INDEX

TESTIMONY.

For Plaintiffs.

SUMMONS.

The State of New Jersey to Essex Sales Company, a New Jersey corporation.

(L. S.)

YOU ARE SUMMONED to answer the complaint of William Okin in an action at law in Essex County Court of Common Pleas. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Essex County Court of Common Pleas at Newark within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, HONORABLE EDWIN C. CAFFREY, Judge of the Essex County Court of Common Pleas at Newark, this 27th day of October, nineteen hundred and twenty-five.

JOHN H. SCOTT,
Clerk.

AARON MARDER,
Attorney.

COMPLAINT OF WILLIAM OKIN.

Essex County Court of Common Pleas

WILLIAM OKIN, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. The defendant, Essex Sales Company, is a corporation organized and existing under the laws of the State of New Jersey.

2. On or about the 13th day of July, 1925, and for some time prior thereto, plaintiff was the owner of an automobile, to wit, 1924 Peerless touring car, with motor #33498.

3. On or about the 13th day of July, 1925, and for some time prior thereto, the defendant was the owner of a certain motorcycle.

4. On or about said date, one William Katz was lawfully driving said automobile easterly on Northfield Road, in the Town of West Orange, County of Essex and State of New Jersey, at or near the point where Gregory avenue intersects said road, plaintiff having loaned said automobile to said William Katz.

5. At said time the defendant, by its agents and servants, did operate and drive said motorcycle in a southerly direction along Gregory avenue toward said Northfield Road.

6. At said time the defendant, by its agents and servants, did continue to drive said motorcycle at a high, excessive and dangerous rate of speed and without warning did negligently, carelessly and wilfully strike, run into and turn over the automobile driven by the said William Katz at the intersection of said streets.

7. The negligence of the defendant, its servants and agents, also consisted of the following, amongst other things:

(a) The driver of said motorcycle ignored the warning given by said William Katz, who sounded his horn in approaching the intersection of said streets;

(b) The automobile driven by said William Katz had the right of way under the statutes of the State of New Jersey, which was ignored by the driver of the motorcycle;

(c) Said motorcycle was not equipped with proper brakes in good repair;

(d) Said motorcycle was operated in a manner contrary to the statute of the State of New Jersey in divers other respects;

(e) The driver of said motorcycle failed to give warning of its approach of said intersection of streets.

8. The driver of said motorcycle was about the defendant's business and was authorized to drive said motorcycle by defendant at the said time.

9. As the result of said collision, said automobile was so extensively damaged as to make

Answer.

it practically worthless and plaintiff was put to expense in the hiring of other automobiles in and about his business, because of the loss of his use of said automobile.

Plaintiff demands the sum of three thousand five hundred ($3,500) dollars damages.

AARON MARDER,
Attorney of Plaintiff.

ANSWER.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM OKIN, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Answer.*

The answer of Essex Sales Company, a New Jersey corporation, the defendant above named, to the complaint heretofore filed against it herein, says that:

FIRST DEFENSE.

1. It admits paragraphs 1, 2 and 3.
2. It denies paragraphs 4, 5, 6, 7, 8 and 9.

SECOND DEFENSE.

It denies that it was guilty of the negligence charged against it in the said complaint.

Answer.

THIRD DEFENSE.

It denies it was guilty of any negligence whatsoever.

FOURTH DEFENSE.

The plaintiff was guilty of contributory negligence in that at the time and place in question, he permitted his automobile to be driven in a reckless and careless manner, at an excessive rate of speed, without giving warning of his approach, without any regard for the rights of other vehicles then and there lawfully upon the highway and otherwise carelessly, as the result of which it collided with the said defendant's motorcycle and sustained the damage referred to in the said complaint.

McCARTER & ENGLISH,
Attorneys for Defendant.

REPLY.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM OKIN, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Reply.*

The plaintiff denies the second, third and fourth defenses of the answer.

AARON MARDER,
Attorney for Plaintiff.

SUMMONS.

The State of New Jersey to Essex Sales Company, a New Jersey Corporation.

(SEAL)

YOU ARE SUMMONED to answer the complaint of William Katz in an action at law in Essex County Court of Common Pleas. AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the Essex County Court of Common Pleas at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Honorable EDWIN C. CAFFREY, Judge of the Essex County Court of Common Pleas at Newark, this 27th day of October, nineteen hundred and twenty-five.

JOHN H. SCOTT,
Clerk.

AARON MARDER,
Attorney.

COMPLAINT OF WILLIAM KATZ.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM KATZ, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, residing in the City of Newark, County of Essex and State of New Jersey, says that:

1. The defendant, Essex Sales Company, is a corporation organized and existing under the laws of the State of New Jersey.

2. On or about the 13th day of July, 1925, and for some time prior thereto, the defendant was the owner of a certain motorcycle.

3. On or about said date, the plaintiff, William Katz, was lawfully driving an automobile easterly on Northfield Road, in the Town of West Orange, County of Essex and State of New Jersey, at or near the point where Gregory avenue intersects said road.

4. At said time the defendant, by its agents and servants, did operate and drive said motorcycle in a southerly direction along Gregory avenue toward said Northfield Road.

5. At said time the defendant, by its agents and servants, did continue to drive said motor-

cycle at a high, excessive and dangerous rate of speed and without warning did negligently, carelessly and wilfully strike, run into and turn over the automobile driven by the plaintiff at the intersection of said streets.

6. The negligence of the defendant, its servants and agents also consist of the following, amongst other things:

(a) The driver of said motorcycle ignored the warning given by the plaintiff, who sounded his horn in approaching the intersection of said streets;

(b) The automobile driven by the plaintiff had the right of way under the statutes of the State of New Jersey, which was ignored by the driver of the motorcycle;

(c) Said motorcycle was not equipped with proper brakes in good repair;

(d) Said motorcycle was operated in a manner contrary to the statute of the State of New Jersey in divers other respects.

(e) The driver of said motorcycle failed to give warning of its approach of said intersection of streets.

7. The driver of said motorcycle was about the defendant's business and was authorized to drive said motorcycle by defendant at the said time.

8. As the result of said collision, plaintiff was thrown out of said automobile and was severely and permanently injured and underwent and will undergo great pain and suffering and has suffered great shock to his nervous system and has been from thence hitherto prevented from transacting his ordinary business and has

Answer.

been and will be forced to pay out large sums of money for medical expenses and other expenses incident upon his injuries.

Plaintiff demands the sum of twenty-five thousand ($25,000) dollars damages.

AARON MARDER,
Attorney of Plaintiff.

ANSWER.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM KATZ, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Answer.*

The answer of Essex Sales Company, a New Jersey corporation, the defendant above named, to the complaint heretofore filed against it herein, says that:

FIRST DEFENSE.

1. It admits paragraphs 1, 2 and 3.
2. It denies paragraphs 4, 5, 6, 7 and 8.

SECOND DEFENSE.

It denies that it was guilty of the negligence charged against it in the said complaint.

Answer.

THIRD DEFENSE.

It denies it was guilty of any negligence whatsoever.

FOURTH DEFENSE.

The plaintiff, William Katz, was guilty of contributory negligence in that at the time and place in question, he was operating the automobile in which he was riding, in a reckless and careless manner, at an excessive rate of speed, without giving warning of his approach, without any regard for the rights of other vehicles then and there lawfully upon the highway and otherwise carelessly, as the result of which he collided with this defendant's motorcycle and sustained the injuries referred to by him in the said complaint.

McCARTER & ENGLISH,
Attorneys for Defendant.

REPLY.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM KATZ, *Plaintiff,* vs. ESSEX SALES COMPANY, a New Jersey corporation, *Defendant.*	*Action at Law.* *Reply.*

The plaintiff denies the second, third and fourth defenses of the answer.

AARON MARDER,
Attorney for Plaintiff.

JUDGMENT.

ESSEX COUNTY COMMON PLEAS COURT.

39016

WILLIAM KATZ, *Plaintiff,* vs. ESSEX SALES COMPANY, a corporation, *Defendant.*	*Action at Law.*

After verdict judgment entered for defendant April 12, 1926. Costs $53.84.

39017

WILLIAM OKIN, *Plaintiff,* vs. ESSEX SALES COMPANY, a N. J. corp., *Defendant.*	*Action at Law.*

After verdict judgment entered for defendant April 12, 1926. Costs $53.84.

McCarter & English, attorneys of defendant.

Judgment after verdict in the above-entitled actions was rendered on the 12th day of April, A. D. nineteen hundred and twenty-six, in favor of the defendant, Essex Sales Company, a N. J.

corp., and against the plaintiffs, William Katz and William Okin, for the sum of fifty-three dollars and eighty-four cents costs of suit in each case.

Judgment entered and signed April 12, 1926.

Recorded in Book Common Pleas R 2, page 124.

EDWIN C. CAFFREY,
Judge.

ESSEX COUNTY COURT OF COMMON PLEAS.

Monday, April 12, 1926.

WILLIAM KATZ *vs.* ESSEX SALES COMPANY.	*Action at Law.*
WILLIAM OKIN *vs.* ESSEX SALES COMPANY.	*Action at Law.*

Before Hon. Edwin C. Caffrey, Judge, and a jury.

For the plaintiffs appears Aaron Marder.

For the defendant appear McCarter & English (by Augustus C. Studer).

By direction of the Court, the two cases are tried together.

A jury is called and sworn.

Mr. Marder opens for the plaintiffs.

Mr. Studer opens for the defendant.

Adjourned until tomorrow, Tuesday, April 13, 1926, at 10:00 o'clock A. M.

SECOND DAY.

Tuesday, April 13, 1926.

Appearances as before stated.

Continued pursuant to adjournment.

WILLIAM KATZ, one of the plaintiffs, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Mr. Marder: I offer in evidence by consent two photographs.

(The photographs are received in evidence and marked Exhibits P. 1 and P. 2, respectively.)

Q Mr. Katz, where do you live? A Newark.

Q Number 32 Leslie street? A 45.

Q How old are you? A Thirty-four.

Q Do you remember the accident about which this suit is being brought? A Yes, sir.

Q You were driving an automobile? A Yes, sir.

Q A Peerless phaeton, as it is called? A Yes, sir.

Q Belonging to whom? A William Okin.

Q How did you happen to be driving it? A I borrowed Mr. William Okin's car.

Q At about the time of the accident, where were you proceeding? A I was on the Northfield Road going east, coming toward Newark, coming down hill, but before starting on the hill I put her in second gear, because it is an exceptionally steep hill before getting to the intersection of Gregory avenue. When I got to the intersection of Gregory avenue and Northfield

Road, I blew my horn and proceeded; as I was about halfway past the intersection I saw this motorcycle, and he hit me just about where I was, upsetting the car, throwing me thirty or forty feet, landing on my right side.

By the Court.

Q Did you say he hit you about where you were sitting? A On my left side, just at the door.

By Mr. Marder.

Q Will you point on Exhibit P. 1 where the motorcycle hit you; that is, with reference to the car right there (indicating)? Suppose you mark it.

(The witness marks Exhibit P. 1 with a "K.")

Q Did you see what happened to the driver of this motorcycle? A No, I didn't. When he hit me I turned over twice and then I was thrown. The next I saw of the driver of the motorcycle was that we were both being taken to the hospital.

Q Was anybody else with you in the car? A Yes, a young lady I was driving down.

Q What happened to her? A When the car righted itself she was under the car.

Q When the car, immediately after the accident, came to rest, is that a picture of the situation (indicating)? A That is the way the car was.

Q It came to rest immediately after the accident? A Yes.

Mr. Studer: What do you mean by that? Exhibit P. 1?

Mr. Marder: Yes.

Q What happened to you physically? A This finger was severed.

Q Which finger? A My left forefinger; and a scar here (indicating), and a scar over my right eye and a bruise on my spine, and a bruise on my chest which had to be strapped, and this finger out of joint—the middle finger of the right hand.

Mr. Marder: Will you consent that the words, "Essex Sales Company," were on the sidecar of this motorcycle?

Mr. Studer: Yes, I will consent to that.

Mr. Marder: It is stipulated, if the Court please, that the name of the owner of the motorcycle was painted on the side car of the motorcycle, "The Essex Sales Company."

By Mr. Marder.

Q Where did you go after the accident? A I was taken to the Orange Memorial Hospital.

Q What happened to you there? A Why, they sewed this forefinger of mine—put it in splints, washed my eye out, which was full of blood, bandaged me up and put me to bed.

Q How long were you there? A Three days.

Q Then where did you go? A I was taken to the Beth Israel Hospital, Newark, High street, and the splint was taken off the finger, but it had been sewed wrong; the tendon had been severed and the tendon had been sewed with the

muscle; I couldn't raise my finger, and the doctor applied a local anaesthetic and ripped it open and sewed the finger again.

Q Who did that? A Dr. Danzis.

Q Dr. Max Danzis? A Yes, sir.

Q What other treatment did you receive? A I was strapped for ten days; they strapped me from the spine to my chest and also bandaged me up on my spine, and just took the bandages off here (indicating) of which there is a permanent scar here (indicating).

Q Where do you say there is a permanent scar? A Over the right eye.

Q Do you mind walking up to the jury box and showing it to the jurors, please? A (Witness does as requested.)

Q Did you have that twitch in the right eye before the accident? A No, sir.

Q Did you have any pain? A Pain in the eye?

Q Generally. A Yes, I have pains every now and then.

Q I mean right after the accident. A Immediately after the accident, yes.

Q Where? A My body, my hand—everywhere; I was thrown fifteen or twenty feet from the car.

Q Do you still have pain? A Yes, sir.

Q Where? A In my chest; on damp days or cold days my finger gets numb.

Q You haven't been able to recover full use of it?

Objected to as leading.

Q Have you recovered the full use of the finger? A No.

William Katz, direct.

Q Who treated you besides Dr. Danzis? A Dr. Soschin.

Q Did you have any expenses in connection with your injuries? A Yes, sir.

Q What were they? A $308.70 hospital bills, doctors' bills and so on.

Q How long were you in the Beth Israel Hospital? A About twelve days—ten or twelve days.

Q Were you fully recovered when you left the hospital? A No, sir, I had my finger in a splint and I had to visit Dr. Danzis for three or four weeks to get the bandages changed and after three or four weeks I took it off.

Q Did you get to business? A No, I had splint and my elbow in bandages.

Q What was your business? A I was handling the estate.

Q Whose estate? A My father's estate for the executors.

Q Who is the administrator of that estate? A My mother.

Q Were the affairs of the estate many? A Yes, quite a good deal of real estate, a lot of property, mortgages, and so forth, rentals—

Q Did you receive any compensation for your work? A Yes, sir.

Q What compensation did you receive? A $100 a week.

Q Did you receive this compensation while you were sick as a result of that accident? A I received it, but I had to give half of it for the person who took care of it for me; I couldn't get around to collect the rents and take care of the affairs.

Q Who took care of it? A My brother.

William Katz, cross.

By the Court.

Q How long did that continue? A About six weeks.

Cross examination by Mr. Studer.

Q You were in the real estate business? A Yes, sir.

Q You, yourself? A Yes, sir.

Q You and Mr. Okin were partners? A No, sir.

Q You shared an office together? A I have desk room there.

Q In his office? A Yes, sir.

Q You and he? A Yes, sir.

Q Was that so on July 13, 1925? A Yes, sir.

Q What is your brother's name? A My brother's?

Q Yes. A Harry.

Q When did you borrow Mr. Okin's Peerless Phaeton? A On the morning of July 13—Monday morning.

Q Where did you borrow it from him? A Lake Hopatcong.

Q Had he gone to Lake Hopatcong with you and Miss Skinner on the previous Saturday? A No, sir, Miss Skinner was the guest of Mr. Burpo.

Q And you brought her down? A Yes, sir, on Monday morning.

Q What time did you leave Lake Hopatcong, do you know? A It was early—around 8:30, or a quarter to nine.

Q What time did this accident happen? A Around ten o'clock, this accident happened—10:15 or 10:30; it was around ten o'clock.

Q The accident happened where? A West Orange.

Q You came east on Northfield Road? A Yes, sir.

Q Had you been there on that road before? A Yes, sir.

Q You knew that it was a steep descent, did you not? A Yes, sir.

Q And it curves in and out quite a bit? Does it not? A At that point it is straight down.

Q About eight hundred or a thousand feet west of that, it is a sharp curve looking down? A Yes, sir.

Q You say it was in second gear? A Yes, sir.

Q Where did you put it in second? A At the top of the hill.

Q How far had you come down the hill? A Three or four hundred yards.

Q At that sharp bend? A Yes, sir.

Q You say you didn't see this car until it hit you? A No, sir.

Q You say you blew your horn? A Yes, sir.

Q There was at that time a thickly grown clump of trees on your left corner, was there not; on the northwest corner of Gregory avenue and Northfield Road? A I don't remember that.

Q You don't remember that? A No, sir.

Q I show you Exhibit P. 2 and ask you if that does not show the motorcycle in the front; that is right, is it not? A Yes, sir.

Q And in the rear there are a number of trees, are there not? A Yes, it is.

Q And the automobile in the right foreground facing north on Gregory avenue? A Yes.

Q And those trees are on the northwest corner of Gregory avenue and Northfield Road, are they not? A Yes, sir.

Q You say you don't recall that or did not until now? A No, sir, I didn't.

Q You blew your horn and went right across? A Yes, sir.

Q And you didn't see any motorcycle until it hit you on your left? A That is how fast he was going.

Mr. Studer: I move that it be stricken out.

The Court: Strike it out.

Q Do you know how wide Northfield Road is from amasite to amasite? A No, sir.

Q Thirty feet? A Yes.

Q Where were you with reference to Gregory avenue? A Past the corner.

Q West or east? A I was past the first corner; I was almost in the center of the intersection; almost—not quite.

Q Were you more to your left? A I was on the right side of the road.

Q How much to the right of the center were you? A Quite a ways; in fact, I was on the right side of the road coming down the hill.

Q Were you hugging the center, or to the right of the amasite? A To the right.

Q The road was torn at the amasite so that there was a sharp decline? A I don't remember that.

Q Where did your car come to a stop? A Oh, about thirty or forty feet below the corner, below the southeast corner; that would be probably about forty feet; we were upset twice.

Q How wide was Gregory avenue? You say you were in the middle of Gregory avenue. A Gregory avenue would be about forty feet, I should imagine.

Q Both are the same? A I think Gregory avenue is wider than Northfield Road.

Q When you say the widths, are you referring to the amasite only? A Yes.

Q Each has about forty feet of amasite? A About thirty or forty feet.

Q From there you went thirty-five feet? A The car was hit, and the car itself turned over twice; I imagine when I saw the car it was thirty or forty feet from the corner.

Q Where were you? A On the road; on Northfield Road.

Q How? A I was thrown out.

Q Were you near the corner? A Fifteen or twenty feet.

Q You went fifteen feet? A I was thrown from the car about fifteen feet.

Q The car, you say, was thirty or forty feet from the corner? A From where the car finally landed I was about fifteen.

By the Court.

Q Were you thrown on the first turn? A No, at the first turn I was still in the car; it was the second turn I was thrown. I was north of the car on the other side of the Northfield Road; I was thrown across the road.

Q Was this car on Gregory avenue or on Northfield Road? A On Northfield Road.

By Mr. Studer.

Q And it stopped some thirty feet east of Gregory avenue? A Yes, on the second turn; I was thrown out to the north.

Q Also to the east of where the car was? A Yes, sir, that is right; I was thrown ahead of the car.

Q Is this a left-drive or a right-drive Peerless? A Left drive.

Q Had you ever driven it before? A Yes, sir.

Q Did you have any other business but this real estate business at this time? A No, sir.

Q Were you also in the theatre business? A No, sir.

Q Were you connected with the Orpheum Theatre? A Not renting it; it was part of the real estate.

Q It was part of your father's estate of which your mother was executrix? A Yes, sir.

Re-direct examination by Mr. Marder.

Q Exhibit P. 1 is looking in which direction? A That is looking east.

Q Toward Newark? A Toward Newark; yes, sir.

Q And Exhibit P. 2 is looking which way, and along what street? A Looking north on Gregory avenue.

Q Will you indicate which way the motorcycle came when it hit you? A The motorcycle was going south on Gregory avenue.

Q Will you show us where Gregory avenue is? A This is Northfield Road and this is Gregory avenue. The motorcycle was going this way, south, and I was going east; and I was going down that hill (indicating).

By the Court.

Q Did the motorcycle strike you directly or did it hit one part of the machine and turn

slightly to the left? A The motorcycle hit me. All I remember is that it hit me and it swerved and we kept on going over like that (indicating).

