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Notice of Appeal.

(Filed, June 19, 1929.)

New Jersey Supreme Court

PASSAIC COUNTY.

10

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

SILK CITY NEWS Co., Inc., and
WILLIAM MANKETO,
Defendants.

Action
at Law.

Notice of
Appeal.

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To

HUMPHREY & SUMNER, Esqs.,
Attorneys for Plaintiff-Appellee,
and

TO WHOM IT MAY CONCERN:

30

Sirs:

PLEASE TAKE NOTICE that the defendant,
Silk City News Co., Inc., hereby appeals to the
New Jersey Court of Errors and Appeals in the
Last Resort in all causes from the whole of the
judgment entered in this cause.

JOHN W. OCKFORD,
Attorney for Defendant,
Silk City News Co., Inc.

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Grounds of Appeal.

(Filed, July 2, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

20

SILK CITY NEWS Co., INC., and
WILLIAM MANKETO,
Defendants.

Action
at Law.

Grounds
of Appeal.

Sirs:

PLEASE TAKE NOTICE that the following
are the grounds of the appeal of the defendant-
appellant, Silk City News Co., Inc., upon its ap-
peal in this Court to the Court of Errors and
Appeals in the Last Resort in all causes in New
Jersey:

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1. Because the Court refused to non-suit the
plaintiff as against the defendant, Silk City News
Co., Inc., at the close of the plaintiff's case.

2. Because there was no legal proof in the case
that the operator of the automobile was an em-
ployee or was acting for or on behalf of the de-
fendant, Silk City News Co., Inc.

40

Grounds of Appeal.

3. Because the testimony established that the operator of the automobile was an employee of and was acting for the defendant William Manketo, and not for the defendant Silk City News Co.

4. Because there was nothing in the evidence from which the Silk City News Co. could be legally held liable for the negligence of the operator of the automobile. 10

5. Because the Court refused to direct a verdict in favor of the defendant Silk City News Co., Inc., and against the plaintiff.

6. Because there was no evidence in the whole case to legally hold the defendant, Silk City News Co., Inc., liable for the negligence of the operator of the automobile. 20

7. Because upon the whole case, the evidence was that the operator of the automobile was an employee of the defendant William Manketo and was not in anywise acting for or on behalf of the defendant, Silk City News Co.

8. Because the evidence was that the driver of the automobile was operating it solely for and under the instructions of the defendant William Manketo. 30

9. Because the action was brought as by an administrator and not by an administrator ad prosequendum, and the Court should have non-suited the plaintiff and not having done so, should have directed a verdict in favor of this defendant upon the said ground. 40

Grounds of Appeal.

10. Because there was no evidence of negligence shown on the part of the driver of the automobile and upon this ground the Court should have granted a non-suit, and not having done so, should have directed a verdict in favor of this defendant.

11. Because the verdict is contrary to the evidence, for the reason that there was no evidence from which the jury might legally find against this defendant.

20 12. Because the verdict is contrary to law for the reason that the jury did not follow the charge of the Court with respect to their necessity of first finding negligence on the part of the driver and with respect to the necessity of their finding that the driver of the automobile was either a servant of the defendant, Silk City News Co., or was doing something for the said defendant at its request or by its acquiescence or permission.

30 13. Because the verdict is erroneous and illegal, for the reason that there was no evidence which the jury could legally consider from which it could find that the defendant, Silk City News Co., was either the owner, operator or in control of the automobile at the time of the accident.

40 14. Because the verdict is erroneous and illegal, in that there is no legal evidence to support it as against this defendant, for the reason that upon the whole case, it affirmatively appears without contradiction, for impeachment, that the driver of the automobile was an employee of and was acting for the defendant Manketo alone.

Summons.

15. Because there was no proof in the plaintiff's case or the whole case, that the administrator's intestate, Elizabeth Meicke, also known as Elizabeth Michael, died as a result of the injuries sustained, and the allegations of the complaint that, "she died as a result of the injuries so caused by the defendant," were not sustained, and upon this ground, the Court should have granted either a non-suit or a direction of verdict, and the verdict rendered is illegal and erroneous, for the reason that there is no proof in the whole case to sustain this necessary allegation. 10

JOHN W. OCKFORD,
Attorney for Defendant, 20
Silk City News Co., Inc.

To,
HUMPHREYS & SUMNER, Esqs.,
Attorneys for Plaintiff-Appellee.

Summons.

(Filed May 18, 1928.)

The State of New Jersey to Silk City News Co. 30
and William Manketo:

(Seal)

You are summoned to answer the annexed complaint of William Meicke, administrator of the goods, chattels and credits of Elizabeth Meicke, also known as Elizabeth Michael, deceased, in an action-at-law in the Supreme Court. And take 40
notice that unless you file your answers to said

Complaint.

complaint with the Clerk of the Supreme Court at Trenton within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

10 Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton this 15th day of May, Nineteen Hundred and Twenty-eight.

EDWARD J. KELLEHER,
Clerk.

HUMPHREYS & SUMNER,
Attorneys.

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Complaint.

(Filed May 18, 1928.)

NEW JERSEY SUPREME COURT,
PASSAIC COUNTY.

30	WILLIAM MEICKE, Administrator of Elizabeth Meicke, also known as Elizabeth Michael, deceased, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	Action at Law.
	vs.		Complaint.
	SILK CITY NEWS Co. and WILLIAM MANKETO, <div style="text-align: right;"><i>Defendants.</i></div>		

40 William Meicke, administrator of the goods, chattels and credits of Elizabeth Meicke, also

Complaint.

known as Elizabeth Michael, deceased, complains of the defendant as follows:

1. On May 4, 1928, letters of administration upon the goods, chattels and credits of Elizabeth Meicke, also known as Elizabeth Michael, were issued to the plaintiff, said William Meicke, by Honorable John P. O'Brien, a Surrogate of the County and State of New York, and an exemplified copy thereof has been filed, and is now on file in the office of the Register of the Prerogative Court of New Jersey at Trenton. 10

2. At the time of the death of said Elizabeth Meicke, hereinafter set forth, she was the wife of the plaintiff. 20

3. On or about January 18, 1928, defendants were, by their servant, operating a certain automobile at or about the corner of King & Hudson Streets, in the Borough of Manhattan, in the City, County and State of New York.

4. Defendants, at the time and place aforesaid, by their servant, carelessly operated the said automobile and recklessly and negligently drove the same against, and struck, the said Elizabeth Meicke, knocked her down in the street, and so seriously injured her that on or about January 25, 1928, she died as the result of the injuries so caused by the defendants. 30

5. Section 130 of the Statute of New York State, known as Decedent Estate Law, provides that the executor or administrator, duly appointed 40

Complaint.

in said State, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a
 10 wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife, or next of kin do not participate in the estate of decedent, under a will appointing an executor,
 20 other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

6. Plaintiff, as the husband of said Elizabeth Meicke, who died intestate, has sustained great pecuniary loss and damage by reason of her death. Plaintiff demands \$5,000 damages.

30

HUMPHREYS & SUMNER,
 Attorneys of Plaintiff.

40

Answer.

(Filed May 23, 1928.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

WILLIAM MEICKE, Administrator of Elizabeth Meicke, also known as Elizabeth Michael, deceased, <i>Plaintiff,</i> vs. SILK CITY NEWS Co. and WILLIAM MANKETO, <i>Defendants.</i>	} Action at Law. Answer.	10 20
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The defendants, Silk City News Co. and William Manketo, answering the complaint filed in the above entitled action, say:

1. Paragraph "1" is neither denied nor admitted as the defendants have not sufficient knowledge or information to form a belief as to the truth of the same. 30

2. Paragraph "2" is neither denied nor admitted as the defendants have not sufficient knowledge or information to form a belief as to the truth of the same.

3. Defendants deny the allegations set forth in paragraphs "3" and "4." 40

Answer.

4. Paragraph "5" is neither denied nor admitted as the defendants have not sufficient knowledge or information to form a belief as to the truth of the same.

10 5. Defendants deny allegations of paragraph "6."

FIRST SEPARATE DEFENSE:

The defendants, their agents, servants or employees, were not guilty of any negligence that was the proximate cause of injuries to the plaintiff's intestate.

SECOND SEPARATE DEFENSE:

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And for a further and separate defense, the defendants say that the plaintiff's intestate by her own negligence contributed to the happening of the accident alleged in the complaint, and without such negligence on the part of the plaintiff the accident would not have occurred.

30 WHEREFORE, the defendants demand judgment that the complaint herein be dismissed together with the costs and disbursements of this proceeding.

Dated, May 22, 1928.

HERMAN D. EDELSON,
Attorney for Defendants,
Silk City News Co. and
William Manketo,
5 Colt Street,
Paterson, N. J.

40

Replication.

(Filed May 24, 1928.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

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WILLIAM MEICKE, Administrator of Elizabeth Meicke, also known as Elizabeth Michael, deceased, <i>Plaintiff,</i>	vs.	Action at Law.
SILK CITY NEWS Co. and WILLIAM MANKETO, <i>Defendants.</i>		Replication.
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Plaintiff denies the allegation in the second separate defense of the defendants.

HUMPHREYS & SUMNER,
Attorneys of Plaintiff.

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Deposition.

(Filed, February 1, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

20

SILK CITY NEWS Co. and WILLIAM
MANKETO,

*Defendants.*Action
at Law.Depositions
De Bene
Esse.

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The deposition of Saul H. Frankel, a witness
produced on the part of the above plaintiff, taken
de bene esse before me, Sidney J. Turner, a Su-
preme Court Examiner of New Jersey, on the fif-
teenth day of January, 1929, at the office of Messrs.
Breed, Abbott & Morgan, 15 Broad Street, in the
City, County and State of New York, at 2:15 P.
M., pursuant to the annexed stipulation.

SIDNEY J. TURNER,
Supreme Court Examiner
of New Jersey.

APPEARANCES:

40 William M. Sumner, Esq., of Messrs. HUMPHREYS
& SUMNER, for the Plaintiff.

Depositions De Bene Esse.

SAUL H. FRANKEL, being duly sworn according to law, upon his oath, testifies as follows:

Direct Examination by Mr. Sumner:

Q. Mr. Frankel, where do you live? A. At the present time I am living at 1068 Newport Street, Brooklyn, New York. 10

Q. Where are you employed at the present time? A. For the Eastern Steamship Company, Pier 31, North River.

Q. Where were you living on January 18th, of last year? A. At 194 Tapscott Street.

Q. And, where were you employed at that time? A. For the Mallory Steamship Company, Pier 38, North River. 20

Q. Is that in the vicinity of Hudson and Charlton Streets? A. Yes, sir.

Q. On the morning of January 18th, 1928, did you see an accident occur on Hudson Street, New York City? A. Yes, sir.

Q. An accident in which an old lady was hit by an automobile? A. Yes; I was in the back of her when she was hit, but how she was hit, I don't know. She was struck with the front, the motor, right by the motor, and I was in the rear of her. 30

Q. By the motor of the automobile? A. By the motor of the automobile. Naturally she was struck by some object connected with the automobile.

Q. Where were you when you first saw the automobile that hit this woman? A. It is a year old now, so I can't recall how far I was away from it. 40

Depositions De Bene Esse.

Q. The accident,—it occurred at about what time, in the morning? A. About half-past seven.

Q. In the morning? A. Yes.

Q. And you were on your way to work from Brooklyn, were you? A. Yes, sir; most likely.

10 Q. How did you come from Brooklyn to go to your work that morning? A. Well, I arrived on the east side of the street.

Q. What street? A. Where the subway is located,—on Varrick Street.

Q. At Park and King Streets? A. Yes.

Q. And where were you going from the subway station,—in what direction? A. Going west.

Q. Through King Street? A. Yes.

20 Q. Towards the Hudson River that would be? A. Yes.

Q. Now, at what point near the corner of King and Hudson Streets did you notice this automobile? A. It was on the northwest corner.

Q. Northwest? A. I was in the middle of the block, between King and Charlton, on Hudson Street.

30 Q. Going in which direction? A. I was going to the bakery on Hudson Street and between King and Charlton Streets.

Q. On what side of the street? A. On the west side of Hudson Street.

Q. And were you then on the west side of Hudson Street when you first noticed this automobile? A. No; that automobile passed me by when I was just trying to make the crossing.

Q. Where were you then? A. Crossing from the east side to the west side of the street.

40 Q. At what corner? A. At King and Hudson Streets.

Depositions De Bene Esse.

Q. And did this automobile attract your attention then? A. Yes, certainly; it almost bowled me over.

Q. Why,—how? A. That man had the motor running and when I was about a few feet away he starts up the automobile.

10

Q. How fast was the automobile going when he passed you? A. No human being can tell unless you are sitting beside the driver.

Q. Well, was he going fast or slow? A. I presume he was.

Q. That was your opinion at the time,—that he was going fast? A. Yes, that was my opinion.

Q. After he passed you at the corner of King and Hudson Streets, he drove southerly towards Charlton Street, did he? A. Yes, sir.

20

Q. Did you notice any change in his speed as he went through Hudson Street? A. I don't know.

Q. You didn't notice that he slackened up any in speed? A. Not until he struck the object.

Q. And what was the object that he struck? A. Why,—the person that is dead. I didn't know what he struck until I hurried down and got there and seen what it was.

