

NEW JERSEY COURT OF ERRORS AND APPEALS.

ADAM HECKMAN,

Plaintiff-Respondent,

vs.

ABRAHAM COHEN,

Defendant-Appellant.

On Appeal
from
Supreme
Court.

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BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Supreme Court affirming a judgment in the Orange District Court. Plaintiff sued to recover damages for injuries he received by being struck by defendant's automobile in Newark, June 11, 1915.

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Plaintiff, the driver of a pie wagon, stopped his wagon on the north side of Bowery Street in the middle of the block. The pie wagon had high sides and an entrance from the back to a passageway through the middle, with a step at the rear. After stopping his wagon, plaintiff entered it from the rear, piled fifteen small pies on his left arm, backed out of the wagon, stepped to the street and started to the other side of the street to deliver pies to a customer. Bowery Street is only thirty-five feet wide, with two trolley tracks on it. Plaintiff was on the car track nearest the wagon when struck by defendant's automobile. The automobile was being driven, at the most, eight or ten miles per hour. No witness testifies to a higher rate of speed. The automobile was brought to an immediate stop, the pies were knocked from plaintiff's arm and he was pushed over. When the car was

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brought to a stop plaintiff was in a sitting posture with his legs under the radiator. The automobile was going westwardly along Bowery Street and plaintiff's wagon was heading in the same direction. Plaintiff was given judgment for \$196.65, his injuries being slight.

The errors alleged are the refusal of the Trial Court to grant defendant's motion for a non-suit because of plaintiff's contributory negligence and
 10 because no negligence was proved on the part of the defendant; the refusal of the Court to give judgment for the same reasons in favor of the defendant and the affirmance of this judgment by the Supreme Court, whereas the Supreme Court should have reversed the judgment. These grounds of appeal are pressed here.

POINT I.

20 **There was no evidence that the defendant was guilty of negligence.**

The negligence declared in the state of demand (p. 2) is that "defendant operated the said automobile in a careless and negligent manner and at a reckless rate of speed and gave no warning of its approach."

The evidence did not support this allegation. The only evidence plaintiff produced to show negligence was his own testimony, as follows (p. 17):

30 "Q. Did you hear any sound, gong or alarm of any kind? A. No, sir."

On page 23 plaintiff testified that when he stepped from his wagon to the street he looked up the street one hundred feet.

Page 24: "The whole road was clear? A. No. I saw an automobile down the street—excuse me—I saw an automobile down the street.

40 "Q. How far from you? A. Oh, well, I suppose, I don't know how many feet it was; it was there, anyway.

"By the Court: ..."

"Was it going; was it moving? A. It was moving; yes, sir; going at a good rate."

Page 25: "Q. You looked to east about a hundred feet? A. Approximately a hundred feet.

"Q. And saw this automobile coming towards you? A. Yes.

"Q. Then you started to cross the street? A. Yes, sir.

"Q. After you saw the car? A. Yes, sir. 10

"Q. Was it moving? A. Yes, sir.

"Q. Towards you? A. Towards me, it must have been."

Page 25, l. 30: "Q. Approximately; was it going very very fast, at a rapid rate of speed? A. Well, I will tell you, it was coming fast enough to push me along for a few feet and stopped; it pushed me along and I held onto the car; it pushed me along before it stopped."

On page 26 plaintiff testified that when he saw the car "the car I should judge was about forty or fifty feet" from him. Page 26, l. 18. 20

As against the testimony of the plaintiff, which does not establish that defendant was negligent, is that on behalf of defendant, as follows:

Elmer S. Hoyt, the chauffeur, p. 38, line 11:

"Q. How fast were you going at the time of the accident, approximately? A. Well, between eight and ten miles an hour."

Page 38, l. 26; "Q. Did you see Mr. Heckman before you were struck? A. Why, within a couple of feet of him, I saw him." 30

Page 38, l. 33: "Q. Could you see Mr. Heckman on the wagon? A. The first I saw of him he was on the step of the wagon."

Page 39, l. 12: "Q. Just tell us what happened, if you will, please? A. I was coming along in the west bound car track, the engine throttled down to about eight or ten miles an hour; I saw this wagon as I approached Mott Street, and was going straight through; when I got within about three feet of the rear of 40

the wagon Mr. Heckman got off the step of the wagon, backwards, and started to cross the street, that is, to go to the south side of Bowery Street, and he only took about two steps when the right hand lamp of our machine struck him in the left arm."

Page 39, l. 38. "Q. How far was it that you stopped, within how much distance? A. Oh, at the most, five feet."

10 Page 41, l. 8: "Q. He (the plaintiff) was on the wagon until you got within three or four feet of him? A. Yes, sir."

The defendant testified that his car was being driven not over ten miles an hour, between eight and ten miles an hour (p. 45, l. 10).

Page 45, l. 36: "Q. Did he (the plaintiff) step down off the wagon? A. Well, just as we got almost, the front of our car was almost to his step, of his wagon, he stepped right off the step and stepped right in front of the car."

20 Page 46, l. 13: "Q. Did he start to cross? A. As soon as he got off he started right across; he had taken about two steps when the front lamp touched the man before Mr. Hoyt put the brake on.

"Q. The front lamp? A. The lamp nearest to him, that is the right hand side."
Page 47, line 36:

30 "Q. Was there anything in his actions to indicate that he was going to cross the street? A. No, sir; I never dreamed for a moment that he was going to cross the street; I thought he was delivering pies on the side that the wagon was on; that is the way it seemed to me; that is the reason I didn't say anything."

40 We submit that this testimony does not establish any negligence on the part of the defendant. Defendant's car was being operated between eight and ten miles per hour. This is not a negligent rate of speed. The fact that it was being operated in a careful manner is established by the fact

that the car stopped with five feet after striking plaintiff.

The only thing that anyone could suggest that the defendant might have done that was not done, was to sound the horn as the automobile approached the pie wagon. The reason such warning was not sounded is given by defendant and the chauffeur: They did not anticipate that the plaintiff would step directly in their path. (Hoyt, p. 43, l. 38; Cohen, p. 47, l. 38.)

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It was held in *Baier vs. Camden Railway Co.*, 68 N. J. L., 42, that a motorman is not chargeable with negligence because he fails to apprehend that a boy, who is riding on the back of a wagon, will jump from the wagon and run under his car, while he is engaged in looking at the wagon in order to pass it without a collision.

The contention that the defendant was negligent because he did not blow his horn has no force in the face of the plaintiff's own testimony that he saw defendant's automobile approaching when it was forty or fifty feet away (p. 26, l. 15). The object of sounding a horn is to give a warning. No better warning of the approach of this automobile could have been had by the plaintiff than the demonstration that it was there, which was furnished by his own eyesight.

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We submit that there having been no negligence proved on the part of the defendant, defendant's motions should have been granted.

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POINT II.

The plaintiff was guilty of contributory negligence.

10 The accident happened at noon on a beautiful day (p. 14). Plaintiff attempted to cross the street in the middle of a block (p. 27, l. 9). His wagon was drawn up to the curb on the north side of Bowery Street and plaintiff intended to serve customers on the south side of the street.

20 On page 23 the plaintiff testified that before he started to cross the street, he looked one hundred feet up. On his left arm were fifteen small pies. Plaintiff was able to see over the top of them (p. 21, l. 18; and p. 23, l. 29). When plaintiff stepped from the step of his wagon to the street he looked east in the direction from which the automobile approached and it was between forty and fifty feet away (p. 26, lines 15 to 18).

In spite of the fact that plaintiff saw the approaching automobile when it was forty to fifty feet away, he walked directly in front of it to go to the other side of the street (p. 23, l. 40).

30 In *McCormick vs Hesser*, 71 Atl. Rep., 55, the plaintiff saw an automobile approaching him when it was only one hundred and thirty feet away, and then, without looking again or paying any further attention to it, he walked into the street where he knew, or should have known, the automobile would pass. The Court said:

40 "We think it was the duty of the plaintiff, when he saw the machine approaching and heard the warning given by the defendant, to observe where he was going, and that, in walking into the street in front of an approaching vehicle without using his eyes and making some attempt to avoid a collision, he deliberately placed himself in a position of danger, and was thereby guilty of negligence which contributed to the accident."

As was said in *Schnackenberg & Co., vs. D. L.*

& *W. R. R.*, 86 N. J. L., at pg. 519, one cannot practically invite a calamity by his negligence or indifference, and make it the basis of a legal injury.

The rule of conduct for one crossing a street in the middle of a block was established by the Legislature in 1915 (P. L. 1915, Chap., 156, p. 297) as follows:

“(2) Any person crossing a street at any place other than a crosswalk shall do so at his own risk. Nothing in this regulation, however, shall relieve the drivers of vehicles from being constantly vigilant, exercising all reasonable care to avoid injuring either persons or property.” 10

In *Schreiner vs. Grinnell*, 97 Atl. Rep., 781, in a case certified from the Hudson Circuit, the Supreme Court construed the above section of the statute, as follows:

“(1) That as against owners of vehicles not themselves driving the pedestrian who crosses a street at a place other than a crosswalk is barred from maintaining an action for damages caused by collision; (2) that as against drivers, whether they are owners of the vehicle or servants of the owner, the pedestrian is not barred of his action.” 20

This accident happened June 11, 1915, and after the above Act became effective. It also happened before the Act was changed in any respect. The plaintiff crossed the street in the middle of a block, and knowing that an automobile was approaching deliberately stepped in its path without any regard for his own safety. 30

We submit that this was contributory negligence as the law stood before the Act of 1915 was passed. We further submit that by virtue of the 1915 statute the defendant cannot be held liable for plaintiff's injuries.

In this case, the defendant, the owner of the car, 40

was not driving the car. The car was being driven by Mr Hoyt, a licensed driver (p. 38, ll. 8 to 10). Under the authority of *Schreiner v. Grinnell* (supra) suit might have been brought against Mr. Hoyt, supposing he was guilty of negligence; but this defendant could not be held even if the chauffeur was guilty of negligence.

In the opinion filed in the Supreme Court in this case it is stated that the "defendant was driv-
 10 ing his automobile on the trolley tracks behind a trolley car, at eight or ten miles an hour; that he saw the plaintiff leave the rear of his wagon and start across the street; that at that time the automobile was one hundred and fifty feet away; that he gave no signal of the approach of the automobile to warn the plaintiff" (Case, p. 60, lines 20 to 25).

We have been unable, in going through this record several times, to find one word about a trolley
 20 car. We have further been unable to find any evidence whatsoever in the case that either the defendant or the defendant's chauffeur saw the plaintiff leave the rear of his wagon and start across the street when the automobile was one hundred and fifty feet away. Both Mr. Hoyt, the chauffeur, and the defendant testified that the plaintiff stepped from his wagon and started
 30 across the street when the automobile was but about three feet from the rear of the wagon (Hoyt, p. 39, lines 18 to 20; Cohen, p. 45, lines 36 to 40).

Plaintiff was seventy years of age, as pointed out in the Supreme Court's opinion, but he was a very active man and had been driving a wagon for the Wagner Pastry Company for fourteen years (p. 14, ll. 10 to 15). Being on the streets every day delivering pies he must have known well the rules of the road and must have been cap-
 40 able of using reasonable care for his own safety,

The proximate cause of this accident was plaintiff's failure to permit defendant's car to pass, i. e., his failure to use reasonable care for his own safety.

We respectfully submit that this accident happened because of the contributory negligence of the plaintiff, and that the judgment of the Supreme Court and of the District Court should be reversed.

MCDERMOTT & ENRIGHT, 10

Attorneys of Defendant-Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

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The first part of the report...

The second part of the report...

The third part of the report...

The fourth part of the report...

