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Complaint.

COMPLAINT.

Filed December 8, 1924.

New Jersey Supreme Court

ESSEX COUNTY.

10

MARIE LACOMBE,

Plaintiff,

vs.

JAMES J. DAWKINS and CUDAHY
PACKING COMPANY, a corpora-
tion,

Defendants.

20

Stickel & Naughtright, attorneys of plaintiff.

Harold L. Turk and Joseph Rolnick, attorneys
of defendant Dawkins.

John A. McFadden, attorney of defendant
Cudahy Packing Co.

Summons issued Nov. 17, 1924.

Plaintiff, Marie Lacombe, residing in the Town
of Belleville, in the County of Essex and State
of New Jersey, says that:

30

1. On and before the 30th day of July, 1924,
the defendant, James J. Dawkins was the owner
of a certain automobile truck.

2. On and before said date, the defendant,
Cudahy Packing Company was a corporation of
the State of Maine.

3. On the said 30th day of July, 1924, the said
automobile truck of the said defendant, Dawkins,
was being operated in and through the Town of

40

Complaint.

Belleville, in the County of Essex and State of New Jersey, by and under the control, supervision and direction of the servants and agents of the said defendants, James J. Dawkins and Cudahy Packing Company, and in and about the business and concerns of said defendants.

10 4. On the same day and in the same municipality the plaintiff, Marie Lacombe, was lawfully crossing Washington avenue, a public street in said municipality from the easterly to the westerly side of said avenue at a point in said avenue designated as a trolley stop in front of the manufactory of the Westinghouse Lamp Works and opposite a public street of said town known as Carner avenue.

20 5. While so in the act of crossing said avenue and in the exercise of due and proper care, the said plaintiff was struck by the said automobile truck then and there proceeding in a northerly direction on the easterly side of said Washington avenue, and under the control, supervision and direction of the servants and agents of the defendants.

30 6. Plaintiff was so struck due to the negligence of the said defendants through its servants and agents in that such truck was propelled past and close to a trolley car standing at that point to take on passengers, and so propelled at a high and excessive rate of speed under the existing circumstances, without having said truck under proper control, without any regard for the safety of those using said street and with no notice, warning or signal of its approach.

40 7. As the result of such negligence of the defendants, the plaintiff was thrown to the street, the truck passing over her causing severe and

Complaint.

permanent injuries to her left foot and right leg, her left foot being crushed and bruised, and her right leg mangled, making necessary the amputation of the right leg above the knee, and the amputation of the big toe of her left foot, she was cut and bruised in and about the head and body and otherwise grievously injured, suffered great pain and shock and was confined to her bed for a long time; her nervous system is shattered and she suffers and will continue to suffer torturing pain, terrific mental anguish and loss of sleep; she was unable for a long space of time to attend to any of her avocations and concerns, and will be forever unable to attend to them as before the accident; she has lost and will continue to be deprived of business and social opportunities, ambitions and hopes; her chances of marriage and her own home are minimized if not destroyed and she has spent and will be required to spend large sums of money in and about the treatment and care of her injuries and in and about her efforts to restore herself to as much usefulness as the loss of one leg and the balancing toe of the foot of her other leg will permit.

Wherefore plaintiff claims damages of the defendants in the sum of Fifty Thousand Dollars (\$50,000.00).

STICKEL & NAUGHRIGHT,
Attorneys of Plaintiff.

Answer of Cudahy Packing Co.

ANSWER OF CUDAHY PACKING CO.

Filed December 8, 1924.

Cudahy Packing Company, a foreign corporation authorized to do business in the State of New Jersey, says:

- 10 1. It is without sufficient information to form a belief as to paragraph 1 of the plaintiff's complaint.
2. It admits paragraph 2 of the plaintiff's complaint.
3. It denies paragraph 3 of the plaintiff's complaint.
- 20 4. It is without sufficient information to form a belief as to paragraph 4 of the plaintiff's complaint.
5. It denies paragraphs 5, 6 and 7 of the plaintiff's complaint.

FIRST SEPARATE DEFENSE.

30 For a further and separate defense, this defendant says, that the injuries if any, sustained by plaintiff, were caused wholly by her own negligence and carelessness in that she attempted to cross Washington avenue in the Town of Belleville, Essex County, New Jersey, at a place in said highway not at a crosswalk, and in that she did not make proper observation for vehicular traffic lawfully using said Washington avenue, as she was attempting to cross same, and in that she did not use due care and caution in crossing said avenue, and in that she was crossing said Washington avenue in a careless and negligent manner; and not having any regard for her own
40 safety.

Answer of James J. Dawkins.

SECOND SEPARATE DEFENSE.

For a further and separate defense, this defendant says, that the injuries if any, sustained by the plaintiff were caused wholly by the negligence and carelessness of defendant James J. Dawkins, in that the automobile truck in question was his own, and was directly and solely under his own care, control and management, and he being then and there an independent contractor for whose negligence this defendant is not in anywise responsible. 10

WHEREFORE, this defendant demands judgment that the complaint herein be dismissed together with costs and disbursements of this proceeding.

Dated, New York, December 3, 1924.

JNO. A. McFADDEN, 20
Attorney for Defendant,
Cudahy Packing Company.

ANSWER OF JAMES J. DAWKINS.

Filed May 6, 1925.

JAMES J. DAWKINS, one of the defendants herein, residing in the Town of Acqueduct, County of Queens, City and State of New York, answering the complaint herein, alleges: 30

First: He admits paragraphs "1" and "2" of plaintiff's complaint.

Second: He denies paragraph "3" of plaintiff's complaint.

Third: He denies paragraphs "5," "6" and "7" of plaintiff's complaint. 40

Answer of James J. Dawkins.

FIRST SEPARATE DEFENSE.

10 For a further and separate defense, this defendant says, that the injuries, if any, sustained by plaintiff, were caused wholly by her own negligence and carelessness, in that she attempted to cross Washington avenue in the Town of Belleville, Essex County, New Jersey, at a place in said highway not at a crosswalk, and in that she did not make proper observation for vehicular traffic lawfully using said Washington avenue, as she was attempting to cross same, and in that she did not use due care and caution in crossing said avenue, and in that she was crossing said Washington avenue in a careless and negligent manner; and not having any regard for her own safety.

20

SECOND SEPARATE DEFENSE.

30 For a second, further and separate defense the defendant, James J. Dawkins, says: That the injuries, if any, sustained by the plaintiff were caused wholly by the carelessness and negligence of the defendant, Cudahy Packing Co.; that at the time and place mentioned in the complaint, the said automobile was hired to the defendant, Cudahy Packing Co., and that the defendant, Dawkins, exercised no control over the driver of the automobile and that the defendant, Cudahy Packing Co., through its agents, servants and employees, exercised exclusive control over the said driver or chauffeur and that at the time and place aforesaid, the said automobile and driver were engaged in the work of the defendant, Cudahy Packing Co., and that the defendant, James J. Dawkins, is in nowise responsible.

40

Reply.

WHEREFORE the defendant, JAMES J. DAWKINS, demands judgment that the complaint herein be dismissed together with costs and disbursements of this proceeding.

HAROLD L. TURK and
JOSEPH ROLNICK,
Attorneys for Defendant, Dawkins, 10
185 Montgomery Street,
Jersey City, N. J.

**REPLY TO ANSWER OF CUDAHY
PACKING CO.**

Filed December 10, 1924.

Marie Lacombe, plaintiff, replying to the answer of the Cudahy Packing Co., a corporation of the State of Maine, authorized to do business in New Jersey, says that: 20

She denies the allegations of the first and second separate defenses set up in the said answer of the said Cudahy Packing Company.

STICKEL & NAUGHRIGHT,
Attorneys of Plaintiff. 30

Reply.

**REPLY TO ANSWER OF DEFENDANT
JAMES J. DAWKINS.**

Filed December 15, 1924.

10 Plaintiff, Marie Lacombe, replying to the answer of the defendant, James J. Dawkins, says that:

1. She denies the allegations of the first separate defense.

20 2. She admits, in reply to the second separate defense, that at the time and place mentioned, in the complaint, the said automobile was hired to the defendant, Cudahy Packing Co., and that at the time and place aforesaid, the said automobile and driver were engaged in the work of the defendant, Cudahy Packing Co., and denies all the other allegations of said second separate defense and says that the agents of both James J. Dawkins and the Cudahy Packing Co. were in charge of and exercising control over said truck at the time and place of the accident.

STICKEL & NAUGHRIGHT,
Attorneys for Plaintiff.

30

40

*Postea.***POSTEA.**

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MARIE LACOMBE,

*Plaintiff,**vs.*JAMES J. DAWKINS and the
CUDAHY PACKING COMPANY, a
corporation,*Defendants.*

10

*Action at
Law.**Postea.*

The above-entitled cause was tried before
Honorable Worrall F. Mountain to whom the
same had been duly referred and a jury in the
presence of counsel for the respective parties on
November 17th and 18th, 1926.

20

At the close of the plaintiff's case a motion
was made and granted for a non-suit in favor
of the defendant Cudahy Packing Company and
against the plaintiff and a motion having been
made by the attorney for the plaintiff the Court
granted a voluntary non-suit in favor of the
defendant James J. Dawkins.

30

(Signed) WORRALL F. MOUNTAIN,
Circuit Judge.

40

Rule for Judgment.

RULE FOR JUDGMENT.

Entered November 29, 1926.

NEW JERSEY SUPREME COURT.

| | | | |
|----|---|---|---|
| 10 | JAMES J. DAWKINS and the CUDAHY PACKING COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendants,</i></div> <div style="text-align: center; padding: 5px 0;"><i>ads.</i></div> | } | <i>Action at Law.</i> <i>On Postea.</i> |
| | MARIE LACOMBE, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff.</i></div> | | |

20 It is ordered that judgment of non-suit be and
 hereby is entered in favor of defendants and
 against the plaintiff with costs to be taxed nisi.

Entered November 29, 1926.

On motion of

HAROLD L. TURK and
 JAMES ROLNICK,
 Attorneys for Defendant,
 James J. Dawkins.

30 ROBERT CAREY,
 Attorney for Defendant,
 Cudahy Packing Company, a Corp.

A true copy.

EDWARD J. KELLEHER,
 Clerk.

Opening.

NEW JERSEY SUPREME COURT.

Wednesday, November 17, 1926.

| | | | |
|---|---|---------------------------|----|
| MARIE LACOMBE, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JAMES J. DAWKINS and CUDAHY PACKING Co., <div style="text-align: right;"><i>Defendants.</i></div> | } | <i>Action at Law.</i> | 10 |
|---|---|---------------------------|----|

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appears Stickel & Stickel, (by Fred G. Stickel, Jr.) 20

For the defendant Cudahy Packing Company appears Robert C. Carey.

(No appearance by the defendant, James J. Dawkins.)

(A jury is called and sworn.)

Mr. Stickel opens for the plaintiff.

Mr. Carey opens for the defendant, Cudahy Packing Company. 30

Mr. Stickel: I desire to read the testimony of Mary Harris Rungsted and Paul V. Rungsted taken on October 16, 1925 and which testimony was stipulated, by and between the attorneys for the respective parties, might be used at this trial as though the testimony had been given here, subject to the ruling by this Court on the objections.

The Court: You may. 40

Mary Harris Rungsted, direct.

(Mr. Stickel reads the testimony of Mary Harris Rungsted to the jury as follows:—)

“MARY HARRIS RUNGSTED, sworn in behalf of plaintiff.

10 *Direct examination by Mr. Stickel.*

Q Do you know the plaintiff, Marie Lacombe? A Yes, very well.

Q Did you know her in July, 1924? A Yes.

Q At that time what was your name? A Mary Harris.

Q Since that time you have married? A Yes; it is now Mary Harris Rungsted.

Q Where was Miss Lacombe employed July 30, 1924? A The Westinghouse Lamp Company, 20 Belleville, New Jersey.

Q On what street is that plant located? A On Washington avenue.

Q Where is the entrance to the plant? A At the main gate, a street called Carner street.

Q And the entrance is located on what street? A Washington avenue and Carner street.

Q Did you witness an accident to Miss Lacombe on July 30, 1924? A Absolutely.

Q Where did it take place? A Right in 30 front of the gate.

Q On what street or avenue? A Washington avenue.

Q Tell us about it. A As Miss Lacombe and I were coming out of the plant, we immediately took hold of hands and walked out of the plant and through the drive until we reached the gate. In reaching the gate we still had hold of hands, both of us, and as we came out of the building we came out that way still having hold of each 40 other's hands. I saw the approaching car—

Mary Harris Rungsted, direct.

Q What car do you mean, an automobile or a trolley car? A The trolley car coming to a stop. I waited and the car stopped. I looked and the car was standing still and the passengers I saw getting on this same car from the Westinghouse Lamp Company, so I approached over, both of us together holding hands, in front of this car. I was the nearest to the car and she was to my right. 10

Q You were then facing what street? A Carner street. I stepped out beyond the car,—in front of the car and this truck—I saw the approaching truck—was coming very fast and parallel with the trolley car.

Q How close to it? A Right close to the car. I immediately stepped back, and as I stepped back, the truck dodged right towards us, then he dodged the other way. He made a strike towards the opposite direction, towards Carner street, and then he made another one at an angle, not coming straight to get both of us, but at an angle, where he caught Miss Lacombe. At the same time I had hold of her hand and still had hold of her hand when she went to the ground. 20

Q Which way was the trolley car coming, north or south? A The trolley car was going north, towards Nutley. 30

Q Then it was coming towards your left side? A Yes, towards the left side. I walked in front of the trolley car and she was to my right.

Q When you left the curb, was the trolley car moving or standing? A The trolley car was still standing.

Q Is that a trolley stop? A Yes, a trolley stop; signs on both posts on this side and also the pole with a white label on the side going north. 40

Mary Harris Rungsted, direct.

Q There is a trolley pole on the east side of Washington avenue and also on the west side of Washington avenue? A Both sides; a white label on both poles. The trolley stopped where it always stops, the regular stop for trolleys.

10 Q When you were in the act of crossing, on which side of you was Miss Lacombe? A She was on my right.

Q Was she furthest away from the trolley car? A Yes; I was next to the trolley car and the truck, both.

Q When you first saw the truck, where were you? A When I first saw the truck I had passed over in front of the standing trolley car.

20 Q And at that time where was the truck? A The truck was about twelve feet—just about in the middle of the trolley car, about twelve feet away from me.

Q Were there any obstructions or any traffic in the road? A Nothing whatsoever; nothing coming either way.

Q At that point how are the trolley tracks laid, in the middle of the street or otherwise? A On the side.

Q Was any horn blown? A None whatsoever, no warning, no horn, no brakes applied.

30 *By Mr. Carey.*

Q No what? A He didn't apply his brakes.

Mr. Carey: I object as a conclusion for her to say whether the brakes were applied or not. Brakes on the car are operated by foot. It is utterly impossible for anyone to tell.

40 Mr. Stickel: I will not consent to its being stricken out. I will let it stand as it is.

Mary Harris Rungsted, cross.

Mr. Carey: It is a mere opinion and conclusion.

Q From the time you first saw the truck until it struck Miss Lacombe, was there any lessening in the speed? A None whatsoever.

Q When you say that the brakes were not applied, what did you mean by that? A By the rate of speed. He kept on the same as when I saw the approaching truck. 10

Q Do you know what part of the truck struck Miss Lacombe? A I saw the right front wheel go over Miss Lacombe's leg the same time I was holding her hand and she was holding mine. I helped to pick Miss Lacombe up.

Q Were there any other people around there before or after you came out of the factory? A Several people had crossed over and were waiting for the south car to take them to Newark; there on the opposite side just ahead of us. 20

Q They had crossed from where to where? A Crossed over the street from the plant; they had come out from the plant.

Q Was the plant letting out the employees at the time? A All of us.

Q What time was it? A About five forty-eight. 30

Cross examination by Mr. Carey.

Q The exit from this plant is in the middle of the block, is it not? A There is a street; it's a regular street and a regular trolley stop.

Q I didn't ask you that. The exit from this plant is in the middle of the block, is it not? A I don't know just what you mean.

Q What part of the building where you were all working is the exit you came out, in the 40

Mary Harris Rungsted, cross.

center? A Well, I really wouldn't know what to say, Judge.

Q The street did not run through the company property? A No, it is on Washington avenue.

10 Q I show you a photograph and ask you if you recognize it? A Yes, I know that is the plant and this is the watchhouse (indicating).

Q You are pointing now to a small building in the center of the photograph. You say that is the watch house? A Yes.

Q And the building on the right of the photograph is the factory itself? A Yes, on the right of the photograph.

20 Q I show you two large gates between the watch house and the factory. Is that where you came out? A Yes, that is where we came out.

Q So there is no public street running through the property where you are. That is an entrance of the factory plant? A Yes.

Q That is what street? A Washington avenue.

30 Q That is Washington avenue? When you say that is Washington avenue, that is the street that runs up and down in front of the factory? A Yes.

Q That is the street the car tracks are on? A That is the avenue where the car tracks are on.

Q So then your factory is fronting on Washington avenue, is it not? A Yes.

Q And the exit from the factory is on what side of Washington avenue? A The entrance?

40 Q The exit where you come out? A Oh, the exit where we come out? It would be in front of Washington avenue.

Mary Harris Rungsted, cross.

Q On what side, the east or west side of Washington avenue? That is the east side, is it not? A It must be. I am not familiar about it. It's to the river.

Q It is the side nearest to the river? A I don't know.

Q Do you know whether the exit from the factory is on the east or the west side of Washington avenue? A On the east side. 10

Q Now, what is the name of the next street running across Washington avenue north of the exit? A Above is King street.

Q How far is that above the entrance? A Well, I really would not be able to say; I don't know.

Q About how far? A I really wouldn't say about, I don't know. 20

Q You have an idea. A I really couldn't say; I really don't know much about it.

Q Is it a city block? A I don't know whether it is a city block.

Q Is it two hundred feet? A I really wouldn't say; I really don't know.

Q How long have you been working there? A Nineteen months. King street belongs to Belleville. 30

Q I don't care what King street belongs to, I am asking you how far north King street is from the factory exit, approximately? A I would say about twenty-five feet.

Q How many? A About twenty-five feet.

Q Twenty-five feet? Why, the watch house is twenty-five feet wide, is it not, or pretty near? A Well, King street is quite a distance from where the watch house is. What the distance is, I wouldn't know. 40

Mary Harris Rungsted, cross.

Q What is the name of the next street running across Washington avenue to the south? A I didn't mean Carner street. That is where we come out of the exit.

10 Q I am asking you what is the name of the next street crossing Washington avenue to the south? A That is Greylock avenue.

Q How far south is that from the exit? A Oh, that is blocks away.

Q Now, Carner street that you refer to runs into Washington avenue from the west, does it not? A Right across, yes.

Q Into Washington avenue from the west? A Yes.

Q It doesn't cross Washington avenue, does it? A I think it crosses Washington avenue.

20 Q Well, where? Where does Carner street cross Washington avenue? A Right near the gate.

Q Isn't it a fact that no street crosses Washington avenue between the two streets I have just named, one north and one south? A Yes, there is a street, but I don't know just exactly where. I couldn't say by the photograph just where it is, but I could point you out the street.

30 Mr. Carey: I would like to have this photograph marked for identification.

(Photograph marked D-1 for identification.)

Q Isn't it a fact that no street crosses Washington avenue running east between the two streets that I have named? A No; there is a street that runs across Washington avenue, Carner street.

40 Q Where does Carner street run over east of Washington avenue? Isn't it a fact that

Mary Harris Rungsted, cross.

Carner street begins or ends at Washington avenue? A I guess it does.

Q That is what I want to get at.

Mr. Carey: I ask that this photograph be marked for identification.

(Photograph marked D-2 for identification.) 10

Q I show you another photograph, D-2 for identification, and ask you if that is a correct picture of the factory as it stood at the time of the accident? A Well, I am not very good or capable as to pictures or photographs, so really I couldn't say or express my opinion.

Q You have known that factory for nineteen months? A I could say it is the Westinghouse Lamp Company just by looking at it. I wouldn't say with other pictures, but your bringing it and looking at it I would say it is the Westinghouse Lamp Company. 20

Q There is no question about that, is there? A No.

Q And this picture D-2 for identification shows the gate entrance with an asphalt walk leading to it, does it not? A Yes. 30

Q Looking at photograph D-2 for identification, on the distance covered by that photograph, there is no street crossing Washington avenue east, is there? A No, just the trolley tracks.

Q No street crossing the avenue? A No paved street.

Q Can you point out on that photograph where Carner street runs into Washington avenue? A No, I would not be able to by a photograph. 40

Mary Harris Rungsted, cross.

Q As a matter of fact, there is no street running into Washington avenue directly opposite the entrance to the factory, is there? A There is no paved street.

10 Q Isn't it a fact there is no street directly entering Washington avenue from the west almost directly opposite the exit or entrance of the factory? A I would say there was a street.

Q Can you see it on the photograph? A No, I can't see it on the photograph.

20 Q Would you say that photograph from your recollection is a good photograph? A I said if you had other photographs along with it I wouldn't distinctly say it is the Westinghouse Lamp Company. I am not familiar with photographs and didn't pay much attention to it. But knowing you have it and brought it here, I would say that is the Westinghouse Lamp Company, but if Judge Stickel would have several of them, I really wouldn't say; I am not very good on photographs.

Q You are not good on photographs? A No.

Q And your memory is very good, of course? A I don't think my memory is very good on photographs.

30 Q Now, let's see. This street you called Carner street, that ends at Washington avenue, is a dirt street? It is not a paved street? A No, it is not a paved street.

Q Do you know how wide it is? A I really couldn't say as to the width.

Q You never noticed it? A I noticed it but I couldn't say as to the width.

Q You came out of the factory about five-thirty? A Five forty-eight.

40 Q Quite a number of people came out? A Yes, I presume fifty to seventy-five; a bunch of us.

Mary Harris Rungsted, cross.

Q You came out with your friend, the plaintiff, holding her hand? A Yes.

Q Did you have an engagement at the time that you two were going to satisfy? A No, not necessarily an engagement whatsoever.

Q You were going to take the trolley car? A Well, we didn't know for certain. 10

Q Isn't it a fact you came out of the factory, both of you, intending to drive home in an automobile? A We didn't know that the automobile would be there, Judge. I didn't know for certain that the automobile would be there.

Q Did you expect the automobile there? A Occasionally I did and sometimes I didn't.

Q Whose automobile did you expect? A Mr. Rungsted's automobile, if it came.

Q When he came he always parked on the opposite side of the street watching for you? A No, he did not. 20

Q Where did he park? A Sometimes I would wait for him when I got there. He wouldn't always be there. Sometimes he would be across the street and sometimes he would be a little away from it.

Q He generally would be across the street? A No.

Q Where would he generally be? A He had no place that he would generally be at all. 30

Q There was nothing on the road to prevent his parking directly across from your exit? A No, nothing on the road whatsoever.

Q So this day when you went out you looked for him, didn't you? A I wouldn't say that I did, because I wasn't certain he was coming.

Q But you did kind of expect him, didn't you? A Well, just offhanded. 40

Mary Harris Rungsted, cross.

Q And you and your friend expected to ride home with him, is that right? A No, she wasn't going to ride, necessarily. She might go with me on the trolley. She hadn't fully decided.

Q Did you decide before you went across the street? A And if Mr. Rungsted was there we
10 were going home by automobile.

Q As you same out you looked to see, of course, if he was there? A No, I didn't look to see if he was there.

Q Well, why not? A Well, because there was a bunch of people crossing ahead of us and I never look until I really get across the street.

Q Was he across the street? A Mr. Rungsted was across the street? Yes, I guess he was across the street.

Q Didn't you see him at all? A I didn't see
20 him at all. I didn't look for him before the trolley came, and then I looked and I saw him across the street.

Q Where were you when you first saw Mr. Rungsted in his car? A When I first saw him I would say I was right—coming out of the gate.

Q Coming out of the gate? So when you were coming out of the gate, you saw Mr. Rungsted across the street, didn't you? A Yes.
30

Q His car was standing there? How far from the factory exit was his car standing? A Well, I don't know how many feet because I am not good on that.

Q Well, about how far? A Well, I'd say on the opposite side.

Q On the opposite side of the street standing still? A His car was standing still.

Q Which way was his car pointing? A
40 Towards the south.

Mary Harris Rungsted, cross.

Q In other words, he was on the right-hand side of the street pointing south, and the moment you came out of the exit gate you saw him there? A I saw him.

Q Did you wave to him? A I don't remember waving at all to him.

Q Will you say you did not? A I would not say as far as I could honestly tell the truth I didn't wave to him. I don't remember waving to him. 10

Q You don't remember whether you waved or not? A No answer.

Q When you saw him, what did you say to the plaintiff, "There he is?" A No, I don't remember making any remark whatever.

Q Didn't you tell her the car was there and she could ride home with you? A No. 20

Q Wasn't there anything said to her about going in the car? A No, I didn't say anything to her at all at the time.

Q You had hold of her hand? A We had hold of hands, yes.

Q And you walked down over the sidewalk to where the trolley was standing, is that right? A Yes. 30

Q That was right in front of your exit? A Yes.

Q How many trolley cars were standing there? A One trolley car was standing there.

Q Were there any other cars moving? A No car was moving at all.

Q No trolley car moving? A No.

Q There was only one there? A Just one.

Q Any other automobile standing there? A No. 40

Mary Harris Rungsted, cross.

Q The only one was your present husband's across the street? A That is all; and people crossing over and several watching for the trolley, but no car approaching to take them to Newark.

10 Q So you started across the street with her in front of the standing car, is that right? A Yes.

Q Were people getting on the standing car? A Yes, people were getting on the standing car.

Q That was going in an opposite way from you? A Yes, to Nutley.

Q That car was right at the curb on the side of the street? A Yes; they are changing them now, putting them in the middle of the street.

20 Q At that time, the trolley tracks were on the extreme sides of the street? A Yes.

Q Both sides? A Yes.

Q And all wagon traffic was in between the trolley tracks? A Yes.

Q It was not paved between the trolley tracks at that time, it was dirt between the trolley tracks, wasn't it? A I think so, but I really wouldn't say yes or no.

30 Q But a paved highway was between the trolley tracks for automobiles, trucks, and everything of that sort? A Yes.

Q There was no road between the trolley tracks and the exit? A No, just the trolley tracks on the side of the paved street.

Q When you started to walk across the street in front of the trolley car, did you look to see whether any automobiles were coming? A Absolutely, judge.

40 Q Where did you look? A I looked both ways, first her way, then the opposite way, and that is when I saw the truck.

Mary Harris Rungsted, cross.

Q You didn't see the truck, you said, until you stepped out in front of the trolley car? A After I passed the trolley car.

Q Before you passed the trolley car you didn't see the truck? A Yes, I looked both ways, but the truck was going parallel with the trolley.

10

Q And you couldn't see the truck because it was on the other side of the trolley car? A Yes, it was right close to the trolley. I did look both ways.

Q The trolley was in the way and you couldn't see the truck because the trolley car was standing there? A The truck was in the middle of the trolley car.

Q When you stepped out in front of the trolley car to cross the street, as soon as you stepped out holding hands, you saw the truck? A I saw the truck.

20

Q As soon as you stepped out in front of the trolley car? It was then about twelve feet, you said, away? A Yes, as far as I could judge.