Q What is that mark? A It may be the mark from the road.

Re-cross examination by Mr. Studer.

Q How far was it from Lake Hopatcong to where this collision occurred? A About twenty—twenty-two or twenty-three miles.

Q It may be more? A It may be more, but I don't think so.

Q You didn't clock it on the speedometer? A No, sir.

Q This accident happened in West Orange? A Yes.

Q About nine or ten miles from Chatham? A I don't know—it is about seven miles from Newark; seven or eight miles from Newark. I guess it is about ten miles from Newark to that point.

Q About how far from Orange? A About four or five miles.

JACOB W. MASON, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Mason, you are in the automobile business? A Yes, sir.

Q For how long a time have you been in that business? A About twenty-one years.

Q Buying and selling automobiles? A Yes, sir.

Q Used cars also? A Yes, sir.

Q For that period of time? A Yes.

Q Your present place of business is on Broad street? A Yes, sir.

Q And you sell Peerless automobiles? A Yes, sir.

Q Both new and used? A Yes, sir.

Q How long have you been doing that, since that time? A Yes, sir.

Q Peerless since when? A 1918.

Q Did you sell Mr. Okin a Peerless phaeton? A Yes, sir.

Q Did you know the car about July, 1925? Did you know its condition? A Prior to the accident?

Q Yes, sir. A Yes, sir.

Q You saw it at your place of business? A Probably four or five days before the accident happened.

Q What, in your opinion, was its value before the accident? A Between $1,600 and $1,800.

Q Did you see the car after the accident? A Yes, sir.

Q What was its value at that time? A It was of no value at all, practically, at that time.

Q You bought it from Mr. Okin? A We did.

Q What did you pay him for it?

Objected to.

Objection overruled.

Q You took it in trade? A We traded it.

Q What did you allow him? A $300.

Q And you gave him a new Peerless? A Yes.

Q What did he pay for the Peerless originally?

Objected to.

Objection overruled.

The Witness: I can't tell you.

Q Do you remember when Mr. Okin purchased the car? A Yes, sir.

Q When? A No, I don't remember that.

Q Do you remember what he paid for the car? A $3,100 and some odd.

Objected to.

Objection sustained and the answer is stricken out.

Q Will this refresh your recollection as to the time Mr. Okin purchased the car that was damaged? A That is correct.

Q Does it refresh your recollection as to when he bought this car? A Yes, I remember the time he bought the car.

Q When did he buy the car? A The date is on it.

Q That is your bill? A Yes, sir; it is August 13, 1924.

Q What did he pay for the car?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

The Witness: $3,112.50.

Q What was the condition of the car shortly before the accident?

Objected to.

Objection sustained.

Cross examination waived.

SAMUEL SOSCHIN, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Doctor, did you treat William Katz in connection with this accident? A I did.

Q Where did you treat him? A At the Beth Israel Hospital.

Q When? A I saw him first on July 15th of last year.

Q Were you the main physician? A I am associated—

Q Are you his main physician? A No, I was associated with Dr. Danzis on the case.

Q Will you tell us what condition you found him in, his ailments, if any, and what treatments you gave him? A On his admittance he had a laceration of the right side of the head over the right eye; he had contusions of his chest; contusions of his lower spine, lumbar; a laceration of the back of the left hand and a severed tendon of the left index finger.

Q Can you tell us what your treatment was; that is, yourself and Dr. Danzis, if you know? A On his admission his wounds were dressed and his chest and spine were X-rayed; the hand had been sutured at the hospital where he had been treated previously, and evidently the tendon was not sutured, because he had a total loss of function in that finger, which two days later was operated on and it was evidently restored.

Q That is what is called immobilization? A Yes, sir.

Q In connection with his chest, how would you designate the illness or the disability he was suffering? A He had no fracture; the pains that he complained of were probably due to a

traumatic pleurisy, which frequently happens after a pressure injury to the chest.

Q About how long did that continue? A He complained of pains in his chest after his discharge from the hospital.

Q In your opinion, will he recover full use of this index finger? A He will probably have some disability; he has firm adhesions of that tendon. He will never have full flexion of that finger.

Cross examination by Mr. Studer.

Q You were the intern, were you not? A No, sir.

Q You were a doctor then? A Yes, sir.

Q Dr. Danzis was the head doctor in the ward? A He was a private patient of Dr. Danzis and I am associated with Dr. Danzis; I take care of his work when he is away.

Q Do you know how long he was in the hospital? A Admitted on the 15th of July and discharged on the 25th of July.

Q You say that he probably will have some disability in what? A In full flexion; that is, in making a fist with his finger; it pops up a little.

JACOB G. RUEHL, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Ruehl, you are connected with the Newark Police Department? A I am.

Q In what capacity? A Photographer.

Q On July 13th of last year, you took these photographs up in West Orange on Northfield Road and Gregory avenue? A I did.

Q In connection with a certain accident? A I did.

Q About what time of the day? A About 11:30.

Q Are these the photographs that you took? A They are.

Mr. Marder: I offer them in evidence.

Mr. Studer: I would like to cross examine.

(A photograph is marked Exhibit P. 3 for identification.)

(A photograph is marked Exhibit P. 4 for identification.)

(A photograph is marked Exhibit P. 5 for identification.)

(A photograph is marked Exhibit P. 6 for identification.)

(A photograph is marked Exhibit P. 7 for identification.)

By Mr. Marder.

Q I show you Exhibit P. 3 for identification. Will you tell us what this location is? A This is Northfield Road looking northeast of the accident.

Q And that automobile is on what street? A Northfield Road.

Q The motorcycle is on what street? A Northfield Road.

Q On the side of Northfield Road looking where? A Looking northeast.

Q Toward Newark? A Looking toward Newark.

Mr. Marder: I offer this in evidence.

Jacob G. Ruehl, cross.

Cross examination by Mr. Studer.

Q What time did you get there to take this photograph? A Probably 11:00 o'clock.

Mr. Studer: To save time, if your Honor please, my only objection to this is that the relative positions of the two vehicles are not as they were immediately after they came to a stop. As to the physical conditions, I do not make any objections. I would like to have it understood that that is not where they were immediately after the accident.

(The photograph previously marked Exhibit P. 3 for identification is received in evidence and marked Exhibit P. 3.)

Mr. Studer: I raise the same point with reference to the next photograph. The only thing I have in mind is the position of the two vehicles.

Mr. Marder: Will you agree that Exhibit P. 4 for identification is Northfield Road looking west?

Mr. Studer: If it is.

The Witness: That is Northfield Road looking west.

(The photograph previously marked Exhibit P. 4 for identification is received in evidence and marked Exhibit P. 4.)

By Mr. Marder.

Q And Exhibit P. 5 for identification is Northfield Road looking east from a point west of Gregory avenue? A That is correct.

Jacob G. Ruehl, re-direct.

(The photograph previously marked Exhibit P. 5 for identification is received in evidence and marked Exhibit P. 5.)

Q And Exhibit P. 6 for identification is Gregory avenue looking south? A Correct.

(The photograph previously marked Exhibit P. 6 for identification is received in evidence and marked Exhibit P. 6.)

Q And Exhibit P. 7 for identification is Gregory avenue looking north? A Correct.

(The photograph previously marked Exhibit P. 7 for identification is received in evidence and marked Exhibit P. 7.)

Cross examination by Mr. Studer.

Q You are an officer of the Newark Police Department? A I am.

Q And you took these pictures in West Orange? A I did.

Re-direct examination by Mr. Marder.

Q Do you remember the ground at the time you took the picture, Exhibit P. 3? A I remember the time I had taken it.

Q Do you remember the physical situation there to a certain extent? A About, yes.

Q Do these lines mean anything to you? A These lines are from a tire.

Mr. Studer: Yes or no.

The Witness: To me personally they do not.

The Court: Ask the witness to describe the picture.

By Mr. Marder.

Q Will you describe the picture in connection with what you see here? A The picture shows the automobile and the motorcycle, and there are ruts there from the scraping of an automobile tire from the center of the street and the curb on the northeast corner of Northfield Road and Gregory avenue.

Q When you say the center of the street, which street do you mean? A Northfield Road starting from the Northfield Road from the center of the street.

Q Are there many other ruts there? A There is a smaller rut coming from the Northfield Road—from the direction of Gregory avenue toward east on the Northfield Road.

Q Going as far as what? A Beyond Gregory avenue about ten or fifteen feet.

Q Do the smaller ruts extend as far as the position of the motorcycle as shown on that picture? A They show that they came with the wider scraping on the street and the smaller scraping seemed to have come together.

Q Does it end with the position of the motorcycle as shown on this picture? A It does.

Re-cross examination by Mr. Studer.

Q You find on that picture a rut—a mark—of wheels of an automobile? A I do.

Q For how long a distance do those ruts show, or did they show on the road? A They showed on the road, but the upper part here didn't photograph as well as the lower, because

the point was to get the position of the motorcycle and the car, which wasn't really photographed with the ruts.

Q Then the ruts made by the wheels of the automobile were longer, in fact, than they appear on the photograph? A A little bit, because the camera was too close; it wasn't the object to get the ruts, but the relative positions of the two. These were made for the Police Department and nobody else.

Mr. Studer: I ask that that be stricken out.

By Mr. Studer.

Q Do you know how long, in fact, those ruts, made by the wheels of the automobile, were? A How long a distance?

Q Yes. You say they were longer than they are indicated in the picture. A I should judge ten or fifteen feet above Gregory avenue; that is, about from this corner here (indicating)—

Q Indicating the southwest corner. Is that right? A Yes, about ten or fifteen feet above this on Northfield Road.

Q Then the ruts were ten or fifteen feet west of Gregory avenue on Northfield Road? A Yes.

Q Where they first started? A Well, about; I didn't really look for that purpose.

Q I am asking you. A They were above Gregory avenue on Northfield Road about ten or fifteen feet.

Q On the northwest corner of Gregory avenue and Northfield Road there were high trees, were there not? A I can't really remember that.

Jacob G. Ruehl, re-direct.

Q I show you Exhibit P. 7 and ask you if that is not Gregory avenue looking north? A That is Gregory avenue looking north, yes.

Q And in the left foreground, which would be the northwest corner of Gregory avenue and Northfield Road, there were high trees, as indicated in that picture? A Yes.

Q How high would you say they were? Forty or fifty feet? A Forty or fifty or sixty feet.

Q There is also on the northwest corner of those two roads, is there not, a bank about four or five feet high before the trees being to grow? That is indicated on P. 6, is it not? A Yes, it is a small bank there.

Q There is a man standing beside the bank in the left foreground, isn't there? A Yes.

Q The bank is as high as his shoulder? A Yes, it looks that way, but it is not that high.

Re-direct examination by Mr. Marder.

Q About how far is it from the red line here (indicating) on Exhibit P. 6 to where this man is standing? A About a hundred—120 feet.

Q I meant this red line (indicating). A You mean from here to the Northfield Road?

Q Yes. A That is what I mean.

Q Where on Gregory avenue? A On Gregory avenue.

Q This man is about 100 or 120 feet on Northfield Road? A Yes.

Q How far is this man standing from the westerly edge of the amasite? A Oh, he is five or six feet.

Q And a similar space extends all the way down to Northfield Road, does it not, five or six feet? A It does.

Joseph F. Gartland, direct.

Q And as it gets nearer the corner, there is still more distance, isn't there? A You are going in much further than he is here.

Q I say there is still more distance between the westerly edge of the amasite and the trees? A Yes, oh, yes.

Q About how much distance as you remember it? A I should say about fifteen feet—about.

Re-cross examination by Mr. Studer.

Q Do you mean to say that the fifteen feet from the right edge of the amasite, which is the westerly edge, to the place where the man was standing is fifteen feet wide? A Up to here, to the trees.

Q Well, the roadway is only about five feet wide from the edge of the amasite to where the grass begins to grow? A Yes.

JOSEPH F. GARTLAND, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Gartland, where do you live? A Caldwell; 49 Roseland avenue.

Q Do you remember this accident? A I do.

Q About when did it happen?

The Court: Are you referring to this particular accident?

Mr. Marder: Yes.

The Court: Ask him the date.

By Mr. Marder.

Q Do you remember the accident on July 13, 1925? A I do.

Q Where were you on Gregory avenue? A Near Northfield Road.

Q About where? A About three hundred feet from the intersection of Gregory avenue and Northfield Road toward South Orange.

Q You mean you were south of Northfield Road? A Yes, facing South Orange in my car.

Q About what time was this? A Around ten o'clock, I imagine; a little after ten.

Q Did you notice anything? A Why, yes.

Q What did you notice? A I noticed the motorcycle.

Q What motorcycle? A One with a side car.

Q Did it have the words "Essex Sales Company" on it? A I think it did.

Q Which way was it going and along what streets? A Coming over Gregory avenue in the opposite direction—north.

Q Going toward Northfield Road? A Toward Northfield road.

Q What happened? A Well, he went across Northfield Road toward Mt. Pleasant avenue.

Q How was he traveling? A He was traveling at a good rate of speed.

Q About how fast? A I should judge he was going better than thirty-five.

Q Much better? A Quite a bit.

Q Did you motion to him? A I did.

Q What for? A I had a flat tire and I didn't have a pump.

Q Did you get any response? A Just he shook his head as he passed by.

Q Then what happened? A He proceeded over Gregory avenue at the side.

Q Yes? A And I didn't think there was much chance of getting a pump in that neighborhood so I decided to walk down Northfield Road and get a pump in a garage.

Q You walked toward Northfield Road? A I did.

Q Did you see this motorcycle come back? A I did.

Q Where was it traveling? On the right-hand side of Gregory avenue? A From the center of the road.

Q How was it traveling? A About the same speed.

Q Did you see the accident in question? A I did.

Q Tell us in your own words what you saw. A I was walking. I suppose I was about halfway from my car to the intersection and I was on the right-hand side of the road walking north. The motorcycle was coming down in the middle of the road, but I could see him before he got in sight and he got to the middle of the road and got to the intersection and there was a car going toward West Orange on Northfield Road, and the car was about a little over a quarter of the way across the road and I seen the motorcycle cut out at an angle as if to turn down Northfield Road toward West Orange.

Q Then what happened? A I seen the motorcycle kind of skid and then a crash.

Q Did the motorcycle slow down as it hit the automobile? A Not a bit.

Q What happened to the automobile? A I seen the automobile kind of turn and then my view was blocked.

Q What happened to the motorcycle? A I didn't see what happened to the motorcycle; I seen the driver of the motorcycle.

Joseph F. Gartland, direct.

Q What happened to him? A He took a ride through the air.

Q Was the automobile going fast before the collision? A That I couldn't say.

By the Court.

Q Did I understand you to say that the motorcycle turned to the right? A No—at the time of the collision?

Q Before the collision. A He turned to the left.

By Mr. Studer.

Q To its left? A Yes.

Q And your right? A Yes, turned to my right; the motorcycle's left.

By Mr. Marder.

Q Did it turn much? A It took a swerve right at an angle.

Q Did it travel far in that swerve? A To the impact, I guess.

Q How much distance was that? A I imagine about fifteen feet.

Q Did you see the automobile and the motorcycle immediately after the accident after they both had come to a rest? A I did.

Q I show you Exhibit P. 3. Does that accurately portray the position at rest of these two vehicles? A It does.

Q Did you examine the automobile to see what gear it was in? A Not at that time. I was pretty busy, but while we were waiting for the ambulance others examined it.

Q What happened to Katz? You didn't say what happened to him. A When I got to the

Joseph F. Gartland, cross.

scene—I was right there—Katz was sitting across the road on this side of the road (indicating).

Q Indicating the northerly side of Northfield Road? A The northerly side, yes, sir.

Q Where was this young lady he was riding with? A In underneath the car.

Q Did you see the car begin to turn over? A I didn't see the car turn over; I seen it kind of swerve; I seen the wheels go up; I seen it go kind of to one side.

Cross examination by Mr. Studer.

Q How long was it between the two times you saw the motorcycle? How long a period elapsed? Ten minutes? A No; I imagine about five minutes at the most.

Q The first car you saw was south of Northfield Road, that is, the motorcycle? A Yes, toward South Orange.

Q Did you have a car? A A Ford.

Q And you had a flat tire and no pump? A No pump.

Q You waved at him and he made no sign? A He just shook his head as he went past.

Q Then five minutes later you saw him coming toward you again from Gregory avenue in the middle? A Yes, sir.

Q And you say that the automobile was a quarter across the road when you first saw it? A A little more; perhaps between a quarter and a half.

Q When you first saw it? A Yes.

Q Were you walking? A I was.

Q Did you see the motorcycle before the automobile? A I did.

Q The second time? A I did.

Q How far north was the motorcycle when you saw it? A How far north of Northfield Road?

Q Yes. You say you saw it approaching you as you approached Northfield Road from the south? A Yes, sir.

Q How far north of Northfield Road was the motorcycle when you saw it approaching the second time? A I didn't measure it, but I should judge about sixty or seventy feet.

Q It came on? How long a time do you think elapsed between the time you saw it and the time you saw the automobile for the first time? A How long?

Q Yes. How long a time do you think elapsed? A Well, it is only a short time; I didn't have a watch in my hand.

Q I want your best recollection. A Only a short time.

Q A minute? A No, it couldn't have been a minute.

Q What was it? A A matter of some seconds; maybe half a minute; maybe not that.

Q You didn't see the automobile until it was about halfway across the road? A Yes, I was watching this fellow coming down Gregory avenue.

Q The automobile intercepted your view of him? A No; I was on the right-hand side of the corner as the automobile approached; naturally, my view was attracted to both.

Q There was a time when the automobile cut off your view of the motorcycle? A In a way, there was.

Q In fact, there was. A Yes.

Q You don't know whether he decreased his speed or not when the automobile was between

you and him in his efforts to turn to the left. You say he attempted to turn to the left? A He did turn to the left.

Q You said he did not decrease his speed? A No, he did not.

Q You didn't see him part of the time as he turned to his left? A I saw him turn to the left.

Q Did you see the impact? A I seen part of it.

Q Where did the two vehicles come together? A On the corner of Gregory avenue; on the southeast corner of Gregory avenue and Northfield Road.

Q All the way across Gregory avenue? A It was—

Q All the way across? A The impact? The impact was on the right side of Northfield Road.

Q It was all the way across Gregory avenue; that is, east of the southeast corner? A It was.

Q The whole impact took place in Northfield Road? A The collision did.

Q East of Gregory avenue upon which you were? A I wouldn't say it was east; it was right on the corner.

Q The southeast corner? A Yes.

Q You are sure of that? A Positive.

Q How far from the southeast corner were the two vehicles respectively when they both came to a stop? A How far east?

Q Yes. A When they came to a stop?

Q Yes. A One was about fifteen feet—

Q Which one? A The motorcycle—and the automobile was about twenty feet or thirty feet beyond that.

Q The motorcycle was fifteen feet east of the southeast corner of Gregory avenue and Northfield Road? A Yes.

Q And the automobile was about how far? A About twenty feet past that.

Q It is thirty-five feet east of the corner? A Yes, sir.

Q Did you see those ruts in the road from the wheels of the automobile? A Not until some time after the accident—after the accident.

Q You just saw the automobile come into your view and then you saw the collision of the two vehicles; is that right? A I did, yes.

HENRY W. CLOSS, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Closs, you are a member of the West Orange Police Department? A Yes, sir.

Q In connection with the accident which happened on July 13, 1925, were you sent to the scene of the accident? A Yes, sir.

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

Q I show you Exhibit P. 3. Does that represent what you found as to the situation of the car and the motorcycle? A Yes, sir.

Q Did you make an examination of the automobile? A Yes, sir.

Q Did you find what gear the automobile was in? A Second gear.

Mr. Studer: Yes or no, please.

Witness: Yes, sir.

Mr. Studer: May I ask a question as to when he got there?

The Court: Yes.

By Mr. Studer.

Q How long a time intervened between the time you were told to go up there and the time you got there? A I should judge about five minutes.

Q You don't know when the accident happened? A We got the call at ten o'clock.

Q You don't know whether those cars had been moved or not when you got there? A From all indications—

Q With reference to where they were when they came to a stop. A I don't know.

Mr. Studer: Then I do not think he ought to be permitted to say what happened.

The Court: Isn't there some testimony describing the position of the cars?

Mr. Studer: No.

Mr. Marder: Mr. Gartland testified as to the position of the cars.

Mr. Studer: Mr. Gartland did not refer to that picture.

Mr. Marder: Yes, he did.

Mr. Studer: A good deal could have happened between the time he was told about the accident and the time he arrived.

