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NOTICE OF APPEAL.

CUMBERLAND COUNTY CIRCUIT COURT.

GEORGE IRESON,	}	ACTION AT LAW.	10
vs.			
GEORGE CUNNINGHAM,			
Plaintiff,		NOTICE OF APPEAL.	
Defendant.			

To S. Webster Hurd, Esq., Attorney for Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause. 20

Dated January 7, 1916.

HENRY S. ALVORD,
Attorney of Appellant.

STATE OF NEW JERSEY,	} ss:
CUMBERLAND COUNTY,	

30

I, L. H. Hogate, clerk of the County of Cumberland, also clerk of the Circuit Court in and for said county, the same being a Court of Record, do hereby certify the foregoing to be a true copy of the Notice of Appeal therein recited as taken from and

New Jersey State Library

compared with the original notice on file in my office.

(L.S.) IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said county and court this 10th day of January, A. D. 1916.

L. H. HOGATE,
Clerk.

By ROBT. S. SCHILLER,
Deputy Clerk.

10

MINUTES OF CIRCUIT COURT.

CUMBERLAND CIRCUIT COURT.

20	GEORGE IRESON, vs. GEORGE CUNNINGHAM.	}	ACTION AT LAW.
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S. W. HURD, R. P. TULLER, attorneys for plaintiff;

HENRY S. ALVORD, attorney for defendant.

30 This cause coming on to be heard this seventh day of October, A. D. 1915, before Hon. Howard Carrow, Circuit Court Judge, the following persons were called and sworn as jurors to try the issue:

JURORS.

1. Albert Hann

7. Raymond Bowen

- | | |
|-----------------------|------------------|
| 2. George Bartholomew | 8. Hamil Ladow |
| 3. Chas. Gridley | 9. C. V. Johnson |
| 4. J. E. Goodman | 10. Wm. Paullin |
| 5. Harry McKeen | 11. Leon Wood |
| 6. Joseph Maytrott | 12. Wm. McKillip |

The following persons were called and sworn as witnesses:

Witnesses for Plaintiff.

- | | | |
|----------------------------------|------------------------------------|----|
| 1. George Ireson, S. | 5. George Lorber, S. | 10 |
| 2. Fred McClennen, S. | 6. George Boody, S. | |
| 3. John H. Winslow,
M. D., S. | 7. Lorenzo Garton, S.
Rebuttal. | |
| 4. Charles W. Wilson,
M. D. | 8. Alfred Chalmers, S. | |

Witnesses for Defendant.
Motion for non-suit denied.

1. Geo. Cunningham, M. D.,
S.

20

The evidence being closed and counsel heard, the Court charged the jury, who retired at 1.30 o'clock P. M. to a private room in the custody of Harry Phifer, a constable, sworn to attend them, and after an absence of about three hours, they return to the court and being called, all answer to their names, and being asked if they have agreed upon a verdict, say they have, and by their foreman, Albert Hann, say they find for the plaintiff, in the sum of one hundred and fifty dollars, and so say they all.

30

Therefore it is considered that the plaintiff recover of the defendant the sum of one hundred and fifty dollars, besides costs of suit to be taxed.

Rule entered Oct. 7, 1915, on motion of

S. W. HURD,
Atty. of Pltff.

STATE OF NEW JERSEY,
CUMBERLAND COUNTY,

} ss:

I, L. H. Hogate, clerk of the County of Cumberland, also clerk of the Circuit Court holden therein, the same being a Court of Record, do hereby certify the foregoing to be a true copy of the minutes
10 therein recited, as taken from and compared with the original minutes as found recorded in Circuit Court Minute Book, page 332.

IN WITNESS WHEREOF, I have hereunto
(L.S.) set my hand and affixed the seal of said county and court this 10th day of January, A. D. 1916.

L. H. HOGATE,
Clerk.

By ROBT. S. SCHILLER,
Deputy Clerk.

20

30

JUDGMENT RECORD.**CUMBERLAND COUNTY CIRCUIT COURT.**

GEORGE IRESON,	} Plaintiff, vs. GEORGE CUNNINGHAM, <i>Defendant.</i>	ACTION AT LAW.	10
		JUDGMENT RECORD.	

George Cunningham, the defendant in this suit, was summoned to answer unto George Ireson, the plaintiff therein, in an action at law upon the following complaint: 20

The plaintiff, George Ireson, residing in the Township of Landis, County of Cumberland, and State of New Jersey, says:

1. He was, on and prior to the nineteenth day of March, nineteen hundred and fourteen, owner of a horse and wagon.

2. That the defendant, George Cunningham, possessed and operated an automobile on or about the nineteenth day of March, nineteen hundred and fourteen. 30

3. That on the nineteenth day of March, nineteen hundred and fourteen, at about seven o'clock in the

evening, said plaintiff was driving his horse and wagon to his home on a public highway in the Township of Landis, County of Cumberland and State of New Jersey, known as West Avenue; said defendant, who was also driving on said highway in his automobile, operated the said automobile in such a negligent manner as to strike said plaintiff's horse and wagon in which said plaintiff was riding, causing great injury thereby, to wit, the horse being injured to such an extent that it was necessary to kill the horse to relieve it of its suffering; the wagon and harness were also damaged, and the plaintiff being thrown from the wagon with great force, suffered severely from the shock, requiring the attention of a physician and incapacitating the plaintiff from performing his daily labors to the damage of the plaintiff of five thousand dollars (\$5000.00). The plaintiff will demand damages for the sum of five thousand dollars (\$5000.00) and costs of this suit.

S. W. HURD,
Atty of Pltff.

The defendant answered and made counter-claim as follows:

The defendant, George Cunningham, answering, says:

1. He has no knowledge as to the truth of the statement in paragraph No. 1 of the plaintiff's complaint, but leaves the plaintiff to make his proof.
2. This plaintiff admits that on or about the ninth day of March, 1914, he owned and operated an automobile.
3. Defendant admits that on or about the ninth

day of March, 1914, about seven o'clock in the evening of said day, defendant was driving his automobile on West Avenue, in or near the Township of Landis, but this defendant avers that he was not operating his said automobile in a careless and negligent and unlawful manner; but this defendant avers that the said plaintiff was driving a horse and wagon along said highway, in an unlawful manner; that is, that the said defendant was driving without any lights, as prescribed by law, and was doing so in violation of the law, and that any injury caused by the automobile of this defendant was caused by the carelessness, negligence and unlawful act of the defendant, and this defendant avers that the automobile of the defendant at the time of the accident was equipped with lights according to law, and was operated in a careful and skillful manner, and the plaintiff avers that any damage that was caused to any property of the plaintiff or to the person of the plaintiff was the result of the plaintiff's own carelessness, negligent conduct and on account of his, the plaintiff's failure to comply with the law, not only as to the lights on the wagon in which the plaintiff was then driving, but because the plaintiff was on the wrong side of the road, that is, on his, the plaintiff's, left-hand side of the road, when the accident occurred.

By way of counter-claim against the plaintiff, defendant says that:

1. He repeats the statements in paragraph three above.

2. The said plaintiff was, on the day hereinbefore referred to, driving a horse and wagon on the said public highway, known as West Avenue, later than

one-half hour past sunset, without any light on said wagon as required by law, and was driving said horse attached to said wagon, in such a careless, negligent and unlawful manner, that said defendant, who was operating his said automobile in a lawful and skillful manner, collided with said horse and wagon driven as aforesaid, and in consequence of the carelessness, negligence and unlawful action of the plaintiff, the defendant, without negligence
10 on the part of the defendant, was greatly injured, to wit, the automobile of the said defendant was injured by the contact, and the steering gear was bent, mud-guards bent, one of the lamps was broken, the chassis was bent, the radiator was bent and caused to leak, and the automobile was generally shaken up, marred, scratched and damaged.

The defendant counter-claims \$100.00 damages.

20

HENRY S. ALVORD,
Attorney for the Defendant.

The plaintiff made reply to the counter-claim as follows:

George Ireson, plaintiff in the above stated cause, in reply to the counter-claim filed by the defendant, says:

1. He denies the truth of the matters contained in the counter-claim.

30

2. And admits that he, the said plaintiff, was driving without lights on his wagon, but avers that he was driving on the right side of the highway when he was run into by the automobile driven by the defendant, which automobile was being operated in a negligent manner.

S. W. HURD,
Atty. of Plaintiff.

This cause was tried before Hon. Howard Carrow, Circuit Court Judge, with a jury, at the Cumberland Circuit, on October 7, A. D. 1915.

The cause having been heard and submitted to the jury, they returned a verdict as follows: "We find for the plaintiff in the sum of one hundred and fifty dollars."

Whereupon, it is adjudged that the plaintiff recover of the defendant, the sum of one hundred and fifty dollars and his costs, which are taxed at sixty-eight dollars and seventy-seven cents, making in the whole the sum of two hundred and eighteen dollars and seventy-seven cents. 10

Judgment entered October 7th, A. D. 1915.

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } ss:

I, L. H. Hogate, clerk of the County of Cumberland, also clerk of the Circuit Court and Court of Common Pleas, in and for said county, the same being Courts of Record, do hereby certify the foregoing to be a true copy of the judgment record therein recited as taken from and compared with the record of the same as found recorded in my office in Book 22, Record of Circuit Court Judgments, page 90, etc. 20

IN WITNESS WHEREOF, I have hereunto
(L.S.) set my hand and affixed the seal of said county and court this 10th day of January, A. D. 1916. 30

L. H. HOGATE,
Clerk.

By ROBT. S. SCHILLER,
Deputy Clerk.

TESTIMONY.**CUMBERLAND COUNTY CIRCUIT COURT.**

10	GEORGE IRESON, vs. GEORGE CUNNINGHAM,	}	ACTION AT LAW.
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Bridgeton, N. J., October 7th, 1915.

20 Before HON. HOWARD CARROW, Judge, and jury.

APPEARANCES:

S. WEBSTER HURD, Esq., HON. R. P. TULLER, for
plaintiff;
HENRY S. ALVORD, Esq., for defendant.

30 **PLAINTIFF'S OPENING TO JURY.**

Mr. Hurd: If your Honor please, and gentlemen of the jury, this is a case wherein the plaintiff, a farmer, who does a little carpenter work besides, was on his return home from the Borough of Vine-land. He lives in a municipality adjoining the bor-

ough. He was driving home with a companion in a wagon, and on the highway he met the defendant, who was coming in a southerly direction, the plaintiff going in a northerly direction, on one of the main highways. The plaintiff, seeing the defendant approaching him in an automobile, the defendant seemed to be driving from one side of the road to the other, and the plaintiff pulls out to the left-hand side of the road, which was the wrong side for him; nevertheless he pulled out on that side, believing that the operator of the automobile, the defendant, was going to hold to the right. But before reaching one another the automobilist swung around over on what appeared to be the right side of the road, and the plaintiff then pulls to his right. The defendant, instead of staying on the right side of the road, pulls over in towards the center, and at that the plaintiff gets clear out to the right-hand side of the road, pulls out almost into the ditch, the incline or ditch there alongside of the right-hand side of the road, and while in this position, standing there to avoid any accident, getting further out to the right than just exactly the right of the road, clear out almost into the ditch; while in this position the operator of the automobile drives on and strikes the plaintiff's team and injures the horse to such an extent that the horse had to be killed, and broke the harness, and injured the plaintiff. 10 20

If we show you that the plaintiff was entirely within his rights, that this accident was caused purely by the negligence of the defendant, we will ask you for a judgment in our favor. 30

MOTION TO NON-SUIT ON OPENING.

Mr. Alvord: May it please the Court, I desire to make a motion, and I will state to the Court that the pleadings show that this alleged injury took place on the nineteenth of March, 1914, at seven o'clock in the afternoon or evening of that day, and counsel, in his opening, I think, did not mention
10 the fact that his client was driving at that time without any light, and he has consented to admit that, and also to admit that sunset on that day was at 6.11 in the evening. That is admitted, as I understand.

Mr. Hurd: That is true.

Mr. Alvord: On that opening of the plaintiff I ask the Court to non-suit the plaintiff on the ground
20 that the plaintiff was violating the penal statute of the State of New Jersey at the time that this accident happened. The statute law of the State of New Jersey is that all vehicles, and this was a horse and wagon driven by the plaintiff at seven o'clock at night on the nineteenth of March, when the sun set at 6.11; that is, it was within eleven minutes of one hour after sunset, and the plaintiff should have had at least one light lighted on his wagon at thirty minutes after sunset on this date. The effect of
30 that statement of facts as regards the right of the plaintiff is, in my way of viewing the law and decisions in the State of New Jersey, that the plaintiff cannot recover.

The Court: Have you any case that holds that?

Mr. Alvord: Oh, yes. I will refer you to it.

The Court: That where a plaintiff has not a light on his vehicle and is run down he cannot recover?

Mr. Alvord: Yes. I will get it. Opposite counsel does not question the statute in regard to lights.

Mr. Hurd: No.

Mr. Alvord: There is no question. Counsel admits the statute in regard to the light, in regard to requiring the plaintiff to have a light thirty minutes after sundown. In the case of Menger vs. Laur, this was a case reported in 26 Vroom. 10

The Court: Was it a Court of Errors case?

Mr. Alvord: It was not. It was a Supreme Court case in which the opinion was given by Justice Depue, afterwards Chief Justice, and the case has been cited by the Court of Errors and Appeals favorably since. I have that case, too. 20

The Court: What does it hold?

Mr. Alvord: It is a case which involves about twelve pages in our reports, and I should read a good deal of it. "In this State the established rule is that if the plaintiff's negligence contributed to the injury, so that if he had not been negligent he would have received no injury from the defendant's negligence, the plaintiff's negligence being proximately a cause of the injury, he is without redress unless the defendant's act was a willful trespass or amounted to an intentional wrong, and in such case the comparative degree of the negligence of the parties will not be considered." 30

The Court: That has always been the law.

Mr. Alvord: Yes.

The Court: No doubt about that, but the question here is whether, assuming that the plaintiff was negligent—under the facts which you state he was negligent, undoubtedly negligent, but did his negligence contribute, that is a question of fact for
10 the jury.

Mr. Alvord: I think not in this case.

The Court: That is what the cases all hold, whether this contributive negligence is for the jury. If a man goes out and takes a chance at night in the dark without a light on his vehicle, he is surely negligent, there is no doubt about that, but it would not give his neighbor a right to run him down, and
20 the jury would be entitled to assess damages unless they found that the fact that that plaintiff was without a light was a contributing cause, and if it contributed in any degree there can be no liability.

Mr. Alvord: As I view the matter—of course, I may be wrong—but as I view the matter, the facts as stated in the pleadings and as stated by counsel in his opening are such that the negligence will be presumed as a matter of law to be the proximate
30 cause, for this reason: this was where an accident occurred at a time when it was nearly an hour after sunset, and it will be presumed that if the defendant could have had the benefit of a light on the vehicle of the plaintiff, that the probability of this accident occurring would have been reduced to such an extent that as a matter of law, and not a ques-

tion for the jury, it would be presumed to be a proximate cause, and it was held similarly in another case of light.

The Court: Read that.

Mr. Alvord: That is a case that is referred to by Chief Justice Depue in this case.

The Court: Was that on a rule to show cause?

10

Mr. Alvord: No, it was not a New Jersey case. He referred to it.

The Court: Is the Chief Justice dealing with a rule to show cause in the case you have there?

Mr. Alvord: This was on certiorari.

The Court: I am inclined to hold this motion. I think it better to let the plaintiff unfold his case and then we will see whether or not he has shown himself to be guilty of negligence which contributed proximately to his own injuries.

20

Mr. Alvord: You will allow me an exception for not deciding in the defendant's favor at this time?

The Court: Yes.

(Which exception is hereby noted.)

30

GEORGE IRESON, SWORN.

Direct examination.