Q It was moving? A Coming very fast and right close to the trolley car, right like that (indicating with hands).

Q "Right like that" doesn't mean much for the record. How far from the trolley? Just tell us in feet. A Well, I would say it was so close; you might think they were running together (indicating).

30

Q Well, how close, about two feet, ten feet, or what? A Oh, it wasn't ten feet.

Q Two inches? A Right close to the trolley.

Q Your fingers would indicate about an inch and a half. There is no way of getting that on the record. Just tell me how far in inches about,

40

Mary Harris Rungsted, cross.

in your judgment, they were apart? A I would say about like that (indicating).

Q That is about three inches, isn't it? A Three or four inches apart. I really couldn't say.

10 Q Three or four inches, as near as you can judge? A Yes, I know it was right close together. I am not good on feet.

Q You know what inches are; you are not good on them, but you know what they are? A Yes, I know what they are; I know they were close together.

Q When you saw this car as you stepped out, twelve feet away, you say it swerved in which direction? A Towards us.

20 Q Towards you? A Yes.

Q Well, if it was only about three or four inches from the trolley car and it swerved towards you, it would have hit the trolley car, wouldn't it? A No, he couldn't hit the trolley car.

30 Q Why not? A Well, he was farther away from the trolley car. He couldn't hit the trolley car; he was coming fast, and he came right at us ahead of the trolley car at that time.

Q How far in front of the trolley were you when you passed him? A Over a foot.

Q Were you pretty close to the trolley car? A Yes, I was pretty close to the trolley car.

Q About a foot away? A About a foot away.

Q You could touch the trolley car with your hand, couldn't you? A I don't know; I didn't try.

40 Q Well, could you? A I doubt it.

Mary Harris Rungsted, cross.

Q If you were a foot away, couldn't you have touched it? A I must have been a little over a foot; about a foot, I guess.

Q Now, when you stepped out in front of that trolley car, you looked to see if a car was coming, didn't you? A Absolutely.

Q Why? A Well, I always look when crossing the street or crossing in front of trolley cars or in front of automobiles; I always look both ways. 10

Q So as you stepped out in front of the trolley car, knowing there is a chance of an automobile coming, you looked? A I did.

Q And the reason you looked you thought there was a chance of an automobile coming? A That is my regular habit, looking.

Q You were further out in the street than your friend that was injured, or was she further out in the street? A She was further out from me. 20

Q She could see without any trouble anything coming? A I don't know what she saw.

Q She was in a position to see as readily as you could see? A I don't know; I couldn't say about her whatsoever.

Q But she was in a position where she could see as readily as you could? A I don't think she was; she was to my right. She wasn't at that time out. We were side by side. 30

Q You just said she was out further than you were when you stepped out? A No, we were walking hand in hand.

Q Then you were walking about even? A About even.

Q Then you are mistaken when you said she was further out than you were, is that right? A Well, I would say we were walking hand in hand. 40

Mary Harris Rungsted, cross.

Q Well, you were mistaken when you said she was further out than you? A Well, that I don't remember, how far out she was. I only remember we were hand in hand.

Q Were you mistaken when you said she was further out than you were? A Well, she
10 wasn't any further at the time we crossed over the trolley track than I was. We were walking hand in hand.

Q Then, if you walked out together, you each had apparently the same view of the road, didn't you? A Well, I don't know; I don't think so, I think I obstructed her view.

Q You think you obstructed her view? Was there anything else besides you to obstruct her view? A No.

Q Now, as soon as you stepped out in front
20 of the car, you saw the truck? A I saw the truck, because—

Q Never mind "because." You saw the truck? A I saw the truck.

Q You saw it coming along? A Yes, coming along.

Q You only saw it for an instant, of course? A Just in an instant it was on us.

Q Not long enough to say how fast it was
30 going? A I saw it was going very fast as soon as I stepped out, judge.

Q When you saw very fast, you don't know how fast, do you? A I couldn't say as to speed.

Q You mean it seemed it was fast because it was right there on you? A I could honestly say before God it was coming very fast.

Q Was it going a hundred miles an hour? A As to speed, I couldn't say, but he was com-
40 ing very fast.

Mary Harris Rungsted, cross.

Q Was he going ten miles an hour? A As to state how fast, I wouldn't know; I couldn't judge.

Q You jumped back, didn't you? A I stepped back.

Q You were not hit? A No.

Q Your friend didn't step back? A I can't vouch for what she did. 10

Q Didn't you see whether she stepped back or not? A I couldn't vouch for her. I saved myself from being hit.

Q You jumped back together? A Yes, together.

Q Didn't you leave go of her hand? A No, we didn't leave go of hands. She was absolutely on the ground when we let go of hands.

Q Hadn't you and she started to run across the street to get in your intended husband's car? 20

A No, we were walking and looking.

Q Weren't you both looking at his car? A Absolutely not.

Q Were you looking at his car? A Absolutely not, judge.

Q He was only about twenty feet ahead of you? A Honestly, before God, I wasn't looking at his car.

Q You jumped back and you were not hit at all, were you? A No, I was not hit. 30

Q She was hit by what part of the truck? A By the front right wheel.

Q The front fender didn't hit her? A That I couldn't say; I was too badly shocked myself. I saw the wheel go over her.

Q And the truck stopped? A It went beyond her.

Q How far did the truck go after striking her? A As far as I could say, from being shocked, I don't know. 40

Mary Harris Rungsted, cross.

Q How far did the truck go after it struck her? A Well, it went after it struck her—I really couldn't say as to distance, how far.

Q When she was picked up, wasn't she between the front and rear wheels of the truck?

A Really, I don't remember.

10 Q Don't you know that the truck stopped within ten feet? A No, my vision—of course, I was shocked. My vision is that both wheels, front and back, went over Miss Lacombe.

Q That is your vision? A Yes, and the truck went beyond her.

Q Don't you know she was taken out from between the two wheels of the truck? A No, I do not.

20 Q You didn't see that? A I thought both wheels of the truck went over her and the truck went beyond quite a distance.

Q I don't want your thoughts, what you know? A That is what I remember.

Q Didn't the truck stop right still alongside of the car? A The truck went beyond her.

Q How far did the truck go? A I don't know how far it was when it stopped.

Q Ten feet? A I couldn't say how far.

30 Q You couldn't say? A No; it went beyond her.

Q Isn't it a fact that the rear end of the truck didn't clear the trolley car when it came to a standstill? A Oh, no, the rear end of the truck went over Miss Lacombe and went past the trolley car.

Q You think it did? A Absolutely.

Q You saw that? A With both of my eyes, and I am only saying what I saw myself.

40 Q How far was she from the truck when she was picked up? A How far was she from the truck when she was picked up?

Mary Harris Rungsted, cross.

Q Yes. Think hard. A I couldn't say; I don't remember, because I was too badly shocked myself and in too nervous a condition.

Q Wasn't she picked up right from under the truck? A I would say no; the truck went beyond.

Q Wasn't she picked up right from under the truck? A No, as far as I remember, the truck had gone beyond Miss Lacombe. 10

Q Your memory is a little doubtful because of your shock? A I wouldn't say so; I remember having a clear vision of it.

Q How long had the plaintiff been employed in that factory to your knowledge? A Ever since I was employed there.

Q She was accustomed to going out with you every day practically? A No, I wouldn't say we were accustomed to going out. When we got through the same time, we did go out, but we didn't go out every night together, because sometimes I would work longer. 20

Q Frequently you went out together? A Yes, frequently we went out together.

Q And frequently you drove home with your husband-to-be? A I would say a very few times we ever took Miss Lacombe. Miss Lacombe and I were just acquaintances in the plant. I had no personal friendship with Miss Lacombe. 30

Q Why hold her hand if you were just acquaintances? A I mean friends in the plant. I visited Miss Lacombe.

Q Does she live up near you? A No, but I liked the girl.

Q And she liked, too? A I guess so. It was my custom with everybody to hold hands. 40

Mary Harris Rungsted, re-direct.

Q Was the plaintiff rather a bright girl?
A Very bright; exceedingly bright. She is one of the brightest girls I ever met.

Re-direct examination by Mr. Stickel.

10 Q How many turns did the truck make before it struck Miss Lacombe? A When it made the third turn it struck Miss Lacombe.

Q It made three turns? A Yes, it turned in the opposite direction and then came at right angles to her, didn't come straight at all toward both of us.

Q Where was it when it made its first turn toward you? A Right in front of the trolley car.

20 Q When you had your first vision of the truck, and as you say, it was twelve feet away, where were you? A I had stepped beyond the trolley car.

Q Did you have any vision of the truck before you left the rails of the trolley car? A I couldn't see the truck before I left the rails. I was in front of the trolley car. I looked as soon as I crossed in front of the trolley car. The first thing I did I looked that way.

30 Q Was there anything to prevent the truck from turning out? A Nothing whatever.

Mr. Carey: I object on the ground that is merely a matter of opinion of the witness, and a conclusion, and I ask that it be stricken out.

The Court: I will strike it out.

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

40 Exception noted as ground of appeal.

Mary Harris Rungsted, re-direct.

Q Was there anything approaching the truck going south? A Going towards Newark?

Q Going towards Newark at the time of the accident? A No, nothing was coming that way at all.

Q What was the condition of the street, the pavement between the two tracks, not the rails, but the two tracks at that time? What was the condition of the street with respect to travel or any obstruction? A Pardon me, I don't know what you mean. 10

Q Was there any obstruction either from the standpoint of automobiles or anything else on the street at the time of the accident? A Nothing but the standing trolley car.

Q That was on the tracks? A That was on the tracks. 20

Q Was there anything between that track and the track on the west side of the street? A No.

Q Where was Mr. Rungsted's car? A Across the street.

Q How far away from this car? A Oh, a distance on the opposite side of the trolley car going to Newark. His car was facing Newark.

Q If the truck had turned towards the west side of Washington avenue, would it have been anyway near Mr. Rungsted's car? A No, a few feet from where Mr. Rungsted's car was standing. 30

Q Had Mr. Rungsted's car reached the watch house? Was it standing anywhere near a point opposite the watch house? A It was opposite the watch house.

Mary Harris Rungsted, re-cross.

Re-cross examination by Mr. Carey.

Q This accident, then, happened, practically right in front of your exit, didn't it? You came out of the exit and started to go across and the accident happened, is that right? A Yes.

10 Q I mean in front of the watch house, is that right? A That is right.

Q And your husband's-to-be car was right opposite the watch house pointing the other way, is that right? A That is right.

Q Now, you say after you saw this truck and before it hit your friend, the plaintiff, it changed its course three times, is that right? A The third time when it struck us.

20 Q The third time when it struck you, and that was all within twelve feet? A Well, no, it was beyond when it struck out towards us; it was right on us when I stepped back.

Q The third time it was on the twelve-foot line? A It was beyond that; she was to my right.

Q She was only about two feet from you? A Yes.

30 Q Fourteen feet in all then, is that right, if done within fourteen feet? A I wouldn't say feet, because I don't know.

Q You said feet? A Twelve feet when I first saw it.

By Mr. Stickel.

Q You said Miss Lacombe didn't step back at all? A I didn't say Miss Lacombe didn't step back at all.

40 Q Judge Carey said to you you stepped back and got out of danger, and did Miss Lacombe step back? A Miss Lacombe did step back,

Paul V. Rungsted, direct.

but I don't know anything about Miss Lacombe; I am talking about myself. I only had my own mind.

Q Did Miss Lacombe step back? A She did step back with me.

Q What did you do with regard to Miss Lacombe? A I pulled her with all my might. 10

Q Isn't it a fact that Carner street or avenue begins or ends almost directly opposite the exit of this plant? A Yes.

By Mr. Carey.

Q Isn't it a fact that Carner avenue does not begin directly opposite the exit of this factory? A No, I wouldn't say.

Q You don't know? A No.

20

PAUL V. RUNGSTED, sworn on behalf of plaintiff.

Direct examination by Mr. Stickel.

Q Mr. Rungsted, where do you live? A At the present time I am located in Florida. I am here temporarily at 755 Highland avenue. 30

Q How long have you been here? A This last time?

Q Yes. A Two weeks.

Q Are you required to return to Florida? A Yes.

Q Have you your reservations? A Yes, sir.

Q For when? A Saturday.

Q (By Mr. Carey.) That is tomorrow? A Yes.

Q Is the last witness your wife? A Yes. 40

Paul V. Rungsted, direct.

Q Has she reservations also for Florida for tomorrow? A Yes.

Q And that is the occasion for the taking of this testimony now? A Yes. Here are the tickets, if you want to see them.

10 Q No, I want to show the reason for taking this testimony. Did you on July 30, 1924, know Miss Lacombe and also Miss Mary Harris? A I did.

Q Is Miss Mary Harris your present wife? A Yes.

Q Where were Miss Lacombe and Miss Harris employed at that time? A The Westinghouse Lamp Company, Belleville, New Jersey.

Q What street is the Westinghouse located on? A Washington avenue.

20 Q Did you witness an accident to Miss Lacombe that occurred July 30, 1924? A I did.

Q And where did the accident occur, what street? A Washington avenue.

Q And where with respect to the plant in which she was employed? A At right angles to the gate; practically right in front of the plant.

30 Q Do you know anything about the time? A About five forty-eight or five-fifty, something like that.

Q Where were you when you witnessed the accident? A I was in an automobile proceeding south on Washington avenue. At the time of the actual accident, I was about seventy-five feet in the distance.

Q Seventy-five feet which way from the accident? A Well, I was north of the accident proceeding south.

40 Q You were on the opposite side of Washington avenue? A Yes.

Paul V. Rungsted, direct.

Q Can you tell us how far you were away from Carner avenue? A I don't know where Carner avenue is.

Q Who was with Miss Lacombe? A Miss Harris.

Q What was it that produced the accident? What was it that struck Miss Lacombe? A A truck owned by J. J. Dawkins. 10

Q When you first saw the truck, where was it? A It was practically abreast of the rear end of the trolley car. That is to say, the rear end of the truck and the rear end of the trolley car were on a line when I first saw it.

Q And how close to the trolley car was the truck? A Oh, I should judge about a foot.

Q And do you know anything about the speed of the truck? A No, I don't. 20

Q Was there any signal given of the approach of the truck? A No signal whatever.

Q At the time you first saw the truck, did you see Miss Lacombe and Miss Harris? A I don't recall whether I saw the truck first. I presume I saw Miss Harris and Miss Lacombe first. In fact, it is reasonable to suppose I did; I had started up the street.

Q When you first saw Miss Lacombe and Miss Harris, where were they? A They were just about leaving the gate, that is, from the plant. 30

Q At the time the trolley car, abreast of which the truck was operating, was it moving or standing? A The truck at that time? I don't think I took particular notice of the truck. It was when I caught sight of them first that I took notice of the truck.

Q Was the trolley car moving or standing? A The trolley car was standing. 40

Paul V. Rungsted, direct.

Q And where with respect to the end of the trolley car did Miss Lacombe and Miss Harris start to cross the street, how far from the front of it? A Oh, close from the front of it. I suppose they were about a foot and a half, possibly two feet away from the front of the car.

10 Q Did you see the truck strike Miss Lacombe? A The truck didn't strike her. I saw the truck run over her.

Q On which side of Miss Harris was Miss Lacombe? A As I recall it, she was on the right.

Q Just tell us what you saw of the truck until it ran over Miss Lacombe. A The truck was proceeding north pretty close to the trolley car and at that particular point, when it was
20 abreast of the rear end of the trolley car—that is the rear end of the truck to the rear end of the trolley car—Miss Lacombe and Miss Harris had started to cross the car track and they made one step or one pace beyond the car track at which time the truck was practically abreast of the middle of the trolley car. At that point, the truck for some unknown reason veered off to the left, and—

30 Mr. Carey: I ask that "for some unknown reason" be stricken out.

Mr. Stickel: I agree to strike out "for some unknown reason."

Q At that time, the truck did what? A It swerved, that is from its true, straight line, towards the west of Washington avenue. It proceeded a very short distance before it recovered and retraced its course towards the trolley car
40 again for a very short distance, and then made a

Paul V. Rungsted, cross.

sharper turn than its first westerly direction, at which time it ran over Miss Lacombe.

Q Do you know what part of Miss Lacombe it ran over? A It ran over her upper right leg.

Q What part of the truck ran over her? A The front right wheel. 10

Q Was there any lessening of the speed from the time you first saw the truck until it struck or hit Miss Lacombe? A Not until the truck was relatively about two feet away from Miss Lacombe.

Q Then what happened? A Then there seemed to be a lessening of speed.

Q Did you see Miss Lacombe make any effort to back away? A She backed away and in doing so tripped. 20

Q Was there any traffic in the road to the west of the truck? A Nothing whatever.

Q The road was entirely clear? A Absolutely clear.

Q Did you see more than one trolley car there? A Only one trolley there at the time I took note of it.

Q Did you observe any effort on the part of the driver to apply his emergency brake? A That I couldn't say. My vision was directed towards the proximity of the cars, and naturally I didn't pay any attention to the driver. 30

Cross examination by Mr. Carey.

Q You were in your car, were you not? A Yes, sir.

Q What car were you driving? A A Studebaker coupe.

Q You were waiting for your fiancee, were you not? A Yes, that is right. 40

Paul V. Rungsted, cross.

Q You expected to drive her home? A That is right.

Q You saw her coming out of the factory, is that right? A That is correct.

Q She had with her the other young lady, the plaintiff? A That is correct.

10 Q You knew the other young lady? You had taken her home before with your fiancee? A On one occasion, yes, sir.

Q You saw them starting across the street, did you? A Yes, they started across the street with the idea of meeting me.

Q Where were you when you first saw them? A I was about two hundred to two hundred and fifty feet distant.

20 Q Why? A Because I was parked on a side street waiting for the whistle to blow.

Q And as soon as you heard the whistle blow, you started up? A No, I did not; I waited until I got sight of them. I had no assurance they would be there.

Q Didn't you drive up and stop the car for them? A No.

Q Weren't you parked right over from the watch house? A No, sir.

30 Q You heard your wife's testimony a little while ago on that subject. She said you were parked right across the street from the watch house; is that correct or isn't it? A It is not correct.

Q So, she could not have seen you parked directly opposite the watch house as she described? A No, sir.

Q She is mistaken about that? A Correct.

Q You were not parked at all? A No, sir.

40 Q You were operating in first speed? A No, I was not operating in first speed.

Paul V. Rungsted, cross.

Q What were you operating in? A In high.

Q Then you were going at what speed when you came down and saw her? A About eight miles an hour.

Q What speed were you going when the accident happened? A When the accident happened?

Q Yes. A Eight miles an hour. 10

Q Eight miles an hour? How far north of the place of the accident when it happened? A About seventy-five feet.

Q You were still moving? A Yes, I was still moving.

Q Even up to that time you hadn't parked opposite? A No.

Q While you were still moving, you were on the right-hand side of your street? A Yes.

Q On the pavement, of course? A Yes. 20

Q The pavement is how wide at that point, approximately? A Oh, I should judge about—I guess about sixty to sixty-five feet.

Q The pavement in the centre of the road? A Yes, sir.

Q Look at this photograph. How wide is the pavement? A I have still the impression of sixty feet.

Q You are not sure about that? A Naturally I am not sure. 30

Q Do you know the whole road is only sixty feet wide? A No, I didn't know that.

Q If you take out the trolley tracks and sidewalks, that would leave the centre of the road about thirty feet—twenty-four to thirty feet?

A I can only state what my impression is. That is what my impression was.

Q You mean from the sideline to the sideline? A The width of the whole street. It's possible to drive over the car tracks. 40

Paul V. Rungsted, cross.

Q I understand that. I am talking about the paved section, below the car tracks, how wide is that? That is between twenty-four and thirty feet, isn't it? A I guess it is, about the distance of four cars abreast.

Q About twenty-four to thirty feet? A
10 About thirty feet, I should say.

Q You were riding on that, were you? A I was riding on that.

Q You were the only car, as far as you could see on your side of the street? A I was the only car.

Q And the only car on the other side of the street was the trolley car and the truck? A That is correct.

Q There was nothing in front of the trolley
20 car for anybody to cross the street a considerable distance in front of it? A No.

Q There was no need of anybody passing a foot and a half in front of the trolley car? A Yes, there was. Why should anybody walk down six feet to go on a straight line? If the front of the car is parallel with the gate, a person would cross on a straight line.

Q There was plenty of room to go along the trolley track north if they wanted to? A There
30 was nothing in the way of the trolley car in front of them, no.

Q You were seventy-five feet away and you could see the front of the trolley car very distinctly? A Sure.

Q Nothing to obstruct your view? A No.

Q The first you noticed the truck was when the rear of the truck was about even with the trolley car? A That is correct.

Q How long was that trolley car, do you
40 know? A No, I do not.

Paul V. Rungsted, cross.

Q Fifty feet? A I imagine so.

Q How long was the truck? Can you tell from your recollection? A I don't know that.

Q The ordinary, regular sized truck, apparently? A That would not cover that, because some trucks are possibly double the size of this particular truck. This was a small truck. 10

Q How long was this one? A Possibly about twelve feet, I guess.

Q A heavy truck? A I judge about two and a half ton truck.

Q Did it make any noise? A That I can't say.

Q You are not sure? A I was there within seventy-five to one hundred feet of it.

Q Did you hear any noise from it? A No, I didn't hear any noise. 20

Q Was there any noise from the trolley car? A The trolley car was standing still.

Q Was there any noise from the trolley car? A No.

Q Was your car moving when you first saw the truck? A Yes.

Q How far did your car go before the accident after you first saw the truck? A Oh, I should judge about possibly one hundred feet. 30

Q About one hundred feet? So, your car went one hundred feet between the time you first saw the truck and the accident? A That is correct.

Q You were going, you say, about eight miles an hour? A Yes.

Q Now, the accident happened right in front of the trolley car, of course? A The side of the car.

Q The accident happened at the side of the car? A Yes. 40

Paul V. Rungsted, cross.

Q The girls were in front of it? A The side and adjacent to it.

Q The trolley car didn't move at all from the first time you saw the truck? A No.

Q Between the time you first saw the truck and the time the accident happened, the truck
10 moved from the rear end of the trolley car to the front? A I didn't get that question.

Q I said between the time you first saw the truck and the time the accident happened, the truck moved from the rear end of the trolley car to the front, from the position you have described? A Yes.

Q Its rear end was parallel with the rear end of the trolley car and traveled to the front part of the trolley car where the accident happened, is that right? A That is correct.
20

Q Between the time you first saw the truck and the time of the happening of the accident you noticed it from where you were seventy-five feet down the road moving and you noticed that the truck swerved a little? A I did.

Q Seemed as though he pulled to the left to avoid something? A Yes.

Q Then righted himself? A That is right.

Q Just at that time you saw your fiancée and
30 her friend stepping out from the car, didn't you? A That is right.

Q Looked as if he was trying to avoid them, didn't it? A Well—

Q It looked that way? A I couldn't quite consent to that inasmuch as I made the remark before that had somewhat of the same allusion and you objected to it.

Q Just answer my question. Didn't it appear to you he was trying to avoid the girls?

40 A Not on the first turn, no.

Paul V. Rungsted, cross.

Q How far did he change his course measuring in distance from the trolley car when he made that first turn? A I don't quite get your question.

Q You say he was running parallel with the trolley car about one hundred feet away? A Yes. 10

Q And you saw him turn to the left? A Yes.

Q How far did he turn out from the trolley car when he turned to the left? A Oh, possibly three or four feet.

Q Three or four feet? A Yes.

Q Then started straight down? A No, he retraced his course right back again.

Q Then you said he straightened and started out and the third time he went back to the right again? 20

Mr. Stickel: No, he didn't say that.

Q What did he do? A He went straight and when in the proximity of the centre of the car, he turned to the left making a detour of about four feet, and when he reached that point he immediately turned back the other way.

Q How far was he from the front of the car then? A He was whatever distance it might be. Possibly five feet or six feet beyond the centre. 30

Q So, he made a turn and took a new course for five or six feet, is that right? A That is right.

Q And the second course? A He retraced his course.

Q How many feet did he go when he retraced his course? A The distance it took 40

Paul V. Rungsted, cross.

him to get in the same relative location he was when he started, about three or four feet.

Q Then what did he do? A Made a sharp turn to the left, a sweeping turn and went a distance of five or six feet.

10 Q Then what did he do? A Then the accident occurred.

Q Then what did he do? A What do you mean?

Q After the accident happened? A After he ran over her?

Q Yes. A I presume he got off his truck.

Q What did he do and what did his truck do after the accident? A After he passed over her, the truck stopped.

20 Q How far did that truck go after it came in contact with her? A About six or seven feet.

Q And wasn't her body between the two wheels of the truck? A Yes.

Q When he stopped? A Yes.

Q In other words, she was between the two wheels of the truck? A That is true.

Q Between the front right wheel and the rear right wheel? A That is right.

30 Q You helped pull her out? A I drove my car up to the scene of the accident and two were there before me.

Q And you all pulled her out from between the car? A They had pulled her out from between the car when I reached there. They had taken her from under the car.

Q Was she at the edge of the car? A That is right.

40 Q In other words, the car made this third turn you speak of— A That is right.

Paul V. Rungsted, cross.

Q —and you said it changed its speed, between the time you first saw it and the time the accident occurred it slowed down?

Mr. Stickel: No, he didn't say that.

Q Didn't you say it went slower about two feet before it came to the time it hit her? A 10
That is different.

Q Is that true? A No, just get the question straight. Ask the question.

Q (Question repeated by stenographer.) A
It started to go slower when it was within two feet of her.

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

Q All this you have described about this car happened from the time you first saw the car when its rear and the trolley car's rear 20
was parallel or even, up to the time of the accident, it was straight? A That is rather ambiguous.

Q Isn't it a fact that all you just described about the operation of that car occurred between the time you first saw it and the happening of the accident? Answer the question yes or no.
A Yes.

Q It was during that same period of time you covered the distance you described? A 30
That is right.

Q Now, you say the young lady who was injured slipped, is that right? A That is right.

Q Did you see her slip? A Yes.

Q Did she have hold of your fiancee's hand when she slipped? A I can't say; that I don't know.

Q Did you see your fiancee pull her back? 40
A I can't say I did.

Paul V. Rungsted, cross.

Q You were looking right at the people?
A I wasn't looking at her while watching the proximity of the truck.

Q You don't know whether they held hands or not? A No, I do not.

Q You are sure you saw her slip? A Trip.

10 Q What did she trip on? A Her heel—she stepped back, and in throwing herself back from the path of the truck her right heel struck her left toe and unbalanced her.

Q When she fell her right foot went out?
A I can't say; I don't know.

Q You saw it? A I saw her trip.

Q When you saw her trip she fell? A Yes.

Q When she fell the wheel of the truck ran over her? A The car didn't hit her.

20 Q The front part of the car didn't hit her at all? A No.

Q If she hadn't fallen she would not have been under the car? A She might have been struck, because she was approximately out right in the centre of the truck and the truck was coming head-on, and the fact she fell is probably why it didn't crush her body.

30 Mr. Carey: I ask that that be stricken out as an opinion and conclusion.

Q Now, when she fell didn't her right foot slide out right under the wheel of the truck?
A I don't know.

Q Her left foot wasn't run over, was it?
A It was, yes, not possibly by the wheel, but the impact of the wheel.

Q Was her left foot run over? A That I can't say. Her left foot was injured.

