(28) 1085

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TESTIMONY:

For Plaintiff:

SUMMONS.

New Jersey Supreme Court.

HUDSON COUNTY.

The State of New Jersey to Benjamin Grunstein:

You are summoned to answer the annexed complaint of CLARK H. NICHOLS, as Administrator ad prosequendum of the goods, chattels, etc., of CATHERINE NICHOLS, Deceased, in an action at law in the New Jersey Supreme Court; AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within TWENTY DAYS after service

upon you of this writ, and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of the Supreme Court, at Trenton, this 9th day of March, 1927.

EDWARD J. KELLEHER,
Clerk.

WILLIAM GEORGE,
Attorney.

ACTION AT LAW.—COMPLAINT.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chatteis, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

vs.

BENJAMIN GRUNSTEIN,

Defendant.

The above named plaintiff, residing in Jersey City, County of Hudson and State of New Jersey, says:

1. That he is the Administrator Ad Prosequendum of Catherine Nichols, deceased, having been appointed as such by the Surrogate of the County of Hudson on the 7th day of March, 1927.

2. That on or about February 9th, 1927, defendant was the owner of a certain motor truck which he, the said defendant, by his agent or servant, operated in a northerly direction on a certain public street or highway in the City of Jersey City, County of Hudson and State of New Jersey, known as Jersey Avenue, at or near the intersection of Second Street.

Action at Law.—Complaint.

3. That at the time and place aforesaid, the plaintiff's intestate was lawfully upon the crosswalk of said Jersey Avenue, proceeding in a westerly direction, and at which time and place said plaintiff's intestate acted in a careful, reasonable and prudent manner, with regard to her safety.

4. At said time and place the said defendant, by his agent or servant, operated his said motor truck in a reckless, careless and negligent manner, as a result of which the said defendant's motor truck was caused to be driven into and against the said intestate, causing her to be thrown violently to the ground, wherefor and by reason of which, the said intestate aforesaid sustained injuries from which she died.

5. The negligence of the defendant, his agent or servant, consisted in this:

Failure to use reasonable care by the defendant, his agent or servant, in the following particulars:

(a) To keep a lookout for persons in the vicinity of the said automobile.

(b) To control the motion thereof so as to avoid striking persons in the vicinity thereof.

(c) To give warning of the approach thereof.

(d) To propel same at a rate of speed safe to persons in the vicinity thereof.

(e) To equip same with proper lights, appliances and brakes, as required by the statute in such case made and provided.

Action at Law.—Complaint.

6. Plaintiff's intestate left her surviving her father, the said Clark H. Nichols; her mother, Agnes Nichols, and Veronica and Agnes Nichols, her sisters, and Howard Nichols, her brother, all of whom have sustained damages through the negligent causing of the death of the said plaintiff's intestate as aforesaid.

7. That this action is brought within twenty-four calendar months of the date of the death of Plainiff's intestate.

Plaintiff demands as damages the sum of $25,000.00.

WILLIAM GEORGE,
Attorney for Plaintiff.

ACTION AT LAW.—ANSWER.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

VS.

BENJAMIN GRUNSTEIN,

Defendant.

Defendant, answering the complaint, says that:-

1. He has no knowledge or information sufficient to form a belief as to paragraph 1.

2. He denies paragraphs 2, 3, 4, and 5 and all subdivisions thereto, and 6.

3. He admits paragraph 7.

FIRST SEPARATE DEFENSE.

Defendant alleges that the plaintiff's intestate was guilty of contributory negligence in that she did run across said street at a point or place where there was no regular cross-walk, without using due care and caution, and that she did not properly observe said highway or automobiles then and there lawfully upon said

highway and did attempt to cross said street without looking to the left or right, and without using due care as is required and did knowingly place herself in a position of danger and therefore plaintiff cannot recover.

ALEXANDER M. MacLEOD,
Attorney for Defendant.

Dated: March 25th, 1927.

ACTION AT LAW.—REPLY.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

vs.

BENJAMIN GRUNSTEIN,

Defendant.

Plaintiff, replying to Defendant's answer, says:

1. He denies each and every allegation contained in the First Separate Defense set forth in said answer.

WILLIAM GEORGE,
Attorney for Plaintiff.

TESTIMONY.

HUDSON COUNTY, SUPREME COURT.

CLARK H. NICHOLS as Administrator ad prosequendum, of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

vs.

BENJAMIN GRUNSTEIN,

Defendant.

BEFORE:

HON. FRANK L. CLEARY, J.

and a Jury.

Jersey City, N. J.
March 19, 1928.

Appearances:

WILLIAM GEORGE, Esq., for the Plaintiff.

ALEX. MCLEOD, Esq., for the Defendant.
by FRANK J. HIGGINS, Esq.

A Jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

Mr. George: For the sake of expediency I would ask whether ownership by the defendant of the truck in question is admitted.

Mr. Higgins: We admit that.

Mr. George: Although it was denied in the answer, I want to be sure.

Mr. Higgins: Ownership is admitted.

MRS. AGNES NICHOLS sworn for the plaintiff:

Direct Examination by Mr. George:

Q. Mrs. Nichols, where do you live? A. 253 Newark Avenue, Jersey City.

Q. How long have you lived in Jersey City? A. Forty years.

Q. Are you the mother of the late Catherine Nichols? A. Yes, sir.

Q. How old was she at the time of her death? A. Seven years old.

Q. Did she live with you from the time of her birth until her death? A. Yes, sir.

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

Q. What school? A. St. Mary's.

Q. Where is that? A. On Third, between Erie and Grove.

Q. Did she attend school all day or part time? A. All day.

Q. What time did she go in the morning? A. Half past eight.

Q. And returned to lunch when? A. About a quarter to twelve.

Q. And on the 9th of February of last year did she return for lunch? A. No, sir.

Q. Did you learn why? A. Yes, her brother came home and told me she was hit by a truck.

Mrs. Agnes Nichols—For Plaintiff—Direct.

Q. How old was the brother at the time? A. Nine.

Q. Have you any other children? A. Yes, three others.

Q. You had five children at the time? A. No, four at the time.

Q. Four altogether, including Catherine? A. Yes, four counting Catherine.

Q. How many have you now? A. Three.

Q. How old were the other two? A. One is thirteen and one is nine and the other is three.

Q. What is the name of the nine year old boy? A. Howard.

Q. It was he who came home and told you that Catherine was struck by a truck? A. Yes, sir.

Q. Immediately after she was struck, do you know? A. Yes, sir.

Q. About the usual time that they both came home for lunch? A. Yes, sir.

Q. Then what did you do? A. I started to get ready to go to the hospital and the driver and the officer came in.

Q. The driver of what? A. Of the car that hit her; and the officer came in.

Q. And what happened? A. Well, they told me that she was struck with a car.

Q. And that the child went to the hospital? A. Yes, sir.

Q. You then went to the hospital? A. Yes, sir, I went.

Q. Did you see Catherine? A. She was asleep.

Q. Was any bandage on her anywhere? A. No.

Q. Were you with her any time before she died? A. Yes, the day before she died.

Q. Was there any bandage on her anywhere? A. No.

Q. Was she well before the accident? A. Yes, sir

Q. A Healthy child? A. Yes, sir.

Q. And what grade was she in school? A. Yes, sir.

Q. Was she a bright child? A. Yes, sir.

Q. What hospital did she go to? A. Jersey City.

Q. When did she die? A. Well, the officer came and told me at seven o'clock.

Q. Never mind what the officer said; do you know when she died? A. Only he came at seven o'clock and told me.

Q. And you went to the hospital? A. No.

Q. Did you bury your child? A. Yes, sir.

Q. Then you do know that the child died? A. Yes, sir.

Q. When did you last see the child alive? A. Right after noon; about three o'clock.

Q. When did you next see the child after that? A. Not until Saturday afternoon.

Q. Next day? A. Yes, sir.

Q. Dead or alive? A. Dead.

Q. You buried the child? A. Yes, sir.

Mr. George: Cross-examine.

Mr. Higgins: No questions.

HOWARD NICHOLS sworn for the Plaintiff:

Direct Examination by Mr. George:

Q. How old are you? A. Ten.

Q. When were you ten? A. December.

Howard Nichols—For Plaintiff—Direct.

Q. You realize what you just did when you put your hand on the Bible? A. Yes, sir.

Q. What? A. Swore that I will tell the truth.

Q. I can't hear you? A. That I would not tell no lies.

Q. Do you know what that book is? A. The Bible.

Q. Do you know what happens to boys or girls who tell lies after they swear on the Bible to tell the truth? A. Yes, sir.

Q. What happens to them; do you know; where do boys and girls go who tell lies? A. To hell,

Mr. George: Is there any doubt in Mr. Higgins' mind as to the binding effect of the oath in this case.

Mr. Higgins: Proceed in the regular course.

Mr. George: I thought you raised some question.

The Court: Do you want to examine him?

Examined by Mr. Higgins:

Q. Do you go to Sunday school? A. No.

Q. Did you ever go? A. No.

Q. You understand what an oath is; you must tell the truth, the whole truth, and did I understand you to say if you did not tell the truth under oath you are going to hell; is that right? A. Yes, sir.

Mr. Higgins: Satisfactory.

Howard Nichols—For Plaintiff—Direct.

Direct Eximination by Mr. George: (Resumed)

Q. Where do you live? A. 253 Newark Avenue.

Q. How old did you say you were? A. Ten.

Q. What school do you go to? A. St. Mary's.

Q. Do you remember last year going to school with your sister Catherine? A. Yes, sir.

Q. Do you remember in the month of February of last year coming home from school when something happened? A. Yes, sir.

Q. Which way were you coming home? A. Through Second Street.

Q. Through Second Street and what street?

Q. Were you going west; you don't know east or west, do you? You were on your way home? A. Yes, sir.

Q. Toward Jersey Avenue? A. Jersey Avenue and 2nd Street.

Q. You and Catherine were walking on the sidewalk, were you? A. Yes, sir.

Q. Then when you came to Jersey Avenue, what happened? A. We was standing there—

Q. I can't hear? A. We was going across.

Q. Talk right out. We was going to go across the street when a horse and wagon came and went on past me; we was going across the street, when the auto was about First Street, we went to go across and my sister ran ahead of me, went to go, and the car was coming fast; it did not blow its horn and I jumped back. I went to grab her and I didn't have a chance.

Q. What happened to Catherine? A. And the car bumped into her.

Q. What part of her was hit, do you know? A. No, sir.

Howard Nichols—For Plaintiff—Cross.

Q. Did you see her knocked down? A. Yes, sir.

Q. How far did the truck go after hitting her. About how far? Can you tell by any object in this room? A. About the end of the desk there.

Q. The end of the desk over there? A. Yes, sir.

Q. Which desk do you mean; where Mr. Craig is sitting, that man over by the wall? A. Yes, sir.

Q. From where you are to the wall? A. Yes, sir.

Q. He had gone that far before stopping? A. Yes, sir.

Q. Did you hear any horn blown? A. No, sir.

Q. Who picked Catherine up? A. The driver.

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

Q. Where is he? A. There. (Indicating).

Mr. Higgins: Stand up.

Q. Is that the man who was driving? A. Yes, sir.

Q. And he took Catherine to the hospital? A. Yes, sir.

Q. In what, in the truck? A. In the truck.

Q. Was he going fast or slow before the accident? A. Fast.

Cross Examination by Mr. Higgins:

Q. Howard, how far were you from school when you got to Jersey Avenue and Second Street? A. A block and a half.

Q. Were you going along together? A. Yes, sir.

Q. Hand in hand? A. Yes, sir.

Q. When you got to Second Street. you say you saw a horse and wagon? A. Horse and wagon.

Q. Where were you when you saw them? A. They passed Jersey Avenue.

Q. They were going where? A. They passed Jersey Avenue.

Q. To Jersey Avenue? A. Yes. sir.

Q. Were they above or below Second Street when you first saw them? A. That was the way the car was going.

Q. The what? A. The automobile was going.

Q. How far from the corner were they when you first saw them, about half way or a quarter or what? A. I don't know.

Q. Were they very far away from the corner when you stopped for them to pass? A. Yes, sir.

Q. How long did you stop for that horse and wagon to pass? A. Only a few seconds.

Q. Then did I understand you to say you saw this truck about down at First Street? A. About at First Street.

Q. Do you know how far First Street is from Second Street? A. A block.

Q. Do you know how long a block it is? Just about a regular city block? A. Yes. sir.

Q. The size that most of them are; I don't suppose you can tell me in feet? A. Yes, sir.

Q. Had it crossed First Street when you first saw it? A. It was about at First Street.

Q. Where were you and your sister then? A. I was right there. holding hands with her.

Q. I don't understand you. A. I was right holdings her hands there.

Howard Nichols—For Plaintiff—Cross.

Q. Where were you with her when you saw the truck a block away? A. Standing at the corner.

Q. Right at the corner? A. Yes, sir.

Q. Had the wagon gone by the front of you then? A. No. sir.

Q. And then what happened; you started to cross the street? A. Yes. sir.

Q. Who went first? A. My sister ran.

Q. You saw the truck then, didn't you? A. Yes. sir.

Q. You didn't start to go over? A. No. sir.

Q. You thought it was dangerous to go over when this truck was coming? A. Yes. sir.

Q. Did you grab your sister? A. I went to grab her, and the truck came so fast.

Q. Did you reach your sister when you went to grab her, did you touch her at all? A. Yes, sir.

Q. Did you holler at her? A. Yes, sir.

Q. What did you say to her? A. I said, "Come back".

Q. She did not come back but she went right on? A. Yes, sir.

Q. How far did she get across Jersey Avenue? A. She got around to the car tracks.

Q. And then she was hit? A. Yes, sir.

Q. This truck you saw down at First Street. Then, from the time you went to holler to your sister, or to grab her, it got down to Second Street, did it A. Yes, sir.

Q. A long block before she was hit. You yourself thought it was dangerous to cross over there, didn't you? A. Yes, sir.

Q. What side of the street was the truck on,

on its own right hand side; was it near the curb where it was running? A. About the middle, like.

Q. Middle of what? A. The middle of the street.

Q. Was it on the car tracks? A. On the tracks, yes sir.

Q. The car track runs right through the center, doesn't it? A. Yes, sir.

Q. You didn't get hurt any? A. No, sir.

Q. You got off and back there yourself? A. Yes, sir.

Q. Before your sister got off? A. I tried to grab by sister. I got off and then I came right back.

Q. How far did you get off the sidewalk? A. A little ways.

Q. When you hollered to your sister to come back. where was the truck then? A. Second Street.

Q. On Second Street; just before you started it was on First Street, wasn't it? A. But it was coming fast.

Q. Wasn't it there just before your sister stepped off; it was at First Street? A. Yes, Sir.

Q. When you say you hollered to her, it was at Second Street? A. Yes, sir.

Q. Where was she then? A. She was in the middle of the block.

Q. A little louder. A. she was out in the middle and I hollered; she was walking across.

Q. You tried to grab her the moment she went off, didn't you? A. Yes. sir.

Q. And she ran away from you, didn't she? A. Yes. sir.

Q. Was there anything in between your sister

and the truck that would prevent her from seeing it coming? A. Sir?

Q. There wasn't any other cars in between you? A. No.

Q. You had no trouble in seeing when you stepped off the sidewalk, did you? A. No, sir.

Q. You are sure as to how far the truck went after it hit your sister? A. About to the wall.

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

Q. A policeman came there right after? A. Yes, sir.

Q. Were you there when he came? A. Yes. sir.

Q. Was the truck still in the same place where it stopped when the policeman came? A. Yes. sir.

Q. That was right in the center of the road wasn't it? A. Yes, sir.

Q. Did you talk to anybody about what you were going to say this morning? A. No.

Q. Sure you didn't? A. No.

Q. Didn't you tell your lawyer what you were going to say? A. I told the lawyer before. I told the lawyer when I was coming up.

Q. Did you talk to anybody else at home before? A. No, sir.

Q. Who was the first person that ever spoke anything about a horn being blown; who asked you that first? A. My father.

Q. What time did you leave school? A. Half past eleven.

Q. What street did you go by first? A. Second Street.

Q. Will you tell us again when you got to Second Street, what happened when you reached Jersey Avenue? A. The horse and wagon had

passed right there, and we were going to start to go across. The car was at First Street when she got in the middle of the block. Then I hollered to her.

Q. What is the last you say? A. When she got to the middle of the block, I hollered to her to come back.

Q. You were walking and you got to the middle of the block? A. Yes, sir.

Q. Where was your sister then? A. She ran to the middle of the block.

Q. She was in the middle of the block? A. She ran out there.

Q. You just told us it was at that time the truck was in the middle of the block; where was your sister then? A. She ran out to the middle of the block.

Q. Was she in the middle of Jersey Avenue when the truck came down in the middle between First and Second Streets? A. Yes, sir.

