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Grounds of Appeal.

said case, as required by the rules and statutes in such case made and provided.

Dated July 12, 1918.

POMEREHNE & LAIBLE,
Attorneys of Defendant,
George G. Salmon Company.

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Grounds of Appeal.

(Filed October 15, 1918.)

ESSEX COUNTY CIRCUIT COURT.

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HAROLD DEPUE, *et al.*,
Plaintiffs-Appellees,

v.

GEORGE G. SALMON COMPANY,
et al.,
Defendants-Appellants.

Action at
Law.

The above appellant, George G. Salmon Company hereby assigns the following grounds of appeal in the above stated cause.

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1. Because the Trial Court refused to direct a verdict in favor of the defendant George G. Salmon Company, because,

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a. There was no proof in the case showing that the driver of the automobile which caused the collision was, at the time of the said collision, either in the employ of the said defendant, George G. Salmon Company or was at said time, using said automobile for the purposes of said defendant, George G. Salmon Company.

Summons.

b. Because there was no proof in the case showing the existence of the relation of master and servant between the defendant George G. Salmon Company, and the driver of said automobile, at the time of the collision above mentioned and referred to herein.

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POMEREHNE & LAIBLE,

Attorneys for appellant,
George G. Salmon Company.

Summons.

Essex County, ss.:

The State of New Jersey to George G. Salmon Company, a corporation, and Jonas Salmon, an infant, you are summoned to answer the annexed complaint of Harold Depue, Josephine Depue and Kenneth Depue, infants and Roy Depue, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, within twenty days after the service upon you of this writ, and the annexed complaint, the plaintiffs may proceed in this suit and judgment may be entered against you.

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Witness, Frederick Adams, Esquire, Judge of the said Circuit Court at Newark, this twelfth day of November, nineteen hundred and seventeen.

JOSEPH McDONOUGH,

Clerk.

HENRY P. BEDFORD,

Attorney of Plaintiffs,
924 Prudential Bldg.,
Newark, N. J.

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Complaint.**ESSEX COUNTY CIRCUIT COURT.**

10	HAROLD DEPUE, JOSEPHINE DEPUE, and KENNETH DEPUE, by ROY DEPUE, their next friend, and ROY DEPUE, Plaintiffs,	}	Action at Law.	
	<i>v.</i>			
	GEORGE D. SALMON COMPANY, a corporation, and JONAS SAL- MON, an infant, Defendants.			

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Essex County, ss.:

FIRST COUNT.

Plaintiff, Roy Depue, residing in the City of Summit County of Union and State of New Jersey, says:

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1. On or about February 7, 1917, the defendant, Jonas Salmon was in the possession, management and control of a certain automobile then being operated and driven by said Jonas Salmon through and along Morris Avenue near Springfield Avenue in the City of Summit.

2. Said Morris Avenue is a public highway.

3. Said Jonas Salmon was then and there the servant of the said defendant George G. Salmon Company.

4. Said George G. Salmon Company is a corporation of the State of New Jersey, having its

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Complaint.

principal office in said Essex County, and then and there by its servant had the management and control of said automobile.

5. On the day and year last aforesaid, at the place aforesaid, the said defendant, George G. Salmon Company by its said servant Jonas Salmon did so carelessly and negligently manage and operate said automobile and improperly and wrongfully guide and propel the same, and drive the same at an unsafe and dangerous speed, and fail and neglect to properly drive, operate, guide and control the speed of the said automobile, and fail to keep a proper and reasonably careful outlook for persons being upon or crossing said highway in front of said automobile, and fail to give due and timely warning of the approach of the same to persons being upon and crossing said highway, and fail to use due and proper care to avoid colliding with or running into persons lawfully being in and upon or crossing said public street or highway; that by means of the premises, and of the negligence, default and mismanagement of the said defendant company by the said defendant's servant, and without any fault or negligence on the part of the said plaintiffs or any of them, the said automobile, while going in a southerly direction on the said Morris Avenue, near Springfield Avenue, at a dangerous speed, was, with great force and violence, run into and against and collided with the said plaintiffs, Harold Depue, Josephine Depue and Kenneth Depue then and there lawfully being upon said Morris Avenue, in front of said automobile, and they and each of them were thereby violently thrown to the pavement of said Morris Avenue and the said automobile

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Complaint.

and the wheels thereof ran upon and over the said plaintiffs.

6. Said collision was not caused by any negligence on the part of the said plaintiffs or any of them.

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7 As a result thereof, said Harold Depue, Josephine Depue and Kenneth Depue were each violently dragged along the street and received severe and painful injuries to the head, body, arms and legs, of each of them, and each was greatly wrenched, sprained, jarred, hurt and wounded externally and internally, and the nervous system of each of them was greatly shocked and shattered, by means whereby they and each of them, became and was sick, sore, lame, disordered and disfigured, and so remained and continued for a long space of time, to wit, from thence hitherto, and will in the future so remain and continue, and thereby during all that time they and each of them suffered and underwent and will in the future suffer and undergo, great physical and mental pain and suffering, and have been and are and in the future will be hindered, incapacitated and prevented from carrying on and attending to their respective, necessary and lawful business as they respectively otherwise could have done, and have respectively lost and been deprived of, and will in the future lose and be deprived of, divers great gains profits and advantages which they and each of them would otherwise have derived, earned, acquired and gained.

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8. Plaintiff Roy Depue's servants, the said Harold Depue, Josephine Depue and Kenneth Depue, were by means of the premises greatly

Complaint.

bruised, hurt, cut and wounded and then and there became disabled and were thereby hindered and prevented from transacting and attending to the necessary business and affairs of their master, the said plaintiff, Roy Depue, by them during all that time to be performed and transacted and thereby the said plaintiff, Roy Depue, during all that time lost and was deprived of the services of his said servants, and will in the future be deprived thereof.

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9. By means of the premises said plaintiff, Roy Depue, was obliged to and did pay out about \$250 and will in the future be obliged, and compelled to, lay out and expend a large sum of money, for medicine, care and attendance in and about endeavoring to cure the said Harold Depue, Josephine Depue and Kenneth Depue, who are the children of said Roy Depue under the age of 21 years, of the sickness, soreness and disorders occasioned as aforeaid, and paid about \$50 for said children's clothing destroyed in said accident.

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SECOND COUNT.

The plaintiff, Harold Depue, who is an infant under the age of 21 years, residing in the said City of Summit by Roy Depue, who is admitted by the Court here to prosecute as the next friend of said Harold Depue, by his next friend says:

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1. Plaintiff, Harold Depue by said Roy Depue repeats all the statements contained in paragraph 1 to 7 inclusive of the first count and the same are hereby made part of this count.

THIRD COUNT.

The plaintiff, Josephine Depue, who is an infant under the age of 21 years residing in the

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Complaint.

said City of Summit, by Roy Depue, who is admitted by the Court here to proescute as the next friend of said Josephine Depue, by her next friend says:

10 1. Plaintiff, Josephine Depue, by said Roy Depue repeats all the statements contained in paragraph 1 to 7 inclusive of the first count and the same are hereby made part of this count.

FOURTH COUNT.

The plaintiff, Kenneth Depue, who is an infant under the age of 21 years residing in the said City of Summit, by Roy Depue, who is admitted by the Court here to prosecute as the next friend of said Kenneth Depue, by his next friend says:

20 1. Plaintiff, Kenneth Depue by said Roy Depue, repeats all the statements contained in paragraph 1 to 7 inclusive of the first count and the same are hereby made part of this count.

Plaintiff Roy Depue demands as damages \$5,000 on the first count.

Plaintiff, Kenneth Depue by Roy Depue his next friend, demands as damages \$10,00 on the second count.

30 Plaintiff, Josephine Depue by Roy Depue her next friend, demands as damages \$5,000 on the third count.

Plaintiff, Kenneth Depue by Roy Depue his next friend, demands as damages \$5,000 on the fourth count.

HENRY P. BEDFORD,
Attorney for Plaintiff.

Answer.

(Filed December 21, 1917.)

ESSEX COUNTY CIRCUIT COURT.

HAROLD DEPUE, JOSEPHINE DEPUE,
and KENNETH DEPUE, by ROY
DEPUE, their next friend, and
ROY DEPUE,

Plaintiffs,

v.

GEORGE D. SALMON COMPANY, a
corporation, and JONAS SAL-
MON,

Defendants.

Action at
Law.

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ANSWER TO FIRST COUNT.

The defendant, George G. Salmon Company, having its principal place of business at No. 417 Valley Street, South Orange, New Jersey, answering the complaint of the plaintiffs, says:

1. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 1 of the first count of the complaint.

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2. It admits, upon information and belief, the allegations of Paragraph 2 of the first count of the complaint.

3. It denies the allegations of Paragraph 3 of the first count of the complaint.

4. It denies the allegations of Paragraph 4 of the first count of the complaint except that it

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Answer.

admits that it is a corporation of the State of New Jersey.

5. It denies the allegations of Paragraph 5 of the first count of the complaint.

10 6. It denies the allegations of Paragraph 6 of the first count of the complaint.

7. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 7 of the first count of the complaint.

8. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 8 of the first count of the complaint.

20 9. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 9 of the first count of the complaint.

ANSWER TO THE SECOND COUNT.

1. In answer to Paragraph 1 of the second count, this defendant repeats the allegations of the answer to the first count of the plaintiffs' complaint.

ANSWER TO THE THIRD COUNT.

30 1. In answer to Paragraph 1 of the third count, this defendant repeats the allegations of the answer to the first count of the plaintiffs' complaint.

ANSWER TO THE FOURTH COUNT.

1. In answer to the allegations of Paragraph 1 of the fourth count, this defendant repeats the allegations of the answer to the first count of the plaintiffs' complaint.

40 This defendant denies that the plaintiff Roy

Answer.

Depue is entitled to damages in the sum of \$5,000 or in any other sum.

This defendant denies that the plaintiff Harold Depue is entitled to damages in the sum of \$10,000 or in any other sum.

This defendant denies that the plaintiff Josephine Depue is entitled to damages in the sum of \$5,000 or in any other sum. 10

This defendant denies that the plaintiff Kenneth Depue is entitled to damages in the sum of \$5,000 or in any other sum.

FIRST, SEPARATE AND DISTINCT DEFENSE
TO THE FIRST, SECOND, THIRD AND
FOURTH COUNTS.

This defendant denies that the plaintiffs have sustained no damages or any injuries on account of the negligence of this defendant. 20

SECOND SEPARATE AND DISTINCT DEFENSE
TO THE FIRST, SECOND, THIRD AND
FOURTH COUNTS.

This defendant was not guilty of any negligence.

THIRD SEPARATE AND DISTINCT DEFENSE
TO THE FIRST, SECOND, THIRD AND
FOURTH COUNTS. 30

This defendant alleges that at the time of the accident, the automobile was not under the control of this defendant nor was the said automobile being used with the consent of this defendant nor was the said automobile being used at the time of the accident on any business, purpose or agency of this defendant; nor was the party driving the said automobile, acting as the 40

Answer.

servant or agent of this defendant at the time of the alleged accident.

10 Defendant further alleges that the said automobile was being operated by Jonas Salmon, for his own business and purpose and on no business, nor upon any duty for this defendant whatsoever.

FOURTH SEPARATE AND DISTINCT DEFENSE
TO THE FIRST, SECOND, THIRD AND
FOURTH COUNTS.

This defendant alleges that Jonas Salmon was not its agent or servant at the time of the alleged accident.

20 FIFTH SEPARATE AND DISTINCT DEFENSE
TO THE FIRST, SECOND, THIRD AND
FOURTH COUNTS.

30 This defendant, nor any of its officers or agents were present at the time of the occurrence of the accident; neither the defendant nor its officers or agents caused the accident; nor did they contribute in any extent to the occurrence of the said accident; and whoever was guilty of the negligence causing the said accident, or contributed to the occurrence thereof, the plaintiffs were guilty of contributory negligence, of which the particulars are as follows:

40 Whatever damages and injuries were sustained by the plaintiffs Roy Depue, Harold Depue, Josephine Depue and Kenneth Depue at the time and place mentioned in the complaint, were caused and contributed to by their negligence in that they negligently and carelessly exposed themselves to the risk of such an accident and neglected to take precaution or exercise care to

Answer.

guard and protect themselves against such an accident. Moreover, at the time and place mentioned in the complaint, they were conducting themselves in a careless, reckless and negligent manner and were not exercising care or taking proper precautions.

10

Wherefore, this defendant demands that the complaint herein be dismissed with the costs and disbursements of this action.

Attorneys for Defendant,
George G. Salmon Company.

State of New Jersey,) ss.:
County of Essex, {

being duly sworn according to law on his oath says: That he is the of the defendant George G. Salmon Company, a corporation; that the foregoing answer is true except as to such matters as are alleged upon information and belief; and as to such matters, he believes them to be true.

20

Sworn to and subscribed to before me)
this day of December, 1917. {

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**Amended Answer of Jonas Salmon, by
George G. Salmon, His Next Friend.**

(Filed .)

ESSEX COUNTY CIRCUIT COURT.

10 HAROLD DEPUE, JOSEPHINE DEPUE,
and KENNETH DEPUE, by ROY
DEPUE, their next friend, and
ROY DEPUE,

Plaintiffs,

v.

20 GEORGE D. SALMON COMPANY, a
corporation, and JONAS SAL-
MON, an infant, who defends by
GEORGE G. SALMON, his next
friend,

Defendants.

Action at
Law.

30 The defendant, Jonas Salmon, residing in the
City of Summit, by George G. Salmon, who was
admitted by order of this Court, as next friend
of said Jonas Salmon (who is an infant under
the age of twenty-one years), to defend for the
said Jonas Salmon, in answer to the complaint
in this action says that:

ANSWER TO FIRST COUNT.

1. He admits the first, second and third and
fourth paragraphs of the first count of said com-
plaint.

2. He denies the fifth, sixth, seventh, eighth
and ninth paragraphs of the said first count of
said complaint.

Amended Answer by Jonas Salmon.

ANSWER TO SECOND COUNT.

3. He denies the fifth, sixth and seventh paragraphs of the first count to the extent that they are made a part of the first paragraph of the second count.

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ANSWER TO THIRD COUNT.

4. He denies the fifth, sixth and seventh paragraphs of the first count to the extent that they are made a part of the first paragraph of the third count.

ANSWER TO FOURTH COUNT.

5. He denies the fifth, sixth and seventh paragraphs of the first count to the extent that they are made a part of the first paragraph of the fourth count.

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DEFENSE TO FIRST, SECOND, THIRD AND FOURTH COUNT.

6. He says that the plaintiffs Harold, Joseph and Kenneth Depue and all of them were guilty of contributory negligence in that they carelessly and negligently and improperly placed themselves in a position of danger before a moving automobile.

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DAY, DAY, SMITH & SLINGERLAND,
Attorneys of Defendant George G. Salmon,
next friend of Jonas Salmon.

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Reply to both of Separate Answers of Defendants.

ESSEX COUNTY CIRCUIT COURT.

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HAROLD DEPUE, JOSEPHINE DEPUE,
and KENNETH DEPUE, by ROY
DEPUE, their next friend, and
ROY DEPUE,

Plaintiffs,

v.

GEORGE D. SALMON COMPANY, a
corporation, and JONAS SAL-
MON,

Defendants.

Action at Law.

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Reply to George G. Salmon Company Answer.

Plaintiffs replying to the answer of defendant George G. Salmon Company, a corporation, say that plaintiffs were not, nor were any of them guilty of contributory negligence in the manner mentioned in this defendants Fifth Separate Defense, or otherwise.

30

Reply to Jonas Salmon Answer.

Plaintiffs replying to the answer of defendant Jonas Salmon say that;

The plaintiffs were not, nor were any of them guilty of contributory negligence as alleged in the separate defense of this defendant.

Plaintiffs will object at the trial that defendant Jonas Salmon's answer does not properly set up the defense of contributory negligence for the

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Judgment entered June 18, 1918.

reason that it does not set out the facts constituting negligence, and that such defense cannot be interposed by him because not properly pleaded.

HENRY P. BEDFORD,
Attorney for Plaintiffs.

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Judgment Entered June 18th, A. D., 1918.

Action at Law After Verdict.

HAROLD DEPUE, JOSEPHINE DEPUE,
and KENNETH DEPUE, by ROY
DEPUE, their next friend, and
ROY DEPUE,

Plaintiffs,

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v.

GEORGE D. SALMON COMPANY, a
corporation, and JONAS SAL-
MON,

Defendants.

Damage	\$2000.00
"	50.00
"	250.00
"	200.00
costs	75.84

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TOTAL \$2575.84

Henry P. Bedford, Attorney of Plaintiffs.

Judgment after verdict in the above entitled
Action at Law was rendered on the eighteenth

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Judgment entered June 18, 1918.

10 day of June A. D., Nineteen hundred and eighteen,
in favor of the said plaintiff, Harold Depue and
against the said defendant, George G. Salmon
Company, a corporation, and Jonas Salmon, for
the sum of two thousand dollars damage and
also find in favor of the plaintiff, Josephine De-
pue, and against the defendant the sum of fifty
dollars damage and also find in favor of plain-
tiff, Roy Depue, and against the defendant for
the sum of two hundred dollars damage and the
sum of seventy-five dollars and eighty-four cents
cost of suit. Judgment entered and signed June
18, A. D., 1918.