By Mr. Hurd:

Q. Mr. Ireson, where do you reside?

A. Vineland.

Q. Where were you on March nineteenth, 1914?

10 A. Coming home, West Avenue.

Q. What time were you passing along West Avenue?

A. Three minutes to seven.

Q. Where were you coming from?

A. I had been down to South Vineland building a chimney and I was just coming home. I left my work at quarter after five, and I had been building a chimney —

20 The Court: Never mind.

Q. You were driving along West Avenue?

A. I was driving along West Avenue.

Q. Who were you accompanied by?

A. Fred McClunnen.

Q. Did you meet any one on West Avenue?

A. No, sir.

Q. Will you state just what took place in connection with this suit?

30 A. Why, I was driving along West Avenue and I had Fred McClunnen in the wagon with me and as we crossed the railroad track he says, "There she comes," and we could see the train coming, three minutes of seven, and before we crossed the railroad tracks he says to me, "Lookout for that automobile."

Mr. Alvord: Never mind what he said to you. Don't tell what he said to you or what you said to me.

A. He said, "Look out for that automobile," and I pulled out there. I got in the gutter and I pulled to my right side and he come over the hill five hundred paces away when we saw him coming, and I pulled in the gutter, and he was wobbling so, and then I pulled out to get on the other side to give 10 him the roadway, and then he come over to his own side, or seemed to be, the way he was wobbling, and I pulled right in the gutter and he come along and his automobile run right in my horse and broke its leg and threw me in the ditch and Fred McClunnen put his legs around my neck and it smashed my wagon up, and then he went to Dr. La Baw for the horse—he said it could be strung up in the stable, and he fetched Dr. La Baw, and its thigh was broken clean off, hanging by the skin, and then Dr. La Baw 20 sent us for Mr. Garton to kill the horse, and that is the case.

Q. What was this horse worth, Mr. Ireson?

A. Two hundred dollars.

Q. Were you thrown from this wagon?

A. Yes, sir.

Q. Did you suffer any injury?

A. It affected my heart.

Q. Were you treated by a physician?

A. Yes, sir.

Q. By whom?

A. Dr. Winslow and Dr. Wilson.

Q. Do you know the amount of the bill of Dr. Winslow?

A. The bill is right there.

Q. Is this the bill he presented?

A. Itemized bill of Dr. Winslow, and there is another there, \$80.25.

(Bill offered in evidence and marked "Exhibit P1.")

A. Another bill there.

Q. Did any other physician treat you?

A. Dr. Wilson tested my blood pressure.

10 Q. Did he charge for the services?

A. Yes, sir; there is the bill.

Q. This is the bill he rendered?

A. Yes, sir.

Q. Twenty dollars?

A. Twenty dollars.

(Bill offered in evidence and marked "Exhibit P2.")

20 The Court: Is that your claim for the horse and these doctor bills?

Mr. Hurd: Yes, sir.

The Court: The plaintiff has recovered, has he?

A. It affects my heart now, yet. I lost work with it.

Q. Did you suffer long after the accident?

30 A. Well, I was about six weeks that I couldn't do a thing.

Q. How are you at the present time? Does it affect you at the present time?

A. Yes, it does now.

Q. Prevent you from performing your daily work?

A. Yes, sir.

Q. How about your comfort? Do you suffer pain at all?

A. Well, I have. My heart beats.

By the Court: Of course your heart beats. Did you have any trouble of this kind before?

A. No, sir. I told Dr. Cunningham the day I went to see him —

10

Q. Never mind what you told Dr. Cunningham. I am asking you now, the Court and jury want to know what your condition of health was before? What was your condition of health before?

A. I was all right, normal.

By Mr. Hurd:

Q. Have you lost any work by reason of this injury?

20

The Court: What is his business?

Mr. Hurd: I understand he is a farmer and a builder, both.

Mr. Tuller: Carpenter and builder.

A. I am a contracting builder.

Q. Have you lost any business by reason of this injury?

30

A. I lost two contracts at that time.

The Court: That would not be a feature. It is too speculative. He might have lost money on the contracts.

Q. Will you describe the situation as to the roadway, the width, at this place where the accident occurred?

A. Oh, the road is wide enough for two vehicles to pass.

Q. Were you out as far as you could get on the right-hand side?

A. Yes, sir.

Q. You were on the right-hand side?

10 A. Yes, sir.

Q. How light was it as to distances that you could see?

A. Well, we could see five hundred paces away.

By the Court:

Q. It was light enough to see, was it?

A. Plenty.

Q. When was it?

A. March nineteenth.

20

By Mr. Hurd:

Q. Do you know what time the sun set that evening?

A. Eleven minutes past six.

Q. And this accident occurred ——

A. Three minutes to seven.

By the Court:

30

Q. You had no light on your wagon?

A. No, sir.

Q. Was it a one-horse team or two?

A. Yes, sir.

Q. One-horse team? Did he have a light on his automobile?

A. Just a small light, just a very small light.

By Mr. Hurd:

Q. At the time the automobile struck your wagon were you moving or pulled to one side?

A. We were just pulling right in the gutter, just in the gutter.

Q. You were right in the gutter?

A. Yes.

Cross-examination.

10

By Mr. Alvord:

Q. When you first saw Dr. Cunningham's automobile that night you saw the light on it, didn't you?

A. We could see both the light and the automobile.

Q. As you figured it, that was about five hundred yards away?

A. Yes, sir.

Q. You were on the south side of the railroad track going north at the time when you saw the railroad train coming from Vineland, weren't you?

A. We were right on the track.

Q. And that was the same train that it has been agreed left the station at Vineland at six fifty-eight? That is the same?

A. That is the same train.

Q. Then that train after leaving Vineland Station at six fifty-eight had to travel a little over half a mile and make a stop in the meantime for the West Jersey Railroad track, in order to get to the crossing on West Avenue where you waited for the train to cross ahead of you before you went further north?

A. No, sir, we saw that train leave the depot. That is when he said, "There she comes."

20

30

Q. All right, but that train crossed West Avenue before you crossed West Avenue going north, didn't it?

A. No, sir.

Q. Did you cross ahead of the train?

A. Yes, sir.

Q. I didn't quite understand you. You crossed right ahead of the train, but the train went along before you were struck, didn't it?

10 A. No, sir.

Q. When did it, in comparison with the time you were struck?

A. I can't answer that question for the simple reason that we were in a mix-up at that time.

Q. You say you saw that train leaving the station?

A. Yes, sir, we did.

Q. Where were you when you saw it leaving the station?

20 A. Just crossing the railroad track.

Q. Then you were just crossing the track as this train left the station at Vineland, as you understand it?

A. He said, "There she comes;" pointed it out to me.

Q. How fast does your horse travel?

A. Oh, we were just jogging along quietly.

Q. And you were a matter of about a thousand feet from the railroad crossing going north from
30 the Central Railroad tracks there before the accident occurred, weren't you, or about that, about a thousand feet, something like that? Nearly to Park Avenue, wasn't it?

A. Just half-way.

Q. It was about half-way?

A. Yes.

Q. That would be perhaps four or five hundred feet, then?

A. Something like that.

Q. Six hundred feet, something like that? You said you had no light on your wagon at that time?

A. Yes, sir.

Q. Were you acquainted with Dr. Cunningham personally at that time?

A. No, sir.

Q. At that time the ruts in the road were rather 10 bad, were they not?

A. Oh, yes.

Q. March. It was the time of the Spring disturbance of roads?

A. Yes.

Q. And it was rather hard work to find good places to travel along on the road?

A. Oh, yes.

Q. And it was rather hard to cross the ruts with your wagon or an automobile?

20

A. Yes, at that time.

By the Court:

Q. Was it a soft country road?

A. No, sir.

Q. An unimproved road?

A. No, sir.

Mr. Alvord: Not a paved road. It was a road 30 badly rutted.

A. It is a good gravel road. It is a well graveled road.

Q. Frequently used road, but it was not a paved road and it was a road that at that time was badly rutted?

A. Not above just ordinary.

Q. Well, it was rather badly rutted? It was rather difficult to cross the ruts to get from one side of the road to the other, wasn't it? Isn't that right?

A. It was just ordinary rutty.

By the Court:

10 Q. Let me ask you this question: Was the road in such a condition that a traveler would have to pick his way?

A. No, sir.

By Mr. Alvord:

Q. Then you change your testimony and say that it was easy to get from one side of the road to the other?

20 Mr. Tuller: That is hardly a fair question.

The Court: I think it is proper cross-examination.

A. Well, it was neither what you might call bad nor good. It was just something like the roads are today.

Q. You think it was something like the roads are today, in March, 1914?

30 A. Well, it had been wet.

Q. They were something like they are now in March, 1914, were they, the same as they are now?

A. Well, that road wasn't what you might call bad.

By the Court:

Q. What the counsel means is when the roads

thaw out in March, they thaw out, don't they, in March?

A. Yes.

Q. Aren't they worse then than any other time of the year?

A. Well, they are worse then, but that road wasn't very bad.

Q. Well, that is your answer, is it?

A. Yes, that is my answer to that question.

10

By Mr. Alvord:

Q. As I understood you, when you first saw the doctor's light he was about five hundred yards away from where you were?

A. Yes, sir.

Q. And that would carry it about to the top of Tennant's Hill, wouldn't it?

A. That is where we saw him.

Q. That is about five hundred yards north of 20 where you were, and he was going south and you were going north, and you say when you first saw him that you held to the east or your right side of the road?

A. Yes, sir.

Q. And then you saw him, as appeared to you, coming along, also on the east side, rather on the east side of the road or middle of the road? How was it?

A. He was on the east side of the road.

30

Q. He was a little to the east of the center of the road?

A. Yes.

Q. That is, he was a little on his left-hand side of the road?

A. That is it.

Q. And probably with the west wheels of his automobile, as he was running about, where the horse is?

A. That is it.

Q. With a one-horse team, about where the horse goes?

A. Yes, sir.

Q. And the other ones running on the east side about where you were, bicyclist might go?

10 A. People walk; that is it.

Q. When you saw that he held rather to his left side of the road you said, as I understood you, that you turned to get away from him, you turned to the west?

A. That is it.

Q. And that was your left-hand side of the road?

A. Yes, sir.

Q. Now, just before the automobile and the horse came together your horse made a turn to the right, 20 to your right, didn't he?

A. No, sir.

Q. Then, you still kept on your left-hand side of the road?

A. I turned on my right before then. I was in the gutter all the time when I saw him come back.

Q. In the gutter on your left-hand side of the road or right-hand side of the road?

A. On my right hand.

Q. You claim, then, that when you were struck, 30 that your wagon and your horse were both on your right-hand side of the road?

A. Yes, sir.

Q. And the doctor was coming along on the same side of the road and kept along on the same side of the road and you turned back into that same side of the road?

A. After he crossed Park Avenue he kept that side and I was giving him the gutter.

Q. He kept on his left-hand side of the road?

A. Yes, sir.

Q. And you, after turning to your left-hand side of the road, as you had been on the right side of the road, your right side of the road, you turned back again to your right side of the road; is that right?

A. I thought to give him the other side, he was wobbling so, and then I got back in my own side, and then he came back. 10

Q. That is when you got struck, just as you were trying to get back on your right-hand side of the road?

A. No, sir.

Q. Now, when you were struck your wagon was on the west side of the road, wasn't it?

A. Because he lifted it over there.

Q. Well, if you had been in the gutter on the right-hand side of the road you don't mean to say he lifted your wagon over to the left-hand side of the road, do you? 20

A. I was laid in the gutter on the left side of the road.

Q. On your left-hand side of the road?

A. Yes.

Q. How did your wagon get on the left-hand side of the road if you were not on the left-hand side at the time you were struck? 30

A. He lifted the wagon across the road.

Q. You mean he stopped and got out and lifted your wagon?

A. No. The automobile, by the force.

Q. If you had been in the gutter on the east side of the road, how could his automobile lift you over onto to the west side of the road?

A. He struck the wagon on the west side of the road and threw the wagon and us over inside of the other gutter.

Q. You say he struck your wagon on the west side of the road?

A. On the east side.

Q. You say he struck your wagon on the—he didn't strike your wagon at all, did he?

A. Yes, he struck the hub of the wheel.

10 Q. He struck the horse, didn't he?

A. Yes, and the wagon, both.

Q. Which shaft was broken of your wagon?

A. The right shaft.

Q. The right shaft?

A. Yes, sir.

Q. The horse fell on it, didn't he?

A. Well, you can't tell. That was done too quick.

Q. Don't you know whether the horse fell on it or not?

20 A. It was all jumbled up.

Q. You claim that when you were struck that you were in the gutter on your right-hand side of the road?

A. That wheel.

Q. That is the east side of the road?

A. Yes, sir.

Q. And you claim that he was running along with two of his wheels of his auto where the horses walk or travel and the other ones on where the bicycles
30 go, on his left-hand side of the road and a little to the east of the center of the road? How is that? is that right?

(Question repeated.)

Q. Is that right? If not, where was it?

A. The question is this——

Q. No. The question you heard.

A. Things were done so quick there, the accident was done so quick you can't tell how such a thing as a shaft or wheel did get broke.

(Question repeated.)

A. I will admit that, yes, sir.

Q. And you had been in the gutter on the east-hand side of the road, is that right, at the time that the auto —— 10

A. Not right in the gutter. On the edge, giving him all the leeway I could; not right in the gutter.

Q. Then, you say that when the auto struck your horse that the striking of it threw your wagon over to the west side of the road?

A. Yes, it did, it did. It was across the road.

Q. Well, things were so jumbled up that you didn't know what happened, you said, you didn't know where you were. 20

A. They were jumbled up.

Q. And you didn't really know where you were, which side of the road or how you got over on to the west side of the road? When you fell ——

A. I know I got threw there.

Q. When you fell you fell on the west side of the road, didn't you?

A. Yes, sir, I did.

Q. And also this friend of yours that was with you fell on the west side of the road? 30

A. He did.

Q. And that was your left-hand side of the road?

A. Yes, sir.

Q. Did you yourself come in contact with the automobile when you fell?

A. No, sir.

Q. Or at any time?

A. Not at all.

Q. And your friend did not either?

A. No.

Q. And you were driving on the left-hand side of your wagon, weren't you, seated in the wagon?

A. Yes, just because I was giving him a ride and he got in at that side.

10 Q. I am just asking you the facts, not anything why. That horse was rather a higher-priced horse at the time he was struck than it was when you bought it, wasn't it? You paid sixty-five dollars for it, didn't you?

A. No, sir, I did not.

Q. How much did you pay for it?

A. I paid one hundred and sixty dollars for the horse.

Q. You did?

20 A. Yes, sir.

Q. How long before the accident do you claim you paid a hundred and sixty dollars?

A. A year on the twenty-second day of April I had had that horse. I bought him in Philadelphia.

Q. Did you tell Dr. Cunningham right after the accident or shortly after the accident that that horse was worth one hundred and fifty dollars?

A. I went to see Dr. Cunningham —

30 Q. Did you tell him that? Just answer the question. Did you tell him that?

A. I don't really remember that I did tell him that.

The Court: How old was the horse?

A. About ten years.

Q. What was he, just a farming horse?

A. I had him working on the farm and carrying my tools and things around.

Q. Did you tell Dr. Cunningham at the time of the accident that you were not hurt?

A. No, sir. I went to him and told him that it affected my heart.

Q. You went to him? You were right there, weren't you? You didn't have to go to him.

A. I went to him on the following Friday.

Q. Did you tell him right there at the time of the accident that you were not hurt? 10

A. No, sir.

Q. Weren't you kind of jumbled up so you don't know what you told him?

A. That night I was.

Q. You don't know what you told him?

A. I don't know what I said there.

Q. So, you may have told him that or you may not?

A. No, I didn't tell him that. He never spoke to me that night. 20

Q. Then, you were not jumbled up, were you?

A. That night I was excited, but this was the day after I went to see him.

Q. Well, the day after, when you went to see him, did you tell him you were hurt or not hurt?

A. Yes, sir.

Q. What did you tell him?

A. I told him that my heart was affected.

Q. You did? 30

A. Yes, sir.

Q. Well, what did you tell him was the trouble with your heart? How far did you walk to get down to the office that next day, two miles?

A. Yes, it is just two miles.

Q. How did your heart bother you when you got there the next day?

A. I had never been able to sleep all night with pains in my heart, and I told him that it had affected my heart.

Q. Anything else you told him? You told him at the time of the accident, didn't you, that if you had had a light on your wagon you would have made him smart for it?

