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**RULE DISCHARGING RULE TO
SHOW CAUSE.**

Filed January 28, 1932.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

LAURA M. SANFORD and CHESTER
SANFORD,

Plaintiffs,

vs.

CHARLES H. TOTTY COMPANY, a
corporation, and HAROLD
YODER,

Defendants.

*Action
at Law.*

*Rule
Discharging
Rule to
Show Cause.*

20

It appearing that a rule to show cause being heretofore obtained by the defendant, Charles H. Totty Company, a corporation, why the verdict rendered by the jury in the above entitled action should not be set aside and a new trial granted upon the ground that the verdict rendered therein was excessive and the result of passion, bias or prejudice, and it further appearing to that Court that the rule to show cause having been argued by counsel representing the respective parties thereto before our Supreme Court at Trenton, New Jersey, and it further appearing to the Court that the verdict rendered therein was not excessive and did not show passion, bias or prejudice on the part of the jury,

30

It is thereupon on this 28th day of January, 1932, on motion of Smith & Kiernan, attorneys for the plaintiffs, ORDERED, that the rule to show

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Rule Discharging Rule to Show Cause.

cause heretofore so obtained, be, and the same is hereby discharged with costs, on the said rule to the plaintiffs.

Entered January 28, 1932,
on motion of Smith & Kiernan,
attorneys for plaintiffs.

10

A true copy,

FRED L. BLOODGOOD,
Clerk.

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NOTICE AND GROUNDS OF APPEAL.

Filed February 18, 1932.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

LAURA M. SANFORD and CHESTER SANFORD, Plaintiffs-Respondents, vs. CHARLES H. TOTTY COMPANY, a corporation, and HAROLD YODER, Defendants-Appellants.	<i>Action at Law.</i> <i>Notice of Appeal.</i> <i>Grounds of Appeal.</i>
---	---

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To William Herda Smith and Luka A. Kieran, Jr., attorneys for plaintiffs-respondents:

TAKE NOTICE that the defendant, Charles H. Totty Company, appeals to the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. Because the Court committed error in refusing to grant a non-suit on behalf of the defendant, Charles H. Totty Company on the ground that there was no evidence to connect the said defendant with the cause of action; on the ground that the testimony showed that the plaintiff, Mrs. Sanford, was guilty of contributory negligence by reason of her violation of the New Jersey Traffic Act, and on the ground that there was no evidence of negligence on the part of the said defendant.

30

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Notice and Grounds of Appeal.

2. Because the Court committed error in refusing to grant a motion for a direction of a verdict on behalf of defendant, Charles H. Totty Company on the ground that there was no evidence to show liability on the part of said defendant.

10

3. Because the Court committed error in refusing to charge the following requests made by the defendant, Charles H. Totty Company:

(1) To render the master liable for the negligent act of the servant the act must be done for the purpose of executing the master's orders and in doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master.

20

(2) The servant's use of such facilities must be in furtherance of and not apart from the master's service and control.

(3) The master is not responsible if the negligence was committed by the servant when engaged in some private matter of his own.

(4) To render the master liable the relation of master and servant must be shown to exist at the time and in respect to the very transaction out of which the injury arose.

30

(5) Liability of a master rests not upon a mere permission to use but upon a use subject to the control of the master and connected with his affairs.

(6) If the agent was using the machine as a means of recreation and pleasure for himself or his friends, it would seem impossible to draw the conclusion that he could be regarded as the agent or servant of the master upon that occasion.

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Notice and Grounds of Appeal.

(7) The plaintiffs' right of recovery depends upon whether or not the defendant was legally responsible for the negligent act of its employee under the doctrine of respondeat superior, and the burden of proving that fact rests upon them.

(8) If Mrs. Sanford being in the roadway under the circumstances described in this case placed Mr. Yoder in such a position that he was compelled to choose instantly in the face of an apparent serious situation between two hazards, and he made such a choice as was, under the circumstances, reasonable, he was not guilty of negligence. 10

(9) Negligence is the failure to do that which a reasonably prudent person under the circumstances would have done. Under the evidence presented in this case there is no showing that Mr. Yoder failed to act as a reasonably prudent person would have acted. 20

(10) On all highways where there are no sidewalks or paths provided for pedestrians' use, the pedestrian shall walk only to the extreme left side of the road facing approaching traffic.

(11) Danger, reasonably to be foreseen at the time of acting, is the established test of negligence.

(12) Upon common law principles, when the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, which has in this regard forewarned the "ordinary prudent man," and through him the plaintiff in a civil action, whose conduct must always coincide with this common law criterion, etc. 30

(13) The motor vehicle act sets a standard of conduct for pedestrians. Breach of this sta- 40

Notice and Grounds of Appeal.

tute is evidential as regards the question whether Mrs. Sanford was guilty of contributory negligence.

- 10 4. Because the Court committed error in charging the following requests to charge with qualifications:

(14) The admission of agency made in the original answer filed is not binding upon the defendant, Totty Company, since it was not made with the advise, knowledge or consent of the defendant company.

(15) There is no evidence in this case to show that the defendant company had any notice or knowledge of the admission of agency made in the original answer.

- 20 5. Because the Court committed error in its charge to the jury wherein it referred to the violation of the Traffic Act as evidence of negligence, as follows:

“The interpretation of the Traffic Act and the several regulations contained therein is that a violation of such a regulation may or may not be evidence of negligence.”

- 30 6. Because the Court committed error in its charge wherein it referred to Mrs. Sanford’s—the plaintiff’s—position on the highway as being “the sole cause of the accident . . . the result of her negligence.”

- 40 7. Because the Court committed error in the following portion of its charge: “There is a suggested interpretation of one of our courts to the effect, that if your eyes are blinded . . . it is your duty to throttle down your car, or, if necessary, in the exercise of due care stop until the obscuring of your vision is removed.”

Notice and Grounds of Appeal.

8. Because the Court committed error in its charge wherein it was stated that plaintiff had equal right with the individual driving the motor under the circumstances shown, wherein it stated: "Now, I am not able to say to you as matter of law, even though Mrs. Sanford was where it is said she was, she had no right to walk in the highway. She, really, as a pedestrian, had an equal right with the individual driving his motor." 10

9. Because the Court committed error in that portion of its charge which related to the driver's duty to return the car to the garage and to his duty to the defendant corporation, including the following statement: "Now, I undertake to say, that you readily understand that if the accident had happened while in the course of his employment, as the agent of the corporation, and it appeared that the latter owned the car, and that Yoder's driving it was one of the purposes for which it was purchased by the corporation, and, at the moment of the accident he was then engaged upon some errand or performing some duty with reference to his employment, that there would be no question that you would recognize that he was doing that which he not only was employed to do, but that was one of the purposes for which the automobile was purchased." 20 30

10. Because the Court committed error in referring to the services rendered by Harold Yoder, the defendant, as follows: "Now it appears that he invariably after these trips were over came back and reported to his employer, leaving the automobile in his own garage."

11. Because the Court committed error in its charge in stating that it was an open question for 40

Notice and Grounds of Appeal.

the jury whether at the moment of the accident the driver was within the scope of his employment or agency.

10 12. Because the judgment is based upon a verdict returned against the defendant, Charles H. Totty Company alone, and not against the defendant, Harold Yoder.

Dated: February 17, 1932.

LUM, TAMBLYN & COLYER,
Attorneys for Defendant-Appellant,
the Charles H. Totty Company.

20 Service of the within Notice and Grounds of Appeal is hereby acknowledged this 17th day of February, 1932.

SMITH & KIERNAN,
Attorneys for Plaintiffs-Respondent.

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SUMMONS.

THE STATE OF NEW JERSEY: To
Charles H. Totty Company, a corpo-
(SEAL) ration, and Harold Yoder;

YOU ARE SUMMONED to answer the
annexed complaint of Laura M. San- 10
ford and Chester Sanford 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 said Court at
Trenton within twenty days after service upon
you of this writ and the annexed complaint the
plaintiff may proceed in a suit and judgment
will be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice
of the New Jersey Supreme Court, this 21st 20
day of March, A. D. 1930.

FRED L. BLOODGOOD,
Clerk.

SMITH and KIERNAN,
Attorneys.

Complaint.

COMPLAINT.

Filed April 10, 1930.

New Jersey Supreme Court

MORRIS COUNTY.

10

LAURA M. SANFORD and CHESTER
SANFORD,

Plaintiffs,

vs.

CHARLES H. TOTTY COMPANY, a
corporation, and HAROLD
YODER,

Defendants.

*Action
at Law.*

Complaint.

20

Plaintiffs residing in the Township of Hanover,
County of Morris and State of New Jersey, say:

FIRST COUNT.

1. On December 6, 1929 and for a long time
prior thereto, the defendant Charles H. Totty
Company was a corporation organized and exist-
ing under the laws of the State of New Jersey
and it did, as such corporation own a certain
automobile, which it was on said above-mentioned
date operating by its servant, agent and employee,
the defendant Harold Yoder upon and along Mt.
Pleasant avenue, a public highway and thorough-
fare in and of the Township of Hanover, Morris
County, New Jersey.

2. On that date the plaintiff Laura Sanford
was lawfully upon and using said Mt. Pleasant
avenue, a public thoroughfare and highway in

40

Complaint.

and of the said Township of Hanover, Morris County, New Jersey.

3. It thereby became and was the duty of the defendants to exercise reasonable care so as to avoid causing injuries to others including the plaintiff, Laura Sanford lawfully upon and using said highway and thoroughfare as aforesaid. 10

4. The defendants notwithstanding and neglecting their duty as aforesaid negligently, carelessly and improperly drove and operated and maintained the said automobile so that as a proximate result of their said negligence same was caused to strike and collide with the plaintiff Laura Sanford, causing her serious bodily injuries hereinafter more particularly described.

5. The negligence of the defendants consisted in the following: 20

In failing to have said automobile under proper control; in failing to make reasonable observation while driving and operating the same; in failing to so guide, steer and stop the same as in the exercise of reasonable care they should have done; in operating the same at an excessive and improper rate of speed; in failing to give warning or signal of the approach along said highway; failing to keep and maintain the brakes, steering apparatus and safety appliances on the same in a safe and proper condition and in operating and using the said automobile while the said brakes, steering apparatus and safety appliances on the same were not in a safe and proper condition for use; in operating the said automobile contrary to the provisions of the Motor Vehicle and Traffic Act of the State of New Jersey and in using the said automobile and the equipment thereon contrary 30 40

Complaint.

to the provisions of the Motor Vehicle and Traffic Act of the State of New Jersey; in failing to exercise reasonable care to avoid causing injuries to the plaintiff, Laura Sanford; in failing to exercise reasonable care in guiding, steering and stopping said automobile and generally
 10 in so negligently, carelessly and improperly driving, operating and maintaining the said automobile so as to cause the injuries hereinafter mentioned to the plaintiff, Laura Sanford.

6. As a direct and proximate result of the negligence of the defendants as aforesaid, the plaintiff Laura Sanford was injured about her head, body and limbs and was rendered sick, sore, lame and disordered and she will in the future be sick, sore, lame and disordered and
 20 she was rendered extremely nervous and will in the future be extremely nervous and she suffered great pain and inconvenience and will in the future suffer great pain and inconvenience and she sustained a severe shock, a fractured rib, a fracture of the spinal bones, together with a serious injury to her back, and plaintiff also sustained numerous cuts on the leg and she was permanently scarred about the limbs, she sustained an injury to her right shoulder and hip,
 30 she was injured internally and she sustained other serious injuries, all of which have and will in the future incapacitate and prevent her from performing her usual household duties and from performing and doing the things she was able to do and perform prior to sustaining the same, all of which is to her damage.

Plaintiff, Laura Sanford, demands of the defendants as damages the sum of one hundred thousand dollars on the first count.

Complaint.

SECOND COUNT.

1. Plaintiff, Chester Sanford on December 6, 1929 and for a long time prior thereto was and still is the husband of the plaintiff, Laura Sanford and as such is obliged to care for and furnish medical aid and services to his said wife and as such he is entitled to her services and consortium. 10

2. Plaintiff Chester Sanford repeats each and every allegation contained in the first count of this complaint as paragraph two of the second count.

3. As a direct and proximate result of the negligence of the defendants as aforesaid, the plaintiff, Chester Sanford has and will in the future be obliged to spend and incur obligation for large sums of money in the necessary and proper medical and surgical treatment of his said wife's injuries, and he has and will in the future sustain the loss of services, society and consortium of his said wife. 20

Plaintiff, Chester Sanford demands as damages of the defendants on the second count the sum of twenty-five thousand dollars.

SMITH AND KIERNAN, 30
Attorneys of Plaintiffs.

Endorsed:

SERVED the within Summons and Complaint upon Charles H. Totty Company by leaving a true copy thereof with Anna L. Moran, she being Treasurer of said Company and Agent upon whom process may be served, at place of business of said Company, Ridgedale Avenue, Madison, 40

Complaint.

N. J.; and served the within Summons and Complaint upon Harlod Yoder by delivering to him a true copy thereof, in person, at place of business of Charles H. Totty Company, Ridgedale Avenue, Madison, N. J., April 4, 1930.

10

FRED S. MYERS,
Sheriff.

By CHARLES A. RIGHTER,
Special Deputy.

I hereby appoint and depute Charles A. Righter, to serve the within writ. Witness my hand and seal this 3rd day of Apr. 1930.

20

FRED S. MYERS,
Sheriff.

HENRY R. SPERLING,
Under Sheriff.
(SEAL)

Rec'd. Apr. 3/30—10 AM

FRED S. MYERS,
Sheriff.

30

40

ANSWER.

Filed May 10, 1930.

NEW JERSEY SUPREME COURT.**MORRIS COUNTY.**

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*
 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
Defendants.

*Action
at Law.**Answer.*

10

20

The answer of the defendants Charles H. Totty Company, a corporation of the State of New Jersey, and Harold Yoder, residing at Madison, N. J., to the complaint filed herein respectfully shows:

ANSWER TO FIRST COUNT.

1. These defendants admit the allegations contained in paragraph 1 of said first count.

30

2. These defendants deny the allegations contained in paragraphs 2, 3, 4, 5 and 6 of said first count.

DEFENSES TO FIRST COUNT.

These defendants will urge at the trial of said cause the following defenses:

1. That said alleged injury and damage to the said plaintiffs was not caused through the negli-

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Answer.

gence of these defendants, or of their servants, agents or employees.

- 10 2. That said alleged injury and damage to the said plaintiffs was caused through the negligence of the plaintiff Laura M. Sanford, in that she failed to look in the direction in which she was proceeding; in that she failed to heed warnings and signals given to her and in that she failed to exercise that degree of care which a reasonable and prudent person would and should have exercised under the circumstances of the case, all of which negligence contributed to and was the cause of the injury and damage complained of.

ANSWER TO SECOND COUNT.

- 20 1. These defendants have no knowledge of the matters and things referred to in paragraph 1 of said second count and leaves the plaintiffs to make proof thereof.

2. These defendants repeat the answers to the first count herein as the answers to paragraph 2 of the second count.

3. These defendants deny the allegations contained in paragraph 3 of the second count.

30 DEFENSES TO SECOND COUNT.

1. These defendants repeat the defenses to the first count as the defenses to the second count.

WM. E. HOLMWOOD,
Attorney for Defendants.

STIPULATION.

Filed May 10, 1930.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*

 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
*Defendants.**Action
at Law.*

10

20

It is hereby stipulated and agreed that the time for the defendant to file answer or other pleadings addressed to the complaint be and the same is hereby extended to and including May 12, 1930.

SMITH AND KIERNAN,
 Attorneys for Plaintiffs.

Dated May 3, 1930.

30

40

REPLY.

Filed May 19, 1930.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*
 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
*Defendants.**Action
at Law.**Reply.*

20

Plaintiffs replying to the answer filed by the
 defendants in the above action say:

1. They deny each and every allegation con-
 tained in the defenses to the first count.

2. Plaintiffs repeat their reply to the defenses
 to the first count as their reply to the defenses
 of the second count.

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SMITH AND KIERNAN,
 Attorneys of Plaintiffs.

40

ORDER.

Filed July 21, 1930.

NEW JERSEY SUPREME COURT.**MORRIS COUNTY.**

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*
 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
Defendants.

*Action
at Law.**Order.*

10

20

Application having been made to amend the answer filed by the defendants and it appearing that notice of motion for leave to amend said answer has been served upon the plaintiffs' attorney, and it further appearing that said attorney has acknowledged such notice, and upon application of William E. Holmwood, attorney of the defendant, it is ORDERED that paragraph 1 of the answer to the first count be amended to read as follows:

30

1. These defendants admit that on December 6, 1929 and for a long time prior thereto the defendant Charles H. Totty Company was a corporation organized and existing under the laws of the State of New Jersey and as such corporation owned a certain automobile but denies all other and further allegations contained in said paragraph 1 of the first count.

40

Order.

And that such amendment also to apply to paragraph 2 of the second count of the complaint.

10 It is further ordered that Charles H. Totty, President of the defendant Corporation, and Harold Yoder, defendant, submit to an examination before trial on behalf of the plaintiffs at the expense of the defendants, or that they answer interrogatories under oath to be submitted by the plaintiff at the option of plaintiffs' attorney before the trial of the above-entitled cause.

RULIF V. LAWRENCE,
Circuit Judge, sitting as a
Supreme Court Commissioner.

Dated July 19, 1930.

20 Entered July 21, 1930, on motion of Raymond E. Taylor, attorney.

30

40

POSTEA.

Filed November 12, 1930.

NEW JERSEY SUPREME COURT.**MORRIS COUNTY.**

LAURA M. SANDFORD (or San-
ford) and CHESTER SANDFORD
(or Sanford),

*Plaintiffs,**vs.*

CHARLES H. TOTTY Co., a cor-
poration,

*Defendant.**Action
at Law.**Postea.*

10

20

This case was tried before the Honorable Rulif
V. Lawrence, Judge, with a jury at the Morris
Circuit on October 24th and October 27th, 1930.

The jury returned a general verdict in favor
of the plaintiff Laura M. Sandford and against
the defendant Charles H. Totty Co. for twenty-
six thousand (\$26,000.00) dollars and also re-
turned and rendered a general verdict in favor
of the plaintiff Chester Sandford and against
Charles H. Totty Co. in the sum of four thousand
(\$4,000.00) dollars.

30

RULIF V. LAWRENCE,
Judge.

R to S. C. & stay
Damages \$26,000.00 L. M. S.
" 4,000.00 C. S.

\$30,000.00

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JUDGMENT.

NEW JERSEY SUPREME COURT.

10	LAURA M. SANDFORD (or San- ford) and CHESTER SANDFORD (or Sanford),	}	<i>Plaintiffs,</i>	<i>Action</i>
	<i>vs.</i>			<i>at Law.</i>
	CHARLES H. TOTTY Co., a cor- poration,		<i>Defendant.</i>	<i>On Postea.</i>

20 It is ordered that judgment be and hereby is entered against the defendant and in favor of Laura M. Sanford (or Sanford), plaintiff, for the sum of twenty-six thousand dollars, and in favor of Chester Sanford (or Sanford), plaintiff, for the sum of four thousand dollars, besides costs to be taxed *nisi*.

On motion of
 SMITH & KIERNAN,
 Attorneys.

30 Entered November 12, 1930.

Damages \$26,000.00 L. M. S.

" 4,000.00 C. S.

\$30,000.00

Costs\$

\$

R. to S. C.
 and stay

40

RULE TO SHOW CAUSE.

Filed October 31, 1930.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

LAURA M. SANFORD and CHESTER
SANFORD,

Plaintiffs,

vs.

CHARLES H. TOTTY COMPANY, a
corporation, and HAROLD
YODER,

Defendants.

*Action
at Law.*

*Rule to
Show Cause.*

10

20

This matter being opened to the Court on motion of Lum, Tamblyn & Colyer, Esqs., attorneys for the defendant, Charles H. Totty Company, made within six days after the trial of the said cause, it is on this thirty-first day of October, 1930, ORDERED that the plaintiffs show cause before the Justices of our Supreme Court at the State House in Trenton, N. J. on the third Tuesday of January, next at 10:30 o'clock in the morning or as soon thereafter as counsel can be heard why the verdict rendered in their favor against the defendant, Charles H. Totty Company, should not be set aside and a new trial ordered.

30

AND IT IS FURTHER ORDERED that all objections or exceptions taken by the defendant, Charles H. Totty Company, during the course of the trial be and the same are hereby reserved to the defendant for argument on appeal.

40

Rule to Show Cause.

AND IT IS FURTHER ORDERED that the execution be and the same hereby is stayed.

RULIF V. LAWRENCE,
Circuit Court Judge.

10 Entered October 31, 1930, on motion of Lum,
Tamblyn & Colyer, attorneys for defendant.

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30

40

REASONS.

Filed November 13, 1930.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*
 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
Defendants.

*Action
at Law.**Rule to
Show Cause.**Reasons.*

10

20

The defendant, Charles H. Totty Company, a corporation, writes down the following reasons upon which it rests its motion for a new trial in the above-entitled cause:

1. The verdict is excessive.
2. The amount of the verdict shows passion, bias or prejudice on its face.

LUM, TAMBLYN & COLYER,
 Attorneys for Defendant,
 Charles H. Totty Company.

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SUBSTITUTION.

Filed November 3, 1930,

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10

 LAURA M. SANFORD and CHESTER
 SANFORD,
*Plaintiffs,**vs.*
 CHARLES H. TOTTY COMPANY, a
 corporation, and HAROLD
 YODER,
*Defendants.**Action
at Law.**Substitution.*

20

We do hereby consent that Lum, Tamblyn & Colyer be and they are substituted as attorneys of record for the defendant, Charles H. Totty Company, in the above-entitled cause in the place and stead of William E. Holmwood, attorney for the defendant.

Dated November, 1930.

30

 WM. E. HOLMWOOD,
 Attorney for Defendant.

40

Certificate of Clerk.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above-stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at
 (SEAL) Trenton, this twenty-eighth day of November A. D. nineteen hundred and thirty. 10

FRED L. BLOODGOOD,
 Clerk.

20

30

40

TESTIMONY.

NEW JERSEY SUPREME COURT.

MORRIS COUNTY.

10 LAURA M. SANDFORD and CHESTER
SANDFORD,

Plaintiffs,

vs.

CHARLES H. TOTTY COMPANY, a
corporation, and HAROLD
YODER,

Defendants.

20 Morristown, New Jersey, October 24, 1930.

Before Honorable RULIF V. LAWRENCE, Judge,
and a jury.

Appearances:

For plaintiffs, Smith & Kiernan, by William
H. Smith, Esq.; King & Vogt, by Robert H.
Schenck, Esq.

30 For defendant, Charles H. Totty Company,
Lum, Tamblyn & Colyer, by Ralph E. Lum, Esq.

For defendant, Harold Yoder, Elmer W. Ro-
mine, Esq.

(A jury was duly empanelled, accepted and
sworn.)

Mr. Lum: I would like noted on the record
that Lum, Tamblyn & Colyer represent the
Charles H. Totty Company.

40 Mr. Romine: Mr. Holmwood is attorney of
record, but he is no longer in the matter and I
appear for Mr. Yoder.

Discussion.

Mr. Schenck: I would like to have it noted on the record King & Vogt appear for the plaintiffs in association with Mr. Smith, of Smith & Kiernan.

Mr. Smith: If your Honor please, may I at this time offer in evidence a transcript of the pleadings as sent to me by the Clerk of the New Jersey Supreme Court and read them to the jury? 10

Mr. Romine: I object.

The Court: No, it is of no importance, don't have to read them. Mr. Lum and Mr. Romine, counsel, call attention to the fact that in your answer paragraph one you admit—

Mr. Romine: Is this the amended answer he is referring to? 20

The Court: No.

Mr. Romine: There is an amended answer.

Mr. Lum: The amended answer covers the whole situation because an order was made for the amendment over his objection.

The Court: I don't see any amended answer.

Mr. Romine: That is a transcript—

The Court: Was one filed?

Mr. Romine: Yes. 30

The Court: If that be so, of course, the pleadings as they are at the present moment will control, but I don't see any amended answer.

Mr. Romine: Did they get the transcript right before the amendment was made?

Mr. Lum: Mr. Smith knows it was amended.

Mr. Smith: I will say that the answer was amended to your Honor, but these are the pleadings I received from Trenton. 40

Discussion.

The Court: The answer to Mr. Smith's suggestion is that the amended answer denied the agency.

Mr. Lum: Yes.

Mr. Romine: Yes.

10 The Court: You cannot use that as conclusive upon these defendants.

Mr. Smith: I don't intend to.

The Court: What you want to get in the record now is that twice they admitted it and then afterwards they denied it?

Mr. Smith: Yes.

The Court: That state of the pleadings, of course, may be indicated. They did file an answer admitting paragraph one, and then filed an amended answer denying agency.

20 Mr. Smith: And I will consent that such an answer has been filed.

The Court: That will be understood.

Mr. Smith: May I read this answer?

The Court: No, I will not allow that, it has already been stated on the record. You don't want any more than that what they did say to admit paragraph one in which you set up agency.

Mr. Smith: Ownership, agency and operation.

30 The Court: Yes, ownership, agency and operation, that was admitted in the first answer filed, then they obtained leave to file an amendment to the amended answer setting up in contradiction of that former admission that there was no agency, and therefore no responsibility in that sense of operation.

Mr. Smith: Yes.

Laura M. Sandford, for Plaintiffs, direct.

LAURA M. SANDFORD, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Mrs. Sandford, how old were you on December 6, 1929? A 39.

Q And who is your husband? A This gentleman just helped me.

Q Chester Sandford? A Chester Sandford.

Q Where do you live, Mrs. Sandford? A Hanover Road, Hanover.

Q And who do you live there with? A My husband and two children.

Q Do you remember December 6, 1929? A Yes.

Q Where were you that afternoon, Mrs. Sandford? A On Mt. Pleasant avenue to a Mrs. Wade's house.

Q What time did you get to Mrs. Wade's house? A About three o'clock.

Q And what were you doing at Mrs. Wade's house? A Giving a sewing lesson to the school girls.

Q Did you sew yourself that day? A Yes.

Q Of course you spoke to them that day? A Yes.

Q How was your speech that day, Mrs. Sandford? A Perfectly all right.

Q What time of the day did you leave Mrs. Wade's house? A About 5:30.

Q And is Mrs. Wade's house on the same road on which this accident took place, Mt. Pleasant avenue? A Yes.

Q As you stepped from her house, where did you go? A I left her porch and cut across her lawn and walked up in the snow off the road.

Laura M. Sandford, for Plaintiffs, direct.

Q Now, Mrs. Sandford, how far off the road were you when you were walking along that road? A About three feet.

Q What was the condition of the roadway that night? A The road was slippery.

Q Did you walk in the roadway? A No.

10 Q Did you ever reach the roadway? A No.

Q Where were you walking, Mrs. Sandford?

A In about three feet from the road.

Q And what were you wearing on your shoes?

A My rubbers.

Q And how deep was the snow where you were walking? A To my rubber tops.

Q And what direction were you going in? A Was going west.

Q Going up this way? A Going up.

20 Q And where were you going? A Home.

Q Tell the Court and jury, Mrs. Sandford, what happened while you were walking along in the snow alongside the road? A I was walking along and I see a truck coming from the opposite direction, and I stepped another step to my right, and continued, and I heard like snow slide, and I turned my head and this car—this way to the rear, struck me in my back and threw me down, and that was the last I remembered.

30 Q At the time the car struck you where were you in relation to the snow that was ploughed on the side? A The snow was piled here and I was here (indicating).

Q A distance of how many feet? A To the right about four feet.

Q Now, you say you heard what? A Like a sliding.

40 Q And what did you do next? A I turned my head quickly, and as I turned my head I saw the rear come this way, and the front go

Laura M. Sandford, for Plaintiffs, direct.

that way, and the rear of the car struck me and threw me on the ground.

Q Did the rear of that car go in the snow?

A Yes.

Q And in what manner did it go across that snow? A Skidding, like that (illustrating).

Q Was any warning given? A No. 10

Q What was the position of the car as it struck you in relation to the road? A It would be in off the road with the rear off the road into me.

Q And where was the front part of that car if you could observe it? A Well, as it struck me it would be facing towards the left.

Q Facing towards the left? A The opposite side of the road.

Q Facing in a southerly direction, you were going west, is that right? A Yes. 20

Q Were you assisted in a car? A Yes.

Q And where were you taken to? A Home.

Q Were you put to bed or did you sit up?

A Put me on the couch at first.

Q Then after? A Then put me to bed.

Q And did the doctor come that night? A Yes.

Q And did you fall that night, Mrs. Sandford?

A I didn't seem, I didn't know anything and then I would, and then I wouldn't, and then I would, but I had dreadful pain in my back and felt as if I would vomit all the time and my head pained. 30

Q And you were put to bed after that? A Yes.

Q And the doctor was called? A Yes.

Q By whom? A Mr. Yoder went and got him.

Q And who was that doctor? A He got Dr. Eckhardt. 40

Laura M. Sandford, for Plaintiffs, direct.

Q Did he call again after the first night? A Yes.

Q When did he come? A The next day.

Q How did you feel the next day, Mrs. Sandford? A Very bad.

10 Q And in what way did you feel bad? A My back, my head, my head and a very nauseating feeling.

Q Did you remain in bed after that, Mrs. Sandford? A Pardon?

Q Did you remain in bed after that, Mrs. Sandford? A Yes.

Q How long did you remain in bed? A 14 weeks.

Q And did Dr. Eckhardt treat you all that time or part of that time? A Part.

20 Q And when did you give up your treatment with Dr. Eckhardt? A After seven weeks.

Q Did you leave the house at all during those seven weeks? A Only when they took me for X-rays.

Q And how did you go to the place where you had the X-rays taken? A We asked him if we should have an ambulance because I couldn't move and he said it wasn't necessary, my husband made a bed in the car and took me.

30 Q And was that the only time you were out during the time you were treated by Dr. Eckhardt? A Yes.

Q After that did you call in another doctor? A Yes.

Q Who was he? A Dr. Myers.

Q Where is his office? A On Mt. Pleasant avenue, Hanover.

Q Has he been treating you ever since? A Yes.

40 Q Is he still treating you? A Yes.

Laura M. Sandford, for Plaintiffs, direct.

Q And how did you feel at the time you called in Dr. Myers? A I was having sinking spells.

Q How did your head feel? A Hurt me and I felt as if I was floating away.

Q And what else? A I would start to get numb at my feet and numbness would creep all the way up on me, and I would get scared, my fingers would get purple. 10

Q How was your back, Mrs. Sandford? A Pains all the time.

Q Is there any time you have not pains in your back? A No.

Q Have you pain in your back now? A Yes, sir.

Q When you went to Dr. Myers how was your head? A It was hurting me; that hurts me, too. 20

Q And at the time you went to Dr. Myers how did you sleep? A Not much.

Q When would you try to go to sleep, or get to sleep, night or daytime, or what? A Did try at night.

Q What time would you go to sleep? A The time would vary.

Q Yes. What would happen after you tried to get to sleep? A I would try and my back would pain and I would try to lay so that it wouldn't and it would keep me awake, and finally I would doze off to sleep and then I would be awakened with the pain. 30

Q And has that been persisting all the time? A Yes.

Q During the day where were you, Mrs. Sandford? A In bed.

Q How many times have you left your house since Dr. Myers treated you? A Well, I go to him three times a week for treatment. 40

Laura M. Sandford, for Plaintiffs, direct.

Q And his house is where? A Up Mt. Pleasant avenue.

Q Who takes you there? A My husband.

Q And what kind of treatment does he give you? A Light treatment.

10 Q Have you been confined to your house ever since the happening of this accident with the exception of the time you have been to the doctor's office? A My husband has taken me to see my mother.

Q And did Dr. Myers prescribe anything for your back? A He kept me strapped till they made a belt for me.

Q And was there any relief from that? A Not for pain.

20 Q You mean that the pain persisted even while the belt was on? A Yes.

Q And what other doctors examined and treated you? A Dr. Kessler and Dr. Dowd and Dr. Mills.

Q And with all the treatment that you received have you gotten better in any way? A Not any to speak of.

Q What is the condition of your leg now, Mrs. Sandford? A My leg grows smaller.

30 Q Which leg is that? A My right leg.

Q Where is it beginning to grow smaller? A All the way from the hip to the ankle.

The Court: Did you have an impediment in your speech, Mrs. Sandford, before the accident?

The Witness: No, sir.

The Court: Never had any such impediment as you have now?

40 The Witness: No, sir.

Laura M. Sandford, for Plaintiffs, direct.

Q Are you able to walk, Mrs. Sandford? A Not without holding something.

Q Did you ever walk from the happening of this accident up to the present time without the assistance of something or somebody? A No.

Q How many floors has your house? A Two.

Q And since this accident have you been on the second floor? A No.

10

Q Did you attempt to go up to the second floor? A No.

Q Why? A I went to raise my foot to go up a step and it makes my back pain.

Q Can you walk up any steps at all? A No.

Q Did you walk up the stairs coming up the courthouse this morning? A No.

Q Were you able to? A No.

Q Where does it pain you most, Mrs. Sandford? A Right there (indicating).

20

Q And how is your hip condition now? A Pains if I sit straight on my hip, straight.

Q And do you do your housework at all now? A No.

Q Do you do anything in your house? A Only sit and my son will put a vegetable up by me and I pare some vegetables.

Q And where are you when you do that? A Sitting in the kitchen.

30

Q And have you done any washing or household duties, or cooking, or sewing, since the happening of this accident? A No.

Q Are you able to do that? A No.

Q Who has been doing your housework, Mrs. Sandford? A My daughter and my husband now.

Q Who did it before? A I had a lady do it for a time.

Q And who is that lady? A Mrs. Stager.

40

Laura M. Sandford, for Plaintiffs, direct.

Q And for how long a time did she do the housework? A I just don't know the exact—

Q Approximately how long? A About two or three weeks.

Q And from that time it was done by other members of your family? A Yes.

10 Q And how many children, you say you have two children? A Two.

Q What are the ages of the children?

Mr. Romine: Any of these facts you may stipulate, you may save this witness by stipulating any of these facts.

Mr. Smith: Yes.

The Court: Mr. Sandford may state the age of the children, the daughter is how
20 old, Mr. Sandford?

Mr. Sanford: 18 and the little boy is 9.

The Court: That may go on record as a stipulation.

Q When did you begin to have that stuttering voice which you now show, Mrs. Sandford? A Seemed about a week after.

Q Did it come gradually? A Yes.

Q And how long has it been in the condition
30 it is in now? A About two months.

Q And is it growing progressively better or worse? A Worse.

Q And what about your hands, what happens when you are sitting, what happens to your hands? A They won't stay still.

Q How about the rest of your body, do the other parts of your body stay still? A There is a tremor always in it.

Q Where, Mrs. Sandford, a tremor is that the
40 word? A Yes. All over me.

Laura M. Sandford, for Plaintiffs, direct.

Q And how long has that persisted, is that all the time or part of the time? A It keeps coming and going.

Q And when you are in bed and fully relaxed does that persist? A Tremor still exists, it goes away, goes and comes.

Q Does it stay away any length of time, short time or how long? A Short time as a general— 10

Q And before this accident, Mrs. Sandford, what work did you do around your house? A Everything, cleaned and washed and ironed and mended and sewed and painted the woodwork, things of that kind.

Q Did you provide the meals for your family? A Cooked and everything.

Q You did sew, you say? A Yes. 20

Q And where did you do sewing? A Sewed all my daughter's and my clothes.

Q And anybody else's? A There was a lady on Mount Pleasant avenue that I would go in and help her out, and do that sewing now and then.

Q Now, can you sew now? A No.

Q Can you do any cooking now or any housework? A No.

Q How was your speech before this accident? A It was all right. 30

Q Were you able to talk fluently before this accident? A Yes.

Q Without any hesitation? A Yes.

Q What did you weigh before this accident, Mrs. Sandford? A 120, the last I was weighed.

Q Before this accident. And what do you weigh now? A 105.

Q That is with your clothes on or without; and how is your appetite now? A Not good. 40

Laura M. Sandford, for Plaintiffs, cross.

Q Do you attempt to eat? A Yes.

Q And what happens to you? A Makes me feel sick.

