

THIRD.

The Court's function is to construe the terms of written contracts, and if the construction placed on same by the trial Court is correct, the direction of a verdict was proper; if, however, parol evidence should have been permitted to explain the contract, the facts should have been submitted to the jury.

AVIS & AVIS,  
*Attorneys for Defendant-Appellant.*  
JOHN BOYD AVIS,  
*Of Counsel.*

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New Jersey  
Court of Errors and Appeals

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**Summons.**

10

STATE OF NEW JERSEY to CHARLES J. HELY  
and JOHN E. McCORMACK, individu-  
ally and as partners trading as Hely  
& McCormack, and CHESTER HUEY:  
(Seal) You are summoned to answer the an-  
nexed complaint of ALICE R. DUNNE,  
a minor, by WILLIAM J. DUNNE,  
next friend, and WILLIAM J. DUNNE individually, 20  
in an action at law in the Circuit Court of Essex  
County. And take notice, that unless you file  
your answer to said complaint with the Clerk of  
the said Essex County Circuit Court at Newark,  
within twenty days after service upon you of this  
writ, and the annexed complaint, the plaintiffs  
may proceed in the suit and judgment may be  
entered against you.

Witness, William A. Smith, Judge of the Es-  
sex County Circuit Court, at Newark, on this 30  
23rd day of March, 1926.

JOHN H. SCOTT,  
Clerk.

ARTHUR M. KARL,  
Attorney.

40

**Complaint.**

ESSEX COUNTY CIRCUIT COURT

10	ALICE R. DUNNE, a minor, by WILLIAM J. DUNNE, next friend, and WILLIAM J. DUNNE, individually, Plaintiffs,	}	Action at Law
20	vs. CHARLES J. HELY and JOHN E. McCORMACK, individually and as partners trading as Hely & McCormack, and CHESTER HEUY, Defendants.		

Plaintiffs, residing in the City of Newark, County of Essex and State of New Jersey, say that:

1. Plaintiffs, William J. Dunne and Alice Dunne, are father and daughter, Alice being a minor, age eight years.
- 30 2. On or about the 24th day of June, 1925, and for a long time prior thereto, the defendants, Charles J. Hely and John E. McCormack, individually and as partners trading as Hely & McCormack, were the owners of a certain automobile truck.
- 40 3. On or about the said date, the plaintiff, Alice Dunne, was lawfully in front of premises, 58-58½ Vanderpool Street, in the City of Newark, County of Essex.

*Complaint*

4. On or about the said time, the defendants, by their agent and servant, Chester Huey, did operate and drive their said automobile along Vanderpool Street in an easterly direction, which is down hill, at a high and excessive rate of speed, and without warning, did negligently and carelessly strike and run over the plaintiff, Alice Dunne, who was lawfully in the place aforesaid. 10

5. The driver of the said car was about the business of the defendants, Charles J. Hely and John E. McCormack, individually and as partners, trading as Hely & McCormack, and was authorized to drive the said automobile at the said time by the defendants. 20

6. Because of the negligence of defendants and their said agent or servant, the said plaintiff, Alice Dunne, sustained severe injuries, to wit, ruptured navel, which may be a permanent injury, severe bruises on and about the body, injured shoulder, lame back, sore ribs, also severe pains in the stomach, and a noticeable scar on the forehead, and other severe injuries were inflicted upon her, and this plaintiff was obliged to spend a considerable length of time in the hospital under the care of various physicians and nurses, and was confined to her home for a long period of time and unable to attend school. 30

Plaintiff still is under the care of a physician.

FIRST COUNT.

1. Plaintiff, Alice Dunne, repeats all the allegations of paragraphs 1, 2, 3, 4, 5 and 6 hereinbefore set forth. 40

Complaint

2. Plaintiff, Alice Dunne, by her next friend, William J. Dunne, demands as damages, the sum of Seventy-five Hundred (7500) Dollars, together with lawful costs of suit.

10 SECOND COUNT.

1. Plaintiff, William J. Dunne, repeats the contents of paragraphs 1, 2, 3, 4, 5 and 6 of the complaint preceding the first count.

2. As a result of the carelessness and negligence of the employee of the defendants, Charles J. Hely and John E. McCormack, individually and as partners, trading as Hely & McCormack, and Chester Huey, as above set forth, plaintiff, William J. Dunne, has been forced to spend large sums of money for medicines, hospital bills, doctor bills and nurses, and has been deprived of the comfort and companionship of his daughter's company.

30 Plaintiff, William J. Dunne, individually, demands as damages the sum of Twenty-five Hundred (2500) Dollars, together with lawful costs of suit.

ARTHUR M. KARL,  
Attorney for Plaintiffs.

Answer.

ESSEX COUNTY CIRCUIT COURT

ALICE R. DUNNE, a minor, by WILLIAM J. DUNNE, next friend, and WILLIAM J. DUNNE, individually, Plaintiffs,	} Action at Law	10
vs.		
CHARLES J. HELY and JOHN E. McCORMACK, individually and as partners trading as Hely & McCormack, and CHESTER HUEY, Defendants.		20

Defendants, answering the complaint filed in the above-entitled action, say:

- 1. Paragraph 1 is admitted.
- 2. Paragraph 2 is admitted.
- 3. Paragraph 3 is admitted. 30
- 4. Paragraph 4 is denied.
- 5. Paragraph 5 is denied.
- 6. Paragraph 6 is denied.
- 7. All the allegations in the first and second count of the complaint are denied. 40

*Answer*

SEPARATE DEFENSES.

For a further and separate defense, defendants say that the injuries, if any, sustained by the plaintiff, were caused by the failure of said Alice R. Dunne to exercise due care for her own safety.

And also defendants say that on the occasion aforesaid, the defendant Chester Huey, was not engaged on the business of the other defendants; nor was he authorized to drive the said automobile; and he drove, on his own business, and used said automobile without his employer's permission.

ANTHONY R. FINELLI,  
Attorney of Defendants.

**Reply.**

ESSEX COUNTY CIRCUIT COURT

ALICE R. DUNNE, a minor, by  
WILLIAM J. DUNNE, next  
friend, and WILLIAM J.  
DUNNE, individually,  
Plaintiffs,

vs.

CHARLES J. HELY and JOHN E.  
McCORMACK, individually and  
as partners trading as Hely  
& McCormack, and CHESTER  
HUEY,  
Defendants.

} 10  
Action at Law  
} 20

Plaintiffs join issue with the answer as filed herein.

Plaintiff, Alice R. Dunne, denies that she exposed herself to any risk of an accident and neglected to take proper precaution, or exercise care to guard and protect herself, and denies that she is in any way guilty of contributory negligence, or in any way, by her acts, contributed to the injury which she sustained, as is alleged in the answer filed herein.

ARTHUR M. KARL,  
Attorney for Plaintiffs.

**Record of the Judgment.**

ESSEX COUNTY CIRCUIT COURT

10	ALICE R. DUNNE, a minor, by WILLIAM J. DUNNE, next friend, and WILLIAM J. DUNNE, individually,	Action at Law On Verdict After Trial.
	Plaintiffs,	
	vs.	
	CHARLES J. HELY and JOHN E. McCORMACK, individually and as partners trading as Hely & McCormack, and CHESTER HUEY,	Judgment En- tered March 25, 1927.
20		Defendants.

Damages for Alice R. Dunne	\$1700.
Damages for Wm. J. Dunne	300.
Costs	61.63
Total	2061.63

Arthur M. Karl, Attorney of Plaintiffs.

30 Judgment on verdict after trial in the above-  
entitled action was rendered on the 27th day of  
March, A. D. 1927, in favor of the plaintiffs, Alice  
R. Dunne, against the defendants, Charles J.  
Hely, *et als.*, in the sum of \$1700. and also in  
favor of the other plaintiff, Wm. J. Dunne, indi-  
vidually against the said defendants, in the sum  
of \$300.00 damages, and \$61.63 costs of suit.

Judgment entered and signed March 27th, 1927.

40 WILLIAM S. GUMMERE,  
Judge.  
JOHN H. SCOTT,  
Clerk.

**Testimony.**

ESSEX COUNTY CIRCUIT COURT

Friday, March 25, 1927.

10	ALICE R. DUNNE, a minor, by WILLIAM DUNNE next friend, and WILLIAM J. DUNNE, indi- vidually,	Action at Law
	Plaintiffs,	
	vs.	
	CHARLES J. HELY and JOHN E. McCORMICK individually and as partners trading as HEALY & McCORMICK and CHESTER HUEY,	Law
20		Defendants.

Before: HON. WORRALL F. MOUNTAIN, J.,  
and a jury.

For the plaintiffs appear ARTHUR M. KARL (by  
Harry Unger).

For the defendants appear ANTHONY R. FIN-  
NELLI. 30

(A jury is called and sworn.)

Mr. Unger opens for the plaintiffs.

Mr. Finelli opens for the defendants.

40

*William J. Dunne—Direct*

WILLIAM J. DUNNE, one of the plaintiffs,  
sworn in his own behalf.

Direct-examination by Mr. Unger:

10 Q. Where do you live? A. 58 Vanderpool  
Street.

Q. Newark? A. Newark, New Jersey.

Q. Were you living there on June 24th, 1925?  
A. Yes, sir.

Q. You lived there with your family? A. I  
did.

Q. Alice R. Dunne, is your daughter? A. She  
is.

20 Q. How old was she on June 24th, 1925? A.  
She was seven years of age.

Q. Was she living with you all the time. She  
was and she is still living with you? A. Yes,  
sir.

Q. Do you recall an accident on that day? A. I  
do.

Q. Did you see it yourself? A. I did not.

Q. How soon after the accident did you get to  
the scene? A. Two minutes.

30 Q. Who did you see there? A. A little girl  
ran in my front door and hollered, "Mr. Dunne,  
Alice was struck by an auto," and I immediately  
ran out to the front of the house and I seen my  
little girl limp in the arms of Mr. Healey.

Q. What is his full name? A. Thomas Healey.

Q. Not one of the defendants? A. No. I di-  
rected Mr. Healey to immediately take her to a  
doctor.

Q. Who else was there? A. Mr. Chester Huey.

40 Q. Who is he? A. The driver of this com-  
mercial Ford truck.

*William J. Dunne—Direct*

Q. Do you know him? A. I do.

Q. How long have you known him? A. Five  
years or more.

Q. You know for whom he works? A. I do.

Q. For whom? A. McCormick & Hely.

Q. Did you see anybody else there at that time? 10  
A. Quite a crowd of fellows there, people around  
the house.

Q. Whereabouts is your house on that street  
with reference to Frelinghuysen Avenue and  
Sherman Avenue? A. In the middle of the block.

Q. What is on the opposite side? A. A play-  
ground.

Q. A city playground? A. Yes, in the rear of  
the Miller Street School. 20

Q. What time of day did this occur? A. Be-  
tween 7:30 and 8 o'clock daylight saving time.

Q. Was it light or dark? A. Just getting  
about dark.

Q. You mean to say it was still light? A. Yes,  
sir.

Q. Or was it dark? A. It was more light than  
it was dark.

Q. The street lights were not lit yet? A. No,  
sir. 30

Q. Were there a lot of children on the streets?  
A. There was a lot of children playing on the  
streets.

Q. Was there anybody in the playground? A.  
Yes, quite a few children in the playground.

Q. Also in the street? A. Yes, sir.

Q. What happened with your child? A. An of-  
ficer came to the house—

Q. No, at the time you say you went to the 40

*William J. Dunne—Direct*

scene of the accident and you saw the child in the arms of Mr. Thomas Healey. A. Yes, I saw her in a limp condition in the arms of Mr. Healey.

Q. Was she conscious or unconscious? A. Unconscious.

10 Q. Was she bleeding? A. Yes, sir, she was bleeding from the left side of her temple and her left eye.

Q. What happened to her? A. I directed Mr. Healey to take her to a doctor.

Q. Did you go with them? A. No, sir.

Q. When next did you see your little daughter? A. The next Saturday afternoon I went to St. Barnabas Hospital.

20 Q. Where did you find her? A. In bed.

Q. How long was she in St. Barnabas Hospital? A. Ten days.

Q. After she came home what was done with her? A. She was put on a bed couch in the kitchen.

Q. Who brought the girl home? A. Her mother.

Q. How long was she lying on her back at home? A. Quite a few days; I don't just remember.

30 Q. Is the little girl being still treated by a physician? A. Yes, sir.

Q. What is the name of the physician who is treating her now? A. Dr. Phelan.

Q. Who paid for the doctors bills on account of this accident? A. I did.

Q. How much did you pay up to today? A. Up to March 16th, \$145.

40

*William J. Dunne—Cross*

Q. Whom did you pay that to? A. That was the hospital bills, for my family physician and—

Q. Does that also include bandages and medicine? A. Everything in general.

CROSS-EXAMINATION by Mr. Finelli:

10

Q. Does Alice go to school? A. Yes, sir.

Q. When did she return to school? A. When did she return?

Q. Yes. A. Half-past three.

Q. This accident occurred on June 24, 1925? A. Yes, sir.

Q. How long was Alice out of school? A. How long was Alice out of school?

Q. Yes. A. I got home from work about five o'clock and she was in the house then.

20

Q. How long was Alice confined to her home and failed to go to school as the result of this accident? A. I don't remember.

Q. I suppose the children congregated because of the fact that there was an accident? A. I don't understand your question.

Q. You say there were many children on the street? A. The night of the accident?

Q. Yes. I attribute that as the result of the accident, don't you?

30

Mr. Unger: I object as argumentative.

40

*Ella Dunne—Direct*

ELLA DUNNE, sworn in behalf of the plaintiffs:

Direct-examination by Mr. Unger:

Q. You are the mother of Alice? A. I am.

10 Q. Do you recall this accident? A. I do.

Q. Did you recall the accident yourself? A. No, sir, I did not.

Q. Where were you at the time of the accident?

A. At the Cameo Moving Picture Theatre.

Q. How soon after the accident did you get there? A. I reached the hospital about eight o'clock; about half an hour afterwards.

20 Q. Where was Alice at that time? A. Lying on the bed in St. Barnabas Hospital.

Q. What was her condition? A. She was asleep.

Q. Was anybody there with her? A. Yes, the nurses and the doctor.

Q. How long was she in the hospital? A. I brought her home July 2d.

Q. Between July 2d and June 24th she was in the hospital continuously? A. Yes, sir.

30 Q. Did you go to see her each day? A. Every day.

Q. Did you talk to her? A. Yes, sir.

Q. Was she in bed all the time? A. Yes, sir.

Q. Who brought her home? A. I did.

Q. Did you walk her home? A. No, sir.

Q. How did you get her home? A. I had to get her by the arm and lead her to the taxicab.

Q. You brought her home in a taxi? A. Yes, sir.

40 Q. When you brought her home did she go

*Ella Dunne—Direct*

about and play as before the accident or did you put her to bed? A. I put her on my bed couch in the kitchen.

Q. How long was she lying in bed after she came home? A. I brought her home on Thursday; until Saturday night. 10

Q. Then, what happened? A. I let her sit up at the table to eat with the rest of the family.

Q. Was that the first time she got up? A. No, sir.

Q. Was she all right at that time? A. No, sir, she had to go back on the couch again after she ate her supper.

Q. Then, what happened? A. That Saturday night when I was preparing her for her bath I saw 20 her navel was bulged and black and blue.

Q. What did you do? A. Immediately I became frightened and I did not give her her bath.

Q. What did you do as the result of seeing this thing? A. I put her back in bed and on Monday I took her to Dr. Phelan.

Q. Did he examine her? A. He did.

Q. What did he do for her? A. He put a bandage over the navel and padded it heavily with adhesive tape; the bandage was made into a 30 ball to fit the size of the navel.

Q. How often would you go to see Dr. Phelan? A. That Monday he told me to bring her back in a week and I took her back the following Monday, which was July 13th and then once a month I have taken her to him since.

Q. Since the early part of July, 1925, you have been taking Alice to him once a month? A. Yes, sir. 40

*Ella Dunne—Direct*

Q. Does she still wear the bandage around her navel? A. Yes, sir.

Q. Does the child complain of pains? A. Yes, sir.

10 Q. How frequently? A. Well, she had them on Friday, that is the first she had them in four or five weeks; she has them occasionally; I couldn't say how often.

Q. Have you had much trouble with her since the accident? A. What do you mean?

Q. Have you had more trouble with her since the accident than you did before the accident? A. Yes, sir.

20 Q. Mrs. Dunne, was Alice ill, did she have any sort of illness, about twelve months previous to the accident? A. She was not.

Q. Does she go to school? A. She does.

Q. After the accident when did she first go to school? A. The following September.

Q. When was she able to get around with the other children and play? A. Not for at least two weeks after the accident.

30 Q. Not for at least two weeks after the accident or from when she came home to the house? A. After she came home.

Q. Does she sleep well? A. No, she does not. She rolls and tosses in her sleep at night.

Q. Did you notice that condition before the accident? A. No, I did not. She is also very nervous since the accident.

Q. Has she taken any medicine? A. No.

Q. Did you inform Dr. Phelan about these things? A. Yes, sir, I did.

40 Q. When was the last time you saw Dr. Phelan?

*Ella Dunne—Direct*

A. Wednesday, March 16th, a week ago last Wednesday.

Q. Is Alice a bright child? A. Ordinary, the average child.

Q. Does she go to school? A. Yes, sir.

Q. Miller Street School? A. Yes, sir. 10

Q. What grade is she in? A. The fourth.

Q. How old is the child now? A. Nine.

Q. Do you know Chester Huey? A. By sight.

Q. How long have you known him by sight? A. Well, at least five or six years; he usually plays ball on the playground there and I know him by sight.