Q. That is where it was, in the middle of the street, isn't it? A. Yes, sir.

Q. How did this happen, then, if she was there and the truck was in the middle of the block? A. The truck was coming in the middle and she ran all the ways out and the truck hit her.

Q. Is there two car tracks there? A. One track, just one track.

Q. And that is in the middle of the street? A. Yes, sir.

Q. And the truck was in the middle of the street and she was in the middle when you hollered? A. Yes, sir.

Q. And that is where she was hit? A. Yes, sir.

Q. Wouldn't she have been able to come back

if the truck was half a block away? A. It was coming so fast, I was scared.

Q. Did your sister keep on walking? A. No, she stopped; she wanted to turn back again when I told her.

Q. Did she run back? A. She didn't have no chance to run back.

Q. Then she didn't run backwards at all? She kept on running over? A. Yes, sir.

Q. Did you see the truck turn either side of your sister? A. No, sir.

Q. Did the truck keep on going? A. Straight ahead.

Q. Didn't the truck swing away, trying not to run into your sister? A. No, sir.

Q. It didn't slow up? A. It might have.

Q. Did it slow up a little bit before it hit your sister? A. It slowed up a little bit before it hit my sister.

Q. And it was going very fast before. Of course you don't know how fast, do you? A. No, sir.

Re-direct Examination by Mr. George:

Q. There is only one car track in the street, isn't there, Howard? A. Only one car track, yes sir.

CHRIS SMITH, sworn for the Plaintiff:

Direct Examination by Mr. George:

Q. Where do you live? A. I live on Henry Street, Jersey City now.

Q. Did you live there in February of last year? A. I lived on Trenton Street, Jersey City.

Q. You lived there at the time this little girl Catherine was killed? A. Yes, what they call the 'Island', near Chestnut Avenue.

Q. Mr. Smith, were you on Jersey Avenue on the 9th of February last shortly before noon? A. Yes, sir.

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

Q. Please describe to the Court and Jury what you saw? A. I was coming along Jersey Avenue and got between Second and Third Street on the Coles Street side, that is the side nearest Coles Street and I was talking to another fellow there. I just happened to turn when I seen the girl knocked down. I didn't see her leave the sidewalk. She was out that way (indicating) between the curb and the car track when she was struck.

Q. Was the truck going fast or slow at the time you first saw it? A. It was going around 20 or 25 miles an hour.

Q. How far did it go after it struck the child? A. I imagine about 25 feet.

Q. Did you hear any horn blown of any kind? A. Not from where I was.

Q. Was he going straight or did he pull to the right or left after he struck the child? A. Why, he might have pulled to the left, but he didn't go more than a foot to the side.

Q. On the left side? A. On the left side.

Q. Going over towards Third Street, was it on the left side or the right side? A. He turned a little left because after he hit the girl, I went over to the driver when he stopped.

Chris Smith—For Plaintiff—Cross.

Cross Examination by Mr. Higgins:

Q. Where do you live? A. Henry Street.

Q. What number? A. 23.

Q. What is your business? A. Plumber.

Q. Who are you employed by? A. By R. P. Gilligan.

Q. Robert Gilligan? A. Yes, sir.

Q. Were you working in February of last year? A. Yes, sir.

Q. Did you see a policeman there at all? A. I didn't see no policeman until after five minutes after the accident. Then a policeman came and took the girl and the driver over to the hospital.

Q. Did you have any talk with this policeman? A. No.

Q. You didn't give the policeman your name? A. No.

Q. You didn't go up to the police station? A. No.

Q. Where were you walking when you saw the truck? A. I was just walking and talking to this friend of mine when I saw the truck.

Q. How many feet from Second Street were you from where the accident took place? A. Third I was.

Q. Which way were you walking? A. Toward Newark Avenue.

Q. You were north of the truck coming towards you when it was coming towards you? A. Yes, sir.

Q. You don't mean to say that you were in that position and you could tell how fast he

was going? A. Well, I figure from the way the truck hit the girl and where it stopped.

Q. That is the way you figured the mileage? A. He must have been going 25 miles.

Q. You don't know what rate he was going before the accident? A. No, because I didn't see him until he hit Second Street.

Q. So that before the accident you have no idea of what rate of speed he was going? A. No.

Q. You don't know whether he was going fast or slow? A. No.

Q. You say you turned around; which way were you facing? A. No, I said I was talking to a fellow that was walking along the street with me when I happened to look up and see it.

Q. You were on the west side? A. No, near the Newark side.

Q. Was your friend on the inner side of you? A. On the inner side; I was at the sidewalk.

Q. What is your friend's name? A. Rose.

Q. What is his first name? A. Fred.

Q. Do you know where he lives? A. I could not tell you where he lives.

Q. Haven't any idea where he lives? A. No, sir.

Q. You say the truck went about twenty five feet after it hit the child? A. Somewheres around that.

Q. Where was the truck when it stopped and when you went up to it in relation to the corner of Second Street. How far north of second Street was it? A. Around 25 feet; 25 or 30 feet from the corner.

Chris Smith—For Plaintiff—Cross.

Q. When you are speaking of the corner, do you mean the curb or the building line? A. No, I mean from Second Street; he was out at the car tracks.

Q. How many feet north of the curbline of Second Street was he? A. About 25 feet; somewheres in that vicinity.

Q. So you know how wide the sidewalk is? A. The sidewalk?

Q. Of Second Street? A. Second Street sidewalk I guess is around eight feet.

Q. And that would make it 17 feet north of where this sidewalk ends, is that right, where the truck was? A. Yes, sir.

Q. The car track is in the center of the street? A. It is.

Q. When you saw it, was it in a diagonal direction? A. Well, the front was pulled a little to the left, a little bit to the left.

Q. Where was the rear? A. The rear may be 2 feet away from the side of the track, the rear wheel.

Q. To the right of the track? A. To the right, yes, sir.

Q. The rear wheels were two feet to the right of the track and the front wheels were slightly over to the left of the track? A. They were, the front of the truck, yes sir, to the left of the track.

Q. A little over the track? A. No, they were inside the track.

Q. Inside the track? A. The right side was alongside the track; it was that way (Indicating)

Q. That left the truck in a diagonal direction, a little in a diagonal direction? A. Yes, sir.

Chris Smith—For Plaintiff—Re-direct.

Q. Did you hear the boy, the brother, holler to the little girl to come back? Or didn't you notice him? A. I noticed him when I was talking to the driver, at that time.

Q. There was nothing that attracted your attention until you saw the child struck? A. No.

Q. You don't know whether she had been on the sidewalk before or not? A. No, I could not tell where she was before.

Q. You were 150 feet away from the crosswalk? A. No.

Q. You could not say whether there was a horse and wagon there at that time, and whether the children waited for that to pass before they crossed? A. No.

Q. You don't know where she came from? A. I just saw her when she was right in front of the truck.

Q. And you don't know where she came from? A. No.

Q. You could not say whether she came from the curb? A. No, sir.

Re-Direct Examination by Mr. George:

Q. Did you have a conversation with the driver of the truck concerning the truck after the accident? A. No, sir.

Mr. George: I want to offer in evidence the Letters ad prosequendum, if there is no objection.

Mr. Higgins: No objection.

Accepted and marked as Plaintiff's Exhibit P-1.

Mr. George: Plaintiff rests.

John Sweeney—For Defendant—Direct.

Mr. Higgins: I move for a non-suit on the ground that the plaintiff's case has shown no negligence on the part of the defendant; on the other hand that the plaintiff's case has shown evidence of contributory negligence on the part of the deceased.

The Court: I will refuse the motion and allow you an exception.

Mr. Higgins: Exception.

JOHN SWEENEY, sworn for the defendant:

Direct Examination by Mr. Higgins:

Q. What is your full name? A. John Sweeney.

Q. You were the driver of the truck on this occasion? A. Yes, sir.

Q. How long have you been driving trucks? A. Eight years.

Q. How long have you been driving this particular truck? A. About a year and a half.

Q. Do you recall coming up Jersey Avenue on this occasion? A. Yes, sir.

Q. Did you see these two children on the sidewalk before you got to Second Street? A. Yes, sir.

Q. Where were you when you first saw them there? A. I was about a hundred feet away from the corner.

Q. What did you do, if anything, when you saw the children there? A. I gave them the horn and kept on going.

Q. What do you mean by giving the horn? A. I blew the horn.

Q. How many times? A. Twice.

Q. What part of the sidewalk were the children on? A. On the right side going up Jersey Avenue north.

Q. What were they doing? A. They were standing there.

Q. You kept on goin, and as you came up towards Second Street, before you got to Second Street, what did the children do, if anything at that time? A. The little girl stepped off the curb; she started to run across. I got too near to her that I could not stop suddenly, so I swung left.

Q. Just a minute; you are getting too far ahead of me. I asked you before you got to the corner of Second Street, what, if anything, did you see the children do at that time? A. I saw this little girl step off the curb.

Q. Where was your truck when you saw the little girl cross over? A. I was about eight feet out from the curb.

Q. How many feet? A. Eight feet.

Q. From which curb? A. From the right side of Second Street.

Q. The south curb or the north curb? A. North curb.

Q. Do you know how wide Second Street is? A. Second Street is about thirty feet.

Q. Then I understand you to say you had crossed Second Street, eight feet from the curb when what did you see happen? A. The little girl stepped off the curb and started to run across the street.

Q. Up to that time, had you seen the child do anything? A. No, sir.

John Sweeney—For Defendant—Direct.

Q. When she started to cross the street, what, if anything, did you see the little boy do? A. The little boy tried to hold her; she would not stand there; she kept on running.

Q. What did he do; don't tell us what he tried to do; what did he do? A. He made a grab for her, but she got away too quick, and I was too near to stop, on top of her.

Q. Don't get ahead of me. I can only ask one thing at a time. I want you to tell us exactly what the little boy did first? A. Well, the little boy stood there, just tried to grab her, hold her arm, that's all.

Q. Did he get hold of her arm? A. No, sir.

Q. He was standing where, on the sidewalk? A. On the sidewalk.

Q. How far were they back from the curb at that time, the children? A. Well, they were right on the edge of the curb.

Q. How far was that away from the front of your truck? When they started to go? A. About three or four feet.

Q. And the little girl went on. Was she running or walking? A. She dragged away from her brother and started to run across.

Q. What did you do? A. I jammed on the brakes a little and I turned left in order to avoid hitting her; the further away I turned, the faster she would run.

Q. You kept turning to the left, you said? A. Yes, sir.

Q. How far did you get before there was a collision between you and the little girl? A. Up to the middle of the car track, and that is where the little girl was struck and knocked down.

John Sweeney—For Defendant—Direct.

Q. Prior to the time you turned to the middle of the car track, what position on the road had you been in? A. Sort of triangle, on a slant; the rear wheels was on the right side and the front wheels was on the opposite side.

Q. You are telling me when the collision occurred. I am asking you before you started to turn to the left at all; where was the truck, on what part of the street? A. It was on the right side of the street.

Q. How near to the curb on the right hand side? A. About eight feet.

Q. Now, after you and the child came in collision, how far did your truck go before it came to a stop? A. Well, the truck passed over, and I stopped about five feet behind the child.

Q. What do you mean by that "behind the child". How far did your truck itself go after the collision with the child until it stopped at a dead stand? A. Well, I should judge about seventeen feet.

Q. What rate of speed were you going before you turned to the left slightly to avoid her? A. Twelve miles an hour.

Q. What did you do after you stopped? A. I stopped and I picked the little girl up and brought her into the store and was going to call the ambulance. Then the officer came along and we put the child in the car and we took her up to the City Hospital.

Q. When the officer came, had the truck been moved from the point where you stopped? A. No, sir.

Q. Did you go up to the hospital with the child? A. Yes, sir.

John Sweeney—For Defendant—Direct.

Q. Then did you go down to the mother's place as she says? A. We went to Police headquarters first; from there we went to the mother's place.

Q. There was no vehicle between you and the children when you saw them there? A. No, sir.

Q. Nothing to prevent you from seeing; a clear day, was it? A. Yes, sir.

Q. Your brakes were in good condition, were they? A. Yes, sir.

Q. I don't know whether they were tested; were they tested? A. Yes, sir.

Q. By whom? A. The officer.

Q. What were your duties in your employment with Mr. Grunstein; what did you have to do? A. Deliver all meats, and then go to lunch.

Q. Deliver meats? A. Deliver meats.

Q. What kind of meats, fresh meats? A. Fresh meats.

Q. That morning, how many deliveries did you have to make? A. Eight deliveries to make.

Q. How many had you made before the accident? A. I made one.

Q. Where was that? A. 244 Warren Street?

Q. What street is that near? A. It is between Grand and York.

Q. Where was your next delivery to be? A. The next stop was West Side Avenue and Union Street.

Q. What were you doing over in this neighborhood? A. I felt kind of hungry, and I thought I would go over there home and have something to eat, being it was near twelve o'clock.

Q. You live over in that direction? A. Yes, sir.

John Sweeney—For Defendant—Direct.

Q. How far is the place where the accident occurred from the place where you made your last delivery? A. The last delivery I made in Bayonne.

Q. I mean the last delivery before the accident? A. It is about a mile.

Q. In making your delivery at Union Street and West Side Avenue, you could have gone straight up Grand Street, couldn't you? A. Yes, sir.

Q. How long did you work for Mr. Grunstein? A. Altogether it is two years and a half now.

Q. At the time you went to work for Mr. Grunstein, did you receive any instructions how to make your deliveries of meats? A. Yes, sir.

Q. What were they?

Mr. George: That is objected to as immaterial irrelevent and incompetent.

Mr. Higgins: I purpose to show what his instructions were at the time, what his duties were at that time and from that time on.

The Court: Overruled.

What were your duties?

The Witness: Supposed to deliver all fresh meats and call up from the last delivery and go to dinner on return.

Q. Did you receive any instructions as to whether or not you were to go to dinner or lunch before you completed your deliveries? A. No, sir.

Mr. George: His answer was "no, sir".

John Sweeney—For Defendant—Direct.

Mr. Higgins: I don't think the witness understood my question.

Q. Did you understand what I said when I asked you "Did you receive any instructions from Mr. Grunstein as to whether you were to take your dinner before you finished your deliveries or deliver your meat before you took dinner?" Did he give you some instructions of that kind? A. No, sir.

Q. At no time?

Mr. George: It is very evident he understood your question.

Q. You have told us Mr. Grunstein gave you some instructions about making your deliveries before goin to lunch or dinner? A. Yes, sir.

Q. Then he did give you some instructions, didn't he? A. Yes, sir.

Q. Had those instruction been given to you after you came to be employed by him on more than one occasion? A. Well, that was when I first started to work.

Q. Did he tell you any time after that, repeat those instructions? A. Yes, sir.

Q. Why did you go to lunch before you completed delivering your meat? A. Well, it was near 12 o'clock. I felt kind of hungry. I thought I would pull up there, unbeknown to the boss and have a bite to eat.

Q. You knew then you were violating your instructions? A. Yes, sir.

Q. You thought you would be able to do it unbeknown to the boss?

John Sweeney—For Defendant—Cross.

Mr. George: That is objected to as leading.

The Court: That is what he said; it is just repitition.

That is what you said, wasn't it?

The Witness: Yes, sir.

Cross Examination by Mr. George:

Q. What kind of truck was it you were operating on this occasion, Mr. Sweeney? A. Transport.

Q. By the way, have you ever been convicted of crime? A. No, sir.

Q. The brakes were in good condition? A. Yes, sir.

Q. When did you last inspect them before the accident? A. Well, I looked at them every week.

Q. When is the last time you looked at the brakes prior to the accident? A. Well, the last time was when the accident happened.

Q. After the accident? A. When the accident happened.

Q. That same day? A. Not the same day.

Q. You examined them, how long before the accident? A. No, I examined them every week up until the accident.

Q. When was the last time you examined the brakes prior to the accident? A. When the officer examined them.

Q. I say before the accident; you understood what I mean? A. A week or two before the accident happened.

Q. And they were in good first class condition, were they? A. Yes, sir.

John Sweeney—For Defendant—Cross.

Q. This truck was a year and a half old? A. Year and a half or two years old; I am not quite sure.

Q. You worked on that truck all the time? A. Yes, sir.

Q. From the time it was first delivered as a new truck, didn't you? A. No, sir; a man had the truck before I went over there.

