

New Jersey
COURT OF ERRORS AND APPEALS.

CONCILIO NAPURANA,
Plaintiff-in-Error,
vs.
WILLIAM YOUNG,
Defendant
~~Plaintiff~~-in-Error,

In Tort.
On Writ
of Error.

Plaintiff's Brief.

The plaintiff, a child of six years, as said by the court below "too young to be careless—not of sufficient maturity to be charged with any duty for her own protection" was run down by a wagon owned by the defendant on a crossing in the public highway and severely injured.

It appeared that the wagon, drawn by two horses, was being driven slowly down the middle of a straight street, of which the driver had an unobstructed view, at about six or seven o'clock in the evening on the eighth day of June, Nineteen hundred and four; the driver and another man were seated on the wagon; it was still light; a storm was just coming up; the plaintiff was walking across the street and had reached about the middle of the crosswalk when she was struck by one of the horses; the team was stopped and she was picked up.

Two errors are assigned. The first on the refusal of the court to admit certain evidence, the second on the granting of a nonsuit.

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I.

STATEMENTS BY THE DRIVER MADE AT THE TIME OF THE ACCIDENT, SHOULD HAVE BEEN ADMITTED.

Luse v. Jones, 10 Vroom, 707.
 Frome v. Dennis, 16 Vroom, 515.
 Hunter v. State, 11 Vroom, 495.

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II.

ON THE FACTS PRESENTED THE COURT SHOULD HAVE DENIED THE MOTION TO NONSUIT—FROM THESE FACTS A REASONABLE INFERENCE COULD HAVE BEEN DRAWN BY THE JURY THAT THE DRIVER WAS NEGLIGENT OR CARELESS.

In Hughes v. Camden and Suburban Railway Company where the plaintiff was injured through
 30 a collision with defendant's car and a nonsuit granted below, Chancellor Magie after reviewing the evidence said:

“Upon these facts and the inference a jury might reasonably draw therefrom, I entertain no doubt that there was a case for the jury, for they would have been justified in finding negligence in the motorman, either in driving his car at a speed dangerous to other travellers on the highway, or because, if the speed was not excessive under ordinary
 40 circumstances, it was yet so great as not to permit him to arrest the car after he perceived or should have perceived, plaintiff's wagon, or he did not attempt to do so.”

“The direction of the nonsuit cannot be sustained on this ground.”

Hughes v. Camden and Suburban Railway Co., 36 Vroom on p. 205.

IF THE EVIDENCE WOULD JUSTIFY THE INFERENCE 10
 THAT THE DRIVER WAS INATTENTIVE, AND THAT IF
 HE HAD GIVEN PROPER ATTENTION THE ACCIDENT
 MIGHT HAVE BEEN AVOIDED, THEN THE QUESTION
 WAS FOR THE JURY WHETHER HE OUGHT TO HAVE
 SEEN AND HIS FAILURE TO STOP IN TIME TO AVOID
 THE ACCIDENT ESTABLISHED NEGLIGENCE.

In *Zolpher v. Camden & Suburban Railway Company* where a bicyclist was injured by an approaching car, Mr. Justice Swayze said:

"The question is whether the motorman, if he 20
 had been running his car at a reasonable rate of
 speed, could, by the exercise of ordinary care, have
 stopped it in time to avoid the collision. The an-
 swer must depend upon the distance the car had
 to go when the motorman saw, or ought to have
 seen the bicycle upon the track in front of him.
 * * * We think it was a question for the jury
 whether a failure to stop in that distance estab-
 lished negligence."

Zolpher v. Camden and Suburban Rail- 30
way Co., 40 *Vroom* on p. 418.

THE QUESTION IS NOT WHETHER THE TRIAL
 JUDGE WOULD INFER NEGLIGENCE FROM THE ESTAB-
 LISHED FACTS, BUT WHETHER THE JURY COULD REA-
 SONABLY AND LEGITIMATELY DO SO—IT IS FOR THE
 JURY TO SAY FROM THOSE FACTS WHETHER NEGLI-
 GENCE OUGHT TO BE INFERRED.

In *Consolidated Traction Company v. Reeves* 40
 where it appeared that a trolley car collided with
 a wagon before the wagon had an opportunity to
 get off the track or avoid the accident and that
 "the motorman, if he was at all keeping a lookout,
 could have had the horse and wagon in plain
 view."

10 Mr. Justice Lippincott, in delivering the opinion said :

“—the above facts appear to have been proven by the plaintiff. Under this proof the trial judge refused to nonsuit.

“It certainly was not, under these circumstances, within the province of the trial judge to take from the jury the question whether the motorman was guilty of negligence in operating this car along the street, causing the accident * * *”

20 Before the trial judge could so determine, the proof must have been so convincing to him that he could extract from it no other reasonable inference or conclusion.

If, from the facts in evidence, two inferences or conclusions can be reasonably deduced, one favorable to the plaintiff and the other against him, a question then is presented which conclusively calls for the opinion of the jury.”

Consolidated Traction Co. v. Reeves,
29 Vroom, 573.

30 In Traction Company v. Scott, where a boy seven years old stepped in front of a trolley car and was killed, the court below refused to nonsuit and error was assigned. This court held, in an opinion by Mr. Justice Hendrickson :

“It is insisted in support of this assignment of error that the plaintiff below failed to establish any facts from which the jury would be justified in finding negligence on the part of the defendant.

40 But this insistent is scarcely in accord with the well settled rule regulating the action of the trial judge upon such a motion. It is not for him to say whether there are any facts proven in a given case from which the jury would be justified in finding negligence on the part of the defendant but rather whether any facts have been established by evidence from which negligence might be reasonably inferred by a jury.” After quoting from the opinion in the Block case the opinion con-

tinues: "In applying this general rule to the examination of the facts, it must be remembered that 'Negligence is not a fact which is the subject of direct proof, but an inference from facts put in evidence.' 'Now negligence,' says Dr. Wharton, 'may be disputed when the facts are undisputed, and the question in such case, where the dispute is real and serious, is eminently one for the jury under the direction of the court.' Whart Neg. 3420. 10

'Whether the facts are disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury, and that, in order to withdraw such a case from the jury, the facts should not only be undisputed, but the inferences, in respect of the defendants failure of duty which arises from these facts, should be undisputed.' 2 Thomp. Tr., 1208. This same doctrine has been repeatedly laid down by this court." 20

Consolidated Traction Co. v. Scott, 29 Vroom, 682. 30

Newark Pass. Railway Co. v. Block, 26 Vroom 605, is one of the leading cases in this state on the question, and there, in an opinion by Mr. Justice Magie the Court held that:

"When * * * the trial judge is requested to non-suit, or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairnes, in Metropolitan Railway Co. v. Jackson, L. R., 3 App. cas. 193, to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred. If none, there is no case to go to a jury; but if from facts established negligence *may* reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence *ought to be* inferred. 40

In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether

10 he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury."

On such a question as is here presented, Chancellor Magie has said:

20 "—for if he (the motorman) deliberately, in broad daylight, with full opportunity to perceive that plaintiff did not heed any signals of the gong, if it was rung, or any notice derived from the rumbling of the car, ran plaintiff down and did him the injury complained of, it cannot be contended that such conduct was not negligent."

Buttelli v. Electric Ry. Co., 30 Vroom, on p. 306.

The case of Conrad vs. Elizabeth etc. Ry., decided by this court in June, Nineteen hundred and four, opinion by Mr. Justice Garrison, acquiesced in by the whole court, would seem to govern this case. The Court said:

30 "If the jury did not find that the plaintiff was negligent in crossing the highway when he did—" (and in this case there is no question of contributory negligence) "~~then the question of the defendants negligence~~ of the defendants negligence depended upon whether the motorman could, by the exercise of reasonable care, have checked his car, or, if need be, have stopped it before striking the plaintiff's wagon. If he could it was his duty to do so.

40 This also was under the evidence a jury question.

The rule of law pertinent to these issues is based upon the plainest dictates of good sense and common humanity."

Conrad v. Elizabeth etc. Ry. Co., 41 Vroom on p. 678.

Kaufman v. Bush, 40 Vroom 645 is an almost parallel case with the case at bar, the opinion is by Mr. Justice Garrison:

“This is an action brought by an infant, aged 10
 five years, to recover damages for being run down
 by defendant’s vehicle upon a public highway.
 The gravamen is the careless management of de-
 fendant’s horse, driven by his servant. The case
 went to the jury and judgment went against the
 defendant, who has brought this writ of error,
 contending that the plaintiff should have been
 nonsuited, or that a verdict for the defendant
 should have been directed, each of which motions
 was made and denied.” 20

“For the purpose of each of these motions the
 facts to be dealt with were that the plaintiff, in
 full daylight, started to cross a public highway
 upon which the defendant’s team was being driv-
 en. The point was a public crossing at the junc-
 tion of two streets. * * * When the plaintiff had
 got between four and five feet from the sidewalk,
 which she had just left, she was struck by the
 fore feet of the defendant’s horse. From these
 facts one legitimate inference would be that the 30
 plaintiff had begun to cross the highway at a pub-
 lic crossing before the defendant’s team had en-
 gaged in the same attempt and while it was suf-
 ficiently distant to have avoided the collision but
 for either the rate of speed at which it was pro-
 gressing, or for the lack of sufficient control by
 the driver over his horse, or from the inattention
 of the driver to the conditions upon the crossing
 that he was approaching. * * * The part of the
 street in which the collision took place, namely, 40
 within four or five feet of the curb, the fact that
 it was at a public crossing near a corner, and in
 full daylight, are all circumstances bearing upon
 the duty of the driver and his alleged negligence
 with respect to it.

“If from this testimony the jury found, as they
 might, that the plaintiff had reached the crossing
 first and was using it at a time when the driver of
 the approaching vehicle ought to have seen her,
 and could, by exercising proper control, have eith-
 er stopped or turned aside so as to avoid running

10 her down, a case of negligence was sufficiently made out. The dangerous character of public crossings, the rule that gives the person who has commenced to cross a priority of right, and the serious consequences that must flow from the neglect of drivers to approach such crossings circum-
spectly and in reasonable control of their horses, are all involved in determining the degree of care that would absolve a driver from negligence, when, in point of fact, he has run down a pedestrian at
20 a public crossing.

“The age of the plaintiff, while it does not, *per se*, alter the rule by which the negligence of the driver is to be gauged, is a circumstance to be taken into consideration in measuring the sort of care he was exercising, and in determining what inferences should be drawn from the other facts respecting the accident.

30 “At the close of the plaintiff’s case, and at the end of all the testimony, the jury might legitimately have found substantially these facts. The case was so left to them by the charge of the trial court. There was, therefore, neither in the refusal to grant a nonsuit nor in the refusal to direct a verdict, any error on the part of the trial court.

“The judgment of the Circuit Court will be affirmed.”

40 THE AGE OF THE PLAINTIFF AND THE PLACE OF CROSSING WERE ALSO CIRCUMSTANCES TO BE TAKEN INTO CONSIDERATION IN DETERMINING THE DEGREE OF CARE BEING EXERCISED BY THE DRIVER.

Kauffman v. Bush, 40 Vroom, 645.

Danback v. N. J. Traction Co., 28
Vroom on p. 465.

We submit that a nonsuit was improper.

H. ^VOSBORNE,
Attorney of Plaintiff.

New Jersey Court

—OF—

Errors and Appeals

CONCILIO NAPURANA
PLAINTIFF IN ERROR

vs.

WILLIAM YOUNG
DEFENDANT IN ERROR

*In
Error*

BRIEF OF ELVIN W. CRANE

Of Counsel With Defendant in Error

New Jersey Court
of
Errors and Appeals

CONCILIO NAPURANA
PLAINTIFF IN ERROR
VS
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BRIEF OF ELVIN W. CRANE
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YENIGSON & H.

New Jersey Court of Errors and Appeals.

CONCILIO NAPURANA,

Plaintiff in Error.

vs.

WILLIAM YOUNG,

Defendant in Error.

In Error.

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BRIEF OF ELVIN W. CRANE,

Of Counsel With Defendant.

The facts of this case are as follows: The plaintiff was 20
on June 8th, 1904, a child seven years of age. Her mother
had gone across the street into a beer saloon and was
coming out therefrom with the plaintiff back of her. A
shower was coming on about dusk when the defendant's
wagon, being driven by one, Patrick Cassidy, to which
was attached two horses going very slowly, while about
the centre of the street the child and horses collided. The
child was knocked down by the horses. As soon as the
horses struck the child they stopped, and the wheels did
not pass over the body. 30

There was only one witness to this accident—one, Bertha
Odenwalder, (printed book page 24, line 20) by name.
Angelina Ricci (printed book page 9, line 20) did not see
the accident. Ginditta Malangone (printed book page 14,
line 15), Michael E. Walsh, a police officer, (printed book
page 15, line 39), both swear that they did not see the
accident. John F. Lee (printed book page 19, line 37)
says that he heard a "hollor" and turned 'round, and the
woman was picking up the young one and running into 40

the house with it. On page 20, line 46, he says he did not see the child run across the street.

I cannot conceive how it is possible for the plaintiff's counsel, with all his ingenuity, to make an argument which would convince this Court that the trial judge erred in directing a non-suit upon the case as presented. The Court points out the fact that the child was *non*^{*sui juris*}~~*pro*~~. In granting the motion the Court uses the following language (printed book page 42, line 29): "It appears
 10 that the driver was driving at a walk; there was, therefore, nothing reckless about the rate at which he was progressing. There is no affirmative evidence that he was inattentive to his surroundings, * * * so that there is really nothing in the case as material for judgment except that a little girl in crossing a straight street, following a woman who, apparently, is about half the width of the street ahead of her, and that a driver, driving slowly and not, so far as appears, inattentive to what he
 20 was doing, proceeds in such a way that one of the horses to which the little girl was nearest strikes her; she falls, the team stops and she is picked up." Further on in his ruling the Court holds that the case is barren of any testimony to show negligence on the part of the defendant. The only other assignment of error which is to be considered is found on page 44 of the book which reads as follows: "That the Judge refused to admit in evidence declarations, statements or conversations made immediately after the accident by the employe or servant of the
 30 defendant driving the wagon which caused the accident as a part of the *res gestae*."

This assignment is not borne out by the testimony. An exception to the ruling of the Judge is found on page 21, line 47, of book, and in order to understand the reason for the ruling complained of, it is necessary to examine the testimony of the witness, Lee, which commences on page 16. On page 21 the following question is asked:
 40 Q. "You say you heard a hallowing and turned and saw this woman running in the house with the child in her

arms. Is that right?" A. "Yes, sir." Q. "Did you go into the house, too?" A. "Yes, sir." Q. "Did you see this child there?" A. "Yes, sir." On line 29 of the same page the following question is put: Q. "Did you have any talk with the driver of the wagon at that time?" The Court—"That would not be competent." Mr. Osborn—"Well, if it was immediately at the time of the accident?" The Court—"No, no; not if it was immediately after the accident. If it was before the accident it was part of the *res gestae*, part of the transaction; but whatever the driver may have said after the thing happened would not be competent. The rule is that where an employer employs an agent to do something, as distinguished from making statements, his acts bind him but his declarations do not."

On page ~~19~~²⁴, line 3, the question is asked whether the witness saw Cassidy, the driver, and the answer was that Cassidy was on the wagon when he saw the child inside the house. He came out and told the driver to wait until the Doctor had come; not to go away with the wagon until the Doctor had come. It will be noticed that the question asked by counsel was as follows: Q. "Did you have any talk with the driver of the wagon at that time?" At what time? The witness says he did not see the accident but went into the house after the affair was all over. The counsel suggests that the witness might have had a talk with the driver immediately at the time of the accident, but the witness is not asked the question whether he had any talk with the driver immediately at the time of the accident.

The Court merely rules upon the question asked, which was not whether the witness had had a conversation with the driver "at that time." The word time would have referred to a period after the accident had occurred, because the witness swears that he was not present at the time of the accident, but came upon the scene when the child was being carried into the house. If, therefore, the transaction had taken place, what the driver said then was clearly incompetent. It seems unnecessary for me to quote

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authorities upon the doctrine of *res gestae*, which has been so long settled in this State. Acts or declarations so connected with the transaction are deemed relevant because they serve to show its nature, purpose, occasion, or object, to explain its origin or significance, to exhibit the relations of the parties concerned therein, etc. *People vs. Davis*, 56 N. Y. 95. *Eighmy vs. People*, 79 N. Y. 546. But declarations which are prior or subsequent to the transaction so as to form no constituent part of it are not
 10 admissible.

Watermat vs. Whitney, 11 N. Y. 157. 1st. Greenleaf on Evidence, Section 108-110. I also refer to the following New Jersey cases: *Castner vs. Sliker*, 33 N. J., L. 95. *Hunter vs. the State*, 40 N. J., L. 495.

Respectfully submitted,

ELVIN W. CRANE,

Of Counsel with Defendant in Error.

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settled in this State. Acts or declarations are con-
sidered with the transaction, are deemed relevant because
they serve to show the nature, purpose, meaning, progress,
to explain the words or significance, to exhibit the rela-
tions of the parties concerned therein, etc. *People vs*
Davis, 55 N. Y. 85. *Highway vs People*, 73 N. Y. 144.
See declarations which are prior or subsequent to the
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admissible.

Waterman vs Whitney, 41 N. Y. 151. 1st. Chapter
on Evidence, Section 106-110. Also refer to the follow-
ing New Jersey cases: *Cramer vs Sikes*, 35 N. J. L. 18.
Hunter vs the State, 49 N. J. L. 436.