10 A. No, sir, he told me that himself.

Q. He told you that himself?

A. Yes, sir.

Q. That if you had had a light on your wagon you would have made him smart for it?

A. No, he said if I had had a light then I would have had him by the neck. That is what he said, and he said Dave Cigifu told him he could sue me and he would do it if I wasn't a poor man, that is what he said.

20

By Mr. Tuller:

Q. I want to clear up this collision. You say that when you first saw Dr. Cunningham up on the hill on West Avenue, you were on the railroad?

A. Yes, sir.

Q. He was coming in your direction?

A. Yes, sir.

Q. South on West Avenue?

30 A. Yes, sir.

Q. And you were going his direction, north on West Avenue? When you crossed the railroad, on which side of the road were you?

A. On the right-hand side.

Q. Your right-hand side?

A. Yes, sir.

Q. Or the east side of the road?

A. Yes, sir.

Q. When you saw him coming across Park Avenue which side of the road was he on?

A. He was on the wrong side, on the east side of the road.

Q. He was on the east side, the same side you were on?

A. Yes, sir.

Q. How far had you gone after you crossed the railroad when you turned to the left, over on the west side of the road? 10

A. Just after Fred told me, about five or six yards over the railroad track.

Q. Then, how far had you gone when you turned back onto the east side of the road?

A. Just simply turned out and went right back again.

Q. Why did you do that?

A. Because he seemed to be keeping that way 20 and I was going to give him the leeway.

Q. You were giving him the side of the road that he wanted?

A. Yes, sir.

Q. When you were struck where were you, on the extreme right side of the road or toward the left side?

A. On the extreme right.

Q. At what location on Park Avenue was it when you were struck? 30

A. It is on West Avenue.

Q. I mean on West Avenue.

A. Just not quite half-way up in between Park and the railroad.

Q. Well, is there any street half-way between the railroad and Park Avenue?

A. Peach Street.

Q. Was it, then, at the foot of Peach Street?

A. Just about there.

Q. Now, when he came toward you when you reached the foot of Peach Street, which side of the road was he on?

A. He was on the east side of the road.

Q. Did you make any outcry?

A. Yes, I certainly did.

10 Q. What did you say or do to attract his attention?

A. I shouted myself until I was hoarse.

Q. Did you see him strike your horse? Did you see his machine strike your horse?

A. Oh, yes.

Q. Just state where his machine struck your horse and the manner in which it struck it.

A. Well, the tender in front of the automobile struck the horse right in front of both legs.

20 Q. Right in the breast?

A. In the breast, and it lifted the horse up and threw the horse on top of the wagon and it pushed the wagon, the compact pushed the wagon that way across the road.

Q. Over on the west side?

A. That is how the wagon stood. The tail of the wagon was in the gutter on the west side of the road, and he struck the horse, and all underneath the horse was all torn and its back leg was broke.

30 Q. Then, he came on ahead, struck your horse in the breast, lifted it up, ran under it, pushed it over, and broke —

A. And turned it south.

Q. And broke the left hind leg of the horse?

A. Yes.

Q. Throwing the horse over toward the left side of the road, and where did it throw you?

A. It threw us over on the west side, too.

Q. Where did you land? Where did you find yourself, rather?

A. In the gutter, both of us.

Q. After the horse was struck what did you do, anything?

A. We got up, and Dr. Cunningham got out and examined the horse, he said it could be strung up in the stall; he said it wasn't hurt.

Q. That is what Dr. Cunningham said?

10

A. Yes, sir, he said he didn't think any bones were broke, and then he bothered with his automobile and backed out and went for Dr. La Baw, and Dr. La Baw condemned the horse to death.

Q. Dr. Cunningham himself went for Dr. La Baw in his machine?

A. Yes, sir.

Q. Anybody come up in the meantime, any of the neighbors come around?

A. There is one here who passed while they were killing the horse. 20

Q. Who was that?

A. George Boody.

Q. After the accident did anybody come, any of the neighbors come around?

A. After I fetched Mr. Garton.

Q. Did you go for Mr. Garton?

A. Yes.

Q. Who is he?

A. He is the man who killed the horse.

30

Q. Was that after Dr. La Baw got there?

A. Oh, yes.

Q. Did Dr. Cunningham say anything, to the best of your recollection, about whose fault it was at that time?

A. Not to my recollection. He was arguing about the right and the wrong side of the road.

Q. But you don't recall any statement he made?

A. No.

Q. Who was with you, did I understand?

A. Fred McClunnen.

By Mr. Alvord:

Q. You said Mr. Garton came while this accident was fresh?

10 A. No, sir; after Dr. La Baw condemned the horse to death he sent me for him to kill the horse.

Q. He came with a lantern, didn't he?

A. He did, yes, sir.

FRED MCCLUNNEN, SWORN.

Direct examination.

20

By Mr. Tuller:

Q. Mr. McClunnen, you live in Vineland?

A. Yes, sir.

Q. Where?

A. Elmer Road.

Q. Do you remember the night of March nineteenth?

A. Yes, sir.

30 Q. With whom were you that night that causes you to remember this day?

A. I was riding home with Mr. Ireson.

Q. Where did Mr. Ireson take you in?

A. Why, he took me in Boulevard and Landis Avenue, right opposite Goodfellow's drug store.

Q. Do you live out his way?

A. Yes, just this side of where he lives.

Q. What time in the evening was it when Mr. Ireson picked you up, do you remember?

A. Why, I don't remember, but it must have been a few minutes to seven.

Q. A few minutes before seven?

A. Before seven, yes.

Q. Which way did you go after you got in the wagon?

A. Went straight out Landis Avenue to West and 10 through West.

Q. Turned north on West Avenue?

A. Turned north on West Avenue.

Q. In going north on West Avenue you have to cross what railroad?

A. Central Railroad.

Q. What time did you reach the Central railroad crossing?

A. Why, just as we went across the crossing we saw this train, head light, come around that small 20 bend just as we crossed the West Jersey track.

Q. That is from the Vineland Station going west?

A. Yes.

Q. How far away is it from the West Avenue crossing to the West Jersey crossing?

A. About half a mile.

Q. Were you driving rapidly or slowly?

A. Why, I should say about six miles an hour.

Q. An ordinary gait?

A. Ordinary gait, yes, sir.

30

Q. What occurred after you got onto the railroad track? What did you say to Mr. Ireson and what occurred?

Mr. Alvord: I object to what he said.

Mr. Tuller: That part of the question is withdrawn.

A. I saw this automobile coming.

Q. Did you call Mr. Ireson's attention to the automobile?

A. I did.

Q. Where was the automobile when you first saw it?

A. Why, coming down that small hill, going from Osborne Avenue down.

Q. Just north of Park Avenue?

10 A. Just north of Park Avenue.

Q. How far away was the automobile when you first saw it?

A. Oh, I should say it is about a quarter of a mile from there to Park Avenue, I suppose, and about half as far again up the hill. That would make it probably about three-eighths of a mile.

Q. Had it any lights?

A. Yes, sir.

Q. What lights had it on?

20 A. It had two lights on it.

Q. Large or small lights?

A. Why, I should call them small for an automobile.

Q. What was the condition of the twilight at that time?

A. Why, I should say that—in fact, I did see that automobile very plainly when it came within one hundred and fifty or two hundred feet.

30 Q. You could see the outlines of the automobile very plainly?

A. I could see the outlines of the automobile.

Q. Could you see anybody in it?

A. No, sir.

Q. Just describe what was the course of the automobile as it came toward you.

A. Why, the automobile was evidently trying to

hold to the east side of the road and having trouble. You could see him twist this way and that way, couldn't hold one side, and swing around quick and jerk too far and have to come back again.

Q. He was on the east side of the road?

A. He was trying to hold to the east side and would get from one side of the road to the other.

Q. That was on the right side going north, his left-hand side?

A. Yes, sir.

10

Q. How did Mr. Ireson drive his horse when he left the railroad?

A. Why, my recollection is we went right down about the middle of the road.

Q. Was he on the right-hand side or on the left-hand side?

A. We were on the left-hand side after we saw the automobile.

By the Court:

20

Q. Where was he when he was struck?

A. On the right-hand side as far over as we could get.

Q. Do you mean to say the plaintiff was on the right-hand side of the road?

A. Yes.

Q. The plaintiff was on the right-hand side of the road when he was struck?

A. On the right-hand side, yes, sir.

30

By Mr. Tuller:

Q. As far as he could get?

A. Yes, sir.

Q. Where was the defendant's automobile at the time he struck the plaintiff?

A. Why, he was straddling the east rut.

Q. Was he then on his right-hand side, on the east side of the road?

A. He was on the east side of the road.

By the Court:

Q. All this east and west is somewhat confusing.
Was the automobile on the same side of the road
10 as the plaintiff?

A. Yes, sir.

Q. Coming head-to?

A. Head-to-, yes, sir.

By Mr. Tuller:

Q. How did the automobile strike the plaintiff's horse?

A. The horse rose up in the air and it looked as
20 if it struck it pretty near full, head-on.

Q. As the automobile approached, the horse reared?

A. The horse got frightened of the automobile, that is the way it struck me it was.

Q. Can you describe the effect of it and where you found yourselves?

A. It threw the horse up in the air and kind of over backward to the east and threw us out of the buggy. I rolled right over Ireson's neck and shoulders.
30

Q. On which side of the road?

A. West side we rolled.

Q. Which side of the road was the horse and wagon?

A. Why, the horse laid toward the east side, headed toward the east side, kind of southeast, and

the wagon was slued around pretty near across the road, or kind across the road.

Q. And you two people were over in the ——

A. Rolled over on the west side.

Q. On the other side of the road in the gutter?

A. Yes.

Q. What damage did it do to Mr. Ireson's rig?

A. Why, I don't remember that. It seems to me there was a shaft broken. I know the horse's leg was broken.

10

Q. Which leg?

A. Left leg.

Q. Hind leg or front leg?

A. Hind leg.

Q. Horse injured in any other portion?

A. I didn't notice particularly. I didn't look.

Q. Who came there to examine the horse?

A. Why, Dr. La Baw was called.

Q. Who went after Dr. La Baw?

A. Dr. Cunningham.

20

The Court: Is there any doubt but what the horse died as the result of this injury?

Mr. Alvord: It is not questioned.

The Court: There is no use wasting any time on that. It is admitted.

Q. What did you do after the accident?

30

A. In what way?

Q. What did you do regarding the matter after the accident, anything? Did you do anything at all?

A. Did I do anything at all? Why, yes, as the man came out of his machine I says, "Is that you, Doctor?"

Q. You knew who it was?

A. No, I didn't know, but the thought struck me that he was about the only man I know that run a machine that way.

Q. What did you say to him?

Mr. Alvord: I ask that be stricken out.

10 The Court: The answer is yes or no. Strike it out.

A. I didn't know who he was before, no. I didn't.

Q. Did you have any talk with him?

A. Not that I remember particularly, except as we walked down to the railroad track. He didn't want to see the horse killed and I didn't, and we walked down to the railroad track together.

20 Q. Didn't have any conversation about it at that time?

A. No, not about the accident. He said he didn't want to see it killed.

Q. So he walked away from it?

A. Yes.

Q. How long was it after the accident that the horse was killed?

A. Oh, fifteen minutes.

Q. Who killed him?

A. Lorenz Garton.

30 (No cross-examination.)

DOCTOR JOHN WINSLOW, SWORN.

Direct examination.

By Mr. Tuller:

Q. Doctor, did you treat Mr. Ireson after the accident out on West Avenue in March, 1914?

A. Yes, I went to his house to treat him and he came to my office. 10

Q. How long did you treat him?

A. Why, I still have him under treatment.

Q. What was his difficulty when you went out there to see him?

A. Why, he was complaining of great distress over the region of his heart and he was in a very nervous condition.

Q. What was the cause of the difficulty with his heart? 20

A. Well, I couldn't be sure of that. He attributed it to his accident he had.

Q. Had you been his physician prior to the accident?

A. No, I had never treated him before.

Q. How long did you treat him for this difficulty immediately?

A. Why, I made daily calls for some time. He wasn't confined to bed or even to his house, but he had gone out several times against my orders. I advised him not to go out and kept him as quiet as I could on account of the condition of his heart. I made a number of daily calls and then he came to my office afterwards. 30

Q. What did you find ailed his heart on examination?

A. Well, he had an intermittent heart.

By the Court:

Q. What do you mean, a nervous heart?

A. No, an intermittent heart, skipping beats, two and three and four beats a minute. That has improved. Under treatment he has improved.

Q. Do you know the origin of that, what would cause that?

A. An accident could cause it. I wouldn't say
10 the accident did cause it, because I hadn't treated him previously.

By the Court:

Q. Is that a constitutional trouble?

A. Oftentimes it is.

Q. More likely to be a constitutional trouble than a trouble arising from an accident?

A. Well, it would be hard to say positively about
20 that. It is likely as not to be constitutional as to be due to an accident.

Q. And it is probable he had it before?

A. It is possible he had it before. I rather think from the history of the case it was due to the accident, but I couldn't say positively.

Q. Will you tell me what kind of an accident, Doctor, could produce that condition of the heart?

A. Anything that would upset the nerves controlling the heart action, injury to the cardiac nerve or
30 any of the nerves would make the heart intermit. Nervous excitement sometimes will make a heart intermit when it would be otherwise normal.

Q. Has he recovered?

A. Not completely. He has improved very much.

Q. It is a curable condition?

A. I think he is going to get well, yes. I don't

think it is going to be permanent. He has improved gradually and steadily.

By Mr. Tuller:

Q. The same difficulty is with his heart at present, in a different degree, as was present when you saw him first after the accident?

A. Yes.

Q. How many times has he visited your office, 10
Doctor?

A. I don't recall; quite a good many times; two and three times a week.

Q. What has been his expense for medical services so far as you are concerned?

A. I rendered him a bill here of about eighty dollars, I believe.

Q. About eighty dollars?

A. Yes.

Q. Did you call any one else in consultation with 20
you in the early stages of this matter?

A. Yes, on account of his heart I thought it would be advisable to take his blood pressure and I had Dr. Wilson take his blood pressure and examine him four different times.

Cross-examination.

By Mr. Alvord:

30

Q. What was his blood pressure?

A. I don't recall. I know that at first ——

The Court: Do you mean to say you are attending a patient whose blood pressure you advised to have tested and don't know what it is now and still attend him?

A. Yes, I don't recall the exact number of millimeters of the pressure. I can tell you what the blood pressure approximately was. He had a low blood pressure, which I attributed to a dilated heart. Since—the last examination shows that his blood pressure was slightly above normal. I haven't been doing blood-pressure work and I don't recall the number of millimeters the pressure should be or calls for, but I know Dr. Wilson told me he had a
10 low blood pressure.

Q. Can a dilated heart come from an accident?

A. Yes, sir.

Q. How?

A. Oh, from the force of the accident, the sudden strain that a heart might be thrown under might cause a dilatation of the right or left ventricle or auricle.

Q. Can a person be perfectly healthy in other ways and yet have an intermittent heart?

20 A. Yes, they can.

Q. On what date did the plaintiff first visit you?

A. I don't recall. It was the day following the accident.

Q. Are your services in any way contingent on the result of this suit?

A. No, sir.

Q. Not in any way at all?

A. No, sir.

Q. Have you been paid?

30 A. No, sir.

Q. Then it may be somewhat contingent on the result of this suit?

A. Mr. Ireson is a responsible man. I don't worry about my bill.

Q. It may be contingent somewhat on the result of this suit?

A. I shall be paid for it whether he wins this lawsuit or not. It is immaterial to me.

Q. You have had serious personal differences between yourself and the defendant, haven't you?

(Question objected to. Objection overruled. Question repeated.)

A. No, I can't say that we have had any serious differences. We have had differences, of course.

Q. They have not been serious? 10

A. Why, no.

Q. You haven't gotten very mad with him?

A. Why, we all lose our tempers, Mr. Alvord.

Q. Then you have. That is all.

By Mr. Tuller:

Q. You haven't any differences that would cause you to tell what was not true on the witness stand?

A. Absolutely not. 20

By Mr. Alvord:

Q. Do you speak friendly with Dr. Cunningham now? Do you?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

30

By Mr. Tuller:

Q. If there is any animosity, it is on the other side?

A. I feel that way.

DOCTOR CHARLES W. WILSON, sworn.

