOSE OF PLAINTIFF'S CASE.

The accident resulting in the death of plaintiff's decedent occurred outside of the corporate limits of

Trenton, in the Township of Lawrence, on the road known as the Brunswick Pike, leading from Trenton to Princeton. Decedent was riding a bicycle toward his home from the direction of Trenton, and had reached a point opposite his home (which was on the side of the road to his left), riding on the right-hand side of the road, when he suddenly turned to the left for the purpose of crossing the road to enter his premises. Defendant's automobile, approaching from his rear, was then about to pass him on the left. The front portion of the automobile passed him in safety, but the front wheel of decedent's bicycle collided with the rear right-hand mudguard of the automobile and he was thrown to the ground, sustaining a fracture of the skull which ultimately resulted in death.

The automobile was then being driven by the defendant's son-in-law, but was in charge of a repairman who had received the car that afternoon at one o'clock. Defendant's son-in-law, at her request, delivered the car to the repairman that afternoon, for the purpose of making necessary repairs, and he had remained with him during the progress of the work until about five o'clock, when the repairman requested him to drive the car while he rested on the front fender adjusting the carburetor. The accident occurred while the repairman was engaged in this work.

At the close of the plaintiff's case the only testimony offered to establish the relationship of master and servant was that of Fergus A. Dennis, a member of the bar, who had been consulted by decedent's widow immediately after the accident, and he interviewed the defendant before decedent's death. The conversation between Mr. Dennis and the defendant, pertinent to this inquiry, follows:

"I told her I had learned she was the owner of the car that had caused the accident, and she said yes, she owned that car and she knew about it, and Mr. Buckley, her son-in-law, was

out with the mechanic trying the car out; that it had been in the repair shop and she had it repaired, and they were out on the road testing it out." (Case, p. 73, l. 29.)

On cross-examination the witness said substantially the same, but added the following, when asked to quote the defendant exactly:

"I don't remember whether it was trying it or testing it; but *Mr. Buckley and the mechanic were out with the car after the repairs had been made to try it.*" (Case, p. 76, l. 29.)

There was nothing in this testimony to justify a finding that the relationship in question did exist between the defendant and the driver at the time of the accident. The defendant was merely narrating to Mr. Dennis information conveyed to her after the accident as to what the repairman and Buckley were doing at the time of the injury to decedent. She was not present when the accident occurred, and necessarily was stating only what she had heard. She did not hear of the accident until the next day. (Case, p. 122, l. 30.)

There was nothing in the testimony of Mr. Dennis from which an inference could possibly be drawn that she had directed the repairman and Buckley to test the car on the road, or that she knew they intended to do so. When counsel for the plaintiff asked Mr. Dennis whether anything was said in this conversation "about her sending him there," he replied, "*I don't know that she said she sent him.*" (Case, p. 73, l. 38.) The trial court in dealing with this proposition held that such statements, coming from the defendant, meant more than the mere recital of information which had come to her possession, and that the "adoption of the information as her own and the assertion of it" became at least evidential in the case.

It seems hardly necessary to submit argument in support of the proposition that the mere narration of an occurrence or the circumstances surrounding it, after the act, by a party who was not present, and could have

no personal knowledge of what occurred, cannot in itself have the effect of proving the character of the relationship between such person and the occurrence in question, or between such person and any of the parties connected therewith. What purports to be a statement of information conveyed to the party making it by someone else, as in the case at bar, cannot be distorted into an admission.

The conversation between Mr. Dennis and the defendant did not concern her liability, and she did not admit liability or that the relationship of master and servant existed between her and the person in charge of the automobile. The character of the relationship must be determined by the circumstances existing at the time of the occurrence. While any subsequent statement admitting the relationship is, of course, competent evidence in the inquiry, to have the character of an admission it must be something more than a mere statement to a third party that such an occurrence took place, a mere narration of a past transaction.

The distinction between evidence illustrating the character of an occurrence and that which is merely narrative of the transaction, is sharply drawn in the cases applying the *res gestae* doctrine.

Blackman v. West Jersey and Seashore R. R. Co., 68 N. J. L. 1.

Statements made as mere matters of hearsay are not receivable in evidence as admissions.