Respectfully submitted,

ELVIN W. CHASE,

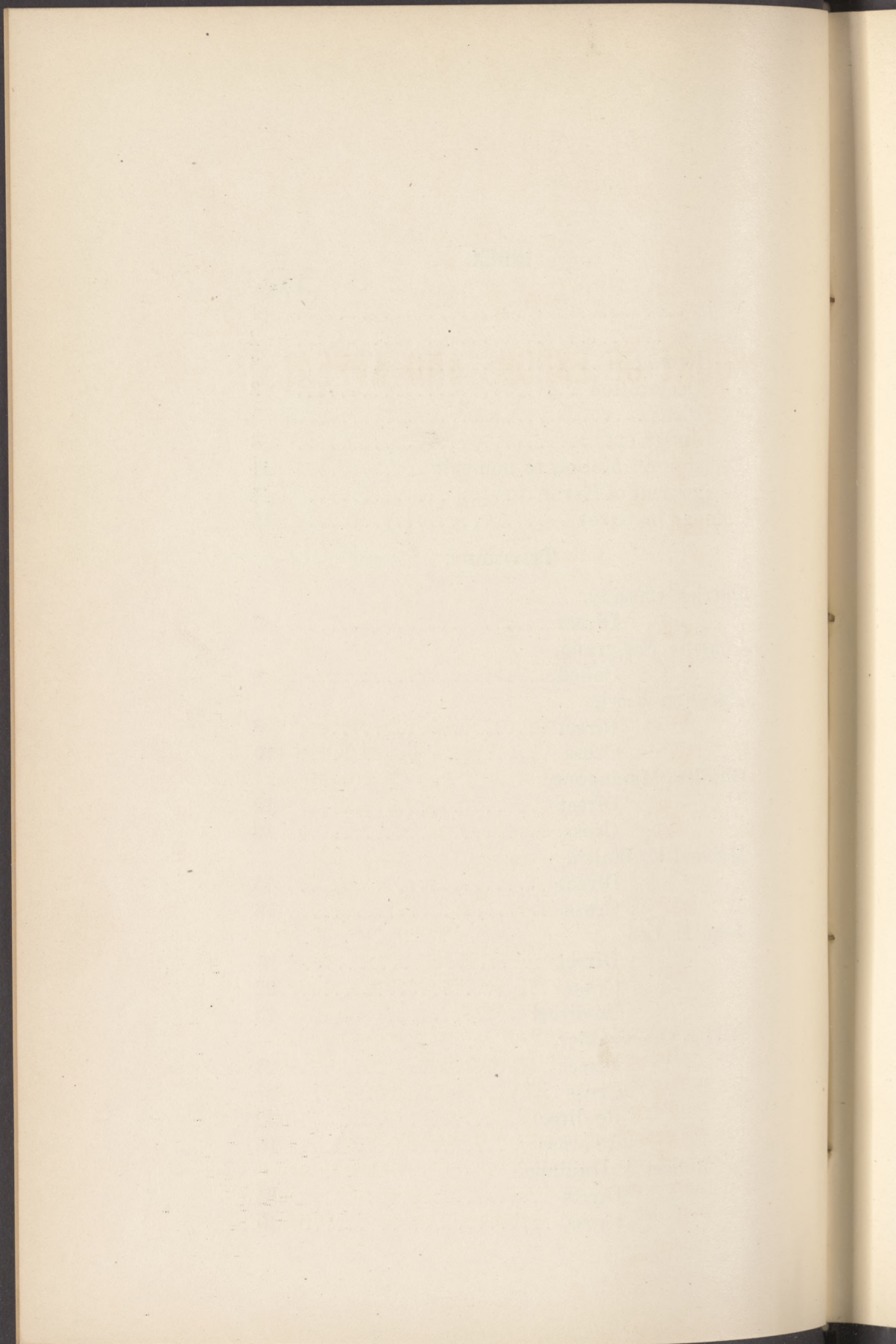
Of Counsel with Defendant in Error.

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New Jersey

COURT OF ERRORS AND APPEALS.

CONSILIO NAPURANA by next
friend,

Plaintiff in Error.

vs.

WILLIAM YOUNG,

Defendant in Error.

By agreement of counsel the within state of the 30
case is abridged by the omission therefrom of the
petition and order for the appointment of next
friend.

Writ.

New Jersey, ss:

The State of New Jersey to Frederic
Adams, Esquire. Judge of our Cir- 40
cuit Court in and for the County of
Essex, Greeting:

Because in the records and proceedings, and
also in the giving of judgment in a plaint, which
was in our Circuit Court holden at Newark, in and
for the County of Essex. between Consilio Napur-
ana, by next friend, plaintiff, and William Young,
defendant in an action of tort, manifest error
hath intervened to the great damage of the said
plaintiff as by her complaint we are informed,

10 we being willing that speedy justice should be
 done to the parties aforesaid in this behalf, do
 command you distinctly and openly to send under
 your seal, the record and proceedings aforesaid
 with all things touching and concerning the same
 to our Judge of our Court of Errors and Appeals
 in the last resort in all causes, at Trenton, on the
 sixth day of February next, together with this
 writ, that the record and proceedings aforesaid
 being inspected, we may cause to be further done
 20 thereupon, for correcting that error, what of
 right and according to the law and custom of the
 State of New Jersey ought to be done.

WITNESS, our Chancellor and President
 Judge of our said Court of Errors and Appeals,
 at Trenton aforesaid, the eighteenth day of Jan-
 uary, in the year nineteen hundred and six.

S. D. DICKINSON,
 Clerk.

Harry V. Osborne,
 30 Attorney.
 Filed, February 15, 1906.

Return.

State of New Jersey: } ss:
 County of Essex,

I, Frederic Adams, Presiding Judge of the Cir-
 40 cuit Court Essex county, New Jersey by virtue of
 a certain writ to me directed, do hereby certify
 and return to the Court of Errors and Appeals
 of the last resort in this State the judgment re-
 cord and proceedings together with all things
 touching and concerning the same as by the with-
 in writ to me directed I am commanded.

Dated, February 8, 1906.

(L. S.)

FREDERIC ADAMS,
 Circuit Court Judge.

Summons.

Essex County, ss:

(L. S.)

The State of New Jersey, to the Sheriff of the County of Essex aforesaid, Greeting:

You are hereby commanded to summon William Young, if in your county he may be found, so that he be and appear before our Circuit Court to be holden at Newark, in and for the said County of Essex on the eighteenth day of July instant to answer unto Consilio Napurana, in an action of tort to her damage five thousand dollars, as is said, and have you then there this writ. 20

Witness, William S. Gummere, Esquire a Judge of our said Circuit Court, at Newark aforesaid, the eighth day of July in the year One thousand nine hundred and four.

ARTHUR HORTON,

Clerk. 30

H. V. Osborne,
Attorney.

Pleas before the Judge of the Circuit Court, holden at Newark, in and for the County of Essex of the eighteenth day of July A. D., 1904.

Arthur Horton, 40
Clerk.

Essex County, ss:

William Young, the defendant in this suit, was summoned to answer unto Consilio Napurana, the plaintiff therein in an action of tort, and the plaintiff being an infant under the age of twenty-one years, Pasquale De Falco has been appointed

10 to prosecute this action in her behalf, and there-
upon the said Pasquale De Falco her next friend
complains; for that the said defendant on the
eighth day of June, in the year nineteen hundred
and four, at Newark, in the County of Essex, was
the owner and possessor of a certain wagon which
was drawn and propelled along and upon the pub-
lic street or highways by horses attached thereto,
and it thereby became and was the duty of the
said defendant to use due and proper care in the
20 use, management and control of said horses and
wagon while being driven along and upon the pub-
lic street or highway as aforesaid, so as to avoid
colliding with and running into persons lawfully
walking along or across said public street or high-
way, yet the said defendant, not regarding his
duty in that behalf, did not use due and proper
care in the use, management and control of said
horses and wagon while the same were being driv-
en along said public street or highway, so as to
30 avoid colliding with and running into persons law-
fully walking upon and across said public street
or highway, but wholly failed and neglected so to
do. And on the day and year aforesaid, to-wit, at
the junction of Malvern and Van Buren streets,
in the City of Newark, County of Essex afore-
said, the said defendant by his servants so care-
lessly, negligently and improperly used, managed
and controlled said horses and wagon while the
same were being driven upon and along said pub-
40 lic street or highway, so as to collide with and run
into the said plaintiff, who was then and there
lawfully going upon and crossing said public
street or highway at the junction of Malvern and
Van Buren street as aforesaid, with such force
and violence as to throw the said plaintiff to the
street, thereby seriously, painfully and perman-
ently bruising, wounding and injuring the said
plaintiff so that her life was despaired of; and

also by means of the premises, said plaintiff be- 10
 came sick, sore, lame and disordered, and so re-
 mained and continued for a long space of time,
 to-wit, hitherto, and still so continues, during all
 of which time said plaintiff suffered and under-
 went great pain and in the future will suffer and
 undergo great pain, and was hindered and pre-
 vented from transacting and attending to her nec-
 cessary and lawful affairs by her during all that
 time to be performed and transacted, and lost and
 was deprived of divers great gains, profits and 20
 advantages which she might and otherwise would
 have derived and acquired; and thereby also, the
 said plaintiff was forced and obliged to lay out and
 expend divers large sums of money, amounting
 in the whole to the sum of one hundred dollars in
 and about endeavoring to be cured of said wounds,
 bruises and injuries, so received as aforesaid, to-
 wit, at Newark, aforesaid. Wherefore the said
 plaintiff says that she is injured and has sus-
 tained damages to the amount of five thousand 30
 dollars, and therefore she brings her suit.

H. V. OSBORNE,
 Attorney for plaintiff.

And the said defendant, by Elvin W. Crane.
 his attorney, comes and defends the wrong and in-
 jury when etc. and says that he is not guilty of
 the said supposed grievances above laid to his
 charge or to any or either of them, or any part
 thereof in manner and form as the said plaintiff 40
 hath above thereof complained against him, and
 of this he, the said defendant puts himself upon
 the country, etc.

ELVIN W. CRANE,
 Attorney for Defendant.

Judgment.

And now at this day that is to say the Tuesday of September next who neither etc. to recognize etc. because etc. and the same day is given to the parties here etc.

At which time before the Judge aforesaid, at Newark, aforesaid, come the parties aforesaid, by their attorneys aforesaid and the Sheriff hath not
20 sent here the writ to him in this behalf directed nor hath he done anything thereupon.

And now at this day that is to say the twentieth day of November, nineteen hundred and five to which day the issue as aforesaid, joined had been continued come the said parties by their said attorneys before the judge aforesaid at Newark aforesaid and the said plaintiff failing to prosecute her said suit by her next friend appointed by order of the Court in this behalf the Court do
30 thereupon order that the said plaintiff take nothing by his said writ, but that she and her pledges to prosecute be in mercy etc. and that the said defendant do go thereof without day etc.

Whereupon it is considered that the said defendant do recover against the said plaintiff the sum of twenty-four dollars and sixty-eight cents as for his costs and charges by him about his defence in this behalf laid out and expended by the Court now here adjudged to him with his assent
40 according to the form of the statute in such case made and provided and that the said defendant have execution thereof.

And in the said defendant in Mercy etc.

Judgment signed Nov. 20, 1905.

W. S. GUNMERE, Judge.

ESSEX CIRCUIT COURT.

10

Monday, November 20, 1905.

<p>CONSILIO NAPURANO, by next friend,</p> <p>vs.</p> <p>WILLIAM YOUNG.</p>
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In Tort.

20

Before Hon. FREDERIC ADAMS, J., and a Jury.

For plaintiff appears Harry V. Osborne.

For defendant appears Elvin W. Crane.

Mr. Osborne opens for plaintiff.

PATRICK CASSIDY, sworn in behalf of plaintiff:

Direct-examination by Mr. Osborne:

Q. Mr. Cassidy, where do you live? A. I live 30
in 186 Pacific street.

Q. How old are you? A. I am about sixty-five.

Q. On the 8th of June, 1904, were you working
for Mr. Young, the defendant? A. Yes, sir.

Q. And on that day at about six o'clock were
you driving a team for Mr. Young along VanBur-
en street and across Malvern street? A. No, sir;
not at six.

Q. At what time? A. About seven.

Q. About seven? A. Yes, sir.

40

Q. You were working for Mr. Young then? A.
Yes, sir.

Q. And driving his wagon? A. Yes, sir.

Cross-examination waived.

10 Mr. Osborne: The plaintiff in this case, the child, is seven years old. Whether your Honor will think that she is competent to testify or not, I cannot say. I will submit her for the examination of the Court, and let the Court determine.

CONSILIO NAPURANO, called in behalf of plaintiff (not sworn).

20 By the Court: (through the interpreter in the Italian language). Q. Ask this little girl what her name is? A. Consilio.

Q. What is your last name? A. Napoli.

Q. Where do you live? A. I don't know; my mother knows it.

Q. Do you know the street? A. No, sir.

Q. How old are you? A. I don't know.

Q. What is your mother's name? A. Angelina.

30 Q. What is your father's name? A. Pasquale.

Q. What city is this that you live in? A. I don't know.

The Court: I do not think this little girl ought to be sworn.

Mr. Osborne: I might say, with reference to where she lives, she has only recently moved away and just within a few weeks came back to Newark again. That may be a very reasonable reason why she doesn't know the street or the town.

40

The Court: Well, her mind is evidently very immature. That is all.

ANGELINA RICCI, sworn in behalf of plaintiff (through the interpreter):

Direct-examination by Mr. Osborne (through the interpreter):

Q. Ask her if her maiden name is Ricci? A. 10
Yes, sir.

Q. What is your husband's name? A. Napu-
rano.

Q. No, ask her who she is married to? A. Pas-
quale Defalco.

Q. Are you the mother of the little girl who was
just on the witness-stand? A. Yes, sir.

Q. Was the child hurt a year ago last June?
A. Yes, sir.

Q. Did you see her hurt? A. No, sir; I didn't 20
see it.

Q. How soon after the accident did you see
her? A. Right away.

Q. Whereabouts? A. Corner of VanBuren
and Malvern street.

Q. And where was the child then? A. It was
going home.

Q. No, after the accident, when you saw her
on the corner of VanBuren and Malvern? A.
They brought her in the house. 30

Q. What was the child's condition? What was
the matter with her? A. Arm broke, teeth broke
and everything.

Q. What do you mean by "everything?" A.
You couldn't tell that it was a human being.

Q. Well, did they send for a doctor? A. Yes,
sir.

Q. What doctor did they send for? A. Dr.
DonAntonio.

Q. Then what was done with the child? A. He 40
didn't want to touch her, and they sent her to the
hospital.

Q. Oh, he did not treat her, then? A. No, sir.

Q. What hospital was she sent to? A. St.
James.

Q. And how long did she remain there? A.
Three days. She didn't want to stay there no
longer, and they sent her home.

Q. They sent her home? A. Yes, sir.

10 Q. How long was she confined to the bed at home? A. Over two months.

Q. How long before she could go outdoors? A. Four or five months.

Q. Is there anything the matter with the child now? A. She has a crooked neck, and whenever it is bad weather the arm hurts her.

Q. How about her face—anything the matter with her jaw? A. No, sir; nothing; the neck; when she wants to eat, she can't eat.

20 Q. What was the child's condition before the accident; was it healthy? A. Sure.

Q. Was its neck straight? A. Sure.

Q. Could it eat all right? A. Yes, sir.

Q. Did it have any pains when the weather was bad? A. No, sir; nothing.

Q. How was the child's mind before the accident? Was it a bright child or not? A. Yes, she had a color and she was stout.

30 Q. How was her mind; was she bright in her mind? A. Yes, she used to do anything.

Q. Is there any difference now? A. Now she is like a stupid.

CROSS-EXAMINATION by Mr. Crane:

Q. Who brought the child to her house? A. When?

Q. After the accident? A. We took her direct to the hospital.

40 Q. Oh, then, it was not taken into her house? A. No, sir; direct to the hospital.

Q. Who had the child? A. Two women.

Q. Do you know their names? A. Giuditta Malangone and another one; she is dead.

Q. What doctor attended the child at her house after it was brought back from the hospital? A. Dr. Guiliano.

Q. How many times did he visit her? A. He came twice a day.

Q. For how long? A. Over a month.

Mr. Crane (To the interpreter): Well, 10
what did she say there after you answered
the question?

The Interpreter: What do you mean?
"Over a month," she says, "until the baby
got well."

Q. Until the baby got well? A. Until the baby
got well.

Q. Well, was it a month? A. Then, instead of
coming twice a day, he came once a day.

Q. How old is the child? A. Seven years. 20

Q. Now? A. Yes, sir.

By the Court: Q. Ask her what is the child's
birthday? A. I can't remember.

Q. What month? A. I got the papers home.

Q. What month? A. I can't remember.

Q. What season? A. The eleventh of June.

Q. How old was she on the eleventh of last
June? A. Over six years.

Q. Was the eleventh of June her birthday? A.
Yes. 30

Q. Now, on the eleventh of last June, last
summer, how old was she? A. Just six years.

Q. Six last June? A. Yes, sir.

Q. Was there a Doctor DonAntonio? I want
to see if I understood her correctly? A. Yes; he
lives in front of the Italian church.

Q. What did he have to do with the case? A.
He didn't want to touch her.

Q. When did he see her? A. Right after the
accident. 40

Q. Before she was brought to the house? Well,
I do not know that she was brought to the house;
perhaps not. But before she went to the hospi-
tal? A. Yes, sir.

Q. And the physician who saw her after she
came out of the hospital was Dr. Guiliano? A.
Yes, sir.

Q (By Mr. Osborne).: How long was she in the
hospital, do you say? A. Three days.

10 GIUDITTA MALANGONE, sworn in behalf of plaintiff (through the interpreter):

Direct-examination (through the interpreter) by Mr. Osborne:

Q. What is your husband's name? A. Alfonso Sabarasa.

Q. Do you know this little girl back of me? A. Yes, sir.

Q. Do you remember when she was hurt? A. Yes, sir.

20 Q. When was that? A. I don't remember in what month it was.

Q. How long ago, about? A. I don't know.

Q. Where was it? A. On VanBuren street.

Q. Near what other street? A. Malvern street.

Q. When did you see her? A. After she went under the car.

By Mr. Crane: Q. What? A. After she went under the car.

Q. Car?

30 The Interpreter: That is what she said.

The Court: What did she say?

The Interpreter: "After she went under the car."

Mr. Osborne: Did she say "car" or "wagon?"

The Interpreter: "Car." (The Interpreter gives the Italian word).

Mr. Osborne: Does that mean car or wagon?

40 The Interpreter: I will have to ask her what she means.

By the Court: Q. What was it she went under? A. Car.

Q. What kind of a car? A. Car of the moving stuff.

By Mr. Osborne: Q. What kind of stuff? A. Greens, everything.