Q. Where were you when he struck this object? A. I am not a public surveyor,—I didn't measure it, and I can't tell you.

30

Q. Well, do you think you were thirty feet away? A. I couldn't tell; I don't know.

Q. Which side of the street was the automobile on which hit the woman? A. On the proper side,—the west side.

Q. Going southerly? A. In the center of the block anyway. It was right on the car tracks. You can't judge how far the distance is.

40

Depositions De Bene Esse.

Q. The north bound or south bound track? A. The south-bound.

Q. Just what location was it where he hit the woman? A. On Hudson Street.

10 Q. With reference to Charlton Street, where on Hudson Street was it that the woman was hit? A. I can't say,—I was too far away.

Q. Charlton Street is the next block south of King Street, is it not? A. Yes, sir.

Q. How near was the woman to the crossing of Charlton and Hudson Streets when she was hit? A. I don't know.

Q. How near were you when she was hit? A. I was about in the center of the block.

20 Q. In the center of the block between King and Charlton Streets? A. If there is a hundred feet to the block, fifty feet; well, say forty-five feet to be sure.

Q. Did you hear the automobile blow any horn? A. I don't remember. I have had a lot trouble during that year, and I can't recall a lot of things that happened that year.

30 Q. What other persons were in the vicinity at the time this accident happened? A. Oh, there was fifty or seventy-five people around there after the accident happened.

Q. Was there anyone in the immediate vicinity at the time the accident happened? A. Yes, a few of them come running out of the restaurant there when they heard that short stop of the car.

Q. Were they any nearer to the woman than you? A. I don't think so. I couldn't tell.

40 Q. What other vehicles were in that block on Hudson between Hudson and Charlton Streets? A. My mind was on the object that was hit; I couldn't tell you that.

Depositions De Bene Esse.

Q. Do you recall seeing any other vehicles? A. There was a street car I know,—everything came right there all at the same time. The street car travelled faster than the human being, and when I got there, there was the street car there.

Q. In what position was the woman when you came to or arrived at the point where the accident had happened? A. I couldn't tell that. When we lifted the car up, she was lying north and south stretched out on the car tracks; I don't remember if her head laid north or south or if her feet laid north or south,—I don't remember that. 10

Q. What was the woman's apparent condition when you picked her up? A. She was bleeding and she had contusion of the head, and cuts. 20

Q. What kind of a car was this, do you recall? A. According to the affidavit,—it says it was a Buick, and I believe it was.

Q. A touring car? A. I couldn't tell if it was a touring car or a bus or whatever it was.

Q. How many people were in it? A. When I arrived on the scene, I found a driver and a helper was with him.

Q. Did you learn the name of the driver? A. I wasn't interested in that at the time. 30

Q. Well, did you hear the driver make any statement to any policeman on the scene at the time? A. The policeman arrived about ten minutes after the accident happened.

Q. Did the driver give his name to the policeman? A. I learned the name of the officer in the Jefferson Street Market after that.

Q. Do you remember what the name was? A. I believe it was "Adamchesky"—something like that. 40

Depositions De Bene Esse.

Q. Did you notice what was on the touring car, —what they were carrying, if anything? A. A lot of papers.

10 Q. Did you notice what papers they were? A. They picked them up,—the Graphic, I presume,—they had other papers besides.

Q. Did you learn the name of the injured woman? A. No.

Q. Didn't you learn that? A. I heard in Court the name was supposed to be Meicke or Michaels, whatever she called herself in the neighborhood.

Q. Were you in the Police Court in connection with this accident? A. I was in the Jefferson Market Court.

20 Q. As a witness? A. Yes, I was subpoenaed to be a witness and appeared, not voluntarily.

Q. In what proceeding was that? A. When the man was held,—whatever they held him in the Jefferson Market for.

Q. What man was held? A. The driver of the car,—to find out what the outcome of the case was going to be.

Q. There was a Police Court proceeding in this matter, was there? A. Yes, sir.

30 Q. And you were a witness there at that proceeding? A. Yes.

Q. Do you remember the license number of the car that caused the accident? A. I couldn't remember that; it is too long ago now.

40 Q. If I were to show you a sworn statement signed by you, your name, and which statement contains that number, would it serve to refresh your memory? A. I want to see that signature of mine.

(Witness was then handed such statement.)

Witness: That is not my signature.

Depositions De Bene Esse.

Q. That is a copy of the statement. This is the original which I now show you,—how about that signature on there? A. Oh, yes, that is my signature.

Q. Will you look at that statement and then tell us after reading that statement if you can recall what that license number was? A. It says P-13619, New Jersey. It must have been the right number when I gave it, but if it is now or not, I can't swear to it. 10

Q. You swore to it then? A. Yes, everything I said there was the truth, although it was compulsory, the way they got that affidavit out of me. It will give me a good lesson on the next case.

Q. That was an affidavit dated January 25th, 1928? A. Yes, nearly a year old. 20

Q. That affidavit was sworn to before F. Harold Weiss, a Notary Public? A. Yes, that gentleman sitting right there,—and I will say he treated me very good.

Q. In that affidavit you stated that you had just started to cross Hudson Street at the southeast corner of King and Hudson Streets when a touring car travelling westward along King Street turned sharply to the left into Hudson Street almost hitting you as it rounded the corner, that you barely escaped being run over by the car, and it was being driven so recklessly and so fast that you watched the car as it gathered speed along Hudson Street;—that was true, was it not? A. When that affidavit was fixed up,—it was being prepared in this office. 30

Q. Was that statement true or not? A. I swore to it, but I can't remember exactly what I said a year ago. 40

Depositions De Bene Esse.

Q. You thought it was true when you swore to it? A. Being prepared here the way affidavits are prepared,—I swore to it, it must be; I won't retract anything I swore to. If I'd had any more brains than that, I would probably be a little better off than a clerk. That was prepared by Harold F. Weiss.

10

Q. But you know it was an affidavit when you signed it, did you not? A. I did sign it yes. I don't retract a word in that statement or affidavit. You can re-copy that affidavit and use it, I have no objection to you using it at Court in Paterson, New Jersey.

20

Q. You also stated in that affidavit which you signed and swore to, that it also almost reached the intersection of Hudson and Charlton Streets and was approximately twenty feet from where you were at the time when you saw that same car run into a woman, knocking her down. Did you swear to that, and is that the truth? A. I didn't mention any woman. That was placed in the affidavit. I said the car hit an object,—I didn't know what it was until I arrived at the scene.

30

Q. You learned that object that was struck was a woman? A. Yes. When we lifted up the women, it was like a bundle of rags; she had fifty or sixty dresses on,—I don't know how many.

Q. You further stated that the driver did not blow his horn and the only sound you heard was the woman's screams,—is that true? A. I don't remember.

40

Q. That is what you swore to. A. I suppose if I said it, it must be true. I don't know. I can't remember what happened a year ago.

Depositions De Bene Esse.

Mr. Sumner: I offer this original affidavit made by Saul H. Frankel and sworn to before F. Harold Weiss, a Notary Public, and ask that it be marked for identification by the Examiner.

(Said affidavit referred to is marked P-1 10
for Identification.)

I HEREBY CERTIFY, that the foregoing deposition of Saul H. Frankel was taken by me stenographically and reproduced to typewriting by me personally; that I have read the same and certify that said deposition as transcribed is a true and correct transcription of the deposition of the said witness as given.

20

SIDNEY J. TURNER,
New Jersey Supreme Court Examiner.

Dated, January 23rd, 1929.

30

40

Stipulation, Annexed to Deposition.

(Filed, January 19, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

20

SILK CITY NEWS Co. and WILLIAM
MANKETO,

*Defendants.*Action
at Law.

Stipulation.

30

It is hereby stipulated by and between Humphreys & Sumner, attorneys of the plaintiff, and Herman D. Edelson, attorney of the defendants that the testimony of Saul H. Frankel, a witness residing in the Borough of Brooklyn, County of Kings and State of New York, shall be taken *de bene esse*, stenographically, in behalf of the plaintiff, to be used upon the trial in the above stated action before Sidney J. Turner, Supreme Court Examiner, at the office of Messrs. Breed, Abbott & Morgan, 15 Broad Street, in the City, County and State of New York, at 2:15 P. M. on Tuesday, the 15th day of January, 1929.

40

It is further stipulated that the notice dated December 21, 1928, of taking the testimony of the said witness before Eugene W. Leake, a Master

Testimony.

in Chancery of New Jersey, on January 8, 1929,
shall be, and the same hereby is, withdrawn.

Dated, Paterson, N. J., December 27th, 1928.

HERMAN D. EDELSON,
Attorney of Defendants. 10

HUMPHREYS & SUMNER,
Attorneys of Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT,
PASSAIC CIRCUIT.

20

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

SILK CITY NEWS COMPANY and
WILLIAM MANKETO,
Defendants.

30

Paterson, N. J., January 28, 1929.

Before—Hon. CLIFFORD L. NEWMAN, Judge, and
a jury.

APPEARANCES:

For Plaintiff: HUMPHREYS & SUMNER, Esqs., by
Mr. Sumner. 40

For Defendants: HERMAN D. EDELSON, Esq.

William Meicke—For Plaintiff—Direct.

(A jury was called and sworn and counsel for the respective parties opened the case to the jury.)

Mr. Sumner: I offer in evidence exemplified copies of letters of administration issued in New York City.

10 (Paper marked Exhibit P-1.)

Mr. Sumner: And a certificate from the Secretary of State that such exemplified copy is filed in the Prerogative Court here in New Jersey.

(Paper marked Exhibit P-2.)

I also offer in evidence the New York Decedent Estate Law of New York State, Sections 130, 131, and 132.

(Book marked Exhibit P-3.)

20 The Court: Just read me that law.

(Mr. Sumner read from Exhibit P-3.)

WILLIAM MEICKE, sworn.

Direct Examination by Mr. Sumner:

30 Q. Mr. Meicke, talk facing this way so the jury will hear what you say. Where do you live, Mr. Meicke? A. 55 Leroy Street, New York City.

Q. Where were you living in January of last year? A. The same house.

Q. What street? A. Leroy. 55 Leroy.

Q. How many rooms do you occupy? A. I got three rooms there which I had to take because we were thrown out of one place, and we had to get in there.

Q. Never mind that. A. I was thrown out.

40 Q. Now, were you the husband of Elizabeth Michael? A. Yes, sir.

William Meicke—For Plaintiff—Direct.

Q. And did she meet with an accident last January? A. Yes, sir.

Q. Do you know the date? A. The 18th of January, about half past seven in the morning.

Q. When did you—

10

By the Court:

Q. January, '28 or January, '27?

Mr. Sumner: 1928.

By Mr. Sumner:

Q. When did you first learn of that accident?

A. When I first learned of the accident? I laid in bed with a hemorrhage, and the officer came to the door. 20

The Court: When was it?

Q. When did you first— A. That was on Wednesday morning, the 18th of January.

Q. What time in the morning? A. She left the house at seven o'clock to take my place, to go down and clean up for me, and half past eight the officer came to the door. So I says, "Who is there?" He says, "The officer." So I wasn't to get out of bed until four or five o'clock that afternoon, so I got up, anyway, and I opened the door. 30

The Court: Never mind about the officer.

Q. You learned at half past eight that morning, through a police officer, did you, that your wife had been injured? A. Yes. 40

William Meicke—For Plaintiff—Direct.

Q. And then how soon after you learned that did you see your wife? A. Well, I didn't see her until the next morning.

Q. Where did you see her then? A. In the hospital.

10 Q. What hospital? A. St. Vincents.

Q. Where is that? A. That is on the corner of Eleventh and Seventh Avenue.

Q. New York City? A. New York City.

Q. What was your wife's condition when you saw her that day? A. Well, she was—

Q. Had she any injuries? What was her condition? Had she any injuries? A. Oh, yes.

20 Q. What were her injuries? A. She had a big gash in her head, her arm was broke in two places, her left leg was broke in two places, and it was all ripped up from the foot up.

Q. Now, how many times after that did you see your wife? A. I saw her every day, sir.

Q. Where? In the hospital? A. In the hospital.

Q. How many days was that? A. That was seven days.

30 Q. Did her condition improve or not? A. No, it didn't improve, because Monday afternoon she turned off, she went for the worse.

Q. She died? A. Yes. Not that Monday, but Wednesday night, nine o'clock, she died, on the 25th.

Q. Now, the morning before the accident what was the condition of her health, the last you saw her before the accident? A. The morning before the accident?

40 Q. Yes. A. She was always in good health, sir.

Q. What? A. And anxious to work.

William Meicke—For Plaintiff—Direct.

By the Court:

Q. Always in good health? A. She was always in good health.

By Mr. Sumner:

10

Q. What did she do? A. She was cleaning offices.

Q. Offices? A. Yes, sir.

Q. How was she employed? By the day or by the week? A. That was paid by the week.

Q. How? A. By the week.

Q. What did she earn? A. Ten dollars a week, sir.

Q. And besides the work, cleaning offices, what work did she do around your house, your rooms? A. She took care of me and also the house.

20

Q. Did she do the cooking? A. Oh, like a wife, she always did cook for me, every day.

Q. And took care of the rooms? A. Yes, sir.

Q. How about your clothes? A. Well, clothes was all mended. If there was stockings to darn she would do that at night. If there was any clothes to be patched she fixed them up. She was always busy. She was always busy. She was a woman in the house.

