INDEX.

Summons.

THE STATE OF NEW JERSEY.
(L. S.)

To MATTHEW KRAUSE and ROMAN KRAUSE.

YOU ARE SUMMONED to answer the annexed complaint of Martin Ceslak, in an action at law in the Hudson County Circuit Court, and take notice that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, at Jersey City, New Jersey, 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, A. DAYTON OLIPHANT, Judge of our Hudson County Circuit Court, at Jersey City, New Jersey, this 10th day of September, 1928.

JOHN J. McGOVERN,
Clerk.

BRENNER & KRESCH,
Attorneys.

Complaint.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK, Plaintiff, vs. MATTHEW KRAUSE and ROMAN KRAUSE, Defendants.	Action at Law.

Plaintiff residing in the City of Bayonne, County of Hudson and State of New Jersey, says that,

1. On or about July 18th, 1928, the defendant, Roman Krause was the owner of a certain automobile which was being driven by him, his agent, servant or employee along Standard Place, at or near Avenue E, both public streets and highways in the City of Bayonne aforesaid.

2. On or about the date aforesaid, the plaintiff while lawfully walking along Avenue E and as he was crossing the said Standard Place, the defendant, his agent, servant or employee negligently and carelessly operated said automobile that he caused the same to run into and over the body of the said plaintiff, Martin Ceslak, and as a result thereof, the said plaintiff was severely and permanently injured.

3. The negligence and carelessness of the defendant Roman Krause, his agent, servant or employee consisted in this,

(a) That he operated said automobile in a careless and negligent manner.

(b) That he did not have proper control of said automobile.

(c) That he did not give any warning of his approach.

(d) That he did not keep a proper lookout for the plaintiff, who was then and there upon the public highway.

(e) That he drove at a high, excessive and improper rate of speed.

4. By reason of the negligence and carelessness of the defendant as aforesaid, the plaintiff was severely and permanently injured about the head, limbs and body, suffering contusions, abrasions, lacerations of the face, hands and to other parts of his body, more particularly suffering an injury to his skull, from which injuries the plaintiff has suffered and in the future will suffer great pain.

5. By reason of the injuries sustained as aforesaid, the plaintiff has been and will be obliged to expend large sums of money for medicines, doctor bills and medical attention in order to effect a cure of the injuries sustained, and as a further result of the injuries sustained, the said plaintiff has been and in the future will be deprived of his earnings, wages, profits and advantages which he would have otherwise received, except for the injuries sustained as aforesaid.

To the damage of the plaintiff $30,000.

SECOND COUNT.

1. Plaintiff repeats each and every allegation of the first count as if the same were herein repeated

and realleged and makes same a part of this count and further says,

2. On or about July 18th, 1928, the defendant, Matthew Krause was the driver of a certain automobile which was being driven by him, his agent, servant or employee along Standard Place, at or near Avenue E, both public streets and highways in the City of Bayonne aforesaid.

3. On or about the date aforesaid, the plaintiff while lawfully walking along Avenue E and as he was crossing the said Standard Place, the defendant, his agent, servant or employee negligently and carelessly operated said automobile that he caused the same to run into and over the body of the said plaintiff, Martin Ceslak, and as a result thereof, the said plaintiff was severely and permanently injured.

4. The negligence and carelessness of the defendant Matthew Krause, his agent, servant or employee consisted in this,

(a) That he operated said automobile in a careless and negligent manner.

(b) That he did not have proper control of said automobile.

(c) That he did not give any warning of his approach.

(d) That he did not keep a proper lookout for the plaintiff, who was then and there upon the public highway.

(e) That he drove at a high, excessive and improper rate of speed.

5. By reason of the negligence and carelessness of the defendant as aforesaid, the plaintiff was severely and permanently injured about the head, limbs and body, suffering contusions, abrasions, lacerations of the face, hands and to other parts of his body, more particularly suffering an injury to his skull, from which injuries the plaintiff has suffered and in the future will suffer great pain.

6. By reason of the injuries sustained as aforesaid, the plaintiff has been and will be obliged to expend large sums of money for medicines, doctor bills and medical attention in order to effect a cure of the injuries sustained, and as a further result of the injuries sustained, the said plaintiff has been and in the future will be deprived of his earnings, wages, profits and advantages which he would have otherwise received, except for the injuries sustained as aforesaid.

To the damage of the plaintiff $30,000.

BRENNER & KRESCH,
Attorneys of Plaintiff.

(Filed Sept. 18, 1928.)

Answer.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK, Plaintiff, vs. MATTHEW KRAUSE and ROMAN KRAUSE, Defendants.	Action at Law.

Defendants, residents of the City of Bayonne, County of Hudson and State of New Jersey, answering the complaint filed herein say that:

FIRST COUNT.

1. They admit that defendant Roman Krause, owned a certain automobile on July 18th, 1928, and that his son Matthew Krause operated said automobile on said day at the intersection of Avenue E and Standard Place, Bayonne, N. J.

2. They deny paragraphs 2, 3, 4 and 5.

SECOND COUNT.

1. In answer to paragraph 1, they repeat the answer to each and every allegation to the First Count, as if the same were herein repeated and alleged, and makes them a part hereof.

2. They admit that defendant Matthew Krause drove a certain automobile on July 18th, 1928, at

the intersection of Standard Place, and Avenue E, Bayonne, N. J.

3. They deny paragraphs 3, 4, 5 and 6.

FIRST SEPARATE DEFENSE.

Defendants, or either of them, were not guilty of any negligence.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Defendants.

(Filed Oct. 24, 1928.)

Reply.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK, Plaintiff, vs. MATTHEW KRAUSE and ROMAN KRAUSE, Defendants.	Action at Law.

Plaintiff for a reply to the answer of the defendants says that,

1. He denies all the allegations contained in the paragraphs of the first separate defense.

BRENNER & KRESCH,
Attorneys of Plaintiff.

(Filed Oct. 25, 1928.)

Case.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK,
Plaintiff,

vs.

MATTHEW KRAUSE and
ROMAN KRAUSE.

Before—Hon. THOMAS BROWN, *J.*, and a Jury.

Jersey City, N. J., November 12, 1930.

APPEARANCES:

BRENNER & KRESCH, Esqrs, for the Plaintiff, by ALFRED BRENNER, Esq.

McDERMOTT, ENRIGHT & CARPENTER, Esqrs., for the Defendants, by PATRICK A. DWYER, Esq.

A Jury was duly empanelled; being found satisfactory, they were sworn.

Counsel opened to the Jury.

(It is agreed between counsel that Standard Place is about 25 feet wide and that Avenue E is about 60 feet wide.)

Martin Ceslak. Called by Plaintiff. Direct.

MARTIN CESLAK, called:

Mr. Brenner: I think we will need the interpreter for Mr. Ceslak.

The Court: How long have you lived in this country?

The Witness: Eighteen years.

(Martin Ceslak was then sworn in the English language, as a witness for the plaintiff.

Q. You remember walking along Avenue E on July 17th, 1928? A. Yes, sir.

Q. Were you walking on the sidewalk or in the street, or where? A. On the sidewalk.

The Court: Take your hand down and speak so that the last juror can hear you.

Q. Were you crossing over the sidewalk at the time that an accident happened? A. Yes, I walked on the sidewalk.

Q. While you were walking on the sidewalk and crossing Standard Place, what happened to you? A. I don't know. I was walking and I heard noise coming along and knocked me.

Q. What knocked you down? A. Auto. And threw me. I tried pick my head up and get number; can't do it, because my eye was covered with blood.

Q. Now, when you looked up after you were hit and could not see the number, because your eye was covered with blood; what was the next thing that you remember? A. After that I am down here; after that I don't remember.

Martin Ceslak. Called by Plaintiff. Direct.

Q. What next do you remember? A. I don't know nothing.

The Court: Well, you were in the hospital?
The Witness: Next day; I come up to myself.
The Court: Where were you, at home?
The Witness: No.
The Court: In the hospital?
The Witness: I never knew.
The Court: When you did come to?
The Witness: I don't know. I heard noise. The nurse told me.

Q. The nurse told you you were in the hospital? A. The nurse told me I am in the hospital.

Q. Before you were hit with the automobile was there any horn? A. No.

Q. Any sound of any kind? A. No.

Q. Did you see any lights on any automobile? A. I didn't see no lights.

The Court: How do you know it was an automobile if you didn't see it?
The Witness: Because after, when I got hit, I tried to lift my head up to get license. I can't see because my eye was covered with blood.
The Court: How do you know it was an automobile if you didn't hear the horn and didn't see the light?
The Witness: I was feeling my head was run through me. That's all I know, being run through my head and knocked me down.
The Court: I wonder if you understand this. (Through the Polish interpreter) How can you tell it was an automobile that struck you

if you didn't see it, or you didn't hear a horn, or didn't see a light?

The Witness: (Through the interpreter) I could not see it, because it struck me in the back. When he run over me this way, I remember seeing a tire.

The Court: So it was while running over you, you saw the automobile?

The Witness: When he was going over there to the garage.

Mr. Dwyer: I object to that. I think this latter part of the answer is a conclusion of the witness.

The Court: It is, what the witness said.

(Examined without the interpreter):

The Court: How long were you in the hospital?

The Witness: A month.

The Court: How long were you out of work?

The Witness: Since after I got hurt.

The Court: Up to now?

The Witness: No.

The Court: Never work a day since?

The Witness: No.

The Court: What were your wages?

The Witness: I am no good.

The Court: How much did you make; what wages?

The Witness: $25. a week.

The Court: You lost all that?

The Witness: Yes, sir.

The Court: What is the amount of your doctor's bills?

The Witness: I don't know.

Q. Who paid the doctor? A. Nobody yet.

Martin Ceslak. Called by Plaintiff. Direct.

The Court: I suppose you will have the doctor here; or have you submitted bills?

Q. Before the accident, where did you live? A. Staten Island.

Q. Since the accident, where do you now live? A. In Red Bank.

Q. With whom? A. After, when I got a little better, I come out from the hospital, I stay by my sister in Bayonne a month.

Q. How long did you stay with your sister? A. A month.

Q. Then you went to another sister in Red Bank? A. Yes, sir.

Q. You are back in Bayonne now, then? A. Yes, sir.

Q. Living with the sister in Bayonne? A. Yes, sir.

Q. Have you tried to work since the accident? A. I did.

Q. What did you try to do? A. That is only neighbors; I tried to pick some apples.

Q. Tried to take some job picking apples on a farm? A. I got about half a bushel and I started from my eye get dizzy and I fell down on the ground.

Q. Did you have to be taken home that time? A. Yes, sir.

Q. Have you tried any other work since then? A. No.

Q. Have you tried around the house to do any work? A. No; I went once after coal to the cellar for my sister; fell down.

Q. For coal and fell down? A. Yes, sir.

The Court: Can you work?

The Witness: No.

The Court: Why?

The Witness: Get so dizzy and weak.

Mr. Brenner: I would like to offer in evidence these five photographs.

(Accepted and marked as Plaintiff's Exhibits P-1 to P-5 inclusive, of this date.)

(It is agreed on the record that Exhibit P-5 shows an arclight hanging on an arm from a telegraph pole over Standard Place, and that that arclight was not in Standard Place at the time that the accident occurred.)

CROSS EXAMINATION BY MR. DWYER:

Q. Mr. Ceslak, before you reached Standard Place on the evening of the accident, where were you coming from? A. From 21st.

Q. Where were you going to? A. To my sister on 15th Street.

Q. Had you made any stops on 21st Street? A. I did stop on 21st Street, dry good store, to get some working clothes.

Q. This was Sunday night, wasn't it? A. Yes, sir.

Q. Was the store open Sunday night? A. Yes, that store is open. It was—

Q. What? A. I have forgot what I buy; shirt and some other kind clothes.

Q. Were you carrying this shirt with you when you were hit? A. Yes, sir.

Q. Before you crossed Standard Place going to your sister's on Avenue E, did you look to your right in the street before you crossed? A. Yes; I looked on both sides.

The Court: Was he going north, or south?

Mr. Brenner: He was going south.

Martin Ceslak. Called by Plaintiff. Cross.

Q. You say you looked both ways? A. Yes, sir.

Q. When you looked to the left, did you see anything? A. No.

Q. How far could you see? A. Just look around, keep on going. Auto came along and knocked me down.

Q. When you looked to the left before you crossed Standard Place, how far to the left did you see? A. That way, I seen no kind of car coming along. I walking right on the sidewalk.

Q. How far across Standard Place did you get when you were struck? A. I could not remember very well how far I get; somewhere around on the center.

Q. About in the center? A. Yes, sir.

Q. Did you hear anything before you were struck? A. No.

Q. Did you hear the noise that an automobile made? A. I heard automobile pass through. I never know this.

Q. You didn't hear the automobile which struck you before you were struck? A. No, I didn't hear that.

Q. Where were you knocked down? A. After I got knocked down I tried to pick my head up and look what is that.

Q. How were you knocked; were you knocked on your stomach or on your side or back? A. Hit me on the head.

Q. How did you fall; forward or to the right or backwards? A. I don't know. I suppose take me swing and hit me.

Q. Did you say you saw the tire of this automobile? A. After passed through me I see tire.

Q. Did the automobile run over you? A. Run over me, hit me on the head and knocked me down.

Martin Ceslak. Called by Plaintiff. Cross.

Q. The automobile went right over you? A. Yes, sir.

Q. Where was the automobile when you saw the tire? A. Went to the garage.

Mr. Dwyer: I move to strike that out. That is a pure conclusion.

The Court: That is not responsive. Counsel is right in his objection. His meaning may be different.

Q. Where was the automobile which struck you when you saw the tire? A. Just when it passed me I tried to pick up my head and get the plates. I can't see the plates, only tire.

Q. What tire did you see, the front tire or the rear? A. Back tire.

Q. How far was the automobile away from you when you saw the back tire? A. From me to the door.

Q. Was it as far as I am?

The Court: He says from here to the door. That is 34 feet 9 inches. If counsel agree to that, that will be entered on the record.

Mr. Brenner: I agree to that.

Q. Did you see the automobile after that? A. I could not see because my eye was covered with blood.

Q. Did you see it? A. I tried. I want to get the number. I can't see because my eye was covered.

The Court: When the tire was from you to the door, where was the car?

The Witness: Was keep on going.

The Court: Which way?

The Witness: Went ahead.
The Court: In Avenue E or what?
The Witness: In Standard.

Q. When you saw the car which struck you, or rather, saw the tire from where you are to where the door is, is that the last view you had of it. You didn't see it any more after that? A. No, that is the last. I went down again, the door.

Q. You say you were working as a farmer making $25. a week?

The Court: Was he a farmer?
Mr. Dwyer: I think he worked as a farmer.
The Court: You were a farmer before this happened?
The Witness: Yes, sir.

Q. Your salary was $25. a week? A. Yes, sir.
Q. Did that include your board? A. Yes, sir.

Mr. Dwyer: No further questions.
(Witness excused.)
The Court: Is this a head injury?
Mr. Brenner: Yes, sir.
The Court: Any other injury.
Mr. Brenner: That is all of any importance. The others cleared up.

DR. JOHN DE ROSA, sworn for the Plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are a practicing physician of this State? A. Yes, sir.

Dr. John De Rosa. Called by Plaintiff. Direct.

Q. In June of 1928, you were connected with the Bayonne Hospital? A. Yes, sir.

Q. In what capacity? A. House physician.

Q. Were you on service the night that Martin Ceslak was brought in? A. Yes, sir.

Q. Will you briefly describe, doctor, the injuries that you found him suffering from at that time and when you did the first night that he was brought in? A. The man was brought into the admitting room, or emergency room and he was bleeding profusely from the region of the head. On examination we found that he was badly lacerated, the scalp was freely moveable, could be lifted off the skull, and by feeling it, it felt as if the bone was broken. He had a few scratches on his hands. That is all we could tell. He was in a state of shock.

Q. Where were those scratches on the hands, the palm or the back? A. On the back of the hand.

Q. Did you see any dirt or particles in those scratches? A. I don't remember.

Q. This scalp injury; you said something about something being lifted away from the head. What could be lifted away from the head? A. The scalp.

Q. The skin and bone on top of the head? A. That is skin and fat.

The Court: All the scalp or just part?

The Witness: Just part of it.

The Court: State what part it was?

The Witness: The part that is over the front.

The Court: Over the forehead.

The Witness: Yes, sir.

The Court: Just how many inches?

The Witness: I don't remember.

The Court: You don't mean to say that the entire scalp all the way back—

The Witness: No, not the entire scalp, just part of the scalp could be raised.

The Court: The laceration was over the forehead?

The Witness: Yes, sir.

The Court: Midway between the eyes?

The Witness: I don't know.

Q. Do you recall the number of stitches that were taken in the scalp? A. No, sir; I recall that we used catgut and silk worm. Catgut is used for deep stitches and silk worm the outside stitches.

Q. Have you any recollection of how many stitches? A. I have no idea.

Q. Was there a considerable number, or just a few? A. I believe there was quite a number.

Q. Does the hospital report show that? A. No.

Q. You have that here? A. The hospital report does not show how many were used.

Q. Did he remain under your care, doctor, during the time he was in the hospital? A. In the ward he was under my care as interne and under the Chief's care.

Q. How long did he remain in the hospital? A. Three weeks; the exact dates, from June 17th to July 9th.

CROSS EXAMINATION BY MR. DWYER:

Q. What was his condition, doctor, on July 9th? A. His condition was reported as improved.

Q. Did you perform this operation upon Mr. Ceslak? A. Well, there was so many of them. I believe I sutured; I was in charge of the admitting room at the time.

Q. Dr. Metcalf did this surgical job? A. Of the suturing?

Q. Yes? A. Well, I would not swear to that.

Q. Would you describe the character of the laceration, giving us your best judgment as to where it started and where it ended, using your own head or mine? A. Well, I can't say if it is on the right side or left side. I know it started from back of the ear and came across to that part, probably the right frontal region from the left mastoid to the left frontal region—right mastoid, rather.

The Court: How long?

The Witness: That may be three or four inches.

Q. You made some reference to the breaking of bone? A. Yes, sir.

Q. Could you illustrate on your own skull, the approximate point of the skull fracture? A. The approximate point is indicated as the right frontal bone, which is about in that region (Indicating).

The Court: Over the right eye?

The Witness: Over the right eye.

REDIRECT EXAMINATION BY MR. BRENNER:

Q. Do I understand you don't know whether the injury was to the right or left side? A. I say I don't know if it was exactly on the right side or the left side.

Q. So that in describing the side of the head that was injured as the right; it may be either the right or the left? A. In my opinion, it was the right.

Mrs. Joseph Rudzinski. Called by Plaintiff. Direct.

MRS. JOSEPH RUDZINSKI, sworn for the Plaintiff:

The Court: How long have you lived in this country?

The Witness: Eight years.

The Court: You can talk English.

DIRECT EXAMINATION BY MR. BRENNER:

Q. Mrs. Rudzinski, you have a place of business in Bayonne; you own a place in Bayonne? A. Yes, sir.

The Court: You speak up and tell the Court and Jury. Speak so that the last juror can hear you, that last man over there.

Q. Where is your place?

The Court: What number. Do you live at your place of business?

The Witness: I don't know.

The Court: What is the number of your store on the street?

The Witness: 207 Avenue E.

The Court: Do you go to the moving pictures?

The Witness: No.

The Court: Go to the Bank with the money?

The Witness: No.

The Court: Did you see Ceslak?

Mr. Brenner: I will let her step down and call another witness if we can't get the interpreter.

(Examination resumed through the Polish interpreter.)

Mrs. Joseph Rudzinski. Called by Plaintiff. Direct.

Q. You have a place of business at 207 Avenue E? A. I had it. Not now.

Q. That is right at the corner of Standard Place? A. Yes, sir.

Q. Did you see Martin Ceslak after he was hurt? A. I heard a moaning. I went out to see who it is and I saw him lying down.

Q. Did you know Martin Ceslak before you saw him lying on the ground? A. No.

Q. You didn't know who it was? A. I didn't know him.

Q. Was there anybody in your place of business when you went out, or with you at the time you went out? A. Marianski and Kowalski.

Q. Where was Ceslak lying when you saw him? A. There is an alley way on Standard Place. That is where he was lying.

Q. Was it near the sidewalk or far away from the sidewalk? A. About six or seven feet from the sidewalk.

Q. What was Ceslak's condition when you first saw him? A. When I saw blood there, then I turned and walked back again.

Q. Did you see any automobile there at the time? A. No; there was some on Avenue E. I didn't see any there.

Q. Did you see any lights in any garage along Standard Place? A. I didn't look at that time.

Q. When you saw the blood, you walked back into your place of business? A. Yes, sir.

Q. Did the two men go back with you, or did they stay there? A. I didn't look after them.

Q. Were there other people around besides you and Marienski and Kowalski, or were you the first three people that were there? A. No one else; when we came out. There was other people com-

ing from work there, and who were there first and they were lighting matches out in the street there.

Q. Do you know who those people were? A. No.

Q. Do you know Mr. Krause, Roman Krause? A. Yes, sir.

Q. Did you know him the night of the accident? A. He was coming back from that place and looking—

Q. You knew him then? A. I knew him before that.

Q. Where did you see him coming from when you were standing there looking at Ceslak? A. From the garage.

Mr. Dwyer: I move that that be stricken out. I think that is a conclusion of this witness.

Mr. Brenner: I might say very fairly that the only purpose of this is to get the general practice, not to show he was coming out of the garage. I don't suppose the witness knows where he was coming from.

The Court: Did you see him coming from the garage?

The Witness: No, he was coming from that side where the garage is.

The Court: The other answer will be stricken.

Q. Did you talk to Mr. Krause, or did he talk to you? A. No.

The Court: Did she say where she saw the body lying?

Mr. Brenner: She said about five or six feet from the sidewalk.

The Court: Is that north and south; what part of the road? Where was this man, Martin Ceslak lying when you saw him?

The Witness: The way Standard Place is, he was lying in the center.

The Court: Well, how near was he to Avenue E, or was he in Avenue E?

The Witness: I don't remember.

CROSS EXAMINATION BY MR. DWYER:

Q. Can you pick it out on the photograph?

The Court: Can you mark on either of those photographs by a cross where you saw the body lying, on Exhibits P-4 and P-5?

The Witness: I cannot show on these photographs. He was on the street, that's all I can say.

The Court: Do you recognize the place on these photographs?

The Witness: It don't look like the place.

The Court: Doesn't look like Standard Place?

The Witness: It is different on the picture and on the dirt.

Mr. Brenner: Maybe, if you show her this one (handing the Court picture).

The Court: Can you mark it?

The Witness: I cannot mark it, because it all looks the same to me.

The Court: See if you can get where this body was and if she saw it. She has got it in the center of Standard Place.

Mr. Brenner: She said above five or six feet from the sidewalk.

Q. Well, is this the side entrance to your place of business? A. I don't know.

Q. Is that the building in which you conducted your business on the night of the accident? A. I cannot say.

The Court: What business are you in?

The Witness: Cigars, cigarettes, soda.

Q. Did you come out of the cigar store, through the side entrance? A. No.

Q. Did you come out of the front entrance on Avenue E? A. Avenue E store.

The Court: You stated in answer to the Court's question that you saw the body lying in the middle of Standard Place. How near Avenue E was it?

The Witness: Well, there is Avenue E sidewalk and then five or six feet is this place I saw him.

The Court: Five or six feet from where?

The Witness: From the sidewalk.

The Court: Was he on the sidewalk or off the sidewalk?

The Witness: Outside, the sidewalk.

The Court: Outside, which way?

The Witness: At Standard Place.

The Court: Where outside, the sidewalk?

The Witness: Well, the sidewalk runs this way. Then in between the houses in this place.

The Court: Which side of the sidewalk, on the avenue side or the other side?

The Witness: On the side that we live.

The Court: You live on Avenue E?

The Witness: Yes, sir.

The Court: Was it on Avenue E, the body, or was it in Standard Place?

The Witness: Standard Place.

Q. When you heard this man moan, was he moaning loud? A. Yes, sir.

Q. And the first time you heard him moan, did you come out to see what it was? A. When I heard him moaning, I went out.

Q. You came out quickly? A. Not fast. I didn't know where it was. I was looking all around.

Q. Just as soon as you heard it, you left your store and went out to find out? A. Yes, I went out to see who was moaning.

Q. And the man that was moaning was Mr. Ceslak, who was lying in the street in Standard Place? A. But I don't know him at that time.

Q. Well, he was moaning? A. Yes, sir.

Q. Who was standing near Martin Ceslak when you came out and found him lying on the ground? A. There was three men coming from work.