Q How did you feel generally before this accident, Mrs. Sandford? A Perfectly all right.

Q Did you go different places with your husband? A Yes.

10 Q And your children? A Yes.

Q Did you go out in the car with him? A Yes, and drove.

Q You drove an automobile before this? A I drove my car myself.

Q And did you have any difficulty in driving before this? A No.

Q And how long before the accident had you been driving an automobile? A Either four or five years.

20 Q And you were always properly able to drive a car? A Yes.

Q Of course, are you able to drive a car now? A No.

Q Are you able to do anything now? A No.

Q After you were taken home you met Mr. Yoder? A Yes.

Q And did you have any conversation with him? A Yes.

30 Q And what did you say to him and what did he say to you? A This was on a Saturday afternoon and he came in and he asked me how I felt and I said badly. He said he skidded off the road and hit me and he had one of my rubbers in his car, he found it there Saturday morning.

Cross examination by Mr. Romine.

40 Q Mrs. Sandford, do you recall what time of night it was that you were walking along the road just before this accident? A About 5:30.

Laura M. Sandford, for Plaintiffs, cross.

Q Was it dark? A Yes.

Q Dark enough for automobiles to have lights on them? A Yes.

Q And you noticed the light on the truck that was approaching you? A Yes.

Q And where were you walking at that time? A Off about three feet to the right of a little mound of snow. 10

Q That is, the roadway had been ploughed and the snow was on each side, is that right?

A Yes.

Q Of course the truck was not coming on the same side that you were walking, was it?

A No.

Q Did that truck have bright lights, or not?

A No.

Q You could see the lights, couldn't you? 20

A Yes.

Q I understood you to say when this truck approached you you stepped a step or two further over to the right? A I said I stepped one step to the right.

Q And the truck was on the other side of the road? A Yes.

Q Will you tell us why it was you stepped this one step to the right if you were in the snow, and off the road at the time? A For safety. 30

Q Let me ask you how wide was the ploughed portion of the road? A All the tarvia was cleared.

Q Do you have any idea how wide that was, the cleared portion? A Not exactly.

Q Can you give us any information about it? A I would say about 20 feet.

Q Wide enough for two cars to pass? A Yes.

Laura M. Sandford, for Plaintiffs, cross.

Q And at that particular time were you walking in the tarvia portion of the road? A No.

Q What I do not understand, Mrs. Sandford, suppose if you were walking on the snow portion of the road, some 15 or 20 feet away from the truck, why it was you stepped over a foot
10 to the right when you saw this truck approach you, can you explain that? A Just for extra safety.

Q You were then you say walking in the snow? A Yes.

Q And how far from the edge of the roadway that was ploughed? A Was I?

Q Yes. A About three feet.

Q Then if your distance is right you were some 15 or 20 feet from the truck then, weren't
20 you? A I suppose.

Q And you mean to tell the jury that you stepped a foot to the right when you saw the truck approaching you? A Yes.

Q How deep was this snow, do you know? A Oh, up to my rubber tops.

Q In inches, how deep would you say, four or five inches? A No, I would say two or three.

Q When they ploughed the road and
30 moved the snow over to the side, didn't it make the snow on the side deeper than the ordinary layer of snow was? A Yes.

Q How deep was it there, can you tell us? A About five or six inches.

Q You realized I suppose that there was a car coming up in back of you, didn't you? A No.

Q You could see the lights reflected on the roadway, couldn't you? A No.

Q Didn't notice that? A No.
40

Laura M. Sandford, for Plaintiffs, cross.

Q You did not have any intimation that this car was approaching you at all? A No.

Q When was it that you stepped this foot to the right, was it just before you were struck?

A When I first saw the truck.

Q That is a straight road there, isn't it? A No.

10

Q How far away was the truck when you first saw it? A I couldn't say.

Q You could see the lights on a moving truck coming towards you? A Yes.

Q Did you wait until the truck got almost to you before you stepped aside? A No.

Q Well, with reference to the time that you were struck, how long before that was it that you stepped this foot to the side? A When I saw the truck I took the step to the side.

20

Q Then, I ask you how far away was the truck when you took this step? A I couldn't say.

Q Was it five feet, ten feet, or twenty feet? A It seemed further than that.

Q How far were you walking on this snow portion from the edge of the ploughed Amesite or the clean Amesite? A I was about three feet to the right of the snow that was pushed back.

Q Was that where you were when you were struck, about that distance? A With the other step to the right that I had taken.

30

Q Then you took another step beyond three feet, is that right? A Yes.

Q Now, as I understand it, you say that just as the truck passed you the Ford skidded over toward the truck, is that right? A No, I don't say that. I said I saw the truck coming from the other direction and took my step to the right.

40

Laura M. Sandford, for Plaintiffs, cross.

Q Well, the question I am asking you is, did this Ford car that you say struck you from the rear, pass the truck at just the point where the accident occurred? A I couldn't say.

Q Had the truck entirely passed by or not? A I don't remember.

10 Q Does it seem to you that both the truck, automobile and you were all there about the same time? A I couldn't say that.

Q Now, what side were you struck by the Ford, what side of your body? A In my back.

Q In your back. You were walking along, I take it, parallel with the ploughed portion of the road, the snow portion? A Yes.

Q When this Ford car skidded off to the left, what part of the car struck you, or what
20 part of your body was struck, could you indicate to us—I mean without getting up? A The rear struck my back and threw me down.

Q Well, do you say your back or your side, you would be walking along this way (illustrating)—assuming this is the ploughed portion of the snow, you walked along in line with that, is that right? Right alongside of it three or four feet away? Do I understand that when this car skidded it struck you on the left side?

30 A No, my back and the right side.

Q Well, was it more on the side of your body or more in the back, in the centre? A Right—just centre and side.

Q And I take it you went down in the snow, didn't you? A Yes.

Q And someone got you up? A Yes.

Q Do you recall it being Mr. Yoder? A Mr. Yoder took me home.

Q And did Mr. Yoder get a doctor for you, or did you get one? A Mr. Yoder did.
40

Laura M. Sandford, for Plaintiffs, cross.

Q And what doctor did he get? A Dr. Eckhardt.

Q From Madison? A Yes.

Q And Mr. Yoder came to see you again after that, did he, next day, and how many times did he come to see you? A About ten—you mean the doctor? 10

Q No, I mean Mr. Yoder, how many times did he come to see you? A Just the one.

Q You mean once after the night he took you home? A Yes.

Q Did you ever send for him after that? A No.

Q Did you write him telling him about your condition?

Mr. Smith: Objected to, that is not material. 20

The Court: Doesn't make any difference.

Mr. Romine: I take an exception.

The Court: Unless you want to show that her condition was not as it is now claimed.

Mr. Romine: I think it is quite important to have this jury know—

The Court: The fact she did write Mr. Yoder, do you think that makes any difference? I will allow her to answer it. It may have some slight bearing. Did you write to Mr. Yoder about your condition? 30

The Witness: No, Mr. Yoder said he would come in and see me the next Saturday.

The Court: Never came back?

The Witness: No, sir.

Q And you never wrote him about your condition after that? A No. 40

Laura M. Sandford, for Plaintiffs, cross.

Q Now, you say that you had an X-ray? A Yes.

Q Do you remember when that was, I mean how many days after the accident? A It was about ten days, on a Saturday morning.

10 Q Now, this accident to you, this injury occurred on the 6th of December, did it not? A Yes.

Q And was it not the next week you went to the hospital for the X-ray photograph? A The next following Saturday.

Q And that X-ray photograph was made at the Memorial Hospital, Morristown, was it not? A Yes.

Q Did the doctor report to you what the X-ray photograph showed? A Didn't show me a report.

20 Q Did he tell you what it showed? A Said—

Mr. Smith: I object to that.

The Court: It wouldn't make any difference what he said.

Mr. Romine: I want to find out if she knew what her condition was.

The Court: She is telling you.

Mr. Romine: Counsel object—

30 Mr. Smith: The doctors will be in court.

The Court: Yes.

Q Now, were there any sidewalks on the road where you were walking? A No.

Q As I understand it, you were walking with your back to the car that was approaching you, is that right? A Yes.

40 The Court: Don't put that that way, she was not walking with her back to the car

Laura M. Sandford, for Plaintiffs, cross.

that was approaching her, she was struck in the back by the car that came up from the rear, not coming at her.

Mr. Romine: No.

Q You were walking on your right-hand side?

A Yes.

10

Q With your back to the car that came up and struck you, is that right? A Yes.

Q Don't you know that under the law of this State where there are no sidewalks that pedestrians are required to walk facing approaching cars?

Mr. Smith: I object to that.

Mr. Romine: That is the law.

The Court: Doesn't make any difference. 20

Mr. Romine: Makes a lot of difference.

The Court: I know, you may say she was not taking due care of herself in the manner in which she was walking, but the mere fact there is a law, I will allow her to answer. What is the answer?

The Witness: On the other side of the road is a deep ditch.

Mr. Romine: That isn't an answer to the question. 30

The Court: Just what I surmised.

Q And the road you say was 20 feet wide in the clear, you say? A About.

Q And could have walked on the other side of the road facing the car approaching you, could you not?

Mr. Smith: I object to that, it is immaterial, she tells where she is walking. 40

Laura M. Sandford, for Plaintiffs, cross.

The Court: It is cross examination, and he has a right to probe what she did with reference to taking care of her own safety, it is proper cross examination.

Mr. Smith: Yes.

10 Q You could have walked on the other side of the road facing approaching cars, couldn't you? A I would have had to walk in the road, then.

Q But the snow was ploughed in the centre of the road, wasn't it? A The centre was clear, yes.

20 Q And you could have walked on the snow on either side because the road was ploughed to the full width, isn't that correct? A Not without falling in the ditch.

Q In other words, it was more convenient for you to have walked on the side you walked than it would be for you to walk on the other side, is that right? A Not necessarily.

Q Now, you say that you did very little work after this accident?

30 Mr. Smith: I object to that, very little, she didn't say that, she said didn't do any work except pare the potatoes.

The Court: That would justify the question.

Q You did some sewing? A No.

Q Didn't you do sewing in June of this year?

A No.

Q You remember a young lady coming to see you about this accident in June? A Yes.

40 Q You were sewing then, weren't you? A No.

Laura M. Sandford, for Plaintiffs, cross.

Q Didn't you tell her you were making clothes for your daughter, then? A This lady that was there was making the clothes for my daughter.

The Court: Were you sewing at all?

The Witness: No.

10

Q Before this accident you did not go out very much or do any work, did you, the heaviest work you did was sewing, wasn't it? A And my housework.

Q Well, you had your daughter there to help you with the housework? A My daughter was in school.

Q When she came home from school she helped you, didn't she? A No.

Q Didn't do any work at all in the house? A Probably dried dishes. 20

Q On Saturday she helped you and Sunday? A To dust and get through that we all might go out.

Q You never were very strong physically, were you, Mrs. Sandford? A Yes.

Q Did you say you have two children? A Yes.

Q You had difficulty with child labor when they were born, didn't you? 30

Mr. Smith: I object to that, it is assumed that every woman would have some difficulty.

The Court: No, wouldn't necessarily follow; she may develop any nervous condition of a permanent nature that had its inception before the accident.

Mr. Smith: In view of the fact the next child is nine years old? 40

Laura M. Sandford, for Plaintiffs, cross.

The Court: Yes.

Mr. Smith: I withdraw my objection.

10 The Court: Her physical condition may be examined necessarily before this accident because we are concerned here with the proximate result of the alleged negligence of one or the other of these defendants. Did you have difficulty in labor at the time of the birth of the child?

The Witness: It was natural.

The Court: After that did you have any difficulties at all?

The Witness: Just what they call nervous exhaustion from childbirth.

20 The Court: How long did that last?

The Witness: I don't remember the time, about four weeks.

The Court: Then, what was your condition?

The Witness: Gradually got strong and well.

The Court: Had no nervous difficulty after that?

The Witness: No.

30

Q Now, you say that you had normal, natural labor in childbirth, for how long a period did that last, I mean was it one, two or three days going through the labor period? A From about two in the afternoon until 11 in the evening.

40 Q Remember telling this lady, Miss Lowrie, that came there to see you, I have referred to before, that your labor periods lasted some times two or three days? A No.

Laura M. Sandford, for Plaintiffs, cross.

Q How long did Dr. Eckhardt treat you? A Seven weeks.

Q When did you say this impediment in speech started? A Soon after I was hit.

Q What do you mean by that, a week, two weeks or two months? A About a week.

Q Did you have that impediment in speech when the doctors examined you? A Dr. — 10

Q I refer now to Dr. McMahon. Do you know Dr. McMahon of Morristown? A Yes.

Q Will you say now you had that impediment in speech when he examined you? A Yes.

Q You talked with him? A Yes.

Q Answered his questions? A Yes.

Q And you still say the impediment in speech existed at that time? A Some. 20

Q Remember a doctor from Newark examining you? A Yes.

Q That was after Dr. McMahon? A Yes.

Q Two or three months after? A I don't remember.

Q Do you say you had the impediment of speech at that time? A Yes.

Q As pronounced as manifested now? A No.

Q And you remember this young lady coming there to talk to you, about this case, Miss Lowrie? A She didn't talk about this case. 30

Q She talked to you about your condition and so on, didn't she? A Yes, but that isn't what she said she came for.

Q You remember her being there? A Yes.

Q You talked with her and she talked with you, is that right? A Yes.

Q Did you have the impediment of speech at that time? A Yes. 40

Laura M. Sandford, for Plaintiffs, cross.

Q Was it as pronounced as it is now? A No.

Q That was about three or four months ago? A June.

Q Was there any impediment of speech at that time? A Yes.

10

Cross examination by Mr. Lum.

Q Mrs. Sandford, I understand that you drove a car before the accident? A Yes.

Q And you passed an examination for a license? A Yes.

Q You were familiar then with what we call the Traffic Act of New Jersey? A Yes.

Q And you knew there was no sidewalk at this place where the accident happened? A Yes.

20

Q You knew that the law required that you should walk on the extreme left side of the road facing approaching traffic, didn't you? A No.

Q You mean you did not notice that part of the Traffic Act? A No.

Q You were walking on the same side on which was the house which you had come out of? A Yes.

30

Q There was nothing to have prevented you from walking in the cleared part of the road, towards this truck that was approaching you, was there? A Yes.

Q What? A The road was slippery and I should not be on the road.

Q Didn't you know the place that you should not be was on the side of the road not facing the traffic? A Well, I would have had no way of walking.

40

Laura M. Sandford, for Plaintiffs, cross.

Q Mrs. Sandford, you remember that Mr. Yoder brought some flowers over to you, did he not? A Yes.

Q That was some several days after the accident? A The next day.

Q Do you remember that you spoke of the accident with him? A Yes.

10

Q You did not make any complaint against him at that time, did you?

Mr. Smith: I object to that as immaterial.

The Court: It may have some relation to the issue of negligence here.

Q Did you, or did you not? A He just said he hit me, and I knew that.

Q Do you remember saying, you and your husband, both, that there was no need to report the accident to Commissioner Dill? A No.

20

Q That was not mentioned? A Didn't say shouldn't be reported.

Q Did you say it should be reported? A Mr. Yoder said he would report it.

Q Do you remember your husband saying in your presence that it would not be necessary, not to do it, it would be a mark against him? A Didn't say it.

30

Q Do you remember saying to Mr. Yoder that you expected to be well in a few days? A No.

Q Do you remember saying to him that it was as much your fault as his? A No.

Q Did you ever communicate with Mr. Totty, or the Totty Company at any time in any way? A No.

Q Never asked Mr. Totty to come to see you? A I did not.

40

Laura M. Sandford, for Plaintiffs, re-direct.

Q Ever tell him that you thought his company was responsible for this accident in any way? A I did not.

Re-direct examination by Mr. Smith.

10 Q You started suit against Totty and Yoder, did you not? A Yes.

Q Now, you say the snow was five or six inches, on examination now, where was that snow, five or six inches deep? A Where it had been pushed back by the scraper.

Q That is not where you were walking? A No.

Q And how deep was the snow where you were walking? A About two inches.

20 Q Now, this truck you say you saw coming down, and you saw the lights on that truck, how far away was that when you saw it, how many feet or yards? A I couldn't say.

Q Approximately, 100, 175, 200, 220? A Might say 200 feet.

Q And you say the road was slippery? A Yes.

Q And your last child was born when? A Nine years ago last April 2nd.

30 Q And you were sick for a period after the birth of that child? A Yes.

Q For how long? A About four weeks.

Q How long were you sick after the birth of the first child? A Two weeks I was in bed.

Q And then you were up in the house? A Yes.

Q For how long? A All the time.

40 Q Now, Mrs. Sandford, since the happening of this accident what is your menstrual condition? A It is not correct.

Chester G. Sandford, for Plaintiffs, direct.

Q In what way is it not correct? A Over-time and undertime.

The Court: Irregular?

Q How often do you menstruate now? A Now?

10

Q Yes, during the past summer I will say.
A Can't have any way of keeping track of it.

Q Do you suffer any pain before or during your period? A Yes.

Q How is that pain compared to the pain or condition that you had during the same period before the happening of this accident? A Harder.

Q Was the point where the accident happened, was that close by to Mrs. Wade's house where you came from?

20

The Court: How near to Mrs. Wade's house?

The Witness: There is one house, and then the lot, and I was in front of the lot.

The Court: The vacant lot.

(Witness excused.)

The Court: We will take the usual recess and come back at quarter to one.

30

(Convened pursuant to adjournment.)

CHESTER G. SANDFORD, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Mr. Sandford, how old are you? A 43.

40

Chester G. Sandford, for Plaintiffs, direct.

Q Are you the husband of Mrs. Laura Sandford, one of the plaintiffs in this action? A Yes.

Q How long have you been married to Mrs. Sandford? A 20 years.

10 Q How many children have you? A Two.
Q There names? A Evelyn.

Q Age? A 18.

Q And the boy? A Just nine.

Q Do you recall the night of December 6, 1929? A Yes, sir.

Q What time did you get home that night? A About quarter of seven.

Q What did you see when you got home? A I saw two cars standing in front of the house
20 and wondered what happened, and I saw a bushy head of hair in the window, which I thought it was my little boy.

Mr. Romine: Object.

The Court: You found your wife at home, she had been home?

The Witness: Yes.

The Court: Where was she when you went in the house?

30 The Witness: On the settee, lying down.

Q Who was present then? A Dr. Eckhardt was there, Mr. Yoder was there.

Q What did you observe about Mrs. Sandford at that time? A She was very excited, said she had gotten hit and her back hurt her.

Q Did you have any conversation with Mr. Yoder? A Only for a couple of minutes, Mr. Yoder said he was the one that hit her and
40 brought her home and he went for a doctor and

Chester G. Sandford, for Plaintiffs, direct.

then he told me that he had skidded off the road and struck her.

Mr. Romine: I object to his telling what some one said.

The Court: This is Mr. Yoder talking directly to this gentleman. 10

Q Mr. Yoder told you that? A Mr. Yoder told me that.

Q Then after awhile Mr. Yoder and Dr. Eckhardt left? A Yes.

Q Then, what did you do with Mrs. Sandford? A Made a bed downstairs for Mrs. Sandford on the settee.

Q Did she remain in bed that night? A She remained in bed for weeks after. 20

Q And what did you observe about her next morning? A The next morning she said she had great pain and that her back hurt her. She did not sleep all night, she tried to turn some times and she would cry, and some times call me and say, "Oh my back."

Q Did you go to business the next morning? A I did.

Q When you got back that night did you observe her? A She was worse. 30

Q Where was she? A Still in bed.

Q Did Dr. Eckhardt come to the house? A Dr. Eckhardt came to the house.

Q And for how long a period of time was Dr. Eckhardt treating her? A For about seven weeks.

Q And during that seven weeks was she confined to her bed? A Yes.

Q She had occasion to leave to go to the hospital? A Yes. 40

Chester G. Sandford, for Plaintiffs, direct.

Q Who took her there? A I took her.

Q In what? A My car.

Q How did you arrange to take her there?

A I laid her on the back seat of the car.

Q And took her to the hospital? A To Morristown Hospital.

10 Q During the seven weeks that she was being treated by Dr. Eckhardt how did she sleep at night? A She didn't sleep good.

Q What would she do? A Have spells in the night, wake up, lie there awake and try to turn over one side to the other, but she could not.

Q Then, after Dr. Eckhardt, you called in Dr. Myers? A Yes.

Q And has he been treating her ever since?

20 A Ever since.

Q Has Mrs. Sandford left the house ever since the happening of the accident to the present day? A Only to be taken to Dr. Myers, or to her mother's.

Q How would she be taken there? A I would take her in the car.

Q How would she get from the steps of your home to the car? A I helped her, she would be helped.

30 Q How? A Most always I had to pick her up and carry her.

Q Could she walk down the steps? A No, sir.

Q You have a 2-story house? A 2-story house.

Q Has Mrs. Sandford been upstairs on the second floor since the happening of this accident? A No.

Q Where has she been most of the time? A At home.

Chester G. Sandford, for Plaintiffs, direct.

Q Where? A Hanover.

Q Where, in bed? A On the first floor most of the time in bed.

Q And what do you observe or what have you observed about her that is different since the happening of this accident, what does she do? A Well, she can't do her work, she can't get around. 10

Q What about her speech? A Her speech, you can't understand her sometimes.

Q What does she do? A She stutters.

Q When did this stuttering commence? A Shortly after the accident.

Q Did it come on gradually? A It come on gradually and seems to be getting worse.

Q And what about the movement of her fingers and body? A She don't seem to have control of them. 20

Q What does she do, tell the Court and Jury? A Shivers and shakes all the time, can't stop, can't move, her back aches—her right leg—

Q Assuming she was lying in bed, would that go away? A No, sir, she would still have it.

Q Have what? A Her hands would shake and her legs would shake.

Q What about her body, her trunk? A Her body would tremble. 30

Q How has she been in the past several weeks or months? A She hasn't gained any, she has been worse, if anything.

Q Who did the housework after the happening of the accident? A Her daughter, myself, and then I had a woman come in and do some of it.

Q Has Mrs. Sandford done any of the housework? A No, sir. 40

Chester G. Sandford, for Plaintiffs, direct.

Q And who is doing the housework now? A I do and my daughter; I do it when I am home, my daughter works at night.

Q Works where at night? A Home doing housework.

10 Q Does she work during the day? A She goes to business during the day.

Q And before this accident was your daughter home or at school? A The first part she was to school, but had to stay home at times, then after school was closed I had to keep her away ever since to do the work home, now she goes to business.

Q When she comes home at night she does the work? A When she comes home at night she does the work.

20 Q And you also do it? A Yes, sir.

Q What was Mrs. Sandford's disposition before this accident? A Had a very pleasant disposition.

Q What would she do before the accident she doesn't do now? A She wanted to go and have a good time, now she don't, she just wants to stay home and lie down.

30 Q What did Mrs. Sandford do before the happening of this accident? A She done all her own work, housework, made all the children's clothes, done her washing and ironing and done some sewing for neighbors.

Q Did Mrs. Sandford drive an automobile before this accident? A Yes.

Q And for how long a period of time did she drive? A Four years.

Q And can she do any of the work that she did before the accident now? A No, sir.

40 Q Do you recall what Dr. Myers prescribed for her? A He prescribed for her to be baked. She had treatments of baking.

Chester G. Sandford, for Plaintiffs, direct.

Q Where did the baking treatments take place? A In his office.

Q And had he a machine there? A He had a machine there, he laid her on the table and put the light on her back.

Q How long would that last? A He started with about 20 minutes, gradually worked it up 10
a half an hour.

Q And did he continue those treatments? A Right along.

Q What else did he prescribe? A He prescribed for her to have another belt.

Q Just before you get to the other one, were there two belts?

Mr. Lum: Isn't the doctor here?

Mr. Smith: I am leading up to that, I 20
will have the doctor corroborate it.

Mr. Lum: All right.

Q One belt was put on? A Yes.

Q When was that put on? A That was put on right after Dr. Myers took the case over.

Q How long did that remain on? A That has been on, I don't know just how many months it has been on, it has been on ever since he took the case, right after he took the case we went and got the belt. 30

Q Was another belt prescribed for her? A Yes.

Q And after that belt was put on, after Mrs. Sandford wore the belt, what was the condition of Mrs. Sandford, any better? A It seemed to brace her for a short time, but doesn't hold her now.

Q Now, Mr. Sandford, have you observed Mrs. Sandford's right leg since the happening of this accident? A Yes. 40

Chester G. Sandford, for Plaintiffs, direct.

Q Would you tell the Court and jury what you observed about it? A Her right leg is getting smaller.

Q Any complaint from that region? A She complains of her hip, from the hip down her leg is getting smaller.

10 Q Is it perceptibly smaller that you could observe? A It is noticeable.

Q Have you observed her trying to walk? A Yes.

Q What does she do with that right leg? A She drags her right leg.

Q Have you observed her to put her weight on that right leg? A Yes.

Q What happens? A It goes from under her.

20 Q Now, did Mrs. Sandford have anything wrong with that leg before the accident? A No, sir.

Q Was it normal compared with the other leg? A Yes, sir.

Q Wasn't any thinner? A No.

Q Did she ever drag her leg and complain of pain at her hip before this accident? A No.

30 Q What was the general condition of Mrs. Sandford's health before the happening of this accident? A In good health before this accident.

Q When was the last child born? A Nine years ago.

Q And of course she had her trouble then? A She had her trouble then.

Q And that lasted about four weeks? A That lasted about four weeks.

Q After that did she come around all right? A Yes.

40

Chester G. Sandford, for Plaintiffs, direct.

Q After that did she do her housework? A Yes.

Q Did she ever complain of nervousness before? A No.

Q Did you ever observe her stutter before? A No.

Q Or shaking of the hands? A No. 10

Q Or tremor of the body? A No.

Q Or any of the conditions that are present today? A No.

Q Did Mrs. Sandford weigh any more before the accident than she does now, or don't you know? A She weighed about 15 pounds more.

Q Now, did Dr. Eckhardt submit a bill? A Yes. 20

Q How much was his bill? A \$64.

Q And Dr. Myers' bill? A For almost \$500.

Q It is not quite \$500? A Not quite \$500.

Q Now, what did you pay for that brace? A The brace cost \$12.

Q And what did you pay for the second brace? A The second brace, I haven't been able to take her for it yet.

Q Is that being made? A Waiting for a fitting. 30

Q And you don't know what that will cost? A No, sir.

Q Now, have you received from Dr. Kessler a bill? A No.

Q Did Dr. Dowd send a bill? A No, sir.

Q How long was Mrs. Sandford in the hospital—she just went there for X-ray pictures, didn't she? A That is all.

Q Did you get a bill for those? A Yes.

Q What was the bill for them? A \$20. 40

Chester G. Sandford, for Plaintiffs, direct.

Q Did you have to pay for outside help for your home? A I paid a woman to come in and do some housework.

Q How much did you have to pay her? A 50 cents an hour.

10 The Court: How many hours?

The Witness: She worked generally three or four a day.

The Court: How long a time?

The Witness: For about three weeks.

Q And then after that you did the housework yourself? A Yes.

Q In conjunction with your daughter? A Yes.

20 Q Do any of the neighbors assist in the household duties, the cooking? A Some of the neighbors brought us in victuals to eat.

Q Has your wife done any cooking since the happening of this accident? A She does very little cooking, she might boil potatoes in the evening.

Q How does she do that? A She sits at the table, the little boy puts the potatoes on the table and she peels them.

30 Q I mean, who does the heavy work, scrubbing, washing of dishes, and dusting? A My daughter and the little boy and myself.

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

Evelyn Sandford, for Plaintiffs, direct.

EVELYN SANDFORD, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Miss Evelyn, you are the daughter of Mr. and Mrs. Sandford, the plaintiffs in this case? 10

A Yes.

Q How old are you? A 18.

Q Do you remember the happening of this accident, the day it happened, December 6, 1929? A Yes.

Q And of course you remember your mother before this accident did happen? A Yes.

Q Remember her general condition? A Yes.

Q What was the general condition of your mother's health before the happening of this accident? A She was in fine health. 20

Q What things did your mother do before the happening of this accident? A She did all of her housework, cooking, baking and everything else that goes with home duties, and she did a little bit of sewing for a neighbor when she needed it, and all of our sewing.

Q Made the clothes for you children? A Yes.

Q And before this accident you were going to school? A Yes. 30

Q What school did you go to? A I attended Madison High School.

Q What grade were you in? A In my senior year.

Q Did you quit school then? A I did not, I did the work at home, and went on to evening school.

Q You mean you did the work after the happening of the accident? A Yes. 40

Evelyn Sandford, for Plaintiffs, direct.

Q We will come to that in a moment. How was your mother before this accident, what was her disposition? A She was a sunny disposition, and always willing to help any one, and made the home as happy as any mother could possibly make it for her family.

10 Q Was your mother given over to going out with the family? A With the family, yes.

Q Going away in the automobile? A Yes.

Q Who drove the car at times? A Mother drove it and Daddy drove it.

Q Did she do any work around the grounds of your home? A Well, not this home, but other homes she did.

Q Tell the Court and jury? A Years ago she had a garden, she raised mostly everything
20 we used in the house, she raised it all herself.

Q And did she do the planting and hoeing and things like that? A Yes, sir.

Q And did your mother—of course you had occasion to observe her since before this accident? A Yes.

Q Tell the Court and jury how your mother spoke before the happening of this accident? A She spoke perfect.

Q She did? A Yes.

30 Q Do you recall if your mother slept well before this accident?

Mr. Romine: I don't want to object, but these questions—

Mr. Smith: I withdraw it.

Q Was your mother able to walk before this accident? A Certainly.

Q And did you ever take walks with her? A Surely.

40

Evelyn Sandford, for Plaintiffs, direct.

Q Did she walk with any hesitancy? A No.

The Court: How was her speech?

The Witness: Her speech was perfect.

The Court: No impediment?

The Witness: No, sir.

10

Q Now, since this accident what do you observe about your mother, Miss Sandford? A Well, she is weak, she can't walk, can't speak right, and she hasn't any way near the disposition she did before, and is in pain all the time.

Q Has she ever walked since the happening of the accident that you know of? A Not without help.

Q And when she has to go from one place to another in the room does she have to be helped? A She has to lean on something all the time. 20

Q And have you observed her going down the steps, or trying to get down the steps? A She can't, it is impossible.

Q How is that done? A Daddy usually carries her down.

Q Carries her down? A Yes.

Q Do you have occasion to observe her during the night since the happening of the accident? A I did have in the beginning. 30

Q What did you observe? A She did not sleep at all, she was restless, and she would try to lay so she was comfortable, but she did not seem to get fixed.

Q What about her body when she is lying in bed, is her body rigid or just how is it?

Mr. Romine: Object, it is a leading question. 40

Evelyn Sandford, for Plaintiffs, direct.

Mr. Smith: I withdraw it.

Q Have you observed anything else about your mother that exists now that did not exist before the accident? A She has become thinner and she looks worn out, and as I said before
10 she hasn't the disposition she had.

Q And did she shake before the accident?
A No.

Q And does she shake now? A Yes.

Q What parts of the body shake? A All parts.

Q Now, were you there, Miss Sandford, when Mr. Yoder was in your house? A I was.

Q When was that? A I was there when he brought my mother home.

Q And who else was there? A My little
20 brother.

Q And did you have any conversation with Mr. Yoder? A Well, when he brought my mother in I asked him what had happened, and he told me his car had skidded and knocked her down, and he had brought her home and that he was going to get a doctor.

Q And that night a doctor came? A Yes.

Q Dr. Eckhardt? A Yes.

Q And you know your mother has been
30 treated by Dr. Eckhardt, Dr. Myers, Dr. Dowd, Dr. Mills and Dr. Kessler? A Yes.

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

Laura Zettenstrom, for Plaintiffs, direct.

LAURA ZETTENSTROM, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Mrs. Zettenstrom, where do you live? A
Belleville, New Jersey. 10

Q In Belleville now? A Yes.

Q Where did you live before? A Well, I
moved from East Orange to Belleville.

Q Did you know Mrs. Sandford before this
accident happened? A Yes.

Q How long have you known her? A Ex-
actly 16 years.

Q And where did you first meet her, Mrs.
Zettenstrom? A In East Orange.

Q And will you tell the Court and jury your
observations as far as her general appearance
and health is concerned, as you observed before
the happening of the accident on December 6,
1929? A Well, she has always been in perfect
health as far as I knew and always done her
work, took care of her family, just as any woman
would do. 20

Q Have you been in her home? A Yes.

Q Did you observe her doing work? A Yes.

Q What work did you observe her doing? A 30
Regular home duties.

Q And before December 6th did you have
occasion to observe her speech? A Yes.

Q And how was her speech before? A Per-
fect.

Q And what was her general condition before?
A Perfectly all right.

Q Did she have these tremors and nervous
appearance about her? A No.

Q Her disposition was what? A Excellent. 40

Mary W. Wade, for Plaintiffs, direct.

Q And you saw her after December 6th?

A Yes.

Q Where? A At her home.

Q How many times have you seen her since December 6th? A I don't just remember how many times.

10 Q Several times? A Several times.

Q And where did you find her when you went there? A In bed.

Q What did you observe about her while she was lying in bed? A Well, she was all in.

Q What would she do? A She was extremely nervous—ill, I thought—

Mr. Romine: I object.

Mr. Smith: Not what you thought, just tell the jury what you observed.

20

The Court: You could see she was an ill woman?

The Witness: Yes, she was a very ill woman.

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

30

MARY W. WADE, called as witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Mrs. Wade, where do you live? A In Hanover.

Q And how long have you lived in Hanover?

A I have always lived there.

40 Q And do you know Mrs. Sandford? A I do.

Mary W. Wade, for Plaintiffs, direct.

Q Did you know her before December 6th, 1929? A Yes.

Q What was her general physical condition if you could observe it before December 6th, 1929? A Whenever I saw her she was able to be going around and driving her car and she did her own housework.

10

Q What was her general disposition? A She was very bright and full of pep.

Q And did you see her after the happening of this accident? A I have seen her a good many times after it.

Q Will you tell the Court and jury what you observed about her when you saw her? A Of course the first time I saw her she was in bed, and she was a terrible wreck, I think she had been driving her car every day almost up to the time of the accident, and she has not been able to do anything since then.

20

Q You of course spoke to her before December 6, 1929? A Oh, seen her in her house a great many times.

Q How was her speech before that? A I never noticed any impediment in it.

Q And have you observed the impediment in it now? A Certainly.

Q What else did you observe about her as you went into her home, about her general physical condition now? A Of course it is terrible for her to get around, she can hardly walk, I have taken her out in the car sometimes, but always helped her down the steps and into the car, she can't do anything by herself.

30

Q Who does her housework now, who does her cooking, do you know? If you don't know just tell us. A Why, her husband, and I know her husband and daughter do most everything before they leave in the morning.

40

Thomas S. Reilly, for Plaintiffs, direct.

Q Did you ever assist her? A I have taken things into her to eat lots of times when she was in bed, and I just wanted to help them out because I was a neighbor.

Q And before this accident you saw her around the grounds of her home? A Many a time.

Q And she was able to walk all right? A Absolutely.

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

20 THOMAS S. REILLY, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Mr. Reilly, where do you live? A Hanover.

Q On December 6, 1929, were you driving or in an automobile on Mt. Pleasant avenue? A I was.

30 Q Will you tell the Court and jury—who was with you? A My son.

Q And where were you coming from? A I was going to Baldwin's for milk.

Q In what direction? A I was traveling east.

Q Tell the Court and jury what you observed? A As we got into Hanover we saw a car facing the south part of the road.

Q What kind of car was it? A I think it was a Ford.

40

Thomas S. Reilly, for Plaintiffs, direct.

Q Facing direct south? A Yes, sir, I wouldn't say direct, kind of catacorner, like that (illustrating). Then we saw another car on the left-hand side of the road and we saw a lady lying alongside of the road. My son pulled the car up to the side of the road and we got out and we saw three gentlemen there lifting this lady from the road. 10

Q And where was she with respect to the snow, was she in the snow? A She was in the snow.

Q And how far from the roadway was the place where she was picked up from? A I should say two or three feet.

Q Were her clothes covered with snow? A Well, now, I couldn't say, I didn't notice.