Q. Green stuff? A. Greens, everything.

Q. Now ask her whether she means carreto or 10 car? A. Car.

Q. What is that? A. Car.

By the Court: Q. Ask her what moved the car?

A. The horses.

Q. Now, tell us what you saw? A. I was in my house; I heard hollering; after I went out and I found that the car was stopped near the sidewalk, and the old man crying.

Q. And where was the child? A. At the corner; but she went under the car right at the cross- 20
ing.

Mr. Crane: She was not asked that.

By Mr. Osborne: Q. Where was the child?

The Court: Just what she saw, nothing else.

A. Maria Antonio Defalco gave me the child—she does not exist now—at the corner.

By the Court: Q. Dead? A. Yes, sir.

Q. Was she the child's grandmother? A. No, 30
sir.

By Mr. Osborne: Q. What did you do with the child? A. The officer told me to take the child in my house.

Q. Well, did you do it? A. Yes, sir.

Q. And then what happened to the child? A. Then they called for the doctor, and then they took her to the hospital.

Q. How long after she had taken the child in her house was she taken to the hospital? A. About an hour. 40

Q. Is your husband here—Pasquale? A. Alfonso, yes.

Mr. Osborne: Oh, yes, Alfonso.

CROSS-EXAMINATION by Mr. Crane:

Q. Just a question. As I understand it, when you went out in the street this woman who is now

10 dead gave you this child; is that it? A. Yes, sir; but she told me—

Q. What? A. But she told me that the car had struck—

The Court: Never mind that.

Q. Of course I knew it would lead up to that. You do not know anything about this accident, do you? You did not see this child knocked down?

A. No, sir.

By the Court: Q. You say the old man was
20 crying? A. Yes, sir.

Q. Have you seen him here today? A. I don't think I can recognize him.

Q. Where was he when he was crying? A. On the car.

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

Q. Where was the car? A. Right near my home.

Q. Where is your house? A. I used to live in VanBuren street.

30 Q. What number? A. 148.

Q. How near is that to the corner? A. From here to there (indicating).

Q. From here to where? A. As far as Dr. Guiliano (indicating).

Q. As far as to the gentleman who sits just inside of the rail. Is there any house between your house and the corner? A. No, sir.

Q. An open lot? A. Yes, a street.

Q. What street? A. VanBuren.

40 Q. What street does your house front on? A. VanBuren and Malvern street.

Q. Is your house on the corner of those streets? A. Yes, sir.

Q. What doctor did they send for? A. Don-Antonio.

Q. Did he come? A. Yes, sir.

Q. Did he come into your house? A. Yes, sir.

Q. Who went with the child to the hospital? 10

A. The mother.

Q. Did Dr. DonAntonio go? 9. No, sir.

Q. Did they take the child in an ambulance?

A. Yes, sir.

MICHAEL E. WALSH sworn in behalf of plaintiff:

Direct-examination by Mr. Osborne: 20

Q. Mr. Walsh, are you a police officer in Newark? A. Yes, sir.

Q. Were you on duty on the 8th day of June, 1904, Down Neck, Third Precinct? A. I was on reserve duty at the station house.

Q. Do you remember being called to the corner of VanBuren and Malvern streets or sent there about six or seven o'clock in the evening of that day? A. Yes, sir.

Q. With reference to a little girl? A. Yes, sir. 30

Q. Is this the little girl (indicating)? Do you recognize her? A. No, I couldn't recognize her now.

Q. Well, what happened when you got down there? A. When I got there the doctor was there with the child, and she had been run over, so they told me.

Mr. Crane: Will you speak a little louder?

Witness: When I got there the child was in a house and the doctor was there with her, and 40 advised her to be taken to the hospital; we wrapped her up in a blanket and took her to the hospital. She was hurt in the mouth; her jawbone was sticking out; that is about all I could see about the child that was wrong with her.

Q. Who was with you? A. Officer Reilly.

Q. You took her to what hospital? A. St. James.

10 Q. About what time was that? A. Oh, I should judge about eight o'clock.

By the Court: Q. Eight o'clock in the evening or the morning? A. Eight o'clock in the evening; yes, sir.

By Mr. Osborne: Q. Did you see the driver of the wagon there? A. Yes, sir.

Q. Would you recognize him if you saw him? A. Yes, sir.

Q. Do you see him in court? A. Yes, sir.

20 Mr. Osborne: Cassidy, stand up.

(A man in the audience arises).

Q. Is that the man? A. Yes, sir.

CROSS-EXAMINATION by Mr. Crane:

Q. Where did you see the driver; where was he? A. I seen him at the station house after we come back from the hospital, after he was fetched in; I don't know who arrested him.

30 Q. Well, was he at the corner when you got there? A. I didn't see him; I see a truck standing there; but we didn't stop for him; we took the child and got her to the hospital.

JOHN F. LEE sworn in behalf of plaintiff:

Direct-examination by Mr. Osborne:

Q. Mr. Lee, are you a police officer in this city?

A. Yes, sir.

40 Q. Attached to the Third Precinct? A. Yes, sir.

Q. Do you remember being on duty on the corner of Malvern and VanBuren streets on the evening of June 8, 1904? A. Yes, sir.

Q. Do you remember an accident in which a wagon struck a small child? A. I do; yes, sir.

Q. Do you remember the child? A. Well, I never took notice to the child, not to know her, before that nor since.

Q. Well, do you recognize this little girl as 10
being the child (indicating)? A. Well, I wouldn't
say that is the young one that got hurt.

Q. Well, now, just tell us where you were on
that night, on that evening, and what you saw.

A. Well, I was standing on the corner of Van-
Buren—

Q. Which corner were you standing on? A. I
was standing on the west corner.

Q. The west corner? A. Yes, sir. I was stand-
ing there, and I see this wagon coming up with 20
two men onto it—

By the Court: Q. VanBuren and what other
street? A. VanBuren and Malvern.

By Mr. Crane: Q. Malvern street? A. Mal-
vern street and VanBuren. And I see this wagon
coming up and two men on the wagon, and the
team was walking very slow; it got dark and a
shower of rain come up; there was a couple of
children on the sidewalk, and these run across the
street, and the wagon or the horse or the pole 30
hit this young girl and knocked her down, and
some woman was walking up with a pint of beer
in a can up the street, she picked the young one
up and carried it in the house, and after I heard
the holler I followed the woman in, and after
finding what it was I telephoned for a doctor, and
after the doctor come there he ordered the young
one taken to the hospital.

By Mr. Osborne: Q. Now, you did not see all
this, did you? A. No, sir; I didn't see it; my 40
back was turned at the time.

Q. Well, this is just what you heard? A. That
is just what I heard; yes, sir.

By the Court: Q. Well, how much was it that
you did see?

Mr. Osborne: Why, he has been telling
conclusions from what he heard.

Q. How much of it did you see? You want to

10 separate what you saw from what you were told.

A. Well, my back was turned to it, when the wagon passed me by, my back was turned; I didn't see the wagon until I went to the other side of the street, when the accident happened.

By Mr. Osborne: Q. Which direction, as to the points of the compass, does VanBuren street run, north and south or east and west? A. Well, it runs straight up.

Q. Well, does it run north and south or east and west? A. Well, it runs north and south.

Q. And Malvern street crosses it at right angles? A. Yes, sir.

Q. East and west? A. Yes, sir.

Q. Now, there is a tenement house on one corner, is there not? A. Yes, sir.

Q. What corner is that on? A. Well, that is on the off side of it.

Q. Well, first let me ask you where you were standing, north, south, east or west? A. I was standing at the saloon corner.

Q. Well, there are two saloons? A. Yes, sir; each side; yes, sir.

Q. Were you standing on the southeast corner? A. I was standing on the corner—

Q. Well, on which side of VanBuren street were you, on the east or west? A. I was on this side of VanBuren street.

Q. Well, I don't know which that is. A. Well, VanBuren runs the same as this, and Malvern street crosses it in this direction (indicating). Well, there is a saloon on that corner and a saloon on this corner; I was standing here on this side.

The Court: Where is Malvern street?

Mr. Crane: It is down over the railroad, your Honor.

Q. I show you a rough sketch representing two streets, VanBuren street and Malvern street (paper shown to witness). A. Yes, sir.

Q. That is north and that is south, that is east 10
and that is west, as indicated by that arrow.
Now, the wagon, you say, was going along Van-
Buren street? A. Yes, sir.

Q. In a northerly direction? A. That way
(indicating).

Q. (Indicating) There is a saloon and there is a
saloon. Where were you standing? A. Right
here.

Q. Right here where I make that cross? A.
Yes, sir. 20

Q. With your back to the scene of the accident?
A. Yes, sir.

By the Court: Q. How many blocks is Mal-
vern street from Market street? A. From Mar-
ket?

Q. Is it near Market street or is it—A. About
eight blocks from Market street.

Q. You say your back was turned to something.
To what, to the wagon? A. Yes, sir.

By Mr. Osborne: Q. What first attracted your 30
attention? A. When I heard the holler.

Q. You heard a holloa? A. Yes, sir.

Q. And then you turned around? A. Then I
turned around and went across the street, and
this woman was after picking up the young one
and running in the house with it.

Q. That was the first you saw of it? A. Yes,
sir.

Q. Was the wagon going straight along Van-
Buren street or did it turn around the corner? 40

The Court: One moment. Some part of
this testimony ought to be struck out.

Mr. Osborne: The first part, where he
testified to what he heard; yes, sir. I will
consent to that.

By direction of the Court, the steno-
grapher reads from the record as follows:

“And I see this wagon coming up and

10 two men on the wagon, and the team was walking very slow; it got dark and a shower of rain come up; there was a couple of children on the sidewalk, and these run across the street, and the wagon or the horses or the pole hit this young girl and knocked her down; and some woman was walking up with a pint of beer in a can up the street, she picked the young one up and carried it in the house, and after finding
20 what it was I telephoned for a doctor, and after the doctor come there he ordered the young one taken to the hospital.

Q. Now, you did not see all this, did you?

A. No, sir; I didn't see it; my back was turned to it at the time."

The Court: A good deal of that appears to be hearsay. I will strike it out.

By the Court: Q. What was the first you saw of the team, officer? A. Coming along the street.

30 Q. Before or after the accident? A. Before.

Q. And how was it coming? A. Going towards Market.

Q. Going north? A. Yes, sir.

Q. At what rate? A. Just walking slow; a slow walk, the team was going.

Q. That is observation. Now, you said it got dark and a storm came up. A. Yes, sir.

40 Q. What do you know about that? A. Well, that is what started the children to run, I believe—the rain—to run out of the way.

Q. No, not what you believe, but what you saw. Did you see it get dark? A. Yes, sir.

Q. And there was a storm coming up? A. Yes, sir; a big heavy shower of rain.

Q. But you did not see the children run across the street? A. No, sir.

The Court: That goes out, then.

By Mr. Osborne: Q. Is Malvern street a block 10
below Chestnut one block? A. Yes, sir.

Q. One block from Malvern to Chestnut? A.
Yes, sir.

Q. You say you heard a holloaing and turned
and saw this woman running in the house with the
child in her arms; is that right? A. Yes, sir.

Q. Did you go in the house, too? A. Yes, sir.

Q. Did you see this child there? A. Yes, sir.

Q. In what condition was the child? A. The
child was laying there crying, with her jawbone 20
broke here; and I had a party telephone for the
doctor, and when the doctor come he had the
young one ordered to the hospital.

Q. Did you ring for the police patrol? A. No,
sir; they went for a telephone.

Q. That is the last you saw of it and all you
know about it? A. That is all I saw of it; yes,
sir.

Q. Did you have any talk with the driver of
the wagon at that time? 30

The Court: That would not be compe-
tent.

Mr. Osborne: Well, if it was immediate-
ly at the time of the accident—

The Court: No, No, not if it was immedi-
ately after the accident. If it was before
the accident, it is part of the *res gestae*,
part of the transaction; but whatever the
driver may have said after the thing hap-
pened would not be competent. The rule 40
is that where an employer employs an
agent to make statements for him, the
statements bind him, but where an employ-
er employs an agent to do something as
distinguished from making statements, his
acts bind him, but his declarations do not.

Plaintiff's counsel prays an exception to
this ruling of the Court.

10 Exception allowed; let it be sealed, and
it is sealed accordingly.

FREDERIC ADAMS, (L. S.)

Circuit Court Judge.

Q. Did you see Mr. Cassidy immediately after
the accident? A. Mr. Cassidy was on the wagon,
and when I see the child inside, I came out, and
I told him to wait until the doctor had come, not
to go away with the wagon until the doctor had
come.

20

CROSS-EXAMINATION by Mr. Crane:

Q. Now, Mr. Lee, when you first saw the wagon
what street was it on? A. It was coming right
on the corner.

Q. What street was it on? A. It was on Van-
Buren street.

Q. Which way was it going, north or south? A.
Going north.

Q. Was it loaded or unloaded? A. It was
30 loaded.

Q. How far away from you was it when you
first saw it, about? A. Well, I was just about
opposite when I saw it first—the wagon.

Q. That is, you were standing on the southwest
corner of VanBuren and Malvern streets, and
when you first saw it was the wagon directly in
front of you? A. Well, not just exactly; it might
have been just a little to the side.

Q. It had not reached you yet? A. It hadn't
40 reached the crosswalk at the time, and then it
only just went over the other crosswalk when the
accident happened.

Q. Did you see this child picked up? A. I seen
the woman running away with it.

Q. Did you see the child picked up in the street?
A. I didn't see the child picked up, no.

Q. Did you see one woman hand the child to
another? A. No, sir; I did not.

Q. When the wagon stopped where was it with 10
reference to the crosswalk? A. Well, it was just
over the crosswalk, about fifteen feet, I guess,
over the crosswalk, when the wagon stopped.

Q. Do you know whether it moved at all after
the child was struck? A. Well, I couldn't say
whether it moved; if it did, it was only a few feet.

Q. Did you see the child before it was injured?
A. No, sir. I might have seen it, but not to pass
any remarks of it.

Q. Well, you spoke of a storm coming up. Did 20
a storm come up? A. Yes, sir.

Q. Was it a heavy storm? A. It certainly
was.

Q. Was it raining when you saw this woman
take the child and go in the house with it? A.
Well, it was just starting to rain.

Q. Was the wind blowing? A. The wind was
blowing; yes, sir.

Q. Anything like an April shower—the storm?
A. Well, something similar to that. 30

Q. You do not recollect seeing this child before
the accident? A. No, sir; I do not.

Q. How many persons were on this wagon? A.
Two.

Q. And it had a team of horses, two horses, did
it? A. Yes, sir.

Q. And, as you say, was coming along on a
slow walk? A. On a slow walk; yes, sir.

RE-DIRECT-EXAMINATION by Mr. Os^d 40
borne:

Q. These two people that you saw on this wag-
on, what were they doing? A. One of the men
was driving and the other was sitting on the seat
alongside of him.

Q. Were they talking to each other? A. I
couldn't say whether that they were talking to
each other or not.

- 10 By the Court: Q. Did you see a doctor there?
 A. I seen the doctor there, yes, sir.
 Q. Do you know his name? A. No, sir; I don't
 know the doctor's name.
 Q. Did you hear him talk? A. Yes, sir.
 Q. Was he an Italian doctor? A. He was; yes,
 sir.
-

- 20 BERTHA ODENWALDER, sworn in behalf
 of plaintiff:
 Direct-examination by Mr. Osborne:
 Q. Bertha, where do you live? A. Chestnut
 street.
 Q. And where did you live a year ago last
 June? A. In VanBuren street.
 Q. Whereabouts? A. VanBuren street.
 Q. How far from the corner of Malvern and
 VanBuren? A. Well, a block.
- 30 Q. Do you remember an accident which hap-
 pened on the 8th of June, 1904? A. Yes, sir.
 Q. To this little girl? A. Yes, sir.
 Q. Do you remember the little girl? A. Yes,
 sir.
 Q. Is that the little girl that you saw have the
 accident (indicating)? A. Yes, sir.
 Q. Where were you standing? A. I was stand-
 ing by our gate.
 By Mr. Crane: Q. By what? A. By the gate.
- 40 By Mr. Osborne? Q. And how far from your
 gate was it that this accident happened, about?
 A. Well, it was from our gate was half a block.
 Q. About half a block? A. Yes, sir.
 Q. What did you first see about this whole
 thing? A. Well, I saw when the wagon go apast
 our house—
 By the Court: Q. You must speak louder. You
 say you saw the wagon go by your house? A.

Yes, sir. The wagon was driving slow, and the 10 lady was coming out of the saloon and the baby was walking in back of her.

Q. What do you mean by "the baby"—the little girl who was hurt? A. Yes, sir.

Q. Whom do you mean by "the lady?" A. She is dead now.

Q. Where was the saloon? A. She was about six feet away from the saloon.

Q. Where was the saloon? A. The saloon was on that side of the corner. 20

Q. Was that on the corner? A. Yes, sir.

Q. Well, the lady was coming out of the saloon and the little girl was walking behind her? A. Yes, sir.

Q. Go on. A. And the lady was on the corner.

By Mr. Osborne: Q. Did you see Officer Lee? A. No, sir; I saw him go in the house, but he was in the house quite long.

Q. You did not see him standing on the corner? A. I can't tell you. 30

Q. You do not remember that? A. No.

Q. Now, who was driving this wagon. A. That man down there (indicating).

Q. That old man? A. Yes, sir.

Q. The old gentleman who was on the stand first? A. Yes, sir.

Q. Who was on the wagon with him, anybody? A. Yes, sir; another man.

Q. Do you know who the other man was? A. No, sir. 40

Q. Black or white? A. Black.

Q. He was a colored man? A. Yes, sir.

Q. What were they doing when you saw them, anything? A. No, sir; they wasn't doing nothing; that old man, he was driving, and the other man was sitting there still.

By Mr. Crane: Q. What is that? A. The old man was driving, and the other man was sitting there still.

10 By Mr. Osborne: Q. How were they driving, fast or slow, as they went up the street? A. Slow.

Q. And was the child running or walking as it came up the street? A. Walking.

Q. How far was the child from the woman that it was following? A. The woman was on the corner and the child was on the next corner across, that corner, and the lady was on that corner, and the baby was crossing the street when the lady
20 was on that corner.