22 C. J. 299, with citations.

See *Austin Electric R. Co. v. Faust*, 63 Tex. Civ. A. 91; 133 S. W. 449.

Corpus Juris (Vol. 22, p. 469), contains a citation of cases in which hearsay testimony of this character has been rejected as an admission, but in many cases upon the mistaken ground that the statements were not part of the *res gestae*. The discussion of this point contains the following:

“In a large number of cases narrative statements against the interest of the declarant or

one whom he represented have been received or rejected for the assigned reason that they were or were not part of the *res gestae*, when the proper ground for the action taken would have been found in the competency *vel non* of the statements as admissions."

From the testimony of Mr. Dennis it appeared that prior to the accident the defendant had sent her automobile to a repairman for repairs, and that at the time of the accident this repairman was engaged in his work of repairing the car. In this situation the testimony of Mr. Dennis not being sufficient to prove the requisite relationship, the motion to nonsuit should have been granted.

In the case of *Missell v. Hayes*, 86 N. J. L. 348, this Court held that an automobile, being personal property, was presumed, in the absence of evidence to the contrary, to be in the possession of the owner or his servant, possession being the badge of ownership of personal property.

In view of the testimony of Mr. Dennis, offered by the plaintiff, and relied upon to prove agency, that the defendant told him the car was not in her possession but in the possession of others for repairs, this presumption did not prevail. In that situation, the plaintiff had failed in meeting the burden of proof.

The application of legal principles to the facts of this case will be discussed under Point II.

POINT II.

A VERDIT SHOULD HAVE BEEN DIRECTED IN DEFENDANT'S BEHALF AT THE CLOSE OF THE WHOLE CASE, BECAUSE THE RELATIONSHIP OF MASTER AND SERVANT DID NOT EXIST BETWEEN DEFENDANT AND THE DRIVER.

The defendant testified that the "car was not running right," and that on the day of the accident she told Mr. Buckley "to take it down to Smith's, to his

repair shop, and have it repaired." Smith kept a garage and repair shop on Olive street, in Trenton, and had repaired this automobile before. (Case, p. 122, l. 10.)

Mr. Buckley took the car away shortly after noon on the day of the accident, but the witness did not know just when the car was returned to her garage. She did not hear of the accident until the next day. (Case, p. 122, l. 30.) The defendant testified that *she did not give Mr. Buckley authority to test the car on the Brunswick Pike or any other roadway; did not know he was using the car on the roadway to test it, and "did not know it would have to go out of the shop after it went there."* (Case, p. 123, l. 10.) She gave Mr. Buckley *no directions or instructions, except to take the car down to the repairman.* (Case, p. 124, l. 10.) *She said she did not know the car was out of the garage to which it was sent for repairs, and had no information as to the testing of the car on the roadway until after the accident happened.* (Case, p. 124, l. 30.) Mr. Buckley was her son-in-law, and at that time had employment in an iron works in Trenton. He and his wife lived with Mrs. Walker, and he frequently drove the car for the pleasure of the family. (Case, p. 127, l. 10.)

The defendant indisputably showed that her conversation with Mr. Dennis was a recital merely of the information given to her by Mr. Buckley after the occurrence. (Case, p. 124.) Her daughter, Theresa Walker, who was present, corroborated the defendant on this point. (Case, p. 129.) Mr. Dennis was not recalled to rebut the testimony of Miss Walker.

Mr. Buckley testified that he was the only member of the family who was capable of driving a car, and that it naturally fell to his lot to drive it when the family wanted to go out. He was never employed by the defendant as a driver or chauffeur. (Case, p. 133, l. 15.) The defendant told him to take the car to John Smith's garage and let him repair it, because he knew

the car, having repaired it before. (Case, p. 134, l. 25.)

Mr. Buckley did not know the nature of the defect in the mechanism of the car before the repairman tore it down. (Case, p. 135, l. 20.)