Direct examination.

By Mr. Tuller:

Q. Doctor, you are a practicing physician in Vine-land?

10 A. Yes, sir.

Q. Do you know Mr. Ireson?

A. Yes.

Q. Were you called in to attend him in March or April of 1914?

A. Yes, somewhere about the middle of March I saw him.

Q. By whom were you called?

A. By Dr. Winslow.

Q. For what purpose?

20 A. Why, he said his pulse was so irregular and wanted me to examine him with him.

Q. Did you make any examination of him?

A. Yes.

Q. How many times?

A. I think four or five times.

Q. What did you find was his difficulty?

A. Why, he complained all along of great shortness of breath and he had a very irregular pulse and irregular heart, and there was a dilatation

30 there going on with his heart.

Q. Do you know the cause of that dilatation?

A. No, I don't know the cause for a certainty.

Q. Had you ever treated him before?

A. No.

Q. When did you cease your examination of him?

A. Oh, I don't think I have seen Mr. Ireson since somewhere in the latter part of August.

Q. Latter part of August when?

A. This year.

Q. Did you find any trouble in that locality at the time you last examined him?

A. Still has some trouble there, yes.

Q. Improving or not?

A. Yes, it is improving.

Q. Is it curable, do you think?

A. It may be if he lives long enough.

Q. Be slow? But he is improved over what he 10 was when you first examined him?

A. Yes, it is better than what it was.

Q. What are your charges, Doctor, for your services in this case?

A. My charges were twenty dollars.

Cross-examination.

By Mr. Alvord:

20

Q. How many times did you treat him?

A. Four or five times. Took his blood pressure.

Q. In what way did his heart intermit at the time that you first examined him?

A. Well, it would skip; it would be three or four times and then skip a couple of beats.

The Court: Does that not occur with almost everybody?

30

A. Yes, but it occurs more with a dilatation. It occurs more with a dilatation. There is always some cause for an intermittent heart.

Q. Is that dilatation caused by an accident?

A. It may be.

Q. You don't know in his case whether it was or not?

By the Court:

Q. It may not be caused by an accident?

A. Yes, might.

Q. More frequent not from an accident than with an accident?

A. Might be. Soldiers often have it after a hard march. They will often have a dilatation of the heart.

10 Q. Don't ordinary citizens, who are not soldiers, frequently have it? Isn't it very common among people?

A. It is common. I don't know as it is so very common.

Q. Especially people who work for a living?

A. Well, I don't think there is few laboring people have a dilatation of the heart. I don't think there is but a few.

20 By Mr. Alvord:

Q. It is a very common thing for them to have an intermittent heart?

A. Oh, yes.

Q. Could you tell from your examination whether he did have a dilated heart or not?

A. Yes, he did have a dilated heart.

Q. You know he did?

A. Yes.

30 Q. Could you tell how long he had had it from any indications that you saw?

A. No, I couldn't tell that. Hypertrophy has not commenced to take place.

Q. What has not?

A. Hypertrophy. That follows dilatation.

Q. Have you received your fees?

A. No.

Q. Is your fee somewhat contingent on the result of this suit?

A. Well, I don't think so, no. He told me he was short of money and just as soon as he got it he would pay me.

Q. Just as soon as he got his money from this suit he would pay you?

A. No.

Q. What else has he got on hand in the way of a 10 venture?

A. In the way of what?

Q. In the way of a speculating venture?

(Question objected to. Objection sustained.)

Q. You don't know what else he has to look to to pay you besides this suit, do you?

A. Why, I think he is able to pay it, yes, I do.

Q. There has been bad feeling between you and 20 Dr. Cunningham, has there not, on a division between the doctors in Vineland?

A. Well, you might call it that. I was on a note and wanted to get off of it. I didn't think it was very good to be on.

Mr. Alvord: I ask that be stricken out as not responsive to the question.

(Question repeated.)

30

The Court: You mean to say there is rivalry and jealousy between these professional gentlemen?

Mr. Alvord: Bad feeling, yes.

Mr. Tuller: That is a thing of ancient history.

It has been through the Court of Chancery and everything else and now settled, I hope.

A. There was nothing in that feeling that would keep me from stating the facts just as they are.

Q. You generally get five dollars for testing blood pressure?

A. When I take blood pressure, yes.

Q. Don't do it for fifty cents on an ordinary call?

10 A. No. Some of them do, but I don't.

Q. That is about the pay the others generally get, fifty cents?

A. I don't know what they get.

Q. You do not?

A. No.

By Mr. Tuller:

20 Q. Would a shock such as Mr. Ireson has had in this accident in March tend to increase dilatation or intermittent condition of the heart?

A. Yes; a great many have a perfectly normal heart and after a sudden shock or nervous tension that way have their heart dilate.

GEORGE LORPER, SWORN.

30 Direct examination.

By Mr. Tuller:

Q. Mr. Lorper, where do you live?

A. Vineland.

Q. Were you living in Vineland on the nineteenth of March, 1914?

A. Yes, sir.

Q. Do you remember that day?

A. I wan't there. I didn't see it.

Q. I asked you if you remember the day?

A. Yes.

Q. What makes you recollect that day particularly or that particular period of March?

A. Why, I went down town the next day after the accident and I met Mr. Ireson on Landis Avenue, and he says to me —

10

Q. Never mind what he says. Just tell what occurred, not the conversation.

A. Why, I didn't see it occur.

Q. Not this accident, but what makes you remember the nineteenth of March or the twentieth of March?

A. Why, if you want to know just what made me remember the very night, I was working on my hot-bed and a train went by about as usual, seven o'clock. I always take that for my time, because the railroad runs through my property and I was close to my hot-bed at that time and it was light enough so I could see without a light, if that is what you want to know.

20

Q. That was on the nineteenth?

A. Yes, sir.

Q. On the day of the accident?

A. Yes, sir.

Q. What hour was that?

A. I judge around seven o'clock. I can't tell just what time that train comes down to the minute, but I always call it my seven o'clock train.

30

Q. And you could see how far at that time

A. Well, I judge it must be six hundred feet, anyway. It runs pretty well down into my field.

Q. Could you see without a light?

A. Yes, sir.

Q. Several hundred feet?

A. Yes, sir, I could see further than six hundred feet that night. But I took that as that train went down and I was working on my hot-bed and I have got to have daylight to tend to it.

Q. You have to do it in daylight?

A. I have to do it in daylight.

Q. And you took that hour at that particular time
10 to attend to your work?

A. When I work at my hot-bed it has got to be daylight.

Q. How far could you see a wagon ahead of you at that time?

A. I judge I could see it a quarter of a mile, anyway.

Cross-examination.

20 By Mr. Alvord:

Q. It is lighter where you were in the rear of your house there than it was where this accident took place, wasn't it, on account of the foliage and the trees and so on?

A. Well, I was out in the open.

Q. I say it is not out in the open where the accident occurred?

A. It might have been and might not.

30 Q. You know where it was, don't you?

A. Yes.

Q. It is more obscured there by trees?

A. There is a kind of a woods on each side of the road that no doubt —

Q. Has some effect on it?

A. Might have.

By Mr. Tuller:

Q. This woods, Mr. Lorper, are scrub-oaks?

A. Scrub-oaks and pine trees on each side.

Q. How many pine trees are there in that locality?
Only very few, aren't there?

A. Well, about a dozen or so, I guess.

Q. Been all cleared as a standing forest in that part of the town, hasn't it?

A. Yes; only here and there a tree. 10

Q. And some scrub-oaks that run up three or four feet?

A. Yes.

By Mr. Alvord:

Q. How near to the road are some of the trees, pine trees?

A. Why, I judge —

Q. At that place? 20

A. I judge about fifteen feet from the center of the road.

Q. And some of them are as high as the telephone poles, aren't they?

A. Not quite.

GEORGE BOODY, SWORN.

30

Direct examination.

By Mr. Tuller:

Q. Mr. Boody, where do you live?

A. On Osborne Avenue, Vineland.

Q. Did you go along West Avenue the night of this accident?

A. Yes, sir.

Q. What time?

A. Well, I get done work at five o'clock. It must have been about an hour and a half or hour and a quarter after that. I stopped up town a while. I don't know just what time it was.

10 Q. You were there quarter after six or half-past six

A. It was after that. The train had gone, I am pretty sure.

Q. The train of what railroad?

A. The Central.

Q. What time does that train go down?

A. Seven o'clock, I guess, or thereabouts.

Q. Was it along about that time when you went by?

20 A. It must have been about fifteen minutes after that.

Q. What was the condition of the light at that time?

A. Why, I came through the power-house grounds there and when I came out on to West Avenue I saw vehicles and men in the road near Park Avenue.

Q. Where were they?

A. They were up near Park Avenue about a hundred and fifty feet, I should say, or two hundred feet from Park Avenue.

30 Q. What did you do then?

A. Why, I was going right by there. I walked up that way and stayed there for a few minutes.

Q. Did you see what was the difficulty?

A. Well, the automobile had evidently hit the horse and wagon.

The Court: No. You didn't see it, did you?

A. Oh, no. I saw the condition then.

Q. You saw the wreckage around there?

A. I saw the wreckage, yes.

The Court: That is all he can do, describe what he saw.

Q. What was the condition of the light when you got up there to the scene of the accident?

A. Well, I could see plainly from the power-house drive. That is, I should say, seven hundred feet. I could see two vehicles. I couldn't exactly describe the make of the automobile, but I could see an automobile and a wagon and some people in the road. Dr. La Baw was there and Mr. Garton had just come.

Q. When you got there these people were there?

A. Yes.

Q. But you could plainly see them from the railroad?

A. I could see them, yes, sir.

Q. Garton came up after you?

A. I walked—I guess I got there a minute ahead of Garton. He came there just about the time I did.

Cross-examination.

By Mr. Alvord:

Q. Garton came with a lantern, didn't he?

A. I think so.

Q. You know he did, don't you?

A. Not positive, no.

Q. Did you see him with a lantern?

A. I saw a lantern there, yes. I don't know who had the lantern.

Q. Didn't see him carrying it?

A. I did not.

LORENZ GARTON, SWORN.

Direct examination.

10 By Mr. Tuller:

Q. Mr. Garton, where do you live?

A. Vineland, West and Plum.

Q. Just south of the Central Railroad?

A. Yes, sir.

Q. Do you remember the night of the accident to Mr. Ireson up on the other side of the Central Railroad?

A. Yes, sir.

20 Q. Were you there?

A. Yes, sir.

Q. How did you come to be there?

A. Mr. Ireson came down after me and said his horse had got his leg broke and wanted me to come down and get him.

Q. What did you do

A. We hooked up the horse and went down there and killed him and took him away.

30 Q. What condition was the horse in when you found him?

A. Well, he laid a little to the right of the road.

Q. How was he injured?

A. Leg broke.

Q. Which leg?

A. Well, I hardly forget whether it is the right leg or left leg. I didn't take particular notice.

Q. Hind or front?

A. Hind leg.

Q. Was he injured anywhere else?

A. I didn't see that he was.

Q. Did you drive up there?

A. Well, drove the wagon up.

Q. What was the condition of the night—light or dark?

A. Well, it was—I think I had a lantern with me. Just dusk-like. I didn't think it was so very dark. 10

Q. Did you see the people up there around the wreckage when you came up?

A. Well, I wasn't there—you see, I geared the horse and I was half an hour gearing the horse, I suppose, before I went up, like enough.

Q. Half an hour after the accident?

A. After the accident, yes.

Q. Well, when you got on to the railroad looking toward the place of the accident could you see the people there? 20

A. Oh, yes.

Q. And distinguish them?

A. I could see them up there.

Q. And see the figures moving around?

A. Yes.

Q. And the wagons that were there? Did you have any conversation with Dr. Cunningham?

A. I said to Doc, I said, "Doc, where was you running?" and he says—he took and showed me, he says, "Right here," and I had the lantern and 30 then I could see the automobile, where the wheels was, and I said, "Why, Doc, you was on the wrong side of the road."

Q. Just describe where you found the automobile tracks.

A. Well, it was away over on the right.

Q. That is, on his left?

A. On his left-hand side.

Q. Coming from Park Avenue it would be on his left?

A. Coming from Park Avenue this way.

Q. What did the doctor say to that?

A. Well, he said the roads was bad and he was picking the best part of the road.

Q. Say anything else?

10 A. That is all.

Cross-examination.

By Mr. Alvord:

Q. The appearance—you looked all around there, did you, where the accident happened?

A. Well, looked around a little.

20 Q. Which side of the road did the wagon appear to be going on at the time of the accident?

A. Well, it looked to me as though he was on his right, by the looks of it.

Q. That the wagon was driving on the right?

A. Right-hand side.

Q. Right-hand side of the road?

A. Yes.

Q. After the accident where was the wagon? Was it on his left-hand side of the road?

30 A. It was a little dark there then and I couldn't hardly tell, but I think the wagon was shoved over a little.

Q. Wasn't it west of the center of the road when you got there?

A. Yes, I think it was.

Q. Well, that was on his left-hand side of the road, wasn't it, the plaintiff's left-hand side of the

road? The west side of the road was the plaintiff's left-hand side of the road?

A. Yes.

Q. His wagon was over there on that side?

A. The wagon—it seems as though he struck the wagon and threw the wagon a little to his left.

Q. That is, threw the wagon to the west side of the road?

A. Yes.

Q. Did it show any marks on the ground of the slewing of the wagon? 10

A. I didn't look.

Q. There was snow on the ground, wasn't there?

A. I don't think so.

A. A little? Wasn't there enough snow to show tracks?

A. I don't think there was, but I don't recollect.

Q. At the place where this accident happened there are pine trees on the east side of the road that are fairly high? 20

A. On the right-hand side.

Q. On the east side, yes.

A. Yes.

Q. On the right-hand side going north, the way the wagon was going, you mean, don't you?

A. Yes, on the right-hand side.

Q. And that would tend to make it a little darker there than it would be any other place, wouldn't it? 30

A. Yes, it might make it a little darker.

Q. Do you know whether it was darker shortly after sundown than it was a little later that night on account of the moon or anything of that kind?

A. I don't recollect.

By Mr. Tuller:

Q. No trees on the other side of the road?

A. No, no.

Q. All cleared?

A. Just on the right side.

PLAINTIFF RESTS.

10

The Court: The motion to non-suit is denied.

(Exception noted for defendant.)

DEFENDANT'S TESTIMONY.

20 DOCTOR GEORGE CUNNINGHAM, SWORN.

Direct examination.

By Mr. Alvord:

Q. You are a practicing physician in Vineland?

A. Yes, sir.

Q. How long?

A. Eighteen years.

30 Q. On the nineteenth of March, 1914, where were you about seven o'clock in the evening?

A. Running home from making my visits.

Q. And where were you?

A. The last call before the accident occurred was at the house of a man named Bailey.

Q. Where were you? Which way were you going?

A. Why, that Bailey house is a half mile from where the accident occurred, and I was going from his house in town, south.

Q. At what rate of speed were you traveling

Q. Oh, probably six, possibly eight miles an hour.

Q. What caused you to go at so slow a rate of speed?

A. The roads were very heavy, in fact, so heavy that an automobile just a day or two before that had been stuck just above that and had to be pulled out. 10

Q. What was the condition of the roadbed on West Avenue, where you were traveling?

A. On West Avenue, after I got to the hill —

Q. Tennant's Hill?

A. Tennant's Hill; I kept on the east side of the road all the way down. The bicycle path is on that side of the road.

Q. That was on your left-hand side of the road?

A. That was on my left-hand side going into town with one wheel where the horses travel. 20

Q. How far over on the left-hand side of the road were you, speaking of the center of the road?

A. My right-hand wheels were in the center of the road.

Q. Did you continue to maintain that position in respect to the center of the road in continuing your course down to where the accident occurred?

A. All the way down.

Q. How was the road as to your right-hand side of the road in respect to the traveling as compared with the left-hand side of the road on that road at that time? 30

A. The left-hand side of the road was bad road.

Q. At that time what were you doing? Were you paying attention to where you were going

A. Certainly.

Q. Did you have up the glass wind shield in front of your machine at that time?

A. Yes, sir.

Q. In what condition was that in respect to your opportunity to see through it?

A. Well, just the ordinary condition, as far as I could see. Perhaps it was a little misty that night. It might have been a little misty.