30

Q. How old do you say she was? A. Sixty-nine.

Q. What is your age? A. Seventy-three.

Q. What did your wife do with the money that she earned? A. Well, of late years we have accumulated a little to put aside, which we didn't need. Of course, I lived a little expensive before that, before I got into Leroy Street. I was paying then thirty dollars rent, and I took this—

40

William Meicke—For Plaintiff—Cross.

By the Court:

Q. He is asking you what your wife did with her money. A. Well, me and her saved together, whatever we could save out of what we earned,
10 Judge.

Mr. Sumner: That is all.

The Court: Cross-examine.

Cross Examination by Mr. Edelson:

Q. What do you do, Mr. Meicke? At what are you employed? A. What?

Q. What is your work? A. Where do I work?
20 I am a porter.

Q. How much do you make a week? A. I make twenty dollars now.

Q. How much did you make at the time of the accident? A. The same thing.

The Court: The same.

Q. How much? A. Same thing.

Q. How much did you say your wife made?
30 Ten dollars a week. A.

Mr. Edelson: That is all.

Mr. Sumner: I offer in evidence deposition taken *de bene esse*, pursuant to stipulation.

The Court: You may read it.

(Papers marked Exhibit P-4.)

(Mr. Sumner read Exhibit P-4 to the
40 jury, as follows:)

Deposition of Saul H. Frankel—Direct.

“SAUL H. FRANKEL, being duly sworn according to law, upon his oath, testifies as follows:

“Direct Examination by Mr. Sumner:

“Q. Mr. Frankel, where do you live? A. At the present time I am living at 1068 Newport Street, Brooklyn, New York. 10

“Q. Where are you employed at the present time? A. For the Eastern Steamship Company, Pier 31, North River.

“Q. Where were you living on January 18th of last year? A. At 194 Tapscott Street.

“Q. And where were you employed at that time? A. For the Mallory Steamship Company, Pier 38, North River. 20

“Q. Is that in the vicinity of Hudson and Charlton Streets? A. Yes, sir.

“Q. On the morning of January 18th, 1928, did you see an accident occur on Hudson Street, New York City? A. Yes, sir.

“Q. An accident in which an old lady was hit by an automobile? A. Yes. I was in the back of her when she was hit, but how she was hit I don't know. She was struck with the front, the motor, right by the motor, and I was in the rear of her. 30

“Q. By the motor of the automobile? A. By the motor of the automobile. Naturally, she was struck by some object connected with the automobile.

“Q. Where were you when you first saw the automobile that hit this woman? A. It is a year old now, so I can't recall how far I was away from it. 40

Deposition of Saul H. Frankel—Direct.

“Q. The accident, it occurred at about what time? In the morning? A. About half past seven.

“Q. In the morning? A. Yes.

“Q. And you were on your way to work from Brooklyn, were you? A. Yes, sir, most likely.

10 “Q. How did you come from Brooklyn to go to your work that morning? A. Well, I arrived on the east side of the street.

“Q. What street? A. Where the subway is located, on Varick Street.

“Q. At Park and King Streets? A. Yes.

“Q. And where were you going from the subway station? In what direction? A. Going west.

“Q. Through King Street? A. Yes.

20 “Q. Towards the Hudson River, that would be? A. Yes.

“Q. Now, at what point near the corner of King and Hudson Streets did you notice this automobile? A. It was on the northwest corner.

“Q. Northwest? A. I was in the middle of the block, between King and Charlton, on Hudson Street.

30 “Q. Going in which direction? A. I was going to the bakery on Hudson Street and between King and Charlton Streets.

“Q. On what side of the street? A. On the west side of Hudson Street.

“Q. And were you then on the west side of Hudson Street, when you first noticed this automobile? A. No, that automobile passed me by when I was just trying to make the crossing.

“Q. Where were you then? A. Crossing from the east side to the west side of the street.

40 “Q. At what corner? A. At King and Hudson Streets.

Deposition of Saul H. Frankel—Direct.

“Q. And did this automobile attract your attention then? A. Yes, certainly. It almost bowled me over.

“Q. Why, how? A. That man had the motor running, and when I was about a few feet away he starts up the automobile. 10

“Q. How fast was the automobile going when he passed you? A. No human being can tell unless you are sitting beside the driver.

“Q. Well, was he going fast or slow? A. I presume he was.

“Q. That was your opinion at the time, that he was going fast? A. Yes, that was my opinion.

“Q. After he passed you at the corner of King and Hudson Streets, he drove southerly towards Charlton Street, did he? A. Yes, sir. 20

“Q. Did you notice any change in his speed as he went through Hudson Street? A. I don't know.

“Q. You didn't notice that he slackened up any in speed? A. Not until he struck the object.

“Q. And what was the object that he struck? A. Why, the person that is dead. I didn't know what he struck until I hurried down and got there and seen what it was.

“Q. Where were you when he struck this object? A. I am not a public surveyor. I didn't measure it, and I can't tell you. 30

“Q. Well, do you think you were thirty feet away? A. I couldn't tell. I don't know.

“Q. Which side of the street was the automobile on which hit the woman? A. On the proper side. The west side.

“Q. Going southerly? A. In the center of the block, anyway. It was right on the car tracks. You can't judge how far the distance is. 40

Deposition of Saul H. Frankel—Direct.

“Q. The north-bound or south-bound track? A. The south-bound.

“Q. Just what location was it where he hit the woman? A. On Hudson Street.

10 “Q. With reference to Charlton Street, where on Hudson Street was it that the woman was hit? A. I can't say. I was too far away.

“Q. Charlton Street is the next block south of King Street, is it not? A. Yes, sir.

“Q. How near was the woman to the crossing of Charlton and Hudson Streets when she was hit? A. I don't know.

“Q. How near were you when she was hit? A. I was about in the center of the block.

20 “Q. In the center of the block between King and Charlton Streets? A. If there is a hundred feet to the block, fifty feet; well, say forty-five feet, to be sure.

“Q. Did you hear the automobile blow any horn? A. I don't remember. I have had a lot of trouble during that year, and I can't recall a lot of things that happened that year.

30 “Q. What other persons were in the vicinity at the time this accident happened? A. Oh, there was fifty or seventy-five people around there after the accident happened?

“Q. Was there anyone in the immediate vicinity at the time the accident happened? A. Yes, a few of them come running out of the restaurant there when they heard that short stop of the car.

“Q. Were they any nearer to the woman than you? A. I don't think so. I couldn't tell.

40 “Q. What other vehicles were in that block on Hudson between Hudson and Charlton Streets?

Deposition of Saul H. Frankel—Direct.

A. My mind was on the object that was hit; I couldn't tell you that.

"Q. Do you recall seeing any other vehicle?

A. There was a street car, I know. Everything came right there all at the same time. The street car traveled faster than the human being, and when I got there there was the street car there. 10

"Q. In what position was the woman when you came to or arrived at the point where the accident had happened? A. I couldn't tell that. When we lifted the car up she was lying north and south, stretched out on the car tracks. I don't remember if her head laid north or south or if her feet laid north or south. I don't remember that.

"Q. What was the woman's apparent condition when you picked her up? A. She was bleeding and she had contusions of the head, and cuts. 20

"Q. What kind of a car was this, do you recall? A. According to the affidavit, it says it was a Buick, and I believe it was.

"Q. Touring car? A. I couldn't tell if it was a touring car or a bus or whatever it was.

"Q. How many people were in it? A. When I arrived on the scene, I found a driver, and a helper was with him. 30

"Q. Did you learn the name of the driver? A. I wasn't interested in that at the time.

"Q. Well, did you hear the driver make any statement to any policeman on the scene at the time? A. The policeman arrived about ten minutes after the accident happened.

"Q. Did the driver give his name to the policeman? A. I learned the name of the officer in the Jefferson Street Market after that. 40

"Q. Do you remember what the name was? A. I believe it was Adamchesky—something like that.

Deposition of Saul H. Frankel—Direct.

“Q. Did you notice what was on the touring car, what they were carrying, if anything? A. A lot of papers.

“Q. Did you notice what papers they were? A. They picked them up. The Graphic, I presume.
10 They had other papers, besides.

“Q. Did you learn the name of the injured woman? A. No.

“Q. Didn't you learn that? A. I heard in court the name was supposed to be Meicke or Michaels, whatever she called herself in the neighborhood.

“Q. Were you in the Police Court in connection with this accident? A. I was in the Jefferson Market Court.

20 “Q. As a witness? A. Yes. I was subpoenaed to be a witness, and appeared—not voluntarily.

“Q. In what proceedings was that? A. When the man was held, whatever they held him in the Jefferson Market for.

“Q. What man was held? A. The driver of the car, to find out what the outcome of the case was going to be.

“Q. There was a Police Court proceeding in this matter, was there? A. Yes, sir.

30 “Q. And you were a witness there at that proceeding? A. Yes.

“Q. Do you remember the license number of the car that caused the accident? A. I couldn't remember that. It is too long ago now.

“Q. If I were to show you a sworn statement signed by you, your name, and which statement contains that number, would it serve to refresh your memory? A. I want to see that signature of
40 mine.

Deposition of Saul H. Frankel—Direct.

“(Witness was then handed such statement.)

“Witness: That is not my signature.

“Q. That is a copy of the statement. This is the original which I now show you. How about that signature on there? A. Oh, yes, that is my signature. 10

“Q. Will you look at that statement and then tell us after reading that statement if you can recall what that license number was? A. It says ‘P-13619, New Jersey.’ It must have been the right number when I gave it, but if it is now or not, I can’t swear to it.”

The Court: P-13— 20

Mr. Sumner: 619.

The Court: 13,619. All right.

(Mr. Sumner continued reading, as follows:)

“Q. You swore to it then? A. Yes. Everything I said there was the truth, although it was compulsory, the way they got that affidavit out of me. It will give me a good lesson on the next case. 30

“Q. That was an affidavit dated January 25, 1928? A. Yes, nearly a year old.

“Q. That affidavit was sworn to before F. Harold Weiss, a notary public? A. Yes, that gentleman sitting right there. And I will say he treated me very good.

“Q. In that affidavit you stated that you had just started to cross Hudson Street at the southeast corner of King and Hudson Streets when a 40

Deposition of Saul H. Frankel—Direct.

touring car traveling westward along King Street turned sharply to the left into Hudson Street almost hitting you as it rounded the corner; that you barely escaped being run over by the car; and it was being driven so recklessly and so fast that

10 you watched the car as it gathered speed along Hudson Street. That was true, was it not? A. When that affidavit was fixed up, it was being prepared in this office.

“Q. Was that statement true or not? A. I swore to it, but I can’t remember exactly what I said a year ago.

“Q. You thought it was true when you swore to it? A. Being prepared here, the way affidavits are prepared, I swore to it. It must be, but I

20 won’t retract anything I swore to. If I had had any more brains than that, I would probably be a little better off than a clerk. That was prepared by Harold F. Weiss.

“Q. But you knew it was an affidavit when you signed it, did you not? A. I did sign it, yes. I don’t retract a word in that statement or affidavit. You can re-copy that affidavit and use it. I have no objection to you using it at Court in Paterson,

30 New Jersey.

“Q. You also stated in that affidavit which you signed and swore to, that it also almost reached the intersection of Hudson and Charlton Streets and was approximately twenty feet from where you were at the time when you saw that same car run into a woman, knocking her down? Did you swear to that, and is that the truth? A. I didn’t mention any woman. That was placed in the affidavit. I said the car hit an object. I didn’t know

40 what it was until I arrived at the scene.

Edmund Adamchesky—For Plaintiff—Direct.

“Q. You learned that object that was struck was a woman? A. Yes. When we lifted up the woman it was like a bundle of rags. She had fifty or sixty dresses on,—I don’t know how many.

“Q. You further stated that the driver did not blow his horn, and the only sound you heard was the woman’s screams; is that true? A. I don’t remember. 10

“Q. That is what you swore to. A. I suppose if I said it, it must be true. I don’t know. I can’t remember what happened a year ago.”

Mr. Sumner: That is the end of the deposition.

20

EDMUND ADAMCHESKY, sworn.

Direct Examination by Mr. Sumner:

Q. Where do you live, Mr. Adamchesky? A. 79 Plauderville Avenue, Garfield, New Jersey.

Q. Where are you employed? Where are you employed? A. Comfort Bus Company.

Q. Where were you employed on January 18 of last year? A. Silk City News. 30

Q. And where was their place of business? A. Parker Avenue. I have forgotten the number.

Q. In what city? A. Paterson.

Q. What was the nature of their business? A. Delivering newspapers.

By the Court:

Q. Did you say it was the Silk City News Company? A. Yes. 40

The Court: Go ahead.

Edmund Adamchesky—For Plaintiff—Direct.

By Mr. Sumner:

Q. On the morning of January 18, 1928, were you driving a Buick touring car along Hudson Street, between King and Charlton Streets, New York City? A. Yes, sir.

Q. Whose car was that? A. William Manketo's.

Q. Had you driven that car before? A. Yes, sir.

Q. And where were you coming from? A. From the Graphic Building, New York. I was going over to—

Q. Just where were you coming from at that time? A. The Graphic Building.

Q. Where was that? A. On Hudson and King.

By the Court:

Q. Did you say the car was owned by William Manketo? What did you say was its connection with the Silk City News? A. Yes.

Q. What was your connection with the Silk City News? A. I worked for them.

Q. Driving for them then? A. Yes.

By Mr. Sumner:

Q. Had you called, you say, at the Graphic? Just before the accident you were coming from the Graphic office, were you? A. Yes, sir.

