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WITNESSES FOR PLAINTIFF.

WITNESSES FOR DEFENDANTS.

Summons.

The State of New Jersey to: Bayonne News Company, and Herman Hoofman.

(Seal)

You are Summoned to answer the annexed Complaint of Simon O'Shaughnessy, in an action at law, in the Hudson County Circuit Court at Jersey City.

And Take Notice, that unless you file your answer to said Complaint with the Clerk of the said Hudson County Circuit Court, at Jersey City, New Jersey, within twenty days after service upon you of this writ and the annexed Complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, FRANK L. CLEARY, Esquire, Judge of the Hudson County Circuit Court, at Jersey City, N. J. this 4th day of March, 1929.

JOHN J. McGOVERN,
Clerk.

BENNETT A. ROBBINS,
Attorney for Plaintiff.

Complaint.

Filed March 13, 1929.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Complaint.

The plaintiff, Simon O'Shaughnessy, residing in the City of Jersey City, County of Hudson and State of New Jersey says that:

1. At all times hereinafter mentioned the defendant, Bayonne News Company, was a corporation of the State of New Jersey, and was the owner of a certain automobile truck hereinafter referred to.

2. On or about February 25, 1928, said automobile truck of the defendant, Bayonne News Company, was being driven and operated by the defendant, Herman Hoofman, the agent and servant of the defendant Bayonne News Company in a southerly direction along Grove Street, a public highway in the City of Jersey City, County of Hudson and State of New Jersey.

3. At said time and place the plaintiff at the express invitation of said defendants, their agents and servants, became and was a passenger of the

said automobile truck owned by the said defendant, Bayonne News Company.

4. It thereupon became and was the duty of said defendants, their agents and servants, to use reasonable care in the operation of said automobile so that it would be reasonably safe for said plaintiff to ride therein, and it became and was the duty of said defendants, their agents and servants, to use reasonable care in the management and control of said automobile, so that the same would not become dangerous to plaintiff lawfully riding on said automobile as aforesaid, and it became and was the duty of said defendants, their agents and servants, to so manage and control said automobile that it would be reasonable safe for plaintiff riding in said automobile as aforesaid to alight therefrom at his destination.

5. Although defendants were under said duties as aforesaid to use reasonable care in the management and control of said automobile truck so that it would be reasonably safe for plaintiff lawfully on said automobile truck as aforesaid to alight therefrom at his destination, said defendants violated said duty, and so negligently, carelessly and recklessly operated the same that the plaintiff while lawfully alighting from said automobile truck at or near the intersection of said Grove Street with Eighth Street in said City of Jersey City, was caused to be thrown therefrom and under the wheels of said automobile, and as a result thereof sustained serious injuries.

6. The negligence of the defendants consisted in this:

(a) Said automobile truck was being driven and operated by an incompetent driver.

(b) The operator of said automobile truck failed to make any observation as to the position of the plaintiff while lawfully alighting from said automobile, and started said automobile before plaintiff had completely alighted therefrom.

(c) The operator of said automobile truck failed and neglected to give plaintiff any warning of his intention to start said automobile while plaintiff was still alighting therefrom.

7. By reason of the aforesaid premises, the plaintiff, Simon O'Shaughnessy, was seriously and permanently injured both internally and externally in and about his head, body, arms and legs, and his ankle and heel-bone were fractured, and he was hurt, cut, wounded, bruised and injured, and his nervous system was severely shocked; he has undergone and suffered great pain and torment both of body and mind, and still suffers and will continue to suffer therefrom, from which injuries and the results thereof he was made sick, sore, lame and disordered and so continues, and he will suffer great losses by reason of his reduced earning capacity, and he has been unable to attend to his necessary business and affairs, and will in the future be unable to attend to his necessary business and affairs, and he was forced and obliged and will in the future be forced to pay out a large sum of money for medicines and doctor bills, and he has expended and will continue to expend large sums of money in efforts to recover from his said injuries.

Plaintiff, Simon O'Shaughnessy, demands against the defendants, Bayonne News Company, and Her-

man Hoofman, the sum of Twenty-five Thousand ($25,000) Dollars damages.

BENNETT A. ROBBINS,
Attorney for Plaintiff.

I hereby deputize John Crimmins to serve the within Writ. Witness my hand and seal this 4 day of March, 1929.

By JOHN J. COPPINGER, Sheriff
By Joseph Colford, Under Sheriff.

Served the within Summons and Complaint March 8, 1929 on the defendant Herman Hoofman by leaving a true copy thereof for him at his usual place of abode—413 New York Av., Jersey City—with a member of his family above the age of fourteen years whom I informed of the contents thereof, March 7, 1929 on the defendant Bayonne News Company (a corp.) by delivering a true copy thereof to Thomas B. O'Connor, Agent of the said defendant Company.

JOHN J. COPPINGER, Sheriff
By John Crimmins, S. D. S.

Demand for Bill of Particulars.

Filed March 27, 1929.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Demand for Bill of Particulars.

To: SIMON O'SHAUGHNESSY, Plaintiff, or
BENNETT A. ROBBINS, his Attorney.

Please Take Notice that the defendants demand a bill of particulars from the plaintiff in the following matters and things, to wit:

1. Give the exact location of the place where the plaintiff got on the defendants' truck as alleged in the complaint.

2. How far did the plaintiff ride in the defendants' truck.

3. At what place did the plaintiff alight from the defendants' truck;

4. What words were spoken by the defendant, Herman Hoofman, at the time the plaintiff became a passenger of said truck;

5. What words were spoken by either the plaintiff or the defendant, Herman Hoofman, at the time the plaintiff alighted from said truck;

Demand for Bill of Particulars.

6. Give a general description indicating exactly how the accident happened;

7. Wherein were the defendants guilty of negligence in the operation of their truck;

8. Give a general statement of the injuries sustained by the plaintiff;

9. Describe in detail the plaintiff's present physical condition;

10. What injuries, if any, sustained by the plaintiff are claimed to be permanent;

11. How long was the plaintiff in the hospital, if at all;

12. Give the name and addresses of the physicians who attended the plaintiff;

13. For how long after leaving the hospital was the plaintiff compelled to remain at home;

14. What was the occupation of the plaintiff at the time of the alleged accident; and what were his wages per day, week or month;

15. Was the plaintiff paid a salary while he was unable to work;

16. If not, what amount of wages did he lose as a result of the alleged accident;

17. Give a statement of the amounts of money spent by the plaintiff and/or which he has become liable to pay for doctors' bills, hospital bills, nurses' bills, and medicine bills, and any and all other expenses incurred as a result of the alleged accident.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendants.

Due service of a true copy of the within Demand is hereby acknowledged this 20th day of March, 1929.

BENNETT A. ROBBINS,
Attorneys for Plaintiff.

Bill of Particulars.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Bill of Particulars.

To: STEIN, MCGLYNN & HANNOCH, ESQS.
Attorneys for Defendants.

Take Notice that the following are answers to demand for bill of particulars propounded by you in the above entitled cause:

1. At or near the intersection of 13th and Grove Streets in the City of Jersey City.

2. Set forth in Complaint.

3. Set forth in Complaint.

4. Invited plaintiff to ride in truck.

Bill of Particulars.

5. Invited plaintiff to ride in truck.

6. Set forth in Complaint.

7. Set forth in Complaint.

8. Fractured heel-bone and ankle; also badly sprained ligaments and numerous other injuries as set forth in complaint.

9. Set forth in Complaint.

10. Not determined at present.

11. About one month or more.

12. Treated by a number of doctors.

13. Until about July 1, 1928.

14. Patrolman. $204.16 per month.

15. Yes.

16. Answered by No. 15.

17. Not determined at present.

BENNETT A. ROBBINS,
Attorney for Plaintiff.

Answer.

Filed April 4, 1929.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Answer.

The defendants answering the complaint of the plaintiff filed herein, say that:

1. They admit the allegations of paragraph one of the plaintiff's complaint.

2. They deny the allegations of paragraphs two, three, four, five, six and seven of the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

1. The plaintiff, if he was injured as alleged in the complaint, was not injured by reason of any negligence on the part of the defendants, but on the contrary, by reason of his own negligence in that he jumped off the automobile of the defendant in which he was riding, before said automobile had come to a stop and without giving any warning of his intention so to do.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendants.

Reply.

Filed April 5, 1929.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Reply.

Plaintiff replying to the Answer of the defendants filed herein, says that:

Plaintiff denies the allegations contained in paragraph one (1) of the First Separate Defense.

BENNETT A. ROBBINS,
Attorney for Plaintiff.

Notice of Motion to Amend Complaint.

Filed Feb. 26, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Notice of Motion to Amend Complaint.

To: Messrs. STEIN, MCGLYNN & HANNOCH, Attorneys of Defendants.

Sirs:

Take Notice that on Friday, January 30, 1931, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the Court House, Jersey City, before the Circuit Court Judge hearing motions for the above Court, I shall move for an order amending the complaint herein by adding to paragraph 6 thereof a new subdivision to be known as subdivision (d) which subdivision will be as follows:

> (d) The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said

Grove Street, a public highway, in front of said truck.

Dated: January 15, 1931.

Respectfully yours,

BENNETT A. ROBBINS,
Attorney of Plaintiff.

Service of a copy of the within Notice of Motion to Amend Complaint acknowledged this 16th day of January, 1931.

STEIN, McGLYNN & HANNOCH,
Attorneys of Defendants.

Memorandum.

Filed Feb. 26, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Memorandum.

BENNETT A. ROBBINS, Att'y for Plaintiff.
STEIN, MCGLYNN & HANNOCH, Atty's for Defendants.

ACKERSON, *J.*:

This action is brought to recover damages resulting from the alleged negligent operation of an automobile.

The complaint alleges that plaintiff by the express invitation of defendants became and was a passenger in the automobile truck owned by the defendant, Bayonne News Company, and operated by its agent, the defendant, Herman Hoofman, and that defendants

> "so negligently, carelessly and recklessly operated the same that the plaintiff while lawfully alighting from said automobile truck at or near the intersection of said Grove Street with Eighth Street in said City of Jersey City, was caused to be thrown therefrom and under the wheels of said automobile, and as a result thereof sustained

serious injuries.—The negligence of the defendants consisted in this:

(a) Said automobile truck was being driven and operated by an incompetent driver.

(b) The operator of said automobile truck failed to make any observation as to the position of the plaintiff while lawfully alighting from said automobile, and started said automobile before plaintiff had completely alighted therefrom.

(c) The operator of said automobile truck failed and neglected to give plaintiff any warning of his intention to start said automobile while plaintiff was still alighting therefrom."

The plaintiff now moves to amend his complaint in advance of trial by adding a new paragraph reading as follows:

"The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck."

The motion to amend is resisted by the defendants upon the ground that the proposed amendment would be substituting a new cause of action after the Statute of Limitations had run.

The accident happened on February 25th, 1928, and the two year statutory period of limitation ran against the plaintiff's cause of action on February 25th, 1930, more than eleven months prior to this application to amend.

As was said by the late Mr. Justice Katzenbach, in the case of Wilson vs. Dairymen's League Co.-Op. Ass'n, 143 Atl. Rep. 454 (not yet officially reported):

Memorandum.

> "In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of courts and Legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried."

It may be that under sections 23 and 24 of the supplement of our Practice Act of 1912 (Pamph. L. 1912, p. 381), which confers upon the court the power to permit "before or at the trial the statement of a new or different cause of action in the complaint or counterclaim," that this proposed amendment may be made whether it states a different ground for the action or not, Giardini v. McAdoo, 93 N. J. L. 138, at bottom of page 148. But it is unnecessary, as I conceive it to rest the determination of this motion upon any such consideration, for I do not consider that the proposed amendment substantially changes the plaintiff's claim.

It is quite generally held that if the identity of the transaction forming the cause of action originally declared upon is adhered to, an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or as stating a new or substantially different cause of action. So an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or, if the gist of the action or the subject of controversy remains the same; and this

true although the form of liability asserted, or the alleged incidents of the transaction may be different. Technical rules will not be applied in determining whether the cause of actions stated in the original and amended pleadings are identical, since in a strict sense almost any amendment may be said to change the original cause of action. 49 C. J. 510, 511.

In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action. 49 C. J. 516, sec. 679. (see cases cited in foot notes); Swank v. P. R. R., 94 N. J. L. 552; Duffy v. McKenna, 82 Id. 62; Giardini v. McAdoo, supra; Miller v. West Jersey, etc. R. R. Co., 76 Id. 282; Seaboard Air Line v. Renn, 241 U. S. 290; Texas & Pacific Ry. v. Cox, 145 Id. 593; Missouri, Kansas & Texas Ry. Co. v. Wolf, 226 Id. 570; Hermecken v. Seaboard, 239 Id. 353; Ingwerson v. Chicago, etc. R. R. Co., 150 Mo. 374, 130 S. W. 411.

In the case subjudice the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendant's automobile. The place where the plaintiff was injured is not the gist of the cause of action. Whether he was injured while alighting from the automobile or while passing in front of it, are mere incidents of the wrong done; the subject of the controversy remains the same and the gravamen of the complaint, the real wrong done, was the negligent operation of the automobile. It makes no difference to the cause of action that in the first instance the plaintiff may have been an invitee in the car, and in the second a pedestrian in the street. The duty

required of the defendants, and the degree of care exacted in each instance was the same, and in either event there could be no cause of action, unless the car was improperly operated by the owner's agent.

The defendants rely upon the case of Doran v. Thomsen, 79 N. J. L. 99, as a precedent for the denial of this motion. In that case, however, the charge of negligence, as stated in the original declaration, was made to depend upon the allegation that the automobile was carelessly operated by the defendant's daughter as his agent. The gist of the action was the negligence of a servant inputed to his master, and not the direct negligence of the master himself. As it was proposed to amend the declaration, the negligence counted on was of the father himself in supplying his inexperienced daughter with a dangerous machine, and its gist was the negligence of the father himself. Here there was an effort to change the gist of the action or the subject of the controversy, giving rise to a different cause of action. In the case subjudice, however, the proposed amendment would not change the gist of the action or subject of controversy which is the negligent operation of the defendant's automobile by his servant or agent. The proposed amendment would merely change the position of the plaintiff at the time he claims to have been injured by the negligent starting of the automobile.

For the reasons already indicated the plaintiff's motion to amend his complaint in the manner proposed will be granted.

HENRY E. ACKERSON, JR.,
Judge.

Order Amending Complaint.

Filed Feb. 27, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Order Amending Complaint.

On due notice and after argument of counsel and consideration of same by the Court:

It is ORDERED that the complaint be and the same hereby is amended by adding to paragraph 6 thereof a new subdivision to be known as subdivision (d) which is as follows:

> (d) The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck.

HENRY E. ACKERSON, JR.,
Circuit Court Judge.

Rule actually entered this 27th
day of February, 1931.

On Motion of
BENNETT A. ROBBINS,
Attorney of Plaintiff.

Rule for Judgment.

Filed March 6, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Action at Law. Rule for Judgment.

This action was tried before Judge A. Dayton Oliphant with a jury in the presence of the counsel of the respective parties at the Hudson Circuit on March 4, 1931. During the trial counsel for the plaintiff made a motion to amend the pleadings so as to change the spelling of the name of the defendant Herman Hoofman so as to read Herman Hoffman and there being no objection said amendment was ordered made.

The cause having been heard and submitted to the jury, they returned their verdict as follows:

They found a verdict in favor of the plaintiff, Simon O'Shaughnessy and against the defendants, Bayonne News Company, a corporation of the State of New Jersey and Herman Hoffman for the sum of Eight Thousand ($8000.) Dollars.

Whereupon it is adjudged that the plaintiff, Si-

mon O'Shaughnessy recover of the defendants, Bayonne News Company, a corporation of New Jersey and Herman Hoffman, the sum of Eight Thousand ($8000.) Dollars and his costs to be taxed.

A. DAYTON OLIPHANT,
Circuit Court Judge.

Rule actually entered this 6th
day of March, 1931.

On Motion of
BENNETT A. ROBBINS,
Attorney of Plaintiff.

Judgment.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOOFMAN, Defendants.	Judgment entered March 6, 1931.

Damages	$8000.00
Costs	82.76
Costs on Rule to Show Cause	18.25
Total	$8101.01

BENNETT A. ROBBINS,
Attorney of Plaintiff.

Judgment on Verdict in the above entitled cause was entered in this Court on the 6th day of March in the year of our Lord One Thousand Nine Hundred and Thirty-one in favor of the Plaintiff Simon O'Shaughnessy and against the Defendants Bayonne News Company, a corporation of New Jersey and Herman Hoofman (Amended at trial to read Hoffman) in a plea of Action at Law for the sum of Eight Thousand Dollars damages and Eighty-two Dollars Seventy-six Cents, costs of suit, and Eighteen Dollars and Twenty-five cents, additional costs on Rule to Show Cause.

Judgment entered and signed this 6th day of March, 1931.

A. DAYTON OLIPHANT,
Judge.

Rule to Show Cause.

Filed March 12, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants.	Action at Law. Rule to Show Cause.

This matter being opened to the court on motion of Stein,McGlynn & Hannoch, attorneys for the defendants, and application having been made within six days after the trial of said cause; it is, on this twelfth day of March, nineteen hundred thirty one,

ORDERED that the plaintiff show cause before this Honorable Court, at the Court House in the City of Jersey City, on Friday the tenth day of April next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the verdict entered in the above entitled matter should not be set aside and a new trial granted, on the ground that the damages adjudged to the plaintiff by said verdict are excessive; and on the further ground that said verdict is against the weight of the evidence; and it is further

ORDERED that the defendants' exception to the order allowing an amendment to the complaint be and it is hereby reserved; and it is further

Rule to Show Cause.

ORDERED that in the meantime, and until the further order of this court, execution on said judgment shall be stayed.

A. DAYTON OLIPHANT,
Judge.

Rule Discharging Rule to Show Cause and Entering Judgment Final.

Filed May 18, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants.	Action at Law. Rule Discharging Rule to Show Cause and entering Judgment Final.

The Court having duly considered the defendants' rule to show cause for a new trial and the reasons in support thereof, as well as the arguments and briefs of counsel:

It is on this 11th day of May, 1931, ORDERED that the said rule to show cause be and the same hereby is discharged with costs to the plaintiff.

It is FURTHER ORDERED AND ADJUDGED that judgment final be and the same hereby is entered in favor of the plaintiff, Simon O'Shaughnessy and

Rule Discharging Rule to Show Cause and entering Judgment Final.

against the defendants, Bayonne News Company, a corporation of New Jersey and Herman Hoffman, in the sum of Eight Thousand ($8000.) Dollars and costs.

A. DAYTON OLIPHANT,
Circuit Court Judge.

Rule actually entered this 18
day of May, 1931.

On Motion of
COLLINS & CORBIN,
Attorneys of Plaintiff.

Order of Substitution.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants.	Action at Law. Order of Substitution.

Upon the consent noted below of Bennett A. Robbins, attorney of record of the plaintiff in the above case;

It is on this 1st day of June, 1931, ORDERED that Collins & Corbin be and they are hereby substituted as attorneys of record of the plaintiff in the above action.

Rule actually entered this 1st day of June, 1931,

On Motion of
COLLINS & CORBIN,
Attorneys of Plaintiff.

I consent to the entry of the above order.

BENNETT A. ROBBINS,
Attorney of record of Plaintiff.

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SIMON O'SHAUGHNESSY, Plaintiff-Respondent, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants-Appellants.	On Appeal. Action at Law. Notice of Argument.

To SIMON O'SHAUGHNESSY, Plaintiff-Respondent, or COLLINS & CORBIN, ESQS., his attorneys:

Take Notice that the argument of the above entitled cause will be moved before the said New Jersey Court of Errors and Appeals on the third Tuesday in October next at State House in Trenton, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendants-Appellants.

Endorsed—Service of the within Notice is acknowledged this 18th day of June, 1931.

COLLINS & CORBIN,
Attorneys for Plaintiff-Respondent.

Notice and Grounds of Appeal.

Filed June 1, 1931.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants.	Action at Law. Notice of Appeal and Grounds of Appeal.

To SIMON O'SHAUGHNESSY, Plaintiff, or
BENNETT A. ROBBINS, his Attorney:

Take Notice that the defendants hereby appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above entitled matter, on the following grounds, to wit:

1. That the Trial Court permitted the plaintiff-respondent to amend his complaint by adding thereto, as subdivision "d" of paragraph 6 thereof, the following new matter:

> The operator of said automobile truck negligently and carelessly, and without warning, started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck,

to which ruling of the Trial Court the defendants prayed and were granted an exception.

2. That the Trial Court refused to direct a verdict for the defendant-appellant, Bayonne News Company, a corporation, when moved to do so by the said defendant, Bayonne News Company, to which ruling of the Trial Court said defendant prayed and was granted an exception.

STEIN, McGLYNN & HANNOCH,
Attorneys for Defendants.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 22 day of May, 1931.

COLLINS & CORBIN,
Attorneys of Plaintiff.

Clerk's Certificate.

STATE OF NEW JERSEY,

Hudson County, ss:

I, Gustav Bach, Clerk of the County of Hudson aforesaid and also Clerk of the Circuit Court and Court of Common Pleas, holden therein

Do Hereby Certify, That the foregoing is a true and correct copy of Summons and Complaint, Demand for Bill of Particulars, Answer, Reply, Notice of Trial, Notice of Motion to Amend Complaint, Memorandum, Order Amending Complaint, Affidavit, Rule for Judgment, Judgment Record, Rule to Show Cause, Rule Discharging Rule to Show Cause and entering Judgment Final, Notice and Grounds of Appeal, and Bond on Appeal in the case of Simon O'Shaughnessy, Plaintiff, vs. Bayonne News Company, a corporation of New Jersey and Herman Hoffman, Defendants, as the same is taken from and compared with the original as filed and recorded in my office. This certificate is issued so that the said cause may be removed to the Court of Errors and Appeals of the last resort of all causes, at Trenton, N. J. for adjudicature according to law.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Courts and County, at Jersey City this Eighth day of June, 1931.

(Seal)

GUSTAV BACH,
Clerk.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

SIMON O'SHAUGHNESSY, Plaintiff, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants.	Action at Law.

Jersey City, New Jersey,
March 3rd, 1931.

Present: HON. A. DAYTON OLIPHANT, Judge, and a Jury.

APPEARANCES:

BENNETT A. ROBBINS, ESQ.,
Attorney for the Plaintiff,
By EDWARD MARKLEY, ESQ.
Messrs. STEIN, MCGLYNN & HANNOCH,
Attorneys for the Defendants,
By MR. MCGLYNN.

(A jury was impanelled and sworn).
(Plaintiff opened to the jury).

Mr. McGlynn: If your Honor please, may I have it noted on the record that I have not been served with a copy of the Order—but I imagine one has been entered—amending the complaint. The motion was made regarding the amendment to the complaint. So I now say I have never been served

with a copy of the amendment or a copy of the order, and I would like to have it noted on the record.

The Court: There is no order yet filed.

Mr. McGlynn: Then I do not see why counsel makes the opening he has, because the complaint on file is not anything like the one which counsel has opened on.

Mr. Markley: It is very simple. My motion was held to amend the complaint to add an additional charge of negligence. That motion was opposed by Mr. McGlynn's office. The judge reserved decision, and last week he decided the motion in favor of the plaintiff, and wrote an opinion, and that opinion we drew and had signed, and we filed an order. Here is a certified copy of the order. Probably the original is downstairs in the Clerk's office, waiting to be entered in the minutes. Here is a copy filed and here is a copy for your Honor.

Mr. McGlynn: May I have noted an exception on the record to the entry of this order, so that my rights are reserved?

The Court: Yes.

(Defendant's counsel thereupon started opening to the jury).

Mr. Markley: Please take the opening.

(Balance of Defendants' opening was reported as follows:)

Mr. McGlynn: * * * duly, upon the fact that his client, for whom he is trying this case, Mr. O'Shaughnessy, was injured three years ago, the first or one of the first suits, which I will endeavor to give in this case, on my side of the case—also a copy of the original complaint. Now a complaint is just a paper which a party serves and files when a suit is started. That is, they are served for their

case; and the original complaint filed by O'Shaughnessy as plaintiff on March 4th, 1929—almost a year after this accident happened—is absolutely different from the story you have just heard as black is from white. Now I say that with all the emphasis I can control in my voice, when I tell you that.