10 Q. What was the condition of the weather at that time, was it clear or cloudy?

A. Cloudy.

Q. As you were going south on West Avenue did you at that time observe any team approaching you after you left Park Avenue?

A. Not until he ran into me.

Q. Were you paying attention to your driving?

A. Yes, sir.

20 Q. So that in case he had had a light which was visible, as the law provides, you would have seen it?

A. Yes, sir.

Q. Are you sure about that?

A. I am positive.

Q. Then, at the time the accident occurred you were driving in the same position in reference to the center of the road that you had been further north as you approached that —

30 The Court: What is the point you are trying to develop now?

Mr. Alvord: As the Court has thought proper to refuse to grant a non-suit, therefore, it appears to me that the Court must consider negligence on the part of the defendant.

The Court: The Court has already said that the plaintiff was negligent in not having a light.

Mr. Alvord: I am speaking of the defendant.

The Court: The Court has already said that the plaintiff was negligent for not having a light, but whether plaintiff's negligence was such as to have contributed proximately to the collision is a question for the jury. I suppose you want to show by the doctor where he was in the highway at the time this collision occurred and how the accident happened. If you will get directly down to that, the jury perhaps are anxious to know from his standpoint what he has to say about that accident. 10

Mr. Alvord: In other words, it seems to me that the effect of the ruling of your Honor in regard to my motion is that it is up to me to show, from your Honor's standpoint, whether or not my client was negligent. 20

The Court: Yes.

Mr. Alvord: That is what I am trying to do.

The Court: I am only asking you to ask him the direct question where he was in the highway, and the circumstances.

(Question repeated.) 30

Q. — place of the accident?

A. Yes.

The Court: Doctor, where were you with refer-

ence to the center of the road? Where were you when the collision happened?

A. When the collision happened my right-hand wheels were in the middle of the road where the horse travels. I was straddling the ruts, as you can't get out of ruts if you get into them with an automobile, without a great deal of difficulty. The bicycle path was on the east of the road. One wheel,
10 or my two left-hand wheels were in the bicycle path where the ground was firm, and the other two wheels were in the solid part of the road where the horses step.

Q. Then, at the time of accident, where was the horse and wagon of the plaintiff in reference to the center of the road?

A. I didn't see them until the minute they struck me. The first I saw of the accident I saw a horse raise up in the air and drop over on my right-hand
20 side of the machine from the west side of the road. I didn't see them an instant before that.

Q. And at the time of the accident was the wagon of the plaintiff on his right-hand side of the center of the road or on his, the defendant's, left-hand side of the center of the road?

A. The defendant's left-hand?

Q. I mean the plaintiff's.

A. As I said, I saw nothing until the horse reared up in front of me.

30

The Court: Then, you don't know.

A. No. I saw the wagon immediately after I hit the horse. I didn't see the wagon before I hit the horse.

Q. Where was the wagon then?

A. The hind wheel of the wagon was just in the rut, a portion of the rut.

Q. Which rut?

A. His left-hand rut. That is, his right-hand wheel was in the left-hand rut. His front wheel was six inches out of it.

Q. Had the wagon been slewed to that location in consequence of the collision or not?

A. It had not. If you want, I will tell you in my own words just how this thing happened.

10

Q. Tell it exactly.

A. As I say, the horse reared up and it fell on the right-hand side of my machine; I jumped out of the machine; I stopped. I didn't get quite to the wagon, because I was going so slow, and my machine has a brake and a clutch that work together. I stopped before I got to his wagon. The horse was thrown directly across it and on my right-hand side. He didn't injure the left-hand side of my machine

one particle. My right-hand side of my machine was the part that was broken down. I jumped out and

20

I says, "Are you hurt?" No, he was not. Then he says, "You are on the wrong side of the road."

I says, "What is the matter with you, you are further over than I am," because he was fifteen or

eighteen inches further. He was from the center of the road to the rut further. He says, "You

knocked me there." I called his attention to the wagon, that the wagon had not slurred. I says,

"The wagon don't show any signs of slurring."

30

I says, "Where is your light?" He says, "I have been to work down in South Vineland building a

chimney," I think he says. He says, "It is the first time I have been out without a light." He

says, "You ought to have these great big lights you can see a long ways off." I says, "What kind of

lights ought you to have?" He says, "I know, but it is the first time I have been out without lights." I backed the machine out, it bent my steering gear, so that in backing out I backed around into the gutter, because I couldn't get out any other way, my steering gear wouldn't work, and I examined the horse and somebody thought the leg was broken; I don't know whether it was myself or not, but we kind of thought the leg was broken and I knew there

- 10 was a horse doctor down the street and I went after him. I only had to walk one square. He came up and said the horse should be killed, and the horse was killed. The next day, or two days after, I think it was the following Saturday, he came to my office. He told me that night that he saw me at the railroad and drove—then he says I knocked him from the right-hand side of the road; from the low side of the road up into the high. He repeated that he saw me, and he says—I says, "Why didn't you have
- 20 lights?" I says, "Didn't you know it was against the law to go without lights?" He says, yes, he knew it was against the law not to have lights. He said it was the first time he had been out without them. He says, "You know if I had had lights I could make you pay dear for it." I says, "If you had had sense enough to have a light I could have been you and avoided you." There was a little more conversation, but that was practically all of it, and he left and I have never seen him until recently.

- 30 Q. Did he say anything about having an intermittent heart when he called on you?

A. No, he hadn't found out he was hurt yet when he came the second time. Told me he wasn't hurt.

Q. Told you then he wasn't hurt?

A. Yes. I says to him, "What did you say when you got out?" I says, "The first word I asked you

was whether you was hurt." I says, "You didn't care anything about whether a man was killed or not, whether that flying glass from the wind-shield cut me or not." I says, "You didn't care anything about that. What you commenced hollering about was your horse."

Q. You don't know whether he had been to Dr. Winslow the day after the accident before he came to see you or not, do you?

A. No. He wasn't hurt then, he said. 10

Q. He didn't complain anything about the intermittent heart?

A. No, he did not.

Q. Nor any dilated heart?

A. No.

Q. Does an accident cause dilated heart?

A. I never heard of it.

Q. Doesn't it seem to be something new in the medical profession?

A. Entirely new on me. 20

Q. Have you had any experience in dilated hearts?

A. Yes.

Q. What generally causes these dilated hearts?

A. A heart to dilate, the first stage, a heart grows to accommodate itself to the work which it has to perform, exactly as your arm, which is nothing but another muscle, the same as the heart is, grows to accommodate itself to the work that you have to do. For instance, a clerk cannot do the work that a blacksmith has to do. A blacksmith's arm grows for it. If for any reason the work on the heart gets too much for it, then the heart muscle in its contracting and endeavoring to force on the blood stretches and dilates. If the growth came before the dilatation you would never die, but the fact 30

- is that a man, we will say, has heart disease, a leaking valve, and his heart pumps blood, his heart grows strong to overcome that leak, and for years a man might have a leaking valve and never know it, just the same as you pump hard on an ordinary water pump when the pump leaks. After while the heart can no longer grow strong to overcome its work, the valve leaks more, just the same as the valve of any other pump leaks, and the heart gives way. It stretches and the man dies, and you have all seen him with dropsy as the result of his heart stretching. Failure of compensation takes place. That is, his heart can no longer compensate. The growth of his muscles no longer compensate for the leaking. Then the heart fails. That is, it does not recover. A dilated heart never recovers.

By the Court:

- 20 Q. Have you answered the question? The question which was propounded was whether the condition which you have described is ordinarily attributable to an accident, an injury, or does it come from other causes? Can it come from a physical injury?
- A. I never knew of one, that is sure.
- Q. In other words, you can't put a heart in that condition by a blow?
- A. I think not.

- 30 By Mr. Alvord:

 Q. Is there anything further you wish to state in regard to this accident?

By the Court:

 Q. Now, Doctor, doesn't that condition come from

diseases, infantile diseases, frequently, like scarlet fever, and diphtheria, and measles and so forth?

A. Very commonly.

Q. What?

A. Very commonly.

Q. Rheumatism?

A. Yes, rheumatism is a very common cause. Diphtheria is another.

Q. And inherited sometimes?

A. Sometimes. Lots and lots of people have it 10 and never know it until somebody accidentally listens or hears it.

Q. You find it by listening? You hear the murmur?

A. You hear it, yes.

Q. Did you examine this plaintiff?

A. No. Never said he was hurt. Told me he was not hurt.

Q. Then, if I understand you, if he has it, he will never get well? 20

A. If he has got dilated heart he will never get well. An intermittent heart may get well. That is all right.

By Mr. Alvord:

Q. Is there anything further that you desire to state in regard to this accident that I have not questioned you on?

A. Only in regard to the place and speed. You 30 asked me about the speed. He told me he came from the Central Railroad. We measured the distance with a tape measure. From the top of the hill to the railroad was about eighteen hundred feet. Where I struck him or he struck me was six hundred and seventy-five feet north of the railroad.

Therefore, he came about six hundred and seventy-five feet while I was going eleven hundred and twenty-five feet. I was going, you see, about half again as fast as he was. The accident occurred right opposite the woods between Park Avenue and Peach Street on West Avenue. Just at that point there were a number, I don't know how many, perhaps as Mr. Lorper says, a dozen pines. Two of these pines were about twenty-four feet apart
10 and right within just about four feet of the edge of the road. In fact, they were so close to the edge of the road that they have been cut down since. Right in line with the telephone poles. Besides the underbrush.

Q. How large in diameter were these trees at the butt?

A. The largest one measured eleven inches across it inside of the bark. The other one measured seven and one-half inches across it inside of the bark.
20 There was no sidewalk at that time.

Q. Do you know how tall these trees were?

A. Well, there is plenty of trees there now that look as if they went up fifteen feet higher than telephone poles. I don't know these particular two trees, how high they went.

Q. Are these telephone poles little telephone poles or large ones?

A. Just ordinary telephone poles that you see on the road. They are perhaps a foot in diameter.

30 Q. The large poles? Not like these rural telephone poles?

A. No. Such as they run through a city. This is in the Borough of Vineland.

Cross-examination.

By Mr. Tuller:

Q. No trees on the west side of the road, are there, Doctor?

A. Nothing but fruit trees.

Q. And they are back in the yards?

A. Shade trees.

Q. And only a few trees on the east side? 10

A. Oh, no, there is quite a good many trees there. There is a regular woods. It is probably, as Mr. Lorper said, a dozen pines right there.

Q. Spread all around in there?

A. Well, within say one hundred feet, fifty feet, perhaps.

Q. What was the kind of a night, Doctor?

A. It was a foggy night. The early part of the night was foggy.

Q. Was it cloudy? 20

A. Yes.

Q. Raining?

A. I think it drizzled a little. Later it cleared up and was moonlight.

Q. It cleared up and was moonlight?

A. Yes, I think later.

Q. When was the moon shining?

A. Well, I think the moon shone inside of an hour.

Q. Was it high in the heavens?

A. Oh, no, it rose in the east that night, as I re- 30
call it.

Q. Did it rise an hour after this accident?

A. Do you mean the moon rose so you could see it?

Q. Did it rise an hour after this accident?

A. I don't know.

Q. Where was it when you saw it?

A. Well, where it generally is, that is all I can tell you.

Q. Answer the question.

A. Well, it is in the sky.

Q. What part of the sky?

A. I don't remember what time I looked at it.

Q. Don't remember whether it was an hour afterward or two hours or four hours or six hours?

10 A. No. Oh, yes, it was early in the evening. Must have been inside of an hour.

Q. Your memory on moons is not very clear?

A. No, we hadn't thought of that before.

Q. Thought of it later?

A. Yes.

Q. So you discovered it was cloudy here lately, did you?

A. No, discovered it was cloudy right at the time.

Q. You discovered it was cloudy at that time?

20 A. Right at the time, yes.

Q. So you were riding down West Avenue with extreme care and slowness, were you?

A. Yes, sir.

Q. The roads were very bad?

A. The roads were very bad.

Q. So that you had to get over on the east side of this road in order to get a good road?

A. Well, it was above that, and I continued on that side.

30 Q. And you continued to peer out through your glass to see if anybody was ahead of you?

A. Yes, sir.

Q. Why did you do that?

A. Because that is the way you have to drive when you drive at night.

Q. You have to keep your eye out?

A. You have to watch the roads to see lights.

Q. It wasn't so dark you couldn't see anybody in the road ahead of you?

A. You couldn't see anybody in the road ahead of you.

Q. You were facing Landis Avenue, weren't you?

A. Yes.

Q. Coming down West Avenue toward Landis Avenue?

A. Yes.

10

Q. If there had been anybody on the road couldn't you have seen it silhouetted against the light back of it towards Landis Avenue?

A. There was no light there until you strike the railroad, and then there is a small incandescent lamp.

Q. Isn't there a light at the railroad?

A. A small incandescent lamp.

Q. Isn't there a light at Plum Street beyond it?

A. Oh, yes, that is when you go over the hill 20 again.

Q. Isn't there a light at Wood Street?

A. Yes.

Q. Isn't there a light at Landis Avenue?

A. Yes.

Q. Coming down Park Avenue and looking toward Landis Avenue wouldn't you see the shadow of a team if it was dark, against those lights in the rear?

A. I would not, no. I did not.

30

Q. How is your eyesight?

A. Good.

Q. How was your wind-shield that night?

A. The same as any other time.

Q. Always dirty?

A. Well, there might have been times when it was clean.

Q. So there might have been times that you could have seen through your wind-shield?

A. Yes, sir.

Q. But it was not this night?

A. Yes, sir.

Q. You are sure you cleaned your wind-shield that day?

A. I could see through that wind-shield as good as anybody else could at that time of night.

10 Q. Could you see through it to see anything in front of you?

A. I could see any light that was visible.

Q. Could you see any other thing in front of you except a light?

A. Well, I could if they had a light.

Q. In fact, Doctor, had you cleaned your wind-shield at any time lately?

A. I couldn't tell you when I cleaned that wind-shield. I might have cleaned it just when I left that
20 house and I may not have cleaned it for three or four days before.

Q. Or three or four weeks before?

A. I don't think anybody ever remembers when they clean their wind-shield.

Q. You never do, and the reason is you never clean your wind-shield?

A. Oh, my, yes.

Q. Does your machine show it? Does your machine attract public attention because of its cleanliness?
30

A. I never knew it to.

Q. You say you didn't see him until he struck you?

A. No, sir.

Q. Why not?

A. He had no light.

Q. Couldn't you see anything out of your windshield at all?

A. Yes, sir.

Q. Couldn't you see a horse and wagon driving towards you before you got struck by it or struck it?

A. Couldn't that night.

Q. Were you looking?

A. Yes, sir.

Q. And you had lights on your machine?

10

A. Yes, sir.

Q. How far did they throw light?

A. Didn't throw light very far that night. They are the ordinary electric lights, that is, battery lights. I hadn't search lights and I think it was a stormy day, and mud and one thing and another was spattered on those lights.

Q. So the lights were no good at all and you were in the dark?

A. Oh, yes, the lights were so good that Mr. Ire- 20
son told me he saw them coming up over the hill eighteen hundred feet away.

Q. He says so, true.

A. That is how good they were.

Q. When you had those lights on your machine what were they for?

A. To warn a person approaching me that there is an automobile coming.

Q. And not to show you the path or anything in front of you?

30

A. No, they were not to show me the path. They help, but the law presumes that they are a warning for the other man.

Q. You didn't have any lights on to help you along this dark, cloudy road, did you?

A. Yes, all my lights are to help me as well as to help the other fellow.

Q. Did you have any lights on your machine that would help you down this dark road?

A. Yes, sir.

Q. And prevent you from running into anybody?

A. No, they wouldn't prevent me from running into a man that had no light that came in a shady place.

Q. You were on your right-hand side of the road?

A. How is that?

10 Q. You were on your left-hand side of the road?

A. On my left-hand side of the road.

Q. And you didn't see him at all until you came right square into him?

A. Didn't see him at all until his horse reared up in front of me over on the wrong side of the road.

Q. When he went to you afterward about this, Doctor, did you say to him you would help him out of his difficulty?

20 A. No. He asked me—he came to see me if I would.

Q. What did you say?

A. I said, "I am not in the humor to talk to you about what I will do for you." I says, "I don't know how much I have got to spend on my automobile for your neglect," and I says, "I don't know how long I have got to hire a horse to do my work when I need my machine at this time of the year, but," I says, "I will tell you what I would do with you, if you were a rich man; I would sue you for damages."