Q. As the lady with the beer was crossing the street—

The Court: She has not said anything about the beer.

Q. Well, as the lady who left the saloon was crossing the street? A. Yes, sir.

Q. How far behind her was the little baby? A. Well, the baby was— she was about here, and the lady was back on the other corner; the wagon was
30 right in the middle of the street and so was the baby.

By the Court: Q. You know Malvern street? A. Yes, sir.

Q. As you go towards Malvern street from your house on which side of VanBuren street is your house, on the right-hand or on the left? A. On the right-hand.

Q. On which side of VanBuren street is the saloon? A. On the right-hand.

40 Q. The same side as your house? A. Yes, sir.

Q. And on which side of the street did this lady that you speak of live, the one that came out of the saloon? A. She lived on the left-hand side.

Q. She lived on the left-hand side? A. On the corner.

Q. Now, she came out of the saloon, and what did she do? Did she start to go across the street? A. Yes, sir; she came out of the saloon and went

across the street, and the baby was in back of 10
her.

Q. Now, when she got across the street where
was the little girl? A. The baby was in back of
her.

Q. In back of her? A. Yes, sir.

By Mr. Osborne: Q. Did you see the wagon hit
the baby? A. Yes, sir.

Q. What part of the wagon struck the baby?
A. Well, the horses struck the baby first.

Q. Did she fall down? A. Yes, sir. 20

Q. Do you remmeber whether it was light yet
or not? A. Yes, sir; it was light.

Q. Do you remember any storm? A. Yes, sir;
it was raining.

Q. Just begun to rain, had it? A. Yes, sir.

Q. At what point did you leave your house and
go up to the scene of the accident? A. I crossed
the street from our gate, I crossed the street and
ran over to the corner.

Q. And when you got there what happened? 30
Just tell us what happened. A. Well, they was
in there; I looked in the window, and they was
all in there crying; that is all that I saw.

Q. Where was the wagon? A. The wagon was
standing on the corner.

Q. And where was the driver? A. The man
went in the house.

Q. And the driver of the wagon went in the
house? A. Yes, sir; and he says he didn't see
the little baby. 40

Q. You looked in the window? A. Yes, sir.

Q. The window was up? A. Yes, sir.

CROSS-EXAMINATION by Mr. Crane:

Q. Then this wagon, Bertha, passed you before
it got up to the corner; is that it? A. Yes, sir.

Q. And you saw that there were two men in it?
A. Yes, sir.

- 10 Q. The wagon was loaded? A. Yes, sir.
 Q. And the horses walking? A. Yes, sir.
 Q. What caused you to look up the street? A. Well, I was looking for my sister.
 Q. You were looking in that direction for your sister? A. Yes, sir.
 Q. And you saw a woman coming out of the saloon? A. Yes, sir.
 Q. Did she have anything in her hand? A. Had a pail.
- 20 Q. She had a pail? A. Yes, sir.
 Q. And this little girl followed on behind? A. Yes, sir.
 Q. And just as they were crossing a storm came up; is that right? A. Yes, sir.
 Q. Did it rain? A. Yes, sir.
 Q. Well, didn't they run to get out of the rain? A. No, sir.
 Q. Are you sure of that? Yes, sir.
 Q. Well, as soon as the horses struck, or as
- 30 you suppose, the horses struck this little girl—is that right? A. Yes, sir.
 Q. The wagon stopped right there? A. Yes, sir.
 Q. Is that right? A. Yes, sir.
 Q. That is, so far as you could see. You were quite a little distance away, were you not? A. Yes, sir.
 Q. Half a block, you call it? A. Yes, sir.
 Q. The wheels did not go over this child at all?
- 40 A. No, sir; only the horses.
 Q. From where you were standing, it is your judgment that the moment the horses struck the child the team stopped? A. Yes, sir.
 Q. It was knocked down by the horse? A. Yes, sir; the horses.
 Q. Do you know which horse? A. Yes, sir.
 Q. Which horse? A. It was the brown one.
 Q. What? A. It was two brown ones.
 Q. Two brown horses? A. Yes, sir.

Q. Well, what I meant is this. The wagon was 10
going this way (indicating)? A. No, that way
(indicating) towards the market.

Q. Were you on the opposite side from where
this woman came out of the saloon? A. Yes, sir.

Q. You were on the opposite side? A. Yes,
sir.

Q. Well, is your house on the same side of the
street that you saw this woman come out of the
saloon? A. Yes, sir, only her house is on this
side.

20

By the Court: Q. Your house and the saloon
are on the same side? A. Yes, sir.

Q. And her house is on the opposite side? A.
Yes, sir.

Q. Opposite the saloon? A. Yes, sir.

By Mr. Crane: Q. Then you saw this child go
across? A. Yes, sir.

Q. And it was knocked down by the first horse?
A. Yes, sir.

By the Court: Q. Bertha, how far from Mal- 30
vern street is the saloon? A. Well, from Mal-
vern street? It is right on the corner of Van-
Buren.

Q. And is this lady's house on the opposite cor-
ner? A. Yes, sir.

Q. Then the saloon and house were opposite
one another? A. Yes, sir.

Q. And did the lady go straight across? A.
Yes, sir.

Q. How far behind her was the little girl? A. 40
Well, in the middle was the little girl and on the
corner was the lady.

Q. That is, by the time the lady had got across
the street the little girl was in the middle of the
street; is that the idea? A. Yes, sir.

Q. And in what part of the street was the wag-
on? A. Well, the wagon was right on the corner.

Q. No, but whether it was in the middle or on
one side? A. In the middle.

10 Q. This was about what time in the evening?

A. About seven o'clock.

Q. Had you had your supper? A. Yes, sir.

Q. What time did you have your supper that night? A. Had it six o'clock.

Q. At six? A. Yes, sir.

Q. Had the lamps been lit? A. Yes, sir.

Q. In the streets? A. No, sir; not yet.

Q. Not yet? A. No, sir.

Q. What lamps had been lit? A. None hasn't
20 been lit.

Q. None had been lit? A. No, sir.

Q. Then how light was it or dark was it? A.
Well, it was kind of light yet.

Q. Kind of light yet? A. Yes, sir.

Q. Did you see any other little girl in the street besides this little girl? A. No, sir; only her.

Q. What? A. Only that little girl.

By Mr. Crane: Q. The saloon that you saw this lady come out of is on a corner, is it? A. Yes,
30 sir.

Q. And was it on the corner nearest your house? A. Yes, sir.

Q. Well, now, where is the house into which they took this little girl located? Is it right across or is it cat-a-cornered across? A. It is right across.

Q. Right straight across? A. Yes, sir.

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

Q. Do you know the number of the house into
40 which they took the child? A. No, sir.

Q. Whose saloon is it that is on the corner? Do you know who keeps it? A. No, sir.

Q. Do you know the name? A. No, sir.

Q. Well, there are two saloons there, are there not? A. Yes, sir.

Q. Well, now, aren't they right straight across one from the other? A. Yes, sir.

Q. Well, now, the house that this little girl

lives in is on the other side of that street, is it 10 not? A. On this side.

Q. On Malvern street? A. Yes, sir.

Q. Well, then, they went cat-a-cornered across, didn't they? A. No, sir; they was on that side saloon; they didn't go on this side.

Q. Now, see if you understand this drawing. (Paper shown to witness) That is VanBuren street. A. Yes, sir; here is the saloon, and on this corner is a saloon.

The Court: Wait a minute. We are get- 20
ting confused.

By the Court: Q. This is VanBuren street (indicating)? A. Yes, sir.

Q. Now, where do you live? A. I live down here.

Q. This is VanBuren street? A. Yes, sir.

Q. And here is Malvern street? A. Yes, sir.

Q. Now, where do you live? A. I lived on that side, and on this corner was a saloon.

Mr. Crane: She has just got it turned 30
around.

Q. Do you know what is north? A. Yes, sir; right straight.

Q. Now, is this team going north or south on VanBuren street? A. North.

Q. Well, this is north, up here (indicating)? A. No, I mean south.

Q. South? A. Yes, sir.

By Mr. Crane: Q. Now, can you fix in your eye the way that street—you know how Broad street 40 runs, do you not? A. Yes, sir.

Q. Now, does VanBuren street run the same way as Broad? A. Yes, sir; runs straight.

Q. Well, do they run alongside of each other, we will say? A. Yes, sir.

Q. Now, Malvern street runs the same as Market street here, does it not? A. Yes, sir.

Q. Now, then, can you tell us on which side of

10 VanBuren street you were when you saw this accident? A. On that side (indicating).

Q. Well, what do you mean, on this side of Broad or the other side of Broad? A. On the other side of Broad.

Q. On the other side of Broad? A. Yes, sir.

Q. On the east side, you were, then? A. Yes, sir.

Q. Then you did not see Mr. Lee, the police officer, did you? A. No, sir.

20 Q. Did you not see him standing in the street at all? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Osborne:

Q. Now, Bertha, you see those marks there (indicating on paper); that represents VanBuren street and that represents Malvern street. Now, we will assume that you live down here; there is your house, and there is your father's shop, and
30 there is your back yard, and there you stand. A. Yes, sir.

The Court: You may assume that, but you assume something that is entirely contradictory to the witness's testimony.

Mr. Osborne: Well, the witness is evidently confused as to the points of the compass, and I am trying to straighten her out, after the questions that have been asked.

40 The Court: Go on. We want to get at the facts.

Q. Now, as you stood looking out on VanBuren street you saw the wagon go by? A. Yes, sir.

Q. Which way did the wagon go as you stood by your back gate looking that way? A. If I was standing here—

Q. Sanding there. A. Then it went that way (indicating).

Q. Exactly. Now, the wagon went this way? 10
A. Yes, sir.

Q. Now, show us where the house was that they took the child in afterwards. A. On this side (indicating).

Q. If you were standing here, I mean. A. On this side, right there.

Q. Right there, eh? A. Yes, sir.

Q. Is there a saloon on that corner and a saloon on this corner? A. A saloon on this corner— 20

Q. Now, you are still standing down here, remember that. A. Yes, sir.

Q. Now, is there a saloon here? A. Yes, sir.

Q. And a saloon here? A. Yes, sir.

Q. If you are still standing down there? A. Yes, sir.

Q. Now, still standing down there which saloon did you see this lady come out of? A. Out of this side saloon (indicating).)

Q. This one (indicating)? A. Yes, sir. 30

Q. And then what did she do? A. She crossed on that side.

Q. On that walk? A. Yes, sir.

Q. And where did she go then? A. Down towards her house.

Q. And where was she, then, as she crossed the street when the accident happened? A. She was right in the middle.

Q. You are still standing here? A. Yes, sir.

Q. Show us where the woman was crossing? 40
A. The woman was right here in the middle, and the little baby was crossing the street here (indicating).

Q. Was the little baby going over towards the house? A. Yes, sir.

Q. Following the woman? A. Yes, sir.

By Mr. Crane: Q. She came out of this saloon, then (indicating)? A. Yes, sir.

10 By the Court: Q. You lived on the west side of VanBuren street? A. Yes, sir.

Q. And the saloon out of which the woman came was on the same side as your house? A. Yes, sir.

Q. On the corner of Malvern street? A. Yes, sir.

Q. And then when the woman came out what street was it she crossed first? A. It was on the corner.

20 Q. After she came out of the saloon what street did she cross first? A. Crossed VanBuren street first.

Q. Show me with your finger. A. This way she crossed first (indicating); here was the saloon and she crossed this way and went in that house.

Q. First she crossed VanBuren street? A. Yes, sir.

Q. To the opposite side? A. Yes, sir.

30 Q. And then what did she do? A. She went and stood on the corner and the baby was in the middle of the street, crossing the street.

Q. Which corner did the lady stand on? A. On this corner (indicating).

Q. Then the lady first crossed VanBuren street from west to east? A. Yes, sir.

Q. And then crossed Malvern street from north to south? A. Yes, sir.

Q. And the little girl followed her? A. Yes, sir.

40 Q. And how far did the little girl get? A. She was right in the middle.

Q. Just show how the little girl walked. A. Well, she walked slow.

Q. But trace it here. She comes out of the saloon. A. She comes out of the saloon and goes straight over here (indicating), and then she goes —no, this is the saloon; she goes over this way, and this is another saloon, and from that saloon she crosses over here and gets struck with the horses.

Q. But how could she get struck, then? A. 10
Well, the wagon was coming this way; she was
crossing the street here (indicating).

Q. Was the team coming towards your house
or going away from your house? A. Going away
from my house.

Q. Then the team was going so (indicating)?
A. Yes, sir.

Q. In that direction? A. Yes, sir.

Q. This is your house? A. Yes, sir.

Q. Now, just point out on the map where the lit- 20
tle girl was struck. Never mind how she got
there. Show us where she was hit. A. Well,
she went this way and came over this way (indi-
cating) and the baby was in the middle when she
was struck.

Q. Where did she get hit? A. I don't know
where she got hit first.

RE-CROSS-EXAMINATION by Mr. Crane:

Q. You live near Delancey street, do you not? 30
A. Yes, sir; Chestnut and Delancey.

Q. And that is a block below Malvern street?
A. Yes, sir.

Q. What number did you live at? What was
the number of your house, do you recollect? A.
There was no number on it.

Q. There was no number on it? A. No, sir.

By Mr. Osborne: Q. Are those short blocks or
long blocks? A. It was a short block.

Q. How old are you now? A. Thirteen. 40

ROBERT A. GUILIANO, sworn in behalf of
plaintiff:

Direct-examination by Mr. Osborne:

Q. Doctor, you are a practicing physician in
this city? A. Yes, sir.

10 Q. How long have you been such? A. About eight years.

Q. In June, 1904, were you connected with St. Michael's Hospital? A. St. James' Hospital.

Q. St. James' Hospital? A. Yes, sir.

Q. Do you recall this little girl here having been brought in there on June 8th? A. Yes, sir.

Q. Did you treat her? A. Yes, sir.

Q. Just tell us what condition you found her in when you first saw her? A. Well, I was tele-
20 phoned by the Sister Superior of the hospital at about half past eight or nine o'clock, something like that, to call at the hospital immediately, that there had been a case, a bad case, a serious case, come in, and wanted me to see it; and when I got to the hospital I found the child downstairs in one of the dressing rooms, and the child was unconscious; and on examination I found that the child was suffering with a compound fracture in three different places of the lower jaw, and the bone
30 was protruding, hanging out from the mouth; then there was also a fracture of the neck of the humerus, the left arm. There was also a sort of a movable neck, the child could bring the neck around 'most any way. I wasn't sure then what it was, but after awhile I made an X-ray examination, and found that she had a fracture of the sixth cervical vertebra. The child remained in the hospital for about three days; she was unconscious for about a day and a half; and the
40 mother asked me about the prognosis of the case—I mean by that what the result of the case was going to be, whether the child was going to live or die—and at the time I expressed my opinion that the child was very serious and would probably die.

Objected to as incompetent.

Objection overruled.

Q. Doctor, how long did the child remain in the hospital? A. Three days. 10

Q. And then where was it taken? A. It was taken home. The mother said that if the child was going to die, she would rather have the child die at home. That is what I wanted to bring out.

Objected to.

The Court: Strike it out.

Q. What was the reason that the child was taken from the hospital? A. Because the prognosis of the case was bad; the mother wanted the child to die at home, if the child was going to die. 20

The Court: Strike out what the mother said.

Q. Did you continue to treat the child after it was taken home? A. Yes, sir.

Q. How often did you call at the house to see it? A. Well, at the beginning I called probably twice a day; I continued that for probably a month; and I called three months altogether, but after the first month I think I called once a day and as the child got better, why, I called two and three times a week, until finally I stopped calling. 30

Q. What do you mean by a compound fracture of the jaw? A. Why, I mean a fracture that also has a laceration; the fracture communicates with the air, communicates with the atmosphere.

Q. You say there were three breaks in the jaw? A. Three different places; yes, sir.

Q. Now, you speak of a tranverse fracture of the neck of the humerus? A. Yes, sir. 40

Q. What is the neck of the humerus? A. Well, the neck of the humerus is simply this; that the humerus is composed of a shaft, the upper part of it is composed of a shaft—

Q. Where is the humerus? A. It is the bone of the arm here (indicating), and there is a shaft, and then what we call tuberosity, which is the protuberance here, and between the tuberosity

10 and the head of the humerus, which is rough—it is what they call a socket and ball joint—between the ball and the tuberosity there is a neck; that is the neck of the humerus and there is where the fracture took place. It was an extra capsular fracture. That means that the fracture took place outside of the capsule of the joint.

Q. When did you make this X-ray examination to determine the condition of the neck? A. Just during those three days.

20 Q. While the child was at the hospital? A. Yes, sir.

Q. Were these injuries that you speak of painful? A. Very painful.

Q. Do they to any extent continue to exist at the present time? A. Yes, there is a deformity of the neck; that is very apparent; you can see that.

Q. In what way does that manifest itself? How is it apparent? A. Well, you can see it.

30 Q. What can you see if you examine the neck? A. Well, I can see probably more than anybody else could probably see; but you could see yourself that the child has her neck twisted to one side; it isn't a straight neck.

Q. And that is caused by— A. By the fracture of the body of the cervical vertebra, the sixth.

Q. Do these breaks in the child's jaw affect the child at all at this time? A. Well, she doesn't get a proper closure of the two jaws; it isn't normal closure.

40 Q. Did these injuries, in your opinion, have a tendency to affect the child's mentality? A. Well, I notice that the child's memory is not good.

Q. Would they have a tendency to affect the child's mind? A. Certainly, the concussion of the brain that she received at the time.

Q. Have you seen this child from time to time since the accident? A. Well, not recently, I haven't.

Q. When did you last make an examination? 10
 A. Oh, I made an examination last night.

Q. In your opinion, is the child's mental condition at the present time due to these injuries which it received? A. Yes, sir.

Q. What are the probabilities of its ultimate recovery? A. Well, in regard to the memory, being that the child is young, I can't say; she may improve; but regarding to the injuries to the jaw and her arm and her neck, they are permanent.

Q. Well, now, this injury to the spine, will that 20
 probably grow less or greater as the child grows older? A. I can't say.