Mr. Buckley remained at the garage while the garageman was engaged in the work of repairing it. (Case, pp. 134-5.) Late in the afternoon, after he had spent about three hours in repairing the car, the repairman said to Buckley, "I cannot properly adjust the carburetor standing here in the garage, because it is not pulling on a direct load; it must be taken out on the road; will you drive it?" (Case, pp. 136-7.) Mr. Buckley agreed to drive the car, as requested, because there was only one other man in the garage, and it was necessary for him to remain to keep the place open. They left the garage together in the defendant's car, but Mr. Buckley could not recall whether he drove the automobile to the Brunswick Pike or not. When they reached Brunswick Avenue Mr. Buckley drove the car beyond the city limits and then returned to the city line, a distance of about three-quarters of a mile. (Case, p. 137, l. 20.) The mechanism did not seem to be in proper running order, and *the repairman directed Mr. Buckley to turn and drive out the Brunswick Pike.* The repairman asked him to open the cut-out, and when the automobile reached Slackwood, just outside the city limits of Trenton, he took a position on the running-board to make an adjustment of the carburetor. (Case, p. 138-9.) The car proceeded out the Brunswick Pike with the repairman on the left-hand front fender, and he was in this position, adjusting the carburetor and other mechanism, when the accident happened. (Case, p. 139, l. 10.) At the time of the accident the hood was raised, exposing the motor, so that the repairman could make the necessary adjustments. (Case, p. 139, l. 30.) The repairman directed Buckley not to go at a greater rate of speed than between 15 and 18 miles an hour, because he could not

make the necessary adjustments going at a greater speed. (Case, p. 138, l. 15; pp. 140-1.)

The repairman drove decedent to the hospital and then took the car back to the garage, where it remained until the following day, and was then taken to defendant's garage. (Case, p. 145, l. 20; p. 146, l. 15.)

At p. 151 of the state of the case, Mr. Buckley detailed the mechanical troubles defendant had with the car for about eight months prior to the accident, and stated that sometime previously it had been taken to another repair shop without successful results. The repairman, Smith, had repaired this same car two or three times before. (Case, p. 152, l. 20.) Buckley stated that his purpose in remaining at the shop while Smith was engaged in the work of repairing the car was to learn what the trouble was. Two other repairmen had attempted to find and correct the trouble a short time before without success. (Case, p. 153, l. 25.) The witness stated that *the repair work was not finished when he and Smith left the garage for the Brunswick Pike, and could not be finished until the carburetor was adjusted, and that the adjustment could not be made in the garage. It was necessary to drive the car on the road to make the required adjustments.* (Case, p. 154, l. 1.) While he drove the car the repairman sat alongside of him for the purpose of discovering whether or not it was firing properly. (Case, p. 155, l. 10.) When they reached the Brunswick Pike Buckley stopped the car so that the repairman could leave his seat and place himself on the front left-hand fender. (Case, p. 155, l. 30.) The garageman raised the hood, took his position on the fender and began adjusting the carburetor. (Case, p. 155, l. 30; p. 156, l. 1.)

Mr. Buckley then testified:

"He (the repairman) started to adjust it, if I remember rightly, standing still, and he could not get it, *and he said you will have to drive the car; you drive and I will try to adjust it.*" (Case, p. 156, l. 5.)

The witness said that to make an adjustment it is necessary for someone to drive the car, while the mechanic engaged in the adjustment is at work. (Case, p. 157, l. 15.) He said that the repairman drove part of the time, but when he was actually engaged in the adjustment it was necessary for the witness to drive the car. (Case, p. 157.) The witness testified that after the accident the car was taken back to the garage of the repairman because the work was not completed. (Case, p. 168, l. 32; p. 169, l. 30.) The witness said that if the car was in proper running order and the accident had not happened, he would have returned to the garage of the repairman, paid him for his work and then taken the car to the defendant's garage. (Case, p. 170, l. 30; p. 175, l. 15.) *Mr. Buckley stated that further road tests and adjustments were necessary to complete the work, but in view of the accident he decided to dispense with any more tests, and the car remained in the defendant's garage for sometime before it was used.* (Case, pp. 171-2; p. 175, l. 22.) He said that he consented to drive the car at the request of the repairman "only as a matter of courtesy to a man who is willing to do that work immediately as soon as you brought it in." (Case, p. 174, l. 1.) He remained there only because he was interested in the mechanism of the car and in ascertaining the trouble with it. (Case, p. 173, l. 30; p. 174, l. 15.)

