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Summons.

(Filed November 3, 1926.)

10

THE STATE OF NEW JERSEY TO JOHN J. FREE AND
MORRIS GATKIN.

YOU ARE SUMMONED TO ANSWER the annexed complaint of Benjamin Shefts, by his next friend, Isidore Shefts, and (SEAL) Isidore Shefts, individually, in an action at law in the Hudson County Circuit Court. And take Notice that unless you file your answer to said complaint with the Clerk of the Hudson County Circuit Court, within twenty (20) days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

20

WITNESS, HENRY T. ACKERSON, Esq., Judge of the Hudson County Circuit Court, at Jersey City, this 13th day of October, 1926.

30

JOHN J. MCGOVERN,
Clerk.

MILBERG & MILBERG,
Attorneys for Plaintiffs.

40

Complaint.

(Filed November 3, 1926.)

HUDSON COUNTY CIRCUIT COURT.

10

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

20

Plaintiffs, residing in Jersey City, County of
Hudson and State of New Jersey, complaining of
the defendants, say:

FIRST COUNT.

30

1. That on or before September 23, 1925, de-
fendant, John Free, was the owner of a certain
Maxwell automobile, bearing New Jersey License
No. 417968, which he was operating in a westerly
direction along Newark Avenue, in the City of Jer-
sey City, Hudson County, New Jersey.

2. That at the same time and place, the de-
fendant, Morris Gatkin, was operating a certain
Ford Truck in a southerly direction along Cole
Street, in said Jersey City, aforesaid, by his agent
and servant, Louis Gatkin.

3. That the plaintiff, Benjamin Shefts, an in-
fant, twelve years of age, was, at the time and
place herein mentioned, riding upon the said Ford
Truck of the defendant, Morris Gatkin.

40

Complaint.

4. That as the automobile truck of the defendant, upon which plaintiff, Benjamin Shefts, was riding was crossing said Cole Street, at the intersection of the said Newark Avenue, the said defendant, John J. Free, so negligently and carelessly operated the said automobile, that the said automobile of John J. Free, ran into and collided with the automobile truck of the defendant, Morris Gatkin, and that the negligence and carelessness of the said defendant, John J. Free, consisted in this: that the said defendant, John J. Free, was driving his automobile at a high and unlawful rate of speed; that the appliances and brakes of the said defendant, John J. Free, were in a dangerous condition; that the said defendant failed and neglected to sound a signal or give warning of his approach; that he failed and neglected to observe the rules and regulations of the motor vehicle act of the State of New Jersey in failing to give the automobile truck of the defendant, Morris Gatkin, the right of way; that the said defendant failed and neglected to properly apply the brakes and appliances on said automobile; that the said defendant failed and neglected to make proper observations and have due regard for the rights of others lawfully using the said highway; that the said defendant so negligently and carelessly operated his automobile, so as to cause it to come into collision with the automobile truck of Morris Gatkin, upon which plaintiff, Benjamin Shefts, was riding, and the said defendant was otherwise negligent in preventing his said automobile from coming into collision and contact with the said automobile truck of the said Morris Gatkin.

5. That as a result of the negligence and care-

Complaint.

lessness of the defendant, John J. Free, said plaintiff, Benjamin Shefts, was thrown from the said automobile truck upon which he was riding, and by reason thereof, suffered and sustained severe, serious and permanent injuries. Said plaintiff
 10 sustained serious cuts about the face and scalp, his nose was broken and he was severely bruised and injured in and about the arms and body and the use of the said plaintiff's arms will in the future be impaired by reason thereof, his nervous system was shocked and plaintiff suffered, still suffers, and will continue to suffer great pain and distress and was confined to his home and bed for a considerable length of time. Said plaintiff was and
 20 still is under the care and treatment of physicians and will in the future be obliged to undergo treatment for recovery and cure of the injuries sustained by him, as a result of the carelessness and negligence of the said defendant, John J. Free.

SECOND COUNT.

Plaintiff repeats and reiterates the allegations contained in the First Count in as far as they apply to this count and makes them part hereof, and
 30 further says:

1. That on or before September 23, 1925, the defendant, Morris Gatkin, was the owner of a certain Ford automobile truck used and operated in the conduct and connection with his business.
2. That on or before said date, the said automobile truck of the said defendant was in the control and operation of his servant and agent, Louis Gatkin.
- 40 3. That with the knowledge, consent and invi-

Complaint.

tation and permission of the said Morris Gatkin, and the furtherance and in the course of his said business, the said defendant, Morris Gatkin, expressly and otherwise directed his said agent and servant, Louis Gatkin, to invite the said plaintiff, Benjamin Shefts, to assist the said defendant, Morris Gatkin, and his agent, Louis Gatkin, in the delivery of the products of his business, and in pursuance of said authority, and by the invitation, consent and authorization of said defendant, Morris Gatkin, his agent or servant, the said plaintiff, Benjamin Shefts, was invited to assist said Louis Gatkin in the performance of his duties and furtherance of the business of the said Morris Gatkin, and for and on his behalf, and said Morris Gatkin, the said plaintiff, was invited to ride upon the said automobile truck of the defendant, Morris Gatkin, and by reason thereof, it became the duty of the said defendant, Morris Gatkin, his agent or servant to operate and control and maintain his said automobile truck in a reasonable, careful and proper manner.

4. That as a result of the negligence and carelessness of the defendant, Morris Gatkin, by his agents and servants, said plaintiff, Benjamin Shefts, was thrown from the automobile truck upon which he was riding, and by reason thereof, suffered and sustained severe cuts about the face, scalp, his nose was broken, and he was severely bruised and injured in and about the arms and body and the use of the said plaintiff's arms will, in the future, be impaired, by reason thereof, his nervous system was shocked and plaintiff suffered, still suffers, and will continue to suffer great pain and distress, and was confined to his home and bed

Complaint.

for a considerable length of time. Said plaintiff was and still is under the care and treatment of physicians and will in the future be obliged to undergo treatment for recovery and cure of the injuries sustained by him, as a result of the carelessness and negligence of the said defendant,
 10 Morris Gatkin.

THIRD COUNT.

Plaintiff, Isidore Shefts, repeats and reiterates the allegations contained in the First and Second Counts and makes them a part hereof, and further says:

1. That by reason of the said negligence of the defendants, Morris Gatkin and John J. Free, by
 20 both or either of them, the said plaintiff, Isidore Shefts was obliged to expend large and divers sums of money for medical attention, medicines, etc., and that the said plaintiff, Isidore Shefts, was also deprived of the services of the said plaintiff, Benjamin Shefts, by reason of the injuries sustained to the said Benjamin Shefts, by the carelessness and negligence of the defendants.

30 Plaintiff demands the sum of Three Thousand (\$3,000.00) Dollars on this Count.

Plaintiff, Benjamin Shefts, by his next friend, Isidore Shefts, demands the sum of Ten Thousand (\$10,000.00) Dollars on the First Count, and Ten Thousand (\$10,000.0) Dollars on the Second Count.

MILBERG & MILBERG,
 Attorneys for Plaintiffs.

I hereby deputize Robert Connolly to serve the within Writ. Witness my hand and seal this 13th
 40 day of October, 1926.

JOHN M. HANNAN, Sheriff
 By THOS. MADIGAN, Under Sheriff.

Answer of Defendant Free.

Served within Summons and Complaint Oct. 15/26, on the defendants John J. Free and Morris Gatkin, by leaving a true copy thereof for each at their usual place of abode, John J. Free at 146 Chestnut Avenue, Jersey City, Morris Gatkin at 477 Jersey Avenue, Jersey City, with a member of their family above the age of fourteen years whom I informed of the contents thereof. 10

JOHN M. HANNAN, Sheriff
By ROBERT CONNOLLY, S. D. S.

Filed Clerk's Office,
November 3, 1926,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk. 20

Answer.

(Filed November 4, 1926.)

HUDSON COUNTY CIRCUIT COURT.

BENJAMIN SHEFTS, by his next friend, ISIDORE SHEFTS, and ISIDORE SHEFTS, individually, <i>Plaintiffs,</i> v. JOHN J. FREE and MORRIS GATKIN, <i>Defendants.</i>	} Action at Law.	30
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Defendant, John J. Free, residing in Jersey City, County of Hudson, and State of New Jersey, answering the complainant's complaint in the above entitled cause, says: 40

Answer of Defendant Free.

ANSWER TO FIRST COUNT.

1. Defendant admits the truth of the allegations contained in paragraph one of the First Count of the Complaint.

10 2. Defendant has not sufficient information to form a belief as to the truth of the statements of paragraph two of the First Count of the Complaint.

3. Defendant has not sufficient information to form a belief as to the truth of the allegations contained in paragraph three of the First Count of the Complaint.

20 4. Defendant denies the truth of the allegations contained in paragraph four of the First Count of the Complaint.

5. Defendant denies the truth of the allegations contained in paragraph five of the first count of the Complaint.

ANSWER TO SECOND COUNT.

Defendant repeats and reiterates the answers to the allegations in the First Count of the complaint, and answers further:

30 1. Defendant has not sufficient information to form a belief as to the truth of the allegations contained in paragraph one of the Second Count of the Complaint.

2. Defendant has not sufficient information to form a belief as to the truth of the allegations contained in paragraph two of the Second Count of the Complaint.

40 3. Defendant has not sufficient information to form a belief as to the truth of the allegations con-

Answer of Defendant Free.

tained in paragraph three of the Second Count of the Complaint.

4. Defendant has not sufficient information to form a belief as to the truth of the allegations contained in paragraph four of the Second Count of the Complaint.

10

ANSWER TO THIRD COUNT.

Defendant, John J. Free, repeats and reiterates the answers to the allegations in the First and Second Counts of the Complaint, and answers further:

1. Defendant denies the truth of the allegations contained in paragraph one of the Third Count of the Complaint.

HUGHES & WEIGAND,
Attorneys for Defendant
John J. Free.

20

Filed Clerk's Office,
November 4, 1926,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

30

40

Answer.

(Filed November 5, 1926.)

HUDSON COUNTY CIRCUIT COURT.

10	BENJAMIN SHEFTS, by his next friend, ISIDORE SHEFTS, and ISIDORE SHEFTS, individually, <p style="text-align: right;"><i>Plaintiffs,</i></p> <p style="text-align: center;"><i>v.</i></p> JOHN J. FREE and MORRIS GATKIN, <p style="text-align: right;"><i>Defendants.</i></p>	} Action at Law.
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20 Defendant, Morris Gatkin, residing in the City of Jersey City, County of Hudson and State of New Jersey, by way of answer to the complaint of the plaintiffs, says:

FIRST COUNT.

- 30
1. He has no knowledge or information sufficient to form a belief as to Paragraph 1.
 2. He denies Paragraph 2.
 3. He has no knowledge or information sufficient to form a belief as to Paragraph 3.
 4. He admits Paragraph 4.
 5. He denies Paragraph 5.

SECOND COUNT.

He denies so much of the repetition of the first count in the second count as is denied in the first count.

- 40
1. He denies Paragraph 1.

Answer of Defendant Gatkin.

2. He denies Paragraph 2.
3. He denies Paragraph 3.
4. He denies Paragraph 4.

THIRD COUNT.

10

He denies so much of the repetition of the first and second counts in the third count as is in the first and second counts.

1. He denies Paragraph 1.

FIRST SEPARATE DEFENSE.

By way of first separate defense, defendant, Morris Gatkin, says that the plaintiff, Benjamin Shefts, is guilty of contributory negligence.

20

SECOND SEPARATE DEFENSE.

By way of second separate defense, defendant Morris Gatkin, says that he was guilty of no negligence which was the proximate cause of the injuries alleged to have been sustained in the complaint.

THIRD SEPARATE DEFENSE.

30

By way of third separate defense, defendant Morris Gatkin, says that the accident and the injuries complained of were caused by the sole negligence of the defendant, John J. Free.

EDWARD GRIFFIN,
Attorney for Defendant
Morris Gatkin.

Filed Clerk's Office,
November 5, 1926,
Hudson County, N. J.

