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New Jersey
Court of Errors and Appeals

Notice of Appeal

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(Filed, May 2d, 1914)

HUDSON COUNTY CIRCUIT COURT

MAX RUBINOW, Plaintiff-Appellant, vs. PUBLIC SERVICE RAILWAY COM- PANY, Defendant-Appellee.	}	Action at Law. Notice of Appeal.	20
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*To Messrs. Edwards & Smith, Attorneys for
Defendant:*

PLEASE TAKE NOTICE, that the plaintiff appeals
to the New Jersey Court of Errors & Appeals
from the whole and every part of the judgment 30
entered in this cause, on the following grounds:

FIRST: That the plaintiff was not contributorily
negligent.

SECOND: That the Court should have refused to
direct a verdict in favor of defendant and against
the plaintiff.

THIRD: That the questions raised at said trial
were questions of fact solely for the jury. 40

Judgment Record

FOURTH: That the question of contributory negligence was one for the jury.

FIFTH: The following questions were over-ruled:

10 "Q. Mr. Rubinow, from your observation, what was the most travelled course of pedestrians from the northerly side of South Street to the southerly side of South Street?"

SIXTH: The following questions were admitted:

"Q. And then did you see the old gentleman there, the plaintiff?

"Mr. Autenrieth: I object to that as leading.

"Mr. Smith: I can ask her if she saw the man? A. Yes."

20 ROE, RUNYON & AUTENRIETH,
Attorneys for Plaintiff-Appellant.

Judgment Record

HUDSON COUNTY CIRCUIT COURT

30	MAX RUBINOW, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law.
	vs.		
	PUBLIC SERVICE RAILWAY COM- PANY, <div style="text-align: right;">Defendant.</div>		

40 The Public Service Railway Company, defendant in this cause, was summoned to answer unto Max Rubinow, the complainant therein, in an action at law upon the following amended complaint.

Amended Complaint

(Filed, December 17, 1913)

The plaintiff, residing at #73 Parkhurst Street, in the City of Newark, County of Essex and State of New Jersey, says:

1. That on or about the 7th day of December, 1912, the said plaintiff was crossing Mulberry Street, in the City of Newark, aforesaid, at the corner formed by the said Mulberry Street and South Street, in said city. 10

2. That said defendant by its servants and agents was operating a trolley car along what is known as either Mulberry Street or Railroad Avenue at or near the corner formed by said street and South Street, in said City of Newark, and while the said plaintiff was attempting to cross said South Street from the southerly to the northerly side thereof, the said trolley car which was operated and managed by the defendant, through its servants and agents, came along said Mulberry Street or Railroad Avenue in the rear of the said plaintiff, and without any warning or notice to the said plaintiff, the said defendant, through its servants and agents propelled the said trolley car against the plaintiff, and he was then and there thrown to the ground and greatly injured and damaged, in and about his arms, legs and head, 20
30
and that he sustained a fracture of the hip on the right side, and he was otherwise severely cut, bruised and scratched by reason thereof, and has suffered and still does suffer great pain in and about his leg and hip, aforesaid.

3. That by reason of the injuries sustained as aforesaid the plaintiff was confined to his bed for a long space of time, and has been and still is un- 40

Defendant's Answer

able to perform his ordinary work and duties, and has been prevented from transacting his lawful business, and will be unable in the future to transact his lawful business in the same manner and under the same conditions as prior to receiving the injuries aforesaid, and that the injuries sustained by the plaintiff are permanent, and the said
 10 plaintiff will never be cured thereof, but will in the future suffer great pain by reason thereof.

4. That by reason of the said accident the said plaintiff has necessarily expended large sums of money for doctors' bills and medicines in endeavoring to be cured of the said injuries, to wit: the sum of ONE THOUSAND DOLLARS, and will in the future be obliged to pay out large sums of money endeavoring to be cured and healed of the injuries occasioned aforesaid.

20 5. That the said plaintiff was injured and has sustained damage in the premises in the sum of TEN THOUSAND DOLLARS.

HAIGHT & AUTENRIETH,
 Attorneys for Plaintiff.

The defendant answers as follows:

30 **Defendant's Answer**

(Filed, October 31, 1913)

Defendant, a domestic corporation, answering the complaint herein, says:

1. It admits that on December 7, 1913, plaintiff was on Mulberry Street in the City of Newark,
 40 at or near the corner formed by said Mulberry

Defendant's Answer

Street and South Street in said city, but as to whether or not plaintiff was crossing the street at the time defendant leaves plaintiff to make proof thereof.

2. Answering paragraph two (2) of said complaint defendant admits that by its servant it was operating a trolley car along Mulberry Street, at or near the corner formed by the said Mulberry Street and South Street in the City of Newark. It denies the rest of said paragraph. 10

3. Defendant denies the matters set forth in paragraphs three (3), four (4) and five (5) of said complaint.

For defense to said action, defendant says:

1. That plaintiff received no injury and suffered no loss by reason of any neglect, default or misconduct on the part of defendant, or any of its servants. 20

2. That plaintiff received the injuries complained of, if any, and the results complained of, if any, by reason of his own negligence, either in whole or in part, in the following particulars:

(a) Plaintiff endeavored to cross the tracks of defendant in said street without making reasonable observation for his safety.

(b) That plaintiff attempted to cross the tracks of defendant in said street in front of an approaching car, which he saw or knew to be approaching, when the same was so close to him as to make such crossing dangerous. 30

(c) That plaintiff attempted to cross said tracks in front of an approaching car, which he knew to be approaching, without heeding the warning given to him by the persons in charge of said car. 40

Plaintiff's Reply

(d) That plaintiff, while in said street, assume a position so close to the tracks of defendant, with knowledge of the approach of said car, that the said car in making a turn upon a curve in the tracks extending from one street to the other, was struck by the rear of said car as it rounded the curve.

10 (e) That plaintiff assumed a position so close to the tracks of said defendant, with knowledge of the approach thereof, as to be struck by the overhang of said car as the same passed along.

EDWARDS & SMITH,
Attorneys of Defendant.

The plaintiff replied as follows:

20

Plaintiff's Reply

(Filed, November 3, 1913)

The plaintiff *denies* every allegation of the defense set up in the answer.

HAIGHT & AUTENRIETH,
Attorneys for Plaintiff.

30

This action was tried at the December term of the Hudson County Circuit Court on March 25, 1914, before Hon. Luther A. Campbell, Judge, and a jury, in the presence of the counsel of the respective parties.

The plaintiff and the defendant having put in their cases and the Court having granted the motion of the defendant for direction of verdict in

40

Rule for Judgment

favor of the defendant and against the complainant on the ground that contributory negligence was shown, and to that extent that it was not a question for the jury.

WHEREUPON, on the 28th day of March, 1914, defendant entered the following rule for judgment:

10

Rule for Judgment

(Filed, 3/28/14)

This cause coming on to be heard at the December term of this Court on March 25, 1914, before Hon. Luther A. Campbell, Judge and a jury in the presence of the counsel of the respective parties 20 and the plaintiff and defendant having put in their cases and the Court having decided that the plaintiff was contributorily negligent, directed the jury to find in favor of the defendant and against the plaintiff.

And the jury having retired come again into Court and say that they find in favor of the defendant and against the plaintiff.

Wherefore it is ordered that judgment final be entered in favor of the defendant and against the 30 plaintiff with defendant's costs to be taxed.

Rule actually entered March 28, 1914. On motion of Edwards & Smith, attorneys for defendant.

The testimony produced before said Court was as follows:

40

Testimony

The Plaintiff asks leave of the Court to amend Section Five of his amended complaint to read as follows:

“5. That the said plaintiff was injured and has sustained damages in the premises in the sum of Fifteen Thousand Dollars.”

10 The Court: I will permit such amendment.

CHARLES HOPPER, sworn:

Mr. Autenreith: You admit, Mr. Smith, that Mr. Hopper is qualified as an engineer?

Mr. Smith: I admit he is an engineer, yes.

20 Mr. Autenreith: Civil engineer and able to draw this map?

Mr. Smith: I presume he may be able to draw it.

DIRECT-EXAMINATION by Mr. Autenreith:

Q. Mr. Hopper, did you go at any time to make a survey of the streets and trolley tracks at the corner of New Jersey Railroad Avenue and South Street in the City of Newark? A. I did.

Q. On what date? A. December 22, 1913.

30 Q. I show you what purports to be such a survey and ask you whether that was made by you? A. It was.

Q. Did you actually take the measurement? A. I did.

40 Q. Is this map that I show you made up by you pursuant to measurements taken by you? A. Yes, sir; strictly according to measurements made on that day.

Charles Hopper—Cross

Q. What date was that again? A. December 22, 1913.

Q. Does that map represent the true location of the trolley tracks and streets and crossings as of that time? A. It does.

Mr. Autenreith: I offer the map.

Mr. Smith: I object. I want to examine him.

10

CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Hopper, you made that in December, 1913? A. Yes.

Q. This accident happened, I believe, December 17, 1912. You do not know the condition of the streets there in 1912, do you? A. No, sir.

Q. Do not know the measurements of it in 1912? A. No, sir; except it is reasonable—

Q. I didn't ask you whether it is reasonable. 20
You do not know, do you? A. No.

Q. You do not know what position the tracks were in 1912? A. No.

Q. You do not know the degree of curve that was there in 1912, in December? A. No, sir.

Q. Know what you are presenting here is the condition of affairs as existed in December 22d, 1913; is that right? A. Just as I stated a short time ago.

A Juror: Is this the curve around here? 30

Mr. Smith: He wants to know something.

Mr. Autenreith: That will come in after you get the map in evidence.

Q. Mr. Hopper, this distance of South Street, as you have it here, that is the distance of the street between the curb to curb—39 feet and 5 inches? A. Yes.

Mr. Autenreith: Why don't you label the point on there?

40

Charles Hopper—Cross

Q. Is that the same from this point to this point, from the southwest corner of South Street and Railroad Avenue to the opposite side of South Street? What is the distance? A. Practically the same; it may be a tenth or two difference. Practically the same.

Q. Do you show the crosswalks here? A. I do.

10 Q. There is no crosswalk from the south side of South Street to the north side of South Street, is there? A. No, sir.

Q. The crosswalk from the southwest side of Mulberry Street or New Jersey Railroad Avenue to the southeast side, isn't it? A. Yes.

Q. You have shown a curve here from New Jersey Railroad Avenue or Mulberry Street going west on South Street? A. Yes.

20 Q. There is a curve going from New Jersey Railroad Avenue on Mulberry Street, east on South Street, is there not? A. Yes.

Q. Then there is an almost straight track with a slight turn going straight along Mulberry Street or New Jersey Railroad Avenue this way (indicating)? A. Yes, sir.

30 Q. Now then right here, right below the north of South Street the single track that runs on Mulberry Street or New Jersey Railroad Avenue turns into two tracks, doesn't it? A. Yes—on New Jersey Railroad Avenue north of South Street, there are two tracks.

Q. But some little distance back from the corner before it verges into two tracks? A. A short distance, about 25 feet northeast.

40 Q. Can you tell me the distance between this track that runs along Mulberry Street at the intersection, and the curve on the north side of Mulberry Street into South Street?

Max Rubinow—Direct

Mr. Autenreith: You do not mean Mulberry Street? You call it New Jersey Railroad Avenue; it is really Mulberry Street.

A. It is New Jersey Railroad Avenue on the map. Now if you will indicate the point where you want this.

Q. Here (indicating). A. Between those two curves? 10

Q. Yes. A. At the shortest point?

Mr. Autenreith: Why don't you make a point?

Q. At the shortest point? A. Nine feet.

Q. What is the distance between the curve going west on South Street to the curve coming from the north of New Jersey Railroad Avenue into South Street—taken there at what point of intersection of the curve going south on Mulberry Street to the curve going into South Street from the south? This point of intersection here? A. About 13 feet. 20

Mr. Autenreith: Do you still press your objection?

Mr. Smith: No, I will admit the map. I will allow you to use the map.

Mr. Autenreith: Will you admit the conditions were the same?

Mr. Smith: I do not know that myself.

Mr. Autenreith: All right. I offer the 30 map in evidence.

Map marked Exhibit P-1.

MAX RUBINOW, sworn:

Direct-examination by Mr. Autenreith:

Q. Mr. Rubinow, you are the plaintiff in this suit, are you? A. Yes, sir.

Max Rubinow—Direct

Q. Where do you live? A. 73 Parkhurst Street, Newark, New Jersey.

Q. How long have you lived in Newark? A. About eighteen or nineteen years.

Q. Do you recall on December 7th, 1912, meeting with an accident with a trolley car? A. Yes, sir.

10 Q. Where was that? A. It was—I am going over on this morning from this side of the street—

Q. Just generally—I will bring the map up to you. A. On the block from Parkhurst Street I am going with South Avenue—with Railroad Avenue to cross South Street.

Q. Where did the accident happen? A. The accident happened by South Street—on South Street.

20 Q. South Street at the intersection of what other street? A. No; on South Street.

Q. On South Street? A. On South Street.

Q. That happened you say, on December 7, 1912? A. December 7, 1912, yes.

Q. What time of the day was it? A. It was about 6:30 in the morning.

Q. You will have to speak a little louder. A. 6:30 in the morning.

Q. Where were you going? A. I was going to the shop.

30 Q. Whose shop? A. To my son's shop.

Q. Did you work there? A. I was working there for the last fifteen years.

Q. Just refer to this map for a moment; in which direction were you coming before the accident? A. Well, shall I get up?

Q. If you can stand up here. A. I was on this place here—

40 Q. The question is which direction were you coming? A. Here. Here is Parkhurst Street,

Max Rubinow—Direct

here; then I come here or started here on this side, on Railroad Avenue.

Q. You were walking along Railroad Avenue?
A. Walking along here from here—from there walked along Railroad Avenue there.

Q. What street is west of South Street? A. West of South?

Q. Southwest? A. Here is South Street and here goes Thomas Street, and then Parkhurst here. 10

Q. That is one block? A. Another block is Parkhurst.

Q. That is the street you live on? A. Yes.

Q. You had come down Parkhurst Street? A. I came down Parkhurst Street here, this way.

Q. You came down Parkhurst Street to Railroad Avenue? A. Yes, sir.

Q. What direction did you take along Railroad Avenue? A. Well, this way (indicating). 20

Q. In a northeasterly direction? A. Yes. I went this way.

Q. Coming— A. Coming here.

Q. Towards South Street? A. Yes. That is the usual way I coming here to the shop.

Q. In which direction does the shop lie? A. The shop lays here and here.

Q. Northeasterly? A. Yes, sir. When I came here I looked out and hear the car—if there is no car, because sometimes the car— 30

Mr. Smith: I object, if the Court please, to the sometimes.

The Court: Tell what you saw if anything there.

Q. When you came along the sidewalk on Railroad Avenue going towards South Street— A. Yes.

Q. And got to the corner— A. Yes.

Max Rubinow—Direct

Q. Just before you crossed South Street did you look for any cars? A. Yes, I did look, but there was no car there.

Q. Which way did you look? A. Well, turned around and looked. There was no car there.

Q. In Railroad Avenue? A. Yes.

Q. Was there a car on Railroad Avenue? A.
10 No, there was not.

Q. Did you look down South Street? A. Yes. When I started here for South Street, why, the South Street car was here, this way.

Q. Were there any cars on South Street? A. No, there was not.

Q. Did you notice whether there was any cars on the other side of South Street? A. No, I did not—I started here and going over here.

Q. When you started at a point here—point A?
20 (Marking on the map.) A. Yes; I went to this corner.

Q. Going to B? (Marking on the map.) A. Yes. Then I started here, this way, and then when I came in the middle of the way here I seen a car come here from Mulberry Street to go this way out on South.

Q. What kind of a car was that? A. Mulberry Street.

Q. Coming— A. She is coming. She was here in
30 this place. She was coming.

Q. Where was she when you first saw her? A. Then I go out on this place.

Q. Here? A. Yes.

Q. The point I mark?

The Court: Mark it C.

Q. The Mulberry Street car was at C? (Marking map.) A. Yes.

40 The Court: Let him mark it, where he was when he saw the car.

Max Rubinow—Direct

A. I can not tell this.

Q. Where were you in this part of the street?

A. In this part.

Q. When you saw the Mulberry Street car? A. In this part.

Q. About the middle? A. Yes, about the middle, yes.

The Court: Mark it.

Q. I will mark it D. You were about point D or the middle of the street, between the trolley track and the curve? A. Yes, sir. 10

Q. When you saw the Mulberry Street car? A. Then I didn't—I went to walk, because the car is coming here out—Mulberry Street car is coming here out on South Street.

Q. Was it coming on this curve? A. Yes, she is coming on this, but she was here this places.

Q. When you saw it? A. When I saw it. 20

Q. Was it moving or standing still? A. No, she was going.

Q. When you saw it first? A. Yes.

Q. She was coming around this curve that I mark E; is that right? A. Yes.

Q. Going around that curve? A. She was going around here. I saw her this place, and then I started to go this way to let room for the car.

Q. You walked? A. I started a little bit—a little east more, because I know the car will go to here, and I walked a little more east and then comes— 30

Q. Just a minute? You walked a little more east? A. Yes.

Q. Which direction were you intending to go? A. Well, I was intending—here this way and go up here.

Q. You were trying to get on the sidewalk on the other side? A. Yes, on the other side. 40

Max Rubinow—Direct

Q. Now, did the Mulberry Street car go around that curve, start around that curve while you were coming across?

Mr. Smith: Yes, started coming—

The Court: It is leading, of course.

Mr. Autenreith: I am under a little bit of difficulty on these points.

10 Q. Just go back, Mr. Rubinow.

The Court: You ought not to lead, of course, especially in the present circumstances, because this narration you are getting is important.

Mr. Autenreith: It is not my intention to lead. I want to get it out so the jury can understand it as well as the rest of us.

Q. Just go back, Mr. Rubinow, to the point or to the time when you first saw the Mulberry Street
20 car? A. Yes.

Q. What did you do? A. I started to go a little more east, here, and let the car—at once I feel it knock me down, hit me and knock me down, and I turned around and see what was the matter, I didn't know—I saw a car pass me here, the Bergen Street car.

Q. The Bergen Street car had passed you? A. Yes.

Q. Where were you? A. I was going this way.

30 Q. Just a minute. About where were you when the Bergen Street car struck you? A. Well, I was about five or six feet—five feet, I am not sure, five or six feet from here.

Q. Point out on the map here as near as you can? A. Well, here.

Q. About here. That will be F, (marking map). A. About five feet from it.

40 Q. Five feet from what? A. From here.

Max Rubinow—Direct

Q. From the curve of the Bergen Street car?

A. Yes.

Q. Into South Street?

Mr. Smith: The edge of it. There is the curve there.

A. There is one **only**.

Q. Well, the southeasterly curve, the curve he indicates on the map, the curve marked 2. Now when you came to the corner at A, Mr. Rubinow, did you look back to see whether a car was coming up that street? A. Yes. 10

Mr. Smith: I object to it as leading.

Q. Or didn't you? A. Yes, I did.

Q. What did you see?

Mr. Smith: I object to the question as leading.

A. There was no cars there.

Mr. Smith: All right. 20

Q. How far does this trolley track continue down Railroad Avenue in a southerly direction from South Street? A. What do you mean?

Q. Where does the Bergen Street car come from before it goes into Railroad Avenue? A. One little block from Thomas Street.

Q. Then it came up Thomas Street? A. She goes through Thomas Street, so, one block here, and then she turns on here, on this (indicating).

The Court: The witness understands 30 what is meant by that?

Mr. Smith: The car comes east from Broad Street on Thomas Street.

The Court: Thomas Street is the first street to the west of South, parallel?

A. South of South Street.

Mr. Smith: The car comes down this way and turns up here.

A. One little block. 40

Max Rubinow—Direct

The Court: How far, if he knows, is Thomas Street south of South Street. Do you know?

A. A little block, small block.

Q. How many feet, if you know? A. I can't tell; about eighty feet—eighty or ninety feet.

Q. You can not tell just about that? A. No; 10 here is Thomas Street here.

Q. Just before you were hit did you hear any bell on the Bergen Street line? A. No, sir.

Q. Was there any bell rung? A. No, sir, there was not.

Q. Were you listening? A. It was not.

Q. I say were you listening? A. Certainly.

Q. Do you know what happened to that Bergen Street car after it hit you? A. She goes—she went on—she did not stop.

20 Q. Which way did it go, which direction? A. This way, east.

Q. East along South Street? A. Along South Street, yes.

Q. Just calling your attention to the map again, Mr. Rubinow, are there any crosswalks from the southerly side of South Street to the northerly side of South Street at points A and B and C? A. No, there is not.

30 Q. When you left the sidewalk of Railroad Avenue at the point A, what kind of a direction did you take to the other side? A. Well, across.

Q. Straight across or how? A. Straight across.

Q. To the sidewalk B? A. To the sidewalk.

Q. On the other side, the continuation? A. Yes.

Q. Now you say, Mr. Rubinow, you have been working for the Rubinow Edge Tool Works? A. Yes.

40 Q. For fifteen years? A. Nineteen years.

Max Rubinow—Direct

Q. How long had you been travelling along that route? A. Why, travelling—I am only four years, because I lived—

Q. Four years? A. I lived in this place for four years.

Q. Was the route you took this morning on December 7th any different from the way you had usually gone? A. Oh, no, no; for the last eighteen 10 years I remember it was all the same, for the last twenty years maybe, or nineteen years, when I am working—I used to work on the other side, but I used to walk on South Street all the time.

Q. Always walked over that same direction? A. Yes.

The Court: What does he mean?

Q. From A to B?

The Court: From the corner A towards the corner B? 20

A. I used to walk through South Street for four years.

The Court: I am asking—

A. Before the four years?

Q. You did not live in the same neighborhood?

A. No.

Q. You said you had been coming in this direction for four years. Did you take this route that you have just now described as a regular thing?

A. Yes. 30

Q. Came along that way to the work, in going to the shop? A. Yes.

Q. How many times a day would you go over that route? A. Well, four times—two times there and two times back.

Q. Did you go home for lunch? A. Yes, at twelve.

Q. As a usual thing you would take that route in the same manner that you—

Max Rubinow—Direct

Mr. Smith: I object.

A. The same.

Mr. Autenreith: I will withdraw it.

Mr. Smith: I move to strike it out.

The Court: It may be stricken out.

Q. Can you state how other people crossed that same crossing?

10 Mr. Smith: I object.

Q. During the time that you have gone by?

Mr. Smith: I object to it as irrelevant and incompetent.

Q. From your observation?

Mr. Smith: I object.

The Court: I do not see that it is of any value, what other people do.

Mr. Autenreith: I will withdraw the question.

20 Q. *Mr. Rubinow, from your observation, what was the most travelled course of pedestrians from the northerly side of South Street to the southerly side of South Street?*

Mr. Smith: Objected to as irrelevant, incompetent and immaterial.

The Court: I will sustain the objection.

Q. Mr. Rubinow, after you were struck by the car what happened to you? A. Well, when I—

Q. Speak up now and tell the jury about it? A.

30 Well, when I was fall down I tried to get up myself; I didn't know what it was, I tried to get up myself, but I couldn't. Then I was looking around—maybe will find somebody, but at first I couldn't see anybody there around, no men, and then in a minute like I saw a man coming on the sidewalk and I called him.

Q. What sidewalk? A. On that sidewalk there, the drug store.

40 Q. The other side? A. On the B.

Max Rubinow—Direct

Q. At B? A. Yes; and he come, and then comes a poor man, and then they lift me out.

Q. Where did they take you? A. They lift me out and they try I should walk, and they kept me under the arms, but I couldn't make a step, and then he comes around the hand and they bring me in the station, and then came a policeman there when I was by the station.

10

Q. The policeman came when? A. When they was carrying me to the station.

Q. Where were you when he came up? A. Well—

Q. When the policeman came up where were you, in the station or just going in? A. I was by the station, by the station, and then the policeman telephoned for an omnibus, and they bring me to my son, to the doctor, and I asked him to bring me to the doctor.

20

Q. Your son is— A. I have a son, a doctor.

Q. Your son is a doctor? A. Yes, and they bring me there and I want to see what is the matter with me.

Q. You finally arrived at your son's house? A. Yes.

Q. Were you able to walk from the point F where you were knocked down, to the station? A. I could not make a step, not a step—all legs just as a stick of wood; I could not move.

30

Q. What time of day was this? A. What time? Maybe it was a half an hour later, or about 7 o'clock, until they came there the omnibus, they said.

Q. What was the condition as to light and dark? A. Oh, it was light—it was not light exactly as the day time, but it was light enough.

Q. Were the street lights lit, do you know? A. No.

40

Max Rubinow—Direct

Q. They were not? A. No.

Q. Now, after you got to your son's house—you might tell me where that is? A. On High Street, Newark, 602.

Q. How were you taken there? A. Well, I was taken with the wagon there, with the omnibus.

Q. The ambulance? A. Ambulance.

10 Q. Did you subsequently have doctors to come in to treat you? A. Well, my son looked, and he says, "It is broken," broken hip, and then he said—

Mr. Smith: I object.

A. And then he sent for other doctors.

Q. Never mind? Did any other doctors come?

A. Yes, then the other two doctors came.

Q. Who were they? A. Had Mr. Ascher and Morrison in Newark.

20 Q. Did you have other doctors afterwards? A. Then after they said they would like to have—

Q. Never mind. Did you have any doctor? A. Yes. After a day they sent for a doctor, for a specialist, to New York.

Q. Did he come there? A. Then he came, yes.

Q. Who was he? A. Dr. Myer.

Q. Do you know his first name? A. I don't know his first name.

30 Q. How long were you laid up in your son's house? A. I was in my son's house eight weeks, just eight weeks I was in bed.

Q. You were where? A. I was in bed eight weeks.

40 Q. How long were you in bed altogether with this injury? A. Well, then they took me down with the ambulance home, and I was eight or nine weeks there in a chair sitting, I could not move nothing, and then after this they started to try on crutches, I used to start home, in the house.

Max Rubinow—Direct

Q. To walk on crutches? A. To walk on two crutches, yes—pain certainly.

Q. Now, Mr. Rubinow, did you suffer any pain with this injury? A. Oh, my; I got pain every day, every moment; I can not sleep.

Q. Do you suffer any pain now? A. I can't sleep any nights. I don't sleep, not an hour in the night time. If I lay down I sleep about a half hour, then I wake up with pain. I must sit down I can not lie down. 10

Q. Does it affect you any differently in bad weather? A. Oh, certainly, it changes—sometimes a little, not so much pain, but sometimes it is terrible. I can not walk, not two blocks, and I get the pain in it.

Q. Before this accident, Mr. Rubinow, while you were working in the machine shop— A. I was superintendent in the shop. 20

Q. How did you feel as regards your health? A. Oh, I was strong man.

Q. How many hours a day did you work? A. I was working—I opened the shop and I locked the shop. I came to the shop about 7 o'clock, ten minutes before, because 7 o'clock started work, and I was the superintendent, I had to get out the work and have to look over the work. I use to come all the time myself quarter to seven to the shop. The work is to half-past five, and I used to lock the shop 6 o'clock. 30

Q. Work from seven till six? A. From seven until six.

Q. You say you were strong before this? A. I was very strong, yes.

Q. Ever miss a day's work because of sickness? A. No, sir; I can tell you I was never sick.

Q. You had been working there how long? A. I was working there in the shop from 1899. 40

Max Rubinow—Direct

Q. How old were you, Mr. Rubinow, when this accident happened? A. Sixty-six.

Q. Sixty-six, and how old are you now? A. Sixty-seven.

Q. Do you still have treatment for this? A. Eh.

Q. Do you still have treatment for this injury?
A. Now?

10 Q. Yes. A. No, it is no use.

Q. Can not have any more treatment? A. I can not help it.

Q. Are you able to walk without crutches? A. I would be glad to work with crutches.

Q. Are you able to walk without crutches? A. I can not work.

Q. Walk, I said. A. I can not walk without crutches.

Q. Does it pain you to walk?

20 Mr. Smith: I object.

A. Yes.

Mr. Smith: I object to it as leading. We might as well have Mr. Autenreith on the stand.

Q. Now, Mr. Rubinow, tell us how your leg feels when you walk? A. Then when I start to walk I feel is here in the hip a pain, and the knee.

30 Q. In the hip and in the knee. It was not hurt in the knee, but it pulls me—it pulls everything, even here in the knee it pulls, and I can not—when I am walking two blocks on the crutches then I must stop. Sometimes I get so I have to go to the wall and stay on the wall for half an hour and wait.

Q. How far are you able to walk at a time? A. Two or three blocks I walking with pain.

Q. Pain all the time? A. All the time.

40 Q. Before this accident, Mr. Rubinow, how

Max Rubinow—Direct

much were you earning with the Rubinow Edge Tool Works? A. I used to get from—this five years I used to get forty dollars a week.

Q. Five years? A. The last five years, before 1912.

Q. Before the accident? A. Yes.

Q. Forty dollars a week? A. Forty dollars a week.

Q. Since the accident have you been able to work at all? A. I did not work at all. I started—it was as I told you—I was eight weeks there and then the eight weeks was home and then I started to go out. In the end of June I thought maybe I will be able to walk out something in the shop. I was very lonely sitting home and I tried, but it begins to pain so terribly again—I used to try something to do—I went a day and the doctor advised me I should not work, I shall go—

Mr. Smith: I object.

Q. Never mind what the doctor said. I will withdraw that. Did you do the same kind of work that you done before the accident? A. I don't do anything.

Q. These four weeks that you spoke of when you spoke of when you went back? A. No. I tried—at the end of June I want to try.

Q. Oh, you want to try? A. I tried a day and I couldn't do it.

Q. Could not. Did you go back and try to do any kind of work at all? A. No, I went to the doctor and he sent me to the seashore to help to get baths, ocean baths, warm baths, and then I came home the 1st of September.

Q. How long did you stay there then? How long did you try? A. A couple of days I tried, one day a couple of hours and the other day a couple of hours.

Max Rubinow—Direct

Q. What kind of work? A. That is work. To examine the edges and give out to everybody in the shop; go upstairs to the stockroom and everything, but I can not—

Q. Can not do it? A. Can not do it.

Q. Are you working now? A. No, sir.

Q. Doing nothing. Did you pay any money to
10 Dr. Myer at the time he attended you? A. Yes; one hundred and fifty dollars for the visit.

Q. One hundred and fifty dollars for what? A. A visit.

Q. How many times did he come? A. He was only one time.

Q. Pay any money to the other doctor? A. Yes, Dr. Myer and Dr.—Dr. what you call it—Asher and Dr. Morrison, paid seventy-five dollars each.

20 Q. Seventy-five dollars each to Morrison and to Ascher? A. Yes.

Q. What did Myer do at the time he came? A. The doctors consult him.

Q. Did Morrison treat you? A. Morrison treat me too—all the eight weeks I was in my son's house.

Q. How long did Ascher treat you? A. Same time.

30 Q. Both coming together? A. Both coming together.

Q. Did you pay any other moneys out at that time? A. Well, certainly, I had eight weeks, I had a nurse.

Q. How much did you pay her? A. I paid her twenty-five dollars a week and besides for board what I paid to my son.

40 Q. How much did you pay your son for board? A. Son for board I paid one hundred and forty dollars for eight weeks, for both of us.

Max Rubinow—Direct

Q. Have you paid any other moneys out for other purposes? A. Yes.

Q. For what? A. After the eight weeks when I came home the doctors told me to take massage.

Q. Massage? A. Yes; and I had a woman too, and I paid her twenty-five dollars.

Q. How often? A. And she came every day eight weeks. 10

Q. Twenty-five dollars how often? A. Twenty-five dollars a week.

Q. How long did she massage? A. For eight weeks.

Q. Did you pay out any other moneys? A. Eh?

Q. For medicines or anything of that kind? A. It was from medicines—it was for a rubber mattress that the doctor—all the things, I don't know what it was; it was every day something, but I remember a hundred and fifty dollars. 20

Q. About a hundred and fifty dollars? A. Yes.

Q. Pay anything for crutches? A. Well, certainly I paid for crutches, seven dollars for the second pair. I paid one pair seven dollars and then I paid the other one, broken.

Q. How much altogether? A. Fourteen dollars.

Q. You say you broke the first one? A. Yes.

Q. You have testified, Mr. Rubinow, that you still suffer pain. Just tell the jury how you feel in health generally? A. Well, I feel very bad. 30

Q. As compared with how you felt before the accident? A. Before the accident I was very strong. I can show that—I can prove that I used to do the work of two or three people every day, and I was a strong man.

Q. How do you feel now? How is your state of health? A. Now is nothing—I can't do anything. If I stay a quarter of an hour on the crutches then I can not—terrible pain. When I sit 40

Max Rubinow—Cross

down for a quarter of an hour or a half an hour then begins me here the pain. (indicating.) In the flesh here.

Q. Outside of the pain in your leg how is your general state of health? How do you feel? A. I feel not bad, but I can not work. I am too weak.

10 CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Rubinow, you live, you said, on Parkhurst Street? A. Yes.

Q. That is two blocks south of South Street, is it? A. Yes.

Q. And the cars come down Thomas Street from Broad Street, don't they? A. Yes.

Q. They come east on Thomas? A. Yes, sir.

Q. And turn into New Jersey Railroad Avenue? A. Yes.

20 Q. The Bergen Street cars? A. Yes.

Q. Then they come down and turn east on South Street? A. Yes.

Q. And the Mulberry Street cars run from Mulberry Street north? A. Yes.

Q. Then turn west on South Street? A. West on South Street.

Q. Is that right? A. That is right.

Q. On this day, as I understand you, you came down Parkhurst Street into Railroad Avenue? A.

30 Yes.

Q. And you walked north? A. Yes.

Q. On the west side? A. Yes.

Q. Is that right? A. Yes.

Q. Now when you started to go across you started from the saloon corner to the easterly side, didn't you? A. No, sir I started there.

40 Q. Didn't you start to the easterly side? A. What for?

Max Rubinow—Cross

Q. Well, I didn't ask you that. A. No, I did not.

Q. Did you tell your lawyers how this accident happened and what you were doing? A. Who?

Q. Your lawyers? A. Certainly I did.

Q. Which one did you tell, Mr. Autenreith? A. Yes, Mr. Autenreith.

Q. Tell him how it happened? A. Yes. 10

Q. When? A. When I engaged him.

Q. When you first engaged him? A. Yes.

Q. That is the way you told him? A. Yes.

Q. So when you told him how the accident happened the first time you engaged him, you said that "the car, trolley car, came to a stop near the corner formed by Mulberry Street and South Street," didn't you? There is a car that stopped here at this switch, wasn't there, coming north on New Jersey Avenue? A. Yes. 20

Q. And it stopped there at that switch? A. This car?

Q. Did you not tell Mr. Autenreith that a car was coming north on New Jersey Avenue and it stopped at the corner of New Jersey Avenue and South Street? A. No, sir.

Q. Did not tell him that? A. No, sir; there was a mistake.

Q. Didn't you tell him at that time that then, after it was stopped— A. Yes. 30

Q. —you started across the street, to cross Mulberry Street from the west to the east, didn't you? A. This is not Mulberry Street.

Q. They call that Mulberry? A. No, sir.

Q. Or New Jersey Avenue? A. No, sir; it is not Mulberry Street.

Q. Where is Mulberry Street? A. There is Mulberry Street. 40

Max Rubinow—Cross

Q. Over here? A. Yes.

Q. Then did you start to cross from this corner to this corner? A. No, sir; to that corner.

Q. When you reached the corner of South Street and Mulberry Street you started across from the west to the east? A. No, sir.

Q. Didn't you tell him that? A. No, sir, I did
10 not.

Q. You did not tell him that? A. No, sir, I did not.

Q. Then didn't you tell him that while this car was standing— A. Yes.

Q. —at the corner, and while you were walking across from the west to the east— A. Yes.

Q. —the car started up? A. No.

Q. Did you tell him that? A. I did not.

Q. And the rear of the car in swinging around
20 the corner, struck you. Did you tell him that? A. Yes, I told him that the car—

Q. Told him that? A. That the car—

Mr. Autenreith: Let him finish. You said the rear end of it.