Q But she was in the snow when she was picked up? A Yes. 20

Q And the roadway itself was scraped clear of snow? A Yes.

Q What was the condition of that roadway that night? A Very icy, kind of sleet, you know, little rain, and it was freezing.

Q Did you speak to Mr. Yoder that night? A No, I did not know the gentleman, I just was there, and heard the conversation. There was two other gentlemen with him and they asked him what happened, and he said that there was a truck came down the road and forced him off the road and he hit this lady and didn't see her. 30

Q Didn't see her? A Didn't see her. So they took her over to the car and I opened the door and they put her in, and one gentleman said you better take her to the hospital. She says no, take me to my home. And they asked her where she lived and she told them around the corner. Well, they went and my son and 40

Thomas S. Reilly, for Plaintiffs, cross.

myself started for the Chief of Police. He lived the second house from there and we called him and sent him after them. Of course, I don't know who this Mrs. Sandford was, or I didn't know any of the gentlemen, but I thought I would put the police on the job, and so in three
 10 days after that I heard who she was but I never knew her before.

Q Did you see her after that at all? A I think once.

Q Is that all you heard of her? A That's all.

Q That is all you know about this case?
 A That is all.

Cross examination by Mr. Romine.

20 Q How was Mrs. Sandford laying in the roadway when you arrived? A I couldn't really explain that, because as I said these three gentlemen were just picking her up.

The Court: On what portion of the road?

The Witness: Right side of the road, she was not lying on the macadam road, the macadam there is about 17 feet wide.

30 *By the Court.*

Q Had the road been scraped? A Yes.

Q What was its condition, describe it? A Very slippery.

Q And what else? A I think it was raining a little bit.

Q What else? A That is about all.

Q What became of the snow? A The snow was scraped to the side where the lady was.
 40

Thomas S. Reilly, for Plaintiffs, cross.

Q Go ahead and tell us? A That is all I can remember.

Q Was she laying in the snow? A She was laying in the snow.

Q Was there a ridge of snow on either side? A Just a little about, wasn't a deep snow.

Q Off the macadam? A On the right side of the road entirely off the macadam. 10

Q In other words, she was not on the 17 feet width? A No.

By Mr. Romine.

Q Do I understand you to say these men were picking Mrs. Sandford up when you arrived there? A Yes.

Q So she was not lying on the road in the snow when you got there? A Yes, I should say so when they were just lifting her up. 20

Q So that she was at least partially up from the ground or the snow on the ground or road, is that right? A Why, they were just raising her, they weren't off the ground entirely, they were setting down to raise her, as we got alongside of her.

The Court: He is asking you if her body left the ground when you arrived? 30

Q Was her body off the ground when you arrived there? A I think she was sitting in a sitting position, one man was behind the lady.

Q Did you notice whether her feet extended out toward the cleared portion of the road or not? A I think her feet were that way.

Q What do you mean, "that way?" A West.

The Court: Her feet pointing west? 40

William Reilly, for Plaintiffs, direct.

Q The side of her body was how near to the cleared portion of the road, right near that mound of snow? A I should say right on it.

Cross examination by Mr. Lum.

10 Q You didn't see the happening of the accident? A No.

Q It had already occurred? A Yes.

Q And you say there was another car there besides the Ford? A Yes, two gentlemen had a car that stepped out to give this man assistance, who they were I don't know.

Q What kind of a car was it those men were getting out of? A Some kind of sedan car, I couldn't say.

20

(Witness excused.)

WILLIAM REILLY, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

30 Q Mr. Reilly, where do you live? A Mount Pleasant avenue, Hanover, New Jersey.

Q And where are you employed? A Morristown Savings Bank, Morristown.

Q In what capacity? A Bookkeeper.

Q Was that your father the gentleman who was on the stand a moment ago? A It was.

Q Were you with your father the night of December 6, 1929 when the accident happened? A Yes.

40 Q Did you know Mrs. Sandford before this accident happened? A No.

William Reilly, for Plaintiffs, direct.

Q Tell the Court and jury what you observed that night? A Father and I were going down in the direction of Livingston, we had a Dodge truck, and as I came around the corner in Hanover by the school just near the church, I saw a car pulled almost diagonally across the road. I says, "Pop, there has been an accident." 10

Mr. Romine: I object to what you said to Pop.

Mr. Smith: You can't tell that.

The Court: Cut out the conversation, just state what you saw.

The Witness: I saw the car and just as I passed the car I said—

Q What made you exclaim something? 20

The Court: He saw the car going diagonally across the road. What else did you see?

The Witness: As I said I stopped the car. As I was going around this car pulled into the bank, I happened to look out the window like that, and I saw a lady laying on the ground in the snow. 30

Q And in what manner was this car driven across the road? A Well, it was in a south-westerly direction.

The Court: Diagonally?

The Witness: Diagonally.

The Court: And where did it stop?

The Witness: It stopped right against the bank. 40

William Reilly, for Plaintiffs, direct.

The Court: And where did it come from, which side of the road?

The Witness: It went from the right-hand side of the road to the left.

Q And where, Mr. Reilly, were the front
10 wheels of that car after it came to a stop? A
They were off the hard road.

Q On what side of the road? A On the south side of the road.

The Court: In what direction had that car been going, could you tell?

The Witness: It had been going west.

Q And how far off the road had the front
20 wheels gone off the left side of the road? A
About $2\frac{1}{2}$ feet.

Q And the rest of the car was on the macadam road? A Yes.

The Court: What did you do?

The Witness: I stopped my car, father and I got out, as we turned around there was another car coming down the road and they also stopped and two gentlemen got
30 out of the car and were assisting this lady to her feet as my father and I got there.

The Court: And where was she at that moment, with reference to the width of the road?

The Witness: She was off the road between three and four feet.

Q What do you mean off the road? A Well, off the hard surface of the road.

40 Q Was the hard surface scraped—

William Reilly, for Plaintiffs, direct.

The Court: What sort of road is that?

The Witness: Macadam.

The Court: What is the width?

The Witness: Between 18 and 20 feet.

The Court: Any snow on the road?

The Witness: No.

10

Q What was the condition of the road at that time? A The road was very slippery.

Q And was Mrs. Sandford being picked up from the snow? A She was.

Q And you say that was about three feet in from the road? A Yes.

Q Now was there a ditch over further to the right from where Mrs. Sandford was going, do you know? A No.

Q You don't know that. Mrs. Sandford was put in a car? A Yes.

20

Q Did you see Mr. Yoder there? A I did.

Q Did you have a conversation with him, or was there a conversation in his presence?

A Conversation in my presence.

Q And Mr. Yoder was there? A Yes.

Q What was the conversation?

Mr. Romine: Wait a minute—

The Court: Mr. Yoder, your client?

30

Mr. Romine: If he did, I have no objection, Mr. Yoder was there, there was a conversation; what was the conversation?

The Court: What did Mr. Yoder say was the question, if anything.

Mr. Romine: I object, unless he says Mr. Yoder made the statement.

The Court: I can't tell until he answers, then I will tell you. What did he say?

40

William Reilly, for Plaintiffs, direct.

The Witness: One gentleman that picked Mrs. Sandford up—

Mr. Romine: That is why I object, if it is Mr. Yoder I have no objection.

The Court: Did you know the gentleman?

10 The Witness: No.

The Court: See him here?

The Witness. No.

The Court: See any one in the court room who was there that night?

The Witness: I do.

The Court: Where is he?

The Witness: Sitting right in back of Mr. Romine.

20 The Court: Well, did you hear that gentleman say anything?

The Witness: I did.

Q What did he say, tell the Court and jury?

A One of the gentlemen asked Mr. Yoder what happened.

Q He asked him a question? A Yes.

30 The Court: And as a result what did he say?

The Witness: He said a truck coming down the road forced him off the road.

Q And did he say anything in relation to the manner in which his car went? A Not that I could recall.

40 The Court: What did he say, give the entire conversation as you recall it, anything he said at that moment?

William Reilly, for Plaintiffs, cross.

The Witness: He only said, there was a truck coming down the road forced him off the road, he struck this woman and never saw her.

Cross examination by Mr. Romine.

Q You did not actually see this car that was crossways in the road travelling on the road, did you? A No.

10

Q In other words, when you came down the road you just saw this car stationary crossways of the road? A Yes.

Q And when you arrived down to the point where the car itself was you saw the woman being assisted by some man? A Yes.

Q Was her body off the ground when you got there? A No.

20

Q And you noticed this mound of snow right along the edge of the cleared portion of the road? A Yes.

Q And was that where Mrs. Sandford was on that mound of snow? A No.

Q You heard your father testify that she was on that mound of snow right alongside the cleared portion?

30

Mr. Smith: I object to that.

The Court: He may answer.

The Witness: I heard him say it, yes, sir.

Q And you saw this mound of snow there, didn't you? A Yes.

Q Now, isn't it a fact that as your father says, that Mrs. Sandford was lying on that mound of snow right alongside the cleared por-

40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

tion of the roadway? A No, sir, she was lying on the right side of this mound.

Q Right on the mound or alongside of the mound of snow? A Alongside.

10 The Court: You should not quote the father literally, as you have, he said she was right next to the mound of snow.

Mr. Smith: He also used the words two or three feet.

Mr. Romine: That is when you examined him.

The Court: It only shows that eight pairs of ears can even hear things different.

20 Q Do you know whether Mrs. Sandford had been moved from her position while these men were there, before you got there? A No.

Mr. Lum: No questions.

(Witness excused.)

DR. AMBROSE F. DOWD, called as witness, having been duly sworn, testified as follows:

30 *Direct examination by Mr. Smith.*

Q Dr. Dowd, are you a practicing physician of the State of New Jersey? A Yes.

Q And for how many years have you been practicing medicine in the State of New Jersey?

A Twenty years.

Q Have you specialized in any branch of medicine? A Yes.

40 Q What branch? A Nervous and mental diseases.

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

Q And have you been connected with any institutions and hospitals during your practice as a physician? A Yes.

Q What hospitals have you been connected with, doctor, and in what capacity? A Connected with the Newark City Hospital as Chief Resident Physician, and now connected with the Women's and Children's Hospital, and Home and Hospital for Crippled Children. 10

The Court: I may say the doctor has qualified a number of times.

Mr. Lum: The doctor's qualifications are admitted.

The Court: As a neurologist.

Mr. Smith: Specialist.

The Court: Mental diseases. 20

Q Doctor, you were called in this case to examine and treat Mrs. Sandford? A Yes.

Q When was the first time you saw her, doctor? A July 25, 1930.

Q Where did you examine her? A At her home.

Q And when you got to her home where was she? A Sitting on a couch.

Q Will you tell the Court and jury— 30

The Court: What date was that?

The Witness: July 25, 1930.

Q What was the result—what did you find, doctor? A Objectively she presented a tremendous increase in her knee jerks.

Q What does that signify? A A disturbance of the nervous system, either organic or functional, increase of all her deep reflexes, which 40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

10 signified the same thing; an inability to walk without assistance, she dragged her right leg; her pulse was rapid, her hands tremulous; her eye-lids tremulous; her lips and tongue tremulous; her movements uncoordinated, and many areas, about her face, head and chest affected
by sensory disturbance, or indicative of nervous disturbance.

The Court: Traumatic, doctor?

The Witness: Traumatic, yes.

The Court: In other words, the result of an injury of some sort?

The Witness: Yes.

20 Q And doctor, what do you mean by traumatic? A By traumatic, I mean the effects of an injury, the application of force and the effects thereof.

The Court: Literally, trauma means a black eye, a blow?

The Witness: Yes.

30 Q What subjective symptoms did you find, doctor? A Subjectively she complained of headache, dizziness, insomnia, nervousness, irritability, excitability, inability to perform any of her household duties.

The Court: And you found objective symptoms which correspond with subjective?

The Witness: I did.

Q Did the subjective symptoms check up with the objective symptoms, doctor? A They did in this case.

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

By the Court.

Q By subjective symptoms, you mean by that, what the patient tells? A That's right.

Q And, objective, by what you see? A That's right.

Q Did you treat her, doctor? A No, I didn't treat her. 10

The Court: The question was asked, I understood you to say, have you treated her, Mr. Smith?

Mr. Smith: I think I did, but the doctor, did not.

Q When was the next time, doctor, that you examined her? A October 19, 1930. 20

Q And what did you find on that occasion? A In addition to the things found at the first examination, all of which were present at the second, she has now a diminution in the size of her right leg and right thigh, about a half to three-quarters of an inch smaller than the opposite leg and thigh and she has added reflexes which indicate a cord injury, structural change in her cord.

Q What cord do you mean, doctor? A Spinal cord. 30

By the Court.

Q What is the atrophy due to? A Spinal cord injury.

Mr. Smith: What is the atrophy?

The Witness: Diminution in size.

The Court: Withered, shriveled. 40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

Q Did you have occasion to see her again, doctor? A I am speaking of the second examination; I saw an examination today, I did not participate in it.

10 The Court: Is her condition better or worse?

The Witness: Worse.

Q And what would you say, doctor, would be the condition of that leg, is that getting progressively worse? A Was not present when I saw her in July, and it is present today.

Q And how do you account for that, doctor? A Spinal cord injury.

Q A trauma? A Yes.

20 *By the Court.*

Q What have you to say as to the condition of this woman with reference to a permanent injury? A I think her injuries are absolutely permanent, I do not think any question about it.

Q What will happen to her, doctor? A She will not get better, and perhaps get worse and become bed-ridden.

30 Q Paralytic? A Probably that leg is going to become entirely paralyzed; it is now weak, becoming rigid and shows these abnormal reflexes, which are unmistakable which were not present in July.

Q What about her speech, doctor? A That is not due to a spinal cord injury, that is due to general nervousness, due to functional condition.

Q Nervousness comes from trauma, doctor? A In this case; of course it results from anything.

40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

Q In this particular case it results from a blow? A That's right.

Q Doctor, did you find any injury to the transverse process of the spinal column? A I saw the X-rays, I didn't find any injuries.

Q And of course you can read an X-ray picture, doctor? A Pretty well.

10

Mr. Smith: Gentlemen, I will be able to connect this up with the doctor when he gets here, Dr. Baker.

By the Court.

Q Did the X-rays confirm your diagnosis as the source of difficulty? A Yes.

Q And what is the source of this woman's difficulty? A Source of her major difficulty is her spinal cord, the X-rays show fracture of two of the transverse processes of her lumbar vertebrae.

20

Q And they would be the source? A Some force that fractured those transverse processes injured her spinal cord.

By Mr. Smith.

Q Will you look at these pictures, doctor? A Yes.

30

Q Will you point out to the Court and the jury just where those fractures are? A These are the first pictures; the other pictures are much better.

Q Try that one? A The injuries are right here, these being the processes right here; just see the fractural line right there through.

Mr. Smith: I ask they be marked for identification.

40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

The Court: They may be marked.

(Received and marked for identification,
P. 1 and P. 2.)

The Witness: Shows a congenital condition here (indicating on X-ray).

10 The Court: Does that condition figure in the permanent condition?

The Witness: No.

Q Now, doctor, did you look at that picture (handing same to witness)? A That doesn't show anything.

Q How about this one? A This one does; the fractures are more clearly seen, callus formations very evident above those transverse processes.
20

Q What bones are fractured? A Transverse processes of third and fourth lumbar vertebrae.

Q Will you tell the Court and jury what the transverse processes are, what their function is? A They are processes of bone attached to the vertebrae to which muscles and ligaments are attached.

Q What is their function? A To stabilize muscles and ligaments.
30

Q Of course, doctor, if there is a fracture what is the natural result of the ligaments and muscles in the region? A You get an inflammation and fibrous formation at the point where the fracture occurs.

Mr. Smith: Ask it be marked for identification.

(Received and marked for identification
P. 3.)
40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

Q Now, what is this, doctor, will you look at this picture and say what that shows? A That shows a fracture also.

Q How many fractures does that show? A Two.

Mr. Smith: I will ask to have this marked 10
for identification also.

(Received and marked for identification
P. 4.)

By the Court.

Q Is there any cure for this condition, doctor? A Not for the spinal cord injury, the functional part of a nervous disturbance may be in part, may be, but not a structural defect; it will never entirely disappear. 20

By Mr. Smith.

Q And what effect will such a condition have upon this woman in regard to her doing housework or performing the duties of her home? A It will embarrass and handicap her and perhaps prevent such activities entirely.

Q Do you hold out any hope for her immediate recovery? A I think the outlook is very unfavorable in this case, don't anticipate her recovery. 30

The Court: We figure in terms of reasonable probability?

The Witness: In all probability she will not recover.

Q And you say her right leg will atrophy, wither away and become paralyzed? A In all probability it will do that. 40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

Q Now, doctor, assuming Mrs. Sandford, a woman who was 38 years old on December 6, 1929, assuming doctor that she was the mother of two children, had been married twenty years, one child was nine years old during December, 1929, and another one was 18 years old, that she
10 met with an accident on December 6, 1929, and that before this accident the condition of her health was very good and that she had a sunny disposition and that she did sewing and that she taught sewing, and that she did her housework, that she made her own beds, that she did her own cooking, that she took care of a garden and planted vegetables and flowers, and that she was able to drive an automobile for a period of four years before the happening of this accident,
20 and assuming that nine years before that date she gave birth to a boy and she was in labor for a period of from twelve o'clock noon until eleven at night, and that she was laid up after the delivery of that child for a period of four week with a nervous exhaustive condition, and that after that she was back to her normal condition and that she was well and able to do her duties about the household and drive a car and do sewing and was happy and pleasant,
30 and slept well and did not stutter in her speech and was not nervous and was in general good health, and weighed 120 pounds before the happening of this accident, and that on December 6, 1929, she was walking along on the side of a road and going in a westerly direction on Mount Pleasant avenue and that an automobile was going by and going in the same direction on Mt. Pleasant avenue, and that the automobile swerved over to the left side of the road the rear end of this automobile striking Mrs. Sand-
40

Dr. Ambrose F. Dowd, for Plaintiffs, direct.

ford in and about the center of her back throwing her to the snow which was on the ground, and that she was carried to an automobile and that she was taken home and that she was treated by a doctor, that she was injured about the head, back and limbs, and that she was treated by a physician for a period of seven weeks and that after a while that she was nervous and shocked and could not sleep, that she had tremor, and after that she was treated by another doctor for a period of six or seven weeks after the accident up until today, and that now her condition at your examination in July was that she was suffering in the condition in which you found her on July 24th, and that you again examined her in October and that her condition had become progressively worse, and that she has an atrophy or withering of the right leg, and it has withered to the extent of a half to three-quarters of an inch since you last saw her, that she stutters in her speech, that she is nervous and cannot walk or do anything—

The Court: To what would you attribute her condition?

Mr. Lum: I object, there is no necessity for a hypothetical question, it is purely cumulative.

The Court: It does have that tendency. But I will allow you to ask the doctor whether or not he attributes her condition, her present condition to the statement incorporated in that hypothetical question as to the childbirth. You say her present condition has anything to do with that?

The Witness: Childbirth has nothing to do with it.

Dr. Ambrose F. Dowd, for Plaintiffs, cross.

Q Is that condition due to the accident? A In my opinion, yes.

Cross examination by Mr. Romine.

10 Q Doctor, do I understand you to say that Mrs. Sandford is of a neurotic type? A Yes.

Q Naturally nervous? A No, I said neurotic condition is due to trauma.

Q There are some people who are more nervous from injuries than other people? A Unquestionably.

20 Q And is Mrs. Sandford one of that type of person? A Mrs. Sandford is a tremendously neurotic person at this time, I think her neurosis is due to the accident; if she was predisposed thereto prior to the accident then the accident excited and precipitated it.

Q This neurotic condition which I suppose affects her speech and causing the impediment, you think in time will disappear, do you not? A I think it may improve; in the presence of a structural defect, which I believe her to have, it will not entirely disappear.

30 Q Any person who suffers an injury and is predisposed to nervousness is apt during a certain period of time after the trauma, the blow or injury, to evidence that nervousness? A Very many of them do, most of them, in fact.

Q And I suppose in a great many of these cases that they worry about the outcome of the case and its disposition, and after the case has been closed and disposed of a great part of that nervousness disappears, does it not?

Mr. Smith: Object to that.

Dr. Ambrose F. Dowd, for Plaintiffs, cross.

The Court: Do you know anything about that, doctor?

The Witness: Yes, I know something about it.

The Court: Does the cessation of litigation produce that effect?

The Witness: Where the condition is purely functional, where there isn't a structural change; that does not apply to this case. It would apply to the functional part of her nervous condition if there were no structural changes.

10

Q I am directing my question to her nervous condition? A It may help ameliorate it by the cessation of this litigation, but will not remove it.

20

Q Now, as I understand you to say, from these X-rays, that there was a fracture of the transverse processes, is that right? A Of two lumbar vertebrae.

Q Now, I suppose after the fracture a certain period of time elapses for nature to take its course and create that callus formation? A Necessary callus formation.

Q I think you referred in one or two of the later X-ray pictures of a callus formation existing? A That's right.

30

Q Now, let me see the first one you referred to, the first X-ray appears to be dated February 15, 1930. Now, I believe this is the X-ray said to have been taken by Dr. Baker, the date of which I understand is October 3d, shows the callus formation in the region of the fracture? A Right.

Q And I understand that the X-ray that was referred to as taken by Dr. Myers, February

40

Dr. Ambrose F. Dowd, for Plaintiffs, cross.

15, 1930, shows no callus formation, is that right? A Shows some callus formation, it is incomplete however.

Q But the complete callus formation is in the later one? A Yes.

10 Q Now, doctor, can you tell us how long in the ordinary course of events after a fracture occurs that the callus formation is complete, or begins, or is evidenced?

The Court: Which do you mean now, complete or evidenced?

Q How long does it take for the callus formation?

20 The Court: Complete?

The Witness: In this particular bone?

Q Any fracture? A It depends on the size of the bone, location of the bone, its complete immobilization, and a number of other factors.

Q In a situation such as this? A Callus formation should be complete in three or four months.

30 Q If the injury occurred on December 6, 1929, there would be no callus formation evident on the 13th of December, six or seven days later, would there? A That is hardly probable.

Q Now, this fracture is on what you might term in the vernacular on the outside of the spinal column? A It is.

Q Now the spinal cord and vital nerves run inside of those "spools" I will call them, which make up the spinal column? A They do.

40 Q Now, there is nothing on the outside of the spinal column of any particular import is there? A Yes.

Dr. Ambrose F. Dowd, for Plaintiffs, cross.

Q What is there? A Nerve roots, they emerge through the foramen.

Q When this callus formation is apparent nature has taken its course, has it not? A So far as fractures are concerned.

Q And if at the time of the callus formation there is no paralysis of the limbs, isn't it fair to assume whatever condition exists in the patient might not be any further evidenced or increased in any way? A Certainly is not. 10

Q Why, if the callus formation has been complete is there any possibility of any further difficulty in locomotion or anything else? A Callus has to do with bone only.

Q That is true. A And the same force that fractured those bones gave her a hemorrhage in the lower part of the spinal cord, which has been progressive; deterioration has set in, and it is apparently going forward today. 20

Q This callus formation is something which oozes out, we say, of the bones and forms a solid substance? A Yes.

Q That formation on the outside of this spinal column where the fracture is? A Forms wherever the fracture exists.

Q So that it is removed from any pressure on the spinal column, is it not? A Yes. 30

Cross examination by Mr. Lum.

Q Doctor, you cannot tell that there is a structural defect in a cord by any examination of the cord, of course? A No.

Q That is enclosed within bony structures and not susceptible of examination? A True.

Q And it is the hemorrhage condition, I believe, that causes the injury? A That's right. 40

Dr. Ambrose F. Dowd, for Plaintiffs, cross.

Q And of course, doctor, there are certain diseases that can produce some such effect? A Certain diseases produce hemorrhages in the spinal cord.

Q Certain diseases, which are inheritable, rather common? A Which produce spinal cord conditions, yes, sir.

Q And you find in your practice in the city hospitals have found them many times? A Many times.

Q Utterly irrespective of any trauma? A Absolutely.

Q And you find a congenital condition of the spine here? A Yes.

Q That means a condition with which this woman was born? A Yes.

20 Q Which predisposed toward weakness? A Yes.

By Mr. Romine.

Q Did you find, doctor, any relaxation of the sacroiliac joint evidenced by the X-rays? A I do not, no.

30 Q If it should appear that there was a relaxation of the sacroiliac joint, coupled with this congenital malformation, which you say was from birth, would that tend to cause a weakness in that particular region?

Mr. Smith: I object. I do not think it is proper cross examination.

The Court: I think it is proper cross examination because the doctor has given his opinion as to the proximate cause of the present situation; I will allow him to answer.

Charles F. Baker, for Plaintiffs, direct.

The Witness: It would of course make her much more susceptible to injuries or blows to that region.

Q And if she did have any trauma in that region it would excite and make more manifest that weakness there from these other conditions? 10
A Make her more susceptible to effects of trauma there.

Re-direct examination by Mr. Smith.

Q A person being struck by an automobile it would unquestionably cause the condition which you describe? A Unquestionably.

(Witness excused.)

20

CHARLES F. BAKER, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Dr. Baker, you are a practicing physician of the State of New Jersey for how many years? 30
A 26.

Q And do you specialize in any branch of medicine?

Mr. Lum: The doctor's qualifications are admitted.

The Witness: I do.

Q You conduct your own X-ray laboratories?
A Yes, sir.

40

Charles F. Baker, for Plaintiffs, direct.

Q Do you devote most of your time to X-ray work? A All of my time.

Q How many pictures do you take in the course of a year? A That I couldn't say.

Q Thousands of them, doctor? A Yes.

10 Q How long have you been specializing in X-ray work? A Since 1914.

Q Now, doctor, I will refer you to this X-ray marked for identification P. 3, will you tell the Court and jury did you take that picture? A Yes.

Q Of Mrs. Sandford? A Yes, October 1, 1930.

20 Q And what do you find in that picture, doctor? A This is a picture of the lumbar and lower dorsal spine, and upper portion of the pelvis. It shows there has been fractures of the right transverse processes of the third and fourth lumbar vertebrae, which has healed with strong callus formation. There is also an anomalous appearance of the spinous processes of the upper portion of the sacrum, and there is a fusion of the top of the transverse processes on the left side of the first lumbar vertebrae.

30 The Court: Doctor, is there any way, I am asking this timidly, because I don't know a thing about it. I admit it. Is there any way of telling how long that fracture had existed from the presence of the plate?

The Witness: Well, I could say that it has existed for many months, but I couldn't say that it had not existed for a long period.

40 Q And from the date of that picture was in a few months' time? A Yes, it takes several months for callus to show as firmly as this.

Charles F. Baker, for Plaintiffs, direct.

The Court: Usually callus makes itself manifest and ultimately disappears?

The Witness: All excess callous, but generally there is a thickening at the point of fracture, but after many months you could also discover the old line of fracture, which gradually becomes lost, and to view in most cases. 10

Q How long does it take for the callus to disappear, doctor? A I don't think any one can set a definite time. I have seen fractures that have apparently healed in four or five weeks, very little callus showed on the plates.

The Court: Not uniform?

The Witness: No, it would vary, young children develop callus very rapidly. 20

Q What is your opinion as to this particular case, doctor? A As I said, I think the fracture must have occurred many months before the picture was taken, just how many months I wouldn't like to say.

Mr. Smith: I offer the picture in evidence.

The Court: If the doctor will say he took all of these— 30

Mr. Romine: He only took that one.

The Court: It may be marked.

(Received in evidence and marked Exhibit P. 3.)

Q Now, doctor, this is another picture you took? A Yes. This picture was taken on the same day, but it is a lateral view with the patient turned on the side. 40

Charles F. Baker, for Plaintiffs, direct.

The Court: Doesn't disclose anything?

The Witness: This doesn't show anything, because it would be impossible to show on this.

Q It is a lateral view, doesn't show anything? A Yes, lateral view.

Mr. Smith: I have pictures taken by another doctor, and I want counsel to stipulate, I put them in also.

The Court: If you get them properly in.

Mr. Smith: Taken by Dr. Wyeth at the direction of Dr. Myers.

Mr. Romine: On the same day as the other?

20 Mr. Smith: No, that is before February 15, 1930.

Mr. Romine: Those are the ones we referred to heretofore in the case?

Mr. Smith: Yes.

The Court: The doctor may use them for the purpose of reading them.

Q Doctor, will you look at this picture dated
30 February 15, 1930, marked P. 2 for identification—

The Court: Tell us what it shows?

The Witness: That is a lateral view of a spine and does not disclose the things I told you about it.

Q Yes. Now, I refer to picture marked P. 1 for identification, will you read that picture, doctor? A This is a picture of the same region
40

Charles F. Baker, for Plaintiffs, direct.

and shows the fractures very distinctly on the right side of the third and fourth lumbar vertebrae, and at that time the callus had not reached the heavy state that it had later, that is, it was not as firm, and you can see the fracture lines passing through those bones.

Mr. Smith: I offer this in evidence, also Dr. Wyeth's picture.

(Received in evidence and marked Exhibit P. 1.)

Q Now, doctor, from your examination of the pictures and X-ray findings would that fracture of the transverse process cause pain in a human being? A Yes, sir.

Q And what is attached on the transverse processes of a person's back? A They are muscular attachments.

Q What happens if there is a fracture of one or more of these transverse processes? A Considerable muscular disability, pain, stiffness.

Q Assuming, doctor, that this woman, Mrs. Sandford, was 38 years old on December 6, 1929, and that before this accident she was always in good health, and had two children, and that the last child she had was nine years before the happening of the accident, and laid up a period of four weeks during childbirth delivery, and that she had an exhausted nervous condition at that time for four weeks, that subsequent to that she was always in good shape, able to drive an automobile, do her own housework and never had any injury to her back, never complained of pain, never had any pain in her back, was able to do all her work, and

Charles F. Baker, for Plaintiffs, direct.

on December 6, 1929, was struck in the back by the rear end of an automobile, struck about the middle of her back, and from the pictures you have taken, and from the time that has elapsed, from the time of the accident, on December 6th, up to the time you took the pictures, and the other pictures which you have seen, as made by Dr. Wyeth, what would you say was the cause of the condition as it is manifested in these pictures, doctor, what caused that condition? A The patient has suffered fracture of the transverse processes.

Q Assuming all these facts were true—

The Court: You don't have to put that, the doctor says she has a fracture of the transverse processes, that is his answer.

Q Would you say it would come from such an accident? A Would say that it could, yes, sir.

Q What is your opinion in this particular case, doctor, was that probably the result of this accident? A Yes, sir, those fractures are only caused by a very severe blow.

Q What is your bill, doctor, for making X-ray pictures? A \$25.

The Court: That is the usual and customary charge?

The Witness: Yes.

Q Doctor, in taking X-ray pictures, the mere fact that something does not show on one side of the pictures doesn't necessarily mean that there isn't a fracture there? A No.

Q You have to get it in a certain position in order to get these certain bones to show

Charles F. Baker, for Plaintiffs, cross.

in pictures, is that right? A It has to be in the proper position, so that the light will pass through the bones at proper angles, and so on to the plate.

Q And if the body is not in the proper position of course it will not show? A That proper position is a very broad term. 10

Q Proper position, by taking an X-ray picture? A Taking of any particular portion would have to be a proper position, yes, sir.

Cross examination by Mr. Romine.

Q Then, of course, X-rays are not always absolutely dependable, are they, doctor? A Just whose X-rays do you mean, there are X-rays and X-rays? 20

Q When counsel say one may show something and another may not, you said that is true. Now, I ask the question, X-rays are not always dependable, then, are they? A I think they are, yes, if they are good.

Q That is, they show something they are good, and if they don't, they are not?

The Court: The X-ray might be taken with certain strength of light, and not show what a stronger ray would develop. 30

The Witness: An X-ray might be under-exposed, or the patient may move, and blur the image, no diagnosis could be made from it. You get a good sharp picture, there is no reason why you can't tell.

The Court: The doctor is telling you if they are properly taken as he takes them.

Q What is the least period of time in which a callus formation can evidence itself after an 40

Charles F. Baker, for Plaintiffs, cross.

injury or fracture in case of a woman of this age? A In this particular case I would say six weeks, being a callus, that would be the earliest.

Q Now, if it should appear as in this case that there was an accident on the 6th of December, and that there were X-ray photographs
10 taken on the 13th of December, 1929, the same year, seven days later, and that the X-ray photograph disclosed callus formation in the region of the transverse processes as indicated on your photograph here, the first one you took— A I only took one.

Q Would you then say that this condition arose from the accident on December 6, 1929? A I would not.

20 *Cross examination by Mr. Lum.*

Q Doctor, you have had experience with injuries to the spine, of course, in your practice? A Yes, sir.

Q And the injuries are caused really by scar tissues, the spinal injury evidenced itself by scar tissue? A We don't call callus scar tissue.

Q Well, callus? A Yes, callus.

30 Q And the callus is connected with hemorrhage of the spine? A No, that isn't correct. It doesn't put it clearly.

Q It is a layman's view— I will ask you in the view of a layman what is the connection of hemorrhage with the injuries defined? A Every fracture is attended by hemorrhage from a bone, but callus is a repairing process, a building up of new material, has nothing to do with hemorrhage.

40

Charles F. Baker, for Plaintiffs, re-direct.

Q You do find injuries to spine and spinal cord, in many cases a disease, do you not? A We cannot demonstrate the spinal cord from an X-ray standpoint, not the cord itself.

Q I understand that, and do you limit your knowledge and experience solely to that which is developed by X-ray? A No, I practiced medicine for ten years. 10

Q You have come in touch in your practice with no cases of injury to the spine due to diseased conditions? A Yes.

Q Entirely separated from any trauma? A Yes.

Q They are certain quite common diseases which are inheritable which produce such conditions quite frequently? A Yes. 20

Q In this case you made no special test? A Of the spinal cord? 20

Q Yes. A No, sir.

Re-direct examination by Mr. Smith.

Q You only come into this case as an X-ray expert? A That is all.

Q Now, doctor, will you look at these pictures, do these show— A Do you wish my opinion of this picture? 30

Q Yes. A I have not seen this picture before.

Q No, you haven't. A This picture shows fractures of the transverse processes of the third and fourth lumbar vertebrae on the right side, but without any callus formation.

Q And that was taken on December 14th at the Memorial Hospital at Morristown, wasn't it? A I did not take that picture. 40

Charles F. Baker, for Plaintiffs, re-direct.

Mr. Romine: I move to have it stricken out.

Mr. Smith: I ask to have it marked for identification.

Mr. Romine: I move to strike out his testimony.

10

The Court: No, I will allow him to express an opinion as to what it discloses, that is all he has done. Whether it is an X-ray of the lady in question or when it was taken, its verity and so on is subject to proof.

(Received in evidence and marked Exhibit P. 5.)

Q Do you see anything in that picture, doctor, or is that blurred? A This is slightly
20 blurred by adhesive plaster, which evidently was around the patient at the time it was taken, it is my opinion it shows fractures, but very indistinctly on the right side.

Mr. Smith: I ask to have it marked for identification.

Q This lateral view does not show? A No, does not show.

30

(Received and marked for identification Exhibit P. 6.)

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

40

Dr. Joseph Harrison Wyeth, for Plaintiffs, direct.

DR. JOSEPH HARRISON WYETH, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Doctor Wyeth, you are a practicing physician of the State of New Jersey? A I am. 10

Q And you have been practicing medicine how long? A Practicing medicine twelve years.

Q And you specialize in X-ray work? A I specialize in X-ray work.

Q And did you have occasion to take a picture of Mrs. Sandford? A I did.

Q What was the date, do you recall? A No, I could tell from the films, February 15, 1930 (after looking at films).

Q Was that picture taken by you? A Yes. 20

Q What does the picture reveal? A Reveals a transverse fracture of the right transverse processes of third and fourth lumbar vertebrae with callus formation.

Mr. Smith: This has been marked. Offer it in evidence.

The Court: No objection I understand, it may be marked.

(Received in evidence and marked Exhibit P. 4.) 30

Q Was this your picture, doctor, do you know? A No.

Q I refer to Exhibit P. 6 which has been offered in evidence, will you read that picture to the Court and jury? A Shows anterior posterior exterior of the third, fourth and fifth lumbar vertebrae, the bones of the pelvis and the right and left hips. 40

Dr. Joseph Harrison Wyeth, for Plaintiffs, direct.