The Court: I will rule against the question. I will allow him to testify as to the position of the cars—

Mr. Marder: All I asked was whether he found the car and the motorcycle as indicated on that photograph. He said, "Yes." Now, I am asking him what he found with reference to the car.

The Court: I will allow it.

Henry W. Closs, direct.

The Witness: The photograph shows the condition of the car.

By the Court.

Q You describe it as you saw it? A It was pretty well wrecked up and we tried to see what gear it was in. He came down the hill in—

Objected to.

Objection sustained.

By Mr. Marder.

Q What gear was it in when you made the examination? A Second; it was jammed.

Q It was jammed? A It was in there tight; yes.

Q Did you see Mr. Katz? A Not until I got to the hospital.

Q Did you see the driver of the motorcycle, young Martin? A Not until I got to the hospital; they were taken to the hospital before the ambulance got there.

Q All the people were taken to the hospital before the ambulance got there? A No, I took Miss Skinner to the hospital in the ambulance.

Q You had difficulty in lifting the car? A It was lifted before we got there.

Q This boy died three or four hours after he got to the hospital? A He died that day; I don't know the exact time.

Q Do you remember seeing the motorcycle with the side car in that neighborhood before?

Mr. Studer: When before?

Q A short time before? A I didn't see the motorcycle before.

Jerome Nussbaum, direct.

Q You don't ever remember seeing it before? A No.

Cross examination by Mr. Studer.

Q So, I understand you say the car had been lifted between the time of the accident and the time you got there? A The woman had been—

Q So you understand, is my question. A Yes.

JEROME NUSSBAUM, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Nussbaum, you live in the City of Newark? A Yes, sir.

Q And you are associated with the Ledger? A Yes, sir.

Q What is your business? A Newspaper reporter.

Q You were an eyewitness to this accident? A I was.

Q Where were you driving? A I was immediately behind the automobile that figured in the accident.

Q Traveling east on Northfield road? A Traveling east on Northfield Road toward Newark.

Q For how long a time had you been behind this automobile? A Close to two hours.

Q You were driving the car behind him? A Yes, sir.

Jerome Nussbaum, direct.

Q Who was in the car with you? A My wife.

Q How fast were you traveling down Northfield Road toward Gregory avenue?

Objected to.

Objection overruled.

Witness: I should say about eighteen or twenty miles.

Q You say you saw this accident? A Yes, sir.

Q Tell us what you saw? A I was about seventy-five feet behind the Peerless car and the Peerless car had just about nosed past the Gregory avenue intersection, that is, the full length of the car was past the avenue, when a streak came along from the south side, going south, and crashed into the motorcycle and the automobile turned turtle; the motorcycle turned turtle.

Q How many times did the automobile turn over? A Twice.

Q I show you Exhibit P. 3. Does this truly show the position of the automobile and the motorcycle when they came to a rest after the accident? A Yes, sir; that is the position.

Q The motorcycle in traveling along Gregory avenue was traveling on the right-hand side, the left-hand side, or the center of the street? A From the car behind it looked about in the center to me.

Q Traveling fast? A Like a streak.

Mr. Studer: I move that it be stricken out.

Witness: There was a hedge there; you really can't see.

Jerome Nussbaum, cross.

By the Court.

Q Was it going fast? A Yes, sir.

By Mr. Marder.

Q And the Peerless car ahead of you, was it on the right-hand side or on the left-hand side or in the center of Northfield Road? A It was on the right-hand side of the road.

Cross examination by Mr. Studer.

Q You mean the right-hand side of the amasite strip? A On the strip on the right-hand side designated as center; on the right of the center.

Q How wide a strip was there from the right-hand side of the edge of the amasite to the edge of the road down Northfield Road, do you recall? A Do you mean this path from here to the center (indicating)?

Q No. That is Gregory avenue. I mean the right-hand side of Northfield Road, the edge of the amasite to the edge of the road. Do you know how wide that strip was? A I should say that strip was possibly four feet of dirt.

Q There was a steep descent down there which you were traveling on on Northfield Road? A Extremely steep.

Q Do you remember turning a sharp bend about eight hundred feet west of the intersection? A Yes.

Q Turning sharply to the south? A Yes, sir.

Q And you recall there was a thickly grown lot of trees and shrubbery on the northwest corner? A Yes, sir.

Q That screens the view? A Yes, that is, you can see just a part at an oblique view.

Q That foliage extends about a hundred feet up? A I wouldn't say, but I do remember there is foliage at the corner, that is, off the corner; the picture I just looked at shows it.

Q How high? A I don't think it is over four feet or five feet.

Q I show you a photograph, Exhibit P. 2. This, it is agreed, is the northwest corner of Gregory avenue and Northfield Road. I direct your attention to the foliage and trees. Is it more than five feet high? A The trees are.

Q Fifty feet high? A The trees are; there is a slope there; the trees do not come down to the slope; the trees are about ten feet back.

Q Between the trees and the road there is shrubbery? A Yes.

Q Five or six feet high? A Yes.

Q What height are the trees? A They are very high; I don't know what height.

Q What time had you left Lake Hopatcong? A About 8 o'clock.

Q It might have been 8:15? A It might have been a few minutes after 8.

Q Do you know what time this happened? A It was about 10.

Q You are not a reporter? A Yes, sir.

Q Aren't you in the real estate business? A It is a side line.

Q In the side line, you maintain an office with William Katz and William Okin? A I hadn't gone into it yet.

Q You have an office there? A We are just fitting it up.

Q Did this collision occur, in your judgment, I think you said, as the Peerless was a whole car-

length out on Gregory avenue coming down Northfield Road? A Yes, sir.

Q It had not gone across the middle of the road of Gregory avenue, had it? A I was behind; I couldn't say exactly. I think it was just past the curb line; I don't know just exactly how much of that street had been covered.

Q Did you see the impact? A I certainly did.

Q What is your best recollection of where the two came together with reference to the center of Gregory avenue? A It seemed to me it would be a bit more toward the southeast corner.

Q Did you see these brake marks on the road afterwards? A These ruts? I saw some ruts, yes, sir.

Q Did you observe that they covered a distance of forty or fifty feet? A I don't think they did. The rut marks I saw were right about maybe four or five feet from the southeast corner of those two streets; they were discernable at that point.

Q Were you here when the police photographer testified? A Yes, sir.

Q Who was this young lady with Mr. Katz? A Miss Skinner.

RAYMOND MOONEY, for the plaintiffs.

Direct examination by Mr. Marder.

Q Do you go to high school, Mr. Mooney? A Yes, sir.

Q Where do you live? A West Orange.

Q Do you remember the accident on July 13, 1925? A I do.

Q Did you see it? A I did.

Q Where were you going at the time you saw it? Where were you? A Proceeding up Northfield Road in the automobile going in a westerly direction.

Q With whom were you? A Mr. Charles Ingrund, who was driving the car.

Q Did you see the automobile coming toward Newark? A I did.

Q Where did you see it? A About 300 feet from the point of contact.

Q From the accident? A I was about 300 feet in the car from it.

Q I mean the Peerless car; where did you see that before the accident? A Coming down the hill in an easterly direction; I saw it when it was about forty feet before the point of contact.

Q Did you observe whether it was going fast or not? A It was going rather slowly.

Q It was traveling on which side of the street, its right or left or the center on its right? A On its right.

Q Did you see the accident? A I did.

Q Tell us what you saw in connection with the motorcycle. A I saw the automobile first. When it was about half way across the intersection, my left, of the intersection, the motorcycle shot out of Gregory avenue, struck the car in the center about back of the front door, about opposite the driver. The front of the motorcycle hit the car; the motorcycle bounded back; the car, the brakes of which had been applied—

Objected to.

By the Court.

Q How do you know the brakes were applied? A I heard the screeching and saw the marks after the accident.

Q Proceed. A The motorcycle turned as if to attempt to make the turn and proceed down Northfield road but he was going too fast and he—

Mr. Studer: I move to strike that out.

Stricken out.

By the Court.

Q Tell us what you saw. A The motorcycle swerved to the southeast corner of Northfield Road and Gregory avenue, being perpendicular to the car; it made a complete revolution; it made a half turn. The roof snapped off. After the second turn of the car it landed directly on top of the woman.

By Mr. Marder.

Q What happened to the driver of the motorcycle? A He was thrown out and he was in a pretty bad condition; he landed in front of our car.

Q About how fast was the motorcycle traveling at Gregory avenue? A Rather fast.

Q Can you give us any idea of about how fast it was going? A I am no judge of speed.

Q By that you mean you cannot measure it in so many miles an hour? A I cannot.

Q Did you examine the automobile after the accident—immediately after the accident? A I did.

Q Did you look at the gear to see what gear it was in? A I did.

Q What gear was it in? A Second.

Q I show you Exhibit P. 1. Is this a true picture of the car after it came to a rest? A It is.

Q I show you Exhibit P. 3. Is this a true picture of the car and motorcycle after they both came to a rest? A It is.

Q Did the motorcycle slow down before the impact? A There was practically no time to do so.

Mr. Studer: I move that it be stricken out.

Stricken out.

Q Did it slow down or not? A I feel indisposed to answer that question because I don't know whether it did or not.

Cross examination by Mr. Studer.

Q Are you only in high school? A I am.

Q You say the man from the motorcycle landed in front of you? A In front of our car.

Q And your car was on the right-hand side of Northfield road going west? A Right.

Q And he made some effort to turn towards his left, that is, in the direction from which you were coming— A He did, yes.

Q Where, with reference to the corner, did the impact take place? A A little to the southeast of the center of the intersection.

Q Southeast? You heard his screeching of brakes being applied? A I heard several noises, but I am sure one of them was the screeching of brakes.

Q Did you afterwards see ruts of brakes having been applied sharply? A I did.

Q Extending over forty or fifty feet? A Not that.

Q Are you a judge of distance? A Better than of speeds.

Q What was the distance? A One was the scraping of a tire and one was a dig; which one do you mean?

Q Tell us both. A The dig was about three feet and the scraping of tires ten or fifteen feet.

Q Your attention was directed primarily to which? A I had plenty of time after the accident to look over it. I live near there; there is still a dig in the road.

Q In the amasite? A Please inform me what that means.

Q Don't you know what amasite is? A Ignorance is bliss.

Re-direct examination by Mr. Marder.

Q Did you see this motorcycle before the accident? A Not immediately before; I had seen it around West Orange at various times.

Q The same driver? A I can't recognize the driver.

Q But you saw the same motorcycle?

Objected to as immaterial.

Q Did you see a motorcycle? A I seen a motorcycle with "Essex Sales" on the side; I don't know whether it is the same motorcycle; I presume it is.

The Court: Strike that out.

Charles L. Ingrund, direct.

Q Did you see any motorcycle with the words "Essex Sales Company" on it?

Objected to.

Objection sustained.

CHARLES L. INGRUND, sworn in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Ingrund, where do you live? A Gregory and Mt. Pleasant avenues.

Q West Orange? A Yes, sir.

Q Mt. Pleasant avenue runs parallel with Northfield Road? A It is the beginning of Northfield Road or, rather, of Gregory avenue.

Q It is about one block north of Northfield Road? A Yes.

Q It is the next block north, parallel to Northfield Road? A Yes, sir.

Q What is your business? A Water department.

Q West Orange? A Yes, sir.

Q How long have you been living up there? A Six years.

Q Did you see this accident on July 13, 1925? A I believe I did.

Q Where were you, and where were you going? A I was going about my work, going up Northfield Road, going west.

Q Toward Gregory avenue? A Yes, sir.

Q Did you notice this Peerless automobile coming along Northfield Road toward Gregory avenue? A I did.

Charles L. Ingrund, direct.

Q Going fast? A No, it didn't appear to be.

Q Was Mr. Mooney, who just testified, in the car with you? A Yes, sir.

Q Your car, was it? A The company's car.

Q But you were driving it? A Yes, sir.

Q Tell us what you saw about this accident. A Well, I was going westerly about 300 feet from the accident and my first attraction was drawn to a noise and as I looked up, the car and the motorcycle had collided and the car seemed to have swerved south; the rear part of the car.

Q Did you see the motorcycle coming out of Gregory avenue? A Yes, sir.

Q Going fast? A I don't know; it was going fairly fast, yes; it was going that fast it couldn't stop.

Mr. Studer: I move to strike that out.

Stricken out.

Witness: It was.

Mr. Studer: I move to strike that out.

Stricken out.

By Mr. Marder.

Q How fast was it going? Are you a judge of speed? A I should judge about thirty-five miles an hour.

Q Are you a judge of speed? A I am; pretty good.

Q How fast was the Peerless car coming? A Well, it appeared about eighteen or twenty.

Q What happened to the car and the motorcycle as you saw it? Tell us in your own words. A I am telling you it is hard to tell for the simple reason that one car turned east out of

Gregory avenue and the other car was coming down Gregory avenue and they both met—the motorcycle hit just about evenly with the back door of the car.

Q Did the motorcycle slow down before the impact? A It didn't appear to.

Q After the impact, were the automobile and the motorcycle both setting on their respective wheels? A No.

Q What happened? A Well, the cars were sidewise and turned over.

Q Which? The Peerless? A The Peerless, yes, sir.

Q I show you Exhibit P. 3. Is this a true picture of the motorcycle and the Peerless when they came to a rest immediately after the accident? A Yes, sir.

Q I show you Exhibit P. 1. Is this a true picture of the Peerless car right after the accident? A Yes, sir.

Q You are pretty well acquainted with the locality there. Do you know the width of the two streets, that is, Gregory avenue and Northfield Road? The width of the paved portion of the roads? A Northfield Road is about thirty-five and Gregory avenue runs about forty.

Q I show you Exhibit P. 6. Do you recognize the locality? A Yes, this is Gregory avenue going south.

Q And this road here, going east— A Northfield Road, yes, sir.

Q I understood you to say that the accident occurred by the motorcycle's going south along this road and the automobile's going east along this road (indicating); that is true, isn't it? A Yes, sir.

Q From where this man is standing to the westerly side of the amasite, about how much distance is that? A About five feet.

Q And from this man to about where the trees would be in back of that would be about how much distance? A About eight feet.

Q I mean shrubs? A That is hedge, yes.

Q At about the intersection of Gregory avenue and Northfield Road, about how far is the westerly line of the amasite and the hedge? A About ten feet.

Q How far is it from the westerly side of the amasite to this point (indicating)? A About six feet; that is about six feet, I know that.

Q You see this post here? A Yes, sir.

Q Do you recognize that post? A Yes, sir.

Q About how far is that from the westerly side of the amasite? A That is eight feet.

Q Do you see this boy standing here (indicating)? A He is on the other side.

Q He is on the southerly side of Northfield Road? A Yes.

Q About how far is that point from this sidewalk or curb line here? A From that property line to the curb is about twelve feet.

Q This boy is about twelve feet away? A Yes.

Q As a man got closer to this intersection, could he see farther up this road?

Objected to as calling for a conclusion.

Objection sustained.

Q As one got nearer Northfield Road, in order to look, could one see up farther?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q From your observation, as you got nearer Northfield Road, traveling south along Gregory avenue, could you see farther up Northfield Road? A No, sir, from the curb line you couldn't see over ten feet.

Q From which curb line? A The westerly curb line from Gregory avenue, that is, from the curb line out, you can't see over ten or twelve feet.

Q From where? A This side here (indicating); that hedge is too heavy.

Q But the nearer you got to Northfield Road, the farther up you could see?

Objected to.

Objection sustained.

Q Could you see farther up as you got nearer Northfield Road? A Hardly.

Q Suppose you were right on the corner, could you see farther up? A You would have to be on the corner.

Cross examination by Mr. Studer.

Q It would have to be on the corner to see farther than ten or twelve feet? A With the hedge, yes.

Q The hedge is on a bank four or five feet above the road? A The hedge is twelve feet high.

Q It is very high and very thick and was then? A Yes, sir, it hasn't been cut down in fifteen years.

Re-direct examination by Mr. Marder.

Q Did you examine the automobile, the Peerless, right after the accident? A Yes, sir.

Q Did you examine it as to its gear? A Yes, sir.

Q What gear did you find it in? A Second speed.

Q Did you ever see this driver of the motorcycle before?

Mr. Studer: Just yes or no.

Witness: Yes, sir.

Q Did you see him a short time before the accident? A That day?

Q Before that day.

By the Court.

Q Did you see him at all before the accident that day? A No, sir.

By Mr. Marder.

Q Did you ever seen him before? A Not that day.

Objected to.

Objection sustained.

Q Did you see him before that day?

Objected to.

Objection overruled.

Mr. Studer: Before on that day, or some other day?

The Court: Yes, the driver of that motorcycle and a side car. I will allow it.

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

Exception noted as ground of appeal.

By Mr. Marder.

Q Did you see him before that day? A Yes, sir.

Q On the same motorcycle?

Objected to.

Objection sustained.

Q When did you see him before that day?

Objected to.

Objection sustained.

Q Where did you see him?

Objected to as immaterial.

Objection sustained.

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

Exception noted as ground of appeal.

Q What was the last time you saw him before the accident?

Objected to as immaterial.

Objection sustained.

The Court: What do you want to prove?

Mr. Marder: I want to show that this boy was sent quite often on this motorcycle.

The Court: Ask him that.

Mr. Marder: I did ask him.

The Court: Ask him directly.

By Mr. Marder.

Q Did you ever see that motorcycle before?

Objected to.

Objection overruled.

Witness: Yes.

Q Were the words, "Essex Sales Company" on it? A Yes, sir.

Q Where? A Gregory avenue.

Q How often—

Objected to as immaterial.

Objection sustained.

The Court: Ask him whether he saw that man.

Q Did you see this boy drive this motorcycle before? A Yes, sir.

Q When?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

Witness: I can't name the time I saw him anyhow.

Q Did you see him within a week? A Yes.

Q Did you see him often?

Objected to as immaterial.

Objection overruled.

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

Exception noted as ground of appeal.

Witness: Well, I saw him about an average of two or three times a week.

Q On Gregory avenue? A Yes, and how I know him is he rode without his coat on; he had a white shirt on. I have seen him go there a good deal. I go by there a great deal. We passed each other a great deal.

Q Did you notice anything else about the car?

Objected to as immaterial.

Objection sustained.

Q Did you notice anything else about him?

Objected to.

Objection sustained.

Q Was it on week days or Sundays that you saw this boy?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

Witness: Week days.

Q When? In the morning or afternoon? A In the afternoon.

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

Q Was there anything in particular that made you notice this boy?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Re-cross examination by Mr. Studer.

Q You said, I think, when Mr. Marder first asked you if you had ever seen that boy with that motorcycle that you couldn't say you had. A That day.

Q He asked you about other times? A I meant that day; it was a confusion and I didn't know.

Q There was a confusion? A Right here.

The Court: That was the question, "That day."

By Mr. Studer.

Q You say you saw him before because he had a white shirt on? A Yes, sir.

Q You recognize a man on a motorcycle because he wears a white shirt? A Not necessarily; if you see a person with a white shirt you would know them, wouldn't you?

Q You also said you were going up the hill driving this car? A Yes, sir.

Q Was it a Ford? A Yes, sir.

Q For the water company? A Yes, sir.

Q This high school boy was working with you? A Yes, sir.

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

Q You said your attention was first attracted by a noise? A Yes, sir.

Q And then you looked and saw that that noise was caused by the car and motorcycle—that they had collided? A Yes, sir.

Q That is when you first saw those two? A Yes, sir; well, I saw the car coming down the hill, I didn't pay—

Q Was there confusion also when you said the first time your attention was attracted was when you heard a noise? That is the first time you saw them? A I was looking up all of the time, driving.

Q That is the first time you saw them? A When they collided.

Q That is what you said before, and that is what you say now? Is that your story? A Yes, sir.

Q Where did they collide with reference to Gregory avenue and Northfield Road? A They collided on the northerly corner of Gregory avenue and Northfield Road.

Q The northerly corner would be the right corner going up the hill as you were going up? A The right-hand side, yes, sir.

Q The northerly corner? A The northeasterly corner, yes, sir.

Q So that the automobile was on the northerly side of Northfield Road coming down, is that right? A Yes, sir.

Q You said that one would have to be on the corner of Gregory avenue and Northfield Road to see more than ten or twelve feet up Gregory avenue? A Yes, sir.

Q And the same applies to one on Northfield Road looking out Gregory avenue? A Yes, sir.

Q That works both ways, that screen of the trees and hedge? A Yes, sir.

Re-direct examination by Mr. Marder.

Q I show you Exhibit P. 3 again. Do you recognize the locality? A Yes, sir.