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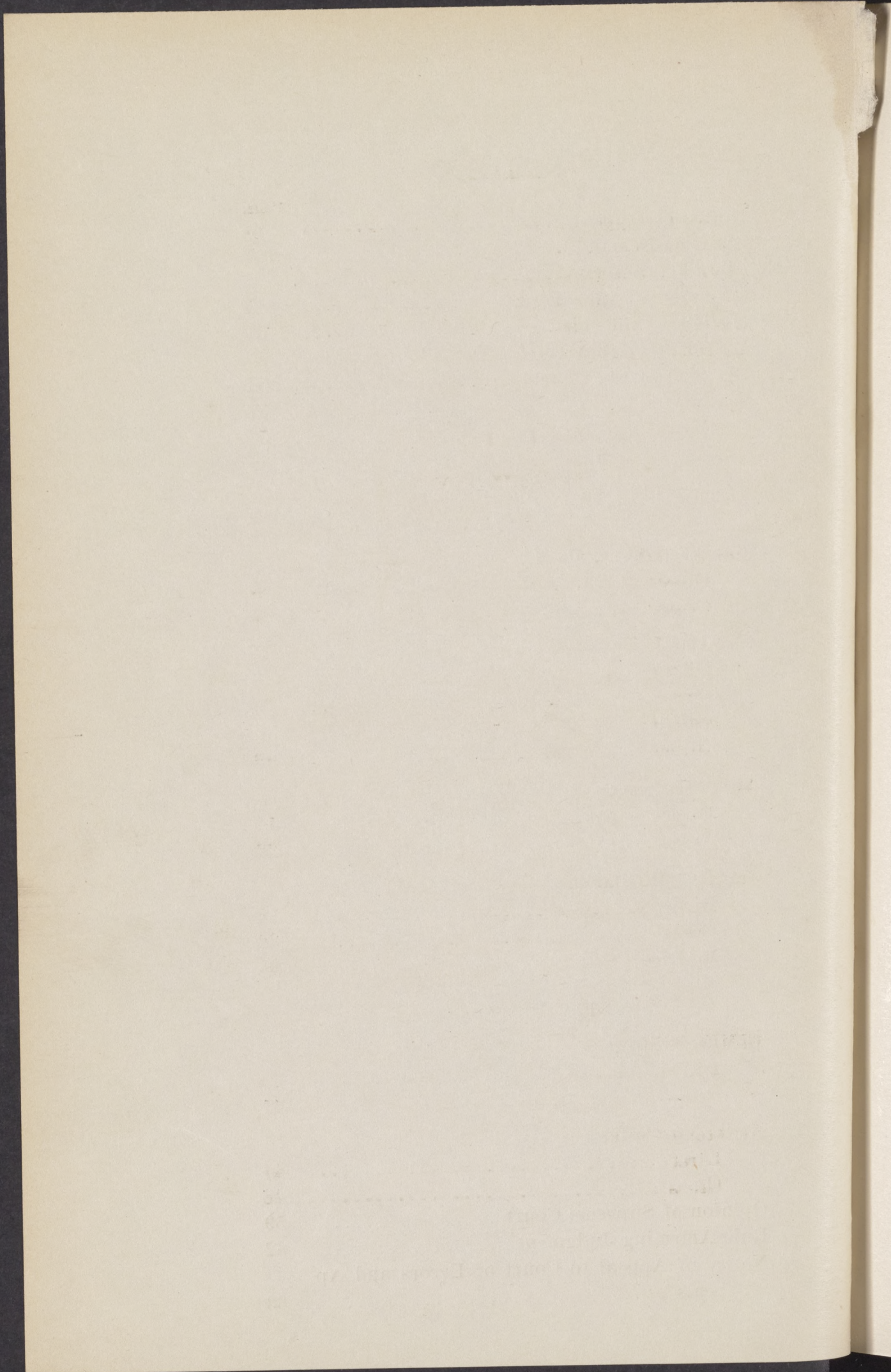
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Notice of Appeal.

DISTRICT COURT OF THE CITY OF ORANGE.

(Served on Plaintiff's Attorney November 29,
1915 and Filed).

10

ADAM HECKMAN,

Plaintiff,

vs.

ABRAHAM COHEN,

Defendant.

Action
at Law.

To John A. Bernhard, Esq.,

20

Attorney of the Plaintiff Adam Heckman:

SIR:

Take notice that the defendant, Abraham Cohen, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the City of Orange rendered in above action on the 26th day of November, 1915.

Dated, November 26, 1915.

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MCDERMOTT & ENRIGHT,
Attorneys of Defendant.

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State of Demand.
ORANGE DISTRICT COURT

	<hr/> ADAM HECKMAN, <i>Plaintiff,</i>	} Action at Law.
	<i>vs.</i>	
10	ABRAHAM COHEN, <i>Defendant.</i> <hr/>	

The plaintiff alleges that:

1. On the eleventh day of June, while crossing Bowery Street, between Mott and Lexington Streets, Newark, New Jersey, he was struck and injured by an automobile owned and operated by the defendant.
- 20 2. Plaintiff alleges that the defendant operated the said automobile in a careless and negligent manner and at a reckless rate of speed and gave no warning of its approach.
- 30 3. The plaintiff was injured in and about the head, both arms, back and knees, so that he suffered great pain and was unable to work for a considerable length of time, by reason of which he lost a considerable sum of money, which he would otherwise have earned, and which he was obliged to spend for disbursements and doctor's bills and medicines.

The plaintiff claims \$500.00 damages and costs of suit.

Dated, November 3, 1915.

JOHN A. BERNHARD,
Attorney of Plaintiff.

Clerk's Transcript.
ORANGE DISTRICT COURT
12324.

ADAM HECKMAN,

Plaintiff,

vs.

ABRAHAM COHEN,

Defendant.

Action
 at Law.
 Demand
 \$500.

10

John A. Bernhard, Plaintiff's Attorney.

McDermott and Enright by P. G. Cruden, Defendant's Attorney.

November 4th, 1915. Summons issued.

November 12th, 1915. Summons returnable. 20

November 4th, 1915. Demand filed.

November 5th, 1915. Summons served.

Summons returned as follows:

"The said defendant not being found, I served this summons Nov. 5, 1915, by leaving a copy thereof at his place of abode in presence of his niece a person of the family, of the age of fourteen years who was informed of the contents thereof. Albert E. Robinson, Sergeant-at-Arms."

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November 12th, 1915. Case adjourned to November 26th, 1915.

November 26th, 1915. Trial had.

Harry Schirmer was sworn as stenographer.

Dr. John F. Hagar, Edward J. Hauch, Adam Heckman and John C. Dowling were all sworn and testified. Plaintiff rests.

Motion for non-suit on ground that contributory negligence was shown was denied.

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Clerk's Transcript.

Elmer S. Hoyt and Abraham Cohen were both sworn. Defendant rests.

Edward J. Hauch was recalled.

Motion for judgment for the defendant on ground that contributory negligence was shown was denied.

10 Judgment was rendered in favor of the plaintiff and against the defendant for One hundred ninety two dollars and sixty-six cents damages and fifteen dollars and twenty-five cents costs.

Plaintiff's costs:

Summons,	\$2.10	Witness fee,	\$1.70
Mileage,	.32	Attorney's fee,	9.63

Listing fee,	1.50	Total costs,	\$15.25
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December 3d, 1915. Notice of Appeal filed.

20 December 3d, 1915. Bond on Appeal filed.

I, J. Dudley Ennis, Clerk of the District Court of the City of Orange, do hereby certify that the foregoing is a true transcription of the entries in the docket of the said District Court of the City of Orange in the case of Adam Heckman, Plaintiff, vs. Abraham Cohen, Defendant.

WITNESSETH, my hand and seal of the said Court, this 3d day of December, 1915.

30

J. DUDLEY ENNIS,
Clerk of the District Court of the
City of Orange.

(Seal.)

Grounds of Appeal.
NEW JERSEY SUPREME COURT.

ADAM HECKMAN,

Plaintiff-Respondent,

vs.

ABRAHAM COHEN,

Defendant-Appellant.

On Appeal
 from Dis-
 trict Court.

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The appellant in the above entitled cause hereby specifies the following as his grounds of appeal in said cause:

(1) Because the Judge of the District Court refused to grant defendant's motion for a non-suit.

(2) Because the Judge of the District Court refused to grant defendant's motion for judgment in favor of defendant and against plaintiff. 20

(3) Because the Judge of the District Court did give judgment for the plaintiff and against the defendant.

(4) Because the Judge of the District Court in giving judgment to the plaintiff and against the defendant awarded the plaintiff punitive damages, and took into consideration in awarding damages improper elements of damage. 30

MCDERMOTT & ENRIGHT,
 Attorneys for Defendant-Appellant.

Testimony.
ORANGE DISTRICT COURT

10	<p style="text-align: center;">ADAM HECKMAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">ABRAHAM COHEN, <i>Defendant.</i></p>	}	In Tort.
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Orange, N. J., November 26th, 1915.
Before HON. DANIEL A. DUGAN, Judge.

A P P E A R A N C E S :

20	JOHN A. BERNHARD, ESQ., Attorney of plaintiff;
	MCDERMOTT & ENRIGHT, ESQRS., (Mr. Cruden) for Defendant.

The Case of the Plaintiff.

DR. JOHN F. HAGER, SWORN.

30 DIRECT EXAMINATION BY MR. BERNHARD:

Q. Dr. Hager, you are a practicing physician of Newark and have been for some time, and have your office at 88 Ferry Street? A. Yes, sir.

Q. In the course of your practice did you have Mr. Heckman call upon you? A. Yes, sir.

Q. Do you remember the days, Doctor, about? A. About the 12th and 14th or 15th of March—
40 of April.

Dr. John F. Hager—Cross.

Q. Do you remember if you made an examination of him? A. Yes, sir.

Q. Will you tell the Court what you found as a result of your examination? A. Well, he was suffering from contusions, all on the left side, his left arm, elbow and left leg, there were black and blue marks, bruises and swellings. I first thought possibly there were broken bones, but there weren't; there were simply lacerations. 10

Q. Did you prescribe for him, Doctor? A. Yes, sir.

Q. In a general way, what did you prescribe, internal or external treatment? A. Both internal to relieve pain and external to relieve the inflammation.

Q. On the second call did you examine him again? A. Yes, sir.

Q. Was there any improvement then? A. Some improvement. 20

Q. From the examination that you made did you ascertain how long he would be incapacitated from work, as a result of those injuries, taking into account the fact that he is an elderly gentleman? A. That is a difficult thing to answer; we can't tell how long he is going to be laid up, but I should judge from his condition it would be a week or two.

Q. As a matter of fact, you don't know whether he was laid up one week or five days. You have a bill against him? A. Yes, sir. 30

Q. What were your charges? A. Four dollars.

Q. He paid you, did he not, Doctor? A. Yes, sir.

CROSS EXAMINATION BY MR. CRUDEN:

Q. On what day were you called in this case? A. I think it was the 12th; I haven't any records here, because I had to leave in a hurry. 40

Edward J. Haugh—Direct.

Q. The 12th of what month? A. The 12th of April, I think; I mean to say it was either March or April; I can't give you the positive date.

Q. How many calls did you make? A. Two calls.

EDWARD J. HAUGH, sworn.

10

DIRECT EXAMINATION BY MR. BERNHARD:

Q. Your business is what, Mr. Haugh? A. Coal business.

Q. Your business place is where? A. 38 Bowery.

Q. With your father? A. 38 Fleming Avenue.

Q. With your father? A. Brother.

20 Q. Did you see something of an accident that happened to Mr. Heckman down your way? A. Well, I didn't see the accident altogether, but I was there and I went at the time this here Mr. Greenbaum said there was a crowd around and Mr. Greenbaum told me to take the number of this automobile.

MR. CRUDEN: I object to that.

Q. Don't tell us that; where was the car, first?

30 A. The car was right on the Bowery, up about two doors from our place.

Q. What part of the Bowery was it on? A. What part?

Q. Yes, what part of the roadway was it on?

A. I don't remember.

Q. What way was it headed? A. I think it was facing down; I am not sure.

Q. Toward Newark? A. Towards Newark, yes.

40 Q. Does the Bowery run the same way as Ferry Street, or in which direction? A. Yes, it does.

Edward J. Haugh—Direct.

Q. Between which two streets did you see the automobile, which two cross streets? A. Oh, between Lexington and Mott Street.

Q. So that, as I understand it, you saw the automobile standing on the Bowery? A. Yes, sir.

Q. Did you see Mr. Heckman there? A. Yes, Mr. Heckman was there.

Q. Where was he when you first saw him? A. Mr. Heckman was right in about the center of the street near his wagon. 10

Q. Where was his wagon? A. His wagon was on Market—on Fleming Avenue, facing westerly, facing up, on the right hand side.

Q. That would be toward Newark also? A. No, it would be towards Broad Street.

Q. How far was Heckman away from his wagon? A. Oh, I don't know.

Q. Just behind it? A. A short distance. 20

Q. Point out some place in the court room? A. Maybe from here to there (indicating).

Q. About eight or ten feet? A. Yes, about.

Q. In what position was he, standing up or lying down? A. He was standing when I seen him.

Q. How far is your place of business away from that spot? A. Well, it is just two doors up, about, we will say, about 50 feet.

Q. So that you were about 58 feet from where he was? A. Yes, sir. 30

Q. Did you notice his general condition? A. Well, yes, the man was—he was in pretty bad shape.

Q. No, but what about him did you notice? A. Well, his clothes were all dirty, muddy like, muddy from where he fell.

Q. Did you see Mr. Cohen there, this gentleman with the glasses (indicating defendant)? A. Yes. 40

Edward J. Haugh—Cross.

Q. Did you hear Mr. Greenbaum talking to him? A. That I don't remember, no.

Q. Who is Mr. Greenbaum? A. Mr. Greenbaum, he is an ice man, he is in the ice business, he was right beside where this accident happened.

Q. What time of day was this? A. Well, around dinner time.

10 Q. Then, while you were within 58 feet of this scene, did you hear the sound of a gong, of a horn, or any kind of warning, just previous to the time that you went out? A. No, sir; I did not.

CROSS EXAMINATION BY MR. CRUDEN:

Q. You spoke of Fleming Avenue—or Fleming Street—and Bowery; are they the same? A.
20 Well, I will tell you; Bowery Street is the old name for it; they changed it to Fleming Avenue.