Q Shows a fracture there, doctor? A Indistinctly, yes. Quite a bit of adhesive tape.

Q That is the one blurred. Will you look at this picture which has been marked in evidence Exhibit P. 3, will you read that to the Court and jury? A This radiograph shows
10 the anterior posterior exposure of the lumbar vertebrae, the sacrum, and the tenth, eleventh and twelfth ribs. On the first rib is the left transverse process, there is a line of separation which probably is due to a ununited epiphysis, it is not shown on the other side, the edges of it are rounded, and it is not recent. In my opinion I think it is an ununited epiphysis.

The Court: What is that?

20 The Witness: An epiphysis is a part, origin, formation of bone, it is where they grow together, two bones of origin, they grow together and you get an epiphysis in line.

The Court: That hasn't grown together?

The Witness: It has not.

The Court: Is that a structural defect?

30 The Witness: Defect in formation, yes. Then at the right transverse processes of the third and fourth, there is evidence of bone formation, two lines of fractures, good callus formations. There is the spina bifida, which we sometimes say which is a developed natural defect.

Q Doctor, I don't think you looked at this one, one of your pictures, and marked Exhibit P. 1, what does that picture reveal, doctor? A
40 This picture reveals the lumbar vertebrae of

Dr. Clifford Mills, for Plaintiffs, direct.

the sacrum, and the tenth, eleventh and twelfth ribs in the anterior posterior position, and this reveals practically the same as on the previous one.

Q Fractures in the same places? A Fractures in the same places.

Q And where are the fractures, doctor? A 10
Fracture of transverse processes of the third and fourth—the right transverse processes of the third and fourth lumbar vertebrae.

Mr. Romine: No questions.

Mr. Lum: No questions.

(Witness excused.)

DR. CLIFFORD MILLS, called as a witness, 20
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Dr. Mills, you are a practicing physician of the State of New Jersey? A I am.

Mr. Romine: Dr. Mills' qualifications are admitted.

The Court: Yes, the doctor is qualified. 30

Q How many years have you been practicing? A Thirty years.

Q Did you examine Mrs. Sandford? A I did, I examined her on Saturday, October 18, 1930, last Saturday.

Q Will you tell the Court and jury what you found, doctor? A I examined her, I asked her for a history of the accident. She said she had received a blow in the back by an auto- 40

Dr. Clifford Mills, for Plaintiffs, cross.

mobile. I got her history, history of trauma coming on a short time after the injury, getting progressively worse, history of how long she had been in bed, she had been in bed seven weeks, and at the end of the fourteen days she got out of bed, but had been unable to stand or sit and had gone back to bed for from seven to eleven weeks, and since that time had been in bed part of the time and part out of bed. I measured her, she had atrophy of her entire right leg. She has certain definite symptoms, one is known as ankle clonus.

Q What is that? A To extend the leg to full length, extend the leg and forcibly flex the toes, and where the ankle clonus is present the foot waves back and forth two or three times.

20

The Court: No control?

Q What does that signify? A It is just a little different from hand control, the ordinary foot push it up once, and it comes down once, her foot comes down two or three times.

Q What else, doctor? A Her Rhomberg symptom, being unable to stand upright with the eyes closed, she would sway to the side.

Q What does that signify when she does that? A These various things signify an extreme nervous condition. Now, I understand from my readings on the subject—I am not qualifying as a nerve expert—but from my reading and thirty years' experience, I understand that the sign of ankle clonus cannot be faked, Rhomberg symptom might be, anybody can stand up with the eyes closed and sway. Very good authorities say ankle clonus cannot be.

40

Dr. Clifford Mills, for Plaintiffs, direct.

The Court: Mental injury?

The Witness: Mental injury, yes, with a definite atrophy of her right leg, taken into consideration, with that symptom, with the changes in her menstrual flow and menstrual periods, plus her stuttering, plus her constant nervous tremor, my opinion was after looking her over that she was very seriously sick, and she would not fully recover. 10

Q And what have you to say as to the future condition of the leg condition, the withering of that leg? A I believe that the condition, the atrophy of the leg is due to injury to the nerve roots, or where the nerve branches come off the lumbar spine, that condition is a permanent condition, and may get worse; but I don't believe it will get better. True, it cannot get much worse, but I don't believe it would get any better. 20

Q A woman with a fracture of the third and fourth lumbar vertebrae, transverse processes, is unable to do the work that the average person does? A You have that wrong, I don't say that at all. I say, anybody that received a blow sufficient to fracture the transverse processes, got a very severe blow to the spine, the blow to the spine and the injury to the spinal cord is what her trouble is, not the injury to the transverse processes, one that it shows she had a severe injury to her back. 30

Q What is the relationship between the spinal cord which you say is affected and the right leg which is withering? A The nerve supplying the legs go off the greater sciatic and lesser sciatic are the two main nerve supplies of each of the legs, they come off of the different sections of the lumbar vertebrae. 40

Dr. Clifford Mills, for Plaintiffs, cross.

The Court: No proper circulation. Circulation have anything to do with it?

The Witness: No, I don't believe so. This woman received a blow hard enough to break her transverse processes, that shows it was no love tap she received on her back.

10

Cross examination by Mr. Lum.

Q Doctor, I presume this is a case for specialized treatment? A I think so.

Q When did you see the lady? A I saw her on Saturday, October 18th.

Q For the first time? A First time.

Q And you found out the treatment she had been receiving? A Yes.

20

Q And from that you gained the knowledge that she has as yet had no specialized treatment from neurological experts, has she? A I didn't go into the question of treatment with her, I couldn't tell you what treatment she received.

30

Q In getting the history of the case, did you get any history of treatment of any neurological expert? A No, the only history I got was that Dr. Dowd had seen her right previous to that.

Q But you did not understand that Dr. Dowd in any way had treated her, did you? A I don't know who called Dr. Dowd, I didn't ask whether Dr. Dowd was called originally or Dr. Eckhardt.

Q You did not know whether Dr. Dowd was merely called to qualify himself to testify before the jury in this case? A No, I know she was under Dr. Eckhardt for seven to eleven

40

Dr. Clifford Mills, for Plaintiffs, cross.

weeks, I just forget the exact time, I knew Dr. Eckhardt was a very competent physician.

Q Were you called to treat the lady or testify?

A Just to examine her.

Q And so far as you know there was no history of her treatment by any neurological experts? A I knew no treatment.

10

Q Of course a case of this kind would be greatly benefitted by that treatment? A Not necessarily, it ought to be tried.

Q And should have been tried months ago?

Mr. Smith: Object.

The Court: No, I will allow it.

A I believe it was tried months ago when she was under the care of Dr. Eckhardt—I don't know who her last doctor was.

20

Q They are general practitioners? A Yes.

Q Not neurological experts in any way? A No, I don't think they pretend to be.

Q No history of her having been to an institution where they give specialized treatment in cases of this kind? A No.

Q Did you suggest Dr. Goldthwaite, a recognized authority on the subject, and with a hospital for special treatment for such cases? A I never heard of it.

30

Q You have received no history of any such treatment for this lady? A No.

Q In the course of your experience you of course find many spine injuries due to diseases? A Yes.

Q There is a rather general class of diseases which is inheritable, which produces injuries to the spine, do they not? A Produce changes in the spinal cord, not injuries.

40

Dr. Clifford Mills, for Plaintiffs, re-direct.

Q Changes in the spinal cord, and those changes produce just such conditions as we see in this case, do they? A No, I don't think they do. I know of no disease that causes one-sided atrophy of the leg. Now, it might be so, but I say I know of none myself. As I told you
10 before I am not qualifying as a nerve specialist.

Q You wouldn't doubt Dr. Dowd's word on it for a moment? A No, but I would like to see exactly what he said that this was a medical disease that caused a one-sided paralysis.

Q Did you take any test of the serum from the spinal cord? A Yes, we did reflexes.

Q No, I mean fluid tests? A No.

Re-direct examination by Mr. Smith:

20 Q Doctor, would you hold out anything for that condition of the spinal column and withering of the leg, is there anything that you can say will cure? A Maybe a very good man could cure her right, I don't know, I wouldn't believe that if they said so.

Q And you consider that— A She has a one-sided paralysis, has an injury to nerves, got it on one side. If Dr. Dowd says so, I
30 won't say I don't believe it, but I will go home and look it up.

(Witness excused.)

Dr. Francis S. Myers, for Plaintiffs, direct.

DR. FRANCIS S. MYERS, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Dr. Myers, you are a practicing physician
of the State of New Jersey? A I am. 10

Q And where are your offices, doctor? A
In Hanover, New Jersey, and in Newark.

Q Did you examine and treat Mrs. Sandford?
A I did.

Q When did you first examine her? A I
first examined her on January 27th, I believe,
but I was called in to see her one night when
she was in a lot of pain and distress on January
24, 1930.

Q When you saw her, doctor, what did you
observe? A Well, she was very tender over 20
her back, she complained of headaches, she was
extremely nervous. I suppose that was the
remains of the shock she had had from the
accident. She complained of numbness over
her right leg, she had some pain in her arm,
and I believe there was some lacerations on
her right leg that were healed, but she com-
plained of them just the same.

Q And those are subjective symptoms? A
Pain is a subjective symptom. 30

Q What other objective symptoms? A Ten-
derness, muscle spasm, limitation of motion.

Q Where was the muscle spasm? A The
muscle spasm about the muscles of her shoulder
and lumbar and gluteal muscles of her back.

Q Where are they? A They follow down
the spinal column on each side, they are bilat-
eral, right lumbar and left lumbar, the gluteal
muscles form the buttocks, there is one on each
side. There are three gluteal muscles. 40

Dr. Francis S. Myers, for Plaintiffs, direct.

Q And did you arrange to have X-ray pictures taken, doctor? A As soon as I could get the lady up I sent her down to Dr. Wyeth, to have X-ray pictures taken.

10 Q What did those X-ray pictures reveal? A Show fracture of two transverse lumbar processes.

Q And what did you do in respect to treatment, doctor? A Then, of course, she had such pain I had to strap her back up, now, all strapped with adhesive, and later on I got her a belt, and I have gotten her a brace to protect her back.

Q And how often did you see her? A Well, it was variable, sometimes three or four times a week, sometimes only twice a week, but most often it was the more often, three times a week.

20 Q And when did you observe her stuttering condition, doctor? A Well, she stuttered right along, she was an extremely nervous woman, as I say, I attributed that to her shock during the accident, and she has been growing lately the last three months progressively worse.

Q Where has she been growing worse, what part of her body? A She has developed an atrophy of her right leg. Along in June she developed the menstrual disturbances.

30 Q Let us go back to June, what was her condition there, doctor? A You mean at home?

Q Yes, condition of the woman, you say she developed menstrual disturbances? A She developed menstrual disturbances, and I know she had considerable distress, and she called me in one night because of her distress, discomfort, and she called me in at times, I think at night, I saw her at night after 10 o'clock because of discomfort.

40

Dr. Francis S. Myers, for Plaintiffs, direct.

Q And what would you do to comfort her, doctor? A I would have to give her something, nerve sedative, of some kind.

Q And how long did the menstrual disturbances persist, doctor? A They came on about the 25th of June, and right along she has had menstrual disturbances. I don't just know the time of her periods, but I think she has a record of them. 10

Q That they have been irregular? A They have been irregular.

Q When did this atrophy or withering of the right leg begin, doctor? A About three months ago, I first noticed it at first, though, when I saw it she had anesthesia of her leg—though this was partially cleared up, she developed atrophy. 20

Q What is anesthesia? A Numbness, inability to feel pain.

Q Did she complain of numbness, on what particular point? A Over the right hip and right lateral portion of the leg.

Q What has that numbness developed into, doctor? A I don't know, maybe nerve degeneration.

Q Did you have occasion to call in Dr. Dowd on this case? A I did. 30

Q Did you treat her? A I did.

Q And what treatment did you prescribe, doctor? A Well, I have had her under aluminol and various nerve sedatives, right along, she was very hysterical bursting out in crying attacks, she was very much disoriented, couldn't do her housework as she had been—of course I didn't know Mrs. Sanford prior to the accident. She said she was unable to do any of the house- 40

Dr. Francis S. Myers, for Plaintiffs, direct.

work—poor woman, made her feel very badly, worried considerably about that. She would cry.

Q And did you consult with Dr. Dowd on this case? A I did.

Q And what treatments did you give to her?

10 A Well, he said that I was carrying out the proper treatment, and that I should only continue, that is all he would advise.

Q And what hope do you hold out for her?

A As to permanent disability?

Q Yes. A I don't think she will ever recover the use of her leg, I think that her injury is permanent.

Q And assuming doctor that this woman, Mrs. Sandford, was injured in an automobile accident on December 6, 1929, and that prior to that
20 accident she was able to do her housework and had a sunny disposition and gave birth to two children—

The Court: Doctor, I wouldn't pursue that hypothetical question, counsel is not insisting on it. What do you think her condition is due to, doctor?

The Witness: To the injuries she received.
30

The Court: He is the attending physician.

Q Have you put her through various tests, doctor, so far as walking is concerned? A Yes, I have tried to get her to walk, had her out in the sunshine on the porch trying to build up her nerves with fresh air and sunshine all summer, and as I say give her nerve sedatives, tonics, then I have tried to bring her back to prevent any further deterioration of nerves.
40

Dr. Francis S. Myers, for Plaintiffs, cross.

Q Did you consult with any other specialist in regard to the general condition? A Dr. Kessler.

Q Who is Dr. Kessler? A Orthopaedic surgeon in Newark.

Q He is a specialist in that branch? A Yes.

Q And after your consultation did you agree to follow a certain plan? A Why, he said her condition was a profound psychoneurosis, gave me some idea as to the treatment, which I proceeded to follow out.

10

Q And you followed that out religiously? A Only a matter of changing the type of brace she had.

Q And you say that the patient has gotten progressively worse? A For the last three months I should say that she has gone down hill quite a bit.

20

Q Doctor, did you submit a bill for your services? A Yes, I was asked for a bill.

Q What was it? A \$444.

Q And is that a reasonable bill for the services? A It seems to me so, I have spent considerable time on this case.

Q And you have treated her for a period of about how many months? A Nine months, \$50 a month.

30

Cross examination by Mr. Romine.

Q You say that you and Dr. Kessler agreed that this woman has psychoneurosis? A Yes, a profound psychoneurosis.

Q What is that? A Due to nervous shock and trauma would initiate the same.

Q Isn't it an imaginary idea that the patient gets? A It is not an imaginary idea.

40

Dr. Francis S. Myers, for Plaintiffs, cross.

Q Well, largely due to imagination of the mind which increases? A As a disease it has different symptoms the same as scarlet fever—psychoneurosis.

10 The Court: He is asking whether psychoneurosis is neurasthenia?

The Witness: No, it is not exactly, but border line condition.

Q It is a nervous condition? A Nervous disease.

The Court: He is telling you, acute nervous disease, that is what he says it is.

The Witness: Yes, sir.

20 Q And that can be increased by the person's mental attitude, could it not? A It may be increased by the person's mental attitude, I think in this case it was by shock.

Q And her mental attitude in regard to it, is that right? A By the shock, yes.

The Court: In other words, you think she is not helping herself particularly by reason of the neurasthenic condition?

30 The Witness: I think it was initiated by the shock, and she is suffering pain and her inability to do her work, and discouragement has caused the disease to progress.

Q Don't you think, doctor, when this case is over and the matter is disposed of, that Mrs. Sandford's mind will be cleared up and she will advance toward recovery? A Psychoneurosis that occurred during the war is still prevalent,
40 and government hospitals have them.

Dr. Francis S. Myers, for Plaintiffs, cross.

Q That is because some of these people were gassed? A Not necessarily.

Q Wasn't that some other affliction? A No, shock is the main thing.

Q And that shock could be overcome in many cases by the mental attitude the patient takes? 10
A I wouldn't say that, no.

Q It helps, doesn't it? A But not in all cases.

Q And if their mind is relieved of certain things where they say—in this particular instance, the disposition of this case, that would help, would it not towards recovery of this woman?

Mr. Smith: Object, if this question is put there is no evidence that there is anything 20
about this case that is worrying this woman.

The Court: It is one of those questions that is frequently asked especially where it involves a neurosis or some nervous disorder; whether the restoration to a normally peaceful condition will not have a beneficial effect, that is all there is to it, in other words, difference between a person living in a condition of excitement, and not anticipating the 30
day in court, for example—or four days in court.

The Witness: No one can determine.

Mr. Smith: And also a fracture of the transverse processes should be included in that question.

The Court: I don't know that it has any particular value either to ask it, nowadays, anyway. That rests entirely with Mrs. Sand- 40
ford.

Motion for a Non-suit.

Mr. Romine: In other words, we have to rest until after the case is over?

Mr. Smith: I don't think that is a fair question.

The Court: The doctor answered, he says he doesn't know.

10 Mr. Romine: If he doesn't know, that is all I want.

(Witness excused.)

The Court: With the exception of Dr. Kessler you are ready to rest your case, Mr. Smith?

Mr. Smith: Dr. Kessler and probably another doctor.

20 The Court: Then I think we will take a recess until Monday morning at 10 o'clock. Jury excused.

30 Mr. Lum: I move for a non-suit on behalf of defendant, Charles H. Totty Company, on the ground there is no evidence whatever to connect that defendant with this cause of action. There is an answer, the amended answer admits that the defendant, Charles H. Totty Company was a corporation organized and existing under the laws of the State of New Jersey, and as such corporation owned a certain automobile, but denies all other and every other allegation contained in paragraph 1.

The Court: You admit the ownership of the automobile?

40 Mr. Lum: Admit the ownership of the automobile. But there is no proof whatever of any agency of anything whatever, but the mere fact of ownership, no statement,

Motion for a Non-suit.

and there is nothing in the case to connect the Totty Company in any way whatever. The Doran case does not go to the length that would require the Totty Company under the present state of the record.

I further move for a non-suit on the ground, by the testimony, that while the testimony of Mrs. Sandford was in the roadway under the circumstances described, and on the side of the road where, under the Traffic Act of New Jersey, she should not have been, and that the proof shows that there was no sidewalk here, and the Section, Article Five, Section 3 of the Motor Vehicle Act would apply, and that as the Legislature has established a rule, of what would be ordinary prudence, by this legislation the plaintiff was guilty of contributory negligence; that the danger does not have to be proved, that is the danger of her being on the wrong side of the road; under the circumstances, because there was no longer room for reasonable difference of opinion if, by the breach of the Statute plaintiff through her common law conscience is charged with knowledge, and if injury ensues she would have been held to have acted at her peril. The benefit of the Statute should apply to this defendant if he is to be connected to the case in any way, the defendant, the Totty Company.

Then I move for a non-suit on the ground there is nothing to connect the defendant, Totty Company, with the case in any way; that the plaintiff was guilty of contributory negligence, and no negligence on behalf of the defendant, for whom I speak.

Motion for a Non-suit.

10 The Court: If I have the situation in mind here, it appears that the defendant, Totty Company, had first filed an answer in which paragraph one of the complaint it was admitted in that paragraph there was an allegation of agency existing between the driver of the motor vehicle and the Totty Company; it subsequently appears that an amended answer was filed in which all of that paragraph of the complaint was admitted excepting the agency. The pleading however as it now is, does admit the ownership of the automobile, no question, by the defendant, Totty Company. There is a recognized presumption of law that if an automobile becomes involved in an accident which results in the charge of negligence that the driver of the car is presumed to have been at the time, the agent for the owner, that is to say, it is based upon a mere presumption. There is no proof in the case at the present moment, it is true, that the defendant Yoder was in the employ of the Totty Company, but it does appear that he was driving that company's automobile, or motor vehicle. I think therefore that the presumption would apply that Yoder was driving it with authority of the owner, and in accordance with the agency. That would be presumed. That being so, then it would be to all intents and purposes for the purpose of this motion equivalent to proving that Yoder was employed by the Totty Company at the time he was driving the automobile and in the course of its employment, and within the scope of his authority. Moreover the suggestion that there is no proof of

Motion for a Non-suit.

negligence in the case at the present moment, as far as this particular motion is concerned, for the reason that the plaintiff, Mrs. Sandford, admits that she was walking on what might be termed under the Traffic Act the improper side of the road. Judge Katzenbach wrote an opinion a short time ago, that the mere proof of a traffic regulation under a Statute, of itself standing alone would not rise to the dignity of proof of negligence. It might very well be a person was violating the Traffic Act, but mere violation without accompanying proof of negligence showing a causal relation between the violation of the regulation under the Statute and injury incurred in the collision would not suffice to justify the Court as matter of law in holding that by reason of such violation there was negligence on the part of Mrs. Sandford in this case. While the violation of a regulation laid down in the Traffic Act might ultimately prove to be the cause of the injury, unless that was shown to have a causal relation to the injury in the contributory sense, it could not of itself, or standing alone, it appearing she was walking on the wrong side of the road contrary to the Traffic Act, amount to negligence. Therefore, the motion is denied and you may have an exception. You first admitted ownership and agency, then an amendment came in afterwards and denied the agency, but admitted the ownership but denied the agency. Now, it would be open to the plaintiff in the case to have the jury pass on these circumstances, having first admitted responsibility, and then subsequently, by amended

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Henry O. Peckham, for Defendants, direct.

pleading, it is a question in my mind whether they are not entitled to criticize you for it.

(Court convened pursuant to adjournment, Monday, October 27, 1930.)

10 Mr. Romine: If the Court please, I make the same motion as Mr. Lum before adjournment on the ground of contributory negligence on the part of the plaintiff, and that she was walking on the wrong side of the road contrary to law, and therefore by her acts contributed to the injury which she received.

The Court: The same ruling.

Mr. Romine: Exception.

20 Mr. Smith: The three doctors I was going to call this morning have been subpoenaed to appear here this morning, just after checking up and I find they have left their offices.

The Court: You want to reserve the right to call them when they arrive?

Mr. Smith: Yes. In the meantime there is no reason why the defense should not proceed.

30 HENRY O. PECKHAM, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Romine.

Q Mr. Peckham, what is your business? A Civil engineer and surveyor.

Q Where located? A Madison, New Jersey.

Q Did you make a map of this road where the alleged accident occurred? A Yes.

40 Q Will you produce the map and explain it?

Henry O. Peckham, for Defendants, direct.

Mr. Smith: May I ask, if your Honor please, when that map was made?

The Court: He will tell you.

The Witness: This morning.

The Court: Now, you may describe your map.

The Witness: Right near Hanover Church, the heavy lines here are the hard pavement, the green lines along each side of the road represents the edge of the grass; these are the driveways going into the church shown in this corner, and a driveway running into here, this dwelling, and another to this dwelling. Poles are indicated and various trees; along this side is a foot path.

By the Court.

Q The width of the improved pavement? A 18 feet.

Q What are those varied widths of the grass between the pavement and the grass? A At this point?

Q No, on the south side. A On the side?

Q Yes. A It runs from 2½ feet there to 5 feet here (indicating on map).

Q On the other side? A On the other side about 3½ to 4 feet, 4 feet.

Q Any ditch on that side? A There is a depression here where a culvert goes across the street, it isn't shown here, I couldn't see it exactly, because it is pretty well covered up. Right along this dwelling there is quite a hole.

Q How about the other side of the road? A The bank runs out quite a ways and then drops down.

Henry O. Peckham, for Defendants, cross.

The Court: That map may be marked Exhibit D. 1.

(Received in evidence and marked Exhibit D. 1.)

By Mr. Romine.

10 Q Mr. Peckham, will you mark on the map where the culvert goes across, approximately?
A I have marked it by a dotted line.

Q At the extreme end of that dotted line indicates where the ditch is? A The culvert is covered but there is an opening here and another here (indicating).

Q That is, there is an opening on the north and south side of the road? A By opening, I mean a stone, you can see the stone.

20 Q The opening is how far from the grass portion of the road? A Five feet.

Q Is that map drawn to a scale? A Yes, one inch to 10 feet.

Cross examination by Mr. Smith.

Q You drew that this morning, of course?
A Yes, sir.

30 Q That doesn't represent from your own knowledge how that scene looked on December 6, 1929, of course? A No.

Q And you don't know from your picture and your study this morning that there was a ditch there at that time, or how deep it was or how the bank lay without making a measurement of it? A I don't know—you mean did I measure it this morning?

40 The Court: No, how long have you known that road, Mr. Peckham?

Harold F. Yoder, for Defendants, direct.

The Witness: 15 years.

The Court: Were you familiar with the conditions existing on December 6th?

The Witness: I cannot say just that date, but to my eye the road hasn't made any change in a number of years.

The Court: It so happens there was snow at that time, you haven't put the snow on your map?

10

The Witness: No.

Q Nor can you tell us exactly how the ditch was dug out at that time on December 6, 1929?

A No.

Q You couldn't tell us that at all? A No.

(Witness excused.)

20

HAROLD F. YODER, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Romine.

Q Mr. Yoder, you are one of the defendants in this case? A Yes, sir.

Q And on December 6, 1929, where did you live? A In Madison.

30

Q And on that particular day were you on this road known as Mount Pleasant avenue? A Yes.

Q In which direction were you going? A I was traveling west towards Madison.

Q Can you indicate by this in which direction you were going? A This was what they call Mount Pleasant avenue, I was traveling this way, from east to west.

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Harold F. Yoder, for Defendants, direct.

Q And in what were you traveling? A I had a Ford coupe.

Q Do you know how old that Ford automobile was? A Yes, I think we purchased that automobile about the second week in November of the same year.

10 Q And practically new? A It was practically new, less than 500 miles on it.

Q What kind of night was it? A Well, it was to me not a rather clear night, the road was rather slippery, due to the snow coming down, and what water there was on the road freezing.

Q Was there snow on the ground? A Yes.

Q And with reference to the road itself was there any snow in the main portion of the road?
20 A No, I think that had been scraped rather clear, except for what little had been on there the sun had melted, and when the sun had gone down it began freezing a little.

Q Do you know how much of the amount of the road had been ploughed free of snow?

A At that time there was just about enough room for two cars to pass comfortably.

Q And how high was the snow on either side of the cleared portion of the road? A Where
30 it had been scraped from it?

Q Yes. A I don't know, more than five or six inches.

Q Do you know the depth of that five or six inches of snow? A No, I don't recollect that.

Q Do you know how deep the fall of snow was itself? A Couldn't have been more than two or three inches, at the time.

Q What time of night was it you approached this point near the church? A To my knowl-
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Harold F. Yoder, for Defendants, direct.

edge it was approximately a quarter of or ten to six.

Q Was it light or dark at that time? A It was dark at that time.

Q Did you have the lights on your car lighted? A Yes, sir.

Q As you approached this point will you tell us what occurred in your own words? A As I came along Mount Pleasant avenue I saw a pair of headlights coming toward me, and they were very bright, and consequently on the Ford you can move a lever there and shut the lights down directly in front of you, as I did that this car kept coming toward me at quite a rate of speed, and I don't know what it was, so at the same time watching the side of the road and watching this truck, since the road had not been scraped its full width I shut the lights down, it happened that the plaintiff, the truck and myself happened together at the same spot at the same time, as a result the lights formed more or less of a neutral zone where I had vision up to the time the truck passed me, and at that time I saw the plaintiff about six feet ahead of me.

Q When you first observed the plaintiff six feet ahead of you where was the truck? A The truck was just in the process of passing me, it gave me enough time—I had two things to do, either hit the truck head-on or hit the plaintiff head-on, I took more or less the intermediate, I shot my wheel over in under the truck which happened to be a high one, and my fender went in under it.

The Court: Was she walking towards you?

Harold F. Yoder, for Defendants, direct.

The Witness: She was walking in the same direction I was going.

The Court: Going west?

The Witness: Going west.

10 Q And where was the plaintiff, Mrs. Sandford, walking? A She was walking along the edge of the road.

Q What do you mean by that? A To my knowledge it was not in the snow.

Q She was not in the snow? A She was on the cleared portion of the road.

The Court: The cleared portion?

The Witness: The cleared portion of the road.

20

Q Did you notice whether she continued there as you made the turn, or not? A You mean as I shot my car to the left?

Q Yes. A When I shot my car to the left I was quite positive that I had not hit her and when the car stopped I was more or less horizontally across the road, not vertically, and I had stopped within four or five feet of where the plaintiff should have been walking. I got
30 out of the car.

Mr. Smith: Object, and ask it be stricken out.

The Court: You may state where she actually was.

The Witness: Where she actually was?

Q You got out of your car, what did you do?
A I went over to tell her to walk on the other
40 side of the road, that is, for her own personal

Harold F. Yoder, for Defendants, direct.

safety, and when I got out there I was dumfounded, because I did not see her; I had felt no jar to the car whatsoever, couldn't tell you what part of the car hit her except it was not the front end.

Q Where was the plaintiff laying, where was she? A More or less in that so-called five or six inches of snow, the heap. 10

Q Right by the said of the road? A Yes.

Mr. Smith: I object to that question.

The Court: Let him tell.

Q Now, when you say, heap of snow, what do you mean by that?

The Court: Where was she lying? 20

The Witness: Just to the edge of the road in the snow.

Q Did you do anything? A Yes, I picked her up.

Q Any one come to give you any assistance? A To my knowledge there was no one there, I was thoroughly putting all of my attention to this woman, because when I got out of the car and found she was hit, I hardly knew what to do, so I picked her up and took her over to the car. 30

Q Did any one come to your assistance at that time? A Not to my knowledge.

Q Did you see any one there? A I probably saw somebody there, because there were cars coming up there all the time. I tried to stop several cars but they wouldn't stop. After that I paid no more attention to them. 40

Harold F. Yoder, for Defendants, direct.

Q Did you have any conversation with Mrs. Sandford at that time? A Yes, I told her that I wanted to take her to the hospital, and she began to fight with me, that is, she wanted to get away from me. I told her the best thing to do would be to go to the hospital and she
10 wanted me to take her home.

Q Did you take her home? A I did take her home.

Q Was any one at home when you arrived at her house? A When I got in her home her daughter was there, and then about five minutes afterwards the Chief of Police came in.

Q Did her husband come there while you were there? A Her husband came in, in the meantime I had gone down for the doctor, and come back, and while I was in there the doctor told the Chief of Police and I together in the
20 back room—I don't know what room it was—and while I was talking to the Chief of Police there the plaintiff's husband came in.

Q What doctor did you go for? A Dr. Eckhardt.

Q Where is he located? A In Madison.

Q Did you have any further talk with Mrs. Sandford or her husband that night? A Yes,
30 when Mr. Sandford came in I gave him the greetings of the night and told him what happened. He went in to see his wife and came back to the room. The Chief of Police and I were talking, and he said at the time not to worry about this thing, and that if I turned in a report to Mr. Dill it would be just a black mark chalked up against me.

Q Did you have any further conversation with Mrs. Sandford that night? A No, not
40 until I left.

Harold F. Yoder, for Defendants, direct.

Q Did you go to the Sandford home again after that night? A Yes, I went back again, I am not sure whether it was the Saturday after the accident, the day after, or the following week, I think it was the first Saturday.

Q Did you have any conversation with Mrs. Sandford at that time? A Yes, we said very little about the accident, I asked her how she was feeling and she said she was not feeling very good, but I said in a week or so she would be all right. And then the rest of the time was devoted to—I think they lived in New Hampshire or Vermont at one time, and we talked about motoring through that State. 10

Q Was anything said with reference to this accident at either the night you took Mrs. Sandford home or on any occasion you went there to visit her? A Yes, I don't remember whether it was the night of the accident or the day I went over to see her, but she said at that time that it was no one's fault, that the accident could not be avoided. 20

Q The accident could not be avoided. Now, were you familiar with this road before the night in question? A I had been over it, but not very often.

Q Been over it in the daytime? A Yes. 30

Q Have you been over it since the occurrence of the accident? A I have been over only once or twice.

Q Can you tell us whether the road today is in the same condition, without of course the snow, as it was the day of the accident? A Yes, I am quite sure, because I had been going over that way in the last three years probably once or twice a year. 40

Harold F. Yoder, for Defendants, cross.

Q Does this photograph correctly show the road leading up toward the church? A Yes.

Q As it was on the night in question except for the snow? A Yes, sir.

Mr. Romine: I offer this in evidence.

10 Mr. Smith: If your Honor please, I have no objection to this picture being put in with the understanding it was just taken here recently.

Mr. Lum: Yesterday.

Mr. Smith: And it does not show certain ditches as would have been revealed in a picture taken on December 6, 1929?

20 The Court: You question its accuracy in that respect, you may reserve the right to show it, otherwise it may be marked.

(Received in evidence and marked Exhibit D. 2.)

Cross examination by Mr. Lum.

Q Mr. Yoder, you had been employed by the Totty Company for some time before the accident? A Yes, sir.

30 Q For about how long, approximately? A Three to three and a half years. The first two years I was with the Totty Company I was entirely in the growing end, that is, I was at the home plant where the flowers were produced, and two winters I was salesman for him out on the road.

Q As salesman, what did you do? A I solicited orders and was more or less contact man with our biggest customers.

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Harold F. Yoder, for Defendants, cross.

Q Where was your territory? A Long Island was the principal one, I had Westchester County, part of Connecticut and some of Pennsylvania.

Q Anything in Jersey? A Yes, I had Jersey, which was the territory out around Bernardsville.

Q And with whom did you come in contact in connection with your work, what member of the Totty Company? A Usually it was Miss Moran more than Mr. Totty.

10

Q What would determine where you were to go? A That was up to my discretion, I knew the field more than anybody else in the firm, I was out around my customers, and I could tell which territory required my work at different times.

Q Now, did you consult with Mr. Totty at all after that? A Yes, I would either see Mr. Totty on Saturday, if he was not in the city, if he happened to go to the city on Saturday, I would see him on Sunday and we would go over the past week's work and suggest the following week, and suggest I go certain places.

20

Q Did that take place the week of the accident? A Yes.

Q Where were you to go? A Connecticut that week.

30

Q Were you to be there all the week? A Up to Friday.

Q And what was your arrangement for Friday? A Friday I was supposed to have the day off myself, I thought that week would terminate my business up to Thursday night.

Q Did you have that arrangement with Mr. Totty? A Yes.

Q What about Saturday? A And Saturday I was to be back in the office if Mr. Totty was

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Harold F. Yoder, for Defendants, cross.

there I would report to him and tell him about the week's work, and if not I would see him on Sunday.

10 Q And in that event would Saturday be your own time? A Yes, I usually spent that time looking around the greenhouse and checking up on varieties we had growing there.

Q Where would the car be kept? A I kept that in my own garage, that is, the garage downtown.

Q In Madison? A In Madison.

Q Not at the plant? A No, I never left it there.

Q And did you do your shopping in New York? A Yes.

20 Q Was any of that whatsoever for Mr. Totty or the Totty Company? A No, he was not involved at all.

Q After the shopping where were you to go? A After the shopping I went over to Rutherford to see a friend of mine.

Q Anything to do with the Totty Company or its business in any way? A No, to my knowledge we have no customers over there, that is, any customers that would be worth my time.

30 Q Were you to see any customer whatever? A No.

Q Was there anything you were to do that had anything to do with the Totty business in any way? A No.

Q Who was the man you wanted to see in Rutherford? A Carl Harris, an old school mate of mine, have known him for seven years.

40 Q Did you know exactly where he lived in Rutherford? A No, I had his address but lost it. At that time I thought I had the oppor-

Harold F. Yoder, for Defendants, cross.

tunity of seeing him, but just could not get with him that day.

Q How did you try to find him? A I looked around various streets, a good bit of my driving when you are on the road—

Mr. Smith: I object. 10

The Court: I don't see why you object.

Q All right, at any rate you did not find Mr. Harris? A No.

The Court: You did not finish that, you were saying—

The Witness: A good deal of driving out on the road, you travel a good bit, you don't pay so much attention to the street, it is more appearance of buildings, and I couldn't locate the building, I didn't know any of the streets in Rutherford except two main streets. 20

Q Is Carl Harris a customer of Totty & Company? A No, sir.

Q Or ever has been? A Not to my knowledge.

Q After you failed to find him in Rutherford, where did you go then? A On my way back to Madison. 30

Q Where were you going to go after you had gone to Madison? A Going home.

Q Your own place? A Yes.

The Court: I am not entirely clear how he started. Did you go into New York with the car?