Mr. Crane: I have not heard him say that the spine was injured.

The Court: Yes, one of the vertebrae was injured. That is what makes the trouble with the neck.

Q. Doctor, make yourself clear on that. When you examined this neck with the X-ray—when you examined with the X-ray, what did you examine, 30
 the arm or neck? A. Everything, examined the jaw and the elbow joint—I mean the shoulder joint—and I examined the spine.

Q. Now tell us about the spine. A. There was a slight deviation the bone was not only fractured, but the spine on one side was somewhat depressed, showing where there had been a crushing blow given to the vertebra; and it was a very hard thing to treat it properly, because a plaster-of-paris cast in these cases don't give a very good 40
 result; but, nevertheless, I did my best, and the child recovered; and, as I say, there is an apparent deformity, which can be seen today; the child has a slightly twisted neck, and with it, I thought, and I think today, that the child probably had laceration of some of the ligaments of the neck.

Q. And you say that condition will not get better? A. No, sir; she will always have a deformity there.

10 Q. Will the child probably suffer in the future
 any pain from these injuries? A. Well, I can't
 very well say that; but I can say this, that the
 child has suffered and is suffering with pain in
 that joint, especially when the weather changes,
 when there is humidity, she complains of pain in
 that shoulder where that fracture exists. That is
 probably due to some abnormal circulation there;
 possibly the circulation of the joint is not good;
 it might be a neurosis, a nervous condition there,
 20 that some of the nerves had been injured at the
 time.

CROSS-EXAMINATION by Mr. Crane:

Q. When did you first see this child? A. Why,
 on the 6th, I think it was, of June.

Q. You never saw the child until it was brought
 to the hospital? A. No, sir.

Q. And you do not know anything about what
 the child's mental condition was prior to that
 30 time? A. No, sir.

Q. And therefore you cannot say what the men-
 tal condition of the child before the injury was,
 whatever it may be now? A. I can compare her
 mental condition now with what the mental con-
 dition ought to be in a child of her age, from my
 experience as a physician.

Q. Well, there are many things which will cause
 a lack of memory, are there not? A. They are
 functional and not organic.

40 Q. Do you mean to say that a broken arm nec-
 essarily interferes with a person's memory? A.
 A broken arm; no, sir.

Q. Or a broken jaw? A. No, sir.

Q. What in this case interferes with her mem-
 ory? A. Well, I think in her case the mental dis-
 turbances are due to concussion of the brain that
 the child probably had at the time.

Q. Well, she is overcoming that, you say? A.
 Well, she is probably overcoming it, yes.

Q. She is a young child? A. I say she probably will; my prognosis with reference to her mental deficiencies is simply that they might and might not recover.

Q. Well, that is your opinion? A. That is my opinion.

Q. Your opinion also was that she was going to die, and that is the reason that you took her from the hospital, isn't it? A. Yes, sir; I had all reason to think so.

Q. Well, she did not die, did she? A. No. 20

Q. So, then, you were mistaken? A. Yes, sir.

By the Court: Q. Doctor, was she at any time insensible? A. She was about a day and a half, she was unconscious.

Q. That was the result of the concussion of the brain, I suppose? A. And probably injury to the spine.

Plaintiff rests.

30

Defendant's counsel moves that plaintiff be non-suited, on the ground that no negligence on the part of defendant has been shown.

After argument, the Court said:

ADAMS J. The plaintiff was too young to be careless—not of sufficient maturity to be charged with any duty for her own protection; and it is the law in this state, although, not in all states, that the negligence of the person in charge of such a child is not imputed to the child. Consequently, the only question in the case is whether the negligence of the defendant, William Young, is established. 40

From the mere happening of an accident, no presumption of negligence arises. That is the general rule. There are exceptions to it; for example, if a man is walking along a street and a

10 brick falls out of a window and hits him on the head, or a barrel rolls out of a second story doorway and falls upon him, the occurrence of such an accident does raise a presumption of negligence, because bricks naturally do not fall out of windows, and barrels, if they are properly secured, do not, in the ordinary course of things, roll out of doorways. The very fact that these articles, which are incapable of self motion, get into motion necessarily raises a presumption that some-
20 body has been careless in not properly securing them. But this is not such a case, and the maxim that the thing speaks for itself does not, I think, apply. So that we are left to inquire whether the evidence in the case affords affirmative proof that the driver was negligent and by his negligence occasioned the accident—sufficient affirmative proof to justify a reasonable conclusion that he was careless.

30 It appears that the driver was driving at a walk. There was, therefore, nothing reckless about the rate at which he was progressing. There is no affirmative evidence that he was inattentive to his surroundings. There is some evidence that there was just then a rain storm, the coming up of which coincided pretty nearly with the accident, and that it was also toward the end of the day, seven or eight o'clock, on a summer evening, when the light was somewhat subdued. So that
40 there is really nothing in the case as material for judgment, except the fact that a little girl is crossing a straight street following a woman, who apparently is about half the width of the street ahead of her, and that a driver, driving slowly, and not, so far as appears, inattentive to what he was doing, proceeds in such a way that one of the horses, to which the little girl was nearest, strikes her, she falls, the team stops and she is picked up. The question is whether there is any-

thing to go to the jury—whether, if the jury should 10
 find a verdict in favor of the plaintiff on this evi-
 dence, the Court would be able to sustain it con-
 sistent with the rules of law. If so, why, then,
 in every case where a person is run down under
 such circumstances negligence may be directly in-
 ferred—negligence on the part of the defendant,
 to say nothing about contributory negligence.
 Contributory negligence does not exist unless the
 negligence of the defendant is first established.
 It is to that that the negligence of the plaintiff is 20
 said to be contributory.

Now, can it be said, as a sound legal proposi-
 tion, that a person who is knocked down by a
 walking horse in the middle of the public high-
 way is injured by the negligence of the driver?
 Is that general proposition true? It seems to me
 that it would be going a great way to hold that.
 We must have something more, something to
 show want of care on the part of the driver, some-
 thing beyond a mere inference founded on these 30
 naked facts—some positive testimony showing
 some act of inattention or want of care—evidence
 for instance, that the driver was looking else-
 where, that he was not minding his business, that
 he was asleep or intoxicated, or what not. How
 can the Court or the jury predicate a charge of
 negligence on the bare fact that a walking horse
 knocks a person down in the middle of a street?

I think I ought to grant your motion, Mr.
 Crane. If I am wrong, there is a way of correct- 40
 ing any errors into which I may fall; but I am
 bound to act on my own judgment, and my judg-
 ment is that this is not made out.

Plaintiff's counsel prays an exception to this
 ruling of the Court.

Exception allowed; let it be sealed, and it is
 sealed accordingly.

FREDERIC ADAMS, (L. S.)
 Circuit Court Judge.

10

Assignment of Error.

COURT OF ERRORS AND APPEALS.

	CONSilIO NAPURANA,	}
	Plaintiff in Error,	
	vs.	
20	WILLIAM YOUNG,	}
	Defendant in Error.	

Afterwards, that is to say, as of the present term, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Consilio Napurana by Harry V. Osborne, her attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of
 30 exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to-wit:

That the said judge, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid refused to admit in evidence, declarations, statements or conversations made immediately after the accident by the employee or servant of the defendant, driving the wagon that caused the accident, as a part of the *res gestae*.

40 There is also error in this, to-wit, for that the said judge, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, after the said plaintiff had rested her case, granted the motion of the said defendant that the plaintiff be non-suited, and ordered that the said plaintiff take nothing by her said writ and that judgment of non-suit be entered against her.

Therefore, the said Consilio Napurana prays 10
that the judgment aforesaid may be reversed, an-
nulled and altogether held for nothing, and that
she may be restored to all things which she hath
lost by occasion of the said judgment, etc.

HARRY V. OSBORNE,
Attorney for and of counsel
with Plaintiff in Error.

Filed, Feb. 15th, 1906.

Joinder in Error.

20

NEW JERSEY COURT OF ERRORS AND
APPEALS.

CONSILIO NAPURANA,
Plaintiff in Error,

vs.

WILLIAM YOUNG,
Defendant in Error.

In Error.
Joinder in Error.

30

And hereupon, afterwards, to-wit, on the twen-
tieth day of February, A. D. Nineteen hundred
and six, the said William Young, by Elvin W.
Crane, his attorney, comes into Court and says
that there is no error either in the record and pro-
ceeding aforesaid, or in giving the judgment
aforesaid, and he prays here that the Court here
may proceed to examine as well the record and
proceeding aforesaid, as the matters aforesaid 40
assigned for error, and that the judgment afore-
said, in manner aforesaid given, may in all things
be affirmed, etc.

ELVIN W. CRANE,
Attorney for and of counsel
with Defendant in Error.

Filed, March 12, 1906.

THE FIRST PART OF THE HISTORY OF THE
LIFE OF JOHN BUNYAN
BY JOHN BUNYAN
IN TWO VOLUMES
THE SECOND PART OF THE HISTORY OF THE
LIFE OF JOHN BUNYAN
BY JOHN BUNYAN
IN TWO VOLUMES

By JOHN BUNYAN
Author of THE HISTORY OF THE
LIFE OF JOHN BUNYAN

1700

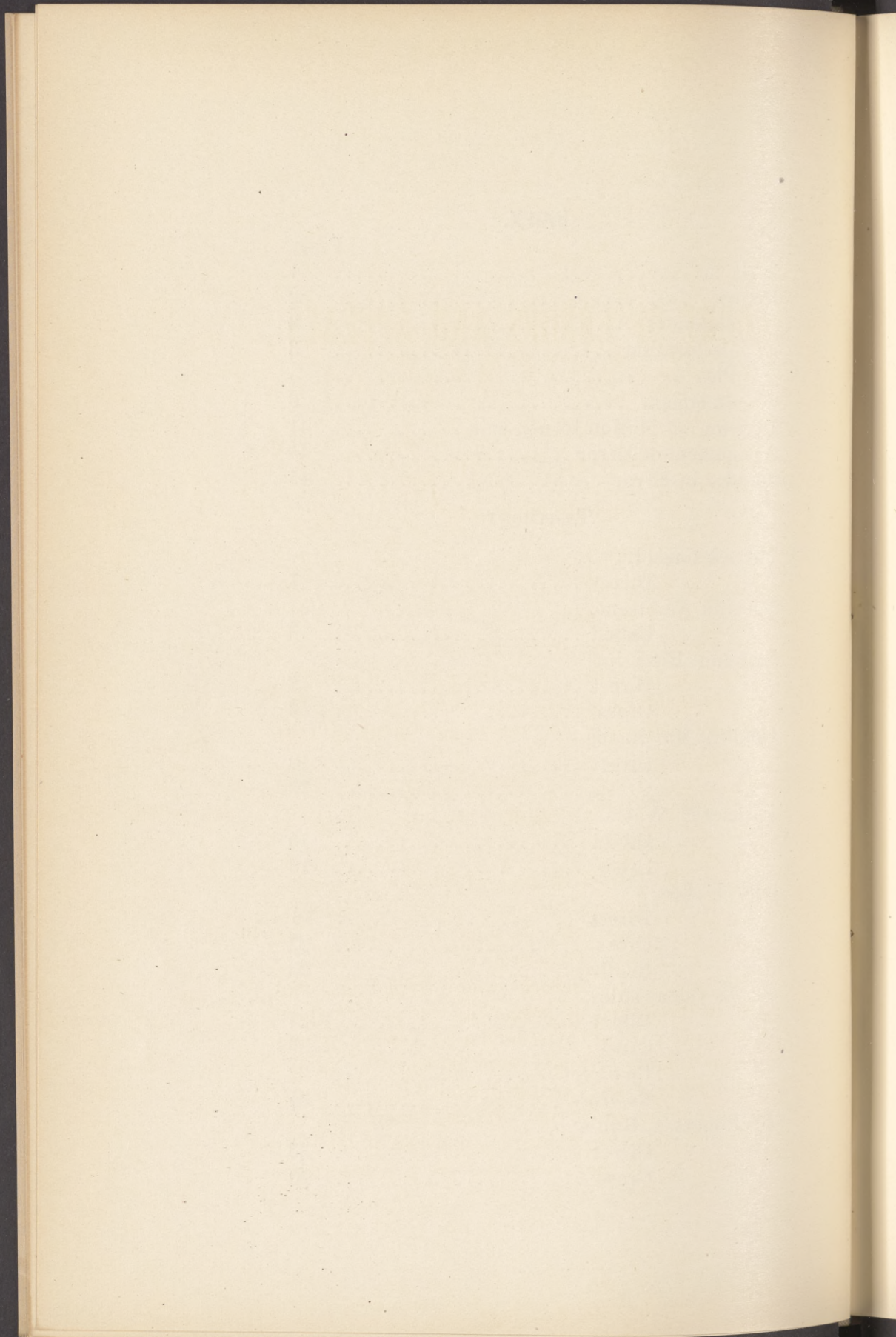
1700

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New Jersey
COURT OF ERRORS AND APPEALS.

CONSILIO NAPURANA by next
friend,

Plaintiff in Error.

vs.

WILLIAM YOUNG,

Defendant in Error.

By agreement of counsel the within state of the 30
case is abridged by the omission therefrom of the
petition and order for the appointment of next
friend.

Writ.

New Jersey, ss:

The State of New Jersey to Frederic
Adams, Esquire. Judge of our Cir-
cuit Court in and for the County of 40
Essex, Greeting:

Because in the records and proceedings, and
also in the giving of judgment in a plaint, which
was in our Circuit Court holden at Newark, in and
for the County of Essex between Consilio Napur-
ana, by next friend, plaintiff, and William Young,
defendant in an action of tort, manifest error
bath intervened to the great damage of the said
plaintiff as by her complaint we are informed,

10 we being willing that speedy justice should be
 done to the parties aforesaid in this behalf, do
 command you distinctly and openly to send under
 your seal, the record and proceedings aforesaid
 with all things touching and concerning the same
 to our Judge of our Court of Errors and Appeals
 in the last resort in all causes, at Trenton, on the
 sixth day of February next, together with this
 writ, that the record and proceedings aforesaid
 being inspected, we may cause to be further done
 20 thereupon, for correcting that error, what of
 right and according to the law and custom of the
 State of New Jersey ought to be done.

WITNESS, our Chancellor and President
 Judge of our said Court of Errors and Appeals,
 at Trenton aforesaid, the eighteenth day of Jan-
 uary, in the year nineteen hundred and six.

S. D. DICKINSON,
 Clerk.

Harry V. Osborne,
 30 Attorney.
 Filed, February 15, 1906.

Return.

State of New Jersey: }
 County of Essex, } ss:

I, Frederic Adams, Presiding Judge of the Cir-
 40 cuit Court Essex county, New Jersey by virtue of
 a certain writ to me directed, do hereby certify
 and return to the Court of Errors and Appeals
 of the last resort in this State the judgment re-
 cord and proceedings together with all things
 touching and concerning the same as by the with-
 in writ to me directed I am commanded.

Dated, February 8, 1906.

(L. S.)

FREDERIC ADAMS,
 Circuit Court Judge.

Summons.

Essex County, ss:

(L. S.)

The State of New Jersey, to the Sheriff of the County of Essex aforesaid, Greeting:

You are hereby commanded to summon William Young, if in your county he may be found, so that he be and appear before our Circuit Court to be holden at Newark, in and for the said County of Essex on the eighteenth day of July instant to answer unto Consilio Napurana, in an action of tort to her damage five thousand dollars, as is said, and have you then there this writ. 20

Witness, William S. Gummere, Esquire a Judge of our said Circuit Court, at Newark aforesaid, the eighth day of July in the year One thousand nine hundred and four.

ARTHUR HORTON,

Clerk. 30

H. V. Osborne,
Attorney.

Pleas before the Judge of the Circuit Court, holden at Newark, in and for the County of Essex of the eighteenth day of July A. D., 1904.

Arthur Horton, 40
Clerk.

Essex County, ss:

William Young, the defendant in this suit, was summoned to answer unto Consilio Napurana, the plaintiff therein in an action of tort, and the plaintiff being an infant under the age of twenty-one years, Pasquale De Falco has been appointed

10 to prosecute this action in her behalf, and there-
upon the said Pasquale De Falco her next friend
complains; for that the said defendant on the
eighth day of June, in the year nineteen hundred
and four, at Newark, in the County of Essex, was
the owner and possessor of a certain wagon which
was drawn and propelled along and upon the pub-
lic street or highways by horses attached thereto,
and it thereby became and was the duty of the
20 use, management and control of said horses and
wagon while being driven along and upon the pub-
lic street or highway as aforesaid, so as to avoid
colliding with and running into persons lawfully
walking along or across said public street or high-
way, yet the said defendant, not regarding his
duty in that behalf, did not use due and proper
care in the use, management and control of said
horses and wagon while the same were being driv-
en along said public street or highway, so as to
30 avoid colliding with and running into persons law-
fully walking upon and across said public street
or highway, but wholly failed and neglected so to
do. And on the day and year aforesaid, to-wit, at
the junction of Malvern and Van Buren streets,
in the City of Newark, County of Essex afore-
said, the said defendant by his servants so care-
lessly, negligently and improperly used, managed
and controlled said horses and wagon while the
same were being driven upon and along said pub-
40 lic street or highway, so as to collide with and run
into the said plaintiff, who was then and there
lawfully going upon and crossing said public
street or highway at the junction of Malvern and
Van Buren street as aforesaid, with such force
and violence as to throw the said plaintiff to the
street, thereby seriously, painfully and perman-
ently bruising, wounding and injuring the said
plaintiff so that her life was despaired of; and

also by means of the premises, said plaintiff be- 10
 came sick, sore, lame and disordered, and so re-
 mained and continued for a long space of time,
 to-wit, hitherto, and still so continues, during all
 of which time said plaintiff suffered and under-
 went great pain and in the future will suffer and
 undergo great pain, and was hindered and pre-
 vented from transacting and attending to her nec-
 cessary and lawful affairs by her during all that
 time to be performed and transacted, and lost and
 was deprived of divers great gains, profits and 20
 advantages which she might and otherwise would
 have derived and acquired; and thereby also, the
 said plaintiff was forced and obliged to lay out and
 expend divers large sums of money, amounting
 in the whole to the sum of one hundred dollars in
 and about endeavoring to be cured of said wounds,
 bruises and injuries, so received as aforesaid, to-
 wit, at Newark, aforesaid. Wherefore the said
 plaintiff says that she is injured and has sus-
 tained damages to the amount of five thousand 30
 dollars, and therefore she brings her suit.