WM. S. GUMMERE,
Judge.

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Jonas H. Salmon, direct.

ESSEX COUNTY CIRCUIT COURT.

APRIL TERM, 1918.

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

HAROLD DEPUE, JOSEPHINE DEPUE,
and KENNETH DEPUE, by ROY
DEPUE, their next friend, and
ROY DEPUE

v.

GEORGE D. SALMON COMPANY, a
corporation, and JONAS SAL-
MON, an infant, who defends by
GEORGE G. SALMON, his next
friend,

Action at Law.

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APPEARANCES.

For plaintiffs, HENRY P. BEDFORD, Esq.

For defendant, GEORGE G. SALMON COM-
PANY, Messrs. DAY, DAY, SMITH &
SLINGERLAND, by FREDERICK W. SMITH,
Esq.

For defendant, JONAS SALMON, BENJAMIN
M. WEINBERG, Esq.

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A jury is called and sworn.

JONAS H. SALMON, sworn in behalf of de-
fendants.

Mr. Weinberg: If your Honor please, by
reason of the situation, I am representing
the corporation only, and Mr. Smith this
young man, and because of the fact that
the testimony from this witness will be re-

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Jonas H. Salmon, direct.

10 quired by both defendants, I am wondering whether the original, or the usual, rule of limiting the questioning to one attorney would be dispensed with here—whether I may not examine the witness only with relation to the subject matter of our defense.

 The Court: Well, the Court sees no objection to that.

Direct examination by Mr. Weinberg:

 Q. Mr. Salmon, how old are you? A. Twenty-one.

 Q. And where do you live? A. 58 Elm Street, Summit.

 Q. Are you single or married? A. Single.

20 Q. Do you work for the George G. Salmon Company? A. Yes, sir.

 Q. And have you been working there a couple of years? A. Yes, sir; for a number.

 Q. Well, what were your duties around about February 7, 1917? A. I didn't get your question.

30 Q. What were your duties around February 7, 1917? A. Shipping and if a man went out without chutes, or anything, I would take the chutes to him, or carry baskets, or convey men to the job—anything in general for the benefit of the company in the business.

 Q. What time was your usual time for getting the work? A. That varied.

 Q. Then you did not have a usual time to get to work? A. No, sir; I did not.

 Q. What time did you get to work? A. I could get there at half-past six, and then I might get there later.

 Q. What time did you quit in the evening? A. That varied.

40 Q. I want to know generally. Did you work

Jonas H. Salmon, direct.

up to midnight or did you quit before sundown? What was your general time for quitting? A. About six o'clock I was supposed to quit.

Q. Now, did you not have a time when you were supposed to come to work, too? A. Well, sometimes I would go out earlier to arrange the teams in the morning; you have to get there earlier to arrange the teams, so that they would get out at seven o'clock.

10

Q. How long did it take to arrange the teams? A. Took about half an hour to arrange the teams.

Q. How did you generally go to business? A. By train and by auto.

Q. Now, when by train, where did you take the train from? A. At Summit.

Q. And that took you to Maplewood? A. Yes, sir.

20

Q. How near to the business where you were employed? A. About half a mile from the station to the place, to the office.

Q. What did you do, did you walk or take a trolley? A. I would walk it.

By the Court:

Q. This is at the Summit end? A. Maplewood.

Q. The Maplewood end? A. Yes, sir.

30

By Mr. Weinberg:

Q. How near were you to the railroad on the Summit end? A. I should say it would take me about four or five minutes to walk from the station to my home.

Q. When you went home what train were you in the habit of taking from Maplewood? A. The 6:08 train; if I missed that there would be one about quarter of seven.

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Jonas H. Salmon, direct.

Q. Did you ever take the 6:08 train home?

A. Yes, sir.

Q. Did you ever take the 6:45 train home?

A. Occasionally, but not very often.

10 Q. You have taken it home, though? A. Yes, sir.

Q. And what train did you usually come down on? A. The 6:26.

Q. That is, leaving Summit at 6:26? A. Leaving Summit at 6:26.

Q. And that got into Maplewood about when?

A. About quarter of seven.

By the Court:

20 Q. It would get to the Maplewood station at quarter to seven? A. Yes, sir.

By Mr. Weinberg:

Q. Did you ever come down on any other train in the morning? A. At that time that was the first train out in the morning.

Q. At what time? A. 6:26.

Q. You say at that time it was the first train out. What do you mean by that? Do you mean that time of the year? A. Yes, sir.

30 Q. That is the only train out at Summit? A. Yes, sir.

Q. Now, do you recall February 7, 1917? A. Yes, sir.

Q. What time did you finish your work? A. It was about ten minutes past six when I left the office.

Q. You had just missed your 6:08 train, then, had you? A. Yes, sir.

Q. What did you do then? A. I went home by machine.

40 Q. Just listen to my question. After you had

Jonas H. Salmon, direct.

missed your train, what did you then do, what was the first thing that you did? A. I went out and took the machine home.

Q. Where did you find the machine? A. At the yard, where we usually keep the machine, in South Orange.

10

Q. Did you say anything to anybody in the company before you took the machine out? A. No, sir; I did not.

Q. What was the purpose for which you took the machine, where you you going with it? A. I was going home with it, from my office to my home, in Summit.

Q. Did you have any business of the company between the firm's place of business, in Maplewood, and your home, in Summit? A. No, sir.

20

Q. Then you were not on any business of the company at that time?

Objected to as calling for a conclusion.
(Question withdrawn.)

Q. Your intention was to go straight home, you say? A. Yes, sir.

Q. And were you proceeding straight home? A. Yes, sir.

Q. At that time? A. Yes, sir.

30

Q. Was there any business of the company's whatsoever on Morris Avenue or Springfield Avenue that evening? A. No, sir.

Q. Or on any other part of the route until you got to your home, in Summit? A. No, sir.

Q. You took the automobile so that you would not have to wait for the—

Objected to as leading.

Q. This was a little Ford, was it? A. Yes, sir; a Ford business car.

40

Jonas H. Salmon, direct.

Q. With a delivery body? A. Yes, sir.

Q. Was anybody in the automobile besides yourself when you were on your way home? A. No, sir.

10 Q. Was there any merchandise in the machine?
A. No, sir.

Q. Were you going to do any collecting on the way home, or anything of that sort? A. No, sir.

By Mr. Smith:

20 Q. Mr. Salmon, what course did you take from the yard of George G. Salmon Company towards Summit? A. I started at the office, on Valley Street, and went straight out Valley Street to Millburn Avenue; I turned to my right on Millburn Avenue and went out Millburn Avenue to Morris Avenue; up Morris Avenue; that would lead me right straight through to Elm Street, Summit.

Q. What time of the evening did you reach the junction of Springfield and Morris Avenues? A. About half-past six.

Q. Was it dark or light at that time? A. It was dark.

30 Q. Tell us about the condition of your lights on your machine when you reached Springfield and Morris Avenues? A. I had two front lights burning and—

Q. You had two front lights burning, and anything else? A. I lit my tail light before I left the office.

Q. What kind of front lights were they? A. Electric lights.

Q. And where was the electricity generated from in that machine? A. From the magneto.

40 Q. How long have you been driving a Ford?
A. About four years, four or five.

Jonas H. Salmon, direct.

Q. Are you familiar with the mechanism of the lighting arrangements on the Ford? A. Yes, sir.

Q. Now, will you tell the Court and jury in your own way about this accident, when it happened, picking up your route from the junction of Springfield and Morris Avenues? Just tell us what happened in your own way, in your words.

10

A. I came up Morris Avenue, going towards Summit on Morris Avenue, and I turned the corner at the Spring Lake Hotel, and I passed a Ford car coming down from Summit, and a short distance behind this Ford car was a large car, with glaring headlights, and the reflection of these headlights on the windshield and in my face dazzled my eyes so I couldn't distinguish anything before my eyes, or before my machine and when I was able to distinguish—I threw out my clutch, and when I was able to distinguish anything before my machine I saw something in front of the car. I applied my brakes and stopped the machine. I got out and I heard some children crying, hollering, in under the—one was in under the front axle. I went around there and picked the child up and carried him to the right side of the machine and sat him on the bank there.

20

30

By the Court:

Q. Can you tell which child that was? A. That was the big boy.

By Mr. Smith:

Q. Harold? A. Yes, sir.

Q. Where was he? A. In under the front axle of the car.

40

Jonas H. Salmon, direct.

Q. Was there anybody about when you did that? A. I didn't see anybody.

Q. You sat him on what bank? A. Alongside of the road.

Q. The other side of the gutter? A. Yes, sir.

10 Q. Where was the rest of them? A. And then I run around to the back of the machine, and another child was laying, hollering and kicking, under the rear axle of the car; that was the little girl that was laying there. I picked her up and stood her up, and she started to run around and holler and cry. And the third child, I don't know where he was laying; I didn't pick him up.

Q. You did not pick him up? A. No, sir.

20 Q. Well, do you know where he was? A. From where the car hit the children, the next morning my brother and I measured the distance. When I hit the children the glass in the front headlight was broken, and the next morning we measured the distance from the glass of the headlight to where the blood was on the snow. It was about 30—about 20 feet from the back, 20 feet in back of the car.

Q. Now, Mr. Salmon, how did you measure that distance? A. We paced it off.

30 Q. Who was with you? A. My brother.

Q. Anybody else? A. No, sir.

Q. Now, Mr. Salmon, where were you with reference to the bridge when you first saw the children? A. I just passed the bridge, a short distance past the bridge.

Q. And had you changed the course of your car at all going over the bridge?

Objected to as leading.
(Question withdrawn.)

Jonas H. Salmon, direct.

Q. Do you remember in crossing the bridge how far you were from the fence on the right side of the bridge? A. I couldn't say exactly how far I was from the fence.

Q. Well, what part of the road were you in when you crossed the bridge? A. I was on the righthand side, near the center. 10

Q. What is that? A. I was on the righthand side of the street, near the center of the road.

Q. And where did this automobile with the glaring headlight pass you? A. Just on the Maplewood side of the bridge; I was just going over.

Q. Just before you had gone across the bridge? A. Yes, sir.

Q. Did you see the children in front of you before or after the car had passed? A. Which car? 20

Q. The automobile with the glaring headlights. A. Just after the car had passed. He crowded me away over to the right-hand side of the street.

By the Court:

Q. Who crowded you? A. This car with the glaring headlights.

By Mr. Smith: 30

Q. What position was your driving apparatus in at the time you went by the car with the glaring headlights? A. I was going towards Summit.

Q. No. How were you driving, in neutral or in high or low, when the car with the glaring headlights went by? A. When the lights glared into my eyes I was unable to distinguish anything before my car; I threw out my clutch and I was running at neutral. 40

Jonas H. Salmon, direct.

Q. What does that do? A. My light would be dimmed somewhat.

Q. I do not mean with respect to the lights; I mean with respect to the car. A. It would cut down the speed of the car.

10 Q. Well, did it cut down the speed of the car? A. Yes, sir.

Q. How fast were you driving, if you know, before you threw your car into neutral? A. I should say from fifteen to twenty miles an hour.

Q. And how do you put a Ford in neutral? A. Just push in the left pedal half-way.

Q. There is no operation with the hand necessary, is there, A. No, sir.

20 Q. It is a foot pedal that you push? A. Yes, sir.

Q. How fast do you think you were going when you passed this car with glaring headlights? A. I should say I was going about ten to twelve miles an hour.

By the Court:

Q. You met it, did you not? A. Yes, sir.

Mr. Smith: Yes. I beg your pardon! When you met it.

30 The Witness: Yes, sir.

By Mr. Smith:

Q. Did you have your windshield up or down? A. My windshield was up.

Q. Was it a cold day, or night? A. No, it was pretty warm that day.

Q. Did you have your top up or down? A. My top was up.

Q. Do you wear glasses all the time? A. Yes, sir.

40

Jonas H. Salmon, direct.

Q. What is the matter with your eyes? A. Weak eyes.

Q. Had your glasses on that night? A. Yes, sir, I have worn glasses for the last four or five years.

Q. Was your windshield clean or dirty? A. It was clean. 10

Q. Now, between the time you first saw this car approaching you with glaring headlights and the time you passed it what did you do with reference to looking ahead? A. I didn't understand the question.

Q. Between the time you first saw the car with glaring headlights and when you met it what did you do with reference to looking ahead? A. I looked ahead as far as I could see, and I didn't see any children in the street, and— 20

Q. Did you see anybody in the street? A. No, I didn't see anything in the street.

Q. And when you first saw the children how far ahead of you were they? A. My machine was right on them when I was able to distinguish anything.

Q. You say when you were able to distinguish anything your machine was right on them? A. Yes. 30

Q. Do you remember whether they were walking or riding, or what they were doing? A. That I couldn't say.

Q. What is that? A. I couldn't say whether they were walking or riding.

Q. Could you tell how many children there were? A. No, I don't know.

Q. Could you tell whether they were children or not? A. I could not. It was all done in a second's time, and I couldn't tell whether there was one or two or three there, or how many. 40

Jonas H. Salmon, direct.

Q. Now, up to the time this car with the glaring headlights swung into the road so that it blinded your eyes how far ahead of you could you see clearly? A. I should say about 30 feet.

Q. 30 feet? A. Yes.

10 Q. Was there anything ahead of you at that time before you saw the headlights? A. No, sir.

Q. Where were you with reference to the electric light on the corner at the time when the automobile with the glaring headlights appeared?

A. There is one right on the corner of Springfield Avenue and Morris Avenue, and then there is another light up past North Street on the left-hand side of the street.

20 Q. Well, where you struck the children was it light or dark? A. It was dark.

Q. How far away is the nearest light? A. I should say about a hundred feet from the light near North Street.

Q. What was the condition of the roadway, was there snow on it? A. No, it was free from snow.

Q. Was it wet? A. No.

Q. Are you pretty familiar with that road? A. Yes, sir.

30 Q. What kind of a road was it at the time of the accident? A. It was a macadam road with some kind of a road binder to lay the dust, tar or——

Q. Do you know what an amacite road is? A. Yes, sir.

Q. What is an amacite road? A. It is stone and tar mixed together.

Q. Has that road since been fixed? A. Yes, sir.

40 Q. What kind of a road is it now? A. It is an amacite road.

Jonas H. Salmon, direct.

Q. When was it made amacite? A. Last fall they fixed it over.

Q. Was there any amacite road there at the time of the accident? A. No, sir; there was not.

Q. What was the distance, if you know, between the edge of the road bounded by the gutter and the roadway as covered by this binder? A. About 5 or 6 feet. 10

Q. Well, was the edge of that roadway as covered by the binder a straight line? A. No, sir; it is an irregular line.

Q. And where was your car with reference to that edge of the binder? A. Where the glass out of the right headlight was broken to the gutter it was a distance of about 8 feet. 20

Q. When did the glass in your right headlight break? A. When I hit the children.

Q. How do you know that? A. It was right back of the car. I think 20 feet in back of the car.

Q. What was? A. This glass was.

Q. What did that do to your lights, if anything? A. It put my lights out.

Q. Did it put your lights out? A. Yes, sir.

Q. Both of them? A. When I hit the children it must have hit the glass in the right headlight and broke the bulb and put the light out. 30

Q. You say the bulb in the headlight was broken? A. Yes, sir.

Q. And the glass broken? A. Yes, sir.

Q. Did you hear the testimony of one of the witnesses for the plaintiffs who said that he tested your right light? A. Yes, sir.

Q. That was Mr. Delaney. A. Yes, sir. 40

Jonas H. Salmon, direct.

Q. Did you see Mr. Delaney there? A. There were a number of men standing around there, but I didn't know him at the time.

Q. Did you see anybody with a flash-light? A. No, sir; I did not.

10 Q. Did you see anybody make any measurements? A. No, sir.

Q. What was done with the children after you picked the boy up and put him on the bank and picked the little girl up? What did you do then? A. The man that drove the other Ford, Mr. Bielefeld, he went down to the corner of Morris Avenue and Springfield Avenue and came back; he turned around and came back; and by that time there were some other people there, at the time Mr. Bielefeld got there, one or two, and I picked up the children and loaded them in his car and sent them to the hospital.

20 Q. Why did he take them? A. He offered to take them. I was going to load them in my little machine and take them up there.

Q. Well, why didn't you? A. He said I had better wait there and call an officer.

Q. And what did you do? A. I helped load them in his machine and sent them up to the hospital, and then I went down to the Spring Lake Hotel and called up the police station.

30 Q. Whom did you see there? A. Mr. Sommers; I saw him down there behind the bar, and then I went in and called up the police station. That is all I saw down there.

Q. And what happened to you then? A. Then after I called the police station up I went back to the scene of the accident and saw Mr. Depue there, and I reported how the accident happened to him.

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Jonas H. Salmon, direct.