40

JOHN J. MCGOVERN,
Clerk.

Rule for Judgment Interlocutory by Default.

(Filed November 15, 1926.)

HUDSON COUNTY CIRCUIT COURT.

10

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

20

The summons and complaint in this cause having been duly served upon the defendants, on the 15th day of October, 1926, and defendants having failed to file an answer or taken any other steps in response to the complaint, within the time limited by the rules of Court.

It is ORDERED, that judgment interlocutory be entered against defendants, John J. Free and Morris Gatkin and in favor of the plaintiffs Benjamin Shefts, by his next friend, Isidore Shefts, and Isidore Shefts, individually.

30

HENRY E. ACKERSON, JR.,
Judge.

On motion of MILBERG & MILBERG, Attorneys for Plaintiffs.

Rule entered this 15th day of November, 1926.
Filed Clerk's Office,
November 15, 1926,
Hudson County, N. J.

40

JOHN J. MCGOVERN,
Clerk.

Reply to Answer of Morris Gatkin.

(Filed December 3, 1926.)

HUDSON COUNTY CIRCUIT COURT.

BENJAMIN SHEFTS, by his next friend, ISIDORE SHEFTS, and ISIDORE SHEFTS, individually, <i>Plaintiffs,</i> <i>v.</i> JOHN J. FREE and MORRIS GATKIN, <i>Defendants.</i>	}	Action at Law.	10
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- 1. Plaintiffs deny the allegations set forth in the
 First Separate Defense. 20
- 2. Plaintiffs deny the allegations set forth in
 the Second Separate Defense.
- 3. Plaintiffs have not sufficient information to
 form a belief, as to the truth in the statements of
 the Third Separate Defense.

MILBERG & MILBERG,
Attorneys for Plaintiffs.

Filed Clerk's Office,
December 3, 1926, 30
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Order.

(Filed December 15, 1926.)

HUDSON COUNTY CIRCUIT COURT.

10

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

20

It appearing to the satisfaction of the Court that the Answer filed on behalf of Morris Gatkin was inadvertently filed one day out of time and that interlocutory judgment had been entered against him due to his failure to file his said Answer within the time limited by law, and it further appearing that counsel for the plaintiffs has consented to re-open the judgment and has consented that the Answer filed be declared filed as of time,

30

It is, therefore, on this 14th day of December, 1926, ORDERED, that the interlocutory judgment entered against the defendant, Morris Gatkin, in the above entitled cause be re-opened, set aside and for nothing holden, and that the Answer filed by the defendant, Morris Gatkin, be declared and filed as of time.

It is further Ordered that the plaintiffs have 20 days from the date of the making of this Order to plead to the said Answer.

40

HENRY E. ACKERSON, Jr.,
Judge.

Rule for Judgment.

On Motion of Edward Griffin, Attorney for the Defendant, Morris Gatkin, I hereby consent to the making of the above Order.

MILBERG & MILBERG,
Attorneys for Plaintiffs.

10

Filed Clerk's Office,
December 15, 1926,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Rule for Judgment.

HUDSON COUNTY CIRCUIT COURT.

20

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

30

This cause having been tried before the Honorable Frank L. Cleary and a jury on the 21st day of February, 1928, and continued to the 23rd day of February, 1928, and a motion on behalf of the defendant Morris Gatkin having been made to direct a verdict in favor of the defendant Morris Gatkin, and argument having been had thereon, the Court directed the jury empanelled in the cause to find a verdict for the defendant Morris Gatkin as against the Plaintiffs Benjamin Shefts,

40

Rule for Judgment.

by next friend Isidore Shefts, and Isidore Shefts, individually, of no cause of action; which verdict the jury returned in accordance with the said direction of the Court.

10 It is thereupon on this 24th day of February, 1928, Ordered that judgment be entered in favor of the defendant Morris Gatkin and against the plaintiffs Benjamin Shefts by his next friend Isidore Shefts, and Isidore Shefts individually, and that judgment of non-suit be entered as to the defendant John J. Free, which non-suit was requested by the plaintiffs.

FRANK L. CLEARY,
Judge.

20 Entered Feb. 24th.

On Motion of Edward Griffin, Attorney for Defendant Morris Gatkin.

30

40

Judgment.

HUDSON COUNTY CIRCUIT COURT.

BENJAMIN SHEFTS, by his next friend, ISIDORE SHEFTS, and ISIDORE SHEFTS, individually, <i>Plaintiffs,</i> Ad — v. JOHN J. FREE and MORRIS GATKIN, <i>Defendants.</i>	Judgment entered February 24, 1928. Damages See Minutes. 10 Costs Total EDWARD GRIFFIN, Attorney.
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Judgment On Verdict in the above entitled cause was entered in this Court on the 24th day of February in the year of our Lord One Thousand Nine Hundred and twenty-eight in favor of the defendant John J. Free and Morris Gatkin and against the plaintiffs Benjamin Shefts, by his next friend Isidore Shefts, and Isidore Shefts individually in a plea of Action at Law for the sum of (See Minutes). 20

Judgment entered and signed this 24th day of February, 1928.

FRANK L. CLEARY,
 Judge. 30

Notice of Appeal.

(Filed November 22, 1928.)

HUDSON COUNTY CIRCUIT COURT.

10 BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

20 To Edward Griffin, Esquire, Attorney of Defend-
ants, Morris Gatkin.

SIR:

PLEASE TAKE NOTICE, that the plaintiffs in the
above entitled cause appeal to the Court of Errors
and Appeals in the last resort in all causes in New
Jersey from the whole of the judgment entered in
this cause.

Respectfully yours,

30 MILBERG & MILBERG,
Attorneys for Plaintiffs.

Service of a copy of the above Notice of Appeal
is hereby acknowledged this 16 day of November,
1928.

EDWARD GRIFFIN,
Attorney for Defendant,
Morris Gatkin.

40 Filed Clerk's Office,
November 22, 1928,
Hudson County, N. J.

JOHN J. MCGOVERN,
Clerk.

Grounds of Appeal.

(Filed November 30, 1928.)

NEW JERSEY COURT OF ERRORS & APPEALS.

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,

*Plaintiffs-Appellants,**v.*

JOHN J. FREE and MORRIS GATKIN,
Defendants-Appellees.

10

On Appeal from
Hudson County
Circuit Court.

To Edward Griffin, Esquire, Attorney for Defend-
ant-Appellee, Morris Gatkin.

20

SIR:

PLEASE TAKE NOTICE, that the following is the
ground upon which the plaintiffs-appellants ap-
peal from the judgment heretofore entered in the
above cause against them.

1. That the Trial Court erred in finding that
at the time of the accident, the servant was beyond
the scope of his employment and erroneously di-
rected a verdict on that ground in favor of the
defendant.

30

Yours respectfully,

MILBERG & MILBERG,
Attorneys for Plaintiffs-Appellants.

Service of a copy of the above Ground of Appeal
is hereby acknowledged this 23rd day of Novem-
ber, 1928.

EDWARD GRIFFIN,
Attorney for Defendant-Appellee,
Morris Gatkin.

40

Benjamin Shefts, direct.

HUDSON COUNTY CIRCUIT COURT.

10	BENJAMIN SHEFTS, by his next friend, ISIDORE SHEFTS, and ISIDORE SHEFTS, individually, <div style="text-align: right;"><i>Plaintiffs,</i></div>
	<i>v.</i>
	JOHN J. FREE and MORRIS GATKIN, <div style="text-align: right;"><i>Defendants.</i></div>

Before—Hon. FRANK L. CLEARY, J., and a Jury.

Jersey City, N. J., February 21, 1928.

20

APPEARANCES :

MILBERG & MILBERG, Esqs. (by S. MILBERG,
 Esq.), for the Plaintiffs.

EDWARD GRIFFIN, Esq., for the Defendant
 Morris Gatkin.

(No appearance for the Defendant Free.)

(Jury empanelled, accepted and sworn.)

(Both sides open to the jury.)

30

BENJAMIN SHEFTS, sworn.

Direct examination by Mr. Milberg:

Q. Where do you live, Ben.? A. At the time of
 the accident I lived at 121 Mercer Street.

Q. Where do you live now? A. 247 Montgomery
 Street.

Q. How old are you? A. Fifteen.

Q. How old were you when this accident hap-
 pened? A. I was twelve.

40

Benjamin Shefts, direct.

Q. Were you going to school at that time? A. At the time of the accident?

Q. Yes. A. The accident happened at night.

Q. I mean about that time, during September, 1925, were you attending school? A. Yes, sir.

Q. What school were you going to? A. Number three. 10

Q. And what grade were you in? A. Six-A.

Q. And you lived on Mercer Street at that time? A. Yes, sir.

Q. After school, what did you do? A. I used to help Gatkin.

Q. When you say "helped Gatkin" what do you mean by helping him? A. I used to go out with him and sometimes make deliveries with him.

Q. Do you know Mr. Gatkin? A. Yes, sir. 20

Q. Do you know his father? A. Yes, sir.

Q. Where are they? A. There they are.

Q. Those two gentlemen? A. Yes, sir.

Q. And what deliveries did you make for them? A. Sometimes I used to bring up butter to people's houses, sometimes eggs.

Q. What kind of car did he have? A. Ford commercial.

Q. And after school you got on this car? A. Yes, sir. 30

Q. Who was driving this car when you were on it helping deliveries? A. Louie.

Q. Who is Louie? A. Mr. Gatkin's son.

Q. Were you ever on the truck with Louie and the father? A. Yes, sir.

Q. How many times would you say before this accident you were on this truck with Louie and his father? A. About ten times.

Q. About what? A. Ten times. 40

Q. How long had you been accustomed to riding

Benjamin Shefts, direct.

on this truck with Louie and his father or either one prior to the date of this accident in September of 1925? A. I used to go on the truck after school before I would go home at five or six o'clock.

10 Q. I mean how long a period of time before then was it, a week or two or how long before this accident that you had been helping them make these deliveries? A. About six months.

Q. About six months. Were you paid for your deliveries? A. No, sir.

Q. What is that? A. No, sir.

Q. When you got through making deliveries, as you say, about six o'clock what did you do then?

20 A. I used to go to supper and then after supper I would go down to my father's store and help him.

Q. Your father's store? A. Yes, sir.

Q. What business is your father in? A. Furniture business.

Q. Where? A. Railroad Avenue.

Q. And you used to go down to the store? A. Yes, sir.

Q. How late did you stay there? A. Used to stay from supper time until about nine or ten o'clock.

30 Q. And did you do any work at the store? A. Yes, sir.

Q. What particular work did you do? A. Used to wait on the customers.

Q. Wait on the customers? A. Yes.

Q. Did you do anything else? A. Any time people would bring him money I would give them a receipt.

40 Q. In payment of the bills that they owed? A. Yes, sir.

Q. Now then, on the 23rd of September were you

Benjamin Shefts, direct.

making any deliveries in the afternoon with Gatkins? A. Yes, sir.

Q. Do you remember any of the places that you had made deliveries to that morning? A. Yes, sir.

Q. What were the places that you made these deliveries with Gatkin? A. Sometimes we used to go to Greenville and sometimes we used to go around here. 10

Q. Around where? A. Around Sussex Street.

Q. Jersey City? A. Yes, sir, all those places.

Q. And on that afternoon you were making deliveries with him, is that correct? A. Yes, sir.

Q. Now, when you got back what did you do? What time did you get back that afternoon on that date? A. Got back about half past five. 20

Q. And what did you do? A. I went up and ate supper and then after I ate supper I went down to the store.

Q. You mean your father's store? A. Yes.

Q. What time did you leave there? A. I left the store about half past eight and then I came back home and then I went over to my aunt's house across the street from where I lived.

Q. On Mercer Street? A. Yes. And I stood there about nine o'clock at night and then I went around to Louie's house and he came outside. 30

Q. Who is that? A. Gatkin.

Q. Where is this house? A. Around the corner on Jersey Avenue.

Q. Around the corner from where you live? A. Yes.

Q. And what? A. And he asked me if I wanted to go with him because he had to go to the drug store and get medicine and then go to the garage. 40

Benjamin Shefts, direct.