Q. How long did you work on the truck before the accident? A. A year and a half.

Q. So the truck was at least a year and a half old up to that time? A. Yes, sir.

Q. Do you know whether or not the brakes had been relined? A. No, sir.

Q. You do know they were not relined? A. Not while I was working the truck.

Q. So the brakes were not relined for at least a year and a half, isn't that so? A. That is right.

Q. This was a dry, clear day, wasn't it? A. Yes, sir.

Q. What is the weight of the truck? A. I can't think of the weight; it was a ton truck anyhow.

Q. Small truck; what make did you say it was? A. Transport.

Q. You didn't have much of a load on that day, did you? A. Well, I had about a ton and a half.

Q. Now, with a ton and a half load and the streets dry and the street level and the brakes in good condition as you were saying, and assuming that you were going along at twelve miles an hour, what is the shortest distance in which you can stop such a truck, applying your

emergency and foot brakes? A. What rate, what speed?

Q. Twelve miles an hour? A. Five or six feet.

Q. Now, how far was the child in question from your truck when you first saw her? A. Well, I saw the child when I blew the horn. They were just coming down the street and they stopped at the corner.

Q. You are not answering my question. I asked you how far was your truck from the children when you first saw the children; the first time you ever saw the little girl? A block away? A. It wasn't quite a block.

Q. Half a block? A. About forty or fifty feet from the corner.

Q. That is true, isn't it? A. Yes, sir.

Q. You told the court and Jury in one of the very first questions of your counsel that you were 100 feet away when you first saw her? A. I blew the horn 100 feet away.

Q. Which is correct, forty or fifty feet, or a hundred? A. You asked how far up they were.

Q. I asked how far from the children were you when you first saw them and you said between forty and fifty feet; that wasn't true, was it? A. I figured you meant from the time I was coming down until I could see them.

Q. You understand my question now, don't you? A. Yes, sir.

Q. You were at least about 100 feet; maybe 150 feet? A. A hundred.

Q. At least a hundred? A. Yes, sir.

Q. Over a hundred? A. No.

Q. Not less than a hundred? A. No.

Q. You are accurate about that? A. Yes, sir.

John Sweeney—For Defendant—Cross.

Q. Is there a speedometer on your car? A. No.

Q. Did you race that car? And how could you tell what speed you were going? A. As I was coming down Jersey Avenue, I was stopped at first and from First to Second, you can't make up 25 miles an hour with that truck, because it is governed to only make twenty miles.

Q. It is a pretty long street, isn't it? A. I say the truck is only governed for twenty miles.

Q. You want to tell the Court and Jury that a one ton truck has a governor limiting the speed to twenty miles an hour? A. Yes, sir; Transport.

Q. You are telling the truth? A. Yes, sir.

Q. Did you ever see the governor on that truck? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. And it was working? A. I guess it was.

Q. You don't know, do you? A. It had a seal on it.

Q. You don't know what that seal meant, so far as speed is concerned, do you? Come on, you answered Mr. Higgins more readily than that? A. I know the governor is sealed up; it has a seal on.

Q. You don't know what it meant? A. Of course I know what it meant.

Q. You know it was a governor? A. Yes, sir.

Q. And that's all? A. That's all.

Q. Now, what is the distance between First and Second Streets? A. The length of the block?

Q. The length of Jersey Avenue between First and Second Street? A. Thirty feet.

Q. Not the width, I am talking about the

length from First to Second Street A. About 250 feet.

Q. You want to tell the Court and Jury that you could not get up a greater speed than twelve miles an hour if you have 250 feet to cover; is that right. Is that your explanation? A. Yes, sir.

Q. You are quite sure about that? A. Yes, sir.

Q. Now, you blew your horn twice, you said? A. Yes, sir.

Q. Why twice? A. Well, I always blow it twice.

Q. At every corner? A. Yes, sir.

Q. You never pass a corner without first blowing your horn twice? A. Very seldom.

Q. Well, it is rather a rare occassion, isn't it, when you miss blowing it twice at a corner; is that right? A. On cross streets everybody should blow their horn.

Q. Did you slow down any when you saw these two children standing on the curb, after having blown your horn twice, being 100 feet away when you first saw them, did you slow any before becoming parallel with the child?

Mr. Higgins: I object to that; the witness did not testify that he saw them on the curb.

Mr. George: On the sidewalk then.

Q. Call it whatever you said; you know what I mean, don't you. They were not in the street, were they? A. No.

Q. They were on the sidewalk? A. They were on the curb.

John Sweeney—For Defendant—Cross.

Q. So that the misunderstanding is with Judge Higgins. As between you and myself there is no dispute as to what the curb means? A. No.

Q. The fact is they were 100 feet away when you first saw them standing on the curb or on the sidewalk right by the street? A. Yes, sir.

Q. Then you blew your horn twice, and you were going no more than twelve miles an hour? A. No, sir.

Q. Did you slow down then? A. Positively; I took my foot off the gas.

Q. And put your foot on the brake? A. Not right away.

Q You did slow down? A. I slowed down a little.

Q. When you got within a foot of the child, speaking of little Catherine, you were running much slower than when you blew your horn? A. Might have dropped two points or so.

Q. You mean about nine or ten miles an hour? A. Yes, sir.

Q. So that, with that same load, going nine or ten miles an hour, you could have stopped your car in how many feet, applying both the emergency and foot brakes? A. Four or five feet.

Q. Well, you could stop within five feet? A. Yes, sir.

Q. If you said you could stop within six feet going at twelve miles, you ought to be able to stop within three feet at the nine miles speed? A. Ten miles.

Q. How far did you say you were from the curb, about eight feet, as you were going along? A. Yes, sir.

John Sweeney—For Defendant—Cross.

Q. How wide is the street there, about forty feet? A. About forty four feet.

Q. You say there was no other vehicle in front of you? A. No.

Q. Nor coming in the opposite direction, either? A. No.

Q. You had the whole street to yourself? A. Yes, sir.

Q. The only ones in the street were you and the children; is that right? A. Yes, sir.

Q. Then you told us in your direct examination that you were within three feet of the child when she stepped off the sidewalk; is that right. You told us that on your direct examination; was that true? A. Well, very close to it.

Q. About three feet? A. About three or four feet.

Q. From where this juror's foot is to about here; and your one-ton truck, carrying a ton and a half, was coming along on this particular day, about noon time, the sun was high, and you waited until you saw the child get within three feet of your truck, with nothing in between the child and your truck to obstruct your vision, and she stepped off into your path, the path of your truck? A. She stepped off and I turned left to avoid hitting her.

Q. She stepped off when you were within three or four feet of the child? A. Yes, sir.

Q. Then you say you were eight feet from the curb as you were going down the street. How do you explain that? Because, if you were going straight, eight feet from the curb, and she was three feet away from you? A. What do you mean, after she went off the curb?

John Sweeney—For Defendant—Cross.

Q. You would not have hit her, would you, if you still had four foot clearance, with about 32 feet in a westerly direction toward the westerly curb of Jersey Avenue? A. She went off the curb just before I got near her.

Q. You were only going nine or ten miles an hour? A. In order not to hit her, I turned to the left.

Q. The moment you hit her, you realized there was some damage done and immediately put on your brakes? A. I knew I hit the girl, because the front of the radiator knocked her down.

Q. You knew some damage was done? A. Yes, sir.

Q. Instantly you put on your brakes? A. I pulled on the brakes as I was turning off too.

Q. Whether you were turning or not turning, you put on your brakes, didn't you? A. Yes, sir.

Q. You didn't know whether your truck was running over her or not at the time? A. No.

Q. You were very much confused? A. I was excited.

Q. You put on the emergency and foot brakes as hard as you could? A. Yes, sir.

Q. How do you explain that you went seventeen feet after hitting her? A. I passed the child; I figured if the weight of the truck would be on her—

Q. What is that? A. I figured if the weight of the truck would be on her, it would be worse, so I moved up further.

Q. You were, then, willing to take a chance to have both wheels go over the child rather than slow up? A. What do you mean.

John Sweeney—For Defendant—Cross.

Q. You didn't know whether the wheels were going to go over her? A. Not in the position she fell.

Q. You were willing to keep on going the seventeen feet with that possibility? A. I had to pass the child; if the wheels were on her, it would be worse.

Q. If you were going at nine miles an hour, why didn't you stop? A. Why, because the child was in front of the truck.

Q. That is the better reason why you should apply your brakes, isn't it?

The Court: How many of these deliveries had you made?

The Witness: One.

The Court: Where was the next one?

The Witness: Union Street and West Side Avenue.

The Court: How near was that to where this accident was?

Mr. Higgins: I think perhaps I had better offer this map, to show that.

The Court: Did you have deliveries on the truck; did you have stuff on the truck at all?

The Witness: Yes, sir.

The Court: To deliver after you got your lunch?

The Witness: Yes, sir.

The Court: Had you had your lunch yet?

The Witness: No, sir.

The Court: You were on your way to lunch?

John Sweeney—For Defendant—Re-cross.

The Witness: I was on my way to lunch.

The Court: After lunch, you were going to continue and deliver these other goods?

The Witness: Yes, sir.

Re-direct Examination by Mr. Higgins:

Q. Look at this map; you were down here at Warren Street, near Grand? A. Yes, sir.

Q. Your next delivery was to be at Union and West Side Avenue? A. Yes, sir.

Q. That is somewhere up the Hill there. You say you were at Grand Street, you went over Jersey Avenue to Second Street, nearly a mile off your course? A. Yes, sir.

Q. And to go where you lived how much further would you have to go, how far beyond where you were? A. Six blocks.

Q. Six more blocks? A. Yes, sir.

Q. How many deliveries did you have on your wagon? A. Eight altogether.

Q. You had only made the first one and you had seven still to deliver? A. Yes, sir.

Mr. Higgins: I will offer this map in evidence.

ACCEPTED and MARKED as Defendant Exhibit D-1 of this date.

Re Cross Examination by Mr. George:

Q. What time did you usually go to work in the morning? A. 6:30.

Q. You were a chauffeur? A. Yes, sir.

John Sweeney—For Defendant—Re-cross.

Q. Your job was making deliveries? A. Yes,

Q. You say you had eight deliveries on this particular day? A. Yes, sir.

Q. What time did you leave Mr. Grunstein's plant? A. I don't know exactly what time I left there. I left for the first delivery at about a quarter to eleven.

Q. About what time did you receive your next delivery? A. A quarter to twelve.

The Court: You will have to speak so that the Jury can hear you or there is no using your talking.

Q. What time did you receive your next delivery? A. I left the first delivery about twenty minutes to twelve.

Q. I am not asking you that; I am asking you when you first started out with your deliveries? A. I don't remember the time I left.

Q. What time did you load up? A. About 11 o'clock.

Q. How long did it take you to finish loading? A. A couple of hours.

Q. To put eight deliveries on? A. Yes; sometimes we haven't got the stuff and we have got to go and get it.

Q. What time did you load up on this occasion? A. I just don't exactly know the hour.

Q. Well, you are quite sure about the hour you made your first delivery; now probably you can tell us when you left the place to start on your first delivery, about ten o'clock? A. No, it was after ten.

Q. Half past ten? A. It was after ten, I say.

John Sweeney—For Defendant—Re-cross.

Q. Half past ten? A. It was later than that too.

Q. A quarter to eleven; come on, make it snappy. You take an unusually long time to answer? A. Well, I have to think.

Q. Come on; I have given you all the time that you want? A. I didn't look at the clock when I loaded.

Q. You were careful to look at the clock when you make your first delivery? A Yes, sir.

Q. Try and look at the clock again for the hour when you left the place to start on your delivery? A. We will say a quarter after eleven.

Q. And where did you say that delivery was? A. Warren Street.

Q. And the second delivery was where? A. Union and West Side Avenue.

Q. This was meat you were delivering, wasn't it? A. Yes, sir.

Q. To the different butchers in town? A. Yes, sir.

Q. For distribution that day, wasn't it? A. Yes, sir.

Q. Fresh meats, to be sold as quickly as it is brought in? A. Yes, sir.

Q. You say your first delivery was made at a quarter past eleven? A. I won't change that.

Q. You never had any instructions as to what to eat or where to eat or when to eat? A. No.

Q. That was your own business? A. Yes, sir.

Q. So that so far as you were concerned, you might have had you dinner, so-called, at three o'clock or four, or eleven? A. By rights, I should have waited.

Q. So far as you were concerned, your boss

was satisfied that you could have your dinner any time you wanted to?

Mr. Higgins: I think the witness should be allowed to answer the question.

Mr. George: It was not responsive; for that reason I should have asked that it be stricken out, even though it were fully answered.

Q. (Question read as follows: So far as you were concerned, your boss was satisfied that you could have your dinner any time you wanted to?) A. I generally go from the last delivery. We have to call up from the last delivery in order to go up and eat dinner.

Q. You are supposed to do that? A. Yes, sir.

The Court: How long did it take you usually to make these deliveries?

The Witness: Takes you two or three hours.

The Court: Takes you four hours?

The Witness: Not eight deliveries; other days.

The Court: How long did it usually take you to make these eight deliveries?

The Witness: If I continued on with them, I would have been done between half past one and two o'clock; there was eight deliveries.

Q. How long did it take you to make your first delivery? A. To Warren Street.

Q. Yes, sir? A. From a quarter after eleven until about twenty to twelve.

Q. That is, about twenty-five minutes. And where do you get four hours for making eight deliveries? A. Some of them close from one to two. You had to wait for them.

Q. It was your job to get these deliveries in before noon; is that right?

Mr. Higgins: He hasn't said that.

Mr. George: Let me ask if that is so.

Mr. Higgins: Don't try to deceive him.

The Court: Were you supposed to have these deliveries made by noon time?

The Witness: No, sir.

The Court: Do they close every day from one to two?

The Witness: Yes, sir.

The Court: What do you do usually?

The Witness: Continue on making other deliveries and stop on the way back.

The Court: Where were you going to get your lunch?

The Witness: Home.

The Court: How far was your home from the first place that you mentioned?

The Witness: About a mile.

The Court: Where was the next place you were to make the next delivery to where you made the first delivery?

The Witness: West Side Avenue.

The Court: That doesn't mean anything to me. How far would it have been in distance from your first delivery to the second delivery?

The Witness: Taken me half an hour almost to get there.

John Sweeney—For Defendant—Re-cross.

The Court: Was it on your way home?
The Witness: No, on my way out.
The Court: Did you ever do this before this day, drive a mile and a half home to get your lunch without doing your other deliveries?
The Witness: No, sir.
The Court: This was the only time?
The Witness: Yes, sir.

Q. Just where were you going to have your lunch on this occasion? A. Home.
Q. You are married? A. Yes, sir.
Q. And you live with your wife? A. Yes, sir.
Q. You still work for Mr. Grunstein? A. Yes, sir.
Q. When did you first tell Mr. Grunstein as to what you were doing on Jersey Avenue? A. Next morning, next day.
Q. You told him of course that you violated his instructions, didn't you? A. Yes, sir.
Q. You have no phone at your home, have you? A. No, sir.
Q. And you still work for Mr. Grunstein? A. Yes, sir.
Q. Have you any children? A. Three.
Q. Young ones? A. The youngest is fourteen months.
Q. And the oldest? A. She will be four in April.
Q. And a year ago was only three? A. They don't go to school? A. No.
Q. You never in all the period of time that you worked for Mr. Grunstein, you never went home for your dinner; you had no phone, and

therefore did not communicate with your wife to tell her you were coming home for dinner; is that right? A. She always expects me for dinner.

Q. Notwithstanding the statement that you made to the Jury a moment ago that you never before went home for dinner before finishing your job? A. Not unbeknownst to the boss. I go home every day for dinner.

Q. Whether it is beknownst to the boss or not. It takes a couple of hours to load in the morning; takes you from three to four hours to unload, and you never go to your lunch before you complete your last delivery, which would take you at least until three or four o'clock in the afternoon; is that right? A. Doesn't take that long; some days it does, yes sir.

Q. You always have about the same number of deliveries? A. Some days I have few; some days I have a bunch.

Q. It takes about the same length of time? A. No.

Q. You were going home, even, before twelve? A. When was this?

Q. On the day of the accident? A. Oh, yes, sir.

Q. Did you talk to Judge Higgins after the accident about this case? A. No, sir.

Q. Did you talk to Mr. McLeod, who was another one of the lawyers in the case? A. No, sir.

Q. Or to Hobart Higgins? A. No, sir.

Q. Or George Record, also another lawyer in the case? A. No, sir.

Q. The only one you talked to concerning this very important aspect of the case, that is , your

going to lunch unexpectedly, was your boss? A. What is that?

Q. Was he the only one you talked to about that? A. I don't get you.

Q. Did you talk to anybody else besides your boss concerning your going home unexpectedly for lunch when this thing happened? A. No, sir.

Q. He is the only one you talked with? A. Yes, sir.

Q. You are sure about that. aren't you? A. Yes, sir.

Q. Weren't you talking with Judge Higgins out here between one and two today, before this case was called? A. No, sir.

Q. Weren't you talking to Judge Higgins this morning about that very same thing?

Mr. Higgins: Of course he was and you were there.