40 Q Was her left foot run over? A That I can't say.

Paul V. Rungsted, re-direct.

Mr. Carey: I ask that this photograph be marked for identification.

Photograph marked D. 3 for identification.

Q I show you photograph marked D. 3 for identification, and ask you whether or not that is a good photograph of the conditions existing there at that time as you knew them? A That represents the Westinghouse plant, but I can't say about the road. 10

Q If I tell you this photograph was taken August 8, 1924, would that refresh your notions upon the subject, you having been familiar with that location? A I am not familiar with the location, that is just the point.

Q Didn't you stop there frequently to take your fiancee home? A Not frequently, occasionally; rarely, I might say. 20

Re-direct examination by Mr. Stickel.

Q When you say Miss Lacombe tripped, how far away was the truck? A About two feet.

Q And where was she with respect to the truck? A She was at the right centre of the truck. That is to say, the truck was headed for her and she was approximately at the right centre of the truck. 30

Q So, if she hadn't tripped she would be hit? A Absolutely.

Mr. Carey: I ask that that be stricken out as a conclusion of the witness, being purely an opinion.

Mr. Stickel: Your motion was made after the question was asked and the answer given. 40

Paul V. Rungsted, re-direct.

Mr. Carey: A motion to strike out the answer can't possibly be made until after the answer is given.

Q Do you know whether or not Miss Lacombe was pulled out from between the two wheels?

10 A My impression is she was.

Q When the first detour was made that you speak of, of three or four feet, where did that take the truck with respect to the position of Miss Lacombe? A That took the truck on an approximate line with Miss Lacombe.

Q It took the truck on an approximate line with Miss Lacombe? A Yes.

Q Then it swerved back towards the trolley again? A Yes.

20 Q How sharp was the turn as the result of which she was struck?

Mr. Carey: I object to the question. It carries an unwarranted assumption of fact.

Mr. Stickel: Question withdrawn.

Q How sharp was the third turn that was made? A It wasn't very sharp, but it was possibly at an angle of forty-five degrees to the trolley.

30 Q Directly towards Miss Lacombe?

Mr. Carey: I object on the ground it is entirely leading.

Mr. Stickel: Question withdrawn.

Q Directed in which direction? A Towards the west side of Washington avenue.

40 Q Where was Miss Lacombe when that turn was made? A She was east, practically four feet, possibly, from the car."

Edward Sprague, direct.

SECOND DAY

Thursday, November 18, 1926.

Continued pursuant to adjournment.

Present, counsel as before stated.

EDWARD SPRAGUE, sworn in behalf of plaintiff.

10

Direct examination by Mr. Stickel.

Q Where do you live? A Newark.

Q Where, in Newark? A 55 Highland avenue and I have an office at 86 Washington street.

Q How long have you been practicing medicine?

20

Mr. Carey: I will admit the doctor's qualifications.

Q Do you know the plaintiff in this proceeding, Miss Lacombe? A I do.

Q Did you perform an operation on Miss Lacombe? A I did.

Q Can you tell us about when? A On the evening of July 30th.

Q What year? A 1924.

30

Q Do you know when she had been injured? A The exact hour, no.

Q Had she been injured that day or the day before? A She was injured that day, I understand.

Q Where did you operate upon her? A St. James' Hospital.

Q When you first saw her what injuries did you find she had? A When I first saw her she was in a bad condition of shock; very rapid

40

Edward Sprague, direct.

pulse with a very serious injury about her right knee and an injury of lesser degree to her left foot.

10 Q What was the nature of the injury around her right knee? A She had a very severe crushing injury which lacerated and macerated all the soft tissue above and below the knee.

Q Had she lost blood? A Yes, very much, I imagine.

20 Q Can you describe the injuries around there more in detail? A Well, there was a sort of rent in the skin about five or six inches long on the side at about the knee. The leg from about three inches above the knee and down was cold and there was an absence of sensation in it, apparently; I could not determine any circulation. On examining the wound I found that all the soft tissue had been destroyed, severed apparently, by the injury. She had a break of the femur, that is the large bone on the leg, beginning about five inches above the knee and extending down into the knee joint; an injury which apparently destroyed the nerve and blood supply to the leg below.

30 Q What did you determine to do? A I advised an immediate amputation above the site of the injury.

Q Was she conscious at the time? A Oh, yes.

Q Did you have a consultation with other physicians? A Well, the advice of friends suggested that she have another opinion, which we did. Dr. Staehlin came in and confirmed the finding and advised on an immediate operation, which was done.

40 Q What was that operation? A We amputated her leg above the knee.

Edward Sprague, direct.

Q How far above the knee? A Well, the skin incision began above five inches above the knee and the bone was cut off perhaps two or three inches above that.

Q What was the injury to the left foot? A She had a peculiar injury to the left foot, sort of a split between the great toe and the one next to it extending up to the top of the foot and down to the sole towards the ball of the foot a little ways. I could not determine whether she had a dislocation of that toe or not, I couldn't tell. 10

Q How long was she in the hospital after the operation? A About three weeks.

Q Did you treat her while she was there? A Yes, sir.

Q What did the treatment consist of? A Dressing her wound and she ran a little fever for a few days afterwards and I watched her carefully; saw to her feeding; just symptomatic treatments, nothing else special. 20

Q Did you treat the other injuries? A Yes, sir.

Q When she left the hospital I presume she went to her home? A Yes, sir, I believe she did.

Q Did you treat her at her home? A Yes, sir. 30

Q How long did you visit her at her home? A I really don't know exactly; I was there several times. I suppose off and on maybe two months but I am not sure and then she came to my office for awhile.

Q When was the last time you treated her? A The last time I treated her was October, 1925; I think that's right.

Q Did you examine the stump of her leg at that time? A I did. 40

Edward Sprague, direct.

Q What condition was it in? A It had healed—I might say it was not entirely healed when she left the hospital, but she had to be dressed, and it was dressed by a friend, a nurse, at her home, and when I saw her in October it had healed entirely, but it was still sensitive.

10 Q Did she have her artificial leg at that time? A She did.

Q What was the condition of the other injury? Had that healed up, the injury on the left foot? A The wound had all healed.

Q Did that injury to the left foot have any effect on the use of the artificial leg? A Well, she had a peculiar drawing of the toe on her left foot, drawing up of her toe, but I suppose in use with the artificial leg she drew an extra
20 amount of weight on the good remaining foot and that may have caused more of a strain on the foot; the function was not entirely normal in the left foot, that is, the great toe at the ball of the foot.

Q You say you found her suffering from shock when you first saw her? A Yes, sir, very much.

Q Were there any after effects of that? A She had this very rapid pulse, about 130 at
30 the start and she had that for several days and really was in a serious condition for about two days and then gradually improved, and at the time she left the hospital she had quite improved from that although she was feeling weak and was much depressed.

Q Did you render a bill for your services? A Yes, sir, I did.

Q How much was it? A I have forgotten the exact amount, but it is around \$200; it is
40 between \$208 and \$200.

Edward Sprague, cross.

Q Has it been paid? A No.

Cross examination by Mr. Carey.

Q This was a pretty severe injury that she had to that right leg, was it? A Very.

Q No question about, it required the amputation of the leg? A Absolutely. 10

Q You did the best job you could under the circumstances and got as good results as you expected? A We did.

Q You treated her for two or three months? A About that.

Q During that time you treated her for the injury to the left foot? A The left foot had healed by the time she left the hospital, but she had pain. 20

Q What was the injury to the left foot again? A It is hard to explain. There had been a split between the great toe and the toe next to it running this way (indicating) two inches, and up here (indicating) two inches.

Q There was no crushing of any bones? A There was a bruise, nothing broken.

Q The injury where she had been crushed by the wheel passing over her, was the right leg? A She was injured in both feet. 30

Q The injury on the left foot was just a bruise on the toe and the splitting of the membrane of the two toes? A It was an injury. I do not know how she got it. She had a split there from some bruising or pressure.

Q That you treated and that became well after awhile. A Yes, it healed up except that she had this drawing up of the toe and this sensitiveness there. 40

Edward Sprague, re-direct.

Q That passed away afterwards? A Well, at the time I saw her in October she still had the sensitiveness.

Q You haven't seen her since? A No.

Q You prescribed the artificial limb? A No. I told her she would have to have one, but I
10 had nothing to do with the selection of it.

Q She wore that then, didn't she? A She wore that when she came to see me, not always, but towards the last when she came in October; that I am sure of.

Q She was able to walk fairly well? A She did quite well. She had quite a limp, but she did surprisingly well, I thought.

Q She is a nice girl? A Kind of good in spirits, although very depressed.

Q The injuries she complained of when you
20 examined her toes and so forth, they are the result of an injury of that sort? A Yes, sir.

Q They pass away when the body heals up?
A If not too severe.

Q If they are too severe the patient passes away? A No, the patient may recover, but that may leave a permanent effect.

Q In October last she was all right except
30 the leg. A She was all right physically, she could walk, but she was very much depressed.

Q You have seen her in court here? A Just now.

Q She looks pretty well physically, doesn't she? A Yes.

Re-direct examination by Mr. Stickel.

Q She was much depressed when you saw
40 her in October, 1925? A She was just the same as she had been, as far as I know.

Edward Sprague, re-direct.

Q That would have some effect upon her health? A I don't understand what you mean.

Q The recovery of the use of the leg? A I don't think the attitude and the mien would effect the use of her leg.

Q Would it have any effect upon her attitude towards the use of the leg? A I don't believe I would be competent to answer that question. 10

Q You did find her in a depressed state on account of her injury? A Yes, she seemed to be in a depressed state worrying about her condition.

Q When you saw her on other occasions other than the last one how did she get to your office; what was she using at that time? A I have forgotten about that, I do not know whether she had an artificial leg when I saw her a few months before that, or not? I know when I saw her at home—of course, she went home first, and then we got crutches and she learned to use her crutches and then when she got her artificial leg, I couldn't say. 20

Q You said any kind of pressure would produce the injury on the left foot. Do you mean that? A It looked to me like an injury due to some pressure of some sort, some blow of some heavy object. 30

Q Any kind of light pressure like kicking it with your other foot, would not produce that, would it? A I couldn't answer that accurately; as far as I could determine none of the bones were broken.

Q Was the injury to the left foot a substantial injury? A Oh, yes, it was strong enough to split her toes, separate them; there must have been considerable force. 40

Minnie Arnt, direct.

1 Q There must have been considerable force to split her toes and separate them? A Yes, and nerve swelling.

10 Q How far back were the toes split? A About two inches, I should think, in this part (indicating) between the toes on the upper side and perhaps an inch underneath.

Q So it must have been quite a severe blow to produce that? A It was a severe injury of some sort.

MINNIE ARNT, sworn in behalf of the plaintiff.

Direct examination by Mr. Stickel.

20

Q Where do you live? A 433 Center street, Nutley.

Q Did you know Miss Marie Lacombe in July, 1924? A Yes, sir, I did.

Q How did you come to know her? A By working in the Westinghouse Electric Company.

30 Q You worked with Miss Lacombe, not with her, but in the same factory with her? A Yes, sir, the same place.

Q Where is that factory located? A Washington avenue, Belleville.

Q Do you know anything about an accident which she had on July 30, 1924? A No, sir, I do not.

Q You did not see it? A No, sir.

Q You knew she had one, did you? A Well, after, I did, yes, sir.

40 Q After she had the accident you knew of it? A Yes, sir.

Minnie Arnt, direct.

Q How did you first know about the accident, how did you first come to know of it? A Why I heard about it.

Q You came out of the plant on the night of the accident? A Yes, sir, I did.

Q Where were you going? A On the trolley car. 10

Q To where? A To Nutley.

Q Did you get on the trolley car? A Yes, sir, I did.

Q When you came out of the plant where was the trolley car? A Standing still in front of the Westinghouse.

Q On the side nearest the Westinghouse factory? A Yes, sir.

Q What did you do? A I got on the car and sat down. 20

Q Where did you sit in the car? A On the left side near the motorman.

Q Then what happened? A Then I heard somebody scream and I seen every one get up, and I got up and stooped down and looked out the window and I seen Miss Lacombe lying in the street.

Q Then, what did you do? A I got off.

Q Where did you go? A I didn't go closer, 30 I went a little far.

Q Near what street did you go? A Towards the gate.

Q Towards the gate of the plant? A Yes, sir.

Q Where were you standing when you looked at Miss Lacombe? Where was she? A I was standing near the trolley car.

Q Where with respect to the gatehouse, do you know where the gate house is? A Yes, sir. 40

Louis Rohrer, direct.

Q Where were you standing with respect to that, were you in the front or near that or at the side of that? A I was near it.

Q You did not walk over to where Miss Lacombe was? A No, sir, I did not.

Q You just looked over to where she was?
10 A Yes, sir.

Q After that what did you do? A Went home again; got on the car.

Q On the same trolley car? A Yes, sir.

Q Was it still standing there after the accident? A Yes, sir.

Cross examination waived.

20 LOUIS ROHRER, sworn in behalf of the plaintiff.

Direct examination by Mr. Stickel.

Q Where do you live? A Nutley.

Q Where did you work on July 30, 1924?
A Westinghouse, in Belleville.

Q Do you know of an accident to Miss Lacombe that occurred at that time? A I was
30 in the trolley car at the time it occurred.

Q The same trolley car the last witness was on? A Yes, sir.

Q Did you see her on the trolley car? A I was speaking to her.

Q How did you learn anything about the accident? A I heard Miss Lacombe scream and when I got to the window I seen her lying in the street.

Q What did you do? A I stayed on the car; I didn't get off.

40 Cross examination waived.

Rose Dolan, direct.

ROSE DOLAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Stickel.

Q Where do you live? A 725 Washington avenue, Belleville.

Q Is that the corner of Carmer avenue? A 10
Yes, sir.

Q Carmer avenue and Washington avenue?
A Yes, sir.

Q Were you living there on July 30th, 1924?
A I was.

Q Did you witness an accident that day? A
Yes, sir.

Q To Miss Lacombe? A Yes, sir.

Q Where were you employed at that time?
A I was working in Clay street, Newark.

Q Where did you see Miss Lacombe first? 20
A She was crossing with Miss Harris.

Q And what happened? A Then I couldn't
see anything else, but a truck coming along.

Q Did the truck hit anybody? A Yes, sir,
it did, it hit Miss Lacombe.

Q Did you see the truck before it hit Miss
Lacombe? A Yes, sir, I did.

Q How many men were on it? A Two.

Q What were they doing before they hit 30
Miss Lacombe? A They had their heads turned,
but I don't know whether they were flirting or
not.

Mr. Carey: I ask that that last part be
stricken out.

The Court: Strike out "I do not know
whether they were flirting or not."

Q You say they had their heads turned;
which way? A They had their heads towards 40
the girls.

Rose Dolan, cross.

Q What were they doing? A They were walking home, the girls, from work.

Q What were the men doing by this turning of their heads? A I couldn't tell you what they were doing.

Q Which way were they turning their heads?
10 A Towards the girls, sideways.

Q Where were the girls, on the same side of the street with you? A Yes, sir.

Q Where were you? A Right in front of my house.

Q Where is that, across the street from the Westinghouse plant? A Yes, sir.

Q Did you see the driver? A Yes, sir.

Q How was he dressed? A He had a
20 light coat on.

Q Where was the truck with respect to the trolley car, was it near the trolley car, close to the trolley car? A Not so very close to the trolley. The trolley had passed and then there was another one coming on the side where I was.

Cross examination by Mr. Carey.

30 Q You say the truck was not very close to the trolley? A I couldn't see that, because there was a trolley right on the side where I was.

Q At the time the accident happened was a trolley on the side where you were? A Yes, sir.

Q Are you sure of that? A I saw a trolley.

Q Are you sure there was a trolley on the side of the street where you were at the time
40 of the accident? A Going up, yes, sir.

Rose Dolan, cross.

Q Was it standing or moving? A Well, I couldn't tell you it was going up, because I was excited that moment.

Q You say you were on the opposite side of the street from this factory? A Yes, sir.

Q What were you doing? A I was just going in. 10

Q Going in? A On the corner there.

Q What were you doing, talking or standing or what? A I happened to watch the girls coming out.

Q Were you working that day? A Yes, sir.

Q You were going home, weren't you? A Yes, sir.

Q Going in the house, weren't you? A I was standing there, I wasn't going right in.

Q Did you get off a car? A No, I didn't. 20

Q Where did you come from? A I was walking from Belleville.

Q You were walking from Belleville to your house on the opposite side of the street. You did that every day, didn't you? A Yes, sir.

Q You didn't pay attention every day to the girls coming out of the Westinghouse? A Just on Saturdays I saw them.

Q You were walking in about what time was it; do you remember? A I can't remember the time. 30

Q Was it night or morning? A I couldn't tell you now.

Q You cannot even tell whether it was night or morning? You were walking in your house and you did not know whether it was the night or morning? A No.

Q You say you think there was a car on your side of the street but you do not know whether it was standing or going? A No. 40

Rose Dolan, cross.

Q Where was it, if there was a car on your side of the street, near you? A I don't remember, it was going up.

Q You don't know whether it was going up or down? A Another trolley did go down.

10 Q Did a car pass on the trolley tracks on your side of the street just about the time of the accident? A A car.

Q Yes, a trolley car. A It did pass.

Q It did pass? A Passed, yes, sir.

Q How long had it passed? A I don't remember.

Q How far was it away? A I couldn't tell you how far.

20 Q You did not see any car on your side of the street at all, did you? A Yes, sir.

Q Wasn't the only thing on your side of the street an automobile that these girls were going out to get in? A Yes, sir.

Q Did you see an automobile on this side of the street coming down on your side? A I don't know; there was an automobile there.

Q Was it standing or moving? A I don't believe there was an automobile there.

30 Q Won't you tell us what you saw there? You were there, weren't you? A Oh, yes.

Q Nobody had to tell you what was there, did they, you can tell us, because you were there. Are you sure you were there? A Yes, sir.

Q Did you see an automobile on your side of the street? A Well, there are so many automobiles there.

40 Q Standing there about at the time of the accident? A There are so many, but I didn't know which; it was Miss Harris' automobile.

Rose Dolan, cross.

Q I didn't ask you about Miss Harris' automobile. Was there any automobile there at the time of the accident? A I didn't see that.

Q Now, you were going in your house to get supper, I suppose? A Yes, sir.

Q Then, it must have been about evening?
A It must have been towards evening. 10

Q Was it? Was it getting dark? A It must have been getting dark.

Q Was it getting dark? A I don't remember, maybe.

Q You were going in your house and you do not know whether it was getting dark or what it was and there was nothing special going on, was there? A What do you mean "special"?

Q To attract your attention? A No, but I always look around. 20

Q You were not paying particular attention to trucks and automobiles? A No.

Q You did not even know how many automobiles or trucks there were on the road, did you? A No.

Q Isn't it a fact when you first knew about anything you heard a scream? A Yes, sir.

Q Then, you looked around, didn't you? A Yes, sir. 30

Q You did not look around before that, did you? A No, I did not.

Q So, you heard the scream and you looked around and the accident was all over, wasn't it?
A Yes, sir, and I saw Miss Lacombe lying down.

Q If it had not been for her scream you would never have known about the whole thing, would you? A No. 40

Rose Dolan, cross.

Q You had your back to the car when you heard the scream, didn't you, going into your house? A Yes, sir.

Q You were walking into your house and you heard a scream and turned around that was the first you saw of anything, wasn't it? A Yes,
10 sir.

Q You had not noticed the car or truck or anything up to that? A I was looking at a truck; I don't know if they were flirting.

Q You were looking at the truck before? A Yes, sir.

Q Where? A On the other side.

Q Was it standing, the truck? A No.

Q Was it going? A Yes, sir.

Q What kind of a truck was it? A Beef
20 company, was it?

Q Do you know what kind of a truck it was? A No.

Q Who has been telling you all these things? A No one, but I saw trucks going by.

Q You did not pay any attention to them, did you? A No.

Q You saw trucks passing there every day? A Yes, sir.

Q You noticed all of them, too? A Yes, sir.
30

Q You did not pay any attention to this truck any more than any other, or any one on it until after the accident? A I saw it after the accident.

Q If you had not heard the scream you never would have thought of a truck or car, or girls or anything there, would you? A No.

Q You were going home, going in your house and suddenly saw this thing, turned around and saw all these things? A I didn't go over, but I
40 stood across there.

Rose Dolan, cross.

Q You weren't even interested enough to cross the street, were you? A I couldn't cross.

Q What was the matter with your legs, anything? A I was supposed to go home.

Q You were supposed to go home? A Sure.

Q You were home, in front of your house. A I saw the excitement across the street there; it isn't very far. 10

Q Do you mean to say you heard a scream, you thought there was a bad accident, that some girl had been hurt and you were right across the street but was so anxious to get home you did not even cross the street to see what was the matter? A I saw her lying there.

Q How did you see her lying there if you did not go across the street? A I was on the other side, I could see.

Q You were on the other side? A Yes, sir. 20

Q How could you see at that time; wasn't the truck between you and her? A Yes, sir, but they took her away and pushed the truck down on the other side.

Q You say when they took her away they pushed the truck down on the other side, is that right? A On the same side where she was hit.

Q They pushed the truck down after they took her away? A Yes, sir, I saw the truck lying there. 30

Q You saw the truck lying where? A Standing on the side where she was hit.

Q Did you see her taken away from the truck? A I saw them take her.

Q Did you see them take her away? A No.

Q Why don't you tell us a few of the things you saw, instead of what you heard? A Well, I didn't hear.

Q You tell us you saw her taken away from the truck, and now you tell us you didn't see 40

Rose Dolan, cross.

her taken away at all, did you? You did not, did you? A After I went upstairs—

Q You did not even wait to see her taken away from the truck, did you? A No.

Q You went upstairs and did not care whether the girl was hurt or not. You did not
10 know the girl was hurt until afterwards? A I heard the scream.

Q You heard the scream and went on into the house? A Yes, sir.

Q That did not bother you, a little thing like a scream? How old are you? A Eighteen.

Q Where do you live; on the corner of what? A Carmer avenue and Washington avenue.

Q That is a little above the place where the accident happened? A Yes, sir.

Q Is it south or north? A Right opposite
20 Westinghouse; I am right on the corner, across the street.

Q Just above where the accident happened? A Yes, sir.

Q How far above? A Not so very far.

Q I know, but tell us how far. A Right across the street.

Q About seventy-five feet up, isn't it? A I don't know.

Q You do not even know that? A No.

Q How long have you been living there?

A I have been living there about three years.

Q You say the man who was driving this truck had a white coat on. Is that right; are you sure about that? A I saw him by the truck.

Q Are you sure the man who was driving this truck had a white coat on? A Yes, sir.

Q On the truck that you saw? A Yes, sir.

Q How many trucks did you see? A There
40 were so many.

Rose Dolan, re-direct—re-cross.

Q How many were there? A I don't know.

Q But his. A They passed up.

Q Did you see ten, twelve, fourteen, sixteen, or how many? A I don't know how many I saw.

Re-direct examination by Mr. Stickel.

10

Q How many trucks were there you saw strike Miss Lacombe?

Mr. Carey: I object. She said she did not see any strike; she said she heard a scream, looked around and the whole thing was over.

Q You did see a truck before you heard the scream, didn't you? A Oh, yes, I saw the truck before I heard the scream. 20

Q On that truck there were how many men?

A Two, on the one I saw.

Q One of these men had a white coat on?

A Yes, sir.

Q The man who was driving? A Yes, sir.

Q Where did you see that truck after the accident? A After what?

Q Did you see that truck around after the accident? A Later it was stopped on the side. 30

Q Is that the truck you refer to which they pushed further down the street? A That is the truck that had to stop because it hit Miss Lacombe.

Re-cross examination by Mr. Carey.

Q You did not see them push the truck down the street, you went in the house? A Yes, sir, but after I saw the truck standing there. 40

Marie Lacombe, direct.

Q You saw the truck standing there when you went upstairs in your house? A Yes, sir.

Q In the meantime you went in and took off your hat? A Yes, sir.

Q I suppose you looked in the glass and fixed your hair a little bit? A No.

10 Q Then you went on upstairs? A Yes, sir.

Q Did you speak to any one downstairs? A No.

Q Is your room in the back or front? A Right in the front.

Q Then, you looked out then? A Yes, sir.

Q And the accident was all over then, wasn't it? A Yes, sir.

20 MARIE LACOMBE, plaintiff, sworn in her own behalf.

Direct examination by Mr. Stickel.

Q Where do you live? A 86 Bell street, Belleville.

Q Were you living there on July 30th, 1924? A I was.

30 Q Where were you employed at that time? A Westinghouse Lamp Works in Belleville.

Q Where is the Westinghouse Lamp Works located? A 720 Washington avenue, Belleville.

Q What was your position in that plant at that time? A At that time I was the payroll clerk.

Q What side of the street is the factory located on? A It is on the east side of Washington avenue.

40 Q At that time where were the trolley tracks on Washington avenue, what part of the street?

Marie Lacombe, direct.

A They were near the curb and wagon traffic was in the center.

Q So the trolley tracks were on the east side and the west side of the street? A Yes, sir.

Q And in the center was the place for vehicles? A That was the wagon track.

Q Is that center paved or unpaved? A It was a paved street. 10

Q Is there a street near that plant? A There is a street about opposite.

Q There is a street about opposite the plant? A About opposite the gate; the Westinghouse plant takes in a good city block.

Q Do you know the name of that street? A Carmer avenue.

Q You say it is about opposite the gate? A Just about opposite the gate. 20

Q The gate is at what end of the plant? A The gate is at the northerly end of the plant, the plant entrance is on the north side of the building and you have to go into the gate and walk down a concrete drive to get to the entrance of the building.

Q Is there a trolley stop either on the east or the west side of Washington avenue at that point? A There is a trolley pole painted white on the west side. 30

Q Did you sustain an accident on July 30, 1924? A I did.

Q Where did the accident take place, on what street? A On Washington avenue.

Q At what time did you leave the plant on that day? A Somewhere between 5:45 and 5:55, the whistle blows at 5:45.

Q Was that the regular quitting time? A The regular quitting time. 40

Marie Lacombe, direct.

Q How many were employed in the plant at that time? A Between 115 and 125.

Q Did you leave the plant with any one?

A I did.

Q With whom? A Miss Harris.

Q What was her occupation in the plant?

10 A She was the nurse.

Q Had any persons left the plant before you left? A Oh, yes, sir.

Q Were there any people around at the time you came out of the gate? A Well, there were people ahead of me and people in back of me, because we were located on the second floor, the office is on the second floor and the factory is on the first floor, so we all get out at the same time and give the people a chance on the first floor a chance to get out ahead of us.

20

Q By ahead of you, what do you mean? A They were walking ahead of us.

Q When you came out of the gate or entrance of the plant did you see any trolley cars there? A While we were walking up the drive there was a trolley just pulled to a stop.

Q That is just before you got to the gate?

30 A We had quite a walk, I don't know how many feet, it is a winding drive, and just as we were coming up the drive this trolley was coming to a stop and by the time I had gotten to the gate, before I had gotten out of the gate at all the trolley had stopped.

Q Where did it stop with respect to the gate?

A It did not pull up as far as the gate.

Q Where at that time were you going? A That particular evening I was going to Newark.

Q To do that what did you have to do? A Take the trolley.

40

Marie Lacombe, direct.

Q On what side of Washington avenue? A We had to take the trolley going south, that would be on the west side of Washington avenue.