Q. Then it is the same. A. People down there call it Fleming Avenue; some people call it Bowery Street; it is the same.

Q. Where were you at the time of the accident? A. Right there at our driveway there at the office.

Q. Were you in the office? A. No, right outside in the driveway.

30 Q. You were on the driveway alongside of the office? A. Yes, sir.

Q. So you didn't see the accident occur? A. No, I did not.

Q. What was the first thing you noticed, Mr. Hauch? A. Why, the crowd, they were running.

Q. Did you notice the crowd out in the street there around the car? A. When I looked out I saw the crowd out there, and I walked up.

40 Q. The car, or automobile, was going toward Newark, is that right? A. Yes, sir.

Edward J. Haugh—Cross.

Q. That would be on which side of the road?

A. On which side of the road?

Q. Yes; which side of the road was the car on?

A. I guess about in the car tracks, somewheres around there.

Q. On the right hand side? A. Facing down.

THE COURT: We are going to get mixed up here. He said one thing in answer to one question and then he said another thing in answer to another. That started to mix me. My recollection of the Bowery is that it is in this part what we call Down Neck. 10

THE WITNESS: Yes; Down Neck.

THE COURT: The direction of Newark is going in the direction of Orange, that is what he means.

MR. BERNHARD: Yes, sir; that is what he means. 20

Q. The car or automobile was headed east or west? A. East or west?

Q. Yes. We will change the question and substitute another. How does Bowery Street run, in what directions?

THE COURT: Perhaps he does not understand the points of the compass. Ask him whether it is towards the center of Newark or towards Jersey City. 30

MR. CRUDEN: If your Honor please, I will substitute Jersey City, because I know nothing about Bowery Street, so that I am confused when he speaks of going towards Newark.

THE COURT: I doubt whether he understands the points of the compass in relation to the Bowery. 40

Edward J. Haugh—Cross.

MR CRUDEN: Well, we will get at it in another question.

Q. The automobile was headed towards Orange then; is that right? A. You mean what way was it facing?

Q. Yes. A. Well, that I don't remember.

Q. Which way was the wagon facing? A.
10 Well, the wagon was facing, it was off the track, you know, facing we will say, up the Bowery, towards the Pennsylvania depot.

Q. Towards Jersey City that would be? A. No, coming up.

Q. Then, in other words, they were both facing the same way? A. Well, I don't know about the automobile; I know the wagon was facing west, I guess.

Q. Facing west? A. Yes, I guess that is what
20 you call it, towards the Pennsylvania depot, west.

Q. In answer to the plaintiff's counsel you said that the car was headed towards Newark; now you say you don't know how it was headed. A. Well, I say the automobile was about in the car track.

Q. Yes, but you didn't say that, with all due respect to you; you say it was headed towards Newark, between Lexington and Mott Street; that
30 is just what you testified to. A. It was facing Lexington and Mott Streets?

Q. Then you don't know how it was headed, you say now? A. No, I don't know about the front of it, if that is what you mean, which way it was facing, going up or down; that is where it was standing; I know the horse and wagon were standing facing up towards Newark, you see, the horse and wagon was facing towards Newark, on the right side.

40 Q. When the accident happened, you have just

Edward J. Haugh—Cross.

testified, you did not see, it, the first thing you noticed, was the crowd? A. Yes, sir.

Q. How did you see Mr. Heckman, if there was a crowd right there? A. Well, I walked right up there, seeing the crowd right there, and I saw the man.

Q. You walked over to the crowd? A. Yes, sir.

Q. You just testified that at that time he was in a standing position? A. Yes, sir; he was standing up. 10

Q. And was eight or ten feet from the—A Wagon.

Q. From the wagon? A. Yes.

Q. You did not notice anything but the condition of his clothes? A. His clothes, that is all.

Q. Did you hear anything that was said between Mr. Cohen and the plaintiff, Mr. Heckman?

A. Mr. Heckman, no; Mr. Heckman didn't say anything. 20

Q. Mr. Heckman didn't say anything? A. I heard it from people up there.

Q. No, I don't want that. Did you hear anything yourself? A. No.

Q. So that all you know about it is that after it all happened you saw Mr. Heckman standing there with his clothes soiled? A. Yes, sir.

Q. That is all you know about it? A. Yes, sir, and I took the number of the automobile. 30

Q. I beg your pardon. A. I took the number of the automobile.

Q. That is all you know about the accident? A. Yes.

Adam Heckman—Direct.

ADAM HECKMAN, SWORN.

DIRECT EXAMINATION BY MR. BERNHARD:

Q. Mr. Heckman, where do you live? A. I live at 277 West Clinton Avenue, Irvington.

Q. What is your business? A. Pie business.

Q. You are with the Wagner Pastry Company?
10 A. With the Wagner Pastry Company; yes, sir.

Q. How long have you been with that company?
A. I have been with that company, I guess, going on fourteen years.

Q. What were your weekly wages in May and June of this year? A. Well, my weekly average was \$20 a week.

Q. How old are you? A. 70 years old last April.

Q. Were you working in April and May of this
20 year? A. Was I working in April and May?

Q. Yes. A. I was working in April and May.

Q. Did you have an accident? A. The accident happened in May.

Q. What date? A. I think it was on the 11th.

Q. Where? A. Well, it was Bowery Street, it is Fleming Avenue now.

Q. Between? A. Between Mott and Lexington Street.

Q. What part of the street? A. About the
30 middle of the block, in front of a shoe store.

Q. Are there car tracks on that street? A. Yes, two car tracks running there.

Q. Running from Newark to Jersey City? A. Yes, sir.

Q. What time of day was it? A. Well, it was around twelve o'clock.

Q. What kind of day was it? A. A nice day, a beautiful day.

Q. Like today? A. Not like this morning; like
40 today.

Adam Heckman—Direct.

Q. What were you doing? A. Delivering pies.

Q. How? A. With a horse and wagon.

Q. Which way were you going? A. My horse facing west.

Q. Towards Orange? A. Yes, towards Newark, towards Broad Street, west.

Q. Did you come up the roadway? A. In the middle of the street.

Q. In front of what place? A. In front of, I guess, the shoe store. 10

Q. Where were you with reference to the curb? A. Close to the curb.

Q. How close? A. Well, the wagon was close up to the curb, as far as I could get.

Q. After your wagon stopped close to the curb, what did you do? A. Well, I jumped inside the wagon, got my pies.

Q. How many pies did you get? A. I got about 15 small pies on my arm, and went out. 20

Q. Put them on your arm? A. On my arm.

Q. Which arm? A. Left arm.

Q. Then what did you do? A. Then I took a step down out of the wagon.

THE COURT: Wait a minute. On what side of the road were you, north or south side?

Q. On which side were you? A. On what side of the street with the wagon? 30

Q. Yes. A. On the north side, facing west.

Q. So that you were on the right side of the street? A. On the right side of the street.

Q. When you stepped down where did you step to? A. I stepped on the street.

Q. Did you step on the step of your wagon first? A. Yes, I stepped on the step first.

Q. When you stepped on the step of your wagon, did you do anything? A. I stepped on the street. 40

Adam Heckman—Direct.

Q. When you stepped on the ground did you do anything? A. Then I started to serve customers across the street.

Q. Before you started across the street, as you stepped from the step of your wagon to the pavement, did you do anything? A. I turned, as I naturally do—

10 Q. Wait a minute, Mr. Heckman, answer the question. Did you do anything or not? A. Did I do anything?

Q. Did you look? A. Yes, sir.

Q. Which way did you look? A. I looked east.

Q. How far did you look? A. I looked close onto a hundred feet; as far as I could look down the street.

Q. Did you see anything? A. I saw nothing.

20 Q. Was there any automobile, or any vehicle, approaching? A. I didn't see no automobile.

Q. Was there an automobile there, is what I am asking you, in your sight, at the time that you looked? A. I didn't see no automobile.

Q. Was there an automobile there—won't you answer the question? A. Was there an automobile there?

Q. Yes, within the space of a hundred feet that you looked? A. Yes, there was an automobile there.

30 Q. Where? A. Inside that hundred feet.

Q. Which automobile was it? A. Well, the one that struck me.

Q. How far away was it? A. Well, not quite a hundred feet.

Q. What did you then do? A. Then I simply walked across the street.

Q. Did you get across safely? A. No, sir.

40 Q. What hit you? A. Why, when I got on the inside rail I was struck.

Q. How far away was that rail that you speak

Adam Heckman—Direct.

of? A. Well, I think it is, from the curb to the center of the street, I guess about eight feet, or something around that.

Q. How much? A. Eight or nine feet, I guess, or more.

Q. What is the distance between the rails? A. Between the street?

Q. No, I say what is the distance between the rails of the track? 10

MR. CRUDEN: I object to that, Your Honor.

A. I don't know exactly how many feet.

Q. How many feet about? A. Well, I suppose—I couldn't tell you exactly how many feet, but I suppose—

Q. How many feet did you walk before you were struck is what I am asking? A. I suppose about nine feet. 20

Q. How many steps did you take from your wagon until the time you were struck? A. How many steps?

Q. Yes. A. I went catty-corner—I suppose about 12 or 15 steps from the back part of the wagon, from the back part of the wagon to the inside rail.

Q. Did you hear any sound, gong or alarm of any kind? A. No, sir.

Q. What part of the car struck you? A. On the left side of the car. 30

Q. Then you had gotten across the front of the car, had you? A. Across the car; I crossed one track—

Q. Wait a minute; you had gotten across the front of the automobile until you reached the left side of it, had you? A. Yes, sir.

Q. Don't answer so quickly. Wait until you hear the question. What part of the left side of 40

Adam Heckman—Direct.

the automobile struck you? A. I think it was the headlight.

Q. Which headlight? A. The left.

Q. What did it do to you? A. Struck me.

Q. Whereabouts? A. On my arm, right by my side here (indicating).

10 Q. Would that be the side of your body that was towards the automobile? A. Yes, sir.

Q. What did it do when it struck you? A. Knocked me down.

Q. Is that the side on which you carried pies? A. Yes, sir that is the left side.

Q. When it knocked you down, what happened? A. Well, it pushed me along for a few feet, then it stopped.

Q. What do you mean by a few feet—how far? A. Well, I guess about four or five feet.

20 Q. Were you injured? A. Yes, sir.

Q. Whereabouts? A. All of my left side here, and in my elbow here was a big hole, on my shoulder and on the hip.

Q. The left hip? A. The left hip, all on the left side; nothing on the right; all on the left.

Q. Did you receive medical attention that day? A. Yes, sir.

Q. By whom? A. The doctor, corner of Mott and Bowery Street, I was taken right in there.

30 Q. Did he do anything for you? A. Yes, sir; he undressed me and washed me off and bandaged my wounds.

Q. What wounds did he bandage? A. He bandaged the arm, fixed that all up; then, of course, he used some stuff on the side, and washed me off.

Q. Did you pay him anything, Mr. Heckman? A. No, sir.

Q. Did you have any other physician? A. Yes, sir.

40 Q. Who? A. Dr. Hager.

Adam Heckman—Direct.

Q. When did you go to him? A. I sent for Dr. Hager as soon as I got home.

Q. He came to you, did he? A. Yes, sir; I sent for him.

Q. Is he your family physician? A. Yes, sir.

Q. Did he attend you after that? A. Yes, sir.

Q. For how long? A. I guess about twice, two calls.

Q. And did you pay him? A. Yes, sir. 10

Q. Did you buy any medicine? A. Yes, sir; some medicine.

Q. Whereabouts? A. From Dr. Hager.

Q. How much did you pay for the medicine? A. I don't know how much I paid for it; I know I bought medicine in another drug store.

Q. Whereabouts? A. In Irvington Center there.

Q. How much did you pay at that time? A. It cost about a dollar. 20

Q. Did you lose any wages? A. Well, I waited two weeks.

Q. Two weeks what? A. Two weeks' wages.

Q. Why didn't you work for those two weeks? A. I couldn't.

Q. Weren't you physically able to work? A. No, sir.

Q. When did you go back after the accident? A. After I had been away for two weeks they wanted me to come back. I wasn't really fit to go, but Mr. Bittles wanted me to help him out, he was short of help, and I just limped along. 30

Q. When you went back he paid your full wages after the time you went back? A. Yes, sir; he paid me full wages after that.

Q. So you were out of wages for two weeks, were you? A. Yes, sir.

Q. How did you feel during those two weeks? A. Well, the first night I felt all broke up, dazed; 40

Adam Heckman—Cross.

that was the shock, I guess; they didn't know whether I would get over it or not, a man of my age, I was kind of shaky like.

Q. How did you feel? A. Well, I felt pretty bad.

Q. In what way? A. Well, I felt dizzy in my head.

10 Q. Have any pains? A. Yes, sir; pains in my head and then I had pains on the side under the arm.

Q. How long did those pains last? A. The real pains in my arm lasted for about a month.

Q. You are all right now? A. I am all right now.

Q. You have been back and worked steadily since? A. Yes, sir; I worked steady since.

20 CROSS EXAMINATION BY MR. CRUDEN:

Q. Now, Mr. Heckman, what kind of a car did you use in delivering, or, rather, what kind of a wagon did you use in delivering your pies? A. A regular pie wagon.