Q. Didn't you tell him the rear end struck you? A. No; I said the car struck me. I don't know how they struck me.

Q. The trolley car in turning the corner struck you; is that what you said? A. Yes.

30 Q. Which part of it struck you, do you know? A. I don't know. How can I know?

Q. Didn't you tell? A. No; it was in the back.

Q. You had not seen that car at all, did you? A. No, sir; I did not.

Q. Sure of that? A. Sure.

Q. You did not hear it? A. No, sir.

Q. You did not know it was there? A. No, sir.

Q. Do you remember—is that your signature?
40 (Handing witness a paper.) A. Yes, sir.

Max Rubinow—Cross

- Q. Is that your signature? A. Yes.
- Q. Is that the signature of your son? A. I don't know, my son—
- Q. "Samuel Rubinow, M. D.?" A. Yes.
- Q. Is that the signature of your son, Samuel Rubinow, M. D.? A. Yes.
- Q. Remember making that statement, don't you, to a man by the name of Schnadel, in the 10 house of your son? A. Yes, I remember making the statement.
- Q. Your son was present? A. No; my son was not present. My son was there when I signed it.
- Q. Your son was there when you signed it? A. Yes.
- Q. Did you read it? A. No, sir.
- Q. Did your son read it? A. No, sir.
- Q. Your son signed it? A. I don't know. I can not tell for my son, but I can tell for me. 20
- Q. Yet your son signed it? A. I don't know. I can not tell for my son, but I can tell for me.
- Q. You did not read it? A. No. Let me tell you how it was.
- Q. Was it read to you? A. Yes, he read it.
- Q. Who read it? A. Mr. Schnable.
- Q. Was your son there when he read it? A. No, sir.
- Q. He was not there when he read it? A. No, sir; he came down when he gave me to sign. 30
- Q. Then your son came down? A. Yes, sir.
- Q. And your son signed it? A. Yes.
- Q. And you signed it? A. Yes.
- Q. At that time didn't you say this: "On Saturday morning, December 7, 1912, about 6:15 a. m., I was walking north on New Jersey Railroad Avenue, on the west side, and was on my way to my business at 35 Vesey Street, and was alone; 40

Max Rubinow—Cross

when I reached South Street I stepped from the west curb opposite the saloon, and as I was walking slowly intending to cross South Street tracks, and was between the tracks and curve I heard this car coming behind me, and I thought it was a Mulberry Street car going north, but I did not look back, and slowed down to let the car pass me
 10 and I then would cross over behind it; as the car passed me it turned around the curve and turned out to be a Bergen Street car and the rear swing of the car struck my right side and I was knocked down. I was dazed for the time being and can not say if the conductor saw me, or the motorman saw me, and I can not say what the car number was. The next Mulberry Street south-bound car that came along stopped after the
 20 motorman saw me and got off and a policeman named Weber also appeared in the meantime as well as some people from the sidewalk, and I was assisted into the railroad station, and in about half an hour the police ambulance came and took me to my son's home on High Street I do not know the motorman of the Mulberry Street car. I do not know his name. There was no bell rung by the motorman on this car which was running about the same as usual." Did you tell him that? A. No, sir, I can't tell you—

30 Q. Didn't you tell him that? A. No, sir. Let me tell you what I told him.

Q. I asked you did you tell him that? A. No, sir. I told him that it is not right, this (indicating paper.)

Q. Oh, you told him that it is not right? A. It is not right.

Q. This paper then is not right? A. No.

Q. But it bears your signature? A. Yes; it is
 40 my signature? A. Yes, it is my signature.

Max Rubinow—Cross

Q. It bears your son's signature? A. Yes. I can tell you how it was.

Q. You will get plenty of time to change it, I think. A. All right.

Q. Did your son read this at all? A. I can not tell what the son—it was such a condition that I couldn't tell anything.

Q. Did your son—

10

Mr. Autenreith: I object to his interrupting the answers.

The Court: Ask the question again.

(Question repeated.)

A. No, sir, I can't tell you, because it was in bad condition.

Mr. Smith: I ask that the last be stricken out, if the Court please.

Mr. Autenreith: I think it is fair.

The Court: He says no, the son did not read it. 20

(Papers marked A and B for identification.)

Q. As I understand you, you say now you were walking from the saloon corner which is the southwest corner to the drug store corner, which is the northeast corner? A. Yes.

Q. Northeast corner? Then you got in the position marked F? A. Yes, marked D.

Q. You saw a car coming south on Mulberry Street, as you call it? A. Yes. 30

Q. It was at the corner of Mulberry Street and South Street? A. Yes.

Q. Was it? A. Yes.

Q. It was still on Mulberry Street, is that right?

A. It was running.

Q. Was it running? A. Yes.

Q. And coming around the curve? A. Yes. 40

Max Rubinow—Cross

Q. Then you walked a little toward— A. Yes.

Q. —the street here? A. Yes.

Q. Did not look behind, did you? A. No, sir.

Q. Did you see any car behind? A. No, sir.

Q. At all? A. No, sir.

Q. Then as you were walking this way in a southeasterly direction— A. No.

10 Q. Southeasterly direction? A. No; east direction, to the corner.

Q. You were coming from D to F? A. A little more east.

Q. From F? A. Yes.

Q. You were walking there? A. Yes.

Q. You say a car came around the corner? A. Yes.

Q. And hit you? A. Yes.

Q. You don't know what part of that hit you, 20 do you? A. I do not know.

Q. Didn't know there was any car there? A. No, sir.

Q. Sure of that? A. Sure.

Q. Now there is a switch right at the south corner of South Street and Railroad Avenue, isn't there? A. A what?

Q. A switch? A. Yes.

Q. And the point is toward the south, isn't it, the point of the switch? A. Yes.

30 Q. Is that right? The point of the switch is toward the south? A. Yes, but they don't switch there.

Q. I didn't ask you about the switch. I asked you if the point of the switch was south? A. Yes.

Q. Where did you say your place of business was? A. In Vesey Street.

Q. That is east of the railroad? A. Yes.

- Max Rubinow—Cross

Q. There is a street which is right the other side of the trestle, isn't there, of the embankment?

A. Yes.

Q. A street that runs down? A. Yes.

Q. What is the name of that? A. Vesey Street.

Q. Is that right? A. Vesey.

Q. What is the name of the street that runs parallel with New Jersey Avenue? A. That is 10 Mulberry Street—call it Mulberry—parallel with New Jersey Avenue.

Q. The embankment was made right in the center of the street, wasn't it? A. Yes.

Q. The trains run up along the embankment? A. Yes.

Q. And the embankment divides the street? A. Yes.

Q. Didn't you go from the west side? A. Yes.

Q. Wait a minute. Didn't you go from the west 20 side of New Jersey Avenue, as a rule? A. Yes.

Q. Down South Street and then turn up the other side? A. No, sir, no, never, because it is twice so long.

Q. It is twice as long? A. Yes. Never.

Q. Twice as long? A. Yes.

Q. The other sides is parallel, the other side of the embankment? No, there is no street there back.

Q. There is no street there? A. There is no 30 street there, because another street goes through there. It is twice so long.

Q. Isn't there a street just on the other side of the embankment that runs parallel with the embankment? A. No, sir.

Q. There is not? A. There is. Yes. I am going always this way.

Q. You always go that way? A. Yes.

Max Rubinow—Cross

Q. Your factory is down here on Vesey Street? It is the other side of the embankment? A. Yes, on the other side.

Q. East of the embankment? A. More than a block.

Q. Do you say, Mr. Rubinow, when you were knocked down there was nobody present? A. No-
10 body.

Q. Nobody around there at all? A. Nobody was there. I was looking around and I tried to get up first myself, because I didn't know that it so pain that I couldn't, and I tried, and I couldn't stand up, and then I was looking there, looking a minute or two, and nobody was there, and then I see the people there coming.

Q. Oh, when you were first knocked down, and the first time you were on the street you looked
20 around and there was nobody around the street at all. A. Well, when I fall down?

Q. Yes. A. No, sir; nobody in the street at all.

Q. You say a policeman did come to you? A. A policeman came afterwards.

Q. He came to you, didn't he? A. After.

Q. All right, after, but he got there? A. Yes, he was there when they carry me out—

Q. Who was that policeman, Weber? A. I don't know his name.

30 Q. You say that in your expenses there, that you paid to your son one hundred and forty dollars for your board? A. One hundred and forty or fifty, I don't remember.

Q. Did you pay that to your son? A. Certainly, I did.

Q. You paid him for your board while you stayed at his house? A. Yes, sir.

Q. He has a house? A. No, he hasn't, but he
40 lives in the house.

Max Rubinow—Cross

Q. Is he married? A. Yes.

Q. Lives in the house? A. Yes.

Q. You were there and there was a nurse there?
A. Yes.

Q. And you paid for the board of yourself and the nurse in your own son's house? A. Yes, paid to my son.

Q. You paid it to your son? A. Yes. 10

Q. Did you pay Dr. Myere one hundred and fifty dollars? A. Yes.

Q. Did he give you a receipt for it? A. No, he did not. He came from New York and he was a half hour, and we paid him the money and he went home.

Q. Who paid it? A. My son paid it.

Q. You did not pay it? A. No, I was in bed and I couldn't pay it. I didn't have any money.

Q. Whose money was it? A. Mine. 20

Q. You paid it to Dr. Myer? A. Yes.

Q. Is Dr. Myer here, do you know? A. No, sir, I don't know.

Q. Dr. Ascher, did you pay him seventy-five dollars? A. Yes.

Q. Did he give you a receipt for it? A. I don't know if he gave me a receipt or not, because my son paid for me. I have my money by the dresser.

Q. Did your son get a receipt? A. Yes, I guess so. 30

Q. Do you know? A. I guess so.

Q. Did you ever see it? A. I did not see, because my son—I was sick.

Q. If anybody got it your son got it? A. I don't know.

Q. This massage you said you had, you paid somebody twenty-five dollars a week? A. Yes.

Q. For two hundred dollars? A. Two hundred dollars, yes. 40

Max Rubinow—Cross

Q. Do you remember being asked to itemize the amounts of money expended by you by reason of said alleged injuries or debts incurred, and for what purpose? Do you remember answering that, by signing this paper? That is your signature, isn't it? A. Yes.

10 Q. Did you say anything in your answers to this about massage? A. I said—yes, certainly.

Q. Will you show it to me? A. I said, a nurse, four hundred dollars.

Q. Nurse, four hundred dollars? A. Yes; that is for this nurse too. One nurse two hundred dollars and the other nurse two hundred dollars. I called it four hundred dollars for nurses. I didn't know to put it in a separate amount.

Q. You called these people nurse? A. Nurse, yes.

20 Q. That is what you meant when you put it here four hundred dollars, is that it? A. Yes.

Q. Do you remember also being asked to describe how the accident happened? Do you also remember this question: "Describe the happening of the accident?" and your saying, "The plaintiff was crossing from the southerly side of South Street to the northerly side of same along the crossing provided for pedestrians and stopped at about the center of the street in order to permit a trolley car—" A. No, sir.

30 Q. You don't remember that? A. No, sir. I didn't tell them, because I didn't know what—they told me north and west and south—I didn't know what it is.

Q. Wait.

The Court: Start all over again and read the answer, and you wait until it is through.

40 Q. Listen to me. "The plaintiff was crossing from the southerly side of South Street to the

Max Rubinow—Cross

northerly side of the same along the crossing provided for pedestrians, and stopped at about the center of the street in order to permit a trolley car, which was rounding the curb ahead of him from Railroad Avenue, or Mulberry Street, coming into South Street, and while standing there another trolley car of the defendant, which came up in back of him on Railroad Avenue or Mulberry Street, which this plaintiff understands to have been a Bergen Street car, turned the corner into South Street going west, and in order to do so the said car had to turn on a loop." A. What do you mean by going west? 10

Q. Going west? A. Which? What?

Q. Going that way (indicating) from here, that way? A. Along from here that way?

Q. I am asking you if you remember saying it was going west? A. No, sir. 20

Q. "The plaintiff was standing within sight of the motorman of that car, but there was no warning given or any bell sounded to warn him of the approach of the car, and he was unaware of its approach. The motorman of the car propelled it into the plaintiff, and knocking him down before he had an opportunity to avoid a collision. The plaintiff was standing on that portion of the street known as a crosswalk, which is provided for pedestrians to cross at the corners, and the car which struck him came from his rear. He had no warning or knowledge of its approach and while in this position was run down and struck by the car as above mentioned." Do you remember saying that? A. No, I do not. I couldn't tell you. I couldn't tell you it is going west, because the car went east. 30

Q. Did you say that? A. No, sir, I did not. 40

Max Rubinow—Cross

Q. This paper then—that is signed by you, isn't it? A. Yes, it is signed by me.

Q. And sworn to before Joseph Autenreith, Master in Chancery? A. Yes.

Q. And Mr. Autenreith is your counsel, isn't he? A. Well—

10 Q. Will you answer, please? A. Yes, I have answered.

Q. Mr. Autenreith is your counsel? A. Yes.

Q. You knew that these answers were to questions propounded to you under the law? A. Yes.

Q. And you told your counsel? A. Yes.

Q. How it happened? A. Yes.

Q. And your counsel served these? A. Yes.

Mr. Smith: I offer this.

A. I did not—

Paper marked C and D for identification.

20 Q. Mr. Rubinow, the doctor that attended you was your son, wasn't it? A. No, sir.

Q. Your son is physician, isn't he? A. Yes.

Q. And that is where you were taken, to his house? A. Yes.

Q. And you say that Dr. Morrison and Dr. Ascher are the ones who attended you? A. Yes.

Q. Not your son? A. No, sir.

Q. One of the people you worked for was your son, wasn't it? A. Yes, another son.

30 Q. Was he the owner of this manufacturing company? A. Yes.

Q. You worked for him? A. Yes.

Q. Did you live with him too? A. No, sir.

Q. Did you live with your son? A. No, sir.

Q. I see; what business was that; what kind of a business? A. It is a hatchet shop; hatchet factory or axes.

Max Rubinow—Re-direct

RE-DIRECT-EXAMINATION by Mr. Autenreith:

Q. You know, Mr. Rubinow, when you were at my office answering these questions, whether we had that map? A. No, sir.

Q. Well, did we have it or didn't we have it?
A. This map?

Q. Yes. A. I don't remember. 10

Q. That is when you told me the directions that you took and put it down on paper? A. No, I didn't have this map.

Q. Did I have that map there at my office? A. No, sir.

Q. And the directions of north, east, south and west were all given to me by you, weren't they? A. Yes.

Q. Were you familiar with the exact directions?
A. What is that? 20

Q. Were you familiar with north, south, east and west at that point? A. No. I could not explain right at that time north and west.

Q. Now, pointing at this loop, we will mark it H, do you know what kind of a curve that is, whether it is used by trolley cars or not? A. Yes, sometimes in the mornings they use, what they call it the Bergen Street car comes only to the station and goes back in the mornings.

Q. Is that a regular— A. No, it is not a regular. 30

Q. It is not a regular curve?

Mr. Smith: It is not a regular what?

Mr. Autenreith: Track.

Q. Do cars run on that curve with the same frequency they do on the other tracks at that crossing? A. No, sir.

Q. At the time, Mr. Rubinow, that you came along Railroad Avenue to the point A, the cross- 40

Max Rubinow—Re-direct

ing of South Street, did you look to see whether there was any car on Railroad Avenue? A. Yes, I did.

Q. Did you look? A. Yes.

Q. Was there any car there? A. There wasn't any car there.

Q. How far back into the street did you look?

10 A. Well, I was looking only for that one block, because there is no other.

Q. No tracks beyond that block? A. No.

Q. In starting across from A to B did you at any time come to a dead stop in the street? A. No, sir.

Q. Kept on walking always toward B? A. Yes.

Q. How were you standing with reference to the Bergen Street car? A. How?

20 Q. How were you standing with reference to the Bergen Street car, the one that struck you? A. I was not standing.

Q. What was your position, did you have your face towards it? A. With my face to the south—what you call it—I think.

Q. Face towards B? A. Yes, to B.

Q. That would bring your back to this car? A. Yes.

Q. What kind of a car was this Bergen Street car, large or small? A. Oh, what do you mean.

30 Q. Large or small car? A. Oh, a large car—used to be before on this same track was used to run small cars, but the last time—

Q. How long before? A. Couple of years, two or three years maybe.

Q. How long had they been running the big cars on that track? A. Oh, about two years—long cars—the long backs.

40 Q. Do you know the size of the Plankroad cars? A. Yes.

Max Rubinow—Re-direct

Q. How did it compare with that? A. That was the same size.

Q. About the same size? A. Yes.

Q. Now, Mr. Rubinow, this statement that Mr. Smith has been reading from with your signature on, when was that taken? How soon after you were injured? A. Well, that was in there on the second day—it was happened Saturday and he 10
came Monday, and I was in very bad condition—
in awful pain, my leg was—

Q. Had any of the doctors begun to treat you yet? A. No, before—we were waiting for the specialist from New York.

Q. When this statement was taken? A. Yes, and my leg was so swollen.

Q. It was two days after the accident? A. It was Saturday morning and he came Monday 20
morning.

Q. How did you feel? A. I feel very bad that time. It was temperature very high and the headache, and the leg was swollen so big (indicating), and when he came he started to ask me for a statement, and I begged him to let me alone, I can not tell nothing, and he started to beg me, that in his position he had to give a statement just the same day in the office there.

Q. Did he say who he was? A. He says he is 30
agent from the company.

Q. From the company? A. Yes, sir; and he started to beg me, and then I couldn't get along for him, and I said "All right, ask me questions and I will answer them you what you want," and he asked me a couple of questions and I answered him, and then—

Q. Did you write out any of that statement? A. No, sir. 40

Max Rubinow—Re-cross

Q. Who wrote it out? A. He write it himself.

Q. Who, the agent? A. The agent, and then he—

Q. After he had wrote it all out? A. Then he asked me for to sign it, and I told him again to let me alone, and he started to beg me I shall sign it, and he read me—I don't know what he
10 read. He put it down in the papers and I gave it to him and I was glad to get alone, I was in such condition I could not tell anything.

Q. That statement was taken before Dr. Myer had arrived? A. Yes.

Q. Did he say anything to you about a settlement, this agent?

Mr. Smith: I object to it is irrelevant, incompetent and immaterial.

Mr. Autenreith: I will not press it.

20

RE-CROSS-EXAMINATION by Mr. Smith:

Q. As I understand you, you were walking all the time, weren't you; you did not stand there at all? A. No, sir.

Q. Walking all the time? A. Yes.

Q. Now, Mr. Rubinow, this Samuel Rubinow, that is signed on the bottom here, is the doctor, isn't it? A. Yes.

Q. Is he here in Court? A. I guess so.

30 Q. Is this the gentleman over here? A. No, sir.

Q. Did he come to Court with you today? A. Yes, he did.

Q. I see. By the way, what cars run north on New Jersey Railroad Avenue? A. Where?

Q. Coming from Thomas Street around? A. No cars on this side. Bergen Street cars on the west side.

40 Q. There are two cars that come up south? A.

Max Rubinow—Re-cross

One car is coming north, and the other car, Bergen Street, going down south.

Q. The Mulberry Street cars comes down Thomas Street into New Jersey Avenue? A. Yes.

Q. Then comes along this way? A. Yes.

Q. Is that right? A. Yes.

Q. The Bergen Street car comes down Thomas Street? A. Yes. 10

Q. Into New Jersey Avenue? A. Yes.

Q. Then comes along and goes east; is that right? A. Yes.

Q. The one switch operates both, doesn't it? A. What?

Q. The one switch there operates that car upon Mulberry Street and the Bergen Street car? A. I guess so.

RE-DIRECT-EXAMINATION by Mr. Auten- 20
reith:

Q. Do you know what happened to that Bergen Street car after it hit you?

Mr. Smith: I object.

The Court: He said it went on.

Q. It went right on, did it? A. Yes, it went right on.

Q. Anybody get out or come back to you, the motorman or conductor? A. No, sir. 30

RE-CROSS-EXAMINATION by Mr. Smith:

Q. As far as you know then that Bergen Street car had not stopped at the corner at all? A. No, sir.

Q. No one had got on or off? A. No, sir.

Q. Sure of that? A. I am sure.

Q. How do you know? You never saw it at all, you say, until it hit you? How do you know? A. 40

If she did that she would not hit me.

Max Rubinow—Re-cross

Q. How do you know? A. If she would stop she would not hit me. That is what I think so.

Q. That is what you are doing, isn't it thinking? A. Yes.

Q. You did not see anything of it at all? A. No, sir.

By Mr. Autenreith: Q. After the car struck
10 you did you look to see what name was on it? A. Yes.

Q. Did you see it? A. Yes.

Q. What did you see? A. Bergen Street.

By Mr. Smith: Q. Why did you look to see what name was on the car? A. When I was looking what happened and I saw the car goes so near, and I saw the car, and it was a Bergen Street car.

Q. You said you looked to see what kind of name was on the car? A. I saw it on the roof of
20 the car. You have to see that because it is right on the sign there.

Q. Didn't you say you looked to see what name was on the car? A. Yes—I didn't look—I was looking what car it is, and I seen Bergen Street car.

Q. You were looking to see what car it was? A. Yes, what car it was. It was a Bergen Street car.

By Mr. Autenreith: Q. Did you see that car before it hit you? A. No, sir.

30 Q. When was it you looked? A. When I was down on the ground.

Q. After you were hit? A. Yes.

By the Court: Q. Do you know, Mr. Rubinow, or did you know how often the cars ran through Thomas Street and into Railroad Avenue? A. Oh, there are different times, not all the time in the daytime.

40 Q. At the time in the morning which you have

Dr. John B. Morrison—Direct

fixed at half-past six or quarter of seven did you know how frequently those cars ran? A. About five or six minutes.

Q. That is you mean they run about five or six minutes apart? A. Yes, sir.

10

DR. JOHN B. MORRISON, sworn:

Direct-examination by Mr. Autenreith:

Q. Doctor, what is your profession? A. Physician and surgeon.

Mr. Autenreith: Will you admit the doctor's qualifications, Mr. Smith?

Mr. Smith: No. I do not know him.

Q. You are practicing where? A. Newark.

Q. How long have you been practicing? A. Fifteen years.

Q. Are you a graduate of a college of a medical college? A. I am.

Q. Of what institution? A. College of Physicians and Surgeons, in New York, Columbia University.

Q. You have been practicing how many years? A. Fifteen years.

Q. And your practice has been purely medical or surgical? A. Largely surgical. 30

Q. Were you called upon to treat Mr. Rubinow? A. I was called in as an associate physician with Dr. Ascher to take care of Mr. Rubinow.

Q. When was the first time that you saw him, do you recall? A. The 7th of December, 1913.

Q. What did you find him suffering with at that time? A. Fracture of the right hip.

Q. For how long a period of time did you treat him in connection with the other doctor? A. I saw 40

Dr. John B. Morrison—Direct

him daily from the 7th of December to the 25th; every other day for the balance of that month; I saw him four or five times in January, twice in February, and twice in March and about a week ago.

Q. Just what kind of treatment was administered to Mr. Rubinow for the hip? A. He was put
10 on a water bed. By water bed we mean a mattress the size of the bed filled with water which is as soft as an air cushion, and a slight extension put on the foot, six or seven pound weight, enough weight to overcome the muscle spasm.

Q. That is, put a weight on his foot to draw it out? A. Yes; then he was put up on what we call a bed rest, so as to have his head and chest elevated, and as much as possible he was kept in that position for about three weeks. That was
20 done because he was an old man and because he had some asthmatic tendency, and we find in these old cases of fracture that unless they are kept in an upright position they get what we call hypostatic pneumonia of the lung and go off.

Q. Your treatment was for the broken thigh?
A. Yes.

Q. Is that treatment the usual, recognized treatment? A. That treatment is the best recognized treatment today by authorities for fracture at
30 this age.

Q. What kind of a result has he obtained from that fracture? A. He has obtained what is called a fibrous union.

Q. Will you please explain to the jury what you mean by fibrous union? A. Fibrous union is a condition that develops, condition of healing develops wherein the bone fragments do not unite, and in their place is put out gristly tissue, fibrous
40 tissue. It is soft, yet strong, but the bone ends

Dr. John B. Morrison—Direct

do not unite, and that cavity is filled in by this fibrous tissue, so a piece of bone between them is soft.

Q. Makes a soft union? A. Yes.

Q. Soft, while the proper thing to get in this kind of union would be bony union? A. That is the desirable thing.

Q. And a soft union is the undesirable. What 10
would you say, Doctor, as to the permanency of this injury? A. Mr. Rubinow will always be in the condition he is now.

Q. Can you state just why there is not a bony union? A. The absence of bony union is probably accounted for by Mr. Rubinow's age at the time of the fracture. He had what we call an impacted fracture, that is, the lower portion of the bone along the fracture was driven into the upper portion, and the X-ray picture developed that— 20
showed about half of the fracture impacted. Now there is nothing to do in a man of his age but to keep that impaction in position, and let the matter heal in the position. If he were a younger man, if he were a young fellow of forty years of age, a great many younger surgeons would break the impaction up and put the limb in plaster of paris and attempt to get a good union in proper anatomical relation. With old men we never do that. It is a desirable thing, to secure that impaction in that 30
shape, if possible, and the fixed majority of cases in the fifties and sixties, that impaction dissolves, and instead of being filled in with new bone, that is filled in with this fibrous tissue, and you get the result that we have got in Mr. Rubinow's case.

Q. What is the result of this broken hip in relation to the length of the leg? A. The leg is about an inch and a half shorter than the opposite leg. 40

Dr. John B. Morrison—Direct

Q. He will never, of course, get that? A. He will always be that way.

Q. Just in what way, if you can say, does this broken hip inconvenience him? A. Well, it incapacitates him from walking and for any labor.

Q. Would it permit any motion except a front and back motion? A. Oh, yes.

10 Q. That is without pain? A. Oh, yes.

Q. Can he bear the weight on that leg? A. No.

Q. His own weight? A. No.

Q. He will be able to step on it? A. Not without support.

Q. If he does will it give him pain? A. Yes, will give him pain and he probably will fall over in a heap.

Q. Doctor, in your opinion, will his condition ever be any better than it is now? A. Never.

20 Q. Never be any better? A. Never.

Q. Do you know of anything that can be—do you know of any treatment that can be had for a man of his age that will make it any better than it is now? A. No, sir.

Q. Did you have an X-ray taken of his injury? A. Yes.

30 Q. Can you tell whether this plate is the plate of the X-ray? It has been broken. A. This was an unsatisfactory X-ray, because of the fact that it had to be taken in the man's home with a portable machine, and taken on a water bed, and we could not get the patient absolutely quiet as is necessary for a satisfactory X-ray.

Q. You were present when it was taken? A. Yes, I was present. This is the plate. It shows the impaction in the shaft of the femur.

Mr. Autenreith: I will have this marked for identification.

Plate marked P-2 for identification.

40

No cross-examination.

Dr. Joseph M. Rector—Direct

DR. JOSEPH M. RECTOR, sworn:

Direct-examination by Mr. Autenreith:

Q. Doctor, do you know Mr. Rubinow, the plaintiff in this case? A. Yes.

Q. Have you made an examination of his right hip? A. I have.

Q. And his condition generally? A. Yes. 10

Q. When did you make that examination? A. The 15th day of March, 1914.

Q. What did you find to be the condition of his hip? A. He has an ununited fracture, a break of the right-hip bone at the portion where the bone fits the hip joint. There is a shortening in the limb of about one and three-quarters inches. There is about a quarter of an inch difference of measurement of the muscle, that is, the circumference of the thigh in the leg as compared with the left 20 leg and thigh.

Q. Is there any limitation on his ability to use that leg? A. There is. Upon passive motion, there is about twenty-five per cent of the usual average to the motion to the front and the rear, and to the inner side and to the outer side, taking the central line of the body as the line of the beginning.

Q. What do you say, Doctor, as to the permanency of the injury? A. Permanent—it is permanent. 30

Q. It is permanent? A. Yes.

Q. Were you able to find the kind of a union that was made of the bones? A. Yes.

Q. What kind was it? A. It was what we call a soft union or fibrous union; that is the two ends of the bones are kept in position without being united; they are simply being held there by a 40

Dr. Joseph M. Rector—Direct

soft tissue which surrounds them, like the peel of the orange surrounds the inside of the orange, except it is not adhered tightly to it.

Q. Is he able to bear any weight on that leg?

A. He is not able to bear any weight on that leg.

Q. Bear his own weight? A. He is not able to bear his own weight.

10 Q. Will he ever be, in your opinion? A. He will not ever be.

Q. Never be able to bear his own weight? A. Never be able to bear his own weight on that limb.

Q. What would be the effect if he should attempt it? A. He would fall over.

Q. Would he ever be able to walk without crutches? A. No, sir.

Q. Or a cane, or some support? A. No, sir.

Q. Never will be? A. Never.

20 Q. What would you say about this kind of an injury, is it a painful injury? A. At the time, yes.

Q. That is an injury of this kind? A. Yes, painful.

Q. That is you find them so in your experience? A. Yes.

Q. Can you tell now whether or not he suffers pain now or will suffer in the future? A. Except by the change of features when I move his limb beyond a certain limit.

30 Q. Did you try that? A. Yes.

Q. Did he give any demonstrations of pain? A. He did.

Q. What, in your opinion, is the prospect of the future? Will he always be subject to pain in that leg? A. He will.

Q. Did you examine the condition of this man's health in general? A. Yes.

Dr. Samuel M. Rubinow—Direct

Q. What would you say that his state of health is at the time you made the examination? A. He was below the average.

No cross-examination.

DR. SAMUEL M. RUBINOW, sworn: 10

Direct-examination by Mr. Autenreith:

Q. Doctor, you are a son of the plaintiff in this case, are you? A. Yes.

Q. What is your profession? A. Physician and surgeon.

Q. Where do you live? A. 602 High Street, Newark, New Jersey.

Q. Was it at your house that your father was taken after the accident? A. Yes. 20

Q. How long did he stay there? A. Eight weeks.

Q. What other doctors treated him? A. Dr. Ascher and Dr. Morrison and we consulted Dr. Myer, from New York.

Q. What did Dr. Myer, of New York, do? A. He just advised a general treatment in the case.

Q. Did he examine him? A. Sure.

Q. Then advised the other doctors? A. Yes.

Q. Do you know how much his fee was? A. One hundred and fifty dollars. 30

Q. Do you know Dr. Myer's standing in the profession?

Mr. Smith: I object.

A. Yes.

Mr. Smith: I object to it as immaterial.

Mr. Autenreith: I will withdraw the question. 40

Dr. Samuel M. Rubinow—Direct

Q. What would you say as to the charge made by Dr. Myer for the consultation at that time? A. It was a reasonable charge for one of the best men in New York.

Q. Did he come from New York—

Mr. Smith: I object and ask that it be stricken out.

10 The Court: What part?

Mr. Smith: As a conclusion on the part of the witness.

Mr. Autenreith: As to that part, "One of the best physicians," I am willing.

The Court: All right.

Q. You said his charge of one hundred and fifty dollars was a reasonable charge? A. Yes.

Q. For the work that he did? A. Yes.

Q. You were present at the time? A. Yes.

20 Q. Do you know Dr. Myer's standing in the profession? A. Yes.

Mr. Smith: I object.

The Court: He says yes.

Mr. Autenreith: He knows. That is the reason he makes the statement.

Q. Where is Dr. Ascher now? A. He is on vacation in California, I guess.

Q. Have you endeavored to locate him for the purpose of this trial so he could come here? A.
30 Yes.

Q. You found out that he was in California? A. He is in California.

Q. Did you treat your father yourself at the time of his stay at your house? A. Yes, together with the other physicians.

Q. Do you remember an agent of the Public Service coming there? A. I do.

40 Q. Were you present at the time he took a

Dr. Samuel M. Rubinow—Direct

statement or what purported to be a statement from your father? A. Part—partly present and partly not.

Q. What do you mean by that? A. I was in and out of the room. We were busy that day. I was not present all the time.

Q. How many days after the accident was it? A. It was on the second day. 10

Q. On the second day? A. On the third day. It was Monday. The accident happened Saturday and that was Monday, 2 p. m.

Q. Was your father in pain? A. Yes; did not sleep the whole night.

Q. What was his tempature? A. One hundred and two.

Q. Did this man come into the room? A. Yes.

Q. Tell us what happened? A. He came for a statement and my father did not want to give any 20 statement.

Q. Did they say these things? A. Yes.

Q. Said he came for a statement? A. Yes, he came for a statement.

The Court: Of course, Mr. Autenreith, you have got to understand he is not to say what he thinks, but it is only what was done and what was said.

Mr. Autenreith: That is why I asked him. 30

The Court: Understand that, Doctor; you are not to state what you think; you are only to state what you saw and what you heard.

A. My father said, "I do not want to give any statement," and the man urged him, and I advised father to give—

Q. What did the man say? A. The man said it 40

Dr. Samuel M. Rubinow—Direct

was a statement he wanted to know how to satisfy his claim, and what happened.

Q. What was your father's temperature? You say it was one hundred and two? A. Yes.

Q. Had Dr. Myer been there? A. We were waiting for Dr. Myer that day.

Q. Who wrote this statement out? A. The
10 agent wrote it out.

Q. Did you sign it? A. I did.

Q. As a witness? A. I did.

Q. Did you know what was in it? A. Partly I know—approximately.

Q. You were in and out of the room all the time this was going on? A. Yes.

Q. Your father at that time was in bed, wasn't he? A. In bed, yes.

Q. Do you know whether the agent read this
20 statement over to your father after he wrote it out? A. He handed it to me to read it over.

Q. Did you read it all over? A. I looked it over.

Q. Was your father in pain at the time? A. Yes, and after. May I make a statement?

Q. Just a minute.

The Court: Answer the questions.

Q. The time spent by your father at your house was eight weeks? A. Yes.

Q. Did he pay you anything for board? A. Yes.
30 Q. How much? A. One hundred and forty dollars.

Q. Your father did not live there as a regular thing? A. No.

Q. Where did he live? A. In 73 Parkhurst Street.

Q. Is that anywhere near your place? A. No, it is pretty far.

40 Q. Was there a nurse there? A. Yes.

Dr. Samuel M. Rubinow—Direct

Q. Who was the nurse? A. Miss Blair.

Q. Have you examined your father's injury? A.
Yes. The first one who examined it was me.

Q. You did examine it? A. Yes.

Q. What did you find him to be suffering with?

A. I found a fracture of the hip joint.

Q. Fracture of the hip joint? A. Yes.

Q. Have you examined him since he has been 10
out? A. Yes.

Q. That is out of bed I mean? A. Yes.

Q. Have you examined him lately? A. Fre-
quently, yes.

Q. In your opinion is this injury permanent?
A. Yes.

Q. What is the condition of his right leg with
respect to the left one? A. It is shorter, an inch
and three-quarters, than the left one.

Q. Is that a painful injury? A. Yes. 20

Q. In your opinion will your father ever be able
to walk without the use of some support? A.
Never.

Q. Crutches or canes? A. Never.

Q. Do you know the weeks which your father
was in your house whether your father suffered
pain? A. Suffered pain all the time.

Q. What was his condition as to sleep at night?
A. Did not sleep nights. The first few nights I
had to stay with him the whole night and give 30
him morphine. He could not sleep.

Q. Was that around the time this release was
signed? A. Just before this was signed he had
morphine.

Mr. Smith: I object. There is no release.

Q. I mean a statement. The time before that
statement was signed? A. Yes, just the night be-
fore the statement he had morphine. 40

Dr. Samuel M. Rubinow—Cross

Q. What was his condition when this agent was there? A. When the agent was there?

Q. Yes, his condition? A. Was sick.

Q. Well, pain or what? A. Pain, fever, general weakness.

Q. Did you pay out any expense for your father? A. Yes, I did pay.

10 Q. For him? A. For him, yes.

Q. What did you pay out? A. I paid for all kinds of appliances, mattress, ice bags, hot-water bags, tables, surgical tables for the bed, weights, everything, gloves, I paid physicians.

Q. Did you pay it? A. Yes—not out of my pocket.

Q. You heard the testimony of Dr. Morrison? A. Yes.

Q. Sitting here in Court when he testified? A.
20 Yes.

Q. In your opinion would you say that the treatment which Dr. Morrison testified he had given to your father was the proper treatment for a man of his age? A. Yes.

Q. It was the proper treatment? A. The only treatment.

Q. The only treatment? A. Yes. May I make a statement?

The Court: No.

30

CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Rubinow, you say you are a physician and surgeon, aren't you? A. Yes.

Q. You were present at the time this statement was made, you say? A. Yes.

Q. And you knew your father's condition? A. Yes.

Q. You knew he was in the condition at that time to make a statement, didn't you? A. I knew
40 he was not.

Dr. Samuel M. Rubinow—Cross

Q. What did you let him make it for then? A. I will explain if you will let me.

Q. I said what did you let him make it for?

The Court: You may answer.

A. My relations with the Public Service.

Q. Your relations with the Public Service? A. Yes, as a physician in Newark I had very often to deal with the Public Service and we were on good 10 terms with Mr. Cushing, the claim agent, and I did not want to insult Mr. Cushing by refusing a statement that my father did not want, and to prove to you—he asked my father to sign; we had no time to read over the statement; we had no time; I was too excited at that day, and my father too, but the man says to sign it “What is the difference; you don’t lose anything by this:” and then I marked down “In general true.” I meant I did not want to go into detail as to whether the state- 20 ment is so or not and had no time to read everything. When he started to read I remarked to the agent something is wrong, and he struck it out, and you can find here places struck out.

Q. Show me. A. Maybe it is another statement. Oh, yes, I will show you.

Q. Show me. A. I will show you there are places marked out, here you can see. Here is the words on the top.

Q. You put instead of a word “in” here, you 30 have “into”? A. No.

Q. That is just the word, isn’t it? Look at it. A. I will show you, because I remember very well lines was struck out.

Q. Look at it? A. I don’t know whether it is the same.

Q. That has your signature on it? A. That doesn’t prove anything.

Q. That doesn’t prove anything? A. No. 40

Dr. Samuel M. Rubinow—Cross

Q. With your signature on it? A. No.

Q. With his signature on it? A. It doesn't prove to me. I remember he did strike out.

Q. Show it to me there.

Mr. Autenreith: He has pointed out one.

Mr. Smith: The word "into."

Mr. Autenreith: That is a striking out.

10 A. What is this?

Q. You have stricken out the word? A. Not I; I didn't write anything.

Q. It is not stricken out. Show me any line, that is all. A. What is this?

Q. "Conductor." It is not stricken out, is it?

A. I consider that those lines were stricken out.

Q. Can you swear there were lines stricken out?

A. Yes.

20 Q. That is your signature? A. Yes, and it is in general true, I marked down.

Q. You marked that? A. Yes, I marked it, my handwriting.

Q. That is your signature? A. Yes.

Q. You only signed the two sheets, didn't you?

A. Yes—I don't know.

Q. "Yes, you don't know"? A. I don't remember.

Mr. Autenreith: Let him answer you.

Mr. Smith: He said, "Yes, I don't know."