Q. Did you know them? A. No.

Q. Where was Mr. Krause when you came out; how near the man on the ground was Mr. Krause? A. Krause was then coming from the direction of the garage.

Q. Please answer the question: how close to the man on the ground, who was moaning, was Krause when you came out? A. About from here to the door.

The Court: That is 34 feet as mentioned before. (To the witness) Had you seen Martin Ceslak before?

The Witness: I didn't know him.

Joseph Marianski. Called by Plaintiff. Direct.

JOSEPH MARIANSKI, sworn, for the plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You live at 337 Avenue E, Bayonne? A. Yes, sir.

Q. You lived there at the time of this accident? A. Yes, sir.

Q. Were you in the place of business of Mrs. Rudzinski the night of the accident? A. Yes, sir; I was there.

Q. What was the first thing you heard that attracted your attention to the fact that there was something wrong on Standard Place? A. I was sitting at the table reading a paper. I was sitting at one table and Kowalski and Mrs. Rudzinski they were sitting by the other table.

The Court: How many people were in there?

The Witness: Two.

The Court: In the same store, the cigar store?

The Witness: Yes, sir.

The Court: They serve soft drinks there?

The Witness: Yes, sir.

The Court: What table were you?

The Witness: Yes, sir. So I was reading. Mrs. Rudzinski she goes outside, she heard something. She called me outside. I seen him, the man was lying there.

Q. That was the first you knew there was any accident? A. No, I don't know it.

Q. You didn't know it up to that time? A. No.

Q. When you went out, where did you see the man who was hurt? A. I seen the man lying right in the middle of the road, Standard Place.

Q. Do you know where the sidewalk is, running across Standard Place? A. Yes, sir.

Q. How far from the sidewalk was he? A. Well, about seven or eight feet.

Q. In which direction, from the sidewalk out toward the curb or in toward the garage? A. Toward the garage.

Q. Now, what did you do when you saw the man lying there? A. What I did? I seen blood. I walk away from him.

Q. Had there been other people there? A. There was a lot out there. There was a crowd there when I was out.

Q. Do you know who was in the crowd? A. No.

Q. Did you know Ceslak before that accident? A. No.

The Court: Did you see him that night?

The Witness: No.

The Court: Did you see him in the place where you were?

The Witness: No.

Q. How long had you been in that place? A. About an hour.

Q. He wasn't in there during the time you were there? A. No.

Q. Did you know Mr. Krause? A. No.

Mr. Dwyer: No questions.

Fred E. Fritts. Called by Plaintiff. Direct.

Officer FRED E. FRITTS, sworn, for the plaintiff.

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are connected with the Bayonne Police Department? A. Yes, sir.

Q. How long have you been connected with the department? A. Four years last July.

Q. And were you at the scene of the accident at Standard Place on July 17th, 1928? A. Yes, sir.

Q. How was your attention called to the fact that something had occurred at that point? A. I was in Headquarters. Our attention was called by telephone.

Q. Do you know what time that telephone call came in? A. Not exactly. I would say it was around 11; possibly a little after.

Q. Did you then go to Standard Place in response to that call? A. Yes, sir.

Q. When you got there, what did you see? A. I jumped off the wagon. I saw a form lying on Standard Place.

Q. Where was that form lying? A. It was in Standard Place, inside the sidewalk, I should say. Well, it wasn't lying directly north and south. I would say the feet were 12 or 15 feet from the sidewalk, the best of my recollection.

Q. And the head back further towards the buildings, or out toward Avenue E? A. The back towards the dead end of the street, just a bit; just a little bit.

Q. Had a crowd gathered at that time? A. I don't remember seeing anybody there when I got there.

Q. What was the condition of the man whom you saw at that time? A. Well, the first thing I noticed

was a pool of blood around his head, and if I remember right, he was lying over on his side, or on his stomach, and I turned him over and put my hand back of his head, to lift his head up and I saw that his scalp was torn.

Q. Can you describe the tear in the scalp that you saw? A. Well, yes; it started—I don't mean started; it ran behind the left ear.

The Court: You don't mean run; extended?

The Witness: Extended from behind the left ear here, across the head this way, over here, over his right eye.

Q. Going completely around in the direction that you have indicated? A. No, I think it was right straight across.

Q. Did you examine that to see whether it could be lifted from the bone or not? A. No, sir; my only idea was to get him to the hospital.

Q. Did you make any investigation at that time? A. At that time, no, sir, because I didn't see anybody standing around there.

Q. Mrs. Krause there at the time that you came to the scene of the accident? A. Not to my recollection, no, sir.

Q. Do you know from whom you received the call? A. I don't know.

Q. It was given to you by one of the lieutenants? A. By the lieutenant behind the desk, received by the man on the switchboard and the order given to us by the lieutenant.

The Court: Well, you got the order?

The Witness: Yes, sir.

Fred E. Fritts. Called by Plaintiff. Direct.

Q. Who went to the scene of the accident? A. Officer Kominski went on the ambulance, put a call for a stretcher to take him to the hospital.

The Court: Was there anybody there when you left?

The Witness: Yes, I believe two or three had collected at the time.

Q. Do you know who they were? A. No, sir.

Q. Did you know Mrs. Rudzinski, Marianski and Kowalski? A. No, sir.

Q. That is all you had to do, with the taking care of the man? A. All I had to do was take care of him.

Q. Was there anything else that you saw at that point? A. We went back later.

Q. How much later did you go back? A. Well, I would say it was in the neighborhood of one o'clock; maybe a little after.

Q. Were you accompanied by anyone else at the time you went back? A. Yes, sir.

Q. By whom? A. Sergeant Rigney and I think Chief Kilduff. I know he was on the scene. Whether he went with us I don't remember.

Q. Was Lieutenant Gallagher and Lieutenant Lennon there? A. Detectives Gallagher and Lennon were there.

Q. Did they arrive on the scene when you went the second time? A. That I don't remember.

Q. Were they actually on the scene when you arrived? A. Yes, sir.

Q. Did Detective Gallagher then conduct the investigation at the point? A. Gallagher and Lennon both.

Q. Did you see what they were doing? A. Yes, sir.

Q. Did you go with them? A. Yes, sir.

Q. Will you describe as near as you recall what was done by Detectives Gallagher and Lennon while you were on the scene? A. Went to the garage and inspected the apparatus in the garage, I believe. It is so long ago that I can't say surely, but I think there was a truck, maybe two trucks and a car or two in there.

Q. That is in the garage? A. In the garage, yes, sir.

Q. Did you personally inspect a car in the garage, or was that inspection made by Detective Gallagher? A. Detectives Gallagher and Lennon probably with Rigney.

Q. You had no part in the job? A. I was with them. I saw them.

Q. You saw them make the inspection? A. Yes, sir.

Q. You don't know what the inspection revealed? A. Well, there is one thing that it did reveal.

Mr. Dwyer: I think this question is to call upon him to decide what somebody else's investigation revealed.

The Court: No, what he saw; only what you saw, officer.

The Witness: They found something. I don't remember what it was.

The Court: What you found; what did you see?

The Witness: I saw nothing.

Q. Did you also see Detectives Gallagher and Lennon outside the garage looking for tracks of an automobile? A. Yes, sir.

Q. Did you personally make that with them or did they take care of that? A. They took care of that.

CROSS EXAMINATION BY MR. DWYER:

Q. Officer, your recollection is that when you got there with the police ambulance, you and Officer Kometsko, there was nobody in Standard Place? A. The best of my recollection he was alone.

Q. The best of your recollection also, while you were there and taking him away, several people gathered? A. Yes, sir.

The Court: Two or three, he said.

Detective PATRICK J. GALLAGHER, sworn for the Plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are connected with the Bayonne Police Department? A. Yes, sir.

Q. In what capacity? A. Detective.

Q. You have been connected with the Bayonne Police Department for how many years? A. Going on 19 years.

Q. On the night of June 17th, 1928, or June 18th, I presume, you were called after midnight, did you go down to Standard Place in Bayonne? A. Yes, sir.

Q. Do you recall the time that you arrived there? A. First I was at the hospital. Then I went to Standard Place, which was sometime between 12 and one o'clock when I got to Standard Place.

Q. When you went to the hospital, did you see Mr. Ceslak? A. Yes, sir, I did.

Q. Did you observe the condition that he was in at the time you first saw him? A. I did.

Q. What was his condition at that time?

The Court: I don't wish to cramp your examination but won't you have the doctors here.

Mr. Brenner: Only Dr. De Rosa at the hospital.

The Witness: Well, he had a badly lacerated scalp. He had the skin rubbed off the back of both hands and like a piece of cinders embedded in them.

Q. Can you describe the laceration on the head as you recall it? A. No more than it was a laceration extending from the back of the head over behind the left ear and came all the way around towards the right forehead.

Q. Were you there while it was being stitched? A. Yes, sir.

Q. Who did the stitching, Dr. De Rosa and Dr. Metcalf? A. I don't recall. Both of them were there, both Dr. Metcalf and Dr. De Rosa. They were both there and I don't recall who done the stitching.

Q. Do you recall how many stitches were needed? A. Approximately fifty.

Mr. Dwyer: That is clearly objectionable.

The Court: Yes; he is not the doctor.

Mr. Brenner: He saw it.

Q. Did you see how many stitches were put in the head? A. There was almost fifty. Whether I

missed some or not I don't know, but there was at least 45 stitches put in.

Q. You were there while that was being done? A. Yes, sir.

Q. Did you then, after the stitching was done, immediately leave the hospital? A. We tried to get him to talk.

Q. What did you do? A. Then we left there and went to Standard Place.

Q. Did you try to get him to talk? A. Yes, sir.

Q. Did he seem to understand? A. All we did was get out of him was a car there that struck him, or a truck.

Q. That is all you could get? A. That is all we could get.

Q. Then you went to the scene of the accident? A. Yes, sir.

Q. When you got to the scene of the accident who was there ahead of you if you saw? A. There was nobody there when we got there.

Q. What was the first thing that you observed at the scene of the accident? A. A pool of blood in the middle of the road, about 25 feet west of the curb, of the Avenue E curb.

Q. How far would that be in from the sidewalk crossing over Avenue E? A. Approximately ten feet.

Q. About how large a pool was that? A. Well, it was scattered around the cinders nine or ten inches.

Q. And that you say was right on the center of Standard Place? A. On Standard Place.

Q. And the place where the pool of blood was, was that back toward the building line or was it out toward the curb on Avenue E? A. Back from the building line.

Q. You have described the particles of dirt imbedded in the scratches on the back of this man's hands. The dirt that you saw in there, was that of the same character as the dirt or cinders that are used on the pavement over Standard Place? A. Yes, sir.

Q. You discovered a pool of blood; what did you next do? A. We went to get Martin Krause whom we had learned had made the telephone call to police headquarters. His father informed us that he was in bed. We then got his father to get him out of bed and while we were waiting for him, we went to 207 Avenue E, where this lady Mrs. Rudzinski lived and we got her up and asked her what she knew.

Q. You conversed then with her? A. And we got Mr. Krause, Mr. Roman Krause, to open up the garage after following fresh tracks of an automobile in the cinders from Avenue E back to Krause's garage, which is approximately 225 feet in Standard Place.

Q. What side of Standard Place is the garage? A. On the north side.

Q. Where were these track marks with relation to where the pool of blood was? A. The pool of blood was right in the center of these automobile marks, or tire marks.

Q. So that the pool of blood was both in the center of Standard Place and in the center of the tire marks running back from Avenue E to the garage? A. Yes, sir.

Q. Were there any other tire marks or automobile marks of any kind in the cinders outside of these marks that led directly to the garage? A. No, sir.

The Court: Is Standard Place paved?

The Witness: No, it is just a cinder street.

The Court: How can you tell automobile tracks on a cinder street?

The Witness: It is fine cinders.

The Court: Even if they were fine?

The Witness: They were there. There were tire marks as though an automobile—

The Court: Were they fresh cinders?

The Witness: I don't know whether they were fresh. They were fine cinders.

The Court: Even if they were, were they packed down?

The Witness: Yes, sir, but the top surface is loose as cinders will be. There is no binder.

The Court: I have a place where I have got cinders on the road. I am just trying to figure how you could tell there are marks there. You can go over any number of times and you can't, as I remember it, you can't tell marks except tracks some place where there is a different material than cinders.

The Witnes: They are fine cinders from one of the refineries or something down there, and the top is loose and no binder; nothing under them; they are soft.

The Court: How deep were the tracks?

The Witness: Just on the surface.

Q. The automobile, though, you afterwards located it? A. Yes, sir.

Q. Did it have a tread on the tires? A. Yes, sir.

Q. It was not an absolutely smooth tire? A. No, sir.

Q. Did the tread marks of the tire match up with the tire marks on the road? A. I could not say that, sir.

Q. You could distinguish these marks going back to the garage as tire marks? A. As tire marks.

Q. They were the only tire marks that you saw? A. That's all.

Q. Where is the door of this garage; is it facing out towards Standard Place, or Avenue E or over to Broadway, or what direction? A. Facing out towards Standard Place.

Q. From the tire marks that you saw, did it indicate that the automobile went right straight into the garage, or did it go toward the garage and then back up and then go in? A. That I could not say.

Q. You did see tire marks leading up to the garage? A. Yes, sir.

The Court: He has answered that several times, Judge.

Q. Was it before or after you had made an examination for the marks that you got in touch with Mr. Roman Krause? A. It was after we had made an examination at Standard Place.

Q. He then came on the scene did he? A. Yes, sir.

Q. Did he open the garage for you? A. Yes, sir.

Q. Now, when he opened the garage, was there anybody there outside of yourself? A. There was Detective Lennon, Deputy Chief Kilduff, Captain Griggletter, Officer Fritts and Sergeant Rigney.

Q. Did you make an inspection of the cars? A. There was three cars in the garage; one was a truck, one was a roadster and the other a Packard sedan.

Q. Which— A. We felt the radiator of them all and the radiator of the Packard sedan was still warm.

Q. Then what examination did you make of the car and what did you find on the car? A. We took a large light that we carry ourselves with us.

Q. When you say "we" who do you mean? A. We started to look over the car and looking underneath at all the mudguards and on the axle and we saw several red spots. We didn't know what they were and we told Mr. Roman Krause, who admitted the ownership of the car not to remove that car until the Police department gave him permission to do so after they examined these spots on there.

Q. What was the purpose of giving him that admonition? A. To find out or make sure whether the red spots that were there were blood or not.

Q. How many spots did you, and how close were these spots together? A. I could not say how many there were.

Q. Quite a number or only a few? A. No, there was only a few.

Q. Approximately how many? A. There was one or two or three on the mudguard and several more on the axle.

Q. Fairly close together? A. Yes, sir.

Q. Did you then question Mr. Krause? A. We questioned Mr. Roman Krause as to the ownership of the car and as to who had had it out. He informed us that his son may have had it out.

Q. It was the father who opened up the garage for you; the son wasn't there? A. No, he came there later.

Q. Did you then talk to the son? A. Yes, sir.

Q. Questioned him? A. Yes, sir.

Q. Tell us the conversation that you had with him? A. He admitted coming home about midnight and driving into the garage and on his way out saw several men standing around this fellow that was

lying in the road, and some one of the men said something about another drunk, somebody else said, "Throw him out of the alley" and that he went to the telephone to his house and telephoned Police headquarters about the man lying there.

Q. He was relating the conversation between the men that were standing about the body when he came out of the garage? A. Yes, sir.

Q. Did you direct his attention to the spots that you found on the automobile? A. Yes, sir.

Q. Did you say anything to him about not removing the car? A. I don't recall whether he was there when we were warning or not.

The Court: What did you say to him?

The Witness: I don't know whether Matthew Krause, the son, was in the garage when we were telling—

The Court: Did you say anything to the son?

The Witness: We cautioned the son about hitting this man.

The Court: What did he say?

The Witness: He told us that he didn't, and he said, "Do you think I would be damn fool enough to notify the police if I did hit him and I knew I hit him and nobody seen it". I said to him, then, "The only reason you notified police headquarters was that these people seen you come out of the garage immediately after driving in and he being found there before you could get out of the garage again".

The Court: What did he say to that?

The Witnes: He didn't say anything to that. After that we placed him under arrest; then paroled him because he had to get out at half past three in the morning for his route.

Patrick J. Gallagher. Called by Plaintiff. Cross.

Q. What was the next thing you heard there or did? A. That is all we did that morning.

Q. And that was about what time? A. That was around three o'clock we placed him under arrest.

Q. And the time you first got there?

The Court: Between twelve and one.

Q. Were you on the scene of the accident the whole time between 12 and one o'clock up to three o'clock? A. No, we were a short while at the hospital.

Q. I mean from the time you got down to the scene of the accident to make your investigation and questioning, up to about three o'clock? A. Yes, sir.

Q. Did you go back to the garage that morning? A. I didn't. I went home and went to bed, and it was followed up by another detective.

Q. Who was then in charge in the morning for the purpose of going down there? A. Detective Anzelowitz.

Cross Examination by Mr. Dwyer:

Q. You made a statement, you and Detective Lennon, to the Prosecutor within several days after the accident as to what you found, didn't you, Detective? A. I believe I did.

Q. It was a written statement, too? A. Yes, sir.

Q. In that statement, you said nothing about the suspicious spots on the axle? A. I don't recall whether I did or not.

Q. Isn't it a fact that you said in your statement made to the Prosecutor's office by both you and Detective Lennon, that there were two suspicious

spots underneath the right front mudguard? A. I don't recall what my statement was, counsellor.

Q. You found the tracks of an automobile on the cinders that led from Avenue E in toward the garage? A. Yes, sir.

Q. How far back did these tracks extend? A. Almost back as far as the end of Standard Place.

Q. How near to the garage did they extend? A. About fifteen or eighteen feet.

Q. Did they stop short 15 or 18 feet from the garage? A. No, sir; they faded out.

Q. And the character of the road was the same in front of the garage as it was for the rest of the distance; isn't that so? A. Some of it is harder; it is harder here and there.

Q. What was the character of the road where the spots faded out? A. Cinders; it is all cinders.

Q. So they faded out into nothing 15 feet from the garage; no evidence of a car backing up and going forward in an attempt to get into the door on the easterly edge of the garage, was there? A. Not that we saw.

Q. You used a light, officer? A. Yes, sir.

Q. There was nothing on the road that you didn't see; you made a very thorough examination? A. Yes, sir.

Q. Isn't it a fact, officer, this reference, or rather this statement made by Mr. Krause that he would not be fool enough to telephone the police was made at Police Headquarters, and not on the street? A. No, sir; on Avenue E, in the middle of Avenue E, right opposite Standard Place, right in the middle of the place.

Q. Isn't it a fact that Lieutenant Kilduff charged him with the commission of this crime and then acted very harshly? A. No, sir.

Q. Isn't it a fact that Lieutenant Kilduff swore and cursed him? A. No, sir.

Q. It is not? A. No.

Q. What did Lieutenant Kilduff say? A. Lieutenant Kilduff said "You know your car hit him," and it was right in the middle of Avenue E, right in the middle of the street, right opposite Standard Place. He said "You were in a hurry to get home, coming in at 12 o'clock, having to get up at 3 o'clock to deliver your route. You were in a hurry to get home, and you were just careless and speeded it up."

Q. Lieutenant Kilduff said that? A. That is the Deputy Chief.

The Court: That was an argument with the detective?

The Witness: That was the argument we had had with him on Avenue E in the middle of the street, right opposite Standard Place.

The Court: Why did you argue with the witness or the man in that way; to get an admission from him?

The Witness: No, not necessarily.

The Court: Why did you do it?

The Witness: I could not even tell you.

The Court: Yes, you can. You are going to tell me why?

The Witness: We were accusing—

The Court: Never mind that. I want to know why you accused him and argued with this man that he did this. Why did you do it?

The Witness: There was no particular reason.

The Court: You answer why. You have a reason?

The Witness: I haven't any other reason.

The Court: Why did you accuse this man of running this man down that night?

The Witness: Because his car, he admitted driving his car a few moments previous to this man being found in the middle of the road.

The Court: Why did you accuse him then?

The Witness: That was the only reason why we done it.

The Court: Why?

The Witness: Just because he had driven his car.

The Court: I want an honest sort of reason. Didn't you do this because you wanted to get an admission out of him that he did it?

The Witness: Yes, to get an admission.

Q. Isn't this the fact, too; this young man, Matthew Krause, said that you accused people who reported an accident of this kind if you are going to charge them with committing the crime and prosecute them for it; isn't that what he said? A. No, sir; not in my presence. If he said that he didn't say it in my presence.

Q. Did he say that on the street? A. No, sir.

Q. Or at Police Headquarters? A. No, sir; not to me.

Q. You remember testifying across the hall? A. Yes, sir.

Q. Did you say anything at that trial about tracks on the road that led up to the garage door? A. No, sir.

Q. Why didn't you? A. I wasn't asked that.

Q. The only reason that you give us for failing to tell the same testimony regarding the tracks on the road in the Court across the hall; the only reason

you didn't give it was that you were not asked it? A. Yes, sir.

Q. You were witnesses of the prosecutor? A. We were not asked any questions over across the hall, because Judge Kinkaid as soon as he heard it, he said there was no criminal intent.

Q. He said further than that, there was no crime committed? A. He said there was no criminal intent.

Q. Were you on the stand? A. It was in Special Sessions.

Q. You were sworn? A. Yes, sir.

Q. Isn't it a fact that he said he hadn't any evidence to hold this man? A. No, sir; not that I recollect.

Q. You heard it, didn't you?

Mr. Brenner: I object to that. This is some other prosecution.

Mr. Dwyer: I hesitated until the last minute to bring this into the case, but these statements are so important.

The Court: Stick to the practice.

Q. Isn't it a fact that you told Roman Krause, the father of the boy, not to wash the car or not to wipe it off or dust it? A. Yes, sir. We told him not to take it out or touch it at all.

(Witness excused.)

Detective JOHN T. LENNON, sworn for the plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are a member of the Bayonne Police department? A. Yes, sir.

Q. And have been how long? A. Going on 19 years.

Q. You went to the hospital with Detective Gallagher? A. Yes, sir.

Q. And after leaving the hospital, you went to the scene of this accident? A. Yes, sir.

Q. Will you tell us the first thing that you observed when you arrived at Standard Place? A. Well, we went down to Standard Place and we noticed a pool of blood in the middle of Standard Place, west of the sidewalk.

The Court: You testify to what you saw, instead of using the pronoun "we"; say "I saw".

Q. You saw that yourself? A. Yes, sir.

Q. Did you see anything else after you found the pool of blood? A. On the street?

Q. On Standard Place? A. Saw the automobile tracks.

Q. Where were the automobile tracks in relation to this pool of blood? A. The pool of blood was just about in the center of the automobile tracks.

Q. And also in the center of Standard Place? A. Exactly.

Q. How far was that pool of blood to the west of the sidewalk line crossing over Standard Place? A. Well, about 9 or 10 feet from the sidewalk.

Q. Did you follow the automobile tracks back to the garage? A. Yes, as far as we could.

Q. Do you recollect about how far you could see those tire tracks run? A. No, I could not tell you just how far back they ran. I could not tell you that.

Q. Was it a considerable distance or a short distance? A. It was quite a distance back.

Q. At the time that you were making that examination, was either Mr. Roman Krause or Mr. Matthew Krause present? A. No, I don't remember whether the Krauses were there or not; I could not say.

Q. The garage however was afterwards opened, wasn't it? A. Yes, sir.

Q. And that was opened by whom? A. Mr. Roman Krause.

Q. That is the father? A. Yes, sir.

Q. You and Detective Gallagher went in? A. Yes, sir.

Q. What was the first thing that you did, you yourself did, when you went inside the garage? A. Why, we looked over the garage.

Q. What you did? A. Saw the cars that were in the garage.

Q. How many were in as you recall it? A. Well, three.

Q. Which one did you examine if you examined any of them? A. In fact I touched all of the cars, that is three of them, but the only one that had any heat in the radiator was the Packard sedan.

Q. And that is the one that you examined? A. That is the car we examined.

Q. Did you and Detective Gallagher make an examination of that car at the same time? A. Yes, sir.

Q. With a light? A. With a light, a large searchlight.

Q. Was it a police light? A. Our police light.

Q. Using that light in making that examination, what did you see? A. Looking under the right mudguard, I noticed some spots there and on the axle.

Q. How many spots would you say were under the right mudgard? A. Well, may have been two or three. I could not say just exactly how many there was.