The Witness: I was into New York, and I was in there for a short while. I did my 40

Harold F. Yoder, for Defendants, cross.

shopping and I came from New York over to Rutherford by way of the ferry.

The Court: Do anything else in New York?

The Witness: That's all, had lunch.

10

The Court: What time did you start for the city from your home?

The Witness: I did not come from Madison.

The Court: Where did you come from?

The Witness: I came down from Stamford to New York.

The Court: You had been working over in Stamford?

20

The Witness: Up to Thursday, Thursday night I stayed in Stamford.

The Court: Slept the night there, and were on your way home?

The Witness: On the way to the city on my own business.

The Court: Who owned the car?

The Witness: Mr. Totty.

Q And if you had not done shopping or gone to Rutherford, would you have been on this road at all? A No, I would not have been on that road.

Q And were you on the day of the accident at any time doing anything whatsoever in connection with the affairs of the Totty Company or for the benefit of the Totty Company in any way, directly or indirectly? A No, sir.

The Court: So, you were on your way back home, weren't you?

40

The Witness: I was going home.

Harold F. Yoder, for Defendants, cross.

Cross examination by Mr. Smith.

Q Now, Mr. Yoder, you were employed by the Totty Company and you used the Totty Company's automobile? A Yes.

Q And the custom of the use of that car that you were to drive it for the solicitation of orders and at the end of the day you placed it in your garage, is that right? A Yes. 10

Q And that was the usual custom, the usual thing to do each and every day? A Yes, except when I was on the road, I kept it in various garages.

Q Yes, of course. But that was the usual custom for you to do, at the end of the day's work bring it to your home and leave it there overnight? A If I wanted to go out at night on my affairs that was my privilege. 20

Q You had quite a bit of leeway in the business, did you not? A As far as the work on the road, it was more or less up to my discretion where I should go.

Q And if you took three, four or five days, it wouldn't mak any material difference? A Up to a certain point.

Q Up to a week, we will say, for the Connecticut territory? A Yes, that would be all right. 30

Q That territory generally took a week to cover? A No, I wouldn't say that, at times—it is rather hard to explain that business, the gardeners sometimes will have a meeting and you do your work in three days, and you won't be able to see them the next day.

Q But when you set out from the Totty plant you do not set any definite time? A It is usually a week.

Q And the time is generally at your suggestion? A Yes. 40

Harold F. Yoder, for Defendants, cross.

Q And as you said you have quite a bit of leeway. Where did you go, which way did you go to Connecticut? A In going up to Connecticut?

Q Yes. A Went up through New York.

10 Q Passed through Newark and New York? A Through the Holland Tunnel.

Q And you went up there and carried on your business there? A Yes.

Q And you carried on business for the Totty Company? A Yes.

Q And how long did you remain up in Connecticut? A I was there till Friday morning. I terminated my business Thursday night.

Q Your business, for the Totty Company, the defendant in this case? A Yes.

20 Q And what time Friday morning did you leave Connecticut? A I left Stamford approximately between 10 and 11, I don't know the exact time.

Q And you were starting home from your business trip? A No, I was on my way to New York.

30 Q Well, you had finished your business, you say? A I had finished my business, but I was not going home, I was on my way to New York to do shopping.

Q Going up to Connecticut you went up by way of New York? A Yes.

Q And coming home you were doing that, too? A Yes.

Q And didn't you do that on that Friday morning? A Do what?

Q Go home by way of New York? A I go home by way of New Jersey.

40 Q And coming home from your business trip by way of New York? A Yes.

Harold F. Yoder, for Defendants, cross.

Q What time did you get to New York? A Approximately noon.

Q And where did you go? A Bought lunch.

Q Of course you bought lunch every day? A Yes.

Q And then after that where did you go? A Went shopping then about three or four different stores. 10

Q Which stores did you go to? A Franklin Simon.

Q What did you buy in Franklin Simon's? A I bought a present for my mother.

Q And that did not take long, did it? A No.

Q Then you went where, yourself? A I went to Finchly. 20

The Court: What did you do there, buy a necktie?

The Witness: Necktie and some socks.

The Court: Then where did you go?

The Witness: Down to Rogers Peet.

The Court: What did you do there, buy a suit?

The Witness: No, I looked them over. 30

Q And the time spent there didn't amount to a whole lot of time, did it? A No, I should say it was about an hour and a half, two hours.

Q And that wasn't anything for you to explain if you are on a trip for the Totty Company, you had quite a bit of leeway? A Not as far as that was concerned.

Q You mean to say you could not have an hour and a half to yourself on the ride from Connecticut? A I probably could, but there is some moral obligation there, too. 40

Harold F. Yoder, for Defendants, cross.

Q In other words, your time was practically your own, you told me before? A Yes.

Q And you would not have to go to the Totty Company and say to Mr. Totty, "I want to stop at Finchly's to buy a tie?" A I feel it my duty to tell him though.

10 Q I didn't ask you that. You didn't have to do that? A No, sir.

The Court: Why don't you ask him whether he called Mr. Totty up that morning?

Mr. Smith: I will.

Q Did you call him up that morning? A No, sir.

20 Q As a matter of fact you went of your own accord, didn't you? A Yes.

Q And that was intermingled with your return from your business trip? A That was pre-arranged.

Q And then where did you go from New York? A From New York I went to Rutherford.

30 Q How did you get to Rutherford? A By way of the ferry and down—it is I think the Paterson Plankroad, or Passaic, I am not sure what the name was.

The Court: How did you get over, Fort Lee?

The Witness: 42nd Street Ferry.

Q 42nd street? A Yes.

Q Where did that take you over to? A I think they call it West New York, I am not sure.

40 Q Why didn't you go over the Fort Lee Ferry? A I was down around that territory, downtown, I came down 42nd street.

Harold F. Yoder, for Defendants, cross.

Q Then you went over where? A To Rutherford.

Q What Rutherford, East Rutherford, or Rutherford? A East Rutherford.

Q And when did you make up your mind to go and see this party? A When I discovered that my shopping would terminate better than what I thought it would. 10

Q Now, that was the first time you made up your mind after you finished your shopping? A I had made up my mind before, I had not made up my mind to go.

Q What is his first name? A Carl Harris.

Q How long have you known him? A I have known him about 7 years.

Q Where did you meet him? A I met him in school. 20

Q You never saw him in Rutherford, did you? A I was over there once.

Q How many years ago? A He came over to Madison to see me and at that time he gave me his address. Then I went over a short while afterwards.

Q When was it he came to see you in Madison? A I think it was approximately last spring, I am not sure, he had just moved down from Cleveland, Ohio. 30

Q Last spring, you mean spring of 1929? A Yes.

Q And what was his business? A He was an engineer.

Q And by whom was he employed? A That I cannot tell you, it was a New York firm.

Q Didn't you have occasion to call him up in New York? A I did not know his New York address at all. 40

Harold F. Yoder, for Defendants, cross.

Q In the course of your conversation didn't you elicit where he worked? A Yes, but I did not attach any importance to it, because I did not expect to see him in New York.

10 Q Weren't interested enough in him to see him in New York? A Yes, at the time, but he is working during the day and I had no business with him.

Q Did you have any social relations with him at all? A Not while I was in New Jersey.

Q You say you had an address? A I did have one.

Q And what was that address? A That I couldn't tell you, I lost his address right after he gave it to me.

20 Q How long after he gave it to you? A That I couldn't tell you.

Q Where did you put his address? A Well, I must have put it in a drawer or possibly my wallet and it got mislaid.

Q And he had not been in communication with you since the spring of 1929? A No, sir.

Q And you had not been in communication with him? A No, sir.

30 Q And you had no definite reason why you wanted to see him? A Yes, I had more or less an obligation to.

Q And you made up your mind definitely after you spent an hour and a half out shopping? A Yes.

40 Q Where did you go first in Rutherford? A I came up—I don't know whether it is Paterson or Passaic Plank Road, and I turned off of what I thought was the street, I do not know the name, and I looked around on various streets and could not place the building.

Harold F. Yoder, for Defendants, cross.

Q What kind of a building was it? A I think it was an apartment.

Q Don't you know? A I know.

Q Well, what was it? A It was an apartment.

Q Now, you are sure of it? A Positively.

Q How many story apartment? A That I 10
couldn't tell you.

Q Was it more than four? A I don't know whether it was more than four, it was more than one, and possibly more than two.

Q And you went looking for this man in Rutherford only for the moral obligation that you owed to him, is that right? A Not moral—

Q In spite of the fact you had not seen him since the spring of 1929? A Yes, sir.

Q And then it dawned upon you over in New 20
York? A No.

Q Well, you made up your mind in New York, did you not, in New York? A Yes.

Q To go to see him. You did not have his address? A That is right.

Q When did you look for his address? A I looked for it on several other occasions.

Q Did you attempt to find him out in Rutherford? A On this particular day?

Q At any time before this day. A No, 30
not before this day, this was the first opportunity I really had.

The Court: How were you going out to Madison from 42nd street?

The Witness: Usually?

The Court: Yes, generally.

The Witness: Usually I go down Seventh avenue, down to the Holland Tunnel and then out through Newark to the Oranges. 40

Harold F. Yoder, for Defendants, cross.

The Court: Could you go out to Madison from 42nd street from the Ferry?

The Witness: Yes.

The Court: What is the route?

10 The Witness: I think it goes out West New York, Secaucus, through Rutherford, to Belleville, and from Belleville—Belleville avenue you take to Montclair, then Montclair down to those other towns.

Q Down to where? A Down to Livingston and Hanover.

Q Up through Pleasant avenue? A No.

Q And that was your usual course coming back from Connecticut? A The Holland Tunnel.

20 Q Yes. A Yes.

Q And you went around Rutherford looking for this man? A Yes, sir.

Q Is that the only place you went up that main street? A No, I said I went to various side streets there.

Q How long did you seek him out in Rutherford? A I imagine I was there about 20 minutes to 25 minutes possibly to half an hour.

30 Q And you say you had lunch at 12 o'clock? A Approximately 12.

Q And your lunch took about half an hour or so? A Yes.

Q And you did your shopping about an hour and a half? A Yes.

Q And spent 20 minutes in Rutherford? A Yes.

Q And then you came directly home? A Yes.

40 Q What time was it when you left Rutherford? A I should say it was approximately about quarter of five.

Harold F. Yoder, for Defendants, cross.

Q I thought you said it took you half an hour for lunch? A Yes.

Q An hour and a half for shopping? A Yes, and takes some time to drive over.

Q Yes. Quite early, quarter of five? A No, at that time I was only driving 25 an hour, because the car was new.

10

Q You were going slowly? A Yes.

The Court: You hadn't yet made the thousand miles?

The Witness: No, I hadn't made the five hundred.

Q And that Ford, of course, could go faster than 25 an hour? A I don't know about that, I judge it could.

20

Q You knew it could go faster than that? A I imagine it could, I don't know whether that particular Ford could.

The Court: He says it was not going fast.

Q You only spent 20 minutes in Rutherford? A Possibly a half an hour.

Q And then you came back and put your car in the usual place where it was put before?

A Yes.

30

Q And that was your work when you came back from a business trip? A Yes.

Q To place your car in that same garage? A Yes.

Q And this car was owned by the Totty Corporation, is that right? A That is right.

Q And you usually used Mount Pleasant avenue to go home from your business trips, didn't you? A Oh, no.

Q Well, you were going to use it that night? A I wouldn't have happened there if I hadn't gone to Rutherford.

40

Harold F. Yoder, for Defendants, cross.

Q Didn't you tell the Court a few monments ago that was the usual way to go from over 42nd street to Belleville and Montclair, to Mount Pleasant avenue? A No, sir, I said through the Holland Tunnel.

10 Q What time of the day was it this accident happened, approximately? A From 15 to 10 to 6.

Q You have been driving over Mount Pleasant avenue for a period of three years? A Yes.

Q And you used that road quite often? A Not so very often.

Q You have used it? A Yes.

Q One of the main arteries that come up here in Morris County? A Yes, one of the main arteries.

20 Q And you had lights on your car that night, didn't you? A Yes, sir.

Q Was it light at that time? A No.

Q What was it? A It had gotten dark, say, approximately 5:30, and kept getting darker.

Q It was dusk? A It was a little more than dusk.

Q You told me it was dusk? A Probably, I don't recall.

30 Q And there was snow on either side of the road? A Yes.

Q And how far would your lights shine ahead of you on a brand new car that the Totty Corporation owned, and which you drove, and taking into consideration the fact that it had only been driven a month or two?

Mr. Lum: Object, unless he specifies when and where.

40 Mr. Smith: That particular night.

Harold F. Yoder, for Defendants, cross.

Q How far did your lights shine ahead of you?

Mr. Lum: Object to that, it may be misleading, if he means at the point of the accident or at some other place.

The Court: He can describe the lights, he had on his car, what they potentially could do, whether it was an ordinary lens—I think he has already described. 10

Mr. Lum: Yes, because he told what the situation was when the two cars came together, that there was a neutralizing—

The Court: That isn't what he is seeking to bring out, I will allow it, you may have an exception. 20

Q What was the range or vision you had with those lights on that night? A Ordinary driving I don't know what the exact distance would be.

Q You could picture your lights on the road? A Generally, ordinary drive, 100 to 150.

Q Didn't you tell me it was about 150 to 200 feet? A Possibly I did, that was just a guess I believe.

Q You are only guessing when you told me? A I said I didn't know, I don't know what the exact distance is. 30

Q It might have given you a vision of 150 feet at least? A Ordinarily.

Q And as you were coming down the road if there were an object walking in the center, or alongside the snow, you would have seen it, wouldn't you? A Well, only if—

Q Just a moment, you would have seen it? A No. 40

Harold F. Yoder, for Defendants, cross.

Q With your light shining 150 feet? A Are you speaking conditionally now? You mean about this particular thing?

Q I will put the question this way, before the accident took place, there was nothing on the road to block the view in front of you, was there?

10 A No.

Q So that you had a clear view of the road?

A That is ordinary driving.

Q I am just asking you that question. So that you had a clear view of the road at that time?

A Before the accident?

Q Yes. What was your answer to that? A Yes.

Q And for at least 150 feet in front of you?

A Yes.

20 Q Did you see Mrs. Sandford 150 feet in front of you? A No, sir.

Q Did you see Mrs. Sanford 100 feet in front of you? A No.

Q Did you see Mrs. Sandford 75 feet in front of you? A No, sir.

Mr. Lum: He said five or six.

Mr. Smith: I am cross examining.

30 Q Did you see Mrs. Sandford 75 feet? A No.

Q Fifty feet? A No.

Q Didn't see her until you got on top of her? A Yes, six feet.

Q And were you looking in front of you while you were driving that automobile just before the accident took place? A Yes.

Q And you did not see Mrs. Sandford? A No.

40 Q She wasn't on the right, was she? A I couldn't tell you at that time up to six feet.

Harold F. Yoder, for Defendants, cross:

Q You were looking on the right? A Yes.

Q You didn't see her on that road from 150 feet down to six? A No, the truck blinded me.

Q And how far away from the truck were you when you first saw it? A That I can't say, I imagine as a guess it might run up to 200 feet or 300 feet, I can't tell. 10

Q Two or three hundred feet. And that truck was on the right side of the road, wasn't it? A Apparently.

Q And if there was somebody walking on the ridge or on the side of the road you would have seen the person? A No, sir.

Q With your headlights? A No.

Q With your bright headlights? A Not with the bright lights approaching. 20

Q You were on your right side of the road? A Yes.

Q Did you see the road 150 feet ahead of you? A No, up to the front of me, you know where the lights blinded me, up to a certain point.

Q How far up the road could you see? A That particular time when the accident happened?

Q I mean before the accident happened. A 30 With nothing approaching me?

Q I mean when you first saw the truck two or three hundred feet away? A At that time I couldn't possibly see more than 15 feet away.

Q And the truck was 200 or more feet away? A Possibly.

Q Well, would the conditions as they were that night, with the icy pavement, as you have described, and in what distance could you have stopped your car that night going at the rate 40

Harold F. Yoder, for Defendants, cross.

of 25 miles an hour? A At the time of the accident I am quite sure I was going less.

Q I didn't ask you that. A Repeat the question, please.

10 The Court: Within what distance could you have stopped your car going at the speed you were?

The Witness: I think I probably could have stopped within four or five feet, possibly six or seven.

Q Four or five feet, six or seven, going at the rate of 25 miles an hour? A Yes.

20 Q What rate of speed were you going when Mrs. Sandford was struck? A That was 20 or less, I can't tell exactly.

Q In what distance could you stop your car going at the rate of 20 miles an hour or less, under the same conditions? A That would probably be around four or five, judge the same as the other.

Q Why didn't you stop your car when you saw Mrs. Sandford six feet away? A I did stop within my six feet I believe.

30 Q How? A I shot the car—I turned it—it didn't skid—I shot my car under the truck, as I said before, and the left fender went under and I stopped horizontally in the road.

Q And you swung the rear end of your car around? A No, it didn't leave the road, went more or less in a straight line, followed the front wheels.

Q You struck Mrs. Sandford with the rear wheel? A I don't know.

40 Q You found it out later? A I found out later she had probably been struck.

Harold F. Yoder, for Defendants, cross.

Q Found her in the snow? A Yes.

Q And the front wheels of your car were over on the other side of the road? A No, not entirely, I was just about in the middle of the road, I believe.

Q Where were the front wheels of your car in relation to the left hand side, going west? A 10
The front wheels were nearer the left hand side of the road than the head.

Q Most of your car was on the left hand side of the road after the accident? A No, I wouldn't say most of it.

Q Mr. Yoder, this is going west, I presume? A Yes, to the left.

Q And your front wheels were on this side of the road, weren't they? A The car was swung more or less like this, and the front wheels were close—naturally they were closer to the 20
left side.

Q Not naturally, just want to know the facts, how close to that side of the road were your front wheels? A I think that would be probably within two or three feet.

Q How long is that car? A That I don't know, what the wheel base is.

Q Will you give the jury some idea of what the wheel base is on that car? A I don't know 30
just what it would be.

Q Would you say it was eight feet? A Might possibly be that, I don't know.

The Court: He says he doesn't know; if you don't know, say so.

Q How wide was that road, Mr. Yoder, at that particular point at that time? A Two cars could just pass.

Harold F. Yoder, for Defendants, cross.

Q How many feet wide would you say it was?

A I couldn't tell you either.

Q Can't you give us an approximate idea what the width of that is? A Your Honor told me not to guess.

Q I don't want you to guess.

10

The Court: If you don't know, say so.

The Witness: All I know is two cars could pass very comfortably, with not too much room.

Q And if your front wheels were only two or three feet from the opposite side, then your rear wheels would be just about over the center line, would they not? A You mean to the right?

20

Q Yes. A I think the rear wheels were closer to the right side of the road than they were to the left.

Q You mean your right going up? A Yes.

Q I think you told us a moment ago, you told us your front wheels were within two or three feet of the left side of the road? A I say my rear wheels were closer to the right side of the road than they were to the left side.

30

The Court: He said, came around in horizontal fashion.

Q Yes. But most of your car was on the left side of the road? A No, I would say most of the car was in the center of the road.

Q So you did not stop in four feet, or so? A Yes.

Q All right. You say you saw this woman six feet ahead of you? A Yes.

40

Q That is the first time you saw her? A Yes.

Harold F. Yoder, for Defendants, cross.

Q You went that six feet, didn't you? A Shot the car over this way.

Q When you shot that car over this way, as you say, you skidded, didn't you? A No, the wheels, the car went in the direction, the front wheels were turned over to the left.

Q And there was ice on the roadway at that time? A Yes, sir. 10

Q And Mrs. Sandford's body was found in the snow, wasn't it? A Yes.

Q In fact, you did not see her at all before the happening of this accident? A Yes, I saw her before the accident.

Q Did you skid at all when you applied your brakes? A I probably skidded a little bit.

Q Certainly you skidded? A Just a little. 20

The Court: Did your car go beyond her or did it pass her?

The Witness: As I recollect she was directly in back of my rear end, that is, facing horizontally across.

Q And as you skidded the rear end of your car struck Mrs. Sandford? A That I cannot tell you, I know it was not the front end of the car. 30

Q You knew it was some place in the back of your car? A Probably.

Q Probably? You know whether you hit her? A I don't know whether she slipped into me.

Q She slipped into you? A I don't know.

Q Where did she slip to, she slipped into you?

Harold F. Yoder, for Defendants, cross.

The Court: Do you know what side of your car came in contact with her body if it did at all?

The Witness: It was probably the right side—the right fender came in contact with her body.

10 The Court: The right side?

The Witness: The right side of my car, you see she was walking in the same direction I was going.

The Court: Yes.

Q And when this truck was passing you, this other vehicle, you put on your brakes to avoid hitting that, didn't you? A Yes, sir.

20 Q And that is what caused you to skid, and skidded off the road and hit the lady? A No, sir.

Q How long was that truck? A That I couldn't tell you, it was a big truck.

Q Just a moment—

30 The Court: A large truck he says. He evidently didn't have any opportunity to observe it. These accidents are not slow movies at all, and you cannot take out a card and put down everything. An accident is an accident. They happen so quickly it takes an alert mind to get all the details a lawyer should have.

Mr. Lum: Judge Lawrence, one of the doctors must go into an operation at 11 o'clock.

The Court: All right, you may suspend the examination of this witness.

(Witness excused.)

40

Dr. Ralph A. Eckhardt, for Defendants, direct.

RALPH A. ECKHARDT, called as a witness,
having been duly sworn, testified as follows:

Direct examination by Mr. Romine.

Q Doctor Eckhardt, you are a practicing physician in this State? A I am. 10

Q And located at Madison, are you? A Yes, sir.

Q Do you recall the evening of December 6, 1929? A I do.

Q Did you go to Mrs. Sandford's home that evening? A I did.

Q At whose request? A At Mr. Yoder's request.

Q Did he take you there, or did you go in your own car? A He came over to me, we went over together. 20

Q What was Mrs. Sandford's condition when you arrived there? A At the time I saw her she was very nervous and she complained of pain in her back and difficulty in moving around. She said she had been knocked unconscious for the time being, but when I saw her she was fully conscious, but had difficulty in getting words out. I mean, she was kind of stuttering. She was in an extreme nervous state. 30

The Court: She was stuttering, doctor?

The Witness: Yes, she was very nervous.

Q Had you treated Mrs. Sandford previous to that time? A No, I did not.

Q Did she at the time you treated her give you any history of any previous condition? A She said at one time she did have a nervous breakdown sometime previously, as to the date I couldn't give you. 40

Dr. Ralph A. Eckhardt, for Defendants, direct.

Q How long was it you treated her? A About seven weeks.

Q That would carry you into January, 1930? A Yes.

10 Q What were your physical findings? A At the time I saw her she had a hematoma on her head, did not have any black and blue marks on her body that night, but the succeeding days she developed quite a number of black and blue marks.

The Court: What region was that, on the small of the back?

The Witness: Down more to the buttocks on the right side, also had several abrasions on her leg.

20 The Court: What is a hematoma?

The Witness: A hemorrhage underneath the skin.

The Court: Is the appearance of it blue—was on the head, you say?

The Witness: She had a lump back there, a hematoma. No visible blood, but hematoma is a hemorrhage underneath the skin.

30 Q At the time you ceased treating Mrs. Sandford, what was her condition then? A Very much as when I first saw her.

Q Same neurotic condition? A Yes, she had difficulty in getting around, but she had very much difficulty in walking and complained of a great deal of pain over her right sacroiliac joint.

Q Did you have an X-ray taken? A Yes, about one week or eight days after the accident.

Q Get a report on the X-ray? A Yes.

40 Q What was the report?

Dr. Ralph A. Eckhardt, for Defendants, direct.

Mr. Smith: I object.

By the Court.

Q Can you read X-rays? A Yes.

Q How long have you been doing it? A Why, ever since I was licensed to practice.

Q How long have you been licensed to practise? A Five years. 10

Q How many X-rays a year would you read, approximately? A I should say about 60 to 75, or so.

Q And you use them in your practice, do you? A Yes, I do.

Q What did you diagnose the injury here to be, independent of the X-ray? A Why, I thought she probably had a contusion or some relaxation of the sacroiliac joint. 20

Q Did the X-ray conform to your diagnosis? A There was some relaxation of the sacroiliac joint, and also a congenital malformation there.

By Mr. Romine.

Q You did not attribute the relaxation of the sacroiliac joint to this accident? A It is rather hard to say, she had not complained of any pain there previously, and I thought it rather came from the accident. 30

Q A person could have relaxation of the sacroiliac joint without having an accident.

Mr. Smith: Object, this is direct examination, not as an expert gives his authority possibly.

The Court: It does not necessarily follow that he must be a specialist. Any practitioner can express an opinion. 40

Dr. Ralph A. Eckhardt, for Defendants, direct.

Mr. Smith: He just said it came from the accident.

Mr. Romine: You misunderstood him. What is the question?

(The pending question repeated.)

10

The Court: Could he not?

The Witness: Yes, he could.

Q And this congenial malformation is something that occurs from birth, is it not? A Yes.

Q And both of these things if they existed before this accident could predispose a weakness in that region, could it not?

Mr. Smith: Objected to.

20

The Court: That is merely a line of examination, that is customary procedure. If that be true, then, this accident produced an aggravated situation or aroused the situation more or less latent, or dormant, but that is your answer. You say there was a physical injury as a result of this accident, as the proximate result.

Mr. Romine: I don't think that was the answer.

30

The Witness: Yes, it could.

Q Did you get a report from the doctor at the hospital who took the X-rays, that he found no indication of fracture or dislocation?

Mr. Smith: I object.

The Court: You cannot do that. I have allowed that particular question as to whether the X-rays confirmed his diagnosis, that is as far as I will allow you to go.

40

Dr. Ralph A. Eckhardt, for Defendants, cross

Mr. Romine: He didn't touch on the fracture yet.

The Court: A question of report, and so on, you will have to produce the gentleman who took the X-rays, or produce the X-rays and establish their authenticity, and let him read them one or the other. 10

Mr. Smith: Here are X-rays if you want them.

Q Were you at the hospital after the X-rays were taken on December 13th and 14th, 1929?

A No, I was not.

Q Did you confer with the doctor at the hospital that took them? A I looked them over later, I didn't see Dr. Richard.

Q And when you looked them over was Dr. Richard there? A No, he was not. 20

Q Did you find any evidence of fracture on X-ray examination later on? There is evidence of fracture, where is that evidence? A At the transverse processes, third and fourth lumbar vertebrae.

Q Which side? A Left side.

Cross examination by Mr. Smith.

Q And you are positive there was a fracture there at the third and fourth lumbar vertebrae? 30

A Yes.

Q And you looked over Dr. Baker's X-rays, presented in court the other day? A I saw them after court.

Q And the X-rays put in evidence here, I will refer to them as Dr. Baker's, and you found some fracture in that X-ray, with callus formation? A Yes. 40

Dr. Ralph A. Eckhardt, for Defendants, cross

Q And you say you found a hematoma in the back of the skull? A Yes.

Q And as a result of that hematoma, a woman receiving a blow like that would become nervous and in shock, would she not? A She may and may not.

10 Q In this particular case she did, did she not? A She was very nervous when I saw her.

Q And she stuttered when you saw her? A Yes.

Q And did that grow progressively worse? A I think it was about the same.

Q And when you went to see her the first night she was in bed or on a couch? A Yes, sir.

20 Q When you saw her the next time where was she? A In bed downstairs, I think in the hall.

Q Did you observe the tremor in her hands and body? A Yes.

Q And the general shock? A Yes.

Q And what were her subjective symptoms? A Pain in her back, mostly, and quite nervous.

Q Did you apply pressure to that particular portion? A I did.

30 Q And was pain elicited as a result of your test? A Yes. Very much tenderness was elicited, yes.

Q And the woman was a pretty sick woman? A Yes, was.

Q Was she able to walk? A She was not able to walk the next day, no, but she was able to walk, not walk, able to go around but with difficulty.

Q With assistance? A With assistance, later on.

40

Dr. Ralph A. Eckhardt, for Defendants, cross

Q Those conditions sometimes get progressively worse? A They may.

Q And when there is a fracture of the third and fourth lumbar vertebrae there is a breakdown of the structural make-up of the back, isn't there? A Well, it all depends whether you mean the vertebrae or transverse processes, transverse processes I don't believe are what you might term a complete breakdown of its body, of the vertebrae, then there might be. 10

Q Of course, you didn't have occasion to examine her recently, have you? A No.

Q You don't know what condition had set in afterwards? A No, the time I left her—I mean, she was probably in the same condition I first saw her in, not quite as nervous as she was but unable to get around. 20

The Court: What are some of the causes for atrophy of the leg?

The Witness: One of the principal causes of course is disuse, and another one, disturbance of nerve function in the leg, and, of course, you may have certain diseases which would cause atrophy of the leg.

The Court: Not involving trauma?

The Witness: Yes, and of course also trauma, you may have, which would result in atrophy of the leg. 30

Q The nerves of the leg, doctor, are connected with the third and fourth lumbar vertebrae? A They are, yes.

Q And if the lumbar vertebrae was fractured or affected it naturally would affect that nerve that goes down to the leg? A If anything happens to press or involve that nerve, yes. 40

Harold F. Yoder, for Defendants, cross (continued).

Q If that nerve is affected or deteriorates, or atrophies, what— A You just answered your question.

10 Q If the nerve atrophies what happens to the leg, I mean to say? A Undoubtedly the muscles which are supplied by that nerve would atrophy, too.

Q And the leg will gradually wither away? A It will.

Q What was your bill, doctor, for your services? A \$80.

Q And is that a reasonable amount, doctor? A I think so.

Mr. Lum: No questions.
(Witness excused.)

20

HAROLD F. YODER, resumes the stand.

Cross examination (continued) by Mr. Smith.

Q You remember signing this affidavit, don't you, Mr. Yoder? A Yes, sir.

30 Q And you remember Mr. Cliff taking your affidavit?

Mr. Lum: I object to this, not matter of cross examination at all.

The Court: In a sense, it is not. If on any previous occasion he made statements inconsistent with his present testimony, you have a right to indicate and bring it up, if statements were made or incorporated in some affidavit, then you have a right to give it to us.

40

Harold F. Yoder, for Defendants, cross (continued).

Mr. Smith: This is part of the Court's record.

Mr. Lum: Your Honor made the order for the amendment.

The Court: Well, they have a right to do that, it is part of the record. In other words, I allowed him to file what— 10

Mr. Smith: An amended answer.

The Court: On the strength of that affidavit. You may use it.

Q Now, you swore everything in here was true? A Yes.

Q You remember saying in this affidavit, Mr. Yoder, that on the afternoon—"On the afternoon of Saturday after shopping in New York,"— A What day was that? 20

Q "On the afternoon of Saturday, after shopping in New York, drove to Rutherford, New Jersey, to visit the aforesaid friend, Carl Harris, but was unable to locate him, and after being there, unable to locate him, he decided to drive to his home which he did;" do you remember saying that? A Yes, sir.

Q May I read that into the record?

The Court: No objection to that, he admits it. 30

Mr. Smith: He admits he said, "on the afternoon of Saturday, after shopping in New York, drove to Rutherford, New Jersey, to visit the aforesaid friend, Carl Harris, but was unable to locate him, and after being unable to locate him he decided to drive to his home, which he did."

The Court: For the purpose of the record, counsel is now reading from an affidavit 40

Harold F. Yoder, for Defendants, cross (continued).

made by the witness on application for leave to amend his answer, the defendant corporation's answer, the Totty Company, it appearing that the affidavit was made, signed and sworn to for that purpose.

10 Q Now, Mr. Yoder, you were served with a summons in this case? A Yes.

Q And somewhere around the early part of April? A I don't know the date.

Q You recall about when it was, in the spring? A If you say about 7th of April, it is all right.

Q I don't want you to say that, you were served some time in the spring, weren't you? A Yes.

20 Q And you were sued as was Charles H. Totty Company?

The Court: That is the record speaks for itself.

Q You filed an answer to this through your attorney, William E. Holmwood? A No, I did not know anything about that.

Q Didn't know anything about that?

30 The Court: Turned it over to lawyers.
The Witness: Charles H. Totty Company.

Q And you told the Charles H. Totty Company's attorney about the accident? A Yes.

Q And you also told the man who came up to see you in respect to this accident how it happened and all the circumstances surrounding it? A Yes.

40 Q And as a result of your conversation, your telling him how the accident happened and all the circumstances, they filed an answer in which

Harold F. Yoder, for Defendants, cross (continued).

they admitted that you were the servant, agent and employee of Charles H. Totty Company on December 6, 1929?

Mr. Romine: That is objected to, it speaks for itself, counsel knows there is an amendment later.

10

The Court: Yes, he says he knows nothing about these formal pleadings, but it is true, as you say, taking the original paragraph one of the complaint which carries an allegation of agency between Totty Company and the witness, subsequently an amended answer in which they deny that portion of it.

Cross examination by Mr. Lum.

Q You were asked if you told Mr. Totty all about the accident, did you tell him about your conversation with Mr. and Mrs. Sandford?

20

Mr. Romine: I object to that.

The Court: I will allow it.

The Witness: Yes, I told him.

Q Did you tell him that Mrs. Sandford had said that she was as much to blame as you?

30

Mr. Smith: I object to that, this is not proper cross examination.

The Court: I won't foreclose the Totty Company, they have done that which you criticized, now they have a right to explain, then it becomes a matter for the jury, and they should decide whether it is for or against the Totty Company as an admission against interest.

40

Harold F. Yoder, for Defendants, cross (continued).

Mr. Smith: For the purpose of the record I would like to object to any conversation had between Mr. Yoder and with Mrs. Sandford as not binding.

Mr. Lum: This man asked him whether he reported everything about the accident.

10 The Court: I will allow it. Did you tell Mr. Totty the circumstances of the accident?

The Witness: Yes, I told him everything concerning the accident.

Q Did you tell him anything that would indicate any seriousness possibly?

Mr. Smith: I object to that.

20 The Court: Yes, all he could do was to tell him, then I assume Mr. Totty submitted the matter to the counsel.

Q Miss Moran is secretary of the Totty Company? A She is secretary.

Q You handed these papers to her? A Yes.

Q Did you know whether Mr. Totty saw them, dealt with them at all? A No, I didn't have any more knowledge of it.

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

The Court: Objection overruled, he may answer, he says he doesn't know anything about it.

Q Did you yourself see the first answer filed in this case? A No.

Q Did you ever talk to William E. Holmwood, the gentleman who filed it? A Never saw the gentleman.

40

Harold F. Yoder, for Defendants, cross (continued).

Q Never saw him in your life? A No.

Q Did you have any knowledge whatever of anything that was in that first answer filed? A No.

Q Are you now in Mr. Totty's employ? A No, sir.

Q Did your leaving have anything to do with this accident at all? A No, Mr. Totty and I have an understanding that I would leave some time this year. 10

The Court: Got a better job?

The Witness: It is with my father, I don't know whether it is a better job or not.

Q Now, in this affidavit which has been read to you, mentions the fact you shopped in New York and went to Rutherford on Saturday, do you know how that came to be put there? A That is a typographical error. 20

Q Is there any question—in New York, you weren't shopping in New York, and were not in Rutherford on Saturday? A No, no question, when we were talking about business the week following I told Mr. Totty I am going to New York and Rutherford. 30

Q That is merely a typographical error? A Yes.

Cross examination by Mr. Smith.

Q You read it over? A I don't know anything about it.

Q You swore everything in it was true, the material allegations? A I don't know anything about them. 40

Andrew J. Richard, for Plaintiffs, direct.

Q You don't know anything about the affidavit or the answer? A That was filed, the affidavit was signed, I know that.

The Court: He says he did not read it.

10 Q You knew an answer had to be filed in this suit? A I did not know anything about it, I glanced over it.

Q You found you were a defendant in this cause, and you had twenty days to answer? A Yes.

Q You turned it over to your attorney? A No, I turned it over to Miss Moran who takes care of all the company business.

Q Of the Totty Company's office? A Yes.

20 (Witness excused.)

ANDREW J. RICHARD, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Doctor, will you pick out your X-ray that was taken by you? A (Witness does so.)

30 Q Now, did you have these X-rays made, doctor? A They were made in the laboratory of the Morristown Hospital.

Q Under your supervision? A They were taken by either one of my assistants or myself, but I do not recollect.