30 A. My father refused to sign it. I insisted on signing, because I thought whatever there is the Public Service is—they knew me very well and I knew them, and they wouldn't act in a way which I did not expect.

Q. Did you know there was anything untrue in that? A. I knew it.

Q. What? A. I know.

40 Q. You knew there was something untrue? A. I

Dr. Samuel M. Rubinow—Cross

knew, and that is why I wrote on "In general true."

Q. You knew there was something untrue? A. I knew.

Q. What was untrue in it at the time? A. I mean in general the statement was untrue, because it was not looked over.

Q. What do you mean by that, you knew in 10
general the statement was untrue? What do you mean by that? A. I did not—I knew that there wasn't everything put down, because we had no time—

Q. You said the agent after reading it gave it to you to read? A. Oh, I didn't read.

Q. You didn't read? A. I looked it over, I said.

Q. You read it over, didn't you? A. I looked 20
it over.

Q. What do you mean by looking it over? A. It is a difference.

Q. What is the difference in your mind between looking over and reading over? A. Reading, you read it carefully, and looking it over is just in a second went over this paper.

Q. In other words, that way, do you mean (illustrating)? A. No, read it over. I am surprised—there was words and lines stricken out. I remember that. 30

Q. Show me them there sir? (Witness examines paper.)

Q. Did you read it? A. My father did not want to sign it.

Q. I didn't ask you that, sir. Your father did sign it, didn't he? A. He didn't want to. He did.

Q. Did he sign it? A. Yes. 40

Fred W. Miller—Direct

Q. He signed it under your direction? A. After I marked down, "In general true."

Q. Yes; after you marked down "In general true," and then you signed it as a witness? A. Yes.

Q. Didn't Dr. Schnadel talk to your father and in your father's language? A. No.

10 Q. What did he talk to you, in English? A. English, yes.

Q. Oh, you understand English, don't you? A. I do.

Q. You can read it, can't you? A. I can.

Q. You can see all the words here on it, can't you? A. Yes.

Q. You can read your own signature, can't you? You can read your father's signature?

A. I can.

20

Recess.

FRED W. MILLER, sworn:

Direct-examination by Mr. Autenreith:

Q. Mr. Miller, where do you live? A. 171 Pennsylvania Avenue, Newark.

30 Q. Do you know Mr. Rubinow? A. I do.

Q. Do you recall the morning of December 7th, when Mr. Rubinow was injured? A. I do.

Q. Did you see Mr. Rubinow that morning? A. I did, yes.

Q. Where were you when you first saw him?

A. At the corner of South and Railroad Avenue.

Q. South Street and Railroad Avenue. Where
40 was Mr. Rubinow when you first saw him? A.

Fred W. Miller—Direct

He was on the opposite corner, about twenty-five or thirty feet from the corner.

Q. Just refer to the map there. Was he by that saloon there? A. He was right around—about at the saloon door, side entrance.

Q. Which way was he walking? A. Towards the west—toward the north, rather.

Q. Which side of South Street were you on? 10
A. On the opposite corner.

Q. That is at the north side? A. At the drug store?

Q. The drug store corner? A. Yes, sir.

Q. That is the north side of the street? A. Yes.

Q. At the time you saw Mr. Rubinow did you see any car in the block between South Street—strike that out. Did you see any car at the time you saw Mr. Rubinow on Railroad Avenue? A. I 20 did not.

Q. Wait a minute. —in the block between South Street and Thomas Street? A. I did not.

Q. Were you looking that way? A. I was.

Q. Was there any car there? A. There was no car.

Q. After you saw Mr. Rubinow what did you do? A. I walked to the paper store about twenty-five or thirty feet from the opposite corner towards where Mr. Rubinow was walking. 30

Q. Where is that paper store? A. About twenty-five or thirty feet from the corner.

Q. What street? A. On Railroad Avenue.

Q. Near the drug store? A. On the drug store side.

Q. About how far from the corner? A. About twenty-five or thirty feet.

Q. Did you see him after that? A. I did not. 40

Fred W. Miller—Direct

Q. After you had gotten around the corner on Railroad Avenue did you have occasion to look back? A. I did, yes.

Q. Did you notice then whether there was any car on that block? A. There was a car coming, yes.

Q. About what part of the block was it in? A. 10 About the middle of the block.

Q. Coming in which direction? A. Towards the station, from Thomas Street.

Q. Towards where you were standing? A. Yes.

Q. Coming in? A. Going north.

Q. That would be a northerly direction? A. Yes.

Q. Now what hour of the day was that, Mr. Miller? A. Around 6:30 a. m.

20 Q. Where were you going at the time? A. I was going to work.

Q. You were going to work? A. Yes.

Q. For whom do you work? A. Rubinow Edge Tool.

Q. You work for the Rubinow Edge Tool? A. Plaintiff's son.

Q. Was that the time that Mr. Rubinow usually came to work? A. Around the usual time, yes.

Q. Was that route, the way you were walking 30 that morning, the route that you usually took? A. Yes.

Mr. Smith: I object to it as immaterial and irrelevant.

Mr. Autenreith: I won't press it if you object to it.

The Court: It may be stricken out.

Q. Did you see Mr. Rubinow after you had gone 40 in the paper store? A. I did not.

Fred W. Miller—Direct

Q. Did you see him after you came out of the store? A. I did not.

Q. Where did you go then? A. I looked back to see whether he was coming, as I usually did; I usually met him there to go to work with. I did not see him but three or five people have hold of a man right near the station door, carrying somebody into the station. 10

Q. Did you see who the man was? A. I did not.

Q. Then what did you do? A. I went right on to work.

Q. What car was it you saw as you got around this corner that was coming up this block? A. That was a Bergen car.

Q. The block of New Jersey Railroad Avenue? A. The Bergen car.

Q. Was it there when you came out of the car? 20
A. It was not.

Q. Did you see any other car there as you came around that corner? A. As I came on Mulberry Street there was a car there, yes.

Q. Where was the Mulberry Street car? A. At the drug store corner.

Q. Calling attention to the map, whereabouts on that map? A. Right about this line there—above "Ave."

Q. At the point J on the map. Where were you 30
when you saw that? A. Just passing around the corner.

Q. That is the northeasterly corner? A. Yes.

Q. What were the conditions there as to light or darkness? A. Well, it was about medium, just about break of day.

Q. About break of day? A. Yes.

Fred W. Miller—Cross

CROSS-EXAMINATION by Mr. Smith:

Q. When did you first start to work for Rubinow Edge Tool Company? A. About fifteen years ago.

Q. Where do you live? A. 171 Pennsylvania Avenue.

Q. So that you know Mr. Rubinow pretty well?

10 A. I do, yes.

Q. Work for his son? A. Yes.

Q. Now as I understand you when you first got to the corner there wasn't any cars there at all, were there? A. As I got to the corner of the drug store there was a Mulberry Street car there, yes.

Q. Was that after you came out of the paper store? A. No; when I got to the corner.

Q. Was that after you came out of the paper store? A. No, it was gone when I came.

20 Q. Before you got to the paper store? A. Yes.

Q. How did you get to the drug store from what street? A. From what street? From Orchard Street, came down South.

Q. Came down South Street? A. Yes.

Q. And then at the drug store corner you started up north? A. Yes.

Q. When you got to the corner you say there was no car coming along South Street? A. No.

Q. None at all? A. No.

30 Q. When you got to the corner did you see Rubinow you say? A. I did, yes.

Q. He was where? A. He was about the side entrance of the saloon.

Q. That is of— A. Railroad Avenue.

Q. Then did you go on then as soon as you saw him—go to the paper store? A. I did.

40 Q. And your back was toward him then wasn't it? A. It was.

Fred W. Miller—Cross

Q. You did not look back again until you went into the paper store? A. Yes, I got to the paper store then.

Q. You looked back? A. Yes.

Q. You say you saw a car? A. I saw a car coming.

Q. Where was that? A. About the middle of the block.

Q. Then where was Mr. Rubinow? A. I couldn't see him. 10

Q. Could not see him at all? A. No, sir.

Q. Why not? A. Because you can not see from that side of the street.

Q. Well, here is where you were, isn't it? You were in here somewhere at the paper store? A. Yes.

Q. You saw Mr. Rubinow when he was on this corner. Was Mr. Rubinow about here (indicating)? A. Yes. 20

Q. Then you went to this corner? A. To the paper store.

Q. Down to the paper store. Then you say you looked south? A. Yes.

Q. There is a street, however, there? A. You can't see the sidewalks though.

Q. You mean from this sidewalk you can not see that sidewalk? A. No.

Q. You can not? A. No, sir. 30

Q. Do you mean to say, sir, that from this sidewalk here you can not see the sidewalk on the west side? A. No, sir.

Q. Of Railroad Avenue—look at the map here? A. I see the map.

Q. Don't you see that the outer edge of the curb is not yet to the middle of New Jersey Avenue?

A. I understand you perfectly well. You can not see the sidewalk.

Fred W. Miller—Cross

Q. Why not? A. Because you can not. It extends out too far there.

Q. What extends out too far? A. This here sidewalk extends out further than the other sidewalk.

Q. You can see a block from here to here, can't you? A. You can not see it thirty feet from the

10 corner.

Q. What cuts off your view, anything? A. Of course it does. You can see the street but you can not see the sidewalk.

Q. Do you mean to say, sir standing at this point, right at the corner— A. At he corner you can.

Q. —you can not see the sidewalk on the other side of the street? A. No, sir, you can see it there, yes, but not from where I was at.

20 Q. How far back were you? A. About thirty feet.

Q. Then you can not see the sidewalk? A. No.

Q. Can you see the middle of the street? A. Yes.

Q. Then you did not see Mr. Rubinow there at all in the middle of the street? A. No, sir.

Q. There wasn't anybody there? A. Not that I know of, no.

30 Q. If there was anybody there you would have seen it? A. I would, yes.

Q. So when you reached the paper store and the trolley car was in the middle of the block between Thomas Street and South Street you could see the trolley car? A. Yes.

Q. But you could not see anybody in the middle of South Street and New Jersey Avenue at all? A. No, sir.

40 Q. There was nobody there at all? A. Not that I know of. I couldn't see.

Fred W. Miller—Cross

Q. Then you went in the paper store? A. Yes.

Q. Is that right? A. That is right.

Q. And when you came out you saw somebody carrying a man into the station? A. I saw four or five men have hold of somebody else.

Q. You didn't see this Bergen Street car, did you? A. No, didn't see no car.

Q. Do you know about how far it is from South 10 Street to Thomas Street? A. About a hundred and twenty-five feet.

Q. Isn't it two hundred and twenty-five feet? A. I don't think it is.

Q. Don't think it is. You think it is one hundred and twenty-five? A. Yes.

Q. Then from this, standing in the middle of the street here, at this point marked F, how far down New Jersey Railroad Avenue can you see? A. See down as far as Murray Street. 20

Q. How far is that? A. Three blocks.

Q. So a person standing at this point marked F could see three blocks? A. Could see three blocks. There is a bend in the street.

Q. Mulberry Street cars run north on New Jersey Railroad Avenue and then up towards Market Street? A. Yes.

Q. They don't curve there except on this middle curve that you see here? A. Unless they have to turn back and go up that switch. 30

Q. Back here? A. No, right there (indicating H.)

Q. Marked H? A. Yes.

Q. They don't turn there in the mornings, do they? A. Not unless they turn back. Sometimes they do. Very seldom.

Q. Sometimes they turn back? A. Yes.

Fred W. Miller—Re-direct

Q. Bergen Street cars run this way and then east? A. Yes.

Q. North on New Jersey Railroad Avenue and then east? A. They turn back sometimes too.

Q. Sometimes they are turned back? A. Yes.

Q. Now you are sure you saw a Mulberry Street car here? A. Yes.

10 Q. Wasn't it after you came out of the paper store? A. No, sir.

Q. Sure of that? A. I am positive.

Q. Do you know the exact time it was? A. Not exactly, no, sir; it was around 6:30.

Q. That is where you saw this car here, right at this point? A. Right there.

Q. Was it standing? A. It was standing, yes, when I saw it.

20 Q. Standing when you saw it. Was it standing at the time when you saw Mr. Rubinow over here at the saloon door? A. That I don't know.

RE-DIRECT-EXAMINATION by Mr. Autenreith:

Q. Mr. Miller how far down, or how far south on Railroad Avenue do the trolley tracks extend on South Street? A. To Thomas.

30 Q. How far down is Thomas Street? A. About one hundred and twenty-five feet.

Q. No, no; how many blocks? A. One block.

Q. Just one block down? A. Yes.

Q. This paper store, you say, is next to the drug store on New Jersey Avenue? A. North.

Q. North of the drug store? A. Yes.

Q. Northerly from South Street? A. Yes.

40 Q. Are there buildings in there? A. There is no buildings in between the drug store and the paper store, no.

Fred W. Miller—Re-cross

Q. What kind of a building is the drug store?

A. It is a frame building.

Q. How high? A. Two and one-half stories.

Q. Can you tell what shut off your view of the sidewalk when you were there at the sidewalk—the sidewalk where Mr. Rubinow was—what shut off your view from that? A. Why, you can't see there, and the car partly shut it off when I first 10 turned.

Q. What else shut it off? A. That is all.

Q. Can you see past the building, the drug store? A. From the paper store?

Q. Yes. A. Yes.

RE-CROSS-EXAMINATION by Mr. Smith:

Q. You said, I believe, that the reason you could not see the sidewalk, is because the car probably shut off your view? A. If I was standing right 20 at the corner, yes, it would, but not from the paper store it would not.

Q. From where you were at the paper store at that time could you see all the way down New Jersey Railroad Avenue, south? A. If I waited until the car passed, yes.

Q. I didn't ask you that, sir. I am not speaking of any car. Assume there was no car there. If you stood on the sidewalk near the paper store you could not see all the ways down on New Jer- 30 sey Railroad Avenue? A. You could see the street, yes.

Q. See the car tracks? A. You could see the car tracks, yes.

Q. You saw the car coming? A. Yes.

Q. Did you see this sidewalk over there? A. No, sir.

Q. Could not see that? A. No, sir.

George M. Rubinow—Direct

Q. Know whether this map is true or not? A. I believe it is, yes.

Q. Is there anything from this point that will prevent you from seeing down? A. Not from the point, no.

Q. Anything from back here? A. Yes.

Q. What does—the building, you mean? A. 10 Well, the building don't, no, but this corner comes out further than the other corner.

Q. Of course it comes out to here? A. You can see about ten to fifteen feet from the corner, but beyond that you could not.

Q. Ten or fifteen feet down this way? A. Yes.

GEORGE M. RUBINOW, sworn:

20

Direct-examination by Mr. Autenreith:

Q. What is your business? A. Manufacturer of tools, hatchets and hammers.

Q. You are the man that runs the Rubinow Edge Tool Works? A. Yes.

Q. Mr. Rubinow, the plaintiff here, is your father? A. Yes.

Q. Do you recall an accident happening to Mr. 30 Rubinow on December 7th, 1912? A. Yes.

Q. When did you first know of it? A. I was called to my brother's house and was told that an accident happened to my father, a car knocked him down.

Q. Was it the same day? A. Same day, same morning.

Q. What did your father do around the place 40 before the accident? A. He was superintendent of the works and did all the inside work that the factory requires.

George M. Rubinow—Direct

Q. How much did you pay him a week? A. For the last five years I have paid him forty dollars a week—at the rate of forty dollars a week.

Q. How many hours a day was he accustomed to work? A. From 7 o'clock in the morning until closing time.

Q. What time was closing? A. The machinery stopped at half-past five, and probably takes another few minutes, about a half an hour, to leave things in order and close the shop. 10

Q. How long had he been working there for you? A. He has been working for me for fifteen years.

Q. Fifteen years? A. Since 1899.

Q. Do you know whether he was ever off on account of illness? A. No, with the exception of a week or so in the summer time he would go for a vacation. He was never off. 20

Q. Were you familiar with his general condi-

Q. What was his general condition of health, in your observation? A. It was in good condition.

Q. What kind of work was it that he was doing there? A. Well, the work was to give out work to the men, to inspect the work, to go around from one place to the other, attend to the shipping of the orders, shipping out, picking out what is to be done for the day, and what kind of finish for one kind of tools and what for another, and what kind of labels and so forth, finishing up, or seeing that we should have plenty of stock—when the stock would run out he would report to me that things were short; he did all the inside work the factory required. I see after myself the outside work mostly. 30

Q. Did you pay any monies for Mr. Rubinow during the time of his illness? A. Yes. 40

George M. Rubinow—Direct

Q. At his request? A. At father's request, of course.

Q. I show you a check, dated December 9, 1912, for fifty dollars, payable to the order of S. Rubinow, M. D., signed by George M. Rubinow. Is that your signature? A. Yes.

10 Q. Was that money paid at the time? A. That was given to the doctor for expenses, for moneys he laid out.

Q. Your brother? A. My brother.

Q. I show you another check dated December 28, 1912, payable to S. Rudinow, M. D., fifty dollars, and signed, George M. Rubinow; is that your signature? A. Yes.

Q. What was that for? A. The same purpose.

20 Q. I show you another check, payable to J. Bennett Morrison, for fifty dollars, dated June 3, 1913, signed George M. Rubinow. A. Yes.

Q. What was that for? A. That was for Dr. Morrison, doctor fees, on account of his fees.

Q. I show you another check, dated the same day, payable to Dr. Morris Ascher, fifty dollars, and signed by you? A. Same purpose.

30 Q. I show you a check dated May 12, 1913, payable to S. M. Rubinow, M. D., for fifteen dollars, and signed by yourself; what was that for? A. For several expenses and moneys laid out.

Q. What kind of expenses do you mean? A. Kind of expenses for the sickness and some for board—I could not distinguish the fees.

Q. Another check to C. H. F. Baker, M. D. fifteen dollars, dated March 29, 1913, signed by you? A. Yes.

40 Q. What was that for? A. That was to Dr. Baker for making an X-ray picture.

George M. Rubinow—Direct

Q. That X-ray picture of your father's hip? A. Yes.

Q. I show you another check dated February 13, 1913, payable to Smith & Smith, for five dollars, signed by you? A. Yes.

Q. What was that for? A. That was for an ambulance to bring over my father from my brother's, the doctor's house, to his own house— 10
had to hire a private ambulance.

Q. That was for that item? A. Yes.

Q. Another check, Sol. Rubinow, M. D. fourteen dollars twenty-five cents, dated February 7, 1914, signed by you; what was that for? A. Well, different disbursements for medicines and different appliances.

Q. Check of January 25, 1913, payable to Miss Blair, twenty-five dollars, signed by you; what was that for? A. That was the nurse. 20

Q. Another check, January 21, 1913, to S. Rubinow, M. D., for \$7.50, signed by you? A. Yes.

Q. What was that for? A. I don't know; some little things he had to buy for father.

Q. Another check, January 18, 1913, to Miss Blair, for \$25? A. Nurse.

Q. Nurse fee? A. Yes.

Q. Another check, January 14, payable to Rondel Schuman, \$5; what is that for? A. Surgical 30
appliances.

Q. Another check dated 13th of January, 1913, payable to Miss Blair, \$25? A. That is the nurse.

Q. That is for the nurse? A. Yes.

Q. Check of January 5, 1912, payable to bearer, \$25? A. I see that has Miss Blair's endorsement. That was for her, I just made it out not to her name, but to bearer.

George M. Rubinow—Direct

Q. Do you know whether that date, January 5, 1912 is the right date? A. Yes, I guess it is right.

Q. Did you ever draw any checks to Miss Blair before this time? A. Before she was a nurse, no. I didn't know her.

Mr. Smith: What was the date?

10 Mr. Autenreith: Apparently January 5, 1912—misdated.

Mr. Smith: I ask that it be stricken out.

The Court: If that is the date, January 5, 1912, that precedes your accident about a year.

Mr. Autenreith: The witness says it is endorsed by Miss Blair. That probably explains it.

20 Right at the first of the year, when anybody is apt to write 12 instead of 13. This says, 1-5-12 in the front of it. He says he never paid any money to Miss Blair before this accident.

Mr. Smith: He didn't say anything of the kind.

Mr. Autenreith: It says "Bamberger & Company."

The Court: Bamberger's Company, 1913.

30 Mr. Autenreith: I will leave the check out. Miss Blair will tell us when she got it.

Q. I show you another check dated December 28th, 1912, payable to S. Rubinow, for \$25. What is that for? A. That is to the doctor. It might have been for board or for any other money he spent.

40 Q. I show you another check December 21, 1912, to S. Rubinow, M. D., \$25? A. Same thing.

George M. Rubinow—Direct

Q. Another check of December 17, 1912, payable to Sol. Rubinow, M. D., \$25, signed by yourself; what is that for? A. That is also for the same purpose. He might have paid the doctors or somebody else. I don't know what he did with the money.

Q. Your father at this time was at his house?
A. Yes. 10

Q. I show you another check, December 14, 1912 payable to Sol. Rubinow, for \$7. A. That is also Miss Blair's endorsement.

Q. Another check of December 13, 1912, for \$52.25. A. That was to pay for the water mattress that he bought.

Q. Water mattress? A. A water mattress, yes.

Q. I show you another check of August 23, 1913, payable to M. Rubinow, that is for \$100, signed by yourself. What was that for? A. That was for board at the seashore. 20

Q. During the following summer? A. During the following summer.

Q. I show you another check of August 5, 1913, to M. Rubinow, for a hundred dollars? A. The same.

Q. Made by yourself. What was that for? A. For the same thing. He stayed there for eight weeks.

Q. Has your father done any work since this accident? A. No, sir. 30

Q. Do you know whether he ever tried to work again? A. He tried, but he did not go.

Q. Did not stay there on the job? A. Could not do it.

Q. Is he working now? A. He comes around to the shop for a while, but just a pastime; he couldn't do no work.

Q. Does not do any work? A. No, sir. 40

George M. Rubinow—Cross

CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Rubinow, all these checks are made out in your name. Why are they your checks? A. Well, they are not made out in my name, no, sir.

Q. Who signed them? A. I signed, but it is not—

Q. They are made out to you? A. By me, yes.

10 Q. From your money? A. Not from me, but from Father's money.

Q. Who are they signed by? A. They are signed by myself.

Q. In your name? A. Now when we understand a check in my name, it means a check to me, to my order.

Q. No; a check signed by you? A. Yes.

Q. All right. Now when these are presented they are charged out to your account? A. Yes.

20 Q. So this money was all taken out of your account wasn't it? A. Yes.

Q. And your father was at your brother's house? A. Yes.

Q. The only checks that you have here payable to doctors are one to Mr. Ascher for fifty dollars, and one to Mr. Morrison for fifty dollars; isn't that true? A. Yes.

30 Q. And all the money that was paid to Mr. Morrison was fifty dollars, wasn't it? A. No, sir, not all. He didn't ask me that.

Q. Have you any other checks at all that are made to Dr. Morrison? A. I didn't pay them all in checks. My brother paid out several moneys, probably. He paid him in cash.

Q. Probably? A. I think so.

Q. Is Dr. Morrison still here?

Mr. Autenreith: No; but Dr. Rubinow is here. He can tell us about it.

George M. Rubinow—Cross

Q. You haven't any other checks except what is there? A. No, sir. Well, I had money and gave him money.

Mr. Autenreith: If you still raise objections to this check I will call Miss Blair. If you will look at it you will see it is simply a mistake.

Mr. Smith: Oh, it is deposited January 10 26, 1913. All right put it in.

Mr. Autenreith: Check of January 5, 1912, to bearer, twenty five dollars, endorsed, Anna D. Blair, made by George M. Rubinow— I will offer all those checks in evidence.

Mr. Smith: I object to the two checks made in August, both for the sum of one hundred dollars, which he says is for board at the seashore. In the event that anything was chargeable to the defendant I do not see how they can be charged. 20

Mr. Runyon: The testimony is that Mr. Rubinow was directed to go to the seashore resort to take certain treatment and that is connected up with the statement that he was doing this under the direction of his then attending physician, being a part and parcel of his treatment at that time, and in that respect it is admissible. 30

Mr. Smith: If it is for treatment of course I have no objection, but don't you see what he says it is for his board at the seashore. He can not charge his living to the defendant company. He can charge treatment, he can charge medicine, he can charge anything that goes into the treat- 40

Max Rubinow—Direct

ment for him, but he can not charge food. Board is nothing more than food and lodging.

10 The Court: I am inclined to look at it that way, gentlemen, unless there is some further explanation of the purpose for which those moneys were expended other than board.

Mr. Autenreith: We will call Mr. Rubinow and have it straightened out.

 MAX RUBINOW, re-called:

Direct-examination by Mr. Autenreith:

20 Q. While you were at the seashore did you expend any money for treatment? A. Well, the doctor told me I had to go and take warm baths—warm ocean baths.

Q. Warm ocean baths? A. Ocean baths, yes. I had to pay—used to pay fifty cents for baths a day.

Q. This money was sent to you by George M. Rubinow— A. Yes.

30 Q.—for what purpose was it used? A. Well, it was for expenses, to pay for baths and for board and for bathing. Of course I used my—I had to either live in the city or pay there and live there.

Q. Did you keep the house in the city at the same time? A. Certainly.

Q. That is all.

Mr. Smith: The same objection.

The Court: I will overrule the objection and they may be admitted, and you have your objection.

40 Bundle of checks marked Exhibit P-2.

Max Rubinow—Direct

The Court: The Court did not keep account of these checks. Do they cover any other item of outlay and expense other than the plaintiff testified to?

By Mr. Autenreith: Q. Mr. Rubinow, while you were at the shore taking these warm salt baths, did you at the same time keep up your place in the city? A. Yes. 10

Q. Was your expense changed any in the city?
A. No, sir.

Q. Was it more or less, or what? Was it increased or diminished? A. Well, maybe, of course, a dollar or two, but I wasn't there. Maybe it was less in expense than I said there. I can't tell.

Q. Have you any idea how much less? A. Oh, two dollars.

Q. Two dollars how often? A. A week.

Q. Were there any other moneys expended by you or by your son by your direction? A. Yes. 20

Q. Which was not covered by these checks? A. Yes. There was money what my son used to pay, I don't know. Sometimes in checks and sometimes to somebody cash.

Q. Generally paid with cash? A. I used to pay with cash. When I go up to the country I take about one hundred and thirty dollars with me in cash.

Q. Did you keep any track of that? A. Yes; 30
when I went there I kept for my son, because all my money is in his place.

Plaintiff rests.

Motion to Nonsuit

Mr. Smith: I move to nonsuit on the ground there is no negligence established on the part of the defendant, and that the case shows contributory negligence on the part of the plaintiff.

10 The Court: I decline to grant the motion at this time. You may enter an exception.
Mr. Smith: Exception.

Defendant's Testimony

DR. GEORGE B. GALE, sworn:

Direct-examination by Mr. Smith:

20 Q. Doctor, you are a practising physician and surgeon in New Jersey? A. I am.

Mr. Autenreith: I will admit the Doctor's qualifications.

Q. You examined Mr. Rubinow, did you, Doctor? A. I did.

Q. What did you find? A. He had a broken hip. I found he had a united fracture of the right hip.

Q. What was the union? A. A fibrous union.

30 Q. At the time you saw Mr. Rubinow did he tell you how the accident happened? A. He did.

Q. What did he tell you? A. He said that he was injured in December, 1912, by being struck by the rear end of a car as it passed around a curve.

CROSS-EXAMINATION by Mr. Autenreith:

Q. Anybody present at that time? A. Yes.

Q. Who? A. His son, Dr. Rubinow.

40 Q. Dr. Sol. Rubinow? A. Dr. Sol. Rubinow, yes.

William D. Schnable—Direct

WILLIAM D. SCHNABLE, sworn :

Direct-examination by Mr. Smith:

Q. Mr. Schnable, where do you live? A. 765
Huntington Street, Newark.

Q. You are employed by the Public Service
Railway Company? A. I am.

Q. In what position? A. Investigator and ad- 10
juster.

Q. Did you go and see Mr. Rubinow, the plain-
tiff in this case? A. I did, yes, sir.

Q. I show you a statement on paper and ask you
if that is a statement that you took from Mr.
Rubinow at the time? A. Yes.

Q. Is that written by you? A. It is, yes.

Q. It is signed by Mr. Rubinow? A. It was.

Q. Signed by his son? A. Yes.

Q. And witnessed also by you? A. Yes. 20

Q. At the time that that was taken where was
Mr. Rubinow? A. He was in bed.

Q. In what place? A. At High Street, at this
address.

Q. Is that the son's address? A. 602 High
Street, where it was taken.

Q. Was the son, Dr. Rubinow, present? A. Yes.

Q. Was he present all the time, or was he in and
out of the room? A. Why, no, he was present part
of the time and then he would go out and come 30
back.

Q. What you have written in that statement,
was that told to you by Mr. Rubinow?

Objected to as leading.

Q. Was it, Mr. Schnable? A. Yes.

Q. After you wrote it down did you read it to
him? A. Yes.

Q. How did you read it to the old man? A. 40

William D. Schnable—Cross

Well, I read the statement in English. I did speak some Jewish and German to the old gentleman.

Q. Can you speak Jewish and German so that he can converse with you? A. I can, yes.

Q. After you had written it did Dr. Rubinow come in? A. He did, yes.

Q. Did you show Dr. Rubinow that statement?

10 A. I showed him this statement, yes.

Q. Do you know whether or not he read it? A. He did. He read it carefully.

Q. Did you talk to him in English? A. I did, yes.

Objected to as leading.

Q. After it had been read by Dr. Rubinow, what did he do? A. The doctor read it over and read it to his father, and after he had finished with it he said, "Well, that is all right; you can sign that."

20 The father signed it and I asked the doctor whether he would not kindly witness his father's signature.

Q. Who wrote that down on the bottom here, "In general true." Whose writing is that? A. Dr. Rubinow.

CROSS-EXAMINATION by Mr. Autenreith:

Q. You are now employed in the Public Service, aren't you, Mr. Schnable? A. Yes.

30 Q. And in investigating cases of this kind—it is your business with the Public Service? A. Yes.

Q. That is all you do for them? A. Yes.

Q. You investigate and if you can you adjust some of these claims, don't you? A. I do.

Q. Who sent you up to Mr. Rubinow's house? A. I was sent up from our office.

Q. Your claim office? A. Yes.

40 Q. When you got there where was Mr. Rubinow, the plaintiff? A. Who do you mean, the plaintiff?

Walter L. Bartholomew—Direct

- Q. Yes. A. He was in bed.
 Q. You went into his bedroom? A. I was taken
 in by the doctor.
 Q. This is in your handwriting? A. It is, yes.
 Mr. Smith: I offer it in evidence.
 Mr. Smith: No objection.
 Paper marked Exhibit D-1.

10

WALTER L. BARTHOLOMEW, sworn:

Direct-examination by Mr. Smith:

- Q. What is your business? A. Engineer and
 surveyor.
 Q. Are you employed by the Public Service
 Company? A. I am.
 Q. Graduate of any college? A. I am. 20
 Q. What? A. Cornell University.
 Q. Have you made an examination of the prem-
 ises at South Street and New Jersey Avenue,
 Newark? A. I have.
 Q. When did you do that? A. The first time,
 February 28th, 1911.
 Q. 1911? What is the distance between the
 southerly side of South Street and the northerly
 side of Thomas Street?
 Mr. Autenreith: I object to any refer- 30
 ence to that book, unless I know what it is.
 Mr. Smith: His field notes, I suppose.
 Mr. Autenreith: Tell us what it is.
 Q. What have you got? A. I have a book that I
 always take my notes in when I make a survey.
 Q. Is that a book made by you? A. Yes.
 Q. At the time you made the survey? A. Yes.
 Mr. Autenreith: Made when? 40

Walter L. Bartholomew—Direct

A. Made February 28th, 1913, the first time.

Mr. Autenreith: I object to that, because it is prior to this accident.

A. I also made surveys there, March 17th, 1914, and found conditions to be the same.

By Mr. Autenreith: Q. When did you enter these writings in that book? A. February 17, 19—

10 Q. The day you made the survey, or when? A. At the time I was making the survey. Take the measurement and then record it.

Mr. Autenreith: Go ahead.

By Mr. Smith: Q. What is the distance, please, between the southerly side of South Street and the northerly side of Thomas Street on New Jersey Avenue? A. 233.6 feet.

Q. What is the width of New Jersey Railroad Avenue? A. New Jersey Railroad Avenue is 31
20 feet from the curb to the station, that is, to the wall, the elevated structure of the Pennsylvania.

Q. What is the distance between the southerly side of South Street and the northerly side of South Street measured at right angles? A. 39½ feet.

Q. What is the distance between the outer rail of the curve going east over New Jersey Railroad Avenue to South Street and the nearest point of the curve going over New Jersey Railroad Ave-
30 nue west on South Street in the opposite side? A. That is 8.2 feet from gauge to gauge.

Q. Eight and two tenths feet? A. Yes.

The Court: That is from where?

Mr. Smith: The nearest point from this curve to that curve.

Mr. Autenreith: Wherever that nearest point might be.

A. The nearest point comes right out at this
40 frog, or on that frog.

Walter L. Bartholomew—Direct

Mr. Autenreith: Right opposite that crossing there.

The Witness: Yes.

Q. Mr. Bartholomew, standing on the westerly side of New Jersey Railroad Avenue, north of South Street, can you see south on South Street?

Mr. Autenreith: I object.

A. You can.

10

Mr. Autenreith: I object, because there is no time fixed, no designation of when or where on Railroad Avenue. They may stand at the outer curb or in by the store. If it is meant for the purpose of contradiction he ought to state just where he is standing.

The Court: That seems to be true.

Mr. Smith: I said on the westerly side, designating the edge of a curb.

20

(Question repeated.)

Mr. Autenreith: I object to it as immaterial, unless he puts himself in the same position that the former witness was in.

The Court: What is the purpose of the question?

Mr. Smith: I want to see. I am asking him the question, and then I am going to ask him the distance.

Mr. Autenreith: Go ahead.

30

Q. Standing at say twenty-five or thirty feet north of the northerly side of South Street on the sidewalk, can you see then south of South Street as far as Thomas Street? A. You can.

Q. Can you see the sidewalk on the westerly side of New Jersey Railroad Avenue, south of South Street? A. You can, yes.

Walter L. Bartholomew—Re-direct

CROSS-EXAMINATION by Mr. Autenreith:

Q. Did you ever place yourself at a distance of thirty feet or thirty-five feet from the northerly corner of South Street on Railroad Avenue to see whether you could look back? A. I have stood on there, and have seen a car coming up around the corner on Thomas Street.

10 Q. You could see a car coming up there on this point? A. See it rounding the corner.

Q. Does not require an engineer, of course, to do anything of that kind, does it? A. It does not.

Q. Any person with a good pair of eyes. Do you know where the paper store is there? A. Yes, I do.

Q. How far from the corner? A. It is 68 feet from the curb on South Street, that is from the northerly curb of South Street along the north-
20 erly curb of New Jersey Railroad Avenue is 68 feet to the southerly edge of that store.

Q. Your idea then is, that any point on that sidewalk in front of that paper store you can see the sidewalk on the southerly—the sidewalk of Railroad Avenue south of South Street? A. I do not say you could see all these sidewalks all the way.

Q. You do not? A. No.

30 RE-DIRECT-EXAMINATION by Mr. Smith:

Q. Mr. Bartholomew, assuming a car passing on this curve from the north side of South Street, going around west into South Street, would a car come from South on to New Jersey Railroad Avenue and turn east into South Street at the same time? A. Could not.

Q. Why? A. The overhang of the car is too great to permit cars to pass on that curve.

40 Q. You mean come in contact? A. They would.

John F. Weber—Direct

RE-CROSS-EXAMINATION by Mr. Autenreith:

Q. How much would the overhang of the Bergen Street car be on that? The maximum of that curve? A. Seven feet and two inches.

Q. And the distance between the nearest point of curve G and E, is 8.2? A. Yes.

Q. What is the overhang of the Mulberry car? 10
A. Five feet.

Q. Two could not pass without striking, could they? A. No, they would strike.

JOHN F. WEBER, sworn:

Direct-examination by Mr. Smith:

Q. Mr. Weber, what is your business? A. Police officer. 20

Q. Where? A. Newark, First Precinct.

Q. How long have you been an officer? A. Six years and four months.

Q. Where do you live? A. 527 Mulberry Street.

Q. Do you remember the morning of this accident to Mr. Rubinow? A. I do.

Q. Where were you? A. I was on South Street about ten or twelve feet in from Railroad Avenue.

Q. Did you see Mr. Rubinow there? A. I seen 30
him just as he got to the corner.

Q. At that time was there any car going north on New Jersey Avenue and South Street, or near there? A. There was one car there.

Q. What car was it? A. Bergen.

Q. What side of South Street was it on? A. On the south side.

Q. Was it in motion or standing still? A. Well, I believe it just about started.

John F. Weber—Direct

Q. Just about started? A. Yes.

Q. At that time did you see Mr. Rubinow? A. Stepped right off the curb.

Q. Which curb? A. On the southeast or the southwest corner.

Q. Is that the corner that the saloon is, as it is marked here? A. This one here (indicating on 10 map).

Q. Where were you? A. When I first seen hem he was about here (indicating).

Q. You saw him step off? A. Yes.

Q. When he stepped off what did he do? A. Walked over towards there (indicating) and I hollered to him to look out.

Q. Why did you holler to look out? A. Because he would get hit by the car.

Q. Was the car moving then? A. Just going 20 around the curve.

Q. In relation to him where was the front of the car? A. You mean when it hit him?

Q. Yes. A. About there (indicating).

Q. What part of the car came in contact with him? A. The rear end of the car.

Q. What was he doing; was he walking or standing? A. He was walking.

Q. At that time, Mr. Weber, was there any other car in that vicinity that you saw? A. No; 30 there wasn't no car in that vicinity at all.