Q. Isn't that a fact? A. I have been talking to him, yes sir.

Q. About the fact that you were on your way home for lunch; isn't that so? A. Well—

Q. Did you or didn't you—honestly? A. I was talking out there all morning.

Q. With Judge Higgins? A. Not only with Judge Higgins.

Q. But with the Judge? A. I was talking to Mr. Foley.

Q. I don't care about anybody else; weren't you talking with Judge Higgins about the fact that you went home for lunch unexpectedly? A. Yes, sir.

Q. You lied, then, just a moment ago, when you said that your boss was the only one you

ever mentioned it to, isn't that a fact? (No answer).

Q. I say, isn't it? A. It is in a way, yes sir.

Re-direct Examination by Mr. Higgins:

Q. Do you know Mr. Nichols, the father of the deceased child? A. Yes, sir.

Q. You were talking with him last night about this case? A. Yes, sir.

Q. At his request? A. Yes, sir.

Q. You went over several times since the accident and talked to Mr. Nichols about this case, didn't you, at his request? A. Yes, sir.

Q. You don't consider it any crime to talk to me this morning? A. No; I don't see no crime.

The Court: After this accident, where did you go?

The Witness: I took the child to the hospital.

The Court: Then after that?

The Witness: Returned back there and went with the officer to the mother; then I went on my deliveries.

Re Cross Examination by Mr. George:

Q. Do you remember having a conversation with Mr. Nichols, the father of the child, after the accident? A. Yes, sir.

Q. Do you remember telling him it was an old car you were driving and that there were seven or eight parts still needed for it, and the brakes were not any good; didn't you tell him that?

Officer Joseph Treusch—For Defendant—Direct.

Mr. Higgins: I object to that as not proper cross-examination.

The Court: I will allow it as to the brakes.

A. No, sir.

Q. But you do recall having a conversation with the father of this child who was killed? A. We have had three or four conversations.

Q. Didn't you talk about the brakes? A. No.

Q. Not at all? A. Not that I remember, no.

Q. You don't remember? A. Not that I resir.

member.

Q. You won't say that you didn't talk about brakes, will you? A. No, I didn't speak to him about any brakes.

Q. You don't remember whether you spoke about any brakes? A. No.

Officer Joseph Treusch sworn for the defendant;

Direct Examination by Mr. Higgins:

Q. Officer, you came there after this accident occured, did you not? A. Yes, sir.

Q. You didn't see the actual accident? A. No, sir.

Q. When you got there, where did you find the truck; what position on the road bed? A. About twenty feet west of the easterly curb; about fifteen feet north of the intersecting street, Second, and Jersey Avenue.

Officer Joseph Treusch—For Defendant—Direct.

Q. In relation to the car tracks; the car tracks are about in the center? A. Just about the center.

Q. In relation to that, where was the truck? A. In relation to the car track, well, the front wheel was west of the easterly track.

Q. And the rear wheel? A. Was this side; was sort of a diagonal position.

Q. Are there two tracks there? A. Only one track.

Q. You mean rails; that is the rear wheels were on the easterly side of the rail and the front wheels cate-corner? A. That is right.

Q. Facing towards the left? A. Yes, sir.

Q. How far north of Second Street, did you say? A. About fifteen feet or twenty feet.

Q. Were there any loads of meat in the truck? A. There was some meat; I don't know how much.

Q. There was some there? A. Yes, sir.

Q. When you got there, what did you find as to the child? A. Well, the driver of the truck, Mr. Sweeney, he had the child in his arms in the store on the corner of Second and Jersey Avenue. He was quite excited, wondered what he should do with it, and I told him to the hospital on the truck.

Q. He went with you? A. He went with me.

Q. After you went to the hospital, where did you go with him? A. To the Second Precinct on 7th Street.

Q. And after that? A. To the house to see the mother if she wanted to make a complaint.

Q. Now, officer, did you test the brakes on this truck? A. I did.

Benjamin Grunstein—For Defendant—Direct.

Q. Were they good or bad? A. Well, they were good. He had to make a very sudden stop against the light with the truck.

Q. They were good there? A. They were good.

Q. They were in perfect condition as far as the brakes were concerned? A. Yes, sir.

Cross Examination by Mr. George:

Q. Are you a mechanic? A. No, just a policeman, that's all.

BENJAMIN GRUNSTEIN sworn for the defendant:

Direct Examination by Mr. Higgins:

Q. You were the owner of this truck that was involved in this accident? A. Yes, sir.

Q. Sweeney being employed by you? A. Yes, sir.

Q. You are in the meat business? A. Yes, sir.

Q. What time in the morning did Mr. Sweeney get to your place? A. About 6:30.

Q. Did they have breakfast there? A. Had breakfast at my place at 8 o'clock.

Q. About what time do they generally get out on their deliveries? A. Start out about ten o'clock.

Q. They get back generally about what time? A. About between two and three.

Q. When you employed Mr. Sweeney, did you give him any instructions as to when he could

have his lunch? A. His instructions was to make deliveries, call up from the last call and come back.

Mr. George: What is that?

The Witness: His instructions is to make all deliveries, call up from the last customer and to return to the place of business.

Q. Now, what were the instructions about his lunch, or anything else? A. When he returns the truck he can go wherever he pleases; he is through at three o'clock.

Q. Was there anything said as to whether he could have lunch during that period or not? A. Nothing was said. That is the reason he has his lunch in the morning before he leaves, when he is to make his deliveries.

Q. And then what? A. Then he is to return with the truck.

Q. And after you employed him, did you instruct him with respect to that any further, at any other time? A. I don't get that.

Q. Did you at any other time instruct him about these deliveries? A. I always instruct them at all times, always to bear in mind that they have to make the deliveries and then return and not to stop anywhere else.

Q. This is fresh meat? A. It is fresh meat and perishable.

Q. Perishable on the truck? A. Yes, not to be exposed.

Q. Did that same rule apply to all your other men? A. Yes, sir.

Benjamin Grunstein—For Defendant—Cross.

Q. At any rate, it was wrong to go home for lunch this day? A. Yes, sir.

Q. Did you know he was going to go home for lunch this day? A. No, sir.

Q. You knew where this first delivery was, on Warren Street near Grand? A. Yes, sir.

Q. From there to Second Street and Jersey Avenue is how far? A. I have no customers there.

Q. How far is that away from this Warren Street place? A. It is about a mile.

Q. And Union Street and West Side Avenue is directly west, further west from Warren Street? A. Go up Grand Street to get to Union and West Side.

Q. Jersey Avenue and Second Street is in a triangle from that? A. Away over to the right.

Q. Did you inspect the brakes of this truck? A. I have them inspected on the car every Saturday. It is their duty to look the car over.

Q. With reference to this accident, did you inspect them then? A. The following day.

Q. What condition did you find them in? A. Found them perfect.

Q. The brakes were in perfect order? A. In perfect order.

Q. Was Mr. Sweeney transacting any business for you there? A. I don't get you.

Q. Was Mr. Sweeney, at Second Street and Jersey Avenue, transacting any business for you there? A. No, sir.

Cross Examination by Mr. George:

Q. But you had your perishable meat in the truck at the time, didn't you? A. Yes, sir.

Benjamin Grunstein—For Defendant—Cross.

Q. What is the character of your customers, private homes? A. No, sir; butcher shops.

Q. You deliver meat to the butchers shops to be sold immediately? A. Yes, sir.

Q. Fresh meats? A. Yes, sir.

Q. So that you try to make it your business to get this meat delivered as soon as possible? A. Before one o'clock.

Q. All of it? A. All of it.

Q. It is for that reason that you give these men their breakfast early in the morning on their arrival and then after they load up you give them their final instructions? A. No, they have to load their truck and leave with their meat and make their deliveries.

Q. Of course, you never tell them what route to take with the deliveries? A. They have instructions from me where to go.

Q. That is, just where, when and how to go? A. How to go.

Q. You tell them how? A. How to make their deliveries, I instruct them.

Q. What streets; did you tell this man Sweeney to go through certain streets from your place of business to the Warren Street place? A. Grand Street.

Q. And where? A. West Side.

Q. And then what? A. Make a stop on West Side and Union Street.

Q. Then after the delivery in Warren Street, do you tell him what streets to go through from Warren Street? A. I don't tell just what street; I am not going to follow what streets he is turning through.

Q. Or where to go? A. I tell him what streets he has to go to. I can't tell whether he is going

on Communipaw Avenue, or Ocean, turning to Ocean, or straight up Communipaw and continue that way.

Q. That was only on Warren Street delivery? A. I can't tell him how to go—

Mr. Higgins: Let him answer.

Q. I am asking about all the deliveries. Did you tell each man each day just exactly what streets to go through in making these deliveries? A. Do you live in Jersey City?

The Court: Answer the question.

Q. You heard me say that? A. I laid the route out for them. I have the delivery slips. I don't tell them just the street.

Q. It says deliver this to Warren Street, deliver this to West Side Avenue, so and so? A. Yes, sir.

Q. Does it also say in giving Warren Street, you must go west on Grand Street and Southeast on Warren? A. No, doesn't say that.

Q. So you don't give specific instructions? A. I tell them—

Q. Wait a minute please. You don't give specific instructions as to just what streets he should go on, do you? A. He goes up Grand Street.

The Court: Do you tell him what streets he must take?

The Witness: I don't tell him what streets, that is straight and turn in on Grand Street—

Benjamin Grunstein—For Defendant—Cross.

Q. Never mind what streets he turns in. You don't tell him what streets he has to take; all you want him to do is to deliver these things before one o'clock, if possible? A. That is right.

Q. And on this particular occasion he had eight deliveries? A. That is right.

Q. The first one was Warren Street? A. Yes, sir.

Q. As you later learned, that was delivered; he still had the other deliveries to make? A. That is right.

Q. Taking at least twenty five minutes to make the first delivery, he still had seven deliveries to make, some of them way down in the Greenville section, on West Side Avenue, over on the other side of the City, and he was to make that before one o'clock? A. That is right.

Q. Well, now, if it takes about two hours or two and a half hours to load up in the morning, and according to his testimony, if it takes three to four hours to unload, can you tell us what time this man left that morning? A. I told you; he didn't explain why it takes two hours to load that truck; we have to cut that meat up.

Q. I am asking you a question now which is very simple, probably not in the line of the question you anticipated, but the question is very simple. What time did he leave there that morning? A. He is supposed to leave about 10.15.

Q. Then he immediately leave for his first delivery? A. That is right.

Q. Where is your place of business? A. Ferry and Jefferson Street, Hoboken.

Q. How long does it take you to go from there to Warren Street, to the Warren Street delivery? A. Takes about ten to twelve minutes.

Q. He left your place at a quarter past ten? A. That is right.

Q. So that he was at Warren Street not later than 10.30? A. That is right.

Q. You heard his story, didn't you? A. I presume everybody did.

Q. I don't want your presumptions? A. I did.

Q. You heard his story? A. Yes, sir.

Q. You heard him say that he left at a quarter past eleven, and that he had this accident at twenty minutes of twelve; is that right? A. That is right.

Q. Or rather that he completed the delivery of the Warren Street delivery at twenty minutes of twelve and his accident occurred at a quarter of twelve? A. Yes, sir.

Q. There is just a discrepancy of one hour as between you and him? A. That is right, yes sir.

Re Direct Examination by Mr. Higgins:

Q. Of course, you don't know where he went after he left your place? A. No, sir.

Q. Did you see the truck after the accident? A. I did.

Q. Were there any undelivered orders of meats in it at that time? A. I didn't see him until late in the afternoon.

The Court: Do you know whether the orders were delivered or not?

The Witness: I didn't know until he returned that this accident had happened; the orders was not delivered at the time the accident happened.

The Court: Afterwards?

The Witness: Afterwards I learned of the accident.

The Court: Were the orders delivered that day?

The Witness: The orders were delivered that day.

Re Cross Examination by Mr. George:

Q. By Sweeney? A. Yes, sir.

Q. After he killed the child, or rather injured this child, he resumed his job? A. He resumed his deliveries.

Q. What time did he get back? A. I could not recollect the time he got back.

Q. Around three o'clock? A. Around three o'clock.

Q. So that the incident of striking this child and inflicting injuries from which she died, did not bust up the program of deliveries, so far as the deliveries were concerned? A. I did not learn of the accident until the deliveries were made; that is when I first learnt of the accident.

Mr. Higgins: Defendant rests.

(Recess to 10 a. m. March 20, 1928)

Case.

March 20th 1928, 10 a. m.

(Met pursuant to adjournment).

Mr. Higgins: I move for a direction of verdict in favor of the defendant. The defendant is the owner of the car in question, and I now make this motion on the ground that the uncontradicted proof in the case is that the driver, who is not a party to this suit, was not operating the car in the course of his employment by his employer.

(Motion argued)

The Court: This is a case where, it seems to me, there is enough evidence to make it a jury question, and for a number of reasons:

First, the testimony of the defendant himself is that this man left his store at a quarter after ten, when the driver says it was a quarter after eleven. They were both in accord as to just how long it would take to get from the store to make the first delivery. The driver says that he only made one delivery, and that after that first delivery he was on his way home when this accident happened.

There is great conflict as to time, and it is very important, because he had only made one delivery, and it could not have been that he left at the same time that his employer says he left; there is an hour difference there and he could have made two or three deliveries within that time. There is no explanation why that happened.

Secondly, this man was not finished with his day's work and on his way home as in a great many of these other cases quoted was the case,

but was actually engaged in his master's business just prior to, at least, the happening of this accident.

He was driving a truck loaded with his master's goods, and the only testimony in the whole case that he was going home, is his own statement that he was, and it seems to me that should be taken into consideration, together with the fact that he testified that after the accident, in answering as to what he did then, "I went to the Hospital." "Q. What did you do then? A. I delivered the goods. Q. And what did you do then. A. I returned to the store".

The testimony in the whole case is that he never did go near his home for his lunch. Why? He may have had good excuse. But whether or not, under all these circumstances, the jury believes that he was on his way home, which if he was, would have been outside of his employment and would relieve the master of liability, makes it a question for the jury to decide. Whether or not that was so, under all the circumstances in the case, in my judgment, is a jury question.

For that reason, the motion will be refused and an exception allowed.

Mr. Higgins: Exception. I take it that your Honor decides it is a question for the Jury.

The Court: Yes, that the jury must determine whether or not he was then outside of his employment.

Mr. Higgins Exception.

The Court: I will grant you an exception.

(Counsel summed up to the Jury).

THE COURT'S CHARGE.

The Court: Gentlemen of the jury:

This is an action brought by Clark H. Nichols, as administrator ad prosequendum of the Estate of Catherine Nichols, deceased, against this defendant, Benjamin Grunstein, to recover for damages which he alleges were caused by an accident that happened on February 9th, 1927, here in Jersey City, in which this little girl was killed.

This suit is brought under what is known in New Jersey as the "Death Act", which I will discuss with you a little further on in my Charge. Prior to its enactment, where death occurred from the negligent act of another, no recovery could be had. Then this Act was passed giving the administrator the right to bring the suit where the person, if alive, would have been able to bring it.

The measure of damages is defined by the statute, if you come to that at all, and that I will take up with you a little later with relation to what the law says in reference to that question, in the event you do come to it.

The plaintiff in this case alleges that on this day in question that this little girl was crossing the street here in Jersey City at a cross-walk; that this truck, driven by an agent of the defendant was coming along at a high rate of speed and carelessly and negligently operated by the driver, struck this little girl and caused her death, and as a result of that negligent act of the driver, the attempt is made to hold this defendant responsible.

The Court's Charge.

The defense in this case is three-fold, as I understand it. And when I say first, second or third defenses, it makes no differences as to their order as I am merely defining them as first, second and third for your convenience, not necessarily in the order in which the defenses are given.

First the defendant says that there is no negligence on the part of the driver of this car and therefore, there being no negligence, of course no recovery could be had.

Secondly, the defendant says that even if there was negligence in the operation, management and control of this car by this driver, that nevertheless the accident was caused, or at least partly caused through the contributory negligence of the child in running out into the street in front of this automobile, and that being so, that that contributory negligence helped cause the accident and hence there could be no recovery.

Third, the defendant says that even if there was negligence on behalf of this driver and that negligence was the proximate cause of the accident, and even if the little girl was not guilty of contributory negligence, that nevertheless this defendant is not liable, because this car was not being operated at the time of the accident by his servant in the scope of that servant's employment, that the servant was doing something which he had been forbidden to do, and that at the time of the accident he was acting outside of the scope of his master's em-

ployment and that therefore the master should not be held responsible.