H. V. OSBORNE,
 Attorney for plaintiff.

And the said defendant, by Elvin W. Crane.
 his attorney, comes and defends the wrong and in-
 jury when etc. and says that he is not guilty of
 the said supposed grievances above laid to his
 charge or to any or either of them, or any part
 thereof in manner and form as the said plaintiff 40
 hath above thereof complained against him, and
 of this he, the said defendant puts himself upon
 the country, etc.

ELVIN W. CRANE,
 Attorney for Defendant.

10

Judgment.

And now at this day that is to say the Tuesday of September next who neither etc. to recognize etc. because etc. and the same day is given to the parties here etc.

At which time before the Judge aforesaid, at Newark, aforesaid, come the parties aforesaid, by their attorneys aforesaid and the Sheriff hath not
20 sent here the writ to him in this behalf directed nor hath he done anything thereupon.

And now at this day that is to say the twentieth day of November, nineteen hundred and five to which day the issue as aforesaid, joined had been continued come the said parties by their said attorneys before the judge aforesaid at Newark aforesaid and the said plaintiff failing to prosecute her said suit by her next friend appointed by order of the Court in this behalf the Court do
30 thereupon order that the said plaintiff take nothing by his said writ, but that she and her pledges to prosecute be in mercy etc. and that the said defendant do go thereof without day etc.

Whereupon it is considered that the said defendant do recover against the said plaintiff the sum of twenty-four dollars and sixty-eight cents as for his costs and charges by him about his defence in this behalf laid out and expended by the Court now here adjudged to him with his assent
40 according to the form of the statute in such case made and provided and that the said defendant have execution thereof.

And in the said defendant in Mercy etc.

Judgment signed Nov. 20, 1905.

W. S. GUNMERE, Judge.

ESSEX CIRCUIT COURT.

10

Monday, November 20, 1905.

CONSilIO NAPURANO, by next
friend,

vs.

WILLIAM YOUNG.

In Tort.

20

Before Hon. FREDERIC ADAMS, J., and a Jury.

For plaintiff appears Harry V. Osborne.

For defendant appears Elvin W. Crane.

Mr. Osborne opens for plaintiff.

PATRICK CASSIDY, sworn in behalf of plain-
tiff:

Direct-examination by Mr. Osborne:

Q. Mr. Cassidy, where do you live? A. I live 30
in 186 Pacific street.

Q. How old are you? A. I am about sixty-five.

Q. On the 8th of June, 1904, were you working
for Mr. Young, the defendant? A. Yes, sir.

Q. And on that day at about six o'clock were
you driving a team for Mr. Young along VanBur-
en street and across Malvern street? A. No, sir;
not at six.

Q. At what time? A. About seven.

Q. About seven? A. Yes, sir. 40

Q. You were working for Mr. Young then? A.
Yes, sir.

Q. And driving his wagon? A. Yes, sir.

Cross-examination waived.

10 Mr. Osborne: The plaintiff in this case, the child, is seven years old. Whether your Honor will think that she is competent to testify or not, I cannot say. I will submit her for the examination of the Court, and let the Court determine.

CONSILIO NAPURANO, called in behalf of plaintiff (not sworn).

20 By the Court: (through the interpreter in the Italian language). Q. Ask this little girl what her name is? A. Consilio.

Q. What is your last name? A. Napoli.

Q. Where do you live? A. I don't know; my mother knows it.

Q. Do you know the street? A. No, sir.

Q. How old are you? A. I don't know.

Q. What is your mother's name? A. Angelina.

30 Q. What is your father's name? A. Pasquale.

Q. What city is this that you live in? A. I don't know.

The Court: I do not think this little girl ought to be sworn.

Mr. Osborne: I might say, with reference to where she lives, she has only recently moved away and just within a few weeks came back to Newark again. That may be a very reasonable reason why she doesn't know the street or the town.

40

The Court: Well, her mind is evidently very immature. That is all.

ANGELINA RICCI, sworn in behalf of plaintiff (through the interpreter):

Direct-examination by Mr. Osborne (through the interpreter):

Q. Ask her if her maiden name is Ricci? A. 10
Yes, sir.

Q. What is your husband's name? A. Napu-
rano.

Q. No, ask her who she is married to? A. Pas-
quale Defalco.

Q. Are you the mother of the little girl who was
just on the witness-stand? A. Yes, sir.

Q. Was the child hurt a year ago last June?
A. Yes, sir.

Q. Did you see her hurt? A. No, sir; I didn't 20
see it.

Q. How soon after the accident did you see
her? A. Right away.

Q. Whereabouts? A. Corner of VanBuren
and Malvern street.

Q. And where was the child then? A. It was
going home.

Q. No, after the accident, when you saw her
on the corner of VanBuren and Malvern? A.
They brought her in the house. 30

Q. What was the child's condition? What was
the matter with her? A. Arm broke, teeth broke
and everything.

Q. What do you mean by "everything?" A.
You couldn't tell that it was a human being.

Q. Well, did they send for a doctor? A. Yes,
sir.

Q. What doctor did they send for? A. Dr.
DonAntonio.

Q. Then what was done with the child? A. He 40
didn't want to touch her, and they sent her to the
hospital.

Q. Oh, he did not treat her, then? A. No, sir.

Q. What hospital was she sent to? A. St.
James.

Q. And how long did she remain there? A.
Three days. She didn't want to stay there no
longer, and they sent her home.

Q. They sent her home? A. Yes, sir.

10 Q. How long was she confined to the bed at home? A. Over two months.

Q. How long before she could go outdoors? A. Four or five months.

Q. Is there anything the matter with the child now? A. She has a crooked neck, and whenever it is bad weather the arm hurts her.

Q. How about her face—anything the matter with her jaw? A. No, sir; nothing; the neck; when she wants to eat, she can't eat.

20 Q. What was the child's condition before the accident; was it healthy? A. Sure.

Q. Was its neck straight? A. Sure.

Q. Could it eat all right? A. Yes, sir.

Q. Did it have any pains when the weather was bad? A. No, sir; nothing.

Q. How was the child's mind before the accident? Was it a bright child or not? A. Yes, she had a color and she was stout.

30 Q. How was her mind; was she bright in her mind? A. Yes, she used to do anything.

Q. Is there any difference now? A. Now she is like a stupid.

CROSS-EXAMINATION by Mr. Crane:

Q. Who brought the child to her house? A. When?

Q. After the accident? A. We took her direct to the hospital.

40 Q. Oh, then, it was not taken into her house? A. No, sir; direct to the hospital.

Q. Who had the child? A. Two women.

Q. Do you know their names? A. Giuditta Malangone and another one; she is dead.

Q. What doctor attended the child at her house after it was brought back from the hospital? A. Dr. Guiliano.

Q. How many times did he visit her? A. He came twice a day.

Q. For how long? A. Over a month.

Mr. Crane (To the interpreter): Well, 10
what did she say there after you answered
the question?

The Interpreter: What do you mean?
"Over a month," she says, "until the baby
got well."

Q. Until the baby got well? A. Until the baby
got well.

Q. Well, was it a month? A. Then, instead of
coming twice a day, he came once a day.

Q. How old is the child? A. Seven years. 20

Q. Now? A. Yes, sir.

By the Court: Q. Ask her what is the child's
birthday? A. I can't remember.

Q. What month? A. I got the papers home.

Q. What month? A. I can't remember.

Q. What season? A. The eleventh of June.

Q. How old was she on the eleventh of last
June? A. Over six years.

Q. Was the eleventh of June her birthday? A.
Yes. 30

Q. Now, on the eleventh of last June, last
summer, how old was she? A. Just six years.

Q. Six last June? A. Yes, sir.

Q. Was there a Doctor DonAntonio? I want
to see if I understood her correctly? A. Yes; he
lives in front of the Italian church.

Q. What did he have to do with the case? A.
He didn't want to touch her.

Q. When did he see her? A. Right after the
accident. 40

Q. Before she was brought to the house? Well,
I do not know that she was brought to the house;
perhaps not. But before she went to the hospi-
tal? A. Yes, sir.

Q. And the physician who saw her after she
came out of the hospital was Dr. Guiliano? A.
Yes, sir.

Q (By Mr. Osborne).: How long was she in the
hospital, do you say? A. Three days.

10 GIUDITTA MALANGONE, sworn in behalf of plaintiff (through the interpreter):

Direct-examination (through the interpreter) by Mr. Osborne:

Q. What is your husband's name? A. Alfonso Sabarasa.

Q. Do you know this little girl back of me? A. Yes, sir.

Q. Do you remember when she was hurt? A. Yes, sir.

20 Q. When was that? A. I don't remember in what month it was.

Q. How long ago, about? A. I don't know.

Q. Where was it? A. On VanBuren street.

Q. Near what other street? A. Malvern street.

Q. When did you see her? A. After she went under the car.

By Mr. Crane: Q. What? A. After she went under the car.

Q. Car?

30 The Interpreter: That is what she said.

The Court: What did she say?

The Interpreter: "After she went under the car."

Mr. Osborne: Did she say "car" or "wagon?"

The Interpreter: "Car." (The Interpreter gives the Italian word).

Mr. Osborne: Does that mean car or wagon?

40 The Interpreter: I will have to ask her what she means.

By the Court: Q. What was it she went under? A. Car.

Q. What kind of a car? A. Car of the moving stuff.

By Mr. Osborne: Q. What kind of stuff? A. Greens, everything.

Q. Green stuff? A. Greens, everything.

Q. Now ask her whether she means *carreto* or 10
car? A. Car.

Q. What is that? A. Car.

By the Court: Q. Ask her what moved the car?

A. The horses.

Q. Now, tell us what you saw? A. I was in
my house; I heard hollering; after I went out
and I found that the car was stopped near the
sidewalk, and the old man crying.

Q. And where was the child? A. At the cor- 20
ner; but she went under the car right at the cross-
ing.

Mr. Crane: She was not asked that.

By Mr. Osborne: Q. Where was the child?

The Court: Just what she saw, nothing
else.

A. Maria Antonio Defalco gave me the child—
she does not exist now—at the corner.

By the Court: Q. Dead? A. Yes, sir.

Q. Was she the child's grandmother? A. No,
sir. 30

By Mr. Osborne: Q. What did you do with the
child? A. The officer told me to take the child in
my house.

Q. Well, did you do it? A. Yes, sir.

Q. And then what happened to the child? A.
Then they called for the doctor, and then they
took her to the hospital.

Q. How long after she had taken the child in
her house was she taken to the hospital? A.
About an hour. 40

Q. Is your husband here—Pasquale? A. Al-
fonso, yes.

Mr. Osborne: Oh, yes, Alfonso.

CROSS-EXAMINATION by Mr. Crane:

Q. Just a question. As I understand it, when
you went out in the street this woman who is now

10 dead gave you this child; is that it? A. Yes, sir; but she told me—

Q. What? A. But she told me that the car had struck—

The Court: Never mind that.

Q. Of course I knew it would lead up to that. You do not know anything about this accident, do you? You did not see this child knocked down? A. No, sir.

By the Court: Q. You say the old man was
20 crying? A. Yes, sir.

Q. Have you seen him here today? A. I don't think I can recognize him.

Q. Where was he when he was crying? A. On the car.

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

Q. Where was the car? A. Right near my home.

Q. Where is your house? A. I used to live in VanBuren street.

30 Q. What number? A. 148.

Q. How near is that to the corner? A. From here to there (indicating):

Q. From here to where? A. As far as Dr. Guiliano (indicating).

Q. As far as to the gentleman who sits just inside of the rail. Is there any house between your house and the corner? A. No, sir.

Q. An open lot? A. Yes, a street.

Q. What street? A. VanBuren.

40 Q. What street does your house front on? A. VanBuren and Malvern street.

Q. Is your house on the corner of those streets? A. Yes, sir.

Q. What doctor did they send for? A. Don-Antonio.

Q. Did he come? A. Yes, sir.

Q. Did he come into your house? A. Yes, sir.

- Q. Who went with the child to the hospital? 10
 A. The mother.
 Q. Did Dr. DonAntonio go? 9. No, sir.
 Q. Did they take the child in an ambulance?
 A. Yes, sir.

MICHAEL E. WALSH sworn in behalf of plaintiff:

Direct-examination by Mr. Osborne: 20

Q. Mr. Walsh, are you a police officer in Newark? A. Yes, sir.

Q. Were you on duty on the 8th day of June, 1904, Down Neck, Third Precinct? A. I was on reserve duty at the station house.

Q. Do you remember being called to the corner of VanBuren and Malvern streets or sent there about six or seven o'clock in the evening of that day? A. Yes, sir.

Q. With reference to a little girl? A. Yes, sir. 30

Q. Is this the little girl (indicating)? Do you recognize her? A. No, I couldn't recognize her now.

Q. Well, what happened when you got down there? A. When I got there the doctor was there with the child, and she had been run over, so they told me.

Mr. Crane: Will you speak a little louder?

Witness: When I got there the child was in a house and the doctor was there with her, and advised her to be taken to the hospital; we wrapped her up in a blanket and took her to the hospital. She was hurt in the mouth; her jawbone was sticking out; that is about all I could see about the child that was wrong with her. 40

Q. Who was with you? A. Officer Reilly.

Q. You took her to what hospital? A. St. James.

10 Q. About what time was that? A. Oh, I should judge about eight o'clock.

By the Court: Q. Eight o'clock in the evening or the morning? A. Eight o'clock in the evening; yes, sir.

By Mr. Osborne: Q. Did you see the driver of the wagon there? A. Yes, sir.

Q. Would you recognize him if you saw him? A. Yes, sir.

Q. Do you see him in court? A. Yes, sir.

20 Mr. Osborne: Cassidy, stand up.

(A man in the audience arises).

Q. Is that the man? A. Yes, sir.

CROSS-EXAMINATION by Mr. Crane:

Q. Where did you see the driver; where was he? A. I seen him at the station house after we come back from the hospital, after he was fetched in; I don't know who arrested him.

30 Q. Well, was he at the corner when you got there? A. I didn't see him; I see a truck standing there; but we didn't stop for him; we took the child and got her to the hospital.

JOHN F. LEE sworn in behalf of plaintiff:

Direct-examination by Mr. Osborne:

Q. Mr. Lee, are you a police officer in this city?

A. Yes, sir.

40 Q. Attached to the Third Precinct? A. Yes, sir.

Q. Do you remember being on duty on the corner of Malvern and VanBuren streets on the evening of June 8, 1904? A. Yes, sir.

Q. Do you remember an accident in which a wagon struck a small child? A. I do; yes, sir.

Q. Do you remember the child? A. Well, I never took notice to the child, not to know her, before that nor since.

Q. Well, do you recognize this little girl as 10
being the child (indicating)? A. Well, I wouldn't
say that is the young one that got hurt.

Q. Well, now, just tell us where you were on
that night, on that evening, and what you saw.

A. Well, I was standing on the corner of Van-
Buren—

Q. Which corner were you standing on? A. I
was standing on the west corner.

Q. The west corner? A. Yes, sir. I was stand-
ing there, and I see this wagon coming up with 20
two men onto it—

By the Court: Q. VanBuren and what other
street? A. VanBuren and Malvern.

By Mr. Crane: Q. Malvern street? A. Mal-
vern street and VanBuren. And I see this wagon
coming up and two men on the wagon, and the
team was walking very slow; it got dark and a
shower of rain come up; there was a couple of
children on the sidewalk, and these run across the
street, and the wagon or the horse or the pole 30
hit this young girl and knocked her down, and
some woman was walking up with a pint of beer
in a can up the street, she picked the young one
up and carried it in the house, and after I heard
the holler I followed the woman in, and after
finding what it was I telephoned for a doctor, and
after the doctor come there he ordered the young
one taken to the hospital.

By Mr. Osborne: Q. Now, you did not see all
this, did you? A. No, sir; I didn't see it; my 40
back was turned at the time.

Q. Well, this is just what you heard? A. That
is just what I heard; yes, sir.

By the Court: Q. Well, how much was it that
you did see?

Mr. Osborne: Why, he has been telling
conclusions from what he heard.

Q. How much of it did you see? You want to

10 separate what you saw from what you were told.
 A. Well, my back was turned to it, when the wagon passed me by, my back was turned; I didn't see the wagon until I went to the other side of the street, when the accident happened.

By Mr. Osborne: Q. Which direction, as to the points of the compass, does VanBuren street run, north and south or east and west? A. Well, it runs straight up.

Q. Well, does it run north and south or east
 20 and west? A. Well, it runs north and south.

Q. And Malvern street crosses it at right angles? A. Yes, sir.

Q. East and west? A. Yes, sir.

Q. Now, there is a tenement house on one corner, is there not? A. Yes, sir.

Q. What corner is that on? A. Well, that is on the off side of it.

Q. Well, first let me ask you where you were standing, north, south, east or west? A. I was
 30 standing at the saloon corner.

Q. Well, there are two saloons? A. Yes, sir; each side; yes, sir.

Q. Were you standing on the southeast corner? A. I was standing on the corner—

Q. Well, on which side of VanBuren street were you, on the east or west? A. I was on this side of VanBuren street.

Q. Well, I don't know which that is. A. Well, VanBuren runs the same as this, and Malvern
 40 street crosses it in this direction (indicating). Well, there is a saloon on that corner and a saloon on this corner; I was standing here on this side.

The Court: Where is Malvern street?

Mr. Crane: It is down over the railroad, your Honor.

Q. I show you a rough sketch representing two streets, VanBuren street and Malvern street (paper shown to witness). A. Yes, sir.

Q. That is north and that is south, that is east 10
and that is west, as indicated by that arrow.
Now, the wagon, you say, was going along Van-
Buren street? A. Yes, sir.