Q This trolley you saw standing was on the east side of Washington avenue? A Going towards Nutley.

Q Can you tell us how close to the curb it was? A What, the trolley? 10

Q Yes. A Well, I just don't know the width, but an automobile might be able to park; I don't know.

Q The trolley at that time was standing? A Standing still.

Q What did you do then? A Well, I walked to go across the street and as I walked I walked in front of the trolley.

Q Can you tell us about how far in front of the trolley car you walked? A Well, about four or five feet. 20

Q Miss Harris was with you? A Miss Harris was with me, yes, sir.

Q Tell us what happened? A As I walked, we walked in front to cross the trolley track, I looked south and saw nothing coming, the best I could see, and then I looked north and there was nothing coming, so we started, and as I stepped three steps off the track I looked south again, that was to my left, and the truck was coming at a terrific speed, and it was just on top of me and as I saw it I tried to step back and as I did the truck hit my left foot and threw me as I stepped back this way; the truck hit my left foot and threw me, and as it threw me it passed over my right leg. 30

Q Was your left leg injured? A My left foot was injured and I had scratches on the knee; I still have scars on my knee. 40

Marie Lacombe, direct.

Q Did you lose consciouness? A No, I did not, I was terribly shocked, but I did not lose consciousness.

Q What part of your body did the truck go over? A It went over my right leg.

Q At what point on your right leg? A
10 Well, between over the knee.

Q After you were thus injured what hap-
pened? A I was in the street and I was, of
course, I was terribly stunned and terribly
shocked and as I looked, of course, I screamed,
and I felt, if I was hurt, if I kept on scream-
ing I knew I was still alive, so I kept on scream-
ing until some one came to me, and as I lay in
the street this way (indicating) I could see the
truck after it had passed over me and of course
20 by that time there were several people there
helping me and tying me. The pain was so
severe I didn't know whether it had crushed the
whole leg or how it had happened, but the
pain was so severe and the pain in the left foot
was so severe and the longer it went the weaker
I was getting. There were two nurses, Miss
Harris and there happened to be another nurse,
so, she helped and they got me into an automo-
bile and I went to the doctor's with these other
30 people.

Q What doctor? A They took me to Dr.
Bootay for first aid until the ambulance came.

Q Then, where were you taken? A St.
James' Hospital.

Q What happened there? A When I got
to St. James' Hospital they took me upstairs
and put me on the bed and the doctor came in
and looked at me and saw what happened and
they started to give me first aid; I had asked
40 for Dr. Houcks and Dr. Houcks went on his

Marie Lacombe, direct.

vacation the day before to California and they said they would get Dr. Sprague, who is just as good, and Dr. Sprague came in and looked at it and he said it would have to be amputated, so, of course, I laid there and they got another doctor and it wasn't very long after the leg was off.

10

Q How long were you in the hospital? A Three weeks.

Q Did you have a night and day nurse? A The first week I had a special day nurse and a special night nurse.

Q What were their names? A The first week Miss McEwan was the special day and Miss Schaefer was the special night, but the second week they did not think I needed a special night nurse because Miss Harris was coming in and she was staying with me and we let the day nurse go and put the night nurse on days, because Miss McEwan had a position in New York during the day, in fact we had quite a time keeping her for the whole week.

20

Q How long did you have a nurse? A The full time I was in the hospital.

Q What did you pay Miss Schaefer? A \$42 a week plus her board.

30

Q How much was her board? A Somewhere in the neighborhood of twelve or twelve dollars and a half a week in the hospital.

Mr. Carey: If you have a statement there I will admit it.

Any statement Mr. Stickel will make as to the expenditures I will admit without proving them, because we do not make any point of that.

40

Marie Lacombe, direct.

10 Mr. Stickel: I have a receipt signed by Pauline Schaefer for \$36 and another signed by her for \$84. One by Miss McEwan for \$42, a bill for ambulance service from Smith and Smith for \$8, and a bill from the St. James' Hospital for \$143.50, which I offer in evidence.

Mr. Carey: No objection.

(Same are marked Ex. P 1.)

Q Did Dr. Sprague visit you while you were in the hospital? A Yes, sir, he did.

Q How often? A Sometimes twice a day, but every day once.

Q Did you suffer any pain while you were there? A Terrible, terrific pain.

20 Q What did Dr. Sprague do to you on the occasion of his visits? A He redressed it and if he came in twice a day he would not take the dressing off, but he would add more to it, because there was a drainage and it was sopping all the time and you could not touch it, it was so terribly sore and for fear the stitches would break he would just wrap it, so the consequence was I would have a bandage around it about like that (indicating) and he would look
30 at the left foot and change the dressing and the bandage on that.

Q Did your left foot give you any pain immediately after the injury? A Yes, sir, it gave me such pain that going down in the ambulance I don't remember who I asked to take my shoe off.

Q What was the condition of your shoe? A Well, the shoe was in this fashion, it was twisted right around like that (indicating); I never
40 wore high heels, but it was a white linen slipper

Marie Lacombe, direct.

and it was twisted like that (indicating) and the consequence was when I took the shoe off the foot puffed away up and when I got home after I had taken the bandage off I had to wear a man's sort of baseball shoe, or sport shoe that laced to the toe and I had to get it in 9 triple E and then I could not lace it, the foot was swollen and puffed so. 10

Q You were in the hospital three weeks and then returned to your home? A Yes, sir.

Q How long were you confined to your home? A Until October.

Q Until October? A Yes, sir.

Q When did you go back to work? A I went back to work about the middle of October, but not on full time; I went back for a couple of hours a day, not to do any real work, but I was so terribly shocked and nervous that they thought a change would do me good, because I wasn't able to do anything and they had to take me in an automobile and lead me and help me, but I didn't do any real work and I went back two or three hours a day until the first of the year. 20

Q How did you get around in your house? A I had a wheel chair.

Q Did you buy a wheel chair? A No, I rented one. 30

Q How much? A Somewhere around \$8; I rented it from Schuman's.

Q How long did you have it? A One month.

Q When did you get your crutches? A I got my crutches as soon as I came home from the hospital.

Q How long did you use your crutches? A I still have them. 40

Marie Lacombe, direct.

10 Q Why? A I have an artificial leg and it is not a good one, it is not satisfactory, I cannot walk very well on it, it is so terribly heavy, it weighs on my shoulder and if I had the proper use of my left foot so I could balance myself and put my weight on it I probably could get
10 along a whole lot better, but not having the use of my left foot, my left foot bothers me so so that it does not function properly, it sort of trips when I try to put my weight on it and it snaps; you can almost hear it yourself, so that is why I am on crutches at times, but I do wear an artificial leg sometimes.

20 Q Why didn't you get an artificial leg? What is the matter with this artificial leg? A This artificial leg is very heavy, it weighs nine pounds and it is a terrible weight to carry on your shoulders.

30 Q Why couldn't you get a lighter one? A I have tried and shopped and tried to get one, but a light weight leg is made of aluminum and leather and only weighs about four pounds and they are between four and six hundred dollars, it is all according to the size of your stump and naturally I sit all the time, I have gained and I am stout; if I could exercise my
30 stump would go down, but I can't.

Q Did you have any pain after you got home? A I had pain and I still have pain.

40 Q Do you have pain at any particular time now? A There is always a sense of feeling there, if you press hard enough on the end of the stump the bone is very sore and I feel it very much more in bad weather, or if I have a cold especially; it seems to settle at the end of those
40 nerves.

Marie Lacombe, direct.

Q How long did you use crutches steadily?

A Well, I used crutches up until about April or May, 1925.

Q Did you tell us about the injury to your left foot, has that entirely healed? A No, of course, it is not broken, but I cannot stand on my foot, I cannot put any weight on my bare foot, because this is a pull on my foot and they go up in this fashion and I cannot put any weight on it and very often I wear arch shoes, and very often I have to put two arches in, but to stand on my foot, even on the crutches I cannot unless I put a shoe on. I cannot wear a bedroom slipper without an arch in it.

10

Q Have the arches fallen? A The arch has dropped right down to the bottom.

Q Did that condition exist right before the accident? A No.

20

Q Did you have any trouble after you got home in getting around? A It was very inconvenient, I wasn't able to go upstairs. We had a house and I wasn't able to go up to my bedroom until several months after I got home because I wasn't able to go up and downstairs, I had to have a bed brought downstairs to sleep on and we had a day bed brought in.

Q Did you have any falls? A I had three falls.

30

Q How did you come to have the fall, what was the cause of it? A My crutches slipped and when I am standing on it it would go this way (indicating) and the rubber slipped like this (indicating) once, and once I was out visiting on crutches and once I had it there and once in my own house, the rubber went right from under me and I had a very bad fall, in fact I was hurt so badly I thought I would have to go back to the hospital.

40

Marie Lacombe, direct.

Q How long after you got home was the first fall, about? A Well, I was hurt in the summer; in the fall.

Q When did you have the last fall? A I had the last fall in—it was the first part of 1925, I had the last fall.

10 Q When did you buy your artificial leg? A The artificial leg man—I wasn't home from the hospital two weeks when I had all kinds of mail and men coming to the house and this man came to see me and of course, after he saw me he said I wasn't in no condition to talk about an artificial leg because I cried so, and he came back somewhere around the latter part of 1924 or the beginning of 1925, I just can't remember, but I started to wear it, putting it on
20 for a half an hour or an hour at a time around April or May, in the spring.

Q How much did you pay for it? A I think it was about \$125, I believe, the first one, and I had to have the sockets changed, or a \$150.

Q Have you a bill? A Did I give you the bill?

Q No. Where did you buy it? A I bought it from the United Limb & Brace Company in Boston.

30 Q Did you have to have anything done to the leg? A I had the socket changed three times.

Q Do you know what that cost you? A Twice I had the socket changed, the first time they took the measurement and they sent it and it got here and I couldn't wear it, and I sent it back. The second time it cost me \$50, because I had to have a whole new socket, and the next time I had to pay \$25 because they
40 made the socket smaller by cutting it down and putting new leather on it.

Marie Lacombe, direct.

Q After you got home from the hospital did you have any trouble with your left leg beyond the injury you had, beyond the cut in it? A I still have; I can't use it and I can't put any weight on it; I can't use the leg or stand on it without it paining me and getting my toes, very often, a very severe cramp in them. 10

Q Did you have to buy a stocking for your leg? A I bought an elastic anklet.

Q What was that for? A Sort of holds my instep and arch up, and keeps my ankle from swelling.

Q How much did that cost you? A \$2.50; I bought that at Schumann's.

Q Did you have any trouble with your left leg swelling? A It swells, it still swells.

Q All the time, or on some particular occasion? A No, it is all right after I get up in the morning after being off of it all night, but when evening comes it is swollen so much so even when I am out I have to undo my shoe and sometimes take it off. 20

Q Did you go back to the Westinghouse? A I did.

Q About when? A I went back in October, just two or three hours a day, not doing anything. 30

Q Did you get your old position back again? A No, I did not.

Q What kind of a position did you get? A When I went back on full time I just got a desk position; production clerk.

Q What kind of a position did you have before? A The payroll and that took me all over the plant, from one department to another; that meant going to the time clock, seeing that the cards were punched properly and those that 40

Marie Lacombe, direct.

10 did not come in to see that they were signed by the various foremen; that took me up and downstairs, and very often I would kind of go through and see that the girls were all happy and one thing and another and if the nurse was out then I used to go in the hospital and give first aid.

Q Were you paid for your loss of time while you were away? A I was.

Q In other words, Westinghouse paid you your wages? A They paid me my salary.

Q When you went back did you get the same salary you had before? A I did.

Q Have you had any raise since that time? A No, I have not.

Q How old were you at the time of the accident? A Thirty-two.

20 Q Did you dance before the accident? A Very much.

Q Were you in the habit of going out to parties before the accident? A Yes, sir, I was.

Q Have you been able to do that since? A Not very well.

Q Did Dr. Sprague render you a bill? A He did.

Q How much was it? A \$208.

30 Q Have you your artificial leg with you? A Yes, sir.

Q Is it here? A Yes, sir.

Mr. Stickel: I would like the jury to see Miss Lacombe in operation with the artificial leg.

The Court: You mean that you want her to put it on?

Mr. Stickel: Yes.

40 (Witness retires and attaches artificial leg.)

Marie Lacombe, direct.

Q Miss Lacombe, have you attached your leg? A I have.

Q Step down from the jury box and show us how you are able to walk. A (Witness does as requested.)

Q Do you have to use crutches when you come downstairs like that? A Either a crutch or a cane. 10

Q Just walk in front of the jury so they may see the effect of the leg. A (Witness does as requested.)

Q Walk back again, please. A (Witness does as requested.)

Q Can't you walk without the crutch? A Not very well.

Q Won't you put the crutch aside and show us how you can walk without the crutch? A I cannot walk only a few steps and when I do limp I have a terrific limp in my side. 20

Q When you haven't the crutch? A I cannot walk very good because it catches me right in here (indicating).

Q Above the hip? A Right in here (indicating).

Q (By Juror No. 2.) Is that pain the result of the strap or is that from some other cause? A Well, it is the result of a heavy leg. I have never been able, if I was able, to put my full weight on my left side. If I was able to stand as I should stand instead of standing like this, I really put more weight on the side I have the stump than I can on my good foot, but if I can stand like this (indicating) but I cannot, because I cannot put my full weight on my left foot, if it was almost quiet enough you could hear my knee sometimes crack and when it cracks like that there is sort of a kink in there 30 40

Marie Lacombe, direct.

that doesn't let me put my full weight on my toe and then the foot drops like this (indicating) and my toes go up in this fashion (indicating).

Q (By Juror No. 1.) Is the size of the artificial leg correct? A You mean at the socket part?

10 Q The whole leg? A The length?

Q Everything. A Well, I can take it off and you can feel the weight of it yourself.

Q (By Mr. Stickel.) What the juror wants to know is whether or not the leg is too heavy for you. A No.

Q (By Juror No. 1.) I mean is it the right length, the proper distance from the end of your stump? A You mean for the limb, and the weight on me?

20 Q Yes. A Here is the end here (indicating), and here is the end here (indicating) and then it is strapped over my shoulders and around my waist. It is hooked here (indicating) and here, and here (indicating).

Q Is it a perfect leg from an artificial standpoint? A Yes.

Q Does the leg fit tightly around the end of the stump? A It is shaped and the end of the stump does not touch the end of the socket.

30 Q When you are standing straight, just standing, are both your feet on the ground? A When I stand?

Q Suppose you just come down from the stand and just stand right here. Just stand. A (Witness does as requested.)

Q (By Mr. Stickel.) Does that help answer your question, Mr. Juror?

Juror No. 1. Yes.

40 Q Where did you get this artificial leg? A United Limb and Brace Company of Boston.

Marie Lacombe, direct.

Q Did someone come from Boston to examine your leg? A Yes, sir, a man.

Q Did this gentleman, from the condition, prescribe this leg? A Yes, sir, he did.

Q How do you get back and forth from business? A In an automobile.

Q Who takes you back and forth? A My 10
father.

Q Is that different from before the accident?
A Yes, before I walked; walked home for lunch and walked back again, and when I get to the plant they have to take me up on the freight elevator because I can't go upstairs.

Q Do you go to the theatre? A Once in awhile.

Q Do you have any difficulty at the theatre?
A Yes, sir, I do. If there is much of an incline 20
I cannot go down front. I have to sit back.

Q Do you find it comfortable in using the seats? A I cannot go into a place where they have these narrow seats, because I cannot sit.

Q Have you had any expense in and about your recovery that I have not asked you about?
A Little incidentals. Of course you cannot get an itemized bill every time. For instance, I have to ride in a cab, if I don't have an automobile or someone to take me, and I have to spend a lot of 30
money to be most comfortable on my good foot, you see if you wear an artificial leg and bump against something it cuts the silk of the stocking and in trying to get a corset and one thing another that will fit me and make me comfortable. Of course, all that I never had to do before.

Q Did you have any other trouble getting around other than what you told us? A I don't get around, I don't walk or do anything 40
unless someone takes me in an automobile.

Marie Lacombe, cross.

Q Do you have any trouble with your bath?

A Yes, sir, I do. I cannot get in and out of the tub unless I have my mother to help me. I have to get a high chair and then I have to sit in the bath tub and I have to use about eight towels because I have to put a towel on the edge of the tub and on the seat so I do not slip, and then I have to have the bottom of the tub lined with bath towels so when I do try to get up on the good foot I do not slip and fall and my mother always has to come and help me get out of the bath tub; I can never get out alone.

Cross examination by Mr. Carey.

Q You have a really serious injury and we appreciate that so I am not going to talk about it. You are doing the best you can to get around, aren't you? A Yes, sir.

Q You attend to your business regularly, you go every day to the Westinghouse? A Yes, sir.

Q You have been working there steadily since about January 25th? A Well, after I had that fall.

Q A few days then? A I was out about two weeks and I lost more time when I have a cold or grippe, I lose more time than when I had two feet, because I cannot get around and it settles in this stump and it feels cold and numb all the time. I had to get an electric heating pad for it and I always wear woolen socks inside the stump; I have to have that made special and in the cold weather I wear two and sometimes three.

Q That is on the stump? A On the stump.

Q At the time of the accident you wore the same kind of a shoe as you have on your left

Marie Lacombe, cross.

foot? A No, I had a regular shoe without the arch propped or rubber heels.

Q The arch prop is a little higher, you get it in all the large shoemakers to put in to take care of your feet when you walk on them too much or press on them too much? A Yes, sir.

Q Sometimes we fellows who play golf have to use them when we play too much, is that right? The kind of a shoe you wore before the accident, up to the time of the accident what kind of a shoe was that you wore? A The day of the accident? 10

Q Yes. A It was a white linen slipper.

Q A white linen slipper? A Yes, sir.

Q That is what size? A I wore a five B.

Q What height heel? A I never wore anything but a cuban heel, just sort of like this heel. 20

Q Is this a cuban heel you have on now? A Yes, this has a rubber heel on, but very often I wore a flat heel.

Q A cuban heel you generally wore? A Yes, sir, this is what they call a cuban heel.

Q This particular day of your accident, of course you did not expect any trouble until the accident came? A I expected to go out that evening and have a good time. 30

Q You were leaving the factory that day with your friend Miss Harris now Mrs. Rungsted? A Yes, sir.

Q She is the witness whose testimony was read here yesterday? A Yes, sir.

Q She married the gentleman who also testified through the depositions that were read here yesterday? A Yes, sir.

Q She married after the accident? A Yes, sir. 40

Marie Lacombe, cross.

Q She is away now? A Yes, sir.

Q You and she were very good friends? A Only business acquaintances.

Q You went home with her occasionally in the car? A The night I was hurt that would have been the second time.

10 Q Did you know her fiance? A I met him.

Q You had been to her house? A Never.

Q Did you hear her testify in the deposition that you called at her house? A No.

Q Are you sure about that? A I didn't hear it. I never was at her house. She had been to mine.

Q How often had she been to your house? A That I don't know; probably once or twice, but that was coming to my house through sickness.
20 They always sent a nurse to see our sick.

Q Is she about your age or near your age? A I couldn't tell you; I never knew her age.

Q This particular day, wasn't she going home with you in her fiance's car? A No, we hadn't planned to do anything; we never knew what we were going to do. It was one of the nights I knew I was going home at a quarter to six because I had an appointment at Clinton avenue;
30 sometimes we used to work until nine or nine-thirty.

Q This particular night when you started out from the plant you and she were holding hands?

A That I don't remember; we may have been.

Q You remember her testimony about holding hands? A I remember your reading it.

Q You read that before yourself? A I remember reading that.

Q That was eight or nine months ago she
40 gave that testimony? A I don't remember.

Marie Lacombe, cross.

Q You remember you and she walked out holding hands and started to go across the street, is that right? A Yes, sir.

Q You did start to go across the street holding hands, didn't you? A Yes, sir.

Q In the distance you saw the car of her fiance? A We did not see the car; we were not looking for it. When I came out I did not know then that I was going in the car. She said if it was there and he hadn't made any arrangements to go anywhere, he probably would take me part of the way. 10

Q When did she say that to you? A Walking out.

Q She said "If he is here I will take you?" A Part of the way.

Q Then you started looking for him, didn't you? A No, we did not, because at that time I was all business; our conversation—we never talked socially. 20

Q She said when you were going out that if he is there you can go down with us in the car?

A Maybe she had to see what his plans were.

Q Then you started out across the street and you saw his car then? A It was not directly opposite. 30

Q Before the accident you saw his car? A Yes, sir, I saw his car before the accident.

Q Was it moving or standing still? A That I don't remember.

Q You and she were going out hand in hand and she had told you that maybe you were going to ride home in his car and you saw his car coming down or standing, you do not know which? A I don't remember whether it was moving or standing. 40

Marie Lacombe, cross.

Q Did you two start out to go towards his car? A No, I started across the street to go on a trolley car.

Q But your intentions were to go in his car if he had room, part of the way? A I wasn't positive whether I was to go in his car or not.

10 Q That was your purpose when you were going across the street holding hands with her, that was your intention? A No.

Q There was no trolley car across the street at the time, was there? A There were people waiting there.

Q I say that no trolley car was across the street at the time? A No.

Q There wasn't anything across the street except his car coming down? A His car was coming.

20 Q His car was coming? A I don't remember whether it was coming, standing still or what it was doing. My whole thoughts were not in riding in his automobile.

Q You heard his testimony where he said his car was coming down and that he was about seventy-five feet away coming down when the accident happened. Having that in mind can you say now whether his car was moving or standing still? A No, I cannot.

30 Q You do not remember that? A No.

Q You do remember holding her hand? A We may have been holding hands; I don't remember that.

Q Remember she said as you stepped out in front of the car she said she was a foot and a half in front of the car and you were right by her side holding hands and that you made a step out and then she was right there and she followed

40

Marie Lacombe, cross.

you back, she jumped back and got out of the way of the truck and something happened? A I don't remember her holding me.

Q You do not remember her holding you at all? A No.

Q You don't remember her holding your hands? A I said we may have been holding hands. 10

Q Do you remember that? A No.

Q You do not remember holding her hand? A No.

Q Do you remember her holding you? A No.

Q Would you say she followed you? A I wouldn't say she did or did not.

Q You read her testimony about that? A That is her testimony.

Q You read that some months ago? A That is her testimony. 20

Q I know that. Which side of her were you on? A To the best of my recollection I was to her right.

Q You can remember that, can't you? A Yes, but my memory sort of left me after I was hit; I wasn't unconscious.

Q You were not unconscious? A No.

Q Because you said afterwards you looked up and saw the truck. A I saw the truck. 30

Q You told them which doctor you wanted to go to? A Yes, sir.

Q So you can remember. You tell us everything else that happened. You can remember just what you were doing before the accident, can't you? A I remember some of the things.

Q You said in answer to a question by your counsel that you stepped out and looked to the south and did not see anything. A No, I did not. 40

Marie Lacombe, cross.

Q Then, you said you looked to the north and did not see anything? A I did not.

Q Then you stepped out one or two steps? A Off the trolley tracks.

10 Q Off the trolley tracks and suddenly you looked up and saw this car rushing at you and then it was too late to do anything? A I stepped back and that is when it hit me.

Q How many steps back did you take? A That I don't remember. As I stepped back this way (indicating) it hit my left foot and in hitting my left foot it threw me and that's when it passed over me. Now, how many steps I took I do not remember.

20 Q You were with this girl stepping out in front of the trolley car? There was nothing to the south on that road as far as you could see? A Nothing.

Q Not a truck? A Not when I looked the first time.

Q You did not stop, did you, you just looked out and went on? A I looked south and I looked north and I looked south as far as I could see.

30 Q How far could you see? A There was a trolley car standing there.

Q You looked around the trolley car? A I looked this way (indicating) and I looked north (indicating) and of course my view was clear north.

40 Q Your view was absolutely clear to the north, but your view was not clear to the south? A I looked south and there was nothing and I looked north and then as I looked south again to walk, we were going directly across the street, the truck was on top of me and as I stepped this

Marie Lacombe, cross.

way (indicating) that is when I said he hit my foot and there was no sign or warning or horn given.

Mr. Carey: I object to that and ask that it be stricken out.

Mr. Stickel: I will consent to that being stricken out. 10

Q You started out to the car, and there was a clean road outside of the car, nothing to obstruct your view? A Nothing to the north.

Q Nothing to the south except a trolley car? A The trolley car was not in full view. I could see around the trolley.

Q I am going to show you a picture here marked D-2 for identification and I ask you if this is a proper picture of that location? A Yes, sir. 20

Q It shows the whole place just as it was?

A No, there is more up on this end (indicating).

Q It shows everything that a picture can interpret correctly? A Yes, sir.

Q It shows your factory. It shows the entrance gate, doesn't it? A Yes, sir.

Q And it shows the condition of the street as it was? A At the time. 30

Q It shows the car tracks on the side towards the factory? A Yes, sir.

Q It shows the asphalt roadway with the tracks and the automobile road? A Yes, sir.

Q And that is the trolley tracks on the other side of the road (indicating)? A Yes, sir.

Q It shows a house quite some distance down on the opposite side of the street? A Yes, sir.

Q That is the only house that shows there on the opposite side of the street. I think that 40

Marie Lacombe, cross.

is the only house that is anywhere around there. It is quite aways down from the entrance? A Yes, sir, it is.

Q Having that picture in mind you say you walked across the trolley tracks in front of the car, is that right? A Yes, sir.

10 Q When did you look south to see if anything was coming? A As I was coming here the trolley car stopped down in here. (Indicating.) Here is the beginning of the concrete drive, and the entrance gate and the trolley was stopped just beyond that.

Q The trolley was stopped just south of the entrance? A Yes, sir.

Q You were passing in front of the trolley car, is that right? A Yes, sir.

20 Q When did you look up and down, just as you were passing out in front of the trolley car? A As I came through here (indicating) the trolley was here and you could see. As I came here (indicating) I looked south.

Q Answer it this way, because the jury cannot see that picture yet because it is not in evidence. When you got to the trolley car, before you stepped on the trolley track, is that when you looked both ways? A As I got to the trolley car did I look both ways?

Q Yes. A No.

Q When was it you looked both ways to see if anything was coming when you were getting off the trolley car or when you were stepping on the trolley tracks? A I was getting off the trolley tracks; I was not right off the tracks.

Q You were still on the trolley tracks? A If the truck had been in the center of the street
40 where it should have been—

Marie Lacombe, cross.

Q You were still on the trolley tracks? A I was stepping off the trolley tracks.

Q You were stepping off the trolley tracks, is that right? A Yes, sir.

Q And when you were stepping off the trolley tracks you looked south and then you looked north? A That's right. 10

Q Now, when you were stepping off the trolley tracks—were you stepping out as far as the trolley car extended? A Trolley car extends maybe a foot over the car track on each side, doesn't it? A Yes, sir.

Q Did you step straight out so you could look up and down so you could see what was coming? A That is what I did this way (indicating), I leaned my head over.

Q What in the world was there then to prevent you from seeing this truck? A I didn't see him. It wasn't at the trolley when I looked south and the first time when I looked north and then I looked south and the second time after I had gotten completely off the trolley tracks is when I saw the truck on me. 20

Q You say when you looked south you did not see him because he was not there? A I don't know whether it was coming in the distance; I didn't see him. 30

Q Then, you say you looked north? A I wasn't completely off the trolley tracks:

Q What? A I wasn't completely off the trolley tracks, out of the way of the trolley.