Q. And was that the same car you had made deliveries in in the afternoon? A. Yes, sir.

Q. Was that the same car you had been riding on with Louie, the boy, and Mr. Gatkin, his father?

A. Yes, sir.

10 Q. What did you say? A. I went in for the medicine.

Q. Let me see if I understand. You got to the house and he said, "Do you want to take a ride and go to the drug store?" Is that right? A. Yes, sir.

Q. And did you go on the truck? A. Yes, sir.

Q. Who else was on that truck when you got on? A. His little sister.

Q. Whose sister? A. Louie's.

20 Q. And how old was she about? A. I don't know.

Q. Have you any idea, about? A. About six or seven.

Q. Just a little girl? A. Yes, sir.

Q. Then the three of you got on the truck? A. Yes, sir.

Q. And did Louie drive it? A. Yes, sir.

30 Q. Where did you go from Jersey Avenue, that is, Gatkin's house? A. To Eighth and Grove Streets to get the medicine.

Q. Drug store? A. Yes.

Q. What did you do when you got to the drug store? A. When I got to the drug store I went in the drug store and got the medicine and came out.

Q. What did you get, do you remember? A. I don't remember.

Q. Did you pay for it? A. Yes, sir.

Q. Who gave you the money? A. Louie.

40 Q. And you got the medicine and came out? A. Yes, sir.

Benjamin Shefts, direct.

Q. All right. What happened then. When you came out did he say anything to you? A. He didn't say anything. I just handed him the medicine and then he turned around on Eighth Street and went down as far as Coles.

Q. Went down Eighth Street as far as Coles? 10
A. Yes, sir.

Q. When you got to Coles Street what did you do? A. We were going pretty fast, at a pretty fast rate, and I said to him, "Louie, you had better slow up, because you are coming into Newark Avenue;" but it seems he didn't listen to me and I got hit.

Q. Did you know where Louie was going when he was going up Coles Street? A. Yes, sir, he was going to the garage. 20

Q. How do you know? A. Because he told me after I got the medicine he was going to go to the garage.

Q. And is that the way to the garage, up Coles Street into Newark Avenue? A. Yes, sir.

Q. Where was the garage? A. Jersey Avenue between Railroad Avenue and Jersey Avenue.

Q. Do you know who runs that garage? A. Yes.

Q. Who? A. Mr. Schimmel. 30

Q. Had you ever gone to the garage with Louie or his father, either one or both, at any time in that car? A. I only went with Louie.

Q. And how many times had you gone with Louie to that garage? Oh, about how many times had you been there? A. About half a dozen times.

Q. When you were coming up Coles Street what was that you said to him? A. Told him to slow up a little bit.

Q. Why did you tell him that? A. Because he 40

Benjamin Shefts, direct.

was coming down near Newark Avenue and Newark Avenue is a street with light traffic on.

Q. Did you know how fast he was traveling then? A. No, he didn't have a speedometer on the car.

10 Q. Didn't have a speedometer on the car? A. No.

Q. Could you tell whether he was going fast or slow? A. Yes.

Q. And the next thing you remember is that the car was hit? A. Yes, sir.

Q. Do you remember how far you had gotten over Newark Avenue? This is right, isn't it? You were coming down Coles Street headed for Newark Avenue? A. Yes, sir.

20 Q. And that is going from north to south? A. Yes, sir.

Q. How far had you gone over this corner here, the intersection of Coles and Newark Avenue? A. About half way.

Q. And do you remember anything that happened then? A. We got hit and I fell out of the car and the truck turned over on top of me.

Q. You don't remember what happened after that, do you? A. No.

30 Q. You were then taken to the St. Francis Hospital? A. Yes, sir.

Q. How long had you been in there? A. About four days.

Q. In the St. Francis? A. Yes, sir.

Q. And do you know what happened to you? A. No, I don't know what happened.

Q. I mean were you hurt anywhere? A. Yes, broke my nose.

40 Q. What? A. Broke my nose.

Q. Anything else? A. That is all.

Benjamin Shefts, cross.

Q. And after the hospital where did you go? A. Went home.

Q. Your own home? A. Yes, sir.

Q. How long were you there, in the house? A. I was laying in bed for about four weeks.

Q. You were what? A. Laying in bed for about four weeks. 10

Q. After the four weeks what happened? A. After the four weeks I was able to sit around in the house and get out of bed.

Q. How long after the four weeks were you still confined in the house? A. About two weeks.

Q. And when for the first time were you able to get out, about how long, altogether? A. About half a week later.

Q. And when did you start going to school for the first time after the accident? A. The next week. 20

Q. And how long altogether was that? A. About seven or eight weeks.

Q. Did you go down to your father's store right after that? A. When I came home from school I went down to the store.

Cross examination by Mr. Griffin:

Q. You were thirteen years old, weren't you, Benny, when this accident happened? A. In November I was thirteen. 30

Q. And the accident happened in September, isn't that right? A. Yes, sir.

Q. You rode on this car often with Louie, didn't you? A. Yes, sir.

Q. You often went down Coles Street and across Newark Avenue before this day, before this night, in the same car with Louie driving? A. Yes, sir. 40

Q. Did you ever tell him on any of the other

Benjamin Shefts, cross.

times to slow up that he was going too fast? A. No, sir.

Q. Never told him before this night he was going too fast? But this night he was going fast, wasn't he? A. Yes, sir.

10 Q. Was he in a hurry to go to the garage, did he say, that night? A. He was in a hurry to go to the garage.

Q. This medicine that he bought, you don't know who that was for, do you? A. No, sir.

Q. Did Louie give you the money to pay for it? A. Yes, sir.

Q. And when you got it you gave it back to Louis? A. Yes, sir.

20 Q. Did you see the car that hit your car at any time? A. No, sir, I didn't.

Q. Your car wasn't struck in the front, was it? A. No, sir.

Q. It was struck in the left rear, wasn't it? A. Yes, sir.

Q. Back by the left rear wheel? A. Yes, sir.

30 Q. And at the time this car was struck the front of the car that you were in, where the engine is, and the hood, that was past the middle of Coles Street and Newark Avenue, wasn't it? A. I don't know that.

Q. You said before you were about half way across. A. About half way across.

Q. What part of this car was half way across, the front or back or middle or what? A. The middle.

Q. The middle was half way across? A. Yes, sir.

40 Q. And this other car that hit you came from the same side of Newark Avenue and was going in a westerly direction, wasn't it? A. Yes, sir.

Benjamin Shefts, cross.

Q. Did you see the car before it hit your car?

A. No, sir.

Q. You don't know how fast it was going, do you? A. No, sir.

Q. When you told Louie to slow up, that he was going too fast that was before you reached Newark Avenue, wasn't it? A. Yes, sir. 10

Q. And you didn't say that because you saw any car coming, did you? A. No, sir.

Q. You only said that because you thought he was going too fast? A. Yes, sir.

Q. You haven't any idea of miles, of the miles he was traveling at the time, the rate of speed? A. No, sir.

Q. Now, if you went with Louie this night in the car from the place you got in—I think he said Louie's house. A. Yes, sir. 20

Q. Directly to the garage, would you have gone past this drug store? A. No, sir.

Q. The drug store was further than the garage, wasn't it? A. Yes, sir.

Q. And it was on the way back from the drug store to the garage that this accident happened? A. Yes, sir.

Q. Louie had his little sister with him, I think you said, at the time? A. Yes, sir. 30

Q. You went back to school, Benny, some time around the first of the year, didn't you, or before the first of the year? A. Before the first.

Q. Before Christmas, wasn't it? A. Yes, sir.

Q. Long before Christmas? A. It was long before Christmas.

Q. Before Thanksgiving? A. It was the beginning of November.

Q. And you were promoted in February? A. Yes, sir. 40

Benjamin Shefts, cross.

Q. And you have been promoted in each class ever since, haven't you? A. No, sir.

Q. Were you left back? A. Yes, sir.

Q. Where? A. Left back in Six-B.

Q. When was that? A. That was the next time.

10 Q. You were promoted the term after the accident, weren't you, in February? A. Yes, sir.

Q. You were promoted in that term? A. Yes, sir.

Q. And you felt all right then, didn't you? A. No, sir.

Q. What was the trouble? A. I used to get a lot of headaches.

Q. A lot of headaches? A. Yes, sir.

20 Q. And after you were promoted in February you went to school until June, didn't you? A. Yes, sir.

Q. And were you promoted in September of the next year? A. No, sir.

Q. That is the term you were left back? A. Yes, sir.

Q. You were promoted in the following February? A. Yes, sir.

Q. You have been promoted ever since? A. No, sir.

30 Q. Left back again? A. Yes, sir.

Q. When were you left back again? A. Left back in Seven-B.

Q. In what? A. In Seven-B.

Q. Since the accident or since you went back to school after the accident did you go down to your father's store every night and wait on the people? A. Yes, sir.

Q. And do you take money from the customers and give receipts? A. Yes, sir.

40 Q. And have been going out in the automobile

Benjamin Shefts, redirect.

in the afternoons in the Gatkin car? A. After the accident?

Q. Yes. A. No.

Q. What did you do in the afternoons, now, since the accident? A. Stay in my father's store.

Q. Work in your father's store? A. Yes, sir. 10

Q. Worked there what time? A. Yes, sir.

Q. What time of night would you go home? A. About nine—between nine and ten.

Q. Nine and ten o'clock. When would you study your lessons, Benny? A. Used to study before I went to the store.

Q. Early in the morning? A. No, sir.

Q. What time did you go to school in the morning? A. I went to school in the morning about half past eight. 20

Q. What time did you get up to study your lessons? A. I studied my lessons the night before.

Q. You said you got up in the morning to study your lessons? A. No, sir.

Q. You mean before you went to the store at night? A. Yes, sir.

Q. And you did that every night? A. Yes, sir.

Redirect examination by Mr. Milberg:

Q. Since this accident, Ben, did you feel the same as you always felt before? A. No, sir. 30

Q. What seems to be the trouble? Just tell us in your own words what is the trouble. A. Most of the times I get headaches, sometimes I get choked up in the nose and my sight wasn't very good.

Q. Your what? A. My eyesight.

Q. Is there anything wrong as the result of this accident—

Mr. Griffin: Objected to. 40

Dr. Joseph I. Berlin, direct.

Q. All right. Were your eyes hurt as a result of this accident? A. No, it doesn't hurt but the nerve in the eye always bothers me.

Q. Can you study and do your lessons the same as you could before the accident? A. No, sir.

10 Q. What is that? A. No, sir.

Q. You were asked whether or not you ever told Louie Gatkin to slow up and you were asked whether or not this was on Coles Street. Did you ever at any time while you were driving with him tell him to slow up, whether it was on Coles Street or any other street? A. No, sir.

Q. What is that? A. No, sir.

Q. And did Louie say anything to you who the medicine was for? A. No, sir.

20

DR. JOSEPH I. BERLIN, sworn.

Direct examination by Mr. Milberg:

Q. Doctor, you are a practicing—

Mr. Griffin: I admit the Doctor's qualifications.

Mr. Milberg: Thank you. I want to have it on the record.

30

Q. —practicing in this City? A. Yes, sir.

Q. And how long have you been practicing, Doctor? A. In this city?

Q. In this city. A. In this city since 1922.

Q. And prior to that time how long had you been practicing? A. In New York City, Post Graduate Hospital.

Q. How long had you been practicing there altogether? A. Since 1907.

40

Q. And what college are you a graduate of? A. College of Medicine and Surgery, Chicago, Illinois.

Dr. Joseph I. Berlin, direct.

Q. And have you specialized in any particular branch of medicine? A. Eye, nose and throat.

Q. And how long have you specialized in eye, nose and throat? A. Since 1916.

Q. And are you at the present time or within the past few years have you been connected or are you connected now with any hospitals or institutions? A. I am instructor of eye, ear, nose and throat at the New York Post Graduate Hospital, Chief of the Eye, Nose and Throat Hospital at Greenville, Fellow of the American College of Surgeons, Certified Eye, Ear, Nose and Throat Specialist. 10.