Q And this one also, referring to P. 5 and 6? A Yes.

The Court: Counsel has no question about these X-rays.

40

Andrew J. Richard, for Plaintiffs, cross.

Cross examination by Mr. Romine.

Q Did you make a report on the X-rays you took? A Yes.

Q And in that report did you state that there was no indication of fracture?

10

Mr. Smith: Object to that.

The Court: I will allow you to ask him as your own witness what the X-ray discloses.

Mr. Romine: I am asking him now if he reported from those X-rays to Dr. Eckhardt that there was no indication of fracture.

Mr. Smith: Object to that.

The Court: No, it wouldn't make any difference about that, that would not be material. 20

Mr. Romine: I take exception to your Honor's ruling.

The Court: You may have it.

Q Did you report that the transverse processes were completely—

Mr. Smith: Objected to, all I did was to have this witness prove the X-rays taken by him. If this gentleman wants to use him as his witness he may do so. 30

The Court: It is immaterial what he reported to Dr. Eckhardt. Dr. Eckhardt has qualified by saying he was treating a condition he discovered, a certain condition. He examined the X-rays made by this doctor and they conformed with what he found.

Mr. Romine: I asked Dr. Eckhardt the question whether this doctor reported to him 40

Andrew J. Richard, for Plaintiffs, cross.

so and so, your Honor said, no, I suppose because it is, no.

The Court: Yes.

10 Mr. Romine: Now, they call this witness in not to read any X-rays but to identify them. He is the man who made the report to Dr. Eckhardt. Now, I want to know from him if he did not make a report which I endeavored to elicit from Dr. Eckhardt.

The Court: I will allow you this question. Did you make a report, not what the report was.

Q Did you, doctor? A I made a report.

20 Mr. Romine: Now, I press the question, because I had Dr. Eckhardt here, and they did not ask him.

The Court: They are not obliged to.

Mr. Romine: That is why I am wondering, why they don't.

The Court: You can get at it in your own way.

30 Mr. Romine: I am trying to, because I am trying the defendant's case.

The Court: You have to make this doctor your own witness.

Mr. Romine: The question is, did you give a report to Dr. Eckhardt that these X-rays which you identified showed no indication of fracture.

Mr. Smith: Objected to.

The Court: Sustained.

40 Mr. Romine: I take an exception.

Andrew J. Richard, for Plaintiffs, cross.

The Court: I allowed you to ask him did he make a report. You may have an exception.

Q In the report to Dr. Eckardt did you not indicate in that report—

Mr. Smith: Object, this is only done for 10
one purpose.

The Court: I have sufficient of the question to indicate the purport. The objection is sustained.

Mr. Romine: I think I must get the question on the record.

The Court: Your adversary feels that you are really getting it before the jury, not on the record.

Mr. Romine: What I am trying to find out 20
from this witness is, a certain report he made and what it contained.

The Court: I have overruled you on that.

Mr. Romine: I must ask the question. The Courts have ruled I must ask the question to get it on the record, whether right or wrong, the Appellate Court cannot say that the question is good or bad unless it is on the record, I have to get it on the record. 30

The Court: Read the question.

(The pending question repeated.)

The Court: The objection is sustained.

Mr. Romine: I haven't asked the question.

The Court: I sustained the objection, you may take your exception.

Mr. Romine: That is, your Honor refuses to permit me to ask him any further questions what his report was? 40

Dr. Henry H. Kessler, for Plaintiffs, direct.

The Court: As to the contents of the report.

Mr. Romine: That is on the record, I have an exception.

(Witness excused.)

10

HENRY H. KESSLER, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Smith.

Q Dr. Kessler, you are a practicing physician of the State of New Jersey? A I am.

Q And what do you specialize in, doctor? A Orthopedic surgery.

20

Q And with what institutions or commissions are you connected with, doctor? A I am Medical Director of the Rehabilitation New Jersey Clinic at Newark, I am on the orthopedic staff of the Newark Beth Israel Hospital, Newark, City of Irvington General Hospital for Crippled Children.

The Court: Any question of the doctor's qualifications?

30

Mr. Romine: Not at all.

Q What is orthopedic, doctor? A Surgery of bones and joints.

Q Do you give all your time to the study of that? A Yes, I practice orthopedic surgery.

Q Did you examine Mrs. Laura Sandford? A I did.

Q When did you first examine her? A On April 22, 1930, at her home in Hanover.

40

Dr. Henry H. Kessler, for Plaintiffs, direct.

Q Where did you find her when you got to her home? A In bed.

Q Will you tell the Court and jury what the result of your examination of Mrs. Sandford was? A I examined her with her clothes removed, I found her lying in bed, lying on her back and she presented at that time a marked stiffness and spasms of the muscles of her back, with marked local tenderness of the muscles of the right side, lumbar region, that is small of the back, and along the right gluteal region, the right buttock and right femoral region, the right thigh, the back was completely rigid at the time, and on trying to extend both legs with the hips flexed there is marked pain elicited in the region of both sacral-iliac and sacral joints. 10

Q Was she able to bend her back without pain? A The back was completely stiff regardless of the question of pain. 20

Q And the legs? A The legs were not stiff, but they were weak and on getting out of bed to have her move around and walk she was unable to do so without assistance.

Q What was the condition, were there any tremors to her body?

Mr. Romine: Object to that as leading. 30

Mr. Smith: I will withdraw it.

Q What else did you observe, doctor? A She had a marked and continuous tremor of her tongue and facial muscles, and her hands.

By the Court.

Q Did you talk with her, doctor? A Yes.

Q How did she talk? A With a sort of impediment in her speech, or halt. 40

Dr. Henry H. Kessler, for Plaintiffs, direct.

Q Was it marked? A Marked impediment in her speech. She seemed to present a typical picture of psychoneurosis with definite vasomotor in ability, marked flush of the face, perspiring, recently marked exaggeration of all reflexes.

10 Q Indicating? A Indicating this co-called condition of psychoneurosis.

By Mr. Smith.

Q Have you a history of the case, doctor? A She gave me the history of having been injured in an automobile accident.

Q And would such accident cause the condition she was suffering from? A Yes.

Q Would you say that was the cause of the
20 condition?

Mr. Romine: Object to that.

Mr. Smith: Withdraw it.

The Court: In all reasonable probability what was her condition as you saw it due to?

The Witness: Due to the injury, the history of which she gave me.

The Court: Trauma, result of an injury?

30 The Witness: Yes.

Q Was she able to do any work? A She was completely disabled at that time.

Q And subsequent to that examination did you inspect any X-ray pictures? A I did.

Q And what did you find in those pictures? A As I recall it I found a fracture of one of the transverse processes of the spine.

Q I will show you a picture, doctor, this
40 Exhibit P. 1, suppose you look at that, doctor?

Dr. Henry H. Kessler, for Plaintiffs, direct.

A This picture shows a definite fracture of the third and fourth spines of the transverse processes of the third and fourth lumbar vertebrae, that is very definite and distinct. Yes, those are the same pictures I saw.

Q Then did you see her afterwards? A The next time I saw her Dr. Myers asked me to go up and see her to see whether there was not something in the way of an appliance that I might prescribe to assist her in getting about, that was September 27th at her home in Hanover I saw her in company with Dr. Myers. 10

Q What was the result? A At that time she had shown some improvement, she was out of bed but sitting in a chair, she still walked with that peculiar gait which she demonstrated here in walking about, and halting, sort of toxic gait, although she did not present a spine that was as rigid as I first saw her, still presented marked spasm and a marked restricted motion of the spine in all directions, the most significant finding on that date, however, was a marked atrophy of the entire right thigh and leg extending not only up to the thigh itself, but to the gluteal or buttock region as well. This measured definitely three-quarters of an inch difference. 20

Q Is there any causal relation between the atrophy or dying of the leg with the back condition and fractures which you have pointed out? A It is my opinion there is direct association. 30

Q What is the association? A I believe she has either a nerve root or peripheral nerve injury causing this injury.

Q What is your prognosis in a case of this kind? A It is uncertain, she may have some return of tone and volume in the entire right 40

Dr. Henry H. Kessler, for Plaintiffs, direct.

lower extremity, then again she may not have any return.

Q And you examined her another time after that? A She was in my office about two weeks after that.

10 Q Did you see any improvement in her at all? A The condition was essentially the same as the examination I made on September 27th.

Q The atrophy in the leg, was that marked, you could readily observe it? A Not only observed fully and measured, there is a loss of tone and difference in the feel of the muscle and character compared to the muscle on the other side.

20 Q When there are fractures of the third and fourth lumbar vertebrae, what is the result of the tissue and tendons in other parts of the body that cling to it? A Normally, you expect fractures to heal, and they heal usually by the formation of callus, which is nature's method of splinting bones ends, cementing, in this case the bones are healed because there is callus formation, and there is probability that the callus is pressing on the nerves just as they come out in the infantum foramin.

30 Q What is the effect of that? A My experience, where there is continuous pressure there is usually damage to those vessels supplied by these nerves.

The Court: Atrophy?

The Witness: Atrophy, loss of muscle tone, and in some cases, paralysis.

Q What was your bill, doctor? A \$75.

The Court: That is a reasonable charge?

40

The Witness: It is.

Dr. Henry H. Kessler, for Plaintiffs, cross.

Cross examination by Mr. Romine.

Q Doctor, this is a typical case of what might be termed traumatic neurasthenia, is it not? A There are a great many names for it, I call it neurosis.

Q It means the same thing, just a nervous condition, a nervous trouble, that is what neurotic means, neurasthenia? A Well, constitution has a great deal to do with that, of course. 10

Q And this woman is a very nervous type to begin with? A I never saw her before, so I don't know.

Q You find her to be a very nervous person, do you not? A Now, it is a question of these definite objective findings indicating this condition known as neurosis. 20

Q That is what you term psychoneurosis? A Might be trauma, psychoneurosis.

Q Don't you believe if this woman gets her mind off the injury after this case is disposed of that she will be much relieved as far as this neurosis is concerned? A She might be, maybe, I don't think she will be relieved.

Q That is hard to tell? A My own experience has been contrary to that sort of thing in these severe cases. 30

Q Are you familiar with the work of Dr. Babcock, professor of surgery, clinical surgery in Temple University? A Yes.

Q He is an authority on such matters, is he not? A Yes.

Q In referring to his work on the traumatic injury, traumatic spinal neurasthenia, you agree with him when he states the condition continues for weeks or months until any pending claim for 40

Dr. Henry H. Kessler, for Plaintiffs, cross.

damages are settled, whereupon the patient usually rapidly recovers? A No.

Mr. Smith: That is objected to.

10 Q You don't agree? A No, my experience has been different.

Q You agree with him when he says that treatment is that avoidance of fixation of spine with a cast or brace, or other measure that emphasizes the patient's impression or disability?

Mr. Smith: Object, those are not the facts in this case.

20 The Court: There is some suggestion she has been wearing a brace or belt, I will allow it.

Q Do you agree with this? A Not in this case.

Q Yet he is an authority on such work, you say? Do you believe that the impediment of speech will disappear after a while? A I couldn't say, that is an absolute speculation on the part of any one to say.

30 Q Do you believe the tremors of the body will disappear? A I also couldn't say.

Q If Dr. Dowd testified in this case that they would, do you agree with him or not?

Mr. Smith: Object to that, that is not proper cross examination.

The Court: Doesn't have to say that.

40 Q You don't know whether it would or not? A My experience has been, every case is a law unto itself, no one can say distinctly at the termi-

Dr. Henry H. Kessler, for Plaintiffs, redirect-cross.

nation of this case this woman will improve, my experience has been unfortunately opposite.

Q In many cases they do? A In some cases.

Re-direct examination by Mr. Smith.

Q Will the completion of this case have anything to do with the pressing of callus on the nerves of this woman's back? A That is physical, organic condition, which is in no way connected with this litigation.

10

Cross examination by Mr. Lum.

Q Did you examine this lady's teeth? A Yes.

Q You did find local infection, did you not? A There was some.

20

Q And that may affect the back? A I don't believe so.

Q You have had experience in scores of cases where you found infection of the teeth related to a focal infection? A I have.

Q And why did you determine— A Because, this being a condition related to a fracture, and not related to muscular condition itself, it is quite common to find focal infection causes a low grade back strained condition, but in this case of a severe injury to the spine I don't believe focal infection affects it in any way.

30

Q Did you advise relative to that focal infection? A Condition of back, with the support, that is a most important condition, the most important thing to relieve the woman's pain.

Q You do find in many cases a condition of teeth does affect the back, won't you please tell us why you did not advise relief of teeth condi-

40

Dr. Henry H. Kessler, for Plaintiffs, cross.

tion? A My opinion is focal infection is a minor item in these low back pain conditions.

Q Removing of minor conditions might lead to improvement? A It is so speculative and so unreliable that I do not depend on it.

10 Q Doctor, you find that atrophy and disease usually go together, do they not? A Yes, but not in this case.

Q You think that disease would not affect atrophy in this case? A I don't think disease is affecting this case.

The Court: And, in other words, you mean to say, if disease was the cause of it, it would be both legs instead of one?

The Witness: Exactly.

20 Q Is that so if there is use of one limb and not of the other? A Not in this case, she is using both legs.

Q You do as a general rule find atrophy and disease definitely associated, do you not? A Yes.

Q Did you test this limb, right limb, for sensation? A Yes.

Q And you found sensation? A Sensation is intact.

30

(Witness excused.)

Mr. Smith: If your Honor please, with the exception of offering again the pleadings into evidence I think the jury would be able to understand this case a whole lot better if they had a chance to read the pleadings in the case.

The Court: I am going to allow you to offer the pleadings, I think it has become definite in view of the exceptions filed.

40

Dr. Christopher C. Beling, for Defendants, direct.

Mr. Smith: I will rest my case.

Mr. Lum: I presume you put in the amendment?

The Court: Yes, you will have to put in the amendment.

Mr. Lum: You mean you obtained a transcript from the clerk of the Supreme Court? 10

Mr. Smith: That was all, an order was not filed apparently.

Mr. Lum: But you obtained the pleadings without the correction.

Mr. Smith: That is all I have received, if it is not correct, I am satisfied to put it in.

The Court: I will allow that transcript of the summons and complaint and answer, and the original answer to go in. This is a carbon copy. 20

Mr. Lum: The original was filed.

The Court: I will allow this to go in as a copy. Look at it and see if it is a copy?

Mr. Smith: Yes, that is a copy, we consent.

The Court: I will allow that to go in as a copy. 30

CHRISTOPHER C. BELING, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Romine.

Q You are a practicing physician of the State of New Jersey? A Yes, sir. 40

Dr. Christopher C. Belling, for Defendants, direct.

Q Do you specialize in any particular branch of your profession? A Yes.

Q And what is that? A Nerves and mental diseases.

Q How long have you been engaged in that particular line?

10

Mr. Smith: I will admit the doctor's qualifications.

Q Doctor, did you examine Mrs. Sandford in this case? A Yes.

Q When did you make the examination? A On October 26, 1930, at her home in Hanover in the presence of Dr. Dowd.

Q What did you find her condition to be, or what was the result of your examination? A
20 When I went in the room she was in bed, and when she was told I was to examine her she became very nervous as I entered she was acting nervously and the right side of her body was shaking considerably. She was upset and crying and apprehensive. After talking to her for a while, quieting her down, we proceeded with the examination. The examination consisted of going over her whole nervous system, her eyes and
30 glands, the nerves of the eyes, the facial nerves, and all the nerves in the upper part of her body and head were normal. The reflexes, that is, those responses you can get when you tap the knees and elbows, and so on, they were markedly increased. The measurements of both thighs showed a difference of about three-eighths of an inch in the middle of the right thigh it was three-eighths of an inch smaller than the left thigh. She was unable to use her right leg as well as her left. She was able to use her left leg
40 quite well, I mean, the left lower extremity, but

Dr. Christopher C. Beling, for Defendants, direct.

the right lower extremity when she tried to lift it off the bed, couldn't raise it more than an inch or so, and it would fall back. She had complained of pain in her back. She was wearing a support for her back which was not taken off so as not to disturb the part. The muscles of the right side were softer than the muscles of the left side. On testing the sensation of both limbs found that she did not appreciate the various types of sensation, that is, pin prick and light touch, etcetera, as well on the right as on the left, but she had appreciation of it but appreciation was diminished. From time to time she would develop these tremors in her hand, and also in her leg. Her speech was affected. It was a stuttering speech, when she became upset the stuttering was more marked. When she quieted down and became interested in what was being done and spoken the stuttering was not so marked. There was no inequality of her reflexes, there were no reflexes such as Babinsky, which is when you strike the sole of the foot and the big toe goes up, indicating damage to the spinal cord or brain, none of those symptoms were present. So on the basis of my examination I diagnose her case as psychoneurosis or hysterical state due to the injury she had sustained, of which she had given me the history. I also understood and learned that she had an injury to her back of which I suppose I am to say nothing.

The Court: What sort of injury was that?

The Witness: She had an injury from an automobile accident and that it resulted in a fracture of the transverse processes, third and fourth lumbar vertebrae on the right side.

Dr. Christopher C. Beling, for Defendants, direct.

The Court: Did you find those in the X-ray?

The Witness: I did not see the X-ray.

Q You had that in mind particularly? A I was given that information.

10 Q At the time you made your examination you had that in mind? A Yes.

Q And bearing that in mind you based your conclusions, did you, you have given us? A Yes, and further I also observed that she had a stiffness of her muscles in the gluteal region, I couldn't examine the back, and it is my opinion that she had some physical changes there in the muscles of the back, on the side where she was injured, and she also had in the upper left jaw
20 some badly infected teeth.

Q What connection, doctor, is there between infected teeth and the woman's present condition? A The only connection is that the infected teeth could keep up and aggravate as a result of the general toxemia resulting therefrom a traumatic condition such as she has.

Q In other words, it would retard recovery, is that what you mean? A Yes.

Q Now, is there, in your opinion, any relief
30 from this psychoneurosis? A Well, the important thing in a psychoneurosis, in regard to psychoneurosis is the removal of the cause that is in her own mind, that is, the accident, and the settlement of her case that would help her considerable in improving her mental attitude.

Q In other words, she needs to adopt what is known as suggestive therapeutics?

Mr. Smith: Object.

40

The Court: Go ahead.

Dr. Christopher C. Beling, for Defendants, direct.

The Witness: No, I think something more important than that.

Q In other words, it is with herself in addition to others?

Mr. Smith: Object to that question. 10

Th Court: I will allow it.

The Witness: I couldn't say that, I could say she has been injured and she has suffered and she is still suffering, and she feels there must be a settlement of her case, on the basis that cases are settled with the injured, it is something for the pain and suffering done to her.

The Court: Would you call that an opposition on her part? 20

The Witness: No, I have real appreciation of the situation.

Q And with the elimination of those things she will get better? A I mean as far as mental attitude is concerned, but she has these physical situations in her back.

Q Now, with regart to those physical situations, let us get down to them, what in your opinion could cause this shrinkage of the leg? 30

A That, I believe, in my opinion is due to two factors, one is the inability to use the leg, partially due to disease of her leg, on that side, the lower extremity, because of the pain and stiffness she has in the muscles of her back that restricts the movement of her limbs, and furthermore I think that there is involvement of the muscles.

Q And in that involvement due to inactivity?

A Yes, partly to inactivity and partly, I think, 40

Dr. Christopher C. Beling, for Defendants, cross.

to an accident, the strain of the muscles by the injury, and probably kept up by the local infection.

10 Q Now, if this infection in the teeth is eliminated, and mentally the patient gets better, will there be relief in the rigidity of the muscles and atrophy of the leg? A Yes, in my opinion to qualify, to add to it, with the proper adequate treatment given, local, in the way of electricity and massage.

Q In other words, whatever condition this woman has now, physical disability, it all could be eliminated and helped, is that right? A I wouldn't say it could all be eliminated, but a greater portion, to be conservative, probably all.

20 Q No one could tell as to that? A No.
Q There will be relief? A Yes, I believe she will improve considerably and become a fairly useful unit again.

Q Did you find there was any real organic trouble there? A I could not discover any organic trouble, if you mean any involvement of the central nervous system, that is, spinal cord.

Cross examination by Mr. Smith.

30 Q The usual cause of psychoneurosis is as a result of trauma, isn't it? A Yes, trauma is one cause of psychoneurosis.

Q It is the main cause? A I would not say main cause, it is a frequent cause.

Q Didn't you tell me down in the courthouse down in Newark, one day, that trauma was one of the chief causes of psychoneurosis? A Yes, I didn't say it was the main cause.

40 Q One of the chief causes? A Yes.

Dr. Christopher C. Beling, for Defendants, cross.

Q We won't quibble. A person struck by an automobile, skidding around, struck her in the back, to throw down, that would be a severe traumatic condition? A Yes, it may or may not be, but in this case evidently it was.

Q And isn't it true, doctor, that the fracture of the transverse processes of the lumbar vertebrae would cause this condition that this woman is suffering from now? A What condition do you mean? I mean a fracture would cause serious disturbance to the point, and suffering, and the shock would produce the psychoneurosis. 10

Q And it isn't all litigation, is it? A No, I don't want to convey that message to anybody.

Q This woman was hurt and badly hurt? A This woman was hurt and I think from what I can gather quite severely hurt at the time. 20

Q And if I told you, doctor, that she has been receiving electrical treatments and massage for a period of about ten months—

The Court: And baking.

Q Baking? A Yes.

Q And she has not improved, in fact she has become progressively worse, would you say she will be cured in a short time, or is it impossible to tell how long she would take? A I don't say she would be cured in a short space of time, but I said that these facts that I stated, that is, the settlement of her case, the removal of infection, and the local treatment will, in my opinion, most probably bring about an amelioration of her condition. 30

Q In respect to the atrophy of her leg, you say you found an trophy in her right leg of three-quarters of an inch? A I imagine so, it is an atrophy from disuse. 40

Dr. Christopher C. Beling, for Defendants, cross.

Mr. Lum: He said three-eighths of an inch.

Q The left leg was not diseased? A No, the left leg is more in use. Here is really the distinction that comes from—

10 Q I don't want the distinction. A The leg is being constantly moved with the welfare of the body on the other side, the other leg is largely removed from the welfare of the body.

Cross examination by Mr. Lum.

Q Will you just explain to the jury, we have had the words transverse process here a number of times, just what the transverse process is?

20 Mr. Smith: That is objected to, he was qualified as a neurologist.

The Court: Most of us have seen the backbone, those little wings.

Q They are the wings coming out from the backbone? A Yes.

Q Now, can you make that clear to us very briefly just what is meant by neurosis, to a layman, neurosis and necrosis might mean much
30 the same thing?

The Court: Necrosis?

Mr. Lum: No, to a layman, explain what neurosis is.

The Court: What is neurosis, doctor, for the benefit of the jury here? In just plain Scotch.

The Witness: In plain Scotch, it is a functional nervous disorder.

Dr. Bernard C. McMahon, for Defendants, direct.

The Court: What is this necrosis?

The Witness: Necrosis is the death of a part in plain English.

(Witness excused.)

10

DR. BERNARD C. McMAHON, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Romine.

Q Dr. McMahon, you are a practicing physician of the State of New Jersey? A I am.

Q And how long have you been practicing? A 27 years.

20

Q A graduate of what college? A The Medical Department, University of Tennessee.

Q And how long was that—

Mr. Smith: We admit the doctor's qualifications as a practicing physician.

Mr. Romine: I am going a little bit further.

Q Do you specialize in any branch of your profession? A Surgery. 30

Q How long have you specialized in surgery? A 15 years.

Q Connected with what hospitals? A All Souls in Morristown, and Psychiatric Institute.

Q Did you make an examination of Mrs. Sandford? A I did.

Q When? A Along in February of this year.

Q Where? A At her home in Hanover.

40

Dr. Bernard C. McMahon, for Defendants, direct.

Q What did you find her condition to be at that time? A I found Mrs. Sandford in bed at the time of my examination, I think she had given me a history that she had received an injury from an automobile along in December, that she had been struck in the back and had
10 been rendered unconscious, and at the time I saw her she said she had been in bed off and on since her injury, complained of a pain in the region of her back, lower right lumbar region, and complained of some pain and nervousness, and was very irritable as a result of this accident.

Q Did you get an oral history of any condition? A Yes, she told me or rather—

20 Mr. Smith: I object.

The Court: He cannot testify to what was told him, for the reason that he is there for the purpose of examination and not for treatment, as I understand it.

Mr. Lum: If the history of the case has been given to all the doctors—

30 The Court: Yes, any admission against interest might be admissible under that theory. This physician or surgeon is called by the defendant, and he is now asked whether she told him anything, that would be permissible as an admission against interest.

Mr. Smith: May I ask the purport of the question, whether it is going to be an admission against interest?

40 Mr. Romine: The object of the question is to disclose the fact that she told the doctor that she had nervous spells before.

Dr. Bernard C. McMahon, for Defendants, direct.

The Court: That is perfectly admissible, wouldn't make any difference what she told the doctor, Mr. Romine or Mr. Lum. What did she say?

The Witness: She said she had been of a nervous temperament, and she had previously had one or two nervous breakdowns, and I corroborated that statement from her physician who was treating her at the time. 10

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

The Court: Not material, strike it out.

Q Did you examine Mrs. Sandford again after that time? A I examined Mrs. Sandford Saturday, last week.

Q What in your opinion is the real trouble in this case with this woman? 20

Mr. Smith: Object to that.

The Court: He may give his diagnosis, that is, what he was there for, what was the result of your examination?

The Witness: My first examination?

The Court: If you haven't given the first one, give that.

The Witness: The first examination, the result of my examination, I did not at that time think she had been very severely injured, that she was of a very highly nervous excitable temperament, and I was under the impression she had magnified her symptoms a great deal and was probably suffering from it as a result of a neurosis following the accident. Saturday when I had seen her again, I had noticed that these symptoms 30 40

Dr. Bernard C. McMahon, for Defendants, direct.

were very much exaggerated and apparently had grown worse.

The Court: Increased in tensinty?

10 The Witness: They were at my first examination. Last February I was unable to make out any atrophy of her limbs, her reflexes at that time, to me, were apparently normal. She did not have this marked tremor that she manifests at this time; she did not have the disturbance of her speech at the time I examined her last February, and when I saw her again these symptoms were very much more pronounced.

Q And what do you attribute the symptoms to now, doctor?

20

Mr. Smith: Object to that.

The Court: He may express his opinion.

The Witness: Probably it is just due to the accentuation of her neurosis.

Q You mean her nervous condition? A Yes.

Q As to the atrophy of the leg, did you refer to that as a result of your last examination?

30

The Court: How do you account for that.

The Witness: From disuse of the limb.

Q In your opinion will this woman recover from her present condition? A I think she will.

40

Q And what will be the predominating factor in that, or helpful factor? A The removal of the cause, or rather, the removal of the present worry.

Dr. Bernard C. McMahon, for Defendants, cross

The Court: Abatement of worry.

The Witness: Yes.

Q Get her mind off her present condition?

A Yes.

Cross examination by Mr. Smith.

10

Q You know she has two fractures in her spine, don't you? A I did not.

Q Didn't you know that at the last examination? A At the last examination, yes, rather, I was told that, I didn't know it.

Q When you make an examination like that you want to find out everything, don't you? A Yes, but the X-ray report—

20

Mr. Smith: I object to that.

The Witness: We can't make a diagnosis of a fracture of a transverse process simply by examination, we have to depend on X-ray examinations for that.

The Court: Did you see the X-rays in this case?

The Witness: No, I did not.

Q Then, you are not qualified to testify as to the probable outcome of this case, not having seen the X-ray plates, can you? A I should think I could form a fair judgment as to the outcome of this case.

30

Q Without the X-ray plates and without knowing she had a definite fracture? A I think, rather, the fracture was part and parcel of this woman's condition.

Q Of course it was.

40

Charles H. Totty, for Defendants, direct.

The Court: Well, would the fracture make any difference as to her condition?

The Witness: In my opinion it would not.

10 Q You mean to tell us that the force of what occurred and fracture would have no effect on her present condition? A These bones are frequently fractured without any force.

Q Then you don't think this woman is injured very much? A Physically, no.

(Witness excused.)

The Court: The hour for recess has arrived; we will return at quarter past one.

20 (Court convened pursuant to adjournment.)

CHARLES H. TOTTY, called as a witness, having been duly sworn, testified as follows:

Direct examination by Mr. Lum.

Q What is your business, Mr. Totty? A Florist.

30 Q And your place is where? A Madison, New Jersey.

Q What is the name of the corporation? A Charles H. Totty Company.

Q And who is the controlling factor in this company? A I am.

Q Who is Miss Moran? A She is secretary-treasurer of the organization.

Q Do you know Mr. Yoder? A Yes.

40 Q Is he employed by you now? A Not at this time, no.

Charles H. Totty, for Defendants, direct.

Q Was he in the employ of the Charles H. Totty Company in December of last year? A Yes.

Q In what capacity? A He was salesman.

Q From whom did he take general directions? A From myself, as a rule.

Q And when as a rule were they given? A Well, either Saturday or Sunday of each week, many times I had to go to New York on Saturdays, and I wouldn't see Harold until Sunday morning when we would meet and discuss things, and places that he should go to next week. 10

Q On the week preceding the 6th, did you go over that with him? A Yes, as usual.

Q And was there any request made by him? A No, except we were discussing how long it would take where he was going up through Connecticut, he had been up there on another occasion, and he said about three days would fix him up all he needed to do. He said, "Do you mind if I have Friday off I want to do some shopping and buy a lot of things for myself?" I said, "No, certainly not." 20

Q Did he state where he was going for the shopping? A He mentioned he wanted to see an old schoolmate of his, or something of that kind, I wasn't interested, didn't ask him. 30

Q On Friday was he engaged on any business for the Charles H. Totty Company? A No.

Mr. Smith: Objected to.

The Court: He can state.

Mr. Smith: He wasn't present at the time as far as he knows.

The Court: Certainly. 40

Charles H. Totty, for Defendants, direct.

Q Was there any business of the Totty Company to take him on a shopping expedition to New York? A No.

Q Or out to Rutherford? A No, sir.

Q Did he report to you an accident? A He did, yes.

10 Q Did he tell you the details? A Yes, he told me that he had knocked down a woman and he had carried her home. She did not want to go to the hospital and he took her home, and they talked it over.

Mr. Smith: I object to this.

The Court: Ordinarily it would not be material what he had said.

20 Q Did you pay any particular attention at all to the accident yourself? A Oh, no. I was sorry that he had had the accident, and it had no bearing on me in any shape or form.

Mr. Smith: Objected to.

The Court: He answered that.

Q As a result of what Mr. Yoder told you, did you give any heed to the matter as of any possible seriousness? A No.

30

Mr. Smith: Object to that, doesn't make any difference.

The Court: Doesn't make any difference.

Mr. Lum: I think it does and I will connect it up or have it stricken out.

Q Did you hear from Mr. or Mrs. Sandford in December, January, February or March by phone call or letter, or in any way, or by any one representing them? A No, sir, I did not.

40

Charles H. Totty, for Defendants, direct.

Q Did you give the matter any further heed up to that time? A No.

Q Were you at home when the papers in this case were served? A No.

Q Did you ever see the original papers up until this summer? A No, sir.

Q Do you know what was done with them? 10
A Miss Moran, as I recall the circumstances, turned it over to Mr. Eagles.

Q Is he a friend of yours in Madison? A Yes.

Q Is he a lawyer? A No.

Q I notice that the answer was filed in this case admitting agency in general, apparently, by an attorney named Holmwood, do you know Mr. Holmwood? A No.

Q Have you ever seen him in your life? A 20
No.

Q Did you have any conference with Mr. Holmwood or any other lawyer at all up to the time this answer was prepared? A No.

Q When was the fact that your company was charged for a serious amount first brought to your attention? A Why, I think I was advised to come down to Newark and appear for a hearing before the Legal Fraternity of some kind, July. 30

Q That was in July of this summer? A Yes.

Q Had you before that any knowledge of the seriousness of this case? A I was informed before that this thing was liable to be a very serious case, and I had better get busy and get something done about it.

Q That was in July? A Yes.

Q And up to that time had you personally any interview with any lawyer in connection with this case? A No. 40

Charles H. Totty, for Defendants, direct.

Q Are you familiar with the answer filed thereafter denying agency? A Just what do you mean by denying agency?

Q Did you know of an amended answer in the case? A Yes, understood the answer had been promulgated, whatever is the proper word
10 to use for that.

Q And up until the time that amendment was made, tell us whether or not you had ever seen or had any knowledge of the original pleadings in this case? A I had not any knowledge of it whatever, no, sir.

Q Did you get in touch with any attorney? A Yes, until sometime after that, not until sometime after it, no.

Q Now, will you tell us whether or not Mr. Yoder was engaged on any business on behalf
20 of the company on this Friday to your knowledge?

Mr. Smith: Object to that.

The Court: He may say.

The Witness: To my knowledge he certainly was not

Q Did you attempt to exercise any dominion
30 or control over his actions on that day, where he should go or what he should do? A Not on that day, no; he asked me for the day off.

Q Had you given him the permission? A I had.

Q And tell me, this car he was using, was owned by whom? A By the corporation.

Q Had he used the car before that? A He used his own car in our behalf for considerably over a year, and practically wore it out I may
40 say, so that when I got this new car I told him

Charles H. Totty, for Defendants, cross.

he could use it any time he wished to compensate him for the use of his car.

Q And where was the car kept, at your place or his? A At his place.

Cross examination by Mr. Smith.

Q Mr. Totty, of course, you don't know of your own knowledge that Mr. Yoder was not your business that day, he told you that, didn't he? A I would accept his statement. 10

Q And that is the only information you have that he was on your business? A His order book didn't show he was on my business, if he told me he was not, I would assume he was not.

Q But you don't know of your own personal knowledge, you didn't see him that day, did you? A No. 20

Q So you can't tell us of your own knowledge without him telling you something, can you? A He didn't have to tell me, he had previously got the day off.

Q He told you, I understand, what he intended to do? A Yes.

Q Now, you of your own knowledge didn't know what he was doing on the day in question? A No. 30

Q And you gave him plenty of leeway, didn't you, in reason? A I had every confidence in him.

Q If he took an hour or two off you didn't mind that, you never checked up on him? A In this way we did, if he went to Stamford I knew how many people he could call on in a day, and about how much work he could do, checked on him that way.

Q An hour or two hours' difference wouldn't make an material difference to you? A No. 40

Charles H. Totty, for Defendants, cross.

Q And how many customers did he call on on this last trip before the accident in Stamford, do you know? A No, I couldn't say, his order book would show it.

Q You haven't that with you? A No.

10 Q When was this automobile purchased by your corporation? A I couldn't give you the exact date, know that three weeks before he was out.

Q How many trips had he taken with it? A I don't know if he had been out with it before any lengthy trips at all.

Q And the Stamford trip didn't take five days? A No, not necessarily.

20 The Court: How long would it ordinarily take?

The Witness: Well, it would depend entirely on conditions.

The Court: There was no regularity about it?

The Witness: No absolute time set, no.

30 Q This car has been used every day in the week, hasn't it? A We hadn't used it much before Harold started to use it.

Q That was during the time that he was selling, wasn't it? A Yes, but he had not been on the road much before that time, this trip, to Stamford.

Q And that car was kept in the usual place in his garage? A Yes.

Q And that was the usual place for it to be kept? A Yes.

40 Q And where was his garage, in Madison? A Yes.

Charles H. Totty, for Defendants, cross.

Q You knew about this accident Saturday morning, did you not? A Yes.

Q You learned about it? A Yes, the first time I saw him after the accident.

Q And this is a corporation, is it not? A Yes.

Q And you are one of the officers? A Yes. 10

Q And Miss Moran is one of the officers? A Yes.

Q She is in charge of the office? A In my absence, yes.

Q And papers were served on your corporation, weren't they in this suit?

Mr. Lum: If you know?

The Witness: Yes, I believe they were.

Q And they were served on the corporation, a suit by Mr. and Mrs. Sandford? A Yes. 20

Q You knew about that? A I didn't attach any importance to it, in any shape, form or manner.

Q I didn't ask you that. But you knew a suit had been instituted against your corporation months and months ago? A After the accident happened.