Q. Was there any Mulberry Street car on the opposite corner? A. No, sir.

Q. Now, when you saw him, when you hollered look out, what did you do? A. Went towards him. He got hit. He fell down. I and another gentleman picked him up and carried him into the depot.

40 Q. You and someone else? A. Yes.

John F. Weber—Cross

Q. Then after you carried him into the depot what did you do? A. Telephoned for the police ambulance, and it was not in and they sent the patrol wagon, and I wanted to remove him to Beth Israel Hospital and he refused to go and he wanted to go to his home, and he was moved to his home, 72 Parkhurst Street, I believe.

Q. Do you know whether or not he had anything 10
in his hands or in his arms? A. He had six or seven or maybe eight cigar boxes—a couple of square ones, and some were oblong, and he was holding them in his hand, like that.

Q. At the time that he stepped from the car here, where was the Bergen Street car? A. Right here (indicating).

Q. How did the cars run? How many lines of cars run on New Jersey Railroad Avenue? A. Sometimes three and sometimes two. 20

Q. What are they? A. Clinton, Mulberry and Bergen on this end, and up to that end is only two lines.

By the Court: Q. Where were you at that time you have just spoken of, when Mr. Rubinow stepped off of the curb and you say the car was somewhere along here? Where were you? A. Right about there, right about the door of the saloon (indicating).

Q. That would be how far away from where Mr. 30
Rubinow was at the time? A. Well, the width of the sidewalk, and then about seven feet or eight feet in from the corner of the building.

Q. Does that building go right up to the property line? A. Yes.

CROSS-EXAMINATION by Mr. Autenreith:

Q. Were you on duty that morning? A. I was 40

John F. Weber—Cross

on until five o'clock, and I finished my tour of duty at 5 o'clock.

Q. You had finished duty at five? A. Yes.

Q. Do you know what time this accident happened? A. Between twenty and thirty minutes after six.

10 Q. In what direction from the crossing of Railroad Avenue on South Street is your headquarters, your precinct? A. Towards the—it is up on the corner of Court and Washington Street, northwest.

Q. Just indicate on the map? A. Off towards here (indicating), about fifteen minutes' walk.

Q. When you finished your duty did you go back to the headquarters on your precinct? A. Certainly; reported off.

20 Q. Did you have your uniform on this morning? A. Carried under my arm.

Q. When did you leave your precinct? A. About ten minutes of six.

Q. Where were you going? A. Home.

Q. You say another gentleman and yourself picked him up? A. Yes.

Q. Who was the other gentleman? A. I found out since this young fellow over here (indicating) sitting over there—the second bench there.

30 Q. Where, right there on the end of the seat? A. Yes.

Q. Do you remember Mr. George M. Rubinow and Mr. Sol. Rubinow coming to see you? A. Yes.

Q. After this accident happened? A. Yes.

Q. Just a moment. Let's go back to the precinct. You left the precinct, you say, at ten minutes of six? A. Yes.

40 Q. Which way did you go after you left the precinct? A. Came along Washington Street and

John F. Weber—Cross

Lincoln Park, cut through Lincoln Park and walked over one block to South Street and down South Street.

Q. Which direction? A. Well, it is going south on Washington Street, and it would be southeast through the park and east on South Street.

Q. And your home was on South Street? A. 527 Mulberry Street.

Q. Which direction is that from the corner of Railroad Avenue and South Street? A. You got to cross over here and down there the other side of the station and walk down five blocks. It is the last house on Mulberry Street. 10

Q. Is that the route you took every morning? A. Yes, every morning.

Q. The usual route? A. Yes.

Q. How long a walk is it from your home to the police station? A. About twenty-five minutes. 20

Q. What happened to these cigar boxes that you claim Mr. Rubinow had? A. Flew all over the street.

Q. Do you know what happened to them? A. Went all over the street. I did not look for the cigar boxes, I looked for the man that was hurt.

Q. Was it you who took him up and carried him to the station? A. Yes.

Q. Positive of that? A. Positive.

Q. This other gentleman you say helped you, 30 with you? A. Yes; there might have been one or two others put their hands on him, I don't know. I can't remember. I know that young fellow there and I put our arms around him.

Q. Were there others? A. That I don't know, I couldn't say. But I am positive there was only two near him to pick him up.

Q. There were others around there or very 40

John F. Weber—Cross

shortly afterwards? A. Immediately there was a crowd gathered.

Q. Remember any one else in the crowd? A. No, sir.

Q. How did you come to get here today? A. Done at 5 o'clock this morning.

Q. How did you come to get to Court today?
10 A. Why, I rode over here, came over on a train.

Q. At whose request? A. Subpoenaed by the Public Service.

Q. You have been here for the last week or ten days, haven't you? A. No, seven or eight days.

Q. Were you subpoenaed each day? A. Yes, subpoenaed each day.

Q. Yes. A. Separately. Separately every day.

Q. Do you remember seeing Mr. George Rubinow and Mr. Sol. Rubinow after this accident?
20 A. Yes.

Q. Where did you see them? A. In the hall of the station house leading to the cell room.

Q. When? A. A couple of weeks, I believe, afterwards, or might have only been a week afterwards.

Q. Do you remember them asking you about this accident? A. I do.

Q. Didn't you at that time tell both of those gentlemen that you did not know anything about
30 the accident? A. No, sir.

Q. Wait a minute now. Don't be in such a rush. Didn't you tell them at that time that you did not know anything about the accident and that you came along after when they were taking them into the station? A. I did no such thing.

Q. Deny it? A. Deny it.

Q. Positive? A. Positive.

40 Q. Did you see them on any other occasion but

John F. Weber—Cross

that once? A. Why, they made arrangement with me to meet me a couple of nights afterwards and they never came around there.

Q. Made you sore, didn't it? A. No.

Q. Perfectly immaterial that they broke their engagement? A. Immaterial to me.

Q. Your tender feelings are not affected that much? A. No, sir, not at all. 10

Q. Now, Mr. Weber, just point out on that map the corner that you claim you were standing on when this accident happened? A. I was not standing, I was walking.

Q. Well, walking. A. Coming down South Street.

Q. When Mr. Rubinow was hit where were you? A. About there, (indicating).

Q. Right at the corner? A. About at the curb.

Q. I show you a diagram; is that in your hand-writing? A. Yes. 20

Q. Did you draw that? A. Yes.

Mr. Autenreith: I ask that the paper be marked.

A. I think you will find it the same as I testified.

Q. You think so? A. I think so.

Q. Aren't you sure about it? A. Positive.

Paper marked Exhibit P-3.

Q. Do you remember meeting Mr. Miller on the morning of that accident? A. I met a whole lot of 30 people down that way.

Q. I asked you if you met Mr. Miller? A. I couldn't say for sure.

Q. Would not deny it? A. No, sir; and I wouldn't say yes—might be twenty people every morning.

Q. Do you recall meeting Mr. Wagener—stand up, Mr. Wagener. Do you recall meeting Mr. 40

John F. Weber—Cross

Wagener on the morning of this accident? A. No, sir, I never seen him that morning at all, because I know him very well.

Q. Is this paper store right near by? A. Yes.

Q. Didn't see him that morning? A. No, sir.

Q. Didn't speak to him that morning? A. No, sir.

10 Q. Didn't speak to Miller that morning? A. I might have spoke to Miller; I don't know.

Q. You wouldn't say you did not speak? A. I have lived in the neighborhood ten years.

Q. I know you have lived there a long while, but you can not say you did not speak to Miller, can you? A. Eh?

Q. You would not say or deny that you did not speak to him? A. I won't say I did speak to him or didn't speak to him.

20 Q. Don't know? A. I don't know.

Q. You are very familiar with how this accident happened? A. I was right there; I ought to be.

Q. Don't remember Miller? A. No.

Q. Don't remember whether you spoke to Wagener? A. I know I didn't speak to Wagener.

Q. Did you enter the report of the accident in the blotter at the police station? A. The man on the wagon makes that out.

30 Q. Did you make it out? A. No, sir.

Q. You were the only officer there at the time, weren't you? A. I was.

Q. Isn't it customary in the departments of Newark for an officer who witnesses an accident to turn in a report of it? A. The man who makes out the report is the man that goes on the wagon. If it is serious the man afterwards makes out a

40 report.

John F. Weber—Cross

Q. You did not think this was serious, did you?

A. I didn't know whether it was serious or not.

Q. You did not make out a report, did you? A. Well, the captain calls me in the office to make out a report.

Q. Did he call you in to make out a report? A. No, sir, he did not.

Q. So you did not make out a report on this occasion? A. No, sir. 10

Q. Who made it out? A. Mike Flood.

Q. Is he here in Court? A. No, sir.

Q. Was he there when the accident happened? A. No, sir.

Q. When did he come along? A. Came along with the wagon, I should judge about twenty minutes after. I called him.

Q. Is Flood out in the police station still, at the first precinct? A. First precinct still. 20

Q. Still doing duty there? A. Yes.

Q. When did you last see him? A. I guess I seen him last night.

Q. Why don't you turn around so I can talk to you? A. I was going to talk to the jury.

Q. Just talking to the jury. Do you remember the morning of this accident when you saw Miller, that Miller came up and said "Hello" to you? A. I don't remember it.

Q. Will you deny that Miller came up and said "Hello" to you? A. No, sir. 30

Q. You won't deny it? A. Won't deny it. Might have been twenty or thirty people spoke to me there at that time.

Q. But you don't remember who they were? A. No, sir.

Q. Big crowd around there after the accident? A. Big crowd, yes. 40

John F. Weber—Re-direct

Q. How many were there? A. Might have been a hundred people there.

Q. Might have been? Don't you know? A. No, sir.

Q. The only one you can talk about as being there, is this man sitting in the seat there? A. Well, I was the nearest one to him and he was
10 talking to me.

Q. He is the only one? A. I said to him, "You grab hold of him."

Q. He is the only one you remember? A. The only one I remember, yes.

Q. All the others you do not remember? A. No, sir.

Q. There is a railroad station right there? A. Yes.

Q. People commuting that morning? A. I
20 might have noticed a couple of the station employees. I know them all.

Q. Have you spoken to any of them since, to find out? A. No, sir.

Q. That is a commuting section; and people there in the morning about that hour? A. Yes a transfer point.

Q. Don't remember anybody there but this one man? A. No.

30 RE-DIRECT-EXAMINATION by Mr. Smith:

Q. Officer Weber, this thing you say you made that, did you? A. Yes.

Q. Did you make that for Mr. Autenreith? A. I says, I thought Mr. Autenreith was somebody else that asked me for that.

Q. Who was it asked you for that? A. This gentleman here.

Q. You mean Mr. Runyon? A. That little gentleman back there.

John F. Weber—Re-direct

Q. The young man back there? A. Yes.

Q. Where was this, at your house or at the station? A. I don't remember just where it was now.

Q. That young man is in Mr. Autenreith's office? A. Yes.

Mr. Autenreith: How does he know?

Mr. Smith: I am not finished.

Mr. Autenreith: I will withdraw it. 10

A. Do you want an explanation of this?

Mr. Autenreith: I would like to know, if you want to explain it.

A. I will show you. That is almost the same as the curb.

Mr. Autenreith: All right. Explain it.

A. There is the saloon and there is the drug store and there is where I was at, and where he was; there is a crosswalk here—there is no crosswalk here—there is a crosswalk here. 20

Q. Then you made a sketch as you remembered it for that young man, is that it? A. Yes.

Q. Did you explain to him what happened there? A. He asked me about the accident.

Q. Did you tell him? A. I did.

Q. When was that? A. A couple of weeks ago, three or four weeks ago.

Q. Where? A. I don't know whether it was in Newark or over here—or over in Newark, I guess it was. 30

Q. Has Mr. Runyon there talked to you about the accident before today? A. Spoke to me out in the hall.

By Mr. Autenreith: Q. Told you to stick to your first recollection of this accident, didn't he?

A. Who?

Q. Mr. Runyon? A. Yes, sir.

Q. Didn't you state at the time you met this 40

Fred C. Hellriggel—Direct

young man that you were not near the accident and you came along afterwards? A. No such a thing.

Q. Just look at me. I can not follow you. Did you state that to him? A. No, I did not.

Q. Do you deny now that you did state it? A. I do deny it positively.

10 By Mr. Smith: Q. Mr. Weber, what was it Mr. Runyon said to you in the hall here the other day?

A. He said—give me a good ripping over.

Q. What do you mean by that? A. I don't know—show me that I wasn't there at the time.

Q. Is that what he said? A. Yes.

Mr. Runyon: Speak out so the jury can hear you.

A. I said you said that you was going to show me that I was not there at that time.

20 Mr. Runyon: All right. Go ahead. I want to hear what it was. No doubt they have heard it.

Mr. Smith: So have you.

Q. That was out in the hall, was it? A. Yes.

Q. Has Mr. Runyon subpoenaed you at all? A. Yes, the first—on the Saturday morning I was over here.

Q. Bring you into Court? A. Yes.

30

FRED C. HELLRIGGEL, sworn:

Direct-examination by Mr. Smith:

Q. Mr. Hellriggel, where do you live? A. I live 183 Avon Avenue, Newark.

40 Q. What is your business? A. My business? Bottle beer driver at the present time.

Fred C. Hellriggel—Direct

Q. Where do you work? A. Hauck's Brewery.

Q. Newark? A. Newark.

Q. Were you at the corner or near the corner of South Street and New Jersey Railroad Avenue on the morning of this accident? A. I was.

Q. Where were you? A. Right in front of the saloon corner.

Q. Did you see Mr. Rubinow, the plaintiff here? 10
A. Yes.

Q. Where was he? A. He was, just at the time I seen him, he was right between the gutter and the center of the tracks.

Q. At that time was there any car there? A. Yes, sir.

Q. What car was it? A. Bergen Street.

Q. Which way was it coming? A. It was going just to make the turn going down east.

Q. As it was making the turn what did Mr. 20
Rubinow do? A. He walked—as though to go on the opposite side of the corner.

Q. Yes. A. It was a cat-a-cornered cut.

Q. From the saloon corner to the drug store corner, is that what you mean? A. No; he was going from the saloon corner over towards—underneath the railroad bridge here.

Q. Oh, here? A. Yes.

Q. Which way was he walking, just in a diagonal line? A. Just a cat-a-cornered, across. 30

Q. Now as the car came around the curve, what did Mr. Rubinow do? A. Why, he deliberately walked in the side of the car.

Q. What part of the car came in contact with him? A. The rear end.

Q. What did it do to him? A. Knocked him down.

Q. What did you do? A. I ran right out there and helped to pick him up. 40

Fred C. Hellriggel—Cross

Q. Did you see Officer Weber around? A. Yes.

Q. Did he go anywhere near the man? A. Yes.

Q. What did he do? A. He helped me raise the man.

Q. Then what did you do with the man? A. Why, put his arms around my shoulder, and Officer Weber had hold of him and the man walked
10 two or three steps when he gave in, and he hollered "Oh, my leg."

Q. Then what did you do with him? A. We took him over to the depot.

Q. That is into the station? A. Into the station, yes.

Q. That is, across directly, is it, from the saloon? A. Yes.

Q. Then did you stay there? A. No, sir; I stayed there about two minutes and I heard a car
20 coming and I went out.

Q. What car was that? A. Why, Mulberry Street car, with about five passengers.

Q. At the time you saw Rubinow in the street and this Bergen Street car there, was there any other car in that vicinity? A. No, sir.

Q. Was there any Mulberry Street car that would go west on South Street there? A. No, sir.

CROSS-EXAMINATION by Mr. Autenreith:

30 Q. Did you give your name to anybody as a witness? A. Not at the present time.

Q. When? A. Two days after.

Q. To who? A. To the conductor on the car that I ride with always.

Q. A friend of yours, wasn't he? A. No, sir.

Q. Well, you have been riding with him a long time? A. Well, he is no friend of mine.

Q. Well, you knew him? A. No, sir, not by
40 name.

Fred C. Hellriggel—Cross

Q. You ride on that car regularly, don't you?
A. I did at that time, yes.

Q. Ride with that conductor? A. With that conductor.

Q. You volunteered to him the information? A. No, sir.

Q. All right. How did he find it out? A. Well, he knowed I picked him up, as two days after he says he hears I was the fellow that picked him up. 10

Q. Said he heard about it? A. Yes.

Q. You then told him that you were the man?
A. I says, "Yes, I picked the man up."

Q. Thought that would be to your advantage to tell him that, didn't you? A. What's that?

Mr. Smith: I object to what his thoughts were on the subject.

The Court: Do you insist on the question.

Mr. Autenreith: I will withdraw it. 20

Q. Do you know Weber? A. No, sir.

Q. When did you see Weber last? A. Weber last? The last day I was here in Court.

Q. When was that? A. In the corridor. If I am not mistaken it was last Wednesday.

Q. When did you first see him? A. When did I first see him?

Q. Yes. A. Last Wednesday when I met him outside was the first I ever met him, Wednesday morning. 30

Q. How often between the time of the accident and this time have you met him? A. Never met him.

Q. Never met him? A. No, sir.

Q. How often had you talked over this case with any of the Public Service men since this accident?

A. How often?

Q. Yes. A. I never spoke over the case to them, 40

George F. Yurbury—Direct

only to the man that came to the house and asked me for information.

Q. Who was he? A. I couldn't say his name.

Q. Schnable? A. No, sir.

Q. Before this accident you had never seen Weber? A. No, sir.

10 Q. You never saw him until here only a week ago, after the accident? A. That is the time I seen him.

Q. The only time? A. Yes.

Q. Between then you never met him? A. No, sir.

Q. Anybody promise you any money to come here to testify? A. No, sir.

Q. Anybody paying your expenses? A. Don't know, sir.

Q. Well, anybody to pay them? A. No, sir.

20 Q. You know, though don't you, that your expenses will be paid? A. I do not.

Q. By the Public Service? A. I do not.

Q. But you will not deny they would not be paid? A. Well, I won't deny that, no, of course not.

By Mr. Smith: Q. Can you point out the conductor in this room that was on this car? A. Yes.

Q. Who is it? A. The grey haired man down there (indicating).

30 Q. That gentleman there? A. Yes.

GEORGE F. YURBURY, sworn:

Direct-examination by Mr. Smith:

40 Q. Where do you live, sir? A. Huntington Street, Newark.

George F. Yurbury—Direct

Q. What is your business? A. I am an inspector of the Metropolitan Life, of New York.

Q. Were you in the vicinity of South Street and New Jersey Railroad Avenue at the time of this accident? A. I was on the car, sir.

Q. On which car? A. On the car, yes, sir.

Q. On the Bergen Street car? A. Yes, sir.

Mr. Autenreith: Let him tell it. He 10
knows.

Q. Mr. Yurbury, where did you board the car?
A. I got on at Huntington Street and Clinton Avenue, that is where I got on every morning.

Q. Where were you going? A. I go to New York.

Q. Where did you get off the car? A. At the station there, right there, when the car stopped there to go around—before she goes around the curve. 20

Q. Is that the South Street station? A. Yes.

Q. That is on the corner of South Street and New Jersey Avenue? A. Yes.

Q. Did this car stop? A. Yes.

Q. Where? A. It stopped—it always stops before it goes around the curve, you know.

Q. Right at the point of the switch? A. Yes.

Mr. Autenreith: Do not lead him. Let him tell it.

Q. Is there a switch at the corner of South 30 Street and New Jersey Avenue? A. Yes.

Q. Where does the car stop as it comes down New Jersey Avenue and South Street? A. Ten feet from the crosswalk it is supposed to stop.

Mr. Autenreith: I object.

Q. Where have you seen it generally stop? A. Stops about that, yes.

Q. You say you were on that car? A. Yes. 40

George F. Yurbury—Direct

Q. Where did you get off? A. On the front end of the car, sir, always got off the front end.

Q. When you got off the front end or after you got off did any other people get off? A. Yes.

Q. Do you know who they were? A. No sir, I do not.

10 Q. Were they men or women? A. I think there was men and I think there was two girls too, generally rides down there in the morning.

Q. At the time you got, or after you got off what did the car do? A. When I got off I was standing on the corner. I have got about seven minutes and I generally light up and take a smoke there and then go upstairs and take the train, the 6:43, so therefore—

Q. While you were standing on the corner what did the car do? A. It went around the curve.

20 Q. As it went around did you see anything happen? A. No, but I saw him—I saw the accident after the car had got around.

Q. I see. What did you see after the car went around? A. Saw two men run back to this man.

Mr. Autenreith: What is that?

A. After the car got around I seen two men picking this man up.

Q. Did you know who they were? A. No, sir.

30 Q. Was there any other car in this vicinity that you saw at the time this Bergen Street car was there or going around the curve? A. Not to my knowledge, sir.

Q. Did you make any observation there to see? A. I always stand on the corner and rubberneck around a little bit, because you generally light your pipe and see what is going on before you go upstairs.

40 Q. Was there any other car that you saw there? A. No, sir.

William Guthrie—Direct

Q. Now after you saw these two men run to pick the man up what then did they do with him? A. Carried him in the depot.

Q. What did you do? A. I stayed there for a little while until they got him in. When they got him in it was about train time, and I walked up and went upstairs and took the train.

Q. Did you see what part of the car came in contact with the man? A. Well, I couldn't positively say—I couldn't exactly say that I did, but it was the tail end, as near as I can judge. 10

Mr. Autenreith: I object.

Mr. Smith: I consent that that be stricken out. I only want to know if he saw.

A. No, I did not.

No cross-examination.

20

WILLIAM GUTHRIE, sworn:

Direct-examination by Mr. Smith:

Q. Mr. Guthrie, what is your business? A. Conductor, sir.

Q. On what line? A. Bergen Street line.

Q. And how long have you been a conductor?

A. Fourteen years. 30

Q. Do you remember the morning of this accident? A. I remember the morning, yes.

Q. What day was it? A. The 7th of December, 1912.

Q. What day of the week was it? A. Saturday morning.

Q. What car were you on, what line of cars? A. Bergen Street car. 40

William Guthrie—Direct

Q. What time on that trip were you due at the South Street station? A. Six twenty-five.

Q. On this morning did you go on the trip to the South Street station? A. This morning?

Q. On the morning of the accident? A. Yes.

Q. As your car comes to South Street is there any stop there? A. Yes, always a stop there.

10 Q. On this morning did your car stop?

Mr. Autenreith: I object to it as leading.

A. Yes.

Mr. Autenreith: I object. Let him tell himself.

Q. Now, Mr. Guthrie, do you know whether you had any passengers on the car that morning? A. What did you say?

Q. Do you know whether you had any passengers on the car that morning? A. Yes.

20 Q. Men or women? A. Men and women, both together.

Q. Did any of them get off at the South Street corner? A. Yes.

Q. After the passengers had gotten off what did you do? A. Went right along down South Street.

Q. Did you see the plaintiff here at all? A. No, sir.

Q. Did you know at the time—A. No, sir.

30 Q. —that there had been any accident? A. No, sir.

Q. When did you first find out? A. Two days after, sir.

Q. How did you find it out? A. The inspector asked me about it, and one of the witnesses that was here asked me about it, and told me about it, rather.

40 Q. What witness was that? A. The young fellow that just got off.

Fred Schultz—Direct

Q. He told you about it, you say? A. Yes.

Q. At the time your car got at South Street, was there any other car there on that morning?

A. No, sir.

CROSS-EXAMINATION by Mr. Autenreith:

Q. You were on the back of your car? A. Yes.

Q. When you went around the corner you went right on and the car did not stop? A. Not right around the corner. 10

Q. You went right on, no stop? A. No stop, sir.

By Mr. Smith: Q. What kind of a car did you have? A. Closed car, sir.

Q. Vestibuled car? A. Yes.

20

FRED SCHULTZ, sworn:

Direct-examination by Mr. Smith:

Q. Where do you live? A. 719 Bergen Street, Newark.

Q. What is your business? A. Motorman.

Q. How long have you been a motorman? A. Eighteen years next month.

Q. Were you a motorman on the car of which this conductor was the conductor? A. I was. 30

Mr. Autenreith: When?

Mr. Smith: Oh, about ten years ago, I guess.

Q. At the time of this trip? A. Yes.

Q. Did you have that conductor on that trip? A. Yes.

Q. Do you remember your car coming to South Street? A. What's that? 40

Fred Schultz—Direct

Q. Do you remember your car coming to South Street? A. Yes.

Q. What line of car was it? A. Bergen Street.

Q. Can you tell me whether or not the car stopped at South Street? A. Certainly stopped.

Q. Do you know whether many people got off your car? A. Yes, sir.

10 Q. Did any of them get off by the front door?
A. Yes, there was a number of them got off the front.

Q. Now after the people had gotten off from the front platform did you get any signals to go ahead? A. Yes.

Q. What did you do? A. Went ahead around the corner.

Q. Did you know of any accident happening to your car at that time? A. I did not.

20 Q. Or on the street? A. No.

Q. When did you first hear of it? A. About two days afterwards.

Q. Somebody told you of it? A. No.

Q. How did you hear of it? A. Mr. Schnable got on the car and asked me about it.

Q. On that trip did you strike anybody that you know of by the front of your car? A. No, sir.

Q. Was there anybody on the track in front of your car on that trip? A. There was not.

30 Q. At that point, I mean. When you stopped at South Street then did you see any Mulberry Street car coming south on Mulberry Street? A. No, sir.

Q. Was there any other car at that corner at that time? A. No, sir, there was not.

Q. What time did you get at the corner? A. 6:25.

Miss Tillie Meser—Direct

CROSS-EXAMINATION by Mr. Autenreith:

Q. Do you still work on the Bergen Street line?

A. Yes.

Q. How long before this accident had you worked on the Bergen Street line? A. Oh, about fourteen years.

Q. How many trips do you make a day past this junction of Railroad Avenue and South Street? 10

A. Well, we make eight. I think it is eight trips.

Q. That is you pass that point eight times? A. Yes.

Q. There was nothing particular about this trip to attract your attention to it, was there? A. There was not.

Q. Nothing; and you have been on that line for fourteen years before the accident? A. Yes.

Q. Been on it ever since? A. Yes.

Q. Still working for the Public Service, aren't 20 you? A. Yes.

MISS TILLIE MESER, sworn:

Direct-examination by Mr. Smith:

Q. Miss Meser, speak up so all these gentlemen can hear you. A. Yes.

Q. Where do you live? A. 32 Bay View Ave- 30 nue, Newark.

Q. Are you employed anywhere? A. Yes.

Q. Where? A. Splitdorf's.

Q. Where is that place of business? A. High Street; I was not working there at the time.

Q. Where were you working at that time? A. Clark's.

Q. What do you mean, Clark's Thread Mills?
A. Thread Mills.

Miss Tillie Meser—Direct

Q. You remember the morning of this accident?

A. Yes.

Q. Were you at the corner of South Street and New Jersey Railroad Avenue? A. I was on the car.

Q. Which car? A. Bergen car.

Q. Where did you get off that car? A. South
10 Street station.

Q. Where did the car stop? A. South Street station, on New Jersey Railroad Avenue.

Q. You say you got off the car? A. Yes.

Q. Was there anybody with you? A. Yes.

Q. Who was it? A. Louise Hilltwine.

Q. After you got off the car what did you do?
A. Walked to the station.

Q. That is the opposite corner from the saloon corner, is it? A. Yes.

20 Q. Then what did you do after you walked into the station there? A. Waiting for the young lady to come from the baker shop.

Q. Where was the baker shop? A. On South Street.

Q. Is it west or east? A. Up from the saloon.

Q. While you were standing there, what did the car, the Bergen Street car do? A. Well, the young lady friend of mine came down while the Bergen car was standing there.

30 Q. Then what happened? A. Then two of us walked towards the cafe, that is the saloon.

Q. Toward here? A. Yes. And the car was just turning then, on the turn, going down South Street.

Q. Going down which way? A. East.

Q. And then did you see the old gentleman there, the plaintiff?

40 Mr. Autenreith: I object to it as leading.

Miss Tillie Meser—Cross

Mr. Smith: I can ask her if she saw the man.

A. Yes.

Q. When you saw him where was he? A. Leaving the curb from the saloon.

Q. Then what did you see happen? A. Just as the car turned I seen the rear end of the Bergen hit him and knock him down.

Q. And then what did you do? A. I walked in the middle of the street where the accident was.

Q. Then did any peope come? A. Yes.

Q. What did they do with the man? A. Two fellows carried him into the—

Mr. Autenreith: Speak up.

A. Two fellows carried him into the station.

Q. Then after they carried him into the station what did you do? A. I went over to Miss Heber's house.

Q. What became of the car? A. Turned down.

Q. Down east? A. Yes.

Q. Was there any other car there at the time?

A. No, sir.

Q. Was the old gentleman, the plaintiff, walking or standing at the time he was hit by the car?

A. Walking.

CROSS-EXAMINATION by Mr. Autenreith:

Q. You got off at the South Street station, you claim? A. Yes.

Q. Did you walk in this direction over to that corner, over to corner A, by the saloon? A. No; walked to the station when I got off the car.

Q. Went into the station; then where did you go from the station? A. Walked over to the cafe.

Q. Over to this saloon? A. And I was on the sidewalk in the street.

Miss Tillie Meser—Cross

Q. Well, how far did you get? A. Wasn't on the curb yet.

Q. When did you get to the curb? A. I didn't get—I never got to the curb. I walked in the middle of the street.

Q. Which direction were you going? A. Waiting for the car to turn around.

10 Q. Which car? A. Bergen car.

Q. Walking around the car? A. Yes.

Q. Where was the car standing? A. It was not standing. It was turning the corner.

Q. Where did it come to a standstill? Just point it out here if you can, just at what point? A. Here (indicating).

Q. That line? A. Yes, sir.

Mr. Autenreith: Is that switch that line?

Mr. Smith: Yes.

20 Q. Is that the line where you mean? A. Yes.

Q. You came away around in back of the car? A. The car was turned.

Q. Was the front of the car at that switch X. Y., as you call it? A. The front end was standing by the switch.

Q. When it was standing? A. When it was standing.

Q. You started across the street before the car started, didn't you? A. No.

30 Q. The car started? A. Yes.

Q. You both make the move at the same time? A. About the same time.

Q. Now in walking across you walked back a little bit to get around the back of the car as it was going around? A. Yes.

Q. You never got to the curb? A. No.

Q. Have you talked this accident over with anybody since that time? A. Yes.

40 Q. Who? A. Don't know his name.

Miss Tillie Meser—Cross

Q. Brother Schnable? A. No.

Q. You know Mr. Schnable? A. No.

Q. The car started to go around? A. Yes.

Q. At the same time you started to cross the street? A. Yes.

Q. And you veered a little back to go around the back of the car at the same time? A. Yes.

Q. You never got over as far as that curb? A. 10
No.

Q. Did you really see the car strike Mr. Rubi-
now? A. Yes.

Q. Where was the car? Just point out on this
map where he was standing when you saw the car
strike him? A. He was walking over here, right
over here; he was about there when I seen him.

Q. About at the point F? A. About here.

Q. When you saw him struck? A. Yes.

Q. But you never got on the sidewalk there? 20
A. No.

Q. This car was going around the corner while
you were walking? A. Well, when the car was
gone around the corner, I was standing there.

Q. You saw him afterwards. Then the front
of the car had passed him? A. No, the car had
not passed him yet.

Q. Had not passed him? A. No.

Q. But before you got to that curb you saw Mr.
Rubinow struck by the car? A. Yes. 30

Q. How far from the curb were you? A. I was
about here.

Q. About how many feet from the curb had you
gotten? A. I am a bum judge—about a foot dif-
ference.

Louise Hilltwine—Direct

LOUISE HILLTWINE, sworn:

Direct-examination by Mr. Smith:

Q. Miss Hilltwine, where do you live? A. 358 Madison Street, West New York.

Q. Where did you live in December, 1912? A. 321 Waverly Avenue, Newark.

10 Q. What was your business? A. I worked in Clark's Thread Mills.

Q. Do you remember the morning of this accident? A. I do.

Q. Were you with Miss— A. I was with Miss Meser.

Q. That young lady that was there? A. Yes.

Q. Where were you? A. On the Bergen line car.

20 Q. Where did you get off that car? A. On New Jersey Railroad Avenue.

Q. What street? A. South Street.

Q. Will you say whether or not the car stopped at South Street? A. The car did stop and let us off.

Q. Where did you get off, the front or rear of it? A. Off the rear end.

Q. And when you got off what did you do? A. I went around to the rear end of the car, because we went over to meet a friend of ours.

30 Q. While you were going around the rear end of the car what did the car do? A. The car started going.

Q. Started going? A. Yes.

Q. Did you see this old gentleman get hurt? A. The rear end of the car hit him.

Mr. Autenreith: I object to that. It is not responsive.

40 The Court: Strike it out.

Louise Hilltwine—Cross

Mr. Smith: I consent that it be stricken out.

Q. You must answer me yes or no, please. Did you see this gentleman get hurt? A. Yes.

Q. Will you tell us how it was done? A. The rear end of the car hit him when the car turned.

Q. Where was he at the time? A. He was coming from the cafe.

Q. Which way? A. Crossing the street. 10

Q. Which way was he going? A. Slanting.

The Court: Show it on the map. A. This way (indicating).

Q. That would be from the saloon corner over to the drug store corner; is that it? A. No, it looks more as if he was coming down that way (indicating).

Q. More slanting towards the railroad embankment? A. Yes. 20

Q. What was he doing at the time the car hit him, was he walking or standing? A. He was walking.

Q. What happened to him? A. He fell down and his boxes flew all around.

Q. What boxes? A. Some cigar boxes, it looked like to me, I don't know.

Q. After he fell down what did the car do? A. The car kept on going. The two men picked him up. 30

Q. Then what did you do with him? A. Carried him into the station.

Q. Then what did you do? A. I went to my friend's house.

CROSS-EXAMINATION by Mr. Autenreith:

Q. When you started from the station to go across the street you were bound for your friend's house, weren't you? A. Certainly. 40

Louise Hilltwine—Cross

Q. Of course you did not expect you were going to run into any accident such as Mr. Rubinow?
A. No.

Q. Did you start before the car started or afterwards? A. I started about the same time as the car started.

10 Q. You went around the back of the car just after you got off, didn't you? A. I did, yes.

Q. Got off the car. Where did the car stop? Point it out here.

(Witness indicates.)

Q. Where was the front of it? A. About here (indicating).

Q. This place marked X Y or further on? A. I don't know, but I think about here.

Q. About the junction of that curve with the main line; is that it? A. About there.

20 Q. Well, we will say that is Z. About there is where the front of the car was. You got off the back and walked around the back over to the other side? A. Right about here is where the man stood.

Q. Now point out where you were when you claim you saw the man hit? A. About here.

Q. About there? A. Yes.

Q. About how many feet from the curb? A. Three or four feet.

30 Q. Let us mark this K. Does that indicate the front, about where you were? A. Yes, about that.

Q. About that. And about three or four feet from the curb? A. Yes.

Q. Do you know how long these cars are, have you any idea? A. No, I have not.

Benjamin M. Richardson—Direct

BENJAMIN M. RICHARDSON, sworn:

Direct-examination by Mr. Smith:

Q. Mr. Richardson, where do you live? A. 744
Huntington Street, Newark.

Q. What is your business? A. Conductor, Public Service.

Q. How long have you been a conductor? A. 10
Fifteen years.

Q. What line were you on December 7, 1912?
A. Mulberry.

Q. Still on the Mulberry line? A. Yes.

Q. Do you remember this morning that this accident happened? A. I remember hearing about it; I did not see it.

Q. What car did you have at that morning on the Mulberry Street line? A. Mulberry.

Q. Do you know whether or not any other cars had gone out that morning on that line? A. I am
the first car out on that line.

Q. Which way were you going? A. I was coming south on Railroad Avenue.

Q. Then as I understand you would be the first car that would motor south on Railroad Avenue that morning? A. Yes.

Q. What time are you due at the corner of South Street station? A. We were due there at
6:26.

30

Q. Now this morning when you got there at the Mulberry Street, was there any other car in the vicinity? A. I didn't see any, no, sir.

Q. When you left Mulberry Street at that place was there any other car there? A. No, sir, there were not.

Q. You did not see this old gentleman get hurt?
A. No, sir.

40

Benjamin M. Richardson—Cross

Q. Did you see him at all on that street that morning? A. No, sir.

Q. How did you know that there had been an accident at that corner? A. Well, there was a party got on the car and told me about it.

Q. Then, as I understand you, yours is the first car out going south on Mulberry Street that
10 morning? A. Yes.

By the Court: Q. Do you know what time that morning it was that your car arrived at the station, so called, or the corner of Railroad Avenue and South Street? A. Well, we are due there at 6:26, I think we were about on time, as near as I can remember.

CROSS-EXAMINATION by Mr. Autenreith:

Q. How long have you been on that line? A.
20 Well, I have been on that line about fifteen years.

Q. How long before the accident? A. Well, the same amount.

Q. Do you know when this accident happened?
A. Sir?

Q. Do you know when this accident happened?
A. December 7.

Q. When, what year? A. On a Saturday.

Q. What year? A. 1912.

Q. How do you fix these dates so accurately?
30 A. Well—

Q. You did not see it happen, did you? A. Well, I remember when they told me about this accident.

Q. Oh, they told you about it. How many trips through there do you make in a day? A. Eleven trips.

Q. Been doing that for fifteen years, and you are still doing it? A. Well, we used to make
40 twelve when I first went on the line, but the last number of years we have been making eleven.