Now, a motion was made by the defendant to direct a verdict in this case, which was refused, and it was refused because the Court thought that there was a conflict of testimony in one or all of these vital things that I have just spoken to you about, a conflict in the testimony of sufficient degree as to enable reasonable men to come to different conclusions upon, that the Court submitted it to you as jurors for your determination as to where the fact lies. It was in no sense any indication of what the Court might think of the situation as presented in this case. It was in no way expressing the Court's personal views of what the evidence was, nor the weight of the evidence, nor how much credence should be given to the evidence, but was merely an indication that in the judgment of the Court, there was a conflict of testimony raised, which raised an issue of fact for you as jurors to decide from the evidence as you obtained it on the stand.

Now, in order to determine this question, you will be interested, of course, in knowing what the law is covering the different questions that are raised by the defense.

It seems to me that the first question that you are to determine in this case is whether or not this servant was at the time of this accident engaged within the scope of his master's employment. You see, it is admitted here that this was the master's car, and it is admitted that this was the master's servant, so that you must make a distinction, and keep in mind

that there is no inconsistency in the defendant's contention, and that, even though the defendant admits the ownership of the car, and even though he admits that this was his servant, that nevertheless he can say that for the time being and at the time that this accident he was not his servant, in the sense that he was acting outside of the scope of his employment.

So that you start out with the premise, predicated upon the fact that this was the master's car, admittedly so; and that this was the master's servant, admittedly so; but the question that you have got to determine is whether or not, at the time of the accident, this servant was acting within the scope of his master's employment.

You will remember what the testimony was as to that by both the driver and by the master, and you will remember what the circumstances were surrounding that particular thing which the driver says he was doing at that time.

Now, if you find that the accident was due to the negligence of the driver of this car, it would not be sufficient that the driver of the car was employed by the defendant, but, to make the defendant liable, it must also appear from the evidence that that the driver was, at the time of the accident, engaged in the performance of his duty as such servant.

Justice Fort, speaking for the Court of Errors, in the case of Holder vs. Rice 68 N. J. L. 324-329, says as follows:

The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the ser-

vant did which caused the injury was an act expressly or by implication within the line of his duty under his employment.

And in another case, the Court of Errors and Appeals said,

That a master is ordinarily liable in a civil suit for the torts of his servant if the act be done in the course of his employment in his master's service and whether it is so done or not depends upon the facts in each particular case. To render the master liable for the negligent act of the servant it must be within the scope of his employment.

So now, Gentlemen of the Jury, applying that law to the facts as you have them in this case, and the facts to the law as I have given it to you, you will determine that first, because it seems to me that that is an important question, whether or not at the time of this accident, this driver was acting within the scope of his employment as the servant of the defendant.

If he was not, that ends the case, because the driver is not made a party, but only the owner; so that, if the driver was not his servant, that ends the case and your verdict must be for the defendant.

Now, if you find that he was the servant of the defendant at the time of the accident and was acting within the scope of his employment, then you have got to go a further step, and find whether or not this accident was caused through the negligence of the defendant's agent, that is, the driver.

The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evi-

dence that this accident was caused through the negligence of the defendant's driver, because the mere happening of an accident is not enough to justify a recovery, but it must be caused through the negligence of the defendant, either personally or through the agent or servant, as alleged in this case.

And if you find that this driver was negligent, you must further find that that negligence was the proximate cause of the injury and the death, and that it was the moving cause, the cause which started the other causes in motion, and the cause without which the accident and the result and death would not have occurred.

So, if you find that the defendant was negligent, through his driver, and that that negligence was the proximate cause of the accident, then this defendant, if this driver was his agent or his servant at the time of this accident, the defendant would be responsible and would be liable in damages to this estate, unless the accident was caused through the contributory negligence of the little girl herself.

And if there was contributory negligence in any degree, no matter how small a degree that might be, it would defeat a recovery and your verdict should be for the defendant.

But if you find, after a careful consideration of all the evidence in the case, taking into consideration what the duty of this driver was, and what the duty of the little girl was, if you find that he was the defendant's agent and servant at the time of the accident, and that he was negligent and that the negligence was the proxi-

mate cause of the accident and that this little girl was free from contributory negligence, then you would come to the question of damages, which I will take up with you in just a moment, as defined under the law under which this action is brought.

It was the duty of this driver to so operate, manage and control his car, as a reasonably prudent person would understand the circumstances, and I think I can best illustrate that to you by again quoting from what has been said by the upper Courts, the Court of Errors and Appeals in a case of this kind.

Negligence presumes the breach of some duty owing from one person to another. Therefore since negligence is charged by the plaintiff here, his duty is to satisfy you by a preponderance of the evidence in the case that the defendant's driver was negligent.

It is necessary for you to know what duty the driver of this automobile owed to other users of the highway.

I want to say right here that the driver and the deceased had a right to use this highway. It might be said that their rights were equal, except that you might apply the provisions of the Traffic Act in regard to persons crossing a street intersection, where it is said that the pedestrian has the right of way.

The facts remains that this child, when she was in the act of crossing the street, had a legal right to cross the street, to cross at a crossing, or at any other part of the street if she saw fit. She might cross at any place, provided that she used reasonable care for her own safety in doing so.

The Court's Charge.

The driver of this automobile, as he approached this intersection, was charged with the duty of having his car under such control and exercising such a degree of care as a reasonably prudent person would have done under the same circumstances. He was obliged to make such observation on the street, of pedestrians who might be crossing the street, and of the conditions that confronted him as to the deceased on that street, as a reasonably prudent person would have done under the same circumstances.

Now, in determining whether or not this driver did use the care that a reasonably prudent person would under the circumstances, you have a right to take into consideration the provisions of the Traffic Act, which limits the speed at which a car may be driven where it is built up, with residences less than one hundred feet apart, at twelve miles an hour.

You have a right to take into consideration the provision of the Traffic Act which required that certain signals be given with approaching a highway in this manner, and the location of the car upon the road; he shall keep to the right, the Traffic Act says, where it is possible.

Taking all these things into consideration in determining whether the driver has violated this Traffic Act, is part of your duty, but I want to say to you, however, that the mere violations of these traffic rules of the Traffic Act, are not of themselves sufficient upon which to predicate negligence, but they are circumstances, which, taken into consideration in connection with all the other facts in the case, may be con-

sidered by you in determining whether or not this driver was negligent.

Now, that covers, it seems to me, the question of the defendant's negligence and what his duty was, upon which you shall determine whether or not he was negligent.

Then, as to the other question as to whether or not this child was guilty of contributory negligence, in order to determine that, it would seem to me that it would be necessary for you to know what is the duty of a person using the highway, in crossing the highway.

Our Court or Errors and Appeals has said that the duty devolving on one using the highway for passage on foot varies with circumstances, which are indefinitely varied. It may be in one degree when the highway is flat country road, and of another degree when the street is a crooked city street. It may be varied by different rates of speed at which they are moving, and by reason of different opportunities of observation.

It is impossible to classify these various circumstances, and to lay down the precise rule of the degree of care required in each particular case.

In dealing with these cases, we must refer to the general rule which requires one using his lawful rights in a place where the exercise of like rights by others put him in peril, to exercise such care for his safety as a reasonably prudent person would use under the same circumstances.

In crossing a roadway, a foot passenger must use his powers of observation to observe ap-

proaching vehicles and a reasonable judgment when and how to cross without collision.

One crossing a roadway on foot is required by the rule of reasonable care to extend his observations only to the distance within which vehicles proceeding at customary and reasonable safe speed, would threaten his safety.

Now, Gentlemen, in this case, you have this little girl, just over seven years of age and the question that will come to your mind is what is meant by a reasonably prudent person, and what such a person would do under the circumstances.

The law says that under circumstances such as this, with a child of this age, that the test is whether or not this child used the degree of care that a person of her age, understanding and experienced would use under like conditions, what a reasonably prudent person of her age and experince would have used under the same conditions.

I think, Gentlemen of the Jury, that covers all the questions that you will have to determine so far as liability is concerned, because, don't you see, the first thing that you have got to determine is whether there was a liability.

If there is no liability, that ends the case.

If there is liability, then you come to the other element of the case and that is the question of damages, and in this case it is different from the measure of damages in the ordinary accident case. where pain and suffering and all those elements are taken into consideration.

This "Death Act" which I spoke about previously in my Charge, defines exactly and limits the damages that can be recovered in case damages can be recovered at all. The Death Act

under which this case is tried states as follows:

Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, or next of kin, and shall be distributed to such widow, surviving husband, or next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate.

And in every such action the jury may just give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife surviving husband and next of kin of such deceased person.

You will note that this statute provides that you may give such damages as you shall deem fair and just with reference to the pecuniary injuries resulting from such death to the next of kin. That means the deprivation, the depriving of them of the reasonable expectation of pecuniary advantage which would have resulted from the continuance of the life of the deceased.

In this case, the deceased being a minor, the father would have been entitled to her services had she lived until she was twenty one years of age, or until she was emancipated, and if the father as administrator is entitled to any verdict, the damages to be awarded would be such sum as would compensate the father for the reasonable expectation of pecuniary benefit during the period of her minority until she becomes of full age or becomes emancipated. such pecuniary benefit as the father and next of kin might

reasonable expect to have received from the deceased.

You are not restricted to considering only what might have been received by the father during the girl's minority. You are also to consider the probability of her contributing to the father's support after she became of age. You should also take into consideration the fact that during the child's minority the father would be obliged to support and educate her.

You are to consider all the probabilities and possibilities. The possibility of the marriage of this girl before reaching her majority; the possibility of the death of the father prior to the girl reaching an age where she would be capable of earning wages.

You are to determine what sum would compensate the father and next of kin, an amount that will represent the reasonable expectation of pecuniary benefit which would have resulted by the continuance of the life of the deceased.

The amount the administrator would be entitled to recover, if entitled to anything, is a sum which will represent the present value of the pecuniary loss, after considering all the elements. all the probabilities and possibilities which may enter therein. But nothing can be included in a case such as this for the loss of society, or wounded feelings, or any loss which cannot be measured by money and satisfied by a pecuniary recompense.

Now, Gentlemen of the Jury, you can see from that, that in a case of this kind, it is merely a question of the pecuniary loss, that the damages are limited to the pecuniary loss sustained; the question of sympathy, sorrow. and wounded feel-

ings, pain and suffering; all these elements are out of the case. It is just a question of how much, if anything, would compensate the father and next of kind for the pecuniary loss that they were put to because of the death of this child.

I have been requested by the defendant to charge you a number of requests.

. The mere happening of an accident does not of itself raise any presumption of negligence on the part of any one. The presumption of law is always against negligence, and the burden is upon the plaintiff to establish negligence by a clear preponderance of the evidence. If you find the evidence on both sides is evenly balanced, then the plaintiff has not sustained the burden placed upon him and the verdict should be for the defendant. I so charge you.

2. I refuse to charge except as I have already charged.

3. You have been asked questions regarding your interest in insurance companies. The question of insurance is not involved in this case in any way, and there is no evidence that any of the parties have anything to do with insurance, and you must totally disregard in your deliberations any question pertaining thereto. I so charge you.

4. I refuse to charge except as I have already charged.

5. You are to decide this question upon the evidence given in the case only. If you find

that any of the evidence in the case is uncontradicted and you believe the witnesses are telling the truth you should use this testimony in a guide to reaching your conclusions. I so charge.

I think I have covered the sixth and seventh. If I have not, I will repeat them.

6. If you find that the driver disobeyed the defendant's instructions and deviated from the business he was directed to pursue his use of the truck was his own use, and the relation of master and servant was thereby terminated and your verdict should be for the defendant.

I so charge you.

7. If you find the uncontradicted proof to be that the truck was not being used by the driver within the scope of his employment at the time the accident occurred, then your verdict should be for the defendant.

I so charge you.

You may take the case.

(The Jury retired).

Mr. Higgins: May I have an exception to your Honor's refusal to charge the requests refused.

The Court: You may have an exception.

DEFENDANT'S REQUEST NOT CHARGED BY THE COURT.

2. Contributory negligence is a complete defense in this State, and if you find that the intestate was guilty of negligence and that her negligence contributed in any way to her injuries and death then the plaintiff can not recover no matter how negligent the defendant may nave been. Under the law the jury has no right to weigh the negligence of the parties and decide which one was the more negligent, because if the intestate was negligent in any degree and her negligence contributed to the accident and her death, it makes no difference under the law how negligent the defendant was.

4. If you find from the evidence that the driver of this truck at the time of the accident was upon his own affairs, and not acting within the scope of his employment then your verdict should be for the defendant, because the the defendant in this case is the owner of the truck and not the driver, the driver has not been made a party to this suit by the plaintiff, and his liability would have to be determined in another suit.

ACTION AT LAW.—POSTEA.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

vs.

BENJAMIN GRUNSTEIN,

Defendant.

This case was tried before Frank L. Cleary, esq., Judge, with a jury, at the Hudson Circuit, on March 19th and 20th, 1928.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Thirty-five Hundred ($3500.00) Dollars.

Dated, March 23rd, 1928.

FRANK L. CLEARY,
Judge.

ACTION AT LAW.—ORDER FOR JUDGMENT.

NEW JERSEY SUPREME COURT,

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

VS.

BENJAMIN GRUNSTEIN,

Defendant.

$3500.00

.....

.....

$

It is ordered that judgment be and hereby is entered in favor of plaintiffs and against the defendants for the sum of three thousand five hundred dollars, besides costs to be taxed nisi.

Entered March 24, 1928.

On motion of
WILLIAM GEORGE, Attorney.

JUDGMENT.

NEW JERSEY SUPREME COURT,

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

VS.

BENJAMIN GRUNSTEIN,

Defendant.

$3500.00

.....

$

Action at Law.—On Postea.

William George, Attorney.

Judgment entered this twenty-fourth day of March, A. D. nineteen hundred and twenty-eight, in favor of plaintiff and against the defendant for the sum of three thousand five hundred dollars damages and costs.

WM. S. GUMMERE,
C. J.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-fifth day of April A. D. nineteen hundred and twenty-eight.

FRED. L. BLOODGOOD,
Clerk.

ACTION AT LAW.—NOTICE OF APPEAL AND GROUNDS.

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

CLARK H. NICHOLS as Administrator ad prosequendum of the goods, chattels, etc. of CATHERINE NICHOLS, deceased,

Plaintiff,

vs.

BENJAMIN GRUNSTEIN,

Defendant.

To:

WILLIAM GEORGE Esq.
Attorney of Plaintiff,
or To WHOM IT MAY CONCERN:

SIR:

PLEASE TAKE NOTICE that the defendant in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole or the judgment entered in this cause on the following grounds, to wit:

1. Because the Court erred in refusing to grant a non suit to the defendant.

2. Because the Court erred in refusing to grant the motion of the defendant for a direction of a verdict in favor of the defendant.

Action at Law.—Notice of Appeal and Grounds.

3. Because the Court refused to make the following charge requested by the defendant.

Contributory negligence is a complete defense in this State, and if you find that the intestate was guilty of negligence and that her negligence contributed in any way to her injuries and death then the plaintiff can not recover no matter how negligent the defendant may have been. Under the law the jury has no right to weigh the negligence of the parties and decide which one was the more negligent, because if the intestate was negligent in any degree and her negligence contributed to the accident and her death, it makes no difference under the law how negligent the defendant was.

4. Because the Court refused to make the following charge requested by the defendant.

If you find from the evidence that the driver of this truck at the time of the accident was upon his own affairs, and not acting within the scope of his employment then your verdict should be for the defendant, because the defendant in this case is the owner of the truck and not the driver, the driver has not been made a party to this suit by the plaintiff, and his liability would have to be determined in another suit.

5. Because the judgment is contrary to law.

Respectfully yours,

ALEXANDER M. MacLEOD,
Attorney for Defendant.

Dated: April 20th, 1928.

New Jersey Court of Errors and Appeals

CLARK H. NICHOLS, as Administrator *ad prosequendum* of the goods, chattels, etc., of Catherine Nichols, deceased, Plaintiff-Appellee, *vs.* BENJAMIN GRUNSTEIN, Defendant-Appellant.	ACTION AT LAW. ON APPEAL.

TRIED BEFORE JUDGE FRANK L. CLEARY, AND JURY.

BRIEF OF PLAINTIFF-APPELLEE.

This cause was tried before Judge Frank L. Cleary and a jury at the Hudson Circuit, on March 19th, and 20th, 1928, and resulted in a verdict in favor of the Plaintiff-Appellee and against the Defendant-Appellant.

The suit was brought by plaintiff-appellee against defendant-appellant for damages sustained by him as Administrator *ad prosequendum* of the goods, chattels, etc., of Catherine Nichols, deceased, by reason of the wrongful death of the said Catherine Nichols, due to the negligence of the defendant-appellant, his agent or servant, on February 9th, 1927, in the City of Jersey City, County of Hudson and State of New Jersey.

Facts.