Q. Go ahead and tell us what else you did.

A. I tried to get some witnesses, and I asked a number of men standing around there for their names, but they wouldn't give me their names, only Mr. Bielefeld; he is the only one that gave me his name. Then I waited ten or fifteen minutes, and the officer came down, and he told me to start my engine up. I started the engine going, and my lights wouldn't burn; my right bulb was broken, and I had to short circuit—turn those two wires together that is in the base of the bulb, in order to make the electric light burn. I lit one of the lights, the left headlight, and we went from there up to the hospital, and from there later we went to police headquarters, and I explained to them how the accident happened, and the sergeant called up the judge—

10

20

Mr. Bedford: I object to this. I do not see how that is material.

Q. Did you go to see the Depues afterwards?

A. I saw him up to the hospital later that night.

By the Court:

Q. You saw the children? A. I saw Mr. Depue up at the hospital.

30

By Mr. Smith:

Q. Mr. Salmon, did you hear the witness who said you were going thirty-five miles an hour?

A. Yes, sir; I did.

Q. Were you or were you not going thirty-five miles an hour? A. No, sir; I was not.

Q. I think you gave us the speed, did you not? A. Yes, sir.

Q. You have travelled this road a good many times? A. Yes, sir.

40

Jonas H. Salmon, cross.

10 Q. Was there anything in this road which would indicate a place for vehicles or a place for pedestrians? A. No, sir; there was not. At the edge of the road was a little rut where the wagons kicked up the cracked stone and made it sort of rough alongside of the gutter.

Q. Was there any difference in the height of the road? A. No, sir; not to my knowledge.

Q. And on the space between the edge where the road had the binder on and the grass, what was that? A. There is a cobblestone gutter in there.

Q. There is a cobblestone gutter? A. Yes, sir.

Q. Is there a curbsone, too? A. No, sir; no curbstone.

20 *By the Court:*

Q. Is there a cobblestone gutter on each side?

A. I couldn't say about the left of the road.

Q. You are speaking about the right side? A. Yes, sir.

Cross examination by Mr. Bedford:

Q. Mr. Salmon, you say the road has been fixed since the accident? A. Yes, sir.

30 Q. And that the fixing consisted in placing ordinary cobblestone all along the edge of the amacite road? A. It is a concrete foundation with an amacite top.

Q. And what is at the edge of the amacite all the way along the road? A. That is concrete now.

Q. Do you know that there is a curbstone, the top of which shows all along the sides of that amacite road? A. No, sir; I never saw it.

40 Q. Do you know whether or not between that edge of the amacite and the cobble gutter there

Jonas H. Salmon, cross.

is a distance of 4 or 5 feet that is not amacite?

A. At the time of the accident it was all macadam road.

Q. What is a macadam road, Mr. Salmon?

A. It is a cracked stone.

Q. Have you not said that there was tar on it for a binder? A. Some kind of a tar dressing, to lay the dust, or a road binder; I couldn't saw what it was.

10

Q. So that you had stones and a tar binder there before the accident, had you not? A. Right in the center of the street—I didn't understand your question.

Q. Before the accident, you say, there were stones with a tar binder? A. There was a stone road with some dust layer, with tar on it, or something to lay the dust, and this run out and made a regular edge on the road.

20

Q. Then it was stone, or what you call macadam, with a tar binder; is that correct? A. Yes, sir.

Q. And you have just said that amacite is a stone road with a tar binder? A. But they are put down altogether different.

Q. But that is what it consists of, stones with a tar binder? A. There is a substance, stone or something mixed together with some black tar, or something.

30

Q. So that both of them that you have spoken of were stones mixed together with tar or something; is that right? A. No, the macadam road is altogether different.

Q. I did not ask you whether it was different; I asked you whether both of them were stones mixed with a tar binder? A. A macadam stone, stone and dirt, they roll it down, and this here oil or tar they put on to lay the dust.

40

Jonas H. Salmon, cross.

Q. You had been travelling there with your automobile how long? A. How long?

Q. Yes, how many years? A. I had been travelling there for four or five years.

10 Q. And had you seen persons walking along that road? A. Yes, sir.

Q. And if they wanted to pass the bridge on the right-hand side of the road where would they walk? A. They would have to walk in the water.

Q. Well, they did walk on the right side of the bridge, as a matter of fact, did they not? A. What do you mean, the right side of the railing?

20 Q. As you went towards the bridge when you were going to Summit, was not the place where the people walked to the left of the bridge? A. Yes, sir.

Q. And have you not seen a great many people walk along there? A. Yes, sir.

Q. And did you not see as they went by that their feet had made a regular path along there? A. No, sir; I never noticed a path along there; it was part of the road.

30 Q. Now, is it not a fact that that at this time was a well defined path where people walked and where there were cinders mixed with the dirt, instead of the cobble stones or broken stones that were in the middle of the road? A. No, sir; it was part of the macadam road that they walked on.

Q. Was the macadam road any wider than the present amacite road there? A. The amacite road now is right in the center of the street. I couldn't say how wide it is, but it doesn't extend from curb to curb like the macadam road did.

40 Q. Was there any curbstone there at the time of the accident? A. A cobblestone gutter.

Jonas H. Salmon, cross.

Q. The gutter there is of cobblestone, is it not? A. Yes, sir.

Q. But there is no curbstone there, is there? A. No, sir.

Q. And there was not at the time of the accident? A. No, sir.

10

Q. And between the curbstone gutter and the macadam, or amacite, or whatever it was, that is where the people walked, is it not? A. There was no amacite road on the street at the time; it was all macadam road at that time from gutter to gutter.

Q. That is your opinion of it at that time? A. Yes, sir.

Q. That is quite a curve there at the junction of Morris Avenue and Springfield Avenue, is it not? A. It is a long curve.

20

Q. It turns right around; from going westerly it goes southerly does it not—Morris Avenue? A. It is just about a curve like this here (indicating).

Q. Like the railing? A. Morris Avenue bears off to the left and Springfield Avenue goes straight ahead.

Q. And the Spring Lake Hotel is just at the junction of Springfield Avenue and Morris Avenue, is it not? A. Yes, sir.

30

Q. And in front of the Spring Lake Hotel is an ash walk, or cinder walk, is there not? A. There is a stone drive—way that leads up around to the hotel; it runs from the—

Q. But in front of the hotel itself, the whole front of the hotel has simply a cinder or ash walk, has it not? A. I never saw an ash walk there.

Q. Well, the entire surface there is covered

40

Jonas H. Salmon, cross.

with cinders or ashes, is it not? A. There is a stone driveway that runs from Morris Avenue up to Springfield Avenue in front of the hotel, right up to the hotel steps.

10 Q. Not where people drive, but where they walk out of the hotel onto Morris Avenue, is a cinder surface, is it not? A. No, sir; you have to walk out of the driveway.

Q. They could not walk in front of the hotel, could they? A. This stone drive runs from Morris Avenue to Springfield Avenue; it cuts right across the corner there, and there was no walk in there.

Q. You came up towards the Spring Lake Hotel that night, did you? A. Yes sir.

20 Q. And you say Mr. Bielefeld's Ford car passed you? A. Yes, sir; a Ford car that I afterwards found was Mr. Bielefeld's car.

Q. And before you got to the bridge, you say, you got the light in your eyes of this automobile that was following Mr. Bielefeld's car; is that right? A. Just as I passed Mr. Bielefeld this car with the bright lights swung over to my right-hand side of the road to pass Mr. Bielefeld and—

30 Q. Well, Mr. Bielefeld was not stopped when you met him, was he? A. No, sir.

Q. He went some distance beyond you, did he not? A. Yes, sir.

Q. And you did not know where he was at the time this other car was down at the Spring Lake Hotel, do you? A. This man was getting ready to pass this Ford car that I passed.

Q. He was getting ready? A. Yes, sir; and he swung over—

40 Q. And where were you then? A. I was just past the bridge.

Jonas H. Salmon, cross.

Q. When was it, as you said in your direct examination, that before you reached the bridge the light of this car following Mr. Bielefeld's car got in your eyes and dazzled you? Where were you then? A. I didn't understand your question.

10

By the Court:

Q. Where were you when your eyes were dazzled by these lights? A. I had just crossed the bridge.

By Mr. Bedford:

Q. You had just crossed the bridge? A. Yes, sir.

Q. Now, you are sure of that, are you? A. Yes sir.

20

Q. But you recollect saying in answer to Mr. Smith that you had not yet reached the bridge, do you? A. When I passed Mr. Bielefeld I hadn't crossed the bridge.

Q. When the car passed you whose lights, you say dazed you you had not yet reached the bridge; do you recollect that? A. (No response).

Q. Do you? A. I was right there just across the bridge when he swung over to my right and crowded me off my righthand side of the road.

30

By the Court:

Q. Was that after you passed the Ford? A. Yes, I passed the Ford, the Ford was coming down Morris Avenue.

Q. The Ford was meeting you and this car with the bright lights came down back of the Ford and went to your right to pass the Ford? A. Yes, sir; he was trying to pass the Ford and he crowded me off the right of the road.

40

Jonas H. Salmon, cross.

Q. Where were you when you met the Ford?

A. Just this side of the bridge.

Q. Before you came to the bridge? A. Yes, sir.

By Mr. Bedford:

10

Q. Where were you when the light dazzled your eyes? A. I was just crossing the bridge.

Q. And that light came from a car that was coming down the hill, did it not? A. Yes, sir.

Q. And that light shone on the roadway in front of that car, did it not? A. It was shining on my face and on the windshield of my car, and dazzled my eyes so that I couldn't distinguish anything ahead of my machine.

20

Q. But did it not shine on the roadway and into your eyes? A. Yes, sir.

Q. And it was not until after you got across the bridge that your eyes were dazzled, then; is that true? A. Yes, sir.

Q. You are sure of that, are you? A. Yes.

Q. Then where was this big car that dazzled your eyes at that time? A. At what time?

30

Q. At the time your eyes were dazzled. You had just gotten across the bridge. Where was the car that dazzled you? A. He was going down toward Maplewood, or Springfield.

Q. Where was it from you? A. Just ahead of me, coming down.

The Court: Which car do you mean, the car with the bright lights?

Mr. Bedford: The car with the bright lights.

40

Q. How far was it from you? A. I couldn't judge the distance he was from me.

Q. You do not know, then, at the time you

Jonas H. Salmon, cross.

were dazzled where the car was from you?

A. Yes, sir; he was right on my left; I couldn't say how far he was from me; he was just a short distance.

Q. Well, you saw him, did you not? A. Yes, I saw him.

10

Q. And yet you cannot tell us how far from you he was? A. No, sir; just a short distance away.

Q. You say your eyes are weak? A. Yes, sir.

Q. And you had not seen anything ahead of you in the road up to the time you were dazzled? No, sir.

Q. Do you say that your lights were lighted and throwing their light on the road ahead of you? A. Yes, sir; I had two headlights burning.

20

Q. And do they show a bright light ahead of you when they are burning as they were that night? A. They are the regular light. When the engine is running fast——

Q. Do they show a bright light so that you can distinguish objects 150 feet at night? A. I don't think you can do that with any Ford car.

A. At what distance could you distinguish objects that night with your lights? A. About 30 feet ahead.

30

Q. Do you mean to say that your light only showed 30 feet ahead of your car? A. If you throw out your clutch and your engine slows up, then your lights do down.

Q. When you throw out your clutch you lose the light on the road ahead of you, do you not? A. You lose a certain amount of it.

Q. And that is what you did just before you hit these children? A. Yes, sir.

40

Jonas H. Salmon, cross.

Q. And you were coming uphill? A. Yes, sir.

Q. And you had just come around or were just going around a curve, were you not? A. Yes, sir.

10 Q. You were away over on the righthand side of the road, were you not? A. Yes, sir; I was on the right; I wasn't away over.

Q. And that was where you had during these two or three years that you had been driving a car seen people walking, was it not? A. I have seen them walk away over to the right of the road.

Q. Well, you were away over to the right of the road, were you not? A. No, sir; not when I hit the children.

20 Q. Well, you just said a moment ago that you had to get over to the right side of the road on account of the big car, did you not? A. There is an ordinary wide street up there, and you can pass two or three cars together there.

Q. You can pass two or three cars together where this accident happened? A. Yes, sir. It is a country road there, a wide street.

30 Q. Well, I want to know whether it is true that you were crowded away over to the right side of the road; is that true? A. I was crowded over to the right; yes, sir.

Q. Then you were over on the side of the road, were you not? A. I was on the righthand side of the road, yes.

Q. And you pulled out your clutch and had your car running in neutral, did you not? A. Yes.

Q. And that dimmed your lights? A. Yes, sir.

A. And you slid along with the momentum of

Jonas H. Salmon, cross.

the car until you hit the children, did you not?

A. Yes.

Q. And you were going uphill at the time, were you not? A. There is a little grade there.

Q. How quickly can you stop your Ford car going at fifteen or twenty miles an hour, in what space, if you apply your brake? A. The next morning I went down and measured from where the glass was lying on the street— 10

Q. No, I do not want to know about that. I am asking you at that time what is the smallest space that you could stop your Ford car by applying your brakes when you were going fifteen to twenty miles an hour? A. That is something I couldn't say.

Q. You can do it in five feet, can you not? A. I don't know; I never tried it. 20

Q. You say that your eyes were dazzled, that you could not see anything in front of you at the time this light came in front of you? A. I couldn't distinguish things in front of my car.

Q. And yet, under those circumstances, you allowed your car to go on at the momentum it had gained while you were going fifteen to twenty miles an hour, did you not? A. Yes, sir.

Q. And after you struck the children you carried them at least 30 feet, did you not? A. No, sir. 30

Q. What was the distance between where the glass was on the road and your car where it stopped? A. I don't know that distance. From where the blood was on the snow to where the glass was broken in my headlight, laying in the street there, it was a distance of about 20 feet.

Q. Where was the blood on the snow? A. It was on the side of the street. 40

Jonas H. Salmon, cross.

Q. Was it away from your car or close by it?

A. Right alongside of my car, where I put the big boy down.

Q. Then you measured from the blood to the glass, did you? A. Yes, sir.

10 Q. And you do not know how far you got before the glass dropped onto the street, do you?

A. I presume that is where I hit the children.

Q. That is only a presumption of yours? A. Yes, sir.

Q. And was not your car stopped up near the culvert there at Mr. Harris's house when it came to a stop? A. Yes, sir; it stopped just this side of North Street.

20 Q. You saw this car coming down the hill, did you not, when it was away up at the top of the hill? A. Yes, sir.

Q. And that top of the hill is 300 to 500 yards away, is it not? A. When I was coming up Morris Avenue I saw the car coming.

Q. And it was away up to the top of the hill? A. I couldn't say exactly where it was.

Q. 300 to 500 yards away, was it not? A. I couldn't say the distance.

30 Q. You do not know where it was? A. I know it was coming down the grade, coming down Morris Avenue.

Q. Now, you say it was not until you struck the children that you applied your brake? A. I heard a crash and I applied my brake.

Q. Now, you had missed the train that night? A. Yes, sir.

Q. And you used this Ford car? A. Yes, sir.

40 Q. Did you have lots to do for the company at that time of the year, February 7th? A. During the winter we are busy on coal orders.

Jonas H. Salmon, cross.

Q. Were you very busy at that time? A. I couldn't say exactly about that day, how busy we were.

Q. Well, you had worked overtime a little that night, had you not? A. Yes, sir, I had.

Q. And you had worked overtime because there was a lot to do, or more than you had gotten done in the time up to six o'clock; isn't that so? A. Yes, sir. 10

Q. And there was something to go out by the teams the next morning, was there not? A. Yes, sir.

Q. It was necessary for you to get there before seven o'clock the next morning to send that stuff out by the teams? A. I have to arrange the teams the next morning. 20

Q. And what time is it necessary for you to get there in the morning for you to have the teams read? A. I have got to get there at half-past six.

Q. You say there was no train that would get you there at half-past six at that time? A. No, sir.

Q. Then did you take this automobile home so that you could get back early enough in the morning? A. Yes, sir. 30

Q. And did you have an arrangement with George G. Salmon Company that you could do that when you were working overtime or you were required to get there earlier in the morning? A. Yes, sir.

Q. Is that the reason you took it this night? A. Yes, sir.

Q. Did you have something to do on the way home that night for the Salmon Company besides the fact that you were to use the car? A. No, sir; I did not. 40

George G. Salmon, direct.

Q. Were you going directly to the office the next morning for them? A. Yes, sir.

Redirect examination by Mr. Weinberg:

10 Q. When you did not work overtime would you still take the automobile? A. No, sir not without I had to get there early in the morning.

Q. I am assuming the same conditions. If you were busy in the morning and did not work overtime, what would you do? A. I was liable to take the machine home with me if I had to get there early in the morning.

Q. Were you working by the day or week? A. By the week.

20 GEORGE G. SALMON, sworn in behalf of defendants.

Direct examination by Mr. Weinberg:

Q. Mr. Salmon where do you live? A. 42 Durand road, Maplewood, New Jersey.

Q. And what is your business? A. Coal and mason's material, manager.

Q. For whom? A. For the George G. Salmon Company.

30 Q. And also a stockholder? A. A stockholder yes, sir.

Q. Where is its business? A. 417 Valley Street, South Orange.

Q. On February 7, 1917, the Salmon Company owned a little Ford automobile delivery wagon? A. They did.

Q. And on that same day Jonas Salmon was an employee? A. Yes.

40 Q. Up to what hour on February 7, 1917, was Jonas Salmon working for the George G. Salmon

George G. Salmon, direct.