Q. What had you been doing there at the Graphic office? A. I got my load of papers there.

Q. How did you go to the Graphic office? Where did you start from? A. Paterson.

Edmund Adamchesky—For Plaintiff—Direct.

Q. Whereabouts in Paterson? A. From the News company.

Q. From the Silk City News Company? A. Yeh.

Q. And you went into the Graphic office, New York, and got some Graphics; is that it? A. Yes. 10

Q. Now, where were you taking them? A. Back to Paterson.

Q. And where were you going to deliver them? A. I was going to deliver them in Bergen County.

Q. To whom? What deliveries were you going to make? A. All the deliveries, all the stores.

Q. To whom were the deliveries to be made? A. From whom?

Q. For whom? A. For the Silk City News. 20

Q. And how many papers did you have on the car? A. Oh, about twenty-two hundred.

Q. And where were they in the car? A. Well, they were—the car was pretty well loaded.

Q. It was a touring car, wasn't it? A. Yes, sir.

Q. Two-seated touring car? A. Five-passenger, two-seated.

Q. Five-passenger touring car. Were the papers on the front seat or the rear seat? A. There was a load in the back, and there was one bundle in front. 30

Q. How big a bundle? A. About that big (indicating).

Q. Was there anybody else on that seat with you? A. Yes, sir.

Q. What is his name? A. Herman.

Q. Is he here in court? A. Yes.

Q. Where did you have this bundle of papers on the front seat? A. In the front, on the floor. 40

Q. Between you and the other man? A. Well,

Edmund Adamchesky—For Plaintiff—Cross.

it is between me and the door, and the other man had his feet on them.

Q. Which door do you refer to? A. The right-hand door.

10 Q. And where is the emergency brake on your car? A. On the right-hand side.

Q. Did you hit a woman on Hudson Street while you were driving this car that morning? A. Yes, sir.

Q. Did you learn her name? A. Yes, sir.

Q. What was done after she was hit? A. Well, I got some help and we lifted the car up and took her out and took her in a taxicab to the hospital.

Q. Did you go to the hospital? A. Yes.

20 Q. Did you learn what her name was? A. Yes.

Q. Do you remember now what it was? A. Yes, sir. Elizabeth Michael.

Q. And what was her condition—apparent condition? A. Oh, she was hurt pretty bad.

Q. Did you notice the nature of her injuries? A. I noticed that her bone was sticking out of her leg.

Q. Did you notice anything else? A. A big bump on her head.

30

Mr. Sumner: That is all.

Cross Examination by Mr. Edelson:

Q. At the time of this accident, Mr. Adamchesky, who instructed you to get these papers?

A. Well, that was my job.

Q. And who instructed you to get the papers?

A. William Manketo.

40

Edmund Adamchesky—For Plaintiff—Cross.

Q. What were your duties, as far as that job was concerned? A. What do you mean?

Q. You say, "That was my job." A. Yes.

Q. What were your duties? A. To get the papers and deliver them.

10

By the Court:

Q. Under whose instructions were you going before this accident happened? A. Under whose instructions? Under Manketo's.

By Mr. Edelson:

Q. Did he instruct you on the day of the accident or—withdraw that. Did you often have to go to New York for these papers? A. Every morning.

20

Q. Every morning? A. Yes, sir.

Q. On the day of this accident, will you tell us, please, how the accident occurred?

Mr. Sumner: Now, if your Honor please, I didn't ask him any questions about the accident. I am perfectly willing to have Mr. Edelson make this witness his.

30

The Court: What questions, Mr. Edelson, do you say were asked that would make this cross examination?

Mr. Edelson: I will withdraw the question.

Q. Whom did you receive your wages from, Mr. Adamchesky? A. William Manketo.

40

Mr. Edelson: That is all.

Edmund Adamchesky—For Plaintiff—Re-direct.

Re-direct Examination by Mr. Sumner:

Q. I don't remember whether I asked you who owned the car.

10 The Court: William Manketo.

Q. What connection, if any, did Mr. Manketo, William Manketo, have with the Silk City News Company, if you know? A. As far as I know, he owned it.

Q. Well, where was his place of business? A. On Parker Avenue.

20 Q. In connection with the Silk City, was it in the same place or somewhere else? A. Well, it was in the same building.

Q. Same office? A. Same office.

Re-cross Examination by Mr. Edelson:

Q. You said, Mr. Adamchesky, as far as you know— A. Yes.

Q. You don't know whether Mr. Manketo actually owned that or whether he—

30 The Court: Owned what? By that you mean the news company?

Mr. Edelson: He said as far as he knew.

The Court: I am asking you which "that" refers to.

Mr. Edelson: I mean the news company.

(Interruption.)

40 A. Well, he paid us.

Motion to Non-Suit.

Q. Now, Mr. Adamchesky, whether or not Mr. Manketo had a contract with the Silk City News for the deliveries, you don't know? A. I don't know anything about it.

Q. But you acted under whose instructions and were paid by whom? A. William Manketo. 10

Mr. Edelson: That is all.

Mr. Sumner: That is the plaintiff's case.

The plaintiff rested.

Motion to Non-suit.

20

Mr. Edelson: If your Honor please, at this time I would like to move for a non-suit. First, on the ground that this case has been started in the name of William Meicke as administrator, and under our practice it is necessary for an administrator to get his letters of administrator ad prosequendum.

(Discussion.)

30

The Court: I will deny the motion on that ground.

Mr. Edelson: Your Honor grant an exception? I would like also to move for a non-suit as far as the defendant Silk City News Company is concerned, in view of the fact that the testimony discloses that the man was employed by William Manketo; was paid by William Manketo; and 40

Motion to Non-Suit.

at the time of the accident the car was owned by William Manketo. There is no evidence in this case to show that the Silk City News had anything to do with it.

10 The Court: The man said, as I wrote it down, that he was working for the Silk City News Company. In the absence of any explanation or denial, I think it becomes a jury question.

Mr. Edelson: Your Honor, allow me an exception.

The Court: Yes.

20 Mr. Edelson: I would like to make a motion at this time for a non-suit so far as both of these defendants are concerned, on the ground that there was no negligence shown on the part of the driver of this automobile which in any way would make either one of these defendants liable.

The Court: Well, I had difficulty in following the reading of the deposition in that respect. Suppose you just read that part which deals with, as you say, negligence.

30 (Mr. Sumner read portions of the deposition of Saul H. Frankel, Exhibit P-4.)

The Court: I will deny the motion. I think it presents a jury question. You may take an exception.

Mr. Edelson: Your Honor allow me an exception.

Samuel J. Fink—For Defendant—Direct.

DEFENDANTS' TESTIMONY.

SAMUEL J. FINK, sworn.

Direct Examination by Mr. Edelson:

Q. Mr. Fink, how are you employed? How are you employed? A. I am connected with the Silk City News Company. 10

Q. Are you familiar with the records of the Silk City News Company? A. I am.

Q. Do you know who the shareholders and different officers or directors of the Silk City News Company are? A. I do.

Q. Will you tell us whether William Manketo is a stockholder or shareholder in the Silk City News Company? A. He is not. 20

Q. In what capacity was he connected with the Silk City News Company at the time—withdraw that. Was he connected with the Silk City News Company as a shareholder or stockholder at the time of this accident? A. He was not.

Q. In what capacity was he connected with the Silk City News Company on January 18, 1928, at the time of this accident? A. Why, he held the office of secretary of the Silk City News Company. 30

Q. And what was his connection as far as these deliveries were concerned?

The Court: What was that question?
(Question read by the stenographer.)

A. Why, he himself didn't direct delivery, although that was part of the man working for Manketo. Although, Mr. Edelson, I didn't fully understand the question as you put it,— 40

Samuel J. Fink—For Defendant—Direct.

Q. Just answer the questions, please.

Mr. Sumner: He says he don't understand the question.

10 Q. Oh, excuse me. At the time of this accident who were the deliveries ordered by Mr. Manketo, as related by the witness Adamchesky—

The Court: It doesn't make any difference about the witness.

By the Court:

20 Q. Who paid Mr. Adamchesky's salary? A. Mr. Manketo.

Q. Out of his own pocket? A. Why, Mr. Adamchesky wasn't working for the Silk City News Company in Bergen County.

Q. Who paid his salary? A. Mr. Manketo.

Q. Out of his own pocket or the Silk City News? A. Out of his own pocket. The Silk City News Company didn't employ him.

30 Q. How was Manketo paid, then? A. Paid whom?

Q. How was Mr. Manketo— A. I am being paid by the Silk City News Company.

Q. I haven't asked you that. I am asking you how Mr. Manketo was paid. A. He was paid by the Silk City News Company.

Q. And out of his salary he had to pay Adamchesky? A. Yes.

40 Q. What was Manketo employed for? A. Well, Manketo had the—was holding office in the Silk City News Company. The Silk City News Com-

Samuel J. Fink—For Defendant—Cross.

pany directs operations in Paterson and vicinity, but not in Bergen County.

Q. How is it that Manketo paid Adamchesky's salary instead of the Silk City paying it? A. Because he had an interest himself from the proceeds of the Bergen County trade, and the Silk City News Company had nothing to do with it. 10

Q. Manketo ran that on his own hook? A. That is right.

The Court: Go ahead.

Mr. Edelson: That is all.

Cross Examination by Mr. Sumner:

Q. What was the business of the Silk City News Company? A. Wholesale newspaper 20

Q. Where did they get their papers? A. Delivered to them in Paterson, and for Bergen County, in New York.

Q. For Bergen County in New York, and the Silk City News gets them in Paterson from whom? A. From the New York publishers.

Q. How are they delivered? A. At that time, by train.

Q. Where did they get these "Graphics"? A. The Silk City News Company got them at the Erie Depot. 30

Q. Isn't it a fact that these "Graphic" newspapers that were on this car at the time of this accident were the property of the Silk City News Company? A. They were not.

Q. How do you know that? A. Because he never came into Paterson with newspapers of any kind.

Edmund Adamchesky—For Pltf.—Recalled, direct

Q. That is the extent of your knowledge, is it?

A. Yes, sir.

Q. Do you know what the arrangement was between Manketo and the Silk City News Company regarding the use of this auto? A. Well, that
10 automobile belonged to Manketo, and he used it for Bergen County territory.

By the Court:

Q. Who used it in Passaic County territory?

A. It wasn't used in Passaic County, as far as I know.

Q. You say it belonged to him and it was used in Bergen County. Is there a difference? A. Pos-
20 tively.

Q. In Passaic whose automobile was it? A. He didn't use it for Passaic County business.

Q. Why do you make that distinction? A. I make the distinction because that car was used for Bergen County only.

Q. You say it was used in Bergen. Why do you think that if that is where he always used it? A. If I made that statement that is my error.

30

Mr. Sumner: That is all.

EDMUND ADAMCHESKY, recalled.

Direct Examination by Mr. Edelson:

Q. You were the driver of the car that struck the woman? A. Yes, sir.

40

Q. Will you tell us how the accident happened? A. Well, I was going down—turned in toward

Edmund Adamchesky—For Pltf.—Recalled, direct

Hudson from King Street and going down Hudson Street, and I hit a woman.

Q. Was it in the center of the block; was it a cross-walk; was it at the corner? A. I think about thirty feet from the corner.

Q. About thirty feet from the corner? A. Yes. 10

Q. Around what time of day was this, Mr. Adamchesky? A. It was early in the morning.

Q. Were there automobiles parked alongside of the road or were they moving? Was there heavy traffic? A. I don't know. I don't know. I didn't notice that. I went to the hospital after that, and I didn't look.

Q. I mean at the time that you were driving on Hudson Street. Didn't you notice whether there were automobiles? A. No. 20

Q. Parked along the curb or whether there were automobiles coming in the opposite direction? A. I didn't notice that.

Q. When did you first see this woman? A. Well, when I hit her.

Q. You didn't see her before then? A. No.

Q. Did she walk off the curb? A. She must have walked off the curb; I didn't know where she came from. 30

Q. Could you have prevented that accident?

The Court: I hardly think you can ask him.

Q. Tell us exactly how it occurred, in more detail. A. I told you. What way do you mean?

Q. You were the driver? A. Uh huh.

Q. Then, how did the accident happen? A. Well, I told you. I was going down Hudson Street and I hit a woman. 40

Edmund Adamchesky—For Pltf.—Recalled, direct

By the Court:

Q. He wants to know how you came to hit her; what was the reason for it. A. Well—

10 By Mr. Edelson:

Q. Where do you work now, Mr. Adamchesky?
A. Comfort Bus Company.

Q. How long have you been working there? A.
About two months.

Q. Did you leave the employ of Manketo on good terms or on bad terms?

20 Mr. Sumner: I think that is immaterial, your Honor.

The Court: I think he is entitled to ask him that.

Mr. Edelson: I beg your pardon?

The Court: You may ask him that.

A. Well, I just quit; that is all.

Q. But you had quite a run-in, didn't you? A.
No, sir, I didn't have no run-in. I quit the job.

30 Q. Did you in any way have complaints made against you or any of— A. No, sir.

The Court: You may ask him about his relations with Manketo, I suppose, whether they are friendly or unfriendly or what.

Mr. Edelson: I am sorry, I didn't get that.

40 The Court: I say, you may ask him what the relationship is between him and Manketo, whether they are friendly or unfriendly.

Edmund Adamchesky—For Pltf.—Recalled, direct

Mr. Edelson: Well, I am trying to ask this witness, because he is very obviously a hostile witness.