Fred J. Beeger—Direct

Q. But the last number of years you have been making eleven? A. Yes.

Q. Still work on the Public Service? A. Yes.

Q. You did not see the accident? A. No, sir, I did not.

FRED J. BEEGER, sworn:

10

Direct-examination by Mr. Smith:

Q. Mr. Beeger, where do you live? A. 759 Bergen Street, Newark.

Q. What is your business? A. Motorman.

Q. How long have you been a motorman? A. I am motoring now twelve years next August.

Q. What line are you on? A. Mulberry.

Q. Were you on that line in December, 1912? 20
A. Yes.

Q. Were you the motorman of the conductor who was last on the stand here? A. Yes.

Q. What time was your car due at South Street station, as you recall, in December, 1912? A. 6:26.

Q. On this trip? A. Yes.

Q. Do you remember coming to the corner on that morning? A. Yes.

Q. Do you know whether or not there was any 30
other car at that place when you got there that morning? A. No, sir.

Q. Was there any other car there that morning?
A. Not at that morning, no, sir.

Q. Did you see this old gentleman get hurt? A.
No, sir.

Q. What was the first you knew of there having
been an accident there? A. Well, the conductor
came out and told me about it. 40

Fred J. Beeger—Cross

Q. When was that? A. That was when we were going up Thomas Street a ways.

Q. Was there any other car that came down south on Mulberry Street that morning before yours? A. Came down South?

Q. Yes. A. No, sir.

10 Q. Is yours the first car out in the morning? A. First car out, yes.

By the Court: Q. How did you say you found out about the accident? A. The conductor came out and and told me about it going up Thomas Street.

Q. Which conductor? A. The conductor that was just on the stand.

Q. The conductor on your own car? A. Yes.

20 Q. How long was that after you reached the corner of South Street and Railroad Avenue? A. He told me?

Q. Yes. A. Oh, I should judge about a minute and a half, your Honor, about a minute, your Honor.

Q. Had you seen Mr. Rubinow, the gentleman sitting here at the end of the seat that morning? A. No, sir.

CROSS-EXAMINATION by Mr. Autenreith:

30 Q. You knew nothing about the accident until the conductor mentioned something? A. That is what he told me, yes.

Q. Still working for the Public Service, are you? A. Yes.

Defendant rests.

Plaintiff's Testimony in Rebuttal

GEORGE H. RUBINOW, re-called:

Direct-examination by Mr. Autenreith:

Q. Do you know John Weber? Where is he?
Weber, stand up, will you. Know that man?
A. Yes.

Q. Did you ever see him before? A. Yes. 10

Q. When did you first see him after the accident? When after the accident did you first see him? A. Oh, about—I saw him the next Tuesday.

Q. Next Tuesday? A. Yes.

Q. Didn't he tell you at that time that he did not see the accident as he was the street and was not near the place where the accident took place?
A. Yes, positively so.

Q. What had you asked him? A. I asked him whether he saw the accident and he said— 20

Q. Go ahead. A. He said, "Gentlemen, I would like to oblige you, but I did not see it; I was away about a block.

Q. What else did he say about it if anything?
A. Well, he didn't say anything else.

Q. What did you do then? A. Didn't do anything.

Q. Say anything more to him or did you leave?
A. I left.

Q. Was there anybody else there at that time? 30
A. My brother, Dr. Rubinow.

Q. Anybody else besides Weber? A. No, sir.

Q. No one else? Where was this conversation?
A. In a small room near the—in the inside of the First Precinct Station.

Q. In Newark? A. In Newark, yes.

CROSS-EXAMINATION by Mr. Smith:

Q. Well, you went to the station house, didn't you? A. Yes. 40

George H. Rubinow—Cross

Q. You went to the station house to see him?

A. Yes.

Q. Somebody had told you that he had seen the accident? A. Somebody told us that it was his beat.

Q. It was his beat? A. Yes, that is what somebody told me.

10 Q. Who told you that? A. In the station they told me that.

Q. Who told you? A. I couldn't recollect the name who told me that.

Q. Was it a policeman who told you it was his beat? A. The station—South Street station they told me.

Q. South Street station?

Mr. Runyon: Let him answer.

A. Somebody told me that John Weber helped
20 to take him in the station and I went to see him and asked him if he saw the accident.

Q. Somebody at the South Street station told you that Officer John Weber helped him into the station; is that right? A. Yes.

Q. You don't know who that was? A. I do not know.

Q. Did you go and see Weber? A. Yes, just as I said.

Q. Did you ask him if he helped him into the
30 station? A. No, I asked him if he saw the accident.

Q. Did you ask him if he helped your father into the station? A. No, I didn't. I took it for granted.

Q. You asked him if he saw the accident? A. Yes.

Q. And he said, "Gentlemen, I would like to oblige you, but I was a block away"? A. Yes.

40 Q. And did not see it? A. Yes.

Dr. S. Rubinow—Direct

Q. Is that what he said? A. Yes.

Q. Oblige you how? A. Well, help me out, he meant, by testifying.

Q. Help you out by testifying? A. Yes, if he would see. If he saw naturally he would help us out.

Q. Naturally he would like to help you out only he said he did not see it? A. Yes. 10

Q. That is what he told you? A. Yes.

Q. Sure of that? A. Positive.

Q. Very positive of it? A. Yes.

Q. Within the station house? A. Yes.

Q. Your brother was there? A. Yes.

Q. That is true? A. Yes.

Q. The two of you were at the station at the same time? A. Yes.

Mr. Autenreith: Naturally.

Mr. Smith: Naturally or unnaturally, I don't care. 20

Q. You were both of you there at the station at the same time? A. Yes.

DR. S. RUBINOW, re-called:

Direct-examination by Mr. Autenreith:

Q. Do you know John Weber? A. I do. 30

Q. Did you see him after December 7, 1912? A. Yes, I saw him once.

Q. Where did you see him? A. In the police station on the corner of Washington and Cross Streets.

Q. Was that the time that you were there with your brother? A. Yes, I was there with my brother. 40

Dr. S. Rubinow—Cross

Q. Did you say anything to him about the accident? A. Yes, we asked him whether he saw the accident.

Q. What did he say? A. He said he was too far away, he didn't see anything.

Q. Say anything else about it? A. I asked him whether he saw anybody there around who has
10 seen it, and he says he didn't see nobody.

Q. Didn't see anybody? A. Didn't see anybody who saw the accident.

Q. Did he say where he was? A. He said he was too far away.

Q. Too far away? A. Too far away.

CROSS-EXAMINATION by Mr. Smith:

Q. You knew he had been there, didn't you? A. I did not.

20 Q. Eh? A. I did not.

Q. You knew that at the time your father made this statement he said that Officer Weber was there, didn't you? A. No, I did not.

Q. Didn't know that? A. No. I heard it. I didn't know it.

Q. Heard it from whom? A. From people. I don't remember from whom..

Q. You heard your father say it? A. I did not.

Q. Didn't hear him say it? A. No.

30 Q. This statement says: "The next Mulberry Street southbound car that came along stopped after the motorman saw me and got off and a policeman named Weber also appeared in the meantime." A. Yes.

Q. You knew— A. I marked this, "Generally true." I didn't know. I didn't care for the name of the policeman and whether the policeman was
40 there or not.

Fred W. Miller—Direct

Q. You knew Weber's name was mentioned as having been there? A. Yes, I guess it was mentioned by a policeman who brought him into my house. He said that Weber must know more about it. That is what I remember. And another policeman brought him in, and when I asked him whether he saw it he says, "No," but he says "Weber is out there, and he must know something about it." That is why I went with my brother to see Weber. I asked the sergeant to let us have a talk with Weber, and we went in the back room in the station, and we asked Weber whether he saw the accident. We wanted to get witnesses. We asked him if he saw and he said no. I asked him if he could give us some of the names of people that could have seen it and he said he didn't know. 10

Q. Didn't know anybody? A. Yes. 20

Q. You knew that your counsel had subpoenaed Weber to come here as your witness during the trial? A. I did not.

Q. You didn't know your attorneys had subpoenaed Weber? A. I did not.

FRED W. MILLER, re-called:

30

Direct-examination by Mr. Autenreith:

Q. You know Officer Weber. Just stand up. A. Yes.

Q. How long have you known him? A. Oh, I couldn't say, a number of years.

Q. Well, more than a year? A. Yes.

Q. Did you know him before this accident? A. I did.

40

Fred W. Miller—Direct

Q. Do you remember meeting him on this morning? A. I do.

Q. Where did you meet him? A. Just as I came out of the paper store.

Q. From which direction was he coming—just turn to the map and point it out. A. Coming from the north—from north to south.

10 Q. What street is north of South Street along Railroad Avenue? A. First Street.

Q. First Street? A. Tichenor Street.

Q. You saw him coming from north to south, from Tichenor Street to South Street? A. Yes.

Q. Was that before or after you went into the paper store? A. That was when I came out of the paper store.

Q. Did you say anything to Weber? A. I said "Hello" to him, yes.

20 Q. What did he say? A. He said, "Hello."

Q. Had you noticed the people or crowd going into South Street station at that time? A. I did, yes.

Q. What was he doing? A. He was walking to the crowd.

Q. Walking towards the crowd, fast or slow, or how? A. Well, medium gait.

Q. When you went into the paper store did you look up towards Tichenor Street? A. I always do.

30 Q. Did you see Weber at that time? A. No, nobody.

Q. You only met him when you came out? A. Yes.

Q. At that time he was walking from what direction? A. He was walking from Tichenor Street to South Street.

40 Q. Towards South Street, did he say anything to you then about an accident? A. No.

Fred W. Miller—Cross

Q. That paper store, you say, is how far from the corner—from the north side of South Street?

A. Thirty-five or forty feet, perhaps more.

Q. You met Weber, you say, right in front? A. Yes, he was coming to the paper store as I was going up.

Q. Walking in a southerly direction? A. He was going south and I was going north. 10

Q. Tichenor Street is north of South Street?
A. Yes.

CROSS-EXAMINATION by Mr. Smith:

Q. You saw Weber as you came out of the paper store? A. Yes.

Q. He was then, you say, on New Jersey Railroad Avenue, was he? A. Yes.

Q. Walking towards South Street? A. Yes.

Q. Sure of that, are you? A. I am positive, yes. 20

Q. Known Weber a long time? A. Yes.

Q. Friend of his? A. No, not personal.

Q. Enemy of his? A. No, sir.

Q. Haven't any animosity against him? A. No, sir.

Q. Not a bit, eh? A. No, sir. Why should I?

Q. Did he ever pull you? A. No, never gave gave him cause to.

Q. He never pulled you at all A. No; I never gave him cause to. 30

Q. Never very friendly with him, were you? A. No.

Q. So this morning you said "Hello"? A. Yes.

Q. And he said "Hello"? A. Yes.

Q. And you went one way and he went the other? A. Yes.

Q. Is that right? A. Yes.

Q. That is all you know about it, is it? A. That is all I know. 40

Fred W. Miller—Cross

Q. You are sure it was this morning? A. I am positive.

Q. What makes you say so positive it was this morning? A. Because I saw the crowd there.

Q. The crowd where? A. At the station.

Q. Well, there were a lot of people running there? A. No, there was nobody running.

10 Q. Nobody at all running? A. No.

Q. Walking? A. No.

Q. Nobody at all walking? A. No.

Q. What were they doing? A. They were taking the old gentleman in the station.

Q. Who? A. Mr. Rubinow.

Q. Who was taking him in? A. Four or five people.

Q. Who were they? A. I don't know.

Q. Don't know any of them at all? A. No.

20 Q. Don't know this young man here at all? A. No, sir.

Q. This young man here next? A. No, sir.

Q. Did not meet him somewhere? A. No, sir.

Q. Did you meet him and say "Hello" to him?

A. No, sir.

Q. Sure of that? A. Positive.

Q. If he says that he helped to carry Mr. Rubinow into the station or helped Mr. Rubinow into the station that may be true? A. It may be,

30 yes.

Q. And the only one you saw is Weber? A. I saw him.

Q. You have got him fixed right in your eye so that you could see him now? A. No, I have not, unless I look at him.

Q. Not unless you look at him, of course. That is all.

Louis Wagener—Direct

RE-DIRECT-EXAMINATION by Mr. Autenreith:

Q. Just point out on the map there where the crowd was when you saw the crowd? A. They were right about here (indicating) at the curb.

Q. At the point marked M—about there? A. Yes.

Q. You were standing where? Just point out on the map? A. The paper store, here (indicating).

Q. Point marked N. And it was at N that you met Weber? A. Yes.

Q. At the same time, just before you said "Hello" to Weber, you noticed the crowd over here? A. Yes, because I had looked for the old gentleman, because I walk with him.

By Mr. Smith: Q. You did not see the old gentleman? A. Yes. 20

Q. You did not see them carrying him in? A. I saw him at the curb, but I didn't know it was him.

Q. Did you see them taking hold of him, or see the crowd there? A. I saw them have hold of him, yes; I didn't know it was him though.

LOUIS WAGENER, sworn: 30

Direct-examination by Mr. Autenreith:

Q. Do you know Weber? Will you kindly stand up again for us? Do you know that gentleman? A. Yes.

Q. What is your business? A. Stationery and confectionery and paper store.

Q. You keep the paper store we are talking about? A. Yes. 40

Louis Wagener—Direct

Q. Do you remember Miller coming into your office that morning, December 7th? A. Yes.

Q. Do you remember that morning seeing Weber? A. Yes, I seen him. That was just the time when Mr. Miller went out from me and said "Hello" to him.

10 Q. What time of day was that? A. I am not quite sure, but I think it was about twenty-five minutes to seven or five minutes—

Q. Somewheres around half-past six? A. Half-past six.

Q. Which direction was Weber walking? A. As far as I could remember he came from Tichenor Street towards South Street station.

Q. Where is Tichenor Street? A. Tichenor Street is one block away from South Street station.

20 Q. North, this way? A. I don't know. I don't know anything about the way. I know in my head where it goes.

Q. It is the other direction from Thomas Street? A. Yes, it is. the third block from the house.

Q. Which direction was Weber walking when you saw him? A. There is only one side. He came down from Tichenor Street.

30 Q. Towards where? A. Walking towards South Street Station. There is only one side there. He had to pass by me.

Q. Did you see Weber say "Hello" to him? A. What's that.

Q. Did you hear Weber speak to him? A. All I heard he saluted him, that is all.

40 Q. What did he say when he saluted? A. He said "Hello," and if he answered or not I don't know.

Louis Wagener—Cross

Q. You heard him say "Hello"? A. I heard him say "Hello," to him.

By the Court: Q. When you say "him" you mean who? A. Mr. Weber.

Q. Mr. Miller said "Hello" to Mr. Weber.

Q. Did Weber have his uniform on, do you remember? A. I don't remember.

Q. Did you notice any people at the South 10 Street station? A. At that time it was when I went out in the morning I seen there was a crowd standing, and at the same time I seen there is a man being carried in the station, and next I see there was a man put into the patrol wagon, or in the wagon, a patrol wagon or ambulance, but who it was I don't know.

Q. Where was Weber when you saw them carrying the man in the station? A. Well, when Mr. Miller went out so was everything over— 20 everything was over.

Q. Did you follow Miller out of your store? A. No, sir, I couldn't I was all alone.

Q. Where were you in the store? A. My paper stand is on the outside, and when I go outside I could see the station there and everything, but that was a dark morning, I suppose that is why it was impossible for me to see what was the matter.

Q. You saw people there, did you? A. I saw 30 them carrying him in the station.

Q. Miller had gone out just about then? A. Miller went out from my store just when Mr. Weber passed by.

CROSS-EXAMINATION by Mr. Smith:

Q. What time was that? A. After six, about half-past six or maybe five minutes more or less, 40

Louis Wagener—Cross

I couldn't say, because I don't remember. I was not watching the time.

Q. Anybody else in the store besides Mr. Miller? A. No, don't remember, no.

Q. Did Mr. Miller buy something? A. Yes.

Q. What? A. Got cigarettes and a newspapers.

Q. Then he started out? A. Started out.

10 Q. When did you see Weber passing? A. At the time when Mr. Miller went out. When he was—at the time he went out.

Q. Just as he went out? A. Yes.

Q. Where was Weber then? A. He passed by the sidewalk—passed by—he walked on the sidewalk down to South Street station.

Q. Had he gone by before Mr. Miller went out or just the same minute? A. It was about the same minute.

20 Q. Did you hear Miller say anything? A. Yes; all he said was "Hello" to him.

Q. What did Weber say? A. I wasn't paying attention to it.

Q. Then you did not go right out, did you? A. No, sir.

Q. What did you do? A. I attended to my business.

Q. Of course you attended to your business, but what did you do? A. I can't tell exactly what I
30 done.

Q. Put the papers away, or— A. Probably somebody else came in.

Q. How long afterwards did you go out? A. Oh, I went out before—it was before Mr. Miller came in to me. When I seen the crowd it was before Mr. Miller came in. When Mr. Miller came in he told me it was somebody got hurt by the
40 trolley car.

Miss Anna C. Blair—Direct

Q. So when Mr. Miller went by the store he told you somebody got hurt by the trolley car? A. Yes.

Q. I see. Then after that he bought the cigarettes and paper and went out? A. Yes, sir.

Q. And then Weber came along? A. Weber came along.

Q. And then they went up towards the station? 10
A. What's that?

Q. Weber went up towards the station? A. I don't know where he went, but he passed by my door.

Q. That was going south? A. Yes.

Q. Then afterwards you went out? A. Oh, when I went out I didn't pay no more attention to it because everything was over, as far as I can remember.

Q. Didn't you say a minute ago that when 20
Miller went out everything was all over? A. Yes, everything was all over.

Q. When Miller went out? A. Yes.

Q. Is that right? A. Yes.

MISS ANNA C. BLAIR, sworn:

Direct-examination by Mr. Autenreith: 30

Q. Miss Blair, you were the nurse that took care of Mr. Rubinow? A. I was.

Q. For a time it was at Dr. Rubinow's house?
A. Yes.

Q. How long were you employed? A. Eight weeks.

Q. Do you remember this man Schnable, from the claim department of the Public Service Com-
pany coming there? A. Yes, I remember. 40

Miss Anna C. Blair—Direct

Q. Were you present at the time he was talking to Mr. Rubinow, the plaintiff? A. I was.

Q. Where was Mr. Rubinow at the time? A. He was in bed.

Q. Do you know who wrote out this statement? A. Mr. Schnable wrote out the statement.

Q. The claim agent? A. Yes.

10 Q. Do you know whether Mr. Rubinow was in pain at the time? A. Yes, he was suffering pain. He had such a lot of pain and was not sleeping all night, and I had to give him morphine to make him sleep.

Q. You had been with him the night before then. Were you there with him from the time of the accident? A. He was injured on Saturday and I was brought in on Monday.

20 Q. At the time Schnable was there did he give any evidence of pain? A. Yes. He didn't want to make a statement, because he had such pain.

Q. Did he say so to Schnable? A. Yes, he told him so.

30 Q. What did Schnable do? A. He proceeded, and told him if he would give him a statement—all he wanted was a general outline of the case, so he would know just what happened to him. He told him he didn't want it for any Court purpose or anything, he just wanted a general outline of the case.

40 Q. What else? How did he get a statement from him? A. Well, Mr. Rubinow told him that he did not think he was in fit condition to make a statement, and afterwards the doctor came in, and he saw the agent was persistent, and Mr. Rubinow was getting very nervous, so that man there told him all he wanted to get was a general outline of the case, and as long as it was not going to be used against him—

Miss Anna C. Blair—Cross

Q. You saw Schnable write that out? A. Yes.

Q. Do you know whether he read it over before Rubinow signed it? A. No, I do not, I don't remember.

Q. Had the specialist come there yet to treat Mr. Rubinow? A. No, they were waiting for the specialist. He came that night.

Q. What was Mr. Rubinow's condition at the time this statement was taken? A. Why, he had quite a great—a good deal of pain, because nothing had been done for him, they had been waiting for the consultation. 10

Q. Any fever? A. Yes, he had a temperature, I don't remember just how much it was, but I know he had a temperature.

CROSS-EXAMINATION by Mr. Smith:

Q. Miss Blair, was Dr. Rubinow there? A. Not all the time; the doctor came in and out of the room. 20

Q. Some of the time? A. Yes, part of the time.

Q. You say he finally told Mr. Rubinow to make a statement? A. Yes, he told him to make a statement.

Q. Were you there when Mr. Rubinow gave it? A. I was there, but I was not paying any particular attention to what was being said.

Q. You heard Mr. Rubinow talking to this man, didn't you? A. I heard him answer questions. 30

Q. Then did you see this man write out this paper? A. Yes.

Q. You saw him write it out? A. Yes, I saw him write it; I don't know just what he wrote.

Q. Did you hear him talk to Mr. Rubinow in Yiddish or Jewish language? A. No, I did not; he spoke only English, to my knowledge. 40

Miss Anna C. Blair—Cross

Q. Only English? A. To my knowledge he spoke all in English.

Q. Did you hear him talk to Dr. Rubinow? A. I heard him tell Dr. Rubinow that the only reason he wanted this was so he would have a general outline of the case to give his company.

10 Q. All right. Then did you hear or see Dr. Rubinow read the statement? A. I saw Dr. Rubinow take the papers, I don't know whether he read the statement or not.

Q. What did he do with the papers? A. He held them in his hand and glanced over them; I don't believe he had time to read over the whole statement.

Mr. Smith: I ask that her belief be stricken out.

20 The Court: Strike it out.

Q. Did you see him look at the papers? A. Yes.

Q. As though he was reading them? A. He seemed to be glancing over them; I don't know whether he read them or not. He did not read them out loud.

Q. Sure of that? A. Positive.

Q. Did you see Mr. Rubinow sign it? A. I did.

Q. Did you see the doctor sign it? A. Yes.

30 Q. You knew the doctor was a physician, didn't you? A. I did, yes.

By Mr. Autenreith: Q. Did Mr. Rubinow himself, the old gentleman, read these papers? A. No, he did not.

Q. Were they handed to him so he could read them? A. I don't remember.

Max Rubinow—Direct

MAX RUBINOW. re-called:

Direct-examination by Mr. Autenreith:

Q. Will you stand up? Did you ever see that gentleman before? A. No, I did not.

Q. Do you remember whether he helped you from the tracks into the station? A. No, he did not. He did not.

Q. Did Officer Weber help you in? A. Yes, he helped me when I was in the door—near the door.

Q. But before that had you seen him? A. No, before he had not.

Q. Just look at this gentleman again—what is your name?

A Voice: Hellriggel.

Q. Just look at Mr. Hellriggel again and be sure? A. Well, I am sure that he, at that time, when I fall down and I was looking around to somebody to help, it was no man around, and I tried to stand up and I was looking for somebody to help me to stand up and nobody that would.

Q. Miss Meser, stand up. Did you see that young lady at the time? A. No, sir. Maybe they were after in the station; I can't tell.

Q. Did not see her then at that instant? A. No.

Q. That other young lady, I don't know her name. Did you see her at the time? A. No, sir, there was nobody there.

Q. Did not see either one of them? A. No, sir. Can I tell about the old man what was here?

Q. Did you see that old gentleman that testified, Mr. Yurbury? A. Yes, I saw him.

Q. Where did you see him? A. When I was sitting on the bench in the station the policeman telephoned for the ambulance, and then I started—there was some people and I started to ask the

Max Rubinow—Direct

people to call up, to telephone, and I gave him the name to call up, my son, the doctor, and he came in with this—

Q. Did this old gentleman say anything to you?

A. No; wait! Then I seen nobody wants to call—the police will attend to it—nobody do it—then I see in the door comes this old man.

10 Q. This Mr. Yurbury? A. Yes, this old man. I don't see him now.

Q. Is he here?

Mr. Smith: He was here.

A. I don't see him here. I thought he was a gentleman and I thought he would do it for me and I asked him and begged him—

Mr. Smith: I object.

The Court: This is irrelevant and immaterial.

20 Q. What did he say to you? A. He said "The police will attend to you."

Mr. Smith: I object.

The Court: What do you propose to prove?

Mr. Autenreith: I won't press it. I will withdraw the question.

Q. Did you see him before you were struck by the car? A. Oh, no. He came in afterwards.

30 Q. How long after you were struck? A. After I was sitting about five or eight minutes in the station. It took him maybe a quarter of an hour or twenty minutes until the ambulance came, and I was sitting.

Q. You did not see him until about five or eight minutes afterwards; is that what you want to say? A. I know it was about eight minutes after when I was sitting there, I saw him come in the
40 door.

Max Rubinow—Cross

Q. Mr. Weber stand up. Just turn around and look at Mr. Weber. Do you recognize him as the police officer that was there? A. Yes.

Q. When did you first see him? A. When he bring me in and set me down on the door—he was helping that time when they bring me in the door and set me down on the bench.

Q. When you first came into the station door? 10
A. Yes.

Q. Did you see him before that? A. No, sir.

Q. Did he help pick you up in the middle of the street? A. No, sir, he did not.

Q. At which street is the entrance into this station; can you say that? A. Yes, I see.

Q. Which street is the entrance into the station? A. From South Street.

Q. At the point marked M, where my pencil is? 20
A. Yes, about here yes.

Q. Had you seen Weber before you were going in the station at that point? A. No, I did not.

CROSS-EXAMINATION by Mr. Smith:

Q. Weber, you say now, did help you from a point near the curb? A. Yes, sir.

Q. Into the station? A. It was not far from the door when I saw a policeman come and help me.

Q. A policeman did come and help you then? A. 30
Yes.

Both sides rest.

Exhibit D-1

<i>In re</i> MAX RUBINOW, Res. 73 Parkhurst St. Bus. Add. 35 Vesey St.	}	Case No. 41216 Occupation Tool Manufacturer; Apparent Age 66 Years. Nationality Hebrew;
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Date Dec. 9/12 Time 3:30 p. m.

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States to William D. Schnable; at his son's home, 602 High Street, as follows: On Saturday morning December 7, 1912, about 6:15 a. m., I was walking North on New Jersey Railroad Avenue on West side and was on my way to my business at 35 Vesey Street and was alone. When I reached South Street I stepped from West curb opposite the saloon and as I was walking slowly intending to cross South Street tracks and was between

20 tracks and curb I heard this car coming behind me and thought it was a Mulberry Street car going North, but I did not look back and slowed down to let car pass me and then I would cross over behind it. As the car passed me it turned around curve and turned out to be a Bergen Street car and the rear swing of the car struck my right side and I was knocked down. I was dazed for the time being and can not say if Conductor saw me, but Motorman saw me and I can not say what car number was. The next Mulberry Street South bound

30 car that came along stopped after Motorman saw me and got off and a policeman named Weber also appeared in meantime as well as some people from sidewalk and I was assisted into Railroad Station and in about half hour Police Ambulance came and took me to my son's home on High Street. I don't know the Motorman of Mulberry Street car and don't know his name. There was

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Motion for Direction of Verdict

no bell rung by the Motorman of this car which was running about same as usual.

In general true.

Signed MAX RUBINOW,

Witness Saul Rubinow, M. D.,
William D. Schnable.

Motion for Direction of Verdict

10

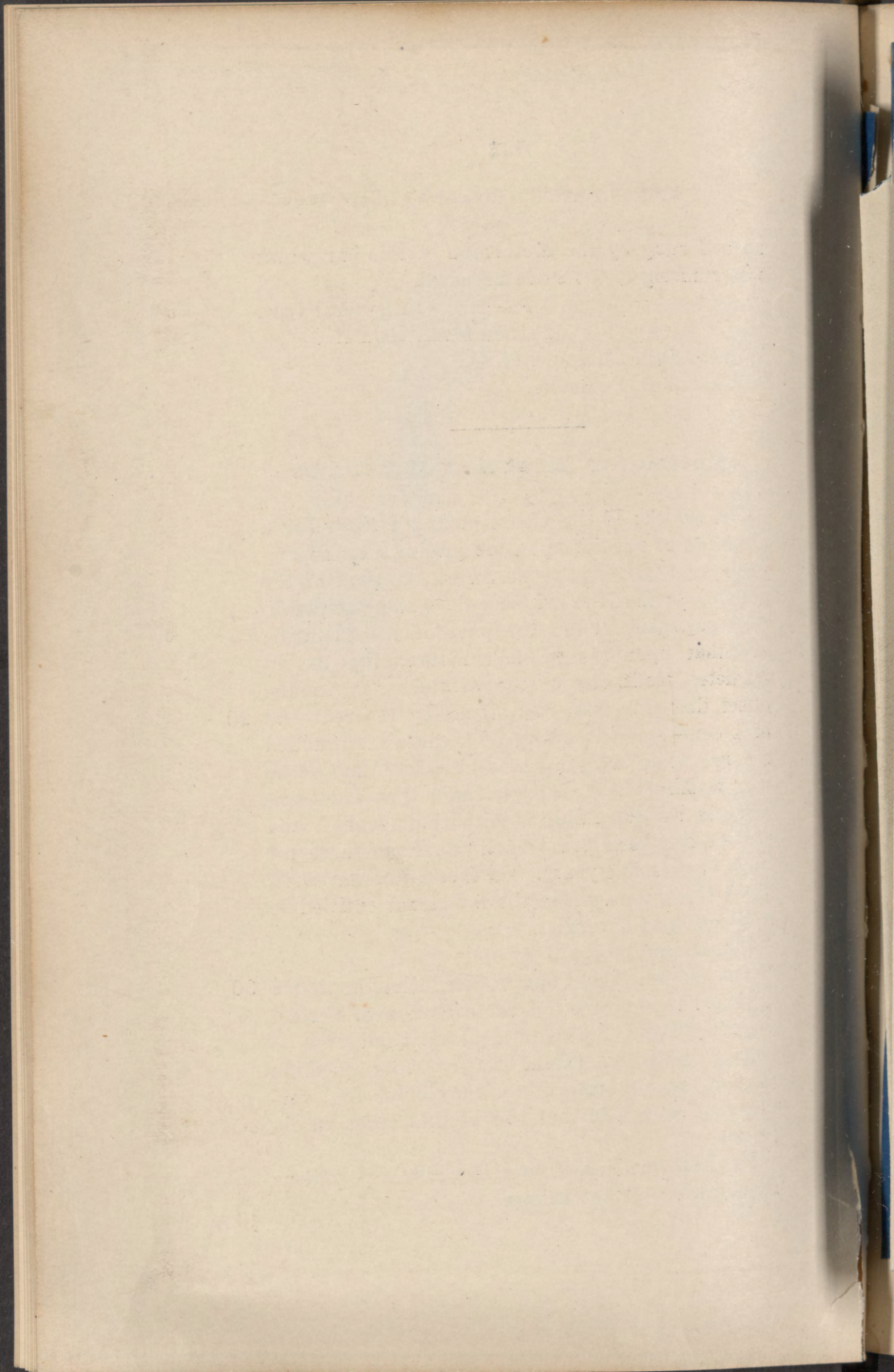
Mr. Smith: If the Court please, I move for a direction of verdict upon the ground that no evidence of negligence is shown on the part of the defendant; that the evidence does show contributory negligence upon the part of the plaintiff; and that upon the whole evidence, the uncontradicted testimony of the witnesses is to the effect that this man was struck by the rear end 20 of a car—the rear swing of a car as it rounded a curve while the same was in motion and as he was walking towards the track; that his testimony is he was familiar with that locality, and that he had been going back and forth there for some four or five years. On those three grounds, sir, I think that under the law I am entitled to a direction of a verdict.

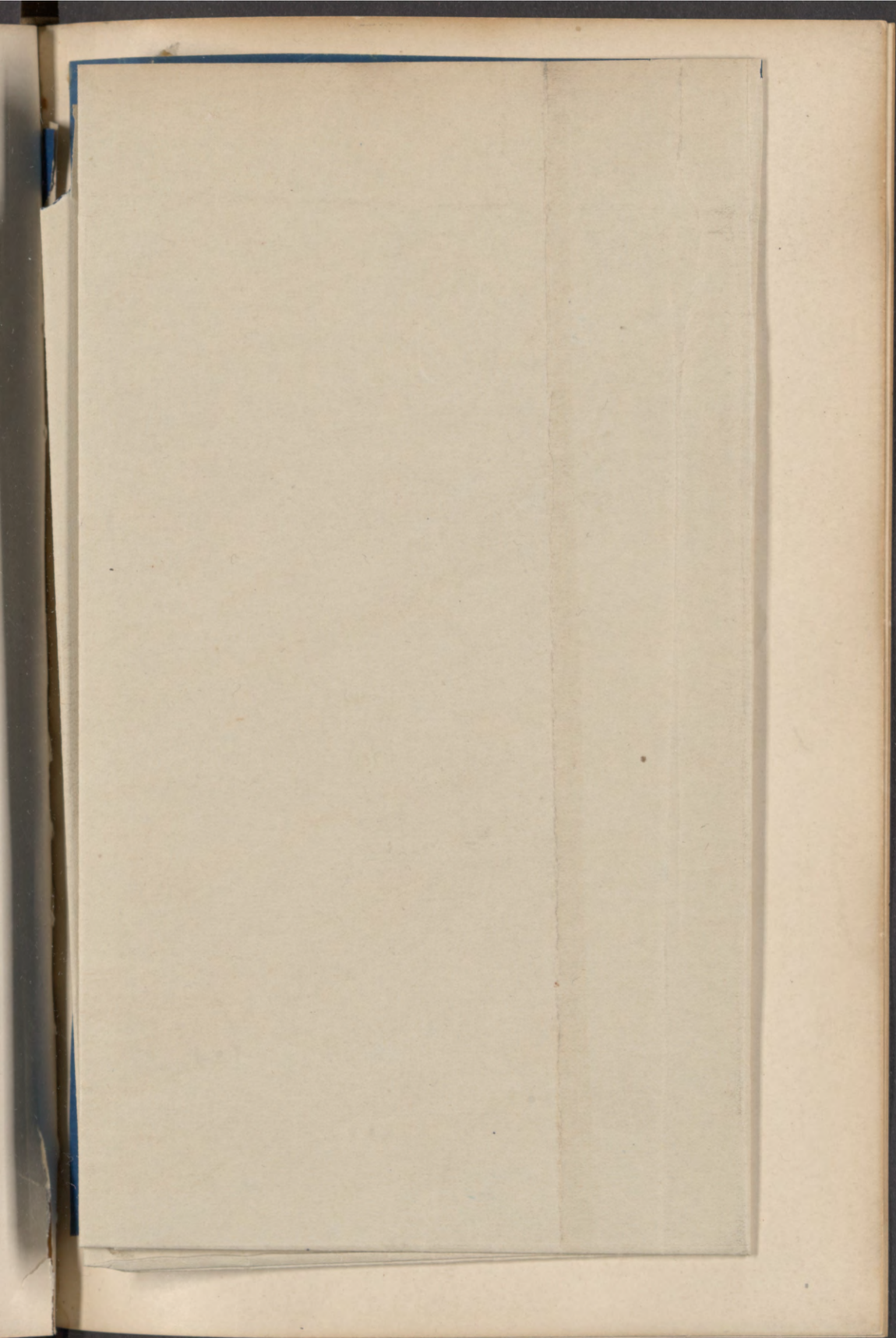
(Discussion.)

The Court: The Court's conclusion is that I 30 shall grant your motion for direction of verdict on the ground that contributory negligence is shown, and to that extent that it is not a question for the jury; therefore, you may enter that verdict. Of course, to that you wish to enter an objection.

Mr. Runyon: Yes, if your Honor will permit us an objection to that ruling.