Q. Connected with any other institutions? A. On the staff of the Columbus Hospital, New York.

Q. Doctor, do you recall treating Benjamin Shefts? A. Yes. I have my record right here. 20

Mr. Milberg: Any objection to referring to it?

Mr. Griffin: No.

Q. Will you, Doctor, tell us from the records before you the history or what has been done by you in this particular case and what you have found?

A. On September 27, 1925, I was called by Dr. Marks to see a case that pertained to my specialty and on getting to 121 Mercer Street a boy by the name of Benjamin Shefts—the history was that five days prior to this date he was thrown from an automobile, taken to St. Francis Hospital and had received a blow on the nose, broken nose. X-ray was taken at the hospital, did not show any— 30

Q. This is what you were told? A. Yes, and remained in the hospital until that day—taken home—when I was called. I found he had bruises and contusions over the right part of both eyes, had 40

Dr. Joseph I. Berlin, direct.

10 what appeared to be a stitched abscission over the upper part of the nose; that is, to explain that, a suture most likely has been taken of some area over the nose, the other part of the nose, and there appeared to be just a little puerile matter—pussy—
 however, that was not of much consequence; had a fracture of the left nasal bone and the septum. I reset the fracture of both the nasal bone and the septum; and saw him again on the following day, on the 28th; again on the 29th; again on the 30th; and then on October 3rd; then I discharged him and turned him back again to Dr. Marks, the family physician, for general treatment.

20 Q. When you refer to the fractures, in ordinary words a fracture is a break or, you could say, a broken nose? A. Yes.

Q. And as a result of that, Doctor, in your experience would it be possible to set or have the nose in the condition as prior to the accident? A. Would it have set?

Q. Yes.

Mr. Griffin: I object to the question.

Mr. Milberg: I will reframe the question.

30 Q. Now, what I would like to know, Doctor—just take your glasses off (addressing Benjamin Shefts, whom the doctor is examining)—the nose as it appears now, is that a result of that fracture, the protruding of the bridge— A. No, counsellor, that is a question that I am not able to answer, for this reason, that I have never seen that boy before. Now it is possible that that would cause it and it is also possible that he may have had a flattened nose prior to that. All I can testify is to what I found.

40 Q. And you reset the fracture? A. Reset the fracture.

Dr. Joseph I. Berlin, cross.

Q. And did you find any trouble with his eyes?
A. The swelling and contusion were disappearing and there wasn't anything further so far as I was concerned to do at that particular time.

Q. And would you say that the boy was suffering pain from the fracture in the condition that you saw him in? A. At the time, yes. 10

Q. And may I ask you, Doctor, if the boy complained at this time of headaches and a choked-up feeling, whether in your opinion you would say that would be the natural result of the injury as sustained in this particular case? A. That is possible.

Q. It is possible? A. Yes.

Q. Doctor, may I ask you what you charged for services in this particular case for the operation and resetting? A. One hundred and thirty-five dollars. 20

Cross examination by Mr. Griffin:

Q. Doctor, at the time you discharged this boy on October 3rd, so far as his condition at that time with reference to anything further that you could do for him, was he normal? A. In so far as the nose was concerned, the part I was called in to see. 30

Q. For the injury you had treated him for he was normal? A. Yes.

Q. And at that discharge was there any permanent disability there? A. To the nose, you mean?

Q. Yes. A. Why none other than the usual result of what would happen to any fracture. There is always a little swelling, a little odema between the bones.

Q. Would that disappear? A. Sometimes it does 40

Dr. David M. Marks, direct.

and sometimes it does not. I have not seen him since then.

Q. You have not been called back to treat him for any eye or nose trouble since October 3rd, 1925? A. No.

10 Q. This condition that counsel explains to you now, Doctor, with reference to breathing might be brought about or might be caused by several other conditions, might it not? A. Yes, that is possible.

Q. And that could only be disclosed by a proper examination? A. Yes.

Redirect examination by Mr. Milberg:

20 Q. When you say, Doctor, you discharged him on or about October 3rd, you mean that you turned him over to Dr. Marks? A. Turned him back to Dr. Marks.

DR. DAVID M. MARKS, sworn.

Direct examination by Mr. Milberg:

Q. Doctor, you are a practicing physician? A. I am.

30 Q. In the City of Jersey City? A. Yes, sir.

Q. How long have you practiced in the City of Jersey City? A. Ten years.

Q. Are you connected with any hospitals? A. The Fairmount Hospital.

Q. Do you know the boy, Benjamin Shefts? A. I do.

Q. And will you please tell the Court and jury the nature of your treatment—did you treat Benjamin Shefts? A. Yes.

40 Q. Will you please tell the Court and jury the

Dr. David M. Marks, direct.

nature of your treatment and exactly what was done by you from the first day you were brought into this matter? A. I was called to see that boy. At the time he had been at St. Francis Hospital for about four days. I was called to his home. I found the boy in bed complaining of a great deal of pain in the area of his nose and eyes. On examination I found both eyes swollen and signs of a fracture of the nasal bone; therefore I thought the boy should see a man more versed in that kind of work, and I called the specialist in, Dr. Berlin. 10

Q. You then, of course, consulted Dr. Berlin?

A. Yes, sir.

Q. And Dr. Berlin treated the boy and he testified here? A. He did. 20

Q. In connection with the swelling of the nose and eyes was any part of the body injured in any way? A. He had a few abrasions and contusions over the area of his eyes, over his forehead, and there was signs of a little cut over his eyes—over his nose rather—where a stitch had been taken and removed that contained a little pus. It formed a little stitch abscission.

Q. Well, was the other part of his face normal? 30

A. Yes, sir, it was.

Q. No other swelling of his eyes, nose and forehead? A. No, sir.

Q. Any other part of the body that you found?

A. I don't think so.

Q. Were you treating the boy in between the time that Dr. Berlin attended to him? A. I came in every day.

Q. And what did you find on your daily visits?

A. I found the boy was progressing fairly well. He had run up a little temperature as a result 40

Dr. David M. Marks, direct.

of pus absorption in his nose and during this time he complained of headache and dizziness in getting up, which we would expect.

10 Q. Would you say, Doctor, the complaints of headaches and dizziness would be the result of the injuries that he sustained in this particular case? A. Was the only reason I could account for it at that time.

Q. Had you ever treated this boy for any ailment prior to this accident? A. I had.

Q. You are the regular family physician? A. Yes.

Q. And what, if anything, have you treated him for? A. Slight matters, little sore throats and gripes—nothing of any consequence.

20 Q. Had you ever treated the boy for any ear, eye, or nose trouble? A. I wouldn't treat him for those things.

Q. You would not? A. No, sir.

Q. Did you have occasion to? A. No.

Q. Did you ever have occasion to treat him for any of those things prior to that? A. No.

30 Q. How long, Doctor, did you continue to treat this boy after Dr. Berlin discharged him and turned him over to you? A. About two and a half or three weeks.

Q. Daily visits? A. I might skip a day or two.

Q. After the three weeks how often did you call at the house? A. I haven't a very good remembrance. I remember calling a few days after that; and the only advice I could give him at that time was to take it easy.

Q. Not to subject himself to any strenuous work or exercise? A. Yes.

40 Q. Why did you say that? A. Because he complained of dizziness.

Dr. David M. Marks, cross.

Q. Would you say that his condition was such that his resistance was low? A. No, only I thought that it was advisable after a fracture of the nose and on account of subjective symptoms I thought it advisable to give him a good rest anyway.

Q. How long did you continue to treat him after these daily visits? A. I continued to treat him regularly. 10

Q. You eased up on your visits as the boy was progressing? A. Yes.

Cross examination by Mr. Griffin:

Q. After October 3rd Dr. Berlin turned the boy back to you again? A. Yes.

Q. And you treated him again for two and a half or three weeks daily? A. No, sir, it was daily the first—at first—and then I eased up. 20

Q. At the end of the first week after October the 3rd how many times were you called in? A. After that I wasn't called; I just came.

Q. How many times did you come? A. I imagine about six or seven times.

Q. You mean six or seven times was the entire number of times that you saw the boy from the time he was discharged by Dr. Berlin? A. Oh no. 30

Q. How many times would you say it was? A. I would imagine that it would be about fourteen times.

Q. About fourteen times. And on any of these visits did you prescribe any medicines for him? A. I did.

Q. What were those medicines for? A. Originally they were medicines to irrigate his nose with, to keep the nose free of mucus and possibly a slight amount of pus, and later, as a sedative to 40

Dr. David M. Marks, redirect.

quiet his nerves a little bit and to give him a proper rest.

Q. When was the last time you treated this boy?

A. I don't remember the exact date.

10 Q. About when? A. The latter part of October.

Q. That is a month after the accident? A. About that.

Q. You haven't been called by either him or his parents since that time? A. I saw him once or twice at the office sometime after the accident.

Q. Yes. A. And at those times he complained of headaches and obstruction of the nose.

20 Q. What did you do for him? A. Nothing. I just told him to irrigate his nose and keep it well drained.

Q. You didn't send him back to Dr. Berlin when you found out there was an obstruction in his nose? A. I did not.

Q. You haven't prescribed for him any medicine yourself? A. No, just the irrigation, just keeping the nose clean.

Q. When was the last time you saw this boy for examination? A. Oh, about a year or two ago.

30 *Redirect examination by Mr. Milberg:*

Q. Doctor, when you mentioned the prescribing of the sedative, that is, to ease the pain. A. Yes.

Q. Will you tell us in plain words— A. Merely to help him keep quiet.

Isidore Shefts, direct.

ISIDORE SHEFTS, sworn.

Direct examination by Mr. Milberg:

Q. Where do you live, Mr. Shefts? A. I live at 247 Montgomery Street now.

Q. And at the time of the accident where did you live? A. 121 Mercer Street. 10

Q. Did you know Mr. Gatkin? A. Yes, sir.

Q. Did you know his son? A. Yes.

Q. Do you know where they lived at that time? A. Yes, in Jersey Avenue.

Q. How far away from you? A. About half a block.

Q. And had you known that this boy was riding on this truck? A. I didn't know it. If I had known I wouldn't have let him. 20

Q. You didn't see the accident? A. No. After the accident somebody called—a man called me up.

Q. A man called you after the accident? A. A man called me after the accident and I went to Mr. Gatkin's.

Q. To the father's? A. Yes.

Q. When? A. Right in the night somebody called me up, Mr. Gatkin's automobile had an accident and my boy was in it and I went and asked Mr. Gatkin what was the matter. 30

Q. Where did you see Mr. Gatkin? A. Right after that.

Q. Where? A. Right in his house.

Q. You saw who there? A. Mr. and Mrs. and Louie and the little girl.

Q. Yes. What did you say to him? A. I said, "Mr. Gatkin, what was the matter?" and he said, "Nothing, just a little accident; your boy got little scratches, and we took him over to the hospital"; 40

Isidore Shefts, direct.

and I say, "They took him over to the hospital?" and he said, yes, and then I went back again.

Q. Was anything else said there at that time?

A. He said, "Benny took a ride with Mr. Louie Gatkin," and at that time when I went in with him—
10 an officer came and told my wife—

Q. Never mind what the officer told you. Did he say anything else to you in the house when you spoke to him about your boy? A. That is what he said: "There is nothing the matter and they took him to the hospital."

Q. Did he say where they were going? A. He said they went to the garage.

Q. Who said it? A. Mr. Gatkin said it.

Q. Which Mr. Gatkin? A. The old man, Mr.
20 Gatkin.

Q. Said what? A. That he went over to the garage and that Benny took a ride with Louie, and he didn't know then he went for medicine. That is what he told me then, that he went over for medicine too after.

Q. He told you that? A. Yes, and then they went to the garage.

Q. Now after you got this report you went to the hospital? A. Yes.

Q. Did you see your boy there? A. I went in
30 the hospital and they said, "Don't bother with him." They didn't want to let me see him.