Mr. Markley: I object to this. I do not think this is a proper opening. This opening is a statement of counsel. If he is proceeding to sum up the case, I object to it.

The Court: I think it is a proper statement for summation rather than an opening, Mr. McGlynn.

Mr. McGlynn: All right. I think I certainly have the right, if your Honor please, to tell the jury that when he stated a wholly different story from his original complaint.

The Court: You have a right to do that.

Mr. McGlynn: And the purpose I have in offering it regards what I intend to rely upon. I intend to offer this original complaint, filed March 4th, 1929—filed by the plaintiff in this case—in which the plaintiff at that time described an accident in which he received these injuries in this way:

He said in this complaint that, as has been said, on or about the 25th of February, 1928, an automobile truck belonging to the defendant, Bayonne News Company, being driven and operated by the defendant, Herman Hoffman, was coming in a southerly direction along Grove Street, and at that time the plaintiff, O'Shaughnessy, at the express invitation of said defendants, their agents and servants, became and was a passenger on the said automobile truck owned by the said defendant, Bayonne News Company. It thereupon became and was the duty of said defendants, their agents

and servants, to use reasonable care in the operation of said automobile, so that it would be reasonably safe for said plaintiff to alight therefrom, and it became and was the duty of said defendants, their agents and servants to use reasonable care in the management and control of said automobile, so that the same would not become dangerous to plaintiff lawfully riding on said automobile as aforesaid, and it became and was the duty of said defendants, their agents and servants, to so manage and control said automobile that it would be reasonably safe for plaintiff riding in said automobile aforesaid to alight therefrom at his destination. Although defendants were under said duties as aforesaid to use reasonable care in the management and control of said automobile truck, so that it would be reasonably safe for plaintiff lawfully on said automobile truck as aforesaid to alight therefrom at his destination, said defendants violated said duty, and so negligently, carelessly and recklessly operated the same that the plaintiff while lawfully alighting from said automobile truck at or near the intersection of said Grove Street with Eighth Street in said City of Jersey City, was caused to be thrown therefrom and under the wheels of said automobile, and as a result thereof sustained serious injuries. The negligence of the defendants consists in this: (a) Said automobile truck was being driven and operated by an incompetent driver. (b) The operator of said automobile truck failed to make any observation as to the position of the plaintiff while lawfully alighting from said automobile and started said automobile before plaintiff had completely alighted therefrom. (c) The operator of said automobile truck failed and neglected to give plaintiff any warning of his intention to start said automobile

while plaintiff was still alighting therefrom.

Now I intend also to bring out to this jury, as part of the defendants' case, that before these defendants filed their answer to this complaint, which I have just summarized to you, we served what is known as a demand for a Bill of Particulars, asking this plaintiff to specify certain things regarding allegations in this paper that I have just read to you; and in that we again asked them for the details of the manner in which he was injured; and his answer was "Set forth in the complaint", which is the paper I have just read to you.

Now we are met, over two years, almost three years, as a matter of fact after three years after the accident, with an amendment; and now the plaintiff says that this case is as follows: The operator of said automobile truck negligently and carelessly, and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck.

Now I say to you gentlemen that the defense in this case, before you are through with it—and I respectfully ask—I know you are going to do it—but I ask as a matter of courtesy also, to withhold your judgment until you have heard the testimony, and I am sure, when you have heard the testimony which is offered on behalf of these defendants, that you will be satisfied that this accident did not happen as they now complain, but that it happened as they originally complained.

The story that I expect to bring out is as follows: This Bayonne News Company truck was coming from New York, I believe, with a load of papers at twelve or one o'clock in the morning. The driver had specific and positive instructions not to allow anybody to ride on his truck, or to allow anybody

to ride on the truck; and I contend as a matter of law he had no authority. The policeman steps out in the middle of the street. The driver did what you or what anybody else would do under the circumstances. The policeman said, "Will you take me down to Eighth Street?" He got on the truck and sat down alongside the driver. He said, as they went along, "I want to get off between Eighth and Ninth Streets". He slowed up his truck. The truck is of a very peculiar construction. I think they call it an Auto car. I think the driver is up in front. It has no running board. It just has two steps, one on the two sides as you step out. Just two steps on the front; not like the ordinary automobile.

This man, O'Shaughnessy, while getting off this step, slipped or fell, and this wheel caught him. He got off the car before it stopped, and he slipped and fell and was pushed absolutely of his own carelessness; and we will show you, or will bring in and show you the story which continued to be the story until just a moment ago, when this application was made to amend the complaint, and I will point out to you one of the reasons it was amended.

Mr. Markley: May I call our doctor?

The Court: Yes.

Mr. Markley: Doctor Sprague.

DR. SETH B. SPRAGUE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

Mr. McGlynn: I assume your Honor places in evidence the copy of this order, so

that later I can file or make the motion necessary, which will properly put the record in shape?

The Court: Certainly.

Q. Doctor Sprague, where do you reside? A. 301 York Street, Jersey City.

Q. What is your profession? A. Orthopedic surgeon.

Q. How long have you been an orthopedic surgeon? A. I have been working at orthopedic surgery since 1907.

Q. Of what college are you a graduate, Doctor Sprague? A. University of Maryland.

Q. What degree do you hold? A. M. D.

Q. M. D.? A. Yes.

Q. What hospitals are you connected with? A. Jersey City Hospital, Christ Hospital, New York Post Graduate.

Q. Now then, were you at the Jersey City Hospital on February 25th, 1928? A. Yes, sir.

Q. When Mr. O'Shaughnessy was a patient there? A. Yes, sir.

Q. Did you have charge of this case? A. Yes, sir.

Q. What injury did he have? A. He had a fracture of the oscalcis. That is the heel bone.

Q. What kind of a fracture was that, Doctor Sprague? A. It was a comminuted fracture.

Q. What does that mean, when you say it is a comminuted fracture of the heel bone? A. Broken in more than two pieces.

Q. Is that also known as a multiple fracture? A. Multiple fracture. Yes.

Q. Is that a painful injury, doctor? A. It is.

Q. What was done for Mr. O'Shaughnessy? A. He was put to bed and to rest, with a splint and

an ice pack, and a lead and opium wash.

Q. A what? A. A lead and opium wash.

Q. What was the purpose of the lead and opium wash? A. To take down pain and reduce the swelling.

Q. Was the leg swollen? A. The ankle and heel were swollen.

Q. Can you give us any idea as to how much it was swollen? A. I cannot say just how much it was at this date. It is a long time. I know from the treatment on the chart that I considered there must have been a whole lot—

Mr. McGlynn: I object to that.

The Court: Objection sustained.

Q. Were you in attendance on the case? A. Yes. I was.

Q. For the three weeks he was at the hospital? A. Yes, sir.

Q. Would you say that was a painful fracture or fractures? A. I would.

The Court: He said it was painful.

Mr. Markley: What is that?

The Court: He said it was painful.

Mr. Markley: Oh. Yes. I am attempting to show personal knowledge, if your Honor please, as to the swelling there was on the heel.

The Court: He said he could not tell the size of the swelling except from the chart.

The Witness: I have read what the treatment was that was given, and I know there must have been swelling there or the treatment that was given would not have been done. I would not remember it in that case.

The man had a fractured heel for three years. It is impossible.

Q. Did you examine Mr. O'Shaughnessy recently, doctor? A. I did. Today.

Q. When? A. Today. This morning about twelve o'clock.

Q. In examining this history of the fracture of the heel, what was its condition today? A. It was tender to pressure. There was a swelling around the ankle joint, and over the heel, and there was limitation of motion in the ankle joint.

Q. Can you say in percentage how much disability he had? A. I should say he had twenty per cent. disability in that ankle.

Q. Is that a permanent disability, in your opinion? A. In my opinion it is.

Q. And keeping in mind that this accident happened more than three years ago, on February 25th, 1928— A. Yes, sir.

Q. You would say that the condition you found today is permanent? A. I should say it is.

Q. And if—

Mr. Markely: Strike it out.

Q. What is the probability of the condition being better or worse in bad weather? A. People that have had fractures report that they have pain on damp weather. Now I do not know. But that has always been the report that people have given me that have had fractures. I never had one, and no personal experience.

Mr. McGlynn: You say you never had one?

The Witness: No, sir.

Q. Assuming that this man on February 25th, 1928, had a wheel of an automobile go over his foot; would that in your opinion be a competent producing cause of the injury you found? A. It would. Yes, sir.

Q. Doctor Sprague, these are the X-rays from the City Hospital. Did you take these (handing to the witness)? A. No, sir.

Q. Were they taken under your direction? A. Yes, sir.

Q. By whom? A. By one of the technicians at the City Hospital.

Q. What was your position at the City Hospital? A. I am attending orthopedic surgeon.

Q. And did you use those in your treatment of the man? A. Yes, sir.

Mr. Markley: Any objection to them, Mr. McGlynn?

Mr. McGlynn: No.

Mr. Markley: May I offer them as one exhibit?

The Court: Yes.

Mr. Markley: I will mark them in the meantime P-1.

(X-rays marked P-1.)

Q. Do these X-rays confirm your diagnosis of the fracture of the heel bone (handing to the witness)? A. Yes, sir. These two do. This is one taken before the cast was put on, and this was taken after the cast was put on, and these two do.

Mr. Markley: I wonder if we may mark this one?

Q. This is before and this is after? A. This is before and this is after.

Mr. Markley: Suppose we mark that P-1A.

(Marked P-1A).

Q. And this other one afterward? A. This one.

Mr. Markley: I will mark that P-1B.

(Marked P-1B).

Cross examine.

Cross-examination by Mr. McGlynn:

Q. Doctor Sprague, in order to refresh your recollection about the details of this man's injuries upon his arrival at the hospital, you have examined the records to which you alluded a few minutes ago? A. I did. Yes, sir.

Q. Did I understand you to say that you were at the hospital when he was admitted or that you say that you were shortly thereafter? Do you understand? A. I cannot remember just whether I was there at the minute he was brought in, but I know I treated him there.

Q. I see, and you, of course, I assume, read in this record what you have referred to, to some sort of a history of his accident, how it occurred, and so forth? A. I cannot say about that. I did not read that history. All I have to do—how a man has injuries is no occurrence of mine—I try to put him back into place again.

Q. Exactly. I just wondered whether you had read into this record that you just alluded to any facts regarding the history? A. I did not. I saw the X-ray and the record of admission, and I saw where I had called on him and treated him.

Q. You say he was in the hospital for three weeks? A. Yes. About three weeks, I think.

Q. Sir?

The Court: About three weeks.

A. About three weeks.

Q. Why wasn't he there any longer? A. What?

Q. Why wasn't he there any longer? A. We put a cast on him, and then they come home. They can get well home and they heal up after the cast is on.

Q. You have not seen him since then at all? A. Not until today.

Mr. McGlynn: Oh. That is all, doctor.

Mr. Markley: That is all, doctor.

(Witness excused).

Mr. Markley: Doctor Brothers.

DR. JAMES H. BROTHERS, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

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

Q. How long have you been a physician and surgeon? A. Since 1914.

Q. Do you specialize in any branch of your profession? A. I do.

Q. What branch, Doctor? A. Diagnozing and traumatic surgery.

Q. What hospital are you connected with? A. St. Barnabas.

Q. Have you had any special practice in your particular field? A. I have.

Q. Will you just briefly relate it to the jury, Doctor Brothers? A. I was connected with the Post Graduate Hospital of New York prior to the war.

I worked with John Moorhead, the traumatic surgeon; Fred Albee, Robert T. Morse, Sam Lloyd, plastic surgeon. I went to war and was abroad twenty-two and a half months, at Base Hospital No. 8. That was the main station for the A. E. F. while we were involved in the war.

Q. Were you in charge of that Base Hospital? A. I was for the last seven months I was connected with it.

Q. Where is that located? A. Savigny, France.

Q. Base hospital at Savigny? A. Yes.

Q. Go ahead. A. After I came back from the war, twenty-two and a half months over there, I came to Newark, instead of going back to New York; connected with the St. Barnabas Hospital; worked with Doctor Lorenz on two of his trips to this country. That is the Vienneze bone surgeon.

Mr. McGlynn: What was the last name?

The Witness: Doctor Lorenz, the bone surgeon.

Q. A Vienneze surgeon? A. Yes; and I have been doing diagnozing and traumatic work since that time.

Q. Did you, Doctor Brothers, at our request, examine Officer O'Shaughnessy? A. I did.

Q. And did you read the X-ray plates which are before you? A. I did.

Q. Have you made any special study of X-ray? A. Well, I have been reading my own X-ray plates ever since I graduated. I took a course at the Post Graduate and during the war I intensified that by reading as many plates as I could.

Q. You say you took a special course in X-ray work? A. I did.

Q. At what hospital? A. Post Graduate.

Q. When did you examine Mr. O'Shaughnessy?
A. Today.

Q. Will you just tell the jury what you found?
A. I found that he has a fracture of the os calcis of the left foot. The os calcis is the main bone—that is the part you walk on. That articulates with the astragalus above, which in turn articulates with the two bones on the lower leg, one on either side of it. This fracture ran just in front of the posterior part of the os calcis forward and into the joint. There was not any great amount of displacement. But it was fragmented. Namely, comminuted. Broken in more than one or two pieces. This man at this time has about ten to fifteen per cent. normal motion—normal to this ankle joint. I asked him to flex it slightly and extend it slightly, but he could not internally rotate the ankle or internally abduct it back that way from the middle. That is, due to the tarsal and metatarsal bones, or due to the pressure of the tarsal arch, which are the two bones of the lower leg, which, due to inflammation in this fracture, are spread slightly apart and are thickened by reason of the inflammation. That ankle measures one inch larger than the opposite or right ankle. There is aggravated soreness of the heel, where his shoe rubs on it, which is about an inch in diameter, and this is because his shoe is more the cause of a nerve condition in the immediate vicinity of the foot, and it rubs in every position every time he takes a step. That is a permanent condition in this foot, due to slight infraction, due to this fracture of the heel bone, and his foot is deformed, both longitudinally—this right here, where your shoe turns up—and the transverse, which is at the base of the metatarsal bone, which are analagous to this bone in the

hand; namely, the forward portion of the foot.

Q. Is this condition which you found today permanent, in your opinion? A. It is.

Q. Assuming that it happened on February 25th, 1928—more than three years ago—do you think there can be any change in the future? A. I do not.

Q. Is the condition that Officer O'Shaughnessy has a painful one? A. It is.

Q. In your opinion, what per cent. of permanency at this time has he? A. Twenty to twenty-five loss of the foot.

Q. Do you think he will ever, in your opinion, regain any of that loss? A. I do not think that he will. No, sir.

Q. Now you say you did examine these X-rays, that are before you marked P—? A. I did.

Q. Do they confirm your diagnosis? A. They do.

Q. And show the fracture? A. Yes.

Mr. Markley: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. What time of the day did you see Mr. O'Shaughnessy for the first time? A. About two o'clock.

Q. How long did it take you to examine him? A. Approximately twenty to twenty-five minutes.

Q. Do you, in addition to specializing in the things that you have described to us, also specialize in testifying in court? A. I do not specialize in it. I am in court as an expert on traumatic injuries many times, but I do not make that a specialty.

Q. You are in court almost every day, are you not? A. No, sir.

Q. Every other day? A. No, sir.

Q. How many days in a week? A. Well, since this term, I have been in court exactly seventeen times since September.

The Court: You do not mean since September then, as far as this term is concerned here.

The Witness: Well, I do not know what it is here.

The Court: You mean since Summer?

The Witness: After the Summer time. Yes, sir.

Q. I assume you are paid for coming here? A. I certainly am. When I am here, I cannot make money in other places.

Q. You say you assisted Doctor Lorenz? A. I did.

Q. Were there many more doctors who assisted Doctor Lorenz? A. There were two of us who did, who had charge of his work.

Q. Where were they? A. There were two of us in Newark. Well, there were others in New York.

Q. How many in New York? A. I do not know. I am only concerned with Newark.

Q. What? A. With Newark. I was associated with another man in Newark, a clinic class in Newark, and also operated in the Newark Hospital.

Q. When did you first hear of this case? A. Two or three days ago.

Q. Were you told then the extent of the man's injuries? A. No, sir. I did not know what the man had. I did not even know he was a policeman. My office was called, and I was told that I was wanted to examine a man named O'Shaugh-

nessy who had a suit against the Bayonne News Company. I did not know the man was a policeman, and I did not know he had a foot injury, or anything about him until I saw him today.

Mr. McGlynn: That is all, sir.

Redirect-examination by Mr. Markley:

Q. And Doctor, have you given your honest opinion as to what you found? A. Certainly.

Mr. Markley: That is all.
(Witness excused).
Mr. Markley: Mr. O'Shaughnessy.

SIMON O'SHAUGHNESSY, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

Q. Officer, where do you reside? A. 205 Eighth Street, Jersey City.

Q. Is that between Grove and Erie Street on Eighth? A. That is between Grove and Erie Street.

Q. On which side of the street? A. On the south side.

Q. Now then, how long have you been a member of the police force in Jersey City? A. Since May the first, 1920.

Q. Were you a member of the police force in Jersey City on February 24, 1928? A. Yes, sir.

Q. What was your beat at that time? A. (No answer).

Q. Where did you do patrol duty? A. On

Grove from the center line of Thirteenth Street to the City line in Hoboken, which was about seven blocks.

Q. That would be from Thirteenth on Grove, going north on Grove Street, wouldn't it? A. Yes, sir.

Q. Up to the Hoboken line? A. City Line. Yes, sir.

Q. About how many blocks is that? A. That is about seven blocks, I think.

Q. Now then, how far was Thirteenth Street and Grove from your home on Eighth Street, about? A. Well, that was about six blocks.

Q. That would be six blocks south of Thirteenth Street, wouldn't it? A. Yes, sir.

Q. What were your hours of employment that night of February 24th and the morning of February 25th, 1928? A. I went to work at eight p. m. February the 24th, and I was supposed to get through at 4 a. m. February 25th.

Q. In between these eight hours did you have any time off at all? A. Yes, sir. We get lunch period of half an hour.

Q. When would you get that? A. From 12:30 to one.

Q. From 12:30 to one o'clock a. m.? A. Yes, sir.

Q. A half hour? A. Yes, sir.

Q. On this evening of your accident, February 24th, the morning of February 25, 1928, did you stop to get your lunch? A. (No answer.)

Q. Where were you at half past twelve? A. I was on the northwest corner of Grove and Thirteenth Street.

Q. Where were you going? A. I was going to go home for my lunch period.

Q. Down seven blocks south? A. Yes, sir.

Q. How would you ordinarily come home? A. Well, I generally come home by trolley car.

Q. And on this evening did you go by trolley car? A. No, sir.

Q. How did you go? A. Well, a Bayonne News happened to come along. The driver says, "Officer, are you going down?" He says, "I will ride you down". I said, "I am only going to Eighth Street". Well he said, "I will pass Eighth Street." I said, "All right. Thank you." And he said, "Step on, please."

Q. Did you get on? A. Yes, sir, I got on.

Q. What was it, an automobile truck? A. It was what you call an Auto car.

Q. An Auto car truck, an automobile truck? A. Yes, sir.

Q. Did you get on that truck? Did you get on the truck with the driver? A. Yes, sir. I got on the seat by the driver.

Q. Where did you sit? A. I sat to the right of the driver.

Q. That was a left drive, was it? A. Yes, sir.

Q. How far did you ride? A. I rode to within five feet of Eight Street.

Mr. McGlynn: What was that?

The Court: Rode to within five feet of Eighth Street.

Q. Well, what happened then? A. I seen a fellow, Mike Flynn, on the corner, of the northeast corner of Grove and Eighth Street. I had met his brother at nine o'clock that night, on the 24th, and he said "If you see my brother—"

Mr. McGlynn: I object.

The Court: Yes. Objection sustained.

Q. You cannot tell us what the brother said. But you saw his brother? A. Yes, sir.

Q. Did you have a message to deliver from his brother? A. That is what I was just going to say.

The Court: Do not tell us that.

Q. You cannot give the message to us. A. All right.

Q. That is all right. Where had you seen his brother? A. I seen the brother that I took the message from?

Q. Yes. A. I seen him at Grove and Fifteenth Street.

Q. Did he work up there? A. No, sir. He is a foreman. He bosses. He is a foreman for Sullivan Brothers over in Bramhall Avenue.

Q. You then say you happened to see his brother Mike? A. Yes, sir.

Q. On Eighth and Grove? A. On the northeast corner of Grove and Eighth Street.

Q. That is the northeast corner? A. Yes, sir.

Q. That would be on your left-hand side as you came down? A. Yes, sir.

Q. South. Suppose I make a little diagram. (At the black board) And this is Grove Street. How does it run? A. North and south.

Q. How does Eighth Street run? A. East and west.

Q. About how wide is Grove Street from curb to curb? A. Well, I judge from about twenty-five to thirty feet.

Q. How wide is Eighth Street about from curb to curb? A. Well, I judge about twenty feet.

Q. Eighth Street is a little narrower than Grove Street, is it? A. Yes, sir.

Q. Is there one or two trolley tracks on Grove Street? A. One trolley car track.

Q. Looking at the board, we will make this north at the top there, and south at the bottom, east to the right and west to the left. As I understand it, this would be Grove Street, then wouldn't it? You can see from up there? A. Yes, sir, I can see.

Q. That is Grove Street coming south, isn't it? A. Yes.

Q. And this would be Eighth Street, wouldn't it? A. Yes, sir.

Q. Now as I understand it, you were coming south on Grove Street? A. Yes, sir.

Q. And where was Flynn? A. Flynn was standing on the northeast corner.

Q. Suppose you come down and point that out to us, will you? A. I will. (Witness indicates on board).

Q. Just show me where the northeast corner is? A. Right here.

Q. This is the corner here, you see. That would be northeast corner, wouldn't it? A. Yes, sir.

Q. And the—where is the northwest corner? A. Right here.

Q. Wouldn't this be the northwest here? This is Grove coming down? A. This is the northwest right here.

Q. Now then, which way was your automobile going? A. Going south on Grove Street.

Q. Well—

The Court: Mr. Markley, I think we better stop until tomorrow morning, because we are getting into a diagram and we will be put upstairs again tomorrow morning, and I think it would be better to wait to get the story of the accident at that time any way. We will be on the third floor tomorrow morning, and you will report there at ten o'clock.

Let me say this to you gentlemen: Do not discuss this case with anybody. I mean if any one endeavors to discuss it with you, immediately stop them and report the matter to the court tomorrow morning.

(Adjournment thereupon taken to March 4th, 1931, at ten a. m.)

March 4th, 1931.

Met pursuant to adjournment.
Present, as before.

The Court: I think the plaintiff was on the stand.

Mr. Markley: Mr. O'Shaughnessy.

SIMON O'SHAUGHNESSY, the plaintiff, resumed the stand, and testified as follows:

Direct-examination (continued) by Mr. Markley:

Q. Will you please step down here officer? A. (Officer goes to blackboard.)

Q. This is Grove Street here? A. Yes.

Q. Going north and south, is that right? You remember? A. Yes.

Q. And Eighth Street runs east and west, does it not? A. Yes, sir.

Q. How wide is Grove Street?

The Court: I think he testified that was between twenty-five and thirty feet.

Mr. Markley: Yes, I just wanted to be sure.

Q. That is twenty-five to thirty feet wide, isn't it? A. Yes, sir.

Q. And Eighth Street is how wide? A. About twenty feet.

Q. Now then, what kind of pavement is there or was there on Grove, at the time? A. Grove Street is a cobbled street.

Q. And Eighth Street? A. That is asphalt.

Q. On Grove Street was there any trolley track? A. Yes, sir. There is a trolley track right in the center of the street.

Q. There is a trolley track right in the center of the street. Just one track? A. Yes, sir.

Q. Two rails? A. Yes, sir.

Q. As you came to Eighth Street, which direction was this truck of the defendant travelling? A. Going south on Grove.

Q. As it went south on Grove Street, it would come from the north to the south? A. Yes, sir.

Q. And as it got to Eighth Street, I think you said you were about five feet north of Eighth Street; how close was it to its right curb? A. About four feet.