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New Jersey
Court of Errors and Appeals

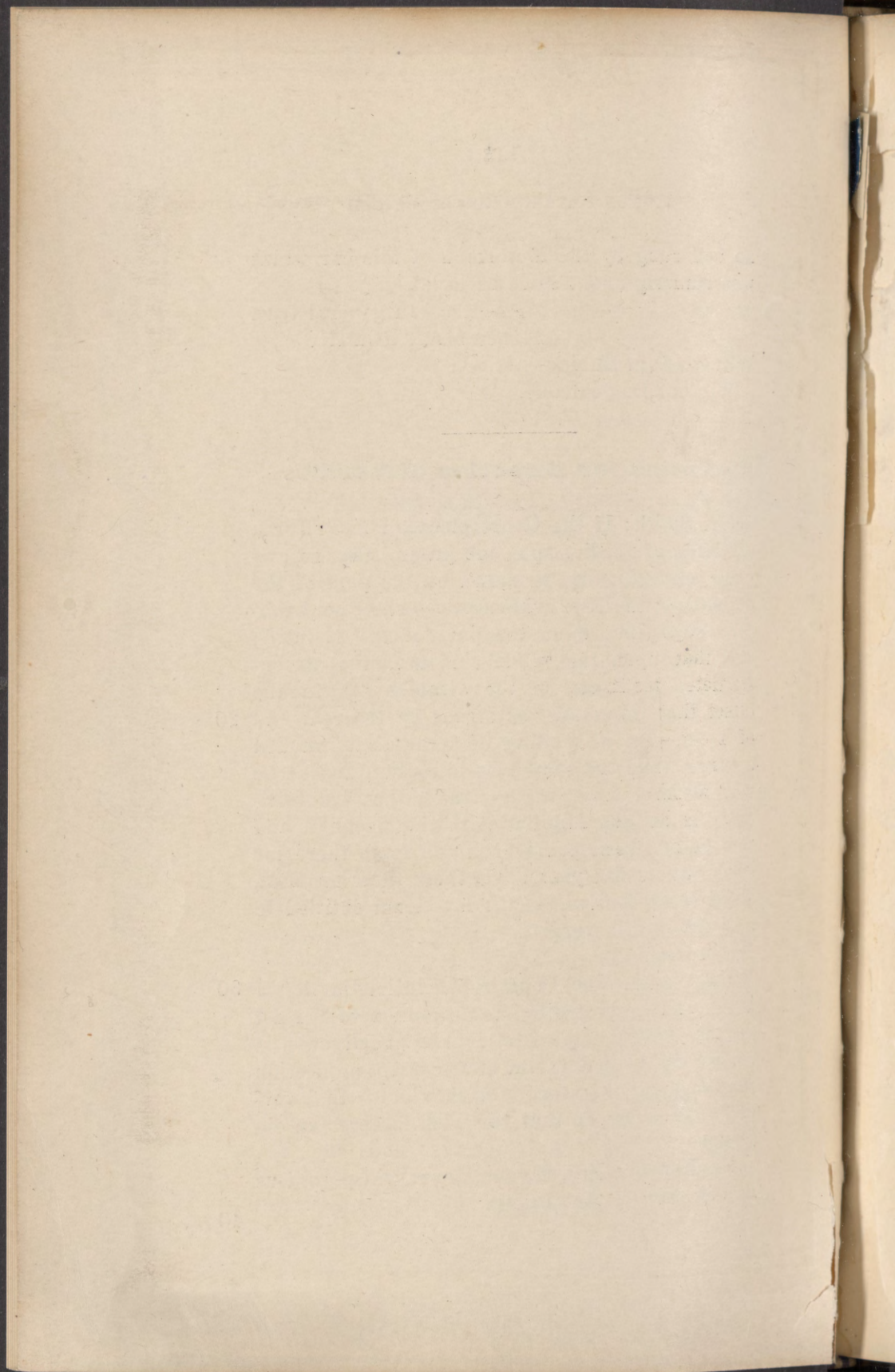
MAX RUBINOW, (Plaintiff)-Appellant, vs. PUBLIC SERVICE RAILWAY COM- PANY, (Defendant)-Appellee.	}	Action at Law On Appeal.
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**BRIEF OF ROE, RUNYON & AUTEN-
RIETH COUNSEL FOR APPEL-
LANT**

The trial was had before Honorable Luther A. Campbell, Judge of the Hudson County Circuit Court, at the December Term, 1914, before a jury and the plaintiff and defendant having put in their cases, at the conclusion of the trial, the defendant moved for a direction of a verdict in favor of the defendant and against the plaintiff, and the Court (p. 143, l. 30) granted said motion over the objection of the plaintiff "on the ground that contributory negligence is shown, and to that extent that it is not a question for the jury."

The jury under said direction rendered a verdict for the defendant and against the plaintiff.

The notice of appeal states the following grounds:



“FIRST: That the plaintiff was not contributorily negligent.

“SECOND: That the Court should have refused to direct a verdict in favor of defendant and against the plaintiff.

“THIRD: That the questions raised at said trial were questions of fact solely for the jury.

“FOURTH: That the question of contributory negligence was one for the jury.

“FIFTH: The following *question was overruled.*

“Q. Mr. Rubinow, from your observation, what was the most travelled course of pedestrians from the northerly side of South Street to the southerly side of South Street?

“SIXTH: The following question was admitted:

“Q. And then did you see the old gentleman there, the plaintiff?

“Mr. Autenrieth: I object to that as leading.

“Mr. Smith: I can ask her if she saw the man? A. Yes.”

ON POINTS 1, 2, 3 AND 4

(The Testimony)

Most of the testimony has reference to the blueprint map, “Exhibit P-1.”

Plaintiff's Case

Plaintiff's story, as verified by his witnesses, to wit, Frederick W. Miller, and Louis Wagner, is that on December 7th, 1912, he, the plaintiff, as was his usual custom, at approximately 6:30 a. m., left his home (p. 13, ll. 8-40) on Parkhurst Street, Newark, N. J., being the second block westerly from the corner of N. J. Railroad Avenue and South Street (as shown on "Exhibit P-1"), Thoman Street being one block westerly of South Street and parallel thereto.

"Exhibit P-1" does not extend far enough west to show either Parkhurst Street (two blocks) or Thomas Street (one block) but defendant's witness "Bartholomew" (p. 86, l. 15) says the distance between the southerly side of South Street and the northerly side of Thomas Street on New Jersey Railroad Avenue was 233.6 feet. Plaintiff and his witness say it was from 80 to 125 feet.

Plaintiff on said occasion (p. 13, l. 18) came down Parkhurst Street to New Jersey Railroad Avenue, proceeding along Railroad Avenue in a northeasterly direction going toward South Street, in the usual way he daily went to his shop.

As he came along the (northerly) sidewalk on Railroad Avenue going toward South Street and got to the corner of South Street (p. 13, l. 18) and just before he crossed South Street, *he turned and looked around and there was no car in Railroad Avenue*, and (p. 14, l. 16) he did not notice whether there was any car on the other side of South Street and he proceeded at the following points indicated by the witness in writing on said "Exhibit P-1."

(P. 14, l. 20) started at "Point A," going to "Point B" (p. 14, l. 22) and then when he came in the middle of the street he saw a car coming from Mulberry Street at "Point C" (being opposite the drug store) (p. 14, l. 35).

At the time he saw the Mulberry Street car he was at "Point D" or the middle of the street between the trolley track and curb (p. 15, l. 11) and the Mulberry Street car was coming from "Point C" around the curve into South Street (p. 15, ll. 13-28).

He started to go this way to leave room for said Mulberry Street car, and started "*a littel bit, a little east more*, because I knew the car would go to here, *and I walked a little more east and then comes—*" He was trying to get on the other side, "Point B" (p. 15, ll. 26 to 40).

(P. 16, l. 21) as plaintiff started to go *a little more east and let the Mulberry Street car*, which was going around a curve into South Street, pass, he felt a Bergen Street car which had come up Railroad Avenue proceeding in easterly direction around the curve into South Street, hit him and knocked him down (p. 16, l. 33).

(P. 16, l. 38) at the time the Bergen Street car struck plaintiff he was *about* at "Point F" on said "Exhibit P-1" being about five or six feet from the southeasterly curve of Bergen Street car (meaning car track).

Repeating the fact, plaintiff stated (p. 17, l. 10) when he came to the corner, "Point A" *he had looked back* (meaning westerly) *to see whether a car was coming up Railroad Avenue* (p. 17, l. 20).

That the Bergen Street car from Thomas Street, the first street to the west of South Street, parallel comes into Railroad Avenue, proceeds one little block from Thomas Street along Railroad Avenue about eighty or ninety feet, and turns southerly into South Street. (Defendant's engineer Bartholomew (p. 86, l. 15) says the block was 233.6 feet.)

(P. 18, ll. 11-16) *just before he was hit he was listening for a bell but did not hear any.*

(P. 18, l. 18) The Bergen Street car after it hit him *went on and did not stop*. It went east along South Street.

(P. 18, l. 25) There were no cross-walks from "Point A" to "Point B."

(P. 18, l. 32) as the plaintiff left "Point A" he proceeded straight across to the sidewalk, "Point B."

(P. 19, l. 21) for the past four years he had walked daily at about that time on the way to his shop from "Point A" to "Point B" (p. 19, l. 33) about four times a day, two times there and two times back.

On cross-examination: (p. 34, l. 12) as he was going from "D" to "F" *a little more east from "F"* the car hit him. *He did not see or hear the car until after it hit him* and, therefore, did not know which part hit him.

(P. 36, l. 12) when he was knocked down there was nobody present, he looked around and tried to get up. *No one was there*, then he saw some people coming. *No one was around the street at all*.

(P. 31, l. 20) a policeman came afterwards.

Re-direct: (P. 41, l. 24).

Pointing at the loop marked "H" on said "Exhibit P-1" the said loop is used by trolley cars, but cars do not run on that with the same frequency as they do on other tracks (p. 41, l. 38).

(P. 42, l. 12) *When he approached "Point A" he looked back to see if there was any car on Railroad Avenue and there was not any car there*. He only looked back that one block (that is to say westerly along Railroad Avenue, as far as Thomas Street, distance, defendant says 233.6 feet, plaintiff says 80 to 125 feet) because there were no tracks beyond that block.

(P. 42, l. 13) starting across from "A" to "B" he at no time came to a dead stop in the street, but kept on walking *always towards "B"* (p. 42, l. 25) *with his face towards "B" and his back towards the approach of the Bergen Street car* (p. 42, l. 39). The Bergen Street car (p. 42, l. 39) was about the size of a Plankroad car.

Re-cross: (P. 44, l. 22) he was walking all the time, and did not stand there at all.

Re-direct: (P. 45, l. 22) After hitting him, the Bergen Street car *went right on and nobody got off or came back to him neither the motorman or conductor.*

Re-cross: (P. 45, l. 32) *The Bergen Street car had not stopped at the corner at all, because he says, although he did not see it, if it had, it would not have hit him, (p. 46, l. 5). He did not see anything of the Bergen Street car at all until it struck him.* He looked to see what happened, and saw on the roof the name Bergen Street car. (P. 46, l. 28) *He did not see the car before it hit him.* Looked around, when he was down on the ground, after it hit him. He knew at that time in the morning these cars ran five or six minutes apart.

On being re-called for rebuttal, the plaintiff stated (p. 139, l. 15) that *he never saw the defendant's witness, Hellriggel, that that witness did not help him from the tracks to the station. That defendant's witness Policeman Weber had helped him only when he was near the door of the station, (being point M).*

(P. 139, l. 24) *that he had not seen the defendant's witness Tillie Meser, but that may be she was in the station after he was brought there. That he did not see defendant's witness Louis Hilltwine. That he did not see defendant's witness, Yurbury until after he was sitting on a chair*

in the station, while the policeman was telephoning for an ambulance. (P. 139, l. 38) that said witness was just then coming in the door of the station (p. 140, l. 10). (P. 140, l. 30) that Yurbury was not around before he was struck by the car and only came in after he was sitting about five or eight minutes in the station, when Yurbury came in the door.

(P. 141, l. 4) that he first saw defendant's witness, Weber, the policeman, when he brought him in and sat him by the door as Weber was helping when they brought him in and sat him down on the chair. He had not seen him before that time. That said policeman did not pick him up in the middle of the street. That the entrance to the station where he was standing was from South Street.

(P. 141, l. 18) He did not see Weber before he was at "Point M," which was not far from the door of the station, when a policeman came and helped him.

The plaintiff's witness, Frederick W. Miller, who worked at the same concern where the plaintiff worked, to wit, the Rubinow Edge Tool Company, being an establishment of the son of the plaintiff, first saw the plaintiff on the occasion in question (p. 62, l. 38) corner of South and Railroad Avenue, at the opposite corner from where witness was standing on Railroad Avenue, about opposite the side saloon door; plaintiff was walking towards the north. (P. 63, l. 10) witness was on the opposite corner at the north side of the drug store. (P. 63, l. 20) *witness was looking towards plaintiff but did not see any car at the time in the block on Railroad Avenue between South Street and*

Thomas Street, (this was a distance of 233.6 feet (p. 86, l. 15) or from 80 to 125 feet as plaintiff's witnesses say. He then walked to the paper store about twenty-five or thirty feet, (defendant's Engineer Bartholomew says it was 68 feet (p. 88, l. 16) from the corner from where the plaintiff was walking.

(P. 64, l. 1) after witness got around the corner on Railroad Avenue he had occasion to look back and noticed there was a car coming about the middle of the block towards the station from Thomas Street in the direction in which witness was standing, coming north, it being around 6:30 a. m., (p. 64, l. 28) this being the usual time that both witness and plaintiff proceeded to their work, both taking their usual respective courses.

(P. 65, l. 3) when witness came out of the paper store he looked back to see whether plaintiff was coming, as was his usual custom. He usually meeting him there to go to work with him. He did not see plaintiff, but three or four people had hold of a man near the station carrying somebody into the station, but witness went on to work.

(P. 65, l. 14) the car he had seen coming up the block on Railroad Avenue was a Bergen Street car which had not been there when witness got out of the car. As he came around the corner he also saw a Mulberry Street car at the drug store, witness being on the northerly corner of South Street and Railroad Avenue, it being just the break of day.

Cross-examination: (P. 66, l. 14) As witness got to the corner of the drug store there was a Mulberry Street car there before. It had gone after he came out of the paper store. Witness had come down South Street at Orchard Street and at the drug store corner started up Railroad Avenue north; there was no car coming along South Street.

(P. 66, l. 30) when witness got to corner opposite drug store "Point B" he saw plaintiff at the opposite side entrance of the saloon on Railroad Avenue, witness proceeded to paper store next to drug store (being "Point N") his back being toward plaintiff.

(P. 67, l. 1) as witness got to paper store (being Point N) *he looked back and saw a car coming about the middle of the block*, but he could not see the plaintiff.

(Placing oneself in the position at the door of the paper store (Point N) near the drug store, it is obvious, that while the approaching car on Railroad Avenue between Thomas and South Street could be seen, that the witness could not see position of plaintiff if he was at either "Points A" or "D" where he said he was.)

(P. 68, l. 14) At the corner, "Point B" he could have seen Rubinow, but not from where the witness was, "Point N," it being about thirty feet (Defendant's expert says it was 68 feet (p. 88, l. 16). So that at that time (p. 68, l. 24) while witness was in front of the paper store, "Point IV," there was not anybody in the middle of the street, and if there was anybody there, he says he would have seen them. At the same time he saw the trolley car (p. 68, l. 32) approaching on Railroad Avenue at the middle of block between Thomas and South Street, and no one was in the street in the line of his vision.

(It is obvious that at "Point N" in front of the paper store, the extension of the drug store at the corner, would be in line of the witness' vision to the point where the plaintiff was apparently walking. ("Points A & D."))

(P. 69, l. 4) when witness came in the paper store, he saw somebody carrying a man into the

station, four or five men had hold of somebody, he then didn't see the Bergon Street car. He says the distance from South Street to Thomas Street is about one hundred and twenty-five feet. (Defendant's expert (p. 86, l. 15) says the distance is 233.6 feet.)

(P. 71, l. 6) *witness was sure he saw a Mulberry Street car also before he went into the paper store being around 6:30 a. m. It was standing but he don't know whether it was standing at the time he saw Mr. Rubinow at the saloon door.*

Re-direct:

Tracks on Railroad Avenue only extend south to Thomas Street being about one hundred and twenty-five feet or one block (defendant's expert says 233.6 feet (p. 86, l. 15).

The paper store is northerly from the drug store and from South Street. The drug store being two and one-half stories high.

(P. 72, l. 8) the car (probably meaning the Mulberry Street car) shut off his view when he first turned.

(P. 127, l. 30) witness, re-called on rebuttal, says, he has known defendant's witness, the policeman Weber, a number of years, before the accident. That on the morning in question *he met Weber just as he came out of the paper store (p. 128, l. 3) (being just after he saw the crowd of men carrying the plaintiff into the station) that at that time Weber was coming along Railroad Avenue from North to South, from the street north of South Street (Tichenor Street) this being as witness came out of the paper store. Witness said "hello" to Weber, and Weber replied. At the time witness had noticed the people and crowds going into the South Street Station (p. 128, l. 23) and Weber was walking towards the crowd at a medium gate.*

(P. 128, l. 28) when witness went into the paper store *he looked up towards Tichenor Street*, being northerly along Railroad Avenue, and then Weber *was not in sight*, but witness met him *coming from that direction* when witness came out of the paper store. Weber *said nothing* about the accident (p. 129, l. 4). Weber was coming to the paper store *walking in a southerly direction*. He was going south, and witness was going north.

Cross-examination: (p. 130, l. 12) witness is sure it was the occasion in question because as Weber *approached from Tichenor Street north of South Street* there was four or five people taking plaintiff in the station.

(P. 131, l. 3) the crowd being at the point marked "M" on "Exhibit P-1," witness at the time standing at the point marked "N" on said Exhibit, being in front of the paper store. Witness did not know it was the plaintiff being carried in.

Plaintiff's witness, Louis Wagner, the owner of the paper store, says he knows defendant's witness, Weber, and remembers plaintiff's witness, Frederick W. Miller, coming into his paper store on the occasion in question (p. 132, l. 4), *and seeing Weber* when Mr. Miller went out from the paper store and said "hello" to Weber, it being about twenty-five minutes to seven (p. 132, l. 14) Weber *was walking from Tichenor Street towards South Station, Tichenor being one block away from South Street Station North*. Witness saw Weber (p. 131, l. 22) say "hello" to Miller. (p. 133, l. 11). *At that time* witness saw there was a crowd was standing at the South Street Station. *At the same time* he saw a man being carried into the station, but who it was, he didn't know, and while witness saw this being done and everything

was over (meaning the accident) *defendant's witness, Weber, came along at "Point N"* (coming from Tichenor Street a block north).

Cross-examination: (p. 131, l. 18) Weber had passed at the same *minute as Miller went out of the paper store* (p. 134, l. 34). Plaintiff's witness Miller had previously been out, that is *before* the witness, Miller came in the paper store, when he *had seen* the crowd it was *before* Miller came in. When Miller came *in*, he told me it was somebody hurt by the trolley car.

(P. 135, l. 4) then *after* Miller bought cigarettes and paper, *and went out, then Weber, came along from Tichenor Street*, going toward the station.

(*Defendant's Case*).

Defendant's witnesses, the policeman Weber, (p. 89) Tillie Meser (p. 111) Louise Hilltwine (p. 116) claim they saw the accident and describe it as having happened in a different manner than plaintiff's witnesses.

Defendant's remaining witnesses do not claim to have seen the accident. The conductor and motorman on a Bergen Street car deny they knew of the accident until two days afterwards and seem to speak rather of usual custom rather than to direct their testimony to the particular occasion.

Also the motorman and conductor of a Mulberry Street car testify to hearing about an accident afterwards, and by the testimony of what was their general custom, indicate that there could have been no Mulberry Street car where the plaintiff and his witnesses testify there was.

Of defendant's eye witnesses, Officer Weber is fully discredited by the testimony of the plaintiff and plaintiff's witnesses, George H. Rubinow (p.

123) Dr. Rubinow (p. 125, l. 30) Miller, (p. 127) and Wagner (p. 131) indicating positively that Weber, immediately after said accident, and while said plaintiff was being carried to the entrance of the station at "Point M," was then only approaching "Poing N" from a northerly direction, and did not know of the accident, and that thereafter he had admitted to two persons, that he did not see it, and was a block away.

The testimony of defendant's witnesses Tillie Meser (p. 111) and Louise Hilltwine (p. 116) is contradictory the one to the other, and is in direct conflict with that of plaintiff's witnesses.

Defendant's witness, Yurbury (p. 105) did not see the accident, and he seems to speak only generally of what usually occurred daily at that point.

Defendant's case is directed to the point that the Bergen Street car, or at least a Bergen Street car, did stop before it got to the crossing in front of the saloon, and proceeded on, striking plaintiff *without warning, none of defendant's witnesses alleging that plaintiff saw the car, or that any signal was given of its approach.*

Plaintiff's case is in direct opposition, to wit, that the Bergen Street car *did not, or could not have stopped,* and at all events was propelled into plaintiff *a little east of "Point F" without notice, signal or warning, and without plaintiff even knowing or having reason to suppose it was there or approaching,* until being thrown down thereby.

Furthermore the testimony of defendant's witnesses, Hilltwine, Meser and Weber are all improbable.

Weber admits it was a custom to make a report yet made none. The witnesses, Hilltwine and Meser, from the point they say they were standing, manifestly by reason of the overhang of the car, could not have seen the accident.

Defendant offered in evidence Exhibit D-1, a statement signed by plaintiff in the presence of his brother and the defendant's agent. According to plaintiff's testimony, (pp. 31-43), testimony of Dr. Samuel M. Rubinow (pp. 55-56-57-58-59-60-61-62), and the testimony of Anna C. Blair (p. 135) plaintiff, when he signed it, did not know its contents. He was under the influence of morphine and was in great pain and did not read the exhibit, but upon false representations had written above his signature the words "*In general true,*" and then signed his name without reading it.

This was about two days after the accident, while the plaintiff was in *great pain*, waiting for doctors. It was a question for the jury to determine therefore and effect of such exhibit, and whether it discredits plaintiff's story.

Argument on Testimony

Plaintiff and his witness, Miller estimate that the distance on Railroad Avenue between South and Thomas Street was from 80 to 125 feet (Defendant's Expert (p. 86, l. 15) says it is 233.6 feet). Plaintiff, leaving "Point A," carefully looked around in back of him as far as the car tracks come along Railroad Avenue from Thomas Street (being therefore from 80 to 233.6 feet) and saw nor heard no car in sight.

Plaintiff's witness, Miller was on the opposite corner "Point B" and saw plaintiff in front of the saloon, walking north, and looked up Railroad Avenue as far as Thomas Street (80 to 233.6 feet) and saw no car in sight, but afterwards saw a Mulberry Street car coming around in front of the corner there turning up South Street.

Plaintiff was warranted in proceeding to his destination, "Point B," and progressed as far as "Point D," when, as he says, on account of the Mulberry Street car approaching along the track indicated by "E," he veered over a *little to the east*, to about a little east of "Point F."

Just before stepping off the curb "Point A" he had looked back of him (a distance of from 80 to 233.6 feet) and no car was in sight. The distance between that curb, "Point A," and the point where he was struck is 22 feet, (according to the scale on the map); according to defendant's expert the width of South Street between curbs was 39 1/2 feet (p. 86, l. 23), so that while plaintiff was walking between "Points A, D and F" on his direct way to "B" all the while pursuing his general destination to "Point B," he only deviated there from sufficiently to allow for the swing on the Mulberry Street car, and in walking such short distance across South Street there was clearly no duty upon plaintiff to turn back to again look back up Railroad Avenue, because he had a right to assume that defendant's car would not be coming without signal or warning at such a rate of speed so as to swing around the corner of Thomas Street, proceed a distance of, as witnesses say, 80 to 233.6 feet, during the period plaintiff would take to walk directly a distance of 22 feet. Or, in other words, at the rate of, allowing for the corner, probably many times upwards of seven times the rate plaintiff was walking.

On the other hand, as plaintiff proceeded to cross, directly from "Point A" to "Point B" progressing to "Point D," according to all of plaintiff's witnesses, by the very act of the defendant in the operation of its Mulberry Street car, plaintiff was suddenly placed in a position of jeopardy, in the center of a public important cross

ing, and it is clearly a question for the jury to determine what, under such circumstances, a reasonably prudent man would have done. Would such a reasonably careful man who had, when he reached "Point D," proceeded only 12 feet by the scale from "Point A" where he had looked, have again turned back and look again, in the same direction as before, before veering, or would he have veered over to allow for the Mulberry Street car, or walk around it, looking in an easterly direction, or would he stand still or go back, it being remembered that at so dangerous a point, cars and vehicles might be approaching in any and all directions.

What a man in such circumstances should have done was a question for the jury. The Court could not lay down a set rule in such condition of danger. The circumstances must govern.

Plaintiff had equal rights on the highway and had a right to expect a warning of the approach of any car in the rear. He was keeping alive to the danger; from defendant in front.

The defendant does not claim that it gave any warning of the approach of its car. It approached plaintiff from the rear, and plaintiff never saw it.

In other words, except for the testimony of defendant's witness Hellregel, the bottle beer driver (p. 100) and Weber, it is uncontradicted that defendant's car was propelled into the plaintiff without plaintiff ever seeing or hearing it, or having reason to believe it to be near him.

It was not a question of plaintiff making a miscalculation of the distance of the rear overhang swing of the car but it was a plain case of the car by one of its parts, whether front or rear, being propelled into the plaintiff, whose back was turned without notice or warning. Under such circum-

stances, it was at least a question for the jury to determine, whether plaintiff was contributorily negligent.

The defendant was negligent in that it gave no signal or warning of the approach of its car, and, according to plaintiff's witnesses, its car, to cover the distance (80 to 233.6 feet) between the time plaintiff looked from "Point A" and plaintiff's witness, Miller, looked from "Point F" up Railroad Avenue toward Thomas Street, and the time of the accident, must have been coming at an unusually high rate of speed; furthermore, throwing aside plaintiff's case and alone on defendant's contention, if the car had stopped opposite the saloon before reaching the crossing and was thereafter propelled ahead toward plaintiff it is perfectly obvious that the conductor, if he had looked or been alert, must have seen the plaintiff as his car approached the line of plaintiff's course, the plaintiff with his face in the opposite direction (to the east), and yet the defendant does not even claim that it gave any signal nor warning of the approach of its car.

Of course the defendant's contention that the car stopped before reaching the crossing opposite the saloon, is inconsistent with the plaintiff's and the plaintiff's witness, Miller's, testimony, that said car was not in the block at the time plaintiff left "Point A" proceeding to "Point B." The testimony could not be read together, unless it be that the car was coming at a most terrific rate of speed.

In this case, the defendant's car, without warning, signal or notice, was propelled into a pedestrian who was lawfully required to veer aside on account of the turn of another of defendant's moving cars immediately in front of him.

The pedestrian and the car had equal rights in the highway, except that the car could only oper-

ate on a given course, and it was a question for the jury whether at such point of danger, in the reach of two overhangs of two moving cars which could not pass together around that corner, plaintiff, as a reasonably prudent man, should have kept his eyes on the moving impending danger immediately in front of him of which he had notice, or was to abandon that danger, and possibly others on other sides, and should look back for unexpected and unknown dangers in the rear, against which he had a right to assume he had protected himself, and would reasonably receive warning or signal.

Defendant's expert (p. 88, l. 38) says the overhang of the two cars was so great they could not pass at the corner together. The distance between the two tracks was 8.2 feet.

How can a rule be laid down as to how often such a pedestrian lawfully crossing such dangerous crossing must look back, without being negligent as to his duties in the front or sides.

To "Point D" he had only walked 12 feet (by the scale) since he had last looked carefully back a distance of 80 feet to 233.6 feet, and a car, to approach in the meanwhile, must have come around a corner (Thomas Street) besides going that distance.

Even with defendant's construction, which is at variance with plaintiff's case, if the Bergen Street car stopped before the crossing in front of the saloon, plaintiff had a right to expert reasonable warning or signal of the approach of any such car and defendant admits he did not get it. It must have been a noisy corner.

If the plaintiff, by the defendant's operation of its Mulberry Street car, was required to step a little east on account of its overhang the plaintiff's back being to the Bergen Street car it was

the defendant's duty to operate its Bergen Street car so as to give way to any change in plaintiff's course especially when made necessary by its own act, and plaintiff was without warning of its approach. In other words, to so operate both cars, at said dangerous crossing so as to leave the reasonably prudent pedestrian in safety and to warn him of approaches, all proceeding along with reference to one another, and it is a question for the jury to determine what such reasonably prudent man would do at such point of imminent danger.

THE LAW

That the plaintiff was not guilty of contributory negligence in point of law.

Upon the motion for direction of a verdict the defendant contended that the plaintiff was guilty of contributory negligence as a matter of law and laid great stress upon the case of *Jelly v. The North Jersey Street Railway Co.*, 76 N. J. L., p. 191.

Under this point, however, we will confine ourselves to the exposition of the differences between the case at bar and the case above cited.

In the case of *Jelly v. North Jersey Street Railway*, the plaintiff stood at the front end of the car while the car was passing around the curve in front of him. He supposed he was far enough away so that the car would not strike him.

The Court in its opinion laid down the rule that the motorman was justified in assuming that the plaintiff would appreciate his danger and step far enough away so that the overhang of the car would not strike him as it turned the corner.

Two elements therefore present themselves in the Jelly case. Paragraph 1—The plaintiff was conscious of the presence of the car; he was standing looking at it as it passed in front of him and made a miscalculation of the overhang of the car. Paragraph 2—The motorman saw the plaintiff and noticed that the plaintiff was aware of the approach of the car, and was entitled to assume that the plaintiff would avoid the danger.

In these two points the case at bar is entirely dissimilar to the case of *Jelly v. North Jersey Street Railway Co.* and the other cases cited therein upon which the Jelly case is based.

In the case of *Widmer v. West End Street Railway Co.*, 158 Mass., 49 and *Garvey v. Rhode Island Company*, 26 R. I., 80, the plaintiff was watching the car and in a position to sense the approaching danger in the overhang as it turned the corner in front of them and made a miscalculation as to their position being one of safety.

In the case at bar the plaintiff was crossing a public street crossing. Before he left the curb he looked back of him for the entire block in which trolley cars would come up behind him and no car was there. He started to cross the street. The car came up behind him, the plaintiff stood in full view of the motorman of that car and with his back toward it. The motorman could see or ought to have seen that the plaintiff would not get out of the way of the car as his back was toward it and he gave no indications of knowing of the presence of the Bergen Street car. The motorman therefore was not entitled to rely (as he was in the case of Jelly) upon the assumption that the plaintiff would move to a place of safety. And in addition thereto the plaintiff in the case at bar made no

miscalculation as to whether he was in a place of safety or not, as he had no knowledge, nor was there any warning given of the approach of the Bergen Street car, such as the plaintiff had in the case of *Jelly against the North Jersey St. Railway Company*.

Another distinguished feature in the case of *Jelly v. North Jersey St. Railway Co.* and the other cases cited therein is that the car passed in front of the plaintiff. In the case at bar the trolley car came from the rear and therefore, so far as the plaintiff was concerned, he was in no different position than if he were crossing at right angles to the Bergen Street car and it came upon him without warning and struck him down. Certainly the portion of the car that struck the plaintiff is no criterion for determining rules of conduct and does not determine the question of contributory negligence, and therefore the plaintiff, not having been warned of the approach of the Bergen Street car, the motorman, seeing that he would not move to a place of safety, should have sounded his warning; and to contend that the plaintiff is guilty of contributory negligence as in the case of *Jelly v. The North Jersey Railway* would be to say that he should have moved himself to a place of safety from a danger of which he knew nothing about.

It can not be contended that the plaintiff did not have a right in the street. There was no cross-walk extending across the street, but the plaintiff was walking from the one corner to the other in the most direct route.

II

Contributory negligence of the plaintiff was not a question of law, but purely a question of fact upon which the jury only could pass.

The conduct of the plaintiff at the time he sustained the injuries for which this action is brought was such that the jury might draw various inferences from it.

The contributory negligence was a question of fact wherein the jury might believe the plaintiff was in the exercise of ordinary care and prudence with respect to his safety at the time he was crossing the street and therefore acting as a reasonably prudent and careful man should act.

On this point it must be borne in mind that the plaintiff, as he reached the crossing, looked in back of him (80 to 233.6 feet) to ascertain whether any cars were coming up Railroad Avenue from his rear. No cars were in the block (cars ran a distance of only one block in back of plaintiff and then turning easterly into another street). He started to cross the street. As he arrived nearly midway in the street, a Mulberry Street car swung around the corner in front of him and he veered a "*little to the east of 'Point F,'*" to avoid being struck by the overhang of the Mulberry Street car.

At the same time the Bergen Street car came up from the rear, a distance varying from 80 to 233.6 feet, turned the corner directly in back of the plaintiff and in doing so, struck and injured him.

No bell or signal was given of the approach of that car and the plaintiff stood in full view of the motorman facing another direction.

It has been settled in cases of a similar nature that under circumstances of this kind, if the question of contributory negligence be raised, it can be one for the jury only to decide.

In the case of *Devine v. Public Service Railway Co.* the plaintiff on a dark, rainy and misty night, waited on a corner for a west-bound car which had stopped in front of him to move on.

After it had gone he stepped upon the west-bound track and stood until the car was 70 or 75 feet away and then looked down the east-bound track about 125 feet and seeing and hearing nothing started across the tracks.

As he was about clearing the east-bound track he was hit and injured by an east-bound trolley car of the defendant company. On the question of contributory negligence under this state of facts the Court laid down the following:

“Nor can it be said, under the evidence, that the plaintiff was guilty of contributory negligence as a matter of law. The rule requiring one exercising his lawful rights in a place where the exercise of lawful rights by others may put him in peril to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles and his judgment how and when to cross without collision, but his observations need not extend beyond the distance within which vehicles moving at lawful speed would endanger him.”

Devine v. Pub. Service Dly Co., 88 Atl., p. 1080 (N. J. Ct. Er. & A.)

In the case of *Kraut v. Public Service Railway Co.*, the facts was generally speaking as follows:

Plaintiff was struck by a trolley car as he was crossing Broad Street in the City of Newark. When he was about five or six feet distant from the north-bound track he saw a car forty or fifty feet away coming at a fair rate of speed towards him on that track when he proceeded to cross and as he was stepping over the last rail his foot was struck by the car and he was injured.

The Court said in its opinion that a verdict should not have been directed against the plaintiff upon the ground of contributory negligence of the plaintiff, but that the case was properly one for the jury, and that it would not be said as a matter of law that the plaintiff was guilty of contributory negligence. The negligence of the defendant was the excessive speed of the car at the time when the plaintiff was crossing where the motorman would, or ought to have seen him in the act of crossing, and that it could be reasonably inferred *if the motorman had looked* he would have seen the plaintiff in the act of crossing, and in failing to reduce the speed of the car, thereby respecting the plaintiff's right to cross. The plaintiff's contributory negligence, if any, in that case was his attempt to cross in front of a fast moving car, but the Court stated that such conduct of the parties both as to negligence and contributory negligence was for the jury to determine.

Kraut v. Public Service Railway Co.,
82 N. J. L., 437.

In the case of *Anderson v. Public Service Corporation*, the plaintiff was walking in a westerly direction upon the public highway very near to the trolley rail of defendant's track laid upon the highway. When its car, coming in the same di-

rection, came from behind him, but which he neither saw nor heard (no signal by bell or otherwise having been given) and struck and injured the plaintiff.

At the time the plaintiff had his back to the car and was walking in the same direction in which the car was coming. He had stepped aside in order to avoid the danger of an overtaking automobile and in doing so was pretty close to the tracks when the car suddenly came upon him. There was a headlight on the car and nothing to obstruct the motorman's vision of the plaintiff at the time of the accident.

The Court held that the question of contributory negligence of the plaintiff was one for the jury and that it could not be said as a matter of law that the plaintiff was guilty of contributory negligence at the time of the accident. The Court held:

“The facts established by the plaintiff's evidence show that there was no physical obstruction to the view of the motorman, who was in charge of the car and that there was daylight enough for the purpose of his seeing the plaintiff who was ahead of the car and was near to the rails of the car as to be liable to be struck by its passage over the rail. There was evidence from which the jury would have been justified in finding that no bell or other signal or warning was given by the defendant to apprise the plaintiff of the coming car and that any motorman keeping a reasonably vigilant lookout ahead should have seen that his face and eyes were turned in the direction he was walking and that his back was turned toward the car and that he was not likely to see the car approaching and therefore

depending for his safety entirely upon his sense of hearing. * * * It seems to us that these questions, both as to contributory negligence of the plaintiff as well as to the negligence of the defendant, belong to the province of the jury.

Anderson v. Pub. Serv. Co.
80 Atl. Rep., p. 480.

The facts in the case at bar are almost similar to those in the case of *Anderson v. the Public Service Railway Co.* above cited.

In the case of *Haight v. Consolidated Traction Co.*, it was held that it is the duty of others not to obstruct the track but a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of proper care. Therefore, even although the plaintiff was standing or walking close to or upon the track of the defendant company, that in itself did not constitute contributory negligence on his part.

In the case of *Merkel, Admr., v. Jersey City, &c., Ry. Co.*, it was held that the questions whether, under the evidence, the trolley car at the time of the accident was coming at a reasonable rate of speed and the motorman operating it was properly on his guard and reasonably careful and vigilant in looking out for the safety of persons on or near his track, were purely questions for the jury, and it was also laid down that the plaintiff's contributory negligence was not a question of law, but a question of fact, *75 N. J. L., 654*, for it is a well settled doctrine that where the conduct of a person at the time is such that negligence will depend upon whether the person's actions were

that of a reasonably prudent and careful man, that then negligence is not a question of law for the Court, but it is for the jury to say what is reasonably prudent conduct under the circumstances and where either inference can be drawn it is for the jury to draw the conclusion as a question of fact.

In the case at bar what other course of conduct would the plaintiff be obliged to conform to? He had taken note of the source of danger from the rear as he left the curb, he had proceeded to the middle of the street when a danger arose in front of him and was in the act of avoiding that danger when the Bergen Street car without warning struck him from the rear.

It is obvious that the slightest warning on the part of the Bergen Street car would have apprised the plaintiff of the danger in the rear, so that it could have been avoided. His negligence, if any, would be in getting in range of the car in the rear, which could not be said to be negligence unless he had some knowledge of danger in the rear, or unless he had failed to take precaution to ascertain that the rear was safe before crossing the street.

These questions can at the most be for the jury to determine.

If the Court laid down any rule of law, there could be no place to draw the line as to how often and frequently a pedestrian should look on all four sides of him. Especially in a position of danger it must necessarily be for the jury to determine, what he should do.

We submit that the judgment of the Court below, directing a verdict, should be reversed, and a new trial ordered.

ON POINT 5

(p. 20 l. 20) the question was:

Q. Mr. Rubinow, from your observation, what was the most travelled course of pedestrians from the northerly side of South Street to the southerly side of South Street?

Defendant objected to the question as irrelevant, incompetent and immaterial.

Plaintiff had travelled the same route for upwards of four years four times daily, and must have been able to testify from an expert knowledge, as to such traffic.

It was very relevant and material to plaintiff's case to show that on the occasion in question plaintiff took the usual and most travelled course of pedestrians, to wit, the course at which the defendant would by daily practice have a right to expect pedestrians to be passing. This is especially so in view of the fact that the testimony shows that there was no regular paved crossing at the point in South Street in question (p. 18, l. 25).

We submit the question should have been allowed.