Q. You went up immediately after you left Gatkin's house? A. Yes.

Q. And didn't you see the boy that night? A. Yes, sir.

Q. Did you see what was his condition? A. I didn't recognize that boy.

Q. You didn't what? A. He was in such condi-
40 tion I didn't recognize him.

Isidore Shefts, direct.

Q. Didn't recognize him? A. No.

Q. Did you go back again the next day? A. I didn't sleep the whole night; I went right in the morning.

Q. You went in the morning? A. Yes.

Q. What did you do then? A. I went over there and I asked to give him a night nurse and day nurse with him. 10

Q. You had a night nurse and a day nurse? A. Yes.

Q. How long did you keep him in the hospital? A. Four days.

Q. Did you have an X-ray made? A. Yes.

Q. And who was the doctor that made that? A. Dr. Collins.

Q. Collins? A. Yes. 20

Q. And was Dr. Collins the man that was treating him at the hospital? A. Yes.

Q. Why did you take the boy away from the hospital? A. The fourth day I went—

Q. Let us cut it short. Did Dr. Collins leave for a vacation? A. Left for a vacation on Sunday.

Q. And then you decided to take the boy home? A. Yes.

Q. Did you pay your hospital bill? A. Yes. 30

Q. How much was that?

Mr. Griffith: I object to that unless it is going to be connected up.

Q. You did pay a bill to the hospital? A. Yes, sir.

Q. And while he was in the hospital was he in a ward? Where was he in the hospital, in a ward or in a room? A. In the ward.

Q. Did you pay for the X-ray? A. I paid for everything. 40

Isidore Shefts, cross.

Q. And what did that include, what you paid for? Don't mention the amount, just mention what it included. A. The hospital and the X-ray; that is all it included.

10 Q. Did it include nurses? A. After the hospital I paid it over together the same nurses were there at my house.

Q. Mr. Shefts, what business are you in? A. Furniture business.

Q. Jersey City? A. Jersey City.

Q. And before this accident did this boy of yours do any work for you? A. Oh, he used to come in at night time and help me along.

20 Q. What did he do? A. After six o'clock my employees go away. The salesmen go away and then he is waiting on customers when they come in and if anybody comes in and makes a payment he would give them a receipt.

Q. And did he do that almost every day? A. Yes, he was every day in the store.

Q. Now, you say you had the nurses in your home day and night for three weeks after you took the boy back? A. Yes.

30 Q. Did you pay any other bills? A. I paid the doctor bills; I paid the nurse bills and I paid the medicine bills.

Cross examination by Mr. Griffin:

Q. When you got to Mr. Gatkin's home that night and Mr. Gatkin told you that they had this accident on the way to the garage, didn't he? A. Went over for medicine and then went to the garage and had the accident on—

Q. Yes or no. A. Yes.

40 Q. And it was some time later that you learned from Mr. Gatkin's son that they had gone to a

Dr. David M. Marks, direct.

drug store for something, wasn't it? A. (No answer.)

Redirect examination by Mr. Milberg:

Q. Did you talk to Gatkin since that time? A. I said hello to him.

10

Q. Did you ever discuss or talk to him about this case? A. About this case I never talked to him.

DAVID M. MARKS, recalled:

Direct examination by Mr. Milberg:

Q. Doctor, your bill was paid by Mr. Shefts for all your services? A. Yes.

20

Q. And what was the amount? A. Seventy-five dollars.

Q. Doctor, are you familiar with the charges and rates of the hospital for the furnishing of the bed or ward and X-ray and other charges? A. More or less; they vary a great deal.

Q. If Mr. Shefts had paid seventy-five dollars for four days, including the doctor's attention, the X-ray and other items, would you say that that was an excessive charge? A. No.

30

Q. Particularly bearing in mind the injuries which this boy received? A. No, sir, it was not.

Q. Doctor, can you tell us what the regular rate was for a trained nurse on or about September and October of 1925? A. Twelve-hour day or twenty-four hour day?

Q. Twelve-hour day. A. Seven or eight dollars.

Q. Seven or eight dollars? A. Yes.

Q. Is it anything below seven dollars? A. No, sir.

40

Q. And would you say, Doctor, in your opinion,

Motion for Nonsuit.

it was necessary to have a day and night nurse for this boy for a total period of about three weeks from the time of the accident? A. I remember the patient having a day nurse for that length of time, but I do not remember whether the night
10 nurse stayed as long as that. I don't remember whether the night nurse was on for three weeks.

Q. Would you say, in your opinion, it was necessary to have a night nurse? A. It would be advisable, yes.

Q. And you say the rate was seven or eight dollars a day? A. Yes.

(Plaintiff rests.)

20 Mr. Griffin: If your Honor please, I ask for a nonsuit on the ground that there has not been any negligence shown on the part of the driver of the car owned by the plaintiff. The mere happening of the accident will not make negligence. The boy didn't see the other car. He knows he was hit in the rear. He says that they were at least half way across the street at the time they were hit. They had the right-of-way; and I don't think there are any facts for the
30 jury to base negligence on at this time so far as the defendant Gatkin is concerned.

The Court: Motion denied.

Mr. Griffin: Exception.

(Recess.)

Morris Gatkin, direct.

AFTER RECESS.

DEFENSE.

MORRIS GATKIN, sworn.

Direct examination by Mr. Griffin:

Q. Mr. Gatkin, where do you live? A. 477 Jersey Avenue.

10

Q. Jersey City? A. Yes.

Q. Did you live there in September, 1925? A. Yes, sir.

Q. How long have you lived in Jersey City? A. About three years.

Q. What kind of business are you in? A. Butter and egg.

Q. Have you any automobiles that you used in that business? A. Yes, sir.

20

Q. How many? A. One.

Q. What kind of car is it? A. Ford.

Q. Is that the car that you use now that you were using in September? A. No.

Q. Did you use a car in September, 1925? A. Yes, sir.

Q. Was that car in an accident of some kind on the night of September 23, 1925? A. Yes.

Q. Who was driving the car that night, if you know? A. My son.

30

Q. When did you last see your son previous to something happening to the car? A. He never sits with me; he never go with me.

Q. What was that? A. He never go only with my son.

Q. The night of the accident and before the accident happened you saw your son, did you? A. Yes.

Q. What time was that? A. About half past

40

Morris Gatkin, direct.

four; I don't know exactly the right time; about four or half past four.

Q. Did you have any conversation with your son at that time? A. No, sir.

10 Q. Did you know where your son was going at the time the accident happened? A. No, sir.

Q. Did you send him any place? A. I sent him in the garage is all with the car.

Q. Did you send him for anything for you that night? A. No, sir.

Q. Did he have any place to go for you, any business of yours, for business? A. No, sir.

20 Q. Wait until I finish, please. Did he have any work for you on September 23rd in the evening other than to take the car and put it in the garage? A. No, sir.

Q. Did you ask him to go to any drug store for anything for you? A. No.

Q. Did he get any medicines for you that night? A. No.

Q. Did you see your car after the accident? A. After the accident, no.

Q. When did you see it? A. I see it before he took it in the garage.

30 Q. Did you see it after it was hit? A. No.

Q. You never saw the car again? A. No.

Q. Where did they take it to? A. Well, it was—they took it in the garage.

Q. Did you go in the garage and look at it? A. I was in the garage there.

Q. Did you go see? A. No.

Q. You never saw the car again? A. No.

Q. Do you remember when it was hit? A. Yes.

40 Q. On Coles Street and Newark Avenue? A. I don't see the accident.

Q. But it was hit, wasn't it, there? A. Yes.

Morris Gatkin, direct.

Q. Did you go around to Coles Street and see the car after the accident? A. No.

Mr. Milberg: I object—well, he has answered; I withdraw the objection.

Q. Did you see the car a week after the accident? A. A week after? 10

Q. When is the first time you saw the car after it was damaged and broken? A. No.

Q. Never saw it. A. I seen it after the accident.

Q. Yes, where was it? A. Yes.

Q. Where? A. At the corner of Coles and Newark Avenue.

Q. You went down there? A. Yes.

Q. Where was the corner? What part of the corner? A. Corner of Coles Street between Newark Avenue. 20

Q. Which corner, north, east, south—do you know? A. On the right-hand side.

Q. The right side going which way? A. Coles Street.

Q. And it crossed over? A. Crossing Newark Avenue.

Mr. Milberg: I object—after the accident.

Mr. Griffin: Withdraw it. 30

Q. Did you see where your car was damaged after the accident, where it was broken?

Mr. Milberg: I object to that, if the court please. He must have been told.

The Court: He says he went down after the accident and saw it.

Mr. Milberg: He says he didn't, but I withdraw it.

Q. Where was the car damaged when you got 40

Morris Gatkin, cross.

there? Where was it broken? A. The left side of the wheel and the axle.

Q. The left side? A. Yes.

Q. And what wheel? A. The left wheel, the back wheel.

10 Q. The left wheel in the back or the right wheel in the back? A. The left.

Q. The left wheel in the back? A. Yes.

Cross examination by Mr. Milberg:

Q. Do you know this little boy? A. Yes, I know him.

Q. How many times was he on the car with you and your son? A. He never was in my car.

20 Q. Don't you know that he was on that car, Mr. Gatkin, when you used to make deliveries? A. He wasn't with me.

Q. Wasn't he in the car with you and your boy? A. Not with me.

Q. Just try to remember, Gatkin. A. No, sir.

Q. How many times did you see him riding on the car? A. He passed my house in the car.

Q. Will you answer my question? How many times did you see him riding in your car? A. Not in my car.

30 Q. Never saw him? A. No, sir.

Q. Never made any deliveries? A. No, sir.

Q. Never sat on the car with you? A. No.

Q. Do you remember being in the car with this young boy? A. No.

Q. And passing Mr. Shefts on Newark Avenue one day? A. No, sir.

Q. Did you ever talk to Mr. Shefts about it? A. No, sir.

40 Q. And you are sure he was never on your car? A. No.

Morris Gatkin, cross.

- Q. Who drove that car? A. What is that?
- Q. Who drove that car of yours? A. My son.
- Q. Did you ever drive it? A. He is the driver.
- Q. He is the driver, working for you? A. Yes, sir.
- Q. Did you pay him? A. Yes, sir. 10
- Q. How much? A. Seven dollars a week.
- Q. And does he live home with you? A. Yes.
- Q. In the same house? A. Same house.
- Q. And you buy his clothes? A. He buy himself.
- Q. Does he support himself on seven dollars?
- A. Yes.
- Q. Does he pay any board? A. Sure.
- Q. How much board does he pay? A. He pay nothing; he gets board free.
- Q. What else does he get free? A. That is all. 20
- Q. Just his board? A. Yes.
- Q. And do you pay anything else for him? A. No, sir.
- Q. Nothing at all? A. Nothing.
- Q. And you give him seven dollars a week and this particular night you told him to go right to the garage, is that correct? A. Yes.
- Q. Did you know the little girl was with him that night? A. No, sir.
- Q. Did you tell him to take the little girl? A. No, sir. 30
- Q. And how old was the girl at the time? A. She was about six or seven years.
- Q. And what time was it that he took the car to the garage? A. I don't know exactly, about five o'clock.
- Q. Five o'clock? A. About half past five.
- Q. And you are sure it wasn't nine o'clock?
- A. No.
- Q. It must have been about five o'clock? A. No. 40

Morris Gatkin, cross.

Q. Is that right? A. It was five.

Q. What time do you usually get back from your deliveries in the day? A. I come over about half past two or three.

10 Q. Do you ever stay out until four o'clock? A. Yes.

Q. Do you ever stay until five o'clock? A. No.

Q. Never stay out as late as five o'clock? Were you with the boy that day when he was making his deliveries? A. The boy—I can't understand.

Q. (Question repeated.) A. Yes.

Q. What is that? A. My son was delivering.

Q. Your son was delivering? A. Yes, with me.

Q. Did you go with him every day? A. Every day.

20 Q. Did you go with him every afternoon? A. Afternoon, yes, sir.

Q. I am asking you, did you go with him every day? A. Yes, sir.

Q. Morning and afternoon? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And during every day of your deliveries you never saw this boy on the truck? A. No.