The Court: I think you are trying to ask him, as lawyers frequently do, to show whether it is his fault or the other fellow's. 10
You may show that there is ill feeling, if there is.

Q. Anyway, you say you quit? A. That is it.

Q. But not as friends, did you? You didn't quit as friends, though? A. Oh, yes, I did.

Q. Would you say, Mr. Adamchesky, that the—withdraw that. After this accident and after the death of the woman were there any other proceedings, as far as—as a result of this accident, in which you were interested? 20

Mr. Sumner: If your Honor please, I don't see that that is material.

The Court: What are you trying to get at? What are you trying to show?

Mr. Edelson: The depositions mentioned something about Jefferson Market.

The Court: Those depositions have been taken without objection, apparently. 30

Q. Mr. Adamchesky, did you see this woman before you struck her? A. Well, yes.

Q. Pardon? A. Yes.

Q. Where was she when you first saw her? A. In front of my car.

Q. How far in front of your car? A. About two foot.

Q. And was it possible for you to stop in that short distance? A. No, sir. 40

Edmund Adamchesky—For Pltf.—Recalled, direct

Q. Did she—was this a cross-walk? A. Well, about thirty foot away.

Mr. Edelson: That is all.

Mr. Sumner: No questions.

10

By the Court:

Q. Just a minute. Who was it you said you were working for? A. Silk City News.

Q. Who paid you? A. William Manketo.

Q. How did you come to work for the Silk City News and to be paid by him? A. Well, I don't know, but when I collected the money—when a bill was sent to the dealer it was a Silk City News bill.

20

Q. Did Manketo pay you by check or cash? A. Check and cash.

Q. Whose check was it? A. Manketo.

The Court: All right.

By Mr. Edelson:

30

Q. Just one more question. When you were working for the Silk City News, what particular territory did you have? A. Well, I had both territories. I worked in Paterson in the morning, from four to six, and on Saturdays and Sundays and on weekdays I worked in Bergen County.

Q. At the time of this accident what kind of papers were you getting? A. "Graphics."

40

Q. And where were they distributed? A. Well, I was to take Paterson papers as far as Rutherford, give them to the Paterson truck which I was to meet there, so I didn't have to go into Pater-

Edmund Adamchesky—For Pltf.—Recalled, cross
son, and started delivering my run from Rutherford.

Q. Then, Rutherford was your territory? A. Rutherford and Bergen County.

Mr. Edelson: That is all. 10

Cross Examination by Mr. Sumner:

Q. These papers that were to be delivered in Paterson and the truck which you were to meet in Rutherford— A. Yes.

Q. —whose papers were they? A. Passaic and Paterson.

Q. Whose papers were they? Whom did they belong to? A. Silk City News. 20

Mr. Sumner: That is all.

By the Court:

Q. Where did you get the papers for the Silk City News? A. New York.

Q. What were they? "Graphics"? A. The "Graphic." 30

Mr. Edelson: That is all.

Defendants rested.

Motion for Directed Verdict.

Mr. Edelson: At this time I move, on behalf of the Silk City News Company, for a direction of verdict on the same grounds as advanced in the motion for a non-suit.

10 The Court: I don't think the situation has materially changed.

(Discussion.)

The Court: It remains a jury question, I think.

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

The Court: Yes.

(Counsel for the respective parties summed up the case to the jury.)

20 (The Court charged the jury as follows:)

Court's Charge to the Jury.

NEWMAN, J.:

Members of the Jury:

30 This is an action brought by William Meicke, administrator of Elizabeth Meicke, against William Manketo and the Silk City News Company.

The accident, the plaintiff says, occurred on January 18, 1928, in the City of New York, and that is the reason why the suit is brought by an administrator instead of by an administrator ad prosequendum, as it would be if the injury occurred in this State.

40 The plaintiff says that on this occasion this woman was proceeding down Hudson Street and the automobile of the defendant, driven by Mr. Adamchesky, struck her, through the negligence

Court's Charge to the Jury.

of the driver, and that she received injuries from which she died within a few days.

Now, the defendants simply say that there was no negligence on the part of the driver which would make the defendants in any way responsible. So, you see, that presents a sharp issue of fact, a fact with which you are called upon to deal. 10

The plaintiff in this case cannot recover merely upon the fact that his wife was killed, but he can recover only in case he has satisfied you by a fair preponderance of the evidence, that is, by the greater weight of the evidence, that she was killed through the negligence of the defendant's driver. Negligence in that respect means a failure to exercise reasonable care, and unless the plaintiff has satisfied you by a fair preponderance of the evidence that she was killed as a result of the negligence of the driver, then there could be no recovery. 20

Now, the first question that arises to confront you is as to whether this unfortunate woman died as a result of the injuries which she received. There has been no direct testimony on that point, the plaintiff alleging that the circumstances, namely, that she died under such circumstances as have been revealed to you and by reason of the injuries which have been described to you, caused her death. The burden is upon the plaintiff to satisfy you in that respect by a fair preponderance of the evidence. So that the plaintiff, before he may recover, must satisfy you, first, that she died as a result of injuries which she received, and, second, that the injuries which she received were the result of the negligence of the driver of the car. If he has not satisfied you of those two 30 40

Court's Charge to the Jury.

particulars by a fair preponderance of the evidence, then your verdict must be no cause of action in favor of the defendants.

Another question which arises in this case is as to which, if either, of the defendants is liable.

10 Of course, unless the plaintiff has satisfied you by a fair preponderance of the evidence that the woman died as a result of injuries which she received in this accident and that such injuries were the result of negligence on the part of the driver, then you need not consider this question, because your verdict would be no cause of action. If, on the other hand, there is liability in this case, then you proceed to consider the question of which

20 of the defendants is liable.

Now, so far as Manketo is concerned, there seems to be no dispute but that he was the owner of the car and that the driver was employed by this defendant and carrying out the business of this defendant. So that there would be no dispute as to the relationship of Manketo; if anybody is liable, he would, of course, be liable. And then the question remains as to whether the Silk City News Company is also liable. Now, the only

30 way that a person not the driver of the car can be made liable is that the driver of the car was in a legal sense an agent or servant of that defendant. Now, that does not necessarily mean that there must exist a written contract of employment between the two or that anything need be evidenced by any formality, such as a written contract. But the relationship of master and servant is not necessarily created by any written document. It may be created by circumstances

40 as they exist. The test as to whether there is a

Court's Charge to the Jury.

relationship of master and servant is that the driver, the so-called servant, was at the time of the accident engaged in something for the master. That presents a question of fact in this case. The driver, as I recall it, has testified that his salary was actually paid by Mr. Manketo, and I think one other witness also said so. But the driver also said that on this occasion, as I recall it—you must be the judges—part of the load of papers which he was bringing home were to be delivered to another truck at Rutherford, when they were to be relayed to the News Company in Paterson, while the truck he was driving was to continue with the other papers for delivery in Bergen County. So that the question for your determination is whether the evidence has disclosed by a fair preponderance of the evidence that the driver was, technically speaking, a servant of the News Company, that is, whether he was doing something for the News Company, and that at its request or by its acquiescence or by its permission. If he was, then, of course, the News Company would be liable for the acts of their so-called servant.

So that if you find liability the question arises as to whether it shall be Manketo alone or whether it shall be both Manketo and the Silk City News Company.

Now, if you find in favor of the defendants, then your verdict is no cause of action. If you find in favor of one defendant, then as to that defendant you will specify no cause of action. If, on the other hand, your verdict is in favor of the plaintiff, then you would consider the question of the damages to which he would be entitled.

This action appears to be brought under the New York Statute by the administrator for the

Court's Charge to the Jury.

benefit of the husband, who is, incidentally, the administrator. The testimony shows that the woman who was killed was sixty-nine years of age; that the husband is seventy-three; and that at the time of her death she was earning ten dollars a week and was taking care of him personally and keeping the house for him. So that the question would be as to what would adequately compensate this administrator, representing the husband, for the damages which he has suffered because of her death.

Now, of course, no one could prognosticate with accuracy just how long the husband would live to enjoy it. Those are questions which are peculiarly within your judgment and consideration, and what the reasonable sum would be worth in one lump sum today, taking into consideration that otherwise it would be paid in weekly or stated sums during the months to come. The question is how much is it worth today in one lump sum. The statute also provides that you shall specify in your verdict the date of her death, which the testimony shows was January 25, 1928, and that the clerk shall compute interest from that date. So you need not do that. But you must specify in your verdict the amount of damages and the date on which she died, so the clerk may have that as a basis upon which to figure up the interest.

Those are the main questions which are before you for your determination, remembering that the questions of fact are all for you to settle and determine, and you will use, in deciding the questions of fact and the amount of damages which will adequately compensate the administrator, your best judgment and common sense.

You may retire.

Postea.

(Filed, February 5, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

WILLIAM MEICKE, Administrator of Elizabeth Meicke, also known as Elizabeth Michael, deceased, <i>Plaintiff,</i>	Action at Law.	10
vs.	Postea.	
SILK CITY NEWS Co. and WILLIAM MANKETO, <i>Defendants.</i>		20

This case was tried before Judge Clifford L. Newman with a jury at the Passaic Circuit on January 28th, 1929.

The jury rendered a general verdict against the defendants and in favor of the plaintiff for Three thousand (\$3,000.00) Dollars with interest thereon from January 25th, 1928, amounting to One hundred eighty-one dollars and fifty Cents (\$181.50).

CLIFFORD L. NEWMAN,
 Judge.

Judgment.

(Filed, February 5, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

WILLIAM MEICKE, Administrator
of Elizabeth Meicke, also
known as Elizabeth Michael,
deceased,

Plaintiff,

vs.

20

SILK CITY NEWS Co. and WILLIAM
MANKETO,

Defendants.

Action
at Law.
Judgment.

IT IS ORDERED that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of Three thousand one hundred and eighty-one dollars and fifty Cents (\$3,181.50) besides costs to be taxed nisi.

30 Entered February 5, 1929.

On Motion of
HUMPHREY & SUMNER,
Attorneys for Plaintiff.

40

Statement of Judgment.

(Filed, February 5th, 1929.)

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

<p style="margin: 0;">WILLIAM MEICKE, Administrator of Elizabeth Meicke, also known as Elizabeth Michael, deceased, <i>Plaintiff,</i> vs. SILK CITY NEWS Co. and WILLIAM MANKETO, <i>Defendants.</i></p>	}	Action at Law.	10
	}	Statement of Judgment.	20

Damages	\$3,181.50	
Costs	73.16	
TOTAL	\$3,254.66	

30

40

Exhibit P-1.THE PEOPLE OF THE STATE OF
NEW YORK

By the Grace of God Free and Independent.

- 10 To all to whom these presents shall come or may
concern, GREETING: Know Ye, That we hav-
ing examined the records and files in the
office of the Surrogate of the County of New
York, do find there remaining, a certain rec-
ord of LETTERS OF ADMINSTRATION
granted to WILLIAM MEICKE upon the
goods, chattels and credits of ELIZABETH
MEICKE also known as ELIZABETH
20 MICHAEL, deceased.

(Seal)

in the words and figures following, to wit:

A-1762-1928
MW

A-1762-1928.

- 30 LETTERS OF ADMINSTRATION.

THE PEOPLE OF THE STATE OF
NEW YORK:TO WILLIAM MEICKE of the County of New
York send greeting:

- 40 WHEREAS, Elizabeth Meicke, etc. departed
this life intestate on the 25th day of Jan'y, 1928,
being at or immediately previous to her death an

Exhibit P-1.

inhabitant of the County of New York, by means whereof the ordering and granting administration of all and singular the goods, chattels and credits whereof the said intestate died possessed, in the State of New York, and also the auditing, allowing and final discharging the account thereof, doth appertain unto us, and we being desirous that the goods, chattels and the credits of the said intestate may be well and faithfully administered, applied and disposed of, do grant unto you, the said WILLIAM MEICKE, with limited authority pursuant to Section S. C. A. 122, by these presents to administer and faithfully dispose of all and singular the said goods, chattels and the credits, ask, demand, recover and receive the debts which unto the said intestate whilst living and at the time of her death did belong, and to pay the debts which the said intestate did owe, as far as such goods, chattels and credits will thereunto extend and the law require; hereby requiring you to make or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our Surrogate of the County of New York, within three months from the date of these presents; and if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge to make or cause to be made in like manner a true and perfect inventory thereof, and return same within two months after the discovery thereof, and also to render a just and true ac-

10

20

30

40

Exhibit P-1.

count of administration, when thereunto re-
 quired; and we do, by these presents, depute,
 constitute and appoint you the said William
 Meicke, administrator of all and singular the
 goods, chattels and credits of the said Elizabeth
 Meicke, also known as Elizabeth Michael, de-
 ceased.

IN TESTIMONY WHEREOF, We have
 caused the seal of Office of the Surrogate's Court
 of the County of New York to be hereunto af-
 fixed.

WITNESS, HONORABLE JOHN P.
 O'BRIEN, a Surrogate of said County, at The
 City of New York, the 4th day of May, one thou-
 sand nine hundred and twenty-eight.

MARTIN G. McCUE
 (Seal) Clerk of the Surrogate's Court.

(Stamp)

[These letters issued with power to prose-
 cute only and not with power to collect
 or compromise or exercise any of the
 other powers mentioned in these letters.]