Q Mr. Holmwood was your attorney? A I never saw Mr. Holmwood, don't know anything about him. 30

Q What did you do after you found out this case was pending? A Why, in the spring we are very busy, and I turned the matter over—at least Miss Moran, my secretary did, in my absence, to Mr. Eagles.

Q Who is Mr. Eagles? A A friend of mine.

Q And he was representing your company at the time? A He was not representing me, 40

Charles H. Totty, for Defendants, re-direct.

no, but just a friend of mine, he does things for me, certain times.

Q Now, an answer has been filed in this case by attorney William E. Holmwood, is that it?

A I don't know the gentleman.

10 Q Did you know an answer had to be filed within twenty days? A Yes, but when a man is busy he leaves that sort of thing to a man who makes a business of it. I presumed the legal procedure had been taken care of.

Q And you knew an answer was to have been filed within twenty days after suit, and you further knew that you were given until May 10, 1930, an extension of time within which to file your answer? A No, I didn't know anything about it.

20 Q Don't you know an answer was filed on May 10, 1930? A I don't know when the answer was filed.

Q You know of Mr. Holmwood? A No.

Q Well, in your application to Judge Lawrence here, wasn't it made on application of William E. Holmwood, attorney of defendant?

A Presumably.

Q So you knew Holmwood? A I did not know Mr. Holmwood.

30 Q You knew he was handling the matter? A I did not know Mr. Holmwood.

Q But you knew that his office, or group of offices was representing you and handling the matter all the time? A I knew.

Re-direct examination by Mr. Lum.

Q In the affidavit of Mr. Yoder that was read, he referred to a typographical error, mentioning Saturday as the day he was shopping in New

Charles H. Totty, for Defendants, re-direct.

York, do you know whether of your own knowledge he was shopping in New York on Saturday?

Mr. Smith: Object, he wasn't there.

The Court: He may state if he knows where he was. Do you know where he was Saturday? 10

The Witness: Yes, he was home in Madison with me.

The Court: By the way, where is your place of business?

The Witness: On Ridgedale avenue, Madison.

Q Mr. Totty, in going from New York or Connecticut to Madison, would one ordinarily go by way of Hanover? 20

Mr. Smith: Object to that.

The Court: If he knows, it depends, may go all sorts of directions.

The Witness: He would follow the road we always follow, straight down and through the Holland Tunnel.

Mr. Smith: Object to that and ask that it be stricken out.

The Court: Strike it out. The best evidence of that is Mr. Yoder himself. He has already testified. 30

Q Is Hanover on the way from Madison to New York? A No.

(Witness excused.)

Mr. Lum: We rest.

Mr. Smith: I would like to recall Mrs. Sandford. 40

Motion for Direction of a Verdict.

MRS. SANDFORD recalled.

By Mr. Smith.

10 Q Mrs. Sandford, did you tell Mr. Yoder, this gentleman that testified, did you tell him that it was both of your faults? A No.

Mr. Romine: Object, and move to strike it out.

The Court: She has already answered it. Mr. Lum asked the question and she answered it.

Mr. Lum: I did, I laid the basis for my contradiction.

20 The Court: Is that the case, gentleman?
Mr. Smith: That is our case.

Mr. Lum: We rest.

Mr. Romine: We rest. I desire to make a motion for a direction of a verdict on the same grounds that I made the motion for non-suit, without repeating it before the jury.

30 Mr. Lum: I desire to move for a direction of a verdict on behalf of defendant Totty Company. Whatever the record may have been at the close of the plaintiffs' case, it seems to us, manifestly clear, the only evidence, uncontradictory evidence, is that at the time of the accident this car was not being used in the business of the Totty Company, nor under any such circumstances as to incur any liability on behalf of that company. So far as the pleadings are concerned it is uncontradicted that the original
40 answer was filed without the knowledge of

Motion for Direction of a Verdict.

the Totty Company as to its contents, and of course there could not be an assumption unless there was knowledge, and the facts are so free from dispute as to these important things, that I feel we are entitled to a directed verdict on behalf of the Totty Company.

10

The Court: I think this motion should be denied as well as that of counsel for Mr. Yoder. It would seem there are issues of fact to be determined. A very interesting issue of fact is raised, whether the Totty Company, owning the automobile in question having sent an employee on a itinerary, or into the State of Connecticut, with the understanding he should return more or less at his own time, and involving somewhat involuntary conduct on his part, whether or not he was at the time on the return at the time of the accident. I recall there are two or three cases which have a tendency to bear upon the diversion of route, shall I say, where an automobile is owned by an employer and at the moment of accident is being driven by an employee. There are a number of cases on the subject. The principal opinion written by Mr. Justice Kalisch, where there was a diversion from the route, yet it was there held, since the ultimate destination was the return where the employer and employee had agreed the motor vehicle should be stored when not in use, that it was not such a diversion from the course of employment or agency as to relieve the principal, the employer from liability. From the number of cases on the subject, as I see the situation here, it is

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Motion for Direction of a Verdict.

10 largely a question for the jury to determine. If they say that Mr. Yoder was not in the performance of any duty, or an agency at the moment of the accident, why then, of course, the Totty Company would be relieved from responsibility. But at the moment of the accident he was on return with the automobile to the place where it was customary and ordinarily stored. Under the circumstances I feel that I am not free to regard it as matter of law entirely, but let the jury determine it in the circumstances.

Mr. Lum: Exception.

Mr. Romine: Exception.

20 The Court: You may have it. Your motion was based upon the ground of contributory negligence?

Mr. Romine: Yes.

Mr. Lum: And I also base the motion on that ground.

The Court: Yes, that is clearly factual question for the jury to determine. You may have exceptions, both of you. Sum up.

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COURT'S CHARGE TO JURY.

Members of the Jury:

I am accustomed to say in a case of this nature that the happening of an accident which may give rise to the suit does not justify the jury in awarding damages. There is a fundamental rule that while proof of the accident is essential, if there is to be a recovery under the law, or compensation, the plaintiff must show or produce before you evidence which satisfies you under the fair preponderance of the proof that the injury of which she complains was due to the negligence of the party or persons she charges therewith. 10

The immediate circumstance which apparently gave rise to this suit, it may be said, was the fact that the defendant, Yoder, driving the car of the other defendant, the Totty Corporation, is said to have collided with Mrs. Sandford at the time indicated in the testimony. As a result it is alleged that she was injured, and it may well be said if that be true, and if her present condition is due to the injury, proximately, that she was seriously hurt—but before any recovery can be had, members of the jury, the question of negligence must be decided in favor of the plaintiffs; if it is not, and you found there was no negligence, in other words, on the part of Yoder, no matter how seriously Mrs. Sandford may have been injured, neither she nor her husband can recover. It would be quite unjust of course for you to decide this case from the standpoint of mere sympathetic feeling for Mrs. Sandford in her present condition. You cannot do so. But you must find in the case, if you do, under the greater weight of credible legal evidence that 20 30 40

Court's Charge to Jury.

the injuries of which she complains are due to the negligence directly of Yoder.

10 We sometimes speak of it in a technical sense of being the proximate cause of the injury of which complaint is made, and I may say in that respect, the proximate cause is that which naturally and probably led, which might have been expected to produce the result; which is the efficient cause, the one that necessarily sets the other cause in operation.

20 Now, it appears here that Mrs. Sandford was walking upon the highway at night-fall—at least at an hour when lights were lit on automobiles. Apparently there had been snow, and the authorities had scraped from the highway, the traveled portion, at least, the snow, and left it banked to a degree on either side of the highway; just where Mrs. Sandford was walking becomes an issue of fact in this case, because she declares as a matter of fact she was walking in the snow, not upon the cleared portion of the highway.

30 Mr. Yoder declares, or at least the testimony produced in his behalf is said to justify the inference, that she really was walking on the cleared pavement. If that be so, then she would be walking directly in the line of on-coming traffic, and upon the side of the road where, it is said, the Traffic Act prohibited her from so doing; in other words, the regulation in the act appears to be that a person walking in a roadway where there are no sidewalks must walk facing approaching traffic. The defendants, however, are not entitled to assert that act of hers, if she did, as being of itself evidence of negligence; in other words, they cannot rest their case so far as their defense is concerned with mere proof that
40 Mrs. Sandford was walking on the right-hand side

Court's Charge to Jury.

of the highway in the direction in which she was going. The interpretation of the Traffic Act and the several regulations contained therein is, that a violation of such a regulation may or may not be evidence of negligence. In other words, a person might violate some particular regulation, such as driving his automobile on the left-hand side of the highway, and that would be contrary to the provision of the statute, and, if caught at it he might be subjected to a penalty under the statute; but if nothing happened while he was so doing to the interference of other travelers upon the highway, the mere fact he had done it would not be evidence of negligence; that is the rule. 10

If, however, the cause of the injury of which Mrs. Sandford complains, she being otherwise than in the exercise of due care, so that she failed to walk with caution on the side of the road where she was and that that was the sole cause of the accident, of her injury, then you would say her violation of that regulation of the statute was the cause, and, since it was the cause, and it was the result of her negligence, if the evidence so discloses, then you could say, well, that violation is in this case at least evidence of negligence, and, therefore, there can be no recovery. 20 30

You will approach this case, I will say to the members of the jury, first from the angle whether plaintiffs have proven to your satisfaction the negligence of Mr. Yoder. The rest of it may or may not be necessary for your consideration if you once decide there has been a failure on the part of the plaintiffs to satisfy you under a fair preponderance of the proof that Mr. Yoder was negligent, then, that is the end of the case as to both defendants, and necessarily a verdict would 40

Court's Charge to Jury.

result of no cause of action. Should you find however that Mr. Yoder was negligent, that the plaintiffs have proven it under the greater weight of the credible legal evidence; in other words that he drove the car at the moment at too high rate of speed, or that he failed to keep it in
10 reasonable control such as an ordinarily prudent person would do in the immediate circumstances; if, because he was blinded by the lights of the on-coming truck he allowed his car to do that which he ought not to have done, in the exercise of the control of a reasonably prudent person, you may say that the evidence does satisfy you that he was negligent; in other words it is suggested here that going at the rate of speed he was, that he could have stopped at four feet; he
20 alleges that his eyes were blinded by the lights of the on-coming truck. There is a suggested interpretation of one of our courts to the effect, that if your eyes are blinded so you cannot see where you are going while driving an automobile it is your duty to throttle down your car, or, if necessary, in the exercise of due care stop until the obscuring of your vision is removed.

The statement of Mr. Yoder seems to be that he was blinded, and that looking up suddenly, without having observed Mrs. Sandford in the
30 highway, even though his lights were lit, within six feet of her he discovered this shadow, or, as he referred to it, a dark object, indicating to him that some person was there. He then suddenly pulled his car to the left, and, in the skidding to some extent which followed, he, not realizing that he had struck Mrs. Sandford—in any event, his car went diagonally across the road and he stopped and got out with the idea of admonishing
40 whoever it was not to walk on the public high-

Court's Charge to Jury.

way in such circumstances. He says that he failed to realize that he had struck her until he discovered her in the snow. Now, it becomes a matter of some importance I would think—this is mere comment, of course—to ascertain where Mrs. Sandford was at the time of the collision. She alleges she was walking in the snow, not on the pavement, from which the snow had been plowed. As I recall her statement, it was a foot or two, or three feet, depends on where she was at the moment, and what her movements were, but, at the moment of the collision she was three feet off the cleared pavement in the snow. Now, it becomes a question for you to determine whether she was where she had a right to be, even though under the Traffic Act she was on the wrong side of the highway, and whether, if Mr. Yoder had, in the exercise of due care in view of the blinded condition of his vision, if he had slowed down his car, or even stopped if necessary, if that is what a prudent person would have done in the immediate conditions and circumstances, whether it followed then that Mrs. Sandford was where she had a right to be, and if Mr. Yoder had done that which it is charged he should have done as an ordinarily prudent person, then there would not have been any collision at all. So there, it seems to me, you have the primary question you must first take up and consider.

Now, I am not able to say to you as matter of law, even though Mrs. Sandford was where it is said she was, she had no right to walk in the highway. She, really, as a pedestrian had an equal right with the individual driving his motor, but what the Courts have said about that, is this: "A pedestrian, while walking in the highway,

Court's Charge to Jury.

is bound to be careful. The law is settled, although its application is not always easy. The general rule which requires one in the exercise of his or her lawful rights in a place where the exercise of like rights by others may put him or her in peril, is to use such precaution and care for his or her safety as a reasonably prudent person would under the circumstances."

"This is the rule from which it may be said, in general, that one who passes on foot along a sidewalk or path of a highway, or walks thereon, must use his or her powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision."

In the latter case doubtless the degree of care exceeds that required in the former case, not because the rights of a foot passenger and a driver differ, but because of the circumstances. The vehicle usually travels at a greater speed, it cannot be so quickly stopped or diverted from its course, while the passer on foot may quickly stop, turn aside or even retrace his steps.

Now, under that rule the question will arise in your deliberation whether Mrs. Sandford was guilty of contributory negligence, even though Mr. Yoder himself may have been shown to your satisfaction to have been negligent, because if he was, you have in the case what is usually present, whether the person injured contributed to her injury in such a way that but for it she would have received no injury from the party charged; in other words, it is stated that contributory negligence is present in a given case when the injured person has contributed to his or her negligence in such a way, that but for such negligence he or she would not have received any injury from the

Court's Charge to Jury.

other party. Therefore, it is said, if Mrs. Sandford though but slightly contributed to her injury, no matter how slight that contribution may have been, even though Mr. Yoder was negligent, she cannot recover.

Contributory negligence however is a defense. It must be proven precisely the same as an issue of negligence, in that the burden is on defendant's in this case and not upon plaintiff; in other words, Mrs. Sandford does not have to show that she was free from contributory negligence; it is a defense, but the burden is on the defendant to prove it so that if it should appear that Mr. Yoder was negligent, and at the same time this defense set up is made out under the rule of preponderance of proof or greater weight of all the evidence that Mrs. Sandford contributed to her own injury, then, I say to you, she cannot recover, nor, necessarily, can her husband. So much for the primary questions in the case.

In the event that you resolve the issue of negligence and contributory negligence in favor of Mrs. Sandford as I have indicated to you under the rules of law, then Mrs. Sandford would be entitled to recover a sum which, in your judgment, would properly and adequately compensate her for the injury she suffered, having in mind its nature and extent, whether it involves any permanent features or not, the pain and suffering that in all reasonable probability accompanied it, and then say what, in your judgment, will properly compensate her in dollars and cents so far as money can do it, for the injury that she received in the accident, assuming it to have been due to the negligence of Mr. Yoder and you find no contributory

Court's Charge to Jury.

negligence on her part, because the damages chargeable to a wrongdoer must be shown to be the natural and proximate effect of his negligence as applied to this case, and the term natural imports what might reasonably have been foreseen, such as occur in the ordinary state of things, and the term, proximate, indicates there must be no other culpable or responsible or efficient agency intervening between the defendant's negligence and the injury to the plaintiff in this case, Mrs. Sandford.

Now, there has been some discussion in this case as to what the injury was Mrs. Sandford received. It is claimed in her behalf that the fracture of the transverse processes occurred, and that as a result of it, and the callus that formed in the ultimate healing of the fractured bones, the coming together of the bones, nerves were affected so that ultimately she became in the condition which you saw her yesterday while she was being examined. I said to you a moment ago, that if the injury received was as a result of the negligence of Mr. Yoder, and she is not to be charged with contributory negligence under the evidence, then you would not be doing violence to your reasoning powers if you found that she had been seriously injured and that a substantial sum would be justified. In saying that, however, I express no opinion as to what the verdict should be in this case, as I see it, it is peculiarly a fact case for the jury, very little law, except that which is generally recognized as basic in an automobile accident case, and generally applied, so that if you determine what the injury was, of course, as proven in the case under the evidence, likewise under the rule of the fair preponderance of the proof, then

Court's Charge to Jury.

you would award her, in accordance with the rules I have heretofore indicated such sum as in your judgment would compensate her, covering the features such as pain, suffering, nature of the injury, whether any permanent characteristic, the extent of it, and how long in all reasonable probability such injury will continue to manifest itself in Mrs. Sandford. 10

Mr. Sandford has been joined as a party plaintiff here in his own right, and as the husband of the other plaintiff he would be entitled to be awarded, if you find her entitled to recover under the rules I have given you, any disbursement he may have been obliged to make for the medical and surgical care of his wife, provided the amounts involved appear to have been necessary and reasonable. There is evidence to that effect. You will have those bills or at least you will recall they were testified to during the progress of the trial. Mr. Sandford is also suing for the loss of services of his wife in his household; in other words, since the accident it is said that she has been unable to do any housework. However, it does not appear that he has been obliged to employ any outside help, or has done so. It may well be that he was not in a financial position so to do, but, however that may be the law gives him the right to have the jury consider what sum in its judgment will compensate him for the loss of services of his wife in the household, that is, for those services customarily performed by her before the accident. In addition to that the law gives him compensation leaving it to the judgment of the jury for the loss of his wife's society in the household; in other words, the thing called the consortium, which the Court need not dwell on other than to say that it 20 30 40

Court's Charge to Jury.

is a well recognized legal right of the husband with respect to his wife while living together. A loss of such a right of consortium, therefore, is said to be the basis for compensation along with those other elements to which the Court has referred.

- 10 Now, I have left until the last for your consideration, or, rather, for my observation, the relation of the defendant corporation to this suit, namely, the Charles H. Totty Company. It appears that Mr. Yoder was in the employ of that company at the time of the accident, had been for some time and continued thereafter for some period of time, although he is not now; that his employment involved his driving an automobile which, in the present instance, ad-
- 20 mittedly belonged to the Totty Company; that his employment required trips of considerable distance, for example, on the day of the accident he was about returning from Connecticut where he had been in pursuance of his employment and on the business of the corporation. It appears that it was the custom of the corporation to allow him in driving the car to keep it in his custody so that when he went upon his trips it would be available; it was placed in Mr. Yoder's garage
- 30 over night and kept there when not in use, and when it was necessary for him to go to the headquarters or office of the Totty Company, getting instructions or conferring with Mr. Totty, the president of the company, he had the car and it was understood that his means of transportation was to be that vehicle which was owned by the corporation.

- 40 Now, I undertake to say, that you readily understand that if the accident had happened while in the course of his employment, as the agent

Court's Charge to Jury.

of the corporation, and it appeared that the latter owned the car, and that Yoder's driving it was one of the purposes for which it was purchased by the corporation, and, at the moment of the accident he was then engaged upon some errand or performing some duty with reference to his employment, that there would be no question that you would recognize that he was doing that which he not only was employed to do, but that was one of the purposes for which the automobile was purchased.

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Therefore, under the rule of the superior responding for the negligence, as applying in this case, of the agent, then the latter, if it be driven, namely, the negligence of the agent or employee would mean that the liability of the employer or principal would be fixed. That is the rule of law, not only recognized today, but it has come down to us from the old Common Law of England. So you will have now to consider whether Mr. Yoder was doing anything for the defendant corporation within the line of his employment at the time of this accident. If he has not, then the corporation should be let out of the case, because it would not be liable. Our Courts have been dealing with this question for a long time, and it may be said that the rules which has been laid down for juries by the trial judges as a result of these interpretations by the Appellate Courts are these: If the employee or the agent at the time of the negligent act of which complaint is made is doing something in the pursuit of his employment or within the scope of his agency and using the means provided by the employer or principal to do it, then the latter will be required to respond to any person injured as a result of the employer's agent's negli-

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Court's Charge to Jury.

gence. If the employee, however, at the moment is not engaged upon his employer's business, but is doing something in which the employer has no interest, even though he be using the means provided by the employer, but independently of the employment, then the employer or principal, as the case may be, is not liable for any negligence of the employee or agent. Here, however, you have a situation which becomes one of fact for the jury, and that is this: There is no question, it is admitted, that Mr. Yoder several days prior to the accident had gone to Connecticut on business of the defendant corporation, and had taken the car in question. It appears, if you credit the statements made here, that he stated to Mr. Totty, "May I take Friday off?" To which the latter replied, that he could, and it thus appears that he, Yoder, went shopping in New York—you heard what he purchased, I could almost divine what he did and where he went; anyhow, he admitted he had made certain purchases, and if the accident had happened while he was in pursuit of those errands I would not have any hesitation in saying to you at all that the Totty Corporation should not be required to respond in damages because then he was doing something in which his employer was not interested at all. But you are to observe that apparently the general practice was that when Mr. Yoder took the automobile of the corporation to go on these various business trips he was expected to bring it back, in other words, his right to use the vehicle was limited to his employer's business, and in accordance with the usual customs and practice. Now, it appears that he invariably after these trips were over came back and reported to his employer, leaving the

Court's Charge to Jury.

automobile in his own garage. It may be said, when he went to Connecticut on the trip to which reference is made in this case, he would naturally be expected to bring the automobile back to its accustomed place. Now, if he diverted the journey in some way in which the employer had no interest, such as that spoken of, going shopping, 10
or to see some personal friend of his, as I say, it may well be that you would say he was not then—if the accident happened at that moment—in the pursuit of his agency, within the scope of it, or in the pursuit of his employment; but if the accident happened while he was on his way back to the garage at his home—that being one of the customary regulations—that he would take it out in pursuance of the employment and bring it back after his duties as an employee were completed, a different situation might arise. 20

Now, it is said by one of our Appellate Courts, that while it is recognized that an employee may divert his course or disobey instructions, nevertheless, the diversion must be of such a substantial nature that if an accident due to negligence, as applied to automobile accident cases, occurs, it may fairly be said that the employee at the time was not on an errand for his employer or in pursuance of such employment. 30

Now, here it may be said that the so-called diversion from the regular scope of the employment, namely, Mr. Yoder attending to some personal matter of his own, had been accomplished, that he was driving the automobile back to Madison when the accident occurred; therefore, it becomes an open question for you as judges of the facts to determine whether at the moment of the accident, if you find he was negligent and Mrs. Sandford is not to be charged with 40

Court's Charge to Jury.

contributory negligence, he was within the scope of his employment or of his agency in reference to using the car.

Moreover it appears in the case that Mr. Totty gave his permission as president of the corporation that Yoder could do the shopping and use the car for that purpose. Now, whether, 10 in all the circumstances involved, that incident in the case, you are able to say that he was not at the moment in the exercise of any agency for the corporation or in the performance of any duty involved in its employment. If you say that, of course the corporation would not be held to respond in the case. If on the other hand you find at the moment of the accident he was doing that which was customarily expected of him as salesman, and which may be said to have 20 been one of the duties of the employment, namely, to return the car, then, if that be so and you so find under the greater weight of the credible legal evidence you would then say that he was doing that which was within the scope of his agency and the nature of his employment, or a duty involved therein. I express no opinion, as I said to you, what the verdict should be in this case. You will endeavor to do justice between the parties; you will eliminate any emotion or 30 sentiment about it; Mrs. Sandford was undoubtedly badly hurt, but that should not sway your judgment of the case, you must determine this case according to the evidence, and the issue is negligence; has it been proven? If it has, and no contributory negligence is to be found in the case under the evidence, then undoubtedly Mrs. Sandford would be entitled to recover, as well as her husband in his own right; but if no negligence has been shown, or if it has been 40

Court's Charge to Jury.

shown that contributory negligence appears on her part, then there could be no recovery on her part or that of her husband.

The case is left with you for your consideration there being a question for the jury, and you are directed to take it and decide the case in accordance with the evidence as you find it and the rules of law the Court has given you.

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While I have been asked to charge a number of requests here, and as it seems to me I have covered them in the main charge, I see none of them to which I should call specially to your attention; for example, I am asked to say to you that if the jury should find the plaintiff is entitled to recover damages she can only recover such amount as will compensate her for actual injuries and not those of an imaginary nature or those which are not the result of the accident. You see, I have already discussed that with you under proximate cause. Again, if the jury should find that both plaintiff and defendant were negligent, then there could be no recovery and the verdict would be no cause for action. I have already discussed that with you along the line of negligence and contributory negligence. It seems to me I have discussed all these questions. The jury may retire; swear an officer.

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You may have your exceptions.

Mr. Lum: I do want to refer on behalf of the corporation, an admission of agency, made in the original answer filed is not binding on the Totty Company since it was not made with the knowledge and consent of the company. There is no evidence in this case the defendant company had any notice or knowledge or admission of agency made in the original answer.

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Court's Charge to Jury.

The Court: Now, I charge these requests with the qualification, it does appear that the Totty Company had an answer filed in its behalf, and, ordinarily, an answer in such circumstances indicates the defense which has to be proven at the trial. In this case the original answer admitted the employment and the agency, at the
10 time of the accident, of Mr. Yoder; later, it appears through a change of attorneys, not of record, but a physical change or whatever the fact may have been, an amended answer was filed by the Totty Company in which it denied the agency, and I apprehend in examining that situation you may endeavor to discover whether at the time the first answer was filed Mr. Totty and the attorney filing it had been in conference and that Mr. Yoder had made a complete dis-
20 closure of the situation involved in the accident.

It may well be that the answer could be filed and then an amended answer filed after the real situation had been discovered, and it might be a perfectly proper one. On the other hand, the plaintiffs here seek to take advantage of the inconsistent position taken by the Totty Company, and they have that right. After all, the circumstances under which it occurred, the motive for it, becomes a matter for the jury; there-
30 fore, if you found that there was an admission, and then on the advice of some lawyer the amended answer was filed to take away the force and effect of the admission, and, nevertheless, that Mr. Yoder under the evidence was shown to be in the employ of the Totty Company, and the first answer was correct, why, then, of course, you would hold the corporation. If you find in fact it was not correct, and it was a mere error, or mistake leading to the filing of the second
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Defendants' Exceptions to Charge.

answer as the correct one, why, you will not assess against the Totty Company the effect thereof.

Mr. Lum: Except to your Honor's refusal to charge our Requests Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and to the qualifications which your Honor gave to No. 14 and 15;

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I except to that portion of your Honor's charge in which you refer to Mrs. Sandford walking on the side of the road;

I except to what your Honor said with reference to the violation of the Traffic Act as merely evidence of negligence;

I except to what your Honor said, in which you referred to Mrs. Sandford's walking where she was—your words: "Sole cause of the accident the result of her negligence";

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Except to what your Honor said the duty of the driver to stop in the event of his being blinded;

I except to that portion of your Honor's charge in which you said, defendant had equal right with the individual driving the motor under the circumstances shown here;

I except to all that your Honor said with reference to the driver being on his way back to the garage, or any duty to bring the car back to the garage, and everything with reference to that subject, because the undisputed evidence shows that the driver was given the use of the car for his own purposes during that day;

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Except to that portion which says, it was an open question for the jury whether at the moment of the accident the driver was within the scope of his employment or agency;

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Defendants' Exceptions to Charge.

And I except to that portion of your Honor's charge in which you refer to the driver doing that which was customary and expected in the return of the car;

10 I except to what your Honor said in reference to bringing the car back, because the undisputed evidence showed if the driver had been on his master's work he would not have been at the place of the accident, because it was undisputed it was a detour, a divergence.

Mr. Romine: I take exception on behalf of defendant, Yoder, to what your Honor said in this regard, that a traffic violation is not itself evidence of negligence;

20 And also take exception to what your Honor said that it was Mr. Yoder's duty to stop if he was blinded;

Also take exception to your Honor's charge to the jury reading from a decision of the Court as to the equal right of a pedestrian on the road, because that decision was evidently before the passage of the Legislative Act requiring where and how a pedestrian should walk;

30 Also take exception to what your Honor said about the plaintiff being seriously injured and that she should be awarded a substantial sum; and also what your Honor said about the plaintiff being undoubtedly badly hurt, it being a suggestion to the jury that they should award a large verdict, whereas the charge should have been, that if the jury found that the plaintiff was free from negligence, and that the defendant was negligent, that they should assess the damages in whatever sum they thought best;

Plaintiffs' Requests to Charge.

And I also take exception to your Honor's refusal to charge Requests Nos. 1, 2, 4 and 6, as requested.

The Court: Exceptions will be granted.

Plaintiffs' Requests to Charge as originally submitted were as follows: 10

"1. Proof that the defendant, Charles H. Totty Company was the owner of the automobile in question raises a presumption that, that automobile which was operated in this case by the defendant Harold Yoder was being used in the business and in behalf of the Charles H. Totty Company.

"2. You must find that the defendant Harold Yoder was the agent, servant and employee of the defendant Charles H. Totty Company and acting as such within the scope of his employment at the time this accident occurred, if it appears that the Charles H. Totty Company owned the automobile in question and provided there is in your opinion not sufficient evidence adduced in this case which would indicate that the defendant Harold Yoder was not on the business of his employer at the time the accident occurred. 20 30

"3. This action is based on the theory of negligence, and negligence is the failure of a person to exercise that degree of care and caution which a reasonably prudent person would or should have exercised under the same or similar circumstances. In considering the question of the defendants' negligence in this case, you must take into consideration the condition of the road at the time the accident took place having in mind 40

Plaintiffs' Requests to Charge.

that the roadway was covered with a substance which would probably cause an automobile to skid if not operated in a reasonably prudent and careful manner, and having in mind all the conditions which were present at the time this accident took place. It is for you to say whether
10 or not the defendants were negligent under the circumstances.

“4. If you find that the driver of the automobile in question while attempting to avoid a truck coming in the opposite direction caused his car to skid off the road and strike the plaintiff while she was walking four or five feet to the right of the roadway, you may find that the defendant Harold Yoder failed to exercise reasonable care for the rights of the plaintiff.

20 “5. The fact that the defendant, Harold Yoder attempted to avoid an automobile truck which was coming in the opposite direction and as a result of such attempt struck the plaintiff with his automobile, that will not excuse him in this case if it appears that he disregarded the rights of the plaintiff in attempting to avoid the said automobile truck.

30 “6. The defendant Harold Yoder is not entitled to your verdict in this case unless it appears that there was no negligence whatsoever on his part which proximately caused this accident, unless it appears that the plaintiff was guilty of contributory negligence, and the burden of proving contributory negligence is on the defendants.

40 “7. If you find the plaintiff was not guilty of contributory negligence and that the operator of the automobile in question was in the slightest degree guilty of any negligence which proximately

Defendant Totty Company's Requests to Charge.

caused this accident your verdict must be in favor of the plaintiff.

“8. If you find a verdict in favor of the plaintiff Laura Sandford, you must find a verdict also in favor of the plaintiff Chester Sandford, because his action in this case is based on the theory that he has lost the society and consortium of his wife, and that he has been obliged to incur obligation and has had expenses in an effort to cure his wife of her injuries, and his action is dependent upon hers.” 10

Counsel on behalf of the defendant, Totty Company, submitted the following requests to charge:

“1. To render the master liable for the negligent act of the servant the act must be done for the purpose of executing the master's orders and in doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master. 20

“2. The servant's use of such facilities must be in furtherance of and not apart from the master's service and control. 30

“3. The master is not responsible if the negligence was committed by the servant when engaged in some private matter of his own.

“4. To render the master liable the relation of master and servant must be shown to exist at the time and in respect to the very transaction out of which the injury arose. 40

Defendant Totty Company's Requests to Charge.

"5. Liability of a master rests not upon a mere permission to use but upon a use subject to the control of the master and connected with his affairs.

10 "6. If the agent was using the machine as a means of recreation and pleasure for himself or his friends, it would seem impossible to draw the conclusion that he could be regarded as the agent or servant of the master upon that occasion.

20 "7. The plaintiffs' right of recovery depends upon whether or not the defendant was legally responsible for the negligent act of its employee under the doctrine of respondeat superior, and the burden of proving that fact rests upon them.

"8. If Mrs. Sandford being in the roadway under the circumstances described in this case placed Mr. Yoder in such a position that he was compelled to choose instantly in the face of an apparent serious situation between two hazards, and he made such a choice as was, under the circumstances, reasonable, he was not guilty of negligence.

30 "9 Negligence is the failure to do that which a reasonably prudent person under the circumstances would have done. Under the evidence presented in this case there is no showing that Mr. Yoder failed to act as a reasonably prudent person would have acted.

40 "10. On all highways where there are no sidewalks or paths provided for pedestrians' use, the pedestrian shall walk only to the extreme left side of the road facing approaching traffic.

Defendant Totty Company's Requests to Charge.

"11. Danger, reasonably to be foreseen at the time of acting, is the established test of negligence.

"12. Upon common law principles, when the legislature has by public statute established a certain standard of conduct in order to prevent a danger that it foresaw, which has in this regard forewarned the 'ordinary prudent man,' and through him the plaintiff in a civil action, whose conduct must always coincide with this common law criterion." 10

Such danger, therefore does not have to be proved by the defendant, since there is no longer room for a reasonable difference of opinion, for by his breach of the statute the plaintiff, through his common law conscience, is charged with knowledge that if injury ensues she will have acted at her peril. 20

Thus the defendant obtains the benefit of the statute if he be one of the class for whose protection it was enacted, and the breach of it was enacted, and the breach of such statute was the efficient cause of the injury.

"13. The motor vehicle act sets a standard of conduct for pedestrians. Breach of this statute is evidential as regards the question whether Mrs. Sandford was guilty of contributory negligence. 30

"14. The admission of agency made in the original answer filed is not binding upon the defendant, Totty Company, since it was not made with the advice, knowledge or consent of the defendant company.

"15. There is no evidence in this case to show that the defendant company had any notice 40

Defendant Yoder's Requests to Charge.

or knowledge of the admission of agency made in the original answer."

Counsel on behalf of defendant, Harold Yoder, submitted the following requests to charge:

10 "1. If the plaintiff, Laura Sandford, in any way contributed to the accident neither she nor her husband can recover from defendant.

 "2. The law of the road provides that a person walking in the roadway where there are no sidewalks must walk facing approaching automobiles and if the jury find that the failure of the plaintiff, Laura Sandford, so to do in this case contributed to or was the proximate cause of the injury then the plaintiff cannot recover
20 from defendant.

 "3. If the jury should find that both plaintiff and defendant were negligent then there can be no recovery and the verdict must be one of no cause.

 "4. Plaintiff Laura Sandford was required to use due care and caution while using the highway and if the jury find that because of some omission on her part or duty violated
30 plaintiff brought about the injuries received which otherwise would not have occurred neither she nor her husband can recover.

 "5. If the jury should find plaintiff is entitled to recover damages she can only recover such amount as will compensate her for actual injuries and not for those of an imaginary nature or those which are not the direct result of the accident.

Defendant Yoder's Requests to Charge.

"6. If the jury are satisfied that whatever injuries plaintiff suffered are merely temporary and that in all reasonable probability there will be no permanent and lasting injuries or effects from the injuries, if compensation is to be awarded it can only be for such as actually exist as a result of the accident."

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The Exhibits consist of set X-ray plates, a road-map and a photograph of the road. They will be presented to the Court at the time the case is presented.

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New Jersey Court of Errors and Appeals

LAURA M. SANFORD and CHESTER
SANFORD,

Plaintiffs-Respondents,

vs.

CHARLES H. TOTTY COMPANY, a
corporation,

Defendant-Appellant.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF PLAINTIFFS-RESPONDENTS.

This matter comes before the Court on an appeal taken by the defendant below, Charles H. Totty Company, a corporation, from judgments entered in the Supreme Court in favor of the plaintiffs below, Laura M. Sanford and Chester Sanford.

The case was tried before Rulif V. Lawrence, C. C. J., and a jury on October 24th, 1930, at the Morris Circuit of the Supreme Court. Subsequent to the rendition by the jury of verdicts in behalf of both respondents, a Rule to Show Cause was obtained by the appellant and argued before the Supreme Court at the January term 1931 before Gummere, C. J., and Justices Trenchard and Lloyd. There was no question on the Rule to Show Cause as to the fact that the jury very properly found negligence and the only question involved was as to the excessiveness of the verdicts which were \$26,000.00 and \$4,000.00 respectively.

The Supreme Court in discharging the Rule to Show Cause indicated that the respondent, Laura M. Sanford, was a physical wreck and

that she will remain so during the rest of her life as a result of the accident.

Admittedly, the appellant reserved its exceptions for the purpose of appeal.