The Court: What was the answer?

The Witness: About four feet.

Q. About four feet. Did it come to a stop? A. Yes, sir. It came to a stop.

Q. Just tell the jury now in your own words what you did? A. I seen the gentleman on the corner, Mike Flynn, on the northeast corner. I said to him—

Q. You saw a gentleman by the name of Mike Flynn? A. Standing on the northeast corner. Yes, sir.

Q. That would be this corner here, Grove Street? A. Yes, sir.

Q. The automobile you say came to a stop about four feet north of Eighth Street? A. Five feet.

Q. Five feet? A. Yes.

Q. Well, five feet? A. About five.

Q. All right. You were going along? A. Yes.

Q. What did you say or do? A. I told the driver to stop and leave me off there. I said, "There is a man there—" I mean Mike—" and I wanted to speak to him."

Q. Then what did he do? A. He stopped and I got off the truck, and I went to walk around the end there, in front of it, and just got about almost across the truck when the front hook caught me and knocked me down and shoved me along, and the wheel came along and went right on top of my left ankle. So I yelled to the driver.

Q. Were you coming from the right side of the car around the front? A. Yes, sir, and I wanted to go east to Eighth Street.

Q. You were at this corner? A. Yes, sir.

Q. How far in front of the truck did you get before it started up against you? A. Almost clear across the truck.

Q. What part of the truck struck you? A. The left front.

Q. What part was on your foot? A. The left front wheel.

Q. All right. Now take the witness stand. A. (Witness returns to the stand.)

Q. This driver of this news truck, Hoffman, did he give you any warning that he was going to start? A. No, sir.

Q. Did he blow his horn? A. No, sir.

Q. How far did he go from the point where he stopped, five feet north of Eighth Street, to where he stopped with the front left wheel on your foot? A. About ten feet.

Q. About ten feet? A. Yes, sir.

Q. Now when he came to the stop, was the wheel actually on your ankle then? A. It was right on top of my ankle. Sure.

Q. Won't you step down here and show the jury just how the wheel was on your ankle? A. (Leaving witness chair): Well, we will say this distance here is the front of the truck now. I went to go east on Eighth Street, and when I was crossing and I am about so far—

The Court: Suppose you use this end of the table as the front of the truck. I think that would be better, Mr. O'Shaughnessy.

The Witness: Right here, your Honor?

The Court: Yes.

A. (Continued) Well, I got up here, like where this gentlemen is here, we will say, and five feet further back from the northwest corner, and I got off. I said "I want to see that gentleman over there on the corner, east corner" and I went to go around the truck, and got about so far, and the left front of the truck hit me on the thigh here, knocked me down, and shoved me, I should judge, about three or four feet, and I got the wheel right upon the top of my left ankle. I fell down on my right side.

Q. You testified, "On your ankle." On this part of your ankle, here (indicating)? A. Right along here.

Q. Across the outside of your ankle, then? A. Yes, sir.

Q. Take the stand. That is what I wanted to know. A. (Witness returns to the stand).

Q. What did they do to get the truck off your ankle? A. He had to back up the truck.

Q. Did he back it up? A. Yes, sir.

Q. Then what happened after that? A. This Michael Flynn came along and pulled me out. He pulled me out from under the truck.

Q. Then what did he do with you? What did Mike Flynn do after? A. He took me across to the northwest corner, and I sat on Grove and a Grove taxi came along; a young fellow stopped the taxi, and the cop there asked him if he would take me up to the hospital and he said "Yes".

Q. That is, the taxi driver? A. That gentleman there on the front seat.

Q. Did you go in his taxi to the hospital? A. Yes, sir.

Q. Did this ankle cause you any pain when it was run over? A. Yes, sir. Terrible pain.

Q. Were you able to stand up on it? A. No, sir. I tried, but I could not. I sat down.

Q. When you got to the hospital, what did they do to you there? A. The doctor made me take off my shoe and helped to take it off, and was examining my foot there. I almost had a weakness there in the hospital. I had a weakness.

Q. You mean a fainting spell? A. Yes, counselor, and I hardly knew what he was doing, but I knew he was hurting my foot very badly.

Q. You do not know what he did to your foot; is that right? A. I know he had hold of the heel, but I do not remember.

Q. How long were you at the hospital? A. Three weeks at the hospital.

Q. Then what did you do? A. I went home on crutches.

Q. And when you went home were you able to walk on your foot? A. On crutches. I could not use my foot any at all.

Q. Did they put a plaster cast on it when you went home? A. Yes, sir.

Q. Did you go back to the hospital after that? A. Yes, sir. I went back there.

Q. How many times did you go back to the hospital? A. Twelve visits.

Q. How often did you go back? I mean, how many days in between? A. Well, like every two weeks or so. He sent me back after the first, after, while the cast was on.

Q. Every two weeks? A. Yes, sir.

Q. How did you go to the hospital from your home on Eighth Street? A. By taxi.

Q. How far is it from Eighth Street up to the City Hospital? A. Well, I would not— I could not tell you the distance.

Q. How much did you pay? A. Dollar. A dollar one way. That was two dollars a visit.

Q. And how many visits did you make? A. Twelve visits.

Q. Then you paid $24.00 in taxi? A. Twenty-four.

Q. Did you have to pay any bill at the City Hospital? A. No, sir.

Q. Did you lose any salary for being away from the police department? A. No, sir.

Q. They paid you your salary? A. Yes. Paid me right along.

Q. Now then, how long were you laid up at your home after you left the hospital? A. Until the first of July.

Q. And when did you go back to do any police work at all? A. I went back the first of July.

Q. And what kind of work did you do when you went back about the first of July? That would be 1928, would it—the first of July, 1928? A. Yes, sir.

Q. What kind of work were you given? A. The captain put me over in the Hamilton Park. You see, after the accident, whenever I wanted I could sit down on a bench there.

Q. Were you able to do that work? A. No, sir.

Q. Then what did he do with you? A. Then I went up to the court room for relief of a court officer there for two weeks' vacation.

Q. Yes. Then what did you do? A. Of course, I could sit down there, but not all the time.

Q. Yes. A. So he sent me down to the bank.

Q. What bank? A. Commercial Trust Company.

Q. What did you do down at the Commercial Trust Company? A. I used to ride around in the car all day.

Q. In a bank car? A. Yes, sir.

Q. How long did you do that? A. I worked there until December— I mean May the thirtieth, 1930.

Q And then what did you do after May, 1930? A. They put me on the street, then.

Q. Did you try to work on the street? A. Yes, sir.

Q. Did you stay on the street? A. While the bank was under repair, the Commercial Trust.

Q. No. Before that date. How long did you stay on the street trying to do patrol duty after May 1st, 1930? A. Several nights and days.

Q. Did you have to give that up or not? A. No, sir. The bank, the Commercial Trust Company, was under—after May and July, 1930, was under repairs, and he sent me down to the bank. I could go in and sit down in the bank.

Q. You went because you could sit down? A. Yes, sir.

Q. How long did you keep that position, sitting down at the Commercial Trust Company? A. Well, about, I think, about four months.

Q. Until when? Until the first of this year? A. Yes. About the first of this year. Yes.

Q. Since this first of this year what have you been doing? A. I have been on the street right along.

Q. Now then, did this being on the street have any effect on your foot? A. Yes, sir.

Q. What effect, what does it do to your foot? A. It pained me all the time.

Q. Anything else? A. Yes. When I come in off my tour of duty my foot is twice its normal size.

Q. When you come in after eight hours tour? A. Yes, sir.

Q. Then what do you have to do with your foot? A. I have to bathe it and my wife rubs it with a rubbing solution.

Q. Does it pain you all the time? A. Pain all the time, but most though when I am wearing anything like on my—

Q. You say when you come in after being out on patrol duty it is swollen about just twice the size? A. Yes, sir.

Q. Do you have any trouble with your foot, with the back of your heel, from your shoe? A. There is a pain in the back of my heel all the time.

Q. What? A. The skin was off the heel last week. It is just starting to heal up now.

Q. It comes on and off, does it? A. Yes.

Q. You say the skin wears off the back of your heel? A. Yes. I got to keep an old pair of shoes on me all the time now.

Q. What other expenses did you have? A. Two pairs of crutches.

Q. What did you pay for the crutches? A. Five dollars a pair.

Q. What else? A. A baking lamp, six dollars.

Q. A what? A. The baking lamp, six dollars.

Q. To bake your foot? A. Yes, sir.

Q. A baking lamp? A. A baking lamp. Yes, sir.

Q. That is to heat the foot? A. Yes, sir.

Q. That was six dollars. What did you spend for alcohol and the other things you used, and medicines? A. About Twenty-five dollars.

Q. You told us about the taxi fare. Did you have to have a rest chair for your foot? A. Yes, sir.

Q. How much did that cost? A. Sixty-nine dollars.

Mr. Markley: That is all. Cross-examine.

Cross-examination by Mr. McGlynn:

Q. What time did you say it was when the truck came along Grove Street that night when you first saw it? A. It was about 12:30.

Q. And where was the truck when you first saw it? A. Coming right on the corner of Grove and Thirteenth Street.

Q. Had you seen him before that coming down Grove Street? A. Well, I suppose, if I happened to be looking in that direction I might have seen him beforehand.

Q. Where were you standing? A. On the northwest corner.

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

Q. Just standing still? A. Standing still. Yes.

Q. You say he drove up and stopped at your corner? A. Yes, sir.

Q. And asked you, "Where are you going? A. He stopped right in front of where I stood.

Q. And asked you, "Where are you going?" A. Yes, sir. He said, "Are you going down?"

Q. And you said what? A. I said, "Yes; going down as far as— I am only going as far as Eighth Street." "All right," he said, "I am passing Eighth Street; come right along."

Q. You said that you were going to Eighth Street? A. Yes, sir. After. "I am going to Eighth Street", I said.

Q. So that you say he knew when you got on the truck that you wanted to stop at Eighth Street? A. Before I got on the truck I told him I was going to Eighth Street.

Q. You lived there on Eighth Street, between Grove and Erie? A. Yes, sir.

Q. Erie is west of Grove, is it? A. Erie is west of Grove. The next street.

Q. It is the next block west, is it? A. Yes.

Q. And you lived a few houses in on Eighth Street from Grove going west? A. Yes. About four or five houses.

Q. That is the corner where the drug store is there? A. No, sir. The drug store is on the northwest corner.

Q. Isn't that your corner? A. No, sir.

Q. Where is your house from the drug store? A. On the south side of the street. Across the street.

Q. South side of Eighth Street? A. Yes.

Q. West of Grove? A. Yes.

Q. Did you say anything to the driver as you came near Eighth Street? A. Yes, sir. I told him—

Q. What? A. When I came to within five feet of the northwest corner I told him to stop, I said, "There is a man on the northeast corner I want to see there; will you please stop."

Q. You told him when you got on that you wanted to get off at Eighth Street? A. I told the driver when I got on that I wanted to get off at Eighth Street.

Q. Is that right? A. No, sir. It is not. I told him when I got on the truck "I am only going to Eighth Street." He said, "All right; I am passing Eighth Street." It was on the street yet. I did not get on yet.

Q. He knew you wanted to get off at Eighth Street. It makes no difference— A. When I was coming—

Q. After you came to Eighth Street, after you passed Ninth Street, did you say anything to him about the "Next street is my block?" A. No, sir. I did not.

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

Q. Did he slow up the truck as he came to Eighth Street? A. He kind of slowed, I guess.

Q. He did not stop after you spoke to him five feet from the corner, did he? A. Yes, sir.

Q. I thought you said he stopped his truck five feet from the corner? A. Five feet north of the corner.

Q. Did you say anything to him before he reached that point five feet from the corner about wanting to get off? A. Yes. I said "There is a man on the corner there;" I said, "I want to see him—" Michael Flynn.

Q. Before you got to the corner? A. Yes, sir.

Q. How far back from the corner were you when you said that? A. I should judge about five feet.

Q. Then he was going very slow? A. Not so slow.

Q. He stopped within ten feet? A. Within five feet.

Q. Five feet. What kind of a truck was it? A. Auto car.

Q. You sat out in front. Is it built like the ordinary automobile truck you see on the street, or is it different? A. It is built kind of different.

Q. Has it got a running board on the side? A. No, sir.

Q. How did you step down when you got off at the corner? A. It has got a step right on each side.

Q. Single iron step? A. Yes.

Q. Did you step on that step to get on or did you step right onto the ground when you got on? A. I stepped on the step to get off.

Q. You knew that step was there? A. Yes.

Q. You knew there was no running board there? A. Yes, sir.

Q. Was it light or dark on the corner at half past twelve this morning as you came up near the corner of Eighth Street? A. It was light.

Q. Very light? A. Yes, sir.

Q. Where is the light on the corner? A. On the northeast corner.

Q. Did the car come to a complete stop before you got off? A. Yes, sir.

Q. Sure of that? A. Positive.

Q. I heard you mention some policeman's name a little while ago, when you talked about a taxi driver. What was the policeman's name? A. Zunkley, the name was.

Q. Zunkley? A. Yes, sir.

Q. Was he standing on the corner when you came to that corner? A. No, sir. He was not.

Q. Did he come over before you were pulled out from underneath the truck? A. No, sir.

Q. Did he come up afterwards? A. Afterwards.

Q. Where were you when he got there? A. I was sitting on the curb.

Q. Sitting on the curb? A. Yes, sir.

Q. The truck driver was there? A. Yes, sir.

Q. And the taxi driver? A. Yes, sir.

Q. Did the taxi driver get there before the policeman? A. No. The taxi driver was not there yet. The policeman was there and the truck driver, and Michael Flynn and myself.

Q. Michael Flynn, yourself and the truck driver sat there first? A. Yes.

Q. Then the officer came up? A. Yes.

Q. And then the taxi driver came up? A. Yes, sir.

Q. The taxi driver is the man who took you to the hospital? A. Yes, sir.

Q. The patrolman went with you, didn't he? A. Yes.

Q. You told the patrolman what happened? A. No, sir.

Q. Didn't say a word to him about what happened? A. No, sir. I was in too much pain.

Q. Didn't he ask you what happened? A. No. He didn't ask me.

Q. Did you make a report to your station house as to what happened? A. No, sir.

Q. Never? A. Never.

Q. Isn't that part of your duty as a policeman to make a report of things of that kind? A. I could not make a report as I was up in the hospital.

Q. Did you make a report the next day? A. No, sir.

Q. Did you make it at any time thereafter? A. No, sir.

Q. And you never told Zunkley what happened? A. No, sir; I never did.

Q. Did you tell anybody else what happened? A. No, sir.

Q. Never talked about the accident? A. No. After I was in so much pain, and I could not.

Q. Were you unconscious? A. No. Not what you call unconscious. But I was in pain.

Q. You knew when the officer came up? A. Yes, sir.

Q. You were conscious at that time? A. Yes, sir. Yes.

Q. You were conscious when the taxi driver drove up? A. Yes, sir.

Q. You knew Michael Flynn? A. Sure.

Q. Did you talk to Michael Flynn? A. Yes, sir.

Q. How wide would you say this truck was? A. Well, I guess a rough estimation was six feet.

Q. About six feet? A. Yes.

Q. Have you any idea how far back from the extreme front of that truck, the dash board reaches out in the front, the wheels are, the front wheels? A. Well, I could not tell you that.

Q. Well, you described, and acted, very beautifully here for your counsel, just exactly how you were hurt, and how the truck ran over your foot, didn't you? A. Yes. But I didn't—

Q. You remembered that, didn't you, very beautifully? A. Yes, sir.

Q. Very vividly? A. Yes, sir.

Q. Can't you tell me how many feet back from the front of this truck that wheel was that went over your foot? A. To the distance, you mean, mister? I did not measure.

Q. Was your body underneath this truck? A. Yes, sir.

Q. How much of your body? A. Mostly all of my body.

Q. You were lying full length? A. No, sir. I was not.

Q. How tall are you? A. I am six feet, two and three-quarters.

Q. Well, how much of your body was there underneath the front of the truck? A. Well, I guess from my hips.

Q. Down here (indicating)? A. Yes.

Q. Didn't you, a few minutes ago say you were out like this, with the truck up over your ankle? Isn't that the way you showed it before? A. I told you I was down on my right side.

Q. Just the way I am standing now? A. No, sir. Down on my right side. Down that way (illustrating).

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

Q. Didn't you have your hand on the floor when you showed it a few minutes ago? A. After, when I had the wheel on top of my foot, I kind of raised up, and he was still holding on to me, and I said, "Will you please get that truck back off my foot."

Q. You are sure you used the word "please?" A. Well, I don't know.

Q. You were laying—were you laying, as a matter of fact, the way the truck was going, or were you out from it or how? A. I was laying facing this way, from the truck.

Q. Facing that way from the truck? A. Yes, sir.

Q. You say you got off the truck and stepped on the step? A. Yes.

Q. Stepped down on the ground? A. Yes, sir.

Q. And you had already told him you were going to talk to Mike Flynn there on the corner, and you had pointed Mike Flynn out? A. Yes.

Q. Mike Flynn was the only person on any one of these four corners? A. That is all I seen.

Q. And it was very light there? A. Yes, sir.

Q. And you pointed this man out and walked over in front of the truck that was standing still? A. Yes.

Q. And you walked almost the entire width of the truck before it started? A. Yes.

Q. Suddenly you were hit on the thigh, thrown over, as you described here, and the truck's left wheel went over your foot, is that right? A. Yes, sir. It got on top of my foot.

Q. On top of your foot? A. Yes, sir.

Q. Were you asked in the hospital what happened to you? A. No.

Q. Never? A. No, sir.

Q. Were you ever examined by Doctor Londrigan? A. Yes, sir.

Q. Do you remember when that examination was? A. I cannot well remember now.

Q. If I told you it was July, 1929, does that seem about right? A. That I cannot say now. I do not really know. I do not really know about the date.

Q. That was long after the accident? A. Yes. It was quite a while after.

Q. Do you remember now that it was about a year and several months after the accident? A. No. I cannot say that. I cannot say it was a year and several months.

Q. You remember around the time you went back to work? A. Yes, sir. I was working with a bank then.

Q. You remember going down to Doctor Londrigan's office? A. Yes.

Q. Do you remember Doctor Londrigan asking you certain questions about your injuries to the foot, and so forth? A. He only asked me how much my pain was. That is all.

Q. Did he ask you your name? A. I guess he did.

Q. Did he ask you your address? A. I guess so.

Q. Did he ask you whether you were married or single? A. Well, I do not know if he asked me that now.

Q. Did he ask you the date of the accident? A. No, sir. I do not think so.

Q. Did he ask you the place the accident happened? A. No.

Q. Did he ask you the time the accident happened? A. No, sir.

Q. Did he ask you what hospitals or what doctors had treated you up to that time? A. No, sir. He did not.

Q. Did he ask you how the accident happened? A. No, sir.

Q. Did you tell him how the accident happened? A. I did not.

Q. Didn't you say that, on the occasion of this examination by Doctor Londrigan, that you told him in response to questions by him, in answer to a question by him, as to how this accident happened— A. No, sir.

The Court: No. Wait until he is finished.

Q. (Continued) —Didn't you tell him on that occasion that on February 25, 1928, at 12:35 A. M. at Grove and Eighth Street, Jersey City, while getting off this auto truck, your left foot was run over by a wheel of the auto truck? Did you tell him that? A. No, sir. I did not.

Q. What did you have to do in order to be relieved of your duties as a policeman and at the same time claim your salary? A. I worked for the bank.

Q. What did you have to do as far as the police department was concerned? Did you have to make any application for sick leave? Did you have to file any certification? Did you have to make any report? A. No, sir.

The Court: Did you have to make any report to the police department?

The Witness: No, sir. I didn't.

Q. Did you claim your salary? A. I claimed my salary. Yes.

Q. How often? A. Every two weeks.

Q. Did you go down for it or was it sent to you? A. No, sir. It had to be sent to me.

Q. Were you examined by the department physician? A. No, sir.

Q. Did you request the City Hospital to send a report of your injuries to the police department? A. No. I did not.

Q. Were you ever interviewed by anybody in the police department as to the extent of your injuries? A. No, sir.

Q. What are the rules in the police department of Jersey City when a man is hurt or sick and he cannot work? What does he have to do in order to get sick leave?

Mr. Markley: I object to that. It is immaterial.

The Court: No. I will allow it on the question of credibility.

Mr. Markley: I object to it as not the proper way to prove the rules and not cross-examination, if there are any rules. There is no evidence that there are any rules. Is your Honor allowing the question?

The Court: No. I think I will sustain the objection on what are the rules.

Q. How long have you been a member of the police department of Jersey City? A. May first, 1920.

Q. What do you have to do? Have you ever been sick before? A. Yes, sir. I was sick before.

Q. Been off on sick leave before? A. Yes, sir.

Q. What do you have to do as a member of the Police Department of Jersey City when you are sick or injured and unable to perform your duty, in order to get your salary while you are away and cannot work?

Mr. Markley: I object to that on the ground that the witness says he was ill and was never injured before and there may be a difference. I mean there is no similarity between the questions, and I object to what he did not do or what he did do at any time prior with respect to being ill.

Mr. McGlynn: I think, if your Honor please, that I have eliminated the rules, and it certainly seems to me that, when a member of any kind of a department, such as the police or fire department, or similar department could just stay away from his duty without something being done to indicate the extent of his injuries, the cause of them or what not, this man has been there all the time since 1920; he has been off before, he says, and I think I am entitled to find out, what he did then, and have the jury compare that with what he said he did not do now.

The Court: No. I think the objection should be sustained.

Mr. McGlynn: Your Honor will allow me an exception?

The Court: Certainly.

By the Court:

Q. Didn't you communicate with your superior officers in any way? A. When I was sick previous, but not now.

Q. No, no. This time? A. No, sir. I did not.

Q. Didn't you have anybody communicate with them? A. Well, I don't know about that.

Q. I say, didn't you have anybody communicate with them? A. Well, there was a policeman there. I don't know what action he took.

Q. I say, didn't you have anybody communicate with them? A. No, your Honor. I did not.

The Court: All right.

By Mr. McGlynn:

Q. Now you say you did communicate with them before? A. Well, I had somebody go out and telephone. That is all.

Q. Who would you communicate with? A. With the station house where you belong.

Q. And what station house were you attached to? A. Second Precinct.

Q. Did you have anybody telephone the station house this time? A. No, sir, I did not.

Q. When was the first you were back in the station house after the accident? A. Back at the station house alone?

Q. Yes. A. On July first.

Q. You were not in there before that at all? A. No, sir.

Q. Before you went back to work? A. No, sir.

Q. And was your pay sent you entirely between

February and July? Didn't you have to go up there and get your back wages before July 1st? A. No, sir, I did not.

Q. Whom did you talk to when you went back first at the station house? A. I just remember it was the lieutenant who was being on the desk at that time there.

Q. You reported to the lieutenant? A. I did. Yes.

Q. What did you tell him?

Mr. Markley: I object to it as immaterial.
The Court: Objection sustained.

Q. Did you tell him that you were ready to report for duty? A. Just told him I would report.

Q. Is that what you told him? A. Yes, sir.

Q. You said you stayed at the hospital three weeks and you went back to the hospital for treatments, I think upon two occasions you said. Is that all the treatments you had then? A. I had more treatments.

Q. Where? A. Down in the Labor Bureau, 471 Jersey Avenue.

Q. When did you start to go there? A. Well, I could not tell you exactly now.

Q. Well, about when? A. Some time after I left the hospital. After.

Q. Well, can you tell me about when that was? Can't you tell me the doctor's name, or the date you were at the Labor Bureau? A. No, sir. I do not know his name.

Q. Sir? A. I do not know his name. No, sir.

Q. It was not by any chance the same doctor who examined you in July, Doctor Londrigan, was it? A. No, sir.

Q. Did he ever treat you down at the Labor Bureau? A. Not that I know of. No.

Q. You would know him when you saw him? A. I think I would.

Q. Did the doctor who treated you over at the Labor Bureau ask you how your accident happened? A. Not that I could remember. No, sir.