All which we have caused by these presents to
 be exemplified, and the Seal of our said Surro-
 gate's Court to be hereunto affixed.

WITNESS HONORABLE JOHN P.
 O'BRIEN, a Surrogate of the County of New
 York, at The City of New York, the 24th day of

Exhibit P-1.

January, in the year of our Lord one thousand nine hundred and twenty-nine and of our independence the one hundred and fifty-third.

MARTIN G. McCUE

(Seal)

Clerk of the Surrogate's Court. 10

A-135995

I, John P. O'Brien, a Surrogate of said county and presiding Magistrate of the Surrogate's Court do hereby certify that MARTIN G. McCUE, whose name is subscribed to the preceding exemplification, is the Clerk of said Surrogate's Court of the County of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said Surrogate's Court, and that the attestation thereof is in due form, and according to the form of attestation used in this State. 20

Dated, New York, January 24th, 1929.

JOHN P. O'BRIEN 30
Surrogate.

State of New York, }
County of New York, } ss.:

I, Martin G. McCue, Clerk of the Surrogate's Court of the County of New York, do hereby certify that Honorable John P. O'Brien, whose name is subscribed to the preceding certificate is the 40

Exhibit P-1.

presiding Magistrate of the Surrogate's Court of the County of New York, duly elected, sworn and qualified, and that the signature of said Magistrate to said certificate is genuine.

10 IN TESTIMONY WHEREOF I have hereto set my hand and affixed the seal of the said Court, this 23rd day of January, 1929.

(Seal) MARTIN G. McCUE
Clerk of the Surrogate's Court.

20 ENDORSEMENT.

SURROGATE'S COURT

COUNTY OF NEW YORK.

.....

In the matter of the Estate

—of—

30

ELIZABETH MEICKE, etc.
Deceased.

.....

EXEMPLIFIED COPY.

40

.....

Exhibit P-2.

STATE OF NEW JERSEY

NEW JERSEY PREROGATIVE COURT.

I, JOSEPH F. S. FITZPATRICK, Secretary
of the State of the State of New Jersey, and Ex- 10
Officio Register of the New Jersey Prerogative
Court, DO HEREBY CERTIFY that an exem-
plified copy of the proceedings for the appointment
of an Administrator in the matter of the Estate
of ELIZABETH MEICKE, also known as
ELIZABETH MICHAEL, Deceased, Intestate,
was filed in this Court on the fifteenth day of
May, A. D. nineteen hundred twenty-eight.

(Seal) WITNESS my hand and the seal of 20
the Prerogative Court, at Tren-
ton, this sixteenth day of May,
A. D., nineteen hundred twenty-
eight.

JOSEPH F. S. FITZPATRICK
Register, N. J. Prerogative Court.

30

40

Exhibit P-3.

New York Decedent Estate Law, Section 130:

“130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent. The executor or administrator duly appointed in this state, or in any other state, territory, or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent’s death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent’s death. When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.”

P-1: Affidavit.

SAUL H. FRANKEL, being duly sworn, deposes and says:

I am a clerk in the employ of the Mallory Steamship Co., Pier 38, North River and I live at No. 194 Tapscott Street, Brooklyn, New York. 10

On January 18, 1928, at 7:35 a. m. I came out of the subway station at Varick and King Streets and walked westward to Hudson Street, where I intended to have breakfast at a bakery situated between King and Charlton Streets, as is my custom.

I had just started to cross Hudson Street at the southeast corner of King and Hudson Streets when a touring car, travelling westward along King Street turned sharply to the left into Hudson Street, almost hitting me as it rounded the corner. I had so narrowly escaped being run over by the car and it was being driven so recklessly and so fast that I watched the car as it gathered speed along Hudson Street. As I watched the car moving along Hudson Street toward Charlton Street at a speed of about thirty miles an hour, I remember saying to myself, "If that driver doesn't run over somebody very soon, it will be a miracle." 20 30

It had almost reached the intersection of Hudson and Charlton Streets and was approximately twenty feet from where I was at the time when I saw that same car run into a woman, knock her down and drag her about five feet before it stopped. The driver did not blow his horn and the only sounds I heard were the woman's screams. I ran to the scene of the accident, being 40

P-1: Affidavit.

the first one to arrive, and saw an old woman lying face upward entirely under the car between the front wheels, her body extended north and south, her feet under the middle of the car and her head under the front part of the radiator, on
10 the south bound trolley car tracks about ten feet from the corner of Charlton and Hudson Streets. Several people then arrived on the scene and I called to them to help me lift the car so that we could get the old lady out from under it.

Just then a policeman arrived and took charge. We raised the car, dragged the woman out as gently as possible and placed her in a taxi. She was bleeding from cuts on her forehead and arm,
20 and her left leg appeared to be injured.

The police officer placed the driver under arrest and ordered the cab driver to drive the injured woman to the St. Vincent Hospital and took the driver with him in the taxi.

I observed that the motor car was a Buick and carried licence No. P13619 N. J. and that it carried a load of "Evening Graphic" newspapers. There were two men in the car at the time of the accident; the driver, a tall rather
30 slender young man about twenty-two years old who told the policeman his name was Edmund Adamshesky and a short stocky man whose name I do not know. Both said they were employed by William Manketo of 43 Park Avenue, Paterson, New Jersey.

I learned later that the injured woman's name was Elizabeth F. Michael and that she lives at 55
40 LeRoy Street, New York City.

P-1: Affidavit.

At the time of the accident the weather was clear and only moderately cold (about 40° fahrenheit). There was no ice or snow on the pavement on Hudson Street which was quite dry, and at the time Mrs. Michael was injured there were no vehicles on said street other than the Buick Touring car which struck the woman and a south-bound trolley car which appeared a minute or two after the accident. 10

SAUL H. FRANKEL.

Sworn to before me this
25th day of January, 1928.

F. HAROLD WEIS
Notary Public,
New York County. 20

(Seal)

N. Y. Co. Clk.'s No. 541, Reg. No. 9619.
Certificate filed in Kings and Bronx Co.
Kings Co. Clk.'s No. 108, Reg. No. 9331.
Bronx Co. Clk.'s No. 82, Reg. No. 2988A.
Commission expires March 30, 1929. 30

New Jersey Court of Errors and Appeals 10

WILLIAM MEICKE, Administra-
tor of Elizabeth Meicke also
known as Elizabeth Michael,
Dec'd,

Plaintiff-Appellee,

vs.

SILK CITY NEWS Co., INC.,
Defendant-Appellant,

and

WILLIAM MANKETO,
Defendant.

Action at Law.

On Appeal

From the

Supreme

Court.

20

**BRIEF FOR SILK CITY NEWS CO., INC.,
DEFENDANT-APPELLANT.** 30

This case was tried in the Passaic Circuit of the New Jersey Supreme Court before Judge Clifford L. Newmann and a jury on January 28th, 1929. It resulted in a verdict in favor of the plaintiff and against both defendants and judgment in the sum of \$3,181.50. The present appeal is brought by one of the defendants, Silk City News Co., Inc.

40

The defendant, Silk City News Co., Inc., appeals upon the ground that it was in no way responsible for the death of the plaintiff's intestate because the automobile which struck her was not owned by the Silk City News Co., Inc., nor was it being operated for its purposes, nor did it have control of its driver, and because the undisputed facts are that the automobile was owned by the defendant, Manketo, and its driver was an employee of Manketo and was paid by Manketo and was performing work under Manketo's instructions. At the trial the defendant, Silk City News Co., Inc., moved for a non-suit and for a direction of verdict. Because of the foregoing situation, these motions were denied and exceptions were duly taken and the questions presented are brought up upon these grounds.

Grounds of Appeal.

The reasons to be urged on this appeal for the reversal of the judgment as against this defendant, Silk City News Co., Inc., are taken from the grounds of appeal (Case, pp. 2, 3, 4, 5) and more as follows:

1. The trial Court refused to non-suit the plaintiff's case against defendant, Silk City News Co., Inc., although a proper motion for that purpose was made.

2. The trial Court refused to direct a verdict in favor of defendant, Silk City News Co., Inc., and against the plaintiff, although a proper motion was made for that purpose.

Facts.

On January 18th, 1928, one Edmund Adamchesky was operating a Buick automobile belonging to defendant, William Manketo, on Hudson Street in the City of New York. The automobile struck Elizabeth Meicke, also known as Elizabeth Michael. She was taken to the St. Vincent's Hospital immediately after the accident, and died in the hospital on January 25th, 1928. On May 4th, 1928, letters of administration upon the goods and chattels of Elizabeth Meicke were issued to her husband, the plaintiff, William Meicke, by a Surrogate of the City and State of New York. An action was brought thereafter by said William Meicke, administrator as aforesaid, in the New Jersey Supreme Court, Passaic County, and resulted in a verdict in his favor as above stated.

10

20

ARGUMENT.**I.**

Plaintiff should have been non-suited by the trial Court as against this defendant, Silk City News Co., Inc.

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The testimony in the case, *uncontradicted*, is that the automobile which caused the injury was owned by defendant, Manketo; that the driver of the car, Edmund Adamchesky, was working for the defendant Manketo, and was paid by him, and that he performed his work under the instructions of Manketo. To support this contention, we quote the following testimony by Adamchesky taken from the records (Case, p. 38, lines 6 to 12):

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“Q. On the morning of January 18, 1928, were you driving a Buick touring car along Hudson Street between King and Charlton Street, New York City? A. Yes, sir.

Q. Whose car was that? A. William Manketo's.”

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(Case, p. 40, lines 35 to 40:)

“Q. At the time of this accident, Mr. Adamchesky, who instructed you to get these papers? A. Well, that was my job.

Q. And who instructed you to get the papers? A. William Manketo.”

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(Case, p. 41, lines 1 to 15:)

“Q. What were your duties, as far as that job was concerned? A. What do you mean?

Q. You say, ‘That was my job.’ A. Yes.

Q. What were your duties? A. To get the papers and deliver them.

By the Court:

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Q. Now, Mr. Adamchesky, whether or not Mr. Manketo had a contract with the Silk City News for the deliveries, you don't know? A. I don't know anything about it.

Q. But you acted under whose instructions and were paid by whom? A. William Manketo.”

Adamchesky's slight reference to the business of the Silk City News Co., Inc., clearly appears to mean that his boss, Manketo, was doing certain

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work (as an independent contractor) for the Silk City News Co., Inc. Adamchesky, however, had no accurate knowledge as to just what the business arrangements were. He was no more a servant of the Silk City News Co., Inc., than a driver of an express truck would be a servant of the owner of the packages being carried in the express truck at the time. 10

Under the circumstances it is apparent that the defendant, Silk City News Co., Inc., was not the master of Adamchesky and should not respond for his negligence.

A leading case and one often cited is,

Courtinard vs. Gray Burial & Cremation Co., et al., 98 N. J. L., 493; s. c. 121 Atl., 145, 20

in which the Court says:

“The reasoning of that distinguished jurist throughout the opinion makes it manifest, supported by a wealth of authority, that the doctrine of master and servant from which emanates the principle of respondeat superior, is based in essence upon the legal theory inherent in the maxim, *qui facit per se*, involving fundamentally the fact of control, direction and representation in the service at hand. He thus defines the relationship: ‘That liability flows,’ says he, ‘from the relation of master and servant, a relation incident to which is the power to select the servant, and direct him in the execution of the duties of his employment; and to discharge him when found to be incompetent; and also the duty 40

to so control his acts that no injury may be done to third persons.'”

In this case the Court of Errors and Appeals decided that there was no testimony to support the theory that the relationship of master and servant existed, and for that reason the motion to
 10 non-suit or direct a verdict should have been granted. Refusal of the trial Court to grant such motions was reversed.

Lacombe vs. Cudahy Packing Co., 5 A. R.,
 797; s. c. 137 Atl., 538,

was recently decided upon the same subject. Here the Court of Errors and Appeals affirmed a judgment of non-suit in favor of defendant. From
 20 the opinion we take the following:

“In directing the non-suit to be entered, we are of the opinion that the learned trial Judge ruled correctly. We consider the facts of the present case bring it within the law as declared by this Court in the Courtinard case. In the Courtinard case the plaintiff was injured by being struck by an automobile
 30 hearse. The defendants, Caseys, were undertakers with an establishment in Plainfield in this State. They are engaged to direct a funeral. They require an automobile hearse which they hired with a driver from the Gray Company. One of the Caseys sat on the front seat with the driver of the hearse and directed him to the cemetery where the interment was to take place. In passing through
 40 New York City the hearse struck and injured

Courtinard. At the trial of the case which grew out of the accident, the Gray Company (co-defendant with the Caseys) obtained a non-suit. The jury rendered a verdict against the Caseys. The judgment entered on this verdict was reversed by this Court. The grounds for reversal as stated in the opinion were that the 'elements of hiring, control, direction, and power of dismissal are made distinct ratio decidendi, and present the fundamental tests of the liability of the occupant and hirer of the coach, under the legal status test of master and servant.' N. Y. Lake Erie & Western Railroad vs. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep., 126. Applying these principles the Caseys neither hired nor directed nor controlled the driver and, hence, were not liable for the acts of the driver employed by the Gray Company. In the instant case, the same elements are present. Dawkins hired the truck as the Gray Company hired the hearse. McEwan was the servant of Dawkins just as the driver of the hearse was the servant of the Gray Company. In each case the driver had to be informed by the hirer or his agent of the destination or route to be followed. While in the present case more directions were given to the driver than in the Courtinard case, this does not differentiate the cases. It is merely a difference of degree, not of kind. The controlling question, is, who was in control and operation of the vehicle at the time the accident occurred? The one who is in control and operation either personally or by a servant, is the one who must respond in damages to the person in-

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10 jured if negligent operation of the vehicle is proven. * * * It is quite immaterial how many stops or how many directions were given, so long as the control and operation of the truck was that of Dawkins, the independent contractor. This applies also to the point made by the appellant that in the Courtinard case the driver of the hirer paid the ferriage charges, while in the case under consideration, the Cudahy Company representative paid them."