Q. Is that right? A. No—right.

30 Q. Is that correct? A. Yes.

Q. And that night you sent him to the garage, did you? A. Yes, sir.

Q. And you didn't know what happened? A. I don't know.

Q. What is that? A. No.

Q. Well, when he came home did he say anything to you? A. Yes, he told me about it.

Q. Told you about the accident? A. Yes.

40 Q. And was this boy ever in your house? A. Never was in my house.

Q. Never saw him in your house? A. No.

Louis Gatkin, direct.

Q. Did you ever see him at all? A. I saw him outside.

Q. Did you ever see him, talk to the boy? A. No.

Q. Never saw him talk to your boy? A. Had no business with him, no—I don't know. 10

Q. What made you say that you had no business with him? A. Well, I got nothing to do with him.

Q. Now I want to ask you again, Gatkin, if you are sure—and you are sworn to tell the truth—that you never saw that boy on that truck with you making deliveries? A. No, sir.

Q. You are sure of that? A. No, sir; yes, sir.

Q. Did you ever go with him to Sussex Street to make deliveries? A. No, sir. 20

Q. Did you ever give that boy any eggs to deliver? A. No, sir.

Q. Did you ever give him any butter? A. No, sir.

Q. Have you got any customers on Grove Street between Sixth and Seventh Street? A. Yes.

Q. What is the name? A. I have forgot already.

Q. You don't know the names? A. No.

Q. And you are sure this boy never made any deliveries for you at that place? A. Right. 30

Q. Is that correct? A. Yes.

Q. And you are sure of that? A. Yes, sir.

LOUIS GATKIN, sworn.

Direct examination by Mr. Griffin:

Q. Louis, where do you live? A. 477 Jersey Avenue.

Q. You live with your father, who was just on the witness stand? A. Yes, sir. 40

Louis Gatkin, direct.

Q. Do you live with your father in the same house? A. Yes, sir.

Q. And did you live with your father in September of 1925? A. Yes.

10 Q. Were you employed by your father? A. Yes, sir.

Q. How much did you get a week? A. About seven dollars.

Q. What was the nature of your employment? What did you do? A. To drive—chauffeur.

Q. Drive what? A. The truck.

Q. What? A. The truck.

Q. What kind of car was it? A. Commercial.

20 Q. What did you do with the truck? A. Deliver butter and eggs.

Q. Your father is in that business? A. Yes, sir.

Q. And was he in that business September 23, 1925? A. Yes, sir.

Q. Do you know this boy, Benny Shefts? A. Yes, sir.

Q. How long have you known him? A. He lives in my neighborhood.

Q. What? A. He lives in my neighborhood.

30 Q. How long have you known him? A. About four years.

Q. Does he ride on your car with you? A. Well, other times when I go to the garage he is always pestering me to take him with me.

Q. Well, do you take him? A. Well, other times I take him.

Q. Well, on some occasions do you let him ride in the car? A. I did.

40 Q. Now, this car—on September 23rd he was in the car with you that night, was he? A. Yes, sir.

Louis Gatkin, direct.

Q. Who keeps the keys for the car? A. My father does.

Q. And on this night who had the keys? A. My father did.

Q. And did he give them to you? A. He gave me the keys. 10

Q. What time was it about when he gave you the keys? A. It was a little after nine, I believe it was.

Q. Where was he when he gave you the keys? He was in the house, your house? A. Yes.

Q. Did you have any conversation with your father when he gave you the keys? A. Just gave me the keys and told me to bring the car to the garage. 20

Mr. Milberg: Object to that and ask that it be stricken out.

The Court: "Just gave me the keys."

Q. Your father gave you the keys? A. Yes.

Q. And does he do that every night? A. Yes, sir.

Q. And what did you do then? A. About the boy?

Q. What did you do after your father gave you the keys—everything? Tell me everything that happened. A. I started the car up. When I came outside I saw Benny near the car and I said to him, "What are you doing out so late?" and he said, "Nothing"; and I told him to go home, and he didn't want to, and so I jumped in the car and started the motor up and he says he is coming along with me, and I says, "All right, come on." At first I didn't want to but he hopped on. 30

Q. Where did you go to? A. I was on my way to the garage but I didn't feel like walking to 40

Louis Gatkin, direct.

Eighth Street for my medicine so I thought I would drive over.

Q. What medicine did you go to Eighth Street for? A. For myself.

Q. What was it, do you remember?

10

Mr. Milberg: I object, if your Honor please. It does not make any difference. It is absolutely immaterial.

Mr. Griffin: Just to show whether the man knows what he went for.

The Court: Well, if he knows. Apparently he does not know; he is taking a lot of time to it.

Q. What was it? A. Medicine for myself.

20

Q. What was it, prescription or not? A. Prescription.

Q. Where did you get the prescription? A. At the drug store—at the doctor's.

Q. What drug store did you go to? A. Eighth Street and Grove.

Q. And when you got there? A. I sent the lad in.

Q. And you gave him the money? A. Yes, sir.

Q. Was the medicine for your father or for yourself? A. Myself.

30

Q. Did you have any reason to go down to this drug store or go past the garage for your father? A. Sure I had to. The garage was only four blocks away from the house.

Q. Do you understand my question? I asked you if there was any reason why this night you should go by the garage and go by the drug store for your father or was it just for something that he wanted? A. Well, it was for myself.

40

Q. Had your father sent you to the drug store this night for anything for him? A. No, he did not.

Louis Gatkin, direct.

Q. Were you on any business of your father's this night after you went by the garage and went on to Eighth Street to the drug store? A. No, sir.

Q. Now as you proceeded along Coles Street which direction were you going, toward the river?

A. Toward Grand Street. 10

Q. Do you know which direction that is, whether it is north or south? A. No.

Q. It is south, isn't it? A. South.

Q. No, I beg pardon.

Mr. Milberg: It runs east and west.

Mr. Griffin: What is that?

The Court: Coles Street runs east and west?

Mr. Griffin: I change that, if your Honor please, because I had those directions, and one of the jurors checked me up. 20

A Juror: North and south.

Q. North and south is Coles Street.

A Juror: Yes.

Mr. Milberg: I may be mistaken.

Q. Anyway, Newark is down this way and this is Grand and this is Coles. Now you were coming down Coles Street towards Grand Street? A. Yes. 30

Q. Not with reference to the center of Coles Street which side of the street were you traveling on? A. The right-hand side of the street.

Q. Were you nearer the center of Coles Street or nearer your right-hand curb?

Mr. Milberg: I think the question is absolutely leading. I think the witness is intelligent enough to answer that.

The Court: He said he was on the right side. Now he can ask him where. 40

Louis Gatkin, direct.

Q. Which part of the right side were you on?

A. I don't know what you mean.

Q. Were you nearer the curb or were you nearer the center? A. Well, nearer the center.

10 Q. When you got to Newark Avenue did you do anything? A. Yes, sir—well, I approached Newark Avenue—I slowed down almost to a stop and blew the horn and to my left I saw a car about forty feet away.

Q. To your left? A. Yes, sir.

Q. And what street was that to your left? A. He was on Newark Avenue.

Q. Had he reached this corner yet, of this crosswalk? A. No, he was quite a distance away from me.

20 Q. I think you said forty feet? A. Yes.

Q. Away from you or the crosswalk? A. About forty feet away from me.

Q. And what did you do then? A. Continued to cross the street.

Q. And how far did you get before something happened? A. I was almost over.

Q. How far would you say? A. About half way.

30 Q. Had the front of the car passed the center? A. I had.

Q. And what part of your car was struck? A. Well, the next thing I know I was struck and the car turned over.

Q. What part of your car was struck? A. The rear.

Q. What part of the rear? A. The left.

Q. And when your car stopped and turned over where was it? A. I guess it hit me so hard the car fell over on Newark Avenue.

40 Q. Was it on Newark Avenue on the intersec-

Louis Gatkin, cross.

tion of this street, was it, when it stopped, or where was it? A. It was laying about half across Newark Avenue.

Q. Which crosswalk was it, this crosswalk or that one? A. Not that side.

Q. On the northerly crosswalk of Coles Street as it crosses Newark Avenue? A. Yes, sir. 10

Q. Your car was lying? A. Yes, sir.

Q. And how far from this southwest corner? A. Well, about ten feet away from the corner.

Q. About ten feet away from the corner. And Benny fell out, did he, and the car fell over on him? A. That is right.

Q. How fast were you traveling as you crossed Newark Avenue on Coles Street? A. I couldn't say, about eight miles an hour. 20

Q. Did Benny say anything to you about slowing down, that you were going too fast? A. No, sir.

Cross examination by Mr. Milberg:

Q. How old are you, Louie? A. Twenty now, will be twenty-one in July.

Q. How long have you been working for your father? A. About four years. 30

Q. Have you graduated from high school? A. No, sir.

Q. Public school? A. Yes, sir.

Q. Did you graduate from public school? A. Yes, sir.

Q. And since then you have been working for your father? A. Yes, sir.

Q. And how much has he been paying you since you first started? A. Five dollars first.

Q. And how much do you get now? A. Seven dollars. 40

Louis Gatkin, cross.

Q. Still get seven dollars? A. Yes.

Q. And how old are you? A. Twenty-one in July.

Q. And you don't pay any board, do you? A. Of course not.

10 Q. Do you buy your own clothes? A. Yes, sir.

Q. Have you got an account of your own? A. No, sir.

Q. Who pays your doctor bills? A. Haven't been sick.

Q. Have you ever had occasion to be sick? A. No.

Q. Then this time you got this doctor's prescription is all a myth, isn't it? A. Well, I paid for that.

20 Q. Well, you just said you were never sick. Did you mean that or did you forget this once? A. Yes.

Q. Now wasn't it a fact that it was your father's prescription? A. No, it was mine.

Q. You are just as certain you were never sick? A. That wasn't serious.

Q. I just asked you if you were ever sick and you said you weren't. Now, isn't it a fact that this was your father's medicine? A. No, sir.

30 Q. It was not? A. I can prove it.

Q. I am asking you, who was the doctor that attended you? A. Dr. Thorne.

Q. And did you pay him for the visit? A. Yes, sir.

Q. Now how long had you known this boy Benny? A. Four years.

40 Q. How many times would you say, Louie, altogether since you have known him that he was on this truck helping deliver or riding with you,

Louis Gatkin, cross.

how many times about? A. Why he has been with me several times but not on deliveries.

Q. Let me see if we can get this right. I say, about how many times was this boy on your truck—I suppose after school—when you were making your delivery of butter and eggs. A. None at all. 10

Q. What is that? A. None at all.

Q. Never at all? A. No.

Q. Is that right A. Yes, sir.

Q. You want us to understand he was never on that truck with you? A. On deliveries, no.

Q. When was he with you? A. If I had to go to the garage.

Q. Did the boy ever help you take off the butter and eggs when you got through the day's work and bring it into the house? Just answer my question, did he, yes or no? A. No, sir. 20

Q. Never did? And he was never on the truck making any deliveries or running on there with you, is that a fact? A. Yes, sir.

Q. You are sure of that? A. No deliveries.

Q. Did he ever go down to Sussex Street with you? A. No, sir.

Q. Did he ever go to Grove Street and Sixth Street or Eighth Street? A. No.

Q. Have you got any customers on Grove Street between Sixth and Seventh? A. Yes, sir. 30

Q. Who are they? A. Siegleman.

Q. Was this boy on the truck with you at any time you made deliveries there? A. Not that I remember.

Q. Well, was he? A. No, sir.

Q. Are you sure that he wasn't? A. Positive.

Q. Or is it positive that he may have? A. No.

Q. That is absolutely certain that he never was 40

Louis Gatkin, cross.

on the truck with you? A. Because I make those deliveries in the morning.