Q. Was it possible he did ask you and you have forgotten? A. No, sir.

Q. Did he ask you when it happened? A. No, sir.

Q. He asked you no questions at all? A. No, sir.

Q. Did you have any papers to indicate what you were there for? A. There were papers sent down by the City doctor.

Q. What city doctor? A. I don't know what his name was. Palsey, or something. I don't know his name. Transferred. That is all. He was from the City.

Q. What? A. He was only transferred from the City, I guess, down there.

Mr. Markley: From the City hospital?

The Witness: Yes.

Q. Did you take the papers down with you? A. No, sir. I did not take the papers.

Q. Well, did you give this doctor at the City hospital, that you say treated you, any history of how you were hurt or when you were hurt? A. No, sir. I did not.

Q. Not a word? A. No, sir.

Q. This same patrolman that you say came after the accident, went with you to the City Hospital? A. Yes. He went in the taxi, too.

Q. Did he stay there with you? A. No. He went home.

Q. Did he stay there at all for a few minutes? A. I do not know. I really could not tell you.

Q. You do not know? A. No. I don't know.

Q. When did you first consult an attorney about this case, Mr. O'Shaughnessy? A. I could not give you the day or date.

Q. Not exactly. What is your idea of the approximate time when you first saw a lawyer about this?

Mr. Markley: I object to that, your Honor. It is immaterial.

Mr. McGlynn: I think it is very material.

The Court: Objection overruled.

Mr. Markley: Allow me an exception.

The Court: Certainly.

Mr. McGlynn: Please read the question.

(Last question read by the stenographer).

Mr. Markley: He has already said he could not fix it.

Mr. McGlynn: What is his answer?

A. I dis-remember the time.

Q. Did you see him a week after the accident? A. No, sir.

Q. Did you see him a month after the accident? A. No, sir.

Mr. Markley: If he knows.

Mr. McGlynn: Of course if he knows.

Mr. Markley: I would like to know. You cannot make a man answer questions he cannot answer.

The Court. No, but he can be interrogated to see if he cannot be helped to remember.

Mr. Markley: If he can. Yes. But I do not think that he would remember a month or a week. It is almost impossible to remember whether it is a month or a week.

The Court: Why, I don't know that it

should be impossible, it may be impossible.

Mr. Markley: There is nothing to fix the date in the witness's mind.

The Court: Well, he may examine to see if he can remember.

Q. Have you a pretty good memory, Mr. O'Shaughnessy?

Mr. Markley: I object to that question.

The Court: Objection sustained.

Q. You remember very vividly all facts in the complaint, sir?

Mr. Markley: I object to that.

The Court: Objection sustained.

Q. You cannot remember when you first saw a lawyer? A. No, sir.

Q. Do you know when your suit was started? A. No, sir.

Q. Who was the first lawyer that you saw? A. Counsellor Robbins is the first lawyer I saw.

Q. Did you see him in March, 1929? A. Well, I do not remember now.

Q. Did he send for you after the suit was started and tell you that he wanted to ask some questions about the case? A. No, sir.

Q. He never sent for you after the suit was started? A. Yes. He sent for me once.

Q. When did you first see him after suit was started? A. Well, I don't—I could not really tell you now. I did not keep note of the date.

Q. Did he ever send for you and ask you and tell you that he had been served with certain papers requesting information about the place where this accident happened? A. No, sir.

Q. Or how far you rode in the defendants' truck? A. No, sir.

Q. Did he ask you or tell you that he had been requested to furnish information as to the place you rode on the defendant's truck? A. No, sir.

The Court: Did you tell your lawyer how the accident happened?

The Witness: Yes, sir.

Q. When was that? The first time you saw him? A. I cannot remember how long ago it was now, to tell you the truth.

The Court: No—

Q. Did you tell your lawyer the first time you saw him how this accident happened? A. Yes, sir. I told him.

Q. What did you tell him? A. I told him just how the accident was.

Q. What did you tell him? A. How I got hurt.

Q. Tell me what you told him then? A. I told him I rode on that truck from Thirteenth Street all the ways to Eighth Street, within five feet of Eighth Street. I got off there, and went to go around the front of the truck for to see a man by the name of Michael Flynn; he suddenly stepped on the gas and he knocked me down and caught the wheel on top of my left ankle.

Q. Did you ever tell your lawyer that you were injured while alighting from the automobile at or near the intersection of Grove Street and Eighth Street? A. No, sir.

Q. Did you ever tell your lawyer that the driver or operator of the truck, while you were alighting from the truck, started before you had completely alighted from it? A. No, sir.

Q. Did you ever tell your lawyer that the operat-

or or driver of the truck failed to give you any warning of his intention to start the automobile while you were still alighting from it? A. No, sir.

Q. Has anybody told you that your suit was started? A. No, sir.

Q. You did not even know you had a suit started? A. They did not tell me.

Q. Nobody talked to you recently about the case? A. No, sir.

Q. What? A. Other than my counsel. That is all.

Q. Well, I said anybody. That included him. Whom did you talk to yesterday about the case? A. I spoke to that gentleman right there on the chair.

Q. Mr. Markley? A. Yes, sir.

Q. Is that the first you ever talked to him? A. I think I met the gentleman before.

Q. You met him before. How long ago? A. That I could not exactly say, how long ago it is.

Q. Within a short time? A. Well, it is quite a while ago, I guess.

Q. Were you ever asked recently by Mr. Markley or anybody in Mr. Markley's office whether this accident happened while you were getting off the truck, or while you were walking in front of the truck? A. No, sir.

Q. Nobody asked you that? A. No, sir.

Q. Did you ever tell anybody in Mr. Markley's office how this accident happened? A. No, sir.

Q. How many times did you tell Mr. Robbins, your first lawyer, how this accident happened? A. I told him once to my knowledge.

Q. Only once? A. Yes, sir.

Q. Sure of that? A. Yes, sir.

Q. Did you tell your lawyer, when you first saw

him, about this accident, that Mike Flynn was a witness? A. Yes, sir.

Q. Did you take Mike Flynn down to his office with you? A. No, sir. I did not.

Q. Never did? A. No, sir.

Q. Did you ever ask Mike Flynn to go to his office to tell him how this accident happened? A. No, sir.

Q. Have you and Mike Flynn ever been to Mr. Robbins' office together? A. No, sir. We have not.

Q. Did you have Mr. Flynn at Mr. Markley's office? A. No, sir.

Q. You remember being called upon by Mr. Dreyer, Mr. O'Shaughnessy? A. Mr.—

Q. Dreyer? A. Who is Mr. Dreyer?

Q. Mr. Dreyer is an investigator who came to see you to ask you about this accident, how this accident happened, I think at your house? A. Yes, sir. I remember a man coming to the house after me.

Q. And he talked to you about this accident, then? A. Yes. I did not speak to him though.

Q. What? A. I did not talk to him.

Q. You did not talk to him at all? A. No, sir. I told him I did not want to have nothing to say about it.

Q. Was he in your house? A. Yes, sir.

Q. You say you did not talk to him? A. No, sir.

Q. You are sure of that? A. Positive.

Q. You are sure that he did not talk to you, on that occasion, and he had a piece of paper with him, and he wrote down exactly what you told him about how this accident happened? A. No, sir.

Q. Did you refuse to sign that paper? A. He wrote down, but I did not tell him nothing.

Q. What did he write down? A. I could not tell you. He went to the dining room table and he started to write. He said "Will you sign this paper here for me?" I said, "No, sir, I would not sign nothing."

Q. He did not discuss it with you at all? A. Just when he first came in. I asked him how he heard it.

Q. Did you tell him how it happened? A. No, sir.

Q. There was no discussion about it? A. No sir. I did not tell him nothing.

Q. Didn't you tell that man, on that occasion, that you were hurt by falling off this seat on the front of the car while you were alighting from it? A. No, sir.

Q. You received your regular compensation for the entire time since this accident happened? A. Yes, sir. From the police department.

Q. And are you asking this jury for any compensation because of the fact that you cannot patrol your beat but was given an assignment down to the bank to sit inside the bank?

Mr. Markley: I object to that question.

Mr. McGlynn: Counsel in opening, if your Honor please, stated that is one of his grounds for recovery. If he withdraws that now, of course I haven't any purpose.

The Court: No, no. I think counsel said they were not asking for any compensation by reason of loss of salary.

Mr. Markley: I think you are right.

The Court: Read the question.

(Last question read by the stenographer.)

Mr. Markley: I object to it as an improper question, because the witness is asking for

what the law will give him after your Honor's instruction. He cannot characterize it.

The Court: The objection will be sustained.

Q. Just going back a minute, Mr. O'Shaughnessy, to this call at your house by Mr. Dreyer: Do you recall that was in April, 1928, two months after this accident happened? A. I dis-remember the time.

Q. But you remember it was a short time after the accident happened, don't you? A. Well, I do not know how short it was.

Q. Within a year, was it? A. No, sir. It was not a year now.

Q. Do you remember whether it was before you went to see your lawyer or after? A. I could not remember that.

Q. Had you ever ridden on this truck before? A. No, sir.

Q. Had you seen the truck before? A. I might have seen it, but never paid no attention to it.

Q. You mean you did not recognize it as a truck that you knew? A. No, sir.

Q. You did not know the driver? A. No, sir.

Mr. McGlynn: That is all I have.

Mr. Markley: That is all. Mr. Rickard.

(Witness excused).

WALTER RICKARD, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

Q. Mr. Rickard, where do you live? A. I live at 242 Bergen Avenue, Jersey City.

Q. How old are you? A. Thirty.

Q. By whom are you employed? A. Well, at the present time—

The Court: Can you talk a little louder? These gentlemen should not have any difficulty in hearing you.

Q. Speak so that these gentlemen all hear. A. I work for the Grove Taxi.

Q. As a taxicab driver? A. As a cab driver. Yes, sir.

Q. Are you still a taxicab driver for that company? A. Yes, sir.

Q. Do you remember the night that Officer O'Shaughnessy was injured up at Grove and Eighth Street? A. I do.

Q. About what time did you come to Grove and Eighth Street that night? A. Oh, it was approximately around 12:40 or quarter to one. Something like that.

Q. You did not see the accident happen? A. No. I did not see the accident happen.

Q. Where were you going? A. I was going back to the stand at Grove and Newark Avenue.

Q. You had a taxi stand at Grove and Newark Avenue? A. That is at the Tubes. Yes, sir.

Q. At the Hudson Tube at Grove Street? A. That is right.

Q. Which way were you proceeding on Grove Street? A. South on Grove Street.

Q. Coming south on Grove, well then the street before Eighth would be Pavonia Avenue? A. Pavonia Avenue.

Q. When you passed Pavonia Avenue coming south toward Eighth? A. Coming south.

Q. What position were you in on Grove Street as you came south toward Eighth? A. Well, I

was in the middle of the street because it is a one-way street.

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

Q. Did you notice where this truck of the Bayonne News Company was? A. Well there was a lot of excitement on the corner, and the truck stopped, and it was probably ten feet from the corner, and I—

Q. Did you get out of your taxi cab? A. No. I did not get out of the cab.

Q. You did not get out of it at all? A. I did not get out of the cab at all.

Q. Where did you stop your cab with reference to the truck of the Bayonne News Company? A. Right on the corner, the northwest corner.

Q. Alongside of it? A. No. It was away from the corner. The truck was away from the corner on an angle, see.

Q. How far away was the truck from the corner when you got there? A. I would say about ten feet.

Q. How far south of the northwest corner was it when you got there? A. About ten feet.

Q. The front or the rear of the truck? A. The rear of the truck.

Q. The rear of the truck, when you got there, was ten feet south of the northwest corner? A. Yes, sir.

Q. How close was it to its righthand curb—assuming that the curb was extended this way on a straight line across Eighth Street, how close was the right line of the truck to the extension of the curb? A. About five or six feet.

Q. Was the truck about five or six feet from its right curb if you extended that curb along across Eighth Street? A. I would say that.

Q. You say the whole truck was in Eighth Street when you got there? A. It was away from the corner.

Q. The rear of the truck, I think you said, was about ten feet south of the corner? A. Yes, sir.

Q. Did you see Officer O'Shaughnessy there? A. He was sitting on the curbstone when I got there.

Q. What curbstone was he sitting on? A. On the northwest corner.

Q. That would be the corner here (indicating on the blackboard)? A. Yes, sir.

Q. Who else was there when you got here? A. The patrolman. I cannot recall his name now.

Q. Any body else? A. A man named Flynn.

Q. What did you do if anything? A. Well, of course it was an accident, and I picked the officer up and these two men, and took them to the hospital.

Q. Did you go in the hospital with them? A. Yes, sir.

Q. Did you stay there? A. I did.

Q. How long? A. Twenty minutes.

Q. Then you went out again? A. I took the officer's clothes down to the Seventh Precinct—Second Precinct.

Q. You took his clothes to the Seventh Precinct? A. To the second.

Q. The second, on Seventh Street? A. On Seventh Street.

Q. Did you take his revolver and other things down? A. Well, the officer took charge of them. We are bad enough without trusting us with guns and things like that.

Q. I won't say that.

The Court: Some of you are all right.

Mr. Markley: Some of you are all right. Sure.

Mr. McGlynn: The exception always proves the rule.

Q. At any rate, you took the officer back his clothes—his uniform you testified you took? A. Yes. His uniform.

Q. Down to the station house? A. Yes.

Q. What kind of a night was it, Mr. Rickard? A. Well it was a clear night. Nothing wrong with the night.

Q. The street dry? A. Street dry.

Q. It was not wet at all? A. No. It was not wet.

Mr. Markley: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. You got there after this accident was all over? A. Yes, sir.

Q. You say that the other patrolman and O'Shaughnessy, himself, were there when you got there? A. They were on the corner, yes, sir.

Q. How far had you been traveling on Grove Street before you got to 8th Street? A. Well I cannot recall exactly how far. I guess I was on my way back from a call, see.

Q. You did not see anything to indicate to you that an accident happened? A. Nothing at all.

Q. You don't know how long it happened before you got there? A. No, sir.

Q. You put the patrolman in your taxi and the policeman got in, and you went to the City Hospital? A. Yes, sir.

Q. Did you go inside with them? A. Yes, sir.

Q. Did O'Shaughnessy do any talking to the hospital at all? A. I waited outside for him, until I got his clothes.

Q. You did not go inside with him? A. I went inside with him, but I did not go in the room where they dressed his foot or took care of his foot.

Q. Did you hear anybody tell in the meantime what happened or what happened to this man? A. No, sir.

Q. You say you waited and took Zunkley down to the second precinct after he got through having this man taken care of? A. Yes, sir.

Q. Do you remember what kind of a truck it was that you saw there? A. I did not really pay any attention to the truck, but I know they are mostly all Autocars.

Q. How do Autocars differ from the ordinary automobile truck? A. Well, the radiator extends usually beyond the wheels. That is, the wheels are not even with the radiator. They are back from the radiator.

Q. Have you any idea how far back? A. Well, I would not say. About maybe three feet.

Mr. McGlynn: I see. That is all.

Mr. Markley: That is all.

(Witness excused).

Mr. Markley: We have another witness, your Honor. Mr. Flynn.

MICHAEL FLYNN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

Q. How old are you? A. 36.

Q. Married? A. No, sir.

Q. Where do you live? A. 235 - 7th Street.

Q. Whom are you employed by? A. The Pennsylvania Railroad.

Q. In what employment? A. Deck hand.

Q. Were you employed as a deck hand back in February 24, 1928? A. Yes, sir.

Q. A deck hand on what kind of a boat? A. Tug boats.

Q. Pennsylvania Railroad? A. Yes, sir.

Q. What were your hours of employment on the night of February 24th, 1928? A. Four to twelve.

Q. You quit at twelve? A. Yes, sir.

Q. Where would your boat be when you quit? A. At the foot of 6th Street.

Q. New York? A. No, Jersey City.

Q. The foot of 6th Street? A. Yes, sir.

Q. After that, what did you do? A. I came up 6th Street and then over Grove.

Q. To where? A. To the restaurant, Pavonia Avenue and Grove.

Q. To the restaurant? A. Yes.

Q. And had a bite there? A. Yes.

Q. Pavonia and Grove are how far from 8th Street? A. Just a block.

Q. Pavonia is one block above 8th Street, is it not? A. Yes.

Q. Then you came down south on Grove Street and then one block to 8th Street? A. One block down, yes, sir.

Q. About what time did you get to 8th Street that night? A. About 12:30 that time.

Q. Where were you going? A. I was going home.

Q. And you lived on 7th Street? A. I lived on 7th Street.

Q. That would be one block south of 8th, wouldn't it? A. Yes, south of 8th.

Q. Did you know Officer Simon O'Shaughnessy

before this accident? A. Yes. I know him about 10 years.

Q. Did you see him that night? A. Well, I just got to 8th and Grove, and stood there for a moment, and I saw a Bayonne News Truck come, and it stopped there, and this officer hollered to me. That was on the corner. So I saw him get off the truck and he walked across the truck, that is, around like in the front of the car, to come to me—just about got clear, when the car suddenly started and hit him, and he went down. So then I run over to him. His foot was under the wheel and the driver kind of backed up a little bit to let it off, and he got his foot off. So I pulled him out and sat him on the sewer.

Q. What wheel was on his foot? A. The left right wheel. That is what I figured.

Q. What? A. The left right wheel.

Mr. McGlynn: What?

The Court: That is a new one on me.

The Witness: The left front wheel.

Q. You said the left right wheel. A. Well, I meant the left front.

Q. Did the car, before it started, give any warning? Did it blow its horn or anything? A. I did not hear anything, no, sir.

Q. Was there any light on that corner, street light? A. There is, on the corner here. Yes.

Q. Which corner were you standing on?

The Court: Northeast corner?

A. Yes.

Q. It was the northeast? A. Yes.

Q. You say that when this truck started, the wheel was on his heel? A. Yes, sir.

Q. Then what was done? A. I pulled him out and sat him on the sewer there.

Q. Was the truck on the foot? A. Yes.

Mr. McGlynn: I object, if your Honor please, to counsel's leading question.

The Court: I will allow it. Was the truck moved out?

The Witness: Yes, sir, to get his foot out. Yes, sir.

Q. Then you say you did what? A. I picked him up and sat him on the corner sewer.

Q. Then what happened? A. I told him to bang his club for this other cop on the corner. So this cop came down, and we called this taxi and put him in it.

Cross-examination by Mr. McGlynn:

Q. You did what? A. Banged his stick for the next officer on the other corner, Officer Zunkley, and he hailed a taxi and put him in the taxi.

Q. Zunkley came over before this happened? A. No, sir—yes, sir. He came over before the taxi. That is right.

Q. Did you tell Zunkley what happened? A. No, sir, I did not.

Q. Did Zunkley ask O'Shaughnessy what happened? A. No, sir. Not as I remember.

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

Q. Zunkley knew you? A. Yes, sir. He knows me from being in the neighborhood.

Q. You were the only person there, you and Zunkley? A. Outside of this taxi driver.

Q. Who came up—the officer and Hoffman, the driver of the truck? A. Yes, sir.

Q. And you had a good look at this Bayonne News car, didn't you? You saw it, didn't you? A. It is an Autocar. I know that.

Q. You said you recognized it as an Autocar? A. It stopped there. Yes.

Q. You fairly knew the truck? A. Yes, sir.

Q. You had seen this kind of a truck before? A. Yes, sir.

Q. How is that truck constructed in the front? A. How is it constructed?

Q. Are the front wheels up in the front like they are in the ordinary car, or back of the front? A. They are back of the front.

Q. How far back are they from the front of the car? A. I think about 3 feet from the radiator.

Q. Do you know where the step is that you step on when you get out of the car? A. It is on the front of the radiator, in front of the wheel.

Q. In front? A. In front of the wheel.

Q. In front of the wheel? A. Yes.

Q. The wheel is in back of the seat? A. Yes, sir.

Q. And you think that wheel is only three feet back from the front? A. That is what I should judge.

The Court: He said in back of the radiator.

Q. Well, the radiator is right out in front, is it not, of the car—the radiator of that Auto car is attached to the dash board, isn't it? A. Yes, sir.

Q. Way out in front. The first thing is this corner of the radiator, isn't it? A. That is a band of iron around it, isn't it?

The Court: Don't ask questions. Answer them if you can.

The Witness: That is the farthest thing out, is it, the band?

Mr. Markley: The band, he says, is the farthest thing out.

Q. The band around the radiator? A. Yes.

Q. Then these front wheels, you say, are at least 3 feet in back of that front?

Mr. Markley: Back of the radiator.

Mr. McGlynn: That is the front?

The Court: Yes.

Mr. Markley: Front of the radiator. I don't care. He did not make it clear.

Q. You say the officer hollered to you? A. Yes, sir.

Q. Before the truck came to a stop? A. No. When the truck came to a stop, he got off the truck.

Q. When did he holler, before he got off? A. Before he got off of the truck.

Q. Before he got off? A. When he got off the truck.

Q. What? A. When he got off the truck.

Q. Then he walked in front of this truck? A. Yes, sir.

Q. How far did he get before something happened? A. Almost clear of it.

Q. Almost clear of it? A. Yes.

Q. When you went over, was he lying flat on the ground? A. Yes, sir.

Q. How much of his body was underneath the car? A. It was his foot under the car.

Q. Well, was the whole of his body east of the truck? A. He was thrown right to his face.

Q. The same way the truck was going? A. Yes, sir.

Q. The wheel, you say was three feet back from the front of the radiator? A. Yes, sir. That is what I figure.

Q. What? A. That is what I figure.

Q. Where was the truck stopped with reference

to the corner? A. Well I figured about 4 feet from the corner.

Q. You mean that he was getting off? A. Yes, sir.

Q. Where was it after his foot was run over? A. Just a little above the crossing.

Q. Sir? A. Just a little the other side of the crossing walk, where he hit him.

Q. How far would you say that is? A. When he was going across the crosswalk, he stopped about four feet from the crossing, then he went over just as he was the other side of it. That is what I figure.

Q. Where was the truck after he ran over his foot with reference to the crossing? A. Well, he had to back the car off his foot.

Q. What? A. He backed.

Q. No. After. I mean at the time you say it was on his foot, where was it with reference to the crossing? A. I remember he was almost on the crossing then. That is what I should judge.

Q. Now, when did you see Mr. O'Shaughnessy after the accident? A. I did not see him until he came out.

Q. Out of where? A. The hospital. I met him on duty.

Q. You did not see him until he went on duty? A. No, sir.

Q. Never saw him at his house? A. No, sir.

Q. And you do not think you saw him until after July first, 1928, when he went on duty? A. That is the only time I seen him.

Q. Where did you see him? A. I seen him at the bank doing duty.

Q. Did you talk to anyone about this case? A. No, sir, I did not.

Q. Never talked to anyone about this case? A. I did not know nothing about it until I got the subpoena.

Q. Nobody has ever talked to you about this case? A. No, sir.

Q. Nobody talked to you yesterday? A. Yes, sir. Mr. Markley, here.

Q. Mr. Markley? A. Yes, sir.

Q. Mr. Robbins? Do you know him? A. Yes, sir.

Q. When did you meet him first? A. Yesterday morning.

Q. That is the first you ever have seen him? A. The first time I have seen him.

Q. Nobody ever called to talk to you from the time this accident happened? A. No, sir. They did not. Never seen him.

Q. Never asked about it? A. Never. I did not.

Q. What? A. Never.

Q. Never talked to Mr. O'Shaughnessy about it? A. No, sir.

Q. He never asked you how it happened? A. No, sir. He did not.

Q. The first anybody ever asked you about how this accident happened was yesterday? A. Yes, sir.

Mr. McGlynn: That is all.

Mr. Markley: That is all.

(Witness excused).

Mr. Markley: Mrs. O'Shaughnessy.

MARGARET O'SHAUGHNESSY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct-examination by Mr. Markley:

Q. Mrs. O'Shaughnessy, how old are you? A. 30.

Q. Where do you live? A. 205 - 8th Street.

Q. Is Officer O'Shaughnessy your husband? A. He is.

Q. You live with him? A. Yes, sir.

Q. Did you live with him in 1928? A. Yes, sir.

Q. When did you first hear of the accident? How long afterward? A. Seven A. M. the next morning.

Q. The next morning? A. Yes, sir.

Q. Did you go to the hospital? A. I went up in the afternoon.

Q. You had some children to take care of, I believe? A. Yes.

Q. And then how long after that was it that your husband came home? A. About three weeks.

Q. Did you visit him at the hospital during these three weeks that he was there? A. Yes, sir.

Q. Did he seem to be suffering and in pain? A. He was complaining all the while of pain in the ankle. They were putting applications to him.