Q. How large were those spots? A. Well, I would say they were about a quarter or half an inch width.

Q. In diameter? A. In diameter.

Q. That is across the spot? A. Yes, sir.

Q. And you have a recollection of seeing two or three on the fender or on the mudguard? A. Yes, sir.

Q. Now, did you see any spots outside of these you saw on the mudgard? A. Well, there was some on the axle.

Q. How many would you say were on the axle? A. No, I could not say how many were there.

Q. Were they the same type of spots that you saw on the mudguard? A. Yes, appeared to me.

Q. About the same size? A. Yes, sir.

Q. What was the color of these spots? A. Seemed to me to be sort of reddish brown. I don't know just exactly what the color was; it was somewhat like reddish brown color.

Q. Was there an accumulation of mud or dirt on the mudguard and on the axle? A. I believe there was, yes, sir, sort of clay, yellow clay on there, if I am not mistaken.

Q. These spots you saw were a different color than the clay that was on there, or the clay colored material that was on? A. Yes, sir.

Q. Did the spots appear as fresh spots or old spots? A. Well, that I could not say. I didn't

touch them. I could not say whether they were or not.

Q. What was said to either Mr. Krause after these spots were discovered on the car? A. They were told to leave the car in the garage.

Q. "They", you mean who? A. Mr. Krause, Mr. Roman Krause.

Q. That is the father? A. The father was told to keep the car in the garage, not to touch it or take it out.

Q. Did you tell him why you wanted him to do that? A. Yes, sir.

Q. Who did the talking, you or Detective Gallagher? A. Detective Gallagher spoke to him.

Q. He was the one that told him to keep the car in the garage? A. Yes, sir.

Q. Did Mr. Krause say whether or not he would keep it there? A. I believe he said he would do it.

Q. Did you tell him the purpose of having the car kept there in the garage until the police got through? A. Detective Gallagher told him what was the reason.

Q. What was the reason? A. Wanted to have the car examined thoroughly in the daylight.

Q. For the purpose of finding what? A. Finding whether those were blood spots, or any other thing that they could possibly find on the car.

Q. You say that your recollection is that Mr. Krause said he would keep the car in the garage the following morning? A. I believe he did, he said he would keep it in.

Q. Do you recall whether or not Matthew Krause was there at the time of this conversation? A. No, I can't recall that, whether he was there or not.

Q. Did you see Mr. Matthew Krause there that evening or that night? A. That was after they got him out of bed.

The Court: No, officer; did you see him there that night?

The Witness: Yes, sir.

Q. Was he that night charged with being responsible for this man's condition? A. Yes, sir.

Q. Who made the charge against him? A. Deputy Chief Kilduff I believe it was spoke to him.

Q. What did Krause say when the accusation was made against him? A. I could not give his exact words. It was something to the effect that if he did hit this man that he would not be damn fool enough to report it, words to that effect. I don't know just exactly what his words were.

Q. What happened as a result of that? A. Why, he was ordered taken to headquarters.

Q. Up until that time there was no charge made against him? A. No.

Q. He was afterwards paroled? A. He was later paroled.

Cross Examination by Mr. Dwyer:

Q. Why didn't you scrape off the suspicious spots when you made your examination between one and two that morning? A. Why didn't I?

Q. Yes? A. I had no reason to do it.

Q. Do you know if Detective Gallagher did it? A. No.

Q. Do you know why he didn't? A. No.

Q. Do you know why Deputy Chief Kilduff didn't do it? A. No.

Q. Do you know why Lieutenant Rigney didn't do it? A. No.

Q. You know Lieutenant Rigney didn't do it because Lieutenant Rigney thought they were not blood spots, and he said so?

John T. Lennon. Called by Plaintiff. Cross.

The Court: What is your answer?

The Witness: I don't know. I have no reason. I don't know any reason why they should—

The Court: Did he say so?

The Witness: Who? Did he say what?

Q. Did Lieut. Rigney say these suspicious spots were not blood spots? A. He didn't say anything to me. I don't know what he said.

The Court: By the way, were these spots examined afterwards?

The Witness: No; they didn't have a chance to.

Q. These suspicious spots, or suspicious substance was a reddish brown? A. Yes, sir.

Q. Could you distinguish them between reddish brown oil, that is very often found in the bottom of a car? Your answer is that you could not? A. No, I never saw reddish brown oil in a car.

Q. Could you distinguish it between the usual oil and grease spots you find underneath a car? A. Yes, sir.

The Court: As I understand, the officer said he could not tell whether they were blood spots?

The Witness: I said I could not tell.

The Court: That is what I thought he said.

Q. You were not sent to the scene of the accident the morning after the accident, were you? A. No.

Q. You were on night duty? A. Yes, sir.

Q. Detective Gallagher was also on night duty? A. Yes, sir.

Abraham Anzelowitz. Called by Plaintiff. Direct.

Detective ABRAHAM ANZELOWITZ, sworn for the Plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are connected with the Bayonne Police Department? A. Yes, sir.

Q. You occupy a position as detective? A. Yes, sir.

Q. You have been connected with the department for how many years? A. Seventeen years.

Q. You were down to the scene of this accident at Standard Place the night that it happened? A. No.

Q. You were on day duty? A. Yes, sir.

Q. When was your attention first attracted to the fact that there was an accident there? A. Well, that morning, ten o'clock that morning, I was directed by the Captain to go down to the Krauses.

Q. Captain whom? A. Captain McGrath. I was notified by him to go down to Krauses garage and examine that car to see if I could find any blood marks or stains under that car.

Q. Did you in response to the direction of your Captain do to the garage, Krause's garage on Standard Place. A. I went to the business place of Mr. Krause.

Q. How near is that to Standard Place? A. That is probably 50 or 75 feet from Standard Place.

The Court: What time did you go down there, officer?

The Witness: I was there about 10:30 in the morning. I went to the business address and I met Matthew Krause there.

Q. That is the son? A. I told him that I want to examine that car.

Q. Did you have directions as to which car to examine? A. No, I says to him "I want to examine that car that you drove in Standard Place last night".

Q. What did he say as to that? A. He told me the car was out.

Q. Did he say who had it out? A. Well, then, from there, from his business address, I says "Matthew, we will walk into the garage". I thought probably he didn't want to show me the car, so I went in the garage and the car was not there. Then I walked out of the garage back in front of Krause's store, and stood there talking to Matthew Krause for a few minutes and his father came along with the car.

Q. His father driving? A. His father drove the car.

Q. Did you know at that time that there had been a direction not to remove the car from the garage until the police made a further investigation in the morning? A. Yes, I think I was told that the car was down there, it was not supposed to be moved, and that I should make an examination to find blood spots under the car.

Q. Was your attention called as to what part of the car to look at for those blood spots? A. No.

Q. You were just to make a general examination of the car? A. General examination of the car.

Q. Did you know from the conversation with either Matthew or Roman Krause as to how long that car had been out that morning? A. No.

Q. This car was a Packard sedan, was it not? A. Yes, sir.

Q. When you went down there, was that Sunday morning or Monday morning? A. Monday morning; it was 18th of June.

Q. The accident happened on Sunday night, did it not?

Mr. Dwyer: Monday the 18th.

Q. So that when you got down there, it was Monday, a business day? A. That is right.

Q. Did Roman Krause or Matthew Krause give you any reason for disobeying the orders of the police as to the removal of that car from the garage? A. I think I asked the father why he removed the car. He said he had to deliver a couple of orders.

Q. Were there any cars in the garage at the time that you went in to examine the garage? A. Yes; there was a small car in there, a small roadster or coupe, whatever you call it, and a small truck.

Q. Did you suggest that he might have used either the roadster or the truck to make the deliveries? A. No, sir.

Q. You then examined the car? A. Yes, sir.

Q. Could you find anything at that time? A. No, sir.

Q. No spots at all? A. No, sir.

Q. So if there were blood spots on there the night before, they had entirely disappeared when you made this examination?

The Court: Can this witness tell that, whether there was any change about the condition. In fairness to the defendant, you ought to be able to show the difference.

Q. There were no spots of any kind either under the right fender or on the axle at the time that you made the examination? A. Well, nothing suspicious, that looked like blood to me.

The Court: To you?
The Witness: To me.

Q. Did you see any reddish brown spots at all on the car, any part of it? A. No.
Q. Did you see any reddish brown spots on either the fender or the axle? A. No, sir.

Mr. Dwyer: No questions.

MRS. MARY JACOBOWSKI, sworn for the Plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are a sister of Martin Ceslak? A. Yes, sir.
Q. Martin is now living with you? A. Yes, sir.
Q. And he has been living with you for how long? A. Well, he came out from the hospital and he was with me a month.
Q. Then where did he go after that month? A. After the month, he was helpless, he was very weak. I sent him up to Red Bank, by the farm. My mother sister's, and he is living there ever since.
Q. Has he recently been with you? The last few months has he been with you? A. Yes, sir.
Q. How long has he been with you? A. He has been six weeks now with me.
Q. Is your brother the same man today that he was before this accident?

Mr. Dwyer: I object to that, if the Court please.
The Court: Sustained. She can tell what she sees different.

Q. Is there any difference in the actions or appearance of your brother now to what it was before the time of this accident? A. Why, yes; I see a great difference.

Q. Will you tell us the difference that exists now between what it was at the time or before the time of the accident? A. Why, he can't sleep nights. He walks nights.

Q. How do you know that? A. I heard him, because he sleeps next to my room. So he walks nights. He makes a light and he can't sleep without the lights, so I often ask him—

Q. You have a light in his room? A. Yes, sir.

Q. And that is kept lit? A. I asked him why does he have to have a light.

Q. You can't tell what he said to you or you said to him; you can tell us what you see? A. Well, I go in; he walks the floor.

Q. Anything else besides his walking up and down the room at night that you see? A. Why, he complains about his head, he is having dizzy spells.

Q. You don't know that except what he tells you? A. No.

Q. Has he done any work around the house? A. I tried to make him work sometimes.

Q. What kind of work have you given him to do, to try him at work? A. Well, there is not much work to do in my house; just bring up coal, or wood, clean up the porch.

Q. Has he tried to do that? A. So, one time I sent him for coal. He fell down on the stairs; so I have gone down and picked him up and bring him in the house, and sat him on a chair. It was a long time before he comes to himself.

Q. Now, you have described what happens to him when he tried to work; you also told us about his

sleeplessness at night. Is there anything else besides that that you noticed. What about his appearance; does he look the same? A. Well, he is weak. He hasn't the weight that he had before.

Q. He is not the same weight? A. He used to be 160.

Q. About what does he weigh now? A. About 125.

Q. He has changed since the accident? A. He is changed, in weakness.

Q. How about the expression of his face; has that changed? A. The expression; he has a peculiar look, looking at a person, like that; he never had that before.

Q. A staring look? A. A staring look.

Q. You say he didn't have that before? A. He didn't have that before.

Q. Do you know whether before the accident his work was steady? A. He was a very steady worker; hard worker too.

Q. Has he been under the care of a doctor ever since this accident? A. Yes; when he came out of the hospital, I know he was very weak, helpless; he had dizzy spells, fainting spells. So I got Dr. Kresch to him. Dr. Kresch came around and he was treating him until I sent him to the other sister.

Q. Did he come from Red Bank to be treated by Dr. Kresch? A. He was treated there by my sister's family doctor.

Q. Do you know who he is? A. I don't know his name.

Q. Since he has been back to your house, did he continue under the treatment of Dr. Kresch? A. Well, yes; he has been seen by Dr. Kresch three times or four times.

Q. Did Dr. Kresch give him any medicine? A. Yes, sir.

CROSS EXAMINATION BY MR. DWYER:

Q. After your brother came from the hospital he stayed at your house how long? A. A month.

Q. And then he went down to your sister's farm at Red Bank? A. Yes, sir.

Q. He has been down there up to six weeks ago? A. Yes, sir.

Q. And he came back here? A. He came—

Q. He came back; wasn't that about the time this case approached for trial? A. Why, my husband, we went over there by automobile, so I know it was near the case, we had better bring him over there. We didn't want to go back and forth with him.

Q. How long had he been working on the farm in Staten Island before the accident? A. That I can't tell.

Q. You kept in close touch? A. We did.

Q. He came to visit you very often? A. He was working there. He got the job there, I believe, in April some time.

(Recess to 2 p. m.)

(After recess 2 p. m.)

DR. PHILLIP KRESCH, sworn for the Plaintiff:

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are a practicing physician of this State? A. I am.

Q. And have been for how many years? A. Since July, 1917.

Dr. Philip Kresch. Called by Plaintiff. Direct.

Q. You are a graduate of what institution? A. New York University, Bellevue Hospital Medical College.

Q. Are you connected at the present time with any hospitals? A. With the Bayonne Hospital and Dr. Sweeney's Hospital.

Mr. Dwyer: I admit his qualifications.

Q. Did you take care of Martin Ceslak for an injury to his head? A. I did.

Q. When did you commence treatment of him? A. Shortly after he was discharged from the Bayonne Hospital on July 12th, 1928, I made my first examination.

Q. What examination did you make and what did that examination disclose? A. I took the history and made an examination of Mr. Ceslak. I found a freshly healed scar, extending from back of the left ear upwards, backwards and forwards in a curve to the right side of the head, over ten inches long. There was discoloration of his right cheek, temple. He had muscular twitching of his face, tremor of the tongue, fingers; complained of pain in the head, insomnia, dizziness, weakness, and no appetite. He was in a very much weakened condition.

Q. Have you continued your treatment of him, Doctor, from that time up to the present time with some intermission? A. I have.

Q. What treatment did you give him after making the examination? A. I gave him some medication for his nervous condition and also some applications for his head and face.

Q. How long did you continue to give him that particular treatment? A. Well, during the month

of July and August, 1928, I saw him several times and then he left Bayonne and went to another sister, I understand in Staten Island, and then he came back to Bayonne this year and I have treated him again.

Q. What have you to say as to the comparison with his condition now and what it was at the time that you first treated him? A. His physical condition is improved considerably. He is not as weak as he was at that time. But his nervous condition and his symptoms are about the same.

Q. What are the symptoms of nervousness that he exhibits, not what he tells us, but what you actually see? A. What he exhibits at the present time is a tremor of the fingers and the tongue and his manner of speech.

Q. Has that improved to any extent since the time that you first treated him? A. Very slightly.

Q. What have you to say, doctor, as to the future, the likelihood of this man's recovery within a reasonable time? A. Well, I believe that he has had a severe injury to his brain, the meninges; and there probably will be very little change from his present condition.

Q. Do you know how old this man is? A. I have his record here; 40 in 1928; that is about 42 now.

Q. So that, in your judgment, this condition not having cleared up up to the present time it will be permanent? A. Yes, sir.

Q. What is your diagnosis, doctor, as to the brain injury that he sustained? A. Concussion; with probably contusion and laceration of the brain.

Q. In your judgment, has that brain condition healed up since the accident? A. Well, the acute condition has healed up and left a chronic condition in place of it.

Q. And in your judgment, will that chronic condition of the brain continue indefinitely? A. It will.

Q. In your opinion, is that permanent or not? A. It is permanent.

Q. This man testified, and his sister corroborates, to the effect that when he attempts to do work, even of a light nature, that he becomes dizzy and must immediately rest. In your judgment is that condition due to the nervous condition or the brain condition, or both? A. In my opinion, that is due to the injury to his brain.

Q. Is it your judgment that when this man attempts to do light work of that type that he will suffer the dizziness that he complains of? A. It is.

Q. Will he suffer the head pains that he complains of? A. He will.

Q. Do you believe that this man will ever be able to return to work, and if so, what type of work will he have to do? A. Well, he will be able to do work where there is no responsibility, where falling on account of his dizziness will not make any difference. That is always to be expected; he will not be able to do a full day's work expected of a man.

Q. In other words, if he does laborious work, he is going to have these spells? A. Where there is any bending or motion of his body involved.

The Court: What is your bill, doctor?

The Witness: My bill is $26.

Q. Is that you total bill to date, doctor? A. Yes, sir.

Q. In your judgment, will this man have to continue under medical treatment for a considerable length of time to come? A. Well, he will have to

see a doctor from time to time; there is a whole lot can be done for him.

Q. Is there any medication of any kind that he can apply that will overcome it? A. No applications will help him any.

Q. Is there any medicine of any kind that you can give him that he will take internally that will help his condition? A. There are iodines for use in this condition, but whether or not it will help—

The Court: Where is the seat of trouble?

The Witness: In the brain.

The Court: What part of the brain?

The Witness: In the brain tissue.

The Court: What part of the brain tissue?

The Witness: Well, I don't know exactly which part.

The Court: If you can localize it in the brain, couldn't you have an operation to remove the pressure?

The Witness: If it could be localized.

The Court: There is pressure there that causes this dizziness?

The Witness: Well, he has scar tissue in there that is probably causing this condition.

The Court: Could you relieve that pressure by operation?

The Witness: If that could be removed, it would help.

The Court: Medication does not do that?

The Witness: Well we do use iodines to try to have that dislodged.

The Court: The real remedy, if any, is an operation?

The Witness: Well, there are no different physical symptoms, operation is not indicated.

If we could localize the injury to a certain spot—

The Court: You cannot do that?

The Witness: That cannot be done.

Q. He also complains of sleeplessness, the man can't sleep without a light in his room, and then he walks part of the night, or a good part of the night; what in your judgment is that due to? A. His nervous symptoms due to the injury.

Q. Is that apt to continue? A. It is.

Q. Do you know that this man has had spells recently which have been reported to you? A. Yes, he has reported to me that he had several attacks of dizziness and disturbing dreams.

CROSS EXAMINATION BY MR. DWYER:

Q. Did you ever see him during any of his dizzy attacks? A. No; when I see him, he is either sitting down or in my office.

Q. Did you ever make any tests for dizziness on any of your visits? A. Well, I didn't make the dizziness tests—

The Court: Did you in this case?

The Witness: I didn't, no.

Q. So that when this man speaks of insomnia and dizziness and that sort of thing, you are taking his word for it? A. Well, I am taking his word; but also the history of the case.

The Court: If this man had a brain injury, and he was suffering from dizziness, you could ascertain that without taking his history?

The Witness: That could be ascertained by very elaborate tests.

The Court: A very simple test; the bending of the body as you put him through the usual tests as to equilibrium in different postures, that would show whether he was dizzy or not?

The Witness: Sometimes; not always.

The Court: Why didn't you try that?

The Witness: Well, the tests I made were negative.

DR. ARTHUR P. HASKING, sworn for the plaintiff.

DIRECT EXAMINATION BY MR. BRENNER:

Q. You are a practicing physician of this State? A. I am.

Q. And have been for how long?

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

Mr. Brenner: I would like to qualify him further.

Q. How long have you been practicing? A. 1903.

Q. Do you hold any official position in this County and State? A. I do.

Q. What is that? A. Among some of them, I am Assistant County Physician in this county.

Q. You have testified in a good many cases for the State, in criminal cases, in this Court House? A. I have.

Q. At my request, did you make an examination or several examinations of Martin Ceslak? A. I did.

Dr. A. P. Hasking. Called by Plaintiff. Direct.

Q. How many examinations in all? A. Three.

Q. It has been testified that this man, when doing work that requires any body strain, suffers attacks of headaches and dizziness. Would you say from the examinations that you have made, the three examinations that you made, that this man would suffer attacks of that kind? A. Well, of course, the question of headache would be subjective. However, the tests show evidences of instability in certain motions, which would corrobate his statement.

Q. Did you notice, during your examination or examinations, any indication of a nervous condition? A. Well, yes; there were marked tremors, particularly the face and tongue. There were some irregular reflexes. Otherwise, the general neurological examination is essentially negative.

Q. What do the irregular reflexes and tremors indicate? A. Indicating that there is certainly some irritation along through the tracks involved.

Q. In your judgment, from the examinations that you did make, what would you say that this man was suffering from, and is now suffering from? A. Well, in the light of the history, which is corroborated by the extensive scar starting in the left mastoid region, running upwards over the head; the history of a head injury, taken in conjunction with his symptoms as given by him and described by others; one would believe that he had suffered from severe concussion of the brain, or contusions of the brain, with irritation and probably adhesions of the membrane covering the brain.

Q. Doctor, is there any operation that can be resorted to that will either correct or improve that brain condition? A. In my judgment, no; there is no operable condition that would remedy the situ-

ation, and if my judgment is correct as to the concussion, it would only probably increase the condition worse than it was before.

The Court: Where did you find the brain injury?

The Witness: I believe that he has adhesions of the brain and the membranes covering it.

The Court: Did you find any fracture?

The Witness: No, I could not see any fracture. Of course the brain is all healed, at least the scalp and the wound.

The Court: You took no X-rays?

The Witness: No, sir.

The Court: Wouldn't they disclose it?

The Witness, Well, I don't take x-rays.

The Court: You had none taken?

The Witness: I have seen x-rays.

The Court: Of this subject?

The Witness: Yes, sir.

The Court: You saw x-rays of this subject?

The Witness: Yes, sir.

The Court: Didn't they indicate where he was injured?

The Witness: I merely go by the report. They were reported—

The Court: Did you or did you not see x-rays?

The Witness: I saw the x-ray of the patient taken in the hospital.

The Court: What did that disclose?

The Witness: To me they didn't satisfy as to exactly the condition of fracture in the skull.

The Court: What did that disclose, not what you were satisfied about, or not?

The Witness: They showed an x-ray of the head.

The Court: Did they show anything the matter with the head?

The Witness: To me they didn't.

The Court: So then, from what you have learned of the case, it is impossible to localize the injury?

The Witness: I believe from the symptoms, they are in the left templar region of the brain.

The Court: Before you could operate, you would have to know where the depression or adhesion was?

The Witness: Operation would not be indicated for this reason. It is not a question of pressure or anything of that nature. It simply is like in pleurisy, where the pleura is attached to the lung and the distress would be related to that, and that would not be an operative condition, merely a post inflammatory condition.

The Court: Doctor, won't that absorb in time and pass away?

The Witness: Irritations and adhesions of the membrane very frequently are the source of continued irritations to the surface of the brain to which they are attached and in which the main cells are located, and by continued irritation, could rise to irritation of the cortex, which produced secondary conditions of change, which continued, ultimately result in a complete change of the brain tissue. Symptoms referrable to that absorption element, are likely to remain a constant factor. I doubt in many cases that they completely recover any more than complete pleurisy is ever complete-

ly subordinated again. Experience is to the contrary.

Q. Your judgment is that this condition this man is suffering from now is a permanent condition? A. Permanent, and depending upon the history of the patient. Of course I haven't seen it, but if the other conditions have to be considered as a possibility in this case.

Q. What would you say, doctor, is the probability either as to this man being entirely cured or improved or his condition becoming worse? A. I think it is just now too early to make a definite statement as to what the man's condition is, as I anticipate he has not yet passed to a point where his condition, ultimate condition, has ben realized.

The Court: Then you can't tell?

The Witness: I would say, judging from experience, one would have to wait for the next year or two, and give a guarded opinion on account of one particular thing which is a late occurrence in these cases.

The Court: Counsel wants to know and the Court wants to know at least: can you tell now an opinion as to the permanency of the injuries?

The Witness: I would believe, well, the normal outlook would be towards permanency.

The Court: That is the probable outlook?

The Witness: Yes, sir, in the light of the present day findings.

Q. Doctor, if this condition is probably permanent, what is the likelihood of this man ever returning to his employment?

The Court: As a laborer; will you take that amendment?

Mr. Brenner: Yes; gladly.

The Witness: One would expect if mere adhesions did not produce further changes that it might, in a way be limited disability. On the other hand, if they were progressive, why then he would not be limited.

Q. If there is a limited disability, will he be able to do the same kind of work as he did before this accident occurred, assuming that he was then a steady working man? A. Inasmuch as his chief and main complaint is an inability to lean forward or make sudden motions, I would feel that that would be a very severe handicap for him as a laboring man.

CROSS EXAMINATION BY MR. DWYER:

Q. How many times have you examined him? A. Three.

Q. You have never prescribed any treatment for him? A. No.

Q. You have examined him for the purpose of testifying as an expert? A. I have examined him as to his present condition.

Q. For the purpose of appearing as an expert to describe that condition? A. Well, express my opinion of what I think his condition is.

Q. What was the date of the first examination? A. About, I think about the 23rd of October and about the 4th of November and yesterday.

Q. 23rd of October, last month? A. Would be about the 23rd of October, last month.

Q. What is your description of the specific brain injury from which this man is now suffering? A.

At the present time, I think he is suffering probably from adhesions, probably adhesions of the brain membrane and cortical irritation.

Q. You say the general neurological examination was negative?

The Court: That answer; does the Jury know what cortical irritation is?

Number One: No, sir.

The Witness: You are asking for an exact definition. The surface of the brain has a skin. (From Court charts) This irregular affair is the brain; the surface of that, which is not shown here, contains cells which control the function of the brain, known as gray matter. The surface of that, is the cortex or outer surface. The other substances of the brain are deeper. The cortex is the surface in which the membranes covering it are attached, apparently adherent in this case.