Q This is what corner of the intersection of Northfield Road and Gregory avenue (indicating)? A That is the northeast corner.

Q Did the collision take place at that corner? A Yes.

Q You are sure that the collision took place on this corner? Or, wasn't it on this corner that it took place? A No, this was coming down, and the automobile was going east on the north side.

Q The Peerless car you say you saw was that on its right coming down? A Yes.

Q Then it was on the south side of Northfield Road coming down?

Mr. Studer: That is very leading.

Mr. Marder: I think he is a little bit confused.

Witness: He was coming down this side (indicating).

Q That is the south side of Northfield Road? A But he was landed over here (indicating).

Q Whom are you talking about? A The automobile.

Q You mean the man in the automobile? A No, the car itself. This car came this way (indicating) down hill; this motorcycle came this

way. Now, when the motorcycle came around the corner, this man applied his brakes here (indicating) which swung him. This man came down with the motorcycle and caught him right here (indicating).

Mr. Studer: Put a mark there, please.

Witness: I believe there is a dent right in the road where they hit.

Q Does this line mean anything to you? A (The witness shakes his head.)

RAYMOND MOONEY, recalled in behalf of the plaintiffs.

Direct examination by Mr. Marder.

Q Mr. Mooney, will you show us on this photograph, Exhibit P. 3, where you say the collision took place, first giving the course of the Peerless on the photograph, so that the jury can see? A This is Gregory avenue running north and south; this is Northfield Road running east and west. The Peerless car was coming down Northfield Road in an easterly direction; the motorcycle was coming in a southerly direction. They met about here (indicating).

Mr. Studer: Indicating where, please?

Witness: If this is the center of the intersection, the place of contact was southeast of the place of intersection.

By Mr. Marder.

Q The center of the intersection of the two streets? A That is what I said before.

Cross examination by Mr. Studer.

Q You examined that photograph with Mr. Marder very carefully just before you took the stand right behind the jury box? A I did.

By Mr. Marder.

Q What was your conversation with Mr. Marder?

Objected to as immaterial.

Objection overruled.

Witness: You asked me the same thing as you asked here, in what directions they were coming, and where they hit.

Q And your answer was the same? A Yes.

PLAINTIFFS REST.

DR. LAWRENCE A. CAHILL, sworn in behalf of the defendant.

Direct examination by Mr. Studer.

Q You are a practicing physician? A Yes, since 1911.

Q Where do you practice? A Newark, New Jersey.

Q You have had hospital experience? A Yes, I am at the present time the medical director

of East End Hospital in Newark and medical director of the Hudson County Rehabilitation Hospital, Jersey City, and an orthopedic surgeon.

Q Did you make an examination of William Katz, one of the plaintiffs here? A Yes, on April 10, of this year.

Q Where was it, please? A At my office, Broad street, Newark.

Q How extensive was it? A I went over him very carefully.

Q What did you find? A An inspection showed a mark on his forehead on the outer border of his hair line.

By the Court.

Q It showed a scar? A Yes, the scar showed there were one or more layers of skin missing which, I think, was the result of a friction rub.

By Mr. Studer.

Q How big a scar is that? A The scar is about a half inch long.

Q It is on the right forehead? A Yes. It was not adherent to the underlying tissues; it was simply confined to the layers of the skin.

Q What else did you find? A There is no other evidence about this head or body or extremities, with the exception of his left index finger.

Q What is on that finger? A Inspection of the finger showed a scar made about an inch above and below the ingual phalangeal joint of the first finger on the dorsal surface. This scar was made by a surgeon. It was a sharp scar and was healed very nicely.

Q What do you say as to whether or not that scar indicates any loss of flexibility? A I tested it very carefully; there is no loss of function.

Q What do you say as to a permanent disability of that man? A No permanent disability and no loss of function.

Q There were two scars? A There were two scars.

Cross examination by Mr. Marder.

Q How extensive an examination did you make of Mr. Katz? A From head to foot.

Q Did he disrobe himself? A Partly.

Q What did he take off? A His hat and coat and that was all; he opened up his vest and shirt.

Q Did he open up his shirt? A Yes.

Q How long did the examination take? A I think about twenty minutes or a half an hour.

Q This examination took place about 12 o'clock, didn't it? A Around noon hour.

Q Around 12 o'clock on Saturday—last Saturday? A Yes.

Q Isn't it true that all you did was look at Mr. Katz's hands and finger? A No, just what I described.

Q How did you examine his chest? A By listening to his heart.

Q With a stethescope? A No, my ear.

Q Are you positive there is no loss of function to this index finger? A Yes, sir.

Q Is the scar there yet? A Yes, sir.

Q Will that scar ever heal? A It is well healed; the scar is healed; the wound is healed.

Q The scar on Mr. Katz' face, will that ever disappear, or is it permanent? A It may disappear.

Q In fact, you are inclined to think it will disappear.

Mr. Studer: I don't think he said anything about the scar on his face; it is the forehead.

Q The doctor knew what I was talking about. A The scar on his forehead may disappear.

Q You say this examination took you about a half an hour? A About that, approximately.

EDWARD B. GUERIN, sworn in behalf of the defendants.

Direct examination by Mr. Studer.

Q Mr. Guerin, you are connected with the Dunham Body Company in Newark? A Yes, sir.

Q You have been connected with them for how long? A Seven years.

Q What is their business? A Body building and repairing.

Q Of automobiles? A Of automobiles.

Q Did you make an examination of a Peerless phaeton, 1924 model, I think, belonging to William Okin, I think, some time in July or thereabouts, in 1925? A Yes, sir.

Q How extensive was your examination? What did you do? A Looked the entire car over.

Q Did you make any estimate as to what you thought would be the cost to repair that car? A And a list, yes, sir.

Q By that you mean a list of the parts that had to be repaired? A Yes, sir.

Q Have you a copy of that estimate with you? A Yes, sir.

Q How long have you been making estimates of repairs to automobiles? A Fifteen years, I guess.

Q Has the work during that period been done under your supervision according to your estimates? A Yes, sir.

Q And have the charges that have been made, been according to your estimates, and been correct? A Yes.

Q You made an estimate of what it would cost to put the car back in shape? A Yes.

Q As to the entire damage to the car, as I understand it?

The Court: This man is not qualified except as to body building. You qualified him as an expert on bodies.

Mr. Studer: I think he said they repair general mechanism of cars; the automobiles as well as the bodies.

By Mr. Studer.

Q Does your company only do body work? A We make bodies and repair bodies and chassis and cars.

Q Was there anything about the car which your company was not able to do in repairing? A No, sir, we could do it all ourselves.

Q Does your estimate include the total cost of repairing the car, body and chassis? A Yes, sir.

Q You have been doing estimating for fifteen years? A Yes, sir.

Mr. Marder: I do not think he is qualified.

The Court: Do you wish to cross examine as to his qualifications?

Mr. Marder: Yes.

Cross examination by Mr. Marder.

Q How many automobiles, generally has your company repaired during the past year, let us say? A Small and large, it might run up to nine or ten thousand, small and large.

Q Do they fix motors, too? A Yes, sir.

Q Are you acquainted with the value of motors? A Yes, sir.

Q And how much it is necessary to expend in order to repair motors? Are you personally acquainted with the amount of money it may be necessary to expend to repair a motor? A Yes, sir.

Q During the past year, how many automobiles has your concern repaired, including not only the bodies, but also the motor and other parts? A I couldn't answer how many; we are doing it every day.

Q More than fifty? A Oh, yes.

Q Do you prepare the estimates on every job? A A good half; there are three of us.

Q Do you figure the estimates aside from body building and chassis building? A Yes, sir.

Q Where is your company situated? A On Miller street, corner avenue B.

Q And do you hold yourselves out as a motor repair shop? A Body building is our principal business, but we keep two or three good mechanics on engine work who specialize on accidents.

Q Do you, of your own knowledge, know the value of the work done by motor mechanics? A On repair work, yes.

Q Do you know that of your own knowledge? A On repair work, yes.

Mr. Marder: I don't think he is qualified yet.

The Court: Proceed.

Re-direct examination by Mr. Studer.

Q What was your estimate for the total cost of repairing that car to put it back in condition? A $1,097.

Re-cross examination by Mr. Marder.

Q Would the car then be as good as before the accident? A We put our work back—

Q Answer yes or no. A We make a good job every time and stand back of our work.

Q There is no doubt about that, but would the car be as good a car—would it be worth as much money after you had made the repairs and expended $1,097 on it as it was before the accident? A If a man didn't know the car he would accept it.

Q But suppose he knew the car. A I would be willing to take the car and use it myself; I will use it if it goes through our shop. I will take any kind of a risk of new parts.

Q Suppose you were in the business of buying and selling cars? A I am not in that business.

Objected to.

Objection sustained.

Recess from 1:00 to 2:00 P. M.

After Recess.

CLIFFORD L. LANDMESSER, sworn in behalf of the defendants.

Direct examination by Mr. Studer.

Q Mr. Landmesser, what is your business? A Engineer and land surveyor.

Q Where is your office? A City Hall, Newark.

Q You are connected with the City of Newark? A Yes, sir.

Q Did you, at my request, make some measurements recently of the intersection of Northfield Road and Gregory avenue, West Orange? A Yes, sir.

Q When did you do that, please? A April 10, 1926.

Q Did you measure the amasite from curb to curb on Gregory avenue at its intersection and directly north of its intersection with Northfield Road? A I did.

Q How wide is it? A From the south curb of Northfield Road to the edge of the pavement there is a grade or curb only on the south side—it is twenty-five feet; that is Northfield Road west of Gregory avenue; east of Gregory avenue it is 25.7 feet.

Q How wide, if any, is the shoulder? A About four feet.

Q How wide is Northfield Road? A South of Northfield Road the amasite pavement is 20.50 feet and north of Northfield Road 19.50 feet.

Q Is there any shoulder on Gregory avenue? A Only on both sides of the road there is a shoulder.

Q On Gregory avenue? A Yes.

Q Did you measure the grade at Northfield Road? A I did.

Q Did you measure the length of Northfield Road from the point of intersection on those two streets up to a turn in the road just west of that road? A I did.

Q How far is it? A 300 feet.

Q Is there a grade on that hill from that point to the intersection? A Yes, sir.

Q What is the grade? A Seven feet three inches to the hundred.

Cross examination by Mr. Marder.

Q Gregory avenue, however, at the point of intersection, is much wider than twenty-five feet? A The amasite portion is what I measured.

Q Did you measure the street from grass line to grass line? A I did not.

Q But it is perhaps twice the amasite itself? A There is approximately a four to five-foot shoulder on each side of the amasite portion, about four and a half feet.

DAVID A. DEPUE, sworn in behalf of the defendants.

Direct examination by Mr. Studer.

Q Are you connected with the Essex Sales Company, the defendant in this case? A I am.

Q What is your relation with the company? A I am president.

Q Where does your company do business? A 87 Halsey street, Newark.

Q Was it there on July 13, 1925? A It was.

Q What was the business of the company? A Wholesale brake linings, principally.

Q Were you in your office that day? A I was.

Q Did you employ William Martin? A I did.

Q He was a boy of about eighteen? A Yes.

Q And he was in your employ that day? A Yes.

Q How long had he been in your employ up to that time? A About four months.

Q What was his job? A Delivery and picking up brake bands.

Q Did your company on that day own a motorcycle with a side car on it? A It did.

Q Are you familiar with the motorcycle? A I am.

Q Were you then? A Yes.

Q Did you make an inspection on or prior to July 13, 1925, with reference to its brakes? A I had ridden it two days before.

Q Answer my question. A I have.

Q How shortly before July 13th? A The Saturday before.

Q What did you find the condition of the brakes? A Very good.

Q Did you give Martin anything having to do with your company on that motorcycle on July 13, 1925? A Yes.

Q What did you tell him to do? A I told him to take a brake lining cutter up to the firm of Barone & Tordell in West Orange, wait for the cutter to be repaired and bring it back as soon as possible.

Q What time did you tell him? A 9:15.

Q Did he ever come back? A No.

Q Did you subsequently learn that he had been in a collision? A Yes.

Q Did you go to the scene of the accident? A I did.

Q About when did you get there, do you know? A About a quarter before eleven.

Q With reference to Barone & Tordell's place, where was it? A A mile and four-tenths from the intersection of Gregory avenue and Northfield Road; that is the distance from the shop to the intersection.

Q Had your company any business on July 13th which required the presence of Martin at Gregory avenue and Northfield Road, West Orange? A We did not.

Q Had you ever gone from your place of business on Halsey street to Valley street, Orange, where Barone & Tordell's shop was, by motor or motorcycle? A Yes, I have driven that distance.

Q Did your course, or does the course, or did the course between those two places take you to Northfield Road and Gregory avenue, West Orange? A It does not.

Q You say that you instructed Martin as to what to do with reference to the brake lining cutter? A I did.

Q Was anybody present when you gave him those instructions? A There was.

Q Who was that? A William Culbert.

Q Is he still in your employ? A He is.

Q When did you learn of this accident? A About 10:30.

Q Ten-thirty? A Yes.

Q Had you, prior to learning of that, had any telephone talk with Barone of Barone & Tordell? A I had.

David A. Depue, cross.

Q Do you know what time that talk was? A About, yes.

Q What time? A About 10:15.

Q What was your talk?

Objected to.

Objection sustained.

Q Why did you call Barone? A I wanted the cutter back.

Cross examination by Mr. Marder.

Q You are acquainted with the locality of this accident, are you? A I am.

Q And the street running immediately parallel with Northfield Road and immediately north of Northfield Road, is Mt. Pleasant avenue? A Yes.

Q If two persons were coming along Gregory avenue from Mt. Pleasant avenue toward Northfield Road, that person would then be heading toward or in the general direction of Barone & Tordell? A He would be going south.

Q Can't you answer my question yes or no? A Generally, yes.

Q Specifically. A He would never reach Barone & Tordell's if he kept going straight ahead.

Q It could have been on his way to Barone & Tordell's? A Yes.

Q In fact, it is as direct a way as there is to Barone & Tordell up Northfield Road, isn't it?

Mr. Studer: I object, because that assumes a right to be in West Orange.

David A. Depue, cross.

The Court: I will overrule the objection.

The Witness: From Mt. Pleasant avenue?

Q Yes. Along Gregory avenue to Mt. Pleasant avenue. A It is as direct as any other.

Q Did this boy Martin ever use the motorcycle for his own purposes with your consent? A No.

Q Positive about that? A Positive.

Q Where was the motorcycle deposited? A 34 Essex street, Newark.

Q Did he ever drive home with it? A Not to my knowledge.

Q Do you know where this boy Martin lived? A Sussex avenue.

Q Is Essex street anywhere near Sussex avenue? A No.

Q But you remember specifically that you told him to have this brake lining cutter fixed at Barone & Tordell's? A I do.

Q Did you tell him anything else at that time? A I told him to wait for it until it was finished and bring it back.

Q Was this boy always prompt in his errands? A Yes.

Q Haven't you any customers in the locality —not the immediate locality—but in the locality of Gregory avenue and Northfield Road? A No, we have not.

Q Is DeCamp on Mt. Pleasant avenue a customer of yours? A He is.

Q That is nearby? A We do not deliver there.

Q That is not the question. Answer my question. That is nearby? A It is in the general direction; it is not near Gregory avenue.

David A. Depue, cross.

Q You can reach it by going over Gregory avenue; it runs into Mt. Pleasant avenue? A Yes, sir.

Q How many boys have you had since?

Objected to.

Objection sustained.

Q Was this boy always a careful driver to your knowledge?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Was any alleged recklessness on the part of this boy ever reported to you?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

The Court: Are you pleading want of skill or carelessness?

Mr. Marder: I didn't, but I pray an amendment to my complaint in that regard.

The Court: Unless Mr. Studer consents it is out of time.

Mr. Studer: I can't consent to the amendment.

The Court: I will not allow it.

David A. Depue, re-cross.

By Mr. Studer.

Q Had you any business with DeCamp or anyone else that required the presence of that boy in the vicinity of Gregory avenue and Northfield Road on that day? A I did not.

Re-cross examination by Mr. Marder.

Q Are you the sales manager of the Essex Sales Company? A I am the president.

Q Were you the sales manager? A No.

Q Were you the sales manager there that day? A Yes.

Q Did this boy know that DeCamp was a customer of yours?

Objected to.

Objection overruled.

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

Exception noted as ground of appeal.

Witness: I don't know.

Q Did this boy make collections too? A Of money?

Q Yes. A No.

Q Did you have any other customers in that vicinity besides DeCamp? A No.

Q Don't you sell to the Pleasantdale Garage in Pleasantdale? A No.

Q Haven't you ever done that? A No.

WILLIAM F. CULBERT, sworn in behalf of the defendant.

Direct examination by Mr. Studer.

Q Mr. Culbert, do you work for the Essex Sales Company? A Yes, sir.

Q In what capacity? A Service manager.

Q Did you work for the Essex Sales Company on July 13, 1925? A Yes, sir.

Q Were you present that morning at that place of business at the time Mr. Depue gave some instructions to William Martin? A Yes, sir.

Q Did you hear the instructions he gave Martin? A I did.

Q What did he say? A "Go to Barone & Tordell's for the brake lining cutter and have it repaired, wait for it and bring it back."

Q Did he ever come back? A No.

Q What time was that? A About a quarter past nine.

Cross examination by Mr. Marder.

Q What time? A About a quarter past nine.

Q Where were you at the time? A At the bench desk at the office.

Q How far from Mr. Depue were you? A About two feet.

Q What were you doing? A Making out an order.

Q And listening to Mr. Depue at the same time? A Yes, sir.

Q How long have you been in the employ of the Essex Sales Company? A Since July 6, 1925.

Q Since the 6th of July? A Yes, sir.

Q What words did he use? A "Go to Barone and Tordell's, have this brake lining cutter repaired and bring it back when he is finished with it."

Q Can you repeat any other part of the conversation that took place between Mr. Depue and young Martin at that time? A No, sir.

Q Was there any other thing said at that time but those words? A No, sir.

Q Do you know the customers of your firm? A Yes, sir.

Q Many of them? A Most of them.

Q Can you tell me the names of the customers in the vicinity of Northfield Road and Gregory avenue?

Mr. Studer: If any.

Q If any? A Not that I know of.

Q What about DeCamp's? A Well, I don't know where they are located at.

Q How about the Pleasantdale garage? A They are not a customer.

Q Meyer's garage? Did you ever hear of them? A No, sir.

Q Have you any customers in Livingston?

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Are you quite sure you don't remember anything else that was said that morning? A Yes, sir.

Q By this you mean that you do not remember? A There was nothing else said.

Q Do you remember anything else said that morning at some other time there?

Mr. Studer: To whom?

Q To him or in his presence.

Objected to as immaterial.

Objection overruled.

Witness: I don't understand the question.

Q Do you remember anything else said that morning about that time to you or in your presence? A No, sir.

Q What were the precise words used? A "Go to Barone and Tordell's and have this brake liner repaired and wait for it until it is finished and bring it back."

MARK J. BARONE, sworn in behalf of the defendant.

Direct examination by Mr. Studer.

Q Mr. Barone, where is your place of business? A At Valley and Forrest streets, Orange, New Jersey.

Q What was your business on July 13, 1925? A General repair business.

Q Did you at that time do general repair work for the Essex Sales Company among other customers? A Yes, sir.

Q On the morning of July 13, 1925, did a boy, William Martin, come to your place of business with some kind of a machine? A Yes.

Q Did you take it from him? A Yes, sir.

Q What did you do with it? A I drilled some holes in it to fasten to an angle iron platform.

Q Was that repair work? A Yes.

Q Did this boy help you? A Yes, sir, it was a cumbersome job and he helped me.

Q Did he stay until you drilled the holes? A He stayed until I drilled the holes; he didn't wait until I got through.

Q How long before you finished did he leave, if you remember? A Five minutes.

Q Do you know where he went? A I do not.

Q About what time did he get there, do you know? A Between half-past nine and ten.

Q And did you ever see him again? A No, sir.

Cross examination waived.

DEFENDANT RESTS.

JACOB W. MASON, recalled for the plaintiffs in rebuttal.

Direct examination by Mr. Marder.

Q Mr. Mason, in your opinion, is a car damaged as extensively as this car was damaged and repaired, worth as much after the repair, assuming that all the parts have been repaired, as before the accident, as before the damage to the car? A No, sir.

Q Do you get as much for an automobile that has been in an accident when you sell it as a second-hand car after repair as if it had not been in an accident?

William Katz, direct.

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Is Mr. Hayes here? A No, sir.