Smith, the repairman, testified that he had worked as an automobile mechanic for seven years, and for three years before the trial he was engaged in the garage and repair business for himself at 216 Olive Street, in Trenton. (Case, p. 182, l. 20.) The defendant's car was brought to his shop by Mr. Buckley at one o'clock on the day of the accident. He was directed to "make the car run correctly at low speed." He commenced work immediately and was continuously engaged until about five o'clock. The magneto and carburetor were not in proper working order. Mr. Buckley remained in his shop "watching me do the job." (Case, p. 183.)

He did not know the nature of the trouble before he examined the mechanism. (Case, p. 184, l. 10.) At five o'clock, after he had made some repairs, he told Mr. Buckley *"it will be necessary to take the car out and adjust it on the road."* The witness *"asked him to drive the car so I could work on it."* (Case, p. 184, l. 20.)

They left the garage together, but the witness did not remember whether he or Mr. Buckley drove the car. When they reached the Brunswick Pike Mr. Buckley drove while the witness was engaged in making the necessary adjustments. They drove out the Brunswick Pike and returned. As the mechanism was not yet in proper running order, the witness said that *he told Mr. Buckley "to stop so I could adjust the carburetor while the car was in motion."* He then *"raised the hood and rode on the running-board and the fender to work on the motor."* (Case, p. 185.) *He "gave him (Buckley) instructions not to run faster than 15 or 18 miles an hour to make the necessary adjustment."* He could not make the adjustment if the car went at a greater rate of speed. (Case, p. 186.) He told Mr. Buckley to have the cut-out open so that he could hear the motor. (Case, p. 187, l. 22.) He was lying on the fender engaged in adjusting the mechanism of the car when the accident happened. (Case, pp. 187-8.) The witness said that he *"had the coil working fairly good when the accident happened,"* but that he was *"still working on it."* (Case, p. 191, l. 1.) It was necessary to operate the car to properly adjust the mechanism. (Case, p. 191, l. 38; p. 192, ll. 1-22.) *Before taking the car out on the road the witness tried to adjust the mechanism in the garage, but could not do so.* (Case, p. 193, l. 1.) The adjustment is determined *"by the way the car pulls."* (Case, p. 194, l. 38.) It had not been made at the time of the accident. (Case, p. 195, l. 10; p. 200, l. 15.) It usually takes only a few moments to make the necessary adjustment, but this

carburetor was of a peculiar type, and he experienced difficulty in accomplishing his object. (Case, p. 195, l. 30; p. 196.) The witness said that if Mr. Buckley had not accompanied him, he would be compelled to secure the services of a mechanic to assist him. (Case, p. 197, l. 30.)

ARGUMENT.

The facts of the case at bar bearing on the question of liability under the maxim *respondeat superior* were undisputed, and presented a sharp legal question for final decision on the motion to nonsuit, and thereafter, that motion having been denied, upon the motion to direct a verdict. Although the trial court submitted this question to the jury for its determination, it is respectfully submitted that the facts presented only a question of law which should have been decided by the court.

This maxim, *respondeat superior*, has no application to the case at bar. At the time of the accident the defendant's automobile was in the possession and control of the repairman, an independent contractor. The status of Smith, the repairman, was clearly that of an independent contractor. He exercised an independent employment, and contracted, as he did in the case at bar, to do a piece of work according to his own method and without being subject to the control of his employer, save as to the result of his work. For three years he had conducted a public garage and repair shop, and in the operation of that business employed assistants who were under his control.

26 Cyc. 1547, with citation of cases.

The test of the relationship is the right of control. It is not the fact ^{of} ~~that~~ actual interference with the control, *but the right to interfere*, that makes the difference between an independent contractor and a servant or agent. If the employee is merely subject to the control or direction of the owner or his agent as to the result to be obtained, he is an independent contractor.

26 Cyc. 1547-8;

Cuff, Admr., v. Newark & N. Y. R. R. Co.,
35 N. J. L. 17, at pp. 23-4; affirmed, *Id.* 574;
Mann v. Max, 93 N. J. L. 191, at p. 193.

Buckley's agency terminated with the delivery of the automobile to the repairman. The repairman had the possession and control of the car while making the repairs, and the defendant was under no liability arising from the use of the car until the repairs were completed, and possession and control were restored to her by the repairman.