Q. Where have you seen him before the accident? A. Where have I seen him? 20

Q. Yes. A. On the commercial truck he drives.

Q. What kind of a truck is it? A. A Ford Commercial.

Q. Do you know who that belongs to? A. Yes.

Q. Who? A. Hely & McCormick.

Q. How many times did you see him on this truck? A. Before this accident?

Q. Yes. A. Many times.

Q. What time of day would you see him on this truck? A. Through the day and after supper. 30

Q. How many times did you see him drive his car after supper? A. Many times.

Q. Did he have anybody with him on those occasions?

Mr. Finelli: I object unless it was the occasion of June 24th, 1925.

(Argument.)

The Court: Sustain the objection. 40

*Ella Dunne—Cross*

By the Court:

Q. Did this truck have any name on it? A. No, sir, not at the time.

Q. What was it, a Ford covered truck? A. Yes, sir.

CROSS-EXAMINATION by Mr. Finelli:

Q. You have school in July and August down at Miller Street. A. No, sir, they do not.

Q. Did you leave your home on the evening in question? A. What do you mean, the evening of the accident?

Q. Yes, to go to the hospital? A. Did I leave my home?

Q. Yes. A. No, I went direct from the Cameo Theatre to the hospital.

Q. Where is the theatre? A. On Elizabeth Avenue between Poinier and Vanderpool Street.

Q. You first heard of this accident while you were at the theatre? A. Yes, sir.

Q. What makes you fix the time of reaching the hospital? A. What makes me fix the time I reached the hospital?

Q. Yes. A. I left my house about quarter after seven on my way to the pictures and stopped for a few moments and was talking to one of my neighbors and hadn't been in the movies very long when it was flashed on the screen, "Mrs. Dunne of Vanderpool Street wanted immediately."

Q. Have you any other children home? A. Yes.

Q. What are the ages of your children? A. Ten and seven.

40

*Julia Wolter—Direct*

JULIA WOLTER, sworn in behalf of the plaintiffs:

Direct-examination by Mr. Unger:

Q. Where do you live? A. 146 Sherman Avenue.

Q. How far is that from Vanderpool Street?

A. It is facing Vanderpool Street.

Q. Facing? A. Yes, sir.

Q. Then, it is on the corner? A. Yes, sir.

Q. What corner is it? A. The southeast.

Q. The southeast corner? A. Yes, sir.

Q. What apartment do you occupy there? A. The first floor.

Q. Is there any house between this house that you live in and the house where the Dunnes live?

A. No, there is not.

Q. Is there now? A. Yes.

Q. But you say there was not at the time of the accident? A. Not at the time of the accident, no, sir.

Q. Were you able to see from your window clear into the street? A. Yes, sir.

Q. How far down, Mrs. Wolter? A. I could see all the way down to Frelinghuysen Avenue.

Q. Do you recall this accident? A. I do.

Q. Do you remember the day? A. I do.

Q. What was the day? A. It was the 24th day of July, 1925.

Q. Do you know the Dunnes? A. I do.

Q. You know little Alice? A. I do.

Q. Do you know Chester Huey? A. Yes, sir.

Q. How did you see the accident? A. Well, I was reading a newspaper by my window.

Q. What window? A. The kitchen window.

10

20

30

40

*Julia Wolter—Direct*

Q. Did that kitchen window face on this street?  
A. Yes, sir.

Q. All right, go ahead? A. I was sitting at the window reading the paper, when this Ford commercial car passed and the jerk of the car and the noise of the boys attracted my attention and I looked down the street and I seen the child hit by the truck, not knowing at the time who the child was.

Q. Did you see the child actually struck by this truck? A. I did.

Q. What did you do? A. I went down in the street and I seen it was Alice Dunne.

Q. Who is Alice Dunne? A. The little girl.

20

Mr. Unger: Stand up, Alice.  
(A child arises in the audience.)

Q. Is that the little girl (indicating)? A. Yes, sir.

Q. Where was she at that time? A. She was in the street.

Q. I mean when you ran down out of your house where was she lying on the street, or where? A. No, she was in Mr. Thomas Healey's arms.

Q. Who is Thomas Healey? A. Sitting over there (indicating).

Q. What was the condition of the child? A. She was limp, and bleeding from the forehead and arms.

Q. Was she conscious or unconscious? A. She was unconscious.

Q. What did you do in reference to this accident about it? A. After the accident I went home.

40

*Julia Wolter—Direct*

Q. What happened with the child? A. Mr. Healey had the child in his arms and kept the child in his arms.

Q. Did they go away? A. They went away.

Q. When did you see this child next? A. I seen her in the hospital. 10

Q. What hospital? A. St. Barnabas.

Q. Do you know how long she was there? A. Well, she was there about ten days.

Q. Now, going back to your window, you say you were sitting there? A. Yes, sir.

Q. When was your attention first directed to this truck? A. Why, when they were passing they were hollering and cheering along.

Q. Who? A. Pat Huey and the crowd in the car. 20

Q. Was there a crowd in the car? A. There was.

Q. Did you see Alice in the street? A. I did.

Q. When you first looked out of your window how far was the truck and Alice apart? A. About fifteen feet.

Q. The truck was fifteen feet away from Alice when you first looked out of your window? A. Yes, sir. 30

Q. Was this truck going fast or slow? A. Very fast.

Q. Did you see who drove it? A. Yes.

Q. Who? A. Chester Huey.

Q. You knew him, did you? A. I did.

Q. How long have you known him? A. About five years.

Q. Did you see this truck before? A. I did. 40

40

*Julia Wolter—Direct*

Q. Where? A. Passing Vanderpool Street.

Q. Who drove it? A. Mr. Chester Huey.

Q. Now, did you see whether the truck ran over Alice or not? A. It did not run over her, it struck her.

10 Q. On what part of her body? A. On the left side of her body; it struck her forehead and her arms.

Q. At the time the truck struck Alice did you hear any horn or any indication of alarm? A. No, I did not.

Q. Do you know whether the truck came to a standstill after it struck the child? A. Yes, sir.

20 Q. What do you know about it? A. Well, I heard the noise of the brakes.

Q. What kind of a noise? A. The car coming to a sudden stop.

Q. A sudden stop? A. Yes, sir.

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

Q. Was it a loud noise? A. Very loud.

Q. Did you know what it was? A. It sounded like the brakes of the car.

30 Q. Do you know whether the car stopped immediately or did it go right on? A. No, it skidded.

Q. How far? A. About two length of the car.

By the Court:

Q. Beyond where it struck here? A. Yes.

By Mr. Unger:

40 Q. When it stopped which way was the car facing? A. Towards the school.

*Julia Wolter—Cross*

Q. Then, would you say it was on an angle shape? A. Well, the nose of the car.

Q. Was towards the school? A. Yes, sir.

Q. You saw just Huey there? A. I did.

Q. How many boys that you saw were in the car? A. About eight or ten boys. 10

CROSS-EXAMINATION by Mr. Finelli:

Q. The window you were at faced in what direction? A. Southeast direction on Vanderpool Street.

Q. Southeast is the corner, the window facing the southeast? A. Yes, sir.

Q. Is Vanderpool Street east of Frelinghuysen Avenue. Is Sherman Avenue east of Frelinghuysen Avenue? A. It is east, yes. 20

Q. Was this car coming from the direction of Frelinghuysen Avenue? A. No, sir.

Q. From which direction was the car coming? A. I don't recall what direction it was coming from.

Q. In which direction was it going on Vanderpool Street? A. East.

Q. Your window you say faces east? A. Faced— 30

Q. East? A. Yes.

Q. It is the southeasterly corner? A. The southeasterly corner.

Q. That is towards Elizabeth, New Jersey side, southeast. A. Southeast.

Q. What is the distance in feet if you know, between Sherman Avenue and Frelinghuysen Avenue? A. I don't know. 40

*Lucille Murtha—Direct*

Q. What is the distance between No. 58, the residence of the Dunnes and your own residence? I don't suppose you know that either. What time of the day or evening was this? A. It was at 7:30 between 7:30 and 8 o'clock.

10 Q. Did you go to the street? A. Yes.

Q. Has your home address a number on Vanderpool Street? A. No, it has not.

Q. No number on Vanderpool Street? A. No.

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LUCILLE MURTHA, sworn in behalf of the plaintiffs:

20

Direct-examination by Mr. Unger:

Q. Where do you live? A. 60 Vanderpool Street.

Q. Is that next door to the Dunnes? A. Two doors away.

Q. You know the Dunnes, do you? A. Yes, sir.

Q. Do you know Alice? A. Yes, sir.

30 Q. Do you recall an accident Alice had? A. Yes, sir.

Q. Do you know when it was? A. It was in 1925, June.

Q. Did you see that accident? A. Yes, sir.

Q. Where were you at the time of the accident? A. I was playing with Alice.

Q. Where were you playing with Alice? A. In the street.

40 Q. What time about were you playing with her, what time of the day? A. We started to play

*Lucille Murtha—Direct*

about seven o'clock, and the accident happened between 7:30 and 8 o'clock.

Q. Was this after supper? A. Yes, sir.

Q. You know the truck that hit her, do you? A. Yes, sir.

Q. What truck was it? A. It was a Ford 10 truck; green truck.

Q. Did it have a name on it? A. No, sir, not then.

Q. Who was driving this truck? A. Mr. Chester Huey.

Q. Do you know him? A. By sight I do.

Q. Did you know him before the accident? A. Yes, sir.

Q. Where did you see him? A. I know him 20 from seeing him around our corners, he hangs out with that gang.

Q. Did you see him on this truck before? A. Twice.

Q. What time of day?

Mr. Finelli: I object.

The Court: Sustain the objection.

Q. Now, at the time of the accident who drove 30 the car? A. Chester Huey.

Q. When did you first see him? A. When the car was twenty feet away from where we were.

Q. Where were you, opposite what house? A. Opposite my house, No. 60.

Q. Alice lives No. 58? A. Yes, sir.

Q. You say the truck was about twenty feet away from Alice when you first saw it? A. Yes, 40 sir.

*Lucille Murtha—Direct*

Q. Which way was it going? A. Going towards Frelinghuysen Avenue.

Q. What direction is that? A. I don't know.

Q. East or west? A. I don't know; east, I guess.

10 Q. Were there any other children in the street? A. Up the street there was.

Q. A lot of children, or just a few? A. A lot.

Q. A lot of children, you say? A. Yes, sir.

Q. Were there any other trucks or automobiles in this street at that time? A. Yes, sir; there was, there was an open car parked in front of 58½ Vanderpool Street and a closed one in back of it.

20 Q. So, there were two cars parked in front of your house? A. No, in front of 58½ Vanderpool Street and one in back of that at Alice's house.

Q. Were they open or closed cars? A. The first one was open.

Q. Were you playing east of these automobiles or west of them? A. East.

Q. Was that nearest to Frelinghuysen Avenue, or Sherman Avenue? A. Nearer to Frelinghuysen Avenue.

30 Q. How far out from the cars were you playing? A. We were playing all in the street, we were using the whole street.

Q. All the children, or just you two, I mean, all the children were out in the street, or just you and Alice? A. The children up the street were playing in the street, too.

Q. Then, you noticed Alice was hit by this 40 truck? A. I noticed the truck when it was about

*Lucille Murtha—Direct*

twenty feet away from Alice and I yelled for her to look out and it was too late because it was right on top of her.

Q. Was this truck coming fast or slow? A. Very fast.

Q. Who was sitting alongside of Huey? A. 10 Some fellow, but I didn't see his face.

Q. Was there anyone else in the car? A. I saw some fellows come from the back of the truck, but I didn't see them after because I ran in the house for Alice's father.

Q. Did you hear any horn blown, or any noise? A. No, all I heard was the brakes squeak.

Q. When the brakes squeaked, by that time did he hit Alice? A. Yes, he threw Alice to the 20 ground and then he skidded.

Q. How far did he skid? Point from where you are sitting to how far. A. About down to the first bench or the second bench.

Q. Where the two ladies are sitting? A. Yes, sir.

Q. Which way was the car facing then? A. The front part, where the motor is, was facing the school.

Q. Did Huey get out of his car? A. He got 30 out of the car, yes, sir.

Q. Where was Alice? A. Then I ran in the house and when I came out Mr. Thomas Healey was holding Alice.

Q. Was she bleeding? A. She was bleeding over her eye.

Q. Did she cry, or was she unconscious? A. I don't know, she was just laying there limp.

Q. Did you go to the hospital to see her? A. 40 No, sir; I did not.

*Lucille Murtha—Cross*

Q. When she came back from the hospital did you see her there? A. Yes, sir; I was there when she came home.

Q. Did you see anybody in these two cars that were standing there? A. Yes.

10 Q. Who? A. The car that was parked in back of the open car there was Mr. Thomas Healey and another man was fixing it.

Q. After the accident was the man who was fixing the car in the crowd, too? A. Mr. Healey was, Mr. Thomas Healey, who was holding Alice.

## CROSS-EXAMINATION by Mr. Finelli:

Q. Do you remember what game you were playing? A. We were playing tag.

20 Q. Do you know of any other child playing tag with you and Alice? A. No, we were playing alone.

Q. Were you tagging her, or she you at that time? A. I was after her.

Q. Weren't you playing on the sidewalk? A. No, we were playing in the street.

Q. Miller Street School is right opposite your home? A. Yes, sir.

30 Q. This automobile just turned to the left, that is the direction, turned to the left just at or about the time Alice fell to the ground, is that right? A. It threw her down and he put on his brakes and they squeaked and then he skid.

Q. The car went to the left side? A. Yes, sir; towards the school.

Q. Are you sure the car struck Alice? A. It threw her to the ground, yes, sir; I am sure.

40

*Lucille Murtha—Cross*

Q. I want to know whether the car touched Alice. A. Yes, sir.

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

Q. Tell the court and jury what part of the car touched Alice. A. The mudguard, the right mudguard. 10

Q. What mudguard, the front or the rear? A. The front.

Q. What part of the mudguard touched Alice? A. What part of it?

Q. Yes. I mean what part of Alice's body touched the mudguard? A. It hit her on the left side and threw her to the ground.

Q. The left side of the body? A. The car threw her to the ground. 20

Q. In other words, did the car push Alice away? A. The car threw her to the ground.

Q. In which direction did Alice fall? A. What do you mean, the way she was facing; she was facing the ground when she fell, she fell on her stomach.

Q. Was her head away from the car and nearer her home? A. I don't know.

Q. Can you please tell us in which way Alice fell after the car hit her? A. When she saw the car coming she put her hand up like that (indicating) and that is the way she fell. 30

Q. Did she fall away from the car? A. It threw her further than she was standing.

Q. Did you see Alice lying on the ground? A. Yes, sir.

Q. With reference to the parked automobile, did Alice fall near that parked automobile? A. No, she was out further into the street. 40

*Lucille Murtha—Re-direct*

Q. You say she fell face to the ground with her hands upright? A. Yes, that is the way she fell.

Q. In other words, did it appear to you as if she was frightened when he made this sudden stop? A. No, when she saw the car coming she went like that (indicating) and saw it was too close to her, and then it threw her down and skidded.

Q. Was she running ahead and away from the car before the accident? A. No.

Q. Which way were you both running? A. She was walking out.

Q. No, you were chasing her. Was she running after you? A. She was not running, because when I saw the truck coming I did not go after her and she just stayed there and put her hands up and she just stayed there, she was scared.

RE-DIRECT EXAMINATION by Mr. Unger:

Q. How far back of Alice were you? A. I was in front of the car that was parked right about the mudguard nearest to the street, standing there.

Q. Alice was how far away from the first corner of Frelinghuysen Avenue? A. Do you mean east?

Q. No, there were two cars parked by the curb and you were walking out from these two cars. A. Yes, sir.

Q. That is the nearest to Frelinghuysen Avenue? A. Yes, sir.

40

*Lucille Murtha—Re-direct*

Q. My question was, "How far were you from the accident at the time of the accident from this first car nearest to Frelinghuysen Avenue?" How far were you? A. I was standing right alongside of it; the car nearest to Frelinghuysen Avenue, and Alice was not.

10

Q. Here is the car. What end were you standing at, this end towards the sidewalk or the end into the street? A. The end into the street.

Q. So then you saw this car coming, did you? A. Yes, sir.

Q. Where was Alice away from you, and if so, how far? A. She was about—I was here and she was out that way (indicating) from me.

Q. How far away, or from what distance? A. I don't know.

20

Q. You do not know how far she was from you at the time of the accident? A. I was near the gutter and she was in the street. You mean east from me?