Company? A. Up to six o'clock, or the time he finished his work.

Q. Do you know what time he finished his work on February 7, 1917? A. Not exactly; no, sir.

Q. Do you know approximately? A. I only know from his hearsay. 10

Q. Where did he finish his work?

Mr. Bedford: If you know.

Q. If you know, as manager of the company, where did he finish his work on February 7th? A. At the office.

Q. What was his business? A. Soliciting orders, collecting money and doing the shipping.

Q. And the shipping was all done from the place, I suppose? A. Yes, sir. 20

By the Court:

Q. Where was the office? A. 417 Valley Street, South Orange, your Honor.

By Mr. Weinberg:

Q. And the soliciting is done when? A. During the day.

Q. Where was the automobile generally kept by the corporation? A. At 417 Valley Street. 30

Q. That is where your business is? A. Yes, sir.

Q. Do you know where Jonas Samon lived on the 7th of February, 1917? A. I do.

Q. He is a brother of yours? A. Yes, sir.

Q. Where did he live? A. 58 Elm Street, Summit.

Q. And he lived with his mother there? A. With his mother.

Q. Did you on behalf of the corporation, or 40

George G. Salmon, direct.

anyone, to your knowledge, instruct or engage Jonas Salmon to perform any work for the corporation after he left its place of business at 417 Valley Street on the night of February 7, 1917?

10

Objected to as leading.

A. I did not.

Objection overruled.

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

Exception noted as ground of appeal.

20

Q. Did you state what Jonas Salmon's regular hours of employment were? Didn't I ask you that? A. Well, he does the shipping; sometimes that requires him in the office very early in the morning and later at night.

By the Court:

Q. Early in the morning and— A. Late at night. It depends on how busy we are.

By Mr. Weinberg:

30

Q. Do you know who gave Jonas Salmon the automobile on February 7, 1917, in the evening, to go home with? A. It was a general understanding that he could use the car when he worked overtime or had to be there early in the morning.

Q. That he should do what with it? A. To go home.

Q. Go home in the machine? A. Yes.

Q. In the company's automobile? A. Yes, sir.

40

The Court: There was a general understanding he said, that he might use the car.

George G. Salmon, direct.

Q. That is, use the car for what purpose? A. Conveying him to and from his residence.

Q. And while on those trips to his residence was he or was he not performing anything for the company?

Objected to as calling for a conclusion.

10

Q. By instructions of the company or any of its managers?

The Court: You may ask the question in the modified form.

Q. Was he by instructions of yourself, as manager, or anyone in the company of authority, to perform any work of the corporation on February 7, 1917, when he was taking this automobile to Summit? A. No.

20

Q. What was the purpose of his using it, personally or for the benefit of the corporation, that night?

Objected to as calling for a conclusion.

Objection sustained.

Question withdrawn.

Q. Was Jonas Salmon on February 7, 1917, after he left the company's place of business taking the company's automobile to his home for further use thereof by him for the company or for himself?

30

Objected to as calling for a conclusion.

The Court: That is asking the witness for a conclusion. I sustain the objection.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you know whether or not Jonas Salmon

40

George G. Salmon, direct.

had anything further to perform for the George Salmon Company on February 7, 1917, after he left the office, in Maplewood? A. Not to my knowledge.

10 Q. Is there anyone else in your corporation that would have any knowledge on the subject? A. No, sir.

Q. Who had charge of the management of the office? A. I did.

Q. Who would have the right to lend the automobile? A. I would.

Q. And who would be the one to instruct an employee if anything was to be done after he left the office with an automobile—who of your company?

20 Objected to as calling for a conclusion.
The Court: I shall allow the question.
I overrule the objection.

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

Exception noted as ground of appeal.
(Question read.)

30 Q. Who would be the one? A. Well, working for the company, they all have certain things that they do each day. It would be hard for me to tell just what they would do.

Q. My question is, if there was special instruction given for work to be done after an employee left the office, who would give that instruction? A. I would give the instruction, but in the ordinary routine work they are working for our interest.

40 Q. What were your general duties on February 7, 1917? A. General management of the business.

George G. Salmon, cross.

Q. You stated that, but that does not seem sufficient. Tell us what you do. What does that include—the general management? (No response.)

Q. Do you know what I mean? A. Well, that means quite a lot, to undertake to explain it. 10
The general management of the business is to instruct the clerks on different things that come along each day in business, if anything arises that isn't in the ordinary routine of work; see that things are properly handled during business hours, proper collections are made, proper payment of bills is made, proper buying, and things of that kind, that it is quite a task, when I come right down to define it. There is a great many things that crop up each day that isn't in the day's work. 20

Q. Are you the one who has the direction of the business? A. Yes, sir.

Q. Are you the one that— A. I am the head part of it.

Q. You are the principal owner of the owner? A. I hold the controlling stock, yes.

Cross examination by Mr. Bedford:

Q. You are the president of the company, are you not? A. Yes, I am president. 30

Q. And Jonas Salmon is your brother? A. Yes, he is my brother.

Q. And how long has he been in the employ of the company? A. Well, I couldn't say off-hand; I should say four or five years.

Q. And you did not tell him each particular thing that he was to do in the course of each day's work, did you? A. I did not; no, sir.

Q. He had learned his duties on February 7, 1917, in general, had he not? 40

George G. Salmon, cross.

Mr. Weinberg: That is objected to as calling for information that can be given by Jonas Salmon, whether he learned his duties or not.

(Question read.)

10

The Court: I overrule the objection. Answer the question.

Defendants' counsel pray an exception to this ruling of the court.

Exception noted as ground of appeal.

A. He had.

Q. And he did a great many things for the company on or about that time without your special direction to do it, did he not? A. He did.

20

Q. It was not necessary before he should go to any customer to solicit or make a delivery that you should direct him to make that particular delivery or that particular solicitation before he would do it, was it? A. The solicitation, yes; the rest of the work, no.

Q. How long had the company had this particular automobile that was in the accident? A. I would say a year and a half or two years before the accident.

30

Q. And how long had Jonas Salmon been driving it?

Mr. Weinberg: That is immaterial and not cross examination of this witness. He is not a party; he is only a witness.

The Court: I think that whatever shows the relation of Jonas Salmon to the company is fairly within the cross examination.

40

George G. Salmon, cross.

A. Ever since he has been in our employ.

Q. And was that for the company, driving for the company? A. Yes.

The Court: That is what I understood the question to be, How long had he been driving it for the company?

10

Q. Were you there on February 7, 1917, when Jonas left the office? A. No.

Q. Then you said in answer to Mr. Weinberg's question that there was an arrangement that he was to take the automobile to convey himself to his home when he worked overtime or bring himself back when he was to be there early in the morning; is that true? A. Yes, sir.

Q. Who determined that usually, as to whether he was to be there early in the morning or whether he worked overtime at night? A. He had to determine that himself.

20

Q. Do you know whether he had worked overtime on February 7, 1917? A. Only from what he said.

Q. Now, do you know whether he was to be there early on the morning of the 8th?

Mr. Weinberg: That is objected to as immaterial and incompetent. This accident occurred on the evening of February 7th.

30

The Court: I think it is competent. I shall overrule the objection.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Do you know Mr. Salmon? A. What is that?

Q. (Former question read as follows: "Now do you know whether he was to be there early on

40

George G. Salmon, cross.

the morning of the 8th?") A. In the wintertime our work is heavy and it requires a lot of shipping, and there is no question but that he had to be there earlier than the ordinary business hours.

Q. Can you say with regard to the 7th and 8th?

10 A. I would say that time of year yes.

Q. Now, you say he lived in Summit? A. He did.

Q. Do you know whose property is there where he lived?

Objected to as immaterial.

The Court: (After argument). The question seems to me to be irrelevant. I sustain the objection.

20 Q. Did the company own the garage at Jonas's home? A. No.

Q. Who employed Jonas? A. The company.

Q. But who actually took him into the employ of the company? A. The manager.

Q. And you were the manager? A. Yes, sir.

Q. How long had the company had this arrangement with Jonas; that is, when he had to be there early in the morning or worked overtime at night that this automobile could be used to take him home or bring him back?

30

Mr. Weinberg: I object to that. The witness said there was an understanding; he did not say there was an arrangement.

The Court: I do not see that there is very much difference, but use the word "understanding." That is the word that was used. How long had this understanding existed?

40 Q. How long had this understanding existed, Mr. Salmon? A. That I couldn't say.

George G. Salmon, cross.

Q. Well, approximately? A. Well, it would be only a guess. The young man had the car from the time he started to do the shipping, or during the shipping.

Q. Who of the company had that understanding with him? A. Myself. 10

Q. Did you have a conversation with him that brought about this understanding? A. I must have.

Q. What was the purpose of this understanding, if you know, that he should use this automobile? A. That he could use this automobile to convey himself to his home and back to the office.

Mr. Weinberg: I object to the question and answer.

The Court: I sustain the objection. We know what the understanding was and the circumstances. The purpose of it ought to be evident. 20

Q. You paid him cash wages, did you not? A. I did.

Q. And did the company or did it not pay his transportation back and forth? A. It did not.

Objected to as immaterial.

The Court: Proceed. 30

Q. Do you know of your own knowledge whether there is any other direct means of transportation from the office of the company to the home of Jonas Salmon, the employee of the company?

Mr. Weinberg: I object to that as being immaterial.

The Court: The objection is overruled. Defendants' counsel pray an exception to this ruling of the Court. 40

Exception noted as ground of appeal.

George G. Salmon, cross.

Q. Is there any other direct method of transportation from the office of the company? A. By train from Maplewood to Summit.

10 Q. But your business is in South Orange, is it not? A. Yes, at the edge of South Orange, between South Orange and Maplewood.

Q. How far from the railroad station is your office? A. I would say about half a mile.

Q. Do you know how far Jonas's home is from the railroad station on the other end? A. I would say it was about four minutes' walk from the station; I couldn't tell you just exactly the distance.

20 Q. Can you tell us whether there were trains at all times stopping at this Maplewood station, half a mile away from your office, to Summit?

Mr. Weinberg: That is objected to as wholly immaterial and irrelevant.

The Court: Let us see what the witness knows about the trains. The objection is overruled.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

30 A. There is a train at 6:10, and the next one is at seven o'clock, or a few minutes before; I don't know exactly the time, but there is a long space between the 6:10 and the next train.

Q. And do you know how it was in the morning at the time Jonas would come to work around that time, February 7, 1918?

Objected to as immaterial and irrelevant.

Objection overruled.

40

George G. Salmon, cross.

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

Exception noted as ground of appeal.

A. There is a train that gets him in the office about seven o'clock, but that makes it pretty late when we are busy.

10

Q. Then, on February 8, 1918, was he required to be there any earlier than seven o'clock?

Objected to as immaterial.

Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. I would say in heavy shipments during the winter it would require him there before seven o'clock.

20

Q. Can you say whether this understanding was had for the purpose of avoiding these delays in using other methods of transportation.

Objected to as irrelevant and calling for a conclusion.

The Court: I ruled on that before, I think, on the ground that if the facts were given the purpose ought to be evident. I sustain the objection.

30

Q. You do not know, Mr. Salmon, do you, whether Jonas performed any work for the company between the time he left the office and the time the collision occurred?

Objected to as incompetent.

Objection overruled.

Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

40

George G. Salmon, cross.

Mr. Bedford: You may answer the question.

A. I know nothing, with the exception that he said he did do nothing.

10 Q. Never mind what he said. Do you know of your own knowledge? A. No.

The Court: The question was as to your own knowledge. I understood you to say that you only knew what he said, that you did not know yourself. The question was as to your own knowledge.

Mr. Weinberg: He went further, your Honor. He said his brother said he did not, and that is on the record.

20 Q. Do you know of your own knowledge whether this Ford automobile could make quicker time between your office and Jonas's home and between Jonas's home and your office than could be made by walking to the railroad station and riding on the train that you have mentioned that would run in the morning?

30 Mr. Weinberg: I object to that on the ground that it must be self-evident that, if the automobile ran quicker than the train, it would get him there quicker than the railroad train would, and if it ran slower the opposite would be the result. It is self-evident. Also it is incompetent.

The Court: The objection is overruled. Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. He could start earlier in the morning.

40 Q. And was it or was it not of benefit to the

George G. Salmon, redirect.

company if Jonas started earlier for the office and got there in the usual course of using the automobile?

Mr. Weinberg: I object to the question. It is wholly immaterial. I suppose if a man worked longer for an employer, that would be a benefit to the employer. This accident did not happen in the morning.

10

The Court: The objection is overruled. Defendants' counsel pray an exception to this ruling of the Court.

Exception noted as ground of appeal.
(Question read.)

A. Yes.

Q. Do you know how business was on February 7, 1917, as to whether you were rushed, as you said you generally were in the winter time?

20

Mr. Weinberg: I object to that. He has stated once, but I object on the further ground that it is irrelevant and immaterial.

The Court: The objection is overruled. Defendants' counsel pay an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

A. I couldn't say at this time.

Q. Did Jonas take this automobile every day or not? A. No.

Q. When did he take it, on what occasions?
A. Well, when he worked late, or missed his train in working late, or had to be there before the train would get him there in the morning.

Redirect examination by Mr. Weinberg:

Q. Where did you live at that time, February 7, 1917? A. Maple Avenue, Maplewood.

40

George G. Salmon, recross.

Q. And did not live in Summit? A. No.

Q. You said your brother lives with his mother? A. Yes.

Q. Did your company pay the garage rent in Summit? A. No.

10

Recross examination by Mr. Bedford:

Q. Was he directed to use this automobile so as to take him home and get him back in the morning? A. It was a general understanding that he could use the car.

Mr. Weinberg: That was not the question.

20

Q. I asked you whether the understanding was that he should use it so as to get him there earlier in the morning to work? A. Yes.

Q. And as to going home at night after working overtime, was that the purpose, having him work overtime, after train time? A. He had to complete his work.

Q. And was the use of the automobile in going home so that he could complete his work and still get home at a reasonable hour? A. If he could use it to an advantage.

30

Further direct examination by Mr. Weinberg:

Q. You say there was a train at 6:10 and one around seven. He could take the seven o'clock train home, could he not? A. Yes.

Q. Was there any benefit to your corporation arising from the fact that Jonas Salmon could get home to his supper earlier?

Objected to as calling for a conclusion.
Objection overruled.

40

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

Exception noted as ground of appeal.

George G. Salmon, redirect.

A. With the exception that the boy wouldn't work until all hours of the night if he had to wait for trains.

Q. Was there any benefit coming to the corporation from the fact that Jonas Salmon could get home a little earlier to supper by taking the automobile in preference to the train? A. No.

10

Q. What were his regular hours, from when to when? A. Well, that is a question that is hard to answer.

Q. Did you have any understanding with him when he went to work for you as to what time the work began and what time it ended? A. He worked up from practically the office boy into the shipping clerk, and other things to do about the place. The shipping clerk must be there before seven and after six; he has to arrange his teams after they come in and before they go out in the morning.

20

Q. What time did he start to work in the morning? A. The teams start at seven o'clock.

Q. Was it within his discretion to come there earlier or later, or was he given a particular time? A. When he took the position of shipping clerk he was given the time that he had to have the teams, to make the arrangements so that they would be out before seven o'clock in the morning.

30

Q. So that you did not care if he got there at five o'clock or six o'clock, or what time he got there, so long as he performed his duties? A. As long as he did the work, that was all.

Q. Is that the time the teams went out, irrespective of the time that he worked the night before? A. Yes, sir.

40

George G. Salmon, recross.

Q. So that leaving the office by automobile in the evening would not send the teams out any later or earlier in the morning; they have a regular hour for going out? A. Provided he had his work finished that night.

10 Q. And how about the teams, then, would they go out or not? A. No, they wouldn't.

Q. The teams going out depended on the finishing of his work the night before? A. Exactly.

Q. And he could finish his work by 6:10 in the evening, and he usually did; isn't that so? A. In the winter time it was usually later than that.

20 Q. Do you know how many times he missed his train before February 7th? A. I couldn't say.

Q. Do you know how far it is from the place in Maplewood to the place you have heard of here as the place where the accident happened? A. About five miles.

Further cross examination by Mr. Bedford:

30 Q. You just said to Mr. Weinberg that he would not work all hours overtime if he could not get home at reasonable hours, did you not? A. I said I supposed he wouldn't work all hours.

Q. And it was for the purpose of inducing him to remain and work overtime when necessary to get his work done that the use of this automobile was given to him, was it not? A. It was for the best interests of everybody that he should have the automobile.

Q. And for the best interests of the company? A. The company, certainly.

40 Q. And that was the reason you gave him the

George G. Salmon, redirect.

use of the automobile when he worked overtime, was it not? A. Yes.