In *Conway v. Furst*, 57 N. J. L. 645, decided in this court, the plaintiff was employed as a watchman in defendant's store. The store was opened in October, but was not then completed. The plaintiff was injured on December 3d, in the evening, after the the store had been closed, by falling down an elevator.

It was held that because the elevator, at the time of the injury to plaintiff, was in the course of construction by contractors who were exercising an independent employment, the plaintiff was without remedy against his employer.

See, also, *McGuire v. Grant*, 25 N. J. L. 356;
Schutte v. United Electric Co., 68 N. J. L., at p.
438; *Otmer v. Perry*, 94 N. J. L. 73.

The repairman carried on an independent business, and in the line of his business was employed by defendant to make the necessary repairs. He was not in any sense under the direction or control of his employer in the doing of that work, but determined for himself in what manner it should be done.

The absolute test as to whether in a given case the person employed is an independent contractor, is not the exercise of the power of control, but the right to exercise the power of control.

Keys v. Church, 59 Atl. 446 (Maine Sup. Ct.);
Standard Oil Co. v. Parkinson, 152 F. 681,
82 C. C. A. 29.

Clark v. Fry, 8 Ohio St. 358.

*See Reisman v Public
Service Corp.*, 82 N. J.
L. 464 (C. E. A.)

See Cooley on Torts
p 1098 (3d Ed.)

The case of *Sherwood v. Warner*, 27 App. D. C. 64, is analogous in principle. In that case a machinist employed by an elevator company to repair a damaged elevator in an apartment house, caught his arm and requested the janitor of the building to raise the elevator. The janitor negligently lowered the elevator, causing the loss of the machinist's arm. It was held that the owner of the apartment house was not liable in an action by the machinist against him, upon the ground that *the janitor acted as the agent of the plaintiff* and not in the general course of his employment as defendant's servant.

Although the defendant reserved the question of agency for the consideration of this Court, and did not present any argument thereon in the Supreme Court on the rule to show cause, it was held in the opinion that "the question of the driver's agency as the representative of the defendant also presented a jury question," citing *Missell v. Hayes*, 86 N. J. L. 348.

The latter case is not analogous in principle. There the defendant had an automobile for the use of his family, and at the time of the accident his son was driving, accompanied by his mother and sister, all three being, of course, members of the defendant's immediate family. It was held to be a jury question whether *the son was the father's servant on the father's business*, in which case the father would be liable, or whether the son was going to call on a friend, and his mother and sister were accompanying him on his invitation and as his guest.

In the case at bar, the driver, Buckley, while he was defendant's son-in-law, was not at the time of the accident the servant of the defendant engaged in the defendant's business. He was delegated to take the automobile to the repair-shop of an independent contractor, and to deliver the car to him for the purpose of repairs. Neither he nor the defendant understood the nature of the mechanical defect in the car before it was delivered to the repairman, and only because he had a personal

interest in ascertaining the character of the trouble, he lingered while the repairman worked.

From the moment of delivery the car was in the possession and control of the repairman. When later in the afternoon the repairman requested Buckley to drive the car on the Brunswick Pike for the purpose of enabling him to complete the repairs, and Buckley assented, Buckley became the servant and agent of the repairman, and was not thereafter engaged in the defendant's business. From that moment until the accident Buckley, in the operation of the car, was under the direction and control of the repairman, and according to the uncontradicted proofs he carried out his instructions regarding the operation of the car in every respect. He had no express or implied authority from the defendant to drive the car that afternoon on the Brunswick Pike for the purpose of adjusting its mechanism.

This case presented not a jury question, but a clean-cut question of law for the court.

In *Doran v. Thomson*, 76 N. J. L. 754, at p. 757, this Court, discussing the application of the doctrine of *respondet superior*, said:

"The real test as to third persons is whether *the act is done by one for another*, however trivial, *with the knowledge of the person sought to be charged as master* and with his assent express or implied, even though there was no request on his part to the other to do the act in question."

It was held further that, assuming the relation of master and servant to exist generally between the defendant and the wrongdoer, liability cannot be imputed to the defendant unless such relationship existed "*at the time and in respect to the very transaction out of which the injury arose.*"

In *Holler v. Ross*, 68 N. J. L. 324, the Court said:

"The servant of the master cannot bind the master to respond in damages to the plaintiff

unless it be shown that the act which the servant did which caused the injury, was an act which was expressly or *by necessary implication* within the line of his duty under his employment."