Q. A regular pie wagon? A. Yes, sir.

Q. It has a step in the back? A. Yes, sir.

Q. Then a passageway through the center? A. Through the center.

30 Q. Which way were the pies in the shelves, on each side? A. On each side.

Q. And your seat is where? A. In front of the wagon.

Q. And is the front open, from your seat to the back? A. From the seat in the back?

Q. Was it open from your seat to the back? A. Yes, sir; it is all open.

40 Q. It is all open and was at the time? A. At that time it was all open from the seat to the back, all open; now I have a curtain back of that.

Q. Were you standing on the step putting the

Adam Heckman—Cross.

pies in your wagon? A. No, sir; I was inside the wagon putting the pies in my arm.

Q. You were inside the wagon? A. Inside the wagon.

Q. When you got down from the wagon, Mr. Heckman, did you go down facing the front, or as they generally get down off these steps, stepping down backwards? A. I stepped down backwards.

Q. You stepped down backwards? A. Yes, sir. 10

Q. With the pies in your left hand? A. Left arm.

Q. About how high, Mr. Heckman, were they piled up,—just show me? A. Just about that high (indicating), about 15 pies, about that high.

Q. Were they piled up as high as your eyes? A. As high as my eyes?

Q. Yes. A. No.

Q. They were not? A. No. 20

THE COURT: Just a second. He said he stepped down backward. Let us find out just how he was facing, so far as the wagon was concerned. I don't know whether he got on the steps facing the wagon, backed down the steps, or whether he went down with his back towards the wagon.

Q. Mr. Heckman, when you had loaded the pies in your arms you stepped from the floor of the wagon to the step of the wagon? A. Yes. 30

Q. Did you step down backwards, facing the front of your wagon, on the step? A. Yes, sir.

Q. Onto the step? A. Onto the step.

THE COURT: You mean you backed down the steps?

THE WITNESS: Yes, I got down, then shut the door.

Q. Then you stepped backwards from the step to the sidewalk? A. Yes, sir. 40

Adam Heckman—Cross.

Q. And the wagon was facing in which direction? A. West.

Q. And the automobile was coming from which direction? A. From the east to the west.

Q. To the west? A. Yes, sir.

Q. In other words, you were both facing in the same direction? A. Exactly.

10 Q. When you stepped off, where were you going to deliver pies? A. Across the street.

Q. Across the street; in other words you were on the opposite side from where you were making your deliveries? A. Yes, sir.

Q. In the middle of the block? A. In the middle, between Mott and Lexington Street. There is one thing I want to say, after I stepped off the wagon, which I always generally do, not generally—

20 MR. CRUDEN: I object to that. I don't care what you generally do. The question is what did you do then.

THE WITNESS: All right, go ahead.

Q. When you stepped down from the wagon and started to cross the street, you had the pies in your left hand? A. Yes, sir.

Q. You were facing your wagon this way (indicating)? A. Yes, sir; west.

30 Q. You stepped down backwards? A. Yes, sir.

Q. Then turned this way (indicating)? A. Yes, sir.

Q. To your left? A. I was going across the street.

Q. You had the pies in your arm in this way? A. Yes, sir; that is the way I carried the pies, like that (indicating).

40 Q. So that when you turned to the left, Mr. Heckman, when you had the pies this way (indicating) will you tell me how you looked down the street? A. As we generally do—

Adam Heckman—Cross.

Q. I don't want that; tell me what you did then? A. I looked up the street a hundred feet; we generally always look; always looked.

Q. Now, Mr. Heckman, please—

MR. BERNHARD: He has answered you. He said, "I looked before I started to cross."

MR. CRUDEN: Well, he was saying he did what he generally does. 10

THE COURT: Yes, he did say that.

THE WITNESS: You ought to listen to what I tell you.

THE COURT: Wait a minute, Mr. Heckman.

MR. CRUDEN: I don't want to get him confused on it.

THE COURT: Ask him your next question. 20

Q. Will you tell me, Mr. Heckman, when you had the pies in your left hand, 15 pies, piled up here, how you could look over the pies to see up the street? A. Well, I have 15 pies up here, there is enough space for me to look over the pies, they are little pies, not big pies; these small pies don't take such a pile of room, they don't take so much room, and therefore there is enough room so that I can look over to see when I stand up and look over; I stand up and hold the pies like this (indicating); you don't carry them high up like this (indicating). 30

MR. BERNHARD: With your hand beside your waist?

THE WITNESS: Yes, sir; with the hand like that; then a man can look and see what is coming.

Q. Then you started to cross the street? A. I looked before I started to cross the street; I looked a hundred feet up. 40

Adam Heckman—Cross.

Q. What did you see when you looked? A. I saw nothing; I didn't see anything.

Q. You didn't see anything? A. It was all clear.

Q. The whole road was clear? A. No, I saw an automobile down the street—excuse me—I saw an automobile down the street.

10 Q. How far from you? A. Oh, well, I suppose, I don't know how many feet it was; it was there, anyway.

BY THE COURT:

Q. Was it going; was it moving? A. It was moving; yes, sir; going at a good rate.

BY MR. CRUDEN:

20 Q. You just answered, as I remember it, to a question of your counsel, you said it was about fifty feet away.

MR. BERNHARD: He did not. What do you mean to do? You stop right there; you can't mislead the witness. He said within a hundred feet.

MR. CRUDEN: I understood he did mention fifty feet in the course of his testimony.

30 MR. BERNHARD: I never heard of such effrontery. I will not let you put words in the witness' mouth and I don't intend to stand for it.

THE COURT: I will rule on it if you object but I want counsel not to argue with each other, or not to put words in the witness' mouth.

MR. CRUDEN: Well, I had no such intention.

40 THE COURT: You mentioned that fifty feet; I don't remember this witness saying that.

Adam Heckman—Cross.

MR. CRUDEN: Then strike out the question.

Q. You looked to east about a hundred feet?

A. Approximately a hundred feet.

Q. And saw this automobile coming towards you? A. Yes.

Q. Then you started to cross the street? A. Yes, sir.

10

Q. After you saw the car? A. Yes, sir.

Q. Was it moving? A. Yes, sir.

Q. Towards you? A. Towards me, it must have been.

Q. Where were you when the car struck you—
A. On the—

Q. Just a minute, Mr. Heckman: Had you crossed the first set of car tracks, or the second set of car tracks? A. I crossed first one track and I was just on the inside track when I was struck.

20

Q. You were struck on your left side, as I understand? A. Yes, sir; on the left side.

Q. By which side of the automobile? A. By the left side of the automobile.

Q. When the car struck you, as I remember your testimony, and have it here, it knocked you down? A. Yes, sir.

Q. How fast was the car going? A. How fast was it going?

30

Q. Approximately; was it going very very fast, at a rapid rate of speed? A. Well, I will tell you, it was coming fast enough to push me along for a few feet and stopped; it pushed me along and I held onto the car; it pushed me along before it stopped.

Q. When you first saw this car, Mr. Heckman, approximately how far was it from where you stood? A. When I first saw the car?

40

Adam Heckman—Cross.

Q. Yes. A. Oh, I don't know; I couldn't tell you how many feet.

Q. I beg your pardon. A. I couldn't tell you how many feet.

Q. Approximately, was it fifty feet, or twenty-five feet? A. I couldn't tell you how many feet it was.

10 Q. Well, you have testified that you saw it about a hundred feet? A. Yes, I saw the car, yes, way down the street.

Q. Was the car near you, Mr. Heckman? A. Near me?

Q. Yes, when you saw it. A. Well, I guess the car, I should judge, was about forty or fifty feet; I should judge, of course.

20 Q. When you saw this car forty or fifty feet away from you, why didn't you stop and let the car go past? A. Because I could get across the street, if he sounded a gong or blowed a horn.

Q. Would that have assisted you to get across the street? A. That would make me stop, that is all.

Q. You saw the car, didn't you? A. Towards me.

Q. But, as I understand, you say if he sounded a horn you would have gotten across the street? A. I never heard no horn. I never heard nothing.

30 Q. You just testified, Mr. Heckman, that you went across the street, after seeing the car approaching forty or fifty feet away, because you could get across the street; then, you said, in answer to another question I think, that if he had sounded his horn or bell, that you could have gotten across the street, what do you mean? A. I would have stopped where I was.

40 Q. Why didn't you stop? A. Because I didn't hear no horn; there was no alarm; he should blow a horn or ring a bell.

Adam Heckman—Cross.

Q. When you saw this car, you knew it was coming toward you, so would the mere fact that he sounded this horn convince you that he was coming? A. Certainly, then I would know there was a car coming.

Q. You crossed in the middle of the block; it wasn't in a crossway there, where you crossed?

A. No, in the middle of the block.

Q. When the car pushed you along, after the car stopped, mind you, where were you with relation to the car? A. Where was I? **10**

Q. Yes. A. Oh, after he pushed me he stopped.

Q. Where? A. In front of the car, picking myself up.

Q. How was your body, with relation to the car; were you sitting down facing the car, or did you face so that the car, or part of the car was over your body? A. One leg was right in front of the car; it pushed me along this way (indicating), dragged me along; I got up and held onto the car. **20**

Q. You held onto the car? A. I held onto the car as much as possible.

Q. What part of the car pushed you along, Mr. Heckman? A. Well, I was struck with the headlight.

Q. Well, you were knocked flat, were you? A. Knocked right flat, I was knocked down before I knew it. **30**

Q. Did the headlight push you along? A. I told you, the headlight on the left side.

Q. Mr. Heckman, do you know that if the headlight knocked you flat, as it hit you, and proceeded five feet more as you were pushed along, the wheel would have run over you? A. I know I was pushed along and then he stopped; then they picked me up. **40**

Adam Heckman—Cross.

Q. He stopped within five feet? A. Then they picked me up.

Q. You don't know then, as I understand it, what part of the car pushed you along, or anything of that kind, but the headlight knocked you flat in your tracks? A. That part of the car knocked me down.

10 Q. Didn't you testify in an accident case some week after you were injured? A. Did I testify to an accident case?

Q. In an accident case? A. Did I?

Q. Yes. A. No.

Q. How much did you pay all together for doctor's bills, Mr. Heckman, just four dollars, as I understand it? A. I paid the doctor his four dollars.

20 Q. He is your family physician? A. My family physician.

Q. Was he subpoenaed to come here? A. Yes, sir.

Q. How much did you pay out all together for medicine? A. Oh, I don't know how much I paid out.

Q. Approximately? A. Have you got to know that, how much I paid out?

30 Q. I want to know, approximately, how much you paid out. A. Well, I might itemize the bill if you want it.

MR. BERNHARD: You answer the question, Mr. Heckman. If you don't know, say you don't know. If you do know, tell him. What is it?

A. Well, there is two dollars in medicines I bought in the drug store, and a couple of dollars or so from Dr. Hager, my family physician.

40 Q. Would two dollars cover everything you paid? A. No, I said I bought two dollars worth

Adam Heckman—Cross.

of medicine in Irvington Center, and I got, I think, a couple of dollars worth from Dr. Hager.

Q. That was included in your bill, that two dollars? A. No, that wasn't included in his bill.

Q. It was not included in his bill at all? A. No.

(Examining counsel thereupon produces and offers to the court for examination the interrogatories and answers made by the plaintiff). **10**

Q. You remember signing these, do you not; this is your signature, is it (referring to signature on answers to interrogatories)? A. Yes, sir; that is my signature.

Q. Now, will you tell the Court, Mr. Heckman, if you spent more than two dollars for this medicine, why you testified in answer to these interrogatories that you only spent two dollars? A. I only spent—did you say I only spent two dollars? **20**

Q. That is all you say here. A. I spent two dollars up in Irvington Center.

Q. Were there any other expenses that day? A. That day?

Q. Yes. A. I suppose there was; I don't remember if there were; there was a taxicab took me up from down there, took me home. **30**

Q. You didn't pay for it? A. No; then the doctor down on the corner of Mott Street that dressed my wounds.

Q. That wasn't paid for? A. That aint been paid; no, sir.

Q. Did you ever receive a bill for either of them? A. No, I haven't received a bill for either one of them.

Q. If you were delivering pies across the street, **40**

John C. Dowling—Direct.

Mr. Heckman, why were you on the opposite side of the street with your wagon? A. Because I couldn't go on the left side of the street; you can't drive on the left hand side.

Q. You could, if you had gone up to the corner and turned around. A. I could have turned, yes but I was on this side of the street as I imagined—

10 MR. CRUDEN: I object to that; I don't care what he imagined.

Q. If you went up the street and had gone to the corner you could have turned? A. Yes, but I was on this side of the street, my horse was west on the right side of the street, that is where we got to drive.

Q. If you had gone up to the corner and turned around you could have gotten on the other side and you would not have been struck?

20

MR. BERNHARD: I object to that as calling for a conclusion; he is not obliged to do it.

THE COURT: Objection sustained.

JOHN C. DOWLING, SWORN.