Q. In a northerly direction? A. That way
(indicating).

Q. (Indicating) There is a saloon and there is a
saloon. Where were you standing? A. Right
here.

Q. Right here where I make that cross? A.
Yes, sir. 20

Q. With your back to the scene of the accident?
A. Yes, sir.

By the Court: Q. How many blocks is Mal-
vern street from Market street? A. From Mar-
ket?

Q. Is it near Market street or is it—A. About
eight blocks from Market street.

Q. You say your back was turned to something.
To what, to the wagon? A. Yes, sir.

By Mr. Osborne: Q. What first attracted your 30
attention? A. When I heard the holler.

Q. You heard a holloa? A. Yes, sir.

Q. And then you turned around? A. Then I
turned around and went across the street, and
this woman was after picking up the young one
and running in the house with it.

Q. That was the first you saw of it? A. Yes,
sir.

Q. Was the wagon going straight along Van-
Buren street or did it turn around the corner? 40

The Court: One moment. Some part of
this testimony ought to be struck out.

Mr. Osborne: The first part, where he
testified to what he heard; yes, sir. I will
consent to that.

By direction of the Court, the steno-
grapher reads from the record as follows:

“And I see this wagon coming up and

10 two men on the wagon, and the team was walking very slow; it got dark and a shower of rain come up; there was a couple of children on the sidewalk, and these run across the street, and the wagon or the horses or the pole hit this young girl and knocked her down; and some woman was walking up with a pint of beer in a can up the street, she picked the young one up and carried it in the house, and after finding
20 what it was I telephoned for a doctor, and after the doctor come there he ordered the young one taken to the hospital.

Q. Now, you did not see all this, did you?

A. No, sir; I didn't see it; my back was turned to it at the time."

The Court: A good deal of that appears to be hearsay. I will strike it out.

By the Court: Q. What was the first you saw of the team, officer? A. Coming along the street.

30 Q. Before or after the accident? A. Before.

Q. And how was it coming? A. Going towards Market.

Q. Going north? A. Yes, sir.

Q. At what rate? A. Just walking slow; a slow walk, the team was going.

Q. That is observation. Now, you said it got dark and a storm came up. A. Yes, sir:

Q. What do you know about that? A. Well, that is what started the children to run, I believe—the rain—to run out of the way.
40

Q. No, not what you believe, but what you saw. Did you see it get dark? A. Yes, sir.

Q. And there was a storm coming up? A. Yes, sir; a big heavy shower of rain.

Q. But you did not see the children run across the street? A. No, sir.

The Court: That goes out, then.

By Mr. Osborne: Q. Is Malvern street a block 10
below Chestnut one block? A. Yes, sir.

Q. One block from Malvern to Chestnut? A.
Yes, sir.

Q. You say you heard a holloaing and turned
and saw this woman running in the house with the
child in her arms; is that right? A. Yes, sir.

Q. Did you go in the house, too? A. Yes, sir.

Q. Did you see this child there? A. Yes, sir.

Q. In what condition was the child? A. The
child was laying there crying, with her jawbone 20
broke here; and I had a party telephone for the
doctor, and when the doctor come he had the
young one ordered to the hospital.

Q. Did you ring for the police patrol? A. No,
sir; they went for a telephone.

Q. That is the last you saw of it and all you
know about it? A. That is all I saw of it; yes,
sir.

Q. Did you have any talk with the driver of
the wagon at that time? 30

The Court: That would not be compe-
tent.

Mr. Osborne: Well, if it was immediate-
ly at the time of the accident—

The Court: No, No, not if it was immedi-
ately after the accident. If it was before
the accident, it is part of the *res gestae*,
part of the transaction; but whatever the
driver may have said after the thing hap-
pened would not be competent. The rule 40
is that where an employer employs an
agent to make statements for him, the
statements bind him, but where an employ-
er employs an agent to do something as
distinguished from making statements, his
acts bind him, but his declarations do not.

Plaintiff's counsel prays an exception to
this ruling of the Court.

10 Exception allowed; let it be sealed, and
it is sealed accordingly.

FREDERIC ADAMS, (L. S.)

Circuit Court Judge.

Q. Did you see Mr. Cassidy immediately after
the accident? A. Mr. Cassidy was on the wagon,
and when I see the child inside, I came out, and
I told him to wait until the doctor had come, not
to go away with the wagon until the doctor had
come.

20

CROSS-EXAMINATION by Mr. Crane:

Q. Now, Mr. Lee, when you first saw the wagon
what street was it on? A. It was coming right
on the corner.

Q. What street was it on? A. It was on Van-
Buren street.

Q. Which way was it going, north or south? A.
Going north.

Q. Was it loaded or unloaded? A. It was
30 loaded.

Q. How far away from you was it when you
first saw it, about? A. Well, I was just about
opposite when I saw it first—the wagon.

Q. That is, you were standing on the southwest
corner of VanBuren and Malvern streets, and
when you first saw it was the wagon directly in
front of you? A. Well, not just exactly; it might
have been just a little to the side.

Q. It had not reached you yet? A. It hadn't
40 reached the crosswalk at the time, and then it
only just went over the other crosswalk when the
accident happened.

Q. Did you see this child picked up? A. I seen
the woman running away with it.

Q. Did you see the child picked up in the street?
A. I didn't see the child picked up, no.

Q. Did you see one woman hand the child to
another? A. No, sir; I did not.

Q. When the wagon stopped where was it with 10
reference to the crosswalk? A. Well, it was just
over the crosswalk, about fifteen feet, I guess,
over the crosswalk, when the wagon stopped.

Q. Do you know whether it moved at all after
the child was struck? A. Well, I couldn't say
whether it moved; if it did, it was only a few feet.

Q. Did you see the child before it was injured?
A. No, sir. I might have seen it, but not to pass
any remarks of it.

Q. Well, you spoke of a storm coming up. Did 20
a storm come up? A. Yes, sir.

Q. Was it a heavy storm? A. It certainly
was.

Q. Was it raining when you saw this woman
take the child and go in the house with it? A.
Well, it was just starting to rain.

Q. Was the wind blowing? A. The wind was
blowing; yes, sir.

Q. Anything like an April shower—the storm?
A. Well, something similar to that. 30

Q. You do not recollect seeing this child before
the accident? A. No, sir; I do not.

Q. How many persons were on this wagon? A.
Two.

Q. And it had a team of horses, two horses, did
it? A. Yes, sir.

Q. And, as you say, was coming along on a
slow walk? A. On a slow walk; yes, sir.

RE-DIRECT-EXAMINATION by Mr. Os- 40
borne:

Q. These two people that you saw on this wag-
on, what were they doing? A. One of the men
was driving and the other was sitting on the seat
alongside of him.

Q. Were they talking to each other? A. I
couldn't say whether that they were talking to
each other or not.

- 10 By the Court: Q. Did you see a doctor there?
 A. I seen the doctor there, yes, sir.
 Q. Do you know his name? A. No, sir; I don't
 know the doctor's name.
 Q. Did you hear him talk? A. Yes, sir.
 Q. Was he an Italian doctor? A. He was; yes,
 sir.
-

20 BERTHA ODENWALDER, sworn in behalf
 of plaintiff:

Direct-examination by Mr. Osborne:

Q. Bertha, where do you live? A. Chestnut
 street.

Q. And where did you live a year ago last
 June? A. In VanBuren street.

Q. Whereabouts? A. VanBuren street.

Q. How far from the corner of Malvern and
 VanBuren? A. Well, a block.

30 Q. Do you remember an accident which hap-
 pened on the 8th of June, 1904? A. Yes, sir.

Q. To this little girl? A. Yes, sir.

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

Q. Is that the little girl that you saw have the
 accident (indicating)? A. Yes, sir.

Q. Where were you standing? A. I was stand-
 ing by our gate.

By Mr. Crane: Q. By what? A. By the gate.

40 By Mr. Osborne: Q. And how far from your
 gate was it that this accident happened, about?
 A. Well, it was from our gate was half a block.

Q. About half a block? A. Yes, sir.

Q. What did you first see about this whole
 thing? A. Well, I saw when the wagon go apast
 our house—

By the Court: Q. You must speak louder. You
 say you saw the wagon go by your house? A.

Yes, sir. The wagon was driving slow, and the lady was coming out of the saloon and the baby was walking in back of her.

Q. What do you mean by "the baby"—the little girl who was hurt? A. Yes, sir.

Q. Whom do you mean by "the lady?" A. She is dead now.

Q. Where was the saloon? A. She was about six feet away from the saloon.

Q. Where was the saloon? A. The saloon was on that side of the corner. 20

Q. Was that on the corner? A. Yes, sir.

Q. Well, the lady was coming out of the saloon and the little girl was walking behind her? A. Yes, sir.

Q. Go on. A. And the lady was on the corner.

By Mr. Osborne: Q. Did you see Officer Lee? A. No, sir; I saw him go in the house, but he was in the house quite long.

Q. You did not see him standing on the corner? A. I can't tell you. 30

Q. You do not remember that? A. No.

Q. Now, who was driving this wagon. A. That man down there (indicating).

Q. That old man? A. Yes, sir.

Q. The old gentleman who was on the stand first? A. Yes, sir.

Q. Who was on the wagon with him, anybody? A. Yes, sir; another man.

Q. Do you know who the other man was? A. No, sir. 40

Q. Black or white? A. Black.

Q. He was a colored man? A. Yes, sir.

Q. What were they doing when you saw them, anything? A. No, sir; they wasn't doing nothing; that old man, he was driving, and the other man was sitting there still.

By Mr. Crane: Q. What is that? A. The old man was driving, and the other man was sitting there still.

10 By Mr. Osborne: Q. How were they driving, fast or slow, as they went up the street? A. Slow.

Q. And was the child running or walking as it came up the street? A. Walking.

Q. How far was the child from the woman that it was following? A. The woman was on the corner and the child was on the next corner across, that corner, and the lady was on that corner, and the baby was crossing the street when the lady
20 was on that corner.

Q. As the lady with the beer was crossing the street—

The Court: She has not said anything about the beer.

Q. Well, as the lady who left the saloon was crossing the street? A. Yes, sir.

Q. How far behind her was the little baby? A. Well, the baby was— she was about here, and the lady was back on the other corner; the wagon was
30 right in the middle of the street and so was the baby.

By the Court: Q. You know Malvern street? A. Yes, sir.

Q. As you go towards Malvern street from your house on which side of VanBuren street is your house, on the right-hand or on the left? A. On the right-hand.

Q. On which side of VanBuren street is the saloon? A. On the right-hand.

40 Q. The same side as your house? A. Yes, sir.

Q. And on which side of the street did this lady that you speak of live, the one that came out of the saloon? A. She lived on the left-hand side.

Q. She lived on the left-hand side? A. On the corner.

Q. Now, she came out of the saloon, and what did she do? Did she start to go across the street?

A. Yes, sir; she came out of the saloon and went

across the street, and the baby was in back of 10
her.

Q. Now, when she got across the street where
was the little girl? A. The baby was in back of
her.

Q. In back of her? A. Yes, sir.

By Mr. Osborne: Q. Did you see the wagon hit
the baby? A. Yes, sir.

Q. What part of the wagon struck the baby?
A. Well, the horses struck the baby first.

Q. Did she fall down? A. Yes, sir. 20

Q. Do you remmeber whether it was light yet
or not? A. Yes, sir; it was light.

Q. Do you remember any storm? A. Yes, sir;
it was raining.

Q. Just begun to rain, had it? A. Yes, sir.

Q. At what point did you leave your house and
go up to the scene of the accident? A. I crossed
the street from our gate, I crossed the street and
ran over to the corner.

Q. And when you got there what happened? 30
Just tell us what happened. A. Well, they was
in there; I looked in the window, and they was
all in there crying; that is all that I saw.

Q. Where was the wagon? A. The wagon was
standing on the corner.

Q. And where was the driver? A. The man
went in the house.

Q. And the driver of the wagon went in the
house? A. Yes, sir; and he says he didn't see
the little baby. 40

Q. You looked in the window? A. Yes, sir.

Q. The window was up? A. Yes, sir.

CROSS-EXAMINATION by Mr. Crane:

Q. Then this wagon, Bertha, passed you before
it got up to the corner; is that it? A. Yes, sir.

Q. And you saw that there were two men in it?
A. Yes, sir.

- 10 Q. The wagon was loaded? A. Yes, sir.
 Q. And the horses walking? A. Yes, sir.
 Q. What caused you to look up the street? A. Well, I was looking for my sister.
 Q. You were looking in that direction for your sister? A. Yes, sir.
 Q. And you saw a woman coming out of the saloon? A. Yes, sir.
 Q. Did she have anything in her hand? A. Had a pail.
- 20 Q. She had a pail? A. Yes, sir.
 Q. And this little girl followed on behind? A. Yes, sir.
 Q. And just as they were crossing a storm came up; is that right? A. Yes, sir.
 Q. Did it rain? A. Yes, sir.
 Q. Well, didn't they run to get out of the rain? A. No, sir.
 Q. Are you sure of that? Yes, sir.
 Q. Well, as soon as the horses struck, or as
- 30 you suppose, the horses struck this little girl—is that right? A. Yes, sir.
 Q. The wagon stopped right there? A. Yes, sir.
 Q. Is that right? A. Yes, sir.
 Q. That is, so far as you could see. You were quite a little distance away, were you not? A. Yes, sir.
 Q. Half a block, you call it? A. Yes, sir.
 Q. The wheels did not go over this child at all?
- 40 A. No, sir; only the horses.
 Q. From where you were standing, it is your judgment that the moment the horses struck the child the team stopped? A. Yes, sir.
 Q. It was knocked down by the horse? A. Yes, sir; the horses.
 Q. Do you know which horse? A. Yes, sir.
 Q. Which horse? A. It was the brown one.
 Q. What? A. It was two brown ones.
 Q. Two brown horses? A. Yes, sir.

Q. Well, what I meant is this. The wagon was 10
going this way (indicating)? A. No, that way
(indicating) towards the market.

Q. Were you on the opposite side from where
this woman came out of the saloon? A. Yes, sir.

Q. You were on the opposite side? A. Yes,
sir.

Q. Well, is your house on the same side of the
street that you saw this woman come out of the
saloon? A. Yes, sir, only her house is on this
side. 20

By the Court: Q. Your house and the saloon
are on the same side? A. Yes, sir.

Q. And her house is on the opposite side? A.
Yes, sir.

Q. Opposite the saloon? A. Yes, sir.

By Mr. Crane: Q. Then you saw this child go
across? A. Yes, sir.

Q. And it was knocked down by the first horse?
A. Yes, sir.

By the Court: Q. Bertha, how far from Mal- 30
vern street is the saloon? A. Well, from Mal-
vern street? It is right on the corner of Van-
Buren.

Q. And is this lady's house on the opposite cor-
ner? A. Yes, sir.

Q. Then the saloon and house were opposite
one another? A. Yes, sir.

Q. And did the lady go straight across? A.
Yes, sir.

Q. How far behind her was the little girl? A. 40
Well, in the middle was the little girl and on the
corner was the lady.

Q. That is, by the time the lady had got across
the street the little girl was in the middle of the
street; is that the idea? A. Yes, sir.

Q. And in what part of the street was the wag-
on? A. Well, the wagon was right on the corner.

Q. No, but whether it was in the middle or on
one side? A. In the middle.

10 Q. This was about what time in the evening?

A. About seven o'clock.

Q. Had you had your supper? A. Yes, sir.

Q. What time did you have your supper that night? A. Had it six o'clock.

Q. At six? A. Yes, sir.

Q. Had the lamps been lit? A. Yes, sir.

Q. In the streets? A. No, sir; not yet.

Q. Not yet? A. No, sir.

Q. What lamps had been lit? A. None hasn't
20 been lit.

Q. None had been lit? A. No, sir.

Q. Then how light was it or dark was it? A.
Well, it was kind of light yet.

Q. Kind of light yet? A. Yes, sir.

Q. Did you see any other little girl in the street besides this little girl? A. No, sir; only her.

Q. What? A. Only that little girl.

By Mr. Crane: Q. The saloon that you saw this lady come out of is on a corner, is it? A. Yes,
30 sir.

Q. And was it on the corner nearest your house? A. Yes, sir.

Q. Well, now, where is the house into which they took this little girl located? Is it right across or is it cat-a-cornered across? A. It is right across.

Q. Right straight across? A. Yes, sir.

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

Q. Do you know the number of the house into
40 which they took the child? A. No, sir.

Q. Whose saloon is it that is on the corner? Do you know who keeps it? A. No, sir.

Q. Do you know the name? A. No, sir.

Q. Well, there are two saloons there, are there not? A. Yes, sir.

Q. Well, now, aren't they right straight across one from the other? A. Yes, sir.

Q. Well, now, the house that this little girl

lives in is on the other side of that street, is it 10
not? A. On this side.

Q. On Malvern street? A. Yes, sir.

Q. Well, then, they went cat-a-cornered across,
didn't they? A. No, sir; they was on that side
saloon; they didn't go on this side.

Q. Now, see if you understand this drawing.
(Paper shown to witness) That is VanBuren
street. A. Yes, sir; here is the saloon, and on
this corner is a saloon.

The Court: Wait a minute. We are get- 20
ting confused.

By the Court: Q. This is VanBuren street (in-
dicating)? A. Yes, sir.

Q. Now, where do you live? A. I live down
here.

Q. This is VanBuren street? A. Yes, sir.

Q. And here is Malvern street? A. Yes, sir.

Q. Now, where do you live? A. I lived on that
side, and on this corner was a saloon.

Mr. Crane: She has just got it turned 30
around.

Q. Do you know what is north? A. Yes, sir;
right straight.

Q. Now, is this team going north or south on
VanBuren street? A. North.

Q. Well, this is north, up here (indicating)?
A. No, I mean south.

Q. South? A. Yes, sir.

By Mr. Crane: Q. Now, can you fix in your eye
the way that street—you know how Broad street 40
runs, do you not? A. Yes, sir.