WILLIAM KATZ, one of the plaintiffs, recalled in behalf of the plaintiffs in rebuttal.

Direct examination by Mr. Marder.

Q Mr. Katz, you were examined on Saturday by Dr. Cahill? A Yes, sir.

Q Will you tell us what sort of an examination he made of you?

Objected to.

Sustained as to the form of the question.

Q Will you tell us what he did in examining you?

Objected to.

Objection sustained.

Q Did Dr. Cahill examine your chest? A No, sir.

Q Did you open up your shirt for him? A No, sir.

Q How long were you there? A About ten minutes.

Q What did he do?

Objected to.

Objection overruled.

Motion for Direction of a Verdict.

Witness: He examined my finger and my two scars here and I took my coat off and he examined my elbow.

Cross examination waived.

PLAINTIFFS REST.

MARTIN J. BARONE, recalled in behalf of the defendant in rebuttal.

By the Court.

Q Mr. Barone, do you know where Northfield Road and Gregory avenue intersect? A Yes, your Honor.

Q How far is it from your place of business? A A little over a mile.

By Mr. Studer.

Q Is it west or east of your place of business? A It is northwest.

Q Is that toward Newark or toward West Orange? A It is toward Montclair.

By Mr. Marder.

Q That is the general direction? A Yes.

DEFENDANT RESTS.

Mr. Studer: If your Honor please, I respectfully move for the direction of a verdict on the ground that there is uncontroverted testimony here that the chain which linked Martin to the Essex Sales Company was broken when, from the testimony, it appears

William Katz, direct.

Objected to.

Objection sustained.

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

Exception noted as ground of appeal.

Q Is Mr. Hayes here? A No, sir.

WILLIAM KATZ, one of the plaintiffs, recalled in behalf of the plaintiffs in rebuttal.

Direct examination by Mr. Marder.

Q Mr. Katz, you were examined on Saturday by Dr. Cahill? A Yes, sir.

Q Will you tell us what sort of an examination he made of you?

Objected to.

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Objected to.

Objection overruled.

Motion for Direction of a Verdict.

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Cross examination waived.

PLAINTIFFS REST.

MARTIN J. BARONE, recalled in behalf of the defendant in rebuttal.

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Q Mr. Barone, do you know where Northfield Road and Gregory avenue intersect? A Yes, your Honor.

Q How far is it from your place of business? A A little over a mile.

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Q Is it west or east of your place of business? A It is northwest.

Q Is that toward Newark or toward West Orange? A It is toward Montclair.

By Mr. Marder.

Q That is the general direction? A Yes.

DEFENDANT RESTS.

Mr. Studer: If your Honor please, I respectfully move for the direction of a verdict on the ground that there is uncontroverted testimony here that the chain which linked Martin to the Essex Sales Company was broken when, from the testimony, it appears

that he was in West Orange at the time of this accident. It is uncontroverted that he was sent to Orange with the machine to be fixed, to wait for it and bring it back and at the time of the accident he was doing none of those things in West Orange. What took him there nobody knows, but there is a distinct break in the link and it is uncontroverted and I think within the cases it presents a question for the Court and not for the jury.

The Court: The testimony indicates that the boy left the Essex Sales Company at 9:15 with instructions to remain at the Barone place until the cutter was repaired. He left five minutes before the job was finished and went in a direction toward Montclair. What have you to say as to the continuity of performance under the employ of the defendant company?

Mr. Marder: The testimony also is to the effect that coming back he was on the way back to Barone and Tordell's.

The Court: You have in the case that he brought the machine to Barone's and waited there until five minutes before the job was finished and then he left. Now, what evidence is there in this case to show that his trip from Barone's to the point where the accident took place was not deviation?

Mr. Marder: The burden is on the defendant to show that.

The Court: I am asking you as to the law.

Mr. Marder: The assumption is since he was driving the car of the defendant that

he was doing it as the agent of the defendant in and about the business of the defendant. To take the case away from the jury the defendant must conclusively show that he was not in the employ or about the business of the defendant, legally, when the accident happened. He might have been about his own business and might have been doing what he was doing for the benefit of it. The jury may infer from what they heard of the testimony whether he was about their business or not.

(Argument.)

Mr. Marder: As to whether the defendant's witnesses are to be believed or not is a fact for the jury. They may not be contradicted, but they certainly are controverted.

(Argument.)

The Court: I am inclined to think that the proof is uncontradicted that there was a deviation. Under the circumstances, I will direct a verdict for the defendant in both actions.

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

Exception noted as ground of appeal.

NOTICE AND GROUNDS OF APPEAL.

ESSEX COUNTY COURT OF COMMON PLEAS.

WILLIAM OKIN,
Plaintiff,

vs.

ESSEX SALES COMPANY, a New Jersey corporation,
Defendant.

Action at Law.

WILLIAM KATZ,
Plaintiff,

vs.

ESSEX SALES COMPANY, a New Jersey corporation,
Defendant.

Notice and Grounds of Appeal.

To Messrs. McCarter and English, attorneys of defendant:

TAKE NOTICE that the plaintiff appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause upon the following grounds:

1. The Trial Court upon the trial of said cause, directed a verdict in favor of the defendant and against the plaintiff over the objection of said plaintiff, whereas said Trial Judge should have submitted the case to the jury for its verdict.

2. There was evidence in the cause from which the jury could find that the driver of the

motorcycle was about the business of and in the employment of the defendant when the accident happened.

3. There was evidence in the cause from which the jury could find that the defendant was legally liable to plaintiff because of the accident, both because of the master and servant relationship and because of the negligence of the servant.

4. The Trial Court, improperly and over plaintiffs' objection, overruled questions concerning the defective condition of the motorcycle and defendant's knowledge of such condition.

AARON MARDER,
Attorney of Plaintiffs-Appellants.

Service of the within notice and grounds of appeal is hereby acknowledged this 16th day of July, 1926.

McCARTER & ENGLISH,
Attorneys of Defendant.

OPINION OF SUPREME COURT.

Filed January 31, 1927.

NEW JERSEY SUPREME COURT.

Nos. 71 and 72, October Term, 1926.

WILLIAM OKIN,
Plaintiff-Appellant,
vs.
ESSEX SALES COMPANY, a corporation,
Defendant-Respondent.

WILLIAM KATZ,
Plaintiff-Appellant,
vs.
ESSEX SALES COMPANY, a corporation,
Defendant-Respondent.

Submitted October 16, 1926; decided January 31, 1927.

Syllabus.

1. Proof of the defendant corporation's ownership of a motorcycle driven on a public highway raises a presumption of fact that such motorcycle was in the possession of the defendant through its servant or agent, the driver, and that such driver was acting within the scope of his employment. But both or either of these presumptions may be overcome by uncontradicted proof to the contrary; and if so overcome

by uncontradicted proof that the motorcycle was not being used by the owner's servant or agent within the scope of his employment, then a motion for a direction of a verdict for the defendant owner will be granted.

2. Where the uncontradicted proof showed that the driver of defendant's motorcycle was directed by the defendant (his employer) to take a tool from the defendant's shop in Newark to a repair shop in Orange, to wait for it to be repaired and bring it back to defendant's shop in Newark as soon as possible, and where the uncontradicted proof further showed that, after waiting a few minutes only, he departed from the repair shop without the tool about five minutes before the repairs were completed, and a few minutes later collided with an automobile more than a mile away, in West Orange, not in the direction of the defendant's shop, but in the opposite direction, where he had no business for the defendant, then the defendant is not liable to third parties for the results of the collision, and the direction of a verdict was proper.

On appeals from the Essex County Court of Common Pleas.

Before Gummere, Chief Justice, and Justices Trenchard and Minturn.

For the appellants, Aaron Marder.

For the respondent, McCarter & English (Augustus C. Studer, Jr., of counsel).

The opinion of the Court was delivered by Trenchard, *J.*

These suits were tried together. The accident involved in both occurred at the corner of North-

field Road and Gregory avenue, West Orange, on July 13, 1925, about 10:00 o'clock in the morning. The automobile, driven by the plaintiff Katz and owned by the plaintiff Okin, was proceeding east on Northfield Road toward Newark and was struck by a motorcycle going south on Gregory avenue, the motorcycle being owned by the defendant corporation.

At the conclusion of the case, the trial court directed verdicts in favor of the defendant, on the ground that it was shown by uncontradicted proof that Martin, who at the time of the accident was driving the defendant's motorcycle, had departed from the instructions given him, so that the relation of master and servant did not exist at the time of the collision, sufficient to hold the defendant on the doctrine of *respondeat superior*.

The legal propriety of that ruling is the only question before the Court on this appeal.

Our examination of the record satisfies us that the ruling was right.

Of course, proof of defendant corporation's ownership of a motorcycle driven on a public highway raises a presumption of fact that such motorcycle was in the possession of the defendant through its servant or agent, the driver, and that such driver was acting within the scope of his employment. But both or either of these presumptions may be overcome by uncontradicted proof to the contrary; and if so overcome by uncontradicted proof that the motorcycle was not being used by the owner's servant or agent within the scope of his employment, then a motion for a direction of a verdict for the defendant owner will be granted. Tischler *v.* Steinholtz, 99 N. J. L. 149; Mahan *v.* Walker, 97 N. J.

L. 304; Cronecker *v.* Hall, 92 N. J. L. 450; Missell *v.* Hays, 86 N. J. L. 348; Doran *v.* Thompson, 76 N. J. L. 754.

Now, in the instant case the record discloses that William Martin was operating the defendant's motorcycle when the accident happened, and as the result of the accident he was killed. But it further discloses without contradiction that at 9:15 on the morning in question, Martin was directed by David A. Depue, the president of the defendant company (his employer), to take a brake lining cutter from the company's place of business, 87 Halsey street, Newark, New Jersey, to Barone & Tordell, at Valley and Forest streets, Orange, New Jersey, to wait for the cutter to be repaired, and bring it back as soon as possible. It further shows, likewise without contradiction, that after waiting a few minutes only, he left Barone & Tordell's shop without the tool, about five minutes before the repair job was completed, and never returned, and that the place where the accident happened was in *West Orange,* more than a mile from Barone & Tordell's shop and northwest of it, not in the direction of his employer's place of business, but in the opposite direction, where he had no business for his employer, the defendant.

As pointed out in Cronecker *v.* Hall, 92 N. J. L. 460, a case in the Court of Errors and Appeals on all fours with this, in view of this uncontradicted proof that the driver of the motorcycle had disobeyed his employer's instructions and deviated from the business he was directed to pursue, his use of the motorcycle was his own use, and the relation of master and servant was thereby terminated, and therefore the direction of a verdict was proper.

The judgments will be affirmed, with costs.

RULE FOR JUDGMENT.

NEW JERSEY SUPREME COURT.

Nos. 71 and 72, October Term, 1926.

WILLIAM OKIN, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a corporation, *Defendant-Respondent.*	*Action at Law.*
WILLIAM KATZ, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a corporation, *Defendant-Respondent.*	*Rule for Judgment.*

These causes having been duly submitted at the October Term of this Court by Aaron Marder, of counsel for the plaintiffs-appellants, and Augustus C. Studer, Jr., of counsel for the defendants-respondents, and the Court having considered the same and being of the opinion that the judgment for the defendants, entered in the Essex County Court of Common Pleas, should be affirmed, and having on January 31, 1927, filed an opinion in which it was stated that the judgment of the Essex County Court of Common Pleas be affirmed, with costs:

It is thereupon ORDERED that the judgment of the Essex County Court of Common Pleas be affirmed with costs, and the record remitted to

Rule for Judgment.

the court below to be proceeded with according to law and the practice of said court.

On motion of

McCARTER & ENGLISH,
Attorneys for Defendants-Respondents.

Rule actually entered this 10th day of February, 1927.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Notice and Grounds of Appeal.

NOTICE AND GROUNDS OF APPEAL.

Filed February 23, 1927.

NEW JERSEY SUPREME COURT.

	Action at Law.
WILLIAM OKIN, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a New Jersey Corporation, *Defendant-Respondent.*	*On Appeal from the Essex County Court of Common Pleas.* *Notice and Grounds of Appeal.*

To McCarter & English, Esqs., attorneys of defendant-respondent:

TAKE NOTICE that the plaintiff-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-stated cause, on the following grounds:

1. That the Supreme Court erred in affirming the judgment of the Essex County Court of Common Pleas.

2. The Supreme Court erred in refusing to reverse the judgment of the court below.

3. The Supreme Court erred in holding that the direction by the trial court of a verdict in favor of the defendant was proper.

AARON MARDER,
Attorney of Plaintiff-Appellant.

Endorsed:

Service of within notice and grounds of appeal is hereby acknowledged this 21st day of February, 1927.

McCARTER & ENGLISH,
Attorneys of Defendant-Respondent.

NOTICE AND GROUNDS OF APPEAL.

Filed February 23, 1927.

NEW JERSEY SUPREME COURT.

	Action at Law.
WILLIAM KATZ, *Plaintiff-Appellant,*	*On Appeal from the Essex County Court of Common Pleas.*
vs.	
ESSEX SALES COMPANY, a New Jersey Corporation, *Defendant-Respondent.*	*Notice and Grounds of Appeal.*

To McCarter & English, Esqs., attorneys of defendant-respondent:

TAKE NOTICE that the plaintiff-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-stated cause, on the following grounds:

1. That the Supreme Court erred in affirming the judgment of the Essex County Court of Common Pleas.

2. The Supreme Court erred in refusing to reverse the judgment of the court below.

3. The Supreme Court erred in holding that the direction by the trial court of a verdict in favor of the defendant was proper.

AARON MARDER,
Attorney of Plaintiff-Appellant.

Notice and Grounds of Appeal.

Endorsed:

Service of within notice and grounds of appeal is hereby acknowledged this 21st day of February, 1927.

McCARTER & ENGLISH,
Attorneys of Defendant-Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM OKIN, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a New Jersey corporation, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*
WILLIAM KATZ, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a New Jersey corporation, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF FOR PLAINTIFFS-APPELLANTS.

These two cases were tried together in the Essex Common Pleas before the Honorable Edwin C. Caffrey, Judge, there being a direction of a verdict for the defendant in both actions at the close of the case (p. 91) upon which judgments were entered for the defendant (p. 13). The Supreme Court, on appeal, affirmed these judgments, (opinion of Supreme Court on p. 95 *et seq.*). These appeals are from the judgments of affirmance by the Supreme Court.

Statement of Facts.

The suits arise out of an automobile and motorcycle collision and were instituted by the two plaintiffs against the defendant on the theory that defendant was responsible to each of them because of the negligence of the de-

fendant's servant, one William Martin, in operating a motorcycle owned by the defendant; the plaintiff William Okin's claim being for damages to his Peerless automobile and the plaintiff William Katz' claim being for personal injuries (complaints, pp. 2, 3, 8 and 9). The accident occurred on July 13, 1925, at or a little after 10:00 A. M. (p. 38, l. 15). The plaintiff Katz, who was driving the car of the plaintiff Okin, was proceeding *easterly* on Northfield Road in West Orange, going toward Newark, just before Northfield Road is intersected by Gregory avenue, which runs in a north and south direction. He was going in second gear because Northfield Road at that point is at an incline (p. 16, ll. 30-40); the car driven by Katz was about one-half way across the intersection when the motorcycle, *going in a southerly direction,* shot out of Gregory avenue, struck the automobile in the left center, back of the front door, about opposite the driver; the motorcycle bounded back, the brakes of the car were put on, the witness Mooney hearing the screeching and seeing the marks after the accident; the motorcycle swerved to the southeast corner of Northfield Road and Gregory avenue; the car was turned over, making two turns, its occupants being thrown out. The motorcycle was going fast (testimony of the witness Mooney, pp. 52-54). The driver of the motorcycle flew through the air (testimony of the witness Gartland, p. 40), and he died as a result of the accident, and on the same day (p. 46, ll. 35-38). To the same effect generally is the testimony of the other witnesses in the case, who testified to the accident. Plaintiff's car unquestionably had the right of way, since the motorcycle was on the automobile's left. Unquestionably as to negligence the matter was at least a question for the jury.

The only reason given for a direction and argued on the motion therefor, was that there was such a deviation by Martin, the driver of the motorcycle, that the defendant was not legally responsible for his negligence (pp. 89-91).

It was admitted that the motorcycle belonged to the defendant and the words "Essex Sales Company" were on the side-car attached to the motorcycle (p. 18, ll. 15-25). David A. Depue, the president of the defendant, testified (p. 777, *et seq.*) that his company was in business on the day of the accident at No. 87 Halsey street, Newark; that William Martin, a boy of eighteen, was in its employ on that day and that he had been in its employ for about four months and that his job was the delivery and picking up of brake bands, the company being in the wholesale brake-lining business principally; that he had ridden the motorcycle two days before and had inspected the brakes the Saturday before the day of the accident, which was on a Monday, and had found them in good condition; that he told William Martin at about 9:15 A. M. to take a brake-lining cutter up to the firm of Barone & Tordell in West Orange for repair, to wait for the cutter to be repaired and to bring it back as soon as possible, and that the boy never came back; that he learned of the accident about 10:30 A. M. that day. Upon cross examination he testified that he was acquainted with the locality of the accident, and after some sparring, admitted that if a person were coming along Gregory avenue from Mount Pleasant avenue toward Northfield Road *(the course of the motorcycle just before and at the time of the accident)* he would be heading in the general di-

rection of Barone & Tordell and such a course would be as direct as any course to Barone & Tordell's (pp. 80-81; also that DeCamp on Mount Pleasant avenue (near and north of the scene of the accident) was a customer of the defendant company (p. 81), *this last being admitted right after a general denial.*

The witness Culbert testified for the defendant (p. 84, *et seq.*) that he was service manager for the defendant, and heard the instructions given the boy Martin on the day of the accident by Depue; on cross examination he twice repeated these alleged instructions almost word for word, although once (p. 85, ll. 1-5) he left out the instructions about waiting at Barone & Tordell's until the repairs were made, and he could not repeat any other part of the conversation between Depue and the boy; and was making out an order when the instructions were alleged to have been given; and he could not remember anything else said that morning.

Barone, of Barone & Tordell, testified (p. 86) that between 9:30 and 10 A. M. on the day of the accident, Martin came to his place of business with a machine and helped him do the repair work which consisted of drilling holes in it to fasten same to an iron platform; that the job was a cumbersome one (indicating that it took some time) and Martin stayed until five minutes before he was finished; also that (p.89) the scene of the accident was a little more than a mile northwest of his place of business. The witness Gartland testified (p. 38) that he was on Gregory avenue about 300 feet southerly from Northfield Road at about 10 o'clock with a car with a flat tire; he saw the motorcycle coming up Gregory avenue toward Northfield Road; that he walked toward Northfield Road to get an

air pump when he saw the motorcycle coming back and that five minutes at the most elapsed between the two times he saw Martin riding the defendant's motorcycle (p. 41, ll. 15-20). The witness Closs, a member of the West Orange Police Department states that the police got the call in connection with the accident at *ten* o'clock (p. 45, ll. 9-10). It will be seen therefor that the accident happened at the most, from five to ten minutes after Martin left Barone's place.

The witness Imgrund testified *that he saw Martin on the motorcycle in question in the neighborhood in question before the accident, two or three times a week on week-days in the afternoon* (pp. 63-64).

The only question for determination on this appeal, therefore, is whether the trial court should have directed a verdict for the defendant on the theory of deviation, and whether the Supreme Court should have affirmed the trial court in so doing.

POINT I.

The presumption arising out of the ownership of the motorcycle is that Martin was driving same for the defendant within the scope of his employment.