DIRECT EXAMINATION BY MR. BERNHARD:

30

Q. Mr. Dowling, you are in the undertaker business? A. Well, I am in the capacity of assistant; I am assistant.

Q. You live where, 40 Bowery Street? A. At that time it is called Bowery Street; now it is Fleming Avenue.

Q. It was called Bowery, now it is called Fleming Avenue; is that right? A. Yes.

Q. Did you see Mr. Heckman that day? A. Yes,
40 sir.

John C. Dowling—Direct.

Q. Did you see the automobile which had collided with him? A. I did.

Q. What was the location of the automobile on the Bowery? A. Well, Mr. Heckman's wagon was located about 34 Bowery Street, 32, rather; I lived at 40; I happened to come out of the door and I saw his wagon.

Q. Did you see him? A. Yes, I was the person that picked him up and took him to the drug store. 10

Q. Where did you go from? A. Well, from the other side of the street; he was struck on the inner tracks.

Q. That is what I wanted to know; when you speak of tracks, do you refer to them as tracks, or rails? A. Well, rails, in the inner rails; midway between the tracks.

Q. Which way was the automobile coming when it struck him? A. Coming toward Jersey City, I presume. 20

Q. Which way was it headed? A. West.

Q. What sort of a car was it? A. Well, I should judge a runabout they term it.

Q. What was Mr. Heckman's general condition? A. I don't know his condition, I took him up to see the druggist.

Q. Who took him to the doctor's office at the corner of the cross street? A. I don't know.

Q. Which store did you go to? A. To Henry West, corner of Bowery and Mott Streets. 30

Q. You did not actually see him struck by the automobile? A. No, I saw him prostrate.

Q. On the ground? A. Yes.

Q. How far away from the automobile? A. Well, the automobile was trying to get away, in fact, the people told me—

MR. CRUDEN: I object to that.

Q. The man that was driving the automobile, 40

John C. Dowling—Cross.

what did he try to do? A. Well, he was anxious to get away.

Q. Do you recognize this second man as being the man who was driving? A. I saw the gentleman; yes, sir.

Q. Did you hear Mr. Greenbaum—a gentleman named Greenbaum, in conversation with him?

10 A. Well, I merely heard the conversation, that Mr. Greenbaum said it was the chauffeur's fault.

Q. Is that the man he was talking to (indicating)? A. That I cannot say; I don't remember the man.

Q. You cannot be sure about it? A. I cannot exactly be sure.

CROSS EXAMINATION BY MR. CRUDEN:

20 Q. You say the wagon was in front of 32? A. 32, I should judge, yes.

Q. You were standing on the same side of the street? A. Yes, between 40 and 38.

Q. The first that you saw of the accident, as I understand you, was when you saw Mr. Heckman after it happened? A. After it happened?

Q. Yes. A. When it happened, when he was over there.

30 Q. I mean to say that you did not see the car hit Mr. Heckmen? A. No, I didn't see the car hit him.

Q. Where was he when you first saw him, Mr. Dowling? A. He was lying between the track.

Q. He was lying down? A. Yes, between the east and west tracks.

Q. Where was the car—had the car stopped? A. Why, the car was stationary then.

40 Q. What was Mr. Heckman's position, his body, as to the car—you understand what I mean—was he under the middle of it, under the front of it, or under the wheel of it? A. Well, he was picked

John C. Dowling—Cross.

up before I got there; I tried to assist him; he was prostrate and I was going over there from where I was standing.

Q. You did not see him at that time then, when he was lying down? A. Yes, from where I was standing.

BY THE COURT:

Q. You saw him in a prostrate condition; what position was he in relation to the car? A. What do you mean, which way he fell? He fell, he was knocked face forward, from my point of view. 10

Q. Facing the car? A. From my point of view.

BY MR. CRUDEN:

Q. The point is, Mr. Dowling, was he in front of the car, was he near the left hand side, or was he near the right hand side? 20

THE COURT: Or was he under the car.

A. Well, no, sir; I didn't see him under the car.

Q. In what position was he? A. From what I could judge—

MR. CRUDEN: I object to that, if your Honor please; it isn't what he should judge.

THE COURT: That is right; strike it out. 30

(To the Witness:) Tell us exactly what you saw?

A. Well, I saw the man prostrate, as I said before; that is all I saw; he was picked up; I took his arm and brought him to the drug store; that is all I did for him; left him in the drug store.

Q. He was up on his feet when you got there?

A. Well, he had some assistance.

Q. I mean, he wasn't lying down? A. No. 40

John C. Dowling—Re-Direct.

Q. So that you don't know what position he was in, with reference to the car, just after he was struck? A. What do you mean by position, sir?

Q. Just what the Court has tried to get you to explain; just how his body was situated? A. (No answer.)

10 MR. CRUDEN: That is all. I will waive the answer; it isn't material.

Q. Will you tell me, Mr. Dowling, is 40 Bowery further west than 32—I am not familiar with the direction of the street. A. No, it is further east.

Q. Well, in answer to a question of counsel you said the driver of the car tried to get away; what do you mean by that; what did he do to try to get away? A. Well, from information I was given—

20 MR. CRUDEN: I object to that.
THE COURT: Strike it out.

RE-DIRECT EXAMINATION BY MR. BERNHARD:

Q. Mr. Dowling, will you listen to me a minute? A. Yes.

Q. Did you, or did you not, see this man lying on the ground? A. Yes, sir.

30 Q. Just listen for a minute. Where was he lying with reference to the front of the car? That is a plain English question. A. Why, I should judge the middle of the tracks, between the tracks on the street.

Q. Well, of course he was, Mr. Dowling; you are an intelligent gentleman. Did I say anything about the middle of the street? I asked you where he was lying with reference to the front of the automobile. A. Why, the front of the automobile—why, he was lying in front, of course.

40 Q. We have been hours trying to get that answer from you. That is where he was lying, in front of the automobile? A. Yes, sir.

Motion for Non-Suit.

BY THE COURT:

Q. How far in front was he? A. Well, I should judge three feet.

BY MR. CRUDEN:

Q. Mr. Dowling, will you please tell us why you told me, when you first saw him after the accident, after you got there, that he was standing up, where you say now, you have just testified, in answer to Mr. Bernhard's question, that he was lying on the ground? Where did you see that from, when you got to him or from No. 40? A. Where I was going over to him, about 34 Bowery, I saw the fellow in the automobile, and I saw a fellow pick him up, before I got there. 10

THE PLAINTIFF RESTS.

MR. CRUDEN: If your Honor please, I would like to ask for a non-suit on behalf of the defendant. In the first place, it has been shown by the plaintiff's own testimony that he was on the opposite side of the street from where he was delivering the goods; that he came off the wagon backwards; that he saw the automobile approaching some forty or fifty feet away coming towards him, and that he, instead of stopping and waiting for the automobile to go by, proceeded to cross the track, thinking he could get through. The decisions all definitely hold that this is contributory negligence, where one does not use ordinary care, and we contend that if this man had used ordinary care and had waited until the car passed, that he would not have been injured, and that it was be- 20 30 40

Motion for Non-Suit.

cause of his contributory negligence that he was injured. There has been nothing shown, no fault of the defendant's here. There is only one man—

10 THE COURT: Wait. Your contention is this, is it, when a man sees an automobile coming along the street, that he has got to stop right then and there and wait until the automobile passes him, otherwise he is guilty of contributory negligence—in other words, the man has no right to cross the street when an automobile is approaching? Is that your contention?

MR. CRUDEN: No.

20 THE COURT: Has everybody got to jump like mad every time he sees an automobile in the street? Is that the attitude you are taking?

MR. CRUDEN: No, that is not my contention.

THE COURT: That is the attitude you have taken so far. If you have any precedents in which this is called contributory negligence in law, let us have it, or I will deny your motion. I don't believe you have any such precedents.

30 MR. CRUDEN: If your Honor please, I would like the opportunity just to read to you Chapter 156 of the Laws of 1915 (Reading): "Any person crossing a street at any place other than a crosswalk, shall do so at his own risk."

THE COURT: That is what Chapter?

MR. CRUDEN: That is Part 4, Section 12, on page 297. We contend—

MR. BERNHARD: Why don't you read the rest of it?

40 MR. CRUDEN: I will read the rest of it.

Motion for Non-Suit.

(Continuing): "Nothing in this regulation, however, shall relieve drivers of vehicles from being constantly vigilant and exercising all reasonable care to avoid injuring either persons or property." Now, in the case of *Baier v. Camden Railroad*, 68 New Jersey Law, it was held—

THE COURT: What page?

MR. CRUDEN: This is 42. A motorman is not chargeable with negligence because he fails to apprehend that a boy, who is riding on the back of a wagon, will jump from the wagon and run under his car, while he is engaged in looking at the wagon in order to pass it without a collision. Our contention is, if your Honor please, that this man, when he saw the car coming toward him, when he went across it was contributory negligence, and through the negligence on his part he was struck. That is the first contention. The second is, that there has been no evidence here of any fault on the part of the defendant; that through the carelessness or negligence of the defendant this accident occurred, and we hold that the burden is on the plaintiff to show that it was through some careless or negligent act of the defendant that the plaintiff was injured, and we ask for a non-suit on the evidence.

THE COURT: The burden is upon the plaintiff to make a prima facie case. I will deny your motion and you may have an exception, because I am of the opinion that the plaintiff has made out a prima facie case—that is on the second ground; and on the first ground I will deny your motion also.

MR. CRUDEN: I pray an exception.

THE COURT: Exception granted.

Elmer S. Hoyt—Direct.

The Case of the Defendant.

ELMER S. HOYT, SWORN.

DIRECT EXAMINATION BY MR. CRUDEN :

Q. Mr. Hoyt, were you driving the automobile which struck Mr. Heckman? A. I was.

Q. Are you a licensed driver? A. Yes, sir; I am.

10 Q. Have you your license with you? A. I have.

Q. How fast were you going at the time of the accident, approximately? A. Well, between eight and ten miles an hour.

Q. Where did this accident occur? A. On Fleming Avenue, between Lexington and Mott Streets.

Q. That was formerly the Bowery? A. Formerly Bowery Street.

Q. Which side of the road were you driving on? A. The north side of the road.

20 Q. What position, with reference to the car tracks? A. I was in the west bound car track.

Q. You were going westerly? A. In a westerly direction.

Q. Did you see Mr. Heckman before you were struck? A. Why, within a couple of feet of him, I saw him.

Q. Well, did you see a wagon there as you approached? A. I did.

30 Q. How was that facing? A. Facing in the same direction as I was going.

Q. Could you see Mr. Heckman on the wagon? A. The first I saw of him he was on the step of the wagon.

Q. How was he with reference to his back or face? A. His back was towards me; he was facing the same direction we were travelling.

40 Q. How far were you from him at that time when you saw him? A. Well, I was about at the corner of Mott Street; I believe that is the first street that we come to.

Elmer S. Hoyt—Direct.

Q. Was he standing on the step? A. I don't know whether he was standing on the step or whether he was going inside the wagon.

Q. When you approached Mott Street, which is the first street, as I understand it, the intersecting street— A. I believe it is.

Q. Did you sound your horn? A. I did.

Q. Where was the wagon standing in relation to the two intersecting streets or the block there? **10**

A. Approximately in the middle of the block.

Q. Just tell us what happened, if you will, please? A. I was coming along in the west bound car track, the engine throttled down to about eight or ten miles an hour; I saw this wagon as I approached Mott Street, and was going straight through; when I got within about three feet of the rear of the wagon Mr. Heckman got off the step of the wagon, backwards, and started to cross the street, that is, to go to the south side of Bower Street, and he only took about two steps when the right hand lamp of our machine struck him in the left arm. **20**

Q. Did you have time, from the time that you saw him, as he stepped down from the wagon to the time of the accident, to stop the car? A. Not without hitting him, no, sir.

Q. Did it knock him down? A. Well, it had a tendency to swing him around, so that he grabbed the radiator to support himself from falling. **30**

Q. Did he go down? A. Why, as he tried to keep his feet, the momentum of the machine pushed him backwards and his feet went under the machine.

Q. How far was it that you stopped, within how much distance? A. Oh, at the most, five feet.

Q. Did the car push him along? A. Well, I don't know—yes, it pushed him along; I don't know that he was prostrate when it pushed him **40**

Elmer S. Hoyt—Direct.

along; he tried to keep his feet, but it was going faster than he could hold his feet and it pushed him along and his feet went under.

Q. What happened then? A. Well, we stopped, we got out to see whether he was injured; by that time someone helped him up.

10 Q. Yes. A. I suppose he was excited, I don't know whether he was injured or not; he held his left arm at the left elbow; we couldn't get any satisfaction, the crowd started to come around, so we gave him our number and name, and took his name, and we went on.

Q. Did you attempt to get away at all? A. Absolutely not, sir.

Q. You stopped as soon as you struck him? A. I did.

20 Q. You say, now—I want to get this clear—you say that when Mr. Heckman started out from the wagon, to cross the street, you were how far away? A. I should say about three or four feet.

Q. Had Mr. Heckman reached the inside track of the two west bound tracks at all? A. No, sir.

Q. Just produce your license for identification? A. (The witness thereupon produces card and hands same to examining counsel.)