The Court: Counsel wants to know what part of the brain is injured?

The Witness: Apparently it is located in the left templar region over here. (Indicating.)

Q. Could you arrive at that medical conclusion that you have just given us by your own examination or does it depend upon what he told you and what others told you? A. Well, the whole thing put together; not having the man constantly under your supervision, you have to embody some of the symptoms as related to you.

Q. So that this conclusion of yours is based in part upon the symptoms related by somebody other than the patient? A. No; the patient himself.

Q. Does any part of your conclusion depend upon what others related to you regarding his symptoms? A. Some would.

Mr. Dwyer: Then I move to strike out this conclusion in the testimony.

The Court: It may be stricken.

REDIRECT EXAMINATION BY MR. BRENNER:

Q. May I reframe the hypothetical question. Doctor, assuming that this man was hit by an automobile on July 17th, 1928; that he was taken from the scene of the accident to Bayonne Hospital where his scalp was sutured, there being required something around fifty stitches to suture the scalp; assuming further that prior to the time of this accident this man had the appearance of a well man, with a weight of about 160 pounds; that he worked as a farm hand or laborer on a farm, and that he worked steadily; assuming that subsequently to the accident he remained in the hospital for about a month, or was discharged from the hospital in about a month, his condition improved and not cured; that from that time on he suffered headaches, dizzy spells, sleeplessness to such an extent that it was necessary for him to keep a light in his room, and he would get up during the night and walk about his room and about the house with the lights lit; assuming further that he had and has a tremor of the tongue, and a tremor of the muscles, and tremor of the fingers, and that he has lost 40 pounds in weight since the accident occurred; what in your opinion, plus the examination that you yourself made, is the cause of the condition which I have outlined? A. In order to thoroughly answer that question, I would like to ask a point of information not covered.

Q. That is what, doctor? A. You simply state that the only injury received was a scalp wound;

you make no mention as to his condition other than that.

Q. Concussion of the brain, severe concussion of the brain, with a laceration of the brain tissue? A. And conscious or unconscious?

Q. Unconscious? A. That in my judgment would indicate that he had received considerable internal violence to the head at that point. Unconsciousness would indicate that there had been severe interference with the function of the brain at the time which was sufficient enough to later produce inflammatory changes which I have described, and which his condition is partially resulting from and which in my judgment has not completely settled to its final stage.

Q. What do you believe in medical terms is the present brain condition, that is permanent, as to the result I have outlined? A. I think these symptoms result from the irritation of the cortex or surface of the brain, due to adhesions of the membrane.

RECROSS EXAMINATION BY MR. DWYER:

Q. What inflammatory changes, doctor; where are they? A. Always inflammatory changes following a severe head injury and contusion to the brain; always.

Q. What is the inflammatory change? A. There is none now. That has all passed; the adhesions are results of previous inflammatory pressure.

Q. You found there were adhesions there? A. That is my opinion. Of course I can't prove that; the only way that can be proved actually is to remove the skull cap.

Q. Your experience tells you there are adhesions? A. There is no other way of doing that during life.

Motion for Non-Suit.
Matthew Krause. Called by Defendants. Direct.

Q. Have you seen cases where patients have improved with these head adhesions? A. I have not only seen them during life; I have posted a large number of them.

Plaintiff rests.

Mr. Dwyer: I want to move for a non-suit on the ground that there is no proof of negligence on the part of either Matthew Krause or Roman Krause, the defendants in this case.

The Court: I am going to reserve decision on your motion at this time.

MATTHEW KRAUSE, sworn, for the defendants.

DIRECT EXAMINATION BY MR. DWYER:

Q. How old are you? A. Twenty-two.

Q. Where do you live? A. 213 Avenue E.

Q. On June 17th, 1928, where did you live? A. 213 Avenue E, Bayonne.

Q. Where is that with reference to Standard Place? A. Just about fifty feet from the side of the house.

Q. Is there any illumination, street illumination in front of your house? A. There is two lights on both sides of the street, just about, one is about 50 feet from one side of the street and the other no more than 20 feet from the side of the street.

Q. From the side of what street? A. Standard Place.

Q. You mean there is a light south of Standard Place on the west side of Avenue E? A. Yes, sir.

Q. There is a light north of Standard Place now? A. Yes, sir.

Q. By what, if any, light does that shed upon the entrance to Avenue E? A. Across the sidewalk, in fact, it will show at least ten feet off the sidewalk into Standard Place.

Q. Did you operate your Packard, this five passenger sedan, through Standard Place? A. Yes, sir.

Q. Tell us what you did with the Packard car on the evening of August 17th, 1928, from about 8:30 on; don't be too lengthy. I want your testimony regarding this accident? A. After I left the house at eight o'clock that night, I went out for a little ride, and stepped down to the club for a while and had a chat with the boys and decided to come home, which happened to be about five minutes of 12 at the time.

Q. On your way home, did you have occasion to use Avenue E? A. I always used Avenue E, being that my address is there.

Q. Describe what happened, from the time you started or shortly before you started from Avenue E into Standard Place and eventually into your garage? A. Well, upon reaching the driveway, or Standard Place, I had the car at a complete stop before I decided to go into the alley, or Standard Place. Going into the alleey, I turned on my bright lights, on account of the back being quite dark. In order to see anything, it is necessary to put on your lights; one reson, there is plenty of glass there, being a cindered street, and I don't want to puncture my tire in any way, and I always put on my lights and take it easy going up the curb.

Q. All right; when you went up the curb, was there anybody on the sidewalk at the entrance of Standard Place? A. I saw nobody there.

Q. Was there anybody there? A. I saw nobody there.

Mr. Brenner: I object to that. He can tell what he saw.

Q. What was your rate of speed, about, as you crossed the sidewalk and went into Standard Place? A. I was at a complete stop before I started entering on the sidewalk.

Q. Why did you come to a complete stop? A. It is necessary on account of the curbstone; you can't naturally go up there without stopping your car dead before entering.

Q. What was your speed as you were crossing the sidewalk? A. I would not even say I was going two miles an hour.

Q. Why do you say that? A. Because the car is in low speed; in low you can't go fast.

Q. What did you do after that? A. Drove the car up the lane, right into the garage.

Q. Did you have any difficulty; describe the manner in which you get into the garage? A. Well, the alley not being wide enough to make a complete turn right into the garage, it was necessary for me to back the car out at least once or twice. After I had the car backed up, I had to put it in position so that I can get the trucks out for the morning work, which required a little time, putting them so I could get my own car in.

Q. Was the garage locked when you pulled up to it? A. It was closed at the time I pulled up to it.

Q. What did you do then? A. After pulling up and opening up the garage door, putting on the light and putting my own Packard sedan right into the garage, after going in there, I had a little trou-

ble trying to get into this, to make room for the trucks to come out, which, after doing that, I put out the light, closed the garage door and was ready to go out.

Q. Can you tell the period of time you consumed from the time you crossed the sidewalk at Standard Place up to the time you locked the door and were ready to come out? A. I would say there was no hurry, never was in a hurry.

Q. Let's get down to this night?

The Court: How long did it take you?

The Witness: Abou ten to fifteen minutes at the most.

Q. What happened after you locked the door when the car was in the garage? A. After locking the door, I was walking out to Avenue E I seen a fellow step over someone lying on the ground. Of course, I didn't pay much attention to it. I thought it was a couple of drunks.

Mr. Brenner: I object to that.

Q. Don't tell us what you think. A. As I got down closer to him, I heard a moaning sound that attracted my attention. I walked over there and tried to inquire what it was,and getting over close enough, I seen this man was hurt pretty bad.

Q. Was there anybody else besides yourself, the man on the ground and the other gentleman who was standing over him, when you arrived there? A. There was only three of us there at the time.

The Court: Were any of these men here there at the time?

The Witness: No, sir.

The Court: Are they in this Court room, I mean?

The Witness: No, sir.

The Court: I think the other witness referred to two men.

Mr. Brennen: Yes; they said there were two men came.

The Court: Where are these two men?

Mr. Brenner: I don't know. Nobody seems to know who they were.

Q. While you and the man on the ground and this third party were there, did anybody else come along? A. That I don't remember. I know after that I seen the man was badly hurt, I decided to call up Police Headquarters to have him taken away.

Q. What did you do in order to do that; where did you do the calling? A. In my father's place of business.

Q. Is there any other exit from your garage but the one that you used that night, that is the one in Standard Place? A. There is one, but you have to go through a lot of flour and being very dark and being dressed up myself, I didn't want to dirty up my clothes.

Q. Where is that other exit from your garage? A. In it in the back of the garage.

Q. Where does that exit lead? A. Leads through the stock room into the baker's shop and then finally into the store and then upstairs.

Q. Would you describe that; just step off the witness stand for a second. Put the pointer where the rear door is? A. The rear door would be about here (indicating).

Q. Using that, what course would you have to pursue to go home? A. I would have to start, after the car is parked, I would have to walk all the way through here, out in the yard and into stockroom and from the stock room, I would walk into the shop, about here (indicating).

Q. That is all; you can resume the stand. After this man was taken to the hospital, what did you do? A. I went to sleep after that.

Q. When did you next hear about this occurrence? A. When one of my helpers told me that the detective wanted to see me downstairs.

Q. You went downstairs and who did you see? A. I came downstairs and there the detectives met me. They were the first people I met downstairs.

Q. Who were they? A. There was Mr. Kilduff there, Gallagher; I am not sure whether Mr. Anzelowitz.

Q. The detectives who testified here with the exception of Mr. Anzelowitz? A. Yes; they were the ones I had seen there.

Q. What, if anything, was said to you about washing, cleaning or removal of the car and by whom was that statement made? A. I was told not to wash the car, not to wipe the car, but nothing was ever said to me about not using the car. It is hard to say which detective exactly made that statement, because there were so many drumming into my ears; I don't know which one really did tell me that.

Q. Did you say to any one of them that you would not be such a damn fool as to call up Police Headquarters if you did do this; did say that? A. I didn't say that.

Q. What, if anything of that character, did you say and what produced that statement from you?

A. Well, I wanted to know what could a fellow get out of trying to be a good fellow; do what he thinks is right and report that case or better let him die or the street.

Q. What brought that about? A. I simply told them it didn't pay me to be a good fellow.

Q. Well, what was said by any of the police officers? A. I didn't like the language they were using to me when they were talking to me.

Q. What did they say to you? A. They were using a lot of profane language.

Q. What language? A. They were telling me I done it; because I said I didn't do it, they were trying to tell me that I have done it, that I hit the man and am trying to hide myself.

Q. Did you hit that man at any time, either on the sidewalk or off it? A. I haven't seen that man and never hit him; absolutely.

Q. Positive of that? A. Yes, absolutely.

Q. You are positive the first time you saw that man was after you came out of the garage and found him on the street in a pool of blood? A. That was the first time I have seen him.

CROSS EXAMINATION BY MR. BRENNER:

Q. Mr. Dwyer asked you to describe the manner in which you could have gotten into your home from the garage. You never used the entrance into your home? A. Which way was that?

Q. The one through the flour? A. I always used that entrance when I am working.

Q. But we are talking about that Sunday night, after going in there, you didn't use that entrance? A. I always came through the front any time I park my car.

Matthew Krause. Called by Defendants. Cross.

Q. You came out front this night, the same as any other night; is that correct? A. Exactly.

Q. The curb on Avenue E is a rather low curb, isn't it? A. It is low but bumpy.

Q. I am not talking about the driveway; I am talking about the Avenue E curb itself. That is a rather low curb, only about 4 inches high against the curb? A. Yes, sir.

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The Court: Would you show the witness the picture and ask if that is the condition that existed that night.

Q. I show you Exhibits P-1 to P-5 inclusive and ask you if these show this street as it existed on this night, with the exception that then it was dark and these pictures were taken in the light? A. Yes, sir; that is it.

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Q. Now, referring let us say to Exhibit P-1, to the right of that photograph is shown the Avenue E curb; that Avenue E curb is no higher than about four inches? A. I could not exactly tell you how high it was.

Q. Approximately? A. Approximately.

Q. This broken up curb at no point is higher than an inch or an inch and a half, is it? A. Probably a little more; I don't know.

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Q. About how much? A. I never took close observation.

Q. It is a real curb? A. I do know it is bumpy. That is the only thing I know about the curb; that is the only thing that ever interest me about it.

Q. This was a Packard car? A. Yes, sir.

Q. Eight cylinders or six? A. Six.

Q. Heavy tires on? A. Quite heavy, yes, sir.

Q. Balloon tires? A. Balloon tires.

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Q. Shock absorbers? A. Yes, sir.

Q. So that that car will ride bumps pretty easily? A. No.

Q. You think it rides rather hard with this equipment? A. It rides very hard; I know it.

Q. At all times? A. At all times.

Q. Is there any difference between that car and any other Packard car? A. Yes, there is. I had a set of springs on the front, heavier.

Q. So that the heavier springs made this car drive different than any other car? A. Much heavier.

Q. Made it ride so bad that you could not drive over an inch or an inch and a half curb without first stopping the car and then throwing it into low gear? A. I don't see any reason why I should rush that curb.

Q. I didn't ask you for any reason. You said you stopped the car because of the roughness of this particular curb. Now, having made that answer, would you say that because of the heaviness of these springs that it was necessary for you to stop your car and go in in low gear to make that trip into Standard Place? A. It is a habit. I always stop the car before I ever go into that driveway.

Q. Was that the reason you stopped your car, because of the bumpiness of this particular curb?

The Court: You can answer whether that is the reason?

The Witness: There were other reasons.

The Court: State what they were?

The Witness: I drive trucks in there, and with the truck I could not go over that very bump.

Q. The truck won't make it? A. The truck will make it, but I can't drive over that bump with a load on it besides.

Q. You were driving a Packard with no load? A. I notice it has been there, any time I drive in with a truck and it has become a practice then with my cars.

Q. With the pleasure car you had, you do the same thing you do with the truck? A. Yes, exactly.

Q. You drive a pleasure car at different speeds; or do you drive your truck just as fast as you do a pleasure car? A. I drive my pleasure car at approximately the same speed as I drive the trucks.

Q. How fast do you drive the trucks? A. Twenty-five an hour.

Q. You drive your pleasure cars at the same speed? A. The same way.

Q. Never any faster? A. No, I don't see myself driving faster yet.

Q. You always keep within that speed? A. Sometimes there is an occasion; most of the time we do 25 miles.

Q. Because you got in the habit of stopping your truck before going into Standard Place, you did the same thing with this Packard car? A. I do.

Q. Then it was not because of the fact that this was a bumpy curb there that you stopped? A. The reason I go over that slowly—

Q. Just a minute? A. It was on account of the bumpy curb, exactly.

Q. It was the curb and force of habit that made you stop your car before going into Standard Place? A. That is right.

Q. Did you have your lights on coming down Avenue E? A. I had my dim lights.

Q. Avenue E is not a very well lit street? A. Very well lit.

Q. You can drive on that street with dimmers on? A. You can.

Q. At 12 o'clock at night? A. You can.

Q. You were coming from where? A. I was coming from the club at the time.

Q. From what street? A. Coming down Avenue E.

Q. Out of what street had you come? A. I came from prospect Avenue over 30th Street bridge.

Q. Did you have your bright lights on over the 30th Street bridge? A. I had my dim lights.

Q. That is pretty dark? A. That is well lit.

Q. Prospect Avenue is well lit up? A. Yes, sir.

Q. Then every place you went that night was well lit up except this driveway? A. This driveway is a public street.

Q. I say, everything was well lit but that? A. Was well lit.

Q. You never had to put your bright lights on until you came to this particular place? A. This particular place.

Q. You go to work early in the morning, don't you? A. I do once in a while. I did, yes, sir.

Q. This time? A. No earlier than I do before.

Q. It was what time in the morning? A. I expected to start at three.

Q. Did you tell the officers you intended to start out at 3 o'clock? A. I done that when they came down.

Q. Did you tell them that? A. I told them that.

Q. You were only getting about three hours sleep up to the time that you had to get up and to be about your work? A. I had some the afternoon before I went out.

Q. You were only to get three hours that night? A. It was sufficient for me, yes, sir.

Q. I didn't ask you whether it was sufficient.

Mr. Dwyer: The answer is obviously—

The Court: The answer will be stricken out if you want it.

Q. Getting only about three hours sleep coming to you before three o'clock in the morning, you were in no hurry to get this car into the garage? A. No hurry at all.

Q. In the morning when Officer Anzelowitz came down, did you have, as he testified, a truck in the garage? A. What morning was that?

Q. On Monday morning? A. When I met Mr.—

Q. That does not answer me; did you have a truck? A. I could not say. I wasn't there.

Q. You were not there? A. I wasn't in the garage at the time Mr. Anzelowitz was there.

Q. Who had the pleasure car? A. Mr. Krause had that out.

Q. What time did he go out with this car? A. Mr. Krause went out with that car at 8 o'clock in the morning.

Q. Did the officers tell you the night before that they wanted to examine some spots on the car? A. The officers told me not to wipe the car off, not to dust it off.

Q. Did they tell you that they wanted to examine some spots on the car? A. No.

Q. Did they bring your attention to the fact that there were spots on the car? A. They told me there was spots on the car, yes, sir.

Q. Did you look at it? A. They would not show it to me. I asked "Let me see it"; they told me it was none of my business.

Q. Did you go back to the garage afterwards? A. I was not allowed in there.

Q. Who prevented you? A. They prevented me.

Q. They were not there all night? A. After that I was taken to Police headquarters.

Q. You were paroled after that? A. I was paroled.

Q. Did you go back? A. I didn't have no time. I had work to do.

Q. Did you go back to the garage? A. No, I didn't.

Q. So that, when you got back to your home after being at Police headquarters, you didn't examine the car at that time? A. I didn't have time.

Q. Could you have examined the car at that time? A. No.

Mr. Dwyer: I object; that is immaterial.

Q. What do you mean? A. I was supposed to start a little before three. It was late, much after three then.

Q. So that you went to work? A. I had to go right to work.

Q. You had no sleep? A. I had my sleep till when they came to wake me at 2 o'clock.

Q. Did you work in the baker shop or on the truck? A. On the truck.

Q. Did you take the truck out of the garage? A. This very garage.

Q. And you didn't have time to examine the car, to look at it? The garage, then there is only a light in the ceiling, which makes it impossible to see anything underneath the car.

Q. Could you see? A. No, there is no possible way to do that. There is one light on the top.

Q. Didn't you have lights in the shop? A. The shop is too far from the garage.

Q. How far is the shop from the garage? A. 75 to 100 feet.

Q. So that you could walk into the shop and get a lamp and walk 75 feet? A. What kind of lamp?

Q. I don't know? A. I had no lamp.

Q. You say the garage was too far from the shop; was that the reason why you didn't have a look? A. Because I didn't see, if I wanted, and another reason, I didn't have time.

Q. Because you didn't have time? A. It is because I didn't have time.

Q. It was because of that; so that not having a lamp had nothing to do with it? A. Well, I could not get a lamp anywhere.

Q. You have no lamp in the shop at all? A. No.

Q. No lantern; no searchlight of any kind? A. No.

Q. I suppose you could even have got a match, couldn't you? A. I could have gotten a match.

Q. You had matches? A. That was going to make me look there; I knew I didn't hit the fellow.

Q. You did know the officers were claiming there were red spots on the car? A. Yes, sir.

Q. And you didn't even look? A. I didn't look, no.

REDIRECT EXAMINATION BY MR. DWYER:

Q. How many garages are in the back in Standard Place? A. There is three.

Q. Where are they with respect to yours? A. One is right next door to mine, on the left of it, toward Avenue E.

Q. What kind of garage is that? A. That is a two car garage there.

Q. Where is the other garage? A. Right across the way from this one.

The Court: Were there any other vehicles passing in and out from the time you got in until you came out?

The Witness: That I could not tell you.

The Court: Did you hear any?

The Witness: I didn't hear.

The Court: When you went into this Place the man was not lying where you afterwards saw him?

The Witness: I didn't see anyone there at the time.

The Court: No one on the street?

The Witness: No one.

The Court: Did you hear any sounds while in the garage of this man or his companion?

The Witness: I didn't hear anything.

The Court: Didn't hear anything?

The Witness: Nothing at all.

The Court: This was your father's car or your car?

The Witness: My father's car.

The Court: Were you driving that car that night for your father?

The Witness: Myself. I have always been allowed to take the car whenever I needed it.

The Court: Were you driving that car on your father's business?

The Witness: No, my own pleasure at the time.

RECROSS EXAMINATION BY MR. BRENNER:

Q. Did you have your father's permission? A. I always had my father's permission to use it any time.

Q. Do the other members of the family use it? A. My father uses it very seldom.

Q. So that it was mostly used by whom? A. Myself.

Q. By yourself? A. Yes, sir.

Q. So that you used the car more than he did, in spite of the fact it was in his name? A. Yes, sir.

Q. You had your own private key to it? A. That is right.

Q. Didn't have to go to him for it? A. No, I had been given permission to use the car at all times, at any time.

Q. Was the car also used for the entertainment and diversion of other members of the family?

(Objected; argued, and objection withdrawn.)

Q. (Question read) A. Yes; whenever my father wanted to use it; my father was the only one outside of myself to ever use the car.

Q. By using, you mean driving it? A. Yes, sir.

Q. Did the other members of the family go out in it? A. Yes, occasionally I took mw parents out in it.

Q. You drove at the time? A. I did.

Q. Any other members of the family drive the car? A. That's all; sister didn't drive at the time.

Q. Did she ever ride in the car? A. She did.

Q. With you driving? A. Me driving.

Q. And at times your father driving? A. I could not tell you if she drove with my father at the time. I know she did drive with me.

Q. So that the car as a matter of fact was bought for the use of all the members of the family, wasn't it? A. No, I would not say that.

Q. Was it bought for your use only? A. Mostly for myself.

Q. But retained in your father's name? A. Right.

The Court: On this particular night, was there any other member of your family in the car with you?

The Witness: No; I was alone with the car.

The Court: You went to a club, a social club you call it, somewhere?

The Witness: Happened to be the Red Men at the time.

The Court: That is a beneficial association?

The Witness: Yes, sir.

The Court: You are a member of that?

The Witness: Yes, sir.

The Court: You went alone there?

The Witness: I went alone.

The Court: For your own business?

The Witness: My own business, pleasure mostly, not business.

The Court: I mean your own pleasure?

The Witness: Yes, sir.

The Court: It had nothing to do with your father's business?

The Witness: None at all.

LIEUTENANT JOHN J. RIGNEY, sworn for the defendants.

DIRECT EXAMINATION BY MR. DWYER:

Q. Lieutenant, you are a member of the Bayonne Police Department? A. Yes, sir.

Q. What is the particular capacity of your association? A. Bureau of Identification and Bureau of Homicide; superintendent.

Q. On the evening of June 17th and the morning of June 18th, 1928, were you superintendent of the Homicide Bureau? A. I was.

Q. Did you have occasion on that evening or on that morning, to visit the scene of an accident at Standard Place and Avenue E? A. I did.

Q. What time did you get there? A. Some time after one o'clock in the morning.

Q. What did you find there that led you to believe that there was an accident at that point? A. I was at the Bayonne Hospital, and there was a man there that was dead, named Brankatella.

Q. Confining yourself to this particular case, not the other one? A. Well, that is why. This Doctor Metcalf was sewing the scalp of another man there and I was questioning the man as to what happened to him, because he had a very bad scalp wound. I see one doctor sew the man; the man seemed delirious. He says once he fell off a trolley car, or jumped off; he was hit with a truck; and he says all kinds of things. So I wanted to find out where he was picked up. I got from Police Headquarters that he was picked up at Standard Place. So I went down to Brankatella's place first and from there down to Standard Place, and Detectives Gallagher and Lennon and Captain ? and Deputy Chief Kilduff, we picked them up at 21st and Broadway and brought them down in the wagon.

Q. What evidence of this particular accident did you see after you got to Standard Place, if any? A. There was a pool of blood in Standard Place right about 12 to 15 feet west of the sidewalk.

Q. Where was that pool of blood; particularly describe it; was it in the center or the right side or left, or where? A. Well, it would be somewhat to the right, I would say.

John J. Rigney. Called by Defendants. Direct.

Q. What did you do next?

The Court: Just at that juncture; is there a curb of any kind on Standard Place?

The Witness: There is a curb at the entrance, in the sidewalk.

The Court: There is a building line?

The Witness: There is no line of any kind.

The Court: There are buildings there?

The Witness: Yes, sir.

The Court: How far from that building line was it you saw the blood which was on the road as you go in?