In *Tischler* v. *Steinholtz,* 99 N. J. L. 149, the opinion of this court reads as follows on pages 152-153:

> "The evidence showed that the car was owned by the defendant Morris Steinholtz. Such proof of defendant's ownership of an automobile driven on a public highway *raises a presumption of fact that such automobile was in the possession of the defend-*

ant, if not personally, then through his servant, the driver, and that such driver was acting within the scope of his employment. Of course, both or either of these presumptions may be overcome by uncontradicted proof to the contrary; and if so overcome by uncontradicted proof that the automobile was not in the possession of the owner or his servant or was not being used by the servant within the scope of his employment, then a motion for a direction of a verdict for the defendant owner will be granted. *If, however, the evidence is contradictory, or reasonably subject to contradictory interpretations, the question of liability is for the jury. Doran* v. *Thomsen,* 76 N. J. L. 754; *Missell* v. *Hayes,* 86 *Id.* 348; *Mahan* v. *Walker,* 97 N. J. L. 304. Here the defendant owner sought to overcome by proof the presumption of agency. In the course of the testimony it appeared that the automobile was for the use of the defendant owner's immediate family, consisting of his wife and daughter and son, the defendant driver. It appeared that the owner could not drive the car, and had no license to drive it, and that the son had a license and habitually drove it for the family; that on the day in question he had driven his mother and sister to his grandmother's home and was to bring them back to their own home later. It is not disputed that if the accident occurred while he was going to bring them back, as plaintiff contends, the question of the liability of the father would be for the jury. *Missell* v. *Hayes, supra.* The defendant owner, however, contends that it occurred after his son had brought the family back home, and while he thereafter was driving for purposes of his own. But the son admitted that, at the time of the accident, he was going in the direction of his grandmother's home. On the first day of the trial he testified that he 'believed' he was to take them home later, and then being further pressed, said he was uncertain whether or not he took

them home before the accident. On the second day of the trial, upon being recalled, he testified that he had taken them home before the accident. Over against the presumption referred to and this contradictory testimony there is the testimony of his mother and sister to the effect that the son took them home at a time before the accident is said to have occurred. But the evidential value of their testimony was much shaken on cross-examination. In this posture of the proofs the question of the liability of the father was properly submitted to the jury. *Crowell* v. *Padolsky,* 98 N. J. L. 552."

POINT II.

The trial court should have left the question of deviation to the jury.

Whether or not the witness, Depue, gave the instructions he is alleged to have given to Martin, was a question of fact that should have been determined by the jury. Appellants were unable to contradict him at the trial, but nevertheless *controverted* these alleged instructions. This court has held in numerous instances that ~~when~~ the testimony of a witness is never to be deemed to so conclusively establish a fact so as to make it one to be determined by the court, rather than by the jury. See *Clark* v. *Public Service Electric Co.,* 86 N. J. L. 144; *Nell* v. *Godstrey,* 90 N. J. L. 709; *Second National Bank* v. *Smith,* 91 N. J. L. 531; also dissenting opinion of Chancellor Walker in *Cronecker* v. *Hall,* 92 N. J. L. 450. Schmidt v Marconi C 86 L 183.

Depue's testimony and the testimony of the witness Culbert was controverted (see argument on direction, 91, ll. 15-20) and where inferentially contradicted as above pointed out in the statement of facts where Depue spars on cross examination and then makes an admission right

after general denial and Culbert remembers only the words of instructions and *mechanically* repeats these; he was doing something else at the time the instructions were given and cannot remember anything else said at the time.

There is direct testimony, however, as pointed out in the statement of facts above that the defendant had customers near the locality in question, to wit, DeCamp and that the witness, Imgrund, saw Martin on the motorcycle in question in the neighborhood in question before the accident, about two or three times a week on weekdays in the afternoons.

It is respectfully submitted that the case at bar is wholly within the *Tischler* case above cited and that the question of deviation should have been left to the jury. The jury could have found that the alleged instructions were not given, or that Martin at the time of the accident was about the business of the defendant. In addition to the presumption mentioned in Point I of this brief, there is a further presumption of fact of the continuance of this master and servant relationship or action within the scope of authority under the general rule, that the continuance of a fact or condition is presumed (see 22 C. J. page 86, *et seq.;* also *Leport* v. *Todd,* 32 N. J. L. 124, on page 128, where it is held that where a person goes into possession of premises as a tenant, there is a presumption of the continuance of the tenancy).

It is submitted that the jury could have found that Martin took the motorcycle when he left Barone & Tordell's in order to test it or some part of it; it will be remembered that he was away from Barone & Tordell's between but five and ten minutes when the accident occurred;

and this would made the defendant liable under the doctrine of *Depue* v. *Salmon Co.,* 92 N. J. L. 550, where it is stated that if what the servant does is for the benefit of both the master and himself, the master is liable; further the direction to wait alleged to have been given unquestionably carries with it an authorization to see that the motorcycle was in proper condition for the purpose of travelling from Barone & Tordell's to the defendant's place of business; as above intimated the jury could have found that at the time of the accident the boy was returning from DeCamp, the customer of the defendant on some business of the defendant.

It is further submitted that even if the jury found that Martin was not told to go to DeCamp's but went to DeCamp's on his own initiative about some business of the defendant, then the defendant would be liable under the rule that where a servant is engaged in his master's business although he is doing something opposite to what his master told him to do, the master is nevertheless responsible. See *Donaldson* v. *Ludlow & Squier,* 94 N. J. L. 306, citing *Driscoll* v. *Carlin,* 50 N. J. L. 28, on page 30.

POINT III.

The jury could have found that Martin was returning to duty when the accident occurred and hence the defendant would be liable.

The opinion of the court below does not seem to make any mention of this point, although the same was argued on the appeal to it.

The evidence above adverted to in the statement of facts shows unquestionably, it is submitted, *that Martin was on his way back to*

Barone & Tordell's at the time of the accident; that he was pursuing as direct route as possible back to Barone & Tordell's; that the accident happened at the most between five and ten minutes after he left Barone & Tordell's at a place a little over a mile northwest of Barone & Tordell's, (not a very great distance in these days of motor vehicles).

There are two unreported New Jersey cases holding that, notwithstanding the servant's deviation or departure from his employment for purposes of his own, if at the time the act complained of, the servant had fulfilled his purpose and was returning to resume his duties, the master would be liable; the cases are *Patrizio* v. *Bancroft* and *Braun* v. *Voorhees,* and are given in full by way of appendix to this brief. In the *Patrizio* case, the deviation was unauthorized by the master; in the *Braun* case, the servant was given permission to make the deviation. This question of deviation is discussed in 22 A. L. R. pages 1397, *et seq.,* particularly pages 1405-1419 and in 45 A. L. R., pages 486-489, and a contrariety of opinion by the various courts of different states is indicated, some basing the decision on, whether the deviation was with the master's consent or not; some on the distance of deviation, and some on the time of deviation.

The note in 22 A. L. R. follows the case of *Riley* v. *Standard Oil Co.,* New York Court of Appeals, 231 N. Y. 301, 132 N. E. 97. In this case defendant's chauffeur named Million was ordered by defendant to go with defendant's truck from defendant's mill to certain railroad yards about two and one-half miles away, to "obtain there some barrels of paint and return at once. After the truck was loaded, Million discovered some waste pieces of wood. He

threw them on the truck, and on leaving the yards, turned, not towards the mill, but in the opposite direction. Four blocks away was the house of a sister, and there he left the wood. This errand served no purpose of the defendant, nor did the defendant have knowledge of or consent to the act of the chauffeur. Million then started to return to the mill. His course would lead him back past the entrance to the yards. Before he reached this entrance, and when he had gone but a short distance from his sister's house, the accident occurred."

The opinion by Judge Andrews reads party as follows:

> "We are not called upon to decide whether the defendant might not have been responsible had this accident occurred while Million was on his way to his sister's house. That would depend on whether this trip is to be regarded as a new and independent journey on his own business, distinct from that of his master (*Storey* v. *Ashton,* L. R. 4 Q. B. 476, 10 Best & S. 337, 38 L. J. Q. B. N. S. 223, 17 Week, Rep. 727; *McCarthy* v. *Timmins,* 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038), or as a mere deviation from the general route from the mill and back. Considering the short distance and the little time involved,—considering that the truck, when it left the yards, was loaded with the defendant's goods for delivery to its mill, and that it was the general purpose of Million to return there,—it is quite possible a question of fact would be presented to be decided by a jury. *At least, however, with the wood delivered, with the journey back to the mill begun, at some point in the route Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached. Jones* v. *Weigand,* 134 App. Div. 644, 119 N. Y. Supp. 441." (Italics mine.)

In *McKierman* v. *Lehmaier,* Supreme Court of Errors of Connecticut, 81 Atl. 969, 1911 (cited in 22 A. L. R. above referred to), the defendant's chauffeur was about his own affairs pending return for his master at a theatre at 9:30 o'clock in the evening and had started back toward the theatre when the accident occurred. The opinion reads partly as follows (on p. 971):

> "In the case before us the servant with the knowledge and consent of his master left him with his motor vehicle to engage in a matter personal to the servant for a limited period. The services of the day in which the servant was engaged had not been completed when the accident happened. He was not then wholly at liberty from his master's engagement and pursuing his own business enclusively. If the injury had been inflicted while Shatzer was going from barber shop to barber shop in Norwalk and South Norwalk, the question would have been different. But we do not deem it necessary to express any opinion upon this phase of the case, because the accident occurred when the private business of Shatzer had been completed, and he was operating the defendant's automobile back over the road which he had previously travelled, for the purpose of discharging the duty for which he was employed and intended to perform. When the automobile struck Seiler, Shatzer was not engaged in any affairs of his own, but was attending to the business of the defendant in the scope of his employment. As bearing on the subject, see *Mulvehill* v. *Bates,* 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; *Rahn* v. *Singer Mfg. Co.,* (C. C.) 26 Fed. 912."

The *Cronecker* case cited in the opinion of the court below, it is submitted, does not involve the returning to duty question at all, nor does it involve the question of joint benefit above argued (such as testing the motorcycle), or the question

of possibly visiting the customer of the defendant, above argued, and plaintiff further submits that the case at bar is not in any way analogous thereto.

It is respectfully submitted, in view of the facts in the case at bar above pointed out that the returning to duty doctrine should be followed, if not on its general principle, at least on the theory of the extremely short lapse of time between the possible deviation and the possible returning to duty and consequent accident or on the theory of the possible implied consent by the defendant to the taking of the vehicle by Martin from Barone & Tordell's.

In conclusion, it is respectfully submitted that the direction was erroneous and that the judgment of the Supreme Court should be set aside and a *venire de novo* awarded to the appellants.

AARON MARDER,
Attorney for and of Counsel with
Plaintiff-Appellants.

NEW JERSEY SUPREME COURT.

No. 61 Nov. T. 1919.
Pasquale Patrizio, Adm.
vs.
Frank Bancroft.

Defendant's Rule to Show Cause.

Argued before Gummere, Chief Justice, and Justices Minturn and Black.

For the Rule, Gedney & McBride.
Contra, J. Victor D'Aloia.

Per Curiam.

This action was brought by the plaintiff as administrator of his daughter, Pasqualine, to recover for her death which resulted from being run over by an automobile driven by the defendant's son, a youth between seventeen and eighteen years of age. The car was the property of the New Hampshire Fire Insurance Company, and was furnished by it to the defendant, who was its state agent, for his use in their business. It is argued that the defendant cannot be held liable for this accident because of lack of ownership of the car. We find nothing of merit in this contention. The car being in his possession and control the defendant is liable if it was being used by his son in the father's business, and the accident was the result of the son's negligence.

The jury were entirely justified in finding that the accident resulted from the negligence of the driver of the car. The only troublesome question in the case is whether, at the time of the accident, the son was engaged in the father's business. The defendant's case was this:

About half-past one in the afternoon of the day of the accident he and his wife went with his brother-in-law and some friends on a pleasure ride in the brother-in-law's automobile. When leaving his home the defendant instructed his son to get the car from the garage and have it at his (defendant's) house about half-past five in the afternoon so that he (defendant) might drive to his office to get his mail. About half an hour after the defendant left home the son, with his younger brother, went to the garage and got the car, and drove it to the house of a boy friend who lived about a mile from the garage, and still further than that from the defendant's house, his purpose being to bring the friend back to his home to spend the afternoon. The accident occurred after he had got his friend and was returning to his father's house. If the accident had occurred while defendant's son was going to his friend's house, no liability would have rested upon the defendant, for the son was not, in doing that, engaged in his father's business, but was driving the car solely on his own account and for his own pleasure. But having reached the friend's house, in violation of his duty to his father, his obligation to take the car to the place where his father had ordered him to take it still persisted, and it was while he was doing this the accident occurred. In bringing the car back to his father's house, he was engaged in the father's service, and that renders the defendant liable.

It is argued that the amount of the verdict, $2,000, was excessive. We think this contention is without merit.

The rule to show cause will be discharged.

NEW JERSEY SUPREME COURT.

February Term, 1921.

Valentine Braun, et als., Plaintiffs, vs. Joseph P. Voorhees, et als., Defendants.	*On Rule to Show Cause.*

Submitted February Term, 1921.

Before Justices Swayze, Parker and Black.

For the rule, Walter L. Glenney, Esq., and Messrs. Edwards & Smith.

Contra, Mr. James R. Nugent.

Per Curiam.

This was an accident case. The plaintiffs were all occupants of an automobile owned and driven by the plaintiff Valentine Braun. On February 7, 1919, while being east on Gould avenue, in the City of Newark, and at the intersection of South 12th street, the automobile of the plaintiff came into contact with another automobile owned by the defendant Joseph P. Voorhees and driven by his chauffeur George Lauter, which was proceeding northerly on South 12th street.

Verdicts for the plaintiffs were returned by the jury. The defendants obtained the rule. The owner of the automobile, Joseph P. Voorhees, rests the motion for a new trial on eleven reasons. The first four challenge the liability of the owner of the automobile for the accident. The other seven reasons allege the verdicts are excessive. These latter reasons require no discussion. We think the verdicts were justified by the evidence. The other reasons may all be disposed of under No. 2 which is an exception to the Judge's charge as follows, "I charge you, that if you find as a matter of fact, that the chauffeur was given permission by Mrs. Voorhees to go to Newark to see his friend and return to the High School about ten o'clock to get her and he went to Newark to his friend's house and completed his errand, and was returning to the High School in accordance with Mrs. Voorhees' instructions, and the accident happened at that time, then he was engaged in the service of the defendant Voorhees." This we think is an accurate statement of the law applied to the facts, as they appear in the record. The chauffeur, George Lauter, was a regularly employed servant of the defendant, Voorhees, on duty entrusted with the car. This distinguishes the case under discussion with *Doran* v. *Thomsen,* 76 N. J. L. 754, and falls in principle within the case of *Ferris* v. *McArdle,* 92 N. J. L. 580; *Patrizio* v. *Bancroft,* No. 61 Nov. Term Supreme Court, 1919; in the latter case, a father directed his son to get the automobile from the garage and have it at the home at 5:30 o'clock. The son took the car out of the garage and went off to the house of a friend, on returning from his friend's house to his father's house the accident occurred. In bringing the car back to his father's house that case held, the son was engaged in the father's service and rendered the father liable. So, in this case, the chauffeur in bringing the car back for Mrs. Voorhees was in his master's business and that renders the defendant liable under the above authorities.

We find no legal reason for disturbing the verdicts rendered in this case. The rule is therefore discharged with costs.

"Filed June 7, 1921.

Enoch L. Johnson,
Clerk."

Robertson v. *Spitler,* 153 Minn. 395, 190 N. W. 992, Dibell, *J.,* on p. 993 of N. W.

"The argument is made, though not greatly urged, that it is not shown that the driver of the defendants' auto was acting within the scope of his employment. The evidence is sufficient, and that is all we need to determine. The defendants did business under the name of 'Northwestern Oldsmobile Company.' The truck involved had printed on it the words 'Oldsmobile Service.' It was owned by the defendants. They employed the driver. He had taken the truck with their permission. There was evidence that, though rightfully out with the car, he had no specific business on Hennepin at the time. He had gone to a paint shop on Lyndale, apparently to get some articles for his employers, and they not being ready he drove down Hennepin with no particular purpose except to use his time until such articles were ready for delivery. The cases have been recently considered. *Behrens* v. *Hawkeye Oil Co.* (Minn.), 187 N. W. 605; *Piepho* v. *M. Sigbert-Awes Co.* (Minn.), 188 N. W. 998; *Stoneman* v. *Smyth* (Minn.), 190 N. W. 607. The evidence sustains a finding that he was in the line of his employment."

NEW JERSEY COURT OF ERRORS AND APPEALS.

Nos. 82 and 83. May Term, 1927.

OKIN *vs.* ESSEX SALES COMPANY
KATZ *vs.* ESSEX SALES COMPANY

The following are quotations from *Fiocco* v. *Carver*, 234 N. Y. 219, 137 N. E. 309, cited and quoted in respondent's brief (pages 10-12). The following quotations, however, are not given in respondent's brief and when read, it is submitted, change the aspect of the Fiocco case, as given in respondent's brief.

This paragraph follows immediately after the first paragraph quoted on page 11:

> "Such a departure is here shown, apart altogether from the narrative put before us by the driver. The plaintiff's testimony, confirmed by the testimony of his witnesses, breaks the force of the presumption that might otherwise be indulged, and leave his case unproved unless something is in the records, in addition to the presumption, to show that the defendant's servant was in the course of the employment. The wagon was an electric truck intended for the transportation of merchandise in connection with the defendant's business. At the time of the accident it was crowded with boys, 'packed as thick as sardines,' whom the driver was taking on a frolic. They filled, not only its body, but also the roof and sides and box. Plainly on proof of these facts the presumption vanishes that the driver was discharging his duty to the master. The character of the transaction is so extraordinary, the occupation of the truck by the revellers so dominant and ex-

clusive, as to rebut the inference that the driver was serving his employer at the same time that he was promoting the pleasure of his friends. The dual function, if it existed, can no longer rest upon presumption. Regularity will no longer be taken for granted when irregularity is written over the whole surface of the picture. We will no longer presume anything. What the plaintiff wishes us to find for him he must prove."

And the last paragraph quoted on page 12 of respondent's brief reads in full as follows:

"We think the servants' purpose to return to the garage was insufficient to bring him back within the ambit of his duty. He was indisputably beyond the ambit while making the tour of the neighborhood which ended when he stopped at Catherine Street upon a visit to a pool room. Neither the tour nor the stop was incidental to his service. Duty was resumed, if at all, when ending the tour, he had embarked upon his homeward journey. It was in the very act of starting that the injury was done. The plaintiff had climbed upon the truck while it was at rest in front of the pool room, still engaged upon an errand unrelated to the business. The negligence complained of is the setting of the truck in motion without giving the intruder an opportunity to reach the ground. The self-same act that was the cause of the disaster is supposed to have ended the abandonment and re-established a relation which till then had been suspended. Act and disaster would alike have been avoided if the relation had not been broken. Even then, however, the delinquent servant did not purge himself of wrong. The field of

duty once forsaken is not to be re-entered by acts evincing a divided loyalty and thus continuing the offense. Many of the illicit incidents of the tour about the neighborhood still persisted. The company of merrymakers was still swarming about the truck. The servant was still using the property of the master to entertain his friends and help the merriment of the carnival. The presence of these merrymakers was the very circumstance that had prompted the little boy to jump upon the truck, and make himself a party to all the fun and frolic. Add to this that the truck was still far away from the route which it would have traveled if the servant had followed the line of duty from the beginning. We do not need to separate these circumstances and to insist that any one of them alone would be strong enough to shape the judgment. Our concern is with the aggregate. We are not dealing with a case where in the course of a continuing relation, business and private ends have been co-incidentally served. We are dealing with a departure so manifest as to constitute an abandonment of duty, exempting the master from liability till duty is resumed. Viewing the circumstances collectively, we are constrained to the conclusion that at the moment of the wrong complained of, the forces set in motion by the abandonment of duty were still alive and operative. Whether we have regard to circumstances of space or of time or of causal or logical relation, the homeward trip was bound up with the effects of the excursion, the parts interpenetrated and commingled beyond hope of separation. Division more substantial must be shown before a relation, once ignored and abandoned, will be renewed and re-established."

New Jersey Court of Errors and Appeals

STEVE DORYK, by FRANCES DORYK KUZMAR, his next friend, and FRANCES DORYK KUZMAR, individually, Plaintiffs-Appellees, *v.* PERTH AMBOY BOTTLING COMPANY, a corporation, Defendant-Appellant.	On Appeal.

BRIEF OF DEFENDANT-APPELLANT.

This cause was tried at the Middlesex Circuit and on January 28, 1927, the jury rendered a verdict in favor of the plaintiff Steve Doryk for four thousand dollars and in favor of the plaintiff Frances Doryk Kuzmar for five hundred dollars against the defendant Perth Amboy Bottling Company.

The plaintiff Stephen Doryk about eleven years of age on April 17, 1926, was riding at the rear of defendant's truck and he describes the accident in which he was involved as follows (Case, p. 97):

> "Q. And what did you do after you got in the truck? A. I was holding the ice box.
> "Q. And what happened then? A. Then we went out in the yard to fill the gas tank up with gas.
> "Q. Yes. Were you in the truck then? A. Yes.
> "Q. All right. After you filled up with gas what did you do? A. We went out.
> "Q. Out where? A. To Carteret.
> "Q. Did you get to Carteret, Steve? A. No.