Q. Didn't you ever make any deliveries in the afternoon? A. I have.

10 Q. How late would your deliveries usually be made? A. On certain days later.

Q. Did you ever make any deliveries as late as four o'clock? A. Sure.

Q. Did you make any as late as five? A. Sure.

Q. Did you make any as late as six? How late was the latest deliveries you made? A. What days?

Q. How late? A. So there were other days at nine o'clock.

20 Q. So your father, when he testified that you were through at four o'clock every day, was—that was not true, was it? Answer me yes or no. A. He didn't understand what he was talking about.

Q. Oh you say now that he didn't understand what he was talking about? And when your father said when he was through with the car at four o'clock to take it to the garage that is not a fact, is it? A. On Wednesday I am through that early.

30 Q. I am asking you every day—is that right? Now this particular night you got the keys at nine o'clock—is that right? A. Yes.

Q. Well, didn't you keep the keys in your pocket? A. No, sir.

Q. Didn't you keep those keys in your pocket? A. No, sir.

Q. Who drove the car? A. I did.

Q. And when you turn off the ignition what do you do? A. Put the key in.

Q. Well, do you take the key out? A. Of course.

40 Q. What do you do with the key? A. Give it to my father.

Louis Gatkin, cross.

Q. Your father wasn't with you when you made every delivery, was he? A. He was with me on all deliveries.

Q. Always? A. Always.

Q. You never made any deliveries alone? A. No, sir.

10

Q. That is a fact, is it? A. Yes, sir.

Q. And you got the keys at nine o'clock? A. Yes, sir.

Q. Now, if your father said he gave you this key at five o'clock to take the car to the garage, that wasn't a fact, was it? He didn't understand my question. A. He didn't give me the key at five o'clock.

Q. Then he didn't understand my question, did he? A. No, sir.

20

Q. Now what are you afraid about in this case, Louie? A. I am not afraid. I have nothing to be afraid of.

Q. Didn't you say anything to anybody that you were afraid of something in this case? A. No, sir.

Q. Did you talk to anybody last night? A. No, sir.

Q. What? A. Last night?

Q. Yes. A. Not that I know of.

30

Q. Did you talk to my brother last night? A. Yes, sir.

Q. What? A. Yes, sir.

Q. Do you remember what you told him? A. He called me over.

Q. Do you remember what you told him? A. Yes, sir.

Q. Did you tell him about certain things that you couldn't testify to? A. No, sir.

Q. Didn't you say you couldn't testify to certain things because they might hold your father? A. Yes, sir.

40

Louis Gatkin, cross.

Q. You are sure of that? A. Yes, sir.

Q. Outside of that you have no reason to try to conceal anything about this matter? A. I have nothing to conceal.

10 Q. And when your father makes these statements that do not agree with your statements he didn't understand my questions? A. No, sir.

Q. You think that is it? A. Yes.

Q. Now, when you got—you were on your way to the garage after you left the drug store and that was rather late, wasn't it? A. I do not know the exact time.

Q. About what time? A. About half past nine or so.

20 Q. And as a matter of fact you thought it was late to see him out at that hour? A. Sure.

Q. Although it didn't mean anything to have your little sister out at half past nine that night? Did you think it was late for her? A. She happened to be outside.

Q. Did you think it was just as late for a little girl of six as it was a boy of twelve? A. Yes, sir.

30 Q. Why didn't you take your sister into the house, as long as you were going on this trip? A. I wanted to take her along.

Q. You wanted to take this trip to the drug store and then go to the garage? A. Yes, sir.

Q. And it was rather late for this little girl, wasn't it, this sister of yours, to have her out? A. (No answer.)

Q. You wanted to get her home, didn't you? A. Yes, sir.

40 Q. You wanted to get her home yourself in a hurry, didn't you? I mean, you were in a hurry to make this trip to the drug store? A. I wasn't in no hurry.

Louis Gatkin, cross.

Q. Wasn't it late to have this little girl out? A. Sister doesn't go to bed until late anyway.

Q. Well, what do you call late? A. Because she goes to school in the afternoon.

Q. What do you call late? A. Twelve o'clock.

Q. Twelve o'clock? A. Twelve o'clock—she don't go to bed until half past eleven or twelve. 10

Q. Anyhow, you wanted to make this trip to the drug store? A. Yes.

Q. You wanted to get that medicine before you went to the garage, is that right? A. Yes, sir.

Q. Why did you go up Coles Street? Why didn't you go up Jersey Avenue? A. I did go through Jersey Avenue to the drug store.

Q. On your way back from the drug store Jersey Avenue is a block from Coles Street. A. That shows that I wasn't in any hurry. 20

Q. That is what I want to know. You weren't in any hurry to get home? A. No.

Q. And you weren't in any hurry to get to this garage? A. No.

Q. And you weren't in any hurry to get the girl home? A. No.

Q. Of course, when this boy wanted to get on the truck at first you told him to go home, that it was late? A. Yes. 30

Q. And in spite of that you still let him on the truck, didn't you? A. Yes, sir.

Q. And in spite of the protest you gave him the money and prescription and asked him to have it filled for you, didn't you? A. Yes, sir.

Q. And then when you got to Coles Street—that is a paved street all the way up? A. Yes.

Q. And were you stepping on the gas? A. No, sir. 40

Louis Gatkin, cross.

Q. You were going about how fast? A. Along Coles Street?

Q. Yes. A. Fifteen.

Q. And then when you got to Newark Avenue did you slow up? A. Yes, sir.

10 Q. How slow were you going when you got to Newark Avenue? A. Eight miles.

Q. Now to go eight miles in a Ford you would have to have it in first gear, wouldn't you? A. No, sir, she was coasting in neutral.

Q. In neutral. Did you have your foot on the brake ready to stop? Anyhow, you were going about eight miles an hour? A. Yes, sir.

Q. That was before you got to the corner of Newark Avenue? A. Yes, sir.

20 Q. Now how far did you have to go to stop your car at eight miles an hour, Louie? A. You could make a sudden stop.

Q. How many feet would you have to go before you could stop it at eight miles an hour? A. I couldn't—

Q. Were your brakes in good condition? A. Yes, sir.

Q. They were in good condition? A. Yes.

30 Q. All right. How far would you have to go at eight miles an hour to stop your car? A. (No answer.)

Q. Could you stop it in ten feet? A. Sure.

Q. Could you stop it in less? A. I guess so.

Q. Well, what would you say as the driver of this Ford for the last so many years how far you could stop your car? A. Could stop it in about eight feet.

Q. Eight feet? A. Yes.

40 Q. Now, as you got to this corner, as I under-

Louis Gatkin, cross.

stand, of Coles and Newark Avenue you first saw this car forty feet away? A. Yes, sir.

Q. Am I right on that? A. Yes, sir.

Q. And he was to your left? A. Yes, sir.

Q. Do you know whether or not he had the right of way on your left? You have read the motor vehicle books, haven't you? A. Yes, sir. 10

Q. Do you know whether the man on the left or right has the right of way? A. The man on my right.

Q. And you have the right of way on your left, is that right? A. Yes, sir.

Q. Then when you got here and saw this car forty feet, he was driving fast, I understand? A. I have no idea how fast he was going.

Q. Did you see whether he was going fast or slow? A. No, sir. 20

Q. And when you started across you thought you could beat him across Newark Avenue? A. Yes.

Q. Why didn't you stop and let him pass? A. He was a distance away.

Q. Well, forty feet away? You saw him when you got to the corner and you were going eight miles an hour and you say by the time this car traveled forty feet it hit you before you got across? A. Yes, sir. 30

Q. And you thought you could beat him to it. A. (Witness laughs.)

Q. And you actually thought you could get across before he come on, isn't that a fact? A. I was nearer the corner than he was.

Q. Yes, and you thought you could get across before he could, isn't it so or not? A. (No answer.)

Q. Is there any reason you have to hesitate about that answer? A. I do not get that. 40

Louis Gatkin, cross.

Q. When you got to the corner of Newark Avenue and Coles Street and saw this car forty feet away and you were going eight miles an hour didn't you believe you could get across before he came on? A. Yes.

10 Q. But of course your judgment didn't prove—

Mr. Griffin: I object to that.

Q. But you didn't succeed in getting all the way across but you got hit before you got all the way over? A. Yes, sir.

Q. You have testified you got hit when you were in the middle of Newark Avenue there? A. Yes, sir.

20 Q. And hit on the left rear, is that right? A. Yes, sir.

Q. Now, didn't Benny tell you to slow up, that you were going a little too fast? A. No, sir.

Q. What? A. Only a crazy person could do that, go fast.

Q. How fast is the fastest that you ever drove your car? A. Well, certain places you can drive fast.

Q. And did he or did he not tell you to go slow? A. No, sir.

30 Q. Did he ever tell you before, slow up? A. No, sir.

Q. Now you are sure that he never made any deliveries with you, aren't you? A. Yes, sir.

40 Q. Do you remember the incident where your front mud bumper hit the bumper of another car where a fellow and girl were in and making love to each other—do you remember that incident, Louie, where your bumper—do you remember that—just try to think—do you remember down on Monmouth Street and Grand Street and do you

Sam Zimmerman, direct.

remember coming behind this car and pushing it a little bit and there was a fellow and girl in the front seat? A. I don't remember.

Q. What is the matter with your memory? Did you ever go down on Monmouth near Grand? A. No, sir.

10

Q. Did you ever go down on Grand Street? A. Yes, sir.

Q. Did you ever go through Monmouth Street? A. Very seldom.

Q. Do you ever go through Monmouth Street—did you ever go through Monmouth Street in the last few months? A. Yes, sir.

Q. And you don't remember that incident at all, do you? A. No, sir.

Q. Do you remember being on a truck with him and stopping at his father's store down on Railroad Avenue, after your deliveries? A. He has been—

20

Q. Answer the question yes, or no. A. Yes, sir.

Q. And that was before you were taking the car to the garage, wasn't it, while you were making deliveries? A. No, sir.

SAM ZIMMERMAN, sworn.

30

Direct examination by Mr. Griffin:

Q. Sam, where do you live, or where did you live September 23, 1925? A. 317 Third Street.

Q. Do you know any of the parties in this case? A. I know some, by sight, which one?

Q. Louis Gatkin. How long have you known him? A. I know him to say hello to him.

Q. How long have you known him to say hello

40

Sam Zimmerman, direct.

to him? A. I haven't seen him for quite some time until yesterday.

Q. You are under subpoena by me? A. Yes, sir.

Q. Where were you on the day of this accident?

A. I was standing on Newark Avenue.

10 Q. Standing on Newark Avenue at what corner?

A. The northeast corner.

Q. Northeast corner? A. Yes.

Q. Where was the car that young Gatkin was driving coming from? A. From Coles Street.

Q. Was it on Coles or Newark Avenue? A. On Coles Street.

Q. Where was the car that is, the Gatkin car, and the other car, where did that come from? A. From Newark Avenue.

20 Q. Which way, to his east—this is west on Newark Avenue; this is Coles Street and that is north and this south. Now which way was the other car going? A. Going west.

Q. And which way was Gatkin's car going? A. Going south.

Q. Did you see the cars when they hit? A. Yes, sir.

Q. And where was it that they hit? A. The front was passed half way over the street.

30 Q. The front of what? A. Gatkin's truck.

Q. And what part of Gatkin's truck was struck? A. The left rear, about the wheel.

Q. And when the Gatkin car stopped with reference to the westerly crosswalk of Coles as it goes over Newark Avenue where was the Gatkin car when it stopped? A. When it turned over?

Q. Yes. A. It was on Newark Avenue.

40 Q. How far from the corner? A. Right at the corner.

Sam Zimmerman, direct.

Q. At this corner here? A. Yes, sir, on Newark Avenue.

Q. At the southwest corner? A. No, the northwest corner.

Q. Over here? A. No, on the bottom, right on Newark Avenue.

10

Q. The southwest corner? A. Yes.

Q. And where was this car owned by Mr. Free after it hit the left rear wheel of the Gatkin car and came to a stop for the first time? A. Pulled over to the southwest corner.