Q The trolley was obstructing your view?

A No, I wasn't in the center of the street; I hadn't gotten off the trolley tracks.

Q You say you hadn't gotten off the trolley tracks? A Not the first time. 40

Marie Lacombe, cross.

Q If you had not gotten off the trolley tracks you could not see very well because the trolley car would be in your way? A It wouldn't if you put your head over.

Q Did you put your head over? A Yes, sir, I did.

10 Q Tell us, if you did, why you could not see this truck? A It was not at the trolley when I put my head out.

Q It was not there? A I did not see him.

Q Are you sure you looked? A Certainly, I looked.

Q Was your girl friend in your way so you could not see him? A No.

20 Q Was any part of the trolley car in the way so you could not see him? A No.

Q You did not stop walking; you were walking on hand in hand. Were you walking or didn't you run? A I was walking.

Q Weren't you running over to his car, you and your girl friend? A I walked.

Q Did you walk slow or fast? A I never walked so fast.

30 Q You walked fast before the accident, like the other girls? A I wasn't in a hurry to go some place.

Q Weren't you in a hurry to go across the street to get this car? A No.

Q You had a date, didn't you? A No.

Q Weren't you in a hurry to keep that? A No.

40 Q You stepped out there and just as you were on the edge of the tracks you bent your head a little forward and looking you did not see anything either way and kept right on going,

Marie Lacombe, cross.

didn't you? You didn't stop? A Until the truck hit me.

Q You did not stop walking? A No.

Q You did not stop walking at all, did you?

A No.

Q So, the whole time, from the time you left the trolley tracks, when you looked north and south until you took two steps, it couldn't be more than a second, could it? A No. 10

Q It couldn't be that, could it? A I don't know.

Q You kept right on going and looked this way and the thing happened, did it? A Yes, sir.

Q Wherever that truck was it certainly got to the place where you got in contact with it very quickly after you looked, didn't it? A It did. 20

Q Right after the accident you looked up and the truck was over you? A It had passed; it was up the street.

Q It was up the street after the accident? A Yes, sir.

Q Weren't you pulled out right from under it? A No, sir, I wasn't pulled out from under it.

Q Who pulled you out of the street? A I wasn't pulled from under the truck; the truck was up. 30

Q Who lifted you out of the street? A Who picked me up?

Q Yes. A Well, there was Miss Harris was over me and Mr. Rungsted; I don't know whether he was over me or not, and Mr. Gledhill.

Q Did you hear Mr. Rungsted say that he came over and picked you out from between the two wheels? A Well, he didn't take me out from between the two wheels. 40

Marie Lacombe, cross.

Mr. Stickel: I do not think he said that. I do not think he said he came over and picked her up.

Q (By the Court.) What did you pay for your crutches? A Seven or eight dollars.

10 Q Have you only had the one pair? A Yes, sir, I bought them in Schumann's. I had a cheap pair at first, but they were not satisfactory and then I got this pair. I had new ends on them; I had them down for new ends to be put on them; the rubber wears out. I had to have them cut down so that they were the proper height.

Q Didn't you hear him testify yesterday this way, "And wasn't her body between the two wheels of the truck? A Yes. In other words, she was between the two wheels of the truck, that is true? A Between the front right wheel and the rear right wheel." You heard that testimony yesterday?

20

Mr. Stickel: You asked her whether he took her out.

Q I will reframe the question. Isn't it a fact that is exactly the way you were taken out from that car, from between the two wheels? A No, it is not.

30

Q Is it a fact that you slipped, as he stated, when you were pulled back by your friend hurriedly and that your right foot slipped right under and was run over by the right front wheel, isn't that so? A No, that is not so.

Q I show you two other pictures, one marked D-1 for identification, and I ask you if that de-

40

Marie Lacombe, cross.

picts the gate entrance as it was? A That is the picture of it.

Q I show you another picture D-3 for identification showing a view of the factory property taken from the south the other one taken from the north. Is that a good picture of it? A Yes, sir.

10

Q How fast were you walking as you walked out on the trolley tracks? A Just the usual stride.

Q About as I am walking now? A About that.

Q At the rate of three and a half miles an hour? A I don't know, I never timed myself in walking.

Q The average walk is four miles an hour and a slow walk is about three miles an hour? A Just the usual walk.

20

Q It would be about as I am walking now? A Yes, sir.

Q You did not stop? A No.

Q You started across the track with your friend walking hand in hand and you looked to your left and you walked two steps and you were hit with this truck? A Just as I said before.

30

Q How far beyond the trolley car would that bring you, four and a half or five feet? A Not as much as that.

Q You stepped two and a half feet, every time you stepped, didn't you? A I couldn't say.

Q When you take a real stride you walk about a yard? A I never walked like that; I take very short steps.

Q We cover two and a half feet on a short step, don't we, that way? A I couldn't say.

40

Adelheide Lacombe, direct.

Q Isn't that your experience? You took about three steps out? A From the trolley tracks?

Q After you took two and a half feet in each step you would be out five feet from the trolley car, wouldn't you? A I don't know.

10 Q You knew the lay-out of that road pretty well, didn't you? You had been there a long while? A Not so very long, a few months.

Re-direct examination by Mr. Stickel.

Q Did you hear Judge Carey read Mr. Rungsted's testimony yesterday when this was testified to, "And you all pulled her out from between the car? Answer: They had pulled her out from between the car when I reached there; they had taken her from under the car." Did you hear that yesterday, or didn't you? A I don't remember whether I did or not.

Q You did look from around the end of that trolley car? A I did.

Mr. Carey: I object as leading.

The Court: The question was answered.

30

ADELHEIDE LACOMBE, sworn in behalf of plaintiff.

Direct examination by Mr. Stickel.

Q Where do you live? A 86 Bell street, Belleville.

Q Is the last witness your daughter? A
40 Yes, sir.

Adelheide Lacombe, direct.

Q When she returned from St. James' Hospital to her home were you required to do anything for her? A Yes, sir, plenty.

Q Tell us some of the things you did to help her? A Well, we had to lift her around, we had to take care of her; we had to give her the bed pan; we had to do everything to help her because she couldn't help herself, in fact we had to sit up with her pretty near all night, because she was shocked so she would raise off the pillow; she would almost jump off the cot. 10

Q Where did she sleep? A First in the living room and then in the dining room on the day-bed.

Q Why was that? A Because she could not go upstairs.

Q Do you know how long she used crutches? A Yes, sir, she used crutches until the following year, until warm weather. 20

Q Then what did she do, get her artificial leg then? A She got her artificial leg then, but still she used crutches; she had to use the two crutches a long time after she had the artificial leg; she said she could not manage it.

Q Did she have any trouble with her bath? A Yes, very much. 30

Q What aid did you give her in that respect? A I always had to help her get in it so she wouldn't slip and after she got finished I would have to help her get out.

Q How did she get to and from business? A Her father takes her.

Cross examination waived.

William A. Miller, direct.

WILLIAM A. MILLER, sworn in behalf of plaintiff.

Direct examination by Mr. Stickel.

10 Q Where do you live? A 145 Carlton avenue, Jersey City.

Q By whom are you now employed? A Hafner Trucking Company.

Q By whom were you employed on June 30th, 1924? A James J. Dawkins.

Q What was his business at that time? A General trucking.

Q Where? A 24 Worth street, New York.

Q What is his business today? A I don't know, I haven't seen Mr. Dawkins.

20 Q Has he still got his business? A No.

Q What was your position with Mr. Dawkins? A Bookkeeper and general manager.

Q On July 30, 1924, did the Cudahy Packing or any of its representatives call you up in connection with your business?

Mr. Carey: I object.

The Court: Sustain the objection.

30 Q Did Mr. Rightmeyer call you up on July 30th, 1924? A Yes, sir, he did.

Q Did you know who Mr. Rightmeyer was? A I know he was an employee of the Cudahy Packing Company.

Q Where was Cudahy Packing Company's plant? A I don't remember exactly; I heard, but I know it was about Fourteenth street.

Q In New York City? A New York City.

40 Q What was their business? A I believe they were packers.

William A. Miller, direct.

Q Of meats? A Meat packers, something like that.

Q Do you know what department Mr. Rightmeyer was in? A No.

Q What did Mr. Rightmeyer say to you?

Mr. Carey: I object as not binding on us, 10
unless he can show it binds us.

The Court: Don't you think he has to show he had authority to speak for them, if he bound them?

Mr. Stickel: All I can show is that this gentleman went up to the Cudahy Packing Company at the request of this telephone call and the truck was used.

Mr. Carey: There is no question in the world that they sent a truck up and delivered goods for us. There is no doubt about that at all. 20

The Court: You will admit that Dawkins, as the result of a conversation over the telephone, sent a truck up to the Cudahy Packing Company?

Mr. Carey: Yes, I can admit that.

Mr. Stickel: I want a little more of the conversation. 30

The Court: I cannot admit that conversation.

Mr. Stickel: I even think I connected it up by showing the going of the driver of Dawkins to the Cudahy plant and reporting there to Mr. Rightmeyer.

Mr. Carey: I withdraw the objection to the question.

(Question read.) 40

William A. Miller, cross.

A If we could send him up a truck.

Q Did you send up a truck? A I did.

Q Did Mr. Rightmeyer say why they wanted the truck? A I don't remember exactly what he said, why he wanted the truck, outside of one of their own trucks was laid up.

10 Q Who did you send up? A Mr. McEwan.

Q With one of Dawkins' trucks? A With one of Dawkins' trucks.

Q Did you see McEwan after that? A Not that day.

Cross examination by Mr. Carey.

Q You were employed by James J. Dawkins, is that right? A Yes, sir.

20 Q He was in the general trucking business? A Yes, sir.

Q He used that truck for anybody and everybody wherever he got orders? A Yes, sir.

Q If I called him up on the telephone and you thought I was reliable you would accomodate me? A Yes, sir.

30 Q If I wanted to move a lot of boxes from one of his branches to another of his branches, if he had a branch office, you would have done it? A Yes, sir.

Q You had a general trucking business? A Yes, sir.

Q Trucks and chauffeurs? A Yes, sir.

Q McEwan was employed by you, as a chauffeur, wasn't he? A Yes, sir.

Q How long did McEwan work for you? A A number of years.

40 Q He was one of the regular drivers of Dawkins? A Yes, sir.

William A. Miller, cross.

Q How long did you work for Dawkins in the trucking business? A About six years.

Q Dawkins was a recognized institution over there in the trucking business, well known to every one? A Yes, sir.

Q He had this business at 24 Worth street, didn't he? A Yes, sir. 10

Q When you sent out your trucks with your drivers you always charged the concern you did that for, didn't you? A Yes, sir.

Q For instance, if I wanted to take a piano to Plainfield, New Jersey, you would take it and I would pay you, all I had to do is pay you? A Yes, sir.

Q You would send and get the piano, and if I told you where to take it you would take it, is that right? A Not exactly. 20

Q If I paid you you would? A If we make a price on it.

Q Surely if you made a price on it? A Yes, sir.

Q You always make a price on it, don't you? A Surely.

Q You hired, your concern, this truck and driver for two days, didn't you? A No, sir, one day.

Q Are you sure of that? A Yes, sir. 30

Q Look at that bill and see if you recognize the bill? A I recognize that.

Q You prepared it as one of your bills, didn't you? A Yes, sir.

Q Truck hire? A Yes, sir.

Q You made out the bill for \$30, didn't you? A Yes, sir.

Q Rightmeyer complained to you about that and said that \$25 was the regular truck hire. Right, didn't he? A Not the next day. 40

William A. Miller, cross.

Q A couple of days after? A A month after.

Q You reduced the bill to \$25 because you said he was right, didn't you? A Yes, sir.

Q The bill was made out for two days for \$60, wasn't it? A Yes, sir.

Q It was paid at \$50, wasn't it? A Yes, sir.

10 Q For two days' trucking? A Yes, sir.

Q That was the regular rate you charged everyone for truck hire? A Yes, sir, the regular rate.

Q They paid it and that ended your relationship in the matter, didn't it? A Yes, sir.

Q Then they had nothing else to do with you, did they? A No.

Q It was your truck you sent up, wasn't it, Dawkins? A Yes, sir.

20 Q It was Dawkins truck that came back? A Yes, sir.

Q It was your driver McEwan that came back? A Yes, sir.

Q And it was your driver McEwan who went with the truck? A Yes, sir.

Q It was your gas which was in the truck? A Yes, sir.

30 Q The only charge you made to us is that represented on that bill? A That's all.

Q That's what we paid? A Outside of the question it was one day and that is charged for two days. You asked me if the truck was only hired for two days, but it was only hired for one day at a time.

Q The bill is for two days. A He called me again.

40 Q And hired it the second day? A He called me up the first day and hired it for one day and that evening he called up and said, "We need the truck tomorrow again."

Corey E. Miller, direct.

Q And so, that was two days? A Yes, sir.

Mr. Carey: I ask that this bill from Dawkins be marked for identification.

(Same is marked D-4 for identification.)

10

PAULINE SCHAEFFER, sworn in behalf of plaintiff.

Direct examination by Mr. Stickel.

Q You are a nurse? A I am.

Q Did you attend Miss Marie Lacombe? A Yes, sir, I did.

Q Where did you attend her? A At St. James' Hospital.

20

Q What was the nature of her injury?

Mr. Carey: We are not raising any question of the injuries at all.

A Badly mangled leg.

Q How long were you with her? A Three weeks.

30

Cross examination waived.

COREY E. MILLER, sworn in behalf of plaintiff.

Direct examination by Mr. Stickel.

Q Where are you employed? A Westinghouse Lamp Company at Belleville.

40

Corey E. Miller, direct.

Q Is that the plant in which Miss Lacombe is employed? A It is.

Q She was employed there on the date of her accident, July 30, 1924? A I understand she was.

10 Q Do you know what her position was at that time? A Pay clerk.

Q Do you know what her position is now? A Production clerk.

Q What kind of a position is pay clerk? A Considered a fairly responsible position in as much as it handles the payroll of the factory and is of a confidential nature and if you classify the clerks it probably would be one of the first of the clerks.

20 Q How does it compare with the position she has now? A As I just said, pay roll clerk would be classified as the first of the clerks, so production clerk would be of a lower position.

Q Has Miss Lacombe had an increase in salary since the accident? A She has not.

Q Has the person who took her place as payroll clerk had an increase? A She has.

Q How much was that increase?

30 Mr. Carey: I object as incompetent, irrelevant and immaterial.

(Argument.)

Q If Miss Lacombe had retained the payroll clerk's position would she have been entitled to an increase in salary since the accident?

Mr. Carey: I object. I do not think this witness is qualified to say.

40 Q What position do you now hold in that plant? A Position of office manager.

Corey E. Miller, direct.

Q As such do you have control of the clerks, including the payroll clerks? A I have.

Q Have you any authority as to increases in salary? A I have everything to say.

Q If Miss Lacombe had remained there since the accident would she have been entitled to an increase under normal conditions? A Had she continued her efficiency she would have, yes, sir. 10

Q How much would that have amounted to? A I would say twenty-five per cent.

Q A twenty-five per cent. increase? A I do not mean by that twenty-five per cent. up to the present time. She would be entitled to a twenty-five per cent. increase to reach the maximum of her position.

Q How much is the amount of the maximum of her position? A We would have it around \$140. 20

Q What is she getting in her present position? A \$95.

Q Can you tell us anything as to her efficiency in her present position? A I would have to cover that question by comparison. She is efficient as far as she is able to be efficient at the present time.

Q Is there any handicap to her doing the work of that job? A A decided handicap. 30

Q What is it? A Because of her injury and loss of limb she is not as active as a clerk in that position should be to carry out her duties throughout the job.

Q You have retained her in that position ever since? A We have.

Q Will that interfere, have any effect on her retention in that position? A That is a rather embarrassing question. 40

Robert McEwan, direct.

Q I will have to ask you to answer it. A At the present time we are getting applicants for her position.

Q The reason for that is—

Mr. Carey: Let him state the facts.

10

A The company realized at the time she came back from the hospital she would be handicapped in her duties and because of sympathy, especially of the general superintendent located at Bloomfield, she was retained and given that position and she has carried it out very efficiently as far as she is able to do so but as I said before a clerk in her position should be one who is very active to get down in the shop and bring back production reports and get results, and at the present time she cannot do that, she has to be helped on the elevator service up and downstairs and when she requires information down in the factory it must be telephoned down and she must call across to another clerk to do that for her, and in that way she is inefficient from our point of view.

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Cross examination waived.

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ROBERT MCEWAN, sworn in behalf of plaintiff.

Direct examination by Mr. Stickel.

Q Where do you live? A I live at 1430 Nostrand avenue.

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Q What city? A Brooklyn.

Robert McEwan, direct.

Q On July 30th, 1924, by whom were you employed? A James J. Dawkins.

Q Where was the business of James J. Dawkins at that time? A Located at 24 Worth street.

Q What was it? A General trucking.

Q What was your job? A Chauffeur. 10

Q On July 30th, 1924 did you operate one of Mr. Dawkins trucks? A I did.

Q Where did you go with the truck? A I was ordered to go to the Cudahy Packing Company.

Q Who ordered you to go there? A Mr. Miller.

Q Who is Mr. Miller? A The bookkeeper.

Q Did he say anything to you? A He just simply told me to go up there and get my orders. 20

Q To do what? A To go up there and get my orders.

Q Did he say anything about the truck? A Why I certainly couldn't go up there without the truck.

Q Did he say anything about the hire of the truck? A We never knew anything about that. We were told to go wherever they had work for the concern. 30

Q Have you ever been hired by the Cudahy Packing Company before? A No, sir.

Q Where did you go at the Cudahy Packing plant to what department? A I went down on Thirty-fourth street below Tenth avenue, that I know.

Q Who did you see there? A I seen several gentlemen.

Q Who is the first man you saw? A There was two gentlemen came out but just who they 40

Robert McEwan, direct.

were, at the present time; I can't recollect, but I believe a party by the name of Mr. McCaffrey.

Q Did you see a man by the name of Rightmeyer? A Not until I had seen this other gentleman.

10 Q But you did see Mr. Rightmeyer? A Yes, sir.

Q Did he say anything to you? A He said, "You are from Dawkins"? that's all, and he told me I was to do as they would tell me.

Q Do as who told you? A I was hired out to them.

20 Q Did he tell you where to go or did he turn you over to anybody? A He said this Mr. Gibney, their regular chauffeur, his truck being laid up, that he would go with me and show me where to go.

Q Did you see Gibney? A Certainly.

Q Did Mr. Rightmeyer say anything to Gibney in your presence? A No, sir.

Q Where did you find Gibney? A He was loading a truck at that time when I first went there.

Q Did you get any orders from him? A From Gibney?

30 Q Yes. A Not until the truck was loaded. That's a large place you know, you can't be standing around with so many men giving orders there and the first time I was there I didn't know who they were or what they were.

Q What truck was being loaded, your truck? A No, sir.

Q Who gave you any orders as to your truck, Gibney? A Gibney told me after that truck was loaded then he would load up mine.

40 Q Then did he load yours? A Yes, sir.

Robert McEwan, direct.

Q Did he tell you where to take the truck?

A I backed it into the platform.

Q Who loaded the truck? A Mr. Gibney.

Q Did you help? A I stood on the side and gave a little hand occasionally, but I was more in the way; they had a system there.

Q Did you have any conversation with Mr. Gibney while the truck was being loaded? A Well, I don't think I did. 10

Q Did you have any conversation with him as to the hour that his truck generally got away?

A Well, yes, he said the truck was late that day getting away, that is, the truck was late.

Q That is the truck you were driving? A Yes, the truck was taking his place.

Q Your truck was taking his place?

Mr. Carey: I object to counsel testifying for the witness. 20

A He said my truck was taking the place of his truck.

Q Did he tell you how many men there were generally on his truck? A Well, now, he said at times there were two, if I remember right.

Q After you finished loading the truck where did you go? A I didn't load the truck. 30

Q After whoever loaded the truck loaded it, where did it go? A It went to Jersey City.

Q Did you get any orders as to where to go as soon as you left the plant?

Mr. Carey: I object to that. Tell us who said it and what was said.

The Court: Sustain the objection.

Q Did Gibney give you any orders as you left the plant? 40

Robert McEwan, direct.

Mr. Carey: I object to the suggestion.

The Court: Sustain the objection.

Q Did Gibney say anything to you when you left the plant? A He told me to go to Twenty-third street ferry.

10 Q Did you go there? A Certainly.

Q Who paid the ferriage tolls? A Mr. Gibney.

Q When you got on the other side where did you go, on the Jersey side? A That I don't know just where we went but I went as Mr. Gibney directed me.

Q Do you know where the first place was you went? A Just at present I can't remember.

20 Q Were you familiar with the streets and places in Jersey? A Not all of them.

Q When you got to the places of delivery did you do anything? A No, very little did I do at any time; all I done was drive the truck.

Q Who took care of the loading or unloading? A Mr. Gibney.

Q You did not participate in that at all? A No.

Q At no time? A No, sir.

30 Q Where was the last stop in Essex County you made? A You will have to be more explicit, because I don't know one county from the other over here.

Q When you came over here did you go to Elizabeth? A Yes, sir.

Q Where did you go from Elizabeth? A Came back through Newark and up Washington avenue.

40 Q How did you come to take Washington avenue? A Under the direction from Mr. Gibney.

Robert McEwan, cross.

Q Where were you bound for at that time?

A We didn't get there, but I don't know whether it was Passaic, Lodi or Garfield, some of those three towns, I know that.

Q How were you dressed that day? A In my own clothes.

Q What color were your clothes? A That I couldn't tell you now, because they are gone. 10

Q Were they black or blue? A I couldn't tell you whether they were or not. If I told you now I would be telling a lie myself.

Q Did you have a white coat on? A No, sir.

Q When you got back at the end of the day was there anything said to you by any of Cudahy's men? A There was an arrangement that I was supposed to come back the next morning, not at the end of the day, that was the middle of the night. 20

Q Did you go back the next day? A Certainly I went back the next day.

Cross examination by Mr. Carey.

Q How long did you work for your boss Dawkins? A Over two years.

Q Your business was to drive one of his trucks for them? A Yes, sir. 30

Q Did you use the same truck right along or different trucks? A No, we used the same truck all the time.

(At one o'clock P. M., the Court takes a recess of one hour.)

Robert McEwan, cross.

AFTER RECESS.

ROBERT MCEWAN, resumes the stand in behalf of the plaintiff.

Cross examination (continued) by Mr. Carey.

10 Q You have been driving that particular truck altogether how long? A For two years.

Q Your business as you described it you worked for Mr. Dawkins? A Yes, sir.

Q During that two years did you work for him continuously? A Yes, sir.

Q Did he pay you regularly? A Positively.

Q No one else paid you? A Mr. Miller, of course, his representative, that is the man who paid.

20 Q Your pay came from Dawkins? A Yes, sir.

Q He was your employer? A Yes, sir.

Q Your boss? A That's right.

Q For instance you would go to the office in the morning and you would not know what you were going to do during the day until you got there? A No, only we got orders the night before.

30 Q Suppose I telephone down that I wanted a truck to do trucking for me, left an order there for trucking to be done in Orange, East Orange and Montclair. You would get orders; how would you get them? A Through Mr. Miller.

40 Q What would he tell you to do? A Go to so and so and such and such a place and report to the concern or the man that was going to take the truck.

Robert McEwan, cross.

Q You would go there and get a load of goods and take that where you were directed?

A Yes, sir.

Q Who was operating the car? A I was.

Q Who gassed the car? A We always done that at night.

Q Where did you do that? A In the garage. 10

Q Whose garage? A Dawkins' garage.

Q On this particular occasion did you gas your car? A That night.

Q In Dawkins' garage? A Yes, sir.

Q The next morning you went and reported? A At the office.

Q And got directions to go to the Cudahy Packing Company on what street? A Thirty-fourth street.

Q You went over there and went to where, the shipping department? A I pulled down in front of the shipping department. 20

Q That is what you usually do when your trucks go out to any place? A Yes, sir.

Q You were told to see Mr. Rightmeyer there? A Mr. McCaffrey; I am not sure; one of those two gentlemen.

Q Whoever you saw told you what? A To wait awhile.

Q Then Mr. Gibney told you he was loading another truck at that time? A Yes, sir. 30

Q Then he put a load on your truck? A Yes, sir.

Q Then you and he went off together? A That's right.

Q He started off to where? A Jersey.

Q Who ran the car? A I did.

Q Anybody else? A No, sir.

Q Did anybody help you? A To run the car? 40

Robert McEwan, cross.

Q Yes. A No, it is only a one-man car.

Q That is your job, isn't it? A That was my job.

Q Did Gibney have anything to do with running the car? A No, sir.

10 Q Did you operate it continuously? A Positively.

Q While you were operating this car you went to the places directed, didn't you? A Surely.

Q The deliveries were made there? A Positively.

20 Q The goods, you say, were removed by Gibney? A The goods were removed by him only I might have got up on the car and shoved the goods to the rear; I wasn't responsible for the goods, he was responsible for them, inasmuch as I put them to the edge of the truck.

Mr. Stickel: I object to that and move that it be stricken out.

The Court: Strike that out.

Q So, the limitation of your work there then was the truck? A That was all.

Q And the operation of the car? A Yes, sir.

30 Q When you got through with the trucking that day, what did you do? A Went to the garage. After I left Cudahy's place I went to the garage.

Q What garage? A Dawkins' garage.

Q Then what did you do the next day? A Went back to Cudahy's.

Q On another day's work? A Yes, sir; reported there.

40 Q Then you made another delivery the next day? A I think I had one straight delivery.

Robert McEwan, cross.

Q Was anyone with you? A No, sir.

Q You had one straight delivery? A Yes, sir.

Q Where did you go then? A Back to our office.

Q What does that mean? A I went to Dawkins' office. 10

Q Did Cudahy Packing Company pay you for those two days' work? A No, they didn't pay me personally; I got my salary from Dawkins.

Q You were on a salary, were you? A I was paid by the week.

Q Did you ever work for Cudahy Packing Company? A No, sir.

Q During the entire time that you were operating that car did you work for anybody except Dawkins the truckman? 20

Mr. Stickel: It seems to me that is a conclusion of law rather than a conclusion of fact.

The Court: Sustain the objection, if you object.

Mr. Stickel: I do.

Defendant's counsel prays an exception to this ruling of the Court. 30

Exception noted as ground of appeal.

Q Wasn't your employment continuous with Dawkins for the entire time you operated that car?

Mr. Stickel: I object to the question as a question of law to be deduced from the facts, one way or the other.

(Argument.) 40

Robert McEwan, cross.

The Court: Sustain the objection.

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

Exception noted as ground of appeal.

10 Q If you were employed in any way by the Cudahy Packing Company you did not know it, did you? A No, I did not.

Q The next day you went right on with your work with Dawkins? A Positively.

Q Who did you truck for the next day? A After that?

Q Yes. A That I couldn't say.

20 Q Other people? A We don't know who really, who we worked for because we worked from one concern to another and we get an order from a certain house to do some trucking and we are told to go there and do this and that.

Q Did you ever do anything for R. H. Macy? A None.

Q Any products house? A No, sir.

Q Any other meat house? A No, sir.

Q Any lumber firms? A No, sir.