"Q. What happened? A. On Laurie Street we was going in Laurie Street, well, she jerked.

"Q. Yes. A. And it threw me right off.

"Q. How did it throw you off, Steve? A. She went front, and then went back and threw me off.

"Q. How did you fall, Steve? A. My back facing the road.

"Q. Your back facing the road. Well, did you fall frontwards or backwards? A. Backwards."

Peter Janco testifies on behalf of the plaintiff as follows (Case, p. 42):

"Q. The tailboard of the automobile was closed, was it? A. Yes, sir.

"Q. So the ice box could not fall off? A. No, sir.

"Q. Would not need anybody to hold it on? A. No, sir.

"Q. Steve lives right near the bottling works, doesn't he? A. Yes, sir; right in back of it.

"Q. He hangs around the bottling works all the time when he is not at school, doesn't he? A. Yes, sir."

Herbert Meek for the plaintiff describes the accident as follows (Case, p. 24):

"Q. That was the first time you saw it? A. Yes, it just come past, cars were passing, they just come past the end of the truck and I saw Steve standing on the back.

"Q. Is that the first time you saw him? A. That was the second time I saw him that day.

"Q. No, I mean was that the first time you saw him on that particular trip? A. Yes.

"Q. And how far away was the automobile when you first saw it? A. On the other side of the road.

"Q. That was the first time you saw it. So you don't know whether Steve had been sitting down before that or not, do you? A. He was standing up from the time I saw him until he fell off.

"Q. And how far did the car travel before he fell off? A. Just made the turn and he fell off and it went up about three-quarters of a block and it stopped.

"Q. The driver didn't indicate that he knew that Steve had fallen off the truck, did he? A. No.

"Q. And went right along. How fast was this car going at the time it turned the corner? A. It was going about fifteen miles an hour.

"Q. Fifteen miles an hour. And how fast —did it go the same rate of speed right along until it finally stopped? A. No. After the jerk it started up again, he started from low speed and then the truck driver stopped him.

"Q. Well, I see. Steve fell off when he turned the corner, didn't he? A. Yes."

and he further testifies (Case, p. 26):

"Q. Just show us if you can how much of a jerk it was. A. Like as if he put the brakes on and then he started off again.

"Q. Like as though he put the brakes on? A. Yes, but it didn't bring it to a stop.

"Q. As though he was going to slow up, is that what you mean? A. Yes.

"Q. You have seen automobiles on the street where the driver puts the brakes on slightly and then takes the brakes off and starts up again, is that right? A. Yes.

"Q. You have seen that many hundreds of times? A. Yes, but this time it wasn't like that. It was more quick.

"Q. Came to a quicker stop, did it? A. It didn't come to a stop. It just went like that and kept on.

"Q. It slowed up quicker? A. Yes."

Stanley Gutowsky testified (Case, pp. 109-110):

"Q. Did you have any trouble with your brakes that morning? A. No, sir, I did not.

"Q. Did you have any trouble with your brakes at any time that day? A. No, sir.

"Q. Now, after you got the gas, when you started out did you observe where Steve was

when you got back on the truck? A. I don't understand you.

"Q. Did you see where Steve was when you got back on the truck? A. When I got back on the truck?

"Q. After you got your gas you got back on the truck, where was Steve then? A. He was in front by the cab, because he had this much room in front, the ice box was on that side and you had about this much room on this side. He was standing next to the cab there when I told him to get off.

"Q. You say you saw him get off, did you? A. Yes, sir, I did.

"Q. Now, when you started off, after getting gas, where was Steve then after he had gotten off of the truck, as you say, where was he when you started off? A. Why, he got off and he walked by the door there, and then I started off, and that is all I remember there.

"Q. And from the time you started off until you saw him in the road did you see him in between that time at all? A. No, sir; I did not.

"Q. Did you know that Steve was on your truck? A. I did not.

"Q. From the time you left the gas tank until the accident? A. No, sir."

and further testified (Case, p. 111):

"Q. I mean to say, did anything happen to your automobile, any change in motion, or anything of that sort? A. No, sir.

"Q. Well, how did you go around there, in high, low or what? A. High speed.

"Q. What? A. High speed.

"Q. How fast did you go around that corner? A. About ten or twelve miles an hour.

"Q. Did you hear any noise when you went around that corner, did you hear any holler or noise of any kind? A. No, sir; I did not.

"Q. Did the car give any jerk when you went around the corner? A. No, sir; it did not."

David Lynch testifies (Case, pp. 128-129):

"Q. Now, when you got out to the gas tank just tell us what happened there that you saw and heard in reference to Steve Doryk. A. When I got out to the gas tank this boy was sitting on the front seat. And Stricky handed me the hose, just as he pulled—

"Q. Stricky is who? A. The driver.

"Q. Do you mean Stanley Gutowsky? A. Yes. He handed me the hose and I put the hose in the tank and he pumped the gas in.

"Q. Where is the tank on this Reo speed wagon? A. Right in the front, right under the seat.

"Q. Go ahead. A. Rather in front of the driver, not under the seat, right in the front where he drives. And this boy was sitting in the front, and as I say—as Stricky was pumping in the gas I was holding the hose, and we filled the tank with gas and Stricky said to this boy, he said, you had better get off; and the child didn't say no more, and Stricky got on the car, and the kid got off, and that was all I seen of him, and that is all I know. Until—

"Q. Did you see this boy, Steve Doryk, after the automobile started? A. No, sir.

"Q. After you left the plant up to the place where the accident happened about how fast did the car go? A. The car that I was riding on do you mean?

"Q. Yes. A. When he made the turn?

"Q. Well, up to the time he made the turn how fast did he go? A. Well, he couldn't go very fast on account of a hill there, see? You have got to make a grade, there is a hill, I should judge about twelve or thirteen miles an hour, fifteen miles an hour at the most.

"Q. When you made the turn how fast did it go? A. About ten or twelve miles an hour.

"Q. Did you hear any noise or holler or alarm of any kind when he made this turn? A. No, sir.

"Q. What happened after that? A. Why, we went up about one hundred feet and there

was a Mack truck coming down, and he pointed, he said, see what you done; and the driver looked back and he seen this kid laying in the road, and he pulled to the curb and he run back and I run after him, and he picked this boy up, and it was this little fellow that got off the front of the truck that was laying there. So—

"Q. And up to that time from the time you left the gas tank did you have any knowledge that this boy was on this truck? A. I did not myself; no, sir."

Abraham Schwartenberg, the president of the defendant company, testified (Case, p. 143):

"Q. Were you at the plant when this ice box was loaded on to the truck? A. No, I was not.

"Q. Did you see this ice box loaded on the truck? A. No, I did not.

"Q. Did you see the plaintiff Steve Doryk at your plant that morning? A. No, I did not.

"Q. At any time that morning? A. That morning, I did not."

He further testifies (Case, p. 145):

"Q. Why didn't you stop and tell your driver to put those boys off the truck? A. Why didn't I stop? Well, it wasn't possible to stop there.

"Q. Why wasn't it? A. Why, because you are right in traffic going up the bridge. That would not be a proper way to stop.

"Q. Well, you could stop there, couldn't you? A. I couldn't; no, sir. All I did I pointed my finger and I hollered at him to get rid of the kids."

Stanley Gutowsky testifies (Case, p. 117):

"Q. Well, how about Abe Schwartenberg? A. He was not there.

"Q. He wasn't there? A. No, sir.

"Q. Wasn't there at any time that morning? A. He was there in the morning, but he left.

"Q. What time? A. Come in around seven —he left there about half-past seven.

"Q. In the morning? A. Yes, sir.

"Q. Did you see him back there again that morning? A. No, sir, I did not.

"Q. Didn't see him at all? A. No, sir.

"Q. I suppose it was an absolute rule not to have anybody on the truck, isn't that so? A. Nothing but my helper."

And Stanley Gutowsky further testifies (Case, p. 116):

"Q. So that, isn't it a fact, Stanley, that if you needed somebody to help you on the wagon, that the boss would let you get one of these youngsters, and at the end of the day pay them a quarter, or half a dollar for being with you, isn't that true? A. Why, no, he didn't allow me to have any kids on the truck.

"Q. For instance, Herbert Meek, didn't he ever help out on the truck? A. Why, when I got downtown with two or three cases on then I would take a kid with me; the boss never sees me do it.

"Q. Isn't it a fact that you used to take these boys with you sometimes and the boss would pay them when you told him that these lads helped you during the day? A. No, sir.

"Q. And isn't it a fact that you would sometimes pay them with money, that is the boss or bookkeeper, isn't that so? A. No, sir.

"Q. And isn't it a fact that sometimes you drivers would pay them by giving them a couple of bottles of soda water? A. No, sir.

"Q. Do I understand you that it was a hard and fast rule that you were not to have these kids on the truck? A. That is right."

David Lynch testifies (Case, p. 131):

"Q. Mr. Lynch, when you left the plant that morning was Mr. Abe Schwartenberg there? A. No, sir.

"Q. Had he been there that morning? A. I did not see him.

"Q. And you were there how long? A. I came in the plant about ten o'clock, or a little after ten, and I left the plant at eleven-thirty."

POINT I.

No negligence was shown on the part of the corporate defendant.

A motion was made for nonsuit on this ground (Case, p. 102). This plaintiff claims he was hired by the chauffeur to help him in delivering bottles.

In *Glowacky* v. *Sheffield Farms Co.,* 134 Atl. 674 (Oct. 18, 1926), our Supreme Court had a similar situation to deal with, and it held:

> "Motor truck owner held not liable, under Death Act, for death of boy hired by chauffeur in defiance of owner's orders and without its knowledge."

There was no act or omission on the part of the driver of the truck that can be described as negligence. There was no unusual happening in the operation of the automobile. Automobiles are subject to the conditions of traffic, the condition of the road, and have to be driven on uneven surfaces and along irregular routes. The plaintiff says that the automobile jerked and threw him off (Case, p. 97).

In the case of *Hughes, et al.* v. *Murdoch Storage & Transfer Co.,* 112 Atl. 111, it is held:

> "Where ordinary truck driver invited or permitted a third person to ride on the truck, such third person assumed whatever risk there was in riding on the truck and whatever risk that might arise from his alighting and leaving the truck, and could not recover from the master by reason of such driver's conduct in negligently starting the truck before he was off, such third person being a trespasser, even though a boy 14 years of age."

In the case of *Zampella* v. *Fitzhenry,* 117 Atl. 711, it is held:

> "Where a 15-year-old boy, invited to ride by the driver, was thrown from defendant's motor truck and injured, defendant was not liable under the doctrine of *respondeat superior,* notwithstanding the boy's infancy, as the act of the driver in inviting the boy to ride was not within the scope of his employment."

In the case of *Perrin, et al.* v. *Glassport Lumber Co.,* 119 Atl. 719, it is held:

> "Where the driver of a truck carrying materials was sent by his employer to do plastering, and on completing the work started the truck on the return journey while a boy 2 years and 11 months was upon it, and the boy was injured by falling off within a short distance without the driver's knowledge, the acts of the driver in permitting the boy to ride were outside the course of the employment, and the employer was not liable."

You cannot spell negligence out of the fact that an automobile jerks. There probably never was an automobile that did not at times so move but that it could be characterized as a jerk.

Herbert Meek describes the actual happening of the accident (Case, p. 31):

> "Q. Now you say ten. It might have been a little slower, might it not? A. No. He made the turn and he was starting up and then he went—it like caught when Tiff got thrown off and then he went until the driver stopped him.
>
> "Q. You say that he had to make a turn going around two corners. What street is that on, the two corners? A. It ain't two corners. He had to turn this way and then back straight again on Laurie Street.
>
> "Q. He just made one turn, didn't he? A. He had to swing north to clear the point and then he swung east to straighten the car.
>
> "Q. Then there is just one turn, isn't there? He just turned around a corner, didn't he? A. Yes.
>
> "Q. He didn't make two turns, did he? A. When he was straightening up for east, that is

when Tiff fell off, to come east on Laurie Street."

Even assuming that plaintiff was an invitee on the truck (which we urge he was not), nothing in the conduct of the driver or in the movement of the truck was shown from which negligence can be inferred.

> "Negligence is never presumed, but must be proved, and the burden of proving it rests upon the party alleging it."
>
> *Tobias* v. *People's Ry. Co.,* 80 Atl. 359.

> "Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence and in favor of innocence. The doctrine or maxim *res ipsa loquitur* is not applicable to the facts of this case."
>
> *Alvina* v. *Public Service Ry. Co.,* 117 Atl. 709.

> "Negligence is a fact which must be proved. It will not be presumed."
>
> *McCombe* v. *Public Service Ry. Co.,* 112 Atl. 255.

> "The mere fact of an injury will not raise a presumption of negligence."
>
> *Nelms* v. *Pennsylvania R. Co.,* 109 Atl. 673.

> "Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."
>
> *Ryan* v. *Public Service Ry. Co.,* 128 Atl. 158.

> "To sustain a cause of action based on negligence, the testimony must be such that negligence may be reasonably inferred. Negligence is a fact which must be shown. It will not be presumed."
>
> *Donus* v. *Public Service Ry. Co.,* 133 Atl. 196.

> "From the mere happening of an automobile accident no presumption of negligence arises."
>
> *Ferrell* v. *Solski,* 123 Atl. 494.

In the case of *Morehouse* v. *Morehouse Bros. Co.,* 122 Atl. 791, it is held:

> "Where a corporation was organized to deal in building materials and to do construction work, and its president and general manager directed his son to use the company's automobile on a pleasure trip, the company was not liable for injuries caused by negligent driving by the son."

POINT II.

Plaintiff was guilty of contributory negligence.

A motion for nonsuit was made on this ground (Case, p. 102).

Plaintiff claims he was not a trespasser and he was actually on the truck by virtue of his employment. The proofs showed that he lived back of defendant's plant, was always hanging around the plant, getting on the trucks for a ride when he could. However he may have gotten on the truck, after he was warned to get off and did actually get off (Case, p. 131; p. 110), the fact is that the boy fell off the truck as a result of some act of his own. He did not hold on to the ice box, for if he had, he would not have fallen off. He claims he had ridden on trucks before. He knew how automobiles stopped, started and jerked. On almost any truck going through the city you can see boys hanging to something at the rear of the truck just as this boy was hanging. If they should let go they would fall off, just as he fell off.

The driver did not do anything to make him let

go. The owner of the truck did not know the boy was on the truck. On the undisputed evidence the boy was guilty of contributory negligence because he placed himself in a position where he says he had to hold on, and then failed to hold on.

POINT III.

There should have been a nonsuit because plaintiff claimed to be an employee.

A motion for nonsuit was made on this ground (Case, p. 103).

It should have been granted. Under Chapter 95, Laws of 1911, the Workmen's Compensation Act is exclusive under the proofs in this case. The claim of this boy is that on the day of the accident he was working for defendant. He claims he had frequently worked for the defendant. According to his story, he was not a casual employee but was hired at regular intervals, particularly on Saturdays. If his story is true then his remedy is an exclusive one under the Workmen's Compensation Law. He was either an employee or a trespasser on defendant's truck. If he is an employee then we submit that his relationship cannot be twisted into an implied invitation. On the motion for nonsuit it was error for the Court to refuse the request of defendant on this ground.

POINT IV.

The Trial Court should have directed a verdict for defendant.

Motion for direction of verdict was made on the same grounds as motion for nonsuit (Case, p. 146). It was error for the Court to refuse this request.

At the close of the whole case it clearly appeared that so far as the corporate defendant is concerned the plaintiff occupies no better position in law than that of licensee.

In *Faggioni* v. *Weiss*, 99 N. J. L. 157, it is held:

> "The driver of a private vehicle owes no duty to a trespasser or mere licensee thereon, except to abstain from acts willfully injurious; and this rule is applicable not only when such trespasser or licensee is an adult, but also, in the case of infants even of tender years. Danbeck *v.* New Jersey Traction Co., 57 N. J. L. 463, and Solomon *v.* Public Service Railway Co., 87 *Id.* 284, distinguished."

In *Lutvin* v. *Dopkus*, 94 N. J. L. 64, 108 at 862, it is held:

> "Persons soliciting one for the use of his automobile to take them to picnic grounds and return are mere licensees, to whom he owes only the duty of refraining from wantonly or willfully injuring them."

There is a long line of decisions in New Jersey and elsewhere, holding that the motion of a vehicle in travelling whereby one is thrown off or injured cannot be held to be negligence. Those are things to be expected. They are not unusual.

> *Chicago B. & O.* v. *Lampwan*, 25 L. R. A. (N. S.), 217.

In the case of *Swink* v. *Philadelphia Rapid Transit Company*, 120 Atl. 827, it is held:

> "An injury to a passenger by the ordinary opening or closing of a street car door, though done by an employee of carrier, is not sufficient to charge the latter with negligence, since the presumption is such employee was acting within the proper line of his duty."

In the case of *Callis* v. *United Rys. & Electric Co.*, 97 Atl. 715, it is held:

> "Plaintiff's testimony that he fell when the car made a 'sudden jerking movement forward' does not show that the movement was unusual or extraordinary, nor does the fact that he was thrown by such movement."

In the case of *Delaney* v. *Buffalo R. & P. Ry. Co.*, 109 Atl. 605, it is held:

> "Injury to a passenger, by lurching of railway train on which she was riding when rounding a curve, raises no presumption of negligence by the carrier, since the accident was not connected with means of transportation, and the burden of proving negligence is on the passenger.
>
> "The passenger's testimony that the lurch of the train in rounding a curve, whereby she was injured, was terrific, does not make out a prima facie case of negligence against the carrier, especially where it appears that the other passengers and the dishes in the buffet were not disturbed."

POINT V.

The Trial Court should have instructed the jury:

> "The jury is instructed to bring in a finding whether the plaintiff Steve Doryk, at the time of the accident, was an employee of the defendant company and was actually performing a duty for the defendant at the time of the accident."

This was a proper request under the issues in this case. The Court did charge the jury (Case, p. 153).

> "The driver said that he invited this boy for the purpose of assisting him in moving

> the boxes that were on that truck, and that he brought the boy on the truck, from where the boy had gotten on, to this bottling establishment."

In view of the above it was error for the Court to refuse to charge as requested. This was a jurisdictional question. If the jury found that plaintiff was an employee, then, manifestly the Court was without jurisdiction.

POINT VI.

The Trial Court should have instructed the jury:

> "The jury is further instructed to find whether the employment of Steve Doryk was at the time of the accident a mere casual employment or whether he was a regular employee."

It was error on the part of the Court to refuse this request. It was one of the issues in the case. The plaintiff claimed he was a casual employee. The defendant was entitled to a definite finding on this point.

POINT VII.

The Trial Court should have instructed the jury:

> "If the boy was not an employee at the time of the accident he cannot recover in this case."

It was error for the Court to refuse this request. The alleged invitation to ride was based upon employment. The employment, to make plaintiff other than a licensee or trespasser, must have been an employment by defendant. The defendant was, therefore, entitled to the charge as requested.

POINT VIII.

The Trial Judge erroneously charged the jury:

> "But, if the boy was on that truck, and on that truck as an invitee at the time of the accident, then was there such conduct upon the part of the defendant that was actionable negligence? Was this boy thrown off the truck as a result of such an act, in the handling of that car, upon the part of the driver of that car, that a reasonably prudent person would not have been guilty of under the time, place and circumstances, or, did he fail to do anything which a reasonably prudent person would have done under the time, place and circumstances, which was the cause of the throwing off of this boy?"

The plaintiff's theory was not that of invitation. He opened his case to the jury and tried his case on the theory that the plaintiff was an employee—not such an employee, he claimed as came within the terms of the Workmen's Compensation Law, but nevertheless, an employee and not an invitee.

We submit it was error for the Trial Judge to so charge. This leaves to the jury the question of liability on the part of the defendant if the driver did something that a reasonably prudent person would not have done. It eliminates contributory negligence, invitation, employment and all the other issues in the case.

POINT IX.

The Trial Judge erroneously charged the jury as to the alleged invitation to plaintiff:

> "Was that boy there as an invitee of Mr. Schwartzenberg, as president of the company, as I say, either expressly from Mr. Schwartzenberg, or from the driver in such a way that Mr. Schwartzenberg, having full knowledge of it, that the act of his employee, the driver, was his act, the same as though he was the one encouraging and inviting and inducing the boy to be on the truck? That is the question."

We respectfully urge that a corporate defendant cannot be bound by an implied invitation on the part of its president. Mr. Schwartzenberg himself might be bound by an implied invitation on his part but a corporation certainly could not. (See cases cited under Point I.)