The Witness: It was almost to the center; a little bit towards the right, I would say, a little bit towards the north side.

Q. Did you make any examination of the Packard car? In the garage of the Krause family? A. Yes, sir.

Q. Who was present when the examination was made? A. There was Officer Fritts, Captain ?, Deputy Chief Killduff, Detective Gallagher, Detective Lennon and the two Krauses.

Q. What if anything did you find on the car or under the car that might have been tied up with this accident? A. I didn't find anything.

Q. What were you looking for? A. I was looking for spots of blood on the car.

Q. Did you find any? A. No, I did not.

Q. What was the general appearance of the bottom of the car? A. Well, there was a couple of spots, might have been stains or something.

Q. Did the bottom of this Packard car, was it part stained, in one spot, or have the general appearance? A. General appearance.

Q. Did you find any blood on any axle? A. I did not.

CROSS EXAMINATION BY MR. BRENNER:

Q. The stains that you did see that you mentioned on the fender, were of what color? A. I could not say.

Q. Were they reddish brown? A. I would not say that, because I rubbed my finger to see if they were wet, to see if it was blood. I would not say what it was.

The Court: Was it wet?

The Witness: No, it was not.

The Court: Were there any wet spots anywhere?

The Witness: No wet spots I could find.

The Court: Regardless of color, were there any damp spots anywhere on this car?

The Witness: None that I could find.

Q. There were spots that you did see? A. There was a couple of spots nuder the right mudguard.

Q. What was the color of these spote? A. Well, the way we used the flash, it is very hard to tell any colors.

Q. What is your recollection of what the color was? A. My recollection, I would not want to say.

Q. Black or brown or gray? A. I would think myself the car was a dark red car.

Q. I am talking about the spots that were on the fender? A. I would not say. They might have been grease stains; might have been rust.

Q. I don't care what it was; what I am trying to get is what was the color of it, if it had any color? A. I could not say what color; I don't remember.

Q. You got down there what time in the morning? A. Around one o'clock in the morning, or a little after.

Q. Do you know what time this accident occurred? A. It occurred around midnight some time.

Q. Will blood dry in an hour?

Mr. Dwyer: I object to that. This witness is not competent to answer that.

The Court: I suppose he is not competent.

Mr. Brenner: I withdraw it.

DR. WILLIAM J. ARLITZ, sworn for the Defendants:

DIRECT EXAMINATION BY MR. DWYER:

Q. You are a practising physician of this State for how many years? A. Forty years.

Q. Did you at my request make an examination of the plaintiff, Martin Ceslak? A. Yes, sir.

Q. When did you make that examination? A. I examined him on the 23rd day of November of last year.

Q. What did you find? A. I found a number of things. Firstly, I found that this individual had had all the toes on his feet amputated when he was a boy. This was caused by freezing of the tissues which resulted in what is known as cold gangrene. Then I found that his general resistance was below the average. I thought also that intellectually he was not over bright. I don't regard either of these two conditions as being due to

trauma. I found that this man had had an extensive laceration which commenced in the posterior part of his head on the left side and extended forwards as far as the forehead, and then ended in the anterior part of the left parietal region; that is here (indicating). That laceration was irregular in character and it required a number of sutures to close it. I found no visible evidence of fracture of the skull, no palpable evidence; by that I mean anything I could feel. There was no depression; there was no irregularity.

The Court: Explain to the Jury just what you did to ascertain whether there was any pressure or depression?

The Witness: Having in mind the shape of the outer table of the skull, the outer part of the skull, I palpated that with my fingers, felt all over it, to find, if I could find, any depression, any part that was raised, or any part lowered, any part that was irregular, but I found nothing of that kind.

I found however that this man had some flattening of the left side of his face and some loss of sensation in the skin of the scalp on the left side. I regarded both of these things as being due to his accident.

The Court: Due to what accident?

The Witness: Well, as far as I could determine, the accident of June 17th. That is the only accident I knew of.

The Court: The automobile accident?

The Witness: Yes, sir. I thought that these were due to accident. I also found that he had what is known as oscillation or movement of the left eye from time to time, which was ab-

normal. That usually signifies one thing, that is that at the time when he got this blow on the head, that disturbed his internal ear. I don't mean his outer. I mean the internal area. When the internal ear is disturbed, through a blow or disease, it is usually followed by this motion of the eyeball. After having found these two conditions, I had him stand in an upright posture, in the upright position, with his eyes closed, to determine if there was any disturbance in the bodily poise. So far as I could determine, there was none. However, a disturbance of poise in connection with the things I did find would not be unusual. I would rather look for it. But he didn't have it. I then had him stand up and examined his general posture, to determine if there was any paralysis of the extremities. There was none. His deep reflexes were over active. I regarded that as being part of this head trauma. In other words, I found, as a result of this accident, or of an accident, that this man had oscillation of the eyeball as a result of probable injury to his internal ear. Exaggerated reflexes due to the same cause, and a flatness of the left side of the face, numbness of tissues, which are also due to the same cause.

The Court: Isn't that a threatening of paralysis?

The Witness: It is a sensory paralysis, not motor paralysis. It is a thing that sometimes occurs after trauma. It sometimes occurs after exposure. It is generally known as Bell's palsy.

The Court: Would it come from concussion of the brain?

The Witness: I doubt if it could come from the blow this man had. If he had concussion of the brain, I can't say.

The Court: Any symptom of that?

The Witness: I would say the symptomology was essentially the middle ear injury.

The Court: Did you test him bending over, stooping?

The Witness: Yes, I have gone all through that.

The Court: Did he manifest any dizziness?

The Witness: No, although he alleged that he has suffered so since the injury. He said among other things he was bothered with discomfort in his head during weather changes, that he suffered with dizziness and unfitness for work. Of course if the man had a history of dizziness—of course I didn't find it, but it is alleged—I certainly would not recommend that a man with attacks of dizziness should work an elevation, but for ordinary ground purposes, ordinary occupations on his feet—

The Court: What did you find, doctor, in putting him through the tests that you described, or do you think that he could follow the occupation of farm laborer without any trouble?

The Witness: Yes, sir.

The Court: Would he be subject to dizziness?

The Witness: I don't think so. I think it would be hazardous—I am assuming the symptomology he tells me as truthful—that with that symptomology I would deem it hazardous for him to work on an elevation or a scaffold.

The Court: If he had a brain injury, how would it manifest itself?

The Witness: Why, as I have said, something of that kind—I am frank to say that sometimes individuals with trauma of this kind go along for a long while without having any dizziness. Then they say that they feel slightly dizzy. I could not say every man tells the honest truth.

The Court: Isn't there some way of ascertaining whether there was a fracture of the skull or a disturbance of the brain?

The Witness: I don't think this man had a brain injury. I think he had a middle ear injury. If he had a fracture of the skull, that can be determined easily enough, with a radiograph of his skull. If there were any, they were not submitted to me for analysis; consequently, I can't say whether he did have a fracture of the skull or not.

Q. Doctor, from your examination, what do you say as to this man's aptitude to working as a farm laborer? A. I say he could work as a farm laborer.

The Court: How long are these symptoms which you find now, that might have been produced by trauma, likely to continue?

The Witness: My experience has been that they gradually subside in several years time. I don't say all of them. But I say the majority gradually subside within two years' time.

The Court: This thing happened July, 1928, this trauma, if there was one. Now, that is over two years. What do you say as to its permanency now?

The Witness: I would say that if he has any permanency, it is essentially that of the oscil-

lation of the eyeball, and it is not the dizziness.

The Court: So that the oscillation, and the flatness of the face, and the sensory paralysis; that is due to trauma, you say?

The Witness: That is my best judgment.

The Court: In the nerve centers in the brain?

The Witness: No, sir; they are external to it.

CROSS EXAMINATION BY MR. BRENNER:

Q. There are nerve centers in the brain? A. Yes, sir; there are nerve centers in the brain. This is what I would regard as sensory paralysis, external to the brain. In other words, he has had a blow which traumatized the tissues.

The Court: Can you show that on the chart?

The Witness: I can show it on him.

The Court: Does it depict the nerve centers, the sensory nerves?

The Witness: The trauma was over the spino-temporal lobe. There are twelve pairs of cranial nerves, which are distributed and whose terminology—

The Court: Just come down and show the nerve centers?

The Witness (indicating): These nerves running down the side of the head and face. These nerves have been injured due to an accident and the sensation has been affected in these parts.

The Court: That is below the brain?

The Witness: Yes; outside.

Q. If this man weighed 160 pounds previous to this accident and now weighs only 120 pounds, would you attribute that to powered power of resistance? A. Well, I would like to clarify this answer, if I may.

Q. I would be glad to have you? A. Loss of weight sometimes does follow nervous disorders. It is not an unusual thing, not to that extent. I doubt if this man ever weighed 160 pounds.

Q. You, of course, have nothing to show to the contrary, there being evidence to that effect? A. I have no more than your word for it that he did weigh 160 pounds.

Q. If it was stated under oath to the effect that this man did weigh 160 pounds prior to this accident and now weighs only 120; if that is a fact, assuming that to be a fact, what in your judgment is the cause of the loss of weight? A. Wear and tear incidental to his nervous state.

Q. And a loss of weight will lower the power of resistance, will it not? A. Surely.

Q. And with a lowered power of resistance, a man is not in condition to do the same amount of work and the same type of work that he could perform prior to the lowering of the resistance? A. You are talking about physical work. As a matter of fact, I think physical work would improve him. I think if this man started to do hard work, really hard work, that would produce physical tiredness, he would sleep better, he would eat better and he would commence to take on weight. Nothing is gained in his case by enforced idleness. I don't think anyone would recommend it as treatment.

Q. Do you know whether or not this man suffers dizziness on doing work of a laborious type? A.

I don't know of my own knowledge. That is only his subjective symptom; he mentioned that.

Q. You would not dispute that fact? A. I would dispute it in this way. If the man has all the symptomology that he mentioned, I would anticipate finding some of it in connection with an examination. Of course, if you don't find these things in an examination, there is no value in medical science, or in the medical art—it is not a science. Any man who complains of certain things, if he goes to the doctor's office, the doctor asks for the subjective symptoms, takes the objective symptoms, and then he commences to make his diagnosis. I did not find these things in this man during my attempt to find out.

Q. What is this injury to the middle ear that you believe is there? A. I believe that the function has been disarranged for the time being.

Q. How long will it continue? A. I think usually patients get over it. They have a roaring in the ears with this uncomfortable feeling in the head and I don't know that you could even call it a headache. It is discomfort, in the final analysis and they usually get over it.

Q. There is no telling, assuming that the condition exists that you say you found, as to when he will completely recover? A. I don't know that he has got any of that subjective symptomology at this time. There is nothing in the world to indicate those subjective symptoms. I do know that at this time he has got a flatness of the face, oscillation of the eyeball and the sensory paralysis or numbness; that is there.

Q. Which to you indicates injury to the middle ear? A. The oscillation indicates injury to the middle ear. Sensory paralysis, if we call it that,

I believe, is due to the tearing and contusing of the tissues external to the skull.

The Court: Just at that juncture. The region where you found that disturbance, the sensory nerve disturbance, was that in the region of this laceration?

The Witness: Yes, sir; there is no question of his laceration.

The Court: Is that between the laceration and the skull?

The Witness: Yes, external to it. That is my best judgment. It is just like a case I saw in the hospital. A lawyer of Hudson County who was riding in an automobile and riding with an open window. He developed within twenty-four hours a Bells palsy of the right side of his face. He is going to make a recovery. That is due to exposure. It happens from two things. It is due to exposure and it is due to an injury. This man having had an injury, I must assume it is due to the injury.

Q. There is no telling when it will be entirely cured? A. Well, I can't tell. It does not produce any physical disability.

ROMAN KRAUSE, sworn for the defendants.

DIRECT EXAMINATION BY MR. DWYER:

Q. On the morning of June 18th, 1928, the morning after the accident, did you open the garage for the detectives? A. Yes, I open.

Q. Did the detective say anything to you about moving the car? A. No.

Q. Did they say anything about moving it, about keeping it in this garage? A. No.

Q. Why did you take it out? A. Because I took the car that morning. My customer gave me a telephone call, I must go over to my customer's.

Q. The morning after the accident, after the Packard car was placed in the garage, you took the car out? A. Yes, sir.

Q. You used it to deliver something to a customer? A. I go over to my customer.

Q. What time did you take it out? A. I don't know good. About ten minutes to eight, or five minutes to eight.

Q. I want you to be very sure of your answer to this: Did the police department of Bayonne or any of the detectives that were down there to examine your car tell you not to take the car out? A. They told me nothing.

The Court: Did they tell you to wash the car?

The Witness: No.

The Court: Did they tell you to do anything to the car at all?

The Witness: I not make nothing for that car.

The Court: Didn't they tell you not to wash under that car?

The Witness: Told me nothing.

CROSS EXAMINATION BY MR. BRENNER:

Q. They didn't tell you not to wash it? A. No.

Q. Didn't tell you not to brush it off? A. Nothing at all.

Q. Didn't tell you to leave it in the garage? A. No; they told me nothing.

Q. Did you go after some customers every morning? A. Yes, sir.

Q. What car did you use to go? A. That Packard car.

Q. Every morning? A. Not every morning I go.

Q. What car did you use every other morning? A. At that time I used a truck.

Q. And this truck that you used was in the garage, wasn't it? A. Yes, that truck.

Q. The truck that you used was in the garage, wasn't it? The truck that you used every morning, you left that truck in the garage? A. Yes, sir.

Q. Every morning you used the truck for your customers? A. Yes, sir.

Q. This morning you used the Packard car? A. No; wait a minute.

The Court: You can answer that yes or no. You can say yes or no; we will let you explain afterwards. This morning you took the Packard out?

The Witness: Yes, sir.

Q. There is another pleasure car there, too, isn't there, in the same garage? A. No.

Q. Isn't there three cars in the garage? A. Yes, sir.

Q. One little car and then the Packard? A. No; just two trucks; only one Packard.

Q. How many trucks did you have altogether? A. Two trucks.

Q. Were they both trucks? A. And one pleasure.

Q. Were both trucks in the garage the morning that the police came down? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. You took out the Packard car; is that right? A. That police came in in the night time.

Q. You took out the Packard car in the morning?

The Court: The witness says they came in the night time. Were there any police there in the morning?

Q. At ten o'clock? A. No, that is eight o'clock, morning.

Q. Did the police come at 10 o'clock? A. No, came one time, night time and then come in about eight or even past eight.

Q. Did you see Officer Anzelowitz about ten o'clock? A. Yes, I see him; I don't know good, about ten or eight; I don't know.

Q. No matter what time it was, ten or eight or seven, it was the Packard car you took out, didn't you? A. Yes, sir.

Q. When you took the Packard car out, you left two trucks in the garage? A. No, that truck go for the route.

Q. What about the other truck that you always used every morning? A. That is two trucks go for the route.

Q. Every other morning you used a truck. This morning both trucks were out on the route, were they?

The Court: He didn't say that. Let him tell his story. We will save time, because he is going to go back to it. Why did you take the Packard car out that morning; why didn't you take the truck out?

The Witness: Because them two trucks go for the route, and leave me one, my pleasure car.

The Court: The Packard car?

The Witness: Because that customer—

The Court: That is what counsel wants to know; when you took the Packard car out, where were the two trucks?

The Witness: The two trucks go for the route.

The Court: What time?

The Witness: Go seven o'clock.

Q. No, the other mornings when you went out to your customers, and used the truck, what time did you go out?

Mr. Dwyer: I object to that as immaterial, what happened on every other morning.

The Court: I think it is proper probing.

Mr. Dwyer: I withdraw the objection.

A. No, I no use every morning, because one time that customer, I took that—

The Court: What time did the trucks go out every other morning?

The Witness: Seven o'clock.

The Court: Every morning seven o'clock?

The Witness: Yes, sir.

The Court: And this morning?

The Witness: Every morning go seven o'clock.

The Court: This morning, too, when you took the Packard?

The Witness: Yes, sir.

Matthew Krause. Recalled. Direct.
Renewal of Motion for Non-Suit.

Q. Well, other mornings when you went to see customers, what did you use, what car did you take? A. I took that car.

Q. Every morning? A. Yes, sir.

Q. Why did you tell us before you used the truck? A. I take because that truck go for the route seven o'clock, all the time goes.

MATTHEW KRAUSE, recalled.

DIRECT EXAMINATION BY MR. DWYER:

Q. Mr. Krause, how far west of Avenue E is your garage? A. 125 feet.

Q. Did anybody wash your car after it was taken out of the garage or before?

Mr. Brenner: I object; there is no contention that anybody did. Our objection is taking the car out at all.

The Court: I don't believe there is any charge—there is no evidence at least that this was a rush to wash the car.

Mr. Dwyer: All right. I just wanted to be certain.

(Both sides rest.)

Mr. Dwyer: I want to renew my motion for a non-suit upon the grounds previous stated, first as to Roman Krause.

The Court (after argument): I am going to grant the motion as to the father, Roman Krause.

Mr. Brenner: Your Honor will allow me an exception.

Renewal of Motion for Non-Suit.
Defendants Motion for Direction of Verdict.

The Court: Yes.

Mr. Dwyer: I renew the motion for a non-suit as to the defendant, Matthew Krause, on the ground that there is no evidence that Matthew Krause or his negligence proximately caused the injuries for which this plaintiff is suing.

The only evidence that we have in the case that ties him up to these injuries of which the plaintiff complains is circumstantial of the thinnest type.

The Court: (After further argument) I will deny that motion.

Mr. Dwyer: I now want to move for a direction of verdict in favor of the defendant Matthew Krause on the same grounds.

The Court: That is denied.

Mr. Dwyer: May I have exceptions?

The Court: Yes.

(Recess to 10 a. m. November 13, 1930.)

November 13, 1930. 10 a. m.

Met pursuant to adjournment.

(The Jury temporarily excused.)

The Court: (After further argument and submissions of citations)

The case Mr. Brenner handed me, while the case goes to great length, does not change the precedents that have been set by the Court, where the car is used as a family car, as in the case reported in 100 N. J. L. I think it is the

Ross case, and in the Missel vs. Hayes, and a number of other cases, where it is said that where a member of the family is being taken and it is not family business, whether by the wife or a member of the family, the Court has considered there is sufficient to go to the Jury or sufficient to draw an inference whether or not it was being operated by the family at the time.

Then again there is a line of cases, where the presumption is allowed, because of admitted ownership, and nothing is said about it to the contrary. I mean by that that there is no dispute about ownership.

Then it appears in those cases that the defendants have produced proofs that are uncontradicted of the accident and the use at the time in question, that is to say there is a contradiction raised as to whether or not it was being used for family purposes or in other words whether or not there was the color of master and servant relationship existing at the time.

I think it goes back to the old test of whether or not the relationship existed, not the family relationship, but the one of master and servant, and in this case, as I remember the testimony there is absolutely no contradiction to this defendant's statement that on the night in question he was out on his own business and his own pleasure.

He had no one with him; whether he asked for permission, or didn't ask for permission, it amounts to little in this case.

I think the fact is he was always permitted to take the car whenever he wanted to. He had a key. Nevertheless, that does not, it seems to me, take the case out of that class of

cases where a presumption is raised by the mere admission of ownership.

In this present case, there being positive proof that at the time of the operation—there is no contradiction as to the person operating alone—he was operating without the scope of the employment of the owner of the car, and therefore it is not for the Court to leave it to the Jury.

In this case, I find there is no contradiction in regard to the defendant's employment and use of the car that night, and I am therefore going to hold, as I did at the conclusion of yesterday's court day, that there is no relationship shown between the young defendant in this case, Matthew Krause, and his father the owner of the car that could cast any responsibility upon the father for the operation of the car that night.

Your motion as to the father, then, will be granted.

Mr. Brenner: Your Honor will allow me an exception.

The Court: You may have an exception.

As regards the other man, the other defendant, Matthew Krause, I think there is enough evidence in this case, for the case to go to the Jury. It seems to me to be singularly a question for the Jury and I am going to leave it to them.

You may have your exception.

Mr. Dwyer: I would like to have an exception to your Honor's ruling.

(The Jury returned to the Court room, and Counsel summed up to the Jury.)

Charge.

The Court then charged the Jury as follows:

The Court: Gentlemen of the Jury:

This is a case brought by Martin Ceslak as plaintiff against Matthew Krause and Roman Krause, defendants.

The Court has seen fit, under the testimony in this case, to decide that the owner, Roman Krause, is not liable for the damages sustained by this defendant, and has accordingly directed a verdict in favor of that defendant, and I say now to you that you are to bring in a verdict in favor of the defendant Roman Krause of "no cause of action" under the Court's direction.

There remains in the case only one defendant against whom a judgment might be found by you. That is to say, the son, Matthew Krause.

The case arises out of an accident, or a collision, alleged to have occurred on the 18th day of July, 1928, in the City of Bayonne. The testimony as adduced before you and in Court shows the scene of the collision or accident, to be somewhere near the intersection of Standard Place and Avenue E.

It is charged in the complaint that the defendant operated his automobile in a careless, negligent manner, in that he didn't have the proper control of the automobile; in that he did not give warning of his approach; in that he did not keep a proper look out; in that he drove at a high and excessive and improper rate of speed; and because of these negligent acts, either one or all, the plaintiff in this case sustained the injuries complained of.

Now, Gentlemen, in the consideration of this case, as well as every other case, you should bring to your service the best judgment that you have. It is a serious proposition to sit in judgment on a suit

between your fellow men. The Court feels the responsibility very keenly, and from what I have seen of jurors in this county so far, they recognize their oaths of office.

You are the sole judges of the facts; each and every one of you have been appointed by the law to be the judges of the facts. Your duty is just as solemn as any that can be cast upon any human being. I make this particular reference because in this particular case, you have the winnowing or the separating of the wheat from the chaff.

Counsel in their summations to you, both counsel,—and I am not saying this in a critical sense, but I am saying it in a sense to guide you jurors, that what you are to take is the sworn testimony on the stand and not all of the sworn testimony, but the testimony that you believe to be truthful and relevant to this case—the office of counsel when summing up to the jury, as I understand the law, is to argue their case from the facts in the case and the legitimate inferences that may be drawn therefrom. No counsel has the right, and it is clearly against his duty, to bring into a case anything that is not in it.

We are not trying the prohibition amendment here, or whether counsel is willing to violate the law or not. What have we got to do with that? What have we got to do with whether a man can collect a claim or cannot collect? We have got nothing to do with that. There is no evidence in this case, that the verdict, if you find one, will be or will not be collected. That is the height of presumption and, Gentlemen, it does not appeal to your intelligence, and counsel have no right, and I hope this will be a lesson for others, that they will not go outside the realm of the testimony. There

is no evidence that this man was drunk in this case. There is no evidence that he came out of a saloon. There is no evidence from which a legitimate inference of that character can be drawn. And why should it be in the case.

Now, men, you get on your sober thinking caps and deal with this matter as just men, conscientious men and deal with this as if you were directed by God Himself to deal with it, justly, as if it were the last case you were ever to deal with; extend yourselves.

Now, it seems to me, if you get in that frame of mind and get away from all this chaff, all this stuff that hasn't anything to do with the case and get down to the facts, the first thing you should do is to have impregnated in your minds the rules that you should follow in order to properly determine this case. Men, if you follow the rules that the Court will lay down to you presently, the chances are that your work and your determination of this case will be much easier than if you don't follow the rules.

Of course you have already found from experience in life that a violation of rules, whether moral or physical, or whether natural, always brings trouble; that follows the violation. It is always well, therefore, to follow rules, and particularly in the determination of a case. In fact, under your oaths, you are obliged to follow the law as the Court gives it to you.

Now, men, here is one of the first rules that you should think about, and that is that the party who brings an action of this character into this Court before you to determine, must prove his case by a preponderance of the evidence. That is to say that he must prove to your satisfaction by a preponder-

ance of the weight of the evidence, of the relevant evidence, of the truthful evidence in the case, that the party that he charges with having committed this negligent act or acts, was guilty of the charge. Preponderance does not mean an even balancing of the scales. It means the preponderating weighing down; the greater weight of the evidence, it is sometimes termed.

So start off with that and you will see that it will save you considerable difficulty, because if the scales balance, in the general weight of the evidence and in material facts, then of course that particular situation does not cast liability upon the defendant. It is only when the scales preponderate in favor of the plaintiff.

Then there is another rule of law, Gentlemen, about contributory negligence. As I read the pleadings in this case, there is not any charge made of contributory negligence and as far as the pleadings are concerned, you are not concerned about that. But nevertheless, in the determination of the case, if a man who brings an action, by his own conduct, brings upon himself the injury that he sustained, he cannot charge someone else with it and so, in this case, if you find from the testimony in the case that this man's injuries were sustained because of his own acts, or the act of someone else aside from this remaining defendant, then, of course, you cannot hold the remaining defendant, Matthew Krause.