30 MR. CRUDEN: I would like to have that marked for identification (handing card to Court).

The license card was thereupon marked Exhibit D-1 for identification.

Q. I don't know whether I asked you this question or not; where did the car strike Mr. Heckman? A. Struck him in the left elbow.

Q. In the left elbow? A. Yes, sir.

40 Q. The car didn't knock him down at that time, then, I believe you said? A. No, sir; it had a tendency to swing him around, and he tried to support himself on the radiator.

Elmer S. Hoyt—Cross.

Q. How was Mr. Heckman facing when you first saw him? A. He had his back towards me, facing west, when I first saw him.

Q. Did you see him turn around and look in your direction? A. No, sir; I did not.

Q. He was on the wagon until you got within three or four feet of him? A. Yes, sir.

Q. Then he stepped off, and what did he do? A. He started to cross the street; he took two or three steps, perhaps. **10**

Q. Did he have anything in his arms or hands? A. He had pies in his arm.

Q. Can you testify as to how the pies were piled up? A. No, I couldn't do that.

CROSS EXAMINATION BY MR. BERNHARD:

Q. How did he get on the ground? A. He stepped off the step. **20**

Q. No; on the ground, after the accident? A. He was knocked down.

Q. Who knocked him down? A. The machine that I was driving.

Q. He was hit by the right hand lamp of your machine? A. The right hand lamp.

Q. So that, at the time, he had passed the wheel and fender and got as far as between the fender and the right lamp? A. They are so close— **30**

Q. I know they are, but he had passed them? A. Yes, he passed the wheel.

Q. He really reached the point of collision before you got there, didn't he? A. Well, approximately at the same time.

Q. How far was your car away when you saw him on the step? A. Well, I just passed Mott Street corner, about.

Q. How many feet away is that? A. Figuring 200 feet to the block, that is about 150 feet. **40**

Elmer S. Hoyt—Cross.

Q. So that when he was on the step of this wagon you were 150 feet away; is that right? A. Well, about; I won't say exactly.

Q. Of course; but approximately? A. Approximately, yes.

Q. How fast were you going then? A. About eight or ten miles an hour.

10 Q. You were going at the rate of eight or ten miles an hour before you reached the point opposite the street, three feet away? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Did you continue to watch Mr. Heckman? A. Well, that I don't remember, whether I did or not.

Q. You don't remember whether you did, or whether you did not? A. No, sir.

20 Q. The next time that he came to your attention was when he appeared on the track, is that right? A. No, sir; I saw him get off the step.

Q. All right; when he got off the step, how far away were you? A. About three feet away.

Q. With his back still to you? A. Yes, sir.

Q. Then he had to walk three or four feet to the track, didn't he? A. About three feet; yes, sir.

Q. So that you had to go three or four feet while he had to go three or four feet? A. Yes, sir.

30 Q. You were going at eight or ten miles an hour? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. You were on the west bound track? A. Following the west bound car track.

Q. Going at eight or ten miles an hour, within what distance can you bring your car to a stop?

A. Well, I never tried to figure that out; within its own length, that is sure.

40 Q. When you saw him on the step did you continue to sound your horn? A. No, sir.

Elmer S. Hoyt—Cross.

Q. You didn't think he was going to stay on the step forever, did you? A. I certainly did not think he was going to cross.

Q. Never mind; answer the question. Did you think he was going to stand on the step forever?

A. No, I did not.

Q. You knew he had his back to you? A. I did.

Q. You expected him to get off the step? A. I don't know. I thought he would ultimately get off. **10**

Q. Knowing he would jump off, why didn't you sound an alarm or give him warning? A. Well, I was so close to him at the time that when he did eventually get off I expected I would safely pass that wagon without anybody being in the way.

Q. As you saw him on the step from the time that you were 150 feet away until you were within three feet of him, you didn't expect him to stay there, so why didn't you sound your horn? A. I sounded it at the crossing. **20**

Q. Why didn't you sound your horn; answer my question? A. I don't know why I didn't sound it.

Q. Well, you didn't? A. I didn't say I did, did I?

Q. You expected him to get off? A. I don't know whether I expected him to do anything.

Q. You did not? A. No.

Q. You expected him to stay there forever? A. I don't know; I wasn't concerned with him. **30**

Q. You were not concerned with him? A. No, sir.

Q. That is the reason why you didn't sound your alarm? A. I told you I sounded it as I was approaching the crossing, that is all; I didn't expect him to get off that wagon in front of me or I would have sounded the horn.

Q. When he took three or four steps, did he run **40**

Abraham Cohen—Direct.

or walk? A. Well, he stepped off and he walked; he didn't run.

Q. All right; now, he stepped off, and then he turned around after he got off, did he? A. Yes, half turned to the left.

Q. He turned to the left; that brought his left side towards you? A. Yes, sir.

10 Q. Whereas his right side had been towards you? A. No, sir; his back had been toward me.

Q. He made a half turn, then? A. Yes, sir; a half turn.

Q. Did you see him get down from the step to the ground? A. Yes, I saw him get down.

Q. Where was your car then? A. I was approaching.

Q. Well, how far away?

20 THE COURT: He has been over that ground.

MR. BERNHARD: Will you just bear with me?

THE COURT: He very, very frankly said he was within three or four feet.

MR. BERNHARD. All right; I am satisfied.

ABRAHAM COHEN, SWORN.

30 DIRECT EXAMINATION BY MR. CRUDEN:

Q. Mr. Cohen, you are the owner of the car in question? A. Yes, sir.

Q. Is the car licensed? A. Yes, sir.

Q. Were you on the car on the day of the accident? A. I was.

Q. Where do you live? A. 340 13th Avenue, Newark, New Jersey.

Q. When was this accident? A. What day?

40 Q. Yes. A. On May 11th.

Abraham Cohen—Direct.

Q. What time of day? A. About noon, about 12 o'clock.

Q. Who was driving the car? A. Mr. Hoyt.

Q. Where were you sitting? A. In the rear seat.

Q. On which side? A. On the right side.

Q. Do you know about how fast you were going?

A. I should judge not over ten miles an hour; between eight and ten miles an hour. **10**

Q. In what direction were you going? A. Going toward Newark, going westerly.

Q. Was the horn sounded at the cross street?
A. At the corner.

Q. What did you see in the street as you came up Bowery Street? A. After we passed the corner I saw a pie wagon standing there.

Q. About where was it? A. About the middle of the block. **20**

Q. How was it facing? A. Facing westerly, the same direction in which we were going.

Q. Did you notice anything about the pie wagon; was there anybody upon it? A. Yes, sir; I saw a gentleman standing upon the back step with his body in the car.

Q. With his body in the car? A. With body in the car.

Q. In the body of the car? The wagon, you mean. A. That is, between those partitions that hold the pies, as if he was putting pies in, sorting them, or something of that kind. **30**

Q. How far off were you when you noticed that?
A. Well, we were down at the corner, I should judge, about a hundred feet.

Q. Did he step down off the wagon? A. Well, just as we got almost, the front of our car was almost to his step, of his wagon, he stepped right off the step and stepped right in front of the car.

Q. Which way was he going? A. That is, he **40**

Abraham Cohen—Direct.

turned off the step, stepped right backwards, and of course, stepping backwards made him step nearer to the car; then he deliberately tried to cross the street; Mr. Hoyt put the—

Q. Just a minute, please. When he stepped backwards off the car, how did he turn, to the right or to the left? A. Well, his body, he half turned; he didn't make any complete turn, he stepped right
10 backwards off the step and faced the opposite side of the street.

Q. To go across? A. To go across.

Q. Did he start to cross? A. As soon as he got off he started right across; he had taken about two steps when the front lamp touched the man before Mr. Hoyt put the brake on.

Q. The front lamp? A. The lamp nearest to him, that is the right hand side.

Q. Then what happened? A. Why, it seemed to
20 me, as soon as the lamp hit his elbow, the pies all fell over the radiator, and in dropping the pies he kind of clutched at the machine, then he sat down; it looked to me as if he was frightened or something, or the jar of the hitting of the elbow caused him to fall down, and he fell down with his body practically under the hood of the machine, as if he was holding onto the radiator, this way (illustrating), and his feet underneath the machine; the
30 car stopped.

Q. About how much distance was there between the left wheel of his wagon and the car track? A. I don't believe there is over three or four feet; it isn't a very broad street.

Q. Did the car drag him along, push him along? A. Well, I believe it did, about a foot or so, of course, the momentum of the car.

Q. What happened to the car then, did it stop at once? A. The automobile?

Q. Yes. A. We stopped right beside his wagon,
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Abraham Cohen—Direct.

we were directly opposite his wagon when we stopped; we were to the left over to about the seat of his wagon.

Q. What did you do then? A. Why, we got out of the machine and we went to pick him up, but somebody else had helped by the time we got to the front of the machine; we asked him if he was hurt; I don't believe he answered me at all at the time; and somebody led him over to the sidewalk; I asked him if he was hurt, and he said his arm hurt; somebody asked us for our name and I gave him my name and address and the car number; I couldn't find out anything else; we waited around about ten minutes; people around there seemed to know him, and he just sat there, and we went on. 10

Q. Did you see Mr. Heckman look in your direction? A. No, sir. 20

Q. As I understand you, then, Mr. Cohen, as he stepped off the wagon backwards, he stepped off sideways and started right across the street? A. Stepped off the back of the wagon, his arms piled up with pies, about up to there (indicating); I should judge there must have been about fifteen pies in his arm; he stepped right off this way (indicating), and took another step that way (indicating), and at the same time the machine hit him at the elbow; it wasn't a big step; if we were doing three miles an hour we would have hit him. 30

Q. Were you watching Mr. Heckman all the time? A. Yes, sir; I kept my eye on him all the time from the time we left the corner.

Q. Was there anything in his actions to indicate that he was going to cross the street? A. No, sir; I never dreamed for a moment that he was going to cross the street; I thought he was delivering pies on the side that the wagon was on; that is the way it seemed to me; that is the reason I didn't say anything. 40

Abraham Cohen—Cross.

Q. You are sure, then, having watched him, that he did not look up the street in the direction in which the car was coming? A. I am positive he did not; yes, sir.

CROSS EXAMINATION BY MR. BERNHARD:

10 Q. You were uncertain as to what he was going to do, weren't you? A. I certainly was; yes, sir.

Q. That being so, why didn't you direct your chauffeur, or the man that was driving your car, to give him warning? A. Why it is impossible.

Q. Oh, it was impossible? A. The man had his head in the wagon, we didn't know that he was going to go across.

20 Q. That is just exactly what I am driving at; and not knowing whether he was going to get off, or going to get on, and knowing you were going to pass the side of the wagon, where you were going. A. Why, we blew the horn at the crossing.

Q. Why didn't you give him warning after that? A. I don't know how you can; you got all you can do to watch out ahead, the man driving, with out watching to see if anybody gets off and goes on the wrong side of the street.

30 Q. You didn't know whether this man was going to cross or not? A. No, sir.

Q. You know that he wasn't going to stand there always? A. Yes, sir.

Q. You knew he had pies— A. I didn't know whether he was delivering or collecting.

Q. You know he was going to get off that step some time? A. I suppose so.

40 Q. That being so, and not knowing which way he was going to go, why didn't you give an alarm? A. It wouldn't do any good.

Edward J. Haugh—Direct.

Q. That is your conclusion. Were only two of you on the car? A. Three of us.

Q. Where is the other witness? A. I don't know.

Q. Why isn't he here?

MR. CRUDEN: Oh, well, if Your Honor please, I object to that.

THE COURT: You need not answer that. 10

MR. CRUDEN: You know very well, Your Honor—

THE WITNESS: He has been at every other hearing.

THE COURT: You can ask him who it was, but that he isn't here speaks for itself.

MR. BERNHARD: I will withdraw it.

BY MR. CRUDEN:

Q. Where does this witness live? A. In New York City; he has been at every other session. 20

THE DEFENDANT RESTS.

EDWARD J. HAUCH, Recalled:

BY MR. BERNHARD:

Q. At the point where this accident happened, what is the distance between the curbsone and the rail on that side of the street, the first rail? A. Well, aronud ten or twelve feet; the street is 35 feet wide. 30

NO CROSS EXAMINATION.

BOTH SIDES REST.

Colloquy.

10 MR. CRUDEN: If Your Honor please, in this case we have as witnesses—you have heard all their testimony and I am not going to go over it and take your time. The only man who has testified to this accident for the plaintiff was Mr. Heckman. He testified that he was struck by the automobile, but that he saw it 50 feet away; that it was coming towards him, and that in spite of the fact that he saw it approaching him he proceeded to cross the street, instead of standing there as a prudent and careful man would do, and allowing or permitting the car to pass. There is a little difference in the testimony as to just where he was struck, which side of the car, but it is not material for there was only that difference

20 between the width of the car in their testimony, and I don't think that goes to the heart of the matter at all. I am not going to go over the testimony at all; you have heard it. I just want to submit to you for your consideration, first, this act which I have read, that when a person crosses a street other than at a cross walk, he shall do so at his own risk; and our contention is, if

30 Your Honor please, that when this man crossed the street delivering his pies, when he could have safely driven his wagon around on the other side and stopped on the side on which he was to deliver; and he crossed the street other than at a cross walk, under this statute, he did so at his own risk, and he took the risk, unless they can show negligence—gross negligence or gross carelessness—on the part of the driver of this automobile, and his con-

40

Colloquy.

tributory negligence should result in finding a verdict in our favor.