On February 9th, 1917, the plaintiff's intestate, Catherine Nichols, who was then seven years of age (Case, p. 8, line 22), was on her way home from school, at about 11:45 A. M., together with

her brother, Howard Nichols, who was then nine years of age, walking along Second Street, in Jersey City (Case, p. 12, line 15), toward Jersey Avenue in said city. Plaintiff's intestate and her brother were walking on the sidewalk of said Second Street (Case, p. 12, line 24) and were about to cross the street. At the time plaintiff's intestate and her brother were about to cross the street, the motor truck of the defendant was about a block away (Case, p. 12, line 32), and as they were crossing the street the said motor truck, which was coming in the direction from First Street to the point where plaintiff's intestate and her brother were, "was coming fast" (Case, p. 12, line 35); "It did not blow its horn", and Howard, plaintiff's intestate's brother, jumped back. He tried to grab plaintiff's intestate, but didn't have a chance (Case, p. 12, line 35), whereupon the plaintiff's intestate was struck by defendant's motor truck (Case, p. 12, line 37). After the defendant's motor truck struck plaintiff's intestate it continued for a distance of about twenty-five feet from the point at which the motor truck struck decedent before the vehicle was brought to a stop (Case, p. 20, line 29).

Plaintiff's intestate was immediately taken to the Jersey City Hospital where she died a few hours thereafter, as a result of the injuries sustained by her when she was run down by the said motor truck or vehicle of defendant-appellant.

Plaintiff-appellee in his complaint alleged that the defendant-appellant was the owner of the motor truck which collided with plaintiff's intestate (Case, p. 2, line 31), but defendant-appellant in his answer, denies this allegation (Case, p. 5, line 25). However, at the trial, defendant-appellant's attorney stated in open Court the admission of defendant-appellant of the ownership of said motor truck (Case, p. 8, line 5).

The Court Properly Refused the Non-suit on Motion of Defendant at Close of of Plaintiff's Case.

In behalf of the plaintiff, two witnesses, who were eye witnesses to the accident which resulted in the death of plaintiff's intestate were offered, Howard Nichols and Christopher Smith. On behalf of the defendant the only testimony concerning the manner in which the accident occurred was the operator of the vehicle, defendant-appellant's servant.

Howard Nichols testified as follows: (Case, p. 12, line 29):

> "Q. Talk right out. A. We was going to go across the street when a horse and wagon came and went on past me; we was going across the street when the auto was about First Street. We went to go across and my sister ran ahead of me, went to go, *and the car was coming fast; it did not blow its horn* and I jumped back. I went to grab her and I didn't have a chance.
>
> Q. What happened to Catherine? A. And the car bumped into her.
>
> Q. (Top of page 13) Did you see her knocked down? A. Yes, sir."

That after plaintiff's intestate was struck by the truck, the driver thereof, who was the servant of the defendant-appellant, on that day (Case, p. 52, line 26) picked Catherine up and took her to the hospital (Case, p. 13, line 29). Again Howard was asked the question (Case, p. 13, line 30). "Q. Was he going fast or slow before the accident? A. Fast."

It will be noted further that the plaintiff's intestate was crossing the street at the intersection of Jersey Avenue, in Jersey City, and crossing upon the cross-walk, commonly used by pedes-

trians, when and where the accident occurred (Case, p. 15, top of page).

> "Q. Where were you with her (plaintiff's intestate) when you saw the truck a block away? A. Standing at the corner.
>
> Q. Right at the corner? A. Yes, sir;"

and further (bottom of page 15 and top of page 16)

> "Q. What side of the street was the truck on, on its own right hand side; was it near the curb where it was running? A. About the middle like.
>
> Q. Middle of what? A. The middle of the street.
>
> Q. Was it on the car tracks? A. On the tracks, yes, sir.
>
> Q. The car track runs right through the center, doesn't it? A. Yes, sir."

It is conceded that the place at which the accident occurred is an intersection of streets of the usual width and that, in the absence of any testimony in any part of the entire case to the effect that there was traffic of any kind at the time and immediate vicinity of the place of the accident such as would have necessitated the operator of the motor truck to proceed along the very center line of the street as testified to by Howard Nichols, and in the light of the further testimony of this same witness, above referred to, as to the speed of the truck and the absence of any signal or warning of any kind, a strong inference of negligence is presented. Moreover there is evidence in the case to the effect that the operator of the truck made no effort to avoid colliding with plaintiff's intestate, as evidenced by the testimony of the said witness, Howard Nichols, as follows (Case, p. 19, line 14):

"Q. Did you see the truck turn either side of your sister? A. No, sir.

Q. Did the truck keep on going? A. Straight ahead.

Q. Did the truck swing away trying not to run into your sister? A. No, sir."

Christopher Smith, a disinterested eye witness to the accident testified (Case, p. 20, line 25):

> "Q. Was the truck going fast or slow at the time you first saw it? A. It was going around twenty or twenty-five miles an hour.
>
> Q. How far did it go after it struck the child? A. I imagine about twenty-five feet.
>
> Q. Did you hear any horn blown of any kind? A. Not from where I was."

Again Smith says (Case, bottom of page 22):

> "Q. Where was the truck when it stopped and when you went up to it, in relation to the corner of Second Street, how far north of Second Street was it? A. Around twenty-five feet; twenty-five or thirty feet from the corner."

Evidence of such conduct on the part of the servant of the defendant which, if unexplained, constituted negligence on his part.

In the case of *Bahr* vs. *Lombard Ayres & Co.*, 53 Law, 233, the Court of Errors and Appeals held the Court rightfully denied a motion for a non-suit, saying, at page 236,

> "If from the facts in evidence two inferences as to defendant's conduct may legitimately be drawn, one favorable and one unfavorable to his negligence a question is presented at once for the opinion of the jury."

See also *Hohnes* vs. *Pellogrino*, 133 Atl., 194; *Burnell* vs. *Waterbury Hospital*, 131 Atl., 501 and *Atlantic City Railway* vs. *Smith*, 12 Federal, 658.

This Court has repeatedly emphasized the rule that a direction of a verdict or a non-suit upon the question of negligence is authorized only where reasonable men cannot differ. It would be specious to say that in the light of the testimony presented on behalf of the plaintiff at the trial that reasonable men could not have differed as to the presence or absence of negligence on the part of the defendant's servant, unless it be to say that there could be no difference of opinion among the members of the jury as to the presence of negligence.

It is elementary and established by many cases in this Court, that a motion for a non-suit, or to direct a verdict for the defendant, based upon the insufficiency of the evidence to establish a cause of action, admits the truth of the plaintiff's evidence *and every inference of fact which can be legitimately drawn therefrom,* but denies the sufficiency in law.

Fox vs. *Atlantic &c. Co.,* 84 N. J. Law, 726;

Jones vs. *Public Service Railway Co.,* 86 N. J. Law, 646.

Defendant-appellant, in his brief, cites the case of *Bennett* vs. *Leeds,* 96 N. J. Law, 405, as authority for the argument advanced on his behalf that the Trial Court in the case at bar should have granted his motion for a non-suit.

An examination of the *Bennett* case cited indicates that the very converse is held by the Supreme Court therein and the reversal ordered in that case was predicated upon an erroneous instruction to the jury and not upon a question of a motion for a non-suit.

The Court held in the *Bennett* case, cited by defendant-appellant (Mr. Justice Kalisch speaking for the Court), as follows:

". . . it suffices to say that the plaintiffs intended to show that the collision was due to the defendant's negligence, and a jury would have been warranted in so finding, and as it did not conclusively appear that the plaintiff was guilty of negligence contributing to his injury, the court could not, under well-settled legal rules, have decided, as a matter of law, that there was such contributory negligence on the part of the plaintiff but was obligated to leave the solution of that question to the jury,"

and again, in the same case, the Court continues . . .

"It is quite obvious that, under that state of evidence, the court could not have properly nonsuited the plaintiff."

It may be well at this time, while discussing the *Bennett* vs. *Leeds* case, cited by defendant-appellant, to point out another aspect of the very case cited by him as related to defendant-appellant's further contention that the Trial Court in the case at Bar should have directed a verdict in favor of the defendant upon his contention that the plaintiff's intestate was guilty of contributory negligence.

The *Bennett* case, as we have above stated, reversed the Trial Court because the latter instructed the jury that

"it (the jury) should eliminate from its consideration the counter-claim of the defendant, for, even though it finds that the plaintiff was responsible for the accident, the defendant had so contributed to it by his negligence as to prevent his having any recovery."

It is apparent from this instruction that the Court decided, as a matter of law, that the defendant was guilty of negligence contributing to his injury.

In doing this, under the evidence in the case, we think the Court invaded the province of the jury by disregarding the well-settled legal principle alluded to in the discussion on the nonsuit, that unless the proof of the negligence charged as contributory is so clear and conclusive that the minds of reasonable men cannot reasonably differ, the case is one for the jury to determine.

It is difficult to reconcile the processes by which defendant-appellant cites the *Bennett* vs. *Leeds* case in support of his contentions. We respectfully submit that the *Bennett* case is clearly dispositive of their case, at least so far as it is offered as an authority by which this Court is asked to declare that the Trial Judge in the case at bar erred in his refusal to grant defendant's motions for a nonsuit and direction of a verdict in his favor.

The Court Properly Refused Defendant's Motion for a Verdict at the Close of the Entire Case.

The only witness, in behalf of defendant, who testified concerning the actual happening of the accident, was John Sweeney, defendant's employee, and operator of the truck which defendant admits struck plaintiff's intestate.

He testified as follows (Case, p. 25, line 30):

> "Q. Did you see these two children on the sidewalk before you got to Second Street? A. Yes, sir.
>
> Q. Where were you when you first saw them there? A. I was about one hundred feet away from the corner.
>
> Q. What did you do, if anything, when you saw the children there? A. I gave them the horn and *kept on going.*"

(Case, p. 26, line 10):

"Q. You kept on going; and after you came up toward Second Street, before you got to Second Street, what did the children do, if anything, at that time? A. The little girl stepped off the curb. She started to run across. I got too near to her that I could not stop suddenly so I swung left."

(Case, p. 33, bottom of page):

"Q. Now with a ton and a half load and the street dry and the street level and the brakes in good condition as you were saying, and assuming that you were going along at twelve miles an hour" (he having previously testified to having proceeded at twelve miles an hour, Case, p. 28, line 29), "what is the shortest distance in which you can stop such a truck applying your emergency and foot brakes? A. What rate, what speed?

Q. Twelve miles an hour. A. Five or six feet."

Sweeney testified that when the child was about to cross the street the truck which he operated was about eight feet out from the curb (Case, p. 26, line 26).

Viewed in the light of Sweeney's own testimony in behalf of defendant, that he could have stopped his truck within five or six feet in an emergency and having also testified that the child was eight feet from his truck at the time she started to run across the street, there was still ample time and opportunity in which to have brought his truck to a full stop before coming in contact with the child.

Thus again, is presented a jury question as to the question of negligence on the part of the defendant.

A conflict of testimony is, of course, raised by the proofs as to the distance of the truck from

the point at which the children started to cross the street.

Plaintiff's witness, Howard Nichols, says the truck was about a city block away when he started to cross (Case, p. 12, line 32).

Defendant's witness, Sweeney, says he was about eight feet from the point at which the children started to cross. With this conflict there is at once presented a jury question such as is involved in the *Bennett* case cited by defendant-appellant, which we are pleased here to offer in support of our contention that it would have been error on the part of the Trial Court, in the case at bar, to have decided, as a matter of law, that the plaintiff's intestate was guilty of negligence which contributed to the happening of the accident.

May we respectfully refer to another case cited by defendant-appellant in his brief, which is difficult of reconciliation with their contentions, to wit, *Poole* vs. *Brown,* 89 N. J. Law, 314 (Court of Errors and Appeals). This case is substantially similar to the case at bar, involving a pedestrian who looked before attempting to cross a public highway and failed to see the automobile which struck him after he had taken but one step from the sidewalk. In the *Poole* case it was suggested that since it appeared that the plaintiff in that case had succeeded in taking a single step forward after he had a view to the north, when he was struck by the automobile coming from that direction, it is a legal presumption that if he had looked with any degree of care he could not have failed to see the automobile so close to him that the danger of attempting to cross in front of it would have been apparent to an ordinarily prudent person in the exercise of reasonable care for his own safety. The Trial Court in that case apparently yielded to that erroneous view and granted defendant's motion for a nonsuit. Upon appeal to

the Court of Errors the Trial Court was reversed and a new trial granted. Mr. Justice Kalisch, speaking for the Court of Errors and Appeals, in the *Poole* vs. *Brown* case, said as to the contention of defendant at the trial, and upon which contention the Trial Court nonsuited plaintiff, as follows:

> "We do not think that the testimony justifies such a presumption (of contributory negligence), either of law or fact. . . . it is manifest that the question whether or not the appellant had acted with reasonable care in the circumstances which confronted him at the time he made attempt to cross the street, was one for the jury and not for the court to pass upon." Citing *Fox* vs. *Great Atlantic & Pacific Tea Co.* (*supra*).

The *Poole* case cited by defendant-appellant and which we also respectfully submit as authority for this Court to dismiss appellant's contentions, also quoted with approval the statement made by Thompson on Negligence to the effect

> "That cases of collision on highways almost invariably involved questions of concurrent negligence on the part of both actors; and that as the circumstances attending such injuries are within the range of every day observation and experience, the question of contributory negligence in those cases is in a peculiar sense a question for a jury, though, of course, within the limits of the principle that there must be evidence tending to that conclusion and subject also to the rule that in cases where the evidence tends only to that conclusion the judge can decide as a matter of law."

In the case cited by defendant-appellant in his brief, to wit, *Verdon* vs. *Crescent Automobile Co.*, 80 N. J. Law 199, it will be noted that this case was presented to the Supreme Court on rule to

show cause. There was a verdict for the plaintiff in that case and defendant obtained a rule to show cause, which rule was made absolute by the Supreme Court.

But it must be noted that the Appellate Court did not make the rule absolute on the ground that the child involved in that case (seven years of age) was guilty of contributory negligence, but did so solely because of error on the part of the trial judge in instructing the jury to the effect that "even if the boy was acting in the most careless way possible and running in front of the machine". The Appellate Court held that such instruction eliminates all question of contributory negligence on the part of the plaintiff, and held such instruction to be erroneous, for which the rule was made absolute. The Court said, however, in that case, as follows:

> "In the case under consideration, *it was at least a jury question* whether the plaintiff was *sui juris* or not, and the court was not justified in assuming, as a matter of law, that he was of such immature age that he could not be charged with contributory negligence, even if he acted in the most careless way possible."

At the Time of the Accident the Driver of the Truck Was Acting Within the Scope of His Employment.

John Sweeney, operator of the motor truck which caused the injury to the plaintiff's intestate from which she died, testified that the defendant was his employer; that he was driving the particular truck involved in the accident, admitted by defendant to be owned by him, at the time of the accident, for about one and a half years (Case, p. 25, line 25); that he left his employer's place of business at about a quarter to eleven in the

morning (Case, p. 42, line 4). That he had more than a ton and a half of meats on his truck (Case, p. 33, line 30):

> "Q. You didn't have much of a load on that day, did you? A. Well, I had about a ton and a half;"

that he had eight deliveries to make (Case, p. 42, top of page):

> "Q. Your job was making deliveries? A. Yes.
> Q. You say you had eight deliveries on this particular day? A. Yes, sir."

And further, and we respectfully submit, most important on this point (Case, p. 42, line 18),

> "Q. What time did you receive your next delivery? A. I left the first delivery about twenty minutes to twelve."

May we at this point respectfully revert to the testimony on behalf of the plaintiff, that the accident involved occurred five minutes after the first delivery was made, and that there were still seven deliveries to be made by defendant's servant at the time of the accident.

It is contended on the part of the defendant-appellant, in order to relieve himself of the responsibility for the wrongful death of plaintiff's intestate, that at the moment of the happening of the accident, and particularly at that moment, Sweeney was not actually acting within the scope of his employment, and in consonance with defendant-appellant's efforts to so relieve himself of responsibility, he alleges that at the very time of the happening of the accident, or less than five minutes prior thereto, Sweeney suddenly decided, contrary to any previous conduct on his part during all the period of his employment by the de-

fendant, to go home to lunch. Notwithstanding the fact that there was still about one and one-half tons of defendant's merchandise, comprising seven distinct orders, yet to be delivered by defendant's servant.

The Trial Court interrogated Sweeney as follows (Case, top of page 41):

> The Witness: "I was on my way to lunch.
>
> The Court: After lunch, you were going to continue and deliver these other goods?
>
> The Witness: Yes, sir."

The following inquiry by the Trial Court elicited the following information which, it is respectfully submitted, is both interesting and important (Case, top of page 46).