Q. No, not east; in which direction was Alice going? A. She was going facing the school.

Q. Was she facing actually the school? A. Yes, sir.

Q. You can say now how far she was away from you? A. No, I don't know. She was about ten feet away from me; I guess five feet, I don't know.

30

Q. Show us here. A. From here to the end here (indicating).

Q. Are you sure about that? A. No, from here to the end of this post here (indicating).

Q. This one here (indicating)? A. Yes, sir.

Q. Facing toward the school? A. Yes, sir.

40

*Thomas Healey—Direct*

Q. Was that the time when you saw this car coming? A. Yes, sir.

Q. When this car struck Alice, what part of Alice's body did it strike first? A. I don't know. I just know it hit her and threw her down; I know  
10 the mudguard struck her left side.

Q. The mudguard struck her left side. And did she fall with her face down, or side; I mean, was she lying flat? A. Just like that (indicating).

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THOMAS HEALEY, sworn in behalf of the  
20 plaintiffs.

Direct-examination by Mr. Unger:

Q. Where do you live? A. 280 Mulberry Street.

Q. Where did you live in June, 1925? A. 58 Vanderpool Street.

Q. Do you recall an accident that day? A. I do.

Q. What is the exact date of this accident?  
30 A. June 24, 1925.

Q. Do you know Alice Dunne? A. I do.

Q. Do you know Chester Huey? A. I know him by sight.

Q. How long have you known him? A. About three years.

Q. You mean three years before the accident?  
A. About six months before the accident.

Q. Did you know him to talk to? A. I know  
40 him to talk to now.

*Thomas Healey—Direct*

Q. Where were you at the time of the accident? A. I was standing out looking at a fellow's motor.

Q. Where was his car? A. Parked outside of 58 Vanderpool Street.

Q. What kind of a car was it, closed or open? 10  
A. It was a closed car.

Q. You were looking at the motor, you say?  
A. Yes, sir.

Q. What time of day was it? A. 7:30, daylight saving time.

Q. Was it light or dark? A. It was light.

Q. Were there any people in the street? A. A lot of people playing in the street.

Q. Whereabouts? A. Oh, they were playing 20  
all over that street; the middle of the street and all.

Q. Is there a school there? A. Yes, sir.

Q. Where is the school? A. Right across the street.

Q. Is part of the street used for that playground, do you know? A. Oh, yes; I took notice passing there that the school used it for the playground. They put the boys out there to play 30  
ball.

Q. Were any automobiles at the time of the accident in this street, and at all beside the two that were parked there? A. Only the two that were parked there and the car that hit the girl.

Q. Now, when did you see this automobile that hit the girl? A. I seen it just when it was about at the corner of Sherman Avenue and Vanderpool Street, was the first when I seen that car. 40

*Thomas Healey—Direct*

Q. Is Sherman Avenue west of the school?

A. Sherman Avenue is west of the school, yes, sir.

Q. That is the first time you saw this car? A. That is the first time I saw that car, yes, sir.

10 Q. Did you hear any horn or any other alarm by this car? A. No, not then. I heard a lot of fellows hollering and singing.

Q. Was the car going slowly or fast? A. It was going pretty good pace.

Q. What do you mean by pretty good pace? A. It was going at a good pace.

Q. Do you drive a car yourself? A. I do.

Q. How long? A. About the last ten years.

20 Q. You can just tell us about how fast you thought this car was going. A. I judge about thirty-one to thirty-two miles an hour.

Q. How wide is that street there? A. That street?

Q. Between Frelinghuysen Avenue and Sherman Avenue? A. Between Frelinghuysen Avenue and Sherman Avenue?

Q. Yes, Vanderpool Street? A. It must be about 600 feet.

30 Q. I mean how wide is the street? A. How wide is Vanderpool Street?

Q. Yes, between the two streets, Frelinghuysen Avenue and Sherman Avenue? A. The width of Vanderpool Street?

Q. Yes. A. That is about thirty-seven feet wide.

Q. What happened after you saw this car? A. After I heard the noise and heard the singing I  
40 looked and followed the car with my eyes going

*Thomas Healey—Direct*

down Vanderpool Street and I happened to turn around and I saw this child walking in the middle of the street.

Q. Who is the child? A. Alice Dunne.

Q. Is that the child (indicating)? A. That is her. 10

Q. What was she doing? A. When I seen the child she was walking; I don't know what she was doing before that.

Q. At the time you looked at her you say she was walking? A. Yes, sir.

Q. Which way was she walking? A. Towards the school.

Q. That is, north? A. Yes, sir.

Q. Was she looking towards the north? A. 20 Her face was towards the north.

Q. Then, what happened? A. Why, I seen the way that car was going, it was going to hit her and I thought the driver might turn in and go around her and instead of that he jammed on his brakes and skidded about 22 to 23 feet.

Q. Did the car hit the child? A. The car hit the child, yes, sir.

Q. What part of the car hit the child? A. The right mudguard. 30

Q. What part of the child did it strike? A. It hit her about in the ribs.

Q. Did it go over her body? A. No, it did not.

Q. It threw her aside? A. Yes, sir.

Q. How was she lying on the ground? A. When I picked her up the child was lying on the right side.

Q. You picked her up? A. Yes, sir. 40

*Thomas Healey—Direct*

Q. When did the car come to a stop after it struck Alice? A. At about—it come to a dead stop, you mean?

Q. Yes, a dead stop? A. A dead stop about 22 feet or so.

10 Q. Which way was it facing? A. Why, it was nosed north then, it was about a foot away from the gutter then.

Q. This fellow Chester Huey was driving his car at that time? A. Huey was driving.

Q. Who was sitting alongside of him? A. I know he had another man there, but to tell you his name I didn't know him.

Q. Was there anybody else in his car? A. 20 When the car stopped I picked the child up I guess thirty-five to thirty-six feet away.

Q. Coming out? A. Coming out.

Q. Is this a closed car? A. It is a Ford commercial body car.

Q. Has it any windows? A. It has a window on the side, and the front windshield.

Q. Did it have a name on it? A. No.

Q. Did you see this car before? A. I seen it around that neighborhood.

30 Q. What did you do with the girl when you picked her up? A. Why, I didn't know anybody there I was new at the time and I didn't know where any doctors were, or anything. I said to Mr. Huey, "We better take her to a doctor", and her father came out and seen her at that time, and he says, "You better get her to a doctor quick", so Mr. Huey drove the car and I held the child in my arms.

40 Q. Was she bleeding? A. Yes, sir; she was.

*Thomas Healey—Cross*

Q. Was she talking to you? A. No.

Q. Why? A. She was unconscious, she couldn't talk.

Q. Did you see this other little girl on the scene, sitting alongside of Alice, here? A. Yes, 10 sir.

Q. Lucille? A. Yes.

Q. Did you know her? A. I know her to see.

Q. Where was she at that time? A. Right standing at the head car facing towards me.

Q. The first car? A. The first car towards Frelinghuysen Avenue.

Q. Did you ever see this car since the accident?

Mr. Finelli: I object. 20

The Court: Sustain the objection.

CROSS-EXAMINATION by Mr. Finelli:

Q. Were you examining the motor from the street or from the sidewalk? A. From the street.

Q. Why didn't you select another spot to make your repairs rather than by a playground? A. I wasn't making repairs.

Q. Did you get out of the way and look for 30 your safety as you saw the fast Ford approaching? A. There was no need of my getting out of the way.

Q. You surmised in advance of the event that there was going to be an accident? A. After the car got up to where I was down there.

Q. You are a friend of the Dunnes? A. Yes, sir.

Q. You are a neighbor? A. Yes, sir. 40

*Henrietta Wagner—Direct*

Q. What do you think the distance to this bench is there? A. The distance to that bench?

Q. Yes. A. About seventeen feet.

10

HENRIETTA WAGNER sworn in behalf of the plaintiffs.

Direct-examination by Mr. Unger:

Q. What is your present occupation? A. I am a pharmacist in St. Barnabas Hospital, have charge of the records.

Q. Were you there in June, 1925? A. Yes, sir.

20 Q. That is part of your duties, to keep the records? A. No, not now.

Q. Don't you keep the records? A. No, I did at that time, but I don't now.

Q. In that capacity did you keep the records of Alice R. Dunne? A. Yes, sir.

Q. Have you them with you? A. Yes, sir.

Q. Are those the records in your hand? A. As far as I know they are supposed to be the hospital records.

30 Q. How did you keep those records, in your handwriting? A. The nurse sends them downstairs to the office.

Q. Who sends them down? A. The nurses.

Q. What do you do with the records? A. Well, they are kept together in the regular way, they get filed that way.

Q. They are kept under your care? A. Yes, sir.

40

*Edmund E. Sawyer—Direct*

Q. Is that the name on it, Alice R. Dunne? A. Alice Dunne, yes.

Mr. Unger: I ask to have the hospital records marked for identification.

(Same are marked P-1.)

Cross-examination waived.

10

EDMUND E. SAWYER sworn in behalf of the plaintiffs.

Direct-examination by Mr. Unger:

Q. You are a practicing physician in the State 20 of New Jersey? A. I am.

Q. How long have you been practicing? A. A little over two years.

Q. Where were you in June 24, 1925? A. I was resident physician of St. Barnabas Hospital in Newark.

Q. When did you leave the hospital? A. I left early in July, the 1st of July for the summer, but I was there again in the fall for awhile.

Q. While you were there did you have occasion 30 to treat one Alice R. Dunne? A. She was in the ward at that time.

Q. Would you recognize the girl if you saw her? A. I think it is that girl (indicating); she has grown some since then.

Q. Have you actually given her treatments? A. Not to my knowledge.

Q. I show you P-1 for identification, and I ask

40

*Edmund E. Sawyer—Direct*

you if any of these records were written, dictated or signed by you? A. Yes.

Q. Do they relate to this child Alice? A. Apparently, yes.

10 Q. Can you tell us from those records what she was confined there for?

Mr. Finelli: I object except to refresh his recollection.

The Court: Let the doctor read from his own records.

Mr. Finelli: I have no objection to the doctor reading his own reports embodied in the records.

20 (Argument.)

The Court: If you need that to refresh your recollection you can refer to any report written by you, dictated or signed by yourself, which you know from looking at it was true at the time it was made.

A. The only thing I can testify to is that she was admitted to the ward at 8:45 p. m. on June 24, 1925, and she was in the hospital when I left.

30

By Mr. Unger:

Q. You left in July? A. July 1st.

Q. When you left she was still there? A. Yes, sir.

Q. In bed all the time? A. In bed.

40 Q. Did you do anything for her? A. Not personally, no, except to recommend that she be x-rayed, and the usual laboratory tests performed, that's all.

*Edmund E. Sawyer—Cross, Re-direct*

*Alice R. Dunne—Direct*

Q. You did not prescribe or do anything for her? A. No, sir.

CROSS-EXAMINATION by Mr. Finelli:

Q. Did I get the hour correct as 8:45 p. m. A. 10 That is the time she was admitted to the ward.

RE-DIRECT EXAMINATION by Mr. Unger:

Q. Can you tell the court and jury what was the trouble with her from those records?

Mr. Finelli: I object.

The Court: Only from his own records he can tell. 20

Q. Do you remember? A. That she had evidently been admitted as the result of an accident and that she was unconscious and I ordered an x-ray picture of her head.

Q. You cannot tell us just what was the trouble with her? A. No, sir.

Q. You did not treat her since? A. No, sir.

30

ALICE R. DUNNE, one of the plaintiffs, sworn in her own behalf.

Direct-examination by Mr. Unger:

Q. How old are you? A. Nine years.

Q. Do you go to school? A. Yes, sir.

Q. What school do you go to? A. Miller 40 Street.

*Alice R. Dunne—Direct*

Q. What grade are you in? A. The fourth.

Q. Do you remember an accident happening to you? A. Yes, sir.

Q. Can you tell us the year? A. June, 1925.

Q. Do you know what happened to you at that  
10 time? A. I got hit with an automobile.

Q. You got hit with an automobile? A. Yes, sir.

Q. What were you doing in the street? A. Lucille and I were playing tag.

Q. Which is Lucille, that young girl there (indicating)? A. Yes, sir.

Q. What part of the street were you in? A. The middle.

20 Q. Was anybody else in the street besides you? A. There was a lot of children up the street.

Q. Was it light or dark? A. It was light.

Q. Light? A. Yes, sir.

Q. Was it after your supper? A. Yes, sir.

Q. What were you playing? A. Lucille and I was playing tag.

Q. You say you were in the middle of the street? A. Yes, sir.

Q. Were you running or walking? A. Walking.

30 Q. Where? A. In the middle of the street.

Q. You wanted to go to where; you say you were in the middle of the street? A. Yes, sir.

Q. At that time where was Lucille? A. She was right by the open car.

Q. How many cars were there? A. Two cars.

Q. Were they standing? A. They were standing.

40 Q. Do you know what part of your body this automobile struck? A. The left side.

*Alice R. Dunne—Direct*

Q. Stand up and show the jury. A. Here (indicating).

Q. On the arm? A. Yes, sir.

Q. Did you see the car at all before it struck you? A. No, sir.

Q. You did not? A. No, sir. 10

Q. Which way were you facing? A. Facing the school.

Q. That is on this side (indicating), is it? A. Yes, it is right across the street from our house.

Q. Assuming this is the street, you lived here (indicating), didn't you? A. Yes, sir.

Q. The school is right opposite? A. Yes, sir.

Q. You were walking towards the school? A. Yes, sir. 20

Q. After the accident what happened to you, do you know? Where did you find yourself after? A. In a hospital bed.

Q. How long were you there? A. Around ten days.

Q. Do you remember when you came home? A. Yes, sir.

Q. While you were in the hospital were you in bed all the time? A. Yes, sir.

Q. You have pains? A. Sometimes. 30

Q. Do you know what I mean by pain? A. Yes, sir.

Q. Did your body hurt? A. Not then.

Q. When did it hurt? A. It hurt when I came home.

Q. Can you tell us just where, what part of your body hurt? A. My stomach.

Q. Does it hurt now? A. No, but it did last Saturday. 40

*Alice R. Dunne—Cross*

Q. Do you still go to a doctor? A. Yes, sir.

Q. What did he do for you? A. Just sees if it is better.

Q. Have you anything on your body now? A. Yes, sir.

10 Q. What have you on? A. A bandage.

Q. Do you have this on all the time? A. Yes, sir.

Q. Do you go to school steady? A. Yes, sir.

Q. You play with the other children? A. Yes, sir.

Q. How is your head? A. It is better; but in the cold weather it shows up.

Q. What shows up? A. The marks.

20 Q. Have you any marks there now? A. No.

Q. Do you feel any pain there at all in cold weather? A. No.

Q. You feel pretty good, don't you? A. Yes, sir.

Q. How is your stomach? A. It is not better yet.

CROSS-EXAMINATION by Mr. Finelli:

Q. Do you take gym in school? A. Exercise.

30 Q. Haven't you a gymnasium? A. Yes, sir. My mother told me not to take it on account of my stomach.

Plaintiffs rest reserving the right to call Dr. Phelan.

40 Mr. Finelli: At this time I am not concerned with the question of negligence in pressing the application I am about to

*Argument*

make on behalf of Hely & McCormick. For the sake of brevity we will call them the masters and we will call Huey the servant. I think we have reached a point in the case where we may distinguish as to the respective liabilities of the parties defendant to this suit. The pleadings admit that Hely & McCormick owned this automobile; the pleadings deny that the relation of master and servant existed between the firm of Hely & McCormick and the defendant Huey, and not a word has been said in support of that allegation of the complaint. I do not press that very strongly except in passing.

Assuming there is generally speaking a position of employer and employee, master and servant. There isn't anything in the case which shows that at the time of this particular occurrence this servant was engaged on his master's business.

(Argument.)

The Court: You admit that Charles J. Hely and John E. McCormick trading as Hely & McCormick owned this automobile in the pleadings.

Mr. Finelli: Yes.

The Court: Then, if that is admitted how about the presumption that the law casts upon them that the car was in the possession of either of those gentlemen or their servants and the driver was acting within the scope of his employment; of course,

*Argument*

10 that presumption is rebuttable, but how can you get around it? That presumption was said to exist and I do not see how you can escape it. That is, the presumption is, if a person is, we will say, struck by an automobile on the highway, for instance in Morris County, and the plaintiff can prove that it had a license number which corresponded to another similar license number as evidenced by the testimony from the survey of the Commissioner of Motor Vehicles identifying the owner, so that the plaintiff can say that the license number was registered in Trenton under the name of John Smith of 32 Mercer Street, Princeton, the plaintiff does not have to go any further, John Smith can come in and say, "My car was stolen; I wasn't driving it that day, and I hadn't had it for three weeks," and if the jury believes him, as far as he was concerned, it is a defense, and John Smith can come in and say, "That car was my car and I used it every day in my business and I put it away for the night and my clerk in my business came in and got it out of his own accord without my authority or consent; he was not acting for me, he was not on any of my business at all."

20 The burden is cast upon the defendant to explain and I do not see how you can get away from that presumption.

I will deny the motion.

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

40 Exception noted as ground of appeal.

*Chester Huey—Direct*

CHESTER HUEY one of the defendants, sworn in his own behalf.