In *Evers v. Krouse*, 70 N. J. L. 653, Chief Justice Gummere, speaking for this Court, called attention to the "assumption in some jurisdictions that an act done by a servant while engaged in the master's work is necessarily an act done within the scope of the former's employment," and said:

"But this is conspicuously a *non sequitur*. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed to be so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible."

In discussing the above case, Mr. Justice Voorhees in *Doran v. Thomson*, *supra*, said:

"While in that case the act was malicious, yet an act not malicious is within the enunciated principle, if such act is not expressly or by necessary implication within the scope of duty, and with regard to which it cannot be said that the servant was engaged in the performance of the act for another. *The act must be done for the purpose of executing the master's orders and doing his work, and while actually engaged in serving the master*, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master."

Citing *Garretsen v. Deunckel*, 50 Mo. 104; *Howe v. Newmarch*, 12 Allen 49; *Morier v. St. Paul, &c., Rwy. Co.*, 31 Minn. 351.

In *Cronecker v. Hall*, 92 N. J. L. 450, this court applied the doctrine laid down in the above cases, and held that chauffeur having disobeyed his employer's instructions, and deviated from the business he was directed to pursue, his use of the car was his own use and the relation of master and servant was thereby terminated.

In the latter case this court held that in the absence of any dispute of fact the direction of a verdict for the defendant was proper.

See *Eldridge v. Calhoun*, 112 Atl. 340.

Dunmore v. Padden, 105 Atl. 559 (Pa.), is another case quite analogous in principle. The automobile was owned by the defendant, who with three or four companions had started on a hunting trip on the morning of the day in question. At noon two of the party found that the hunting dogs were not satisfactory, and one Horan, one of the defendant's companions, requested defendant to loan him the use of his automobile for the afternoon, so that he might go to a friend's house and procure other hunting dogs. While defendant owned the automobile, the chauffeur was employed and paid by a brewing company, but the defendant was permitted to use him for driving his car. Defendant testified that he had given Horan the privilege of using the car, and told the chauffeur to take instructions from Horan for the afternoon. These facts not being disputed or controverted, a verdict for the defendant was directed.

The Supreme Court, on appeal, in applying the principle that to create responsibility in the master, the servant must be at the time engaged in the master's business, said:

"There can be no question that at the time the automobile was being operated along this highway, it was, *temporarily at least, under the*

control and dominion of Horan and not of the owner. It was being used for the purpose of Horan, and under the testimony he was in full charge not only of the car but of the chauffeur."

It is respectfully submitted that the motion to nonsuit should have prevailed, for the reason that the plaintiff had not met the burden of proving the requisite relationship between the defendant and the person in charge of the automobile. It is further urged that there should have been a direction of a verdict for the defendant at the close of the whole case, because the uncontradicted proofs were that this relationship did not exist.

At the time of the accident the automobile was not in the defendant's possession or control or that of her servant or agent. Both possession and control were in the independent contractor. Furthermore, Buckley, in the operation of the car at the time of the accident, had deviated from the instructions of the defendant, and was not acting within the scope of his agency so as to charge the defendant with any of his wrongful acts.

It is, therefore, respectfully submitted that the judgment of the Supreme Court should be reversed.

HARRY HEHER,
*Attorney for and of Counsel with
Defendant-Appellant.*

ADDENDA.

Buckley was not agent of defendant because of relationship.

Freeman v. Robinson, 38 N. J. L. 383.

Neither was he general agent of defendant. His use of car for his own family and his own purposes would not constitute him agent of defendant in that use.

A general servant of one person may, for a particular work or occasion, become, pro hac vice, the servant of another person.

D. L. & W. R. R. Co. v. Hardy, 59 N. J. L. 35; 18 R. C. L., p. 784, Sec. 244; 18 R. C. L., p. 493, Sec. 3; *Cooley on Torts*, p. 1010, citing, *Green v. Sansom*, 41 Fla. 94; *Hastey v. Sears*, 157 Mass. 123; *Atlantic Transport Co. v. Coneys*, 82 Fed. 177, 28 C. C. A. 388.