> The Court: "Was it on your way home?
>
> The Witness: No, on my way out.
>
> The Court: Did you ever do this before this day, drive a mile and a half home to get your lunch without doing your other deliveries?
>
> The Witness: *No, sir.*
>
> The Court: *This was the only time?*
>
> The Witness: *Yes, sir.*"

And further, on page 49 of the case, line 20, the Trial Court further pursues his inquiry, as follows:

> The Court: "After this accident where did you go?
>
> The Witness: I took the child to the hospital.
>
> The Court: Then after that?
>
> The Witness: Returned back there and went with the officer to the mother; *then I went on my deliveries.*"

Here, we believe, is the crux as well as the collapse of defendant's efforts to be relieved of the legal responsibility which rests upon him in this case.

It must be borne in mind that defendant's servant had never previously gone home for his lunch prior to having completed all his deliveries, and this fact is more strongly illustrated by the following testimony of Sweeney himself (Case, p. 44, line 15).

> "Q. So far as you were concerned, your boss was satisfied that you could have your dinner any time you wanted to? A. I generally go from the last delivery. We have to call up from the last delivery in order to go up and eat dinner.
>
> Q. You are supposed to do that? A. Yes, sir."

There was, of course, a very good reason for the existence of the rule adopted and practiced by the defendant's employees which provides that all deliveries shall be completed before the employees may be permitted to have their lunch. First, for the reason, as stated by Sweeney himself, that the butchers to whom deliveries are made, close every day from one to two (Case, p. 45, line 15), and for the further reason that the merchandise to be delivered is perishable (Case, p. 53, line 35), and on the same page, the defendant further says, line 28,

> "Q. Did you at any other time instruct him about these deliveries? A. I always instruct them at all times, always to bear in mind that they have to make the deliveries and then return and not to stop anywhere else."

It should be noted, too, that Sweeney was in the very vicinity of his first delivery. The accident occurred within five minutes of the first delivery.

That Sweeney's home, to which he had never before gone for lunch, prior to completing his deliveries, was about one and one-half miles from the place of the accident, and further, and significant, even after the accident and prior to the completion of all of the remaining seven deliveries, *Sweeney had not even then gone anywhere for his lunch.*

The latest reported case applicable to the present question is that of *Dunne* vs. *Hely,* 140 Atl., 327 (Court of Errors and Appeals). This was an action against an employer for truck driver's negligence and involved the question whether the driver's deviation from direct route to garage to store car for the night, in order to take boys to the store a block or so out of his way, was an act disconnected from his employment, and held to be a question for the jury.

It was further held in this case, as follows:

> "It is not merely the circumstance of employee's deviation from direct route when on employer's business which determines employer's liability for employee's negligence, but rather whether the act or deviation was disconnected from the employment.
>
> Question whether it is deviation from the master's employment to the extent that such deviation is tantamount to an act disconnected from the servant's employment is a mixed question of law and fact."

Defendant-appellant cites the *Dunne* vs. *Hely* case in his brief. We are pleased to submit this same case as authority in denial of defendant-appellant's contentions on the case at bar.

In the *Dunne* case it will be noted that all of the business of the defendant had been substantially performed by his employee, the driver of the truck and was in the act of taking the truck to a garage which was the place designated by

his employer for the storage of the truck and that the truck driver whose delivery hours were to cease at five o'clock in the evening was sometimes engaged until six thirty in the evening, making deliveries, and, after having finished, would proceed to his own home, where he would take his supper and later would take the truck to the garage which was some three or four blocks distant from where he lived. In that case the driver followed his usual custom and after having made his last delivery, after 6:00 P. M., arrived at his home about 6:30 and about one hour later left his own home with the truck for the garage. While on the way he picked up four boys to take them to a candy store in the neighborhood of the garage, but not on the direct route to it, and while on his way to the candy store the accident complained of occurred.

A motion for a direction of verdict in favor of the defendant was made at the trial and denied. On appeal to the Court of Errors and Appeals the Court held that the denial of the motion for directed verdict for defendant was proper and the judgment in favor of the plaintiff therein was affirmed.

The case at bar, we respectfully submit, is stronger than the *Dunne* case above cited. First, the deliveries had not been completed, as in the *Dunne* case (*supra*), secondly the testimony of the driver, Sweeney, is subject to contradictory interpretations by reason of his testimony that he had never previously gone home for dinner as he intended to do on the day of the accident in the case at bar; that at the time of the accident there still remained on his truck one and one-half tons of perishable goods which, he said, was required to be entirely disposed of by delivery before he could have his lunch and that the accident occurred within five minutes after his first delivery, leaving

seven deliveries yet to be made, and the further fact that he had not gone home for his lunch even after the accident, but completed his delivery as theretofore, as though nothing had happened.

In these circumstances the *Dunne* case above cited and the case of *Mahon* vs. *Walker,* 97 N. J. Law, 384, also cited by defendant-appellant in his brief, lays down the rule that

> "where the proof that the driver was acting without the scope of his employment is uncontradicted, the matter is a court and not a jury question, *but if the proof is contradictory or subject to contradictory interpretation the question becomes one for the jury.*"

The Trial Court in the case at bar properly submitted the case to the jury as the only course legally open to him in the face of the proofs in the case.

While the Trial Court was not legally obliged to state reasons for refusing to direct a verdict in favor of defendant as requested by the latter, the Trial Court pointed out another sound reason for his refusal to grant such motion, as follows: (Case, p. 60, line 18):

> "The Court: This is a case where, it seems to me there is enough evidence to make it a jury question, and for a number of reasons:
>
> First, the testimony of the defendant himself is that this man left his store at a quarter after ten, when the driver says it was a quarter after eleven. They were both in accord as to just how long it would take to get from the store to make the first delivery. The driver says that he only made one delivery, and that after that first delivery he was on his way home when this accident happened.
>
> There is great conflict as to time, and it is very important, because he had only made one delivery, and it could not have been that he left at the same time that his employer

says he left; there is an hour difference there and he could have made two or three deliveries within that time. There is no explanation why that happened.

Secondly, this man was not finished with his day's work and on his way home as in a great many of these other cases quoted was the case, but was actually engaged in his master's business just prior to, at least, the happening of this accident. He was driving a truck loaded with his master's goods, and the only testimony in the whole case that he was going home, is his own statement that he was, and it seems to me that should be taken into consideration, together with the fact that he testified that after the accident, in answering as to what he did then, 'I went to the Hospital.' Q. What did you do then? A. I delivered the goods. Q. What did you do then? A. I returned to the store.''

The testimony in the whole case is that he never did go near his home for his lunch. Why? He may have had good excuse. But whether or not, under all these circumstances, the jury believes that he was on his way home, which if he was, would have been outside of his employment and would relieve the master of liability, makes it a question for the jury to decide. Whether or not that was so, under all the circumstances in the case, in my judgment is a jury question.

The Court Properly Refused to Charge Defendant's Requests Nos. 2 and 4.

Request No. 2 is as follows:

"Contributory negligence is a complete defense in this state, and if you find that the intestate was guilty of negligence and that her negligence contributed in any way to her injuries and death, then the plaintiff cannot recover, no matter how negligent the defendant may have been. Under the law the jury

has no right to weigh the evidence of the parties and decide which one was the more negligent, because if the intestate was negligent in any degree and her negligence contributed to the accident and her death, it makes no difference under the law how negligent the defendant was.''

The Trial Court did instruct the jury, however (Case, p. 67, line 20), as follows:

> ''So, if you find that the defendant was negligent, through his driver, and that that negligence was the proximate cause of the accident, then this defendant, if this driver was his agent or his servant at the time of this accident, the defendant would be responsible and would be liable in damages to this estate, unless the accident was caused through the contributory negligence of the little girl herself.''
>
> *''And if there was contributory negligence in any degree, no matter how small a degree that might be, it would defeat a recovery and your verdict should be for the defendant.''*

It is difficult to find any just criticism of the legal efficacy of the foregoing statement of law as presented by the Trial Court, nor which can more clearly and fully embrace the whole subject matter of Request No. 2.

Defendant-appellant further complains of the Trial Court's refusal to charge Request No. 4, as follows:

> ''If you find from the evidence that the driver of this truck at the time of the accident was upon his own affairs and not acting within the scope of his employment then your verdict should be for the defendant, because the defendant in this case is the owner of the truck and not the driver, the driver has not been made a party to this suit by the plaintiff and his liability would have to be determined in another suit.''

The Trial Court, however, did instruct the jury, as follows (Case, p. 65, line 12):

"So that you start out with the premise, predicated upon the fact that this was the master's car, admittedly so; and that this was the master's servant, admittedly so; *but the question that you have got to determine is whether or not, at the time of the accident, this servant was acting within the scope of his master's employment.*"

"You will remember what the testimony was as to that by both the driver and by the master, and you will remember what the circumstances were surrounding that particular thing which the driver says he was doing at that time.

"Justice Fort, speaking for the Court of Errors, in the case of *Holder* vs. *Rice*, 68 N. J. L., 324-329, says as follows:

The servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did which caused the injury was an act expressly or by implication within the line of his duty under his employment."

"Now if you find that the accident was due to the negligence of the driver of this car, it would not be sufficient that the driver of the car was employed by the defendant, *but, to make the defendant liable, it must also appear from the evidence that the driver was, at the time of the accident, engaged in the performance of his duty as such servant.*"

"And in another case, the Court of Errors and Appeals said,

"That a master is ordinarily liable in a civil suit for the torts of his servant if the act be done in the course of his employment in his master's service and whether it is so done or not depends upon the facts in each particular case. To render the master liable for the negligent act of the servant it must be within the scope of his employment."

"So now, Gentlemen of the Jury, applying that law to the facts as you have them in this

case, and the facts to the law as I have given it to you, you will determine that first, *because it seems to me that that is an important question, whether or not at the time of this accident this driver was acting within the scope of his employment as the servant of the defendant.*"

> *"If he was not, that ends the case, because the driver is not made a party, but only the owner; so that, if the driver was not his servant, that ends the case, and your verdict must be for the defendant."*

It seems to us needless to cite further the Court's charge to the jury on the question embraced in defendant-appellant's request No. 4 though the Trial Court in at least two other places in his charge reiterates the sound principle of law laid down by him and applicable to the case at bar.

We find no fault with the sufficiency in law of the subject matter of defendant-appellant's requests to charge as embraced in Requests Nos. 2 and 4. We do respectfully submit, however, that there is clearly no ground for complaint on the part of the defendant-appellant when the Trial Court's instructions to the jury are read in full.

The case at bar presents a case of negligence, with ample proofs of the relationship of master and servant, and we therefore respectfully submit that there is no merit to any of the points raised in defendant-appellant's brief, for the reasons above stated, and that, therefore, the judgment of the Court below should be affirmed.

WILLIAM GEORGE,
Counsel for Plaintiff-Appellee.

NEW JERSEY

Court of Errors and Appeals

CLARK H. NICHOLS as Administrator *ad prosequendum* of the goods, chattels, etc., of Catherine Nichols, deceased, Plaintiff-Appellee, vs. BENJAMIN GRUNSTEIN, Defendant-Appellant.	Action at Law. On Appeal.

TRIED BEFORE JUDGE FRANK L. CLEARY, AND JURY

BRIEF FOR DEFENDANT-APPELLANT

STATEMENT

Defendant appeals from a judgment recovered by the plaintiff, Clark H. Nichols as administrator *ad prosequendum,* etc., in the sum of thirty-five hundred ($3500) dollars, after a trial of the issues had before Judge Frank L. Cleary and a jury at the Hudson County Circuit of the Supreme Court on March 19th and 20th, 1928.

FACTS

On March 7th, 1927 at some time shortly before noon of that day the deceased, Catherine Nichols, a child of seven years of age, was struck by an automobile truck owned by the defendant, Benjamin Grunstein and operated by his employee, John

Sweeney, in the vicinity of the corner of Second Street and Jersey Avenue, in Jersey City, N. J. As a result of the said accident the said Catherine Nichols died on the same day. This suit was instituted by Clark H. Nichols as administrator *ad prosequendum* of the goods, chattels, etc., of Catherine Nichols, deceased, against the defendant Benjamin Grunstein. The defendant appeals to this court on the grounds hereinafter set forth.

ARGUMENT

A MOTION FOR A NON SUIT SHOULD HAVE BEEN GRANTED AT THE END OF THE PLAINTIFF'S CASE.

It is respectfully urged on behalf of the defendant that the case made out by the plaintiff failed to establish any negligence on the part of the driver of the defendant's auto truck, and proved conclusively as a matter of law that the deceased was guilty of contributory negligence.

From the plaintiff's testimony it appears that the deceased was a girl of seven years of age and that some time shortly before noon on the day of the accident that she was returning from school in company with her brother, Howard Nichols, a boy then nine years of age. That as they approached the intersection of Jersey Avenue and Second Street in Jersey City, N. J., and were about to cross the street a horse and wagon came along Jersey Avenue and passed them. The brother, Howard Nichols, testified (p. 12):

> "We was going to go across the street when a horse and wagon came and went on

past me; we was going across the street, when the auto was about First Street, we went to go across and my sister ran ahead of me, went to go, and the car was coming fast; it did not blow its horn and I jumped back. I went to grab her and I didn't have a chance."

Prior to that he says (p. 14) that they were going along hand in hand and further on on the same page he says that he saw the truck about down at First Street and at that time he and his sister were standing at the corner and he was holding her hands there. They started to cross the street and the deceased ran, but her brother Howard didn't start to go over as he thought it was dangerous to do so when this truck was coming.

As his sister started to run across he grabbed at her, succeeded in touching her and hollered to her "come back" but she didn't come back but went right on (p. 15). Further on (p. 16) he says he saw the truck and that it was coming fast and he hollered to her, tried to grab her and she ran away from him. He said there were no cars in between that would have prevented his sister from seeing the defendant's truck and that he himself had no trouble in seeing it (p. 17). He repeats (p. 18, 19) in answer to a number of questions, that his sister ran out to the middle of the street, "the truck was coming in the middle and she ran all the ways out and the truck hit her." He again says that she didn't run backwards at all but kept on running over.

Chris Smith the only other witness to the accident produced by the plaintiff after stating that the truck was coming about twenty or twenty-five miles an hour (p. 20) on cross-examination testified as follows:

"Q. You don't know what rate he was going before the accident?

A. No, because I didn't see him until he hit Second Street.

Q. Was that before the accident, you have no idea of what rate of speed he was going?

A. No.

Q. You didn't know whether he was coming fast or slow.

A. No."

This witness says that he saw the girl knocked down but didn't see her leave the sidewalk. He was standing at or near the corner of Third Street, a block away from where the accident occurred, and that nothing attracted his attention until he saw the child struck (p. 24). It was testified that the distance between Second and Third Street was about 250 feet.

This was all the testimony produced by the plaintiff as to how the accident occurred and the defendant moved for a non suit on the ground that the plaintiff's case showed no negligence on the part of the defendant; and on the other hand that the plaintiff's case showed evidence of contributory negligence on the part of the deceased. The court refused this motion and the defendant here urges that said motion should have been granted.

It appears from the testimony that the boy and girl were both in a position where the approach of the defendant's truck coming according to the testimony of the brother at a rapid rate of speed could easily have been observed. The brother and sister were standing hand in hand. The brother saw the truck. There was no vehicle or other obstruction to prevent his view. His sister, if she had looked could have seen the truck as the brother did. The brother didn't cross the street because he thought

it was dangerous to do so, but the sister broke away from him and although he tried to grab her and called to her to stop she continued on running until she got in front of the truck. It is submitted that this is a very clear case of contributory negligence as a matter of law, and that the court should have granted the motion for a non suit. When the facts are so plain it was the duty of the court to take the case from the jury. No inference other than contributory negligence could be drawn from this testimony. The proof of contributory negligence was so clear and conclusive that the minds of reasonable men could not reasonably differ regarding it.

Bennett v. Leeds, 96 N. J. L., 405.

From the plaintiff's testimony and particularly the testimony of the brother of the deceased, it appears that if the deceased had used her faculties and senses of sight and hearing she could have seen the truck approaching and could have stopped as her brother did and avoided the accident. It was her duty to use the care which a child of her age should use and to observe whether there were vehicles coming down the street, and not to break away from her brother's hand and rush blindly into a condition of danger.

Poole v. Brown, 89 N. J. L., 314.

If she had looked she would have undoubtedly discovered the approaching auto truck and have been able to avoid the collision.

Brown v. Central Jersey R. R. Co., 68 N. J. L., 618.

The fact that the deceased was a child seven years of age and so far as the testimony is concerned a

girl of ordinary intelligence does not exempt her from exercising ordinary care in approaching danger, and the plaintiff is not entitled to recover if the deceased was the heedless instrument of her own injuries and death.

Verdon v. Crescent Auto Co., 80 N. J. L., 199.

There was no element of danger of which a child of her years was not capable of fully appreciating, and in acting as she did she took the risk of being injured, and by her contributory negligence the plaintiff in this suit was barred from recovery of damages.