It will be noted that the appellant's grounds of appeal number twenty-six reasons for reversal and yet there are only two main grounds of appeal for reversal argued in the brief. The two main grounds for reversal upon which the appellant apparently relies concern the alleged fact that there was no agency existent between the operator of the automobile owned by the appellant and the driver, and the other concerns itself with the alleged inconsistency and illegality of the verdicts in the case, the jury having returned a verdict against the appellant and also failed to state in its verdict whether or not it found, for or against the operator of the appellant, who was also a defendant below.

Statement of Facts.

On December 6, 1929, the respondent, Laura M. Sanford, age thirty-nine, and wife of Chester Sanford, the other respondent herein, had visited the home of a Mrs. Wade, the home being located on Mt. Pleasant avenue, Hanover, New Jersey. Mrs. Sanford arrived there about three o'clock in the afternoon for the purpose of giving a sewing lesson to school girls in the neighborhood. About five-thirty in the afternoon she left that place to return to her home. After her departure she walked across the lawn in front of the Wade home, and directly toward the roadway. She continued in that direction until she was approximately three feet north of the roadway and then walked west. While she was so walking, a Ford

coupe automobile, admittedly owned by the appellant, Charles H. Totty Company and operated by one Harold Yoder, one of the defendants below, struck her from the rear, thereby causing her such serious injuries that the Supreme Court on a subsequent Rule to Show Cause characterized as "That as a result of this accident Mrs. Sanford is a physical wreck and she will remain so during the rest of her life."

The jury found that the operator of the car was negligent and that finding has never been questioned by the appellant.

The appellant, Charles H. Totty Company, had its principal place of business in the Town of Madison, New Jersey, at which place it had a large floral plant and greenhouses, and at the time of the happening of the accident, had in its employ the operator of the car, Harold Yoder.

Mr. Yoder, who resided in Madison, New Jersey, had been employed by the appellant for three and a half years prior to the accident. The first two years having been spent as a grower at the plant of the appellant and for a year and a half prior to the accident he had been employed as a salesman on the road (S. C. 128). The automobile which collided with the respondent was a Ford coupe owned by the appellant and purchased by the appellant for the special use of Mr. Yoder in conducting his business as a salesman for the Totty Company, the car having been purchased for that purpose about the second week in November, 1930 (S. C. 127).

Mr. Yoder's duties as such salesman for the appellant were to solicit orders and act as a contact man throughout territory in Long Island,

Westchester County, part of Connecticut, Pennsylvania and sometimes in New Jersey (S. C. 128-9). Mr. Yoder knew a great deal about the appellant's business, particularly his customers in those locations, and he would and did, under arrangements with the appellant, use his own discretion in seeing these customers and in making business trips for the appellant (S. C. 129).

It was the custom of Mr. Yoder, by arrangement with the appellant, to meet Mr. Totty of the Charles H. Totty Company in Madison on Saturday or Sunday following his week's trip to the various places mentioned above and discuss plans with him for the following week (S. C. 129). Mr. Yoder, as was the custom, used his own discretion as to what route he would take on such trips in behalf of the appellant (S. C. 129 and 133), and of course Mr. Yoder would always use the automobile purchased by the appellant for him to be used for that very purpose.

Pursuant to the company's custom and during the week of the accident, Mr. Yoder and Mr. Totty of the appellant company had a conference concerning what territory Mr. Yoder would cover for the following week, and pursuant to such conference, Mr. Yoder, the operator of the car, went to Connecticut. He was to stay there until Friday, which was the day of this accident, and then return (S. C. 129), and after his return to put the automobile, as was the custom, in his own garage in Madison and to leave it there after the trip had been completed (S. C. 130). Mr. Yoder had received permission from the appellant company to do some personal shopping in New York City on his way back from this business trip to Connecticut for the appellant, and also to look up a friend of his in Rutherford, New Jersey.

Mr. Yoder left Connecticut on Friday morning, the day of this accident (S. C. 134), and started home with the idea in mind of doing some shopping in New York and looking up a friend of his and then returning, as was the usual custom, to the place where he customarily stored the automobile. Upon arriving in New York City from Connecticut he did some personal shopping in that place and then went to Rutherford, New Jersey, to see a friend, whom he failed to find. After completing his personal shopping business and after completing his own personal affairs in Rutherford, he started for Madison to the garage where he customarily stored the automobile, and it was while returning to the garage from this business trip, after completely terminating his own affairs, which he did with the permission of the appellant, that he struck the respondent on Mt. Pleasant avenue, Hanover, New Jersey, a place far removed from New York City and Rutherford.

ANSWER TO POINT ONE.

The appellant has argued in its brief two grounds of appeal, although there are some twenty-six grounds for reversal set forth in the grounds of appeal.

It is assumed under the well-settled rule of this Court that those grounds of appeal which are not argued in the brief have been abandoned.

Under Point One in the appellant's brief appears the apparent contention that there was error in the refusal of the trial court to non-suit respondents and to direct a verdict for the Totty Company. Both motions were made by the appellant upon the theory that there was no proof

of agency existing between the appellant and the operator of the car. Admittedly, the respondent's theory in seeking to hold the appellant was upon the doctrine of *respondēat superior*. At the close of the respondent's case a motion for a non-suit was made by the appellant upon the ground that there was no agency existing between the driver of the car and the appellant, and that there was no evidence to connect the appellant company with the accident. The appellant admitted ownership of the automobile which was involved in this accident, and, therefore, upon such admission, there was a presumption that the automobile in question was being operated in behalf of the appellant company (*Nicholas v. Grunstein*, 105 N. J. Law 363); that precluded the trial court from non-suiting the respondent upon that ground. However, it seems that there is no contention in appellant's brief under Point One that such is not the law and that the Court erred in that respect except that it is set forth in the caption of Point One.

It would appear in the appellant's argument under Point One that the main attack is upon the failure of the trial court to direct a verdict in its favor at the close of the entire case.

Admittedly, the respondent filed an answer to the original action in which it admitted that the operator of the automobile was at the time the accident happened acting in behalf of the appellant and as its agent and servant (S. C. 7). Subsequently an application was made to amend the answer by the appellant so as to deny agency, which motion was granted by the trial court (S. C. 11).

There is considerable argument in the brief of appellant with respect to the admission of agency

filed in this case. The mere reading of the Court's charge in that direction together with the Court's opinion on a motion for a direction of verdict, will indicate that the appellant was neither prejudiced by the original admission or by the subsequent order amending the admission.

The trial court based its decision upon the motion for a direction of verdict entirely upon the evidence presented and such decision was not made upon the admission or denial of agency in the answer. The trial court in its charge to the jury covering that particular point said, "If you found that there was an admission, and then on the advice of some lawyer the amended answer was filed to take away the force and effect of the admission, *and nevertheless, that Mr. Yoder, under the evidence, was shown to be in the employ of the Totty Company, and the first answer was correct, why, then, of course, you would hold the corporation. If you find in fact that it was not correct and it was a mere error or mistake leading to the filing of the two answers as the correct one, why, you will not assess against the Totty Company the effect thereof*" (S. C. 218). In other words, the Court said, in effect, regardless of the admission or denial of the agency by the appellant, if the evidence indicates that there was an agency, the Totty Company is liable for the acts of the operator of the car. If the evidence does not show such agency then the Totty Company must be absolved.

The charge of the Court was sufficient to cover the request made by the appellant under Requests Nos. 14 and 15 (S. C. 218). The Court clearly did not instruct the jury that the admission or denial of agency in the appellant's answer would bind it, but, on the contrary, pointed

out to the jury that it would have to determine from the evidence whether or not an agency existed between the driver and the appellant at the moment of the accident as seen from the Court's charge (S. C. 218), "So you will now have to consider whether Mr. Yoder was doing anything for the defendant corporation within the line of his employment at the time of the accident. If he has not, then the corporation should be let out of the case because it would not be liable."

Clearly, the trial judge indicated to the jury that they must be guided by the evidence in determining the agency or non-agency existing between the driver and the appellant. There could therefore be no prejudice to the appellant by the qualification of its requested charge.

The appellant under the same point further argues that the facts warranted a direction of verdict applied for.

The statement of facts which appear in this brief are ample to indicate the facts and circumstances surrounding the employment and relationship of Mr. Yoder, the operator of the car, with the appellant company at the time the accident happened. Some attempt is made by the appellant to indicate that the operator of the car was on his own business at the moment of the accident, but a mere perusal of the testimony of both Mr. Yoder and Mr. Totty will indicate that the facts raised a jury question as to the relationship of the defendants at the time of the accident. It will be remembered that at the moment of the accident the driver of the car was returning to Madison to his garage, a place where the car was customarily and usually stored after business trips by the salesman, and at a time

when the driver of the car was returning from a business trip to Connecticut in behalf of the appellant company, during which trip Mr. Yoder had permission from the appellant to do some shopping on the way back, and it was after completing his personal business and at a time when the driver was again on the business of the appellant that the accident happened.

Admittedly, Mr. Yoder, the salesman of the appellant, had taken this business trip in behalf of the appellant to Connecticut through a pre-arranged conference with the company, and remained in Connecticut on business until Friday, December 6, 1929 (S. C. 134), the day of this accident, and at which time he started back with his eventual destination as the garage where he was supposed to store the car, and incidentally with permission of the appellant to do some personal shopping on the way back from this business trip. The attempt of the appellant to indicate that Mr. Yoder was not on its business on that day is most far-fetched when we consider that Mr. Yoder did not leave Connecticut, the scene of his business activity, until the day of the accident, from which place it would take him most of the day to return to his employer's place of business. It would certainly be a stretch of the imagination to say that Mr. Yoder was not on the business of the company while returning from a business trip to the place where he was obliged to, and usually and customarily stored the appellant's car at the end of such business trips. The fact that Mr. Yoder had permission from the appellant company to do some personal shopping and to look up a friend while on the way back from this business trip is not such a deviation from his employer's business as would

indicate a lack of agency at the time this accident happened.

In the case of *Dunne v. Hely*, 104 N. J. Law 84, we find a statement of facts in which a truck driver following his usual custom had arrived at home with his master's truck and thereafter had intended to start for his master's garage as was his custom, and after finishing his supper. The servant on the way from his own home to the master's garage was requested by four boys to take them to a candy store which was on the way to the garage but which was not on the direct and usual route taken by the servant, and while the driver was taking the boys to the store, an accident occurred.

It was pointed out by the late Justice Kalisch that the action of the servant was not such a deviation from the master's business as would a matter of law indicate a lack of agency. It was further pointed out in the same case that the fallacy of the appellant's contention lay in the assumption that the question whether there was a deviation in the master's employment to the extent that such deviation was tantamount to an act disconnected from the servant's employment is purely a legal one, whereas, according to settled authority, it is a mixed question of law and fact.

In our instant case we find a much stronger set of facts than in the *Dunne v. Hely* matter in that Mr. Yoder was on his way to the garage at the time the accident happened, whereas, in the *Dunne v. Hely* case the driver was on his way to stop at a candy store for the children.

Mr. Yoder was not confined by the appellant to any particular route and he could use his own

discretion as to what route to take and as to what territory to be covered (S. C. 129), so that it made no particular difference to the appellant whether Mr. Yoder took the Mr. Pleasant avenue route home or some other route, and there was absolutely no deviation from his master's employment in taking the Mt. Pleasant avenue route.

If we analyze the facts as indicated by the testimony of Mr. Yoder together with the testimony of Mr. Totty of the Charles H. Totty Company, it will be readily appreciated that the only logical conclusion to be reached both from a factual and legal standpoint is that at the time of the happening of the accident Mr. Yoder was operating the car as the agent and servant of the appellant. If Mr. Yoder was not at the moment of the accident operating the car for the appellant, then for whose benefit was it being operated at the time? What was the destination of Mr. Yoder when the accident happened? These questions must naturally be resolved in favor of the respondent because Mr. Yoder at the time of the happening of this accident was on his way back to the garage where the appellant's car was customarily stored and as was usual in returning from such a business trip as he had just completed for the appellant. The fact that, incidental to the business trip in behalf of the appellant, Mr. Yoder had authority from the Charles H. Totty Company to do some personal shopping on his way back does not change the situation, because at the moment of the accident Mr. Yoder was not engaged in that personal business but had completed such personal business and was returning as per usual to the garage.

It is a well-settled rule of law that, "Notwithstanding the servant's deviation or departure

from his employment for purposes of his own if at the time of the act complained of the servant had fulfilled his purpose and resumed the prosecution of the master's business, the master will be liable for his act'' (39 Corpus Juris 1298).

It is not the contention of the respondents that the facts concerning the point at issue indicated an agency as a matter of law, although that might well be, but that the facts made it a jury question as to whether or not, from all the facts and surrounding circumstances, Mr. Yoder was driving the car for the appellant at the time the accident occurred and therefore it is respectfully submitted that the trial court did not err in failing to non-suit and to direct a verdict against the respondents.

ANSWER TO POINT TWO.

The judgment is not contrary to law and should not be reversed.

The second and the last contention of the appellant in seeking a reversal of the judgment is in effect that since the jury failed to return a verdict either for or against the driver of the car, who was also a party defendant, and did find against the master, i. e. the appellant, the verdict is contrary to law. The obvious fallacy in this contention lies in an apparent misunderstanding of the status of the driver's case upon the rendition of such a verdict.

Admittedly, the theory upon which the appellant was held was under the doctrine of *respondeat superior*; and it is pointed out in the appellant's brief that recovery against the driver was a prerequisite to a recovery against the company, and that since there has been no re-

covery against the driver, there can be no recovery against the company.

It is well-settled law that, "The failure of a jury to return a verdict against the servant in a suit against both master and servant based upon the doctrine of *respondeat superior*, in which a verdict is returned against the master affords no ground to set aside the judgment rendered against the master. Upon the rendition of such a verdict the case stands as to the servant as if it had never been tried" (*Dunbaden v. Castle's Ice Cream Company*, 103 N. J. Law 427; also *Feury v. Reid Ice Cream Company*, 2 N. J. Misc. R. 1008). It requires no citation of authority for the proposition that an action may be maintained against the master upon the doctrine of *respondeat superior* without including the driver as a party defendant. So that a recovery against the driver is not a prerequisite to a recovery against the master.

The Dunbaden case, *supra*, is directly in point with our instant case because in that action the suit was brought against the master and the servant. The plaintiffs had verdicts against Castle's Ice Cream Company, no verdict being found against the driver. This Court pointed out that where there is no finding against the servant, the case as to him stands as though it had never been tried, but the judgment against the master is a valid and legal judgment.

It will be noted that we are not here concerned with a verdict of no cause for action in favor of the driver and a verdict against the master, but with a verdict against the master and no finding against the driver, leaving the driver's case as though it had never been tried. The servant was not acquitted, but, on the contrary, the master was held liable.

The brief of the appellant cites the *Dunbaden* and the *Feury* cases and admits that this Court has laid down a rule directly contrary to appellant's contention upon this point.

The appellant points out the case of *Vaniewsky v. Demarest Company* (106 N. J. Law 134), and admittedly, the case is not in point. In the brief of the appellant there are further citations of cases which upon a mere reading will indicate have no bearing upon our instant case. In that brief is cited the case of *Hummers v. Public Service* (151 Atl. 383 (1930), affirmed 108 N. J. L. 196, Atl. 156, 423). In that case there was a finding of no cause of action in favor of the driver and a verdict was rendered by the same jury in the same case against the master, i. e. the jury acquitted the servant in that case and held the master for an alleged negligent act on the part of the servant, but in our case the jury did not acquit the servant; it merely returned with no finding either for or against him, but did find the master liable. Such a verdict and judgment thereon is a proper one (*Dunbaden v. Castle's Ice Cream Co.*, and *Feury v. Reid Ice Cream Co.*), *supra*.

It is respectfully submitted, therefore, that the verdict rendered against the appellant with no finding by the jury as to the servant is not contrary to law and should not be reversed.

It is respectfully submitted that the judgment herein should be affirmed with costs to the respondent.

Respectfully submitted,

SMITH & KIERNAN,
Attorneys for and of Counsel
with Plaintiffs-Respondents.

New Jersey Court of Errors and Appeals

LAURA M. SANFORD and CHESTER
SANFORD,

Plaintiffs-Respondents,

vs.

CHARLES H. TOTTY COMPANY, a
corporation, and HAROLD YO-
DER,

Defendants-Appellants.

*Action
at Law.*

*On Appeal
from
Supreme
Court.*

BRIEF OF DEFENDANT-APPELLANT.

Statement of Case.

This is an appeal by the defendant, Charles H. Totty Company, from a judgment entered in the New Jersey Supreme Court on November 12, 1930, in favor of plaintiffs and against this defendant after a trial held on October 24, 1930, before Judge Rulif V. Lawrence and a jury in the Supreme Court, Morris County. A Rule to Show Cause (Case p. 15) why the verdict should not be set aside and a new trial ordered was taken by the defendant, Charles H. Totty Company, on October 31, 1930 on the ground that the verdict was excessive and was the result of passion, bias or prejudice (Case p. 17), which Rule was argued before the Supreme Court and discharged on January 28, 1932. In and by said Rule all objections or exceptions taken by this defendant during the course of the trial were reserved for argument on appeal.

The Pleadings.

Plaintiffs' complaint contains two counts, the first of which alleges a cause of action on the part of the plaintiff, Laura M. Sanford, for injuries said to have been sustained from an automobile accident caused by a car which was owned by the defendant, Charles H. Totty Company, and operated by the defendant, Harold Yoder (Case pp. 2-4) . The second count alleges a cause of action of the plaintiff, Chester Sanford, to recover for medical expenses and loss of his wife's services and society (Case p. 5). Defendant's answer denied liability and set up contributory negligence (Case pp. 7-8). An apparent admission by the Totty Company of the defendant, Yoder's, agency, was denied by an amendment to the answer (Case pp. 11-12), under circumstances further referred to hereafter.

The Facts.

The plaintiff, Laura M. Sanford, on December 6, 1929, at about 5:30 P. M. was walking in a westerly direction along the north or right side of Mt. Pleasant avenue in Hanover, N. J. when she was struck by an auto which was owned by the Totty Company and was being driven by the defendant, Yoder, in the same westerly direction along the right side of the road. It was dark and a light fall of snow had been cleared from the center portion of the roadway (Case p. 33, *et seq.*). Yoder was a special salesman for the company, and at the time the accident occurred was having a "day off" and was returning from New York City by way of Rutherford, N. J., where he attempted to make a personal visit (Case pp. 128-132). Further facts will be stated as they relate to the points submitted below.

THE ARGUMENT.

The errors committed at the trial of this cause, which form the grounds of appeal (Case, p. iii) are submitted under the following points of argument:

1. There was no evidence to show liability on the part of the Totty Company.
2. Judgment against the defendant Totty Company founded upon a verdict against that defendant alone is contrary to law.

The grounds of appeal (Case, pp. iii-viii) relied on herein are as follows:

"1. Because the Court committed error in refusing to grant a non-suit on behalf of the defendant, Charles H. Totty Company, on the ground that there was no evidence to connect the said defendant with the cause of action; on the ground that the testimony showed that the plaintiff, Mrs. Sanford, was guilty of contributory negligence by reason of her violation of the New Jersey Traffic Act, and on the ground that there was no evidence of negligence on the part of the said defendant.

2. Because the Court committed error in refusing to grant a motion for a direction of a verdict on behalf of defendant, Charles H. Totty Company, on the ground that there was no evidence to show liability on the part of said defendant.

3. Because the Court committed error in refusing to charge the following requests made by the defendant, Charles H. Totty Company:

(1) To render the master liable for the negligent act of the servant the act must be done for the purpose of executing the master's orders and in doing his work, and while actually engaged in serving the master, and it is not enough to say that the injuries com-

plained of would not have been committed without the facilities afforded by the servant's relations to his master.

(2) The servant's use of such facilities must be in furtherance of and not apart from the master's service and control.

(3) The master is not responsible if the negligence was committed by the servant when engaged in some private matter of his own.

(4) To render the master liable the relation of master and servant must be shown to exist at the time and in respect to the very transaction out of which the injury arose.

(5) Liability of a master rests not upon a mere permission to use but upon a use subject to the control of the master and connected with his affairs.

(6) If the agent was using the machine as a means of recreation and pleasure for himself or his friends, it would seem impossible to draw the conclusion that he could be regarded as the agent or servant of the master upon that occasion.

(7) The plaintiffs' right of recovery depends upon whether or not the defendant was legally responsible for the negligent act of its employee under the doctrine of *respondeat superior*, and the burden of proving that fact rests upon them.

4. Because the Court committed error in charging the following requests to charge with qualifications:

(14) The admission of agency made in the original answer filed is not binding upon the defendant, Totty Company, since it was not made with the advice, knowledge or consent of the defendant company.

(15) There is no evidence in this case to show that the defendant company had any notice or knowledge of the admission of agency made in the original answer.

12. Because the judgment is based upon a verdict returned against the defendant, Charles H. Totty Company alone, and not against the defendant, Harold Yoder."

POINT ONE.

There was no evidence of liability on the part of the Totty Company (Case, p. iii).

There was error in the failure to grant the nonsuit and the motion for direction of a verdict for the Totty Company (Case, pp. 116 and 201).

There is an entire absence of any evidence whatever of negligence on the part of the Totty Company unless and except it be based upon the agency of Yoder. The complaint alleges no separate negligence of the Totty Company and no scintilla of proof of such negligence was offered or even suggested. The plaintiff relied entirely upon the presumption of agency arising from the company's ownership of the car and no other proof was offered and no effort made to show independent negligence of the company or to show defective maintenance.

Both efforts to connect the company were abortive. The first was through the admission of agency in the original answer. This was presented entirely upon undisputed evidence, and left no jury question whatever. Neither the Totty Company nor any agent or representative of it had any knowledge whatever of the original answer or any admission made therein. The matter was handled in the routine course, the complaint going to Eagles who had taken care of some insurance business for the company (Case pp. 193-197). The testimony of Mr. Totty is uncontradicted. The company had no knowledge whatever of the original answer or of any

of the facts stated therein and as soon as the facts were brought to their attention an immediate amendment was filed (Case p. 11 and p. 194).

Nevertheless, the Court instructed the jury as follows:

“If you found that there was an admission, and then on the advice of some lawyer the amended answer was filed to take away the force and effect of the admission, and, nevertheless, that Mr. Yoder under the evidence was shown to be in the employ of the Totty Company, and the first answer was correct, why, then, of course, you would hold the corporation” (Case p. 218, l. 31, *et seq.*).

The record will be searched in vain for any evidence of an admission made by anyone with knowledge of the Totty Company. There was no evidence whatever that Mr. Yoder at the time of the accident was in the employ of the Totty Company and no question of fact was left in the case as to the statements contained in the first answer. We are not here met with conflicting evidence. We are met with the credible evidence of responsible witnesses whose testimony is unchallenged and uncontradicted by anything offered against it. The company could not be effectively bound by an admission which it never in fact made. The presumption arising from ownership was fully rebutted by the full and undisputed proof that agency did not exist at the time the accident took place (Case p. 128, l. 27 to p. 132, l. 40; Case p. 190, l. 37 to p. 192, l. 4).

“The rule is that proof of ownership of an automobile being driven on a public highway raises a presumption of fact that such automobile is in the possession of the owner, if not personally, then through his servant. *Mahan v. Walker*, 97 N. J. L. 304, 117 Atl. 609 (1922). Such presumption may

be entirely wiped out by uncontradicted proof to the satisfaction of the court to the contrary, in which case the matter is a court and not a jury question." *Cosaro v. Ambrose*, 9 N. J. Misc. 323; 153 Atl. 712 (1931).

There was error both in the refusal to charge as requested and in the charge as made. Counsel for the company requested the Court to charge as follows:

"14. The admission of agency made in the original answer filed is not binding upon the defendant, Totty Company, since it was not made with the advice, knowledge or consent of the defendant company.

15. There is no evidence in this case to show that the defendant company had any **notice or knowledge** of the admission of agency made in the original answer" (Case p. 6).

Actually the Court charged as above mentioned.

The evidence at the close of the case is undisputed. The original answer was prepared and filed without the advice, knowledge or consent of the defendant company and at a time when it had no notice or knowledge of the admission of agency made therein. Nevertheless, the Court permitted the jury to speculate on whether there was an admission in the original answer and whether the amended answer was an afterthought conjured up by the ingenuity of a lawyer. Some evidence though very slight might have justified consideration of the facts on the admission by the jury, but the absolute absence of any contradictory evidence left no question of fact on this issue. The qualification of the request to charge was an extremely prejudicial error to the Totty Company.

The attempt to connect the Totty Company because of the ownership of the car and the fact that Yoder was an employee of the company failed completely. There is no conflict of the evidence. Yoder was a salesman for the Totty Company and had formerly used his own car and when it was worn out the company permitted him to use its car in a certain line of work as a salesman for the company (Case p. 194, l. 36). The car was kept in Yoder's own garage and he was permitted to use it for his own pleasure when it was not in use for the company's business (Case p. 194, l. 40 to p. 195, l. 4), and the early part of the week in which the accident happened he had begun a business trip (Case p. 129, l. 27). Before starting he received permission from Mr. Totty, the company's principal stockholder and officer, to take Friday off (Case p. 129, ll. 31-38). The accident took place about 5:30 Friday afternoon (Case p. 23, l. 34). It was shown that Yoder finished his work in Stamford, Connecticut, on Thursday night (Case p. 129, l. 36). Friday morning he drove to New York, made several purchases of wearing apparel for himself, had lunch, and then drove to Rutherford, New Jersey, to call on a personal friend who was not a company customer (Case p. 130, l. 28). This was a complete deviation from his employment. After failing to find his friend, Yoder started back to his own home (Case p. 131, l. 29). He had not been instructed to return to the company's offices and his employment did not require him to report until Saturday or Sunday (Case p. 130, l. 4). The route which he took home on this occasion was not the usual and regular business route which he followed. His route when on business was straight from Madison to the Holland Tunnel

and back on return. He did not use Mt. Pleasant avenue on business (Case p. 139, l. 38). The testimony (Case pp. 128-132) clearly shows that he did no work for the company that day, that the day was entirely his own to spend as he wished, that the company gave him no directions to follow during that time and that the company retained no control of his time or whereabouts and derived no benefit from his activity.

“The vicarious responsibility of a master is legally predicated upon the presumed or proven existence of the relationship of master and servant. If the relationship cannot be shown to have existed *at the time of the occurrence of the damage complained of, responsibility does not exist.*”

Cronecker v. Hall, 92 N. J. L. 450, 105 Atl. 213 (1918) (Court of Errors and Appeals).

There can be no imputed liability where the servant is not acting within the scope of his master's employment. *Eldridge v. Calhoun*, 95 N. J. L. 168, 112 Atl. 340 (1920) (Court of Errors and Appeals); *Evers v. Krouse*, 70 N. J. L. 653, 58 Atl. 181 (1904) (Court of Errors and Appeals). In the case last cited it was stated that a master is not liable for acts done by a servant while engaged in the master's work, where the acts are entirely disconnected therefrom and are done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent purpose of the servant and not being in any sense the act of the master.

The rule is further stated in *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296 (1908) (Court of Errors and Appeals): To render the master liable, the act must be done for the purpose of

executing the master's orders and in doing his work and while actually engaged in serving the master, and it is not enough to say that the injuries complained of would not have been committed without the facilities afforded by the servant's relation to his master.

The doctrine of *respondeat superior*, founded upon the master's control over his servant, cannot be applied to a situation where no control existed. Control is the underlying principle upon which rests the liability of the owner for the driver's negligence. *Spelde v. Galtieri*, 102 N. J. L. 203, 130 Atl. 526 (1925) (Court of Errors and Appeals).

The decisions made in *Cicalese v. Lehigh Valley*, 75 N. J. L. 897, 69 Atl. 166 (1908) and *Depue v. Salmon Co.*, 92 N. J. L. 550, 106 Atl. 379 (1919) (Court of Errors and Appeals) that the relation of master and servant continues during the carriage of the servant to and from his work are not applicable in the present case, and are explained by Justice Kalisch in his opinion in *Eldridge v. Calhoun*, *supra*, as follows:

"The later case of *Depue v. Salmon Co.*, decided by this court, lays down what seems to us a sound and practical test whereby to determine whether an act done by a servant for his own interest comes within the scope of his employment, which test requires that it should appear that the service performed was for the benefit of both the master and servant."

It is submitted that in the present case no liability of the Totty Company was shown, nor was there sufficient evidence before the court to connect the company with the cause of action.

POINT TWO.

The judgment entered in this case, resting upon a verdict against the Charles H. Totty Company alone and not against the defendant, Harold Yoder, is contrary to law and should be reversed.

As above stated, no separate negligence of the defendant company was either alleged, or proved. The judgment against the company rests merely upon a supposed admission of agency which it did not in fact make and upon a presumption of agency arising from the company's ownership of the car, which presumption was completely rebutted by uncontradicted evidence. Under no possibility could the company be found liable except through the liability of the defendant, Yoder. Its negligence, if any, must have been predicated upon the driver's negligence. Recovery against the driver was a prerequisite to recovery against the company. There is absolutely no proof of negligence in failing to properly maintain the automobile, and the case is therefore not within the rule set down in the leading case of *Goeckel v. Erie R. R. Co.*, 100 N. J. L. 279, 126 Atl. 446 (1924) (Court of Errors and Appeals), in which case action was brought against a railroad company and its engineer for damages caused by its locomotive. The allegations of negligence charged against that company were separate and distinct from those charged against the engineer and the court, in holding the company liable and the employee not liable, expressly excluded from its consideration cases where the doctrine *respondeat superior* applied.

Though it is held that one who is injured by the negligence of the servant of another, acting in the line of his employment, may maintain an

action against the master and servant jointly or may proceed separately against either (*Whalen v. Pennsylvania Railroad*, 73 N. J. L. 192, 63 Atl. 993) (1906) (Supreme Court), this rule does not justify the judgment here appealed from.

The cases of *Feury v. Reid Ice Cream Co.*, 2 N. J. Misc. 1008, 126 Atl. 462 (1924) (Supreme Court) and *Dunbaden v. Castles Company*, 103 N. J. L. 427, 135 Atl. 886 (1927) (Court of Errors and Appeals) are not dispositive of the question raised herein. In the *Feury* case there was no finding either for or against the defendant automobile driver, and recovery against the master alone was permitted because there were distinct charges of negligence in failing to properly maintain the automobile. In the *Dunbaden* case action was brought against the driver of an auto truck and the owner company. A verdict was returned against the company alone with no finding as to the driver. On appeal brought by the company it was held that the failure of the jury to return a verdict against the servant afforded no ground for setting aside the judgment and that upon the rendition of such a verdict the case stood as to the servant as if it had never been tried. The Court cites cases showing a conflict of authority, but rejected the argument advanced that the verdict indicated repugnant, contradictory and irreconcilable findings and that, as stated by the Court at page 429, "A verdict which holds the master liable on the doctrine of *respondeat superior* and acquits the servant is equivalent to a finding that no cause of action exists against the master and will not support a judgment against the master." The basis for affirming the judgment was stated at the same page as follows: "The reason assigned for the rule is that the plaintiff

is entitled to the verdict given him by the jury and for the failure of the plaintiff in obtaining a verdict against another equally responsible, the plaintiff may have a grievance but the defendant adjudged responsible has none."

It is respectfully argued that this reason fails to justify the decision made, for it is based upon an assumption that the master and servant are equally responsible and overlooks the fundamental principle of imputed liability—that unless and until the servant be found negligent, there can be no ground for holding the master. The superior's liability is entirely derivative.

The above decisions were considered but not followed in the later case of *Vaniewsky v. Demarest Co.*, 106 N. J. L. 34, 148 Atl. 17 (1929), in which action was brought against a driver of a truck and the company which owned the truck. Negligence similar to that alleged in the case at bar was charged. Following proof that the truck had run off the roadway and into plaintiff's building, motions for non-suit on behalf of both defendants were made and refused. The driver then testified that he had lost consciousness and had no knowledge about the accident. A motion for the direction of a verdict on behalf of the driver was granted but was refused as to the company and judgment against the company alone was entered. On appeal, the judgment was set aside. The Court at page 36 said: "It will be observed that the whole negligence, if any, alleged or proved in the case was in the operation of the truck by Dotson (the driver) as the agent of the company. It is, therefore, entirely apparent that no liability could exist unless by and through the negligence of Dotson." The decision's reference to the

Fuery and Dunbaden cases, *supra*, has an important bearing upon the present case:

"The question here involved was discussed by Mr. Justice Katzenbach in the case of *Dunbaden v. Castle's Ice Cream Co.*, 103 N. J. L. 427, though in that case the precise point did not arise. That action was against master and servant with a verdict against the master only, but with no finding by the jury as to the servant. It was therefore said that the case as against the servant remained yet undetermined. To like effect was *Feury v. Reid Ice Cream Co.*, 2 N. J. Misc. R. 1008.

These cases, however, are far from controlling here. What different juries may do in different cases or possibly in the same case on different trials is by no means analogous to the case where, as here, the action is one against both defendants in which a single complaint is filed alleging the negligence of the driver as the basis of liability against both driver and master, and a verdict is rendered at one and the same time exonerating the servant and holding the master. In the case of *New Orleans and Northwestern Railroad Co. v. Jopes*, 142 U. S. Sup. Ct. 18, it was said by that high tribunal that 'it would seem on general principles that if the party who actually causes the injury is free from all civil and criminal liability, therefore, his employer must also be entitled to a like immunity.' In practice the great weight of authority is as stated in 39 C. J. 1367, that 'where a master and servant are sued jointly in an action based solely on tortious conduct of the servant, and the servant is acquitted, there can be no verdict against the master. A verdict against the master and acquitting the servant is equivalent to a finding that no cause of action exists and will not support a judgment against the master; and such a verdict should be set aside or judgment for the master entered notwithstanding the verdict,'

citing a long line of cases, beginning with the case above noted, and continuing with like rulings in numerous states.

The liability of the servant is primarily due to his wrongful act; that of the master is derivative and predicated wholly upon such primary liability. Courts are for the administration of justice; it is their duty so to administer the law as to effectuate justice within the bounds of adjudicated rules. By implication the judge in the present case found that there was no negligence; none in the servant because it acquitted him of all responsibility, and by implication, therefore, none in the master because such negligence could only exist if the servant had been guilty. It would be a travesty on justice if courts were powerless to set aside a result so illogical and unjust."

A similar decision was made by the Supreme Court in the case of *Hummers v. Public Service*, 8 N. J. Misc. 689, 151 Atl. 383 (1930) (affirmed 108 N. J. L. 196, 156 Atl. 423), where the action was brought against a company and its driver on the same charges of negligence. A cause of action was found in favor of plaintiff as against the company but in favor of the driver as against plaintiff. It was held, in line with the present argument, that the company was liable only if the driver was negligent and that the finding against the company was therefore contrary to law. It may be argued and in fact there exists a distinction between this case and the principal case in that there was a distinct finding in favor of the driver in the *Hummers* case whereas there was no finding either for or against the defendant, Harold Yoder. It is submitted, however, that this distinction is immaterial, for the theory upon which the company's liability rests is identically the same in both cases.

Judgment against the Totty Company, resting upon an improper verdict, should not be permitted to stand. The Court's charge clearly stated the only ground upon which the company could be held liable.

"You will approach this case, I will say to the members of the jury, first from the angle whether plaintiffs have proven to your satisfaction the negligence of Mr. Yoder. The rest of it may or may not be necessary for your consideration if you once decide there has been a failure on the part of the plaintiffs to satisfy you under a fair preponderance of the proof that Mr. Yoder was negligent, then that is the end of the case as to both defendants" (Case p. 205).

The Court further charged:

"So you will have to consider whether Mr. Yoder was doing anything for the defendant corporation within the line of his employment at the time of this accident. If he was not, then the corporation should be let out of the case, because it would not be liable."

There was no finding of any negligence on the part of the defendant, Yoder, nor any proof in this case as to any independent negligence of the Totty Company.

CONCLUSION.

The errors committed at the trial of this cause in refusing to grant a non-suit on behalf of the Charles H. Totty Company in the absence of proof to connect the company with the injuries complained of, and in further refusing to grant a motion for a directed verdict for the company where there was no proof to connect this defendant with the cause of action, and in refusing to charge as hereinabove set forth, and the

further error committed in entering judgment against this defendant in the absence of a proper basis for such judgment, have injured the substantial rights of this defendant. The judgment should be set aside and a new trial granted.

Respectfully submitted,

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