Direct-examination by Mr. Finelli:

Q. How old are you? A. Twenty-six.

Q. Are you married? A. Yes, sir. 10

Q. Where do you reside? A. 69 Brunswick Street.

Q. With your family? A. Yes, sir.

Q. What is your occupation? A. Chauffeur.

Q. Where were you residing in June, 1925? A. 69 Brunswick Street.

Q. Do you remember the day in question? A. Yes, sir.

Q. For whom were you working? A. Hely & McCormick. 20

Q. At what time did you quit? A. Five o'clock.

Q. What did you do? A. Why, I come home and got dressed and was going down to the garage when I picked up four fellows on the corner of Wright Street and Sherman Avenue.

Q. Where was the garage? A. On Frelinghuy- sen Avenue near Wright Street.

Q. What is the name of it? A. Equitable.

Q. Is that the place where your bosses kept the car? A. Yes, sir. 30

Q. They paid rent for that garage? A. Yes, sir.

Q. What were the names of the youths that you took on as passengers? A. One was Nelson Barth and the other Hector Gaudreau and two brothers; I don't know their last names, I only know their first names. 40

*Chester Huey—Direct*

Q. What time did you have supper? A. I had supper about 6:30 o'clock.

Q. Where did you pick up your party? A. At the corner of Wright Street and Sherman Avenue.

10

By the Court:

Q. Was this after supper? A. Yes, sir.

By Mr. Finelli:

Q. Did you have any reason for picking up those boys? A. No, sir.

Q. Why didn't you take the car to the garage?

20 A. It was only a block out of the way to the garage.

Q. How did you get to the garage from your home? A. Over Brunswick Street to Wright Street, down Wright Street turning left about ten feet and into the garage.

Q. Where is the place where you are employed? A. 55 Lafayette Street.

Q. What are your duties? A. Make deliveries.

Q. Of what? A. Electrotypes.

30 Q. Your quitting time is five o'clock? A. Sometimes.

Q. It was that day?

Mr. Unger: I object.

The Court: Sustain the objection.

Q. How did you get from your place of business from Lafayette Street to the garage? A. Why, 40 the nearest way from Lafayette Street would be

*Chester Huey—Direct*

to go to Wright Street, down Broad Street to Wright Street and over Wright Street.

Q. Where was the last delivery you made that day? A. I cannot recall.

Q. What was it you delivered? A. Electro- 10 types.

Q. At what time did you make your last delivery? A. I cannot recall the time.

Q. Did you have any particular place that you were going with these youths, your friends? A. Yes, sir, I was going to take them down to the corner to the candy store.

Q. Which corner? A. The corner of Vanderpool Street and Frelinghuysen Avenue. 20

By the Court:

Q. Where was this candy store? A. Just about in off Frelinghuysen Avenue from Vanderpool Street.

Q. It is not on Vanderpool Street? A. No, sir, just around the corner on Frelinghuysen Avenue.

By Mr. Finelli:

Q. Tell us the position your friends took in the car? A. Why, there was two in the back of the 30 car and two on the seat.

Q. Who drove? A. I drove.

Q. Which way did you proceed? A. I proceeded south over Sherman Avenue and turned east on Vanderpool Street.

Q. When you got on that last street at what rate of speed were you proceeding? A. Why, 40 between twelve and fourteen miles an hour.

*Chester Huey—Direct*

Q. Do you know Alice, the little girl? A. Yes, sir.

Q. Was there an accident? A. Yes, sir.

Q. How did it happen? Just tell us. A. Why, I was coming down south on Vanderpool Street and there were two cars parked in front of 58 Vanderpool Street and coming along there this child just ran out in front of the car and the edge of the front mudguard just grazed her.

Q. What did you do? A. I stopped.

Q. How far did your car travel? A. The car was not four feet from the child.

Q. What did you do, as to direction, if anything? A. Just what do you mean?

Q. Did you change the direction of the car? A. Yes, I swerved the car to the north.

Q. What for? A. To prevent it from going over the child.

Q. What was the position of the child just before the child fell? A. The position? She was running out, directly north.

Q. Did you see the position of her hands? A. No, I did not.

Q. Do you remember how she fell down? A. She fell facing forward.

Q. Who picked her up? A. I believe I did.

Q. What did you do? A. I picked her up and then a fellow there who was fixing the car, he came around and him and I took her to the hospital.

Q. Did any time elapse since the occurrence of the accident and of going to the hospital? A. No, sir.

40.0

*Chester Huey—Direct*

Q. Which hospital did you take her to? A. St. Barnabas.

Q. After you left the hospital, what did you do? A. I came back to the house.

Q. Whose house? A. Mr. Dunne's.

Q. Did you see him? A. Yes, sir.

Q. Did you see Mrs. Dunne? A. No, sir.

Q. Did you see Mr. Dunne after that time? A. Yes, sir.

Q. What did you do to avoid this accident, if anything? A. To avoid it? It was unavoidable.

Q. Why was it unavoidable? A. Because the child darted out from in front of the car; she could not be seen.

Q. What did you do when you were confronted with the danger? A. Why, I swerved the car and put on my brakes.

Q. How did you put on the brakes? A. That was the foot brake.

Q. Did the brake hold? A. Yes, sir.

Q. Would you say you stopped suddenly? A. Yes, sir.

Q. What was the conduct of your friends as you got into that street? A. Why, they were very quiet.

Q. Did you observe any children in the street? A. Positively not.

Q. How wide is that street? A. About 25 feet, I believe.

Q. How many feet from Sherman Avenue did you travel in before you reached this point No. 58? A. About 250 feet.

Q. How far away were you from the most distant corner of the next street? A. About 100 feet, I guess.

*Chester Huey—Direct*

Q. What do you estimate the distance to be between Frelinghuysen Avenue and Sherman Avenue? A. 350 feet.

By the Court:

10

Q. When you quite work where were you that day? A. I couldn't tell you now.

Q. How far was the garage from your place of business? A. How far?

Q. Yes. A. It is about a mile, I presume, probably a little over.

Q. How far was your house from the place of business, your home, I mean? A. Well, the home is about three blocks from the garage; pretty near a mile.

20

Q. Is your home in a direct line between the business and the garage? A. Well, not directly.

By Mr. Finelli:

Q. It would be easier to get to the garage from the factory than it would be to get to your home? A. Well, they are both about the same.

Q. Did this accident happen at a point further than the point where the garage is located? A. Yes, sir.

30

Q. How many blocks away? A. Two blocks.

By the Court:

Q. You mean further than the point where the garage is than the business? A. Yes, sir.

Q. If there was a line drawn to the garage along the various streets from the business were you

40

*Chester Huey—Cross*

beyond that line, beyond the garage as you followed that line, or not? A. Yes, sir.

Q. That is, the shortest distance between the garage and the business if it was represented by that line within the distance where you were at the time of the accident? A. I was beyond.

10

By Mr. Finelli:

Q. Where were you going from the candy shop or the candy store? A. To the garage.

Q. You went off your route, is that it? A. Yes.

CROSS-EXAMINATION by Mr. Unger:

Q. How long have you been driving for Hely & McCormick? A. About five years.

20

Q. In what capacity, as driver? A. Chauffeur, yes.

Q. Chauffeur and driver? A. Yes.

Q. As a driver is it part of your duties to deliver electrotypes? A. Yes.

Q. Throughout the whole city of Newark and elsewhere? A. Yes, sir.

Q. How far do your customers extend from your place of business? A. Oh, we have some in Montclair, and some in Elizabeth and some in Linden, some in Rutherford, Plainfield.

30

Q. How many times do you load your wagon a day? A. Well, I couldn't give you any definite answer on that.

Q. Well, do you load more than once a day? A. Yes.

Q. After you are through with that particular delivery then you go back to get some more? A. Yes, sir.

40

*Chester Huey—Cross*

Q. You keep on going until you finish? A. Yes, sir.

Q. These electrotypes are wanted by McCormick's customers in a hurry, aren't they? A. Yes.

10 Q. What is the usual hour you stop working for them. A. The usual hour is five o'clock.

Q. If you are en route to a customer you finish that, don't you? A. Yes.

Q. Sometimes you turn in at seven o'clock? A. No, probably not as late as that.

Q. A little before that? A. Yes.

Q. You would not stop and turn back on your way, would you? A. No, sir.

20 Q. If there is a hurry call somewhere even a little before five you load and deliver, don't you? A. Yes.

Q. You would not turn back until that thing is delivered and given to some one? A. No, sir.

Q. Is that right? A. Yes, sir.

Q. Now, on June 24, 1925, can you recall whether you had a delivery that took you longer than any other time? A. No, sir, I was through at five o'clock.

30 Q. Where was your last delivery that day? What I mean by that, what customer did you deliver the electrotypes to last? A. I cannot recall that.

Q. Why not? A. It is pretty near a year and a half ago; isn't it?

Q. That you would not remember, would you? A. I don't believe you would either, if you were delivering.

40 Q. I am asking you if you recall your last cus-

*Chester Huey—Cross*

tomer on that day and if so where. A. I cannot recall it.

Q. Where were you coming from? A. I was coming from home.

Q. Do you remember that? A. Yes, sir.

Q. Why do you say you were coming from 10 home? A. Why do I say it?

Q. Why would you say it? A. That is where I was coming from.

Q. You know exactly what time it was when you struck that little girl? A. I cannot give you the exact time.

Q. You do not remember that? A. No, sir, I do not.

Q. From 6:30 to 7 o'clock? A. Between 7:30 20 and 8 o'clock.

Q. Did you have any electrotypes in your wagon? A. Positively not.

Q. Are you sure about that? A. Positively.

Q. You say you picked up several boys, do you? A. I picked up four boys.

Q. They are your friends? A. Yes, sir.

Q. Did you ever pick any boys up before? A. Yes.

Q. How many times? A. On numerous times. 30

Q. During the time while you have been working for this firm, Hely & McCormick, isn't that so? A. Yes, sir.

Q. What kind of a truck is this? A. A little Ford delivery.

Q. Covered all around? A. Panel body, yes, sir.

Q. Has windows on the side? A. Yes, sir. It 40 is all open.

*Chester Huey—Cross*

Q. Where did you say this garage was, on Frelinghuysen Avenue? A. Frelinghuysen Avenue near Wright Street.

Q. How far is Wright Street from the place where this accident happened? A. Two and a half blocks.

Q. Wright Street, is it towards Elizabeth or towards Newark? A. It is more towards Newark.

Q. That is towards the center of Newark? A. Yes, sir.

Q. You live where? A. 69 Brunswick Street.

Q. Where is Brunswick Street in reference to the place of this accident? A. It is more to the center of the city.

20 Q. Did you have this truck at home? A. Yes, sir.

Q. Were you in the habit of taking the truck home? A. On the way down from work I stop and get dressed and put the truck in the garage.

Q. Don't you have a garage near your home for convenience? A. That is near my home; the nearest one around there.

Q. Is that the only truck this firm has? A. Yes, sir.

30 Q. You were the only driver? A. Yes, sir.

Q. These boys were singing, weren't they, making a lot of noise? A. Positively not.

Q. Just before you collided with this little girl did you have anybody sitting alongside of you on the driver's seat? A. Yes.

Q. Who? A. Mr. Barth.

Q. A friend of yours? A. Yes.

Q. You were talking to him? A. No, not at 40 the time I hit her.

*Chester Huey—Cross*

Q. Not at the time, but just previous you had conversations, you had just picked him up a little while ago, hadn't you? A. Yes, sir.

Q. You had not seen him for some time? A. I seen him the night before.

Q. You had something to tell him? A. No, sir. 10

Q. Didn't you say anything to him at all? A. No, sir.

Q. Were you looking ahead? A. Yes, I always do.

Q. Were you talking to your friend? A. What was that?

Q. Were you talking to your friend? A. I looked ahead.

Q. As you were proceeding towards east on 20 Vanderpool Street when did you first notice Alice? A. I didn't notice her at all.

Q. Not at all? A. No, sir.

Q. How fast did you say you were going down there? A. Between twelve and fourteen miles an hour.

Q. You had some boys on there and you were going from twelve to fourteen miles an hour. That is pretty slow, isn't it? A. It is slow, yes, 30 sir; when you turn a corner it isn't slow.

Q. There is a school in this street, isn't there? A. Yes, sir.

Q. There are always a lot of children around? A. Yes.

Q. Away late into the night, isn't that so? A. No, not late.

Q. Up until what hour are the children in the street? A. Until the playground closes at eight 40 o'clock.

*Chester Huey—Cross*

- Q. Before eight o'clock? A. Not much.
- Q. But it was before eight? A. Yes.
- Q. There were other children in the street, weren't there? A. I didn't notice.
- Q. Why didn't you notice? You said you were  
10 looking ahead. A. I was looking ahead.
- Q. Why didn't you notice if there were any other children in the middle of the street? A. I said I didn't notice.
- Q. I am asking you why, weren't you looking? A. Of course, I was looking in the street.
- Q. You were paying attention to these boys in your car? A. I am talking of the street, not the sidewalk.
- 20 Q. You said you did not notice the children? A. I did not.
- Q. You were not paying any attention to your friends? A. No.
- Q. Why didn't you blow your horn? A. Why didn't I?
- Q. Yes. A. There was no necessity to blow it.
- Q. Yet you told the court and jury there was a school there and there are a lot of children in the street up until eight o'clock. A. Until the  
30 playground closes.
- Q. Why didn't you blow your horn? A. The playground was closed.
- Q. That is why you did not blow the horn? A. Was there any necessity of blowing it?
- Q. I don't know. It was summertime, wasn't it? A. Yes, sir.
- Q. Late in June? A. Yes, sir.
- Q. Weren't there any children in the street?  
40 A. I told you I didn't notice any before.

*Chester Huey—Cross*

- Q. You were taking these boys to the candy store down the street? A. Yes, sir.
- Q. From where? A. The corner of Wright Street and Sherman Avenue.
- Q. To where? A. To the candy store.
- Q. And after you intended delivering the boys  
10 there where did you want to go? A. On to the garage.
- Q. You were going there delivering something, weren't you? A. I wasn't going there delivering nothing, I was going home.
- Q. You are sure you came from your home? A. Positively.
- Q. When did you have your supper? A. I have my supper at five or six on certain nights. 20
- Q. And other nights you do not? A. I have it when I get home.
- Q. This night you did not have your supper as yet? A. I had it at six o'clock.
- Q. You are still working for this concern? A. Yes, sir.
- At one o'clock p. m. the court takes a recess of one hour. 30
- After recess.
- Continued pursuant to adjournment.  
Present, counsel as before stated.
- Q. (Question read.) A. Yes.
- Q. You have always worked for the defendant since the accident? A. Yes, sir.
- Q. From your house, after you had supper you  
40

*Edward Phelan—Direct*

came right down with the boys right through this street, Vanderpool Street, didn't you? A. Yes, sir.

Q. What time did you say you had supper? A. 6:30.

10 Q. What time did you say the accident occurred? A. Between 7:30 and 8.

Q. How long did it take you from your house down to this street, only a few blocks? A. It only took about five minutes.

Q. So this accident did not happen near eight o'clock, did it? A. The accident was between 7:30 and 8 o'clock.

Q. Was it this side of 7:30 or near 8 o'clock?

20 A. It was between 7:30 and 8 o'clock.

Mr. Unger: I now have Dr. Phelan here.

EDWARD PHELAN sworn in behalf of the plaintiffs.

Direct-examination by Mr. Unger:

30 Q. You are a practicing physician in the State of New Jersey? A. Yes, sir.

Q. How long have you been practicing as such? A. Thirty-five years.

Q. Where is your office? A. 18 South Street.

Q. Do you know Alice R. Dunne? A. Yes, sir.

Q. Do you see her in the courtroom anywheres? A. Yes, sir.

40 Q. Is that the little girl there (indicating)? A. Yes, sir.

*Edward Phelan—Direct*

Q. Standing up? A. Yes, sir.

Q. Did you have occasion to treat her? A. Yes, sir.

Q. When, Doctor? A. July, 1925.

Q. Do you remember the date? A. Not the exact date, no, sir. 10

Q. Was it the early or latter part of July? A. I don't remember.

Q. Do you recall when she first came to your office? A. Yes.

Q. What did you do for her? A. I treated her for a ruptured navel.

Q. Did you examine the girl? A. Yes, sir.

Q. You say a ruptured navel? A. Yes.

Q. What was the appearance from the outside? 20 A. It protruded.

Q. Was it discolored in any way? A. Slightly.

Q. Was it swollen? A. You might call it a swelling, but it was the intestine pushing out.

Q. Now, would you mind explaining just what you mean by a ruptured navel? A. The tissues where the navel breaks through and the intestine pushes out and carries the skin with it.

Q. Is that curable? A. Yes.

Q. How? A. Some times in a very small child 30 by restraint when the tissues grow together, but usually by an operation.

Q. Would you say that the tissues would mend or grow together in a child eight years of age? A. Sometimes.

Q. How often did you treat Alice? A. I couldn't tell you that exactly.

Q. Would she frequently attend your office? A. 40

*Edward Phelan—Direct*

About once a month they would bring her in for inspection.