Q. And it was necessary in the course of his duties, you say, to complete his work, so that the horses could go out in the morning? A. Yes.

Q. And he might complete the shipping details by working overtime in the evening; is that so? A. Yes. 10

Q. And then, if he worked overtime, he could take this automobile home and get back early in the morning and get the teams out, could he? A. Yes.

Further direct examination by Mr. Weinberg:

Q. Now, I wish you would explain that answer of yours where you say it was for the benefit or for the best interests of the company that he take the automobile home. Just what do you mean by that? A. If the boy did not get there in the morning until the train arrived and did not finish his work the night before, you can appreciate there would be a number of teams standing waiting for an order. 20

Q. Well, if the boy did not attend to his business in the morning, what would happen to the boy or man that did not attend to business and get on time on the job? A. Well, I would try to make him. 30

Q. You had the means of making him do it? A. If you can get a man to fill their place from seven to six and then work overtime.

Q. Well, now, there were mornings when he got there at seven o'clock without your automobile, were there not? A. Lots of them; yes, sir.

Q. There was a means of getting there with- 40

George G. Salmon, recross.

out your machine, was there not? A. Yes, sir.

Q. That was not the only means of communication between Summit and Maplewood? A. No, sir.

10 Q. The question that I want to ask you now, irrespective of what you have been speaking about, is whether or not on the trip out to Summit on the day of February 7th, or on the anticipated trip in on the next morning, he was under any instructions to do anything for your company? A. Not to my knowledge; no, sir.

20 Q. Why do you qualify it by saying not to your knowledge? Why do you not answer the question? Why do you say not to your knowledge? Why can't you say yes or no? A. Well, I don't think the question can be answered yes or no. He was working for the best interests of the company.

Mr. Weinberg: I was speaking about instructions.

Q. (Question read.) A. Not on that particular day.

30 *Further cross examination by Mr. Bedford:*

Q. You just said to Mr. Weinberg that if a man did not get there early in the morning to do his work, or work overtime, and so forth, you would try to use means to get him to do the work. Was this automobile to convey him to his home and bring him back again one of the means you used to get Jonas to do his work? A. Yes.

Motion for Direction of Verdict.

Mr. Weinberg: I want to move for the direction of a verdict on behalf of the Salmon Company, if your Honor please. There is no proof in this case connecting the George G. Salmon Company with this transaction, and nothing to indicate the relation of master and servant, or nothing on which to predicate responsibility of this defendant.

10

The Court: (After argument). I think that the testimony of Mr. Jonas Salmon, and also that of Mr. George G. Salmon, makes this inquiry a question for the jury. For this reason I deny the motion.

Counsel for defendant George G. Salmon Company prays an exception to this ruling of the Court.

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Exception noted as ground of appeal.

Mr. Weinberg sums up for defendant George G. Salmon Company.

Adjourned until tomorrow, Tuesday, June 18, 1918, at ten o'clock, A. M.

THIRD DAY.

Tuesday, June 18, 1918.

30

Met pursuant to adjournment.

Present, counsel as before stated.

Mr. Smith sums up for defendant Jonas Salmon.

Mr. Bedford sums up for plaintiffs.

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Charge.

The Court charges the jury as follows:

Adams, J.:

10 Gentlemen of the Jury. This action is brought
by four plaintiffs against two defendants. Un-
der our system of practice several plaintiffs can
be joined where their claims arise out of the
same transaction or cause of action. It may in a
certain view of the case involve what are prac-
tically several verdicts or it may not. The four
plaintiffs are three minor children: Harold
Depue, a boy who was thirteen years old on the
27th of April of this year, as his mother says;
Josephine Depue, his sister, now, I think, about
the age of eleven, or perhaps about the age of
20 eleven at the time of the accident, which occur-
red on the 7th of February of last year, or about
the age of ten at the time of the accident, and
Kenneth, a younger son, younger than Harold,
who was about five at the time of the accident;
he is now about six. The fourth plaintiff is their
father, Roy Depue as to whose claim I shall have
something to say hereafter. He was not a party
to the accident. The two defendants are the
George G. Salmon Company, a business organi-
30 zation, conducting its transactions in South
Orange I think about a half a mile or a mile from
the Maplewood station, and Jonas Salmon a
brother of George G. Salmon, the president of the
company, who operated the automobile which
caused the accident to the minor plaintiffs, and
who is made a defendant because he was the driv-
er of the automobile; and the company, his em-
ployer, is made a defendant because it is claimed
by the plaintiffs that the injuries that the
40 minor plaintiffs sustained were inflicted by the

Charge.

driving of the automobile by Mr. Jonas Salmon in the course of his duty as an employee of the company. The legal idea that underlies that is that a principal is legally liable for the negligent conduct of his agent within the scope of his employment.

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Many things are undisputed in this case. That an accident occurred in which these three children were hurt is not denied. The date was February 7, 1917; the hour was from half-past six to seven o'clock in the evening of that day. The place of the accident, with which it is possible that some of the gentlemen of the jury may be acquainted, was very near the junction of Morris Avenue and Springfield Avenue. Morris Avenue is an avenue which sweeps down from Summit and, coming in from the south, joins Springfield Avenue. The accident occurred near the junction of those two avenues, and occurred on Morris Avenue at a point south of the junction of Morris and Springfield Avenues. The minor plaintiffs were hurt because, as they were going west on Morris Avenue to a store to which their mother had sent them to get some eatables for family use, a Ford business car driven by Mr. Jonas Salmon, the car itself being owned by the Salmon Company, which employed him, going in the same direction, overtook the children and collided with them, and they were hurt.

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There are three great questions in the case. First, at the time of the accident was Jonas Salmon acting in the service of his employer, the George G. Salmon Company? If he was then acting in the service of the company, and the accident happened while he was running the car in the course of his employment, then the

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Charge.

10 company which employed him, as well, of course,
as he himself, was liable. They were both
legally liable for the consequences of any want
of due care and reasonable prudence on his part.
On the other hand, if Jonas Salmon was not then
acting within the course of his employment, but
was acting outside of it, then the company, his
employer, is not liable for his conduct and the
case is not made out against it, though he, of
course, like any other man, is liable for his own
negligence. It is a question for the jury whether
Jonas Salmon at this time was acting within the
scope of his employment, and I must say, as
counsel have said, that I think that the testimony
of Mr. George G. Salmon and of his brother,
20 Jonas, did them credit. It was evidently con-
scientious and truthful.

Briefly, the evidence was this: that Jonas was
employed by his brother's company. It appears
from some part of the proceedings that he is not
yet of age, but that he had considerable ex-
perience in running an automobile. It appears,
as I have said, that this Ford delivery automobile
was owned by the company, and that Jonas had
pretty long hours. He had to be at the factory,
if that is the proper name for the building where
30 the business was carried on, in South Orange,
before seven o'clock in the morning, and he
lived in Summit, and his hours began at seven
or before seven. It appears that he had to be
there before seven in order to get the wagons
loaded and get the order off. The delivery
wagons were bound to leave at seven, so that
he had to be there before seven, and especially
in the busy season, and this was the busy season,
the winter season, he often had to work after
40

Charge.

hours; that is, after six o'clock. He lived with his mother, in Summit, at 58 Elm Street. Mr. George G. Salmon, his brother, testifies that there was a general understanding that Jonas could use the car when he worked overtime or when he had to be down early in the morning. Mr. George G. Salmon was asked who was to decide that, and he said that Jonas had to determine for himself whether he would work overtime or be there early the next morning, and there is no question that he did have to be there early on the morning of the 8th of February, 1917. The shop was half a mile from the Maplewood station. There was a train that left Summit at 6:10 in the morning and another that left at seven, and then there was a long space between. Jonas does not mention the next train, I think. The 6:10 train was a pretty early train, and the seven o'clock train would be too late to get Jonas down in time, before seven, so that he could get off the wagons. The train got him down at about seven o'clock, but that made him late in heavy winter shipments. On redirect examination he said that there was a general understanding that he could use the car to get him there early in the morning for work. That is all I have to say about that part of the case. It is for you to say whether on this 7th of February Jonas Salmon, in driving that car in the vicinity of the junction of Morris Avenue and Springfield Avenue, on his way home, was acting within the sphere of his employment—whether he had an actual or implied authority from the company to use the car for that purpose. Of course, if he was going to come down in the car the next morning, he had to take it

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Charge.

10 to Summit at night, or there would be no car
to come down in early the next day. If he was
acting outside of the authority of the company,
then the company disappears from this case;
there is nothing to hold them, because in what
he did he was not their agent, and your verdict,
if that is your conclusion, would be in favor of
the defendant company and against the plain-
tiffs. On the other hand, if you think that Jonas
Salmon had the authority of the company with
him in driving that car at that time and at that
place, then the company became legally liable
for any negligence of his that there occurred
and resulted in injury to other persons. That
is the first question, the question whether the
20 driver of the car carried with him the authority
of the company, so as to make the company
liable for his negligence.

If Jonas Salmon was acting under the au-
thority of the company, then the next question
is, Was some want of due and reasonable care
on the part of Jonas Salmon a cause of the
accident? Consider all the circumstances of the
case; consider whether the neighborhood was
populous or not. What was the character of the
30 locality? What was the condition at the time
of the accident of the natural and artificial light
at that point? What was the rate of speed of
the Ford car? What was the place where the
children were when the car struck them? Con-
sider whether the driver of the car, Mr. Jonas
Salmon, should have seen them if he was exer-
cising due and reasonable care, whether he
could and should have either stopped or checked
his car so as not to injure them if he had been
40 exercising the powers of observation within his

Charge.

command, and whether in approaching this intersection he should have blown his horn as a signal of his approach. Did he blow it? He does not say that he blew it. Harold says that he heard no horn, but heard what he called the rattle of the car. The case, however, does not turn on whether a horn was or was not blown. The question, precisely stated, is, If the horn was not blown, was that fact a cause of the accident? Harold said that when he heard the rattling of the car he told his brother and sister to get him out of the wagon. He, with a chivalry that would not have been remarkable in a man, but perhaps was rather characteristic of a boy, was making the others pull him. At any rate, he did not get out of danger. If a horn had been blown, would it have been likely to save him and the others from injury? 10 20

You will consider also the fact that Jonas Salmon testified that a car with glaring headlights was coming down Morris avenue towards him, and that when it was near him it dazzled his eyes so that he could not see. He said that he did not see these children and the little express wagon before his car struck them. In this connection you may ask yourselves whether such a blinding glare is a danger of road travel the existence of which a chauffeur should recognize, so that he should act with increased prudence in view of it, or the possibility of it, and not go blindly on to a possibility, at least, of injury to others, and should stop or check his car until he could see clearly before him. 30

Other features of the case will, no doubt, suggest themselves to you. Consider everything. 40

Charge.

10 If some want of due and reasonable care by Joseph Salmon was a cause of the accident, that points toward a verdict in favor of the plaintiffs, subject, however, to the third question, which is this: Did any one of the minor plaintiffs, these three children, exercise the degree
20 of care and discretion to be reasonably expected of persons of his or her age and experience or did any one of them fail to do so, and was such failure a cause of the accident to the one who so failed? This question, however, hardly applies to little Kenneth, who was only five years old, and who was, moreover, under the charge and care of his older brother and sister. If they were neglectful of him, their neglect cannot
30 be imputed to him, under a rule that I shall mention before I close; but the question does apply to Harold and Josephine, who were old enough to have some responsibility. They were familiar with the locality; they were familiar with the fact of travel and the nature of travel, and the question is whether they acted with such prudence and discretion as was fair to expect of them under the circumstances. If you
40 are led to that conclusion, that either of the two older children, Harold and Josephine, failed to exercise the care and discretion which was reasonably his or her duty to exercise, and that such failure was a cause of his or her injury, then that child cannot recover, and your verdict as to him or as to her should be in favor of the defendants. On the other hand, if you acquit the children of any want of reasonable care, in view of their tender years, then they are entitled to your verdict.

Charge.

It may occur to you, as has been urged in one aspect of the case, that the father was imprudent in letting his children go out as they did. In point of fact, it was the mother who, in his presence and with his knowledge, sent them to the store. The rule on that subject, which is well settled in this state, is this: that the negligence or want of care of a person in charge of a minor child is not imputed to the child, so that, if a nurse or an attendant or a parent or an older sister is careless, does not look after the child of whom he or she is put in charge, that fact does not prejudice the child; the child is not responsible for that negligence. The question that does arise is a question clear of that, between the person who inflicted the injury and the children, whether the negligence of the defendant is established, taking into account, as I have already remarked, whether the children were of sufficient maturity to have some responsibility for their own safety which they have not come up to.

I shall now speak of the subject of damages.

If the plaintiffs or any of them are entitled to recover, they are entitled to recover compensation for physical injury. Harold was hurt more than the others. Dr. Bowles has told us about him. He had a scalp wound and the scalp was torn away from the front toward the back; the tear, or laceration, went all the way through the soft tissues and the periosteum, or the lining membrane of the bone, down to the bone itself. Five stitches were put in it, and when this flap had been replaced, which covered quite a large area of his skull, so that the skull was visible, there was an adhesion of the scar tissue

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Charge.

to the bone toward the front of the scar, which, at that point made it immovable, or not freely moveable, as one's scalp is naturally, which, according to Dr. Bowles, was injurious, likely to occasion pain. It is said that the boy com-
10 plained of headaches. Kenneth's most serious injury was to the bridge of his nose. I do not know whether that means the bone: I suppose not; it is probably the tissue below the bony growth that was flattened, and his mother testified that he did not seem to breathe well. She says, "But I do not think it troubles him so much now. He sleeps with his mouth open." It probably produced a closing of the passage there to some extent. Josephine, I think, was very
20 little hurt.

What a person who is injured in an accident is entitled to is compensation for his pain and for the disfigurement. A scar is a disfigurement, and, in the opinion of Dr. Bowles, the hair will not grow on Harold's head where his scalp was torn away, so that it will probably remain a disfigurement of his head. It may be possible, as his hair grows to camouflage it by brushing the hair over it; but, nevertheless, there will be a
30 bald place on the boy's head, which is a disfigurement, and that is injurious to a boy, and injurious to a young man or a grown man. That is one of the results of the accident, and that is to be considered.

Roy Depue, the father, claims for his disbursements. As head of the family, he was bound to pay the expense of his children's sicknesses. Harold was a month at the hospital, at \$16 a week. Mr. Depue says that he paid \$60 to Dr.
40 Thurston for services for Harold, and there was

Charge.

a hospital bill of \$90 for Harold. There was some service rendered after he was discharged, I suppose, and perhaps there was a bill for an operation. I do not remember how the \$90 was made up. For Kenneth there was a bill of \$23.50 for services to him, and the father says that he paid \$4.50 for this express wagon which was demolished, and the clothes which the children wore were torn and could not be used. Harold's suit cost \$9, Josephine's, \$8 and Kenneth's, \$4. But it is said that Mr. Depue ought not to recover anything of these disbursements which he has made because he was imprudent in letting the children go out at that time, in not countermanding the direction of his wife to the children to go to the store, he being the head of the family, and he cannot be held blameless on that account; that, although that may not impair the children's cause of action, as I have explained, it ought to disable him from reimbursement for what he has paid in consequence of an accident which he ought not to have allowed to take place. That also is a question for you. In considering that question you may remember that the children were in the habit of going to the store, which was a few blocks away, and that Morris Avenue afforded the first part of the natural trip to the store, which afterwards turned off on another street. I will not say these parents were in humble circumstances, but they do not seem to have employed any servant or attendant on their children, but threw the children on their own responsibility, as is so common in our American country life, and I will leave it to you to say whether it was want of care on the part of the

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Charge.

10 father to allow these children to go in the dusk of the day—it was hardly night and hardly daylight; it was between the two—to the store, where they, or some of them, had been in the habit quite frequently of going on similar errands. If you conclude that Mr. Depue acted with disregard of the safety of his children in letting them go, I shall charge that his claims for reimbursement should be disallowed; you would give him nothing. I do not know of any case which rules precisely like this, but it seems to be logical. If, on the other hand, you conclude that he was not to blame, then, if you find for the plaintiffs, you will give him a verdict for what he has paid out. His claim depends on theirs.

20 There is also, I think, a claim in the complaint that Harold's services in the future may be not so useful to his father as they otherwise would have been. I do not think the proof sustains that claim very well. Harold's general health does not seem to have been impaired. He looks like an active boy. The father is entitled to the services of his children until they are twenty-one years old or emancipated. It is difficult to pick out from the evidence in the case any definite loss of service incurred by Mr. Depue in consequence of this accident. I leave it to you, however, as the claim is made in the complaint, whether it is satisfactorily made out. You are the judges.

30 I am requested to charge certain propositions both by the counsel for the plaintiffs and the counsel for the defendants. The requests on behalf of the plaintiffs relate to the rate of speed. I am asked to refer to Section 23 of the

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Charge.