If you find that this was an accident, that is to say, that it was not the fault of either one, that it was a mere happening, then of course you cannot find a verdict against the defendant.

You can only find a verdict in favor of the plaintiff and against the defendant when you believe and find from the preponderance of the relevant evi-

dence in this case that it was solely through the negligence of the defendant Matthew Krause, and that that negligence was the proximate cause of the injuries complained of, that a judgment can be found by you in favor of the plaintiff and against the defendant.

If you come to the conclusion by a preponderance of the evidence, Gentlemen, that this defendant by some act of his, either of commission or omission, caused the injury sustained by this plaintiff, and that it was solely caused and proximately caused by that act of negligence, or acts of negligence, then you reach the question of damages, and not until that point is reached in your determination.

Now, on the question of damages, if you find that the plaintiff is entitled to damages, under the rules that I have laid down, then you will allow this plaintiff for the pain and and suffering that he endured from the time that he was injured up to the present time, and the pain and suffering that he will endure in the future. Also for all of his physical limitations and incapacities, both temporary and permanent that the testimony has proved to you by a preponderance of the weight of the testimony that he is entitled to.

You may have some difficulty, men, in finding first who is responsible for this plaintiff's injuries. As counsel have said in their summations, there is a hiatus in the proof. You may find there is none. You may find in this case that the defendant is guilty; you may find that he is not. It is for you to judge from all the relevant evidence in the case, whether or not he is guilty under the rules that I have laid down.

But beyond that matter of guilt, you may have possible difficulty in ascertaining from the evidence

the extent of the injuries. You have heard reputable physicians testify in this case. I don't know how it has impressed you. It has caused a little confusion in the Court's mind, although you are not bound by the Court's confusion or the Court's impression of the testimony. It is entirely for you men to determine.

Nevertheless, the injury is to the cortex, or the gay coating that goes over the brain; whether that was ruptured and the brain injured, or whether as one of the experts testified, it was the nerve centers outside of the skull and in the region of the cut or laceration that was sustained by this plaintiff in that area, it seems to me, it might make a difference as to the extent of the liability, though that is for you and you are not bound by the Court's thought about that matter, whether the nerves exterior to the skull were injured. You have heard the doctors testify. You have heard the plaintiff testify as to his ailments since he sustained those injuries. From all of this evidence, it is going to be your duty to conclude just what injuries he sustained and how permanent they are.

So after your determination, award fair compensation, if you find he is entitled to any compensation, for all the injuries I have mentioned. He is also entitled, also if he is entitled to anything, to compensation for the expenses that he has incurred and the moneys that he had expended in endeavoring to be cured of his injuries, and also for the loss of wages.

I know of nothing else on this point that I can charge you upon with profit. Let me conclude by saying this, men. Do not be moved by passion or prejudice in your determination; be just men. As I have said time and again, the effectiveness of our

government, in fact, the whole foundation of our government depends upon the jurors. Justice amounts to nothing if the jurors do not do their duty conscientiously. Just as soon as you permit passion to enter your judgment, or prejudice, men, justice goes out, because they both cannot occupy the same seat. Be just men and do not be moved by these matters of emotion that appeal to your passion or prejudice.

Are there any exceptions to the Court's charge? If not, you may retire, Gentlemen.

(Counsel for both sides asked for no exception.)

The Jury retired.

Postea.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK,
Plaintiff,

vs.

ROMAN KRAUSE and
MATTHEW KRAUSE,
Defendants.

Judgment entered November 14, 1930.
Damages, $15,000.00.
Costs, $84.96.
Total, $15,084.96.
Brenner & Kresch, Attorneys.

Judgment On Verdict in the above entitled cause was entered in this Court on the 14th day of November in the year of our Lord One Thousand Nine Hundred and thirty in favor of the Plaintiff Martin Ceslak and against the defendant Matthew Krause in a plea of Action at Law for the sum of Fifteen Thousand Dollars damages and Eighty-four Dollars Ninety-six Cents, cost of suit.

Judgment was signed this 14th day of November, 1930.

THOMAS BROWN,
Judge.

Notice of Appeal and Grounds.

HUDSON COUNTY CIRCUIT COURT.

MARTIN CESLAK, Plaintiff, vs. MATTHEW KRAUSE and ROMAN KRAUSE, Defendants.	Action at Law.

To:
BRENNER & KRESCH, Esqs.,
Attorneys for Plaintiff.

SIRS:

Please take notice that the defendant Matthew Krause in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

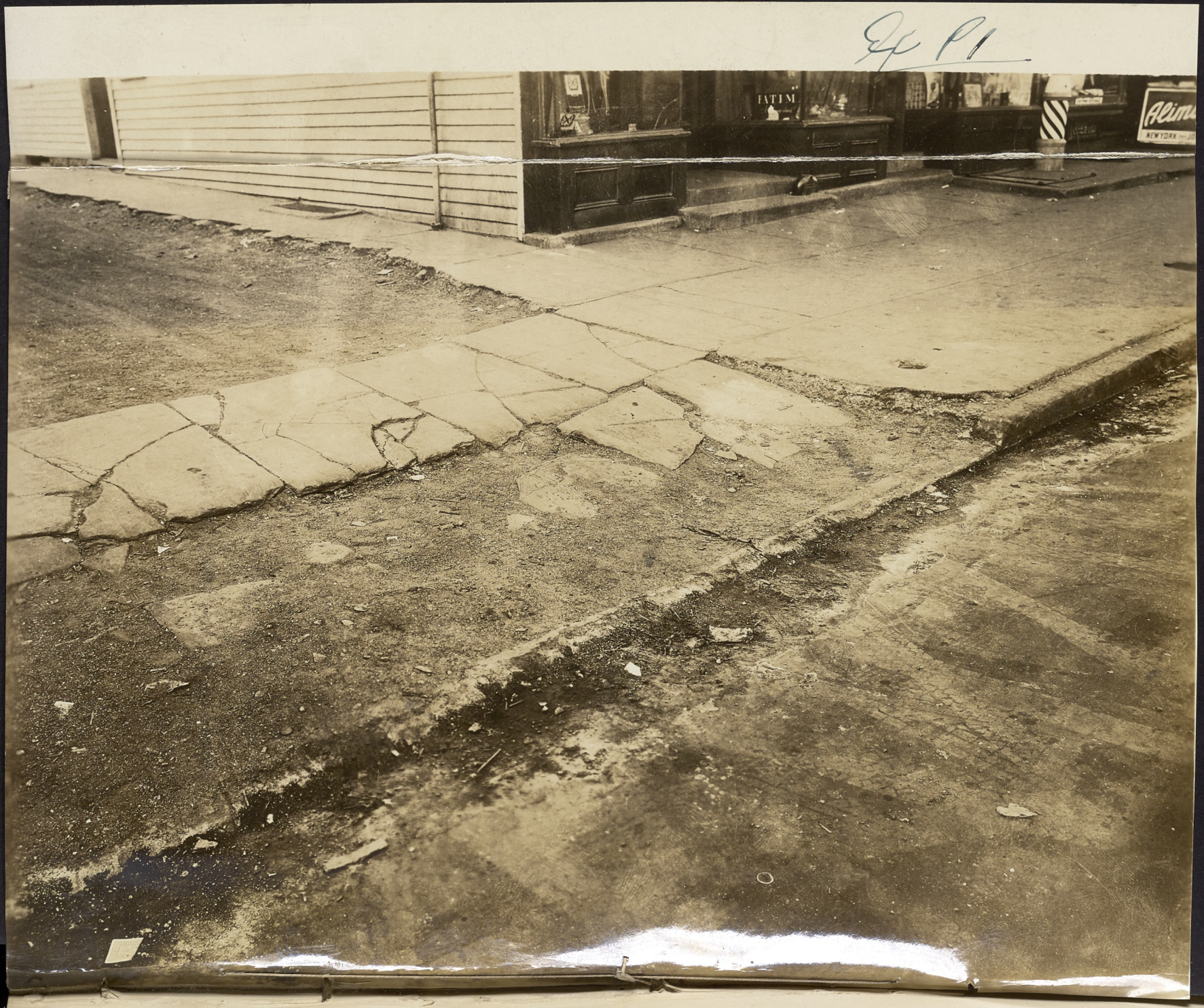
1. Because the Hudson County Circuit Court erroneously refused to grant defendant Matthew Krause's motion for a non-suit.

2. Because the Hudson County Circuit Court erroneously refused to grant defendant Matthew Krause's motion for a direction of a verdict in favor of said Matthew Krause and against plaintiff Martin Ceslak.

Respectfully yours,

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys for Defendant.

Dated, November 26th, 1930.
(Filed November 26, 1930.)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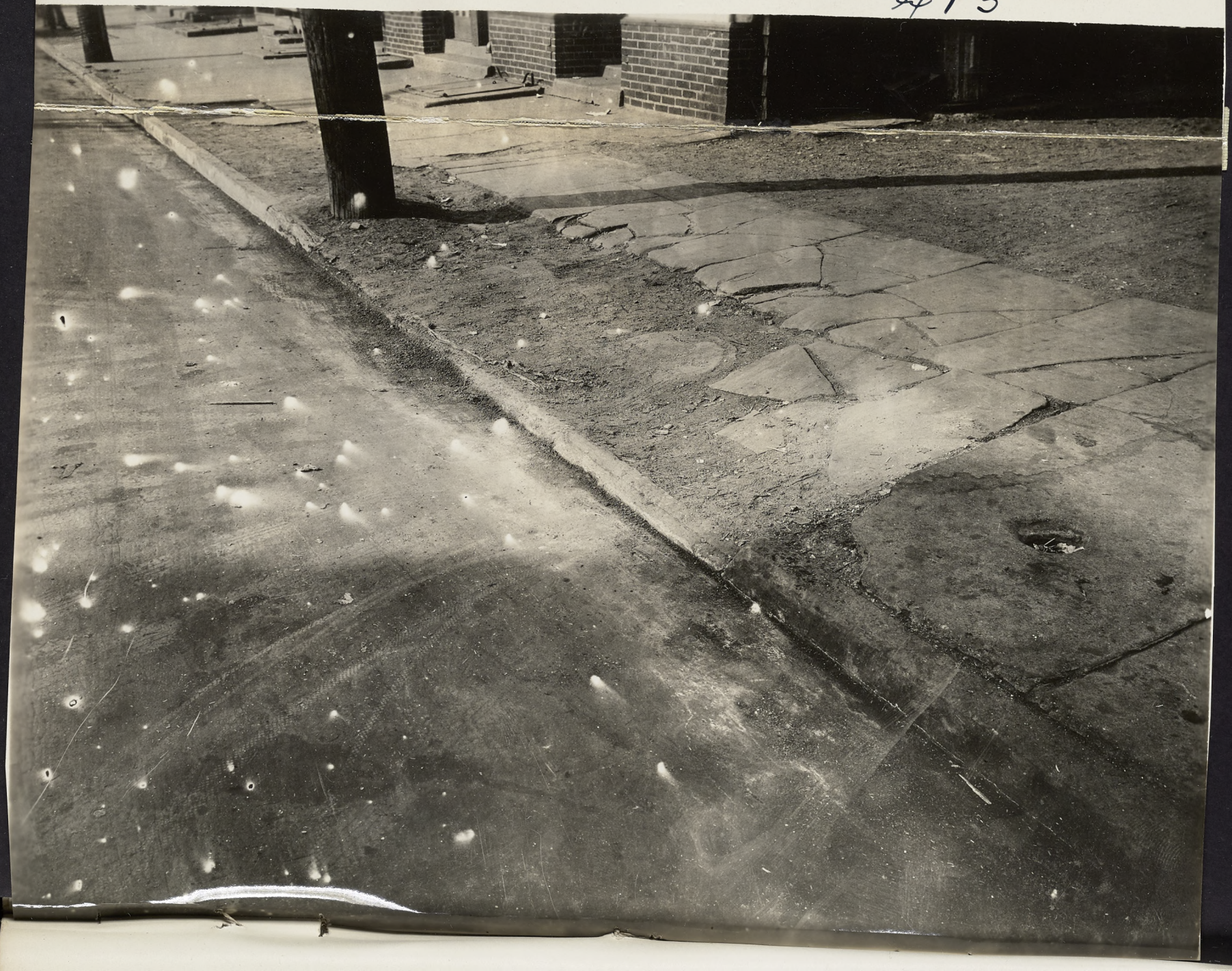

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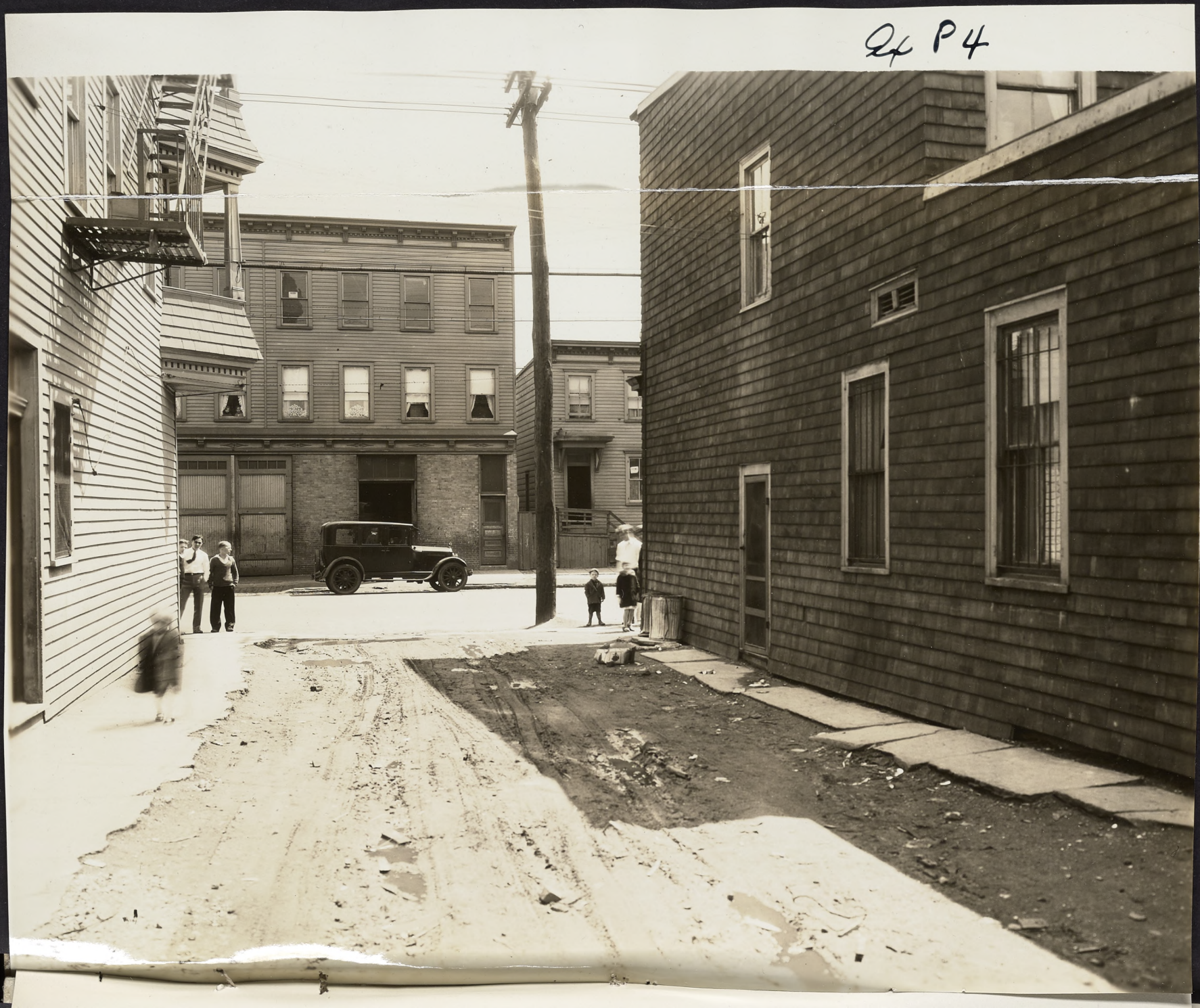

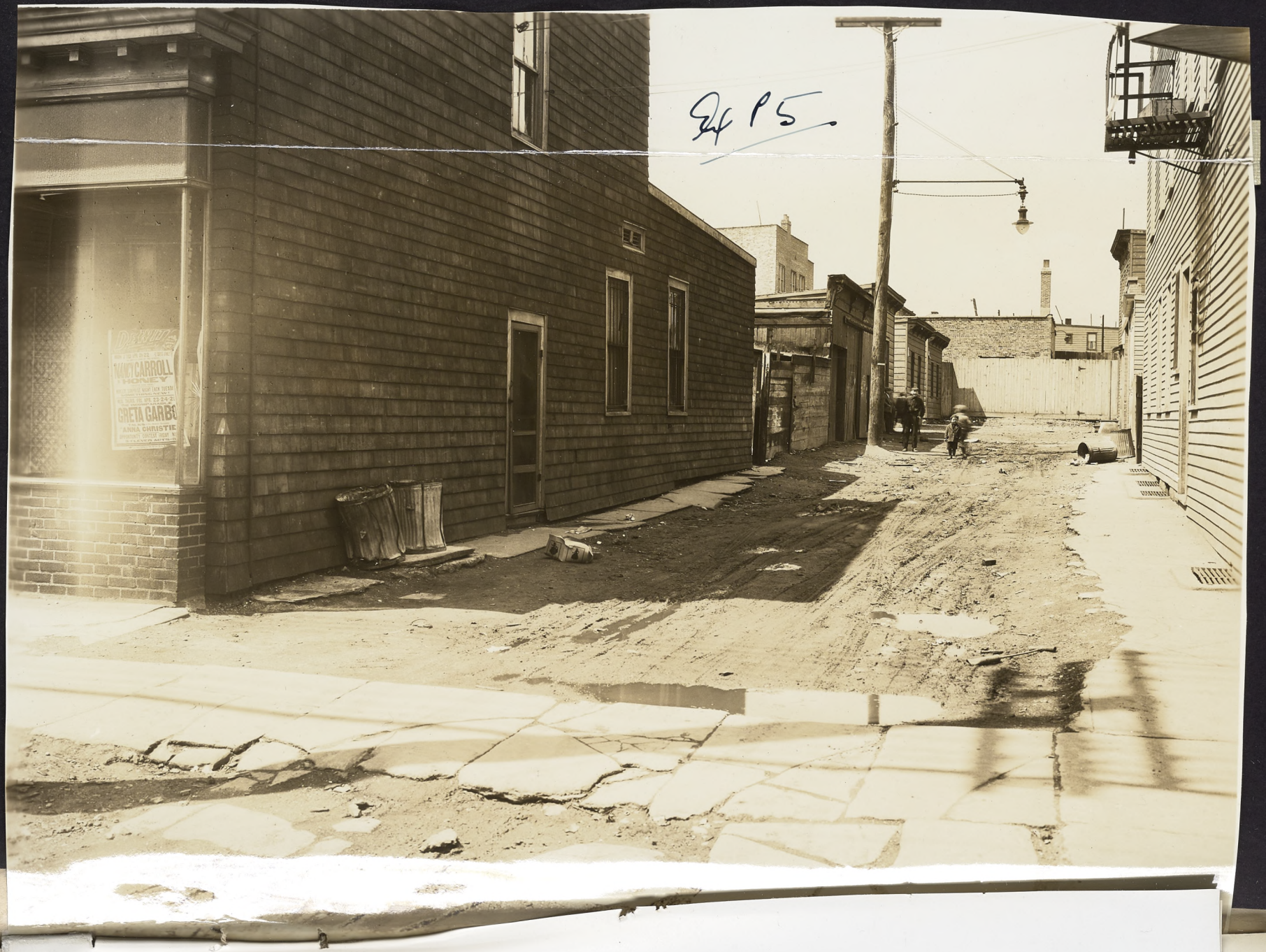
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New Jersey Court of Errors and Appeals.

Action of Law.

On Appeal from Hudson Circuit.

MARTIN CESLAK,
Plaintiff-Appellant,

—VS.—

ROMAN KRAUSE,
Defendant-Appellee.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER, FOR APPELLEE.

This case was tried before the Honorable Thomas Brown and a jury in the Hudson County Circuit Court on November 12th and 13th, 1930. The Court directed a verdict in favor of defendant Roman Krause and against plaintiff Martin Ceslak. Final judgment was entered in accordance with the verdict.

This case is before this Court on appeal and the only ground of appeal is:

> The Trial Court erroneously granted defendant's motion for a direction of a verdict.

Statement of Facts.

About midnight on June 17th, 1928, plaintiff Martin Ceslak was struck and injured by an

automobile at the intersection of Avenue E and Standard Place, Bayonne, N. J. As a result thereof an action for damages was instituted against defendant Roman Krause as the owner of said automobile and Matthew Krause as the operator thereof and servant, agent and employee of the said Roman Krause.

Defendant Matthew Krause admitted that his father permitted him to use the car whenever he desired it and that he had a key for the car (State of Case, p. 88, l. 8). He further stated that he and his father were the only members of the family that drove the car but that his father's use thereof was very infrequent (S. C., p. 87, l. 39). There was testimony also that he drove the car on certain occasions when members of the family were occupants thereof (S. C., p. 88, l. 23). It was undisputed and uncontradicted, however, that at the time of the alleged accident Matthew Krause was driving the car alone and that he was operating said car for his own personal pleasure and not upon any business of his father, Roman Krause.

POINT I.

The Trial Court did not err in directing a verdict in favor of defendant, Roman Krause.

The only testimony relative to the ownership and operation of the automobile of defendant is the undisputed and uncontradicted testimony of Matthew Krause, which appears at (S. C., p. 89, ll. 20-30) and at (S. C., p. 89, ll. 3-28) :

> "The Court: This was your father's car or your car?

The Witness: My father's car.

The Court: Were you driving that car that night for your father?

The Witness: Myself, I have always been allowed to take the car whenever I need it.

The Court: Were you driving that car on your father's business?

The Witness: No, my own pleasure at the time."

and again at

"The Court: On this particular night, was there any other member of your family in the car with you?

The Witness: No, I was alone with the car.

The Court: You went to a club, a social club you call it, somewhere?

The Witness: Happened to be the Red Men at the time.

The Court: That is a beneficial association?

The Witness: Yes, sir.

The Court: You are a member of that?

The Witness: Yes, sir.

The Court: You went alone there?

The Witness: I went alone.

The Court: For your own business?

The Witness: For my own business, pleasure mostly, not business.

The Court: I mean your own pleasure?

The Witness: Yes, sir.

The Court: It had nothing to do with your father's business?

The Witness: None at all."

It is fundamental that where an attempt is made to impose liability upon one through the medium of the doctrine of *respondeat superior* it is necessary to show the existence of the relationship of principal and agent or master and servant at the time of the occurrence of the event that gives rise to the alleged liability.

The requirements of the proof of this relationship is concisely expressed in the familiar case of *Doran* v. *Thomsen* (Er. & Ap. 76 N. J. L. 754), whose fact situation is almost identical with that of the case in question. In the *Doran* case, defendant's daughter, a girl 19 years of age, was driving her father's car at the time of the accident. She drove the car on other occasions with the permission of her father and at times when permission was not obtained. She was not employed by her father to drive the car, and at the time of the accident she was driving the car for her own personal pleasure. There were no other members of her family in the car at said time. At page 757 the Court says:

> "The real test as to third persons is whether the act is done one for another, however trivial, with the knowledge of the person sought to be charged as master with his assent, express or implied, even though there was no request on his part to the other to do the action in question.
>
> It will be noticed that the act must be done by the one for the other. That was not so in the case at bar, and so there was no evidence upon which to find the existence of relationship if the daughter was not doing an act for her father. She was not even driving other members of

> the family. She was using the machine as a means of recreation and pleasure for herself and for her own friends, and it would seem impossible to draw the conclusion that she could be regarded as the agent or servant of her father upon that occasion."

The Court further states:

> "Assuming that the relationship of master and servant existed generally between the father and daughter, it does not appear in this case that on the occasion in question she was acting as such servant within the scope of her employment."

The same reasoning should be applied to the case *sub judice* because it is uncontradicted that Matthew Krause, the son of defendant Roman Krause, at the time of the alleged accident was not performing an act for his father. He was not employed by his father to drive the automobile and he was not driving other members of his family at the time. We respectfully submit that as in the *Doran* case, it is equally impossible to draw the conclusion that he could be regarded as the agent or servant of his father on the occasion in question.