This question is discussed in a learned and exhaustive opinion of the Court of Appeals of New York.

Higgins v. Western Union Telegraph Co., 156 N. Y. 75.

If the servant is not acting within the scope of his employment, his purpose to serve the master will not make the latter liable.

Marion v. Chicago & Ry Co., 59 Ia. 428.

Buckley, in undertaking to drive the car for the garageman, was a mere volunteer, and was not engaged in defendant's business. In thus engaging himself, he could not bind defendant for his wrongful acts.

Longa v. Stanley Hod Elevator Co., 69 N. J. L. 31. *Higgins v. Western Union Telegraph Co. supra.*

Another leading
case in point is

Winstone v Hoover
88 Neb 201

3 Key. & Corp. Cases
Ann. 471

See *Bellaty v*
Barrett Mfg Co
192 Fed 229



(Court of appeals)

Olive v. Whitney Marble Co., 103 N. Y. 292, is a case practically on all fours with the case at bar. There the defendant discovered that two boilers which it had purchased with a guarantee were defective, and notified the vendor to repair them. Olive, plaintiff's intestate, was sent to make the repairs, his instructions being when the work was done "to fire the boilers up and test them." When the repairs were substantially completed, Newcomb, the defendant's engineer, put fire under the boilers; one of them exploded, producing the injury to Olive which resulted in his death. The Court said:

"There is no proof whatever or just inference that he was then acting for the defendant. The vendor had undertaken on its own account to make these repairs, and then to test the boilers to see if the repairs were adequate; and it must be presumed, in the absence of proof on the part of plaintiff who has the burden of establishing his case, that Newcomb either volunteered to aid the boilermakers or was requested by them to aid in making the tests. In either event, he was not the servant of the defendant in what he did, and it did not become responsible for his acts."

~~In~~ *Westover v. Hoover*, 88 Neb. 201 (3 Neg. & Comp. Cases Ann. 471), a leading case on the subject, is also in point. One Loso, who was in the well-boring business, had made a contract with the defendants whereby he was to bore a well in the pit where plaintiff worked. He was to furnish the labor, machinery and material. Plaintiff testified that DeVore, the defendants' foreman, told him to go to Loso's place to help Loso bring in some machinery that afternoon, and gave him street-car fare to that point. The Court said:

"It is clear that Loso was an independent contractor. * * * We think that the relation of master and servant at this particular time, and with relation to this particular work, existed between Loso and the plaintiff, and not between him and the defendants. While according to his evidence he could look to them for wages, he was not under their control or direction, but was working for Loso in the prosecution of

See Delory v. Blodgett
185 Mass 126
(Sup Ct)

Pughman v. Excelsior
Express Co., 103
Att 218 (Sup Ct
Penn)

his independent contract. * * * The master is the person in whose work he is engaged, and who has the right to direct and control his actions. The payment of an employee by the day, or the control and supervision of the work by the employer, though important considerations, are not in themselves decisive of the fact that the two are master and servant. Servants who are employed and paid by one person may, nevertheless, be, ad hoc, the servants of another in a particular transaction, *and that, too, even where their general employer is interested in the work.* Obviously they may desert the service of their lawful master, and work for another; or he may lend their services to another person, abandoning to the latter all control over them; *or they may, without consulting their master, but in good faith, assist a person independently employed to do something which will benefit their master, but with which neither he nor they have any right to interfere, and in which they act entirely under the control of such other person.*" *Shearman & Redfield on Negligence (5th Ed.) Sec. 160, 161; Murray v. Currie, L. R. 6 C. P. Div. 24; Dallas Mfg. Co. v. Townes, 148 Ala. 146; Olive v. Whitney Marble Co., 103 N. Y. 292; The Turquoise, 114 Fed. 402; Rourke v. White Moss Co., L. R. 2 C. P. Div. 205; Wyllie v. Palmer, 137 N. Y. 248; The Gladestry, 128 Fed. 591, 63, C. C. A. 198; Delory v. Blodgett, 185 Mass. 126; Parkhurst v. Swift, 31 Ind. App. 521; Waldock v. Winfield, L. R. 2 K. B. Div. 596; Higgins v. Western Union Telegraph Co., 156 N. Y. 75; Brown v. Smith, 86 Ga. 274; Central Coal & Iron Co. v. Grider's Admr., 115 Ky. 745.*