Motor Vehicle Law of this State, passed in 1903. I am going to read you the section, so that you may see what the law is: "The following rates of speed may be maintained, but shall not be exceeded, upon any public street, public road or turnpike, public park or parkway, or public driveway, or public highway, in this State by anyone driving a motor vehicle." This was the law at the time when the accident occurred. There has been a subsequent statute which it is not necessary to mention. "(1) A speed of one mile in seven minutes upon the sharp curves of a street or highway or when turning a corner, and a speed of one mile in four minutes at the junction or intersection of a prominent cross-road where such a street, road or highway passes through the open country. The term 'open country' meaning where houses are an average more than one hundred feet apart. (2) A speed of one mile in five minutes where such street or highway passes through the built-up portion of a city, town, township, borough or village where the houses are an average less than one hundred feet apart. (3) A speed in one mile of four minutes within two hundred feet of any horse or other beast of draught or burden upon the same street or highway; provided, however, that such speed, not exceeding twenty miles per hour, shall be lawful in the open country as may be necessary in order to pass a vehicle travelling in the same direction, but the speed shall be diminished forthwith if necessary to comply with the provisions of this act. (4) Elsewhere, and except as otherwise provided in Subdivisions One, Two and Three of this section, a speed of one mile in three mintes"—that is, twenty miles an hour.

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Charge.

10 You will remember what the testimony is as to the rate of speed that the Ford car was maintaining. I am asked to say that an excess of speed is negligence because it is in violation of the Motor Vehicle Act. I would rather say that
20 it is evidence on the subject of negligence. It is possible for a vehicle to go at the rate of forty miles an hour and hurt nobody. It would be a violation of the act and a penalty might be imposed by fine or imprisonment. It is not necessary to go into that. The act provides its own penalty. But as between a plaintiff and a defendant, if nobody was hurt, it would make no difference how high the speed was. So it is quite possible to imagine a rate of speed which would
20 not at all violate the Motor Vehicle Act and yet would be grossly negligent. The situation might be such that, if a motor car were moved even at the rate of one mile an hour, it would be the grossest negligence. The speed, as I said, is evidence on the subject of negligence. Whether under the circumstances of any particular case it was negligence which contributed to the accident is a very different question, and it is a question for the jury. That is the real point.

30 On behalf of the George G. Salmon Company I have several requests to charge, which I shall now read.

The first proposition is this: "Before the defendant Salmon Company can be found guilty of negligence the jury must first find from the evidence that the defendant Jonas Salmon was engaged in the performance of an act for the benefit of the company, with its knowledge and assent, either expressed or implied." That I
40 have already said, and I so charge.

Charge.

The second request I deny except as I have charged.

The third request I charge: "Even though the defendant company, by reason of its contract of hiring with the said Jonas Salmon, was under a legal duty to permit him to use the automobile, unless the said automobile was being used for some purpose and benefit to the corporation, it cannot be held responsible."

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I charge the fourth request: "If, notwithstanding reasonable care on the part of the defendant Jonas Salmon, the accident occurred, neither of the defendants can be held responsible for the injuries sustained by the plaintiffs." They cannot either of them be held if reasonable care was used by Jonas Salmon.

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The fifth request I charge: "The mere occurrence of the accident is not sufficient to hold the defendants responsible for the accident; the jury must go further and find that the accident was caused by the negligence of the defendant Jonas Salmon."

The sixth request I charge: "The burden of proving the defendant Jonas Salmon guilty of negligence rests upon the plaintiffs." The question is whether the plaintiffs' cause of action as they set it up is established, in the judgment of the jury, by the greater weight, by the preponderance of the evidence.

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The seventh request I charge, with one verbal alteration, substituting for the word "night" the words "at the time when the accident occurred." "If the jury determines that the two older children were capable of understanding the danger of their conduct in going upon the roadway at the time when the accident occurred, and that

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Charge.

that conduct contributed to the happening of the accident, those plaintiffs cannot recover."

10 Then I am requested to say what I have said as to Roy Depue's claim: "If the plaintiff Roy Depue was guilty of negligence in sending or permitting the children upon the roadway, and that negligence contributed to the accident, the plaintiff Roy Depue cannot recover for any losses sustained by him for doctors, nurses, hospital and medical bills." I charge that.

The ninth request I deny except as I have charged.

The jury retires.

20 The Court: I am wondering whether I ought not to have said to the jury that they must find separate verdicts in the case of each one of the three children, if they find in favor of the plaintiffs.

Mr. Smith: Well, they must do that. I think they understand it. You mean whether you should have specifically said that?

The Court: Yes. I think I had better call them back.

The jury returns into court.

30 The Court: Gentlemen of the Jury. It occurred to me that perhaps I did not make it quite clear what the form of your verdict ought to be in case you found for the plaintiffs.

40 We are really trying four cases in one, and if you should find that the plaintiffs have established their claims, you would have to give a verdict for each one of the four for the amount to which the proof seems to lead: one for Harold, one for Josephine, one for Kenneth and one for the father for his disbursements. On the

Plaintiffs' Requests and Exceptions.

other hand, if the plaintiffs' claims are not made out, of course, a verdict for the defendant would cover the case. That is all I wanted to say.

The jury again retires.

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PLAINTIFFS' REQUESTS AND EXCEPTIONS.

Plaintiffs' counsel respectfully requests the Court to charge as follows:

(1) That under section 23 of the Motor Vehicle Law of this state a speed of one mile in seven minutes (that is eight and onehalf miles an hour) upon the sharp curves of a street or highway, or when turning a corner is lawful, and any speed in excess thereof at such places is in violation of the Motor Vehicle Act and negligent.

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Denied except as charged.

Plaintiffs' counsel prays an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(2) That under section 23 of the Motor Vehicle Law of this state a speed of one mile in five minutes (that is twelve miles an hour) where such street or highway passes through the built up portion of a city, town, township, borough or village where the houses are on an average of less than one hundred feet apart, is lawful, and any speed in excess thereof at such places is in violation of the motor vehicle act and negligent.

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Denied except as charged.

Plaintiffs' counsel prays an exception to the refusal of the Court to charge, specifically as requested.

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Exception noted as ground of appeal.

*Defendant's Requests and Exceptions.*REQUESTS TO CHARGE AND EXCEPTIONS
OF DEFENDANT GEORGE G. SALMON
COMPANY.

10 The Court is respectfully requested to charge
the following propositions of law on behalf of
the defendant, George G. Salmon Company:

(1) Before the defendant Salmon Company
can be found guilty of negligence the jury must
first find from the evidence that the defendant
Jonas Salmon was engaged in the performance
of an act for the benefit of the company, with
its knowledge and assent, either expressed or
implied.

Charged.

20 (2) The mere fact that the corporation per-
mitted the defendant Jonas Salmon to use its
automobile to take him to his home after work-
ing hours and to bring him back to its busi-
ness in the morning is not sufficient to find the
defendant guilty for an act of negligence com-
mitted by the defendant Jonas Salmon while
using the automobile for the purpose mentioned.

Denied except as charged.

30 Defendant's counsel pray an exception to the
refusal of the Court to charge specifically as
requested.

Exception noted as ground of appeal.

(3) Even though the defendant company, by
reason of its contract of hiring with the said
Jonas Salmon, was under a legal duty to permit
him to use the automobile, unless the said auto-
mobile was being used for some purpose and

Defendant's Requests and Exceptions.

benefit to the corporation, it cannot be held responsible.

Charged.

(4) If, notwithstanding reasonable care on the part of the defendant Jonas Salmon, the accident occurred, neither of the defendants can be held responsible for the injuries sustained by the plaintiffs.

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Charged.

(5) The mere occurrence of the accident is not sufficient to hold the defendants responsible for the accident; the jury must go further and find that the accident was caused by the defendant Jonas Salmon.

Charged.

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(6) The burden of proving the defendant Jonas Salmon guilty of negligence rests upon the plaintiffs.

Charged.

(7) If the jury determines that the two older children were capable of understanding the danger of their conduct in going upon the roadway at night and that that conduct contributed to the happening of the accident, those plaintiffs cannot recover.

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Charged as modified.

Defendant's counsel pray an exception to the refusal of the Court to charge specifically as requested.

Exception noted as ground of appeal.

(8) If the plaintiff Roy Deque was guilty of negligence in sending or permitting the children upon the roadway, and that negligence con-

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Stipulation as to Facts Proven by Plaintiffs.

tributed to the accident, the plaintiff Roy Depue cannot recover for any losses sustained by him for doctors, nurses, hospital and medical bills. Charged.

10 (9) The same general duty to observe care by the driver of an automobile in a crowded city and upon a crowded thoroughfare does not devolve upon the driver of an automobile out in the open country, and upon a roadway more or less frequented by pedestrians.

Denied except as charged.

Defendant's counsel pray an exception to the refusal of the Court to charge specifically as requested.

20 Exception noted as ground of appeal.

Stipulation as to Facts Proven by Plaintiffs.

NEW JERSEY COURT OF ERRORS
AND APPEALS

30	HAROLD DEPUE <i>et al.</i>, Plaintiffs-Appellees, <i>v.</i> GEORGE G. SALMON COMPANY, <i>et al.</i>, Defendants-Appellants.	}	Action at Law Stipulation.
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40 It is agreed by and between counsel for the plaintiffs, and counsel for the defendant George G. Salmon Company, that the following constitutes the gist of plaintiffs' case as presented at the trial of the above said cause.

Stipulation as to Facts Proven by Plaintiffs.

Plaintiffs proved that the defendant George G. Salmon Company was the owner of an automobile which was driven by the defendant, Jonas Salmon, on February 7th, 1917; at the time the collision, set forth in the pleadings, occurred, and that Jonas Salmon was an employee of George G. Salmon Company on February 7th, 1917; that three of the plaintiffs who were infant children of the plaintiff, Roy Depue, were negligently run into by said automobile driven by said Jonas Salmon, at about 6:30 o'clock, in the evening, on said day. 10

Defendant, George G. Salmon Company, thereupon move for a non-suit on the ground that under the above proofs, there was no evidence showing that at the time of the accident, the said Jonas Salmon was operating the automobile in question as the servant or agent of the said defendant, George G. Salmon Company. 20

Motion denied.

Defendant counsel prays an exception to the ruling of the court.

HENRY P. BEDFORD,
Attorney for Plaintiffs.

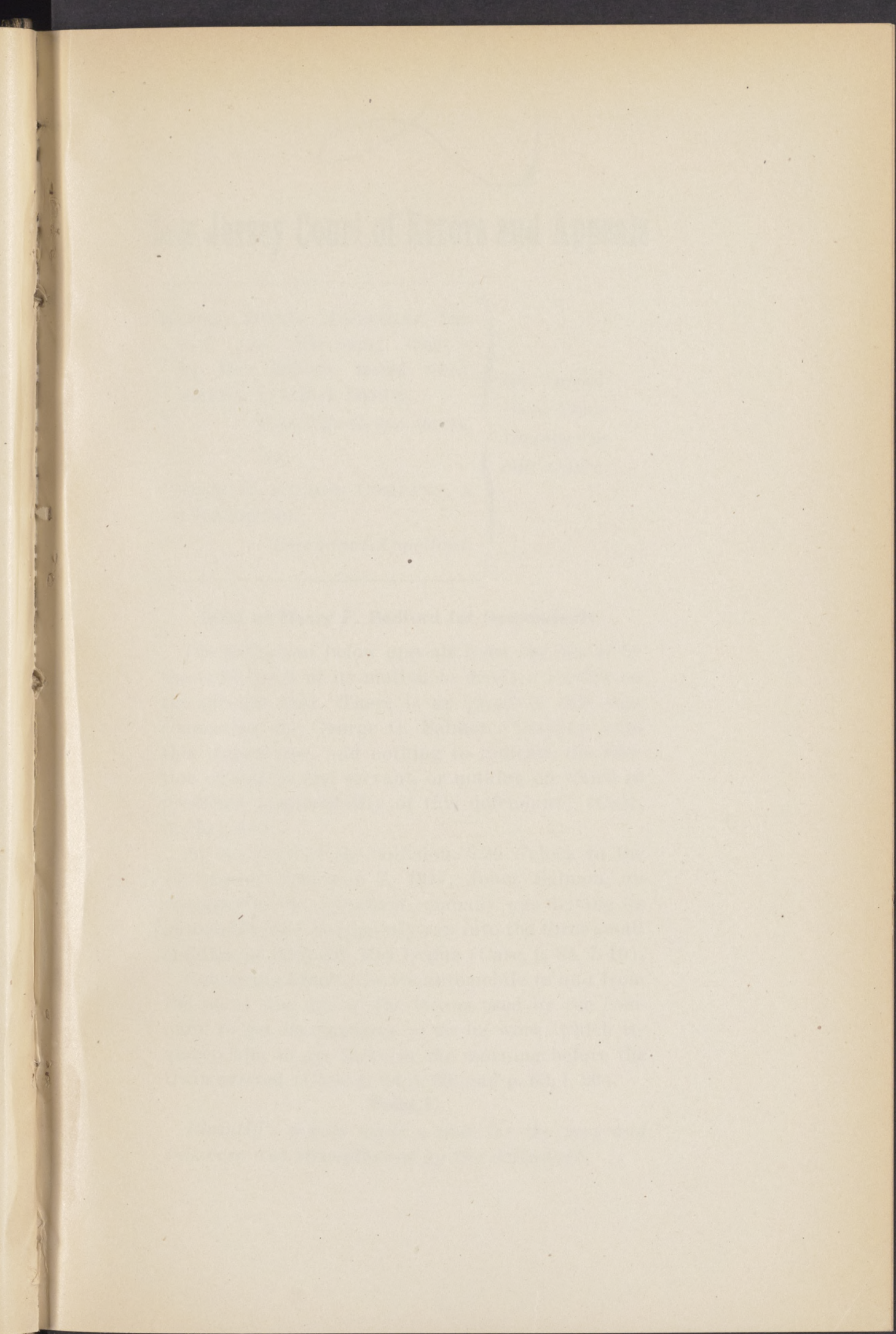
BENJAMIN M. WEINBERG, 30
Attorney for Defendant,
George G. Salmon Company.

St. Louis, Mo., Feb. 1, 1917.

I have read the report of the
Salmon Company and the report of the
this which was given by the defendant, John
Salmon on February 1st, 1917, at the time the
collision set forth in the preceding occurred.
and that John Salmon was at the time in
the vicinity of Salmon Company on February 1st,
1917, and that the plaintiff who was killed
while on the ground, the report was made
by the defendant, John Salmon, who was
at the time in the vicinity of the defendant,
John Salmon, at the time the collision occurred.
I have read the report of the Salmon Company
and the report of the defendant, John Salmon,
and I have read the report of the plaintiff,
John Salmon, who was killed while on the
ground, the report was made by the defendant,
John Salmon, who was at the time in the
vicinity of the defendant, John Salmon, at
the time the collision occurred. I have read
the report of the Salmon Company and the
report of the defendant, John Salmon, and
the report of the plaintiff, John Salmon,
who was killed while on the ground, the
report was made by the defendant, John
Salmon, who was at the time in the vicinity
of the defendant, John Salmon, at the time
the collision occurred.

HENRY P. HEDFORD
Attorney for Plaintiff
BENJAMIN M. WENZEL
Attorney for Defendant
George G. Salmon Company

Very truly yours,
Henry P. Hedford
Attorney for Plaintiff
Benjamin M. Wenzel
Attorney for Defendant
George G. Salmon Company



New Jersey Court of Errors and Appeals

HAROLD DEPUE, JOSEPHINE DE-
PUE AND KENNETH DEPUE,
BY ROY DEPUE, THEIR NEXT
FRIEND, AND ROY DEPUE,

Plaintiffs-Respondents,

vs.

GEORGE D. SALMON COMPANY, A
CORPORATION,

Defendant-Appellant.

*On Appeal
from Essex
County Cir-
cuit Court.*

Brief of Henry P. Bedford for Respondents.

The defendant below appeals from the denial by the trial court of its motion to direct a verdict on the ground that "There is no proof in this case connecting the George G. Salmon Company with this transaction, and nothing to indicate the relation of master and servant, or nothing on which to predicate responsibility of this defendant" (Case, p. 65, l. 10).

At the time of the collision, 6.30 o'clock in the evening of February 7, 1917, Jonas Salmon, an employee of the defendant company was driving its automobile and negligently ran into the three small children of plaintiff, Roy Depue (Case, p. 85, l. 10).

Conveying himself by its automobile to and from the plant was one of the means used by the company to get its employee to do its work, which required him to get there in the morning before the train arrived (Case, p. 64, l. 30, and p. 63, l. 20).

Point 1.

Plaintiff's proofs made a case for the jury and this case was strengthened by the defendant.

The points served by the appellant state, "It will be argued in the brief that when the plaintiff rested a *prima facie* case was not made out against the defendant Salmon Company."

The grounds of appeal are based only on the refusal to direct a verdict (Case, p. 2, l. 30). But if the question of non-suit were available here it must be resolved in favor of plaintiffs. The stipulation (Case, pp. 84 and 85), shows the proofs made by plaintiff.

It being admitted that the defendant company was the owner of the auto, and its servant the driver, if the driver was not on the business of the owner that was something to be shown by the defendant. But the defendant's case only strengthened the claim of the plaintiff as shown by evidence hereinafter cited.

Edgeworth vs. Wood, 29 Vr., 463-468.