The *Doran* case is very definite in its holding that where a father provides an automobile for the use of his family, including his children, and that when said automobile is being driven by one of the children for the exclusive pleasure of the child driving the car at a time when there are no other members of the family in the automobile, the father is not liable for the negligence of said child while driving said automobile.

In the case of *Missell* v. *Hayes,* 86 N. J. L. 348, Er. & Ap., the automobile involved was being driven by a son of defendant at a time when other members of the family were in the car. The Court held that the presence of these members of the family in the car at the time of the accident was sufficient to raise a jury question as to whether or not the son who was driving the car was acting as the servant of the defendant owner.

In that case the Court in distinguishing it from the *Doran* case, specifically oberves that in the *Doran* case no other members of the father's family were in the car at the time of the accident. After mentioning the presumption of agency by virtue of operation upon a public highway the Court at page 349 expresses the following:

> "This presumption, however, in that case was overcome by the uncontradicted proof that in fact the automobile was not in the possession of the owner or his servant, but on the contrary it was in the possession of a third party (who happened to be his daughter), and who was using it for her own pleasure and the pleasure of her friends and not on the owner's business."

Again in the case of *Jennings* v. *Okin,* 88 N. J. L. 659, Er. & Ap., the Court refused to relax the rule laid down in the cases mentioned *supra.* In this case defendant, an owner of an automobile, requested his son to drive it on an errand for him. After the performance of this errand, while the son was returning by

way of an indirect route, he met with an accident causing injuries to the plaintiff. On the question of agency the Court at page 661 uses the following language:

> "Under such circumstances it is settled that the father as principal could not legally under our adjudications be called upon to assume liability for the incidents of the trip, and that, from the moment it was undertaken the relationship of principal and agent theretofore subsisting was severed."

Appellant urges the cases of *Gustin* v. *Calandriello,* 144 Atl. 312, 7 M. 114, and *Grimditch* v. *Olson,* 139 Atl. 430, 5 M. 1006, as authorities establishing error upon the part of the Trial Court. Both cases are at once distinguishable from the case under discussion because in said cases there is no uncontradicted evidence that the operator was driving the car involved on his own personal business or pleasure. The only real similarity between the case in question and the case of *Gustin* v. *Calandriello* is that both operators possessed keys to the cars involved. Surely the presence of this element in the case should not be sufficient to reverse the rule of law expressed in *Doran* v. *Thomson.* Otherwise a mere stranger entrusted with a key to an automobile would be the servant or agent of the owner in any engagement in which he might be using the owner's automobile. It was the fatal lack of uncontradicted evidence regarding the business of the operator and the conflict in testimony as to other phrases of the case that caused the Court to properly submit it to the jury.

The case of *Grimditch* v. *Olson, supra,* presented also a question for the determination of the jury. This case reveals that at the time of the accident the car was being operated by one Peterson with the permission of the defendant owner. Another member of defendant's family, a son, was in the car at the time. In determining that the presumption arising from the proof of ownership was not completely rebutted the Court rightly decided that the case should be submitted to the jury. As in the case of *Gustin* v. *Calandriello* there is no uncontradicted testimony as to the business or purpose upon which the car was being operated at the time of the accident.

In the *Matter of Patterson* v. *Calandriello,* 135 Atl. 91, defendant's automobile at the time of the accident was being operated by his son, enroute to the place where he was to teach one Hayes the art of driving an automobile. Defendant consented to this use of the car and another son was in the automobile at the time of the happening. The presence of two members of the owner's family in the car at the time and the lack of uncontradicted evidence that said car was being operated on the exclusive concern of the operator presented again a matter for the determination of a jury.

In *Gruda* v. *Karbowski,* 139 Atl. 893, a son acted as the driver for his father, the defendant and owner of the car involved. On the occasion in question his son had driven his father to a certain place and obtained permission to use the car until it was time to call for his father for the purpose of bringing him home. While the son was thus using the car and before he had

started back for his father the accident out of which the case arises happened. The Court in this situation directed a verdict in favor of the defendant and against the plaintiff because it was uncontradicted that at the time of said accident the son was using the car for his own pleasure and not upon any business or concern of his father.

This decision is in accord with *Doran* v. *Thomson, supra,* and, in our opinion, states the rule of law that should be applied to the case in question. In all three cases the facts are almost identical. Each presents a situation where a member of a family received permission to use the parent's automobile for the personal and individual purpose of the operator. In all three cases the pleasure of the said operator, alone, is involved and no other member of the family is an occupant of the car at the time of the happening. There is in these cases a complete lack of proof of the relationship of master and servant or principal and agent at the time of the accident, which must be established in order to impose liability upon the parent for the negligence of the child.

We respectfully submit that this case embodies no novelty whatever as contended by appellant. The cases relied upon by appellant offer fact situations far different from that presented in the present litigation. We submit that the law is clear that when a member of a family uses the parent's automobile, alone, on his or her own personal and individual pleasure or business and upon no business or concern of the parent, the parent is not liable for the negligence of the child at that particular time in spite of the fact that the child may have a key for the car and upon

other occasions may have operated the car while other members of the family were occupants thereof.

CONCLUSION.

We respectfully urge that the Trial Court committed no error in this cause in directing a verdict in favor of defendant and that the judgment entered thereon should be affirmed.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Appellee.

JAMES D. CARPENTER, JR.,
Of Counsel.

THE COURT PRESS—47 West Street—Bowling Green 2820

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New Jersey Court of Errors and Appeals

MARTIN CESLAK, *Plaintiff-Appellant,* *v.* ROMAN KRAUSE, *Defendant-Appellee.*	On Appeal

BRIEF OF APPELLANT

Statement of Facts

On July 17th, 1928, Martin Ceslak was struck by an automobile (p. 10, lines 12-33). He sued Roman Krause as owner and Matthew Krause as driver (see Complaint, pp. 2-4). The question of liability of Matthew Krause was left to the jury, who returned a verdict in favor of Martin Ceslak as against the driver Matthew Krause (see *Postea,* p. 117).

As to the owner, Roman Krause, motion was made for direction of verdict and same was granted upon the ground that no relationship was shown between the defendant Matthew Krause, the driver and his father, Roman Krause, the owner, that would cast any responsibility upon the father for the operation of the car. To this ruling exception was taken and allowed (p. 109, lines 9-24).

From this ruling and judgment entered thereon, appeal is taken and is the only ground of appeal urged.

ARGUMENT

The trial court erred in directing a verdict in favor of the defendant Roman Krause.

The testimony relative to the ownership and operation of the car being brief is for the purpose of convenience reprinted in full, as follows:

Matthew Krause, the son and driver testified:

"The Court: This was your father's car or your car?

"The Witness: My father's car.

"The Court: Were you driving that car that night for your father?

"The Witness: Myself. I have always been allowed to take the car whenever I need it.

"The Court: Were you driving that car on your father's business?

"The Witness: No, my own pleasure at the time.

Recross examination by Mr. Brenner:

"Q. Did you have your father's permission? A. I always had my father's permission to use it any time.

"Q. Do the other members of the family use it? A. My father uses it very seldom" (p. 87, lines 20-40).

"Q. So that it was mostly used by whom? A. Myself.

"Q. By yourself? A. Yes, sir.

"Q. So that you used the car more than he did, in spite of the fact that it was in his name? A. Yes, sir.

"Q. You had your own private key to it? A. That is right.

"Q. Didn't have to go to him for it? A. No, I had been given permission to use the car at all times, at any time.

"Q. Was the car also used for the enter-

tainment and diversion of other members of the family?

"(Objected; argued and objection withdrawn.)

"Q. (Question read.) A. Yes; whenever my father wanted to use it; my father was the only one outside of myself to ever use the car.

"Q. By using, you mean driving it? A. Yes, sir.

"Q. Did the other members of the family go out in it? A. Yes, occasionally I took my parents out in it.

"Q. You drove at the time? A. I did.

"Q. Any other members of the family drive the car? A. That's all; sister didn't drive at the time.

"Q. Did she ever ride in the car? A. She did.

"Q. With you driving? A. Me driving.

"Q. And at times your father driving? A. I could not tell you if she drove with my father at the time. I know she did drive with me.

"Q. So that the car as a matter of fact was bought for the use of all the members of the family, wasn't it? A. No, I would not say that.

"Q. Was it bought for your use only? A. Mostly for myself.

"Q. But retained in your father's name? A. Right.

"The Court: On this particular night, was there any other member of your family in the car with you?

"The Witness: No; I was alone with the car.

"The Court: You went to a club, a social club you call it, somewhere?

"The Witness: Happened to be the Red Men at the time.

"The Court: That is a beneficial association?

"The Witness: Yes, sir.

"The Court: You are a member of that?
"The Witness: Yes, sir.
"The Court: You went alone there?
"The Witness: I went alone.
"The Court: For your own business?
"The Witness: For my own business, pleasure mostly, not business.
"The Court: I mean your own pleasure?
"The Witness: Yes, sir.
"The Court: It had nothing to do with your father's business?
"The Witness: None at all" (p. 88, lines 1-40; p. 89, lines 1-30).

There was no other testimony in the case relative to the ownership or operation of the car.

This testimony is similar to that of *Gustin* v. *Calendrillo,* 144 Atl. 312; 7 M. 114, decided by the Supreme Court.

John Calendrillo was the owner of an automobile operated at the time of the accident by his son, Thomas. Thomas had asked permission to use the car. Such permission was refused, but the car was nevertheless taken out without the father's consent. Concerning this, the Court said:

"If this were all the testimony, we would be inclined to think that the presumption of liability had been overcome. Thomas, however, had a license to drive. This license had been paid for by his father. Thomas had had the license for 3 or 4 years. Thomas had no car of his own. He had frequently obtained the consent of his father to the use of his father's car. He drove his father and mother about. While this was denied by John, yet there was evidence to this effect. Thomas had a key for the car. Mrs. John Calendrillo (the mother) also had a key. She would give permission to her son, Thomas to use the car. The testimony of the members of the family upon this phase of the case

> was conflicting. In our opinion, the trial court ruled properly in submitting the case to the Jury."

It was held that the trial court did not err in submitting to the jury the liability of John Calendrillo, the father, for the operation of the car by the son, Thomas, and the judgment against the father was not disturbed.

In the present case there was no such conflict as in the case cited. The son had no car of his own. In the case cited, the son acted in direct disobedience of the command of the father not to use the car. In the instant case there was consent to its use. As in the cited case, members of the family, including both father and mother were driven by the son.

If the law as stated by the Supreme Court in the cited case is favorably considered by this Court, the trial court unquestionably erred in directing a verdict.

The contention that a jury question was presented in the instant case finds support in *Grimditch* v. *Ollson,* 139 Atl. 430; 5 M. 1006. Plaintiff was injured while operating a Ford car. This car collided with one driven by Peterson. In arriving at its decision, the Supreme Court said:

> "The first reason urged for making absolute the rule is that the Court should have controlled the case and directed a verdict in favor of the defendant. We think the Court could not under the evidence have so treated the case. The proofs were that the car was used generally for the pleasure of the defendant and his family, frequently being driven by his son, Anton Ollson, who had the right to use it; that on the night in question the son had taken the car out, having with him Peterson and three girls. Peterson drove the

> car. In addition to the presumption arising from the ownership that the car was under the control and operation of the defendant through himself or his agent, there was proof that the defendant had given Peterson permission to drive the car. This we think made a case for the jury, notwithstanding defendant's denial that the car was either used by his permission or that Peterson had been given authority to drive.
>
> "The defendant's counsel urged upon us as controlling the case of Doran *v.* Thomsen, 76 N. J. L. 754 * * * where the daughter was driving a car belonging to the father and the plaintiff relies on the case of Missell *v.* Hayes, 86 N. J. L. 348; 91 Atl. 322, where the son was driving the car of the father for the enjoyment of the latter's family. Without going into the bearing of these cases on the present situation, it is sufficient to say that in the case before us, the presumption arising from the ownership as above indicated were not so completely overthrown as to make the disposition of the case one for the Court rather than for the Jury."

It will be observed that in the cited case not only was there merely a permissive use as in the present, but there is the further fact that while in this case the son was driving with the consent of the father, that in the cited case it was being driven by a friend of the son. In both cases there appears to have been no relationship of principal and agent or master and servant, the Court going to the extent of holding that the permissive use was sufficient to send the case to the jury, leaving to them the sole decision as to the liability of the owner.

Gruda v. *Karbowski,* 139 Atl. 893, with facts apparently similar to those in *Grimditch* v. *Ollson* and *Gustin* v. *Calendrillo,* all of which were de-

cided by the Supreme Court, does not appear to be in accord with the decision in either case. The *Gruda* case, however, makes no mention of the *Grimditch* case, which was decided at an earlier date and is not commented upon in the *Gustin* case, decided at a later date.

Examination has been made to ascertain whether either of these cases have ever been commented upon in any decision of this Court, but fails to disclose such comment. Like examination has been made for decisions of this Court directly passing upon like facts without success. Apparently the case comes before this Court as one of novel impression. It is urged, however, that the most recent adjudication by the Supreme Court in *Gustin* v. *Calendrillo*, *supra,* should be followed in this Court. If so followed, the trial judge erred in taking the case from the jury as to the defendant, Roman Krause.

Respectfully submitted,

BRENNER & KRESCH,
Attorneys for Plaintiff-Appellant.

ALFRED BRENNER,
Of Counsel.

BAR PRESS, INC., 84-86 Washington Street, New York

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New Jersey Court of Errors and Appeals.

Action at Law:

On Appeal from Hudson Circuit Court.

MARTIN CESLAK,
Plaintiff-Appellee,

vs.

MATTHEW KRAUSE,
Defendant-Appellant.

BRIEF OF McDERMOTT, ENRIGHT & CARPENTER, FOR APPELLANT.

This case was tried before the Honorable Thomas Brown and a jury in the Hudson County Circuit Court on November 12th and 13th, 1930. The jury returned a verdict in favor of plaintiff Martin Ceslak and against defendant Matthew Krause in the sum of $15,000. Final judgment was entered in accordance with the verdict.

The case is before this Court on appeal and the grounds of appeal are:

That the Trial Court erroneously refused

1. To grant defendant's motion for a non-suit.

2. To grant defendant's motion for the direction of a verdict.

Statement of Facts.

On June 17th, 1928, shortly before midnight plaintiff was walking southerly along the westerly sidewalk of Ave. E, across Standard Pl. which enters Ave. E, Bayonne, N. J., on the westerly side thereof. Ave. E at this point is about 60 feet in width and Standard Pl. about 25 feet in width (State of Case, p. 15, l. 17). When plaintiff had proceeded about halfway across Standard Pl. (p. 12, l. 6) he was knocked down and injured by an automobile. Before he was struck he heard no horn and saw no lights (p. 11, ll. 15 to 20). He knew that it was an automobile which struck him because he recognized the back tire of an automobile after he was run over (p. 15, l. 38). He made this observation when the automobile was approximately 35 feet away from him, while the automobile was still moving ahead (p. 16, ll. 24 to 28) and it was the last view that plaintiff had of said automobile (p. 17, ll. 5 to 10). There was no other identification of the automobile except that given by plaintiff. The automobile that struck him was either a car or a truck (p. 35, l. 13). There were no other eyewitnesses to the occurrence.

Mrs. Josephine Rudzinski, the proprietress of the establishment on the southerly corner of Ave. E and Standard Pl., attracted by moaning, left her place followed by two patrons thereof (p. 22, l. 7) and found plaintiff lying in Standard Pl. about 6 or 7 feet from the sidewalk (p. 22, l. 20). At that time three unknown men were near the plaintiff (p. 35, l. 28) and defendant was approaching from the direction of his garage (p. 26, ll. 27 to 32).

Defendant about midnight or shortly thereafter

on the same evening drove his Packard Sedan from Ave. E to his garage, located on the northerly side of Standard Pl., about 125 feet from Ave. E (p. 74, l. 24, p. 106, l. 18). Before entering Standard Pl. he stopped his car, put on his bright lights and slowly crossed the curbstone and sidewalk enroute to his garage (p. 74, l. 30, p. 75, ll. 9 to 21). At this time plaintiff was neither on the sidewalk nor on Standard Pl. west of said sidewalk. About 10 or 15 minutes later while defendant was returning from his garage he found plaintiff lying on Standard Pl. with an unknown man standing over him (p. 76, l. 34). He observed that the man was hurt (p. 77, l. 18) and went to his own home, about 50 feet from that point (p. 73, l. 28) for the purpose of advising police headquarters of the discovery (p. 77, l. 19). The police ambulance came in response to his call and took plaintiff to the hospital.

Officers of the Bayonne Police Department arrived at the scene about one hour after Martin Ceslak was found (p. 35, l. 31). They discovered a pool of blood about 9 or 10 inches in extent in the center of Standard Pl. not more than 10 feet west of the westerly sidewalk of Ave. E (p. 35, l. 28). This pool of blood was in the center of 2 tire tracks (p. 36, l. 27) that extended to a point 15 or 18 feet from the Krause garage, where said tracks stopped or faded out (p. 42, l. 10). The police further found in the Krause garage 3 automobiles including a Packard Sedan, the radiator of which was still warm (p. 38, l. 40). Further examination of the car with the aid of a light revealed 2 or 3 spots, one-quarter to one-half inches in diameter, underneath the mudguard and a few more on the axle (p. 39, l. 23, p. 48, ll. 10 to 14). There was some difference of

opinion as to the character of these spots. Two of the officers did not know what they were and did nothing to remove the doubt. Another officer definitely and unequivocally stated that they were not blood spots. An examination of the Packard automobile on the following morning after said car had been removed contrary to alleged instructions of the police, which instructions defendant denies, revealed no blood spots or any evidence of the possible connection of this car with plaintiff's injury. There was no evidence that defendant had changed the appearance of the car during the interim and plaintiff does not contend that he did.

POINT I.

There is no proof of the allegations of negligence stated in the complaint.

The only evidence as to the operation of defendant's automobile is the undisputed evidence of defendant himself. He testified that on June 17th, 1928, shortly after midnight he operated his Packard sedan southerly along Ave. E to Standard Pl., on which street he intended to move westerly to his garage. Before entering Standard Pl. because of the bumpy curbstone he stopped his car, lighted his bright headlights and started slowly across the curbstone and sidewalk. This is set forth on page 75, line 8:

> Q. What was your rate of speed, about, as you crossed the sidewalk and went into Standard Pl.? A. I was at a complete stop before I started entering on the sidewalk.

Q. Why did you come to a complete stop? A. It is necessary on account of the curbstone; you can't naturally go up there without stopping your car dead before entering.

Q. What was your speed as you were crossing the sidewalk? A. I would not even say I was going 2 miles an hour.

Q. Why do you say that? A. Because the car is in low speed; in low you can't go fast.

This evidence cannot be regarded as proof that defendant drove his automobile at a high, excessive and improper rate of speed, nor is it proof that defendant did not have proper control of his car. Further, the allegation that defendant did not keep a proper lookout for the plaintiff is amply refuted by the undisputed testimony of defendant that plaintiff was not on the sidewalk when he crossed the same (p. 74, l. 40) and again by his testimony (p. 79, l. 18):

Q. Did you hit that man (Martin Ceslak) at any time either on the sidewalk or off it? A. I haven't seen that man and never hit him; absolutely.

Q. Positive of that? A. Yes, absolutely.

Q. You are positive the first time you saw that man (Martin Ceslak) was after you came out of the garage and found him on the street in a pool of blood? A. That was the first time I have seen him.

With regard to the lights on defendant's car plaintiff did not testify that the car that struck him had no lights, he merely stated that he did not see any lights. In opposition to that we urge the repeated assertions of the defendant that he

had his dim lights lighted up to his actual entry into Standard Pl., at which time he put on his bright lights (p. 30, l. 30, p. 82, l. 36, p. 83, ll. 14 to 23).

As to the allegation that no warning was given of defendant's approach, it is, of course, admitted that defendant sounded no horn. Plaintiff was not on the sidewalk or in Standard Pl. when defendant entered and there was no necessity for a signal. Even if it was true, which we strenuously deny, that it was this defendant who failed to sound a horn, that would not *per se* constitute negligence so as to subject him to liability as an efficient proximate cause, *Powers* v. *Standard Oil Co.,* 119 Atl. p. 273; *Winch* v. *Johnson,* 104 Atl. p. 81. We respectfully submit therefore that plaintiff failed to sustain the burden of proof by failing to prove any allegations of the negligence charged in the complaint or any facts from which negligence can be reasonably inferred.

POINT II.

The evidence does not justify the inference that defendant's negligence was the proximate cause of the injury of plaintiff.

The legitimate and reasonable inferences point to the innocence of defendant rather than to his guilt. Plaintiff testified that he was struck by an automobile, the only part of which he identified was a rear tire. This identification was made when said automobile was 35 feet away from him and when it had to travel at least 90 feet (p. 106, l. 18) or 190 feet (p. 36, l. 23), as the fact may be, to the Krause garage, or ap-

proximately 75 feet or 175 feet, as the fact may be, to the 2 garages immediately on the left of the Krause garage toward Ave. E or to the garage directly opposite these latter 2 garages on the southerly side of Standard Pl. There was no evidence that the car that struck plaintiff went into any garage or to any of the dwelling houses on the street revealed by the exhibits, and there was no evidence that it did or did not come out of Standard Pl. after striking the plaintiff.

Plaintiff seeks to infer that because the pool of blood was found between two tire tracks on Standard Pl. only one automobile entered the street and that that automobile struck the plaintiff. This is an unreasonable and unwarranted inference. There is no evidence as to when these tracks were made or how they were made. They might have been made by a car or a truck before the evening of the accident, as defendant testified that he drove trucks carrying loads and otherwise into Standard Pl. (p. 81, l. 37).

Further, these tracks might have been made by a car or truck after the Packard car of defendant entered the street, during the 10 or 15 minutes required by defendant to place his car in the garage and to move the other vehicles therein so that they could be taken out for the work of the following morning (p. 75, l. 31). They might have been made during the interval of approximately one hour between the time Martin Ceslak was taken to the hospital and the arrival of the police. This period of time must have been considerable because prior to reaching the scene of the accident Detective Gallagher, who arrived first on the scene (p. 35, l. 20), was prior thereto at the Bayonne Hospital long enough to witness the completion of the operation of inserting 45

stitches or more in the scalp of plaintiff (p. 35, l. 4) and to interrogate him regarding the cause of his injury. There was no evidence that no other car or truck did or did not enter the street during this interval and it cannot be reasonably inferred that no vehicle entered because no tracks were found.

A complete and final statement of the presence of the tire tracks is given in the cross examination of Detective Gallagher, who modified his direct examination regarding these tracks with relation to the Krause garage. This evidence is as follows (p. 42, l. 3):

> Q. You found the tracks of an automobile on the cinders that led from Ave. E in toward the garage? A. Yes, sir.
>
> Q. How far back did these tracks extend? A. Almost back as far as the end of Standard Pl.
>
> Q. How near to the garage did they extend? A. About 15 or 18 feet.
>
> Q. Did they short stop 15 or 18 feet from the garage? A. No, sir; they faded out.
>
> Q. And the character of the road was the same in front of the garage as it was for the rest of the distance; isn't that so? A. Some of it is harder; it is harder here and there.
>
> Q. What was the character of the road where the spots faded out? A. Cinders; it is all cinders.
>
> Q. So they faded out into nothing 15 feet from the garage; no evidence of a car backing up and going forward in an at-

tempt to get into the door on the easterly edge of the garage, was there? A. Not that we saw.

Q. You used a light, officer? A. Yes, sir.

Q. There was nothing on the road that you didn't see; you made a very thorough examination? A. Yes, sir.

It is undisputed therefore that these 2 tracks extended from Ave. E to a point 15 or 18 feet from the Krause garage, where they stopped or faded out. It is also undisputed that the character of the roadway from Ave. E to and in front of the Krause garage was uniformly the same, that is, it was "cinders, all cinders, harder here and there". There was no explanation on the roadway itself as to why these tracks did not extend beyond their terminating points because where the tracks stopped the road was made of cinders like the remainder of the road. It is unreasonable to assume that the same car on the same character of road should make uninterrupted tracks thereon only part of the way. It is most unreasonable to infer that defendant's car made these tracks because its tracks surely would not be missing where you would expect to find a greater number of tracks, that is, in front of and near the garage, where, according to the undisputed testimony defendant because of the narrowness of the road was obliged to back his car at least once or twice so as to place his car in the garage. We respectfully submit that these tracks were not made by defendant's car and that they are entirely without value as the basis of any inference of negligence on the part of defendant.