In

Giroud vs. Stryker Transp. Co., 104 N. J. L., 424; s. c. 140 Atl., 305,

20 the Court of Errors and Appeals, reversed the refusal to grant a motion for the direction of a verdict on behalf of defendants. It was held that:

(1) The relation of "Master and servant" exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or, in other words, not only what shall be done, but how it shall be done.

30 (2) When the employer exercises no control over the employee in the performance of the work to be done, other than to direct where the material shall be collected and delivered, the doctrine of respondeat superior does not apply.

40 (3) The fact that the employer's agent exercises some kind of supervision for the purpose of seeing that the work is done in ac-

accordance with the contract, does not prevent the employee from being an independent contractor.

To like effect are:

Busch vs. Seaboard By-Products Co., 100
N. J. L., 304; 10
N. Y., etc., Co. vs. Steinbrenner, 47 N. J.
L., 161.

The defendant, Silk City News Co., Inc., was not in fact the employer of Adamchesky, the operator of the automobile. It neither exercised control over Adamchesky nor did it direct how he should do his work or how he should operate his automobile. There is some testimony in the case that Adamchesky had in defendant Manketo's car at the time of the accident, newspapers which belonged to appellant. Even if this is so, the doctrine of respondeat superior should not apply, because there is not the slightest testimony anywhere in the case that the Silk City News Co., Inc., employed the driver of the automobile, or paid his salary, or owned the automobile which caused the accident or controlled its operation or told the driver, Adamchesky, what to do, or how to do it. It may be argued that Adamchesky was working for the appellant, but he certainly was not working for appellant any more than in 20 30

(a) the Lacombe case, McEwan (the driver of the truck owned by Dawkins and the servant of Dawkins) was working for defendant Cudahy Trucking Co.;

(b) the Giraud case, Andryshowich was working for defendant Stryker Transportation Co.; 40

(c) the Busch case, the driver Dominick (employee of the owner of the automobile, Cullum) was working for the Seaboard By-Products Co.

10 In the Courtinard case and in the Steinbrenner case above cited, the elements of hiring, control, direction and power of dismissal are made distinct ratio decidendi, and present the fundamental test of liability under the legal status test of master and servant. Nowhere in the present case is there any element of hiring, control, direction and power of dismissal by this defendant, Silk City News Co., Inc., with respect to the work of the driver of the car, Adamchesky.

20 The appellant is not particularly concerned with the question of the negligence of the driver of the automobile, but there being no legal evidence in the case of negligence on the part of the operator of the automobile, the Court should have had no hesitation in granting a non-suit, nor was there any legal proof that the deceased died as a result of injuries sustained from the accident. There was no testimony at all to show that she died from injuries. Appellant, therefore, contends that there should have been a non-suit upon these grounds as well as upon the ground that the defendant, 30 Silk City News Co., Inc., was in no wise the master of the driver of the automobile.

II.

The motion of this defendant, Silk City News Co., Inc., for the direction of a verdict in its favor, should have been granted by the trial Judge.

40 The argument made under the preceding point applies equally to this point, so that it is unneces-

sary to repeat such argument. In addition, however, we have the testimony of the Silk City News Co., Inc.'s, representative, Samuel J. Fink, which, of course, was not available on the motion for a non-suit, but was before the Court on the motion for a direction.

The following is quoted from Fink's testimony (Case, p. 45, lines 10 to 27):

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“Q. Mr. Fink, how are you employed? How are you employed? A. I am connected with the Silk City News Company.

Q. Are you familiar with the records of the Silk City News Company? A. I am.

Q. Do you know who the shareholders and different officers or directors of the Silk City News Co., Inc., are? A. I do.

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Q. Will you tell us whether William Manketo is a stockholder or shareholder in the Silk City News Company? A. He is not.

Q. In what capacity was he connected with the Silk City News Company at the time—withdraw that. Was he connected with the Silk City News Company as a shareholder, or stockholder at the time of this accident? A. He was not.”

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(Case, p. 46, lines 19 to 15 on page 47:)

“Q. Who paid Mr. Adamchesky's salary? A. Mr. Manketo.

Q. Out of his own pocket? A. Why, Mr. Adamchesky wasn't working for the Silk City News Company in Bergen County.

Q. Who paid his salary? A. Mr. Manketo.

Q. Out of his own pocket or the Silk City

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News? A. Out of his own pocket. The Silk City News Company didn't employ him.

Q. How was Manketo paid then? A. Paid whom?

Q. How was Mr. Manketo— A. I am being paid by the Silk City News Company.

10 Q. I haven't asked you that. I am asking you how Mr. Manketo was paid. A. He was paid by the Silk City News Company.

Q. And out of his salary he had to pay Adamchesky? A. Yes.

Q. What was Manketo employed for? A. Well, Manketo had the—was holding office in the Silk City News Company. The Silk City News Company directs operations in Paterson and vicinity but not in Bergen County.

20 Q. How is it that Manketo paid Adamchesky's salary instead of the Silk City paying it? A. Because he had an interest himself from the proceeds of the Bergen County trade, and the Silk City News Company had nothing to do with it.

Q. Manketo ran that on his own hook? A. That is right."

(Case, p. 48, lines 1 to 10:)

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"Q. That is the extent of your knowledge, is it? A. Yes, sir.

Q. Do you know what the arrangement was between Manketo and the Silk City News Company regarding the use of this auto? A. Well, that automobile belonged to Manketo, and he used it for Bergen County territory."

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Upon all of the evidence it was for the Court to decide as a matter of law, whether the Silk City

News Co., Inc., was in any wise responsible for the conduct of the driver of the automobile. It was error to submit the question to the jury and it was error to deny the motions.

It is respectfully submitted that judgment as against the Silk City News Co., Inc., should be reversed.

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JOHN W. OCKFORD,
of Counsel with Defendant-Appellant,
Silk City News Co., Inc.

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New Jersey Court of Errors and Appeals

William Meicke, Administra- tor of Elizabeth Meicke, also known as Elizabeth Michael, Dec'd, Plaintiff-Appellee, vs. Silk City News Co., Inc., Defendant-Appellant, and William Manketo, Defendant.	}	Action-at-Law On Appeal from the Supreme Court.
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Brief for Plaintiff-Appellee

This is a death case.

The suit was brought by the plaintiff under letters of administration issued by the Surrogate of the County and State of New York, an exemplified copy of which, together with the certificate of the Register of the New Jersey Prerogative Court, as to an exemplified copy thereof having been filed in said Court, was offered in evidence. (Exhibits P-1 and P-2, ps. 62-67.)

The suit was brought under Section 130 of the New York Decedent Estate Law (Exhibit P-3, p. 68) which provides, *inter alia*, that an administrator appointed in that state of a decedent who has left him or her surviving a husband, wife or next of kin, may maintain an action to recover damages for a wrongful act, by which the decedent's death was caused, against a natural person

who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof, if death had not ensued, **and under Section 21 of our act concerning executors and administrators.**

The ninth ground of appeal (page 3) is that the action was brought by an administrator and not be an administrator ad prosequendum. But as this ground of appeal is not argued in appellant's brief, we assume that it has been abandoned. Nevertheless we submit that the suit was properly brought.

Lower vs. Segal, 59 N. J. L., p. 66.

Rankin vs. Central R. R. Co., 77 N. J. L.,
175.

Riddle vs. Slack, 96 N. J. L., p. 415.

As stated in the introductory paragraphs of the appellant's brief, the real ground of appeal relied on is based upon the question of the responsibility of the defendant-appellant for the acts of the driver which caused the accident, but there are interjected in the argument (in the concluding paragraphs relating to Point I) the unsupported assertions that there was no legal evidence of negligence on the part of the operator of the automobile, nor any legal proof that the deceased died as a result of injuries sustained in the accident. We shall point out that there was sufficient evidence on both those subjects.

THE ARGUMENT

I.

DEFENDANT-APPELLANT WAS RESPONSIBLE FOR THE ACTS OF NEGLIGENCE OF THE DRIVER OF THE AUTOMOBILE.

Appellant's brief sets forth only so much of the evidence on this subjects as favors the appellant's side of the case. We propose, therefore, to set it out in full. It is as follows:

The witness, Adamchesky, testified as follows:

Direct Eamination:

Q. Where were you employed on January 18 of last year? A. Silk City News.

Q. And where was their place of business? A. Paterson.

Q. What was the nature of their business? A. Delivering newspapers.

(Page 37, lines 30-42.)

By Mr. Sumner:

Q. On the morning of January 18, 1928, were you driving a Buick touring car along Hudson Street, between King and Charlton Streets, New York City? A. Yes, sir.

Q. Whose car was that? A. William Manketo's.

Q. And where were you coming from?

A. From the Graphic Building, New York.

(Page 38, lines 1-17.)

By the Court:

Q. Did you say the car was owned by William Manketo? What did you say was

its connection with the Silk City News? A. Yes.

Q. **What was your connection with the Silk City News?** A. **I worked for them.**

Q. Driving for them? A. Yes.

(Page 38, lines 22-30.)

By Mr. Sumner:

Q. What had you been doing there at the Graphic Office? A. I got my load of papers there.

Q. How did you go to the Graphic Office? Where did you start from? A. **Paterson.**

Q. **Whereabouts in Paterson?** A. **From the News Company.**

Q. From the Silk City News Company? A. Yes.

Q. And you went into the Graphic Office, New York, and got some Graphics; is that it? A. Yes.

Q. Now, where were you taking them? A. **Back to Paterson.**

Q. And where were you going to deliver them? A. I was going to deliver them in Bergen County.

Q. To whom? What deliveries were you going to make? A. All the deliveries, all the stores.

Q. To whom were the deliveries to be made? A. From whom?

Q. For whom? A. **For the Silk City News.**

(Page 38, line 37 to Page 39, line 20.)

Cross Examination:

Q. At the time of this accident, Mr.

Adamchesky, who instructed you to get these papers? A. Well, that was my job.

Q. And who instructed you to get the papers. A. William Manketo.

Q. What were your duties as far as that job was concerned? A. What do you mean?

Q. You say: "That was my job." A. Yes.

Q. What were your duties? A. To get the papers and deliver them.

By the Court:

Q. Under whose instructions were you going before this accident happened? A. Under whose instructions? Under Manketo's.

(Page 40, line 32 to Page 41, line 15.)

By Mr. Edelson:

Q. Whom did you receive your wages from, Mr. Adamchesky? A. William Manketo.

(Page 41, lines 38-39.)

Re-direct Examination:

Q. What connection, if any, did Mr. Manketo, William Manketo, have with the Silk City News Company, if you know? A. **As far as I know, he owned it.**

Q. Well, where was his place of business? A. On Parker Avenue (meaning "Park" Avenue).

Q. In connection with the Silk City, was it in the same place or somewhere else? A. Well, it was in the same building.

Q. Same office? A. Same office.
(Page 42, lines 11-21.)

Re-Cross Examination:

Q. You said, Mr. Adamchesky, as far as you know— A. Yes.

Q. You don't know whether Mr. Manketo actually owned that or whether he—

The Court—Owned what? By that you mean the News Company?

Mr. Edelson—He said as far as he knew.

The Court—I am asking you which "that" refers to.

Mr. Edelson—I mean the News Company.

(Interruption.)

A. Well, he paid us.

Q. Now, Mr. Adamchesky, whether or not Mr. Manketo had a contract with the Silk City News for the deliveries, you don't know? A. I don't know anything about it.

Q. But you acted under whose instructions and were paid by whom? A. William Menketo.

(Page 42, line 25 to Page 43, line 10.)

This same witness, having been re-called as a witness for the defendant, further testified as follows:

By the Court:

Q. Just a minute. **Who was it you said you were working for?** A. Silk City News.

Q. Who paid you? A. William Manketo.

Q. How did you come to work for the

Silk City News and to be paid by him? A. Well, I don't know, but when I collected the money—**when a bill was sent to the dealer it was a Silk City News bill.**

Q. Did Manketo pay you by check or cash? A. Check and cash.

Q. Whose check was it? A. Manketo's.

By Mr. Edelson:

Q. Just one more question. When you were working for the Silk City News what particular territory did you have? A. Well, I had both territories. I worked in Paterson in the morning, from four to six, and on Saturdays and Sundays and on weekdays I worked in Bergen County.

Q. At the time of this accident what kind of papers were you getting? A. "Graphics."

Q. And where were they distributed?

A. **Well, I was to take Paterson papers as far as Rutherford, give them to the Paterson truck which I was to meet there, so I didn't have to go into Paterson, and started delivering my run from Rutherford.**

Q. Then Rutherford was your territory? A. Rutherford and Bergen County
Cross Examination:

Q. These papers that were to be delivered in Paterson and the truck which you were to meet in Rutherford— A. Yes.

Q. Whose papers were they? A. Passaic and Paterson.

Q. Whose papers were they? Whom did they belong to? A. **Silk City News.**

By the Court:

Q. Where did you get the papers for the Silk City News? A. New York.

Q. What were they? "Graphics? A. The "Graphic."

(Page 52, line 10 to Page 53, line 30.)