30 Q Who can you remember? A We used to get orders from the bookkeeper and go there and take the stuff we used to have to take and brought it from the A. & P. from New York to Newark and sometimes up to Paterson; we got those orders from the bookkeeper.

Q In other words, you were trucking for anyone who brought the business? A That's the idea.

Q Was there a sign over Dawkins' office? A Was there a sign over Dawkins' office?

Q Yes. A Yes, sir.

40 Q Trucking? A James J. Dawkins, bonded truckman.

Robert McEwan, re-direct.

Re-direct examination by Mr. Stickel.

Q Do you know what you were to do the day you went to Cudahy's? A No, not specifically, we did not; I did not.

Q When you carried butter for the A. & P. you knew what you were to do then? A Why, surely, we loaded the butter and took it out and unloaded it. 10

Q On those occasions you were given orders to go to the A. & P. and cart their butter? A No, we were given orders by the bookkeeper.

Q To do what? A To go to a certain house and pick up so many tubs of butter and take it over to Newark or Paterson.

Q That was not your instructions on this day? A No, sir. 20

Q You say you might have pushed the goods from the front to the rear of the truck to help Mr. Gibney? A Yes, to save him jumping up and down off the truck.

Q Do you remember me questioning you some years ago in May, 1925, asking you a number of questions? A May, 1925?

Q Or about that time. Asking you a series of questions about your employment? A I didn't get that question. 30

Q I say you remember me asking you a series of questions about your employment about a year ago or more? A Yes, sir.

Q Do you recall the question, "And who did the unloading there?"

Mr. Carey: I object to the question as incompetent, irrelevant and immaterial as far as we are concerned.

The Court: I will admit it. 40

Robert McEwan, re-direct.

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

Exception noted as ground of appeal.

Q "Who did the unloading there?" A Mr. Gibney did the unloading.

10 Q And your answer, "Both of us. The chauffeur told me on this particular route he always had a helper with him and that accounted for my loading and unloading at the different stops." Do you remember that?

Mr. Carey: I object as entirely improper.
(Argument.)

20 The Court: The witness has testified and you evidently want to refresh his recollection. I do not think you want to impeach him. I will admit the question, but you will have to relate the conditions. Do you want to contradict him or refresh his recollection?

Mr. Stickel: I hope to refresh his recollection and if I cannot refresh his recollection I may have to do the other. I have here the stenographer's record which was taken in my presence.

30 Mr. Carey: I object to that.
(Argument.)

Q (Question read as follows:) "Who did the unloading there?" And your answer: "Both of us. The chauffeur told me on this particular route he always had a helper with him and that accounted for my loading and unloading at the different stops."

40 The Court: You may answer that.

Robert McEwan, re-direct.

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

Exception noted as ground of appeal.

A That was in this statement you are taking these answers from in the statement which was made in the lawyer's office? 10

Q Yes. A I told him that I helped him in taking them off.

Q And who did the unloading there? "Answer: Both of us, the chauffeur told me on this particular route he always had a helper with him and that accounted for my loading and unloading at the different stops." A Well, he didn't ask me to unload with him, but I done it for to help us to get through.

Q Do you remember making this statement? 20

A Do I remember making that statement, yes, sir.

Q Do you remember this question, "And during all that time you were being directed by this chauffeur where to go and were assisting him in unloading?"

Mr. Carey: I object. Counsel cannot ask questions this way.

(Argument.) 30

The Court: He would not be allowed to do it on direct examination.

Mr. Carey: Certainly if he cannot do it on direct examination he cannot do it on cross examination.

The Court: Sustain the objection.

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

Exception noted as ground of appeal. 40

Testimony of Mrs. Anna Seria, direct.

Re-cross examination by Mr. Carey.

Q Since you worked for Dawkins whom have you worked for? A You mean every concern since I left him?

10 Q Yes. A I drove a taxicab after I left him in New York City.

Q Whom are you working for now? A A private party by the name of Lane.

Q Where? A In Brooklyn.

Q Private chauffeur? A Yes, sir.

Q You have never worked for the Cudahy Packing Company, have you? A No, sir.

20 Mr. Stickel: I have here some testimony which was taken of a witness who was confined to her bed and Judge Carey's representative was present and I would like now to read it.

Mr. Carey: No objection.

(Mr. Stickel reads the testimony of Mrs. Anna Seria, as follows:)

30 "Q Mrs. Seria, where do you live? A 9 King street, Belleville. Q And your name before your marriage was what? A Anna Fusaro. Q And before you were married where did you work? A At the Westinghouse in Belleville. Q Where is that located? On what street? A Washington avenue. Q Did you know the plaintiff Miss Lacombe? A Yes, I knew Miss Lacombe. Q Did she work there? A Yes. Q Do you recall seeing part of an accident to her about July 30, 1924? A Yes, sir. Q Where were you when you witnessed the accident? A Across the street from the Westinghouse. Q The Westinghouse is on what side of

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Testimony of Mrs. Anna Seria, direct.

Washington avenue? The east or west side? Is it on the lower side or the upper side of the street? Is it on the side toward the river? A On the side toward the river. Q And had you been working in the factory that day? A Yes, sir. Q Had you left the factory that day? A Yes. Q By the front gate? A Yes, sir. Q Had you crossed the street? A Yes; when I saw the accident. Q With respect to the gate of the Westinghouse, where were you standing? A I was standing across the street from the Westinghouse, looking toward the Westinghouse. Q Do you know where Carmer avenue, Belleville, is? A Yes. Q Where, with respect to Carmer avenue, Belleville, were you standing? A I was standing right in front of the house there across from the Westinghouse. Not right at the corner, not quite a half block down from it. Q Carmer avenue is where, with reference to the gate? A The gate is down further from the avenue, from Carmer avenue. Q Carmer avenue and the gate are catercornered across Washington avenue, are they? In other words, if you walked from the gate of the Westinghouse— A It would not face Carmer avenue. Q How far away would it be? A Well, not quite half a block. Q You were standing, then, in front of the wooden house across from the plant? A Yes. Q There is a tree there, isn't there? A Yes. Q And you were standing how close to the tree? A Not very far away from the tree. Q Is there a trolley stop there? A Yes, sir. Q How near the trolley stop were you? A I

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Testimony of Mrs. Anna Seria, direct.

was across the street to the trolley car at the time of the accident. I seen the trolley car had already stopped. Q Isn't there a trolley stop or a white pole on the west side of Washington avenue, too? A I don't think there was a pole painted white there as it is now on this side of the street. Q
10 Where did you see Miss Lacombe first? A Before crossing the street, I saw Miss Lacombe and Miss Harris coming out from the Westinghouse. Q At that time were there any trolley cars around? A No. There was one coming down but I crossed the street before the trolley car stopped. Q When you saw Miss Lacombe, was there anyone with her? A Yes; Miss Harris. Q Did
20 you see the trolley car stop? A Yes. Q Where did it stop? A It stopped right in front of the Westinghouse. Q Right in front of the Westinghouse? A Yes. Q Near the gate? A Yes. Q Which way was that trolley car going, toward Nutley or Newark? A Toward Nutley. Q That was close up to the curb? A Yes. Q In other words, the trolley tracks at that time were
30 on each side of the street? A They were. Q They were not in the middle as they are now? A No. Q When the car stopped, what did you see Miss Harris or Miss Lacombe do? A Well, I didn't look at them at the time. I was waiting across the street for a girl friend of mine to get off that trolley car. As I was looking at the trolley car I saw the big truck coming down the road. Q You saw a big truck coming down
40 the road? A Yes, sir. Q Which way was

Testimony of Mrs. Anna Seria, direct.

the truck going? A Towards Nutley. Q
 The same direction as the trolley was? A
 Yes. Q How close to the side of the trolley
 car was it? A I couldn't tell you. Q What
 else did you see? A There were two
 fellows on this truck. The fellow with the
 white coat was driving the truck. As they
 were passing down they were flirting with
 the girls where I was standing. 10

Mr. Rea: I ask that that be stricken
 out as calling for a conclusion, the
 statement that they were flirting?

The Court: I will not strike it out.

Defendant's counsel prays an ex-
 ception to this ruling of the court.

Exception noted as ground of appeal. 20

Q What did you see that fellow, the man
 with the white coat do? A They were both
 smiling and flirting with the girls, on the
 side where I was standing. Q They were
 calling to them from the truck? A No, only
 they were flirting with them, trying to get
 their attention. Q What were they doing
 in trying to get their attention? A Smiling,
 and they were looking towards the girls. Q
 Turning their heads? A They had their
 heads turned. Q Which way did they have
 their heads turned? Toward the side of the
 street you were on? A Yes. Q They were
 not looking straight ahead of them? A
 They weren't at the time I seen them. Q
 Neither one? A No. Q Were they doing
 anything else but smiling and turning their
 heads? A Not that I know of. Q Were
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Testimony of Mrs. Anna Seria, cross.

they waving? A No, not that I saw. Q They were smiling and trying to attract the attention of the girls? A Yes. Q How many girls were there? A I really could not tell you. Q Where was the truck with respect to the trolley car when they were doing that? A The truck passed the trolley car? Not very much, though. Q Passed what part of the trolley car? A The whole trolley car where the trolley car was standing, the truck had already passed the trolley car. Not very much, though. Q Did you see Miss Lacombe hit? A I saw Miss Lacombe. I heard a yell. The next thing I turned around and looked to see where that yell came from. I saw the rear end wheel going over Miss Lacombe's leg. Q How long before that had you seen these men smiling and turning their heads? A Not two or three minutes, I think. Q Was there more than one trolley car that stopped there? A Just the one that I seen. Q How far in front of that one trolley car was it that you saw Miss Lacombe hit? A Not very far. Q About how far? A Just about past the gate house. Q Just about past the gate house? A Yes. Q How far from the place where you saw her hit, how far back was it that you saw these men flirting? A Before they passed me they were flirting with the girls. Q Where were you with respect to the trolley car? Were you opposite the trolley car standing toward it? A I was not standing across from the trolley car. I was standing right near the tree. Q In front of the trolley car? A No; across from the West-

Testimony of Mrs. Anna Seria, cross.

inghouse plant. Q If I understand you right, these men were smiling and turning their heads that way just before they hit Miss Lacombe? A Yes. Q Did you see Miss Lacombe and Miss Harris pass in front of the trolley car? A No. Not that I seen. Q What did you do when you saw this? A 10
I heard Miss Harris. I heard a yell, so I looked to see where that yell was coming from, and I saw that Miss Harris yelled for help, but no one came for help. I went across the street and held one of Miss Lacombe's arms. Q Do you know anything about the speed of the truck? A No.

Cross examination by Mr. Rea.

Q This trolley car was going towards Nutley, wasn't it? A Yes. Q Did it come 20
to a full stop—the trolley car? A The trolley car had stopped right in front of the Westinghouse. Q In front of what part of the Westinghouse? A Well, right near the gate. Q Had it come to a dead stop? A Yes, it had already stopped; at the time I saw the trolley car it was stopped there. Q Did anybody get off there? A 30
There was some girls got off at the time I seen it but I really didn't take notice of who they were except that I was waiting for a girl friend to get off. Q She didn't get off? A I couldn't see her, but I was waiting across the street for her to get off that trolley car. Q How many girls got off that trolley car? A I couldn't tell. Q Was it a great number, or two? A I really didn't take notice. Q You don't know whether it was two or a dozen? A 40

Testimony of Mrs. Anna Seria, cross.

I don't. Q Are you sure anybody got off?

A There were girls got off but I could not tell you how many there were. Q When the trolley car, as you say, came to a stop, where was the truck? A The truck was coming down the road and the trolley car was still there. Q And which did you see first? The trolley car or the truck? A I saw the trolley car had stopped and I then saw the truck coming down on the road. Q Where did the trolley car stop? About, say within one or two feet of the right hand curb, wasn't it, going towards Nutley? The tracks were very close to the curb, weren't they? A Not just exactly. Q How near to the sidewalk are the trolley tracks? A Was the trolley car; is that what you mean? Q The tracks were very close to the curb, weren't they? A Yes, sir. Q Within two or three feet of them, weren't they? A I couldn't tell you. Q There wasn't any room for traffic to pass to the right of the trolley car, was there, at any time? A No. Q Did you notice whether this trolley car had started up again before this accident? A No. I didn't take notice. Q You didn't take notice? A No. I did not take notice. Q But it might have started? A It might have started and it might not? Q I couldn't tell you. It was still there at the time of the accident. Q You don't know whether it had started again or whether it was stopped? A No. I could not tell. Q You had crossed the street already, hadn't you? A Yes, sir. Q And you were waiting for a girl friend? A Yes. Q To get off that trolley? A Yes, to get off the

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Testimony of Mrs. Anna Seria, cross.

trolley? But I didn't see her. Q And you were waiting about half a block from the corner of Carmer avenue? A How far? Q Yes. A About half a block. Q That is where you were? A Yes. Q When did you first see Miss Lacombe? A I saw Miss Lacombe before crossing the street. Q 10
That was before the trolley car arrived? A Yes. Q But you didn't notice her any more? A No. Q Then you didn't notice her until the accident happened? A Yes, sir. Q So what she did in the meantime, you don't know? A I don't know. Q You say you saw the rear wheel of the truck run over her? A Yes. Q Which rear wheel was that? The right or the left? A 20
The right. Q The right? A Yes, sir. Q And she was lying flat on the ground then? A Well, Miss Harris was holding her by the arm at the time I went across the street to help Miss Harris hold the other arm. Q At that time how far was the truck? The rear of the truck from the trolley car; do you know? A I couldn't tell you. Q Can you approximate it? Can you tell us about how far it was? A Well, it was 30
just about in front of the gate house, the truck was. Q Was the trolley car in back of it still? A Not exactly in the back. Right near the curb of the westinghouse where the automobiles come in; that is where the trolley car had stopped. Q I am talking now about when the accident happened. Where was the trolley car? A The trolley car was stopped and it was right near the curb of the Westinghouse, right at the curb 40
of the Westinghouse. That is where the

Testimony of Mrs. Anna Seria, cross.

trolley car had stopped. Q You don't know whether the trolley car had started or not? A No. Q Where was the trolley car at the time you saw Miss Lacombe under the wheels? A It was the same place where I saw it first. Q About how far away from the truck would you say that was? A I couldn't tell. I really couldn't. Q Fifty feet? A I couldn't judge. Q Is it as far from this side of the room to the end of the house here? A I couldn't judge, really. Let us see. Maybe from this corner to that corner. I really couldn't tell. It was about maybe from this wall to that wall, or something like that. Q Would you say it was about from one wall of this room to another? A Yes. Q Which would be a space of about eight feet? A Something like that. I really couldn't judge the right distance.

Mr. Stickel: I will agree upon about twelve feet.

Q As a matter fact, did you notice the trolley car at the time you saw Miss Lacombe under the wheels of the truck? A Yes. I took notice that the trolley car was still there. Q So that at that time you saw both the trolley car and the truck? A Yes. The rear end wheel go over Miss Lacombe's leg. Q You hadn't noticed her before that time, I mean? A No; not crossing the street. Q When was the first you saw her? A When she got out into the street? The last time I saw her she was standing just about coming out of the gate house. Q She wasn't in the street at all? A No, sir. Q The next time you saw her in the street was when she was lying

Testimony of Mrs. Anna Seria, cross.

under the rear end wheel; is that right? A Yes, sir. Q Where were these men? Sitting on the truck or standing or where were they? Where were they stationed? A I really don't know what you mean. Q Were both of them sitting in the driver's seat together? A Yes, together. Q You say 10 they were turning their heads? When did they start to turn their heads to the left? A Before they reached the place where the girls were. As they were coming down the road, the fellow with the white coat was driving and there was another fellow with him and as they were coming towards the girls, they were smiling at them. They were just about past—before they passed us, they turned their heads to get the girl's attention yet. Q Had they turned their heads 20 before they reached the spot opposite to where you were? A They didn't have their heads turned, then? I guess it was way up before they reached the girls. Q Were there any girls standing nearer to Carmer avenue than you were? A Yes, there were some girls there. Q Did they start turning their heads when they passed those girls, or did they wait until they 30 reached you? A They had turned before they reached me. They were flirting with the girls that were there further away than I was. Q They weren't flirting with you, were they? A They were flirting with me, too, yes. Q Were there a lot of people on this trolley car or was it pretty nearly empty? A I really did not take notice as to how many persons there were. Q You could not see whether Miss Lacombe was 40

Testimony of Mrs. Anna Seria, cross.

walking or running before she was hit, could you? A No, I could not. Q Was there an automobile parked on the other side of the street or coming up on the other side of Washington avenue? A I couldn't tell you. Q You don't know whether it was or not? A No. Q Were there any other girls crossing the street when Miss Lacombe crossed? A Not that I know of. Q Did you see anybody else? A I really didn't take notice. Q What drew your attention to it? Was there a scream or something? A Yes. Q Who screamed? A Miss Harris. Q That is what caused your attention to the— A Well, I heard first a scream but I really did not notice to see who it was. Then I turned around and saw that Miss Harris called "Help" and that the rear end of the wheel went over Miss Lacombe's leg. Q You didn't pay any particular attention to the truck in that time? A I saw the truck coming down and they were flirting with them. Q You weren't flirting with the fellows? A No; they were looking at us; they were flirting with us. Q They couldn't interest you particularly? A Why, sure; we were looking at them because they were looking at us. Q You weren't flirting? A No; they were trying to get our attention. Q Did you keep on looking at the— A These two fellows until— Q Until the accident happened? A Yes. Q So that if there had been any other people crossing in front of the car, you would have seen them? A No. I wasn't looking at the trolley car. I was looking at the truck,

Testimony of Mrs. Anna Seria, cross.

and the two drivers because they were flirting with us. We were looking at the fellows. Q The motorman wasn't doing any flirting? A I didn't take notice. Q What kind of truck was this? A closed or an open one? A It was open. It had sticks in back of it. Q A sort of rack body? A Yes. Q Loaded or empty? A It was loaded. It had stuff on the truck. I couldn't really tell you whether it was just loaded from the front of the truck to the back of it, but it had stuff on it. Q You could see the driver and the other man all the time? A All the time until the accident happened. Q After the accident happened, did you notice the trolley car after that? A Yes, the trolley car was still in its place. Q How long had you been standing across the street before the trolley car came up? A Well, there wasn't hardly two or three minutes. The trolley car reached—as I crossed the street the trolley car stopped. Q You didn't notice the trolley car any further than that? You were then watching the truck? A Yes, looking at the truck. Q Where was the truck when you first saw it? How far away? A Well, it wasn't very far up from Carmer avenue. Q You saw it before it had reached Carmer avenue? A Yes. Q How far from Carmer avenue was the truck? A About half a block up from Carmer avenue. Q That is when you first saw it? A Yes. Q What time of the day was this? A It was just around our quitting time, a quarter of six, or something like that. Q A quarter of six? A Well, we usually quit about a

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Testimony of Mrs. Anna Seria, cross.

quarter to six. It might have been ten to six at the time we got through coming out of the Westinghouse. Q Well, then, there weren't any other girls or people crossing the street that you noticed? A No. Q Besides Miss Lacombe, you say you saw Miss Harris? A Yes. Q Those were the only two? A Well, I didn't see them cross the street. Q There was nobody else in the street besides those two? A No; I didn't take notice of anybody else. Q When you say these men turned their heads, how far toward the left did they turn them? A They had their heads turned right around. Q Completely around? A Yes. Q Were their bodies turned, too? A I didn't take notice. The driver had the wheel in his hand. He had his head turned away on the other side and he was smiling to us, and as he had his head turned, I heard a yell. Q What were you folks doing all the time? A We were looking at them. Q You wouldn't give them any encouragement at all? A The other girls might have been looking at them at the same time that I was looking at them. Q Did they slow down while this was going on? A I didn't notice that. Q Did they turn around in their seats, or did they just turn their heads? A The driver—the other fellow had his head turned just as much as the driver. Q You didn't take notice of the other fellow? A I did take notice of the driver but I don't know whether the other fellow had his body turned; I know he had his head turned because he was flirting with the girls. Q How about the driver? A

Testimony of Mrs. Anna Seria, cross.

The driver had his hand on the wheel and he had his head turned around while he was flirting with the girls. Q He had both hands on the wheel? A He had his hands on the wheel holding it. Q He wasn't waving with any of his hands? A No. Q He kept both hands on the wheel? A Yes. I saw him give a turn. He turned his wheel. I don't know just exactly how much he turned it. He turned the wheel and I heard a yell. Q Which way did he turn it? A Turned it toward the side which I was standing on. Q Toward the side you were standing on? A Really—let's see—I don't know just exactly— Q You were standing on the left-hand side, he turned his wheel left, then? A Something like that. The time he turned his wheel, I already—he turned his wheel and I right away heard the yell. Q That was just before you saw Miss Lacombe run over by the rear wheel? A Yes. Q When was it, this yell? Just at the time she was hit by the rear wheel? A No. I heard the yell and then turned around and saw the rear end wheel go over her leg. Q Who was it that yelled? She or her companion, Miss Harris? A Well, I heard a voice. I guess it must have been Miss Lacombe. Q Don't guess. A It must have been Miss Lacombe because Miss Harris—as I saw the rear end wheel of the truck go over her leg, then I heard Miss Harris yell for help. Q And this call of Miss Lacombe was just before the rear wheel ran over her; almost at the same instant, is that right? A I heard the yell. Q Miss Lacombe, I

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Testimony of Mrs. Anna Seria, cross.

am talking about; you heard her yell? A Yes. Q And at the same instant the wheel ran over her? Is that right? A Well, no. Just as I heard the yell, then I turned around to see where the yell came from, and then saw the rear end wheel go over Miss Lacombe's leg. Q It was just in an instant, wasn't it? In a couple of seconds? A Just a couple of minutes. Q You mean seconds, don't you? Two minutes would be a long time. A About a couple of seconds, when I saw the rear wheel going over Miss Lacombe's leg? Q Did these men say anything to the girls standing there? A No. Q They didn't make any remarks to them? A Well, they were smiling at them. Q They didn't say anything? A Not that I heard them. I didn't hear them say anything to them. But they were laughing at them and turning around and well exactly—well, I really can't say they were talking to them—but they were smiling and they had their heads turned to them, trying to attract their attention. Q They didn't say anything. Did you hear them say anything? A Not that I remember. I was so excited. Q You weren't excited before this accident happened? A At the same time I saw the man turn the wheel, then I heard the yell. Q Up to that, you weren't excited, at all? A No. Q There was nothing to make you nervous? You didn't know the accident was going to happen? A No. Q You didn't hear them say anything to any of these girls at all, did you? A Not just exactly. I would not say I heard them

Testimony of Mrs. Anna Seria, re-direct.

say anything to them. Q I mean it didn't make you nervous to see them turn their heads, did it? A No. Q At the time that this Miss Lacombe was under the wheel, the rear of the truck, you say, was about twelve feet in front of the trolley car. Is that right? A Something like that. I really couldn't tell you that. Q About that. Not exactly. A Yes, something like that. Q At that time you could not tell whether or not the trolley car was going or stopped? A You mean as the accident happened? Q Yes. A After the accident I still saw the trolley car. Q You don't know whether it was stopped after the accident or not? A The trolley car was still there; it was still in its place.

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Re-direct examination by Judge Stickel.

Q Did the trolley car stop this side of the gate, or on the other side of the gate, below the gate or— A Before passing the gate. Q And that gate house is on the other side of the gate, is that right? A Yes. Q The side nearest Nutley? A Yes, sir. Q So that the trolley car was at least the distance of the gate away, is that right? A Yes, sir. Q It was quitting time, wasn't it? A Yes, it was. Q A great many people coming out of the plant? A Not at the time I came out. They were just starting. Q Had there been any other people crossing before you? A Nobody else. Q These girls—weren't the girls from the plant? A I suppose the plant because there was no one in the street as I crossed the street. I didn't take notice who they were.

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Marie Lacombe, recalled, direct.

Re-cross examination by Mr. Rea.

Q Where did this accident happen with
reference to the little gate house, I guess
you call it. Do you know what I mean.
That little brick house near the entrance?
Did it happen opposite the gate house or
10 where with reference to the gate house? A
Well, I guess the back of the truck— Q
The back of the truck was just— A It
was just about at the end of the gate house.
Q Which end? The Nutley end or Newark
end? A The end of the truck was just about
at the end of the gate house. Q Which
end of the gate house? The one nearest
Newark or Nutley? A Nearest Nutley.
Not just exactly, but about the middle of
20 the gate house. Q The rear end of the
truck was at about the middle of the gate
house when you saw Miss Lacombe being
run over by the rear wheel? A Yes; that
is it. Q And the trolley car had stopped
on the other side of the path or roadway
leading into the plant, hadn't it? A Be-
fore passing the gate, that is where the
trolley car had stopped.

30 *By Judge Stickel.*

Q That is where you saw it also after the
accident? A Yes, it was still in its place."

MARIE LACOMBE, plaintiff, recalled.

Direct examination by Mr. Stickel.

40 Q Was there any warning or did you hear
any warning given of the approach of this truck?
A I did not.

Motion for a non-suit.

Mr. Stickel: Judge Carey and myself have endeavored to locate James J. Dawkins, but without success.

Judge Carey: Yes, he has left his last place of abode; we have not been able to get him here. His own attorney with offices in Newark advises us that Dawkins would not appear and he would not appear either. It is only fair to state that. 10

PLAINTIFF RESTS.

THE JURY RETIRES.

Mr. Carey: On behalf of the Cudahy Packing Company, one of the defendants in this case I now move for a non-suit on the ground there is no proof of any negligence in this case against the Cudahy Packing Company or that is chargeable to the Cudahy Packing Company. The gravamen of the complaint is negligence, and in the first place as against any defendant, I think it is especially that the plaintiff is guilty of contributory negligence, and I move for a non-suit on that ground as well. I wish to discuss the other proposition primarily, which is this: The Cudahy Packing Company in no event had any control over that car at the time of the accident and the test of liability is that. The allegation of the complaint is that this car was owned by James J. Dawkins; that is set forth and alleged in the complaint. The only testimony of witnesses as to the ownership of the car was the testimony of the first witnesses called by the plaintiff to the effect that the car was Dawkins' car. 20 30

(Argument.)

(The jury returns into court.) 40

Motion for a non-suit.

The Court: I have had a motion made in your absence; the motion being a legal motion and one which probably would not have interested you. I have recalled you because I am going to decide that motion.

10 A motion has been made by the Cudahy Packing Company to non-suit the plaintiff as to it. Marie Lacombe has brought an action against two defendants, James J. Dawkins and the Cudahy Packing Company. It appears that the former company, James J. Dawkins, operated a trucking business in New York City on July 30th, 1924. It appears that it owned trucks; that it hired chauffeurs and that it rented its chauffeurs and trucks out to various people for hire or reward.

20 The Cudahy Packing Company, the other defendant, on the day in question hired a truck and chauffeur from Dawkins to make certain deliveries of meat, as I understood it, in New Jersey. During the day, the testimony indicates, Gibney, who was employed by the Cudahy Packing Company and was on the truck with McEwan, who was a chauffeur employed by Dawkins, gave directions to McEwan as to where to go. There is testimony, I think, that also
30 McEwan indicated on direct examination that he did not load or unload the truck, but nevertheless responding to a question on cross examination that he unloaded it, as he expressed it, "For to help us get through." It appears from the testimony, that McEwan, the driver, had been in the employ of Dawkins about two years—by employ, I mean he had been hired by Dawkins and that he was paid by Dawkins by the week, entirely independent of what sum was paid for the hire of trucks which he drove.