30

Q. You always try that bluff on every one you run into, don't you?

A. I have never tried it on any one else that I know of.

(Question objected to. Objection sustained.)

A. Never have had it raised.

Q. Doctor, you are always in command of your machine, are you?

(Question objected to.)

The Court: For the purpose of showing his experience and skill I think probably I had better receive it. The objection is overruled.

(Question repeated.) 10

A. Well, always? I think I have fully as good command as anybody I know.

Q. That don't answer the question, Doctor. Answer the question.

A. Am I? I don't catch what he wants.

The Court: The question is not a good one. What do you mean by the question?

20

Q. Are you always in command of yourself, Doctor?

Mr. Alvord: That is objected to as being an improper question.

(Objection overruled. Exception noted for defendant.)

A. My garage man says that I have control of my nerves. 30

The Court: Strike it out. You are an intelligent man. Answer the question as propounded.

(Question repeated.)

A. Yes, sir, always.

Q. Then, Doctor, do you ever have spells in which you lose yourself or apparently lose control of yourself?

A. Not that I know of.

Q. Did you ever declare to Alfred Chalmers that you had spells in which you at times lost yourself?

A. Absolutely never.

Q. You say that it was a very rough road there?

10 A. Rough road?

Q. Yes.

A. No, right there the road was a little better.

Q. It had been rough up to that point?

A. Yes, it had been rough up above there.

Q. And there were deep ruts?

A. Not right there.

Q. On the road coming down to that point?

A. There had been ruts above there.

Q. Did you see these ruts?

20 A. Yes.

Q. You could see the ruts out of your machine?

A. Oh, yes, you don't have to see very far if you are running slowly.

Q. If a man was coming down in his wagon, down these ruts, you would not be able to see him?

A. If he was in the ruts?

Q. Yes.

A. Yes, I think I would.

30 Q. Didn't you testify in your direct examination, Doctor, that this man's wagon wheels showed to be in the ruts of this road?

A. Not on the side of the road that I was, no. He was further over on his left when I saw him than I was on my left. His right-hand wheel, the rear right-hand wheel was in the left side of the road rut and his front wheel was six inches over.

Q. That was after you had hit him?

A. After I had hit him.

Q. If he had been coming right straight down this wagon track you would have seen him, wouldn't you?

A. I should think I would, but ——

Q. That is all.

Mr. Alvord: According to the pleadings in the case the defendant has put in a counter-claim, and we now abandon and waive the counter-claim and rest our case. 10

DEFENDANT RESTS.

PLAINTIFF'S TESTIMONY IN REBUTTAL.

ALFRED CHALMERS, SWORN.

20

Direct examination.

By Mr. Tuller:

Q. Mr. Chalmers, where do you live?

A. Minotola.

Q. Atlantic County?

A. Yes, sir.

Q. Do you know Dr. Cunningham?

A. Yes, sir.

30

Q. What is your business over in Minotola?

A. Cashier of the bank.

Q. Minotola National Bank?

A. Yes, sir.

Q. Did you ever have a conversation with Dr.

Cunningham in which he told you he had spells, that he lost himself, the control of himself?

A. Yes, sir.

Q. When did you have a conversation of that kind?

A. About five years ago, during the summer of 1911, one rainy day he stopped into my house and asked me if I wanted to go to Malaga with him. I went with him and the conversation came up about
10 Mrs. Chalmers' brother. We talked awhile and I said something about it was funny he had spells when he lost consciousness, and he said not at all. He said he, when he was a young man, had those spells and that was the reason he had to quit riding a motor-cycle.

Q. On that account?

A. On that account.

Q. Did he say that the spells were present with him at that time?

20 A. No, sir, he did not. He said that was the reason he had to quit riding the motor-cycle.

Cross-examination.

By Mr. Alvord:

Q. How many years ago did you say it was?

A. About five or six years ago.

Q. You said it was in the summer of 1911? Five
30 or six years ago? You are not very good on addition, are you?

A. I think it was the summer of 1911. It might have been 1910.

Q. You are not very good on addition, are you?

A. I didn't stop to figure that up.

Q. He said that when he was a young man he sometimes had lapses of that kind?

A. He said when he was a young man, yes, when he was a younger man.

Q. Did he say how long they lasted?

A. No, sir, said he lost consciousness.

Q. Did he say what caused them?

A. No, sir.

Q. You have got a better memory than you have powers of addition, haven't you?

A. The only reason that I can give you that it was in 1910 or 1911—— 10

Q. Yes, but I mean your remembering that the doctor told you that when he was a boy he had some lapses of some kind.

A. No, he didn't say when he was a boy. He said when he was a younger man. He said, "When I was a younger man I had those spells when I lost consciousness."

Q. Did he say how many years ago it had been?

A. No, sir.

Q. Did he tell you anything about the particulars about it? 20

A. No, sir, the only thing he said was that was the reason he had to quit riding a motor-cycle.

PLAINTIFF RESTS.

DEFENDANT'S TESTIMONY IN REBUTTAL.

DOCTOR GEORGE CUNNINGHAM, recalled. 30

Direct examination.

By Mr. Alvord:

Q. Dr. Cunningham, do you remember giving Alfred Chalmers a ride in your automobile?

A. Yes, sir.

Q. When was that, as nearly as you can remember?

A. About 1911.

Q. Do you remember having a conversation with him about some relative or friend of his that had periods of unconsciousness?

A. I don't remember anything of the sort.

Q. Had you been treating any relative of his at
10 that time for that trouble?

A. Not that I know of.

Q. Any lapses of consciousness?

A. Not that I know of. Might have been relatives that I didn't know of.

Q. Do you remember having any conversation with him at that time to the effect that at some time in your life when you were a younger person than you were then that you had had some periods of unconsciousness?

20 A. I never did.

Q. You never told him that?

A. I never told him it. Never was unconscious in my life except once.

Q. As a matter of fact, Doctor, did you ever have to quit riding a motor-cycle for any such reason as he gave?

A. No, sir, and I still own a motor-cycle.

Q. How many years have you been driving an automobile?

30 A. I think I got my automobile in 1910.

Q. Did you ever discontinue driving a motor-cycle for the reason that you had any periods during which you were not capable of knowing what you were doing?

A. Never had any such periods.

Q. Never told anybody you had?

A. Never told anybody that. Never even fainted in my life.

By Mr. Tuller:

Q. Never dropped any children out of your automobile and went to your house without knowing it, did you?

A. No, sir.

10

Mr. Alvord: I object to that question.

The Court: I do not understand. What do you mean?

Mr. Tuller: I mean to refer to an experience of unconsciousness on the part of Dr. Cunningham, of which he is well aware and I am sure I am myself. I was just refreshing his memory as to a period of unconsciousness.

20

A. I never had such condition.

The Court: That would be pertinent.

A. No, it never occurred.

Q. You never dropped out any one of your own children or one of the little Jewish children on Wood Street?

A. I stopped the machine or turned a corner one time and a child sat on a box when the machine was full and as I slurred around the corner I says, "Hold tight," and the little kid, instead of holding tight, turned around and says, "What is that?" and as I turned the corner she rolled out.

Q. You saw her roll out?

30

86 *Motion to Direct Verdict—Court's Charge
to Jury*

A. Yes.

Q. You never went off and left her?

A. No, sir, I picked her right up and took her home to her father.

BOTH SIDES REST.

10

MOTION TO DIRECT VERDICT.

Mr. Alvord: I request the Court to direct a verdict for the defendant.

The Court: I have passed on that. It is the same question as in your motion to non-suit. The motion is denied and exception allowed.

20 (Exception noted for defendant.)

COURT'S CHARGE TO JURY.

CARROW, J.:

30 Gentlemen, the defendant is charged with negligence. Negligence for the purpose of this suit means a neglect of duty. It was the duty of the defendant, as it is the duty of all citizens, to use the highway carefully. The highway belongs to the public. It is maintained by the public, and all travelers with vehicles are entitled to use the highway, but in doing so they must be observant of conditions about them; in other words, they must use

reasonable care, that is, such care as may ordinarily be expected of reasonably prudent persons. If that were not so there would be no safety at all upon the highway. People are endowed by nature with the protecting power of prudence. When this power is exercised reasonably, it will often, but not always, prevent private injuries.

It was the duty of the defendant to look out where he was going and to have his car under control for any emergency that might reasonably be expected 10 to suddenly arise in his path. It was his duty to keep on the right-hand side of the road, unless, of course, the road was in such a condition that he could not do so reasonably.

It was the duty of the plaintiff to exercise precisely the same degree of care. The law has no favorites in the use of the highway. Nobody has any exclusive right to the use of the highway. It is for the common use of all; but persons, as I have said, who use the highway, without regard to who they 20 are or what they are, must exercise reasonable care. In other words, they must act like reasonably prudent human beings. They must do that not only for their own safety, but they must do it for the safety of others.

I will call your attention to the law of the State with respect to the use of lights: "Every vehicle drawn by a horse or horses or other beasts shall carry during the period from thirty minutes after sunset and thirty minutes before sunrise and when- 30 ever fog renders it impossible to see a long distance, at least one lighted lamp, which said light shall be of such nature and so displayed that it may be seen both from a point of at least two hundred and fifty feet distant in the direction toward which the vehicle is proceeding and from a point at least

two hundred and fifty feet in the direction from which the vehicle is proceeding. Any person or corporation violating the provisions of this Act shall be subject to a fine," and so forth. That is a very wise legislative requirement. A traveler who goes upon the highway in the dark when he is required to have a light is guilty of negligence; but even so, that does not give the right to another traveler upon the highway to run him down. Even if you have a
10 light and your neighbor comes along without a light, you have no right to run him down because he has no light.

In order to disentitle the plaintiff to a recovery his negligence, that is, the fact that he had no light, must have been a contributing cause, it must have contributed to the occurrence proximately. You can see yourselves how wrong it would be to make the mere fact of plaintiff's not having a light a ground to destroy his action, because if it is light enough for
20 you to see a traveler you have to be careful anyhow, whether he has a light or not; but, of course, if it is so dark that you cannot see him, then it may be a serious question whether he can escape the charge of being guilty of contributory negligence in the event of a collision; because you are only required to exercise reasonable care, and if in the exercise of reasonable care you cannot see the man in front of you who is either coming toward you or going from you, then I say it is a very serious question
30 whether that traveler would not be guilty of contributory negligence in not having a light. Therefore, you will see the importance of a light. A light may be more important upon one night than another. If the night is dark and you cannot see it would be very wrong to say that you should be obliged to see in the darkness; but if the night was

such that you could see, it is hardly sufficient for you to say, "Well, he didn't have any light on his wagon." The law at once says, "Well, could you see even if he had no light?" I think you see the point, gentlemen.

This plaintiff may be guilty of contributory negligence. If he is guilty of contributory negligence he cannot recover. That would be like paying him for his own carelessness. As I have already said to you in another case or within your hearing, the 10 penalty for carelessness amounting to contributory negligence is no damages, because a careless man may not only jeopard his own life but he may jeopard the lives of others. It would be wrong to pay him for his carelessness; but he must be shown to have been guilty of carelessness by the defendant, because contributory negligence is a defense, and the defendant must bear the burden of showing that the plaintiff was careless, that is, careless in such a way as to bring about either in whole or in part, 20 through his own negligence, the injuries for which he complains. The rule of law with regard to contributory negligence in this State is that mere negligence, as I have already indicated, on the part of the plaintiff is not sufficient to disentitle him to recover, unless his negligence was such that if he had not been negligent he would not have been harmed even if defendant was negligent. Now, it is the law that if the damages in a negligence case are shown to have been the result of the joint neg- 30 ligence of the defendant and of the plaintiff, that is, where the negligence of the plaintiff and the negligence of the defendant furnish the proximate cause, the plaintiff cannot recover. The plaintiff can only recover when the damages are attributable to the defendant's negligence alone. The plaintiff cannot re-

cover, as I say, if the damages are attributable to their joint negligence if their joint negligence furnished the proximate cause.

Now, it may be, gentlemen, that neither party was guilty of negligence in this case. It does not necessarily follow as a matter of law that merely because an accident happens negligence has been committed by either side. It may be a pure accident for which neither party would be guilty of negligence. If it
10 was a pure accident there can be no recovery. It is a great mistake to suppose that whenever an accident happens—strange we call them accidents; of course, if they are pure accidents then there is no liability—but when an occurrence is the result of a pure accident, the injured party cannot recover. It is only where the injury and the damages are shown to have been occasioned by the defendant's negligence, that is, where the defendant's negligence was the proximate cause, that liability attaches. I
20 am saying this because very often when an accident happens it is assumed that somebody is liable anyway, but that is not so. Accidents will happen where nobody can be made liable from any standpoint of law. The law does not impose any unreasonable degree of care upon travelers upon the highway. It is reasonable care; such care, as I have told you, as may ordinarily be expected of reasonably prudent persons. Some people are so very careful they never would get hurt, while others are
30 so careless that it is remarkable they escape injury at all. Now, a reasonably prudent person does not belong to either of the classes I have mentioned. A reasonably prudent person is the average person, who shows the conduct of the average prudent man.

Now, with regard to the facts, I will leave the facts with you. Probably it might be well to briefly

summarize the facts from both standpoints, though. The plaintiff says he was moving along on the right-hand side of the public highway, a place where he had a right to be, about seven o'clock on the nineteenth of March, 1914; that while he was thus going home from his work, with a horse and wagon and no light on his wagon, he was run into, negligently run into by the defendant, Dr. Cunningham; he says that the night was sufficiently light for him to see Dr. Cunningham in the distance five hundred paces off. That is the plaintiff's side with respect to the collision. As a result of the collision he says his horse was killed. That seems to be an admitted fact. It was worth two hundred dollars, and he sustained personal injuries, an injury to his physical health which necessitated the attention of physicians, and they have presented bills amounting to one hundred dollars. He claims that he lost some time from his work. 10

The defendant presents an altogether different story, gentlemen, and you must look at both sides with absolute independence and impartiality, without favoring either side. This is a jury case and the Court cannot assist you in determining the facts. The facts reside with you exclusively. The defendant says that he was coming down the middle, as near as he could tell the middle of the highway, because it was rough, and there seems to be reason to think that at that time of the year a soft country road would be rough; that he was going at a moderate rate of speed, looking ahead, and he was suddenly run into, according to his story, by the plaintiff, never saw the plaintiff until he ran into him. If that is so, gentlemen of the jury, the plaintiff is not entitled to recover. If what Dr. Cunningham says is true, the plaintiff is not entitled to recover. 20 30

If, on the other hand, what the plaintiff says is true, the plaintiff is entitled to recover.

- You will see there is a close question of fact for you to decide. Take your time, go over it, investigate the evidence, give each side careful and thorough hearing and consideration. If you resolve the question of negligence against the defendant, the plaintiff would be entitled to fair and reasonable compensation, no compensation by way of smart
- 10 money or exemplary damages, only compensatory damages; because it is not claimed that Dr. Cunningham willfully did this. If he was to blame from the standpoint of negligence, it was not through any willfulness on his part, and therefore, the damages can only be compensatory, and in considering the damages you would allow the plaintiff damages for his horse, taking into consideration the evidence; he would be entitled to recover back such medical expenses as he has laid out or is obliged to lay out
- 20 or may be obliged to lay out in consequence of his injury; and, if you think there is anything in the case to warrant the belief that the plaintiff has sustained a physical injury, he would be entitled to recover damages for that. You know what the testimony is on both sides. He claims to have had some heart trouble growing out of the collision. I think there is proof, his doctors thought that he would recover from that. He is now improved. Dr. Cunningham, upon the other hand, says that the heart
- 30 trouble described by the plaintiff's doctors could not have been occasioned by the accident; that it may have been constitutional, that is to say, may have been in his system from birth, or may have been the result of disease in his childhood. You want to carefully consider that, gentlemen.