Dennery vs. Great Atlantic & Pacific Tea Co., 81 Atl., 862.

And under the cases defendant's evidence would be considered with plaintiffs.

"All pertinent evidence exhibited in the bills of exception must be considered in reviewing the denial of a motion to non-suit, for if, when made, there was a failure of proof in some respect and the defect was supplied in the evidence afterward adduced, the error of the refusal will not lead to a reversal of the judgment."

W. J. & Seashore R. R. Co. vs. Welsh, 62 L., 655 at 657, E. & A., 1898.

Dennery vs. Great Atl. & Pac. Tea Co., 81 Atl., 862.

Many authorities hold that when a *prima facie* case has been made out by proof of ownership of the auto the case must go to the jury notwithstanding the defendant produces the servant to testify

that he was not serving the master at the time the accident happened, it being then a question of fact on conflicting evidence.

Healy vs. Bernstein, 168 N. Y. S., 44, 1918.

But in the present case the evidence of the servant and of the master was to the effect that the act was being done for and at the direction of the master which brought the case well within the rule in New Jersey and other jurisdictions as shown under Point II.

Point 2.

The act of Jonas in driving the auto at the time of the collision was authorized and required by the master, under the master's control, connected with its affairs, in furtherance of the master's service and within the line of his duty under his employment.

The defendant corporation, in the person of Jonas Salmon, was taking the auto home for use in the morning to bring itself back, in the person of Jonas, in time to get its teams out. It was doing more than that; it was transporting him home at night and back to the plant in the morning when it was busy, *for its own particular benefit and in furtherance of its interests*. It required a man to work early and late, to be at its plant before train time in the morning and to work late in the evening, depending on how busy it was (Case, p. 48, l. 20). Its office was a half mile from the railroad station (Case, p. 56, l. 10). After the train at 6.10 in the evening there was not another until seven o'clock and in the morning there was a train that got him to the office at seven o'clock but he was required to be there before seven o'clock (Case, p. 56, ll. 10 and 30). He could start earlier in the morning and it was of benefit to the company if Jonas started earlier (Case, p. 58, l. 40). "The boy wouldn't

work until all hours if he had to wait for trains" (Case, p. 60, l. 30). The teams going out depended on the finishing of his work the night before and it was for the benefit or best interests of the company that he take the automobile home (Case, p. 62, l. 10, and p. 63, l. 20). The president, manager and holder of the controlling stock, says, "that on the trip out to Summit on February 7th, and on the anticipated trip in, on the next morning Jonas was working for the best interests of the company, and that the automobile to convey him to his home and bring him back again was one of the means used to get Jonas to do his work" (Case, p. 64, ll. 20 to 40). Jonas worked up from practically the office boy to shipping clerk, and other things to do about the place (Case, p. 61, l. 20); he had been in the employ of the company for five years and had learned his duties on February 7th, 1917; he had been driving for the company ever since he was in its employ; had to determine for himself whether he was to be there early in the morning and work overtime at night, and "*there was an arrangement that he was to take the automobile to convey himself to his home when he worked overtime or bring himself back when he was to be there early in the morning*" (Case, p. 51, l. 30; p. 52, l. 15; p. 53, ll. 5 to 20). He had worked overtime on February 7th and had to get there by half past six the next morning; and there was no train that would get him there and he took this automobile home "*so that he could get back early enough in the morning*" (Case, p. 41, l. 40; p. 45, ll. 10 to 30; p. 54, l. 5). He did not take it every day (Case, p. 59, l. 30).

The trial judge in his charge aptly says: "*Of course if he was going to come down in the car the next morning, he had to take it to Summit at night, or there would be no car to come down in early the next day*" (Case, p. 29, l. 40).

The evidence above cited was amply sufficient to

justify a verdict for the plaintiffs under ^{defendants'} ~~their~~ first and second requests to charge and defendant's motion for the direction of a verdict is without merit on this appeal (Case, p. 78, l. 30 and p. 79, l. 10).

Defendant's Cases.

The following are the cases cited by defendant in the points served. We have examined them all and found no support for defendant's contention.

Doran vs. Thomsen, 74 L., 445, Sup. 1907, is a decision on demurrer to a declaration and contains nothing pertinent to the present case except the statement at foot of page 447 that whether the act of the servant be done in the course of his employment or not "*Must depend upon the facts of each particular case.*"

Doran vs. Thomsen, 76 L., 754, E. & A., 1908, lays down principles fully sustaining the action of the trial judge in this case as is hereinafter shown, and the reversal was upon the ground that there was nothing to show that the defendant's daughter was using the auto within the line of her duty. It is distinguished in *Jennings vs. Okin*, 97 A., 249 at 250 E. & A., 1916. The quotation from Mr. Wood in the *Doran* case at page 757 (this brief, p. 10, bottom), fully sustains the present case.

Doran vs. Thomsen, 76 L., 754 at 757, E. & A., 1908.

Missel vs. Hayes, 86 Law, 348, is in point for plaintiff as hereinafter shown at page 12.

Evers vs. Krouse is not in point for it deals with an act "done by the servant while engaged in the work of his master, *entirely disconnected therefrom, done, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant.*"

Evers vs. Krouse, 70 L., 653 at 655, 657.

Holler vs. Ross is not in point for defendant as the servant was there "engaged in a willful and wanton trespass outside the line of his duty" p. 329. But the rule laid down in this case fully supports the action of the trial court "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible."

Holler vs. Ross, 68 L., 324 at 328, E. & A., 1902.

Ritchie vs. Waller, 28 Atl., 29, 30.

In the present case the act of the servant in driving home so as to have the auto to bring him back in the morning, was not only "warranted" but was *required* by the express and implied authority conferred upon him, and "considering the nature of the service required" *i. e.*, that he should be there in the morning to get the wagons off before the time that any train would get him there. and the "circumstances under which the act is done" *i. e.*, upon the implied, yes, the express request, that he transport himself to and from his home in furtherance of their business and for their benefit, the master is responsible in this case.

Jennings vs. Okin is in point for plaintiff on the point of master and servant, as this court said *that was a question for the jury* and the reversal is expressly put upon the ground of rejection of evidence which was a part of the *res gestae*.

Jennings vs. Okin, 88 L., 659, E. & A., 1915.

We have examined all of the cases cited by defendant and find that in each instance the decision

is based on the ground that the particular journey then in question was a *deviation* or *independent journey*. In the present case it was neither. Yet if it could in any sense be so regarded, it would be a question for the jury under the rule laid down in this State.

Jennings vs. Okin, 97 A., 249 at 250, E. & A., 1916.

Van Blarcom vs. Dodgson, 115 N. E. 443 (N. Y.), is not in point, but recognizes the principle at page 444 that if the owner of the car causes someone to drive the same for the benefit of members of his family it is familiar law that such driver may become the agent of the owner. And so in the present case the owner having caused Jonas to drive the car for the benefit of the company, he became the agent of the company. See *Healy vs. Bernstein*, 168 N. Y., Supplement 44 (1918), for true statement of New York rule.

Solomon vs. Commonwealth Trust Co., 100 Atl., 534, a Pennsylvania case, is not at all in point. It is on the question of deviation which does not enter into the present case.

In *Slater vs. Advance Thresher Co.*, 107 N. W., 133 at 134 and 135, it appears that the driver "was not engaged in using it for the purposes for which it was furnished him, but, on the contrary for ends entirely personal to himself. It is not in point.

Schoenherr vs. Hartfield, 158 N. Y. S., 388, is in the same class, the driver there having gone out on business purely his own, the court stating at page 392 that it is not proved that he went on the journey incidentally to test the car of his master.

Brinkman vs. Zuckerman, 159 N. W., 316, relates to an act of the servant, "while doing something relating to his own affairs exclusively, and in nowise connected with his master's service."

Steffen vs. McNaughton presents a situation just

the opposite of the present case. Speaking of the period during which the driver was at dinner, the court says, "While he was so engaged, his employment and the relation of master and servant were suspended for the time being, *unless the facts of the case show that the defendant consented to the chauffeur availing himself of this use of the machine to facilitate his labor and service, and in furtherance of the defendant's interests.*"

Steffen vs. McNaughton, 124 N. W., 1016 at 1018, Wis., 1910.

Symington vs. Sipes is another case of the class where a chauffeur, in violation of orders, drove solely for his own pleasure. It is not in point. 88 Atl., 134 Md., 1913.

Luckett vs. Reighard, 93 Atl., 773, if anything, favors the plaintiff here, as does the case of *State vs. Benson*, 100 Atl., 505, M. D., 1918, where the auto was used for the driver's own business or pleasure exclusively, without even permission of the owner.

White Oak Coal Co. vs. Rivoux, 102 N. E., 302, is very instructive and cites cases with apparent approval which are ample authority for the action of the trial court here but holds that the case before that court is not one of master and servant because there was no evidence offered tending to prove that a bookkeeper was operating the automobile with the knowledge, consent or authority of the company, or that he had ever so operated.

Twombly vs. Stevens-Duryea, 92 N. E., 764, is not in point and is distinguished in the Massachusetts cases cited for respondent.

The foregoing are all the cases cited by appellant in the points served on respondent. They have all been carefully examined and most of them strongly favor respondent in the statement of principles applicable to the facts. None of them are in point

for appellant, for in each case where the decision is not favorable to the plaintiff the facts show that the journey was either a deviation from the route required by the business of the master or an independent journey undertaken for the personal pleasure or business of the driver and without the permission of the owner, and without being in furtherance of the master's business. On appellant's cases alone the appeal should be decided in favor of respondent. But we find overwhelming authority in our own citations.

Authorities for Respondent.

Cyc. states the proposition as gathered from the decisions as follows: "In determining whether the master is liable for the torts of his servants the most difficult question is whether the particular act or omission of the servant causing the injury for which the master is sought to be held liable was committed within the scope of the servant's employment, *and this question is in most cases one of fact to be determined by the jury from the surrounding facts and circumstances.*" 26 Cyc., 1533.

The rule in New York State that it is a question for the jury is clearly set forth in *Healy vs. Bernstein*, 168 N. Y. S., 44, 1918.

In *Reynolds vs. Denholm*, the Supreme Judicial Court of Massachusetts, in upsetting a verdict directed for the defendant, goes far beyond what is necessary to sustain the present judgment. It says: "The question is not one of actual knowledge or express authority on the part of the defendant but whether, taking all the circumstances relating to the chauffeur's employment into account, his use of the automobile as and for the purposes for which he was using it at the time of the accident was incident to his employment, or was permitted or assented to either expressly or impliedly by those

who were acting under authority received from the defendant.

Reynolds vs. Denholm, 100 N. E., 1006. Mass., 1913.

Bourne vs. Whitman, 95 N. E., 404 at 408. Mass., 1911.

And a combined use makes the master liable. "If Corbitt combined his own business with that of the defendant, and was using the team not exclusively for his own use, but at the same time was pursuing the defendant's business, in the service for which he was employed, then the defendant would be liable if the injury was the result of Corbitt's negligence.

Rahn vs. Singer Mfg. Co., 26 Fed., 912 at 916.

Kitchie vs. Waller, 28 A., 29 at 31. Conn., 1893.

In our own State the leading case of *Doran vs. Thomsen* fully sustains the submission of this cause to the jury. Although this court reversed the judgment in the *Doran* case, it clearly distinguished between "a mere permission to use and a use subject to the control of the master and connected with his affairs." This court says:

"To constitute the relation of master and servant as to third persons, it is not essential that any actual contract should subsist between the parties, or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either express or implied. 'The real test as to third persons,' says Mr. Wood in his work on Master and Servant, p. 11, sec. 7, 'is whether the act is done by one for another, however trivial, with the knowledge of the person sought to be charged as master, with his assent express

or implied, even though there was no request on his part to the other to do the act in question.' ”

Doran vs. Thomsen, 71 Atl., 296. E. & A., 1908.

Certainly the evidence in the present case stands this test. The *use* of the auto by Jonas to convey himself, the servant of the defendant company, to his home; the taking of the auto itself to his home so that it could be used in the morning to bring him to the defendant company's plant in time to suit it, was all subject to the control of the master and connected with his affairs. It was “in furtherance of and not apart from the master's service and control.” The act was done by Jonas Salmon for his master the George G. Salmon Company, and the president and manager says, in effect, that it was necessary for the company to use the auto for transportation of its servants for several reasons: To keep its help; to save payment of overtime, and to bring its servant to work on time to properly care for its affairs. He says it was within the line of Jonas' duty under his employment, to take the car home when he worked overtime and had to get there early in the morning. That there was express authority for Jonas to take the vehicle on the occasions like the one in question, as he, himself had had the conversation with Jonas when the arrangement was made for him to use the auto (Case, p. 55, l. 10). It is a case of actual employment to do the thing in the course of which the accident happened, and the service to the employer was the saving of overtime pay; the willingness of the servant to work overtime; the retention of its employee notwithstanding long hours, and the employee's service at an earlier hour than it would otherwise be available.

The mere fact that the servant who performed

the act of transporting for the company was also the servant transported, cannot alter the principles of law applicable to the case. The master expressly and impliedly agreed to transport this servant by this auto for the benefit and furtherance of its business and the mere fact that it used the same servant to drive the auto cannot alter the relation between master and driver. No one can doubt that when a trolley motorman drives a car to a barn near his home under an arrangement with the company by which it transports its shop employees therein, he is the servant of the company, even though the only purpose in transporting the employees is to keep them contented with their place of work. Similarly, a driver for a department store who had an arrangement to take its wagon to his home at night that he might get an early start in the morning, or that the horse might be fed at the proper time, would not be held without the scope of his employment simply because the trip incidentally advantaged him also.

The case of *Missell vs. Hayes*, decided by this court, is strongly in point on this phase of the question. This court said the fact that the defendant's immediate family were in the auto was affirmative proof of the fact of possession by the defendant, quite apart from any presumption, and that such fact being proved it became a question for the jury whether they would conclude that "*while one purpose was to enable the son to make the call mentioned, he was at the same time in his father's behalf taking members of the family out for a trip for their health and recreation as members of his father's family.*"

Missell vs. Hays, 91 Atl., 322 at 322. E. & A., 14.

Jennings vs. Okin, 97 Atl., 249 at 250. E. &

So in the present case, while the use of the auto might well have served the convenience of Jonas, that fact cannot deprive his act in driving the auto to get himself home and to make it available for use in the morning to get back earlier, of its character as an act of a servant for his master, authorized and required by the master, under his master's control, connected with its affairs, and within the line of his duty under his employment.

Authorities endorsing the principles contended for by respondent are found in the reports of the decisions of all the States. It is useless to multiply them for in the final analysis it becomes a question of the application of the same principles to various facts. And this was the function of the jury under the able charge of the trial judge who stated the question in a nutshell when he said, "Of course, if he was going to come down in the car the next morning he had to take it to Summit at night" (Case, p. 69, l. 40).

The act was within the scope of the servants employment, authorized and required by the company, under its control, connected with its affairs, in furtherance of its business, within the line of the servant's duty, and so regarded by the president, manager and principal stockholder of the company, George G. Salmon, as is shown by his testimony. There can be no excuse for disturbing the verdict of the jury in this case properly submitted to them as a question of fact.

Citation of Authorities.

Missell vs. Hays, 91 Atl., 322 at 323. E. & A., 1914.

Jennings vs. Okin, 97 Atl., 249 at 250. E. & A.

Doran vs. Thomsen, 71 Atl., 296. E. & A., 1908.

Reynolds vs. Denholm, 100 N. E., 1006. Mass. 1913.

Bourne vs. Whitman, 95 N. E. 404 at 408. Mass. 1911.

Healy vs. Bernstein, 168 N. Y. S., 44, 1918.

Rahn vs. Singer Mfg. Co., 26 Fed., 912 at 916.

Ritchie vs. Waller, 28 A. 29 at 31. Conn. 1893.

Holler vs. Ross, 68 L., 324 at 328. N. J.

W. & J. Seashore Co. vs. Welsh, 62 L., 655. N. J.

Nell vs. Godstrey, 101 Atl., 50, N. J. E. & A.

Warne vs. Moore, 94 Atl., 307, N. J. E. & A.

Edgeworth vs. Wood, 29 Yr., 463-468.

Dennergy vs. G. A. & P. Tea Co., 81 Atl., 862.

Loomis vs. Hollister, 55 Atl., 561. Conn.

McKeever vs. Ratcliffe, 105 N. E., 552. Mass.

The judgment for plaintiffs should be affirmed with costs.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

HAROLD DEPUE, *et als.*,

Plaintiffs-Appellees,

vs.

GEORGE SALMON COMPANY, *et als.*,

Defendants-Appellants.

Action at Law.

*On Appeal from
Essex Circuit
Court.*

Brief on behalf of George G. Salmon Company, a defendant, Appellant.

This was an action brought by Harold Depue and other infants, by their father, as their next friend, and individually, to recover damages for injuries which they sustained by being struck by an automobile owned by the defendant, Salmon Company, and driven by one Jonas Salmon, an employee of the defendant, at about 6:30 o'clock at night on February 7th, 1917.