Q. Now, does VanBuren street run the same
way as Broad? A. Yes, sir; runs straight.

Q. Well, do they run alongside of each other,
we will say? A. Yes, sir.

Q. Now, Malvern street runs the same as Mar-
ket street here, does it not? A. Yes, sir.

Q. Now, then, can you tell us on which side of

10 VanBuren street you were when you saw this accident? A. On that side (indicating).

Q. Well, what do you mean, on this side of Broad or the other side of Broad? A. On the other side of Broad.

Q. On the other side of Broad? A. Yes, sir.

Q. On the east side, you were, then? A. Yes, sir.

Q. Then you did not see Mr. Lee, the police officer, did you? A. No, sir.

20 Q. Did you not see him standing in the street at all? A. No, sir.

RE-DIRECT-EXAMINATION by Mr. Osborne:

Q. Now, Bertha, you see those marks there (indicating on paper); that represents VanBuren street and that represents Malvern street. Now, we will assume that you live down here; there is your house, and there is your father's shop, and
30 there is your back yard, and there you stand. A. Yes, sir.

The Court: You may assume that, but you assume something that is entirely contradictory to the witness's testimony.

Mr. Osborne: Well, the witness is evidently confused as to the points of the compass, and I am trying to straighten her out, after the questions that have been asked.

40 The Court: Go on. We want to get at the facts.

Q. Now, as you stood looking out on VanBuren street you saw the wagon go by? A. Yes, sir.

Q. Which way did the wagon go as you stood by your back gate looking that way? A. If I was standing here—

Q. Standing there. A. Then it went that way (indicating).

Q. Exactly. Now, the wagon went this way? 10
A. Yes, sir.

Q. Now, show us where the house was that they took the child in afterwards. A. On this side (indicating).

Q. If you were standing here, I mean. A. On this side, right there.

Q. Right there, eh? A. Yes, sir.

Q. Is there a saloon on that corner and a saloon on this corner? A. A saloon on this corner— 20

Q. Now, you are still standing down here, remember that. A. Yes, sir.

Q. Now, is there a saloon here? A. Yes, sir.

Q. And a saloon here? A. Yes, sir.

Q. If you are still standing down there? A. Yes, sir.

Q. Now, still standing down there which saloon did you see this lady come out of? A. Out of this side saloon (indicating).)

Q. This one (indicating)? A. Yes, sir. 30

Q. And then what did she do? A. She crossed on that side.

Q. On that walk? A. Yes, sir.

Q. And where did she go then? A. Down towards her house.

Q. And where was she, then, as she crossed the street when the accident happened? A. She was right in the middle.

Q. You are still standing here? A. Yes, sir.

Q. Show us where the woman was crossing? 40
A. The woman was right here in the middle, and the little baby was crossing the street here (indicating).

Q. Was the little baby going over towards the house? A. Yes, sir.

Q. Following the woman? A. Yes, sir.

By Mr. Crane: Q. She came out of this saloon, then (indicating)? A. Yes, sir.

10 By the Court: Q. You lived on the west side of VanBuren street? A. Yes, sir.

Q. And the saloon out of which the woman came was on the same side as your house? A. Yes, sir.

Q. On the corner of Malvern street? A. Yes, sir.

Q. And then when the woman came out what street was it she crossed first? A. It was on the corner.

20 Q. After she came out of the saloon what street did she cross first? A. Crossed VanBuren street first.

Q. Show me with your finger. A. This way she crossed first (indicating); here was the saloon and she crossed this way and went in that house.

Q. First she crossed VanBuren street? A. Yes, sir.

Q. To the opposite side? A. Yes, sir.

30 Q. And then what did she do? A. She went and stood on the corner and the baby was in the middle of the street, crossing the street.

Q. Which corner did the lady stand on? A. On this corner (indicating).

Q. Then the lady first crossed VanBuren street from west to east? A. Yes, sir.

Q. And then crossed Malvern street from north to south? A. Yes, sir.

Q. And the little girl followed her? A. Yes, sir.

40 Q. And how far did the little girl get? A. She was right in the middle.

Q. Just show how the little girl walked. A. Well, she walked slow.

Q. But trace it here. She comes out of the saloon. A. She comes out of the saloon and goes straight over here (indicating), and then she goes—no, this is the saloon; she goes over this way, and this is another saloon, and from that saloon she crosses over here and gets struck with the horses.

Q. But how could she get struck, then? A. 10
Well, the wagon was coming this way; she was
crossing the street here (indicating).

Q. Was the team coming towards your house
or going away from your house? A. Going away
from my house.

Q. Then the team was going so (indicating)?
A. Yes, sir.

Q. In that direction? A. Yes, sir.

Q. This is your house? A. Yes, sir.

Q. Now, just point out on the map where the lit- 20
tle girl was struck. Never mind how she got
there. Show us where she was hit. A. Well,
she went this way and came over this way (indi-
cating) and the baby was in the middle when she
was struck.

Q. Where did she get hit? A. I don't know
where she got hit first.

RE-CROSS-EXAMINATION by Mr. Crane:

Q. You live near Delancey street, do you not? 30
A. Yes, sir; Chestnut and Delancey.

Q. And that is a block below Malvern street?
A. Yes, sir.

Q. What number did you live at? What was
the number of your house, do you recollect? A.
There was no number on it.

Q. There was no number on it? A. No, sir.

By Mr. Osborne: Q. Are those short blocks or
long blocks? A. It was a short block.

Q. How old are you now? A. Thirteen. 40

ROBERT A. GUILIANO, sworn in behalf of
plaintiff:

Direct-examination by Mr. Osborne:

Q. Doctor, you are a practicing physician in
this city? A. Yes, sir.

10 Q. How long have you been such? A. About eight years.

Q. In June, 1904, were you connected with St. Michael's Hospital? A. St. James' Hospital.

Q. St. James' Hospital? A. Yes, sir.

Q. Do you recall this little girl here having been brought in there on June 8th? A. Yes, sir.

Q. Did you treat her? A. Yes, sir.

Q. Just tell us what condition you found her in when you first saw her? A. Well, I was tele-
 20 phoned by the Sister Superior of the hospital at about half past eight or nine o'clock, something like that, to call at the hospital immediately, that there had been a case, a bad case, a serious case, come in, and wanted me to see it; and when I got to the hospital I found the child downstairs in one of the dressing rooms, and the child was unconscious; and on examination I found that the child was suffering with a compound fracture in three
 30 different places of the lower jaw, and the bone was protruding, hanging out from the mouth; then there was also a fracture of the neck of the humerus, the left arm. There was also a sort of a movable neck, the child could bring the neck around 'most any way. I wasn't sure then what it was, but after awhile I made an X-ray examination, and found that she had a fracture of the sixth cervical vertebra. The child remained in the hospital for about three days; she was unconscious for about a day and a half; and the
 40 mother asked me about the prognosis of the case—I mean by that what the result of the case was going to be, whether the child was going to live or die—and at the time I expressed my opinion that the child was very serious and would probably die.

Objected to as incompetent.

Objection overruled.

Q. Doctor, how long did the child remain in the 10 hospital? A. Three days.

Q. And then where was it taken? A. It was taken home. The mother said that if the child was going to die, she would rather have the child die at home. That is what I wanted to bring out.

Objected to.

The Court: Strike it out.

Q. What was the reason that the child was taken from the hospital? A. Because the prognosis of the case was bad; the mother wanted the 20 child to die at home, if the child was going to die.

The Court: Strike out what the mother said.

Q. Did you continue to treat the child after it was taken home? A. Yes, sir.

Q. How often did you call at the house to see it? A. Well, at the beginning I called probably twice a day; I continued that for probably a month; and I called three months altogether, but after the first month I think I called once a day 30 and as the child got better, why, I called two and three times a week, until finally I stopped calling.

Q. What do you mean by a compound fracture of the jaw? A. Why, I mean a fracture that also has a laceration; the fracture communicates with the air, communicates with the atmosphere.

Q. You say there were three breaks in the jaw? A. Three different places; yes, sir.

Q. Now, you speak of a tranverse fracture of the neck of the humerus? A. Yes, sir. 40

Q. What is the neck of the humerus? A. Well, the neck of the humerus is simply this; that the humerus is composed of a shaft, the upper part of it is composed of a shaft—

Q. Where is the humerus? A. It is the bone of the arm here (indicating), and there is a shaft, and then what we call tuberosity, which is the protuberance here, and between the tuberosity

10 and the head of the humerus, which is rough—it is what they call a socket and ball joint—between the ball and the tuberosity there is a neck; that is the neck of the humerus and there is where the fracture took place. It was an extra capsular fracture. That means that the fracture took place outside of the capsule of the joint.

Q. When did you make this X-ray examination to determine the condition of the neck? A. Just during those three days.

20 Q. While the child was at the hospital? A. Yes, sir.

Q. Were these injuries that you speak of painful? A. Very painful.

Q. Do they to any extent continue to exist at the present time? A. Yes, there is a deformity of the neck; that is very apparent; you can see that.

Q. In what way does that manifest itself? How is it apparent? A. Well, you can see it.

30 Q. What can you see if you examine the neck? A. Well, I can see probably more than anybody else could probably see; but you could see yourself that the child has her neck twisted to one side; it isn't a straight neck.

Q. And that is caused by— A. By the fracture of the body of the cervical vertebra, the sixth.

Q. Do these breaks in the child's jaw affect the child at all at this time? A. Well, she doesn't get a proper closure of the two jaws; it isn't normal closure.

40 Q. Did these injuries, in your opinion, have a tendency to affect the child's mentality? A. Well, I notice that the child's memory is not good.

Q. Would they have a tendency to affect the child's mind? A. Certainly, the concussion of the brain that she received at the time.

Q. Have you seen this child from time to time since the accident? A. Well, not recently, I haven't.

Q. When did you last make an examination? 10

A. Oh, I made an examination last night.

Q. In your opinion, is the child's mental condition at the present time due to these injuries which it received? A. Yes, sir.

Q. What are the probabilities of its ultimate recovery? A. Well, in regard to the memory, being that the child is young, I can't say; she may improve; but regarding to the injuries to the jaw and her arm and her neck, they are permanent.

Q. Well, now, this injury to the spine, will that probably grow less or greater as the child grows older? A. I can't say. 20

Mr. Crane: I have not heard him say that the spine was injured.

The Court: Yes, one of the vertebrae was injured. That is what makes the trouble with the neck.

Q. Doctor, make yourself clear on that. When you examined this neck with the X-ray—when you examined with the X-ray, what did you examine, the arm or neck? A. Everything, examined the jaw and the elbow joint—I mean the shoulder joint—and I examined the spine. 30

Q. Now tell us about the spine. A. There was a slight deviation the bone was not only fractured, but the spine on one side was somewhat depressed, showing where there had been a crushing blow given to the vertebra; and it was a very hard thing to treat it properly, because a plaster-of-paris cast in these cases don't give a very good result; but, nevertheless, I did my best, and the child recovered; and, as I say, there is an apparent deformity, which can be seen today; the child has a slightly twisted neck, and with it, I thought, and I think today, that the child probably had laceration of some of the ligaments of the neck. 40

Q. And you say that condition will not get better? A. No, sir; she will always have a deformity there.

- 10 Q. Will the child probably suffer in the future any pain from these injuries? A. Well, I can't very well say that; but I can say this, that the child has suffered and is suffering with pain in that joint, especially when the weather changes, when there is humidity, she complains of pain in that shoulder where that fracture exists. That is probably due to some abnormal circulation there; possibly the circulation of the joint is not good; it might be a neurosis, a nervous condition there,
- 20 that some of the nerves had been injured at the time.

CROSS-EXAMINATION by Mr. Crane:

Q. When did you first see this child? A. Why, on the 6th, I think it was, of June.

Q. You never saw the child until it was brought to the hospital? A. No, sir.

Q. And you do not know anything about what the child's mental condition was prior to that

30 time? A. No, sir.

Q. And therefore you cannot say what the mental condition of the child before the injury was, whatever it may be now? A. I can compare her mental condition now with what the mental condition ought to be in a child of her age, from my experience as a physician.

Q. Well, there are many things which will cause a lack of memory, are there not? A. They are functional and not organic.

40 Q. Do you mean to say that a broken arm necessarily interferes with a person's memory? A. A broken arm; no, sir.

Q. Or a broken jaw? A. No, sir.

Q. What in this case interferes with her memory? A. Well, I think in her case the mental disturbances are due to concussion of the brain that the child probably had at the time.

Q. Well, she is overcoming that, you say? A. Well, she is probably overcoming it, yes.

Q. She is a young child? A. I say she probably will; my prognosis with reference to her mental deficiencies is simply that they might and might not recover.

Q. Well, that is your opinion? A. That is my opinion.

Q. Your opinion also was that she was going to die, and that is the reason that you took her from the hospital, isn't it? A. Yes, sir; I had all reason to think so.

Q. Well, she did not die, did she? A. No. 20

Q. So, then, you were mistaken? A. Yes, sir.

By the Court: Q. Doctor, was she at any time insensible? A. She was about a day and a half, she was unconscious.

Q. That was the result of the concussion of the brain, I suppose? A. And probably injury to the spine.

Plaintiff rests.

30

Defendant's counsel moves that plaintiff be non-suited, on the ground that no negligence on the part of defendant has been shown.

After argument, the Court said:

ADAMS J. The plaintiff was too young to be careless—not of sufficient maturity to be charged with any duty for her own protection; and it is the law in this state, although, not in all states, that the negligence of the person in charge of such a child is not imputed to the child. Consequently, the only question in the case is whether the negligence of the defendant, William Young, is established. 40

From the mere happening of an accident, no presumption of negligence arises. That is the general rule. There are exceptions to it; for example, if a man is walking along a street and a

10 brick falls out of a window and hits him on the head, or a barrel rolls out of a second story doorway and falls upon him, the occurrence of such an accident does raise a presumption of negligence, because bricks naturally do not fall out of windows, and barrels, if they are properly secured, do not, in the ordinary course of things, roll out of doorways. The very fact that these articles, which are incapable of self motion, get into motion necessarily raises a presumption that some-
 20 body has been careless in not properly securing them. But this is not such a case, and the maxim that the thing speaks for itself does not, I think, apply. So that we are left to inquire whether the evidence in the case affords affirmative proof that the driver was negligent and by his negligence occasioned the accident—sufficient affirmative proof to justify a reasonable conclusion that he was careless.

It appears that the driver was driving at a
 30 walk. There was, therefore, nothing reckless about the rate at which he was progressing. There is no affirmative evidence that he was inattentive to his surroundings. There is some evidence that there was just then a rain storm, the coming up of which coincided pretty nearly with the accident, and that it was also toward the end of the day, seven or eight o'clock, on a summer evening, when the light was somewhat subdued. So that there is really nothing in the case as material for
 40 judgment, except the fact that a little girl is crossing a straight street following a woman, who apparently is about half the width of the street ahead of her, and that a driver, driving slowly, and not, so far as appears, inattentive to what he was doing, proceeds in such a way that one of the horses, to which the little girl was nearest, strikes her, she falls, the team stops and she is picked up. The question is whether there is any-

thing to go to the jury—whether, if the jury should 10
 find a verdict in favor of the plaintiff on this evi-
 dence, the Court would be able to sustain it con-
 sistently with the rules of law. If so, why, then,
 in every case where a person is run down under
 such circumstances negligence may be directly in-
 ferred—negligence on the part of the defendant,
 to say nothing about contributory negligence.
 Contributory negligence does not exist unless the
 negligence of the defendant is first established.
 It is to that that the negligence of the plaintiff is 20
 said to be contributory.

Now, can it be said, as a sound legal proposi-
 tion, that a person who is knocked down by a
 walking horse in the middle of the public high-
 way is injured by the negligence of the driver?
 Is that general proposition true? It seems to me
 that it would be going a great way to hold that.
 We must have something more, something to
 show want of care on the part of the driver, some-
 thing beyond a mere inference founded on these 30
 naked facts—some positive testimony showing
 some act of inattention or want of care—evidence
 for instance, that the driver was looking else-
 where, that he was not minding his business, that
 he was asleep or intoxicated, or what not. How
 can the Court or the jury predicate a charge of
 negligence on the bare fact that a walking horse
 knocks a person down in the middle of a street?

I think I ought to grant your motion, Mr.
 Crane. If I am wrong, there is a way of correct- 40
 ing any errors into which I may fall; but I am
 bound to act on my own judgment, and my judg-
 ment is that this is not made out.

Plaintiff's counsel prays an exception to this
 ruling of the Court.

Exception allowed; let it be sealed, and it is
 sealed accordingly.

FREDERIC ADAMS, (L. S.)
 Circuit Court Judge.

10

Assignment of Error.

COURT OF ERRORS AND APPEALS.

	CONSILO NAPURANA,	}
	Plaintiff in Error,	
	vs.	
20	WILLIAM YOUNG,	}
	Defendant in Error.	

Afterwards, that is to say, as of the present term, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Consilio Napurana by Harry V. Osborne, her attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the judgment aforesaid, there is manifest error in this, to-wit:

That the said judge, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid refused to admit in evidence, declarations, statements or conversations made immediately after the accident by the employee or servant of the defendant, driving the wagon that caused the accident, as a part of the *res gestae*.

40 There is also error in this, to-wit, for that the said judge, before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, after the said plaintiff had rested her case, granted the motion of the said defendant that the plaintiff be non-suited, and ordered that the said plaintiff take nothing by her said writ and that judgment of non-suit be entered against her.

Therefore, the said Consilio Napurana prays 10
that the judgment aforesaid may be reversed, an-
nulled and altogether held for nothing, and that
she may be restored to all things which she hath
lost by occasion of the said judgment, etc.

HARRY V. OSBORNE,
Attorney for and of counsel
with Plaintiff in Error.

Filed, Feb. 15th, 1906.

20

Joinder in Error.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

CONSILIO NAPURANA,
Plaintiff in Error,

vs.

WILLIAM YOUNG,
Defendant in Error.

In Error.
Joinder in Error.

30

And hereupon, afterwards, to-wit, on the twen-
tieth day of February, A. D. Nineteen hundred
and six, the said William Young, by Elvin W.
Crane, his attorney, comes into Court and says
that there is no error either in the record and pro-
ceeding aforesaid, or in giving the judgment
aforesaid, and he prays here that the Court here
may proceed to examine as well the record and
proceeding aforesaid, as the matters aforesaid 40
assigned for error, and that the judgment afore-
said, in manner aforesaid given, may in all things
be affirmed, etc.

ELVIN W. CRANE,
Attorney for and of counsel
with Defendant in Error.

Filed, March 12, 1906.

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