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Motion for a non-suit.

The Cudahy Packing Company claim that they should not be held responsible because so far as they are concerned, Dawkins, the owner of a general trucking business, hiring chauffeurs and owning trucks and letting them out for reward, was an independent contractor; that the actual management and control and operation of the truck was in the hands of Dawkins' man. That they, the Cudahy Packing Company, had nothing to do with the hiring of that particular man or discharging of him, but when they applied to the Dawkins Trucking Company for a truck and chauffeur they got the truck and got the chauffeur, McEwan, and Dawkins is liable, and they are not liable.

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Let us imagine two pictures. It will probably be easy for you to see the relationship that exists between an employer and his chauffeur under these assumed state of facts. Imagine a man who owns an automobile which he uses for pleasure and for the pleasure of his family; imagine that he hires a chauffeur to drive, not only himself, but his family, whenever it is a matter of their respective wills. He pays the chauffeur so much a week and for it the chauffeur is supposed to keep the car clean and drive it whenever he is requested to do so; where he is requested to do so, how he is requested to do so and of course, is subject to discharge by the man who hires him and the man who hires him has the power, as he looks over the whole field to select the man and select that particular chauffeur. Now, if there is an accident and that chauffeur is at the wheel and he is acting within the scope of his authority, subject to the orders of his master, his master is liable. Why? Under a doctrine we call in law *respondeat superior*, the chauffeur is the alter-ego, the servant of

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Motion for a non-suit.

the master, that is the servant acting directly within his master's work, subject to his master's employ and the master is responsible if the servant is careless under the conditions I have indicated. Forgetting that case for a moment let us turn to another case. Both of these, I think, are homely enough not to be at all baffling. Suppose the same man concludes that he would rather not operate an automobile because of accidents and instead of doing that he would rather call upon a taxi company whenever he needed transportation for himself and his family and suppose that on a certain day when the weather is inclement he calls the A. B. C. Taxi Company and requests them to send a taxicab to take him to a distant point. They respond and the taxi comes driven by a driver of the A. B. C. Taxi Company, and he gets in, and starts for that point and on the way there is a smash-up. Is he liable? Well, on the state of facts, as I have indicated them to you, he is not liable; the taxi company operates its own organization, selects its own chauffeurs, purchases its own cars and the company is in the business of renting out cars and chauffeurs to people who want them; in other words, that taxicab company is an independent contractor. Now, do you see the difference between the two propositions, the one where the man is liable and the other where he is not? It is always more important in cases of this kind that one of the most decisive things, in the determination of the liability of a man who is alleged to be held liable for the acts of his servants, is the power of selection, that is, he the man who was supposed to be liable for the accident, selected that man as his servant, I mean by that under the first case I cited about the man with the automobile to be used for the

Motion for a non-suit.

pleasure of his family had the power to go out and make inquiries and find out whether the chauffeur he selected was a careful man and a wise driver. The man who telephones to the taxi company takes what he gets when he gets into that taxicab, he hasn't any share in the selection of that driver, he doesn't know whether that driver has driven for two weeks or two years. Who has selected him? The taxi company. Why? Because they are in that business; they hire men. That may seem apart from this case, but I am coming back to this case now. 10

The testimony in this case indicates, even giving the plaintiff the benefit of the most favorable inferences that can be drawn from the testimony of the witnesses thus far placed upon the witness-stand, that Dawkins was an independent contractor. I have outlined the case briefly, so far as it related to the Cudahy Packing Company and Dawkins when the Cudahy Packing Company hired this truck. 20

It is true that the chauffeur McEwan was apprised of the particular purpose for which he was hired, after he was hired by the Cudahy Packing Company and the object of the employment, but the exclusive control and management of the automobile was left to him. That McEwan was a servant of Dawkins, of course, is apparent from the fact that Dawkins was in that sort of a business; that Dawkins hired McEwan; that Dawkins paid McEwan and that Dawkins selected McEwan from among the fields of chauffeurs that may have been presented to him; that the Cudahy Packing Company had nothing to do with that. That the Cudahy Packing Company very much like the man who called up the taxicab company went to this company and said, 30 40

Motion for a non-suit.

“We want a truck and a driver,” and the truck and driver was furnished.

10 In this state this question has been decided and I think the principle has been laid down in a case that applies directly to the case in question. The case has been cited by counsel and is the case of Courtenar *vs.* Gray Burial and Cremation Company and without discussing the details of that case, which are not particularly helpful, so far as this motion is concerned, I will say that for the reasons I have given, because of the principles of law laid down in that case and also in the case of Bush *vs.* The Bi-Products Coke Company, I will grant the motion made by the Cudahy Packing Company, but that still leaves James J. Dawkins as a defendant in this case.

20 We will take up the plaintiff's claim against him at ten o'clock tomorrow morning and the plaintiff may have an exception to my ruling.

Adjourned to Friday, November 19, 1926, at ten o'clock, A. M.

SECOND DAY.

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Friday, November 19, 1926.

Continued pursuant to adjournment.

Present, counsel as before stated.

Mr. Stickel: In the light of the ruling made by your Honor yesterday, I desire to take a voluntary non-suit as to the remaining defendant, James J. Dawkins.

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The Court: That motion will be granted.

Exceptions to direction of non-suit.

Mr. Stickel: I desire to except to your Honor's directing a non-suit in favor of the Cudahy Packing Company against my client, Marie Lacombe, on the following grounds:

1. There was evidence sufficient in the case to indicate that the driver of the truck at the time of the accident was the agent and servant of the Cudahy Packing Company and on its business. 10

2. There was evidence sufficient in the case to indicate that Robert McEwan, the general agent of James J. Dawkins, the other defendant in this proceeding, had become the special agent for the special purpose of the Cudahy Packing Company in delivering this meat upon the route in question.

3. There was evidence in the case indicating that the driver of the truck at the time of the accident was one Gibney, the admitted agent of the Cudahy Packing Company in that McEwan, the general agent of James J. Dawkins testified that he did not wear a white coat at the time of the accident while Mrs. Seria, one of the witnesses for the plaintiff stated that the driver of the truck at the time of the accident wore a white coat and that there were but two men on the truck, which fact, as to two men being on the truck, was also testified to by McEwan, who said the other man was Gibney and therefore if McEwan did not wear a white coat and the man who was driving did wear a white coat it must have been Gibney who was driving at the time of the accident, and Gibney being the agent of the Cudahy Packing Company, at least a *prima facie* case was made out against the Cudahy Packing Company. 20
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Exceptions to direction of non-suit.

4. The testimony required the case to be submitted to the jury to determine which of the two defendants was the master or superior of the agent at the time of the accident, if both were not the masters.

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Notice of Appeal.

NOTICE OF APPEAL.

Filed December 30, 1926.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

MARIE LACOMBE,

Plaintiff,

vs.

JAMES J. DAWKINS and CUDAHY
PACKING COMPANY, a corpo-
ration,

Defendant.

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*Action at
Law.*

*Notice of
Appeal.*

TAKE NOTICE that the plaintiff, Marie Lacombe, hereby appeals to the Court of Errors and Appeals from so much of the judgment entered in this cause as adjudges and directs that judgment of non-suit be entered in favor of the defendant Cudahy Packing Company and against the plaintiff, with costs to be taxed *nisi*.

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Dated, December 14, 1926.

STICKEL & STICKEL,
Attorneys for Plaintiff.

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To Robert Carey, attorney of defendant, Cudahy Packing Company.

Sat below Mountain, *C. C. J.*

Service of the within notice of appeal is hereby acknowledged this 27th day of December, 1926.

ROBERT CAREY.
Attorney Defendant-Respondent.

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Grounds of Appeal.

GROUNDS OF APPEAL.

Filed December 30, 1926.

New Jersey Court of Errors and Appeals

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| 10 | MARIE LACOMBE, <i>Plaintiff-Appellant,</i> <i>vs.</i> JAMES J. DAWKINS and CUDAHY PACKING COMPANY, a corpo- ration, <i>Defendant-Respondent.</i> | } | <i>Action at Law.</i> <i>On Appeal from Supreme Court.</i> <i>Grounds of Appeal.</i> |
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20 The appellant states the following grounds of appeal:

1. The Trial Judge erroneously granted a non-suit as to the defendant Cudahy Packing Company.

2. The Trial Court erroneously held that the defendant Cudahy Packing Company was not responsible for the negligence of the driver of the automobile truck causing the injury to the plaintiff.

30 3. The Trial Court erroneously held that the person who was driving the truck at the time that it struck and injured the plaintiff was the servant and agent of James J. Dawkins and not the servant and agent of the Cudahy Packing Company.

Dated December 14, 1926.

STICKEL & STICKEL,
Attorneys of Plaintiff-Appellant.

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Grounds of Appeal.

Service of the within grounds of appeal is hereby acknowledged this 27th day of December, 1926.

ROBERT CAREY.
Attorney of Defendant-Respondent.

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of the winter months of 1891-2
is not included in the day of the year

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New Jersey Court of Errors and Appeals

MARIE LACOMBE,
Plaintiff-Appellant,

vs.

CUDAHY PACKING COMPANY, a
corporation,
Defendant-Appellee.

*Action
at Law.*

*On Appeal
from
Supreme
Court,
Essex
Circuit.*

MOUNTAIN,
C. C. J.

BRIEF FOR PLAINTIFF-APPELLANT.

Facts.

Plaintiff, Marie Lacombe, thirty-one years of age, was on July 30th, 1924, struck by an automobile truck, as the result of which she lost her right leg. This suit represents her effort to recover damages for such loss.

James J. Dawkins was in the trucking business in New York City. He did business in two ways. He would hire out a truck and driver, or he would cart material in his trucks. In his employ as a truck driver was one Robert McEwan, while his manager was one William Miller. P. 102, ll. 12-24; p. 104, ll. 18-36; p. 121, ll. 6-20.

Cudahy Packing Company was in the wholesale meat business in New York City, selling and delivering meat to retailers. These deliveries to retailers were made by automobile trucks of the said Cudahy Packing Company, and one Gibney was in the employ of said company as a driver of one of said trucks, the route of said Gibney being in New Jersey, and he having a

helper to assist him in his work. P. 102, ll. 35-40; p. 103, ll. 5-9; p. 112, ll. 16-20; p. 113, ll. 13-35; p. 114, ll. 13-20; p. 122, ll. 32-40; p. 123, ll. 8-22.

Shortly, if not immediately before July 30, 1924, the truck operated by said Gibney and his helper in the supplying of the customers on their route broke down, or got out of repair in some way, and on July 29 or 30, 1924, one Reitmeyer, who was a superior in the shipping department of the Cudahy Packing Company, called up Miller, the manager of James J. Dawkins, and telling him that their truck had broken down, asked Miller to send up a truck and driver to take the place of the broken-down truck. P. 103, l. 9; p. 104, ll. 5-9. On the morning of July 30, 1924, Miller directed McEwan, a driver of Dawkins, to report to the Cudahy Packing Company with a truck, which McEwan did, and there he was told by Reitmeyer he "was to do as they would tell him" and that Gibney would show him where to go. P. 104, ll. 10-14; p. 106, ll. 30-40; p. 111, ll. 11-40; p. 112, ll. 5-21.

McEwan backed in the truck, and Gibney with some assistance from McEwan, loaded the truck. While loading the truck Gibney told McEwan that they were already two hours later in getting started than was usually the case on this route. P. 112, ll. 30-40; p. 113, ll. 5-22.

With McEwan driving, and Gibney on the seat with him, the truck started for New Jersey, Gibney directing McEwan to drive to the Thirty-fourth street ferry, where Gibney paid the ferryage tolls across the river. P. 114, ll. 7-12.

When they got to New Jersey, McEwan, not knowing his way around New Jersey, and not knowing the customers of the Cudahy Packing

Company, was directed from time to time by Gibney, and when they got to places of delivery Gibney unloaded, with some assistance from McEwan. This course was followed all that day, and late in the afternoon, pursuant to the directions of Gibney, which included the taking of the street or avenue upon which the accident occurred, the truck started for either Passaic, Lodi or Garfield. And here for the time being we will leave the truck. P. 114, ll. 12-40; p. 115, ll. 5-8.

The plaintiff, Marie Lacombe, was employed in the Westinghouse Electric Company, whose plant was located on the easterly side of Washington avenue, in Belleville, New Jersey. It extends quite a distance along Washington avenue, surrounded by an iron fence and set back somewhat from the street. There is a gate-house and gateway which opens into Washington avenue, and is located at the northerly end of the plant, connected with the plant proper by a concrete runway. Washington avenue runs north and south, and at the time of the accident the trolley tracks were located on the easterly and westerly sides of the street with the paved roadway between the tracks used by non-rail vehicles. Since the accident the trolley tracks have been changed and located in the center of the roadway. Across Washington avenue from the gate-house and slightly below the gate-house begins a public street known as Carmer street which runs west and slightly north of Carmer street is a trolley stop pole. P. 70, ll. 20-40; all of p. 71, p. 12, ll. 10-28; p. 125, ll. 20-32; p. 126, ll. 27-31; p. 19, ll. 5-7; p. 13, ll. 13-40.

Miss Lacombe and a friend, Miss Harris, came out of the Westinghouse gateway together, and at that time there was standing on the easterly

side of Washington avenue, that is on the side nearest the plant, a trolley car just south of the gateway, taking on passengers, and at least two of them had gotten on the trolley car and taken seats before the accident. P. 72, ll. 7-36; p. 60, ll. 22-40; p. 58, ll. 20-40; p. 59, ll. 5-30; p. 13, ll. 5-10.

Miss Lacombe and Miss Harris passed in front of the standing trolley car and, looking both ways and seeing nothing approaching, stepped from the rails upon which the standing trolley car stood on to the paved center roadway, when almost immediately the truck of Dawkins with the material of the Cudahy Packing Company in it bore down upon the two young ladies at a high rate of speed. They sought to avoid the truck and Miss Harris succeeded, but Miss Lacombe failed. One witness says that she tripped and fell, but Miss Lacombe denies this and says that she was thrown to the ground when the truck struck her left foot, and in being thrown her right foot was projected in front of the truck and crushed by it. Later that same day it was amputated above the knee. P. 73, ll. 15-40; p. 75, ll. 5-10; p. 92, ll. 8-20; p. 98, ll. 33-38; p. 90, ll. 35-40; p. 91, ll. 5-9; p. 15, ll. 14-18; p. 52, ll. 39 and 40.

Returning to the truck, we find that it was approaching at a high rate of speed close to the side of the trolley car, without notice or warning of its approach, and that both the driver and the other man on the truck were flirting with girls on the street, and that immediately before the accident the driver, with his hands on the wheel, had his head turned away from the wheel, smiling at the girls on the street. P. 13, ll. 13-20; p. 14, ll. 28 and 29; p. 15, ll. 9-12; p. 73, ll. 25-37; p. 37, ll. 17-22; p. 127, ll. 7-40;

p. 128, ll. 5-40; p. 129, ll. 5-17; p. 136, ll. 15-40; p. 137, ll. 5-30; p. 138, ll. 32-34; p. 140, ll. 38-40.

The driver of the truck at the time of the accident had on a white coat; there were but two men on the truck, McEwan and Gibney; McEwan did not have on a white coat, although he says he was driving. P. 127, ll. 5-12, 21-23; p. 133, ll. 6-12, 12-20; p. 135, ll. 5-17; p. 115, ll. 9-15; p. 117, ll. 37-40; p. 118, ll. 5-10.

James J. Dawkins did not appear at the trial either in person or by counsel; he had sold his business, and it was admitted at the trial that neither plaintiff nor the Cudahy Packing Company had been able to locate the said Dawkins, nor had his counsel. P. 11, ll. 23 and 24; p. 102, ll. 17-19; p. 141, ll. 5-12.

Plaintiff sued James J. Dawkins, the owner of the truck, and the Cudahy Packing Company, the hirer of the truck. The trial court at the end of plaintiff's case non-suited plaintiff as to the Cudahy Packing Company, on the theory that the driver of the truck was the agent or servant of James J. Dawkins, the owner of the truck, and not of the Cudahy Packing Company, the hirer of the truck, and thereupon the plaintiff took a voluntary non-suit as to James J. Dawkins. P. 1, pp. 141-148.

The issue of agency is the prime and paramount issue and the facts bearing upon that issue are all found in the testimony of William A. Miller, Robert McEwan and in so much of the testimony of Anna Seria as indicates that the driver of the truck at the time of the accident wore a white coat. See pp. 102-107, pp. 110-124; p. 127, ll. 5-30; p. 133, ll. 5-20.

GROUND'S OF APPEAL.

The following are the grounds of appeal:

1. The trial judge erroneously granted a non-suit as to the defendant Cudahy Packing Company.

2. The trial court erroneously held that the defendant Cudahy Packing Company was not responsible for the negligence of the driver of the automobile truck causing the injury to the plaintiff.

3. The trial court erroneously held that the person who was driving the truck at the time that it struck and injured the plaintiff was the servant and agent of James J. Dawkins and not the servant and agent of the Cudahy Packing Company. Page 150.

The foregoing grounds of appeal will all be argued together under the following sub-head:

The trial court erred in non-suiting the plaintiff as to the Cudahy Packing Company.

On the facts as they stood at the end of the plaintiff's case, the jury might have found or inferred, had it been permitted so to do, that McEwan in the operation of the truck was under the control and supervision of Gibney, the Cudahy representative; that the objective acts of control, such as the payment of the ferriage tolls, the layout of the route, the giving of the directions to be taken, the supervision of the loading and unloading were merely indicative of a deeper and more far-reaching right of control which had not been completely tapped or exercised up to the time of the accident but which nevertheless existed, that the truck and driver had been surrendered unreservedly to the con-

trol and supervision of the Cudahy Packing Company by Dawkins and that Gibney in the exercise of that right of control had actually at the time of the accident supplanted McEwan even in the driving, and it being possible for the jury to find or infer as aforesaid, it was error to deny them this opportunity.

The trial court apparently conceived that the cases of *Courtinard v. Gray Burial & Cremation Co.*, 98 N. J. L. 493, 99 N. J. L. 789 (two separate cases), and *Busch v. Seaboard By-Products Coke Co.*, 100 N. J. L. 304, absolutely controlled the instant case both as to fact and law. We concede that these cases are controlling from the standpoint of law, but submit that the law as set forth in said cases was erroneously applied to the facts in the instant case.

These cases re-state and re-apply the well known principle applicable to cases of this kind, namely: that the test to be applied is, who exercised control, who directed, who exercised power and authority, or supervision, over the driver? They do nothing more than to indicate that each case must stand on its own facts and be measured and tested by the said principles of control, direction, supervision, &c., re-stated in the said two cases.

Are the undisputed facts then in this case so similar to those in the mentioned cases as to require this court to apply the law as in the said cases? Clearly and patently not. In the *Courtinard* case, 98 N. J. L. 494, the court found as a fact that though the hirer or his representative sat upon the truck, he "gave no directions and exercised no control over the machine, except to state generally to the driver the cemetery objective of the funeral." In the present

case not only was the representative of the hirer on the truck, but he constantly gave directions where the driver should go and what routes he should take. P. 112, ll. 28-40; p. 113, ll. 5-7; p. 114, ll. 7-10, ll. 13-18, ll. 33-40. Moreover, at the places of delivery while he principally took care of the loading, the driver assisted or participated therein, p. 118, ll. 15-18; p. 123, ll. 11-22; p. 121, ll. 21-24, and the fair inference is that the driver was supervised in that participation by Gibney, the representative of the Cudahy Packing Company. Gibney, the representative of Cudahy, not only exercised control, but the kind of control he exercised and the circumstances surrounding the hiring of the truck and driver by Cudahy indicate quite clearly that he possessed a right of control which he had not found necessary up to the time of the accident to fully exercise. Had anything occurred which Gibney deemed necessary to be done by the driver to accomplish the task in hand, namely: the making of the Cudahy deliveries, is there any question but that Gibney would have felt free to give the necessary instructions and see that they were carried out? Here is no single instruction and a leaving of everything else to the driver, as in the Courtinard case, here is a constant, persistent supervision with a very strongly indicated reserved power in Gibney, the representative of Cudahy.

Again at p. 494, in the Courtinard case, the court found as a significant fact pointing to control by the owner, that "the ferriage fares over the Hudson were paid by the driver, and the entire control and *modus operandi* of the machine was under the direction and management of the Gray driver."

In the instant case the ferriage fares over the Hudson were paid by Gibney, the regular employee of the Cudahy Packing Company, P. 114, ll. 11 and 12, and the actual driving of the machine by the Dawkins man was subject to the direction and management of Cudahy's man in the interest of the accomplishment of the major task, the making of deliveries. That had to be so, for if McEwan, Dawkins' man, could refuse to take orders from Gibney, Cudahy's man, how could deliveries have been made? The driving of the machine was an incident to the task of supplying Cudahy's customers. It was not the prime purpose of the trip—it was a part, a necessary part of the complete transaction, an inseparable and unseverable part. McEwan, the driver of Dawkins, was a mere temporary cog in the Cudahy scheme of things. He for the day and for the purposes of that particular route had taken the place of the helper that usually assisted Gibney to make deliveries on that route when the regular truck of Cudahy was in service.

And again in the Courtinard case, the court found as a fact that "the defendants Caseys (the hirers) were undertakers in business at Plainfield, and hired one of the Gray automobiles, with a driver, to go from Plainfield to a cemetery in Brooklyn, where an interment was to be made under the Caseys' directions." P. 494.

Clearly, such are not the facts here. There the court found a specific hiring for a specific purpose, found as a fact that the owner contracted to cause one of his hearses to be driven to Brooklyn to a cemetery there. Here Dawkins didn't agree to do anything except let Cudahy have his truck and man. He didn't agree to deliver a body or anything else. He didn't agree

to truck anything. He practically said, "Here is my truck and my man; use them as you see fit; only pay me so much per day for them." P. 104, ll. 5-14; p. 105, ll. 27-40; p. 106, ll. 5-15, ll. 28-40; p. 121, ll. 7-20; p. 118, ll. 35-40; p. 119, ll. 5-7.

So much is this so that although the initial hiring was of the truck and the man for a day, the Cudahy Packing people actually used the man and truck for another day without any new or special arrangement, and on that day the truck and driver were used to make a delivery unaccompanied by anyone or any representative of the Cudahy Packing Company. P. 118, ll. 35-40; p. 119, ll. 5-7; p. 106, ll. 35-40.

Moreover, when Dawkins agreed to deliver or cart butter for other concerns, like carting butter for the Atlantic & Pacific Tea Company, McEwan was told to go to the place and cart or deliver a load of butter, or whatever was to be delivered. In this case, no such instructions were given, but McEwan was merely told to report with his truck to the Cudahy Packing Company. P. 121, ll. 7-20.

In the Courtinard case the court found that except for the one direction the hirers left to the driver "the exclusive management, itinerary, direction and control of the vehicle," which factors it states present the substantial inquiries and determinative tests for ascertaining the existence of the legal relationship of master and servant. See p. 496.

Clearly here the management, itinerary, direction and control were not left exclusively to the driver of Dawkins, and consequently the ruling in the Courtinard case cannot apply. *Indeed, the trial court appears to have lost sight entirely*

of a fact which counsel strove earnestly to impress him with, namely, that at the time of the accident the actual driver of the truck was not Dawkins' man, McEwan, at all, but was the agent of the Cudahy Packing Company, Gibney, for he was the only man who had the white coat on that the witnesses testify the driver of the truck had on at the time of the accident. McEwan was a truck driver; Gibney was a regular driver of a meat truck. Ordinary truck drivers do not wear white coats; drivers of meat trucks frequently do, and two witnesses testified here that the driver of this truck did have a white coat on, p. 69, ll. 22-26; p. 127, ll. 5-12, and McEwan says, "I did not have one on." This situation alone, it seems to us, required the submission of the case to the jury and legally prevented the court from deciding the issue of agency as a matter of law.

In the Busch case the court found a definite contract whereby one Cullum agreed to deliver for the defendant, in Cullum's truck, the products of the defendant, at certain stipulated prices. No control whatever was exercised by the defendant over the agents of Cullum. All the defendant did was to put its products onto the truck and tell the driver where the load was to be delivered. Cullum then checked the contents for the purpose of billing the defendant, and billed him accordingly.

Certainly it needs no argument to show that such facts are far from the facts in this case, and consequently that that case cannot dispose of this one.

The general rule may be stated as follows: One furnishing a vehicle, team and driver *under a contract to do trucking or delivering for an-*

other is alone liable for the negligence of the driver where the hirer has no control whatever over the driver otherwise than to direct when and where he shall go. Note to 13 L. R. A. N. S. 1122 and long line of cases cited.

Here we submit that it cannot be stated as a matter of law that Dawkins contracted to truck or deliver for Cudahy. The facts are quite the reverse. Here it cannot be said, as a matter of law, that the hirer had no control or right of control over the driver beyond that of direction. The jury might have so found, but the court could not legally do so as a matter of law, particularly in the face of the testimony from which a jury had the right to find that at the time of the accident this right of control by the Cudahy representative, Gibney, had so far been asserted as to place Gibney at the wheel of the truck actually driving. "The fellow with the white coat on was driving the truck." P. 127, ll. 9 and 10.

As a consequence, this case comes within that class of cases, a few of which follow, where by reason of the peculiar facts thereof a question for the jury is created to say whether the owner of the vehicle, or the hirer, is responsible for the acts of the driver furnished by the owner thereof.

And the first of these is a case recently decided by our own Supreme Court. It is the case of *Winter v. The North Jersey Bus Company*, heard on appeal from the Paterson District Court by Justices Kalisch, Katzenbach and Lloyd. See Vol. 5, No. 2 N. J. Advance Reports and Weekly Law Review, Misc. Reports, p. 42.

In that case plaintiff sued the owner of the bus that had caused the injury. It appeared at the end of plaintiff's case that at the time of the

accident the bus was being driven by the driver of the defendant owner. The defendant's proofs tended to show that the Paterson-Riverdale Company had called up the defendant company and asked for the loan of the bus to make a certain trip, and that the defendant owner had loaned the bus, with the driver, upon the understanding that the driver of the Paterson-Riverdale Company should go along to collect fares. That driver did go along and there was proof both ways that the driver of the Paterson-Riverdale Company, who went along, both did and did not direct the movements of the bus. Upon this showing the defendant owner moved for a direction of verdict in his favor, and the refusal of the trial court to grant such motion was the principal subject of the appeal to the Supreme Court. The Supreme Court held, under the circumstances, that it was a question of fact for the jury not only on the question of negligence, but on the question of agency as well.

The facts in the Winter case are not unlike the facts in our case. In both cases there was testimony that the driver of the owner was operating the motor vehicle, although in our case there is the additional testimony that the driver of the hirer was operating the truck. In both cases the agent of the hirer was on the motor vehicle exercising some authority; in the Winter case in collecting fares; in our case in delivering meat and directing the routes to be taken and in paying ferriage tolls. In both cases it was affirmed and denied that the agent of the hirer exercised control over the agent of the owner, since besides the inference of right of control and supervision which the conduct of Gibney permitted in our case, *there was the positive proof that Gibney, the man in the white coat,*

had so far asserted his authority as to be operating the machine, and there is the denial by McEwan that Gibney was driving the machine. The facts being akin, the result should be the same in both cases. If the plaintiff in the Winter case had sued the owner and the hirer, is it possible in view of the Supreme Court decision that a non-suit would have been upheld as to the hirer, and the question of agency left to the jury as to the owner defendant alone? If so, and the jury should have determined the issue of agency against the plaintiff, the ridiculous situation would be presented of a plaintiff possessing a right without a remedy.