Jonas Salmon, the driver of the automobile which caused the collision, was, on February 7th, 1917, an employee of the defendant, George G. Salmon Company. Having finished his work just a little too late to catch his accustomed train to Summit, N. J., he took a small auto delivery wagon belonging to the corporation, in order to go to his home (p. 22). This permission was given him by his employer, which, according to George G. Salmon, its president, had an "understanding" with him, that whenever he was obliged to work late in the evening, and more particularly when it was necessary for him to arrive at the office a little earlier the following morning, he had a right to use said auto to go to and from his home (p. 48).

On the day in question Jonas Salmon finished his work shortly before six o'clock and took the car to go to Summit, where he resided with his mother. While on the way, at, or near Springfield, N. J., he, at night-time, ran into the children, the plaintiffs mentioned, who were then in and upon Morris avenue, a public highway (p. 5).

The jury found a verdict in favor of the plaintiffs against the defendants, Jonas Salmon, the driver, and the Salmon Company, the owner of the automobile.

ARGUMENT.

Jonas Salmon, the driver, under the proofs, was not acting as the agent of the Salmon Company and actually engaged in serving his master, at the time of the accident.

It appears from the testimony of Jonas Salmon, the driver, in addition to that stated above, that his work was entirely completed at the time he left the office of the corporation where he worked in Maplewood, N. J.; that he had no work to do or errand to perform

of any nature for the company from the time when he left its place of business on that night until he should return there the next morning (pp. 23-24).

George G. Salmon, the manager of the company, testified that Jonas was a solicitor, collector and shipping clerk and that all of his work was done during the daytime (p. 47); that on the night of the accident, Jonas was not to perform any work for the company while on his way home (p. 49); that when shipments were heavy Jonas was required to get to work earlier than usual (p. 57), and that the company was benefited by his starting for work from his home earlier (bottom p. 58, top p. 59); *that there was no benefit coming to the company from the fact that Jonas would get home to his supper earlier by taking the auto* (top 61).

The plaintiffs argue, however, that the company, having an interest in its employee's getting to work early in the morning, the outward bound trip was therefore a necessary incident to such return trip, and that even though the accident occurred while Jonas was on his own business, under the circumstances the owner was liable as well as the driver for its consequences.

It seems to me, however, that there is a fallacy in this reasoning; firstly, because it was the servant's duty to get to work on time in the morning, irrespective of what means of transportation he used to get to his home, and, secondly, because, admitted for the sake of argument that the employer derived an added benefit by the employee's early return to business, the accident complained of, *did not occur on the trip to the employer's place of business*, but on the outward trip to his home, in which the employer could not possibly have had any interest.

Even if it should be considered that Jonas Salmon was entitled to the use of the car as part of the compensation for his services, the situation would not be altered, because the test in a case, such as this is, is not whether the person using the automobile had a right to the use of it, but whether such use in any way was for the benefit of the owner.

The two most canvassed cases dealing with the question of an owner's liability for the negligent driving of his servant, are the cases of *Doran v. Thomsen*, 74 N. J. L. 445 (Sup. Ct.), and 76 N. J. L. 754 (Ct. E. & A.); and *Missel v. Hayes*, 86 N. J. L. 348 (Ct. E. & A.).

In the first case mentioned, *Doran v. Thomsen*, the defendant owned an automobile which his daughter, about nineteen years old, was accustomed to drive, sometimes twice a day. At the time of the accident she had three friends in the car with her and was out for her own pleasure. No other member of the family was with her. It appears from the opinion (76 N. J. L. 756) that the defendant bought the machine "for our own use the same as a person might buy a horse and carriage for the family"; that it was operated mostly by his son and daughter, and, when he was at home, they had to come and ask permission to use it, but when not at home they some-

times took it without permission; that on the day of the accident the father was absent and did not know that his daughter was going to use the auto, but he did know that she used it whenever she desired to do so. The Court after having pointed out that the daughter was not using the car for the benefit of other members of the family, and that it was merely as a means of recreation for herself and friends, and that she therefore could not be regarded as the agent or servant of her father upon that occasion, said: "Assuming that the relation of master and servant existed generally between the father and daughter, yet it does not appear in this case that on the occasion in question, she was acting as said servant within the scope of her employment" (757).

"That the master is responsible for the negligence of his servant when acting within the scope of his employment is elementary law, but that he is not responsible if the negligence was committed by the servant when engaged in some private matter of his own, is equally elementary." Bottom p. 757, top 758.

The case of *Evers v. Krouse*, 41 Vr. 653, is cited from, as follows:

"An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, 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. Such an act is not as a matter of fact, the act of the master in any sense, and should not be termed to be so as a matter of law. As to it the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it, the servant alone should be held responsible."

The Court further said (*Doran v. Thomsen, supra*, 759):

"The act must be done for the purpose of executing the master's orders and 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."

Citing cases.

This seems to cover the case under discussion. The point made by the plaintiffs and which the learned Trial Court seemed impressed with, and which appears in his charge to the jury is, in effect, that the act complained of would not have been committed if the facilities were not afforded by the servant's relation to his master (bottom p. 69, top p. 70). In other words, that the Salmon Company having given its servant an auto to use for the purpose of facilitating the servant's convenience, thereby made it possible for the accident to happen.

The case of *Missel v. Hayes* above referred to, is said, however, to favor the plaintiffs' contention that the master is liable for the servant's negligence in this instance. That case was one where the father supplied an automobile for the use of his family, and where,

at the time of the accident, the son was driving the same, having defendant's wife and daughter in the auto—all three being members of the father's immediate family. The case of *Doran v. Thomsen* was passed upon, distinguished and upheld for the principle therein contained. The distinction was pointed out between the two cases. In the earlier case it appeared that the auto was being used for the driver's personal pleasure, while in the later case it was pointed out, the son was driving for the father's benefit, in that other members of his family were being transported, and that it was "within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing or to minister to their health in other ways" (bottom p. 757, top. 758).

Another case which accords with the principles above enunciated, though not from our own state, is that of *Van Blaricom, admx., v. Dodson*, 220 N. Y. 111-115, N. E. 443, L. R. A. 1917, F. 363.

That was an action against an owner of an automobile whose son, while driving the same for his own purpose, negligently caused injury to another. Hiscock, C. J. (Ct. of Appeals), said:

"On its face a proposition seems to be self-contradictory which asserts that a person who is wholly and exclusively engaged in the prosecution of his own concerns, is nevertheless engaged as agent in doing something for someone else. *It has always been supposed that a person who is permitted to use a car for his own accommodation, was not acting as agent for the accommodation of the owner of the car.* Reilly v. Connable, 214 N. Y. 586, L. R. A. 1916, A. 954.

Further on the learned Court remarked:

"The question whether one person is the agent of another in respect to some transaction, is to be determined by the fact he represents and is acting for him, rather than by the consideration that it will be inconvenient or unjust if he is not held to be his agent. If, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of everyone whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license, rather than by some new and anomolous slant applied by the courts to the principles of agency."

The case of *Doran v. Thomsen, supra*, was passed upon by the N. Y. court in the case just mentioned and accepted for the principles therein laid down. The case of *Missel v. Hayes, supra*, was also considered by the court referred to and approved of and accepted as authority for the proposition

"that if the owner of a car directly or indirectly causes someone, either his son or hired chauffeur to drive the same for the benefit of members of his family, it is familiar law that such driver may become the agent of the owner."

It is contended by the plaintiffs that even though Jonas Salmon was driving the car for his own benefit it was also for the benefit of the defendant corporation, which contention, however, as a legal proposition, seems to be rejected on the principle laid down in the *Van Blaricom* case, *supra*, where, as pointed out, the court held that it was a common supposition that a person "who was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car," in other words, it is another application of the old doctrine, that one cannot act as agent for himself and his principal in the same transaction at the same time.

A consideration of the facts in the case, however, will immediately satisfy the mind that the purpose of Jonas Salmon's trip home was for the benefit of himself alone, and the theory that it was for the benefit of the defendant, Salmon Company, is more illusory than real. He was going to his own home with the auto only because he missed his train. He could have gone home by the later train if he so desired. *He was at no time after leaving his employer's place of business, under its control or direction, and he was not performing any service for it.*

Granting him the use of the auto was purely for his personal accommodation. Whether, if the accident occurred on the *return trip* to the company's place of business, the company would be liable, need not be discussed, for the reason that the accident did not occur at that time, although the cases generally do not indicate liability even under such circumstances.

In defining a master's liability for the acts of a servant we find the expressions "within the line of employee's duty," "while actually engaged in serving the master" and "executing his orders," etc.

In the case of *Doran v. Thomsen*, 76 N. J. L. 754, above referred to, syl. 3 of the opinion reads as follows:

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

And again in *Holler v. Ross*, 68 N. J. L. 324, we find the following syllabi to the opinion, to-wit:

1. "The servant of the master cannot bind the master to respond in damages to the plaintiff, unless it can be shown that the act which the servant did, which caused the injury, was an act *which was expressly or by necessary implication within the line of his duty and under his employment.*"

2. "The master is not responsible if the wrong done by the servant is done without his authority and *not for the purpose of executing his orders or doing his work.*"

Applying the above to test the present situation, we do not find that the servant, Jonas Salmon, was performing *any duty for his*

master, nor was he executing its orders or doing its work at the time of the accident.

His duties to his employer, the Salmon Company, ended when he quit work in Maplewood, N. J., after which time and until he arrived at its place of business, no orders were to be executed by him for the benefit of his employer.

The expression "in the course of his employment" means, in contemplation of law, "While engaged in the service of the master and nothing more." It is not synonymous with "during the period covered by his employment." *Slater v. Advance Thresher Co.* (Minn.), 107 N. W. 133, L. R. A. 5, N. S. 598.

Just as soon as the employee leaves his employer's business and undertakes a trip for himself, from that moment the relation of principal and agent theretofore subsisting, is severed.

Jennings v. Okin, 88 N. J. L. 659 (661).

In the case of *Slater v. Thresher* (*supra*) the Court said:

"Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And, in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master *pro tempore*, the master is not liable. If the servant steps aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities." Citing authorities.

In the case of *Solomon v. Commonwealth Trust Company*, 100 Atl., p. 534 (Sup. Ct. Pa.), the facts briefly were, that defendant sent her chauffeur to an establishment for the purpose of having repairs made to her auto; after these were made instead of returning the auto to the garage, as was his duty, he and a companion went off on a joy-ride and crossed the river from Pittsburg (where the garage was) to Alleghany. Returning from their ride, and while on the way to the garage they caused the injury, to recover damages for which, suit was brought. On a verdict for defendant, the plaintiff assigned error to the reply of the Trial Court to the following question asked by the jury. "If the jury come to the conclusion that the chauffeur left the errand of the defendant in crossing to Alleghany

would he be resuming the errand of the defendant on his way to the garage?" The Court answered that the chauffeur "would not be resuming the errand" of the defendant.

Part of the language of the Trial Court which was approved by the reviewing Court was that "the journey was entirely for the chauffeur's own pleasure, and we cannot say that he had resumed his duty in this case any more than he could be said to have done so had he taken a 'joy-ride' to some neighboring town and the accident had happened when he was about to enter the garage on his return."

If there would be no liability on the part of the owner for the negligent act of a chauffeur "when about to enter the garage," where he was sent, because of an intervening trip made by the servant for his personal pleasure, upon what principle can it be said that an accident which occurred during the trip of the servant, made for his own benefit, and not yet on the homeward journey, can be chargeable to the master?

The Court in the Solomon case, *supra*, further said:

"It was incumbent upon the plaintiff to show by direct or circumstantial evidence not only that Clay (the driver) was the servant of Mrs. Reyner (the defendant), *but that he was on an errand for her or engaged in her business* at the time he drove the automobile into the wagon." Citing cases.

Some other cases almost directly to the point, which indicate that any personal trip of a chauffeur, removes liability from the master, even though there be an incidental purpose or benefit to the master, are the following:

In *Brinkman v. Zuckerman* (Sup. Ct. Mich.), 159 N. W. 316, a servant of the defendant caused damage to the plaintiff by running an automobile into his store-front. The auto was owned by the defendant and was at the time, driven by one M. who was employed by the defendant generally as a chauffeur. On the day of the accident the defendant was being driven around and stopped about eight o'clock, at a certain place in the City of Detroit. He directed his chauffeur to return to him at twelve o'clock. After leaving the defendant the chauffeur drove the car to his own residence, and learning that his wife had gone to her father's house, he drove down to the latter place. While returning to keep his appointment with his employer he caused the damage complained of.

The Court found that the owner did not give his consent to the use by the chauffeur of the car on his private errand, but that if the testimony *had* shown an express consent by the defendant, it would have amounted but to a loan of the car and would not have made the trip any part of the defendant's business. Citing *Doran v. Thomson*. In reply to the argument that, if though the chauffeur was on his own business going out, he was acting within the scope of his employment returning, the Court said: "But in fact, no part of the trip either going or returning was connected with the defendant's business. It was as much the chauffeur's affairs to get back from Dix avenue (where he had gone), as it was to go out there."

The case in hand differs from *McKeever v. Ratcliffe*, 218 Mass, 17-105 N. E. 552 and other similar cases, where the chauffeur while discharging a duty to his employer, was also gratifying a private desire of his own, but is in accord with the cases just above cited, as well as the case of *Schoenherr v. Hartfield*, 158 N. Y. S. 388-172 App. Div. 294, where a chauffeur while on a private trip, was also testing the car for his employer, which he had implied authority to do. In an action to hold the defendant for the negligence of the servant the Court (App. Div. 3) held that the primary purpose of the journey was for the business or pleasure of the servant, and that the use of his master's vehicle was but an incident of the servant's errand and that "the returing was as much as a part of the errand so far as the use of the car was concerned, as the going, for the use of the vehicle for the errand required its return to its place of keep."

Applying the principles laid down in the above cases to the one under discussion, we find that the primary purpose of the use of the auto was for the servant Jonas to reach his home, while the incidental purpose, if it can be called such, was his getting back to business.

In the Brinkman case, *supra*, the Court held that the primary purpose was the servant's personal trip and the incident, his getting back to meet his employer; and in the Schoenherr case it was held that the primary purpose again was the servant's own trip, and the mere incident, the testing of the car for the master. In neither of those two cases was the defendant held to be liable.

Berry, Automobile 130-131, lays down the rule that an act of the servant is not necessarily within the scope of his employment, because it was the intention of the servant to serve or benefit his master, and the same authority, Sec. 144, states the test of a master's liability to be, whether *at the time of the accident*, the servant was doing any act in furtherance of his master's business *as distinguished from his own business or pleasure*.

See also *Steffen v. McNaughton* (Wis.), 122 N. W. 1016, 26 L. R. A. (N. S.) 382 and notes to same. Also *Symington v. Sipes* (Md.) 88 Atl. 134-47 L. R. A. 662 and notes to same.

When the plaintiffs rested their case, all that was proven was, that at the time of the accident the chauffeur was defendant's servant and was driving its car. This was insufficient, as it was incumbent upon plaintiffs to prove that at the time of the accident the chauffeur was engaged in defendant's business.

Luckett v. Reighard (Pa.) 93 Atl. 773. *State v. Benson* (Md.) 100 Atl. 505, *White Oak Coal Co. v. Rivoux* (Ohio), 102 N. E. cases collected in notes to same reported in 46 L. R. A. (N. S.) 1991. *Twombly v. Stevens-Duryea*, 206 (Mass.) 516-92 N. E. 776. In the latter case the Court said:

"There is no presumption from the mere physical possession that the person operating the auto was the servant or agent of the corporation. He may have hired or borrowed it or wrongfully appropriated it for his own use and in neither event would the defendant be charged with his misconduct."

When the plaintiffs rested, a motion was made to non-suit as to the defendant, Salmon Company, on the ground that it did not appear that the driver of the auto, at the time of the accident, was acting as defendant's servant and in its employ, which motion was denied.

After the defendants put in their proofs, a motion was made for a direction of a verdict in favor of the defendant, Salmon Company, on practically the same ground. This motion also was denied and the Court left it to the jury to say, whether under the circumstances, Jonas Salmon was acting as the agent of the corporation. How this question could be left to the jury, is difficult to conceive. There was no dispute in the case concerning the relation of the driver to the owner of the automobile. No attempt was made by plaintiffs to show that the driver was on any business of the employer, and nothing appeared in the case which would indicate that the owner had any interest in the chauffeur's trip aside from the fact already stated, that he was to get back with it in the morning. A purely legal question was thus presented, and if the facts indicated liability on the part of the master, the Court should have instructed the jury to find in favor of the plaintiff on that question, referring to it only the assessment of damages, in the event of course, that the driver was found to be responsible for the accident; otherwise it was the Court's duty to have granted the motion for a direction.

Inasmuch as no liability on the part of the Salmon Company appeared after the plaintiffs rested, the Court should have granted the motion to non-suit, failing to do which, it should have granted the motion for a direction of a verdict in favor of the defendant, George G. Salmon Company, on the whole case.

It is therefore respectfully submitted, that the verdict against the defendant, Salmon-Company, should be reversed, with costs.

Respectfully submitted,

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