Q. When they did what did you do for her? A. I usually used a pad that holds it in place with a band around it to hold the pad in place; a pyramid pad.

Q. Is that fastened around her body? A. Yes.

Q. What does it do? A. Holds it in place, takes away the pressure from the tissues.

Q. You say you have been treating her since July, 1925? A. Yes.

Q. When was the last time you saw this child? A. A couple of weeks ago.

Q. Did you examine her? A. Yes.

Q. What was the condition of her navel at that time? A. It was slightly improved from what it was the first time.

Q. You say that in her case it will be necessary to operate on her? A. I couldn't say.

Q. Would that be a guess on your part if you said that? A. Yes, it would; sometimes they get better, but mostly they do not.

Q. What is your candid opinion in this case, is it better or worse? A. Which? The rupture at present?

Q. Yes. A. It is a little better.

Q. Can you tell whether she will be obliged to submit to an operation or not? A. I think it is the proper thing to do, to operate on them anyway and then you are sure that no more trouble is going to take place.

Q. If you do not operate can you say what may happen? A. It might get worse by some severe strain like skipping rope or burst it out again.

*Edward Phelan—Cross*

Q. Are you prepared to say whether later on in years this will interfere with childbirth? A. It would not interfere with the birth, but the birth would make it worse.

Q. Which way? A. On account of the strangling. I have seen them come all the way out and strangulate and have to be operated on.

Q. You say it would be apt to strangulate? A. Yes.

Q. You infer the child is in danger now? A. Yes.

Q. Is it your advice that she ought to be operated on? A. It is.

Q. Is that dangerous? A. Those operations are always more or less dangerous.

Q. I mean for a child of her age and condition. A. Not particularly because she is a child.

Q. That does not make it easier, does it? A. No.

Q. The child is still under your care? A. Yes.

## CROSS-EXAMINATION by Mr. Finelli:

Q. What is the difference between a hernia and the rupture you describe? A. The same thing.

Q. Is a hernia always traceable to traumatic conditions? A. I think it can be; sometimes there is a congenital hernia.

Q. What do you mean by the term traumatic, medically? A. Accident, injury.

Q. Hernia is a natural malady, is it not? A. What do you mean by that?

Q. History gives it as the result of diseased parts. Don't you agree with that? A. No, sir.

Q. Take an inguinal hernia, do you think that

*Edward Phelan—Cross*

that comes on afterwards as the result of some strain? A. There are cases of congenital hernia where they have been born that way.

10 Q. Aren't most of the cases just where the development happens in later years, when at the time of the birth there is nothing to indicate that a hernia is going to develop ten years or twenty years afterwards? A. Well, from my experience they usually come in after something happens.

Q. You have made charges, I suppose. Were you paid in cash by the calls that you made? A. Yes, sir, they paid cash.

20 Q. I suppose that is the reason why you haven't any accurate data the first time when you saw this child? A. Yes.

Q. You imagine it was in July some time? A. Yes.

Q. Late July? A. I couldn't tell that; I know it was in the summer.

Q. During vacation time when the child was out of school? A. Yes.

30 Q. What is this umbilical cord? Is that connected with the part that is called the after-brith? A. Yes.

Q. Sometimes a midwife, that is, a person attending at child-birth makes a bad job of that particular thing? A. Yes.

Q. And the child suffers as a result? A. Yes.

40 Q. Why is it that you say that you were uncertain as to the direct cause between the accident and the malady? A. I never saw a hernia personally myself that did not come from after an accident.

*Edward Phelan—Cross*

Q. In other words, the exterior parts weren't soft or bruised, they did not show any softness at the time you made your personal observation.

Were the parts soft? A. Why, of course, where the little bit of the intestine stuck out, it was soft.

Q. There was no bruise there? A. No discoloration. 10

Q. No skin opening? A. No.

Q. Nothing to indicate there was any violent contact between the body and some substance? A. No.

Q. What you observed was the ordinary objective symptoms which indicates that something under the skin, some viscera under the skin was injured? A. Yes. 20

Q. The top of the skin, the epidermis on top of the skin, is that right? A. It is reddened.

Q. But under it there is some little thing which indicates a pushing or point? A. Yes.

Q. I suppose the symptoms that were observed—I have never seen a hernia, were the ordinary hernia symptoms? A. That is if you put your finger over it and ask the person to cough it slips up against it.

30 Q. Oftentimes there are no objective symptoms, that is, the symptoms that appear and disappear at different times? A. Yes.

Q. You cure that by a truss in some instances that keeps the part down? A. Yes.

Q. And then there is the surgical way of cutting to cure it? A. Yes.

40 Q. That is the proper and correct method, but of course, it involves a little risk to life, and I suppose you do not always advise it? A. No. 40

*Edward Phelan—Re-direct*

Q. You do not say to the jury that there is any connection between this accident and the condition you found, is that right? A. What is that?

10 Q. (Question read.) A. The only thing, I never saw it before, but I have seen the child with measles and all sorts of things, and I never saw the hernia and she never complained of it.

RE-DIRECT EXAMINATION by Mr. Unger:

Q. These are rare cases in a child of her age? A. Fairly, yes.

Q. You said you were practicing thirty-five years? A. Yes, sir.

20 Q. How many of these cases have you seen in thirty-five years? A. A dozen or twenty.

Q. That is very many, is it? A. No.

Q. You said in the early part of your examination that when you first examined the child it was discolored? A. Yes.

Q. What color was it? A. Probably a rose color.

Q. From your experience what does that indicate? A. It probably cut off the circulation where the intestine was pushed out.

30 Q. You also said it was swollen, didn't you? A. Well, when we have a swelling we have an inflammation; that was just the intestine pushing out the skin.

Q. This cannot be cured by a truss, can it? A. Once in a great while it is, but there is no excuse for not operating and making a permanent job out of it.

40 Q. So, to your mind your truss or bandage

*Edward Phelan—Re-cross, Re-direct  
Nelson Barth—Direct*

would not be permanent; that is, it would not give a permanent cure. A. In children not a truss, but a cross pad allows it to grow together, that is if they meet no shock like skipping rope, or doing anything, of course, you cannot trust a child to go around like that. 10

Q. You cannot restrain her? A. No.

RE-CROSS EXAMINATION by Mr. Finelli:

Q. This discoloration was not the rose hue which follows a blue mark? A. No, sir.

Q. In other words, it was the kind of discoloration which follows a rupture by a forceful injury? A. It was caused in that case by the strangulation coming through a narrow opening and then spreading on the outside. 20

Q. It was not caused by any exterior force which pushed from the outside? A. I couldn't tell.

RE-DIRECT EXAMINATION by Mr. Unger:

Q. It might have been? A. Possibly.

30

NELSON BARTH sworn in behalf of the plaintiffs.

Direct-examination by Mr. Unger:

Q. Where were you living in June, 1925? A. 293 Waverly Avenue.

Q. Do you know Mr. Huey, the driver of this automobile? A. Yes, sir. 40

*Nelson Barth—Direct*

Q. Did you see him on the evening of June 24th? A. Yes, sir.

Q. Where? A. Corner of Wright Street and Sherman Avenue.

10 Q. Who was with him? A. Gaudreau and the two brothers.

Q. What were you doing there? A. Going down to a candy store on Frelinghuysen Avenue.

Q. How many blocks away? A. Two blocks.

Q. How long had you been staying there at that place? A. We just got down to the corner and the four of us were walking down to the corner, and we seen Mr. Huey coming down and we hailed him and asked him to take us down, and he took 20 us down.

Q. The meeting was not pursuant to arrangement? A. No, sir.

Q. The four of you asked for a lift? A. Yes, sir.

Q. Who spoke? A. I couldn't tell you, one of us, and maybe Mr. Gaudreau.

Q. Was the car in motion at the time you hailed the driver? A. Yes, sir.

30 Q. Where was this point where you hailed the driver? A. Corner Wright Street and Sherman Avenue.

Q. Did the driver stop? A. Yes, sir.

Q. Did you speak to him? A. Yes, sir.

Q. As a result of the talk what did you do? A. Got in the car, the two brothers got in the back, and Mr. Gaudreau and I got in the front seat and he took us down to the corner.

40 Q. How were the brothers sitting or standing?

*Nelson Barth—Direct*

A. I guess they kneeled in the back because it was a small back.

Q. Where did you ride? A. On the front seat between Mr. Gaudreau and Mr. Huey.

Q. How far did you proceed before something unusual happened? A. We proceeded about two 10 blocks and a half.

Q. In which direction did you go? A. We went south over Sherman Avenue and turned east on Vanderpool Street.

Q. Is Sherman Avenue east of Frelinghuysen Avenue? A. Sherman Avenue is.

Q. Towards the railroad? A. No, it is west of Frelinghuysen Avenue.

Q. As you turned into Vanderpool Street did 20 you observe the rate of speed the car was going? A. It was going between twelve and fourteen miles an hour.

Q. No faster than that? A. No faster.

Q. Did you observe whether there were any persons in the street? A. There was nobody in the street.

Q. Just tell the court and jury what happened? A. We were going down Vanderpool Street and there were two cars parked on the right hand side 30 of the street and I believe that gentleman was working on one of the cars on the inside to the curb and as we were going down there this little girl ran out from in back of the first car and Mr. Huey could not stop in time and he swerved over to the left and put on his brakes and she ran into the front fender.

Q. After the girl was lifted from the ground did you observe what had happened to her? A. 40

*Nelson Barth—Direct*

She was awake and felt her eyes and all of a sudden she felt the bump over her eye and began crying.

Q. Outside of the bump over her eye, did you observe any other bruises or marks of violence?

10 A. No, sir.

Q. What part of the car came in contact with what part of her body? A. The right mudguard.

Q. Do you know whether her body was touched by the car? A. I couldn't say exactly, it might have been her arm or her side.

By the Court:

20 Q. How did she fall? A. On her face.

Q. Did she turn before she got to the automobile? A. She was running straight out. Yes, I guess she turned a little so I guess her back would be towards the front of the car.

Q. Do you guess that or did you see it? A. I saw it. She turned slightly, but she wasn't turned all the way around.

By Mr. Finelli:

30 Q. After the child was picked up what was done? A. Mr. Huey picked the child up and right away he put her in the machine and rushed her to the hospital.

Q. Which hospital? A. St. Barnabas.

Q. Do you know what part of the hospital the child was? A. No, sir, I didn't go up with them.

Q. Did Mr. Huey leave the hospital? A. Yes, I seen him come back and he went into Mr.  
40 Dunne's house.

*Nelson Barth—Cross*

Q. You returned to Vanderpool Street? A. I stayed on Vanderpool Street.

Q. Oh, you stayed there? A. Yes.

Q. How was the girl taken to the hospital? A. The four of us, Mr. Huey was driving—

10

Q. The same car? A. Yes.

Q. Driven by Mr. Huey? A. Yes, sir.

Q. And you remained on Vanderpool Street? A. Yes, sir.

Q. Who went to the hospital? A. Mr. Huey, Mr. Healey and Mr. Gaudreau.

Q. They returned and the party went up to the Dunne apartment? A. Yes.

CROSS-EXAMINATION by Mr. Unger: 20

Q. How many were sitting in the front of this car? A. Three.

Q. There was not much room for three people, was there? A. Plenty of room.

Q. What kind of a car was it? A. Ford.

Q. You say there was plenty of room on the front seat of a Ford for three people? A. Yes.

Q. Where were you sitting? A. In the middle.

Q. Did you talk to Mr. Huey? A. That I couldn't say, going down. 30

Q. There was a lot of noise made by that car? A. There was no noise made in that car.

Q. You all kept quiet? A. As quiet as most anybody could be.

Q. Are you sure there was no noise? A. Positively sure.

Q. You say you went two and a half blocks before the accident? A. Yes, sir. 40

*Nelson Barth—Cross*

Q. Were there any children in that street? A. No, sir.

Q. You lived in that neighborhood, didn't you?

A. No, I did not live in the neighborhood, but I have been around that neighborhood for about  
10 eight years.

Q. Did you ever get in Mr. Huey's car?

Mr. Finelli: I object.

The Court: Sustain the objection.

Q. You know there is a school across the street, don't you? A. There is.

Q. You say there were no children there? A.  
20 There was no children there.

Q. Was it light or dark? A. It was light.

Q. Do you know the time? A. I judge about a quarter to 8, between 7:30 and 8 anyway.

Q. You were here this morning while the rest of these men were testifying, weren't you? A. Yes.

Q. When you were picked up in this car, you and your friends, it got into Vanderpool Street; is that right, and proceeded down towards  
30 Frelinghuysen Avenue? A. Yes.

Q. Did you know where it was going? A. Yes, sir.

Q. Where? A. Down to the candy store on Frelinghuysen Avenue, where we asked him to take us.

Q. Did you know where he was coming from? A. He said he was coming from his house.

Q. Did you ask him? A. I didn't ask him, I  
40 didn't have any cause to ask him.

*Nelson Barth—Cross*

Q. He just told you that he was coming from home? A. Yes.

Q. Is that right? A. I guess he did.

Q. Do you know or are you guessing? A. I couldn't say he told me that.

Q. Why did you say so? A. He may have been,  
10 because I seen him coming past Brunswick Street every night, and I guess he was coming from his house.

Q. He did not tell you that, did he? A. No.

Q. How fast do you say he went down Vanderpool Street? A. Between twelve and fourteen miles an hour.

Q. Why do you say between twelve and fourteen miles an hour? A. That's about the rate of  
20 speed he was going.

Q. Do you drive a car yourself? A. No, but I worked as a helper on a truck though.

Q. You insist that this car was going twelve to fourteen miles an hour? A. Yes.

Q. You are not sure about it, are you? A. Sure as anybody can be.

Q. You won't say it went thirty miles an hour, would you? A. No, the car can't go thirty miles  
30 an hour.

Q. A Ford car can't? A. Not in the condition that car was.

Q. Was it in bad condition? A. Pretty bad, as far as the motor was concerned.

Q. How do you know? A. Because you could hear the way it was running.

Q. It was rattling? A. Yes, all Fords do.

Q. Were the brakes all right? Do you know  
40

*Nelson Barth—Cross*

whether the brakes were all right? A. They were all right.

Q. You say the car was in bad shape and the brakes were all right? A. Yes.

10 Q. Why do you say that? A. What do you mean why?

Q. Why do you say that? A. Because he stopped quick enough.

Q. When did he put the brakes on? A. Just before he hit the child.

Q. Did you see the child before he hit her? A. I did.

Q. Where was the child? A. She ran right out in front of the automobile.

20 Q. How far was the car away before he struck the child? A. How far was the car away?

Q. How far was the car away from the child when you saw the child? A. I guess about three or four feet.

Q. Were you talking to him? A. No, sir.

Q. Were the other fellows talking to him? A. No, sir.

Q. When did he jam his brakes on? A. Just before he hit the child.

30 Q. Did it make a noise? A. I guess it made a little noise when he put the brakes on.

Q. Why do you say you guess, don't you know? You were there. It made a great deal of noise, didn't it? A. No, it made a little noise.

Q. After the car struck the child how far did the car proceed before it came to a stop? A. Four feet.

40 Q. You wouldn't say 22 feet, would you? A. No.

*Nelson Barth—Cross*

Q. Would you say from where you are sitting now to the end of this railing? A. No, sir.

Q. Did the car swerve? A. He swerved it to the left, yes.

Q. It did not skid at all? A. I wouldn't say it skidded. 10

Q. What would you say? A. Just stopped, that's all.

Q. Did he turn to the left, put on his brakes and stop. A. Just stopped, that's all. He turned to the left put on his brakes and stopped.

Q. When he got into Vanderpool Street did he blow his horn? A. No, there was no necessity of blowing a horn.

Q. You did not go to the hospital, did you? A. 20 No.

Q. You say your friend Huey picked up that child? A. Yes, he absolutely did pick that child up.

Q. Wasn't it that gentleman sitting in the second seat there? A. No, sir, Mr. Huey picked the child up.

Q. Was the child conscious or unconscious? A. The child was conscious when it was picked up, because it began crying. 30

Q. The child was crying? A. Positively.

Q. Was the child bleeding? A. From the eye a little and from the nose I think it was bleeding.

Q. Where was that gentleman when you first saw him? A. Coming out from the car when I first seen him.

Q. Wasn't he standing in the street? A. No, he was not in the street.

Q. At one end of the car? A. No. 40

*Hector Gaudreau—Direct*

Q. Positively. A. Positively he was not.

Q. How do you know? A. Because if he was standing on the side where the street was I would have seen him facing the cars.

10 Q. You say you did not see him? A. No.

Q. How do you know he was on the sidewalk? A. Because he was walking behind towards us.

Q. He must have, but you do not know positively? A. He wasn't in the street.

Q. You are not positive, are you? A. No.

By the Court:

20 Q. Is Wright Street north or south of Vanderpool Street? A. Wright Street is north.

Q. When you got to the corner of Vanderpool Street and Frelinghuysen Avenue which way would you turn to go to the candy store? A. North, left.