Q. When he came home, how did he come home? A. He came home with a plaster cast and on crutches.

Q. How long did he use the crutches after that? A. He used the crutches up until the latter part of June.

Q. And then was it about the first of July that he did some work as a patrolman? A. He was put back on duty the first of July.

Q. What did he do at the time? A. He was sent to the Hamilton Park.

Q. How long did he remain there? A. About November.

Q. Then what did he do? A. Then he was sent out to relieve somebody on vacation.

Mr. McGlynn: I object. It seems to me that this examination does not add any details to what happened.

The Court: I do not think so. It only seems to be corroboration. I suppose Mrs. O'Shaughnessy only has seen what her husband was doing anyway.

Q. Did you know from seeing where he was? A. I know he worked at the Commercial Trust Company, because I have seen him there several times.

Q. You saw him there in the bank? A. Yes, sir, and he said it himself in the morning.

Q. Do you know when it was that he went back to do patrol duty? A. He was sent back on the street on the 30th of May.

Q. How long did he work then at that? A. He did not work more than four days.

Q. Do you know where he went after that? A. Yes, he was sent to the Commercial Trust Company.

Q. When was that, after that? A. The first of this year.

Q. The first of this year that he went out as a patrolman? A. Yes.

Q. Then you had occasion to see his foot when he comes back after doing patrol duty? A. Yes, sir.

Q. Just tell the jury what you saw about that foot. A. When he comes there in the morning, after an eight hour tour duty, his foot is twice the normal size.

Q. What do you do for it? A. He has to bathe and rub it.

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

Q. Is that continued right up until this present time? A. Yes, sir.

Mr. Markley: Cross-examine.

Cross-examination by Mr. McGlynn:

Q. Do you know when your husband first went to the lawyers? A. No, sir.

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

Mr. McGlynn: That is all.

(Witness excused).

Mr. Markley: That is our case, your Honor.

The Court: We will recess for five minutes.

(A short recess taken.)

Mr. McGlynn: I would like at this time, if your Honor please, to offer the original. I can use my copy.

The Court: Yes.

Mr. McGlynn: The original complaint, dated March 4, 1929, in this case, as an exhibit, and I would like your Honor's permission to read it to the jury.

Mr. Markley: Well now, I think the original is here, your Honor. I do not see why it should not be used.

The Court: Well, it may be.

Mr. McGlynn: You do not have any objection, do you?

Mr. Markley: I think the bill of complaint may go in.

The Court: You may offer the amendment.

Mr. Markley: I mean the original and the amendment.

Mr. McGlynn: I am offering the original as an exhibit.

The Court: It may be marked D-1.

(Paper marked Defendant's Exhibit D-1 in evidence).

The Court: I never could see why the judges insist on pleadings being formerly offered. But that seems to be the practice. I don't know why, when a paper is filed, it is not an exhibit *per se*. But I am not finding any fault with the practice, Mr. McGlynn.

(Mr. McGlynn thereupon read the exhibit to the jury.)

Mr. Markley: I object to having counsel read certain words with emphasis. I do not think it is proper. In fact, I once did it myself.

The Court: I don't know how I can control the inflections of the voice of counsel. The complaint should be read, and that is all. You may proceed.

(Mr. McGlynn concluded the reading of the exhibit.)

Mr. McGlynn: I will offer the amendment. Is it drawn as separate amendment? Have you it there?

Mr. Markley: The original is in his Honor's hands.

Mr. McGlynn: He has the amendment, you mean?

Mr. Markley: Yes, I brought it up. From the standpoint of time, I think the copies ought to go in, if he is going to offer it.

The Court: It is all there.

Mr. McGlynn: I offer the motion too, the copies of the motion to amend the complaint, dated January 15, 1931, service held January 16, 1931, and the order amending the complaint entered February 27, 1931.

(Mr. McGlynn read the notice of motion).

Mr. McGlynn: And the order with the same heading, with the same case.

(Mr. McGlynn read the order).

Mr. McGlynn: I would like to offer, if your Honor please, the demand for the bill of particulars, and the answer to the demand for the bill of particulars.

Mr. Markley: There is a demand in the file, I think.

The Court: The demand is in the file.

(Paper was marked Defendant's Exhibit D-2)

Mr. McGlynn: Have you got your copy of the answer?

Mr. Markley: Do you want my copy?

Mr. McGlynn: I suppose you have the original without acknowledgment of service on it?

Mr. Markley: Is that what you want (handing to Mr. McGlynn)?

Mr. McGlynn: I better mark that one. I offer it.

Mr. Markley: Very well.

(Paper marked Defendant's Exhibit D-3)

Mr. McGlynn: I think, perhaps, as a matter of common sense, I should read the question and then the answer to that.

The Court: Yes.

Mr. McGlynn: With the consent of the Court, gentlemen, I am going to read 17 questions which are included in the paper called the Demand for a Bill of Particulars, served by the defendants on the plaintiff. Then there are seventeen answers. I am going to read question number one and answer number one. Then you will understand it.

(Thereupon Mr. McGlynn read the questions and answers referred to.)

Mr. McGlynn: Mr. Hoffman.

HERMAN HOFFMAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct-examination by Mr. McGlynn:

Q. Mr. Hoffman, where do you live? A. 348 Armstrong Avenue, Jersey City.

Q. In February 1928, by whom were you employed?

Mr. Markley: The witness' name was spelled with two Fs.

The Court: Hoffman.

Mr. Markley: Is there any objection? I find that they have in our complaint "Hoofman". So that, if you have no objection, I will just change it, so that we properly spell it.

Mr. McGlynn: Yes.

Q. (Last question read by the stenographer.) A. By the Bayonne News Company.

Q. Sir? A. By the Bayonne News Company.

Q. And on the night of February 24th, or the

early morning of February 25th, 1928, where had you been around twelve o'clock? Where were you coming from? A. I was coming from the New York Times, coming through the Holland Tunnel.

Q. Were you empty or loaded with papers? A. I was loaded.

Q. Did you, in the course of your coming with the papers, get on Grove Street in Jersey City? A. I came through the Holland Tunnel, and that was before Henderson Street was paved. We went down Grove Street to the place where we had our business.

Q. Where were you originally on Grove Street? How far about, what place would you come into Grove Street? A. 14th Street.

Q. 14th Street? A. Yes.

Q. When you reached 14th Street and Grove, as you went, which way on Grove Street, south or north? A. Turned south on Grove Street.

Q. Did you have anybody along with you? A. No, sir.

Q. Where did you first see anybody? A. While I was turning the corner the officer stepped off the curb.

Q. What did he say? A. He asked me if I was going down Grove Street and I said yes; and he came on, he said he was going as far as 8th Street, and as he made a step to get on the truck—it was a very high step—I told him there was no step there, he would have to jump up, which he did.

Q. Jumped up? A. Yes, sir.

Q. Now just tell this jury what sort of a truck you were driving that night will you? A. I was driving a four cylinder Auto car, three tons.

Q. How is that constructed, in your own words, Mr. Hoffman? A. Well, the radiator is right in

front of us. The wheels are right under our seat, They are under our seat.

Q. Did you ever see the catalogue that describes that truck? A. Yes, sir.

Q. Is that the catalogue of the truck? A. Yes, sir.

Q. Is that one of these that is supposed to be a fairly good representation of the kind of truck you were driving? A. Yes, sir.

Q. Which one, the one on the left hand side (indicating in catalogue)? A. The one on the left hand side.

Mr. McGlynn: Any objection? Do you want to look at it?

Mr. Markley: Do you want the whole catalogue?

Mr. McGlynn: No, no. Just the picture.

Mr. Markley: I have no objection. Suppose we just cut it out.

The Court: Which one was it, the right or left?

Q. The left? A. The one on this side (indicating). Just this front, not the body part.

Q. The body part is not the same? A. No. The body part is not the same. That is the type of car.

Q. Sir? A. Just the middle there, not the body.

(The catalogue page was marked Defendant's Exhibit D-4).

Q. That is only the front part of it, not the back, that you have handed us, that was similar to your car? A. Yes. Just this front part.

Q. You mean from the cab on? A. Yes.

Q. Where you put the cross? A. Yes.

Q. You had a different kind of a body back of here at the time (indicating)? A. Yes.

(Mr. McGlynn handed the exhibit to the jury).

Q. Now, could you tell me what time it was about when you got there, Hoffman? Do you remember what time it was about? A. Well, I should judge it was between half past twelve and one o'clock. I could not exactly tell you the right time.

Q. That is all right. When the patrolman got on where did you go? A. I started the car our and he sat alongside of me, and I started the car up, and went down Grove, between 8th and 9th Street the officer had to get off at the next corner. So I told him, before he got off, I said, "Wait until I stop; there is no step on the side of the car". And before I came to the stop, the officer made a little jump to get off. Before I could say any more, he was off the car, and as he went off his heel caught in the wheel, and his foot caught in the wheel and he fell forward.

Q. Which wheel? The right wheel, the right side.

Q. Front or rear? A. Front.

Q. Was there anything—you say there was no step. Was there anything there to hold onto with the hands at all? A. Well, there is just a handle on the radiator and the mud guard, the fender just over the wheel on the front.

Q. Did you get off the truck then? A. Yes, sir.

Q. Where was he? A. The officer was laying on the sewer plate on the corner.

Q. On the what? A. On the sewer plate on the corner.

Q. Had you passed the crosswalk at all before the accident? A. No. I was on the crossing.

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

Q. Well now, did you come to a complete stop and did he get off and walk in front of your car and was hit by the left front wheel? A. No, sir.

Q. When you got off, you say he was on this sewer—what did you call it, the sewer what? A. The sewer plate on the corner.

Q. Was there anybody else there then? A. No, sir.

Q. Who came up first according to your recollection? A. I was off the machine myself first.

Q. Then, after you? A. I picked the officer up, and then some man came who I did not know.

Q. Do you recognize him here today as being any of these people? A. Why, no.

Q. Did an officer appear? A. Well, an officer appeared about five minutes later.

Q. When the officer came there, was there any conversation between the officer with anybody and the one that was injured? A. No. There was no conversation.

Q. Did the officer that came there ask you what happened in the presence of O'Shaughnessy? A. No, sir.

Q. Who took the taxi there? A. Before the officer came, a taxi cab came down the street and we stopped the taxicab, and this other gentleman that was coming down after the accident—I don't know where he came from, but he said "We will stop this cab and take the officer to the hospital", and in the meantime while we stopped the cab the officer came.

Q. The officer who rode on your truck, and who you say was hurt in the manner that you have described, is this the man that was on the stand, O'Shaughnessy, today? A. Yes, sir.

Q. That is the policeman? A. Yes, sir.

Q. He says that he told you, as you got to this

corner—that he said "Stop there is my friend, Mike Flynn; I want to deliver a message to him". Do you have any recollection of any such conversation? A. No, sir. We did not have no conversation from 14th Street down to 9th Street.

Q. When you got off the truck, as you say you did, after he fell, where was he then with reference to your truck? A. Right opposite my right wheel.

Q. Under it? A. No, sir.

Q. What did you say? I did not get the word. A. He was right under my right side wheel. The front wheel, opposite the wheel.

Q. Was there any part of your truck on his heel or body or anything? A. No, sir. Not a thing.

Q. Did you have any instructions about letting riders on your truck? A. Yes, sir. I did.

Q. What were they?

Mr. Markley: I object to that. I withdraw the objection.

Mr. McGlynn: Read the question.

(Last question read by the stenographer.)

A. I was instructed by our insurance people, and the union we work for, to keep all passengers off our machines.

Q. Why did you let this man on? A. Well, I figured he is after me, and I did not know where he was going or what his business was in stopping me.

Mr. McGlynn: All right. Take the witness. Cross-examine.

Cross-examination by Mr. Markley:

Q. Notwithstanding that you had instructions not to let anybody on your truck, you let him on? A. Yes, sir.

Q. And do I understand that this truck did not have any step and the step was missing? A. Yes, sir.

Q. So on the side where the officer was, there was not any step, is that right? A. That is right.

Q. Was this an old truck? A. Well, that is a couple of years now. I don't know.

Q. Where did you lose the steps? Is that the step that appears in the picture? A. Yes, sir.

Q. At the left front of the truck? A. Right.

Q. And you say that was not there at all at the time? A. No, sir.

Q. How long before that had you lost it? A. Oh, that has been lost quite a while. It was only put on here lately.

Q. Here lately? A. Yes, sir, when the truck was overhauled.

Q. Do you still work for this company? A. Yes, sir.

Q. The Bayonne News Company? A. Yes, sir.

Q. Now, you have discussed this case with some other people, haven't you? A. No, sir.

Q. Didn't you make a statement about this accident? A. Only to my insurance people, the Bayonne News Company insurance people.

Q. Haven't you spoken to the lawyers in the case? A. No, sir.

Q. You have not spoken to Mr. McGlynn? A. No, sir.

Q. Or to Mr. Stein? A. No, sir. I don't know the man.

Q. Or his assistants? A. No, sir.

Q. You did not speak to this man sitting at the table here? A. Not until yesterday.

Q. Didn't you confer with him in the little room outside? A. No, sir.

Q. Didn't you go off to the little room, off the

Supreme Court, and sit in there with Mr. McGlynn and go over our case with him? A. No, sir.

Q. Where did you go to confer about with him? A. No place.

Q. Didn't you read over the statement that you gave after the accident? A. The man showed me a statement, but I did not take any—did not want to read it because I remembered just what it was.

Q. Who showed it to you? A. The man that brought it.

Q. Some representative of Mr. McGlynn's? A. Yes, sir.

Q. And you say he showed you the statement? A. Yes, sir.

Q. But you did not read it? A. No, sir.

Q. He did not read it to you? A. No, sir.

Q. So that for over three years you have not talked about this case with anybody, have you? A. No, sir.

Q. And you have not read your statement over? A. No, sir.

Q. And you are testifying now solely from your recollection of February 1928? A. Yes, sir, I am.

Q. Now, there is no question that this officer rode with you on the front of your truck from 13th Street down to 8th Street, is there? He rode with you? A. Yes. He rode with me.

Q. And he was on the front seat with you, wasn't he? A. Yes, sir.

Q. And you were not going fast? A. No, sir.

Q. And you slowed up to let him off at 8th Street? A. Yes, sir.

Q. And you practically had stopped when he got off, hadn't you? A. Yes, sir.

Q. After the accident you did not go to the hospital, did you? A. No, sir.

Q. You went over to the police station? A. Yes, sir.

Q. And made a report? A. Yes, sir.

Mr. Markley: That is all.

Redirect-examination by Mr. McGlynn:

Q. Mr. Hoffman, shortly after the accident you made a statement in writing of just what happened on the night of the accident, did you not? A. I wrote this statement for the insurance people.

Q. The statement that was shown to you yesterday? A. Yes, sir.

Mr. McGlynn: That is all.

(Witness excused).

JOSEPH F. LONDRIGAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. McGlynn:

Q. Doctor, you are a practicing physician of the State of New Jersey? A. I am.

Mr. Markley: I admit Dr. Londrigan's qualifications.

The Court: Very good.

The Witness: Thank you, sir.

Q. Did you, at the request of the defendants in this case, examine the plaintiff, Simon O'Shaughnessy? A. I did.

Q. Have you any records as to when you made that examination? A. July 11, 1929.

Q. Where did you make it? A. At the office of Mr. Robbins.

Q. Was Mr. Robbins present? A. He was.

Q. Did you make any notes on that occasion, of anything that was said by O'Shaughnessy or Robbins? A. I did.

Mr. Markley: What was the date, doctor?

The Witness: 7/11/29.

Mr. Markley: Thank you.

Q. July 11, 1929, right? A. Right.

Q. Have you your original memorandum that you made at that time? A. I have.

Q. Did he at that time—did Mr. Robbins, in the plaintiff's presence, give you a history of how he received his injuries? A. He did.

Q. How did he tell you he received his injuries? A. Well, getting off an auto truck, carrying papers, his left foot was run over by the wheel of the auto.

Mr. McGlynn: Cross-examine.

Cross-examination by Mr. Markley:

Q. Did not Mr. Robbins hand you the complaint in this suit, Dr. Londrigan? A. I don't know. I could not recall. I won't say whether he did or not.

Q. And didn't you take your notes from the complaint? A. I have no record. I have no recollection or mark on my original notes that I did.

Q. You would not say one way or the other on that would you? A. It is unusual. I do not recall ever having done so, but I may have.

Mr. Markley: That is all.

Redirect-examination by Mr. McGlynn:

Q. Didn't O'Shaughnessy tell you, Doctor, how he received these injuries?

Mr. Markley: I object to that, your Honor. He has already testified that he did.

The Court: He has already testified fully.

A. Yes.

Mr. McGlynn: I would like to mark that original memorandum.

Mr. Markley: I object to that. It is not proper evidence.

The Court: Objection sustained.

Recross-examination by Mr. Markley:

Q. You did make an examination, doctor, didn't you? A. I did.

Mr. Markley: That is all.

(Witness excused).

GEORGE A. HARMON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. McGlynn:

Q. Officer, were you detailed by the Jersey City Police Department, in response to a subpoena, to bring certain records with you? A. Yes.

Q. Which precinct? A. The second.

Q. Have you brought such a record? A. I have.

Q. Is this the book that I have in my hand? A. Yes, sir.

Q. What is that record? A. Records of reports.

Q. Records of reports? A. Yes, sir.

Q. Does that book contain the records of reports made on February 25, 1928? A. Yes, sir.

Q. Can you tell me whether there was any report made to the Second Precinct police station in Jersey City by Officer Zunkley on February 25, 1928, that an accident had happened? A. Not of my own knowledge. No.

Q. From the records which you were detailed to bring here? A. I got all the records here, yes, sir.

Q. Is Officer Zunkley here? A. No, sir.

Q. Was he here yesterday? A. He was here yesterday.

Mr. McGlynn: I offer the record.

Mr. Markley: I object to it.

The Court: Objection sustained.

(Witness excused).

Mr. McGlynn: Mr. Robbins.

BENNETT A. ROBBINS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by Mr. McGlynn:

Q. You are the attorney of record for the plaintiff in this case? A. Yes, sir.

Q. When were you retained by the plaintiff? A. I do not recall the exact date.

Q. Have you your file here?

Mr. Markley: Let the witness finish.

A. (Continued). I do not recall exactly, Mr. McGlynn. But a short time after he got out of the hospital, when he went on his tour of duty.

Q. Have you a file, an office file in this case? A. My files are together with Mr. Markley's. I believe Mr. Markley has them at the desk.

Q. Will you look at them for me, please, and tell me whether, looking at these files, you can tell me when you were first retained? A. May I have them, Mr. Markley, please?

Mr. Markley: Surely.

(Handing paper to the witness).

A. (Continued). No, sir. Nothing to indicate when I was first retained.

Q. Does the file indicate when you first wrote this record of this matter? A. I have been looking for a copy of that letter, but I do not see it here. It is possible it might be in my other file in my office.

Mr. Markley: I do not think it is here.

Q. Did you draw the complaint in this case? A. Immediately after, I—

Q. Did you draw the complaint? A. I did not draw it myself.

Q. Did you sign it? A. Yes, sir. I believe I did. I do not recall.

Q. Did you read it before you signed it? A. I may have.

Q. Have you in your file, that you have just read from here, any notes taken by you of the facts concerning this accident? A. No. None at all.

Q. Was the complaint which you filed in this case—did the complaint which you filed in this case contain the facts which the plaintiff gave you when he first retained you in this matter as to how this accident happened? A. Evidently not.

Q. Why "evidently not"? A. When I was orig-

inally retained by Mr. O'Shaughnessy, I did not institute suit until some months later. At that time I merely took a verbal statement and did not take a statement by notes. Subsequently when I was ready to draw my complaint from a copy of a blotter—

Q. A blotter? A. A blotter. The police blotter. Evidently I must have drawn the complaint from the police blotter without calling Mr. O'Shaughnessy to confirm whether or not the police blotter was in conformity with the state of facts as he presented them to me.

Q. Did you just look for a copy of the police blotter? A. No, I did not look.

Q. What is that blue sheet that you have? A. I believe that is a police blotter, but I did not read it through.

Q. Do you mind looking at it now? A. Not at all.

Mr. Markley: I do not see it.

The Witness: I think it is in with the rest of the papers, Mr. Markley.

The Court: It is a blue sheet.

Mr. Markley: Here it is, (handing to witness).

The Witness: That is a copy of the police blotter.

Q. Just read it through, first.

Mr. Markley: You don't want him to read it out loud?

Mr. McGlynn: No. He answered my previous question without reading it. That is what I said.

The Court: Just read it to yourself.

Mr. McGlynn: That is what I want. Just read it to yourself.

(Witness produces paper).

Q. Do you now say that you drafted the complaint from a copy of the police blotter or not? A. I think I did. I am not sure.

Q. Did you make an investigation to determine whether or not the police blotter report was correct? A. I did not.

Q. Did you make any investigation of the hospital record of the history of this case as to how the accident happened? A. I did not. Not at the time the complaint was drafted. As a matter of fact I do not recall whether or not I drafted the complaint. It might have been someone in my office.

Q. Did you acknowledge service of the demand for the bill of particulars? A. I believe I did.

Q. Did you answer them? A. I believe I did.

Q. Did you consult the plaintiff before you answered them? A. I did not.

Q. You did not? A. Exactly.

The Court: You do not mean to say that you answered the bill of particulars without consulting the plaintiff?

The Witness: Well, I answered the bill of particulars from the memorandum evidently that I had in my file at the time.

Q. Did you have a memorandum brought from the police blotter? A. I withdraw that answer. I think I spoke to Mr. O'Shaughnessy while he was on duty in the Second Precinct at the time I received that demand for the bill of particulars.

Q. Then you did talk to O'Shaughnessy before

you answered the demand for the Bill of Particulars? A. I believe I did.

Q. And after conferring with Mr. O'Shaughnessy, after receiving the demand for the bill of particulars you properly served on the other side the answer to that demand? A. I think so. But I am not at all certain, Mr. McGlynn, that I drew the answer to the bill of particulars.

Q. Well, if you did not, who did? A. Someone may have done that in my office.

Q. Did you sign it? A. I do not recall. If you will let me see the original, I will examine it and tell you.

(Handing paper to witness).

A. Yes, I signed it.

Q. Did you read it over before you signed it? A. I did. I think so.

Q. I show you the original complaint and ask you if you signed that? A. I did.

Q. You read it over before you signed it? A. I did.

Q. So you, when you answered the demand for the bill of particulars, in answer to one of the questions, as to how the accident happened, how your client received injuries, you answered that question, "as described in the complaint?" A. Exactly.

Q. When did you first discover that he had not received the injuries in the manner as described in the original complaint?

Mr. Markley: I object to that as immaterial.

Mr. McGlynn: I think it is very material, if your Honor please.

Mr. Markley: I think we are very far

afield, to the issue in this case. I might put Mr. McGlynn on the stand and ask him a lot of questions, and have him produce his file and ask him a lot of preliminary questions beyond the scope of this file altogether.

The Court: Read the question.

(Last question read by the stenographer).

The Court: I will allow it.

Mr. Markley: Your Honor will allow me an exception.

The Court: Certainly.

A. As a matter of fact, I do recall that O'-Shaughnessy told me at the time that he was crossing the street at the time he was struck.

Q. Before you drew the complaint? A. Before I drew the complaint.

Q. Before you answered the demands for the bill of particulars? A. Yes.

Mr. McGlynn: That is all.

Cross-examination by Mr. Markley:

Q. And had that slipped from your mind at the time you did that? A. I believe I was derelict in my duty in the preparation of the complaint.

Mr. Markley: That is all.

(Witness excused).

Mr. McGlynn: If you will alow me to put the history in, I will put it in and rest.

The Court: I will give you five minutes to see if you can get Dr. Sprague. You may recess for five minutes, gentlemen.

(Short recess thereupon taken. After recess as follows):

Mr. McGlynn: Lieutenant Fallon.

James T. Fallon—Direct.