ON POINT 6

(p. 112 l. 38) the question was asked:

Q. And then did you see the old gentleman there, the plaintiff?

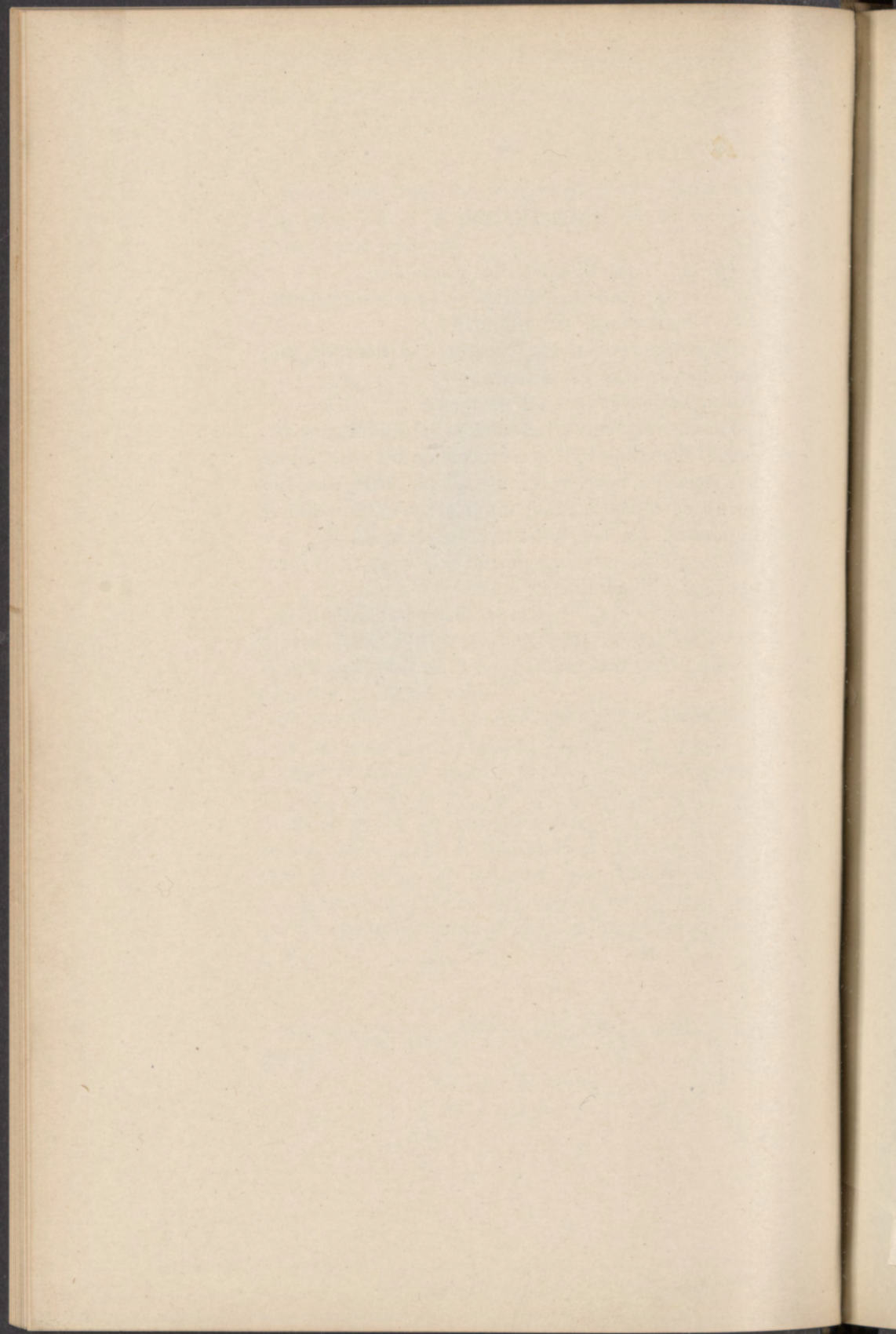
Objection was made, that it was leading, and the answer was permitted.

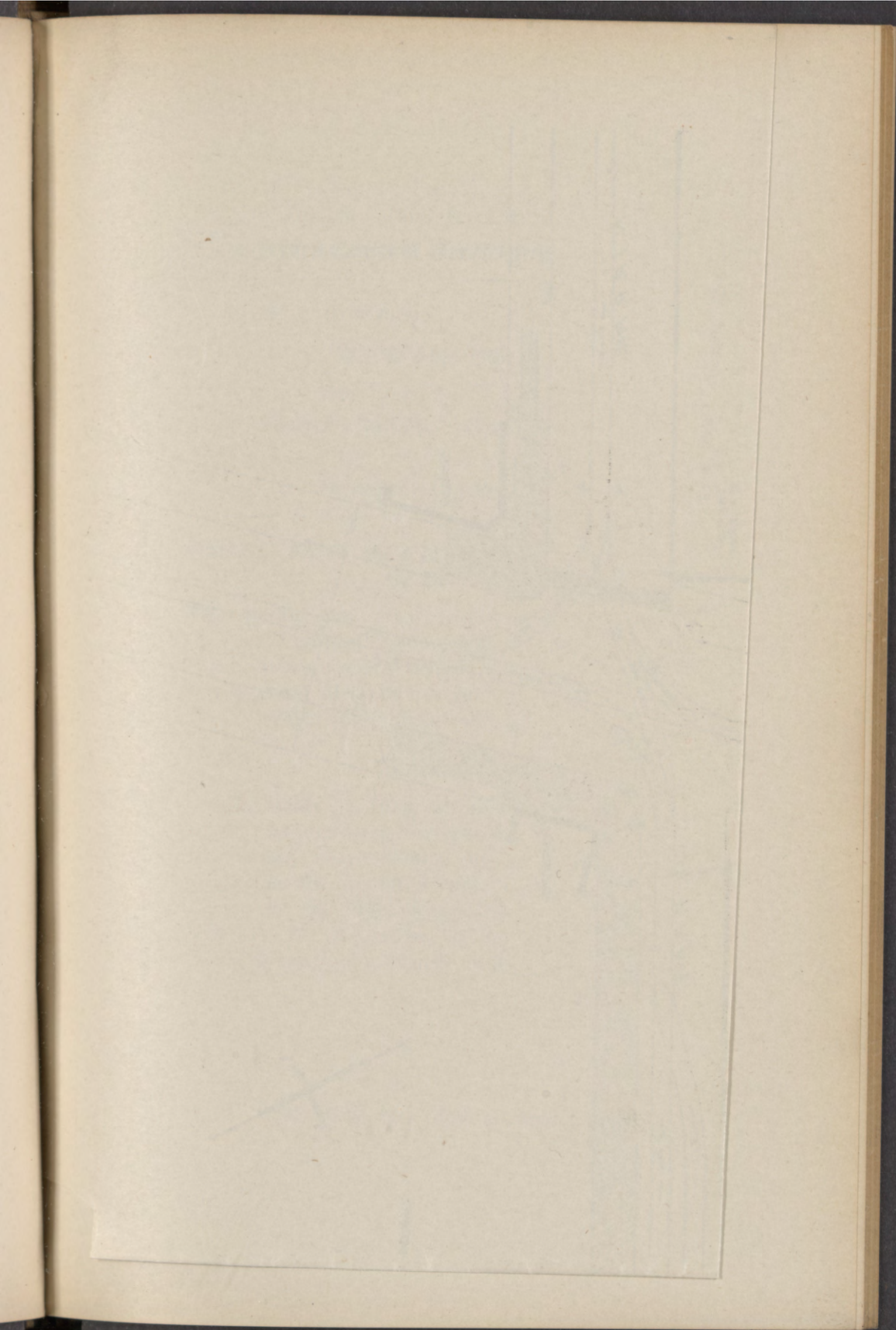
The question suggested its answer.

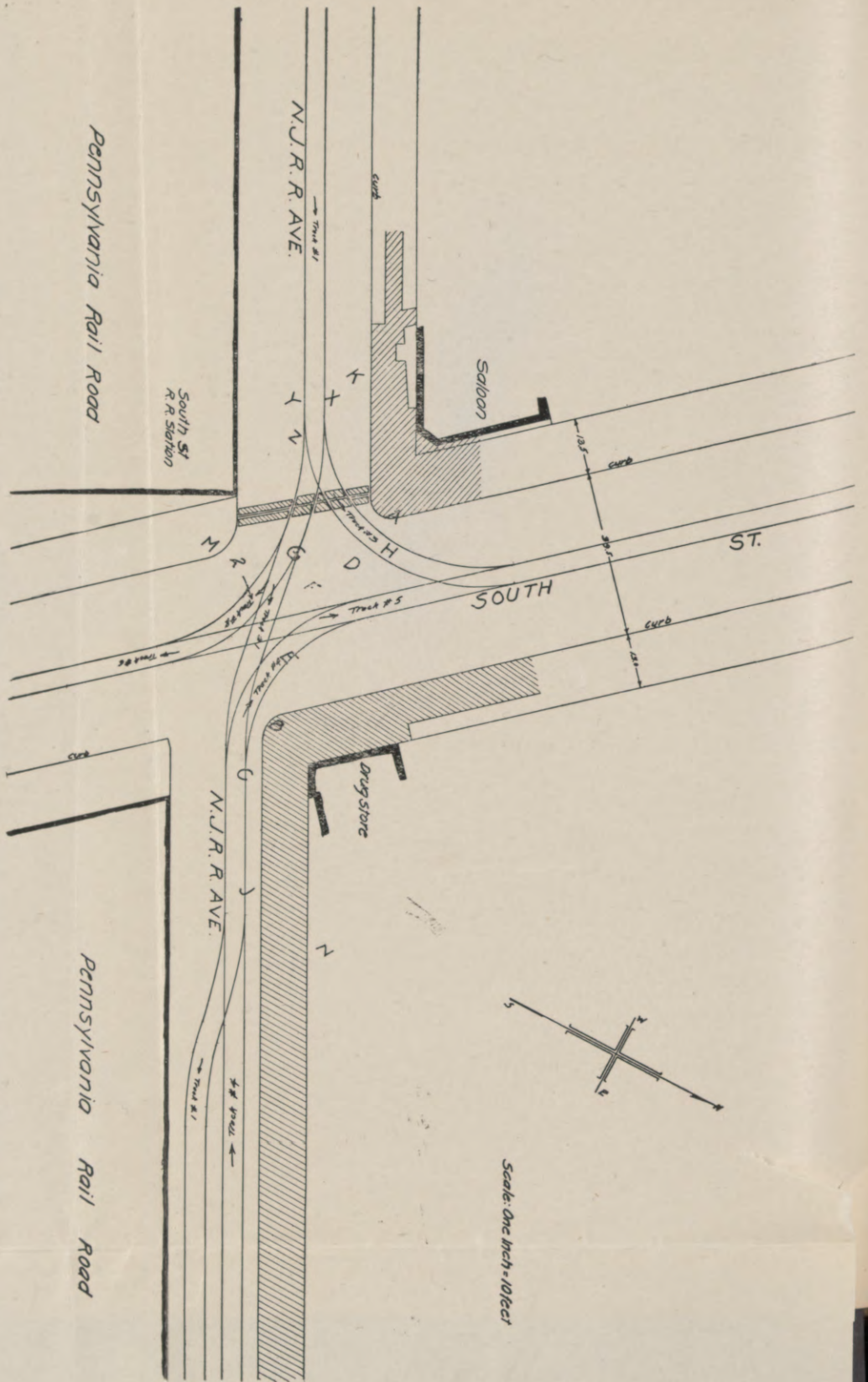
It was very material to the plaintiff's case because according to the witness's own testimony her position, with reference to plaintiff, and the swing of the car, must manifestly have made it impossible for her to have seen plaintiff.

The question being permitted, was, therefore, damaging to plaintiff's case.

Respectfully submitted,
ROE, RUNYON & AUTENRIETH,
Of Counsel for (Plaintiff) Appellant.







Scale on this reduced map: One inch=35 ft.

New Jersey Court of Errors and Appeals.

MAX RUBINOW, <i>Plaintiff-Appellant,</i> <i>vs.</i>	}	On Appeal.
PUBLIC SERVICE RAILWAY COM- PANY,		
<i>Defendant-Appellee.</i>		

10

**BRIEF FOR DEFENDANT-APPEL-
LEE.**

This action was tried before the Honorable Luther A. Campbell and a jury in the Hudson County Circuit Court. At the close of the case, the trial court directed a verdict for the defendant, from which the plaintiff now appeals. 20

Facts.

On December 7, 1912, at about 6:30 A. M., plaintiff was struck by the rear end of a Bergen Street trolley car, operated by appellee, while it was swinging around a curve on Track 2, as shown on the map which is annexed hereto, marked Exhibit P-1, at the corner of South Street and New Jersey Railroad Avenue or Mulberry Street, Newark. South Street runs approximately east and west, and Railroad Avenue north and south. Thomas Street was the next street southerly from South Street, and runs parallel thereto. 30

In order to clarify the location of the tracks, we have numbered them on the map Marked Exhibit P-1.

The Bergen Street cars run easterly on Thomas 40

Street, then north on Railroad Avenue on Track 1, till they reach the southerly side of South Street, and then turn easterly on the curve of Track No. 2 into Track No. 6 on South Street. The Clinton Street cars approach South Street from Thomas Street on Railroad Avenue and then turn westerly on South Street on curve of Track No. 3. The Mulberry Street cars run southerly on Track No. 4 and when they reach South Street they turn westerly on curve of Track No. 4 into Track No. 5 on South Street. These are the only lines of cars operated on these tracks.

10 Plaintiff testified pp. 12-13) that he was walking north on the west side of Railroad Avenue (p. 12, l. 1); when he arrived at the southwest corner of South Street and Railroad Avenue (Point A on map) he looked and saw no cars on Railroad Avenue (ll. 21-22). He then started to cross South Street to Point B, and when he
 20 reached Point D (p. 15, ll. 1-19) he saw a Mulberry Street car at Point C moving around Curve E (curve Track No. 4).

(P. 16):

“Q. Just go back, Mr. Rubinow, to the point or to the time when you first saw the Mulberry Street car? A. Yes.

30 “Q. What did you do? A. I started to go a little more east, here, and let the car—at once I feel it knock me down, hit me and knock me down, and I turned around and see what was the matter, I didn’t know—I saw a car pass me here, the Bergen Street car.

“Q. The Bergen Street car had passed you? A. Yes.

* * * * *

“Q. * * * About where were you when the Bergen Street car struck you?

* * * * *

40 “Q. About here. That will be F (marking map). A. About five feet from it.

* * * * *

"Q. From the curve of the Bergen Street car? A. Yes."

(P. 17, l. 10) That when he reached Point A he looked to see if a car was coming, and there were no cars in sight; (p. 18, l. 10) the car rung no bell; that after it struck him, it continued on its way and did not stop.

(Page 19):

"Q. Was the route you took this morning on December 7th any different from the way you had usually gone? A. Oh, no, no; for the last eighteen years I remember it was all the same, for the last twenty years maybe, or nineteen years, when I am working—I used to work on the other side, but I used to walk on South Street all the time. 10

"Q. Always walked over that same direction? A. Yes.

* * * * *

"Q. What was the condition as to light and dark? A. Oh, it was light—it was not light exactly as the day time, but it was light enough" (p. 21, l. 35). 20

Cross examination (p. 28, ll. 15-33).

The Bergen Street cars run east into Thomas Street, and then turn into Railroad Avenue, and then turn easterly into South Street. He walked northerly on the westerly side of Railroad Avenue (p. 29, ll. 3-30). He first admitted and then denied that he had told Mr. Autenrieth, his attorney who tried the case, that the Bergen car which struck him came north on Mulberry Street or Railroad Avenue, and stopped at the switch marked Z on the map; he continues (p. 30, ll. 29-39): 30

"Q. The trolley car in turning the corner struck you; is that what you said? A. Yes.

"Q. Which part of it struck you, do you know? A. I don't know. How can I know?

"Q. Didn't you tell? A. No. *It was in the back.* 40

"Q. You had not seen that car at all, did

you? A. No, sir; I did not.

* * * * *

“Q. You did not hear it? A. No, sir.

“Q. You did not know it was there? A. No, sir.”

He identified (p. 31, l. 1) the signature to a statement made by him two days after the occurrence of the accident to a representative of the appellee, in which he described the occurrence thereof as follows:

10

“On Saturday morning, December 7, 1912, about 6:15 a. m., I was walking north on New Jersey Railroad Avenue, on the west side, and was on my way to my business at 35 Vesey Street, and was alone; *when I reached South Street I stepped from the west curb opposite the saloon and as I was walking slowly intending to cross South Street tracks and was between the tracks and curve I heard this car coming behind me, and I thought it was a Mulberry Street car going north, but I did not look back, and slowed down to let the car pass me and I then would cross over behind it; as the car passed me it turned around the curve and turned out to be a Bergen Street car and the rear swing of the car struck my right side and I was knocked down.* I was dazed for the time being and cannot say if the conductor saw me, or the motorman saw me, and I cannot say what the car number was. The next Mulberry Street southbound car that came along stopped after the motorman saw me and got off and a policeman named Weber also appeared in the meantime as well as some people from the sidewalk, and I was assisted into the railroad station, and in about half an hour the police ambulance came and took me to my son’s home on High Street. I do not know the motorman of the Mulberry Street car. I do not know his name. There was no bell rung by the motorman on this car, which was running about the same as usual.”

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30

40

He admitted (p. 31, ll. 26-27) that it was read to him and that thereafter he signed it and that

his son, Dr. Rubinow, was present and also signed it. Yet he denied (p. 32, ll. 30-40) that it was true. He continues (p. 33, ll. 23-40) he was walking from the saloon corner to the drug store corner, and when he reached Point D he saw a Mulberry Street car coming around the curve on Track No. 4 from South Street. He then walked a little more easterly to Point F (p. 35, ll. 1-20), that he did not look behind him and did not see any car behind him.

Re-direct examination (p. 41, l. 40; p. 42, ll. 13 to 20). When he reached Point A he looked behind to see if there was a car on Railroad Avenue and did not see any car. 10

“Q. In starting across from A to B did you at any time come to a dead stop in the street? A. No, sir.

“Q. Kept on walking always toward B? A. Yes.”

Re-cross examination (pp. 44, ll. 20-40): 20

“Q. As I understand you, you were walking all the time, weren't you; you did not stand there at all? A. No, sir.

“Q. Walking all the time? A. Yes.

“Q. There are two cars that come up south? A. One car is coming north, and the other car, Bergen Street, going down south.

“Q. The Mulberry Street car comes down Thomas Street into New Jersey Avenue? A. Yes. 30

“Q. Then comes along this way? A. Yes.

“Q. The Bergen Street car comes down Thomas Street? A. Yes.

“Q. Into New Jersey Avenue? A. Yes.

“Q. Then comes along and goes east; is that right? A. Yes.

“Q. The one switch there operates that car upon Mulberry Street and the Bergen Street car? A. I guess so.”

Re-cross examination by the Court (p. 46): 40

“Q. Do you know, Mr. Rubinow, or did you

know how often the cars ran through Thomas Street and into Railroad Avenue? A. Oh, there are different times, not all the time in the daytime.

"Q. At the time in the morning which you have fixed at half-past six or quarter of seven did you know how frequently those cars ran?

A. About five or six minutes.

"Q. That is you mean they run about five or six minutes apart? A. Yes, sir."

10 DR. JOHN B. MORRISON testified (p. 47, l. 36) that the plaintiff had a fracture of the right hip.

FRED W. MILLER testified for the plaintiff (p. 62) that he was standing on the northeasterly corner of South Street and Railroad Avenue at the time in question. That he first saw the plaintiff opposite the saloon on the northwesterly corner; that there was no car at that time on Railroad Avenue. Witness then walked northerly on the west side of Railroad Avenue to a paper store about twenty-five or thirty feet from the corner. 20 (P. 64, ll. 1-40) That he then looked again and saw no car; that after he had gotten around the corner he saw a northbound car at Railroad Avenue about the middle of the block between Thomas Street and South Street. He then went into a paper store and did not see the plaintiff again; that he was employed by the plaintiff's son.

30 (P. 65, l. 14) "Q. What car was it you saw as you got around this corner that was coming up this block? A. That was a Bergen car.

"Q. The block of New Jersey Railroad Avenue? A. The Bergen car.

"Q. Was it there when you came out of the store? A. It was not.

"Q. Did you see any other car there as you came around that corner? A. As I came on Mulberry Street there was a car there, yes."

40 He continues (l. 24), that the Mulberry Street car was at the point marked "J" on the map.

Cross examination (p. 69, l. 17) :

“Q. Then from this, standing in the middle of the street here, at this point marked F, how far down New Jersey Railroad Avenue can you see? A. See down as far as Murray Street.

“Q. How far is that? A. Three blocks.

“Q. So a person standing at this point marked F could see three blocks? A. Could see three blocks. There is a bend in the street.”

10

Dr. Rubinow, the son of the plaintiff, testified (p. 54, l. 40), that he was partly present at time the statement Exhibit D-1 was made by his father; (p. 55, l. 36), that his father did not want to give any statement but he finally did so; (p. 56, l. 9), that the statement was written out, and that he signed it as a witness and that he knew approximately what it contained.

On cross examination (p. 61, l. 22) that he looked over the statement before his father or himself signed it.

20

Defendant's Case.

William D. Schnable, testified (pp. 83-84) that he was employed by the defendant as an investigator; that on December 9th he interviewed the plaintiff, who told him how the accident occurred; he then wrote it down and read it over to the plaintiff in the presence of plaintiff's son, Dr. Rubinow, who himself later read it. That thereafter both the plaintiff and his son signed the statement, which is as follows (p. 142).

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In re Max Rubinow,
Res. 73 Parkhurst St.,
Bus. Add. 35 Vesey St.
Case No. 41216.
Occupation Tool Manufacturer.
Apparent age 66 years.
Nationality Hebrew.
Date, Dec. 9/12. Time 3:30 P. M.

40

10 "States to William D. Schnable; at his son's home, 602 High Street, as follows: On Saturday morning, December 7, 1912, about 6:15 A. M., I was walking North on New Jersey Railroad Avenue on West side and was on my way to my business at 35 Vesey Street and was alone. When I reached South Street I stepped from west curb opposite the saloon, and as I was walking slowly intending to cross South Street tracks and was between tracks and curb I heard this car coming behind me and thought it was a Mulberry Street car going north, but I did not look back and slowed down to let car pass me and then I would cross over behind it. As the car passed me it turned around curve and turned out to be a Bergen Street car and the rear swing of the car struck my right side and I was knocked down. I was dazed for the time being and can not say if conductor saw me, but motorman saw me and I can not say what car number was. The next Mulberry Street south bound car that came along stopped after

20 motorman saw me and got off and a policeman named Weber also appeared in meantime as well as some people from sidewalk and I was assisted into Railroad Station and in about half hour police ambulance came and took me to my son's home on High Street. I don't know the motorman of Mulberry Street car and don't know his name. There was no bell rung by the motorman of this car which was running about same as usual.

In general true,

30 "Signed, Max Rubinow.
 "Witness, Saul Rubinow, M. D.
 William D. Schnable.

Cross examination (pp. 84-85) did not develop any new facts.

40 *Walter L. Bartholomew*, engineer and surveyor in the employ of the defendant, testified (p. 86, ll. 12-40) that the distance between the southerly side of South Street and the northerly side of Thomas Street was 233.6 feet. The width of New Jersey Railroad Avenue 31 feet, and South Street

39½ feet. The distance between the westerly rail of curve of Track Two and the southerly rail or curve of Track Four at the nearest point is 8.2 feet.

Cross examination (p. 88) that the southerly edge of the paper store referred to by the witness Miller is 68 feet from the northerly curve of South Street.

Re-direct examination (p. 88, l. 30) :

“Q. Mr. Bartholomew, assuming a car passing on this curve from the north side of South Street, going around west into South Street, would a car come from South on to New Jersey Railroad Avenue and turn east into South Street at the same time? A. Could not.” 10

“Q. Why? A. The overhang of the car is too great to permit cars to pass on that curve.

“Q. You mean come in contact? A. They would.”

Re-cross examination (p. 89) :

“Q. How much would the overhang of the Bergen Street car be on that? The maximum of that curve? A. Seven feet and two inches.” 20

“Q. And the distance between the nearest point of curve G and E, is 8.2? A. Yes.

“Q. What is the overhang of the Mulberry car? A. Five feet.

“Q. Two could not pass without striking, could they? A. No, they would strike.” 30

John F. Weber testified (p. 89) that he was a police officer of the City of Newark; that at the time the accident occurred to the plaintiff he (the witness) was on South Street ten or twelve feet in from Railroad Avenue (which would be west from Railroad Avenue, page 91, line 30), about seventeen or eighteen feet from the plaintiff; that he saw the plaintiff just as he got to the corner and at that time there was a northbound Bergen Street car on Railroad Avenue on the south side of South Street; it had just started. Plaintiff 40

then stepped off the curb and walked towards the track. The witness hollered to him to look out as the car was coming around the curve and he would be hit; that the rear end of the car struck the plaintiff; he, plaintiff, was walking at the time; (page 90, line 31), that there was no other car in the vicinity of South Street and Railroad Avenue at that time; that he and another man (who was afterwards identified as witness Hellriggel) (page 91, lines 1-3) picked up the plaintiff and carried him into the depot; witness telephoned the patrol wagon and the plaintiff was taken home (page 91, line 9).

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On cross examination (page 92) he testified that he had reported off duty at the police station at 5:50 and at the time of the accident was on his way home with his uniform under his arm; (page 94, line 30) he denied that he had told anyone that he did not know anything about the accident.

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On re-direct examination (page 100) he testified he was under subpoena by the plaintiff.

Fred C. Hellriggel testified (page 101) that he was in the employ of Hauck's Brewery at the time of the accident and was right in front of the saloon (on the southwest corner of South Street and Railroad Avenue) at the time the accident occurred.

(P. 101):

"Q. Did you see Mr. Rubinow, the plaintiff here? A. Yes.

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"Q. Where was he? A. He was, just at the time I seen him, he was right between the gutter and the center of the tracks.

"Q. At that time was there any car there? A. Yes, sir.

"Q. What car was it? A. Bergen Street.

"Q. Which way was it coming? A. It was going just to make the turn going down east.

"Q. And as it was making the turn what did Mr. Rubinow do? A. He walked—as though to go on the opposite side of the corner.

40

"Q. Yes. A. It was a cat-a-cornered cut.

"Q. From the saloon corner to the drug store corner, is that what you mean? A. No; he was going from the saloon corner over towards—underneath the railroad bridge here.

"Q. Oh, here? A. Yes.

"Q. Which way was he walking, just in a diagonal line? A. Just a cat-a-cornered, across.

"Q. Now as the car came around the curve, what did Mr. Rubinow do? A. Why, he deliberately walked in the side of the car.

"Q. What part of the car came in contact with him? A. The rear end. 10

"Q. What did it do to him? A. Knocked him down."

He continues (pp. 101-102 that immediately after the accident he and Officer Weber picked up the plaintiff and carried him into the station which is directly opposite from where the accident occurred (p. 102, l. 16).

(P. 102):

"Q. Then did you stay there? A. No, sir; I stayed there about two minutes and I heard a car coming and I went out. 20

"Q. What car was that? A. Why, Mulberry Street car, with about five passengers.

"Q. At the time you saw Rubinow in the street and this Bergen Street car there, was there any other car in that vicinity? A. No, sir.

"Q. Was there any Mulberry Street car that would go west on South Street there? A. No, sir." 30

On cross examination he testified (pp. 102-103-104) that he gave his name to the conductor while he was riding on a car a few days after the accident, in response to a request of the conductor if he knew about the accident. There were no other material facts developed in the cross examination.

George F. Yurbury testified (p. 104) that he was in the employ of the Metropolitan Life Insurance Company, and had been on the Bergen 40

Street car, but had alighted as it stopped at the near side of the curve on the westerly side of South Street before it proceeded around the curve (Track 2) into South Street; that the car stopped about ten feet from the crosswalk and he alighted from the front end thereof; (page 106, line 19), that while standing on the corner waiting for a train the car went around the curve; that after the car had passed he saw the plaintiff and saw two men run over and pick him up and carry him into the depot; that there was no other car in that vicinity at the time of the accident.

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William Guthrie, the conductor of the Bergen Street car, testified (p. 108) that the car stopped at South Street to allow some passengers to alight; that he did not learn there had been an accident until several days thereafter; (p. 109) that at the time his car reached South Street there was no other car there.

20

The cross examination (p. 109) developed that the car had not stopped after the accident occurred.

Fred Schultz, the motorman of the car, testified (p. 109) that the car stopped at South Street and passengers alighted; thereafter he received a signal and he started the car ahead and around the curve; that he did not know that there had been an accident until it had been called to his attention two days later. He continues (p. 110, l. 26):

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“Q. On that trip did you strike anybody that you know of by the front of your car? A. No, sir.

“Q. Was there anybody on the track in front of your car on that trip? A. There was not.

“Q. At that point, I mean. When you stopped at South Street then did you see any Mulberry Street car coming south on Mulberry Street? A. No, sir.

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“Q. Was there any other car at that corner at that time? A. No, sir, there was not.

“Q. What time did you get at the corner? A. 6:25.”

The cross examination did not develop any material facts.

Miss Tillie Meser, a passenger on the car, testified (p. 112) that she alighted from the Bergen Street car at the corner of South Street and Railroad Avenue; that she then walked to the station opposite the saloon (which is on the southeast corner of South Street and Railroad Avenue); she was accompanied by one Louise Hilltwine.

(Pp. 112-113):

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"Q. What did you do after you walked into the station there? A. Waiting for the young lady to come from the baker shop.

* * * * *

"Q. While you were standing there, what did the car, the Bergen Street car do? A. Well, the young lady friend of mine came down while the Bergen car was standing there.

"Q. Then what happened? A. Then two of us walked towards the cafe, that is the saloon.

20

"Q. Toward here? A. Yes. And the car was just turning then, on the turn, going down South Street.

"Q. Going down which way? A. East.

"Q. And then did you see the old gentleman there, the plaintiff? A. Yes.

* * * * *

"Q. When you saw him where was he? A. Leaving the curb from the saloon.

"Q. Then what did you see happen? A. Just as the car turned I seen the rear end of the Bergen hit him and knock him down.

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"Q. And then what did you do? A. I walked in the middle of the street where the accident was.

* * * * *

"Q. What did they do with the man? A. Two fellows carried him into the station.

* * * * *

"Q. Was there any other car there at the time? A. No, sir.

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"Q. Was the old gentleman, the plaintiff, walking or standing at the time he was hit by the car? A. Walking."

10 On cross examination (p. 113, l. 30) she continued that she walked to the station when she got off the car and then walked over to the cafe, but had not reached the curb yet; (p. 114, l. 11) that they were walking around the car that was just turning the corner (when the accident happened); while the car was standing the front end was at the switch marked X-Y on the map. When the accident occurred they were about a foot from the curb.

20 *Louise Hilltwine* testified (p. 116) that she was with Miss Meser (the preceding witness) at the time the accident occurred; (line 22) that the car stopped and she got off at the rear end. She then went around the rear end of the car to meet a friend; (line 30) while going around the rear end of the car it started and she saw the rear end hit the plaintiff.

(Pp. 116-117):

"Q. While you were going around the rear end of the car what did the car do? A. The car started going.

* * * * *

"Q. Did you see this gentleman get hurt? A. Yes.

30 "Q. Will you tell us how it was done? A. The rear end of the car hit him when the car turned.

"Q. Where was he at the time? A. He was coming from the cafe.

"Q. Which way? A. Crossing the street.

"Q. Which way was he going? A. Slanting.

"THE COURT: Show it on the map.

"A. This way (indicating).

40 "Q. That would be from the saloon corner over to the drug store corner; is that it? A. No, it looks more as if he was coming down that way (indicating).

"Q. More slanting towards the railroad embankment? A. Yes.

"Q. What was he doing at the time the car hit him, was he walking or standing? A. He was walking.

"Q. What happened to him? A. He fell down and his boxes flew all around.

* * * * *

"Q. After he fell down what did the car do? A. The car kept on going. The two men picked him up.

10

"Q. Then what did you do with him? A. Carried him into the station."

On cross examination she testified that the front of the car, when it stopped, was at the point Z indicated on map; that she then walked around the car and was about three or four feet from the curb at a point marked K on the map when the accident occurred.

Benjamin M. Richardson, conductor in the employ of the defendant, testified (p. 119) that on December 7, 1912, he was the conductor of the first car that left the car barns on the Mulberry Street line, and that they arrived at the corner of South Street Station (which would be South Street and Railroad Avenue) at 6:26 A. M.; that at the time they reached the corner of Mulberry and South Streets there was no other car there; that when they had arrived he was informed by some people about the accident which had already occurred.

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His cross examination developed no additional facts.

Fred J. Beger, mortorman in the employ of the defendant, testified (p. 121) that he was the mortorman of the Mulberry Street car on December 7, 1912; that his car was the first one to leave on that line from the Mulberry Street car barns and that they had arrived at the corner of South Street at 6:26 A. M.; that there was no other car there when he arrived, and that after he had been at the

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corner of South Street and Railroad Avenue about a minute and a half his conductor informed him about the accident that had previously occurred.

Rebuttal by the Plaintiff.

George H. Rubinow, son of the plaintiff, testified (p. 123, ll. 10-30) that the witness Weber told him that the next Tuesday following the accident that he did not see the accident, and was not near the place when it occurred.

10

Cross examination (p. 124).

That he called at the station house to see Weber, as he had heard that the accident occurred on his beat. Somebody had told him that Weber had helped his father into the station house. He did not ask him if he had helped his father into the station. Weber said, "Gentlemen, I would like to oblige you but I was a block away."

20

Dr. Rubinow, recalled, testified (pp. 125-6-7) that Weber told him that he was too far away, he didn't see anything.

Cross examination (p. 126). He admitted in a statement he signed with his father that his father had said that the policeman named Weber helped him from the scene of the accident.

Fred W. Miller, recalled, testified (p. 128) that after the accident occurred he saw Weber coming from Tichenor Street to South Street.

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Louis Wagener, testified (p. 131, l. 30), that he kept the stationary and paper store mentioned by the witness Miller; (p. 132, ll. 1-40) that on the morning of December 7, 1912, about 6:30 A. M., Miller came into his store, and when he (Miller) went out, Weber was passing and said "hello" to him.

Cross examination (p. 134):

"Q. How long afterwards did you go out?
A. Oh, I went out before—it was before Mr. Miller came in to me. When I seen the crowd

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it was before Mr. Miller came in. When Mr. Miller came in he told me it was somebody got hurt by the trolley car.

"Q. So when Mr. Miller went by the store he told you somebody got hurt by the trolley car? A. Yes.

"Q. I see. Then after that he bought the cigarettes and paper and went out? A. Yes, sir.

"Q. And then Weber came along? A. Weber came along."

Max Rubinow, recalled, on re-direct examination (p. 139) denied that anybody was around when he was hit. 10

We beg leave to direct the Court's critical attention to that part of the original complaint annexed to the summons in this action, served on this defendant on October 8, 1913, and which describes the occurrence of the accident. On December 11, 1913 an amended complaint was filed by the plaintiff's attorneys which is contained in this printed book. The original complaint follows: 20

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Complaint.

Hudson County Circuit Court.

	MAX RUBINOW,	}	Action at Law.
	<i>Plaintiff,</i>		
	<i>vs.</i>		
10	THE PUBLIC SERVICE RAILWAY COMPANY, a corporation,	}	
	<i>Defendant.</i>		

"The plaintiff, residing at No. 73 Parkhurst Street, in the City of Newark, County of Essex and State of New Jersey, says:

"1. That on or about the 7th day of December, 1912, the said plaintiff was crossing Mulberry Street, in the City of Newark aforesaid, at the corner formed by the said Mulberry Street and South Street in said City.

"2. That the said defendant, by its servants and agents, was operating a trolley car along said Mulberry Street at or near the corner formed by the said Mulberry Street and South Street in said City of Newark, and the said trolley car having come to a stop near the corner formed by said streets, as aforesaid, the said plaintiff attempted to cross over Mulberry Street from the westerly side to the easterly side thereof, and the said defendant, by its servants and agents, did then and there, without any warning or notice to the said plaintiff, and while the said plaintiff was crossing the street as aforesaid, started the said trolley car along Mulberry Street and around the corner, along South Street, in said City; that the said trolley car in turning the corner, as aforesaid, struck the said plaintiff and he was then and there thrown to the ground and greatly injured and damaged in and about his arms, legs and head, and that his right leg was fractured and broken, and he was severely cut, bruised and scratched by reason thereof, and has suffered and still does suffer great pain in and about his arms, legs and head.

"3. * * * * *

"4. * * * * *

"5. That the said plaintiff was injured and has sustained damage in the premises in the sum of Ten thousand dollars.

HAIGHT & AUTENREITH,
Attorneys for Plaintiff."

It is significant that the surrounding circumstances attending the accident—the movements of the car and the accident itself, as set forth in this original complaint, which is a part of the court records—were practically identical not only with the facts as related (supra) by the defendant's witnesses, Weber, Hellriggel, Meser, Hilltwine and Yurbury, but with the signed statement which the plaintiff made to Schnable two days after the accident, in the following language (Exhibit D-1 p. 142):

"When I reached South Street I stepped from the west curb opposite the saloon and was walking slowly intending to cross South Street tracks and was between tracks and curb, I heard this car coming behind me and thought it was a Mulberry Street car going north, but I did not look back and slowed down to let the car pass me and then I would cross over behind it. As the car passed me it turned around a curve and turned out to be a Bergen Street car, and the rear swing of the car struck my right side and I was knocked down."

It is probably more significant that this original complaint has been omitted from this printed book now before the court on this appeal.

Argument.