With regard to the alleged suspicious spots under the car, which spots were from one-half to one-quarter inches in diameter and which numbered 2 or 3 underneath the mudguard and several more on the axle, we contend that the only positive and undisputed testimony on this subject was that given by Lieutenant Rigney, the Superintendent of the Homicide Bureau. He says the following (p. 91, l. 27):

> Q. What if anything did you find on the car (Krause Packard Sedan) or under the car that might have been tied up with this accident? A. I didn't find anything.
>
> Q. What were you looking for? A. I was looking for spots of blood on the car.
>
> Q. Did you find any? A. No, I did not.

Opposed to this we have the testimony of two detectives who did not know what the suspicious spots were. They wanted to examine them by daylight on the following day. We urge that this is without substance because nothing could have been done on the following day with respect to these spots that could not have been done that morning during the investigation by the police. The fact that a Deputy Chief of Police, a Captain, a Lieutenant, two Detectives and a Patrolman saw the condition and did nothing to remove the spots for chemical examination and comparison with the blood of plaintiff is ample proof that they were inconsequential.

The fact that they were so regarded is conclusively confirmed by the fact that Detective Anzelowitz, an officer who did not participate in the initial investigation, was ordered by Captain McGrath (p. 52, l. 21), who likewise did not participate in the initial investigation, to inspect

the car on the following morning. Further, this detective was sent to make his investigation without any instructions as to where the suspicious spots were located. If the alleged suspicious spots had any value they certainly would have been verified or a more serious attempt would have been made to verify their character because at that time there was the possibility that a homicide had been committed. From the foregoing we submit that this alleged evidence is not a fair basis for an inference that defendant had any connection with plaintiff's injuries.

The only remaining suggestion of the possible connection of defendant with this occurrence is that which may be inferred from the fact that he was among the first to arrive at the place where Ceslak was found. He was away from the place where plaintiff was found for 10 or 15 minutes, during which time plaintiff met his injury. The undisputed testimony as to defendant's conduct at this time is as follows (p. 75, l. 21):

> Q. What did you do after that (after crossing the curbstone and sidewalk)? A. Drove the car up the lane right into the garage.
>
> Q. Did you have any difficulty; describe the manner in which you get into the garage. A. Well, the alley not being wide enough to make a complete turn right into the garage, it was necessary for me to back the car out at least once or twice. After I had the car backed up, I had to put it in position so that I can get the trucks out for the morning work, which required a little time, putting them so I could get my own car in.

Q. Was the garage locked when you pulled up to it? A. It was closed at the time I pulled up to it.

Q. What did you do then? A. After pulling up and opening up the garage door, putting on the light and putting my own Packard sedan right into the garage, after going in there, I had a little trouble trying to get into this, to make room for the trucks to come out, which, after doing that, I put out the light, closed the garage door and was ready to go out.

Q. Can you tell the period of time you consumed from the time you crossed the sidewalk at Standard Pl. up to the time you locked the door and were ready to come out? A. I would say there was no hurry, never was in a hurry.

Q. Let's get down to this night?

The Court: How long did it take you?

The Witness: About ten to fifteen minutes at the most.

This work could not possibly have been accomplished in a few moments and it is the type of work that should command and did command all of defendant's attention. During this time plaintiff could have and actually did sustain his injury without defendant having any knowledge of it. We respectfully urge that the only inferences that can be drawn from his actions are favorable to him.

The fact that he telephoned to police headquarters and not merely to the hospital and the fact that defendant might have left his garage through another exit, through a rear door, his

accustomed exit during working hours, without appearing on Standard Pl., are certainly bases of favorable inferences. We contend that all the direct and meritorious circumstantial evidence is more consistent with the absence of negligence on the part of defendant than with his negligence. Plaintiff has proved only an accident with an automobile or a truck. His case against defendant is only a theory to which he asks this Court to add a presumption of negligence. On this subject the law is very clear, *McComb* v. *Public Service Railway Co.,* 112 Atl. page 255:

> "* * * Mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

POINT III.

The evidence does not exclude the idea that this accident was due to a cause with which defendant was unconnected.

No evidence was adduced and no attempt was made to eliminate the possibility of a truck being involved in this accident. The undisputed testimony is that plaintiff informed Detective Gallagher at the Bayonne Hospital of the possibility of a truck being involved. The evidence on this point is as follows (p. 35, l. 10):

> Q. Did you try to get him to talk? A. Yes, sir.

Q. Did he seem to understand? A. All we did was get out of him was a car there that struck him, or a truck.

Q. That is all you could get? A. That is all we could get.

Q. Then you went to the scene of the accident? A. Yes, sir.

Standard Pl. is a public street (p. 83, l. 16). Its roadbed was composed of cinders, and the photographs thereof reveal garages, dwelling houses and the remains of concrete sidewalks. It cannot be fairly assumed that because it is a dead end street and that it is comparatively narrow other vehicles were not likely to and actually did not enter the street at the time of this accident.

The fact that defendant did not see or hear other vehicles is not proof that no other automobile or truck entered the street. Defendant at that time was engaged in the difficult task of moving his car and other trucks in the garage and he was paying no attention to what was happening outside. A car or truck might have struck the plaintiff and might have proceeded 35 feet or more westerly and then backed out of the street without detection by defendant. In the same manner it might have proceeded to its destination on Standard Pl.

From the testimony it appears that when the police found certain clues their energies seemed to have been directed solely toward fastening the commission of the deed upon defendant. It further shows that the police apart from the discovery of physical facts on the road and on the car, which we respectfully submit are without

value, interrogated Mrs. Rudzinski (p. 36, l. 15) and interrogated defendant Matthew Krause and his father Roman Krause. They did nothing else and this conclusively appears in the record at page 41, line 1:

> Q. What was the next thing you heard or did (after arresting defendant Matthew Krause)? A. That is all we did that morning.
>
> Q. And that was about what time? A. That was around three o'clock we placed him under arrest.

Nothing was done and no evidence was offered to eliminate as possible causes of the accident the man or men who were standing over the plaintiff when he was found. There is no evidence of any investigation and elimination of other possible destinations of the car or truck on Standard Pl., and the fact that there was no examination of the other garages is, to our minds, fatal to the plaintiff's case. We respectfully submit that the evidence in the case is more consistent with the absence of negligence upon the part of defendant than it is with the proof of his negligence and that in view of this situation the plaintiff must fail. A mere probability, if plaintiff's evidence against defendant can be regarded as a probability, is not sufficient. *Alvina* v. *P. S. Ry. Co.*, 117 Atl. page 709.

We respectfully urge that a fair appraisal of the evidence leads only to the conclusion that plaintiff has not proved the existence of such circumstances as would justify the inference that his injury was caused by the wrongful act of defendant and that plaintiff has not excluded the

idea that it was due to a cause with which the defendant was unconnected. *Houston* v. *Traphagen,* 47 N. J. L. page 43; *Suburban Elec. Co.* v. *Nugent,* 58 N. J. L. page 658; *P. S. Rwy. Co.,* 112 Atl. page 255; *Olsen* v. *Erie R. R. Co.,* 124 Atl. page 367.

CONCLUSION.

We respectfully submit that the judgment entered in this cause in favor of Martin Ceslak and against the defendant Matthew Krause, should be reversed.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Appellant.

JAMES D. CARPENTER, JR.,
Of Counsel.

THE COURT PRESS—47 West Street—Bowling Green 2820

Notice of Appeal and Grounds

Hudson County Circuit Court

MARTIN CESLAK, *Plaintiff*, v. MATTHEW KRAUSE and ROMAN KRAUSE, *Defendants.*	Action at Law

To Messrs. McDermott, Enright & Carpenter, Attorneys for Defendants.

SIRS:

PLEASE TAKE NOTICE that the plaintiff, Martin Ceslak in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment entered in favor of Roman Krause in this cause on the following ground:

1. Because the Hudson County Circuit Court erroneously directed a verdict in favor of the defendant Roman Krause and against the plaintiff Martin Ceslak.

Respectfully yours,

BRENNER & KRESCH,
Attorneys for Plaintiff.

Dated April 22nd, 1931.

Stipulation

NEW JERSEY COURT OF ERRORS AND APPEALS

	MARTIN CESLAK, *Plaintiff-Appellant,* *v.* ROMAN KRAUSE, *Defendant-Appellee.*	On Appeal

It is hereby stipulated and agreed, by and between the parties hereto, through their respective counsel, that the State of Case used on appeal in Martin Ceslak, Plaintiff-Appellee *v.* Matthew Krause, Defendant-Appellant should be used in the appeal and argument thereof in this action.

BRENNER & KRESCH,
Attorneys and of counsel
with Plaintiff-Appellant.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys and of counsel
with Defendant-Appellee.

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New Jersey Court of Errors and Appeals

MARTIN CESLAK,
Plaintiff-Appellee,

v.

MATTHEW KRAUSE,
Defendant-Appellant,

and

ROMAN KRAUSE,
Defendant.

On Appeal

BRIEF OF APPELLEE

Statement of Facts

On July 18th, 1928, Martin Ceslak sustained a serious injury claimed by him as having been caused by an automobile admittedly owned by Roman Krause, and driven my his son, Matthew Krause. The cause was tried before the Honorable THOMAS BROWN and a jury in the Hudson County Circuit Court. A verdict was directed for the father, Roman Krause, upon the ground that there was no proof that the son, Matthew, was driving for him at the time of the accident. As to Matthew Krause, the case went to the jury, who returned a verdict for the plaintiff for $15,000. From this verdict appeal has been taken by Matthew Krause, he contending that a non-suit should have been granted or a verdict directed upon the ground that there was no proof that the automo-

bile driven by him came into contact with the plaintiff.

Although there is direct evidence coming from the plaintiff himself, to the effect that he was struck by an automobile, it is conceded that the evidence of the identity of the machine is circumstantial.

Ceslak testified that he was walking along a sidewalk on Avenue E, Bayonne, which crossed Standard Place when he was struck by an automobile, the type of which he was unable to describe, and the number of which he was unable to obtain because, as he says, after the collision his eyes were so covered with blood that he was unable to make an observation and almost immediately after the accident lapsed into unconsciousness (p. 10, lines 12-40).

He claimed that prior to the collision he saw no lights and heard no horn (p. 11, lines 15-22). Before crossing Standard Place he looked both to the right and left, but saw no car approaching and succeeded in reaching the center of Standard Place before he was struck (p. 15, lines 1-25).

Although Standard Place is a public highway, it resembles an alley or private road more than a public street. Photographs were offered in evidence marked Exhibits P-1—P-5, which show its peculiar layout. It enters Avenue E on the west side and as shown in Exhibits P-1, 2 and 3 to enter it a driver is obliged to mount a curb and pass over a sidewalk. Instead of the usual crosswalk seen in public highways, the Avenue E sidewalk continues across Standard Place. It enters no other street, but abruptly ends a short distance from Avenue E, as can be observed from Exhibit P-5.

There were no eye witnesses to the accident. Mrs. Rudzinski conducted a place of business at the corner of Standard Place and Avenue E, shown on Exhibit P-5, it being the store in which appears a theatrical advertisement. Her attention was attracted to the accident by a moaning sound, which prompted her to leave her store and go out into Standard Place where she observed Ceslak lying about 6 or 7 feet from the sidewalk (p. 22, lines 1-22).

While standing in Standard Place she saw Krause approach from the direction of the garage toward the spot where the body lay (p. 23, lines 1-30).

Joseph Marianski was in the store of Mrs. Rudzinski (p. 27, lines 10-13). He was called out by Mrs. Rudzinski and saw a man lying in the middle of Standard Place (p. 27, lines 30-40), about 7 or 8 feet from the sidewalk, in the direction of the Krause garage (p. 28, lines 1-10).

Officer Fritts of the Bayonne Police force shortly after 11 o'clock in the evening went to the scene of the accident in response to a telephone call received at headquarters. He saw the body in the roadway and fixes the position as being about 12 to 15 feet from the sidewalk back toward the dead end of the street (p. 29, lines 15-35). He testifies to an investigation conducted by Detectives Gallagher and Lennon in which he took no part, but observed that they inspected the apparatus in the garage and the tracks of an automobile (p. 32, lines 1-40).

Detective Gallagher, who had been connected with the Police Department for 19 years arrived at Standard Place about midnight (p. 33, lines 25-40). He noticed a pool of blood in the middle of

the road (Standard Place) about 25 feet from the Avenue E curb (p. 35, lines 22-40). The pool of blood was in the center of two automobile tire marks in the roadway of Standard Place, the tracks extending from Avenue E in the direction of the Krause garage, on the north side of Standard Place, approximately 225 feet from Avenue E (p. 36, lines 9-40). These tire marks he testified led up to the garage (p. 38, lines 15-16). After making this observation, he called Roman Krause, who opened the garage for him. He found therein 3 cars, a truck, roadster and Packard Sedan. The radiator of the Packard Sedan was still warm (p. 38, lines 27-40). This car he then examined, finding several red spots on the axle and mudguard. He directed Krause, who admitted the ownership of the car, not to remove it until permission was given by the Police Department, his purpose being to make a later examination to ascertain whether the marks were blood spots. He was informed by the father that the car had been taken out by the son, Matthew Krause. The son was then questioned, and admitted that he had driven this car into the garage at about midnight, but claimed that he saw no one as he was driving into the garage, and claimed that he struck no one, but observed the man lying in the roadway for the first time when coming from the garage after having placed the car therein. His attention was called to the spots on the car (pp. 39-40).

Under cross examination he admitted that the tire marks stopped 15 to 18 feet short of the garage where they faded out, which he explains may have been caused by the fact that in some places the road was harder than in other parts (p. 42, lines 10-25).

The absence of the marks leading directly to the door of the garage may also be explained by the testimony of Matthew Krause, who said that because of the narrowness of the road it was necessary to back the car once or twice before entering (p. 75, lines 21-33) from which the jury could well say that in proceeding backward and forward evidently across the tracks first made, that the tracks at this point were obliterated.

The testimony of Detective Gallagher was corroborated by that of Detective Lennon, who had been connected with the Police Department for 19 years (pp. 46-50). Under cross examination this witness said that the reddish brown spots which he observed were different than the oil and grease spots usually found on the under part of a car (p. 5, lines 18-28).

Detective Anzelowitz, who had been connected with the Police Department for 17 years, was assigned the following morning by Captain McGrath to examine the car, particularly to ascertain whether there were any blood marks upon it. He first went to the place of business and informed the son that he had come to examine the car (p. 52, lines 15-40). He was informed that contrary to directions not to remove the car that it had been removed by the father, who was driving it that morning (p. 53, lines 1-40). While there the father returned and an examination was made, but no reddish brown spots could be found. The driver denied striking any one, but admitted that from the time he entered the garage until he came to the point where the man was lying, that he heard no other machine coming into or leaving Standard Place (p. 87, lines 1-8), and testified that there were only 3 garages in that street (p. 86, lines 30-40).

Officer Rigney, called by the defense, admitted the presence of spots, but had no recollection concerning their color (p. 92, lines 23-40).

The father, Roman Krause, contradicts the police officers by denying that he was given any instructions concerning the use of the car until further examination was made. Ordinarily he used one of the trucks to visit his customers. On the morning in question, however, although both trucks were in the garage, he, evidently for the first time used the Packard car to make his deliveries (p. 103, lines 1-40). His statement to this effect he later in his testimony attempts to change by claiming that the trucks were out when the pleasure car was taken by him (pp. 104-105-106). This, however, does not alter the situation that he had been directed not to remove this particular car until a further inspection had been made.

Argument

The driver of the car denies the striking. There were, however, facts and circumstances which, in the absence of eye witnesses, would warrant leaving the case to the determination of a jury. Plaintiff claimed that he was hit by an automobile. The defendant admits that about the time of the accident he drove into Standard Place. There was but one set of tire marks leading to or nearly to the garage in which the car was kept. The defendant heard no other car entering or leaving Standard Place. There were only two other garages in this street and the tracks led to neither of them. The under part of the car was spotted with stains or marks of a reddish tint, differing from the ordinary grease or oil spots. Although directed not to remove the machine, the

owner took it out the following morning and on its return the marks seen by all police officers the preceding night had entirely disappeared. The stains could have been obliterated by rubbing without the rubbing being noticed. A new accumulation of dust or grime picked up from the road during normal operation could have caused them to disappear. This circumstantial evidence indicates that the car was involved in the accident in question. The Courts of this State have on numerous occasions accepted circumstantial evidence where direct proof was lacking.

In the early case of *Wiley* v. *West Jersey Railroad Co.*, 44 N. J. L. 247, recovery was allowed where fire occurred destroying property of the plaintiff, it being claimed that the fire was caused by sparks coming from an engine of the defendant company. No one saw the sparks leave the engine, nor the commencement of the fire, the only evidence connecting the defendant with the conflagration was the fact that a train had passed shortly before the fire was discovered; that the wind was blowing in a direction which would have carried the sparks to the point where the fire originated and that there was a quantity of dry leaves and herbage which if ignited by a spark would burn and would tend to permit the flames to be carried.

Mr. Justice Dixon, speaking for the Court of Errors and Appeals, said,

> "These facts warranted the inference that the fire was communicated by one of the engines. Such was a possible cause of the effect produced; the evidence tended to disprove the presence of any other cause and, therefore, it was, of course, reasonable to believe that this was the real cause."

Appellant cites *Suburban Electric Co.* v. *Nugent,* 58 N. J. L. 658, in support of the general proposition of law that it is incumbent upon a plaintiff to exclude the idea that injury was caused by an act with which defendant was unconnected. The Court held, however, that there was sufficient in the facts of the case although circumstantial to have the question of responsibility passed upon by the jury.

Plaintiff's decedent was found dead. There was no direct evidence to show the cause of death. He was discovered lying close to a pole around which was wound a wire rope, then heavily charged with electricity. There was a burn freshly made on his left hand and an examination of his blood indicated a condition found in the bodies of persons dying from electric shock.

Chief Justice GUMMERE speaking for this Court, said:

> "These facts unexplained not only make it reasonable to suppose that the decedent came to his death through having touched with his hand the uninsulated wire upon the reel which was fastened to the defendant's electric light pole and thereby received a fatal shock, but exclude any other inference."

Minard v. *West Jersey and Seashore Railway Company,* 74 N. J. L. 39 cites with approval the rule previously enunciated in the *Wiley* case, and uses the language,

> "The proof was circumstantial. A train passed shortly before the fire. The building caught fire on the roof. Two or three small fires near the building were also set soon after the engine passed. The proof here was for the Jury and was sufficient, under Wiley *v.* West Jersey Railroad Co., 15 V. 247 to send

> the case to them. The Court rightly refused to non-suit."

Both the *Wiley* and *Minard* cases were cited with approval in *Goodman* v. *Lehigh Valley Railroad Co.*, 78 N. J. L. 317 decided by this Court, in which it was stated,

> "All this evidence was circumstantial of course, but for that reason was none the less legitimate."

In *Austin* v. *Pennsylvania Railroad,* 82 N. J. L. 416, Mr. Justice SWAYZE, speaking for this Court defines what is meant by the term used in other cases, the exclusion of other causes, stating,

> "The defendant appeals to the well established rule that it is not enough for the plaintiff to prove the possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant and exclude the inference that damage was due to a cause for which the defendant was not responsible. That is the rule and the plaintiff must prove circumstances which rener it probable and not merely possible that the defendant is at fault. But when it is said that the circumstances must exclude the inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases and to force the plaintiff to exclude such inference beyond doubt. All that is required is that the circumstances should be so strong that a Jury might properly on grounds of probability rather than of certainty exclude the inferences favorable to the defendant. The question arises only where the evidence is circumstantial and where probability may be all that is attainable. A striking illustration is Suburban Electric Co. *v.* Nugent, 29 V. 658."

Appellant cites *McCombe* v. *Public Service Railway Company,* 95 N. J. L. 187; 112 Atl. 258. In that case no one witnessed or knew what caused the death of the plaintiff's intestate. The only evidence in the case was that a motorman operating one of defendant's cars saw a body lying on the tracks. He stopped his car before reaching the body and found it badly mangled. The motorman on the car preceding his, testified, but his testimony threw no light on the accident as he said he stopped his car before coming upon the bridge where the body was found, saw no one on the tracks and felt no jar of any kind.

This Court held that there was no proof to justify the allegations of negligence in the complaint, that the deceased had been struck by a car; that it ran at great speed, gave no warning or signal of its approach and that no lookout was maintained nor lights provided to illuminate the car or the road in front of it.

The facts are far different than those in the instant case, there being direct proof of the fact that the injured had been struck by an automobile and also proof of its negligent operation. The injured testified that he made observations for its approach, but did not see it, evidently because it turned in from Avenue E in back of where he was walking and no signal was given to him of its approach. Likewise, there was a failure on the part of the driver to exercise reasonable care because had he looked he must have seen the plaintiff walking along the sidewalk and his failure to observe him could be attributed to the careless manner in which he made his observation. The only question in issue is whether it was the car driven by this defendant which caused the injury, and as

to that there was sufficient circumstantial proof gathered from the position of the pool of blood between the single set of tire marks leading from Avenue E to or nearly to the garage of the defendant, coupled with the presence of the reddish brown spots on the automobile suspiciously obliterated over night through disobedience of the order of the Police, to refrain from moving the car until a better and further examination could be made.

Alvina v. *Public Service Railway Company,* 117 Atl. 709 is also cited by the appellant. In this case it was contended that a trolley car of the defendant collided with a motorcycle, in the side-car of which the decedent was riding. No one heard or saw the collision. There was no proof that he was in the side-car, except from his wife, who testified that she had seen him get into it when leaving home. A half hour later she heard of the injury. The deceased and another man were seen lying in the roadway by a Police Officer, who also testified that the right wheel of the motorcycle was dented in.

Concerning this evidence Justice Black, speaking for this Court, said:

> "This is all the testimony in the record that bears on the question of the defendant's negligence. It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car, but if so how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

Attention is directed to the fact that the reason for the reversal of the trial court in submitting the case to the jury was because there was

no proof of negligence. Concerning the proof of collision, however, although there were no eye-witnesses, the Court seems to hold that from the circumstances the jury could infer that a collision had occurred.

This case is entirely different from the present. In the instant case there was direct evidence of a striking, and likewise, evidence that the driver of the car causing the injury was negligent. As previously stated, the only question now involved is whether the defendant was the driver of the particular car that struck the plaintiff. Referring to the chain of evidence heretofore recited at length, there were sufficient circumstances to warrant leaving the case to the jury.

Olsen v. *Erie Railroad,* 124 Atl. 367, cited by the appellant has no application to the present case. There the deceased was found with his body mangled, four or five feet from the railroad track, some time after a train had passed. The charge of negligence was based upon the contention that statutory warning had not been given. There was no proof of this, except from the testimony of one witness who heard a moaning, but did not hear any warning signals. He admitted, however, that he paid no particular attention to whether signals had been given or not. There was no proof that the place where decedent was attempting to cross, if he did cross the railroad tracks, was a public highway. Likewise, no proof that he had been hit by a train. There were, therefore, no facts direct or circumstantial from which the jury could infer that the deceased had met his death through being struck by a train, nor concerning the operation of the train which if it

did strike him would justify a jury in arriving at a determination that it was negligently or improperly controlled and operated.

CONCLUSION

We respectfully submit that the judgment entered in this cause should be affirmed.

BRENNER & KRESCH,
Attorneys for Appellee.

ALFRED BRENNER,
Of Counsel.

Notice of Appeal and Grounds

Hudson County Circuit Court

MARTIN CESLAK, *Plaintiff,* v. MATTHEW KRAUSE and ROMAN KRAUSE, *Defendants.*	Action at Law

To Messrs. McDermott, Enright & Carpenter, Attorneys for Defendants.

SIRS:

PLEASE TAKE NOTICE that the plaintiff, Martin Ceslak in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment entered in favor of Roman Krause in this cause on the following ground:

1. Because the Hudson County Circuit Court erroneously directed a verdict in favor of the defendant Roman Krause and against the plaintiff Martin Ceslak.

Respectfully yours,

BRENNER & KRESCH,
Attorneys for Plaintiff.

Dated April 22nd, 1931.

Stipulation

NEW JERSEY COURT OF ERRORS AND APPEALS

	MARTIN CESLAK, *Plaintiff-Appellant,* *v.* ROMAN KRAUSE, *Defendant-Appellee.*	On Appeal

It is hereby stipulated and agreed, by and between the parties hereto, through their respective counsel, that the State of Case used on appeal in Martin Ceslak, Plaintiff-Appellee *v.* Matthew Krause, Defendant-Appellant should be used in the appeal and argument thereof in this action.

BRENNER & KRESCH,
Attorneys and of counsel
with Plaintiff-Appellant.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys and of counsel
with Defendant-Appellee.