JAMES T. FALLON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct-examination by McGlynn:

Q. Lieutenant, you are connected with the Jersey City Police Department? A. I am.

Q. Were you connected with that department in February, 1928—the 25th? A. Yes, sir.

Q. Were you then attached to the Second Precinct? A. The Second Precinct.

Q. Do you recall whether you were on duty at about between 12 and 2 o'clock on that morning? A. I cannot recall it, but the blotter would indicate.

Q. With the assistance of the blotter here, does that help your memory so that you can tell us whether you were on duty then? A. Yes, sir.

Q. (Handing paper to the witness). A. At 11:40 P. M. I relieved Lieutenant Brown at the desk of the Second Precinct.

Q. And the entries after 11:40 P. M. in the blotter are in your handwriting? A. Yes, sir.

Q. Is there an entry in that blotter—just answer yes or not, officer—is there an entry in that blotter with reference to this accident happening at the corner of Grove and 8th Street, in which Simon O'Shaughnessy, a patrolman attached to your precinct was injured? A. Yes, sir.

Q. Where did you get information shown in that entry, shown in the blotter? A. The report was made by Patrolman John Zunkley.

Q. Do you recall whether the report was in writing or verbally given to you? A. I could not tell you positively. But a report of this length was more than likely made on our report blanks, written.

Q. Now, at that time, February, 1928, what was done with such reports which were given to the Lieutenants on duty? A. Placed on the Captain's desk for his information at his arrival at the station.

Q. Was there any permanent place for the filing of such reports at that time? A. No.

Q. Is there now? A. There is.

Q. And have you any personal knowledge as to whether the original report made by Patrolman Zunkley is or is not in existence at this time? A. I have not any personal knowledge.

Q. Is this blotter record made by you in the regular discharge of your duties as part of the police system of Jersey City? A. Yes, sir.

Mr. McGlynn: I offer the entry.
Mr. Markley: I object to it.
The Court: Objection sustained.
Mr. McGlynn: I ask for an exception.
The Court: You may have it, certainly.
Mr. McGlynn: That is all, Lieutenant.

(Witness excused).

Mr. McGlynn: I am afraid we will be unable to get these physicians. They are too hard to get on short notice, if your Honor please. So, with that, I will have to rest my case.

I would like at this time to make a motion for a direction of the verdict in favor of the defendant, Bayonne News Company, on the ground that there is no testimony in the record, that is as a matter of law, which makes that defendant responsible for the injuries alleged to have been received

by the plaintiff as a result of the facts which were testified to by him. I think the law is quite clear on that. If your Honor wants me to, I can refer to it.

The Court: No, I think I know it.

Mr. McGlynn: With reference to the inviting of a passenger by an employee. There is no question, of course, I think as a matter of law, that there are no such rights, and that the invitee, under these circumstances, cannot hold the employer, and that, then, so far as the other defendant is concerned, I think he is quite liable for the acts of wilful negligence. Now, certainly, with that premise, it is apparent, if your Honor please, that under these facts and circumstances the defendant Hoffman was thus deviating from his regular course of conduct and was acting without the scope of his employment, and therefore it seems to me that as a matter of law, that anything which happened, either in the preliminary steps, call it, while that deviation started, or in the concluding steps in the termination of that period of time, when he was without the scope of his employment, the employer surely should not be held responsible. In other words, they fall right down, if Hoffman, the employee, had proceeded with this load of newspapers from the New York Times to his destination, along the route which he was supposed and which he ordinarily did travel, there would have been no occasions for him to stop at 14th or 13th Street—it makes no difference which—to pick up a passenger, and he would not have stopped at 8th or 9th Street. The sole reason—the only facts which are in this case, indicate that he was stopped or rather he was held up at that corner, and is because of the fact that the invitee got on and he was riding

or had alighted, taking whichever version of the facts you want to take, therefore, it seems to me, that under all the circumstances, the Bayonne News Company should, as a matter of law, be taken from this case by your Honor's ruling.

The Court: The motion will be denied and an exception allowed.

Mr. McGlynn: Exception.

The Court: How long will counsel want?

Mr. McGlynn: I imagine fifteen or twenty minutes. Not longer than fifteen or twenty minutes. Fifteen minutes would be enough.

Mr. Markley: It will be enough for me.

The Court: If you can finish in about fifteen minutes a side, we can start now.

(Counsel thereupon summed up to the jury).

(Recess was taken at two o'clock. After recess as follows:)

(The Court charged the Jury as follows):

COURT'S CHARGE TO THE JURY.

The Court: Gentlemen of the Jury, on the 25th day of February, 1928, the plaintiff in this case, Simon O'Shaughnessy, was injured at or about the corner of Grove Street and 8th Street in this city.

He alleges that his injuries were caused by the negligence of Herman Hoffman and the Bayonne News Company, Herman Hoffman being the driver of the truck of the Bayonne News Company, at the time of this alleged occurrence, he being in the employ and on the business of the Bayonne News Company.

He says that on this early morning in question

he was asked by the driver of the truck, Mr. Hoffman, if he were going down to Grove Street; that he said that he was; thereupon, the driver told him that he was going down town, and to get aboard, or words to that effect.

He says that when they got to the corner of Grove and 8th Street, the truck came to a stop; that he alighted, and went around the front of the truck; and that before he cleared the truck it started, knocked him to the ground and the wheel ran on his left ankle or left heel.

He says that the injuries he sustained were caused by the negligence of the driver of this truck.

The defendants say, in the first place, that they were not negligent, at least the driver of this truck was not negligent; that the plaintiff himself was guilty of what we know in the law as contributory negligence. And they say that the accident happened in an entirely different way from that as claimed by the plaintiff.

The defendants say that at Grove and 13th or 14th Street, as the truck was coming around the corner, the officer stopped the truck and asked the driver "Are you going down Grove Street?" and the driver answering, "Yes", and he got on the truck asking to be taken down Grove Street.

The defendants further say that when they came to 8th Street on Grove Street, and while the truck was being brought to a stop, the plaintiff alighted therefrom, but just before he alighted, the driver said to him, "Wait until I stop, there is no step on that side," but that, notwithstanding that, he jumped off the truck and in doing so his ankle or foot came in contact with the wheel, and the injuries resulted.

Now, gentlemen, let me say to you in the first

place that the mere happening of this accident does not entitle this plaintiff to a verdict at your hands against these defendants.

The plaintiff has the duty of proving by a fair preponderance of the believable evidence the material allegations of his complaint.

The testimony in this case, gentlemen, is that the driver of this truck had explicit orders from the owners of the truck, the Bayonne News Company, not to take riders on the truck. If this driver of the truck, Herman Hoffman, took this policeman on—and it is the testimony that he did—and whether he took him on on his invitation or at the request of the policeman, the plaintiff in this case, and the accident happened as the defendants say it happened, as he was getting off the truck, then, gentlemen, as far as the defendant, the Bayonne News Company is concerned, your verdict would be in favor of the defendant and against the plaintiff—that of no cause of action—because the driver would be exceeding the authority that he had from his company.

And, gentlemen, if the accident happened as the defendants say it happened, that this accident happened while this plaintiff was alighting from that truck, and while it was still in motion, if that is how it happened, there is no evdence in this case of negligence on the part of the driver of this truck —whether he was there on the invitation of the driver or whether he was there at his own request.

So that, we come down to this situation: that if you find, as a matter of fact, that the accident happened as the defendants say it happened, your verdict would be in favor of the defendants and against the plaintiffs—that of no cause of action.

Now, if you should determine that the accident

happened as the plaintiff now says it happened, then you will follow the rules that I will give you.

As I said in the beginning, the plaintiff charges the defendant with negligence. The defendants say that they were not negligent, and, further, that the plaintiff was guilty of what we know as contributory negligence.

Negligence, gentlemen, is the failure to use reasonable care; and reasonable care is defined as that which a reasonably prudent person would or would not do under all the facts and circumstances in the case.

So you will ask yourselves if, as I have said, the accident happened as the plaintiff says it happened—you will ask yourselves, what did the driver of this truck do that a reasonably prudent person would not have done under exactly the same circumstances, or what did he fail to do that a reasonably prudent person would have done under exactly the same circumstances.

And if he did that which a reasonably prudent person would not have done, or if he failed to do that which a reasonably prudent person would have done, then he was guilty of negligence.

To state it in another way to you, if he acted as a reasonably prudent person would have done he was not negligent. If he did not act as a reasonably prudent person would have done, he was negligent.

Now, gentlemen, this plaintiff says that he walked, that he got off the truck when it was standing still; that he walked in front of it, and that before he had cleared the front of the truck it started.

Now it was the duty of the driver of this truck to observe what was on the highway. It was his

duty to keep his car, to have his car under the control that a reasonably prudent person would have done, considering what he saw in front of him; and it was his duty to look effectively.

We get back to the proposition that it was his duty to act as a reasonably prudent person would have done. And, gentlemen, of course, it is for you to say, but reasonably prudent people do not start their automobiles before people are clear of the car which they are driving.

If this accident happened as the plaintiff says it happened, and if the driver was not negligent, then, of course, the Bayonne News Company also would not be negligent.

If this accident happened as the plaintiff says it happened, and the driver of this truck was negligent, then the Bayonne News Company would likewise be negligent, or likewise be liable, because, if the driver of the truck, under these circumstances, was negligent, that negligence would be carried over and be imputed to the owner of the truck, the Bayonne News Company.

Now, if this driver was not negligent, then, as I have said, your verdict would be in favor of the defendants and against the plaintiff—that of no cause of action. If he was negligent, then you would proceed to a further question, and determine whether or not that negligence was the proximate cause of this accident.

And by proximate we mean the moving cause, the thing which brought about that which happened; and even though he were negligent, and that negligence was not the proximate cause of the accident, then again your verdict would be in favor of the defendants, and against the plaintiff—that of no cause of action.

If the driver of this truck was negligent, and that negligence was the proximate cause of this accident, then, under the pleadings in this case, you would be compelled to go a step further and examine into the conduct of the plaintiff, Mr. O'Shaughnessy. And if he was guilty of negligence, which in any degree contributed to the proximate cause of this accident, then again he cannot recover, because in this state, gentlemen, we do not deal in degrees of negligence.

Where two parties to an accident are negligent, the law leaves them where it found them.

But again, while you are the judges of the facts, I do not remember any testimony in this case which could lead you to a conclusion that this plaintiff was guilty of negligence, if the accident happened as he related it to you on the stand.

Now I should say to you gentlemen that in determining whether or not the driver of this truck was negligent, you will take into consideration the section of the Motor Vehicle Act, and the section of the Traffic Act which were in effect at the time of this accident.

"That every motor vehicle must be equipped with a horn or signalling device, and the operator of the same shall give reasonable warning of his approach whenever necessary to insure the safety of other users of the highway or pedestrians in using any part of the highway other than the sidewalk, but the horn, bell or other signalling device shall not be sounded unnecessarily."

A section of the Traffic Act provided that:

"In places where the houses are on an average less than 100 feet apart, pedestrians shall have the right of way over vehicles at any street crossing.

Now, gentlemen, a violation of a section of the

Motor Vehicle Act or the Traffic Act, if there was a violation, or violations, is not, standing alone of itself, negligence. The place and the circumstances should be taken into consideration by you in determining from all of the facts and circumstances of the case whether or not the person whose conduct you are investigating was negligent.

Now under these rules that I have endeavored to give you, if this plaintiff is entitled to a verdict, he is entitled to be fairly and reasonably compensated for the damages he sustained as the natural and proximate result of this accident.

The testimony, as I remember it, is that he was in the hospital for three weeks; that he had a cast on his ankle; that he was in the house for some time, and that he had resumed employment on the first of July 1928.

There is no question in this case, gentlemen, for loss of wages. But if he is entitled to a verdict, he would be entitled to be fairly and reasonably compensated for the pain and suffering he has undergone for the natural and proximate result of this accident, and any pain and suffering which he will undergo in the future as the natural and proximate result of this accident.

He is entitled, if entitled to a verdict, to be compensated for the outlay of money which he has made in an endeavor to effect a cure of himself. As I remember that testimony, he has spent the sum of $16.00 for crutches and a lamp, $24.00 for taxi hire, and $94.00 for a chair and medicines, and he would also be entitled if entitled to a verdict, to be compensated for damages that arise from his permanent injuries, that deprives him of the normal enjoyment and opportunities of a normal person.

Now, gentlemen, this is in the first place a ques-

tion of fact for you to determine. It is for you to determine from the evidence, which has been produced, how this accident happened. You have two widely divergent stories as to how it happened, and it is your function to reach a conclusion as to how it happened. As I say, if it happened as the defendants say it happened, then your verdict would be in favor of the defendants and against the plaintiff—that of no cause of action. If it happened as the plaintiff says it happened, then you will apply the rules which I have endeavored to give you and reach your verdict.

You must reach your verdict—you must base it, that is, not on questions of sympathy or prejudice, but simply on the facts as they have been presented to you during the trial of this case, and the law which the court has endeavored to give you as applying to this case.

I should say to you that during the trial of the case, inadvertently, I think, there was mention of insurance companies. Well, this case is not between insurance companies or against an insurance company. And insurance companies have nothing to do with it as far as you are concerned, and you will banish from your minds any question of insurance. As I say, decide the matter solely and entirely on the facts as they have been presented to you here, and the law which the court has endeavored to give you. You may take the exhibits with you.

Mr. Markley: May I suggest to your Honor one thing?

The Court: Yes.

Mr. Markley: I do not think your Honor has spoken about the burden which is on the defendant to prove contributory negligence.

The Court: Yes, I am glad you brought it to my attention.

I said to you gentlemen that the plaintiff has the duty of proving the material allegations of the complaint. That is, he must prove to you that in the first place the accident happened the way he says that it happened and he must prove to you that the defendants acting through a driver Hoffman, were negligent. I also give you the rule of contributory negligence, and I should add to that the duty of proving contributory negligence, that is the negligence on the part of the plaintiff, is upon the defendants, and it is their duty to prove by a fair preponderance of the evidence that the plaintiff was negligent, if they would have their plea of contributory negligence prevail.

The Court: You may retire.

(The jury thereupon retired).

Mr. McGlynn: May I note on the record, if your Honor please, an exception to that part of your charge wherein you started this sentence in referring to the plaintiff, that the plaintiff alleges that his injuries were caused by the negligence of Herman Hoffman, and the sentence which followed thereafter in which you described the present case, because I thought you should have told them that the amendment did not take away the other, they did not ask for an amendment striking out the other paragraph, and they added this to it. So the case really was presented with everything in it. I mean, the two diverse and divergent stories.

The Court: Yes.

New Jersey Court of Errors and Appeals

SIMON O'SHAUGHNESSY, Plaintiff-Respondent, vs. BAYONNE NEWS COMPANY, a corporation of New Jersey, and HERMAN HOFFMAN, Defendants-Appellants.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF OF DEFENDANT-APPELLANT.

This appeal brings before the Court for a review a judgment of the Hudson County Circuit Court in favor of the plaintiff entered on the verdict of a jury on May 18, 1931 in the sum of Eight thousand dollars.

At the outset and for the sake of simplifying the argument defendants abandon ground of appeal #2 and relies solely upon ground of appeal #1 as a reason for the reversal of the judgment.

This ground of appeal which will be found in the State of Case, pages 28 and 29 is as follows:

> "That the Trial Court permitted the plaintiff-respondent to amend his complaint by adding thereto, as subdivision "d" of paragraph 6 thereof, the following new matter: The operator of said automobile truck negligently and carelessly, and without warning, started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove

> Street, a public Highway, in front of said truck,
> to which ruling of the Trial Court the defendants prayed and were granted an exception."

The original complaint (State of Case, pages 2 to 5) alleged a cause of action briefly summarized as follows:

That on or about February 25, 1928 an automobile truck belonging to the defendant, Bayonne News Company, a corporation, was being driven and operated by the defendant, Herman Hoffman, the agent and servant of the Bayonne News Company, in a southerly direction along Grove Street in Jersey City. That at that time and place the plaintiff *at the express invitation of the defendants, their servant and agents,* became and was a passenger in the automobile truck and that it thereupon became the duty of the defendants, their agents and servants to use reasonable care in the operation of the said automobile, so that it would be reasonably safe for the plaintiff to ride therein and that it became and was the duty of the defendants, their agents and servants to so manage and control said automobile that it would be reasonably safe for the plaintiff riding in said automobile as aforesaid *to alight therefrom at his destination.* That although defendants were under said duties to use reasonable care in the management and control of said automobile truck, so that it would be reasonably safe for plaintiff *lawfully on said automobile truck to alight therefrom at his destination,* said defendants violated said duties and so negligently, carelessly and recklessly operated the same that the plaintiff *while lawfully alighting* from said automobile truck at or near the intersection of Grove Street with Eighth

Street in Jersey City, *was caused to be thrown therefrom and under the wheels of said automobile* and as a result thereof sustained serious injuries.

The original complaint further alleged that:

> 6. The negligence of the defendants consisted in this:
>
> (a) Said automobile truck was being driven and operated by an incompetent driver.
>
> (b) The operator of said automobile truck failed to make any observation as to the position of the plaintiff *while lawfully alighting from said automobile,* and started said automobile before plaintiff *had completely alighted therefrom.*
>
> (c) The operator of said automobile truck failed and neglected to give plaintiff any warning of his intention to start said automobile *while plaintiff was still alighting therefrom.*

The next step in the pleadings was a demand for a bill of particulars by the defendants (State of Case, pages 6 and 7). Special attention is directed to questions #3, 6 and 7.

> 3. At what place did the plaintiff alight from the defendants' truck;
>
> 6. Give a general description indicating exactly how the accident happened;
>
> 7. Wherein were the defendants guilty of negligence in the operation of their truck.

The answers to the questions just referred to will be found on pages 8 and 9 of the State of Case and it will be noted that the same answer

is given to all three questions, namely "Set forth in complaint."

The next pleading was the answer of the defendants to the original complaint (State of Case, page 10) and it will be noted that the answer contains a separate defense, that if the plaintiff was injured as alleged in the complaint, he was not injured by reason of the negligence on the part of the defendants, but on the contrary, by reason of his own negligence, in that he jumped off the automobile in which he was riding before said automobile had come to a stop and without giving any warning of his intention so to do. This answer was filed on *April 4, 1929* and the reply thereto was filed about *April 5, 1929* (State of Case, page 11). The case thereafter was noticed for trial and nothing further was done with reference to the pleadings until *January 16, 1931,* which was almost three years after the plaintiff received his injuries, when a notice was served on the attorneys for defendants that on Friday, January 30, 1931 an application would be made for an order amending the original complaint by adding to paragraph six thereof a new sub-division to be known as sub-division "d" which sub-division was to be as follows:

> "(d) The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck." State of Case, pages 12 and 13.

This application was head by the Honorable Henry E. Ackerson, Jr., who on the twenty-seventh day of February, 1931 signed an order per-

mitting the amendment. Judge Ackerson's memorandum on this motion will be found on pages fourteen to eighteen of the State of Case.

The case came on for trial on March 4, 1931 and counsel for the defendants noted on exception on the record to the entry of the order amending the original complaint, which exception was granted by the trial Court (State of Case, page 32).

A rule to show cause was allowed by the Honorable A. Dayton Oliphant the Circuit Court Judge before whom this case was tried and it will be noted that the rule specially reserved the defendants exception to the order allowing an amendment to the complaint. (State of Case, pages 23 and 24). After argument the rule to show cause was discharged.

ARGUMENT.

The trial court erred as a matter of law in permitting the plaintiff-respondent to amend his complaint.

A careful reading of the original complaint (State of Case, pages 2 to 5), the material parts of which have been referred to in the opening statement of this brief, although not quoted in their entirety, describes with the most utmost detail, which is repeated on five separate and distinct occasions in the complaint, exactly how the plaintiff received his injuries. There can be no doubt after reading the complaint that the plaintiff alleged that his injuries were received *while he was a passenger* in the automobile truck owned by the defendant, Bayonne News Company, while it was being operated by its agent Herman Hoffman, as he was alighting from the truck.

It will be noted that the amendment which was allowed only amended paragraph six, not by changing or striking out any of the allegations in the original complaint, but by adding a new subdivision. The court's special attention is directed to the sub-division which was added.

> "(d) The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck."

This amendment describes the accident in an absolutely and entirely different manner than was so minutely described in the original complaint

and instead of the plaintiff being injured *while a passenger on the automobile* truck of the defendant and before his status as a passenger had ended, describes his injuries as having been received *while a pedestrian* and *after* he had alighted from the truck and while he was in the act of crossing Grove Street.

There are several most significant situations in connection with this material, substantial and vital change.

In the first place, the original attorney of the plaintiff who continued to act as attorney of record, did not try the case, nor did he make the application for the order permitting the amendment. The motion for the amendment was made and argued by the firm of Collins and Corbin and the case was actually tried by Mr. Markley of that firm.

It will be observed that if the plaintiff had gone to trial on his original complaint and proved the facts as alleged therein he would not, under any circumstances, have been able to have secured a verdict against the defendant, Bayonne News Company, a corporation.

In unmistakably clear and lucid language the plaintiff alleged in his original complaint, that he was invited to ride on the defendant's truck and and while lawfully alighting from said truck at or near the intersection of Grove Street with Eighth Street, Jersey City was caused to be thrown therefrom and under the wheels of the said automobile and as a result thereof sustained serious injuries. Practically the same language was repeated five times in the complaint. This is not the usual pleading drawn in general terms, so as to include every possible situation of negligent conduct but a plain, clear and concise statement of a definite

set of facts, describing the actual happening of an accident.

This Honorable Court has said in numerous adjudications involving the principle of law governing this situation that where a plaintiff is injured under circumstances as were set forth in the original complaint, the defendant master is absolved from liability on the doctrine that a servant having exceeded the limits of his authority in inviting persons to ride with him on the truck, his invitation does not extend to the plaintiff the status of an invitee, so far as the master is concerned.

An important opinion in this connection is that of *Karas* v. *Burns Brothers*, 94 N. J. L. 59, which was written by former Justice Minturn in the Supreme Court. That case is exactly similar to the situation which was presented in this case in the original complaint.

> "The complaint is predicated upon the familiar legal theory of an invitation by the driver, which gave to the infant plaintiff the legal status of an invitee, and the case was tried and presented to the jury by the trial court upon that assumption.
>
> The basis for this contention was furnished by the fact that the driver by his act of helping the child into the wagon was acting within the scope of his authority, for which act the master upon the familiar rule of responsibility resulting from the doctrine of *respondeat superior*, is made liable. The adjudications which are cited to support the contention are those which have been evolved from situations in which the driver concededly was employed in a course of the carriage and transportation of passengers, during the course of which employment he invited the infant for some personal reason, connected with the driver's convenience or

the general operation of the car, to become a passenger. Such was the rationale in *Danbeck* v. *N. J. Traction Co.*, 57 N. J. L. 463 and *Solomon* v. *Public Service Ry. Co.*, 87 Id. 284.

What was done in those cases by the driver was within the apparent scope of his authority, as a public carrier, and in such a situation liability was predicated upon a theory consistent with the legal philosophy underlying the doctrine of *respondeat superior*.

But there is a clear line of demarcation upon legal principle between cases of that general character and cases where by no latitude of reasonable construction, it can be maintained that the duty of carrying the public is within the general scope of an agent's duty, and where in cases of injury resulting from an agent's dereliction in that regard the master cannot be chargeable with responsibility upon any recognized principle of the law of agency.

Such was *Kiernan v. N. J. Ice Co.*, 74 N. J. L. 175, in which the late Mr. Justice Reed wrote the opinion for this court, in a case involving an assault by the driver of an ice wagon upon a boy whom he had allowed to take ice from an ice wagon. It was therein laid down that a servant, in extending an unauthorized invitation to a person to ride upon a dump cart, or to ride upon a hand car, or to a child to ride upon a trolley car, or upon a gravel train, or freight car, is not acting within the scope of his authority, and if the invited person is injured the master is not liable.'