In *Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75, the Court of Appeals of New York dealt with a similar question. Plaintiff sustained an injury while engaged in using the elevator in defendant's building. The negligent act to which the injury was attributed was committed by the general servant of the defendant, whose duty it was to manage and operate the elevator. The elevators had been placed in

the building sometime before the accident by the contractor, but he had not yet completed his contract. The Court held that "they were still, for all practical purposes, the property of the contractor." Plaintiff was a mason or plasterer engaged in the service of the contractor, and on the day of the accident, when it became necessary to move the elevator up and down to enable plaintiff to do his work, the contractor instead of employing one of his own men for the purpose, found it more convenient and economical to procure a man who was in the employment of the defendant. The Court held that the inquiry was whether, at the time of the accident, the operator of the elevator was "engaged in doing the defendant's work or the work of the contractor. In holding that he was engaged in the service of the contractor, the Court said:

"The fact that a party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may, nevertheless, be, ad hoc, the servants of another in a particular transaction, *and that, too, when their general employer is interested in the work.* *Wyllie v. Palmer*, 137 N. Y. 248.

"In this case, as already observed, the contractor had the right to use the elevator, and for that purpose could have employed his own servants. Instead of doing so he borrowed the defendant's servant, who, for the time being, became the servant of the contractor, engaged in doing his work and subject to his order. * * * Now, does the fact that Algar, who was guilty of the negligent act that produced the injury, was in the general employ and pay of the defendant, make it liable for the result of this accident? I think not, and for the reason that the conductor, while moving the elevator up and down as directed by the plaintiff, was not engaged in the defendant's work, but in the work

of the contractor. Beyond the scope of his employment the servant is as much a stranger to his master as any third person, *and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master.* And if the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended, and the act of the servant during such interval is not to be attributed to the master.

"The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the conductor in this case, whose negligence caused the injury, was not, at the time, engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff."

In *Bellatty v. Barrett Mfg. Co.*, 192 Fed. 229, the court, after finding that the injury to the libelant was caused by the negligence of the teamster in unloading the barrels of tar from his wagon, discussed the question: In whose control was the teamster at the time of his negligent act? and said:

"The testimony led to the conclusion that he was the servant of Miers & Son, and under their control, and that he was not acting under the direction of the Barrett Mfg. Co. *The test of liability has been repeatedly held to be the right and power to control the agent in the performance of the act or omission at the time of its performance or neglect. Standard Oil Co. v. Anderson*, 212 U. S. 215."

Buckley was a gratuitous bailee of the car for delivery to the repairman, and the bailment was terminated when the delivery was made.

Tomko v. Sharp, 87 N. J. L. 386.

Respectfully submitted,

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of the contractor. Beyond the scope of his contract, and the servant is as much a stranger to the master as any third person, and the act of the servant, not done in the service of the master, which an master cannot be regarded as the act of the master. And if the servant does any act in his master's business, but beyond the scope of his contract, he is not a servant, but a contractor, and his act is not the act of the master. The relation of master and servant is for the time extended, and the act of the servant during such interval is not to be attributed to the master.

The true test in such cases is to ascertain who directs the movements of the person committing the injury. It seems to me that the contractor in this case, whose negligence caused the injury, was not at the time engaged in the defendant's work, but in the work of the contractor, under the direction of the plaintiff.

In *Haley v. Great N. Ry. Co.*, 102 Fed. 214, the court, after finding that the injury to the plaintiff was caused by the negligence of the defendant in providing the horse of the team that was driven across the street, held that the defendant was liable at the time of his negligence. 107 and 108.

"The negligence led to the conclusion that he was the servant of the defendant and that the defendant was liable for his negligence. The court in *Haley v. Great N. Ry. Co.* held that the defendant was liable for the negligence of the driver of the team at the time of the injury. *Standard Oil Co. v. Anderson*, 214 U.S. 215.

The fact that the defendant was liable for the injury to the plaintiff, and the plaintiff was not liable for the injury, was held.

Tomb v. State, 71 N. J. L. 185.

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