Q. Where was it? A. You might as well say one house away from the corner.

Q. On Frelinghuysen Avenue? A. Yes.

30

HECTOR GAUDREAU, sworn in behalf of the defendants:

Direct-examination by Mr. Finelli:

Q. What is your age? A. Twenty-one.

Q. Where do you live? A. No. 136 Brunswick Street.

40 Q. Was that your residence in June, 1925? A. It was.

*Hector Gaudreau—Direct*

Q. Do you remember the evening of June, '24? A. I do.

Q. Where were you? A. When we got in the truck, that Hely truck, you mean?

Q. Yes. A. Sherman Avenue and Wright Street. 10

Q. What were you doing there? A. We were walking down Wright Street.

Q. Who was with you? A. Mr. Barth and the two brothers.

Q. What happened? A. We hailed him and he took us down to the corner.

Q. You hailed who? A. Mr. Huey.

Q. Was there any talk? A. No.

Q. Didn't you know where you were going? 20 A. Yes, right down to the corner.

Q. How did you know you were going down to the corner. A. We asked him to take us there.

Q. What is the distance between the point where you hailed him and the point where you intended to go? A. Two blocks, three blocks; two blocks one way and three blocks the other.

Q. What are the measurements of those blocks in feet, block 1, block 2 and block 3? A. I couldn't tell you the measurements of the blocks. 30

Q. Are they uniform, ordinary blocks? A. Ordinary blocks.

Q. Aren't you fellows healthy enough to walk two blocks? A. What's the use of walking if you can ride.

Q. The four of you got aboard? A. Got on the truck.

Q. What position did the brothers take? A. They went in the rear of the car. 40

*Hector Gaudreau—Direct*

Q. Where did you go? A. Mr. Barth and I sat on the seat with Mr. Huey.

Q. Were you on the right-hand side? A. I was on the right-hand side, yes, sir, right on the end.

Q. The right end? A. Yes, sir.

10 Q. How did you get into this Vanderpool Street? A. Right in off Sherman Avenue; we turned east.

Q. Which way were you coming from, which direction on Sherman Avenue were you coming?

A. We were coming from the north and south, and we turned east on Vanderpool Street.

Q. What course did you take in Vanderpool Street? A. What course?

20 Q. Were you near the middle of the street or to the right or left, or where? A. In the middle of the street.

Q. As you approached No. 58 at what rate of speed was your car going? A. About twelve miles an hour.

Q. Was there any other car or cars ahead of you? A. No cars ahead of us.

Q. Were there any parked? A. Two parked.

30 Q. Did you pass those cars? A. Well, we passed them, yes.

Q. Were there any persons in the street? A. No, I didn't see anybody in the street.

Q. Was your car making any noise? A. Well, a little.

Q. As much noise as a Ford makes? A. Yes, the usual noise.

Q. Was it much amount of noise? A. It is the usual noise any car will make.

*Hector Gaudreau—Direct*

Q. Was there any necessity for blowing your horn?

Mr. Unger: I object.

The Court: Sustain the objection.

10

Q. What were you doing as you passed those two cars? A. What was I doing as I passed them?

Q. Yes. A. Just sitting there and we didn't quite pass the cars yet when this girl came out and ran into us.

Q. In which direction were your eyes looking? A. Ahead.

20 Q. You could see ahead? Are you certain there were no passengers or anything to obstruct your view except these parked cars, is that right? Were there any children in the street? A. No.

Q. Did you know where this child came from? A. I don't know, she came from nowhere. The first thing she was right in front of us.

Q. From what direction did she come? A. From the right.

30 Q. Was she alone? A. She was alone in the street.

Q. Do you know what she was doing just before you observed her? A. Playing a game, I guess.

Q. How do you know that? A. I should know if I heard it all morning.

40 Q. Was this girl thrown down to the ground? A. No, not exactly thrown to the ground, but as we came to her Mr. Huey swerved his car to the left and she just ducked her head away and just enough to knock her down.

*Hector Gaudreau—Cross*

Q. Which way was she knocked down? A. Knocked down on the right.

Q. What did you do? A. When the cars stopped?

10 Q. Do not ask me questions. What did you do?  
A. What could I do?

Q. What did you do? A. Got off the car, that's all.

Q. How far away from where the girl dropped did the car stop. A. Not very far, because I just took two steps forward and she was right there.

Q. You got out of the car and took two steps and reached the point where she was on the ground? A. Yes.

20 Q. What did you do, if anything? A. I couldn't do anything, they were right there. Mr. Huey picked her up and we went up to the hospital.

Q. Did you go to the hospital? A. I went to the hospital.

## CROSS-EXAMINATION by Mr. Unger:

30 Q. You know Chester for a long time, don't you? A. I won't say long, about four or five years.

Q. You are quite friendly with him? A. Yes.

Q. You knew this case was coming on, didn't you? A. Yes.

Q. He asked you to come here? A. He asked me to be a witness.

Q. You are not under subpoena, are you? A. What is that?

Q. He asked you to come here? A. Mr. Huey.

40 Q. Did he subpoena you? A. No, he did not.

*Hector Gaudreau—Cross*

Q. He just asked you to come? A. Yes.

Q. You were here last Friday, were you? A. Yes, I guess I was.

Q. Did you know this man was going to come along that certain street when he picked you up?  
A. No, I did not. 10

Q. Who asked to be taken on for a hitch? A. What is that?

Q. Which one of the boys asked Huey to take you boys on for a hitch? A. I couldn't tell you.

Q. He stopped there for you? A. We might have all hollered to him.

Q. You all hollered? A. I wouldn't say we all hollered, one of us hollered.

Q. Did you? A. I don't remember. 20

Q. You might have hollered for him? A. I might have hollered for him.

Q. You were sitting on the front seat? A. Yes.

Q. The other two boys were in the rear? A. Yes.

Q. Did you look into the truck? A. Well, they got on and Mr. Barth got on and I got on.

Q. Did you look into the truck? A. Did I look  
into the truck? 30

Q. Yes. A. Yes, I guess I did.

Q. Did you see anything there besides the two boys? A. Just the two boys.

Q. Did you see anything else? A. No, sir.

Q. Did you see any goods? A. No, sir.

Q. You know what Chester delivers, do you?  
A. Yes, I guess I do.

Q. What does he deliver? A. Electrotypes. 40

*Hector Gaudreau—Cross*

Q. You know what they are? A. No, I have never seen them but it says it right on the truck.

Q. Were there any on the truck? A. No, there was none whatever on the truck.

Q. You are sure? A. Positively.

10 Q. You say he just went twelve miles an hour through Vanderpool Street? A. Because that's all we were doing.

Q. That was pretty slow, wasn't it? A. Very slow, we were slowing up.

Q. You say there were no children on the street? A. No, sir.

Q. There were none. Do you know there is a school on that block? A. Yes, sir.

20 Q. Also a school yard? A. Yes, sir.

Q. Children used that yard as a playground? A. Yes.

Q. Aren't there children there all the time? A. No, sir.

Q. No. A. No, sir.

Q. This was the summer time, wasn't it? A. Yes, sir.

Q. You say there were no children out in the block? A. No children from the school was.

30 Q. What day did you say this accident was? A. June 24th?

Q. It is not open on that date? A. No, sir.

Q. Are you positive? A. School hasn't closed yet.

Q. No other cars there on that street? A. Yes, there was parked cars.

Q. Any cars in locomotion? A. No, sir.

40 Q. Did you talk to the driver? A. Not that I know of.

*Hector Gaudreau—Cross*

Q. You might have said something to him? A. When I got on the car at Wright Street, I might have.

Q. Did the other boys, too? A. I couldn't speak for them.

Q. Did you hear them? A. Did I hear them? 10

Q. Yes. A. I heard them say something when we got on the car.

Q. Someone made a noise, didn't they? A. No, sir; there was no noise at all.

Q. When did you first see this little girl? A. When did I first see the little girl?

Q. Yes. A. I think the accident was the first time I seen this little girl.

Q. I mean before she was struck? A. I didn't 20 see her before she was struck.

Q. You said she came from nowhere? A. Yes, she came right out into us.

Q. And yet you said afterwards that she was in the middle of the street? A. What is that?

Q. And yet you said afterwards she was in the middle of the street? A. When she got hit?

Q. When she got hit she was in the middle of the street? A. Yes, she was in the middle of the street. 30

Q. You do not know where she came from? A. No, she came from right behind the cars, because we just couldn't see—

Q. I am asking you if you know. A. She came from right behind the cars.

Q. How do you know that? A. Because she wasn't in front of us.

Q. That is the only reason you say that? A. She wasn't in front of us, she came right into 40 us.

*John E. McCormick—Direct*

Q. Because you did not see her? A. I only saw her when she was about to get hit, that's all.

Q. You were busy with your friends, weren't you? A. No, I was not.

Q. You were not? A. No, sir.

10 Q. Do you see that gentleman over there in the second row (indicating)? A. What is that?

Q. Do you see that man there (indicating)? A. Yes, sir.

Q. Have you seen him before? A. Only the night of the accident.

Q. You did see him there? A. Yes, sir.

Q. Didn't he have ahold of the child? A. Yes, sir, Mr. Huey picked her up and gave her to that 20 gentleman there.

Q. Did you see him before he held the child? A. No, I did not.

Q. You did not see him? A. No, sir.

JOHN E. McCORMICK, sworn in behalf of the defendants:

30 Direct-examination by Mr. Finelli:

Q. You are one of the defendants, Hely & McCormick? A. Yes, sir.

Q. Your firm employs the other defendant, Mr. Huey? A. Yes, sir.

Q. Did it employ him on June 24, 19' Yes, sir.

Q. At what time did you quit?

40 Mr. Unger: I object.

*John E. McCormick—Cross*

The Court: I think that is objectionable. You may ask him what the terms of his employment were.

Q. Please tell the jury what the terms of his employment were with your firm? A. 8 to 5 for 10 the shop with an hour for lunch.

Q. What time did he quit that day? A. Five o'clock.

Q. Where did you keep your car? A. On Frelinghuysen Avenue, the Equitable Garage.

Q. Near what street on Frelinghuysen Avenue? A. I really don't know, I think it is near Wright Street?

Q. That is your garage where your firm pays 20 the rent? A. Yes.

By the Court:

Q. What was the character of his employment what did he do; what did you hire him to do? A. Collect and deliver forms of electrotypes.

CROSS-EXAMINATION by Mr. Unger:

Q. You say he quit at five o'clock on that day; that is what you just said, how do you know? A. 30 That's the closing hour in the shop.

Q. That is the only reason you said that? A. Yes.

Q. You don't know, Mr. McCormick, really when he quit? A. He quit at five o'clock.

Q. You don't know that? A. The closing hour of the shop is five o'clock, and there is nothing more to do after that.

Q. He wasn't there at that time, was he? A. 40 Five o'clock.

*Charles J. Hely—Direct*

By the Court:

Q. The garage is? A. Yes, sir.

Q. On Frelinghuysen Avenue? A. On Frelinghuysen Avenue.

10 Q. That is three blocks south of Vanderpool Street? A. No, three blocks north of Vanderpool Street, this way.

By Mr. Finelli:

Q. The garage is nearer your place of business than Vanderpool Street is? A. Yes.

By the Court:

20 Q. The garage is three blocks north of Vanderpool Street? A. It might be, two, but there are three streets in there, counting Vanderpool Street.

Q. Two to three blocks? A. Yes.

By Mr. Finelli:

30 Q. Do you remember the accident, the 24th day of June? A. I remember the driver telling me the next morning.

Mr. Unger: I object to what the driver told him. I think he told us he was not there.

Q. Do you remember what time the driver quit on the 24th of June? A. Yes, he quit at five o'clock.

40 Q. Following his instructions of duty under his hiring, he was to go where from your place? A. Go to the garage.

*Charles J. Hely—Cross*

Q. Take the car to the garage at five o'clock?  
A. Yes.

CROSS-EXAMINATION by Mr. Unger:

Q. You say when you hired him you had a set of understandings. A. Yes. 10

Q. I mean to say, that his hours were to be from eight in the morning until five in the evening?  
A. 8 to 5.

Q. Was he to quit exactly at five? A. I am there until 5 and I tell him to go ahead in.

Q. You did not stay there after five, did you?  
A. Very seldom.

Q. Were you there that day, A. Yes, sir.

Q. Do you recall that day? A. Yes, sir. 20

Q. He was there at five o'clock? A. He was there at five o'clock; I turned him in.

Q. Are you certain about that? A. Yes, sir.

Q. Now, he delivers orders, doesn't he? A. Yes.

Q. He goes out if necessary before five? A. Yes, and sometimes he turns in earlier.

Q. He turns in early and if you have an order to deliver you tell him to deliver it? A. No, sir, we finish at five o'clock. 30

Q. If he is in the middle of a route at five o'clock he does not quit until he is through? A. Our work is routed.

Q. The answer is yes? A. Sure.

Q. On January 24th for all you know he may have been coming from delivering an order, isn't that right? A. No, it is not, that is not right.

Q. Where is your place of business? A. 55 Lafayette Street. 40

*Charles J. Hely—Cross*

Q. That is quite a distance from Frelinghuysen Avenue, where your garage is? A. Yes, I would say eight or ten blocks.

Q. That is about eight or ten blocks from Lafayette Street? A. Yes, from Frelinghuysen Avenue to the garage I would say it was about eight or ten blocks.

Q. You wouldn't say it was a mile or a mile and a half, would you? A. No.

Q. Do you know how many city blocks there are in a mile? A. No, I do not, but I have often walked that.

Q. Would you be surprised if I told you that is a mile and a half from where your place of business is? A. I might be surprised to know that, yes.

Q. Why did you keep your car then in that garage? A. We had been keeping it there before for years. I knew the man who owned the garage.

Q. Didn't you keep it there for the convenience of this driver? A. No, we had it there before we hired him.

Q. How long was he working for you before the accident? A. Why, I would say three or four years.

Q. Where did you keep your car at the time? A. That same garage.

Q. Before you put it into that garage? A. I don't just recall, we have had it in other places.

Q. Since he had been working for you your car was kept in this Equitable garage? A. Yes.

Q. He lives near there, doesn't he? A. He lives on Brunswick Street.

*Charles J. Hely—Cross*

Q. That is only a few blocks from there, isn't that so? A. Yes, five or six blocks I would say.

Q. When he was coming along that day wasn't he on a delivery? A. I didn't get the question.

Q. He wanted to turn the car into the garage? A. The car should have been in long ago.

Q. Do you know what orders he delivered that day? A. No, I don't just recall.

Q. You know the very last order he delivered. Can you tell us that? A. No, I couldn't tell you that.

Q. Well, you say you are sure he was in there at five o'clock? A. Yes, he comes to me to be told to go on.

Q. He wouldn't go home without coming to you first? A. No.

Q. If he turns in after five who tells him to go home? A. He gets his orders from me.

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

Q. You are sure he did not deliver any orders at that time? A. Not after five o'clock.

Q. On that day? A. No.

Q. You did the hiring and the discharging? A. I hired him.

Q. He is your only driver? A. Yes.

Q. You did not fire him? A. No, I did not.

Q. In spite of you discovering about this accident, is that right? A. Yes, I did not fire him.

Q. You talked a great deal about this case, didn't you? A. No, I gave him a raking down the next morning about it and got the details about it, and so forth, and made a report to the Commissioner of Motor Vehicles.

Defendants rest.

*Thomas Healey—Direct  
Motion for the Direction of a Verdict  
Summation*

THOMAS HEALEY, re-called in behalf of the plaintiffs, in rebuttal:

10 Direct-examination by Mr. Unger:

Q. I do not believe I got it straight. What side of the car were you fixing, were you on? A. What side of the car was I on?

Q. Yes, the side that is into the street or that is nearest to the curb. A. I was on the left-hand side of the car, it was a sedan; I wasn't fixing it, but I was listening to the sound of the motor.

Q. You were not on the other side, on the side-  
20 walk? A. I was not.

Plaintiffs rest.

Defendants rest.

Mr. Finelli: I move for the direction of a verdict on the ground that the master was not responsible because the servant was engaged in an enterprise of his own.

30 The Court: I think that is a question of fact which I will leave to the jury.

Defendants' counsel pray an exception to the ruling of the court. Exception noted as ground of appeal.

Mr. Finelli sums up in behalf of the defendants.

Mr. Unger sums up in behalf of the plaintiffs.

The court charges the jury as follows:

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**Charge.**

MOUNTAIN, J.:

This is an action brought by a little girl and her father for injuries which she received on June 24, 1925, as the result of an automobile accident. The father has joined with his daughter because 10 he has to bring the action for her as her next friend on account of her minority and also he has joined with her because he desires to recover certain medical expenses in connection with her cure.

The allegation is that on the day in question the three defendants were responsible for the injuries which this little girl received. There are three defendants, two of them are partners, and they owned the truck which was being driven by 20 the third defendant, Chester Huey. The plaintiffs allege that all three of the defendants are liable. As to whether they are or not is a question of fact for you to determine, after you have thought over the case considering the testimony of the plaintiffs' witnesses and the testimony of the defendants' witnesses and applying the law as I will give it to you.