In the case *Blaser v. Receivers*, 30 N. J. Equity 240, the Court held that the negligence of a railroad company does not relieve a person attempting to cross its tracks from the duty of exercising ordinary care and prudence.

Now then, even if there was—and we contend there was absolutely no evidence sufficient to show here that there was any carelessness on the part of the driver of the car—but even if there was, that did not relieve Heckman from exercising ordinary care and prudence, and if he had done that, he would have stopped still and permitted the car to pass; there was nothing else on the street, he testified, and he would have been delayed just a minute, but instead, he took a chance; and the court held, in the case of *Schwanemede v. North Hudson Railway Company*, in 67 N. J. Law, 449, that if it appears that the trolley car motorman is not going to respect your rights to cross the street first, you must wait or you are guilty of contributory negligence. Again, in the same case, the Court held, that a person cannot take chances and hold himself free from contributory negligence. There is a difference between an unforeseen peril and one recklessly encountered.

We contend that this was foreseen; he knew it was a peril, and if he did not get out of the way and let the car go by, as the court held here, the plaintiff's own negligence contributes to his own injury and he cannot recover.

Colloquy.

In the case that I have already cited to Your Honor on the motion for non-suit, *Baier v. Camden Railway Co.*, 68 N. J. Law, 42, a motorman is not chargeable with negligence because he fails to apprehend a boy, who is riding on the back of a wagon, will jump from the wagon and run under his car, while he is engaged in looking at the wagon in order to pass it without a collision. And we contend, that there was no reason in the wide world why Mr. Hoyt, when he was watching this wagon, to think that this man, instead of going into the stores on the right hand side, would cross the street and deliberately walk in his path. Of course, if Mr. Hoyt had apprehended—by looking at the gentleman you can't tell whether he is going to deliberately run in front of his car but if he apprehended for a minute that the man was going to cross the street, in violation of all common usage, if it is not anything else, he would have stopped; but this man was taking a chance of avoiding the car and getting across before it came.

Now, again, in the case of *Smith v. Public Service Railway Co.*, 75 Atl. 937—well, that really doesn't matter; I covered that in another case.

By reasonable care is meant such care as an ordinary prudent person would exercise in the face of encountering circumstance or circumstances. That is in *Fox v. Great Atlantic & Pacific Tea Co.*, 56 Vroom, 729.

Now, if Your Honor please, we contend that it was through the contributory negli-

Colloquy.

gence of Mr. Heckman that the accident occurred; that Mr. Hoyt did everything that was within his power, for he was driving the car at a slow pace, and that Mr. Heckman had taken a chance in deliberately stepping off this wagon in front of this car and he went straight across the street; and we contend that if he had not taken that chance then there would not have been any accident, and that the fault is not the defendant's. 10

Now, in the case of *McCormick v. Hesser*, 71 Atlantic 55, the plaintiff saw the automobile coming toward him and heard the warning when it was only 130 feet away and then, without looking again or paying any more attention to it, walked into the street, where he knew, or should have known, the automobile would pass. Now if Your Honor please, I don't know whether you heard that or not, but it is a case right in point—the plaintiff saw the automobile coming toward him and heard the warning— 20

THE COURT: What is that reference?

MR. CRUDEN: That is *McCormick v. Hesser*, 71 Atlantic, 55. The plaintiff saw the automobile coming toward him and heard the warning when it was only 130 feet away, and then without looking again or paying any further attention to it, walked into the street where he knew, or should have known, that automobile would pass. We think it was the duty of the plaintiff, when he saw the machine approaching, heard the warning given by the defendant, and ascertained where it was 40

Colloquy.

going, and that in walking into the street in front of an approaching vehicle without using his eyes or making some attempt to avoid a collision, but deliberately placing himself in a position of danger, he was guilty of negligence which contributed to the accident. The judgment below should be reversed.

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Now, if Your Honor please, that is what he did in this case. This man says he saw the automobile fifty feet away, and he started to cross thinking he could make it.

Those are all the cases I have had time to go into, and we contend it was through the contributory negligence of the plaintiff that this accident occurred. We ask for a judgment for the defendant.

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MR. BERNHARD: If you have the slightest idea, your honor, that this plaintiff was guilty of negligence, then I want to be heard before you decide it, but I don't believe you want to hear me.

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THE COURT: The Court is satisfied that the driver of the defendant did not exercise the ordinary care, diligence and prudence that the driver of an automobile ought to exercise going along a public street when he sees somebody in front of him that is likely to be in his path. Now, the driver of this automobile, Mr. Hoyt, very frankly stated that the only time he blew his horn was at the intersection of Mott Street—I believe it was—at any rate it was at the intersection; that after seeing this man at the pie wagon he sounded no other signals and he continued on right through, never swerving, but keeping right on; that the

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Colloquy.

collision between the man and the auto occurred at the right hand side. It would seem to me, if the driver had been exercising care as a driver of a machine should have, that upon seeing this man, after passing the intersection, having blown his horn as a warning coming to the intersection, as he apparently did, to warn any crossing vehicles, that after passing that crossing, when he saw this man, he would have sounded this horn, giving warning. That it appears by the evidence that the plaintiff, after getting off the wagon, looked to the left and saw this man in the distance, and then proceeded to cross the street. I don't understand the law to be, where you see a machine on the street, that you have no right to proceed any further, or even to cross the street, when ordinary prudence would indicate that you can safely make the crossing. If that were so, why people, who were going to cross streets where automobiles were in sight, would never be able to cross streets, because there are always automobiles in sight in the streets, especially in cities, and a man would never be able to cross if he could not cross when an automobile is in sight. The automobile driver must exercise care; he has no right to run the man down and not give a signal warning or anything else. The law does not place that man's life—the pedestrian's life—in their hands when they catch them off the crossing, though they may think they do not have to swerve out, but continue right along and kill them. But that is not so; the law does not place the lives

Colloquy.

of any human being in their hands. The Court feels in this case that the very admission of the driver himself, in proceeding at the rate that he said he did, eight or ten miles an hour, shows negligence, while, on the other hand, the plaintiff did exercise prudence and care and looked, and he had a right to assume, that from the distance that he says it was from him, he could make that crossing all right. I wonder, and I doubt, whether the drivers of machines and those who ride in them appreciate what eight or ten miles an hour means. I wonder if they have ever figured out what it means; they say they can stop within a few feet, within the length of the machine, when they are going at that rate; it cannot be done. They do not realize, they do not appreciate what that speed means, eight or ten miles an hour; ten miles an hour means eleven feet a second, or something like that; they do not appreciate that ten miles an hour is some speed in a machine going at that rate. They do not appreciate it and in that way a good many accidents are brought about. It is the negligence, because it is up to them, as drivers, to exercise due care and diligence. I presume in this case the driver may have thought he was going to make his car go by, as they often do, and he did not blow his horn, which is carelessness, but they do it in that way. I am of the opinion that the plaintiff has established that this accident was due to the negligence of the defendant and was not due to any lack of care or prudence on his part. I will give a verdict, therefore which will include \$42.60, that is,

Colloquy.

the actual expenses. Now, we have to consider, in that, the questions of the feelings of the plaintiff, his age, and the shock. There is another point which drivers do not appreciate, the damage that they are doing. The law charges a greater degree of care where an old man is involved. They think it is the same as banging into a lamp post; the man gets a little bruised and he is better. They never consider the man, the damage to his nerves, and his suffering and mental anguish that he may undergo at the minute of the accident, and the general upset that is undergone in the human system when one of these things happen. I sometimes think if some of them did realize it they never would drive a car. I do not think they appreciate it, or they never give it any thought; that is the average human thoughtlessness; they never give these things a thought. They do not appreciate at all, when these things happen, that the man ought to get some kind of damages that will compensate him, not only for the actual physical damages that he received, but for the suffering and the anguish that he might have undergone as a result. I will give a judgment in this case for \$192.66.

MR. CRUDEN: Now if Your Honor please, I would like to take exception to the judgment and give notice of appeal.

Certificate.

I, Harry Schirmer a stenographer designated by the Court and sworn, do hereby certify that the foregoing is a true copy of the proceedings on the trial of the case of Adam Heckman, plaintiff, against Abraham Cohen, defendant, at the Orange District Court.

Harry Schirmer
Stenographer.

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TO THE CHIEF JUSTICE OF THE SUPREME COURT:

I do certify the foregoing transcript in the above entitled case, to be used on the appeal herein.

Daniel A. Dugon
Judge of Orange District Court.

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Opinion.**NEW JERSEY SUPREME COURT.**

FEBRUARY TERM, 1916.

ADAM HECKMAN,

*Plaintiff-Appellee,**vs.*

ABRAHAM COHEN,

*Defendant-Appellant.*On Appeal
from the
Orange Dis-
trict Court.

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Submitted February term 1916. Decided June 8, 1916.

Before Justices Parker, Minturn and Kalisch.

For the Appellant, McDermott and Enright.

For the Appellee, John A. Bernhard.

Per Curiam:

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This is an appeal from a judgment rendered against the appellant in favor of the appellee in the Orange District Court, for the sum of \$192.66 and costs. The case was tried by the court, sitting without a jury.

The appellant urges three grounds of reversal of the judgment. (1) The refusal of the trial court to grant a motion for a nonsuit. (2) The refusal of the trial judge to find for the defendant. (3) That the court improperly allowed punitive damages.

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We think the motions for a non-suit and to find for the defendant were properly refused. This is a case where a person while crossing a public street in full view of the driver of an automobile for a distance of one hundred and fifty feet, was hit by the automobile and injured.

The plaintiff drove a pie wagon. He stopped his wagon on the right side of Bowery Street, in

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Opinion.

the middle of a block. There was an exit from the rear of the wagon, by means of a step, from which the plaintiff according to his story alighted, with fifteen pies piled on his left arm, and started on his way across the street to make delivery of the pies, when he was struck by the automobile.

10 It appears that the automobile that struck the plaintiff was on the trolley tracks and directly behind a trolley car which was proceeding in a west-erly direction. The plaintiff testified that when he first saw the automobile it was about one hundred feet away and that he had walked from the rear of his wagon, the distance variously estimated at nine and fifteen feet, and had passed over one track and was just on the inside track when he was struck by the automobile.

20 For the appellant, the driver of the automobile, testified that he was driving on the trolley tracks behind the trolley car at eight or ten miles an hour; that he saw the plaintiff leave the rear of his wagon and start across the street; that at that time the automobile was 150 feet away; that he gave no signal of the approach of the automobile to warn the plaintiff. It further appears that the plaintiff was seventy years of age at the time of the accident. We think that it was a question of fact for the trial judge to determine whether 30 the defendant, under the surrounding circumstances, by the exercise of reasonable care could have avoided running into the aged plaintiff. The trial judge found that the defendant could have avoided the accident by the use of reasonable care. The speed at which the car was driven under the surrounding circumstances and the failure of the driver of the automobile to sound a warning to the aged plaintiff were the basis of the court's find- 40 ing that the defendant was negligent. We think the facts properly justified this inference. We

Opinion.

also think that court was justified in finding that the plaintiff was not guilty of contributory negligence. The plaintiff had the right to reasonably expect that the driver of the automobile having the plaintiff in sight as he was crossing the street would have his car under control and would avoid running into him. The driver of the automobile could turn either to the right or left, and therefore, the reason of the rule applicable to street railways which must proceed on the tracks is not applicable to wagons which may turn readily from their course in various directions. **10**

The reason urged for a reversal of the judgment that the trial judge awarded punitive damages is not sustained by the record in the case. The finding of the trial judge plainly shows that he awarded damages to the plaintiff for the pain, suffering and anguish which resulted to the plaintiff as a consequence of his injuries. **20**

The judgment will be affirmed with costs.

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Rule Affirming Judgment.**NEW JERSEY SUPREME COURT.**

 ADAM HECKMAN,

vs.

 ABRAHAM COHEN.

} On Appeal.

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This cause coming on to be regularly heard at the February term of the New Jersey Supreme Court, in the presence of Messrs. McDermott & Enright, of counsel for the appellant and John A. Bernhard, Esq. of counsel for the respondent and the Court having considered the matter and the argument of counsel.

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It is on this 20th day of June, 1916, on motion of John A. Bernhard, ordered and adjudged that the judgment of the Orange District Court be and hereby is in all things affirmed with costs.

Entered, June 20, 1916,

On motion of

JOHN A. BERNHARD, Atty.

Damages & costs below, \$207.91

Costs, Sup. Ct. 22.00

\$229.91

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A true copy.

WM. C. GEBHARDT,

Clerk.

Served June 26, 1916.