Samuel J. Fink, a witness for the defendants, testified as follows:

Q. Will you tell us whether William Manketo is a stockholder or shareholder in the Silk City News Company? A. He is not.

Q. In what capacity was he connected with the Silk City News Company at the time—withdraw that. Was he connected with the Silk City News Company as a shareholder or stockholder at the time of this accident? A. He was not.

Q. In what capacity was he connected with the Silk City News Company on January 18, 1928, at the time of this accident?

A. Why, he held the office of Secretary of the Silk City News Company.

Q. And what was his connection as far as these deliveries were concerned? A. Why, he himself did not direct delivery, although that was part of the man working for Manketo. Although, Mr. Edelson, I didn't fully understand the question as you put it,—

(Page 45, lines 19-41.)

By the Court:

Q. Who paid Mr. Adamchesky's salary? A. Mr. Manketo.

Q. Out of his own pocket? A. Why,

Mr. Adamchesky wasn't working for the Silk City News Company in Bergen County.

Q. Who paid his salary? A. Mr. Manketo.

Q. Out of his own pocket or the Silk City News? A. Out of his own pocket. The Silk City News Company did not employ him.

Q. How was Manketo paid then? A. Paid whom?

Q. How was Mr. Manketo—A. I am being paid by the Silk City News Company.

Q. I haven't asked you that. I am asking you how Mr. Manketo was paid. A. He was paid by the Silk City News Company.

Q. And out of his salary he had to pay Adamchesky? A. Yes.

Q. What was Manketo employed for? Well, Manketo had the—was holding office in the Silk City News Company. The Silk City News Company directs operations in Paterson and vicinity, but not in Bergen County.

Q. How is it that Manketo paid Adamchesky's salary instead of the Silk City paying it? A. Because he had an interest himself from the proceeds of the Bergen County trade, and the Silk City News Company had nothing to do with it.

Q. Manketo ran that on his own hook? A. That is right.

(Page 46, line 18 to Page 47, line 13.)

Cross-examination by Mr. Sumner:

Q. What was the business of the Silk

City News Company? A. Wholesale newspaper.

Q. Where did they get their papers?
A. Delivered to them in Paterson, and for Bergen County, in New York.

Q. For Bergen County in New York, and the Silk City News gets them in Paterson from whom? A. From the New York publishers.

Q. How are they delivered? A. **At that time, by train.**

Q. **Where did they get these "Graphics"?** A. **The Silk City News Company got them at the Erie Depot.**

Q. Isn't it a fact that these "Graphic" newspapers that were on this car at the time of this accident were the property of the Silk City News Company? A. They were not.

Q. How do you know that? A. Because he never came into Paterson with newspapers of any kind.

Q. That is the extent of your knowledge, is it? A. Yes, sir.

Q. Do you know what the arrangement was between Manketo and the Silk City News Co., regarding the use of this auto?
A. Well, that automobile belonged to Manketo, and he used it for Bergen County territory.

Note: The witness's testimony that at that time the newspapers for Paterson were delivered on the Erie train, was mere contradiction of the evidence of the driver of the car, and as the wit-

ness (Fink) was not in the car, his evidence on that subject was valueless.

By the Court:

Q. Who used it in Passaic County territory? A. It wasn't used in Passaic County as far as I know.

Q. You say it belonged to him and was used in Bergen County; is there a difference? A. Positively.

Q. In Passaic whose automobile was it? A. He didn't use it for Passaic County business.

Q. Why do you make this distinction? A. I make the distinction because that car was used for Bergen County only.

Q. You say it was used in Bergen. Why do you think that if that is where he always used it? A. If I made that statement that is my error.

(Page 46, line 19 to Page 48, line 29.)

The foregoing testimony of these two witnesses is all the evidence in the case in regard to the question of the responsibility of the defendant for the acts of the driver of the automobile, whose negligence caused the death.

The trial court, the late Judge Newman, in the charge to the jury, referring to that branch of the case, instructed them as follows:—

“Now, so far as Manketo is concerned there seems to be no dispute but that he was the owner of the car and that the driver was employed by this defendant and

carrying out the business of this defendant. So that there would be no dispute as to the relationship of Manketo; if anyone is liable, he would, of course, be liable. And then the question remains as to whether the Silk City News Company is also liable. Now, the only way that a person not the driver of the car can be made liable is that the driver of the car was in a legal sense an agent or servant of that defendant. Now, that does not necessarily mean that there must exist a written contract of employment between the two or that anything need be evidenced by any formality, such as a written contract. But the relationship of master and servant is not necessarily created by any written document. It may be created by circumstances as they exist. The test as to whether there is a relationship of master and servant is that the driver, the so-called servant, was at the time of the accident engaged in something for the master. That presents a question of fact in this case. The driver, as I recall it, has testified that his salary was actually paid by Mr. Manketo, and I think one other witness also said so. But the driver also said that on this occasion, as I recall it—you must be the judges—part of the load of papers which he was bringing home were to be delivered to another truck at Rutherford, when they were to be relayed to the News Company in Paterson, while the truck he was driving was to continue with the other papers for

delivery in Bergen County. So that the question for your determination is whether the evidence has disclosed by a fair preponderance of the evidence that the driver was, technically speaking, a servant of the News Company, that is, whether he was doing something for the News Company, and that at its request or by its acquiescence or by its permission. If he was, then, of course, the News Company would be liable for the acts of their so-called servant.

So that if you find liability the question arises as to whether it shall be Manketo alone or whether it shall be both Manketo and the Silk City News Company."

(Page 56, line 20 to Page 57, line 32.)

We submit that the case was correctly submitted to the jury under the foregoing instructions.

The verdict is clearly sustainable upon the evidence of the driver himself, thrice repeated (Page 37, lines 30-31; P. 38, lines 28-29 and P. 52, lines 12-15), that he was employed by the Silk City News Company. Surely the man himself was the best witness as to who was his employer. Defendant, Manketo, the other man, who also knew the facts, did not appear as a witness.

The fact that the driver got his pay from Manketo is not controlling. Manketo was an officer of Silk City News Company. He was reimbursed out of his own salary, as was brought out by the court in questioning the defendant's witness Fink.

(Page 46, lines 19-36.)

As it appears from the evidence of this witness for the defendants, Fink, the business of delivering newspapers was divided into two territories, one in Passaic and one in Bergen County. The business in Passaic County was conducted by the Silk City News Company, and the Bergen County business was conducted by Manketo.

The driver testified that he started on his trip from the office of the Silk City News Co. in Paterson. He went to the Graphic office in New York City and got some "Graphics" there, **and he was taking them back to Paterson.** He was going to deliver them in Bergen County for the Silk City News Company (Page 38, line 37 to Page 39, line 20); that he was to take the Paterson papers as far as Rutherford, which is in Bergen County, and give them to the Paterson truck, which he was to meet there. (Page 52, line 10; Page 53, line 30.) It is quite clear from the evidence that the driver of the automobile was acting as the agent of both the parties. **In respect to the Silk City News Co., he was its agent in going from its office in Paterson to the Graphic Office in New York City getting some "Graphics" there which he was to deliver to another truck at Rutherford. He was Manketo's agent to get certain other "Graphics" and distribute them in Bergen County.**

The fact that the vehicle was the property of Manketo is not controlling. There is no evidence in the case in regard to the nature of the arrangement between Manketo and the Silk City News Co. in respect to the use of his car in the Company's business. The defendants offered no evidence on the subject.

It is a noticeable fact that Manketo did not appear at the trial.

There is no evidence in the case, either direct or inferential, that Manketo hired out the use of his car and his driver to the Silk City News Company to bring its papers from New York to Rutherford, or that he was paid anything by that Company for any such service.

The case, therefore, is clearly distinguishable from the cases relied upon by the appellant, and quoted from extensively in its brief.

In the Courtinard case (98 N. J. L., 493) the facts were that one firm of undertakers, the Caseys, **hired**, from another concern, the Gray Burial Etc. Company, one of the latter's automobiles, with a driver. One of the Caseys sat upon the front seat with the driver, but gave no directions and exercised no control over the machine, and its entire control was under the direction and management of the Gray driver. Casey, therefore, was merely a passenger in a hired vehicle.

In the Lacombe case, 103 N. J. L., 651, the plaintiff was struck by an automobile truck. The truck was owned by one Dawkins, and was driven by one McEwan, who was a servant of Dawkins. Dawkins conducted a general trucking business. The defendant Packing Company **hired** of Dawkins a truck and driver, and placed one of its employees on the truck to show McEwan where to go. Dawkins charged \$25 a day for the truck and the services of McEwan.

In the Giroud case (104 N. J. L., 424) the plaintiff was injured by an auto truck. He sued the driver of the truck, one Andryshowich, and the Stryker Transportation Company. The auto truck was owned and operated by said Andryshowich. He had contracted with the Transportation Company to haul dirt for it. According to the contract the driver furnished the truck, paid all operating expenses, and received \$2.75 per hour. The court found that the **contract** with the driver was not an engagement of a servant, **but was that of an independent contractor** for whose acts the defendant Transportation Company was not liable.

Likewise, in the Steibrenner case, 47 N. J. L., 161, and the Busch case, 100 N. J. L., 304, also cited in appellant's brief. The first case was that of a passenger in a hired coach held not to be liable for the acts of the driver over whom the passenger exercised no control, and in the second case the court found that the driver of the truck which caused the accident was an independent contractor.

The allegations in appellant's brief (following the quotations from the cases cited), that the News Company was not the employer of Adamchesky, the operator of the automobile, that the News Company neither exercised control over him or directed him how he should do his work or how he should operate his automobile, are not fair statements of the case. By these allegations counsel begs the question, which is the subject matter of the appeal, namely, the question who was responsible for sending the driver of the auto-

mobile from the office of the News Company in Paterson to the Graphic Office in New York City to get certain papers from the News Company and to deliver them to another truck at Rutherford, by which latter the papers were to be relayed to Paterson.

Adamchesky himself repeatedly testified that he was employed by the News Company, and that he was working for them.

So far as the control over the operation of the automobile is concerned, Adamchesky, the driver, was of course alone in the car at the time of the accident (except for another boy whose presence has no bearing on the case), so that no one, other than the driver, either Manketo (who was an officer of the Silk City News Company) or the Silk City News Company, was exercising any control over the operation of the automobile at that moment.

(Page 46, lines 38-40.)

We submit the trial court committed no error in leaving that question to the jury to determine from the evidence.

Moreover, it is well settled that an appellate court will not consider a ground of reversal which challenges the sufficiency of the testimony.

A jury has a right to use their own experience in the consideration of the credit to be given to the testimony of a witness; they may consider the demeanor of the witness, his manner of testifying.

his appearance, mental capacity, power of observation, closeness of attention, the probability of his statements, and their inconsistencies and contradictions, and other matters which would constitute a proper test under the circumstances of the case.

See *State vs. Runyon*, 93 N. J. L., page 16; affirmed by Court of Errors & Appeals, 94 N. J. L. page 265.

POINT II

THERE WAS SUFFICIENT EVIDENCE THAT THE ACCIDENT WAS THE RESULT OF THE DRIVER'S NEGLIGENCE, AND THAT THE INJURIES WERE THE CAUSE OF DEATH.

The evidence on the question of negligence was as follows:

The witness Frankel saw the old lady hit. She was struck by the motor of the automobile. (Page 13, lines 23-35.) The automobile was going fast. (Page 15, lines 1-26.) It was being driven recklessly and fast. (Page 18, line 35 to Page 20, line 18.)

Adamchesky, the driver, testified that he hit the woman. (Page 49, line 2.) He first saw her when he hit her. (Page 49, lines 25-30.) She must have walked off the curb; he did not know where she came from. When he first saw her she was about 2 feet in front of his car and it was impossible for him to stop. (Page 51, lines 32-41.)

The witness, when asked by defendant's counsel to tell exactly how the accident happened, and the Court explained to the witness that counsel wanted to know how he came to hit the woman, made no responsive answer. (Page 49, line 35 to Page 50, line 8.)

From that evidence the jury could properly find that the car was being so recklessly driven that the driver failed to see the old lady until she was immediately in front of his car, so that he was unable to avoid hitting her, and we submit that such evidence was sufficient to support the verdict.

Upon the question of the cause of death, the witness Frankel testified that when the woman was picked up she was bleeding and had contusion of the head and cuts. (Page 17, lines 18-20.)

The husband of the plaintiff saw his wife in the Hospital the morning after the accident. She had a big gash in her head. Her arm was broken in two places, and it was all ripped up from the foot up. He saw her every day after that, in the Hospital, for seven days, until she died. Her condition did not improve, and on Monday afternoon "she turned off, she went for the worse", and on Wednesday night she died, on the 25th, the accident having happened on the 18th. (Page 26, lines 1 to 34.)

Before the accident she was always in good health. (Page 27, line 5.) She was sixty-nine years old. (Page 27, line 33.)

No one but a lawyer would have the hardihood to raise any question from the foregoing evidence as to what was the cause of the poor woman's death, and we submit that the jury properly found that her death was the result of the injuries she received in the accident.

Respectfully submitted.
Humphreys & Sumner,
Of counsel with plaintiff-appellee.