In the case of *Sheets v. Connolly Street Railway Company*, 54 N. J. L., 518, the court said that while one may walk upon a sidewalk and, relying on its continuity being unbroken for its whole width, may, without being guilty of negligence, permit his attention to be diverted from the pavement in front of him. Such a rule is not applicable to a pedestrian crossing a street used for the passage of vehicles drawn by horses. The language of the decision is as follows:

> "He is bound to look in the direction in which he is moving and to observe approaching vehicles. A determination that an intelligent child of the age of ten years is not negligent in crossing a street with its eyes and attention drawn in another direction from that in which it is moving can not be sustained. Although the question of contributory negligence may properly be submitted to a jury, a verdict ignoring the plain inferences from the facts is one proceeding from prejudices or passion and not one that ought to be permitted to stand."

In the case of *North Hudson v. Flanagan*, 57 N. J. L., 696, in which the decision of the Court of Errors and Appeals was given by Chief Justice Gummere it was held that a boy of nine years of age, even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercising of care and prudence in approaching an unknown danger, and if the evidence showed that he had been the heedless instrument of his own injury he could not recover.

A MOTION FOR A DIRECTION OF A VERDICT IN FAVOR OF THE DEFENDANT SHOULD HAVE BEEN ALLOWED.

At the close of the entire case there was nothing testified to which altered the plain fact that the deceased was guilty of contributory negligence as a matter of law and the arguments advanced above are repeated as reasons why the court should have taken the case from the jury and directed a verdict in favor of the defendant on this point alone. The testimony as to what the deceased did at the time of the accident is clearly set forth by the testimony of her brother, Howard Nichols, confirmed by the story of the driver John Sweeney, and conclusively proves that she was so plainly guilty of contributory negligence that this question should not have been submitted to the jury by the court.

AT THE TIME OF THE ACCIDENT THE DRIVER OF THE AUTO TRUCK WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

The evidence on this point is given by the driver, John Sweeney, and the defendant Benjamin Grunstein *and is uncontradicted.* It appears from the testimony of these two witnesses that the defendant was in the business of selling fresh meats to retail stores. That this meat was perishable and it was important therefore that it be delivered as quickly as possible. Another reason requiring quick delivery was that many of the retail stores closed between one and two o'clock. The driver, John Sweeney says (p. 30) that he received instructions from his employer, the defendant, to deliver all fresh meats and call up from the last delivery and go to his lunch or dinner on the return. He says (p. 31) that he was given these instructions when he first started to work for the defendant and that these instructions were repeated. The defendant, Benjamin Grunstein (p. 52, 53) testified that he instructed the driver to make his deliveries, call up from the last call and come back. That the fresh meat being delivered was perishable, not to be exposed, and that he instructed all his drivers always to bear in mind that they have to make the deliveries and then return and not to stop anywhere else. *This testimony is uncontradicted by any other witness and must be taken as an established fact in the case.* Therefore if the driver deviated radically from his instructions he was not acting within the scope of his employment.

The testimony of the driver, John Sweeney, was that on the morning of the accident (p. 29) he had eight deliveries of fresh meat to make. That he made one at 244 Warren Street, Jersey City, N. J.,

which was between Grand Street and York Street, and that his next delivery would have been at West Side Avenue and Union Street. The place where the accident occurred was about one mile north of the place where the first delivery was made (p. 30) whereas his second delivery at Union Street and West Side Avenue would have taken him west by Grand Street and then southwest to Union Street and West Side Avenue. He made the first delivery and then deviated from his employment, went in a northerly direction towards his home for lunch. He describes (p. 29) as follows:

> "Q. What were you doing over in this neighborhood?
>
> A. I felt kind of hungry and thought I would go over there home and have something to eat, being it was near twelve o'clock."

When being questioned further on (p. 31) as to why he went to lunch before completing delivery of his meat, he answered, "Well, it was nearly twelve o'clock. I felt kind of hungry. I thought I would pull up there, unbeknown to the boss and have a bite to eat." He was then asked the following question:

> "Q. You knew then you were violating your instructions?
>
> A. Yes, sir."

The driver was closely questioned by the court regarding his movements as follows (p. 45):

> "The Court: Were you supposed to have these deliveries made by noon time?
>
> Witness: No, sir.
>
> The Court: Did they close every day from one to two?

Witness: Yes, sir.

The Court: What do you do usually?

Witness: Continue on making other deliveries and stop on the way back.

The Court: Where were you going to get your lunch?

Witness: Home.

The Court: How far was your home from the first place that you mention?

Witness: About a mile.

The Court: Where was the next place you were to make the next delivery to where you made the first delivery.

Witness: West Side Avenue.

The Court: That does not mean anything to me. How far would it have been in distance from your first delivery to the second delivery.

Witness: Take me half an hour almost to get there.

The Court: Was it on your way home?

Witness: No, on my way out.

The Court: Did you ever do this before this day, drive a mile and a half home to get your lunch without doing your other deliveries?

Witness: No, sir.

The Court: This was the only time?

Witness: Yes, sir."

THE COURT'S REASONS FOR REFUSING TO DIRECT A VERDICT.

In denying the motion for a direction of a verdict in favor of the defendant the court gave a number of reasons for such denial. The first reason the court states (p. 60) was that from the testimony of

the defendant the driver left his store at a quarter after ten and the driver said it was a quarter after eleven. Reference to the testimony (p. 42) says that the driver said it was a quarter to eleven. This reduces the difference in time as stated by the two witnesses to one-half hour instead of one hour, which is noted because the court said (p. 60):

> "There is great conflict as to time and it is very important because he had only made one delivery, and could not have been that he left at the same time that his employer says he left; there is an hour difference there and he could have made two or three places within that time. There is no explanation why that happened."

It is true that in one point in the cross-examination (p. 43) the driver said in answer to a question as to when he left the place to start on his deliveries, "we will say a quarter after eleven" but an examination of the testimony of the driver and the defendant shows that both of them were approximating the time and did not intend to be stating an exact hour. The driver (p. 42) says, "I did not know exactly what time I left there." And again on the same page he says, "I don't remember the time I left" and again, "I just don't exactly know the hour."

It is contended that the element of time did not have the importance attributed to it by the court. The testimony as to what the driver did regarding deliveries, his instructions and his deviation from his employment are positive and uncontradicted and any attempt to infer from an indefinite statement of time that the driver could have made two or three deliveries within the time are mere speculations and not founded upon any testimony in the case.

Irrespective of the time at which the driver left the store, the fact is undisputed that he was under certain instructions, which were, to make all of the deliveries as quickly as possible, and not to take any time for dinner or lunch. No matter whether the driver left at a quarter after ten or a quarter after eleven, the instructions were the same in either event.

Another reason given by the court for denying the motion (p. 61) is stated by the court in the following language.

> "He was driving a truck loaded with his master's goods and the only testimony in the whole case that he was going home, is his own statement that he was, and it seems to me that should be taken into consideration, together with the fact that he testified that after the accident, in answering as to what he did then, 'I went to the hospital.' 'Q. What did you do then?' 'A. I delivered the goods.' 'Q. And what did you do then?' 'A. I returned to the store.' "

Reference to the testimony (pp. 28, 29, 49) of the driver, testimony of Agnes Nichols, the child's mother (p. 9) and the testimony of the police officer Joseph Treusch (p. 51) discloses that after the accident the driver took the child and brought her into a store on the corner of Second Street and Jersey Avenue, then went to the City Hospital, up on the hill section of the city, then went back with the policeman to the Second Precinct Station house on Seventh Street, Jersey City, N. J., where presumably he was booked on some charge growing out of the accident. After that he went to the child's home at 253 Newark Avenue, Jersey City, N. J. All of which must have consumed considerable time. After doing all these things he delivered the rest of the

meat to the customers. The court commented in its decision upon the fact that the driver never did go home for his lunch, as if that was an important matter considered in arriving at its decision, and finally left it to the jury whether he was on his way home, stating that if he was he would have been outside of his employment and would have relieved the defendant of liability.

The language of the court is as follows (p. 61):

> "The testimony in the whole case is that he never did go near his home for his lunch. Why?"

This question is answered by the testimony.

The first reason is that the driver had accidently injured a little girl and her injuries were so serious that it was necessary to take her immediately to the hospital. Common humanity, if nothing else compelled him to go along with her. It would have been a very callous man indeed who would have left a child he had run over and calmly gone to lunch.

The second reason is after leaving the hospital he went with the policeman to the police station, a distance of a mile or a mile and a half and afterwards to the child's home. This consumed so much time that it was necessary for him to hurry to get his remaining deliveries completed within the usual time.

The third reason is that immediately the accident happened, it became plain to the driver, that his employer would want to know why he had been in that locality at that time, and his violation of his express orders not to go home to lunch until all his orders had been delivered, would be discovered. Naturally under these conditions, he would hurry to complete his deliveries and would let the matter of lunch stand over. His scheme to deceive his employer had been discovered. The policeman had

him in charge and he could no longer "pull up there, unbeknown to the boss and have a bite to eat" (p. 31). Even if he could have continued his deceit, the experience he had just gone through would have left him with no immediate appetite for food.

All of this seems to be a complete answer to the court's question.

As a further reason for denying the motion for a direction of a verdict, the court said (p. 60):

> "Secondly, this man was not finished with his day's work and on his way home as in a great many of these other cases quoted was the case, but was actually engaged in his master's business just prior to, at least, the happening of this accident."

At the time of the accident the driver was at least a mile away from the last place at which he was engaged in his master's business and to say therefore that he was so engaged "*just prior*" to the happening of the accident is not drawing a fair conclusion from the testimony.

In the cases quoted to the court on the motion, most of which are cited in this brief, the point was not whether the driver had finished his day's work and was on his way home, but whether he was acting within the scope of his employment. In this case the driver was on his way home, at the time of the accident, in direct disobedience of his employer's instructions, clearly showing such a deviation from his employment as to relieve the master from liability.

Again the court said in denying the motion:

> "But whether or not, under all these circumstances, the jury believes that he was on his way home, which if he was, would have

been outside his employment and would relieve the master of liability, makes it a question for the jury to decide" (p. 61).

It is submitted, that neither the court nor the jury had any option under the premises except to decide this point in favor of the defendant upon the basis of the evidence.

There was no contradiction of the testimony that he was on his way to lunch, that he had been instructed not to go to lunch until completing his deliveries, that he was a mile or a mile and a half off the route that would take him to his next delivery, going in another direction towards his home, and that he violated his employer's instructions and his employer, the defendant, had given him instructions not to go to lunch until his deliveries were completed, and had no knowledge that he had done so on that day. On the court's own reasoning it is submitted that the motion for a direction of a verdict in favor of the defendant should have been granted.

In the case of *Okin v. Essex Sales Company,* 135 Atl. 821, Aff. 138 Atl. 922, a verdict was directed in favor of the defendants and this direction was affirmed by the Supreme Court. In that case the driver was directed by his employer to take a brake lining cutter from the company's place of business in Newark to Valley and Forest Streets, Orange, N. J., to wait for the cutter to be repaired and bring it back as soon as possible. After waiting a few minutes he left the shop without the tool about five minutes before the repair job was completed, and did not return, and the place where the accident occurred was in West Orange about a mile from the repair shop and northwest of it, not in the direction of his employer's place of business, but in an opposite direction where he had no business for his employer.

The case at bar is somewhat similar to the extent that the driver in this case was a mile or a mile and a half off the route where his employment would take him, in an entirely different direction and on his way to lunch against the instructions of the defendant.

In the case of *Cronecker v. Hall,* 92 N. J. L., 450, a case in the Court of Errors and Appeals on all fours with this, it was held that uncontradicted proof that the driver had disobeyed his employer's instructions and deviated from the business he was directed to pursue, his use of the machine, which in that case was a motorcycle, was his own use, and the relation of master and servant was therefore terminated, and therefore the direction of a verdict in favor of the defendant was proper.

In *Tischler v. Steinholtz,* 99 N. J. L., 149, it was held that proof of defendant's ownership of an automobile driven on a public highway raises a presumption of fact that such automobile was in the possession of the defendant, if not personally, then through his servant, the driver, and that such driver was acting within the scope of his employment, both or either of these presumptions may be overcome by uncontradicted proof to the contrary, and if so overcome may by uncontradicted proof that the automobile was not in the possession of the owner or of his servant, or was not being used by the servant within the scope of his employment, then the motion for a direction of the defendant owner will be granted. If however the evidence is contradictory or reasonably subject to contradictory interpretation the question of liability is for the jury.

In *Mahan v. Walker,* 97 N. J. L., 304, it was held:

> "Where the proof that the driver was acting without the scope of his employment is uncontradicted the matter is a Court and not

a jury question, but if the proof is contrary or subject to contradictory interpretations the question becomes one for the jury."

In the case at bar it is uncontradicted that the driver was instructed to deliver the meat on his truck and not to deviate from that duty or to go home for luncheon until the deliveries were completed. The reasons for this being that the meats were perishable goods and the delivery to all of the customers should be made prior to one o'clock in the day, if possible, as many of the customers closed their stores at that hour.

The uncontradicted testimony also shows that the driver made his first delivery at a point at Warren Street near Grand Street and that his next delivery was to have been at Union Street and West Side Avenue. That the direct route to Union Street and West Side Avenue was along Grand Street in a westerly and southwesterly direction and that the driver disregarding his instructions left Warren Street and Grand Street to go home to his luncheon before completing his deliveries. To do so he went in a northerly or northeasterly direction to the point of the accident, which point was about one mile away from Warren and Grand Streets, and in a direction almost opposite from the way he should have gone to make his next delivery.

From the moment that the deviation was undertaken, the relationship of principal and agent theretofore existing was severed and the driver was on his own business. He put his master's orders at defiance and *ipso facto* occupied the status of a tort feasor even as against the master. This doctrine has been repeatedly accepted and applied by the courts of this state under various circumstances.

In the case of *Dunne v. Hely,* 140 Atl. 327, the court said:

"The single question raised by the appeal is whether there are any facts developed by the testimony which tend to establish that at the time the plaintiff was injured the driver of the truck was on his master's business, for if he was not then the defendants below were entitled to a directed verdict in their favor."

In this case the driver was taking the truck to a garage which was a place designated by his employer for the storage of the truck when not used in his business, the garage was about one mile or so from the place of the employer's business and the truck driver, whose delivery hours were to cease at five o'clock was sometimes engaged until 6:30 in the evening, making deliveries, and after having finished would proceed to his home where he would take his supper and later would take the truck to the garage which was some three or four blocks distant from where he lived. On the afternoon of the accident he followed his usual custom and after he made his last delivery which was about six o'clock, he arrived at home about 6:30 and an hour later left his abode with the truck for the garage. On his way there he was requested by four boys to take them down to a candy store which was in the neighborhood of the garage, but not on a direct route. While on his way to the candy store the accident happened.

In this case the court held that the question whether there was deviation from the master's employment to the extent that such deviation was tantamount to an act disconnected from the service employment, was a question of law and fact stating further that to relieve the master from liability for the act of his servant done by him while engaged in his master's work, the act done by the servant must be entirely disconnected from the service, and the driver's act being a slight deviation from the direct

route to the garage made it a question of law and fact to be submitted to the jury.

The case at bar seems to come under the other decisions as the driver in this case did not make a slight deviation while on the business of his employer, but went off his route for the purpose of going home to get his luncheon. In doing this he was not engaged in any business for his employer and in fact was acting contrary to his direct instructions.

He was a mile away from his route when the accident occurred and was on the way to his home which was a considerable distance further. There is no dispute about the fact that he was off his route against the positive instructions of his employer, and on his way to his home to have his luncheon. This evidence is uncontradicted and is not reasonably subject to contrary interpretations and the motion for the direction of a verdict for the defendant should have been granted.

In the case of *Doran v. Thomsen,* 76 N. J. L., 754, it was held:

> "To render the master liable for the negligent act of the servant the act must be done for the purpose of executing the master's orders, and in doing his work and while actually engaged in serving the master, that it is not sufficient to say that the injuries complained of would not have been committed without the faculties afforded by the servant's relation to his master."

THE COURT ERRED IN REFUSING TO CHARGE DEFENDANT'S REQUESTS Nos. 2 & 4.

The defendant was injured by the refusal of the court to charge these requests (p. 76). It is submitted that the requests contained a correct statement of the law and that it was the duty of the court to so charge the jury. In particular, the refusal to charge that "the jury has no right to weigh the negligence of the parties and decide which one was the more negligent" took from the jury an important element of the law as applied to this case, which the defendant had a right to have it instructed on.

In the case at bar the driver was not executing the master's orders, and was not doing his work and was not actually engaged in serving him, but was acting directly to the contrary.

Respectfully submitted,

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