DEFENDANT'S EXCEPTIONS.

Mr. Alvord: I except to that part of the Court's charge to the jury wherein the Court said: "It was his duty (defendant's) to keep on the right-hand side of the road, unless, of course, the road was in such a condition that he could not do so reasonably." I claim that was not the law at the time the accident happened. 10

(Which exception is hereby noted.)

I except to that part of the Court's charge to the jury wherein the Court said: "If the night is dark and you cannot see it would be very wrong to say that you should be obliged to see in the darkness; but if the night was such that you could see, it is hardly sufficient for you to say, 'Well, he didn't have any light on his wagon.' The law at once says, 'Well, could you see even if he had no light?'" 20

(Which exception is hereby noted.)

I except to that part of the Court's charge to the jury wherein the Court said: "It would be wrong to pay him for his carelessness; but he must be shown to have been guilty of carelessness by the defendant, because contributory negligence is a defense, and the defendant must bear the burden of showing that the plaintiff was careless, that is, careless in such a way as to bring about either in whole or in part, through his own negligence, the injuries for which he complains." 30

(Which exception is hereby noted.)

I except to that part of the Court's charge to the jury wherein the court said: "Now, it may be, gentlemen, that neither party was guilty of negligence in this case. It does not necessarily follow as a matter of law that merely because an accident happens negligence has been committed by either side. It may be a pure accident for which neither party would be guilty of negligence," as the jury might apply that to this particular case.

10

(Which exception is hereby noted.)

RECESS TAKEN UNTIL 1.20 P. M.

AFTERNOON SESSION, 1.20 P. M.

COURT'S FURTHER CHARGE TO JURY.

20

CARROW, J.:

The law of the road is as follows, gentlemen: "Drivers of motor vehicles, whether of burden or of pleasure, using any of the turnpikes or public roads in this State, when met by another motor vehicle or by a carriage, sleigh or sled, shall keep to the right, and when overtaken by another motor vehicle, carriage, sleigh or sled, shall likewise keep to the right, so as in both cases to permit such motor vehicle, carriage, sleigh or sled either met or overtaken, to pass uninterrupted." That is the law of the State.

30

I desire to correct my charge with respect to the law of the road. I said it was defendant's duty to keep on the right-hand side of the road. I mean

it was his duty to do exactly what this law says, not that he must always keep on the right-hand side of the road, but when met by another motor vehicle or by a carriage, shall keep to the right, and when overtaken by another motor vehicle, carriage, sleigh or sled, shall likewise keep to the right, so as in both cases to permit such motor vehicle, carriage, sleigh or sled either met or overtaken to pass uninterrupted.

It was the duty of the plaintiff in this case to exercise precisely the same degree of care. The law has no favorites in the use of the highway. The plaintiff was required to turn out to the right. The defendant was required to turn out to the right. 10

Now, I have called your attention to the law of the road. That is the only law there is on the subject in the State of New Jersey that would apply to the facts of this case. Of course, your verdict must be rendered in accordance with the facts. The defendant was not required to turn out for the plaintiff if he could not see him, turn out to the right if he could not see the plaintiff, and vice versa, nor was the plaintiff required to turn out to the right if he could not see the defendant, and whether the light required by law was, in view of all the circumstances, a matter of importance, such importance as would make the plaintiff guilty of contributory negligence for not having it, is a question for your consideration under all the facts and circumstances. 20

DEFENDANT'S EXCEPTION.

Mr. Alvord: If your Honor please, I except to that part of the Court's charge to the jury wherein the Court said: "And whether the light required by law was, in view of all the circumstances, a matter of importance, such importance as would make the plaintiff guilty of contributory negligence for not having it, is a question for your consideration under all the facts and circumstances," as I claim that the absence of the light of itself was sufficient to be an act of contributory negligence and the proximate cause of the injury.

(Which exception is hereby noted.)

20

GROUND OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE IRESON, VS. 30 GEORGE CUNNINGHAM.	}	ACTION AT LAW. GROUNDS OF APPEAL.
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The appellant, George Cunningham, states the following grounds of appeal:

1. The Court refused to non-suit the plaintiff on the opening of the plaintiff's case.

2. The evidence shows that the plaintiff, as well as the defendant, was driving on his left-hand side of the road at the time of the accident.

3. The Court refused to grant motion of non-suit at the closing of plaintiff's case.

4. It appears by the evidence, that the negligence and carelessness of the plaintiff was the proximate and clearly contributing cause of the accident. 10

5. No evidence in the cause appears and the pleadings do not allege that the defendant was acting with malice or with any intention of injuring the plaintiff, or that the defendant was running fast or recklessly at the time of the accident.

6. The Court permitted the plaintiff to ask the defendant:

“Q. Are you always in command of your- 20
self, Doctor?”

7. The Court refused to direct the verdict for the defendant as requested.

8. The Court charged the jury:

“If the night is dark and you cannot see, it would be very wrong to say that you should be obliged to see in the darkness; but if the night was such that you could see, it is hardly sufficient for you to say, ‘Well, he did not have any light on his wagon.’ The law at once says, ‘Well, you could see, even if he had no light.’” 30

9. The Court further charged the jury:

“It would be wrong to pay him for his care-

lessness; but he must be shown to have been guilty of carelessness by the defendant, because contributory negligence is a defence and the defendant must bear the burden of showing that the plaintiff was careless, that is, careless in such a way as to bring about, either in whole or in part, through his own negligence, the injuries for which he complains."

10 10. The Court further charged the jury:

"Now, it may be, gentlemen, that neither party was guilty of negligence in this cause. It does not necessarily follow as a matter of law, that merely because an accident happens, negligence has been committed by either side. It may be a pure accident for which neither party would be guilty of negligence."

11. The Court further charged the jury:

20 "And whether the light required by law was, in view of all the circumstances, a matter of importance, such importance as would make the plaintiff guilty of contributory negligence, for not having it, is a question for your consideration, under all the facts and circumstances."

HENRY S. ALVORD,
Attorney of Defendant and Appellant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

GEORGE IRESON,

Appellee,

VS.

GEORGE CUNNINGHAM,

Appellant.

BRIEF FOR APPEL-

LANT.

BRIEF FOR APPELLANT.

I.

ABSTRACT OR STATEMENT OF THE CASE.

Plaintiff brought suit to recover damages for injuries sustained by reason of a head-on collision in the public highway, of an automobile driven by the defendant and a horse and wagon driven by the plaintiff. The plaintiff was driving without a light and the defendant was driving slowly with lights, the time being 7 P. M. of March 19, 1914, on which day the sun set at 6.11 P. M. The law required plaintiff to carry a light one half hour after sunset. The night was cloudy at the time of the accident and the roads were in bad condition and rutty. The defendant was driving a little to his left of the center of the road, the right-hand wheels of the de-

fendant's automobile then running in the center of the road between the two ruts. Defendant swears that he could not see the plaintiff before the accident because the plaintiff did not have a light and that he would have seen him and would have avoided the accident if the plaintiff had had a light. Plaintiff claims that defendant should have seen the plaintiff and should have avoided the accident, notwithstanding plaintiff failed to have a light. The accident occurred at a point in the road where there was some growth of woods on the east side of the road, consisting of underbrush and some tall pine trees, which made the place somewhat darker and more shady than at other places.

The main questions involved at the trial were:

Whether or not defendant was guilty of negligence. If so, was plaintiff guilty of contributory negligence, which was the proximate cause of the accident and therefore precluded him from recovery;

Whether or not the Judge should have granted a non-suit on the opening of the plaintiff's case;

Whether or not the trial Judge should have granted defendant's motion to non-suit when plaintiff rested;

And whether or not the trial Judge should have directed a verdict for the defendant as requested at the close of the taking of the testimony.

Also whether or not the charge of the Court was erroneous in several or any respects.

II.

GROUND OF APPEAL.

1. The Court refused to non-suit the plaintiff on the opening of the plaintiff's case.

2. The evidence shows that the plaintiff, as well as the defendant, was driving on his left-hand side of the road at the time of the accident.

3. The Court refused to grant motion of non-suit at the closing of plaintiff's case.

4. It appears by the evidence that the negligence and carelessness of the plaintiff was the proximate and clearly contributing cause of the accident.

5. No evidence in the cause appears and the pleadings do not allege that the defendant was acting with malice or with any intention of injuring the plaintiff, or that the defendant was running fast or recklessly at the time of the accident.

6. The Court permitted the plaintiff to ask the defendant:

“Q. Are you always in command of yourself, Doctor?”

7. The Court refused to direct the verdict for the defendant as requested.

8. The Court charged the jury:

“If the night is dark and you cannot see, it would be very wrong to say that you should be

obliged to see in the darkness; but if the night was such that you could see, it is hardly sufficient for you to say, 'Well, he did not have any light on his wagon.' The law at once says, 'Well, you could see, even if he had no light.' "

9. The Court further charged the jury:

"It would be wrong to pay him for his carelessness; but he must be shown to have been guilty of carelessness by the defendant, because contributory negligence is a defence and the defendant must bear the burden of showing that the plaintiff was careless, that is, careless in such a way as to bring about, either in whole or in part, through his own negligence, the injuries for which he complains."

10. The Court further charged the jury:

"Now, it may be, gentlemen, that neither party was guilty of negligence in this cause. It does not necessarily follow as a matter of law, that merely because an accident happens, negligence has been committed by either side. It may be a pure accident for which neither party would be guilty of negligence."

11. The Court further charged the jury:

"And whether the light required by law was, in view of all the circumstances, a matter of importance, such importance as would make the plaintiff guilty of contributory negligence, for not having it, is a question for your consideration, under all the facts and circumstances."

ARGUMENT.

III.

Defendant contends:

1. There was no negligence on his part; and
 2. No proof of negligence on his part.
 3. The Judge should not have permitted the case to go to the jury.
 4. The jury had no right to infer negligence on part of defendant and the verdict of one hundred and fifty dollars (\$150.00) against defendant is unwarranted.
 5. Plaintiff was clearly negligent in failing to carry a light and his failure to comply with the law in this regard was the only cause of the accident.
 6. Defendant at the time the accident occurred had a right to drive on his left-hand side of the road, unless he had reasonable notice of the presence of plaintiff in the road.
- The traffic law of 1915, p. 286, part 2, section 2: "A vehicle shall keep to the right and when the improved portion of a road is of sufficient width the vehicle shall keep to the right of the center of such road except when passing a vehicle ahead" was not in force until more than one year after this accident happened.

7. At the time of the accident the law only required the defendant to go to the right when he had reasonable notice of the approach of another vehicle.

Law quoted by the Court in his additional charge to jury (Case, p. 94, line 23, &c.).

Was there any proof of negligence on the part of defendant?

The plaintiff's only claim of negligence on the part of defendant is that he should have seen the plaintiff and should have avoided the accident notwithstanding plaintiff carried no light, and that the failure of defendant to see the plaintiff and avoid the accident amounted to negligence on defendant's part. The defendant swears he was paying attention to his driving and was positive he would have seen the plaintiff if he had carried a light. (Case, page 66.) He swore he could not see any one in the road ahead of him. Driving at right, "You have to watch the road to see lights." (Case, page 75, line 1. See also Case, page 77.)

Defendant was asked:

"Q. Did you have any lights on your machine that would help you down this dark road?

A. Yes, sir.

Q. And prevent you from running into anybody?

A. No. They would not prevent me from running into a man that had no lights that came in a shady place." (Case, p. 78, line 1, &c.)

This evidence concerning the question of whether or not the defendant was negligent in failing to see the plaintiff in time to avert the accident is insufficient to charge the defendant with negligence; as proof that a man working in the open without a light or walking in the highway without a light could

see things six hundred feet or seven hundred feet away is not proof that defendant in an automobile with two electric lights on his machine could see into the night in a dark place the approach of another vehicle without a light.

It is a matter of common knowledge that the carrying of lights strong enough to show the road near the front of any one will operate to prevent the bearer of the lights seeing objects at a distance ahead where no light accompanies such objects.

The lights are carried more to aid other people to see you than for you to see the road and they positively hinder your seeing far ahead of the car unless you carried search lights. The defendant carried two ordinary electric lights, not search lights. (Case, page 77, line 13, &c.) *The plaintiff was clearly negligent.* The Court so stated several times during the progress of the trial. (Case, page 65, line 5):

“A traveler who goes about upon the highway in the dark when he is required to have a light, is guilty of negligence.” (Case, page 88, line 6.)

The Court should have non-suited the plaintiff or should have directed a verdict for defendant.

In the case of *Menger vs. Laner*, 26 Vr. 205, the Supreme Court (opinion by Depue, J.) held as a matter of law that there was nothing to go to the jury and plaintiff was properly non-suited where defendant ran into a surveyor's instrument in the middle of the road where defendant could have seen it if he had looked.

In this case the Court referred to *Dowell vs. Steam Navigation Co.*, 5 El. & B. 195, 206, and said, on page 210:

See case

Savage v Public Service B.C.
99 Atl Rep 383

“In this case the action was by the owner of a collier against the owners of a colliding steamer to recover damages sustained by a collision. The collier was in fault in that it did not continue to show a light for a reasonable time as it approached the steamer. Lord Campbell, in delivering judgment, said, ‘The jury must be taken to have found that this fault led to the collision. If it was approximate cause of the collision however much the steamer might be in fault this action cannot be maintained * * * *’ In a court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident, &c.”

This case is very similar to *Menger vs. Laur*, but is stronger in favor of the defendant because in the case of *Menger vs. Laur* it is not disputed that defendant could have seen the surveyor’s instrument if he had looked, while in the case at bar defendant could not see the plaintiff.

The case of *Decon vs. Dexheimer* does not apply. There is no proof that defendant could have seen plaintiff by the use of ordinary care.

EXCEPTIONS TO COURT’S CHARGE.

Defendant claims he was injured by the charge of the Court, wherein the Court said, subject to exceptions taken: “If the night is dark and you cannot see, it would be very wrong to say that you should be obliged to see in the darkness, but if the night was such that you could see, it is hardly sufficient for you to say, ‘Well, he didn’t have any light

on his wagon.' The law at once says, 'Well, could you see even if he had no light?' " Defendant claims to be injured by the last part of this charge and claims the Court erred in saying, "The law at once says, 'Well, could you see even if he had no light?' " This gives a wrong impression to the jury and is not a correct interpretation of the law. The law says no such thing; all the law requires is that the defendant should use ordinary care to prevent an accident, notwithstanding the plaintiff was negligent, and this instruction of the Court was wrong and prejudicial to the rights of the defendant.

Again, the Court charged, subject to exception taken: "It would be wrong to pay him for his carelessness, but he must be shown to have been guilty of carelessness by the defendant, because contributory negligence is a defense and the defendant must bear the burden of showing that the plaintiff was careless; that is, careless in such a way as to bring about, either in whole or in part, through his own negligence, the injuries for which he complains." The defendant claims he was injured by this charge, as it is not necessary for the defendant to show that the plaintiff was careless if the plaintiff admits his carelessness or if it was shown on the bringing out of the plaintiff's own case that he was careless.

Again, the Court charged, subject to exception taken: "Now, it may be shown that neither party was guilty of negligence in this case. It does not necessarily follow, as a matter of law, that merely because an accident happened, negligence has been committed by either side. It may be a pure accident, for which neither party would be guilty of negligence." The defendant claims this was not a fair charge to make to the jury, because it was untrue, and the first part of the charge was absolutely in-

correct and contradictory to the frequent statement made by the Court, through the trial of the case, to the effect that the plaintiff was clearly guilty of negligence in failing to carry a light; therefore, the Court should not have said that, "It may be neither party was guilty of negligence in this case."

Again, the Court charged, subject to exception taken: "And, whether the light required by law was, in view of all the circumstances, a matter of importance, such importance as would make the plaintiff guilty of contributory negligence for not having it, is a question for your consideration, under all the facts and circumstances." Defendant claims this was incorrect and prejudicial to the defendant, and that the absence of a light on the part of the plaintiff at the time of the accident was, as a matter of law, the proximate cause of the accident.

Respectfully submitted,
HENRY S. ALVORD,
For Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

GEORGE IRESON

Appellee,

vs.

GEORGE CUNNINGHAM

Appellant,

Appeal from Cum-
berland Circuit.