Of course, an allegation that there is negligence 30 does not prove it, that is the reason we have trials. When a person feels that he or she is wronged, an action may be brought in court; the defendant answers the complaint which is filed by the plaintiff and when the matter is at issue it is submitted to a jury, witnesses are called, testimony taken and the jury, decides all questions of fact, and so we have tried this case in that manner. To substantiate the claim of the plaintiffs as to the neg- 40

*Charge*

ligence of the defendants, the testimony, as I understand it—and you must rely on your own recollection of the testimony if it is not in accordance with what I narrate as my recollection— is that this accident happened on Vanderpool Street in  
 10 this city, and that Vanderpool Street runs east and west. The little girl in question, as I vision this case, was living on the southerly side of Vanderpool Street and opposite and across the street was the Miller Street School. There was a playground back of the school. A short distance to the east of where the accident happened is Frelinghuysen Avenue, which runs north and south. The allegations of the plaintiffs are that on the  
 20 day in question at some time between 7:30 and 8 o'clock in the evening, daylight savings time, that there was still considerable light, Chester Huey, one of the defendants was driving a car belonging to his employers, in an easterly direction on this street. He had some companions with him that he had, it is alleged requested to ride with him to a candy store.

The defendants admit that he had completed  
 30 his business at five o'clock, and the plaintiffs allege and insist that Chester Huey, when he was on his way down this street, was in the employ of the other two defendants and on their business; I will take up a little later with more detail, because it is important in the consideration of the case as to whether or not you will hold these two partners liable.

The plaintiff alleges, and I am referring to  
 40 the little girl, that on the date in question she

*Charge*

was about seven years old, and that the Ford commercial car owned by the two partners driven in an easterly direction by Chester Huey at a fast rate of speed, ran into her. Several witnesses testified that they heard no horn, but they did  
 10 hear the noise of brakes, or one of them said so, and that the car skidded according to the testimony of the one I refer to, and went two lengths of the car beyond where it struck this child and stopped facing, as Mrs. Walter expressed it,  
 “With the nose of the car towards the school.” She said in her opinion there were eight to ten boys in the car. The little girl at the time was playing tag with Lucille Murtha. Miss Murtha took the stand and she testified, as I recall it, that  
 20 she and the little plaintiff were playing tag, that the truck came along very fast; that she heard no horn and she thought that the car skidded after the brakes were put on, a distance, as I understood her, from the child and the witness-stand to the second bench in the courtroom and that the car then faced the school. The little girl herself, as I recall it, testified that she was walking in  
 30 the middle of the street and she was not running at the time. Thomas Healey, who was in the immediate vicinity listening to the motor of a car which was standing still, said he saw the little plaintiff and that she was walking towards the school and that the child was hit by the right mudguard.

The defendant driver, said that, he stopped  
 work at five o'clock in the afternoon and went  
 home and got dressed and was going down to  
 40

*Charge*

the garage on Frelinghuysen Avenue and Wright Street. This was after he had had his supper, that is after he arrived home; I understood he arrived there with the car, had his supper, got dressed and then went out to the car again and met these boys and either invited them, or they invited themselves and he then had the intention of going to a candy store which is on Frelinghuysen Avenue, as I understood, just north of Vanderpool Street. He said he was going at a speed of twelve to fourteen miles an hour and that this child ran out in front of one of the cars and that he could not see her and that the edge of the front mudguard grazed her and he stopped his car within four feet. He said he saw no children in the street, which he thought by the way was twenty-five feet wide. He said that children usually were in the street until the playground closed.

In connection with the driving of the truck Chester Huey told us the garage was about a mile from the business and his home was, I understood him, three to four blocks from the garage, not in a direct line and that he was beyond the shortest distance from the business to the garage when he took the car home and he said on cross-examination he went off his route. Why I discuss that will appear to you in a few minutes. Another witness called by the defendant said they were going twelve to fourteen miles an hour and that the little girl ran in front of the first car and into the front fender and then fell on her face.

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*Charge*

Referring to the testimony of the two partners; they are the men who owned the car, the automobile in question, Mr. McCormick testified that Huey, who was driving this car, was employed as a chauffeur to deliver electrotypes, to collect and deliver the forms, and that his terms of employment were from 8 o'clock in the morning until five o'clock in the evening, with one hour off for lunch. He said he stopped at five o'clock on that day and he refers us to his other partner for the particular terms of the employment. The other partner, Mr. Charles J. Hely, took the witness stand and told us that he employed Huey, but told him that the time of his employment was from 8 a. m. until 5 p. m. and then he would take the car back to the garage. He said the garage was two or three blocks north of Vanderpool Street and Frelinghuysen Avenue. He said that he quit at five o'clock on June 24th, 1925, and started with the car to the garage.

Bearing in mind that there are two plaintiffs and three defendants, when you return to the courtroom you will not have performed your entire duty and will embarrass the court if you do not dispose of the claims of both of these plaintiffs and do not dispose of the defense or the rights of the three defendants. There are five different people who claim they have an interest in this case; the father and the daughter as plaintiffs, and two partners and an employee of the partners as defendants. When I say "employee of the partners," I do not mean that he was necessarily employed at the time of the accident because that is one of the questions of fact that you

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*Charge*

10 have to determine when you retire to the jury-room. You should indicate by the character of your verdict, if you decide for the plaintiffs, how much you are going to give the father and how much the daughter and against which or all of the defendants.

20 In the first place, as a matter of law, the plaintiffs have the burden of proof. They have alleged that the defendants were negligent and they must prove it by a preponderance of the evidence. The streets of the city are for the use of the public; they were originally taken by the public for its own use, and are maintained by taxation and are for the common use of pedestrians as well as automobile drivers or companies who have obtained the right to run trolley cars over the streets, and, of course, others. One has no more right than the other, but with the right to use the street you can at once see that there are certain co-relative duties, as there are in fact with almost all rights we have in the world.

30 An individual has the right to walk from the Court House on the sidewalk, to Broad Street. There isn't any question about that and nobody will deny it. What duty has he? He has the duty of exercising reasonable care to observe the rights of others also lawfully using the sidewalks. Suppose he did not do it; suppose he walked down the middle of the sidewalk like a "bull" all the way to Broad Street; do you think he would ever get there. He probably would not, and the reason he would not is because he disregarded some-  
40 one else who had just as good a right as he had

*Charge*

to walk on the sidewalk. Now, how does that apply to Huey in driving this automobile and particularly, this little girl of seven years of age; it begins to get more complicated as we go along. First of all, what duty did Huey as the driver of the car on the street owe to this child? He owed 10 this duty: he owed the duty to drive that car with reasonable care, which has been defined in this state to be such care as a reasonably careful and prudent man would have exercised under similar conditions. So, immediately you have to put yourself in place of Mr. Huey and ride with him down the street to see what facts and circumstances he had surrounding him as he drove the car and among other things whether he was 20 negligent, because there are factors in negligence. A man may—I do not refer to this case alone, but to show you what I mean, a man may for instance drive a car he has not inspected. If he has been warned by some noise that something is wrong with it, and the wheel flies off and hits somebody, it is a question of, whether he used due care in not making an examination of the car. A man who drives on the street, in the exercise of reasonable care, you may find, must have his senses 30 alert; he is warned by what he sees, warned by what he knows and warned of what he hears. If he goes through a street where children are accustomed to be in crowds with this knowledge; if he hears a horn, that is a warning to which he should give some attention; if he sees a child or some automobile in the immediate vicinity, that all tends to inform his senses of physical move-  
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*Charge*

ments. You know that in ordinary cases where a plaintiff is negligent, that his contributory negligence bars his right to recover. The fair rule is that one who is negligent cannot receive money when they themselves have contributed to the accident. If this child was of age that rule would be applicable, but what are you going to do with a child seven years of age. There is a presumption in this state that a child of seven years of age cannot be guilty of contributory negligence, but that is rebuttable. How do we decide whether a child is negligent or not. You cannot fix any particular age, but you would say, perhaps without any hesitation, that a baby of two years old could not be negligent. You would say, "Why, it is impossible, silly; why talk about it." You probably would say, "Why, of course, a boy of eighteen could be negligent, "Where is the middle ground between a two year old baby and the eighteen year old youth, because somewhere in that equator over which a child passes from adolescence to maturity and becomes in law what we call *sui juris* and has sense enough to take care of itself, and if, when she reaches that point—I say "she" because there is a little girl involved in this case—then it would be unfair to test her by the standards of an adult, so if you find as a matter of fact, in this case that this child had passed to that age where she was *sui juris*, or able to take care of herself, that then the standard to be applied to her intelligence, is the standard which you would apply by comparison with other children of like age, experience training, ability and mentality. If she is *sui juris*,

*Charge*

then she can be guilty of contributory negligence. That brings us to another academic question and that is the liability of these two partners. They are being sued here on the theory that they employed or were the masters of Chester Huey. If you find that the relationship of master and servant did not exist at the time of the accident, these two partners should be exonerated because there is no possible way to hold them in the absence of the relation of master and servant at that time. 10

Suppose an employer, a master, says to his servant, "I want you to go over to New York with my automobile and get a trunk at the Grand Central Station and bring it back to the house." Now, gentlemen of the jury, any negligence committed by that servant on his way over to New York in that car and back with the trunk would be imputable to the master, because he was on the business of the master and the servant was driving that car to get that trunk in the scope of his employment. Suppose we take the same case and we get the servant over to the Grand Central Station and he crosses the ferry with the trunk in the car and we will assume he has a young lady he wants to visit up in Tuxedo, New York, and because he has plenty of time he leaves the course which he should pursue on his way home and goes up to Tuxedo and stays with her a couple of hours and then starts back through the Ramapo Valley and down the Pompton Turnpike and has a collision. He is not on his master's business when he goes out of his course to visit this young lady, but on his own enterprise and he alone would 20 30 40

*Charge*

be liable; having deviated from his course. That is the law which we apply to this case. We leave it to the jury to determine when a man is or is not on his master's business. Imagine another case: If a man was sent to New York or to New Haven with a load of lumber and on the way back for some financial profit of his own, decided to take a load from Bridgeport to New Britain, and had an accident, the master would not be liable.

The law is stated succinctly in this opinion. "To render the master liable for the negligent act of the servant, the act must be done for the purpose of executing the master's orders and in doing his work and while actually engaged in serving the master and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master."

If you find that these two partners are relieved of liability because of the fact that at the time of the accident Chester Huey was, though in their daily employ at that time, not acting within the scope of his employment, in accordance with the opinion I have just read, then your verdict should exonerate them. If you find, on the other hand that he was still on his master's business, acting within the scope of his employment then they would not be relieved. That is the reason I was trying to trace the distance between the home office and the garage for the purpose of ascertaining whether he had deviated from his course. You may find that this boy who was told to take this car home at five o'clock; if you find that to

*Charge*

be a fact, drove it to his home, went in and had his supper and then picked up some friends for the purpose of taking them to a candy store and that he was not on his master's business, because his master had sent him to the garage and not to do all of that. That he was using the truck for his personal pleasure. On the other hand, you may say "Yes, he was on his way and had not yet arrived, but had the intention of going to the garage, it was convenient to stop at his house, and there was no deviation."

If the little girl is found by you to be entitled to damages she can recover for the pain and suffering she has had or will have as a result of the negligence of the defendants and the bodily injury she has sustained and the effect of that injury upon her health as to degree and probable duration. The father can recover any reasonable amount that he has spent or will be obligated to spend to cure or alleviate his daughter's injuries. I think he has spent up until today \$145. No damages may be assessed in favor of either of the plaintiffs that are not proximately and naturally the result of the negligence of one or two or all of the defendants.

(The jury retires.)

**Notice and Grounds of Appeal***(Filed, April 23d, 1927)*

## ESSEX COUNTY CIRCUIT COURT

10	ALICE R. DUNNE, <i>et als.</i> ,	}	Action at Law
	Plaintiffs,		
	vs.		
	CHAS. J. HELY, <i>et als.</i> ,		
	Defendants.		

20 The said defendants, Chas. J. Hely and John E. McCormack, individually, and as partners trading as Hely & McCormack hereby appeal from the judgment in favor of the said two plaintiffs entered in this cause on March 25th, 1927 to the New Jersey Court of Errors and Appeals upon the following grounds:

The Court committed error in refusing to direct the verdict in their favor.

30 There was error in the charge of the court holding that there was a fair conflict of testimony on the fundamental issue of whether the relationship of master and servant existed at the time of the occurrence of the damage complained of.

Yours respectfully,

A. R. FINELLI,  
Attorney for Defendants.

To:

40 Arthur M. Karl, Esquire,  
Attorney for Plaintiffs.

New Jersey  
Court of Errors and Appeals

ALICE R. DUNNE, a minor, by  
William J. Dunne, next friend,  
and WILLIAM J. DUNNE, indi-  
vidually,

Plaintiffs-Respondents,

vs.

CHARLES J. HELY and JOHN E.  
McCORMACK, individually and  
as partners trading as Hely  
& McCormack, and CHESTER  
HUEY,

Defendants-Appellants.

Action at Law  
An Appeal  
from Essex  
Circuit Court.

**BRIEF FOR APPELLANTS.**

This is an appeal by the firm of Hely & McCormack.

The respondents covered a judgment against the firm as employers of the other defendant, Huey.

The action is brought by a girl and her father for injuries which she received on June 24, 1925, between 7:30 and 8 o'clock in the evening, while playing tag on Vanderpool Street in the City of Newark. Vanderpool Street runs east and west. A short distance to the east of where the

accident happened is Frelinghuysen Avenue, which runs north and south.

Huey was driving a car in an easterly direction on Vanderpool Street and had some companions with him that he was transporting to a candy store. He completed his employer's business at five o'clock.

The witnesses called by the respondents confined their testimony to facts relating to the accident. The only witnesses who testified to that branch of the case relating to the employment were called by the appellants.

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**POINT ONE.**

**A verdict should have been directed for the appellants because the evidence did not disclose any liability against them for the act of the driver, their employee.**

Huey, the driver, testified that he stopped work at five o'clock and that instead of going to the garage on Frelinghuysen Avenue and Wright Street, he went off his route, stopped home for supper and changed his working clothes, remained home for nearly two hours, and then rode the car again and met some youths and either invited them or they invited themselves, and he and they were riding to the candy store which is at Frelinghuysen Avenue, just north of Vanderpool Street.

"He was three or four blocks from the garage, not in a direct line, and he was beyond the shortest distance from the business to the garage when he took the car home and he said on cross-examination that he went off his route" (charge of the Court, page 96). "He was employed to deliver electrotypes during the day, to collect and deliver the forms from eight o'clock in the morning until five o'clock in the evening, with one hour off for lunch, and that the garage was two or three blocks north of Vanderpool Street and Frelinghuysen Avenue, and on the evening of the accident he quit at five o'clock and started with the car to the garage" (page 97).

The appellants contend that the act of the driver in going home for supper, changing his clothes and taking on board a party of friends to be transported to the candy store, was something entirely disconnected from the master's work, and not as a means for the purpose of performing that work. The appellants further contend that such an act was not the act of the master's in any sense and should be so determined as a matter of law.

In this case the appellants overcame the presumption of agency arising from the ownership of the automobile which was being driven on the public highway by their agent (and that he was acting within the scope of his agency), as will appear from the following excerpts of the testimony:

## AS TO THE TIME AND DEVIATION FROM COURSE.

Direct-examination of Chester Huey (page 47, lines 15-20):

"Q. At what time did you quit? A. Five o'clock.

Q. What did you do? A. Why, I came home and got dressed and was going down to the garage when I picked up four fellows on the corner of Wright Street and Sherman Avenue.

Q. Where was the garage? A. On Frelinghuysen Avenue, near Wright Street."

Direct-examination of Chester Huey (page 52, lines 5-40; and top page 53):

"Q. How far was the garage from your place of business? A. How far?

Q. Yes. A. It is about a mile, I presume, probably a little over.

Q. How far from the house, from the place of business, your home, I mean? A. My home is about three blocks from the garage, pretty nearly a mile.

Q. Is your home in a direct line between the business and the garage? A. Well, <sup>not</sup> direct.

Q. (By Mr. Finelli.) It would be easier to get to the garage from the factory than it would be to get to your home? A. Well, they are both about the same.

Q. Did this accident happen at a point further than the point where the garage is located? A. Yes, sir.

Q. How many blocks away? A. Two blocks.

Q. (By the Court.) You mean further than the point where the garage is than the business? A. Yes, sir.

Q. If there was a line drawn to the garage along the various streets from the business, were you beyond that line, beyond the garage, if you followed that line on in? A. Yes, sir.

Q. That is, the shortest distance between the garage and the business, if it was represented by that line within the distance where you were at the time of the accident? A. I was beyond."

Testimony of Charles J. Hely (page 87, lines 33-40 and top page 88):

"Q. Did you define the garage? What garage did you have in June, 1925? A. The Equitable Garage, the same as we have now.

Q. Where is that located? A. On the left side of Frelinghuysen Avenue, between Wright and Emmett Streets.

Q. Is that in the direction of Vanderpool Street, where this accident occurred? A. That is about three blocks this side of Vanderpool Street.