At the close of the case when a verdict in favor of the defendant appellant was directed it was an established fact, that the rear end of the car in swinging around the curve of track No. 2 struck the plaintiff—and it necessarily followed that the front end of the car had passed him. The fact that the car had stopped at the southerly side of South Street and then started up to go

10 around the curve of track No. 2 was indisputably proved by the testimony of Hellriggel (p. 100, lines 7-40), Yurbury (pp. 105-106), Weber (pp. 89-90-91), Guthrie (p. 108), Schultz (pp. 109-110), Meser (pp. 112-113), Hilltwine (pp. 116-117), plaintiff's statement (Exhibit D-1, p. 142) and the original complaint (supra). The only scintilla of testimony tending to contradict, if it can be said to have that effect, was the statement

20 of the plaintiff that when he left point A he looked south and saw no car. This was absolutely the only evidence to that effect in the case. That the plaintiff was walking from the westerly curb toward the easterly curb of Railroad Avenue, and approaching the trolley track, was, we submit, established by the great preponderance of the testimony, viz: plaintiff's original complaint, the signed statement, and the evidence of Weber, Hellriggel, Hilltwine and Meser. Likewise the testimony

30 of the above witnesses, together with that of Richardson (p. 119) and Berger (p. 121) to the effect that the accident had already happened when they reached the corner of South Street and Railroad Avenue, conclusively prove that the Mulberry St. car was not only not passing over curve E (curve track No. 4) but did not reach South Street until after the accident occurred. Although the plaintiff stated that he judged the distance from South Street to Thomas Street to be about 80 feet (p. 18, l. 7) and Miller about 125 feet (p. 71, l. 30)

40 the actually distance measured by Bartholomew, an expert civil engineer, (p. 86, l. 14) proved that

the distance from the southerly side of South Street to the northerly side of Thomas Street was two hundred thirty-three and six tenths feet (233.6 feet). The distance from the westerly curb line of Railroad Avenue to the westerly rail of the north-bound track of Railroad Avenue is fifteen feet. It was admitted by the plaintiff that from the time he left the westerly curb of Railroad Avenue that he continued walking ahead without stopping (p. 42, ll. 12-16). The testimony of Weber (p. 90, l. 14) likewise established this fact, in addition to the fact that he had warned plaintiff to stop because the car would surely hit him if he continued. 10

At the close of the case, in view of the facts alleged in the original complaint (supra) the plaintiff's signed statement, both of which the court had before it, and the evidence of the defendant's witnesses, was not the trial court justified in looking at the plaintiff's testimony with suspicion and holding that the plaintiff had distorted or changed the facts relating to the accident, when he ascertained that if he testified to the facts alleged in his original complaint, and in his statement, he would not be able to recover from the defendant? 20

There was no substantial conflict of testimony presented at that time, and the assertion of the plaintiff that he stepped aside to allow a Mulberry Street car to pass around curve track No. 4 when he was struck by the Bergen car, coming as it did from the lips of the most interested party, it being not only absolutely uncorroborated but contradicted by the other evidence, presented no substantial conflict of testimony to warrant the court in allowing the case to go to the jury. 30

Mingoes v. C. R. R. of N. J., 87 Atl. Rep.

(N. J.) 106;

Carper v. Met. St. Ry. Co., 84 App. Div.,

(N. Y.) 639; 40

Erie R. R. v. Knowles, 117 Pa. St., 77;

Haycroft v. Davis, 49 Ill., 455;

Grechy v. Met. St. Ry. Co., 132 Mich.,
305;

Thaw v. N. Y. City Ry. Co., 99 N. Y.
Supp., 329;

McCoy v. Milwaukee St. Ry. Co., 82 Wis.,
215;

Maloney v. Met. St. Ry. Co., 95 App. Div.
(N. Y.) 393.

10 Therefore, at the close of the case, we respect-
fully charge that the evidence demonstrated, and
the trial court was justified in so holding, that
the plaintiff was walking from the westerly side
of Railroad Avenue toward the easterly side
thereof towards the tracks on which the Bergen
car was running in the daylight with nothing to
obstruct his view and that he saw, or knew, or
should have known of the presence of the car, and
that the rear end thereof while swinging around
the curve struck him while he was walking to-
wards it, and inflicted the injuries for which he
20 sought to maintain this action.

We submit that under these conditions not only
was the plaintiff guilty of contributory negligence
but there was no negligence shown on the part of
the motorman, and the action of the trial court
in directing a verdict on the ground of plaintiff's
contributory negligence was proper. Although the
court's ruling was not based upon the non-negli-
gence of the motorman, this court has the right,
30 we submit, to sustain this judgment upon that
ground if it should so decide. The adjudicated
cases hereinafter set forth upon this particular
type of trolley accidents, unanimously hold that
the plaintiff under such circumstances would be
guilty of contributory negligence, and the major-
ity of the courts have decided that the motorman
has the right to assume not only that the plain-
tiff would not continue to advance towards the
car when he knew, or should have known that the
rear end was, or so would swing around towards
40 him, but he should retrace his steps to a place of
safety.

The nature of this accident, viz, a collision between plaintiff and the rear end of defendant's moving car swinging out beyond the track as the car rounded a curve, precludes legal liability on the part of defendant, because

(a) Defendant was under no duty, in operating its cars over this curve, to watch out for and warn persons upon the highway who might be or come within the range of the outward swing of its rear platform, and

(b) Plaintiffs were guilty of contributory negligence in taking and maintaining a position so close to the track as to come within the range of the outward swing of the rear platform when they knew or ought to have known, that the car was not likely to stop before reaching them.

The subject of rear-end collisions has up to date come before the courts of last resort of seven jurisdictions in twelve reported decisions. These jurisdictions are: Connecticut, Kentucky, Massachusetts, New Jersey, New York, Pennsylvania and Rhode Island, and the cases are the following:

Widmer v. West End St. Ry. Co., 158 Mass., 49; 32 N. E., 899 (1893);

Riddle v. Forty-second St. M. & St. N. Ave. Ry. Co., 173 N. Y., 327; 66 N. E., 22 (1903);

Hayden v. Fair Haven & W. R. R. Co., 76 Conn., 355; 56 Atl., 613; 2 St. Ry. Rep., 67; (1904);

Garvey v. Rhode Island Co., 26 R. I., 80; 58 Atl., 456; 3 St. Ry. Rep., 802; (1904);

Kaufman et ux. v. Interurban St. Ry. Co., 43 Misc., 634; 88 N. Y., Supp., 382 (1904);

- Matulewicz v. Metropolitan St. Ry. Co.*,
107 App. Div., 230; 95 N. Y. Supp.,
7 (1905);
- Hoffman v. Philadelphia Rapid Transit
Co.*, 214 Pa., 87; 63 Atl., 409 (1906);
- Jelly v. North Jersey St. Ry. Co.*, 76 N.
J. L., 191; 68 Atl., 1091; 6 St. Ry.
Rep., 533, (1908);
- South Covington & Cincinnati St. Ry.
Co. v. Besse*, 33 Ky. Law Rep., 52; 108
S. W., 848; 16 L. R. A., N. S. 890
(1908);
- Louisville Rwy. Co. v. Ray*, Ky. ;
124 S. W., 313 (1910);
- Gribbons v. Kentucky Terminal & Trac.
Co.*, 150 Ky., 276; 150 S. W., 313
(1912).

10

(a) No negligence can be attributed to the Street Railway Company or its employees in these rear-swing collisions.

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No point is made in the cases at bar, as in some of the above decisions, that any negligence is involved in the construction of these cars and the existence of an overhang—circumstances which have been forced on street railway companies as the necessary outcome of the enlargement of their equipment to meet growing traffic demands, and of the accompanying substitution of double for the old single trucks and the adoption of the pay-as-you-enter type; for no matter what the arrangement and distance of the trucks, an overhang must exist somewhere, if not at the ends, then at the middle of the sides, as in the *Hayden* case, above noted.

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What negligence then can be imputed from the operation of the car in these rear-swing collision cases?

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It is submitted that in this inquiry no assistance can be derived from, and the subject is only confused by reference to, the cases of pedestrians

who place or find themselves in a position of danger while crossing straight tracks. Of this character are the New Jersey cases cited in appellants' brief. The situation and circumstances in those cases involve elements so entirely different from those of the cases at bar as to make them useless in this connection. The rear-swing collision cases stand, and must be considered, by themselves. It may be admitted that pedestrians, or vehicles, engaged in crossing street railway tracks, may require the motorman of an approaching car to heed the danger in which they have placed themselves, and by his action protect them from the consequences of their own negligence. But this arises from the equal rights of pedestrians and vehicles *engaged in crossing a highway*, to use the space occupied by the street railway tracks. Now no such right is asserted in these rear-swing collision cases. By the very nature of the cases, the injured party is not engaged in crossing the track; he has not yet set foot on it, and has rather indicated a contrary intention, by stopping before the forward end of the car has come opposite him, or at least he has not advanced so close to the track by the time the forward end comes opposite him, as to indicate to any reasonable man that he can or will attempt to cross the track. He does not challenge the right of the motorman to proceed by the assertion of his equal right to use the same portion of the highway. Hence all the rules which the courts have elaborated by successive analyses of the implications of the exercise of these co-equal rights are utterly irrelevant and unavailing here.

The nature of the peril to which the injured party is subject in these rear-swing collision cases is likewise very different. It is special in its nature, existing only at that particular point, at which it is a necessary and obvious incident of the operation of the car, and is presented to the attention and notice of all who use the highway

by the presence of the curving tracks. Whereas in the crossing cases, the peril is simply the ordinary and general one.

It is the nature of this peril which governs the rules and the law respecting the rights and duties created by it. The existence of the overhang is a matter so obvious to all observing persons, presented constantly to their eyes in their daily use of the public highways, as to be a matter within the judicial notice of courts. Knowledge of this rear-swing is one of those things which the law expects of all. In the *Jelly* case our Supreme Court said, quoting from the *Garvey* case:

“Every person who is of sufficient intelligence to be capable of being left alone in the streets must be presumed to take notice of the obvious fact that the body of a street car must necessarily swing out some little distance from the track on the outside of the curve.”

The obvious and familiar character of this danger constitutes the reason and basis of the rule in all these rear-swing collision cases. The corollary of the knowledge of the danger imputed to all persons by the law is the duty, as reasonably careful persons, to avoid it. And the likelihood that reasonably prudent persons will head this duty to avoid the danger constitutes a factor and guide in reliance whereon the motorman of street cars may govern their own acts in the operation thereof.

These considerations control the question whether any duty rests upon the motorman or conductor of the street car toward persons injured in rear-swing collisions. The duty generally sought to be imposed on them is to warn such persons of the danger, or to stop the car if it is evident that they do not realize it. That neither duty exists; but little examination is necessary to show. If the injured party at the time the for-

ward portion of the car has come opposite him, has stopped to permit it to pass, the mere ringing of the bell would not serve to warn him of the danger of the overhang, for he would naturally assume the warning to be directed to persons on the track ahead; and by no stretch of duty can the motorman be expected to turn from the operation of his car to warn a person standing at the side. If, on the other hand, the injured party still advancing in the direction of the car, and has not reached it at the time the forward portion comes opposite him, then the motorman, having passed him when he was some distance away, cannot be expected to continue to pay attention to him, for the motorman's duty lies *in front of him*—and no court has extended the duty of the *conductor* to warn persons at the side of the car of any such danger. And in either case, *the law will presume from the knowledge of the overhang which it imputed to him as an observing individual, and his duty to avoid it, that he will act with reasonable care and withdraw before the danger becomes imminent. And the employees of the railroad company may act in reliance on this presumption, and continue to operate the car in the expectation that it will be fulfilled and that he will draw back in time, before the overhang rear portion comes opposite him. This presumption, and the right of the motorman to act on it, enters into and governs the duty which the motorman owes him. If the motorman or conductor may expect him to draw back, and may act in reliance thereon, clearly they have no absolute duty to warn him or to stop the car to avoid striking him.*

This is the unanimous conclusion of all the decisions to which reference has been made. Negligence in these rear-swing collisions is quite negatived.

In the *Jelly* case, our Supreme Court, after quoting plaintiff's testimony on his cross exam-

ination that at the time he was struck he was four or four and a half feet from the track, and did not step farther away when he knew the car was swinging out because he supposed he was out of distance, commented as follows on the facts as thus disclosed, concerning the alleged negligence of the motorman:

10 "We are unable to see in this testimony any evidence of negligence on the part of the motorman. He was running the car in the ordinary way around the loop. He saw the plaintiff two or three feet away from the car, *with no reason to apprehend that he would remain in a place where he was likely to be struck.*"

In thus reasoning upon the facts of this accident, the Supreme Court is in accord with the cases which have been cited.

20 In the first case on the subject, the *Widmer* case (cited and followed in the *Jelly* case), decided in 1893, when horse-cars were still in use, the Supreme Judicial Court of Massachusetts held the driver of the horse-car to have violated no duty of due care, in the following terms:

30 "There was no reason why the driver should not drive past her and around the corner, for he had no reason to suppose that she would come so near the rear of the car as to be struck when it went by. The only witnesses who testified besides the plaintiff were two police officers, one of who was stationed there for the better protection of the public, and he testified that he 'did not stop the car, and had no occasion to'; that 'it was not going rapidly—jogging around the corner at the regular rate, as they always go.' The other, in describing the rate of speed of the car at the time of the accident, said 'that the horses started off at a smart walk, and he didn't think they were trotting.' There was no evidence of negligence which had any connection with the accident in the facts that

40 there was no switchman stationed there, and

that the conductor turned the switch. The bill of exceptions discloses nothing that the defendants did or neglected to do of which the plaintiffs can justly complain."

In the *Hayden* case the Connecticut court ruled that even though plaintiff was standing on the sidewalk when struck by the overlapping running board, no greater duty could be required of the motorman than if plaintiff had been in the street, and held that no negligence was shown:

"The court charged the jury that a motorman operating an electric street car has the right to presume that upon the approach of the car the warning being given of such approach, an adult person on the track, or in a position near the track, where he is liable to be struck, will exercise reasonable care for himself, and will remove himself from his position of danger as the car approaches. The plaintiff complains of this, but, we think, without sufficient reason plaintiff concedes that such a presumption exists with reference to a person in the street, but contends that no such presumption exists with reference to one on the sidewalk. This distinction is not tenable as applied to a case like the present. The plaintiff was in fact in a position of danger, and the motorman upon the facts in the case, had the right to presume that plaintiff was aware of it, and would govern himself accordingly. He had a right to so presume, as the court told the jury, until it is apparent, or by the exercise of reasonable diligence would be apparent to him, that the person is in danger, and is not aware of the danger, or is so situated that he cannot avoid the danger. The jury were properly instructed on this point."

In the *Garvey* case the Rhode Island court likewise negated the idea of negligence on the part of defendant. This is the case, it should be remembered, which parallels the case at bar:

"Again, we fail to see that the defendant was guilty of any negligence in the premises.

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10 Even assuming that, from the act of the motorman in slackening the speed of the car in response to the plaintiff's signal, she had the right to assume that it would stop shortly, and while on the curve, yet, as already suggested, she had no right to assume that it would stop at any particular point on the curve, nor was it the duty of the motorman to stop at any particular point thereon. And until the plaintiff had been given to understand by some act of the motorman or conductor that she could safely attempt to board the car, or at any rate until the conditions were such that she could do so, the defendant owed her no legal duty."

In the *Matulewicz* case the court ruled that neither the motorman nor conductor is under any duty with respect to persons taking positions within the range of the rear-swing of the car:

20 "It may be assumed that motorman in discharge of his duties was bound to see plaintiff. Nevertheless it seems to me that under the circumstances the plaintiff being an adult, apparently in full possession of health and vigor, the motorman might rightfully assume that plaintiff, if necessary, as the car turned the curve, would have drawn back far enough to avoid being struck. * * * In view of the well known fact that the rear of a street car in rounding a curve necessarily swings out some little distance from the track at the outer edge, it is extending the obligation of street railway companies too far to impose upon the conductors of their cars the duty of warning persons upon the street against the danger of collision with the rear end after the body of the car has passed in safety."

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In the *Hoffman* case it was insisted for plaintiff that defendant should have been removed or diminished the degree of projection of the fender which struck plaintiff before backing the car, and that in permitting the projection they were negligent.

40 The pertinency of the ruling of the court on this contention consists in that the existence of the

projecting rear end of the car does not constitute negligence in these rear-swing collisions:

"The first question to be considered is whether there was any evidence of negligence by defendant which justified the court in leaving the question to the jury. * * * The learned counsel for appellee contended in the court below, and argues here, that inasmuch as the defendant company, through its employees, did not cause the fender to be raised before the car proceeded to back around the curve, it was guilty of negligence. This position is not tenable under the facts of this case. There was no evidence in the case to show that it was customary or necessary to keep the fender raised at the rear end of the car. Fenders were placed on the cars because of a popular demand that they should be so placed as a protection to the public. In the absence of any evidence showing that the use of the fender by defendant was not a proper one, a jury cannot be permitted to draw an inference of negligence."

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In the *Ray* case the Kentucky tribunals likewise declined to impose any duty upon street railway employees in accidents of this character:

"This court has, in a long line of cases, held, that it is the duty of those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car. But this rule has never been so extended as to require the employees in charge of the car to keep a lookout at corners and curves so as to prevent others using the street from colliding with the rear end of the car."

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And finally, in the *Gribbins* case, the courts of Kentucky, reiterating their conclusions of the *Ray* case, firmly established the rule for that jurisdiction that negligence cannot be ascribed to defendant in rear-swing collisions:

"The next ground of negligence relied upon is that the companies were negligent in not

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warning plaintiff of the dangerous position in which she had placed herself by telling her that the car would strike her, and in not stopping the car, so as to avoid having the rear end thereof strike her. The petition upon this branch of negligence is faulty in two particulars. In the first place, the companies were under no duty of keeping a lookout for persons so as to prevent them from coming in contact or collision with the rear end of their cars, as was expressly decided in *South Covington & Cincinnati Street Railway Co. v. Besse*, 108 S. W., 848, 33 Ky. Law Rep., 52 16 L. R. A. (N. S.), 890, and *Louisville Railway Co. v. Ray*, 124 S. W., 313. Not being required to keep a lookout for her safety or to warn her that she was liable to be injured by the rear end of the car, as it turned the corner, if she came too near the track, those in charge of the car owed her no duty whatever, unless they actually saw or discovered the peril of her position in time to have avoided injuring her. The petition alleges that the employees in charge of the car saw the plaintiff, and knew that the rear end of the car would swing out over the side of the track toward plaintiff a sufficient distance to strike her, or by the exercise of ordinary care could have seen her and known of said things. This, in effect, is but an allegation that, by the exercise of ordinary care, those in charge of the car could have seen her peril, and hence is not a sufficient allegation to support the plea of negligence; for, where no lookout duty is required, those in charge of the car must have had actual knowledge of her perilous position in time to have avoided injuring her before the companies could be held to have been guilty of actionable negligence.

"The speed at which the car is alleged to have been travelling, to wit, six miles an hour, cannot be attributed to appellees as an act of negligence; for the rear end of the car in rounding the curve was not thereby caused to extend any further beyond the track than it would have if it had been going at a much

lower rate. Considered as a whole, the petition not only fails to charge any actionable negligence on the part of appellees * * *

(b) Persons who fail to avoid the rear-swing of the overhang of street cars are guilty of contributory negligence.

No one, we think, will dispute the logic of the proposition that if the existence of the swinging overhang is so obvious a peril that knowledge of it will be imputed to all observing persons, and that the motorman may in operating his car presume that as reasonably careful persons they will draw back from such a peril, then their failure to do so constitutes such a lack of reasonable care that they must be deemed guilty of contributory negligence. The propositions are complimentary, and one is the necessary corollary of the other.

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Examination of the decisions discloses that the courts to which this question has been presented have acknowledged the correctness of this reasoning. With even greater unanimity than is shown on the question of negligence (for not all of the courts have considered whether the motorman violated any duty) have they declared that persons injured in these rear-swing collisions are barred from recovery by their own negligence.

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For New Jersey, we have the declaration of our own Supreme Court in the *Jelly* case:

"The testimony of the plaintiff shows that he saw the car swaying around the loop, but supposed he was far enough away to have the car miss him. There is nothing in this case which shows that the plaintiff was a passenger of the defendant. He was waiting in the street for a car that would carry him to his destination, and the company had no contractual relation with him. He saw the car was in motion, and also that it was swinging around the loop; but he thought he was far enough from the car to be safe. There is no reason why the motorman should

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not continue with the car around the loop, nor had he any reason to suppose that the plaintiff would remain so near as to be struck by the rear of the car as it went by."

Here again the *Jelly* case is supported by the entire array of reported decisions. The views of these tribunals on the subject of contributory negligence sufficiently appear from the subjoined excerpts from their opinions:

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"But assuming that no warning was given, the fact remains that the decedent saw the car as it approached; that he leaned back in the trench so as to be out of its way; that there was plenty of room in the trench for him to remain at a safe distance from the car while it passed, and had he done so no injury would have resulted; but by raising up and bringing his face nearer to the car while it was passing him he came in collision with the step. This was his own act, and we think it was contributory negligence on his part. * * * He knew that the trench was at the point where there was a curve in the tracks around which the cars ran * * * and that in rounding the curve the rear of a car would be thrown to a greater distance from the track than the side of the car when running upon a straight line. He was familiar with the situation; he understood the dangers, and in engaging in the work understood the risks."

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Riddle v. Forty-Second St. Ry. Co.
(above cited).

The doctrine of the *Hayden* case is indicated by the extract already quoted.

The doctrine of the *Garvey* case which was cited in the *Jelly* case, and to which reference has already been made, is as follows:

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"That the plaintiff knew that the position which she took while the car was rounding the curve was a dangerous one must be presumed, as every person who is of sufficient intelligence to be capable of being left alone

in the streets must be presumed to take notice of the obvious fact that the body of a street car, in rounding a curve, must necessarily swing out some little distance from the track on the outside of the curve. And for one to place himself within reach of the swing or overhang of a car while it is in motion is as much a bar to his recovery in an action against the company as though he had negligently placed himself in front of a moving car, and been injured thereby."

Garvey v. Rhode Island Ry. Co., (above cited). 10

"She, (plaintiff), stopped at what she thought was a perfectly safe distance from the track; but she was mistaken. Can we say of the motorman, who was evidently of the same opinion which she entertained that his mistake was negligence without a like fault falling on her? She had the fullest opportunity of knowing and choosing her position, and the fullest opportunity of seeking a place of safety for herself, or giving notice to the motorman to stop if she had any idea of danger. She evidently believed that she was clear of all danger of a collision, but with equal, and possibly better means of knowing than the motorman, she made a mistake in so believing. 20

"If then, it was negligence, for the motorman to make a miscalculation, was it not equally negligent for her to do so? They owed the same duty to each other, and each had a right to assume that the other would discharge it. That being so it cannot be held that the motorman was negligent in thinking exactly as she thought. No different standard of care can be applied to either; if one was negligent, the other was negligent." 30

Kaufman, et ux. v. Interurban St. Ry. Co., (above cited).

"I do not see how plaintiff in this case at bar can be acquitted of contributory negligence unless we disregard the principle applied in these decisions * * Plaintiff does not say or suggest in his testimony that he 40

was not aware of the fact that the rear of the car was likely thus to swing out in rounding the curve, and I agree with the Supreme Court of Rhode Island that an adult wayfarer on the street, apparently in full possession of his faculties, is chargeable with knowledge of the danger which he runs under such circumstances."

Matulewicz v. Metropolitan St. Ry. Co.,
107 App. Div., 230 (N. Y.)

10 "The evidence shows that the plaintiff was guilty of contributory negligence * * He knew that the rear end of the car would swing around, and gives that as his reason for stopping. Instead of using the means at his disposal to avoid the accident which ordinary prudence would have suggested, he did nothing * * The car did not strike the wheel but the step attached to the shaft, which from the evidence did not project out as far as the wheel * * If the plaintiff had driven close to the curb, and the hub on the left side had projected over the curb, this would have given a clear space of fifteen inches at the point of collision between the right hub and the nearest point approached thereto by any part of the car * * It is evident that plaintiff could have driven more than fifteen inches nearer the curb, how much more would depend on the extent to which the outside of the right hub projected beyond the step which was struck by the car * * Here the plaintiff had the time, space and opportunity to turn to the left and avoid the accident, and his failure to observe this simple and obvious precaution requires a reversal of the judgment."

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Waters v. United Traction Co., (above cited).

40 "It is the duty of those driving other vehicles to keep a lookout for the cars, and to exercise ordinary care to keep out of their way. The street car must stay upon its tracks. In making a turn, as the trucks are not at the end of the car, the end must project more or less beyond the track, according to the length of the car and the degree of the

curve. Every driver of a vehicle must know that the motorman cannot control the hind end of the car at a curve so as to keep it from swinging out as far as, by nature, it will go. It is therefore incumbent upon the driver of a vehicle passing a street car to keep out of the way; and, at curves, to drive farther from the car than at other points. He must expect the car to stay on its track, and he must expect that the end of the car will swing out in turning the curve; and, if he does not make a sufficient allowance for the swing of the car, and drives so close to it that the car, in turning, strikes the vehicle, the fault is his own, and not that of the street car company." 10

South Covington & C. St. Ry. Co. v. Besse
(above cited).

"In this case the fault clearly lay with the driver. He knew that he could not with safety drive as close to the car as he was attempting unless it remained stationary. He had no reason to believe that it would do so, but on the contrary, had every reason to know that as soon the passengers were discharged and the switch turned, it would continue on its course out P Street. When he discovered the presence of the hole in the street, he should have either checked his horse and not voluntarily driven into a place of danger, or else he should have driven further away from the cars than he did." 20

Louisville Ry. Co. v. Ray (above cited).

"Considered as a whole, the petition not only fails to charge any actionable negligence on the part of appellees, but on the contrary, shows that in crossing the street at that point appelland, while aware of the presence of the car upon the track and that it would turn around the curve, felt that she was at a sufficiently safe distance to avoid coming in contact with the end of the car. She simply misjudged what would be a safe distance and continued on the way across the street, without looking to ascertain whether she was out of danger. The exercise of the slightest care on her part would have saved her from in- 30 40

jury. The street at that point was of ample width as to have enabled her to cross in safety, and it is apparent that her failure to do so was more the result of lack of care on her part than of any negligence on the part of those operating the car."

Gribbins v. Kentucky T. & T. Co., (above cited).

A case pertinent to the one sub judice is that of *Hoffman v. Transit Co.*, (Pa.), 68 Atl. Rep., 10 409, where Elkin, J., said:

"The wife, plaintiff, engrossed in a conversation with a friend, was walking eastward on the south side of Lehigh Avenue. They reached the curb of Sixth Street, stepped on the street and were proceeding to cross the same when they discovered a car belonging to the defendant standing in front of them. They stopped near the center of the car which had come down Sixth Street at that point, stopped and was about to back around a curved switch in order to take its 20 place on Lehigh Avenue for the purpose of starting on its westward route. As the end of the car swung around the curve the fender, projecting from the south and at that time the rear end, struck the plaintiff on the leg, thus causing the injuries for which damages are sought to be recovered in this action" * *

"On the question of contributory negligence, the case is equally conclusive against the plaintiff. It is true she was at a crossing 30 on a public street where she had a right to be, but the defendant also had the right to be there in the exercise of its franchise. The law required of both parties the exercise of reasonable care. The duty rests on the plaintiff as well as defendant. If the plaintiff saw the danger or should have seen it under the circumstances, and could have avoided it by the exercise of reasonable care, and of this there is no doubt, it was her duty to do so and failure to perform her duty defeats her 40 right to recover damages."

On the other hand let us disregard the other

evidence in the case in so far as it is contradictory to that of the plaintiff, and assume that all the fact and circumstances surrounding the accident as related by him on the witness stand, and hereinafter set forth, were true. Then let us determine whether such conduct constituted contributory negligence which would defeat a recovery by him in this action. He testified (p. 12, ll. 21-22), that when he reached Point A. he looked South but saw no car (p. 17, l. 10). At that time there was a Mulberry Street car rounding curve Track No. 4 (p. 15, ll. 1-19); that when he reached Point D. he moved easterly to Point F. to let the rear end of the Mulberry Street car, which was swinging around the curve, to pass without hitting him (p. 16); that as he did so, not having looked again to see if a car was approaching from the south, and not having heard any bell, he was struck by the Bergen Street car as it rounded curve Track No. 2; that he was then about five feet from the nearest rail of curve Track No. 2 (p. 16); that he continued walking without stopping from the time he left Point A until the accident occurred (p. 42, ll. 13-20); that he had been travelling over that street for four years, and knew that the Bergen Street cars ran every five or six minutes (p. 19; p. 46, l. 33).

It thus conclusively appears that he was familiar with the running of the cars at the point of collision and knew that they ran frequently; that he appreciated that the rear end of the car swings out as it passes around the curve is shown by his action in deviating from Point D to Point F to avoid being struck by the rear end of the Mulberry Street car; his position at Point F, being between the curves of the two tracks, over which cars run frequently, *which he knew* was a dangerous one as subsequent events proved, and which he, as a reasonable and prudent man, must or should have appreciated. If he had used his power of observation, which we submit he was

- under a legal duty to us to do, he would have discovered the presence of the Bergen Street car. *It should be borne in mind that at the time he was not on track No. 2 but five feet from the nearest rail thereof.* Again it having been shown and it being undisputed that the rear end of the Bergen Street car struck him, the front of the car must have passed him before he reached Point F, otherwise the front end, which like the rear swings around the curve, would have struck him.
- 10 Therefore, when he walked from Points D to F facing towards the east or track No. 2, as he says, the front of the car was already passing him, and if he had looked or had not looked carelessly, he would have seen it and would have been able to stop approaching towards the car and could have even retraced his steps to a place of safety, for instance Point D. His action, in this respect, we submit, was not the conduct of a
- 20 reasonable and prudent man. He seeks to impliedly invoke the doctrine that the motorman of the Mulberry Street car in rounding curve No. 4 on to Track No. 5 while he was approaching, was guilty of negligence, which placed him in a place of danger. To advance such an argument, is to overlook the fact that when he left Point A the Mulberry Street car was already rounding the curve, and he continued walking towards the point of collision without even stopping to make
- 30 the required observation for his safety.
- The distance from Thomas Street to South Street is 233 feet and the distance from Point A to Point F is about 22 feet (taken from the map by scale). Therefore, when he says he looked South and saw no car when he was at Point A he conclusively shows that either he did not look or looked carelessly, because it is inconceivable that the Bergen Street car could have rounded the curve from Thomas Street into Railroad Avenue,
- 40 and then have covered a distance of 233 feet and to have passed plaintiff except the rear end

thereof while he was walking, without stopping, a distance of twenty-two feet.

In conclusion, the evidence, we submit, shows that the plaintiff, without making any observation whatever for his safety, rushed into a place of danger and was struck by the rear end of the car, all of which he could have avoided by the exercise of any care whatsoever.

In the adjudicated cases of this State hereinafter set forth, it was his duty to make such observations for his safety, and his failure to do so constituted contributory negligence on his part, barring a recovery in this action. 10

In the case of *Ruggieri v. Public Service Railway Company*, decided at the June term, 1913, of the Supreme Court, and which was argued before Chief Justice Gummere and Justices Bergen and Kalisch, the following is the opinion of the court (which has not been reported):

"The plaintiff was crossing a public highway in West New York, County of Hudson, and was struck by a trolley car of the defendant." 20

"Plaintiff testified that he started to cross Bergenline Avenue at the corner of Seventh Street or Fisher Avenue (as it was sometimes called); that he saw a car going to Union Hill and he stopped on the corner until the car had passed about 75 or 80 yards, and watched it that distance, and saw no other car and then started to cross; that as soon as he got on the south bound track, the other car having passed on the northbound track, he was struck by the car on the southbound track; that no bell was rung nor any warning given. 30

On cross examination he testified that he stood on the sidewalk at the corner and let the southbound car pass, which was on the track nearest to him; then he started to walk; that he did not look in the direction from which the northbound car would come before the southbound car passed; 40

that when the passing car had gone about 75 or 80 yards, he looked and did not see any north-bound car coming; that if there was nothing to obstruct his view he could see for two blocks, but on this morning when he looked he did not see this car coming; that the distance from the curb to the track was 10 feet; that after he left the curb he looked south to see if the car was coming; that he looked as he walked and did not see it. He subsequently said when he looked

10 he was right at the corner and in response to a question put by the Court, whether he did not know that the southbound car was apt to be between him and the other car coming in the opposite direction, he said, "Well, I see this car was pretty far from me, your Honor, and I see there was about 75 or 80 yards, and I started to walk across." Again he was asked on cross examination how far he was from the curbstone when he looked the second time, and he replied, "About

20 two steps and saw no car."

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"So we have this situation: The plaintiff standing on the sidewalk about 15 feet from where he was struck; a car passing about 10 feet away which the plaintiff watched until it had gone 75 or 80 yards, and then started to cross the street, and after taking two steps, which would be about five feet, he looked again and while seeing the south-bound car about 80 yards away, saw no car

30 going north approaching, yet when he had walked only 10 feet, about four steps, he was struck by a car which was at least more than 80 yards away, and must have covered that distance while plaintiff took four steps. *This is so unreasonable as to be incredible for if the plaintiff had looked when only 10 feet from the track, as he said he did, he would have seen the car, and the only inference is that he did not look, or if he did,*

that he would have seen the car so near as to surely strike him, if he continued to walk toward it. But he says he did not see the car, so he is not within the line of cases where the pedestrian seeing an approaching car, exercises his judgment as to his ability to cross safely. In this case, the car must have been within his vision if he had looked, and the fact that he did not see it is a demonstration that he did not look with reasonable effectiveness such as was required of him under the circumstances, and he was, therefore, guilty of such contributory negligence as required a non-suit, the refusal of which was error. In the case of *Brown v. Railroad Co.*, 39 Vr., 618, Chancellor Magie speaking for the Court of Errors and Appeals said, 'When he says that, at that time he could see no trolley car in sight, he conclusively establishes that he did not then make the observation which duty required of him, because, if he had done so, he would undoubtedly have discovered the approaching car, and have been able to avoid the collision.' It seems to us that this case controls the one under review. This result makes it unnecessary to deal with the question of defendant's negligence."

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It is well settled in this state that a person in crossing a highway must use his powers of observation to discover approaching vehicles, and to avoid collision therewith, if possible.

In the leading case of *Newark Passenger Railway Co. v. Block*, 26 Vroom, 605, the Court of Errors said:

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"We must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances. From this rule it may be said in general that one who passes on foot

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10 along a sidewalk or path of a highway must use his powers of observation in respect to other passers thereon and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case doubtless the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed—it cannot be so quickly stopped or diverted from its course; a street car cannot deviate from its tracks; while the passer on foot may quickly stop, turn aside or even retrace his steps.”

Eagen v. J. C. H. & P. St. Ry. Co., 45 Vroom, 699.

20 This rule has been sustained by a long line of cases and is so firmly established as not to require additional citations.

In *Brown v. E. T. & C. J. R. Co.*, 68 N. J. L., 621, wherein Chancellor Magie said:

30 “He admitted that when he started to cross the tracks he saw the lights ‘wav up on the hill,’ did not know what light it was. Prudence required him to wait a sufficient time to enable him to observe whether the lights which he saw were those of the street lamps on the side of the avenue, or were those of a car in the middle of the avenue. Without waiting he proceeded to cross. When he says that, at that time, he could not see any car in sight he conclusively establishes that he did not make the observation which duty required of him, because if he had done so he would undoubtedly have discovered the approaching car and have been able to avoid the collision.”

40 *Pa. R. R. v. Righter*, 13 Vroom, 180;
Eagen v. J. C. H. & P. (*supra*).

We, therefore, respectfully submit that under these decisions and under those cited supra, wherein the rear end of the car had struck a person, this appellant was guilty of contributory negligence as a matter of law.

The cases of *Devine v. P. S. Ry. Co.*, 88 Atl., p. 1080; *Kraut v. ibid*, 82 N. J. L., 437; *Anderson v. ibid*, 80 Atl., 480; *Haight v. Con. Traction Co.*, and *Merkel v. J. C. H. & P. St. Ry. Co.*, 75 N. J. L., 654, have no application to the case at bar, for the reason that in those cases plaintiff was on the track and was struck by the front end of the car, while in the present one, the front end of the car had passed him in safety and he was struck by the rear end thereof. 10

Again, as pointed out by the Supreme Court in the case of *Ruggieri v. P. S. Ry Co. (supra)*, plaintiff is not within the principle decided by those cases wherein the pedestrians seeing an approaching car exercised their judgment as to their ability to cross in safety, while the plaintiff, according to his testimony, did not see the car at all. 20

We, therefore, respectfully submit that the judgment for the defendant directed by the court was a proper one.

POINT V.

The Court properly overruled the following question:

“Q. Mr. Rubinow, from your observation, what was the most travelled course of pedestrians from the northerly side of South Street to the southerly side of South Street?” 30

This question was founded upon an unwarranted assumption of fact in that it assumed that a certain portion thereof was more used than any other portion, and there was no evidence in the case to sustain that assumption. Again, the question was immaterial, incompetent and irrelevant to the issue being tried. 40

POINT VI.

The Court properly allowed the following question:

“Q. And then did you see the old gentleman there, the plaintiff?”

10 Although this may have been a leading question it is entirely within the discretion of the court to allow the same to be answered. That error cannot be taken to the allowance by the court of any matter in its discretion and particularly as to a leading question, is so fundamental as not to require the citation of authorities.

The judgment in favor of the defendant should be affirmed.

Respectfully submitted,

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