The issue in the Winter case was the same issue that was before the court in the present case, namely: was the driver of the automobile at the time of the collision the agent or servant of the owner or of the hirer? That issue the Supreme Court in the Winter case held was a question of fact despite the Courtinard cases and the Seaboard case, heretofore cited, and that application of the law is the one that should have been made in the case now before this court.

Where the defendant not having a sufficient number of horses to draw his delivery wagons, obtained a horse and driver from a stable keeper, he is liable for the driver's negligence, where one of the defendant's regular servants accompanied the driver, directing where he should deliver goods, and also collecting money for the defendant. *Kolnitsky v. Matthews*, 64 Misc. 167, 118 N. Y. Supp. 366.

The court said "that the recent decisions in this State seem to be uniform in the assertion that the true test as to whether the relation of master and servant exists is not necessarily the

payment of wages, but is whether at the time of the injury complained of the alleged servant is engaged in the business of the alleged master and subject to his direction and control. It is not so much the actual exercise of control which is regarded as the right to exercise such control." P. 367.

Muldoon v. City Fireproofing Co., 119 N. Y. Supp. 320, held that plaintiff, although he drove his own team attached to a truck of the defendant for the defendant was an employee, and that as a matter of law the defendant was liable. The court said: "He was engaged in its business, transporting a truckload of its material to be delivered when, where and as directed. He was not exercising an independent calling. He placed himself, his team and wagon at the disposal of defendant, and defendant accepted his services and loaded his wagon with such materials as it saw fit, and directed that it be transported. If it (defendant) did not outline route, there can be no doubt that it was within its province to do."

In *Hershberger v. Lynch*, 9 Sadler (Pa.) 91, 11 Atl. 642, the court approved an instruction which told the jury that the defendant, a livery-stable keeper, would not be responsible for the negligence of the driver of a carriage furnished, with a team, to an undertaker for use at a funeral if the defendant had completely surrendered to the undertaker control of the driver so that the defendant could not exercise any control whatever over him; but, on the other hand, that the defendant would be responsible if the engagement of the vehicle and driver simply gave the undertaker the right to direct where the vehicle was to be driven. See also *Brady v. Giles*, 1 Moody & R. 494.

Howard v. Ludwig, 171 N. Y. 507, 64 N. E. 172, affirming 57 App. Div. 94, 67 N. Y. Suppl. 1095, where the defendants for some years had an agreement with a trucking company to furnish each day a truck, team and driver to deliver goods, the truck bearing the defendant's name, it was held to be a question for the jury whether the driver was the servant of the defendants or the trucking company. The court said that, if the trucking company was to deliver all the goods sold by the defendants for a specified compensation, and was to be responsible for the safety thereof, then unquestionably the defendants would not be liable; but, if, instead, the arrangement was that the defendants were to pay for the truck, team and driver, and take charge of the delivery of the goods, sending the team about as the exigency of their business required, then the relation of master and servant existed between the driver and the defendants, and they were responsible for his negligence. *Baldwin v. Abraham*, 57 App. Div. 67, 67 N. Y. Supp. 1079, affirmed 171 N. Y. 677, 64 N. E. 1118.

Waters v. Pioneer Fuel Co., 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52, it was held that the driver of a coal wagon, who owned the team and running gear of the wagon, and whose duty it was to load coal upon the wagon, deliver it as directed by the coal company, and collect the money therefor, and who received a fixed sum per load, was not an independent contractor, but was a servant of the company whose coal he delivered; and the latter was liable for injuries received because of the driver's negligence in failing properly to cover the opening of a coal hole.

Where one person lends his servant to another to be used by the latter in the performance of his business and under his direction and control, the servant while so employed, is usually the servant of the latter, even though the former may continue to pay him. *D., L. & W. v. Hardy*, 59 N. J. L. 35; *Higgins v. W. U. T. Co.*, 156 N. Y. 75.

So in *Hartwell v. T. H. Simonson & Son Co.*, 218 N. Y. 345, 113 N. E. 255, at p. 256, Cuddaback, J., in a well-considered opinion, says:

“The principles of law which control in this class of cases are quite well settled. A servant in the general employment of one person, who is temporarily loaned to another person to do the latter’s work, becomes, for the time being, the servant of the borrower, who is liable for his negligence. But if the general employer enters into a contract to do the work of another, as an independent contractor, his servants do not become the servants of the person with whom he thus contracts, and the latter is not liable for their negligence.” The facts in this case are quite like those in the present case, although the evidence of direction is stronger in our case, and the court held that the question of agency was one of fact.

Again in the *Hartwell* case *supra*, the court referred to *Schmedes v. Deffaa*, 214 N. Y. 675, 108 N. E. 1107, and further said:

“On the other hand, in *Schmedes v. Defaa*, *supra*, a livery stable keeper who had an order from an undertaker to furnish carriages for a funeral, not having a sufficient number of carriages of his own, applied to another liveryman for an additional carriage and driver. The second liveryman sent a carriage and driver as

requested. That clearly was a case where the first liveryman procured additional facilities for doing his own work, and it was held in this court that he was liable for the driver's negligence."

Justice Kalisch citing this case in his dissenting opinion in the Courtinard case says: "This case seems to be on all fours with the case before us."

Even more so is it on all fours with the present case, for as in the Schmedes case, Cudahy Company required additional facilities or substitute facilities to do its work, and Dawkins merely furnished the facilities.

See also the case of *Reidel v. Moran, Fitzsimons Co.*, 61 N. W. 509, where the Supreme Court of Michigan in holding the truckman liable laid stress on the fact that the hirer did not control the manner in which the goods were to be transferred to the truck, nor the route that should be taken in taking them to their destination, both of which acts of control the hirer here indulged in.

Again in *Warne v. Moore*, 86 L. 710, 94 Atl. 307, the court held that the hiring by an owner of an automobile of a chauffeur to drive the car from one point to another, makes the chauffeur a servant of the owner during the driving of the car, even though the owner never was in the car during the driving.

By a parity of reasoning the hiring of a truck and someone else's ordinary driver to do the work of the hirer, makes the hirer liable.

See also *Dunmore v. Padden*, 105 Atl. 559, 262 Pa. 326, where the Court held that an owner of an

automobile who lent it with a chauffeur to another was not liable for damages resulting from its negligent operation on a highway while used in the business of and under the control of the borrower.

And of course, whether loaned or hired, the principle is the same, the compensation paid by the hirer being for the use of man and vehicle, not for trucking or delivery, or the doing by the owner of any other specific task.

In the case of *Puhlman v. Excelsior Express Co.*, 103 Atl. 218, a Pennsylvania case, the third syllabus is as follows:

“Where an express company each day hired its horse, wagon and driver to an electric company to take its men and material and to go wherever he was directed by the electric company’s foreman, and to assist with the team in pulling down and putting up poles, though it was not affirmatively shown that it was his duty to hand out tools to the workmen, and the driver on request of a servant of the electric company to hand him a chisel, threw it in such a way as to strike him on the knee and injure him, the injured servant could not recover of the express company, as the driver was in the electric company’s special employment at the time.”

In this case the court below having non-suited plaintiff who had sued the express company, which corresponds to our owner here, the plaintiff appealed and contended that the question whether the negligent act of the general agent of the owner was within the scope of his employment by the owner was for the jury. The upper court disagreed saying:

“But they (the plaintiff) offered no evidence sufficient to sustain a finding by the jury in their favor upon that question. They

showed merely that defendant put Elkman in charge of the horse and wagon, and then placed him under the control and direction of the light company (the hirer). They failed to show affirmatively that handing tools from the wagon was a duty which the defendant company (the owner) engaged to perform, or that defendant employed Elkman to discharge that duty. The tools all belonged to the light company and were manifestly under the control of the foreman. The case is essentially different from one in which a master contracts to haul and deliver goods and sends his servant to perform that work for him. We think the evidence clearly justifies the conclusion that Elkman, while in charge of the horse and wagon, and while assisting the workman of the electric company, was under the direction and control of the foreman of that company, and that the defendant company did not retain control over him in the work he was doing at that time."

So in our case.

Cases like the Courtinard and Busch cases, the Steinbrenner case and the "carriage cases" in general have no application whenever it appears as it does here that the master or owner has parted to another, for a time, with control over his servant, to be used in the work of that other. *Byrne v. Kansas City &c., R. R.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; opinion by Circuit Court Judge Taft, now Chief Justice of the U. S. Supreme Court. *Donovan v. Laing, et al.*, L. R. (1893) 1 Q. B. 629.

Standard Oil v. Anderson, 212 U. S. 215, where on marginal page 222 Justice Moody says: the inquiry is "Whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their

work." Certainly Dawkins did not possess a power to control a servant in the doing of a work of which he had no knowledge or information, and clearly Cudahy did direct and had the right to further direct McEwan to the end that its customers might not suffer unduly due to the breakdown of its regular truck and facilities.

Since it is only where the facts are undisputed and only one inference can be reasonably drawn from them, that the court may take an issue whether of agency or otherwise from the jury, and since formal employment is not essential to the existence of the relation of master and servant, nor is payment of compensation, and since it is not indispensable that the alleged servant or agent should actually know who was his master or principal, we submit that under the facts as presented to the trial court, the question of agency was clearly one of fact for the jury.

See Meachem on Agency, section 295, volume 1; section 1859 of Meachem on Agency, volume 2.

This is especially so where, as in this case, the facts as to the understandings and arrangements between the Cudahy Packing Company and Dawkins lay peculiarly in the knowledge and possession of the defendant Cudahy Packing Company, for the defendant James J. Dawkins did not even appear in person or by counsel at the hearing, and could not be located by even his own counsel, having sold his business months before. See *Bien v. Unger*, 64 N. J. L. 596, *et als.*, where this court speaking through Justice Garrison after referring to a practice which allows a trial judge in the exercise of a sound discretion to reserve his ruling on a motion to non-suit in certain cases until the close of defendant's testi-

mony, said, "By force of this practice, which is alluded to in the opinion of this court in *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167, and there said to be unsettled, a trial court may refuse to grant a non-suit at the close of the plaintiff's testimony, not because the plaintiff has made out a prima facie case but because he has presented a case in which all of the relevant facts were so exclusively within the knowledge and control of the defendants that the law imposed upon them the duty of offering explanatory testimony." The court although indicating that the propriety of the practice was not within the lines of its decision proceeded to distinguish the practice, "*reus ipse decat*" from "*res ipsa loquitur*." See also 1 Best. Ev. 505.

Nor can the action of the trial judge be upheld on the theory that no negligence existed and that contributory negligence was plainly present. There was testimony that the truck was proceeding rapidly close to the standing trolley car, that it gave no notice or warning of its approach, and that the driver immediately before the accident and while passing the standing trolley car was flirting with the girls on the street, his head turned away from the direction in which he was going, smiling at the said girls. Page 13, lines 13-20; page 14, lines 28-30; page 140, lines 38-40; page 127, lines 5-30. Certainly such testimony is sufficient to go to the jury on the question of negligence.

On the question of contributory negligence it is true that there was testimony to the effect that the plaintiff had tripped in her effort to get away from the truck and that that had caused her foot to be projected under the truck, page 39, lines 17-20, but such testimony even if indicative of contributory negligence as a matter of law,

which of course cannot be so, was denied by Miss Lacombe, who said that the truck struck her left foot and precipitated her right leg under the truck. Page 73, lines 30-37. The doctor's testimony as to the injuries to the left leg bear out this story. Page 53, lines 8-15; page 57, lines 27-31. Moreover, under the circumstances it certainly was a question for the jury to determine whether or not the driver of the truck had not placed Miss Lacombe in a position of sudden peril, in which case her conduct in avoiding the accident would certainly not constitute contributory negligence as a matter of law. It may also be suggested that Miss Lacombe did not look, or did not look effectively. She testified that she looked both ways, and her friend Miss Harris testified that they looked, and it cannot be said as a matter of law that Miss Lacombe did not look effectively, or else she would have had witnessed the approach of the truck because under the testimony it was a fair inference that the truck was proceeding so rapidly and so closely to the standing trolley car that it could not be seen when Miss Lacombe, being in a place of safety, looked. It is to be noted that the court did not base its action upon the absence of negligence or the presence of contributory negligence.

We respectfully submit that the action of the trial court was error and that such action should be reversed and a new trial granted.

Respectfully submitted,

STICKEL & STICKEL,
FRED. G. STICKEL, JR.,
Attorneys and of Counsel with
Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

MARIE LACOMBE,
Plaintiff-Appellant,

v.

CUDAHY PACKING COMPANY,
a corporation,
Defendant-Respondent.

Action at Law.

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

The defendant, Cudahy Packing Company, is a corporation engaged in the sale of meats, etc. The defendant, James Dawkins, is engaged in the trucking business in the City of New York and in the Metropolitan area. Dawkins' business was general trucking. He maintained his place of business at 24 Worth Street, New York City. He operated a well known and active trucking organization. One William A. Miller (p. 102) was general manager for the Dawkins trucking concern in June, 1924, and had been for six years past (p. 105).

On July 30, 1924, the Cudahy Packing Company required trucking services for the delivery of meats to some customers in Essex County, New Jersey, and engaged the Dawkins Trucking Company to make the deliveries. Dawkins sent a truck and a driver, named McEwan, to the Cudahy place of business in New York City for that purpose.

The truck was loaded and it proceeded under the absolute and complete direction and control of McEwan to the delivery of merchandise of the Cudahy Company. An employee of the Cudahy Company accompanied the Dawkins' driver on the truck for the purpose of designating the places of delivery and for the further purpose of attending to the details of individual cases of delivery. He had no part of any sort, kind or character in the operation or control of the truck. It was solely in the charge of Dawkins and his man McEwan. McEwan was at no time in the employ of the Cudahy Packing Company or under its direction or control in any way, shape or manner, except in this, that he made the deliveries where directed.

Dawkins charged \$25 per day for providing this service; gasoline, etc., were all provided for by Dawkins. While McEwan was driving this truck in the course of his delivery, proceeding along Washington Avenue in the Town of Belleville, New Jersey, the plaintiff in this action stepped out in front of a trolley car directly in front of the truck. The testimony in the case would clearly indicate in our judgment that she was guilty of contributory negligence and that there was an entire absence of negligence on the part of the driver of the truck, but on the evidence as it stood at the close of the plaintiff's case, we are frank to say that we do not think it would have justified the granting of a nonsuit on either the ground of want of proof of negligence in the driver of the truck, or upon the proof of contributory negligence as far as the plaintiff was concerned.

The plaintiff and the truck collided and the plaintiff was seriously injured as a result of the collision. The truck, according to witnesses produced by the plaintiff, proceeded only a few feet after the contact and the plaintiff, who had been

injured by coming into contact with the right front wheel of the truck, was removed from between the front and rear wheels.

The plaintiff's action was brought against Dawkins as owner of the truck, and against the Cudahy Packing Company. The Cudahy Packing Company was included in the action upon the theory that at the time of the accident, the truck was being operated under its control and operated by McEwan as its agent. At the conclusion of the plaintiff's case, a motion for nonsuit was made on behalf of the Cudahy Packing Company upon the ground of want of proof of negligence, in any event, and on the further ground that the case, as far as the Cudahy Packing Company was concerned, came strictly within the law as laid down in the cases of *Courtinard v. Gray Burial & Cremation Co.*, and *Busch v. Seaboard By-Products Coke Company*. The Trial Judge granted the motion for a nonsuit as to the Cudahy Packing Company, and his opinion stated as the basis for the granting of said motion is set forth in full, pages 142-146 of the printed case. After the granting of the nonsuit the plaintiff discontinued its action against the defendant Dawkins. The case is now here on the appeal of the plaintiff from the judgment of nonsuit.

We will endeavor to demonstrate that the Trial Judge was correct in his ruling on this motion. We will not enter into a discussion of the evidence relating to the accident itself, except wherein this testimony or any part of it may bear on the subject matter of the relationship between the driver of the truck and the defendant Cudahy Packing Company. The complaint specifically sets forth and charges that the truck was owned by Dawkins. This was admitted by the defendant. The proof is conclusive and unrefuted that

McEwan, the driver of the truck, was not in the employ of the Cudahy Packing Company, but was in the employ of Dawkins.

In re Control and Operation of Truck.

Paul V. Rungsted, a witness produced by the plaintiff, testified as follows:

“Q. What was it that struck Miss Lacombe?

A. A truck owned by J. J. Dawkins” (p. 37).

The only other testimony in the case that in any wise connects the Cudahy Packing Company with the case is the testimony of William A. Miller (p. 102), and Robert McEwan (p. 110). The liability of the defendant, Cudahy Packing Company, outside of the question of negligence must be found in the testimony of these two witnesses, otherwise there is no testimony in the case on the subject. Their testimony is not lengthy and we respectfully urge that the Court read it line for line.

Miller testified that on the 30th day of June, 1924, he was in the employ of James J. Dawkins, who was at that time engaged in the general trucking business at 24 Worth Street, New York. He was bookkeeper and general manager of the Dawkins business (p. 102); that he had worked for Dawkins about six years (p. 105). He described (pp. 104 and 105), the conduct of Dawkins' trucking business. He stated that their business was to truck goods about for anyone, that they charged for this trucking service regular rates and that their rate charge finally fixed for two days' trucking service, including the day in question, to the Cudahy Company was \$50 or \$25 per day. It was paid by the Cudahy Company (p. 106). He said the gas used in the service was furnished by Dawkins. He testified that McEwan, the driver

of the truck, was a chauffeur in the regular employ of Dawkins. His salient testimony embraces only three pages of the printed record (pp. 104, 105, 106). I will not repeat it here.

The other witness referred to was the driver of the truck. He testified (p. 111), that he was employed by James J. Dawkins, who was engaged in the general trucking business. He was directed to go to the Cudahy Packing Company place of business by the manager, Mr. Miller. He had never been to the Cudahy plant before (p. 111). He said when he reached Cudahy's that he was told Mr. Gibney "would go with me and show me where to go." He said that Gibney loaded up the truck (pp. 112 and 113). He said he followed the direction of travel indicated by Mr. Gibney, the employee, who went with him for this express purpose. McEwan said all he actually did was to drive the truck (p. 114). He said he did not participate in the unloading of the truck (p. 114). Said he had worked for Dawkins continuously for over two years (p. 115); that he had been driving that same truck for two years for Dawkins (p. 116); that he was paid always by Dawkins. He described the *modus operandi* of the trucking business (pp. 116 and 117), and told that he was directed to go to the Cudahy plant where he went to get goods for delivery (p. 117). He testified that he operated the car exclusively; that was his job (pp. 117 and 118). He said Gibney, the Cudahy man, had nothing to do with the running of the car. He was positive about this. He said the limits of his work was the operation of the truck (p. 118), and when he got through he took the car back to Dawkins' garage. He said he was paid by the Dawkins Company by the week (p. 119). He said he was not employed by the Cudahy Packing Company and never

thought or assumed or had reason to believe he was (p. 120). He said there was a sign on the office of Dawkins reading, "Bonded Truckmen."

It is suggested by counsel in his brief there is another element which creates a jury question as to whether or not the truck was being operated by Cudahy or Dawkins. A witness, Anna Seria (p. 127), testifies that there were two fellows on the truck and that a fellow with a white coat on was driving the truck. She could not give any judgment on the speed of the truck and did not see the accident (p. 129). Her attention was called to the situation by a scream. She was some distance away, on the other side of the street (p. 129). She was about a half a block away (p. 131).

On direct examination of McEwan, he was asked, "What color were your clothes?" He said he could not tell now. He was asked, "Did you have a white coat on?" He said, "No, sir." He was not asked whether or not he had his coat off driving in his shirtsleeves, or he was not asked whether anybody on the car had a white coat on. There is no evidence in the case that Gibney wore a white coat. The lady in question must have mistaken shirtsleeves for a coat. Chauffeur truckmen are much more apt to be operating in their shirtsleeves than white coats in the middle of the summer. There is nothing, however, in the incident of this testimony that changes one iota the unrefutable facts. There is no proof of any kind to the effect that Gibney either drove the car or was authorized to drive the car. The only direct testimony in the case is clearly to the contrary.

The Law.

We respectfully submit that the case comes absolutely under the law laid down in the following cases, viz.:

Courtinard v. Gray Burial & Cremation Company, 98 New Jersey Law, 493;
Busch v. Seaboard By-Product Coke Company, 100 New Jersey Law, 304.

The brief of the plaintiff recites a number of cases from other State Courts, some of which are in apparent conflict with the view expressed in the *Courtinard* and *Busch* cases, and most of which present facts not present in the instant case. They cite one New Jersey case, the case of *Winter* against *North Jersey Bus Company*, reported in New Jersey Advance Reports, Volume 5, page 42. The latter holds directly to the contrary of the plaintiff's contention in this case. In the *Winter* case it appeared that the bus was the property of the defendant and was being driven by the defendant's driver. The title of the bus was in the defendant and the driver was in the employ of the defendant, even though it was being operated to serve patrons of the Paterson-Riverdale Company, the third party, not party to the suit. If we had no other law to apply to the situation than the law set down in the *Winter* case, judgment against Dawkins could be sustained, but clearly no judgment could be sustained against the Cudahy Packing Company.

The only other New Jersey case cited in the plaintiff's brief ~~was~~ the case of *Warne v. Moore*, 86 Law, 710, but the facts in that case are entirely different. In that case a defendant automobile owner hired a chauffeur to operate his car and it was held that the chauffeur was his agent for the purpose of operating his car. There is no parity of reasoning between that case and the instant case.

We submit that the law applicable in this case is that embraced in the *Courtinard* and *Busch* cases referred to: *Courtinard v. Gray Burial & Cremation Company*, 98 New Jersey Law, 493, and

Busch v. Seaboard By-Product Coke Company, 100 New Jersey Law, page 304. These are both Court of Errors and Appeals' cases.

The facts in the *Courtinard* case were substantially these. The defendants, Caseys, in that case were undertakers in Plainfield. They hired one of the Gray Company hearses with a driver to go from Plainfield to a cemetery in Brooklyn, where an interment was to be made under the Caseys' direction. John F. Casey sat upon the front seat with the driver. He exercised no control over the machine except to state to the driver the cemetery objective of the funeral. The control and *modus operandi* of the machine was under the direction and management of the Gray Company driver. This case is on all fours with the instant case. The Cudahy Company hired the services of the truck and driver not for the purpose of delivering passengers or a body at a cemetery grave, but for the fixed purpose of delivering merchandise to fixed destinations. There can be no legal distinction between the two purposes. If flowers had been carried in the vehicle to the cemetery and had been lifted off the hearse or vehicle, with or without the aid of the driver, it would not have changed the situation one iota. In the *Casey* case a collision occurred en route to the cemetery to which the Caseys were directing the course of the hearse. The Court of Errors and Appeals held in that case that the Caseys were not responsible for the negligent operation of the hearse. They cited with approval the case of the *New York, Lake Erie & Western Railroad v. Steinbrenner*, 47 New Jersey Law, page 161, and stated that as in the *Steinbrenner* case the "elements of hiring, control, direction and power of dismissal are made distinct *ratio decidendi*, and presents the fundamental tests of liability of the occupant and hirer of the coach under the legal status test of master

and servant" and held that applying the well-settled principle laid down that the defendants, Caseys, neither hired nor directed, nor controlled the driver; nor did they exercise over him power of authority or supervision.

In the instant case all the same elements are present as in the *Casey's* case. There is no distinction in the case created by reason of the fact that Dawkins' truck had several places of destination rather than one. In the *Courtinard* case the coach of the Gray Burial & Cremation Company undoubtedly had to stop and be loaded up with its freight or flowers or something or other for the purpose of conveyance to the cemetery. The driver in our case probably and undoubtedly did have to secure instructions as to locations and direction, but the giving of a mere itinerary direction is not a direction of operation of the car. There are probably few truckmen operating their vehicles in the Metropolitan area who are not making constant inquiry for the location of their places of delivery and even if we assume that a representative of the Cudahy Company, an agent or employee, told the operator of the Dawkins truck the location of the place to go and the most expeditious and practical way to go, this would not change the analogy presented to the picture set forth in the *Courtinard* case one iota either in legal contemplation or in fact.

The question presented in the *Courtinard* case, after all, is exactly the question presented here. Who was in control and operation of the truck at the time of the alleged injuries, Dawkins or Cudahy Company? The Court held in the *Courtinard* case that the transfer of services of the driver from the Gray Company to Caseys could not present a jury question unless it assumed the form of a debatable question, and there certainly is no evidence in the case at bar making this a debatable question.

In the *Busch* case (100 N. J. L., 304) a man named Cullum was doing business under the name of Calumet Coke Company. Callum had been engaged in selling coke at retail. The Seaboard By-Product Coke Company took over the coke business and decided to do its own selling, but in order to make delivery engaged Cullum to deliver by his trucks at stipulated prices per ton. In our case we engaged services at stipulated prices per day. Cullum's truck carried a sign upon it "Seaboard By-Product Coke Company." The driver was employed and paid by Cullum. It was clear in the case that the truck was not owned by the Seaboard Company, that they did not hire its driver or pay him. They did load the truck and did give the driver the address of its destination. There were some other facts in the case that are not present in the instant case but not in any measure changing or affecting the relationship created. In that case the Court held that the case came clearly within the principle laid down in the *Courtinard* case and cited with approval the rather recent case of *Charles v. Barrett*, 233 New York, 127; that Court held that the driver was held to be the servant of the truck owner where a truck owner hired his truck and driver to an express company to transport its express matter under seal between specified points.

It will be noted that the only purpose of an employee of the Cudahy Company being on the truck was to give consideration to matters that had nothing whatsoever to do with the operation of the truck. If the accident complained of had happened as the result of some negligent act of the employee of the Cudahy Company while he was acting within the scope of such employment, a different question might be presented, but that is not the situation presented in this case.

We submit that the conclusions of the Trial Judge set forth in the printed case correctly states the law as applicable to the facts in this case. McEwan, the driver of Dawkins, was in the employ of Dawkins solely and exclusively at the time of the accident, and the operation of the truck was absolutely and completely under his control. The fact that Gibney, an employee of the Cudahy Packing Company, happened to be on the truck, did not change the relationship existing between Cudahy Company and Dawkins, and the relationship existing between Dawkins and McEwan.

As a matter of common understanding, every passenger who enters a vehicle for transportation directs the place of stopping of the vehicle, but it would not be suggested for an instant that such passenger has anything to do with the control and operation of the vehicle. It is further plain that every person who sends an express package for express delivery directs destination of the express company, and it has never been held by a court anywhere as far as we can learn, that the following out of such direction of delivery created any obligation on the part of the shipper growing out of the operation of the shipment vehicle used. Certainly the mere fact that an employee of the shipper should happen to accompany a truck for the purpose of accomplishing some service which had no relation whatsoever to the operation of the truck cannot change the situation. It was distinctly so held in the *Courtinard* case (cited above). The remedy of the plaintiff, if any, on the evidence presented is against Dawkins.

We most respectfully, therefore, submit that the judgment of non-suit should be affirmed.

Respectfully submitted,

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Attorney and Counsel for Defendant.

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