Filed, July 6, 1916.

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Notice of Appeal.
NEW JERSEY SUPREME COURT.

ADAM HECKMAN,
Plaintiff-Respondent

vs.

ABRAHAM COHEN,
Defendant-Appellant.

Action
 at Law.

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To JOHN A. BERNHARD, ESQ., Attorney of Respondent:

Please take notice that the above-named defendant hereby appeals to the New Jersey Court of Errors and Appeals, in the last resort in all causes, from the decision of the New Jersey Supreme Court entered June 20th, 1916, affirming in all things the judgment of the Orange District Court in favor of the plaintiff and against the defendant.

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The following are the appellant's grounds of appeal.

(1) Because the Supreme Court affirmed the judgment of the Orange District Court, whereas it should have reversed the judgment of the Orange District Court.

(2) Because the Orange District Court refused to non-suit the plaintiff.

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(3) Because the Orange District Court refused to direct a verdict in favor of the defendant.

(4) Because the Supreme Court did not hold that it was error for the Orange District Court to refuse to non-suit the plaintiff.

(5) Because it was error for the Supreme Court not to hold that it was error for the Orange District Court to direct a verdict in favor of the defendant.

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Respectfully yours,
 McDERMOTT & ENRIGHT,
 Attorneys of Appellant.

New Jersey Court of Errors and Appeals

ADAM HECKMAN, <i>Plaintiff-Respondent,</i>	}	<i>On Appeal.</i>
<i>vs.</i>		
ABRAHAM COHEN, <i>Defendant-Appellant.</i>		

Brief for Respondent.

I.

THE DEFENDANT'S DRIVER WAS GUILTY OF NEGLIGENCE.

Hoyt, the driver, saw the plaintiff when he was one hundred and fifty feet away, p. 41, l. 40, on the step of the pie wagon and he did not thereafter sound his horn, or continue his observation, p. 42, l. 40, although the plaintiff had his back to him, p. 43, l. 9, and the driver knew "he would ultimately get off" p. 43, l. 10. The reason he did not sound his horn after he passed the street crossing 150 feet away was because "Q You were not concerned with him?" "A No, sir"; p. 43, l. 32. This *unconcern* was the cause of the accident. The trial court found as a fact from this that Hoyt was negligent.

The testimony of Cohen, the owner, accentuated the carelessness of his driver, p. 48, ll. 10-30, "Q You were uncertain as to what he was going to do, weren't you?" "A I certainly was, yes, sir." "Q You didn't know whether this man was going to cross or not?" "A No, sir." "Q You knew that he was not going to stay there always?" "A Yes, sir." "Q

You knew that he was going to get off that step?"
 "A I suppose so."

In view of the evidence of these two men, it is unimportant, therefore, whether the motion for non-suit should have been granted, because the evidence on the whole case made the contributory negligence of the plaintiff and the negligence of the defendant, a question of fact for the trial judge.

"Upon the admission of this testimony, the negligence of the driver and the contributory negligence of the plaintiff became questions of fact for the jury, whatever may have been the status of the proofs at the close of the plaintiff's case."

Van Cott v. No. Jersey St. Ry. Co., 43 Vr. 229.

From this situation, also, it is obvious that the case of *Baier v. Camden Ry. Co.*, 60 N. J. L. 42, is not in point. There the motorman did not expect the boy to jump from the wagon, while here the driver of the automobile admits that he knew Heckman was likely to leave the step at any moment. By observing the conduct of Heckman as he was bound to do, he could easily have avoided the accident.

II.

WHETHER THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WAS A QUESTION OF FACT AND NOT OF LAW.

Upon appeal from the judgment of a District Court, if there was some legal evidence to support the findings of fact, this Court will not reverse upon the point. These findings show that Heckman was not guilty of contributory negligence. On a motion to non-suit, testimony which

is most favorable to him must be considered, *i. e.*, as he stepped from his wagon to the street the automobile which struck him was "not quite one hundred feet away," p. 16, l. 36. After that he walked about nine feet when the automobile hit him, p. 17, l. 20. In his progress, going at a reasonable pace, Heckman was the first to reach the point of crossing. He got almost clear of the automobile and was hit by the left-hand headlight, p. 18, l. 2. The automobile had traversed one hundred feet, while he had walked about nine feet.

Besides this there were other elements which the trial judge could consider, viz:

(1) Heckman was more than seventy years of age. He was closely beside the track. It was the duty of Hoyt to arrest the progress of his car.

(*Butelli v. Ry. Co.*, 30 Vr., 322.)

(2) He was encumbered with pies. (*Connelly v. Trenton Ry. Co.*, 27 Vr., 700.) The driver was required to take this situation into account. (*Murray v. Paterson Ry. Co.*, 32 Vr., 301.)

(3) He reached the point of crossing first by reasonable means, and was thereby entitled to the right of way. (*N. J. Ry. Co. v. Miller*, 30 Vr., 423.)

(4) He was justified in assuming that Hoyt would stop his car, going only seven or eight miles an hour, if necessary, to avoid a collision, and as a prudent man, he, therefore proceeded across the street.

(5) It was a clear day and the driver had an unobstructed view and he should have operated his car accordingly.

After considering all of these elements, Judge Dugan determined as a fact that he was not guilty of contributory negligence.

Where a motorman has a reason to apprehend danger, he should regulate the speed of his car so that it can be quickly stopped, should occasion require it. (Booth on Street Railways, page 493 and cases cited.) Thus greater vigilance is required under some circumstances more than under others. (Booth, *supra.*) This principle applies strictly to the present case.

McCormick v. Hesser, cited by the appellant is not in point. *There* McCormick walked into the street, "without using his eyes and making some attempt to avoid a collision." *Here*, Heckman was actually upon the street and about to cross; *there*, McCormick had thirty-five feet to traverse before he reached the point of crossing; the automobile was 130 feet away, while *here*, Heckman, had but nine feet to cross, with the automobile more than 100 feet distant.

In *Kraut v. Public Service*, 81 Atl., 751, plaintiff left the sidewalk when a car was approaching rapidly fifty feet away from the point to which he intended to cross the tracks. He walked in front of it, and was struck by it. This Court held that he was not guilty of contributory negligence. *There* the trolley car could not leave the tracks; *here* the automobile could have changed its position, but it did not do so.

The inevitable conclusion to be reached, is that Hoyt paid no further attention to Heckman after he saw him at Mott street, 150 feet away.

"From the testimony the jury could legitimately find that when the plaintiff, after looking when five feet from the track, started to cross, it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car running at a 'pretty fair rate of speed' and sufficiently *distant to be checked, or, if need be, stopped before it should reach him.*

The question of the plaintiff's contributory negligence was, therefore, properly submitted to the jury in the district court. *Migans v. Jersey City, H. & P. Ry. Co.*, 76 N. J. L. 535; *Bauer v. North Jersey St. Ry. Co.*, 74 N. J. L., 624."

In *Peterplo v. Public Service Railway Co.*, 79 Atl., 307, the plaintiff saw a car fifty or seventy-five yards distant coming toward him at a very high rate of speed when he was fifteen or twenty feet from the tracks. The Court held that the question of contributory negligence was for the jury. The opinion of Chancellor Pitney sustains the plaintiff's contention in the present case and particularly that part of it which is quoted as follows:

"Plaintiff had a right to assume that the motorman was aware that if plaintiff, without negligence on his part, reached the point of crossing ahead of the trolley car, he had the right of way, and that such right of way would be respected by the motorman."

III.

My objection to the alleged application of the principle laid down in the case of *Schreiner v. Grinnel*, 97 Atl., 781, is fourfold.

(1) In the case at bar there is no proof that the accident did not occur at a crosswalk. The nearest approach upon that point is on page 39, l. 10, "Q Where was the wagon standing in relation to the two intersecting streets or the block there?" "A Approximately in the middle of the block." There may or may not have been a crosswalk in the middle of this block. The burden is upon the defendant which relies upon the statute to prove affirmatively that a crosswalk was not there.

(2) Cohen was as much responsible for the operation of the car as his driver, Hoyt. He was in the seat alongside of him and in a position to direct the control and operation of the car. He comes, therefore, within the purview of that part of the opinion in the Schreiner case which makes the owner responsible when driving for an injury to a pedestrian at a place other than a crosswalk.

(3) Heckman was not a pedestrian within the meaning of the statute. He was a workman engaged in delivering pies to customers. In the concrete case certified, the facts related strictly to a person crossing a street at a place other than a crosswalk when not in the pursuit of his master's business.

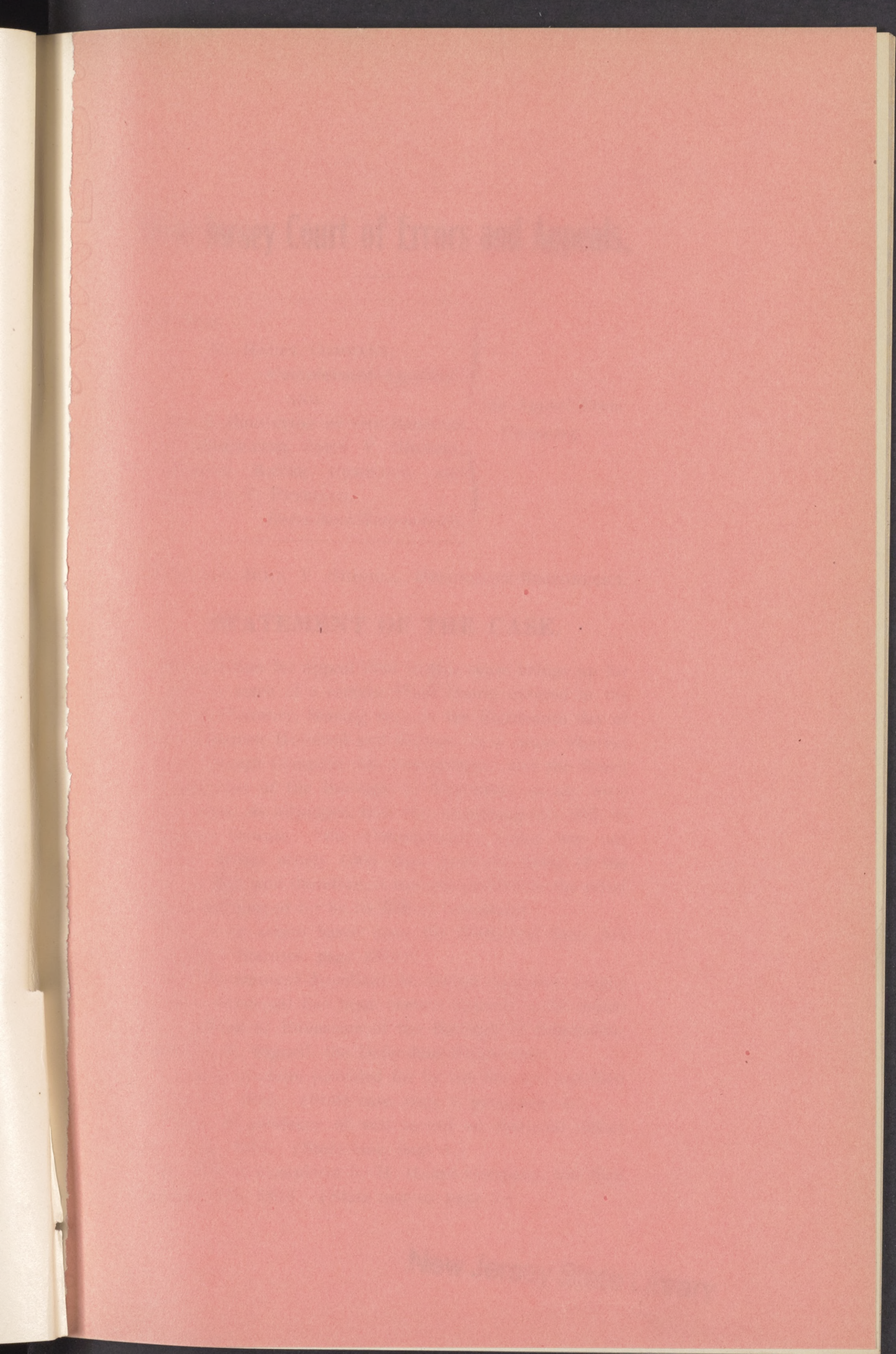
(4) The decision in the Schreiner case is not binding upon this Court in the present case. That decision was based upon five concrete questions, certified to the Supreme Court for its opinion, and does not take into account the important element in this case: viz., the gross negligence of the defendant's driver, which alone caused the accident in the opinion of the trial Court, and other facts as above set out.

If Hoyt had not shown his unconcern about Heckman's progress he could easily have avoided the accident. He admits that he could have stopped the car within its own length, but he never paid any further attention to Heckman after he saw him on the step when he was 150 feet away. The admission of Hoyt, "I wasn't concerned with him," and Cohen to substantially the same effect, makes out a case of gross and willful negligence.

For these reasons it is respectfully submitted that the verdict should be affirmed.

December 4, 1916.

JOHN A. BERNHARD,
Of Counsel for Respondent.



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