Q. The garage is nearer your place of business than Vanderpool Street is? A. Yes.

Q. (By the Court.) The garage is three blocks north of Vanderpool Street? A. It might be two, but there are three streets in there, counting Vanderpool Street.

Q. Two or three blocks? A. Yes."

Cross-examination of Charles J. Hely (page 90, lines 22-28):

“Q. Why did you keep your car there in that garage? A. We had been keeping it there for years. I knew the man who owned the garage.

Q. Did you keep it there for the convenience of this driver? A. No, we had it there before we hired him.”

Cross-examination of Charles J. Hely (page 91, lines 16-27):

“Q. Well, you say you are sure he was in there at five o'clock? A. Yes, he comes to me to be told to go on.

Q. He wouldn't go on without coming to you first? A. No.

Q. If he turns in after five o'clock, who tells him to go on? A. He gets his orders from me.

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

Q. You are sure he did not deliver any orders at that time? A. Not after five o'clock.”

Testimony of Julia Wolter (page 21, lines 15-19):

*Fact A*

“Q. When was your attention first directed to this truck? A. Why, when they were passing they were hollering and cheering along.

Q. Who? A. Pat Huey and the crowd in the car.

Q. Was there a crowd in the car? A. There was.”

Testimony of Thomas Healy (page 34, line 10):

“Q. Did you hear any horn or any other alarm by this car? A. No, not then. I heard a lot of fellows hollering and singing.”

Testimony of Chester Huey (page 49, line 34):

*Fact B*

“Q. What were the names of the youths that you took on as passengers? A. One was Nelson Barth and the other Hector Gaudreau, and two brothers, I don't know their last names; I only know their first names (bottom page 47).

“Q. What time did you have supper? A. I had supper about six-thirty o'clock.

Q. Where did you pick up your party?

A. At the corner of Wright Street, ~~near~~ *and* Sherman Avenue.

Q. (By the Court.) Was this after supper? A. Yes, sir.

Q. (By Mr. Finelli.) Did you have any reason for picking up those boys? A. No, sir.

Q. Why didn't you take the car to the garage? A. It was only a block out of the way to the garage.

Q. How did you get to the garage from your home? A. Over Brunswick Street to Wright Street; down Wright Street, turning left about ten feet and into the garage.

Q. How did you get from your place of business from Lafayette Street to the garage? A. Why, the nearest way from La-

Wright St down Broad St,  
 fayette Street would be to go to Wright Street and over Wright Street.

Q. Did you have any particular place that you were going with these youths, your friends? A. Yes, sir; I was going to take them down to the corner, to the candy store.

Q. Which corner? A. The corner of Vanderpool Street and Frelinghuysen Avenue.

Q. (By the Court.) Where was this candy store? A. Just in off Frelinghuysen Avenue from Vanderpool Street.

Q. It is not on Vanderpool Street? A. No, sir; just around the corner on Frelinghuysen Avenue" (beginning at page 48 to 49).

"Q. Which way did you proceed? A. I proceeded south over Sherman Avenue and turned east on Vanderpool Street."

*Zampella v. Fitzhenry*, 97 N. J. L. 517, 24 A. L. R. 666, decided by this court, was the case where the plaintiff, a boy, while playing upon the street, was invited by the driver of an automobile truck, who was in the employ of the defendant, to board the truck for a ride. While occupying a position on the running board of the truck, the latter struck a rut on the street, causing the boy to fall from the truck and thereby received the injuries which present the basis of the suit. The truck was used for general delivery purposes, and was then engaged in transporting machinery. In affirming a judgment of nonsuit, after an exhaustive research into the history of the doctrine of vicarious liability and

classifying and harmonizing the decisions, in a profound and historical study, Mr. Justice Min-turn, speaking for this court at one point (page 520) says:

"It matters nothing in the legal equation, whether the deviation which caused the damage consisted of a malicious act in no wise related to the master's business, or of an independent act peculiarly due to the whim, or the individual capriciousness, of the servant in failing to attend to the business entrusted to him; the act in either event being disconnected from the master's work, and having no logical or legal relation thereto, the master, upon any theory of agency or representation, is exempt from responsibility. Nor is it of consequence, as in the case at bar, that the plaintiff occupies the status of an infant; for, the defendant being under no legal duty of responsibility, no right or liability can be predicated upon a nonexistent duty. An infant's exemption from contributory negligence can be invoked only where liability has been shown primarily to exist as the logical sequence of the concurrent existence of a legal duty" (citing cases).

The facts of the present case bring it within the control of *Cronecker v. Hall*, 92 N. J. Law 450, 105 Atl. 213, decided by this court and where the cases relating to this topic are collated. It was there held that a servant having disobeyed his employer's instructions, and deviated from the business he was directed to pursue, his use

of the car was his own use and the relation of master and servant was thereby terminated.

The later case of *Depue v. Salmon Co.*, 92 N. J. Law 550, 106 Atl. 379, decided by this court, lays down what seems to us a sound and practical test whereby to determine whether an act done by a servant for his own interest comes within the scope of his employment, which test requires that it should appear that the service performed was for the benefit of both the master and servant. Testing the facts of the present case by that ruling, it is clear that the plaintiff's case must fail.

This court has repeatedly, under variant circumstances, accepted and applied that doctrine.

*Evers v. Krouse*, 70 N. J. Law 653, 58 Atl. 181, 66 L. R. A. 592;

*Doran v. Thomsen*, 76 N. J. Law 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677;

*Missell v. Hayes*, 86 N. J. Law 348, 91 Atl. 322;

*Jennings v. Okin*, 88 N. J. Law 659, 97 Atl. 322;

*Jennings v. Okin*, 88 N. J. Law 659, 97 Atl. 249.

In *Evers v. Krouse*, *supra*, the present Chief Justice, speaking for this court and referring to the same principle enunciated in *Holler v. Ross*, 68 N. J. Law 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546, says:

"An act done by the servant while engaged in the work of his master, may be

entirely disconnected therefrom, done, not as a means for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense, and should not be deemed so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it, the servant alone should be held responsible."

In *Jennings v. Okin*, *supra*, where the son was directed by the father to use the automobile for a certain purpose, and, deviating from his course to accommodate his friends, caused the damage in suit.

We there said that:

"From the moment it (the deviation) was undertaken, the relationship of principal and agent theretofore existing was severed."

## POINT TWO.

**The firm did not commit the use of the auto to the discretion of the servant as to the route to be followed to the garage.**

The servant did not stop for supper with the master's consent. There is a distinction between the driver of a family car deviating from the route and going to his home for supper, with the master's acquiescence, taking a different route in order that he might get his supper on the way, and where, as in the present case, the servant is the driver of a truck for commercial purposes, and the servant stops on the way for a purpose of his own and without the master's consent. In other words, there is a difference between a case where the stop had no influence on the tort; that is to say, when the tort happened prior and while the servant was driving the truck to its destination over a route authorized by the master.

Says Mr. Justice Minturn in *Cleaves v. Yeskel*, N. J. L., page , 133 Atlantic Reporter, page 394:

"The line of demarcation is distinctly drawn between an unauthorized and clearly arbitrary or individual act of the driver of a vehicle and therefore, being *ab extra* his line of duty and the scope of his employment was held to take from him the legal status of agency, so as to relieve the master from liability resulting from the well-settled doctrine involved in the application of the *maxim respondeat superior*;"

and in *Karas v. Burns Brothers*, 94 N. J. L. 59, the same learned Justice says:

"We have held that a deviation by a driver or chauffeur from the line of conduct or course of action mapped out for him by the master, during which injury resulted to a third person, imposed no liability upon the master."

In the language of *Jennings v. Okin*, it was declared that

"from the moment (the deviation) was undertaken, the relationship of principal and agent theretofore subsisting was severed."

So in the present case, the deviation in violation of a designated route, consisted in following a course of conduct incompatible with the purpose of the agent's employment, and in no wise related thereto. In one case the deviation was as marked and distinct as in the other, for the conspicuous principle at the basis of the entire relationship is that liability of the master ceases when the agent is acting, not in the master's occupation, but in line of conduct peculiar to himself and suggested not by any benefit or accommodation to the master or to the master's interests.

In such a situation the agent becomes the principal and is liable for the natural consequences of his independent acts.

The reasoning contained in the above quoted opinions commends itself to us as a correct exposition of the legal rule of liability in this case,

and the essential similitude of facts in the cases requires a reversal insofar as the masters are concerned.

Respectfully submitted,

ANTHONY R. FINELLI,  
Attorney and of Counsel with Appellants.

MAY TERM, 1927.

16 MAY 1 1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

ALICE R. DUNNE, a minor, by  
WILLIAM J. DUNNE, next  
friend, and WILLIAM J.  
DUNNE, individually,  
*Plaintiffs-Appellees,*

*Action  
at Law.*

*vs.*

CHARLES J. HELY and JOHN E.  
McCORMACK, individually and  
as partners trading as Hely  
& McCormack, and CHESTER  
HUEY,  
*Defendants-Appellants.*

*On Appeal  
from Essex  
County  
Circuit  
Court.*

### BRIEF FOR PLAINTIFFS-APPELLEES.

The little girl who was injured in this accident was seven years old (p. 17, l. 12) at the time it happened on June 24, 1925, at about 7:30 P. M., Daylight Saving Time (p. 11, l. 21). She was seriously injured (pp. 12-61). She was run down in the street where there were a lot of children playing (pp. 26-33-42) by the truck of the defendant, which was being operated rapidly (pp. 21-34); there was no horn blown and the truck skidded two lengths (pp. 22-27-35-58-75); but as this matter comes before this Court on an appeal, we assume the Court is not interested in the question of negligence of either of the parties, or the extent of the injuries or amount of damages, provided there is any evidence in the case justifying a finding on these various subjects, in favor of the plaintiff. That there was such evidence, it seems to us to be beyond dispute, and therefore, we will address ourselves to the proposition advanced by the defendants that

the trial court erred in not non-suiting or directing a verdict for the defendants on the ground *that at the time of the happening the truck was not being used in the service or employment of the master, but was being used for the personal convenience of the chauffeur, Huey.*

It appears that Huey was employed solely for the purpose of using this truck in the delivery of goods of this co-partnership (p. 48, l. 28); that his hours of delivery were from eight o'clock in the morning until five o'clock in the afternoon (p. 47, l. 20); although at page 48, line 30, the chauffeur makes this significant answer to the following question:

“Q Your quitting time is five o'clock? A Sometimes.”

From which it is evident that the jury had the right to infer that his duties with this truck still continued after five o'clock, and this is borne out by the testimony of Mrs. Dunne (p. 17, l. 30), who testified as follows:

“Q What time of day would you see him on this truck? A Through the day and after supper.

Q How many times did you see him drive his car after supper? A Many times.”

It is to be observed that the defendants in their answer admitted the ownership of the truck and the fact of the employment of Huey as the co-partnership chauffeur in charge of that truck.

The chauffeur (at page 54) on cross examination, clearly shows that he was not always through with the truck by five o'clock.

“Q You keep on going until you finish?

A Yes, sir.

Q If you are en route to a customer you finish that, don't you? A Yes.

Q Sometimes you turn in at seven o'clock? A No, probably not as late as that.

Q A little before that? A Yes.

Q If there is a hurry call somewhere, even a little before five, you load and deliver, don't you? A Yes.”

He says that on the night in question (p. 54) he was through at five o'clock, and, at page 48, that he had his supper at about 6:30. It must be conceded that one of the duties of Huey was to take the truck, *after the conclusion of the day's work*, from the place of business of the co-partnership to the garage. This is proven by the testimony of one of the co-partners (p. 87, l. 30).

“A He was to be in at eight, pick up the forms, deliver the electrotypes, get an hour for lunch and take the car to the garage at five o'clock.

A On the left side of Frelinghuysen avenue between Wright and Emmett streets.”

which (see bottom of page) “is about three blocks this side of Vanderpool street.”

(Vanderpool street being the place where the accident occurred.)

It also appears by the testimony of this same partner, at pages 90 and 91, that the chauffeur lived only a few blocks from the garage.

At pages 54 and 55, the chauffeur says that on the day in question he had taken the truck and gone to his home for supper.

At page 56, line 20, it appears this was his usual custom.

“Q Were you in the habit of taking the truck home? A On the way down from work I stop and get dressed and put the truck in the garage.

Q Don't you have a garage near your home for convenience? A That is near my home; the nearest one around there.”

We submit that this places this case very close to the case of *Depue v. Salmon*, 92 Law 551, where the defendants were held liable because of their truck colliding with a person while the driver was using the truck in the morning to take himself and it from his home to the place of business of the defendants; and inasmuch as the driver's home in this case was only three blocks from the garage (p. 52, l. 18) and the garage over a mile from the defendants' place of business (p. 52, l. 13), it was open to the jury to find that this arrangement was made for the convenience of the chauffeur, and in order to enable him to get expeditiously to and from his home to the place of business of the defendant.

It appears he was going from his home with the truck to put it in the garage, and on the way to the garage he was hailed by four boys who asked him to give them a ride down to the candy store.

The candy store was located very near (p. 49).

"Q Where was this candy store? A Just about in off Frelinghuysen avenue from Vanderpool street.

Q It is not on Vanderpool street? A No, sir; just around the corner on Frelinghuysen avenue."

From all of which it must appear that if there was any deviation in the usual route which this chauffeur would take in going from his house to the garage, it was very slight, and he says at line 20, page 48, "it was only a block out of the way to the garage."

### ARGUMENT.

From all of the above we submit the Court did not err in refusing to non-suit or direct a verdict for the defendants, and this we think is shown by the following:

In the first place, the admission on the record by the defendants of the ownership of the truck, raised the presumption that the truck was at the time of the accident in the service of the co-partnership. It was the duty of the co-partnership to overcome this presumption, and their mere denial of its being in their service was not absolutely binding and conclusive upon the jury, and we refer the Court to the dissenting opinion by Chancellor Walker in *Kronecker v. Hall*, 92 N. J. L. 454, and the cases cited by him.

We respectfully suggest that the question to be determined by this jury was, "What was the general authority and power of this chauffeur over this truck?" We think the important thing is not necessarily the particular route which he pursued in taking this truck from the place of business to the garage, but rather the fact that it is admitted that the truck was confided to his care by the co-partnership to eventually land it in the garage. That the accident happened while he was still in the act of delivery. The route he took (unless so unreasonable or improper as to raise an inference that he was on an independent mission), did not alter the fact that he was still in the service of his employers. It was the route and manner he selected in which to perform his duty. Is not the decisive fact, the question of the purpose of the trip—rather than its route? He was not limited to any particular street or route. Of course, if he had deviated in an unreasonable way, and gone a long distance off his route, there would be justification for

concluding that he was not, while thus deviating, in the service of the co-partnership; but in the case *sub judice*, he had only deviated, if at all, one block (p. 48, l. 20) off his usual route. His home and the garage were within three blocks of each other (p. 52, l. 18), and both being over a mile from the place of business, and it seems unreasonable to hold that when this truck was generally confided to him to be placed in the garage, that this chauffeur violated his duty because he did not go in the *most direct route possible from the place of business or from his home to the garage*.

The evidence, undisputed, warrants the inference that he had been for a long time in the habit of so using this truck night after night (see p. 17). He evidently, instead of going straight to the garage from the place of business, would stop and get his supper at his home and then take the truck to the garage. It was open to the jury to so find, and that that fact was known to the employers.

There were facts adduced which made it necessary to submit this question of practice for the consideration of the jury, and if it was long persisted in, as it does appear (p. 17), it was for the jury to say whether or not the co-partnership was aware of such practice and acquiesced in it.

The fact that he gave these four boys a ride seems to us to be wholly immaterial in view of the case of *Tenney v. Verdun*, 130 Atl. 369. The presence of the boys did not cause the accident. The chauffeur's duty was to deliver the truck to the garage, and nowhere in the case is there any evidence to show that he was in anywise limited by his employers *either as to route or time in accomplishing delivery*.

It does appear, without doubt, that in the course of the delivery of the truck, still in

his possession, and on the way to the garage, this happening occurred, and it was for the jury to say whether or not it happened while he was in the service of the co-partnership. Not being limited as to route to be pursued, it was reasonable to say that his employers left that to his discretion, and even if he took a bad route, nevertheless, *as long as he was using that route for the purpose of the delivery*, we insist his act was the act of the employers.

We even go further and say that having been entrusted with the delivery of this truck, even if he had been given specific instructions as to a route which he must follow, and he had violated those instructions and thus caused injury to this plaintiff, the co-partnership would still be liable unless it appeared that his deviation was entirely for a purpose wholly disconnected with the delivery of the truck.

*Klitch v. Betz*, 89 Law 348, and cited with approval in *Kronecker v. Hall*, 92 Law 460 (E. & A.).

The only theory upon which the defendants seek to avoid this judgment is this: the chauffeur being entrusted with the delivery of this truck at a garage, and who had followed his usual practice of going that day first to his home and getting his supper, afterwards, while in the act of delivering the truck to its proper place, went one block out of his way. This proposition seems so unreasonable that we respectfully submit the rulings of the court below, and the judgment should be affirmed.

Respectfully submitted,

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Of Counsel with Plaintiffs-Appellees.

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