This general statement of the principle would seem to be controlling in that case at bar. But since the determination of that case we have had presented for review, a class of cases which in their results, as we have determined them, would seem to emphasize the statement of legal principle thus ex-

pounded. Based upon the doctrine enunciated in *Holler* v. *Ross,* 68 N. J. L. 384, that 'the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work' the cases of *Evers* v. *Krouse,* 70 Id. 653; *Doran* v. *Thomsen,* 76 Id. 754; *Missell* v. *Hayes,* 86 Id. 348; *Jennings* v. *Okin,* 88 Id. 659; and *Croneckker* v. *Hall,* 92 Id. 450, have been determined in which we have held that a deviation by a driver or chauffeur from the line of conduct or course of action mapped out for him by the master, during which injury resulted to a third person, imposed no liability upon the master. In the language of *Jennings* v. *Okin,* it was declared that 'from the moment it was undertaken, the relationship of principal and agent theretofore subsisting was severed.' So in the present case the deviation while not in violation of a designated route, consisted in following a course of conduct incompatible with the purpose of the agent's employment, and in nowise related thereto; in the one case the deviation was as marked and distinct as in the other, for the conspicuous principle at the basis of the entire relationship is that liability of the master ceases when the agent is acting not in the master's occupation, but in line of conduct peculiar to himself and suggested not by any benefit or accommodation to the master or to the master's interests. In such a situation the agent becomes the principal and is liable for the natural consequences of his independent acts. For this purpose it was legal and material for the master to show that the driver had been instructed to observe a course of conduct inconsistent with his act.

In the case at bar that opportunity was denied him by the ruling of the trial court.

We have also declared in this court, that

> where an individual *sui juris* procures at his own request the privilege of riding in a conveyance he occupies the status of a mere licensee or volunteer, to whom the driver or owner owes only the duty of refraining from acts wantonly or wilfully injurious, and that the licensee thereby assumes the ordinary risks of damage from dangers and accidents, incident to travel in the operation of the machine or conveyance. *Lutvin* v. *Dopkus*, 94 N. J. L. 64."

A later case in this court is *Zampella* v. *Fitzhenry*, 97 N. J. L. 517. This court had before it for determination another situation exactly similiar to that alleged in the original complaint in this case and also in the Karas case. This court cited with approval the Karas case in the following language.

> "Such we conceive to be the rationale of the rule laid down by the Supreme Court in *Karas* v. *Burns Bros.* which was invoked by the learned trial court as furnishing the rule of law upon which the non-suit was granted. The reasoning contained in the opinion in that case commends itself to us as a correct exposition of the legal rule of liability in this class of cases, and the essential similitude of fact in both cases requires the affirmance of the judgment under review."

The same rule of law is followed in other jurisdictions, in the following adjudications enunciating the same doctrine:

> *Perrin* v. *Glassport Lumber Co.*, 119 Atl. 719, 276, Pa. 8. *Hughes* v. *Murdock etc. Co.*, 112 Atl. 111, 269 Pa. 222. *Nelson* v. *Johnston Traction Co.*, 119 Atl. 918, 276 Pa. 178. *Fadodnick* v. *A. Rose & Son*, 146 Atl. 455, 297 Pa. 86. *Wing* v. *Martin*, 141 Atl. 602, 101 Vt. 108.

Appellant therefore contends that it clearly appears that the original complaint so far as it concerned the defendant, Bayonne News Company, did not set forth a cause of action and if the plaintiff's proofs at the trial had followed the allegations of his complaint, the defendant, Bayonne News Company would clearly have been entitled to a non-suit.

It must be kept in mind that none of the allegations in the original complaint were stricken from the same or omitted from the same by reason of the amendment, but that the order permitting the amendment merely added another sub-division to paragraph six containing the language to which reference has already been made.

Appellant now argues that the amendment permitted by the Circuit Court Judge over the objection of the defendants alleged not only an entirely different set of facts, but an entirely new cause of action in favor of the plaintiff and against the defendants. Surely if not against both, then at least against the defendant, Bayonne News Company.

The accident on which the cause of action was based occurred on February 25, 1928 and on January 16, 1931, almost three years afterward and then not until plaintiff had retained his present counsel, a notice of motion for an order to amend the complaint was served on counsel for defendants. The matter was duly argued. It must be apparent to this Honorable Court from the examination of this notice (State of Case, pages 12 and 13) that it was cleverly conceived to give the impression that the only effect of the amendment would be to add to the complaint an additional and cumulative allegation, supporting the original cause of action on which the plaintiff relied.

It will be seen that the amendment totally altered the charge made in the original complaint. It set forth an entirely new situation as to the happening of the accident. As has already been pointed out, the original complaint described the plaintiff as an *invitee* in the automobile of the Bayonne News Company and the amendment terminated the relation of invitee and the plaintiff was given the legal status of any pedestrian crossing a public highway at a crosswalk. Obviously the status of the plaintiff as described in the original complaint and as described in the amendment were as far apart as the poles. As has been indicated, in the original complaint the plaintiff was a passenger on the truck and as such, without a cause of action against the Bayonne News Company and by the amendment changed into a pedestrian with an allegation of a perfectly good cause of action as against the Bayonne News Company

In this connection, the case of *Lower* v. *Segal*, 60 N. J. L. 99 is in point. In that case an action founded on the Pennsylvania Death Act was instituted in the name of an Administratrix ad Prosequendum of the deceased who happened to be also the widow of the deceased. The application before the court was to amend the complaint to substitute the widow as party plaintiff in conformity with the Pennsylvania statute. The Court said:

> "But the real question in controversy between the personal representative of the deceased and defendant has never been tried. On the contrary, this court has declared that, upon the statements of the declaration, no such question existed. Nor has the real question in controversy between the widow and the defendant ever been tried, but she seeks by this amendment to intervene in this

> suit and to present that question which she might have presented in an action brought by her. In my judgment, the provisions of Section 138 do not apply to such a case and do not require the amendment to be made. The amendment would not continue the existing suit except in mere form, but would create and institute a new suit with a new question and in a controversy between different parties."

Another case substantially to the same effect is *Fitzhenry* v. *Consolidated Traction Co.*, 63 N. J. L. 142. In the latter case the plaintiff sued as father for the death of his son and the cause was before the Court on an application to amend by naming the plaintiff as Administrator ad Prosequendum. After discussing the effect of Section 138 of the Practice Act and its bearing on the application, the Court said:

> "One of the defences to the action, if it was now commenced in the name of the administrator under the Death Act, would be that the action is barred by the statute of limitations. This appears upon the fact of the declaration as it now stands. By this amendment, if it could have any legal effect, it is proposed to deprive the defendant of this defence. Besides, by this amendment, new questions would be raised which are no part of the action as it now exists, and by this amendment the defendant is not only deprived of its rights of pleading proper and substantial defences, but the plaintiff, upon such exclusion, desires to present the same questions which might have been presented if the action had originally been instituted in the name of the administrator. The amendment would prejudice the defendant in its defences and also rests under the opprobrium of being vexatious. Lower, Administratrix v. Segal, *supra.*

> The motion to amend is denied, with costs."

A more recent case and one which is as precisely in point as it would be possible to imagine is *Doran* v. *Thomson,* 79 N. J. L. 99. This is not the usually cited case on the question of master and servant, but a later decision of the Supreme Court. As appears from an examination of the opinion, the plaintiff recovered judgment against the defendant which was reversed by Court of Errors and Appeals and a new trial awarded. The opinion continues:

> "The plaintiff now moves to amend his declaration.
>
> As it now stands the declaration charges in substance that the defendant was possessed of an automobile capable of being operated at a speed of sixty miles an hour, and it was the duty of the defendant to use due care of the same while being operated upon the highways; that defendant disregarded that duty by negligently directing and allowing it to be operated by a member of his family, and while it was so negligently operated by a member of defendant's family, *for the defendant,* plaintiff was injured.
>
> It is now proposed to so amend the declaration that it will charge in effect that the defendant knowingly purchased a dangerous machine for the purpose of allowing it to be used by his daughter, an incompetent person, and negligently allowed her to use it, to the injury of the plaintiff.
>
> This, we think, sets up a new and different cause of action.
>
> Section 126 of the Practice Act (*Pamph. L.* 1903, P. 572) authorizes all amendments necessary for the purpose of determining in the existing action the real question in controversy between the parties. But where the

proposed amendment will institute an entirely new and different cause of action it will not be made. *Lower* v. *Segal*, 31 Vroom 99; *Fitzhenry* v. *Consolidated Traction Co.*, 34 Id. 142.

We have pointed out, that, as the declaration now stands the negligence charged is made to depend upon the allegation that the automobile was carelessly operated by the defendant's servant, for the defendant. The gist of the action is the negligence of the servant imputed to the master.

As it is proposed to amend the declaration, the negligence counted on is that of the father in supplying his inexperienced daughter with a dangerous machine, and its gist is the negligence of the father.

Such an amendment would not tend towards the determination in this suit of the real controversy between the parties, i. e., the issue which the parties hoped and intended to try (*Hoboken* v. *Gear*, 3 Dutcher 265; *Miller* v. *West Jersey and Seashore Railroad Co.*, 47 Vroom 282), but rather would operate to institute a new and different suit between the parties and presenting other questions.

The motion is denied, with costs."

It will be noted from reading of the testimony that there was a most material and substantial factual situation which the plaintiff had to overcome. This was accomplished in a very ingenious manner. The plaintiff, who was a Jersey City policeman, testified that he was invited to ride from the place where his post of duty was situated to the corner of Grove and Eighth Streets, because he lived on Eighth Street. He was going home to get a cup of coffee during his thirty minute relief period. It will be noted from the testimony that he lived on Eighth Street, west

of Grove Street (State of Case, page 61, lines 17 to 24), so that if he alighted from the automobile truck on which he had been riding, his natural course would have been to walk west, which would have taken him *away from the automobile truck instead of in front of it.* This situation was overcome at the trial, first by having the plaintiff state (See State of Case, page 49 and 50, also 53 and 54) that when he arrived at the corner of Grove and Eighth Streets he saw a man by the name of Michael Flynn on the northeast corner of Grove and Eighth Streets. Plaintiff testified that he had met Michael Flynn's brother at nine o'clock that night and had been requested by Michael's brother to deliver a message to Michael. Plaintiff also said that he told the driver that he wanted to speak to Michael. As he got off the truck and went to walk around in front of it, he got almost across the truck when the front hook caught him and knocked him down. Michael Flynn of course, corroborated this story (See State of Case, pages 87), by saying that he was standing on the corner just mentioned and he saw the Bayonne News Company truck stopping and that the plaintiff called to him; that he saw him get off the truck and walk across the front of the car, just got about clear when the car suddenly started, hit him and knocked him down.

The court's attention is also directed to another rather peculiar and unusual situation in connection with this mysterious and almost unbelievable change of story with reference to how the plaintiff received his injuries.

Attention has already been directed to three questions in the bill of particulars which was served before the answer was filed, namely 3, 6 and 7 and to the answers given by the then at-

torney for the plaintiff, which answers were all alike, to wit "Set forth in the complaint."

The defendants at the trial called the original attorney for the plaintiff, Mr. Bennett A. Robins, as a witness. His entire testimony is short and will be found in the State of Case on pages 109 to 114. He was asked on page 110 if he had drawn the complaint to which he stated that he had not, admitting, however, that he had signed it and that he might have read it before he signed it. He was then asked whether he had any notice of the facts concerning how the accident happened. He stated that he had none and then on page 111 he stated that he merely took a verbal statement from the plaintiff and that subsequently when he was ready to draw his complaint, he did so from a "copy of a blotter." He was then asked what blotter and admitted that it was the police blotter, meaning of course, the report to the police of the accident, but stated that he evidently must have drawn the complaint from the facts set forth in the police report without calling on the plaintiff to confirm whether or not the facts contained in the blotter were true, or the same as the plaintiff had given originally to his attorney. He later admitted on page 112, after having read the copy of the blotter which was in his file, that he had drafted the complaint from the facts set forth in that report. He was then asked, on page 112, whether he had answered the demand for a bill of particulars without consulting the plaintiff. He first said that he had answered them without consulting the plaintiff and then when the court asked him "You do not mean to say that you answered the bill of particulars without consulting the plaintiff?" stated, "Well, I answered the bill of particulars

from the memordandum evidently that I had in my file at the time.

Further on the same page of the State of Case, there will be found this statement by the same witness, "I withdraw that answer. I think I spoke to Mr. O'Shaugnessy while he was on duty in the Second Precinct at the time I received that demand for the bill of particulars."

On Page 113, this witness admitted that he had signed the answer to the bill of particulars and that he had read over the original complaint before it was filed. The witness' rather naive explanation is given on page 114 of the State of Case, why it was that he filed the original complaint, answered the demand for a bill of particulars, notwithstanding the fact that the plaintiff had told him originally that he was crossing the street at the time he was struck.

The question and answer with reference to this situation are so strange and unusual that they are set forth herein in full.

> "Cross-examination by Mr. Markley:
>
> Q. And had that slipped from your mind at the time you did that?
>
> A. I believe I was derelict in my duty in the preparation of the complaint."

It will be observed that no explanation is given by the witness as to why he answered the demand for the bill of particulars in the way and manner he did, nor as to why nothing was done to change the allegations in the complaint from March 13, 1929 when it was filed, until January 15, 1931, when the application was made to amend it. Significantly at no time was any explanation given as to *when* it was discovered that the original complaint did not allege the true facts nor *who* it was

that discovered this. Appellants contend that the real explanation was that someone unfamiliar with the law of negligence truthfully set forth the facts of the accident in the original complaint and that when someone preparing the case for trial, who knew the law of negligence, discovered the legal situation that then the brilliant thought of an amendment was born to overcome the complaint's patent weakness.

Appellant's desire to point out to the Court that Doctor John Londrigan produced as a witness for the defendants (State of Case, 106 and 107) testified that on July 11, 1929, almost a year and a half after the accident had happened and several months after the original complaint was filed and after the demand for bill of particulars and answers had been furnished, Mr. Robins attorney for plaintiff in the presence of the plaintiff, had given the witness a history of how the plaintiff had received the injuries and the statement at that time was, that the plaintiff had been injured while getting off the automobile truck. This testimony was not rebutted.

Manifestly in view of the law so clearly established by the cases which have been cited, the amendment to the complaint, especially as to the Bayonne News Company, did not cure a defect in the allegation of a good cause of action in the original complaint, but was distinctly an allegation for the first time of a good cause of action and was therefore as to the Bayonne News Company, an allegation of a new cause of action.

All the cases mentioned in the memorandum of the Circuit Court Judge, who made the order permitting the amendment, have been read together with all the cases cited in the footnote, 49 C. J. on page 517 which were also referred to in the mem-

orandum just mentioned. Appellants state that there is a positive marked distinction between every one of those cases and the case at Bar.

The case of *Giardini* v. *McAdoo,* 93 N. J. L. 138 is clearly distinguishable because no question was raised until after there had been a full trial of the case on the merits.

Swank v. *P. R. R.,* 94 N. J. L. 552 was also a case where an amendment was made after a full trial on the merits and the amendment merely expanded or amplified what had been already alleged. The case of *Duffy* v. *McKenna,* 82 N. J. L. page 62 was an action for deceit and the amendment merely added one more representation to several which had already been alleged. *Miller* v. *West Jersey Railroad,* 76 N. J. L. 282 the case presented by the amendment was one which the plaintiff had attempted to prove at a former trial and was not different in character from that originally pleaded. Both the original complaint and the amendment were based on the negligence of a common carrier toward a passenger, arising out of the management of freight trucks upon a station platform.

None of the cases either referred to herein or which were read had the two elements in them which exist in the case now before this court. They were—

1. That the Statute of Limitations had barred a new suit at the time the amendment was requested

2. That there had been no trial on the merits.

This is most important, especially so far as the defendant, Bayonne News Company is concerned, because as has already been pointed out, the original

complaint did not set up as against that defendant a good cause of action and the amendment, irrespective of anything else, set up against that defendant a good cause of action and was allowed after the Statute of Limitations had barred the commencement of a new suit. Surely the plaintiff by this ingenious method deprived that defendant at least of a substantial right.

Appellant argues that if a suit was started and the complaint alleged a cause of action on a promissory note, which was not barred by the Statute of Limitations and if after a long lapse of time, such as occurred in this case, the plaintiff in the hypothetical case requested an amendment to the complaint and by the amendment sought to recover on a note which was then barred by the Statute of Limitations, certainly such an amendment should be denied. If this illustration be apt, appellants say that the amendment in this case which was allowed, should have been denied.

Appellants maintain that the action of a Circuit Court Judge as evidenced by his memorandum in its most important aspect, was based upon a wrong conception of the result to be accomplished by the proposed amendment. Because it is the real gist of the memorandum and because it indicates the reasoning which actuated the court, it is herein set forth in full.

> "In the case *sub judice* the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendants' automobile. The place where the plaintiff was injured while alighting from the automobile or while passing in front of it, are mere incidents of the wrong done; the subject of the controversy remains the same and the gravamen of the complaint, the real wrong done, was the negligent oper-

ation of the automobile. It makes no difference to the cause of action that in the first instance the plaintiff may have been an invitee in the car, and in the second a pedestrian in the street. The duty required of the defendants, and the degree of care exacted in each instance was the same, and in either event there could be no cause of action, unless the car was improperly operated by the owner's agent.

The defendants rely upon the case of Doran v. Thomsen, 79 N. J. L. 99, as a precedent for the denial of this motion. In that case, however, the charge of negligence, as stated in the original declaration, was made to depend upon the allegation that the automobile was carelessly operated by the defendant's daughter as his agent. The gist of the action was the negligence of a servant imputed to his master, and not the direct negligence of the Master himself. As it was proposed to amend the declaration, the negligence counted on was of the father himself in supplying his inexperienced daughter with a dangerous machine, and its gist was the negligence of the father himself. Here there was an effort to change the gist of the action or the subject of the controversy, giving rise to a different cause of action. In the case *sub judice,* however, the proposed amendment would not change the gist of the action or subject of controversy which is the negligent operation of the defendants' automobile by his servant or agent. The proposed amendment would merely change the position of the plaintiff at the time he claims to have been injured by the negligent starting of the automobile."

Clearly this reasoning was erroneous. As has already been pointed out on several occasions, plaintiff had no right of action against Bayonne News Company on the facts alleged in the original

complaint. That this statement is positively correct is more than amply sustained by the authorities cited in the early part of this brief. The Circuit Court Judge overlooked entirely the most important legal principle governing the plaintiff's rights of recovery, namely: Was the plaintiff when injured an invitee of the driver, or had that legal status been ended and had he become a pedestrian?

If he was an invitee, clearly as against the defendant, Bayonne News Company, the amendment changed entirely the gist of the accident and as against the driver it took away almost completely the defense of contributory negligence.

Moreover, bearing in mind that the amendment which was allowed did not strike out of the original complaint the allegations contained therein but added to it an entirely different allegation of negligence, it will be seen that a most curious and peculiar situation of pleading was presented. After the amendment was allowed, the plaintiff was charging at one and the same time that he was injured while alighting from an automobile that was started while he was still alighting which caused him to be thrown under its wheels and also that he was injured while in the act of crossing in front of the automobile after he had completely alighted and had walked from the right side of the automobile all the way across to the front left side.

At the trial it will be observed that the plaintiff abandoned entirely the charge in his original complaint and based his recovery solely upon his amendment. Surely the inconsistencies and conflicting elements in the two allegations aptly and forcibly sustains the proposition that the amendment added an entirely new cause of action and did not enlarge, amplify or modify the original cause of action.

Decidedly in the words of the late Justice Swayze, the amendment did not tend toward the determination of the real controversy between the parties, i. e. the issues which the parties hoped and intended to try, but rather operated to institute a new and different suit between the parties presenting other questions.

Admittedly on this appeal no argument can be had on the question of the amount of the judgment, that having already been argued and decided against appellants, but surely in considering the question of whether or not the amendment of plaintiff's complaint resulted in harm or prejudice to the defendants, the amount of the verdict is at least a factor to be given some consideration. Appellants emphatically state that the verdict in this case was grossly excessive and clearly demonstrates the result which the plaintiff hoped to accomplish by the amendment was carried into execution with a vengeance.

Appellants recognize the fact that at the present time and for some time past Courts have been more or less generous in connection with the question of amending pleadings and that likewise Legislatures have followed this same course of action. Sections 23 and 24 of the Supplement to the New Jersey Practice Act of 1912 (P. L. 1912-381) confers upon the court the power to permit "before or at the trial the statement of a new or different cause of action in the complaint or counterclaim." There can be no doubt but that there is sound logic in the language of the late Justice Katzenbach in the case of *Wilson* v. *Dairymen's League Co. Op. Ass'n.*, 143 Atl. 454, 105 N. J. L. 540.

> "In the early days of our jurisprudence, many actions were brought to a summary conclusion by reason of mistakes as to form.

> These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of courts and legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried."

Appellants contend however, that this generosity should never be made a means whereby litigants should be harmed or prejudiced as they were in the present case, by the amendment which was allowed.

Conclusion.

Appellants insist that the reasons herein urged for the reversal of a judgment against them are sustained by logic and reason supported amply by precedents and that if there ever was a case which called for the exercise of sound judicial discretion in order to do justice to litigants, this is such a case. Appellants ask and confidently hope for a reversal of the judgment in this case.

Respectfully submitted,

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New Jersey
Court of Errors and Appeals

SIMON O'SHAUGHNESSY, *Plaintiff-Respondent,* *v.* BAYONNE NEWS COMPANY, a corporation, and HERMAN HOFFMAN, *Defendants-Appellants.*	Action at Law On Appeal from Hudson County Circuit Court

BRIEF FOR RESPONDENT

1

Statement of the Case

This appeal reviews a judgment in favor of the plaintiff and against both defendants in an action brought to recover damages for personal injuries sustained by the plaintiff on February 25, 1928. The corporate defendant was the owner of an automobile truck which was operated by the other defendant (who was the agent and servant of the corporate defendant) so as to run over the plaintiff while he was crossing Grove Street, Jersey City, at the intersection of Eighth Street.

The plaintiff, a Jersey City policeman, was on night duty at Thirteenth and Grove Streets. His lunch period was from 12:30 A. M. to 1:00 A. M. On this morning he was standing on the corner of Grove and Thirteenth Streets (about seven

blocks north of the scene of the accident) waiting for a street car to take him to his home on Eighth and Grove Streets to his lunch. As he was waiting, the automobile of the defendants proceeding south on Grove Street came along and the defendant, Hoffman, invited the plaintiff to ride with him. The plaintiff boarded the automobile taking the right front seat alongside of Hoffman. He rode to Grove and Eighth Streets where the truck stopped and he alighted (pp. 48 and 49). After he had alighted from the right side of the truck, while the truck was at a standstill, he proceeded from the west side of Grove Street to the east side on the northerly crosswalk. The automobile was then stopped about five feet north of the crosswalk and about four feet from the west curb (p. 53, *et seq.*). As the plaintiff was walking along the crosswalk from the west to the east side, and after he had passed almost completely in front of the truck, the defendant, Hoffman, suddenly without warning started the truck so that the left front wheel struck the plaintiff. As a result, the plaintiff was pushed along the street and his leg was broken. The left front wheel went over his leg. No horn was blown and no other signal that the truck was going to start was given (pp. 54 and 55).

The trial court submitted the case to the jury in a charge which fully covered the controversy and to which no exception was taken. The jury brought in a verdict of $8,000 (p. 20). Thereafter the defendant applied to and obtained from the trial court a rule to show cause for a new trial (p. 23). This rule assigned two reasons in support thereof, first, that the verdict was excessive, and second, that the verdict was against the weight of the evidence (p. 23, ll. 30-40). After

oral argument and the submission of briefs the trial court denied the rule for a new trial and entered final judgment in favor of the plaintiff (p. 24). In the rule to show cause but one exception was preserved, namely, "The defendants' exception to the order allowing an amendment to the complaint (p. 23, l. 40)."

2

Alleged Grounds of Appeal

There are two grounds of appeal (p. 28). The first is presented by both defendants; the second only by the corporate defendant. The first ground of appeal alleges error because the trial court permitted an amendment of the complaint (p. 28, ll. 30-40). The second ground alleges error because the trial court refused to direct a verdict (p. 29, ll. 1-10).

The second ground of appeal is improper and cannot be argued in this Court for two reasons. First, under Rule 129 of the Supreme Court it is provided:

> "Granting to a party a rule to show cause why a new trial shall not be granted shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule."