POINT X.

The Court admitted illegal evidence on behalf of the plaintiff.

Over objection the Court allowed the following:

> "Q. At Maple and Smith Street what happened there? A. The driver stopped the truck and Martin Doryk and another lad jumped on and we started up, and as we were leaving there—we crossed the temporary bridge and just as we were going off the planks—
>
> "Mr. Turner: I object to that on the ground that it is immaterial and incompetent and irrelevant. This relates to some time prior to the alleged accident.
>
> "Mr. Toolan: It is the same morning and we will show—
>
> "The Court: I will allow it. You may take an exception.
>
> "Mr. Turner: I pray an exception.
>
> "A. (Cont.) And just as we were going off the plank on to them brick that was laid, the brakes locked, and on the other side of the railing—
>
> "Q. What happened when the brakes locked? A. The two wheels stood stiff and slid.

"Q. What happened to the truck? A. The truck stopped with a jerk."

This was error. The alleged happening occurred earlier in the day on the date of the accident. The happening of the accident is not shown in any way to have had anything to do with the brakes. The proof is that the brakes were in perfect condition.

This illegal evidence was offered by plaintiff and used by him in his argument as accounting for the happening of the alleged accident.

POINT XI.

The Trial Court erroneously permitted Joseph Doryk to testify as to a conversation with the driver of the truck.

The testimony above referred to appears (Case, p. 64):

"Q. Speak out. I can't hear you. A. Steve —the driver called Steve and said come on.
"Mr. Turner: I object to what the driver told Steve on the ground it is incompetent and not binding on the defendant.
"The Court: Objection overruled.
"Mr. Turner prays exception.
"A. He called Steve, he said, 'Come on, take the empty cases off, we have got to hurry up and go to Carteret.' All of us went out and got a big white ice box and we put it on the truck, all of us put it on the truck and then Steve was on the back, there was a little space, enough for Steve to stand, or somebody to stand, about eight inches wide, and about as long as the truck, and then he got on there, he got his gas full, tank full and then he started out."

In *Stults* v. *East Brunswick Co.*, 48 N. J. L. 597, it is held:

"The same may be said in respect to the objection to the refusal to admit testimony as to what certain persons—one the engineer of the company, another the superintendent, and the third a toll-gate keeper—said when the witness complained to them of the condition of the road. It may be added that it does not appear that the statements of those persons upon the subject, whatever they might have been, were made under such circumstances as to be binding upon the company."

In *Blackman* v. *West Jersey Co.*, 68 N. J. L. 1, it is held:

"Only such words as are spoken, or such acts as are done, by an agent, in the execution of his agency, are admissible in evidence against his principal."

POINT XII.

The Trial Court erroneously admitted evidence of a conversation between the driver of the defendant's truck and one Herbert Meek.

The above appears (Case, pp. 12-13):

"Q. What was 'Stricky' or the driver doing at the time you saw him? A. He stopped his truck and he was just getting out to go in the store, and he told—
"Mr. Turner: I object to what he told on the ground it would not be binding upon the defendant.
"Mr. Toolan: I think we can show what the driver said to them. I do not think it comes within the line of the case of Blackman *v.* The Railroad.
"The Court: Why is not that competent?
"Mr. Turner: Anything the driver may have told is not binding on the defendant.
"The Court: On the question of invitation?
"Mr. Turner: Yes, sir.

"The Court: Objection overruled.
"Mr. Turner: Prays exception.
"A. He asked us if we wanted to take a ride around town with him and we agreed. And when he come out—"

This comes within the rule in *Blackman* v. *West Jersey Co.*, 68 N. J. L. 1

It is respectfully urged that the judgment of the Supreme Court should be reversed.

Frank G. Turner

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Attorney and of Counsel with
Defendant-Appellant.

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New Jersey Court of Errors and Appeals

WILLIAM OKIN, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a New Jersey corporation, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*
WILLIAM KATZ, *Plaintiff-Appellant,* *vs.* ESSEX SALES COMPANY, a New Jersey corporation, *Defendant-Respondent.*	*Action at Law.* *On Appeal from New Jersey Supreme Court.*

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

The accident involved in these two appeals occurred at the corner of Northfield Road and Gregory avenue, West Orange, on July 13th, 1925, around ten o'clock in the morning of that day (21 and 22). The automobile, driven by the plaintiff Katz and owned by the plaintiff Okin, was proceeding east on Northfield Road toward Newark and was struck by a motorcycle going south on Gregory avenue, the motorcycle being the property of the defendant named in these two appeals (17).

At the conclusion of the entire case, the Court, the Honorable Edwin C. Caffrey, Common Pleas Judge, before whom the cases were tried, directed verdicts in favor of the defendant, on the

ground that it was shown by uncontradicted proof that Martin, who at the time of the accident was driving the defendant's motorcycle, had departed from the instructions given him, so that the relation of master and servant did not exist at the time of the collision, sufficient to hold the defendant on the doctrine of *respondeat superior*. The Supreme Court, on appeal, affirmed the Essex County Court of Common Pleas, the opinion appearing in full in the state of the case, at pages 95, *et seq.*, and these two appeals are from the judgments of affirmance by the Supreme Court.

The propriety of the Trial Court's rulings in directing the verdicts in favor of the defendant, is the only question before this Court on these appeals and we believe that an examination of the record will show that the ruling was proper and that these appeals should be dismissed. William Martin was operating the defendant's motorcycle when the accident happened and as the result of the accident, he was killed. On the morning in question, he was told by David A. Depue, the president of the defendant Company, which makes wholesale brake linings, to take a brake lining cutter from the Company's place of business, 87 Halsey street, Newark, New Jersey, to Barone & Tordell at Valley and Forest streets, Orange, New Jersey, to wait for the cutter to be repaired and bring it back as soon as possible (77 and 78). He was given these instructions at nine-fifteen in the morning and never returned. The place where the accident happened, Northfield Road and Gregory avenue, was in West Orange, about a mile and four-tenths from Barone & Tordell's shop (79) and northwest of it (89).

David A. Depue testified first for the defendant Company and said, pages 77 and 78:

"Q Are you connected with the Essex Sales Company, the defendant in this case? A I am.

Q What is your relation with the company? A I am president.

Q Where does your company do business? A 87 Halsey street, Newark.

Q Was it there on July 13, 1925? A It was.

Q What was the business of the company? A Wholesale brake linings, principally.

Q Were you in your office that day? A I was.

Q Did you employ William Martin? A I did.

Q He was a boy of about eighteen? A Yes.

Q And he was in your employ that day? A Yes.

Q How long had he been in your employ up to that time? A About four months.

Q What was his job? A Delivery and picking up brake bands."

Regarding the instructions which he gave to Martin on the day in question, he said, pages 78 to 80:

"Q Did you give Martin anything having to do with your company on that motorcycle on July 13, 1925? A Yes.

Q What did you tell him to do? A I told him to take a brake lining cutter up to the firm of Barone & Tordell in West Orange, wait for the cutter to be repaired and bring it back as soon as possible.

Q What time did you tell him? A 9:15.

Q Did he ever come back? A No.

Q Did you subsequently learn that he had been in a collision? A Yes.

Q Did you go to the scene of the accident? A I did.

Q About when did you get there, do you know? A About a quarter before eleven.

Q With reference to Barone & Tordell's place, where was it? A A mile and four-tenths from the intersection of Gregory avenue and Northfield Road; that is the distance from the shop to the intersection.

Q Had your company any business on July 13th which required the presence of Martin at Gregory avenue and Northfield Road, West Orange? A We did not.

Q Had you ever gone from your place of business on Halsey street to Valley street, Orange, where Barone & Tordell's shop was, by motor or motorcycle? A Yes, I have driven that distance.

Q Did your course, or does the course, or did the course between those two places take you to Northfield Road and Gregory avenue, West Orange? A It does not.

Q You say that you instructed Martin as to what to do with reference to the brake lining cutter? A I did.

Q Was anybody present when you gave him those instructions? A There was.

Q Who was that? A William Culbert.

Q Is he still in your employ? A He is.

Q When did you learn of this accident? A About 10:30.

Q Ten-thirty? A Yes.

Q Had you, prior to learning of that, had any telephone talk with Barone of Barone & Tordell? A I had.

Q Do you know what time that talk was? A About, yes.

Q What time? A About 10:15."

On his cross examination, Mr. Depue said, pages 80 to 81:

"Q You are acquainted with the locality of this accident, are you? A I am.

Q And the street running immediately parallel with Northfield Road and immediately north of Northfield Road, is Mt. Pleasant avenue? A Yes.

Q If two persons were coming along Gregory avenue from Mr. Pleasant avenue toward Northfield Road, that person would

then be heading toward or in the general direction of Barone & Tordell? A He would be going south.

Q Can't you answer my question yes or no? A Generally, yes.

Q Specifically. A He would never reach Barone & Tordell's if he kept going straight ahead.

Q It could have been on his way to Barone & Tordell's? A Yes.

Q In fact, it is as direct a way as there is to Barone & Tordell up Northfield Road, isn't it?

Mr. Studer: I object, because that assumes a right to be in West Orange.

The Court: I will overrule the objection.

The Witness: From Mr. Pleasant avenue?

Q Yes. Along Gregory avenue to Mt. Pleasant avenue. A It is as direct as any other.

Q Did this boy Martin ever use the motorcycle for his own purposes with your consent? A No.

Q Positive about that? A Positive.

Q Where was the motorcycle deposited? A 34 Essex street, Newark.

Q Did he ever drive home with it? A Not to my knowledge.

Q Do you know where this boy Martin lived? A Sussex avenue.

Q Is Essex street anywhere near Sussex avenue? A No.

Q But you remember specifically that you told him to have this brake lining cutter fixed at Barone & Tordell's? A I do.

Q Did you tell him anything else at that time? A I told him to wait for it until it was finished and bring it back.

Q Was this boy always prompt in his errands? A Yes."

William F. Culbert, corroborated what Mr. Depue had said regarding instructions given by him to Martin, his direct testimony being, page 84:

"Q Mr. Culbert, do you work for the Essex Sales Company? A Yes, sir.

Q In what capacity? A Service manager.

Q Did you work for the Essex Sales Company on July 13, 1925? A Yes, sir.

Q Were you present that morning at that place of business at the time Mr. Depue gave some instructions to William Martin? A Yes, sir.

Q Did you hear the instructions he gave Martin? A I did.

Q What did he say? A 'Go to Barone & Tordell's for the brake lining cutter and have it repaired, wait for it and bring it back.'

Q Did he ever come back? A No.

Q What time was that? A About a quarter-past nine."

On cross examination, Mr. Culbert said, pages 84 to 85:

"Q What time? A About a quarter-past nine.

Q Where were you at the time? A At the bench desk at the office.

Q How far from Mr. Depue were you? A About two feet.

Q What were you doing? A Making out an order.

Q And listening to Mr. Depue at the same time? A Yes, sir.

Q How long have you been in the employ of the Essex Sales Company? A Since July 6, 1925.

Q Since the 6th of July? A Yes, sir.

Q What words did he use? A 'Go to Barone & Tordell's, have this brake lining cutter repaired and bring it back when he is finished with it.'

Q Can you repeat any other part of the conversation that took place between Mr.

Depue and young Martin at that time? A No, sir.

Q Was there any other thing said at that time but those words? A No, sir."

Mark J. Barone of Barone & Tordell also testified on behalf of the defendant, saying, pages 86 to 87:

"Q Mr. Barone, where is your place of business? A At Valley and Forrest streets, Orange, New Jersey.

Q What was your business on July 13, 1925? A General repair business.

Q Did you at that time do general repair work for the Essex Sales Company among other customers? A Yes, sir.

Q On the morning of July 13, 1925, did a boy, William Martin, come to your place of business with some kind of a machine? A Yes.

Q Did you take it from him? A Yes, sir.

Q What did you do with it? A I drilled some holes in it to fasten to an angle iron platform.

Q Was that repair work? A Yes.

Q Did this boy help you? A Yes, sir, it was a cumbersome job and he helped me.

Q Did he stay until you drilled the holes? A He stayed until I drilled the holes; he didn't wait until I got through.

Q How long before you finished did he leave, if you remember? A Five minutes.

Q Do you know where he went? A I do not.

Q About what time did he get there, do you know? A Between half-past nine and ten.

Q And did you ever see him again? A No, sir."

He was not cross examined by the plaintiff's attorney, but after the plaintiff had rested, Mr.

Barone was recalled by the Court and gave the following evidence, page 89:

"Q Mr. Barone, do you know where Northfield Road and Gregory avenue intersect? A Yes, your Honor.

Q How far is it from your place of business? A A little over a mile.

By Mr. Studer.

Q Is it west or east of your place of business? A It is northwest.

Q Is that toward Newark or toward West Orange? A It is toward Montclair."

The testimony above recited was the only testimony given with reference to Martin's authority to bind the defendant and it was entirely uncontroverted, either by cross examination or by direct testimony offered on behalf of the plaintiffs. At the conclusion of the entire case, the following motion was made for the defendant, pages 89 to 90:

"Mr. Studer: If your Honor please, I respectfully move for the direction of a verdict on the ground that there is uncontroverted testimony here that the chain which linked Martin to the Essex Sales Company was broken when, from the testimony, it appears that he was in West Orange at the time of this accident. It is uncontroverted that he was sent to Orange with the machine to be fixed, to wait for it and bring it back and at the time of the accident he was doing none of those things in West Orange. What took him there nobody knows, but there is a distinct break in the link and it is uncontroverted and I think within the cases it presents a question for the Court and not for the jury.

The Court: The testimony indicates that the boy left the Essex Sales Company at 9:15 with instructions to remain at the Barone place until the cutter was repaired. He left five minutes before the job was finished and went in a direction toward Montclair.

What have you to say as to the continuity of performance under the employ of the defendant company?"

After hearing some argument, Judge Caffrey said, page 91:

"The Court: I am inclined to think that the proof is uncontradicted that there was a deviation. Under the circumstances, I will direct a verdict for the defendant in both actions."

THE LAW.

The cases are many in this Court, as well as in the Supreme Court, to the effect that the presumption that a servant is engaged in his master's business can be overcome by uncontradicted proof to the contrary and if so overcome, the direction of a verdict is in order and the Trial Court followed these cases in ruling as he did. Without quoting from the authorities, some of them are: *Tischler* v. *Steinholtz,* 99 N. J. L. 149; *Mahan* v. *Walker,* 97 N. J. L. 304; *Cronecker* v. *Hall,* 92 N. J. L. 450; *Missell* v. *Hays,* 86 N. J. L. 348; *Doran* v. *Thompson,* 76 N. J. L. 754; *Michael* v. *Southern Lumber Company,* 3 New Jersey Adv. Rep. 462; *Zampella* v. *Fitzhenry,* 97 N. J. L. 517; *Evers* v. *Krouse,* 70 N. J. L. 653; *Kras* v. *Burns Bros.,* 94 N. J. L. 859; *Eldridge* v. *Calhoun,* 95 N. J. L. 168, and *Jennings* v. *Okin,* 88 N. J. L. 659. Mr. Justice Trenchard referred to several of these cases in the opinion herein, pages 97 and 98, any one of which is sufficient authority to uphold the judgments now appealed from. There was uncontradicted evidence for the defendant that Martin, at the time in question, was a mile and a half northwest of where he should have been, going south on Gregory avenue, which, if he continued in that direction, never would have brought him to the shop of

Barone & Tordell (p. 80). There was no evidence to show that he was on his way back to Barone & Tordell's when he was hit and although he had been seen going north on Gregory avenue by the witness Gartland a little while before the accident happened, which Gartland also witnessed, there was nothing in these two facts from which it could be inferred that he had actually made up his mind to return to Barone & Tordell's and in the absence of some such proof, the Trial Court would have been entirely unjustified in letting the case go to the jury. This is not a case of deviation, but on the other hand, it is a case where the servant entirely departed from and abandoned his employer's service for some other purpose not connected therewith, the evidence to that effect was clear and uncontradicted and warranted no other ruling but that which the Trial Court made.

Reference is made in the plaintiffs' brief to the case of *Reilly* v. *Standard Oil Company,* New York Court of Appeals, 231 N. Y. 301—132 N. E. 97, as authority for the proposition that this case falls within the "returning to duty" doctrine. The *Reilly* case is distinguished and modified in part by a later case in the same Court, *Fiocco* v. *Carver,* 234 N. Y. 219—137 N. E. 309. In that case, the driver of the defendant's automobile was sent from New York City to Staten Island and having made a delivery there, it was his duty to bring the truck which he was driving, back to the defendant's garage on the West Side of New York City, instead of which he went to the East Side to see his mother. When he arrived there, there was a carnival in progress, and entering into the spirit of it, he filled his employer's truck with children and drove them about, finally

stopping in front of a pool room. When he returned to his truck, the plaintiff was climbing up the side of it and the driver ordered him off three times. As the third order was given, the plaintiff started to come down, but before he could reach the ground, the truck was started and his foot was caught in the wheel and injured. Upon those facts, the jury found a verdict for the plaintiff. The judgment was upheld by the Appellate Division, but was reversed by the Court of Appeals, Chief Judge Cardozo writing the opinion. He said at page 310:

> "The plaintiff argues that the jury, if it discredited the driver's narrative of the accident, was free to discredit his testimony that there had been a departure from the course of duty. With this out of the case, there is left the conceded fact that a truck belonging to the defendant was in the custody of the defendant's servant. We are reminded that this without more sustains a presumption that the custodian was using it in the course of his employment. *Norris* v. *Kohler,* 41 N. Y. 42, 44; *Ferris* v. *Sterling,* 214 N. Y. 249, 253, 108 N. E. 406, Ann. Cas. 1916D, 1161. But the difficulty with the argument is that in this case there is more though credit be accorded to the plaintiff's witnesses exclusively. The presumption disappears when the surrounding circumstances are such that its recognition is unreasonable. *Fallon* v. *Swackhamer,* 226 N. Y. 444, 447, 123 N. E. 737. We draw the inference of regularity, in default of evidence rebutting it, presuming, until otherwise advised, that the servant will discharge his duty. We refuse to rest upon presumption, and put the plaintiff to his proof, when the departure from regularity is so obvious that charity can no longer infer an adherence to the course of duty. * * *
>
> We turn, then, to the driver's testimony to see whether anything there, whether read

by itself or in conjunction with the plaintiff's narrative, gives support for the conclusion that the truck was engaged at the moment of the accident in the business of the master. All that we can find there, when we view it most favorably to the plaintiff, is a suggestion that after a temporary excursion in streets remote from the homeward journey, the servant had at last made up his mind to put an end to his wanderings and return to the garage. He was still far away from the point at which he had first strayed from the path of duty, but his thoughts were homeward bound. Is this enough, in view of all the circumstances, to terminate the temporary abandonment and put him back into the sphere of service? We have refused to limit ourselves by tests that are merely mechanical or formal. *Reilly* v. *Standard Oil Co. of N. Y.,* 231 N. Y. 301, 132 N. E. 97. Location in time and space are circumstances that may guide the judgment, but will not be suffered to control it, divorced from other circumstances that may characterize the intent of the transaction. The dominant purpose must be proved to be the performance of the master's business. Till then there can be no resumption of a relation which has been broken and suspended.

We think the servant's purpose to return to the garage was insufficient to bring him back within the ambit of his duty. * * * The field of duty once forsaken, is not to be re-entered by acts evincing a divided loyalty and thus continuing the offense. * * * We are not dealing with a case where, in the course of a continuing relation, business and private ends have been coincidently served. We are dealing with a departure so manifest as to constitute an abandonment of duty, exempting the master from liability till duty is resumed."

As to the two cases in the Supreme Court, of *Patrizio* v. *Bancroft* and *Brown* v. *Voorhees,*

the opinions in both of which are set forth in full in the plaintiffs' brief, we believe it appears, after a reading of them, that neither applies, because in both of them there was proof to show that the servant had, in fact, resumed the master's duties at the time when the accidents in question occurred, while here there is an entire absence of any such proof. As was said by this Court in *Cronecker* v. *Hall,* 92 N. J. L. 450, which Mr. Justice Trenchard cited in the opinion of the Supreme Court as on all fours with this case:

> "* * * *, there is no testimony worthy of the designation, from which it can be reasonably inferred that what Brown did on that day, was within the scope or discharge of his master's business,"

so here, in the absence of any proof to show a resumption of duty, as against the uncontradicted evidence of Martin's breach of instructions, the Trial Court would not have been warranted in ruling other than he did and, therefore, the judgments appealed from should be affirmed.

Respectfully submitted,

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