Brief for Appellee.

STATEMENT OF FACT.

The appellee, on March 19th, 1914, was traveling north on West Avenue in the Borough of Vineland.

(Page 16, lines 9-11 inclusive.)

He had with him one Fred McClunnen. *(Page 16, line 25).*

When the appellee reached the railroad track on West Avenue it was three minutes of seven, which time was fixed by the coming of the train from the station at Vineland toward West Avenue. *(Page 16, lines 30-35).*

As he drove across the railroad his companion called his attention to an approaching automobile and warned him about it. *(Page 17, lines 5-10).*

The appellee says: "I pulled out there, I got in a gutter and I pulled to my right side and he come over the hill 500 paces away when we saw him coming; and I pulled in the gutter and he was wobbling so, and then I pulled out to get in the other side to give him the roadway, and then he come over to his own side, or seemed to be, the way he was wobbling, and I pulled right in the gutter and he come along and his automobile run right in my horse and broke its leg and threw me in the ditch and Fred McClunnen put his legs around my neck and it smashed my wagon up." *(Lines 5-17).*

The roadway was wide enough for two vehicles to pass and the appellee was as far on his right-hand

side as he could get. (Page 20, lines 1-10 inclusive).

It was light enough to see the automobile 500 paces away. (Page 20, lines 11-12). The sun set at that time at eleven minutes past six, and the accident occurred at three minutes of seven. (Page 20, lines 22-25).

The appellee had no light on his wagon and the automobile had a small light. Both the light and the automobile were visible to the appellee. (Page 21, line 15).

When the appellee first discovered the automobile he was on the railroad crossing about 500 feet from the place where the accident happened. (Page 23, lines 1-5).

The road was somewhat rough or "rutty" (Page 24, line 5), but it was not in such a condition as to compel the traveler to pick his way. (Page 24, lines 10-12).

The approaching automobile was astride of the right-hand rut, one set of wheels running in what was the bicycle path along the east side of the road, and the other set of wheels in the horse's tread between the ruts. (Page 26, lines 1-10).

Appellee was on the right-hand edge of the road, giving to the appellant all the lee-way possible. (Page 29, lines 12-15). (Page 33, lines 20-30).

Appellee was going north on West Avenue and the Appellant was coming south on West Avenue. (Page 32, lines 22-35).

The appellee, as the automobile approached the horse and wagon, shouted to warn the approaching automobile driver before the horse was struck. (Page 34, lines 1-15 inclusive.)

The companion of the appellee testifies that they saw the automobile first coming down the small hill, going from Osborne Avenue just north of Park Avenue; that it was about three-eighths of a mile distant and it had two small lights. (Page 38, lines 1-20). The automobile was plainly to be seen when it came within one hundred and fifty or two hundred feet. (Page 38, lines 25-30).

The automobile was trying to hold to the east side of the road and having trouble, and "you could see

him twisting this way and that, he couldn't hold one side, and swung around quick and jerked too quick, and would go too far and have to come back again." (Page 38, line 35) (Page 39, lines 1-10).

When the appellee was struck he was on the right-hand side of the road as far over as he could get (Page 39, line 22), and the appellant's automobile, at the time he struck the appellee, was straddling the east rut. (Page 39, lines 34 and 35) (Page 40, line 1).

The automobile was on the same side as the appellee's horse and carriage and coming head to. (Page 40, lines 8-14). The horse of the appellee had to be killed as a result of the injury. The wagon was somewhat broken and the appellee himself considerably shaken up and injured. That the hour was one of sufficient light to see a wagon or a machine several hundred feet away, is shown in the testimony of George Lorber, who testifies that at the time of the accident he was working on his hot-bed without a light and that it was light enough for him to see, (Page 53, lines 20-25), and that he could see 600 feet away. (Page 53, line 33).

Statement of Lorber and of the other witnesses was corroborated by the statement of George Boody, who came along a short time after the accident and says he saw the men and vehicles on West Avenue in the road near Park Avenue, when he came out on West Avenue from the power-house grounds, and the men and vehicles were 150 or 200 feet away from Park Avenue. (Page 56, lines 20-30). He was about 700 feet away. (Page 57, line 10).

The testimony of Lorenzo Garton is, that when he got there that it was just "dusk-like," not very dark, (Page 59, line 10), and that he was able to see the moving figures as he approached them. (Lines 20-25). Garton also testifies to the location of the machine and says that he asked the appellant where he was running and, when he was shown, took his lantern which he had with him and saw where the wheels were, and said to the appellant, "Why, Doc, you was on the wrong side of the Road." The machine was away on the right side (Page 59, lines 10-35), that is, on his left. (Page 60, lines 1 and 2). Appellant said the roads were bad and

he was picking the best part of the road. (Page 60, lines 7 and 8).

The appellant admits that when he came up Tenant's Hill he kept on the east side of the road all the way down, the bicycle path being on that side of the road; that his right-hand wheels were in the center of the road, and in that position he kept all the way down. (Page 63, lines 15-35).

He says the wind shield on his machine was just in the ordinary condition as to the opportunity to see through it. He says he did not observe any team, (Page 64, lines 1-20), but says he was paying attention to his driving and that, had there been a light visible in front of him, he should have seen it. (Lines 20-25).

Appellant says that when the collision happened his right-hand wheels were in the middle of the road where the horse travels, he was straddling the ruts and the bicycle path was on the east side of the road; his left-hand wheels were in the bicycle path where the ground was firm and the other two wheels were in the solid part of the road where the horses step; and that he did not see the approaching wagon until an instant before they came together. (Page 66, lines 5-20).

The appellant says that his wind shield was in the same condition that night as at any other time and that there might have been times when the wind shield was clean, (Page 75, lines 30 to 35), but that he could see through his wind shield that night. (Page 76, lines 1-5). He did not know when he had cleaned his wind shield—he may have just cleaned it when he left the house and he might not have cleaned it for three or four days before that—he doesn't think anybody ever remembers when they clean their wind shields. (Page 76, lines 15-25).

He says he was looking to see if he could see any horse or wagon driving toward him. (Page, 77, lines 5-10). He had battery lights, but no search lights on and he thinks it was a stormy day and mud and one thing and another had spattered on those lights. He did not see the appellant until his horse reared up in front of him. (Page 78, lines 10-12).

ARGUMENT

The grounds of appeal will be taken up in their order.

1. "The Court refused to non-suit the plaintiff on the opening of the plaintiff's case."

This motion to non-suit was asked on the ground that plaintiff admitted he had no light on his wagon thirty minutes after sun-down.

The Court was right in refusing at that time to non-suit, unless the bare admission that the plaintiff had not complied with the statute was a bar to his action, or amounted to such negligence as to preclude him from recovery.

In *Hemming vs. New Haven*, 82 Conn. 661:18, A. & E. Ann. Cases, 240, the question arose upon the plaintiff's failure to have his automobile registered and numbered. The Court says:

"The right to maintain an action for damage resulting from the omission of the defendant is not taken away because the person injured is, at the time, disobeying a statute, where the unlawful act or conduct in no way contributes to the accident."

This position is sustained by the case of *Menger vs. Laur*, upon which the appellant relies.

2. "The evidence was that the plaintiff, as well as the defendant, was driving on his left-hand side of the road at the time of the accident."

In this statement the appellant is in error, and it is only necessary to refer the Court to the testimony of the plaintiff on Page 20, lines 1-10 inclusive; Page 29, lines 12-15 and Page 33, lines 20-30; the testimony of McClunnen, Page 39, lines 17, 22, 27 and 28, wherein it is shown that the appellee was over on his right as far as he could get when they struck; and the admission of the appellant that he kept on the east side of the road all the way down, the bicycle path being on that side of the road; and that his right-hand wheels were in the center of the road. (Page 63, lines 15-35).

The testimony of these witnesses disclose the fact that the appellant was on his left-hand side of the road, whereas the appellee was on his right-hand side

of the road. In other words, they were both on the same side of the road approaching each other.

3. "The third, fourth and fifth grounds of appeal seem to be covered by the fourth, and in treating the latter ground the other two may be covered."

4. "It appears by the evidence, that the negligence and carelessness of the plaintiff was the proximate and clearly contributing cause."

This assertion will be discussed under the following heads:

(a). Is the mere non-compliance with the statutory regulation a bar to recovery?

(b). Is the absence of a light forty-five minutes after sunset contributory negligence, if there remains sufficient daylight for the defendant to see, and he was using the ordinary care required of him?

(c). Was defendant negligent?

(d). Was the question of contributory negligence in this case a jury question?

First, then:

(a). Is the mere non-compliance with the statutory regulation a bar to recovery?

The Court in the case of *Hemming vs. New Haven, Supra.*, discussing the question then before the Court at page 664, says:

"The traveler with an unregistered and un-numbered automobile is not a trespasser upon the street, neither does it necessarily follow that the property which he owns is outside the legal protection when injured by the unlawful act of another."

The Court in this case followed the prior case of *Munroe vs. Hartford St. Ry. Co.* 76 Conn. 201; 56 Atlantic 498. In this last case, at page 206, the Court says:

"The fact that the plaintiff or defendant at the time of the injury was a law breaker may possibly be relevant as an incidental circumstance, but is otherwise immaterial unless the act of violating the law is, in itself, a breach of duty to the party injured in re-

spect to the injury suffered."

There is no statutory provision in this State prohibiting the use of the street where the regulations are not complied with.

(b). Is the absence of a light forty-five minutes after sunset contributory negligence, if there remains sufficient daylight for the defendant to see, and he was using the ordinary care required of him?

"A driver of an automobile on a road sufficiently lighted to enable him to see for 150 feet is not justified in running down a wagon driving in the same direction merely because the wagon failed to carry lights, though it was compelled to do so." "The fact that the wagon carried no lights is immaterial."
Decou vs. Dexheimer, 73 *Atlantic* 48.

Mr. Justice Depue, in charging the jury at a trial in the Essex Circuit in the case of *Dickey vs. Kurzenberger*, 8 N. J. L. J. 306, laid down the law in the following language:

"If you reach the conclusion that this defendant was driving with proper care, and that this accident was due to the darkness of the night, then, the plaintiff's wagon being on the left-hand side, clearly there ought to be a verdict for the defendant. But, if you are satisfied from the evidence that there was such a condition of light as that the defendant might have seen, and that the collision was due to the careless manner in which he was driving, and for want of attention, then the first proposition necessary to a verdict for the plaintiff will be established."

The plaintiff in the case of *Dickey vs. Kurzenberger* left her vehicle standing on the left-hand side of the street. In the present action the plaintiff was on the extreme right of the road as far as he could get, and the testimony of the plaintiff, McClunnen, Lorber and Boody is clear that there was sufficient light for the defendant to have seen the plaintiff at least 200 feet, two of the witnesses going so far as to say 600 feet.

If these witnesses are to be believed in contradiction of the defendant, then there could have been no negligence on the part of the plaintiff which in the least contributed to the accident, or was the proximate cause.

(c). Was the defendant negligent?

The testimony of Lorenzo Garton to the effect that he had said to the appellant when the appellant pointed out the wheel-marks of his machine, "Why, Doc, you was on the wrong side of the road," (*Page 59, lines 10-35*); the admission of the appellant that his right-hand wheels were in the center of the road, (*Page 63, lines 15-35*), and his left-hand wheels were in the bicycle path (*Page 66, lines 5-20*); that he did not see the approaching wagon until an instant before they came together (*Page 66, lines 5-20*); that it was cloudy and foggy (*Page 73, lines 15-25*); that his wind shield was in the same condition that night as at any other time, and that there might have been times when the wind shield was clean (*Page 75, lines 30-35*), tends to show his negligence and that he was picking the best part of the road. (*Page 60, lines 7 and 8*).

The appellant further confirms this when he says that the road was rough and that he could see the ruts, (*Page 80, lines 10-30*), and that he would have seen a man coming straight down the wagon track. (*Page 81, lines 3-6*).

All of these things show that the appellant was not paying the attention required of him to the direction in which he was going, except, perhaps, to get where it was easy driving and this he found on the left-hand side of the road. His attention, the appellee contends, was absorbed with other things than watching the highway for approaching vehicles, and because of his desire to find the easy path he paid no attention to anything which was ahead of him. This was negligence on his part and resulted in the accident.

"Negligence arises from inattention, thoughtlessness or heedlessness."

Wideout vs. Winnebago Traction Co., 123 Wis. 279;
69 L. R. A. at page 612.

"The law of the road is, that where two persons are engaged in traveling the highway, and meet, each must turn to the right in order to allow the other to pass, and if an accident happens because of a person being on the wrong side of the road, he is without redress." *Dickey vs. Kurzenberger*, *Supra*.

"The law of the road relating to the passing by one vehicle of another one ahead of him, and moving

in the same direction, does not relieve the driver of the former from the duty resting on him of using reasonable care to observe and avoid other vehicles, including those going in the opposite direction."

Smith vs. Bernard, 82 Law 468.

State vs. Unwin, 75 Law 500.

"What constitutes negligence depends upon the facts and circumstances of each case. And failure to observe the rules as laid down for the government of one's self and a vehicle upon the public highways and to have due regard for one's own safety and the rights of others, is of itself negligence." 28 Cyc. 37.

In this case the evidence clearly shows the defendant to have been on the wrong side of the road, without due attention to that which might have been in front of him.

The defendant says it was a dark night, cloudy and foggy. If this were so, he was bound to use even more care than ordinary to avoid collision, and was guilty of negligence if he were on the left-hand side of the road when the accident happened. It was his duty, if his story is to be believed, to keep to the right with a sharp look-out for other travelers. He is charged with more care than if the night had been less dark. If the plaintiff's witnesses are to be believed, and the defendant alone contradicts them, then the defendant could not have been giving his attention to that which was ahead of him, or the remaining daylight would have enabled him to see the appellee approaching.

(d). Was the question of contributory negligence in this case a jury question?

"A fair controversy existing upon the questions of the negligence of the defendant company and the contributory negligence of the plaintiff, both questions were properly submitted to the jury.

Graves vs. Baltimore &c. R. Y. Co., 76 N. J. L. 362 at page 364.

"The question of the plaintiff's contributory negligence is for the jury where there is evidence that he turned out in the night time for an automobile which collided with him, as soon as he saw the lights on the machine, and that the track was but 18 feet wide with

a ditch on either side."

Anderson vs. Sparkes, 142 Wis. 398.

"The utmost that can be said regarding defendant's evidence is, that it tended to contradict the testimony of the plaintiff's witnesses, and, therefore, to which side credence should be given is essentially a jury question."

Sankiwicz vs. A. C. R. R. Co., 82 N. J. L. 478 at page 480.

Bauman vs. Hamburg American Packet Co., 67 N. J. L. 251.

The evidence in the case shows affirmation of material facts on one side and denial on the other, except in two particulars, that of the absence of a light on plaintiff's wagon and the machine of defendant being on the left-hand side of the road; both of which are admitted.

6. The Court permitted the plaintiff to ask the defendant "Q. Are you always in command of yourself, Doctor?"

If this question tended to bring out irrelevant and immaterial facts, it is not ground for a new trial. It is harmless error.

Munroe vs. Hartford St. Rl. Co. Supra., at page 501.

The plaintiff contends that it is relevant as tending to show appellant's lack of command of his machine at the time of the accident.

7. The Court refused to direct a verdict for the defendant as requested. The Court was right.

Bauman vs. Hamburg American Packet Co., Supra.

8. The charge of the Court excepted to in the eighth ground of appeal is correct.

Decou vs. Dexheimer, Supra.

Dickey vs. Kurzenberger. Supra.

9. The Court was right in holding to the doctrine that contributory negligence is a defense.

Van Horn vs. C. R. R. Co. 38 N. J. L. 133.

10. It would seem that the charge in this respect is supported by all the cases.

11. Appellee merely refers to the following cases:

Menger vs. Laur, 55 N. J. L. 205, at page 216:

Decou vs. Dexheimer, *Supra*;

Graves vs. Baltimore &c. R. Co.

Bauman vs. Hamburgh American Packet Co. *Supra.*

Sankiwicz vs. A. C. R. R. Co. *Supra.*

For these reasons appellee contends that the appeal should be dismissed and the judgement affirmed.

Respectfully submitted,

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