The defendants did obtain a rule to show cause in which the trial court reserved but one exception which is embodied in the first ground of appeal. Under Rule 129, *supra,* the defendants are barred from urging the second ground of appeal.

Second, this ground of appeal was embraced within the reasons filed in support of the rule

to show cause for a new trial in the court below and was there argued and disposed of by the trial court. One of the reasons urged in support of the rule to show cause for a new trial was that the verdict was against the weight of the evidence (p. 23, l. 35). The second ground of appeal urges that the court should have directed a verdict in favor of the defendant, Bayonne News (p. 29, ll. 1-10). The motion for a direction of verdict was on the single ground "that there is no testimony in the record which makes that defendant responsible for the injuries alleged to have been received by the plaintiff (p. 116, l. 40; p. 117, l. 5)." The motion for a direction of verdict is therefore necessarily embraced within the reason that the verdict is against the weight of the evidence. The identical question was decided by this Court in *Cleaves* v. *Yeskel,* 104 N. J. L. 32.

Defendant's waiver of the second ground (to simplify the argument) abandoned nothing.

3

Brief of the Argument

I

The trial court did not err in permitting the amendment of the complaint.

Notice of the motion to amend the complaint was duly served on the defendants on January 16, 1931 (p. 13, ll. 10-20). This was long prior to the trial of the case on March 3, 1931 (p. 31, l. 20). The motion was orally argued before Circuit Judge Ackerson and thereafter he filed a memo-

randum opinion wherein he ordered the amendment to be made (p. 14, *et seq.*). This opinion is also reported in 154 Atl. 13. A reading of the opinion shows that Judge Ackerson carefully considered the matter and demonstrates that the amendment was lawfully made.

The complaint as originally drawn alleged that plaintiff by the express invitation of the defendants became and was a passenger in the automobile truck owned by the defendant, Bayonne News Company, and operated by its agent, the defendant, Hoffman (p. 2, pars. 2 and 3). In paragraph 4 (p. 3, l. 15), the complaint further alleges that it was the duty of the defendants "to so manage and control said automobile that it would be reasonably safe for plaintiff riding in said automobile as aforesaid to alight therefrom at his destination."

In paragraph 5 it is alleged (p. 3) that the defendants "violated said duty, and so negligently, carelessly and recklessly operated the same that the plaintiff while lawfully alighting from said automobile truck at or near the intersection of said Grove Street with Eighth Street in said City of Jersey City, was caused to be thrown therefrom and under the wheels of said automobile, and as a result thereof sustained serious injuries."

In paragraph 6 (p. 3) the original complaint alleged the negligence of the defendants as follows:

> "6. The negligence of the defendants consisted in this:
>
> "(a) Said automobile truck was being driven and operated by an incompetent driver.
>
> "(b) The operator of said automobile

truck failed to make any observation as to the position of the plaintiff while lawfully alighting from said automobile, and started said automobile before plaintiff had completely alighted therefrom.

"(c) The operator of said automobile truck failed and neglected to give plaintiff any warning of his intention to start said automobile while plaintiff was still alighting therefrom."

Paragraph 7 (p. 4) alleges the injuries.

The amendment proposed was simply the adding of a new subdivision to the other subdivisions of paragraph 6, *supra,* to be known as subdivision (d) of paragraph 6 and this subdivision merely set forth another allegation of negligence closely connected with those already set forth. This proposed amendment which was allowed by Judge ACKERSON is as follows (pp. 12 and 19):

"(d) The operator of said automobile truck negligently and carelessly and without warning started the same after the plaintiff had alighted therefrom and while the plaintiff was in the act of crossing said Grove Street, a public highway, in front of said truck."

A comparison of this amendment with the other allegations of negligence demonstrates that it is part and parcel of the action as originally pleaded; as originally pleaded in subdivision (b) the defendants were charged with negligence in failing to make any observation as to the position of the plaintiff and with starting the automobile. In subdivision (c) the allegation is that the defendants neglected to give the plaintiff any warning of the starting of the automobile. One of the duties charged in paragraph 4 was that the plain-

tiff was entitled to have the defendants so manage and control the automobile that it would be reasonably safe for him to alight therefrom at his destination. In paragraph 5 it is alleged that the defendants were negligent and careless in that they so operated the automobile as to cause the wheels thereof to go over the plaintiff. Subdivision (a) charges the driver of the automobile with incompetence in the operation thereof. The amendment, subdivision (d) merely adds to the cause of action already pleaded that in the operation of the automobile and in the starting of the automobile and in the running down of the plaintiff without warning (all of which were previously pleaded) the operator of the automobile struck the plaintiff while the plaintiff was in the act of crossing in front of the automobile.

The objection to the motion to amend the complaint was rested by the defendant upon the sole ground that the proposed amendment would substitute an entirely new cause of action after the statute of limitations had run. The accident occurred on February 25, 1928. The two years period of limitation ran on February 25, 1930, some months before the notice to amend.

There are two answers to the contention that the amendment could not be made. First, even though the statute of limitations had run and a different cause of action were set up in the amendment, nevertheless the amendment could be made; and second, the amendment does not set forth a new cause of action.

Taking up the first answer, we find that this Court, in *Wilson* v. *Dairymen's, etc., Inc.*, 105 N. J. L. 188, 190, said:

> "In the early days of our jurisprudence many actions were brought to a summary

conclusion by reason of mistakes as to form. These decisions resulted frequently in miscarriages of justice. The only meritorious result of dismissing suitors on technicalities was to create a bar adept in the science of pleading. For many years the trend has properly been in the other direction. The aim of courts and legislatures is to abolish technicalities and enable suitors to have the merits of their controversies fully tried. The Practice act of 1903 (3 Comp. Stat., p. 4091) provides:

> "'In order to prevent the failure of justice by reason of mistakes and objections of form the court or judge *at all times* may amend any defects and errors in any proceedings in civil actions, whether there is anything in writing to amend by or not and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs and upon terms, and all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties shall be so made.'

"Section 23 of the Practice act of 1912 (Pamph. L. 1912, p. 377) provides that no civil suit or proceeding shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy by any procedure. The same act provides in section 8 that where a person not a party has an interest which a judgment will affect, the court, on his application, shall direct him to be made a party. Section 9 provides that new parties may be added, and parties misjoined may be dropped by the court at any stage of the cause as the ends of justice may require."

Also, Section 24 of the Practice act of 1912 (P. L. 1912, p. 382) provides:

> "In addition to the present powers of amendment, the court may, upon terms, permit, *before or at the trial,* the statement of a new or different cause of action in the complaint or counter-claim."

This Court, in *Giardini* v. *McAdoo,* 93 N. J. L. 138, 148, held (italics ours):

> "Surely, the provisions in the Practice act (1912), that a person not a party, who has an interest which the judgment will affect, may be made a party, and that a party may be added at any stage of the cause, will justify the amendment of this record, in view of the still further provision of that act, that no civil suit shall fail on the ground that the plaintiff has mistaken the remedy or procedure, if the court has jurisdiction to grant the proper remedy by any procedure. And surely the Camden Circuit Court had jurisdiction to try the issue between Adele Giardini and the Pennsylvania Railroad Company, concerning her husband's death through the negligence of the defendant's servants in Pennsylvania, with recovery regulated by the Death act of that state and enforceable here by comity.
>
> "Nor have we overlooked the fact that in *Lower* v. *Segal, supra,* the Supreme Court held that an amendment would be unreasonably vexatious to the defendant in that case because it appeared that the action was not brought within the period limited by the laws of Pennsylvania, which was followed in *Rankin* v. *Central Railroad Co.* and *Fitzhenry* v. *Consolidated Traction Co.* In the case at bar the situation is the same to this extent, if an amendment were not allowed, and the judgment were reversed without a *venire de novo,* the plaintiff, apparently, would be remedi-

> less, because the limitation under the Pennsylvania statute for bringing this sort of action is one year, which has already expired. But it must be conceded that all *proper* amendments may be made, irrespective of the defences which they would bar; and the only question here is, whether the fact that the statute of limitation in Pennsylvania would bar this action if it were commenced *de novo* is controlling. *Whether or not it was under the law as it stood prior to the Practice Act (1912), it cannot be argued with any show of reason that the beneficent provisions for amendment in the latter act are unenforceable in the presence of such a situation. On the contrary, they are entirely applicable, and, in and of themselves, quite dispositive of the question.*"

It is therefore settled that even if the statute of limitations had run, under the beneficent provisions of the Practice Act of 1912, the amendment could nevertheless be made notwithstanding that a new and different cause of action may be set up in the amendment. Judge Ackerson, in writing the opinion below sustaining the right to make the amendment, recognized the force of the foregoing authorities but found it unnecessary to rest his decision on that ground because he found that the proposed amendment did not substantially change the plaintiff's cause of action as originally pleaded (p. 16, ll. 15-30). The decision below was rested on the second answer, namely, that a new and different cause of action was not set up.

In determining that a new cause of action was not pleaded by the amendment the court below said (p. 16, l. 30, *et seq.*):

> "It is quite generally held that if the identity of the transaction forming the cause of action originally declared upon is adhered to,

an amendment is not ordinarily regarded as substantially changing the plaintiff's claim or as stating a new or substantially different cause of action. So an amendment will not as a rule be held to state a new cause of action if the facts alleged show substantially the same wrong with respect to the same transaction, or if it is the same matter more fully or differently laid, or, if the gist of the action or the subject of controversy remains the same; and this true although the form of liability asserted, or the alleged incidents of the transaction may be different. Technical rules will not be applied in determining whether the cause of actions stated in the original and amended pleadings are identical, since in a strict sense almost any amendment may be said to change the original cause of action. 49 C. J. 510, 511.

"In a tort action an amendment may vary the statement of the original complaint as to the manner in which the plaintiff was injured, or as to the manner of the defendants' breach of duty, without necessarily setting up a new cause of action. 49 C. J. 516, sec. 679. (See cases cited in foot notes): *Swank* v. *P. R. R.*, 94 N. J. L. 552; *Duffy* v. *McKenna*, 82 *id.* 62; *Giardini* v. *McAdoo, supra; Miller* v. *West Jersey, etc. R. R. Co.*, 76 *id.* 282; *Seaboard Air Line* v. *Renn*, 241 U. S. 290; *Texas & Pacific Ry.* v. *Cox*, 145 *id.* 593; *Missouri, Kansas & Texas Ry. Co.* v. *Wolf*, 226 *id.* 570; *Hermecken* v. *Seaboard*, 239 *id.* 353; *Ingwerson* v. *Chicago, etc. R. R. Co.*, 150 Mo. 374, 134 S. W. 411.

"In the case *sub judice* the injury charged in the original complaint was alleged to have arisen out of the negligent operation of defendant's automobile. The place where the plaintiff was injured is not the gist of the cause of action. Whether he was injured while alighting from the automobile or while passing in front of it, are mere incidents of the wrong done; the subject of the contro-

> versy remains the same and the gravamen of the complaint, the real wrong done, was the negligent operation of the automobile. It makes no difference to the cause of action that in the first instance the plaintiff may have been an invitee in the car, and in the second a pedestrian in the street. The duty required of the defendants, and the degree of care exacted in each instance was the same, and in either event there could be no cause of action, unless the car was improperly operated by the owner's agent."

In a tort action an amendment may vary the original complaint as to the manner in which the plaintiff was injured or as to the manner of the defendants' breach of duty or as to the capacity even in which the plaintiff sues, or as to the statute under which the suit is brought, without setting up a new cause of action.

> *Giardini* v. *McAdoo,* 93 N. J. L. 138;
> *Swank* v. *P. R. R.,* 94 N. J. L. 552;
> *Boniewski* v. *Polish Home of Lodi,* 103 N. J. L. 329, 330;
> *Wilson* v. *Dairymen's, etc., Inc.,* 105 N. J. L. 190;
> *Michelson* v. *Erie R. R. Co.,* 106 N. J. L. 147, 150.

The only case cited in opposition to the foregoing by counsel for the defendants in the court below was *Doran* v. *Thomsen,* 79 N. J. L. 99. The court below (p. 18) distinguishes that case on the ground that in the amendment it was sought to charge the father directly with negligence in supplying his automobile alleged to be a dangerous machine, to his inexperienced daughter, whereas in the original complaint the action was merely for negligence on the theory that the car was oper-

ated by the daughter as the servant of the father. In short, the amendment set forth an entirely new cause of action based on a different theory than that of *respondeat superior*. Furthermore, in that case, the decision was rendered in 1909, prior to the enactment of the provisions of the Practice Act of 1912 quoted *supra*.

The cases on pages 13 and 14 of defendants' brief were before the Practice Act of 1912 and their inapplicability to the case at bar is apparent from a reading of them and also for the reason pointed out *supra* in *Giardini* v. *McAdoo*, where they are referred to.

In the case at bar the amendment does not change the gist of the action or the subject of the controversy which is the negligent operation of the automobile of the defendants causing injury to the plaintiff. The time, the place and the occurrence are the same. The proposed amendment merely changed the position of the plaintiff at the time he was struck by the negligent starting of the automobile.

The alleged "marked" distinction between the cases cited *supra* and the case at bar (pointed out at p. 21 of defendant's brief) is a distinction without a difference. Surely if an amendment could lawfully be made at or after the trial of a case or even on appeal (at which times a defendant might with just cause assert surprise and lack of proper notice to plead to and prepare for the change) *a fortiori* it could be made before trial and on due and proper notice to the defendant. The cases cited so hold.

The other distinction, that the statute of limitations had not run in the cases cited, *supra*, is contrary to the fact. That was the very point of the decisions. If the statute had not run the right

to amend would not have been questioned The cases cited in the opinion below demonstrate that the rule as adopted in this state is generally followed.

II

Comments on Defendant's Brief

Counsel for defendant, disappointed by the defeat suffered below, in his brief unfairly attacks the court below and counsel for plaintiff. His presumption is apparent when we read (p. 25), "Appellants emphatically state that the verdict was grossly excessive and clearly demonstrates the result which the plaintiff hoped to accomplish by the amendment was carried into execution with a vengeance."

By this statement both Judge OLIPHANT, who presided at the trial, and the jury are condemned to say nothing of counsel for plaintiff and the plaintiff and his witnesses. The jury rendered its verdict on sworn medical testimony. The defendants' doctor, although called as a witness, failed to testify as to the nature and extent of the plaintiff's injury (pp. 106 to 108). The testimony of the two doctors for the plaintiff (both outstanding surgeons) was uncontradicted, although defendants' doctor had examined the plaintiff and reported his findings to counsel for defendants (pp. 36 to 47). Why did counsel for defendant fail to examine his expert on the nature and extent of plaintiff's injuries (p. 106, *et seq.*)? The plaintiff's injuries more than warranted the verdict. The jury determined the amount. The trial court determined on rule the verdict was not excessive. The question is not before this Court.

Mr. Markley did not argue the motion to amend or write the brief in support of it. Mr. Robbins and Mr. Broadhurst did. Mr. Markley conducted the trial several months later. No apology is made for the amendment.

The complaint as originally drawn stated a cause of action as against both defendants. The answer did not object to it in point of law (p. 10). Whether the defendant Hoffman had the right to invite the plaintiff so as to bind the corporate defendant was a fact to be proved. Even if he did not have authority Hoffman certainly would be liable for his negligence whether the plaintiff was injured while he was on or off the automobile.

Counsel for defendant brought out that the defendants were insured (p. 103, ll. 20-30). Appeal bond has been filed for both defendants. Counsel concedes in his brief that his only ground of appeal does not apply to Hoffman (pp. 7, 12 and bottom of p. 23 of brief) and that the original complaint was sustainable against Hoffman.

If counsel for plaintiff were so "clever and ingenious" as counsel for plaintiff alleges (as to deliberately change the facts so as to make a case against the corporate defendant) surely then counsel for plaintiff knew that Hoffman was insured and Hoffman was negligent and recovery could be had without a judgment against the corporate defendant.

There is no evidence supporting the insinuations contained in defendant's brief. They are made out of whole cloth. The argument advanced is immaterial and irrelevant to the only ground of appeal. It is urged to excite prejudice against plaintiff who with his witnesses are by it declared to be perjurers, although the jury below disbe-

lieved the defendants' only witness on the accident and the court below refused to interfere with the jury's verdict.

On the strength of such an argument counsel concludes (p. 26), "That if there ever was a case which called for the exercise of sound judicial discretion in order to do justice to litigants, this is such a case," thereby revealing his own lack of confidence in his only ground of appeal and his argument in support of it, but nevertheless hoping that he has succeeded in prejudicing the plaintiff's case sufficiently so that this Court might by main strength obligingly reverse the judgment below upon one or more of his immaterial and irrelevant inferences which are not before the Court for decision.

Mr. Robbin's testimony (p. 109) explains why the original complaint was lacking in an accurate statement of the occurrence and he frankly admitted the neglect was his or that of his office assistant.

The plaintiff's lawyers surely would have been derelict in their duty had they gone to trial on the original complaint knowing that it misstated the occurrence to the disadvantage of their client. A variance between the complaint and the proof would have spelled success for the defendants which their courageous counsel would not have hesitated to take advantage of. One instance of an answer to defendants according to their counsel's method of argument would be to say that because defendant Hoffman testified that his insurance company told him not to invite anyone to ride (p103, l.20) that therefore it is proven that such testimony was framed after the accident when Hoffman's statement was obtained by the investigator of the insurance company of defend-

ants, because it is a well known fact which does not have to be proven that insurance companies do not give such instructions to the operators of automobiles and therefore counsel for defendants is "clever and ingenious" in making use of such testimony and consequently this Court in the exercise of a sound judicial discretion should affirm the judgment.

The only witness called by the defendants on the question of liability was the defendnat Hoffman, the operator of the automobile, an interested witness whose testimony on cross examination seriously discredited him and his testimony on direct. The plaintiff on the other hand, called three witnesses to the accident including himself, and their testimony was not shaken in the slightest degree on cross examination.

The credibility of the witnesses was for the jury and the trial court on rule to show cause in reviewing the testimony for the purpose of determining whether there was any merit in the contention that the verdict was against the weight of the evidence. Both the jury and the trial judge have sustained the credibility of the testimony offered in behalf of the plaintiff and this Court on appeal cannot go into that question.

There was ample evidence of the responsibility of both defendants. The plaintiff testified that on the night of February 24, 1928, he was employed by Jersey City as a policeman doing patrol duty on Grove Street from Thirteenth Street to Hoboken, a distance of about seven blocks (pp. 47 and 48). His home was on Thirteenth Street and Grove Street. His hours of employment were from eight P. M. on the 24th to four A. M. on the 25th with a half hour for lunch from twelve-thirty to one A. M. (p. 48, ll. 1-30). When twelve-thirty

A. M. arrived and it was time for his lunch he was standing on the northwest corner of Grove and Thirteenth Streets waiting for a street car on Grove Street to come along to take him to his home (p. 48, l. 30 to p. 49, l. 5). While he was waiting for the street car the automobile of the defendant, Bayonne News Company, operated by its chauffeur, Herman Hoffman, came along going south on Grove Street and the driver, Hoffman, invited the plaintiff to ride with him to Eighth Street, a distance of approximately five blocks (p. 49, ll. 1-15). As a result of the invitation he boarded the automobile and sat on the front seat alongside of the driver (p. 49, ll. 15-25). When the automobile reached Eighth and Grove Streets (the automobile was proceeding south) it came to a stop on Grove Street five feet north of Eighth Street and about four feet from the right-hand or westerly curb of Grove Street (p. 53, ll. 10-30; p. 54, ll. 1-5). The plaintiff happened to recognize a man by the name of Mike Flynn standing on the northeast corner of the intersection (p. 53, ll. 30-40). He knew Mike Flynn and had a message to deliver to him from Flynn's brother (p. 49, l. 30 to p. 50, l. 20). After the automobile had stopped he alighted from the right front seat and proceeded to walk from the right front end of the automobile across Grove Street on the northerly crosswalk of Eighth Street. He was right at the corner and he had almost cleared the front of the truck when the truck was suddenly started without warning and he was struck by the left front wheel, dragged along the highway, the left front wheel finally passing over his leg and resting upon his foot (p. 54, ll. 20-40). The truck went ten feet before it was again stopped (p. 55, l. 5). When it actually

stopped the left front wheel was on his ankle (p. 55, ll. 1-20). The truck had to be backed up in order to release him (p. 55, ll. 30-40).

Flynn, an entirely disinterested witness, testified that he was employed by the Pennsylvania Railroad as a deck hand and on the evening of February 24, 1928, quit work at twelve midnight at the foot of Sixth Street, Jersey City (p. 86, ll. 1-20). He then came up Sixth Street to Grove Street to a restaurant on Pavonia Avenue and Grove Street where he had a bite to eat and then he proceeded to walk down Grove Street toward Eighth Street in a southerly direction for the purpose of going home. He lived at Seventh Street, one block south of Eighth Street (p. 86, ll. 15-40). As he stood on the corner of Eighth and Grove Streets for a few minutes he saw this automobile truck of the defendants proceeding south and the plaintiff hollered to him. The truck reached the corner of Grove and Eighth Streets and Flynn saw the plaintiff alight from the truck and walk across the front of the truck for the purpose of reaching Flynn on the northwest corner. As the plaintiff was just about to clear the front of the truck it was suddenly started by the defendant Hoffman and struck the plaintiff. Plaintiff's foot was under the wheel and the driver backed up the truck in order to get the plaintiff's foot out (p. 87, ll. 10-20). His foot was under the left front wheel (p. 87, ll. 20-30). The defendant Hoffman gave no warning that he was about to start the truck. There was an electric street light at the corner (p. 87, ll. 20-35). He was the only witness to the accident other than the plaintiff and the defendant Hoffman (p. 88, ll. 20-40).

The third witness for the plaintiff, Rickard, was a taxi driver who came along shortly after

the accident happened. He arrived at the scene of the accident at 12:40 A. M. He was driving his taxi south on Grove Street (p. 81). As his taxi approached Eighth Street it was in about the center of the road (p. 82, ll. 1-10). He saw the truck of the defendant stopped at a point about ten feet south of the northwest corner, that is, the rear of the truck was ten feet south of the northwest corner and the truck was about five or six feet from the right hand curb going south (p. 82, ll. 20-40). In short, the whole of the truck was on Eighth Street and south of the northwest corner where the plaintiff had alighted (p. 82, l. 30 to p. 83, l. 1-10). This witness corroborates the other two witnesses for the plaintiff with respect to the position of the truck immediately after the accident.

As against the foregoing testimony of three witnesses, we have nothing but the interested testimony of the defendant, Hoffman. He admitted that although he was supposed to have instructions not to invite anybody on the automobile that nevertheless he permitted the plaintiff to ride (p. 103, l. 40). He said he received his instructions from the insurance people for the defendants and from the union he worked for (p. 103, ll. 25-30), an unusual source of authority, to say the least. He denied that he discussed the case with anybody before going on the witness stand (p. 104, l. 25). He denied having spoken to trial counsel for the defendant (p. 104, l. 30) or to any of his assistants before going on the witness stand (p. 104, ll. 30-40). He then admitted that he was given a copy of a statement which he was supposed to have made of the accident. Although it was given to him to read he did not read it (p. 105, ll. 1-20). Although the trial was three years

approximately after the accident he had not talked with anybody about the case. He had not read his statement (p. 105, ll. 20-25). He was testifying solely from his recollection of what happened on February 24, 1928. The trial was on March 3, 1931 (p. 105, l. 25; p. 32, l. 20). Hoffman finally admitted that the plaintiff rode on the automobile alongside of him from Thirteenth and Grove Streets to Eighth and Grove Streets and that the truck slowed up at Eighth Street for the purpose of permitting the plaintiff to alight *and that the truck was practically stopped when the plaintiff did alight* (p. 105, ll. 30-40). If it was at a standstill then it must have started up again to run over the plaintiff.

Hoffman admitted that he was employed as a chauffeur by the Bayonne News Company at the time of the accident. He was bringing newspapers from New York to Jersey City for that company (p. 99, ll. 1-20).

III

CONCLUSION

For these reasons we respectfully submit that the judgment in favor of the plaintiff should be affirmed, with costs.

Submitted February Term, 1932.

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