Q. Pulled over to this corner here? A. Yes, sir.

Q. That would be the same corner? A. I mean the northwest corner.

Q. You mean this corner here, the northwest corner? A. Yes, sir.

20

Q. Where was the Gatkin car the first time that you saw it? A. I was facing west and I saw it crossing Newark Avenue.

Q. Had it started to cross Newark Avenue when you first saw it? A. Yes, sir.

Q. And did you notice whether it was going fast or slow? A. I judge it was going between eight and ten.

Q. When did you first see the Free car? A. I saw it just when he hit.

30

Q. Did you have any opportunity to observe whether that was going fast or slow? A. No, sir.

Q. The Gatkin car, I think you said, turned over when it was struck? A. Yes, sir.

Q. And this little fellow, did you see him there at the time? A. I didn't see him.

Q. Where was he when you got there? A. My friend picked him up and took him to the hospital.

Q. Who was your friend? A. Charles Goldinov.

40

Sam Zimmerman, cross.

Q. This fellow here? A. Yes, sir.

Q. And took this boy to the hospital? A. Yes, sir.

Q. Did you go to the hospital? A. No, sir.

Cross examination by Mr. Milberg:

10

Q. What time was this, about? A. I don't remember; I can't—

Q. Well— A. I don't remember.

Q. Was it early or late in the evening? A. It was late.

Q. What time, about? A. I couldn't say.

Q. You don't know, and where were you coming from at that time? A. We were standing on a corner waiting for a friend of ours.

20

Q. What corner were you standing on? A. The northeast corner of Newark Avenue.

Q. The northeast corner of Newark Avenue. And were you looking down Coles Street? A. I was looking west.

Q. Then you were looking down Coles Street, were you? A. No, down Newark Avenue.

Q. Looking west? A. Yes, sir.

Q. Was this the corner you were on? A. Yes, sir.

30

Q. And your face was in this direction? A. Yes, sir.

Q. And you saw this Ford coming down? A. I didn't see it coming down; I just saw it crossing Newark Avenue.

Q. You mean the first time you saw the Ford was after it had already started into Newark Avenue from Coles Street? A. Yes, sir.

Q. And your back was turned to this other car so you don't know what happened? A. Yes, sir.

40

Q. So you didn't see this other car coming on? A. No.

Sam Zimmerman, cross.

Q. You didn't follow the Ford with your eyes when it went onto Newark Avenue? A. No.

Q. And after you saw it coming into Newark Avenue, so when you heard the smash— A. Yes, sir.

Q. After you saw it coming into Newark Avenue is when you heard the smash, is that correct? A. Yes, sir. 10

Q. Now this car that was coming in this direction, traveling west, you say stopped before it got to this corner? A. After the smash.

Q. After the smash stopped here. A. He pulled over to the corner.

Q. He pulled over to the corner. I mean did he stop then? A. Yes, sir.

Q. He didn't proceed past this corner, did he? A. No, stopped there. 20

Q. And this car turned over. Was the other car standing up? A. Yes, sir.

Q. What kind of car was it? A. Sedan.

Q. Sedan. Was there much damage to the sedan, did you notice? A. I didn't notice.

Q. Did you look at it at all? A. I might; I don't remember.

Q. What is that? A. If I did I don't remember. 30

Q. Do you know whether anybody was hurt in the sedan? A. No, sir.

Q. Do you drive a car yourself? A. Yes, sir.

Q. What kind? A. Truck.

Q. What kind? A. Maxwell.

Q. Have you ever driven a Ford? A. No, sir.

Q. Do you know about the speeds and gears on a Ford? A. Never drive a Ford.

Q. And from your judgment he was going about eight or ten miles? A. Yes, sir. 40

Q. Did you give your names to Gatkin or some-

Sam Zimmerman, cross.

body? A. Somebody came over after my name and I gave it.

Q. At the time of the accident? A. Yes, sir.

Q. When was the last time you talked this case over with anybody? A. Friday I got a subpoena.

10 Q. What is that? A. They subpoenaed me Friday and—

Q. Have you talked to Gatkin today? A. Yes, sir.

Q. You have talked to him about this thing? A. No, sir.

Q. Didn't mention one word about this case to Gatkin? A. I didn't see him.

20 Q. Today I am talking about. A. Today?

Q. Yes. A. Oh, no.

Q. Do you mean to say when you spoke to Gatkin that you didn't talk to him about this case that you came up here for—were subpoenaed for? Didn't you say anything to him or didn't he say anything to you? A. I didn't say anything about it. He just asked me if I remembered and I said yes.

30 Q. Did he ask you if you remembered how fast he was going? A. No, sir.

Q. You didn't mention that; and of course you remember almost a year and a half ago that he was going about eight miles an hour. A. I should.

Q. What? A. I say I should remember it.

Q. Why should you remember it? A. Because I am supposed to have a good memory.

40 Q. And with your good memory you don't remember whether or not the other car was smashed? A. I didn't look at it.

Q. What is that? A. As soon as I saw the Ford

Sam Goldinov, direct.

turn over I went to help put it on its wheels again.

Q. And did you help turn it over again? A. Yes, sir.

Q. Have you got your subpoena with you? A. Yes, sir. 10

Q. Did you ever give a statement of any of these facts? A. Yes, sir.

Q. How long ago? A. About two weeks after the accident, I guess, something like that, two or three weeks afterwards.

Q. And you gave a statement at that time? A. Yes, sir.

Q. Did you ever see that statement since you gave it? Didn't you go over that statement the last day or two to see what you put into it, and what you signed? A. I did. 20

Q. And that is what refreshes your memory somewhat on these facts? A. I knew most of it.

Q. Didn't that statement refresh your memory somewhat? A. A little.

Redirect examination by Mr. Griffin:

Q. You went over that statement with me, didn't you? A. Yes, sir. 30

SAM GOLDINOV, sworn.

Direct examination by Mr. Griffin:

Q. Where do you live, Sam? A. 56 Coles Street.

Q. Jersey City? A. Yes, sir.

Q. Do you know anybody in this case? A. Gatkin.

Q. Both Mr. Gatkin and his son? A. I just know Louis Gatkin and I never knew his father. 40

Sam Goldinov, direct.

Q. Where were you on the night of the accident? A. Corner of Coles Street and Newark Avenue.

Q. Which corner? A. This is west?

10 Q. This is west, this is east, that is south and that is north. This is Newark Avenue and that is Coles Street. A. Which way does Coles Street run?

Q. This way. A. I was on the left-hand corner.

Q. Does Varick Street run parallel with Newark Avenue? A. No.

Q. You mean Coles Street and Varick run together? A. One runs into the other.

20 Q. Suppose you were walking down the center of Coles Street. See what I mean, from north to the south. A. Yes.

Q. Which side of your body was the corner that you were standing on? This right side or your left? A. Left.

Q. On your left side? A. Left.

Q. Were you with this other fellow? A. Yes.

Q. Were you standing here on this northeast corner? A. Yes.

30 Q. Is that diagonally across from where this car stopped that turned over? A. Just across.

Q. Where was the Gatkin car the first time that you saw it? A. I saw it when it was just passing the corner of Coles Street toward Newark Avenue.

Q. Was that before anything happened? A. Before anything happened.

Q. And did you notice whether it was going fast or slow? A. Well, it was going—well it was going about eight or ten miles an hour.

Q. Eight or ten miles an hour? A. Yes, sir.

40 Q. You drive a car yourself? A. Yes, sir, not a Ford.

Sam Goldinov, direct.

Q. You do drive a car? A. Yes, sir.

Q. How long have you been driving? A. Well, not long—short while.

Q. How long? A. About a month.

Q. Did you see the Free car, the car that was going west on Newark Avenue before the accident? 10
A. Yes.

Q. How far past it—how far was it from the Gatkin car the first time you saw it? A. Well, he was about forty or fifty feet.

Q. From where, from Coles Street or from Gatkin's car? A. From Gatkin's car.

Q. Did you notice how fast it was going? A. He was going at quite a rate of speed.

Q. What would you say, about? A. Oh, between 20
twenty-five—about twenty-five or thirty.

Q. Twenty-five to thirty. Did you see the two cars hit? A. Yes, I saw Free's car hit Gatkin's car.

Q. And what part of the Free car was struck?
A. The Free car?

Q. Yes. A. In the front.

Q. And what part of the Gatkin car was struck?
A. The left rear wheel.

Q. The left rear wheel? A. Yes, sir.

Q. And do you know, with reference to the middle of those four corners— A. Yes, sir. 30

Q. Right here. A. Yes, sir.

Q. Where the Gatkin car was at the time it was struck? A. Well, it turned over right on the corner opposite where I was standing.

Q. Was it struck at the corner? A. No.

Q. Where was it struck? A. More than half way across the car tracks.

Q. Was the entire car across the car tracks? A. 40
More than half way across.

Sam Goldinov, cross.

Q. Are there two tracks that ran or just one?
A. One.

Q. Were the front wheels over both tracks? A.
The front, but the back wasn't.

10 Q. Where was the back? You mean there are
four rails there— A. Four rails, yes—car going
east and west—north side rails.

Q. Yes, east and west. Had he crossed the west-
bound car track before he was struck—that is the
two rails? A. Just about crossing.

Q. Just about crossing those at the time he was
struck. A. Yes.

Q. And when the Gatkin's car was struck you
say it went into the corner and turned over? A.
Yes.

20 Q. And was this little boy in the car? A. He
was under the car.

Q. And you took him in Free's car on the op-
posite side of the street? A. I took him in Free's
car and took him to the St. Francis Hospital.

Q. You were the man that took him to the hos-
pital? A. Yes.

Cross examination by Mr. Milberg:

30 Q. How long have you known Louis Gatkin?
A. Since the accident really.

Q. Did you ever know him before that? A. By
sight. I said hello to him, but otherwise I never
associated with him.

Q. You used to say hello to him? A. Yes.

Q. You were friendly with him? A. Yes.

Q. So you said more than hello to him before
that? A. No, sir.

40 Q. Never said anything else? A. No, sir; the
only way I knew him was because he was in the

Sam Goldinov, cross.

butter and egg business and I used to be in that business myself.

Q. And you never spoke to him except to say hello to him? A. No, sir.

Q. You were standing there that night with your friends? A. Yes. 10

Q. What time was it? A. I should judge about 8:30 or 9:00 o'clock.

Q. I understand this was the corner. Just come down here and show me how you were standing with your friend. A. (Witness leaves stand and goes to diagram.)

Q. Now, where was your friend standing? Put me in the position of your friend, the position your friend was standing in. Which way were you facing? A. I could see Coles Street. 20

Q. Which way were you facing? A. I could—

Q. In other words, you were looking into Coles Street and Newark Avenue? A. Yes, sir.

Q. Your friend was standing like this, then, is that right? A. He was here.

Q. He says that his face was up Newark Avenue and all he could see was Coles Street. Now as far as you are concerned—I don't want to confuse you—I just want to get it as it is. He says he was standing facing and couldn't see back on Newark Avenue this car. Now if I am wrong— A. I don't think you are right. 30

Q. Your friend said that he was standing on this corner and he couldn't see the car in back. All he saw was when this car came right here to Newark Avenue. You remember that? I don't want to confuse the facts. He was right here and all he could see was this Ford. He couldn't see the car in the back and he was standing there. Now I am on this corner right here and I am looking 40

Sam Goldinov, cross.

right across the street. Now how are you standing with your friend when you were talking to him on the corner? A. I was standing this way; he was standing towards Newark Avenue.

10 Q. Now he said where he was standing—I don't want to confuse you at all—he was standing there facing this street and all he could see facing the other side where Free's car finally landed—he didn't see anything back of him. Now I am putting this at the corner— A. The other side of Coles Street?

Q. Yes. Now where were you standing? A. I was standing right here.

Q. You were standing like that, is that right? A. That is Coles Street and Newark runs like that.

20 Q. Go ahead and take your seat. A. (Witness resumes the stand.)

Q. Have you got your position absolutely right? A. Yes, sir.

Q. Now if you were standing with your friend right alongside of you would you tell me how you could see this car coming at your back at twenty-five or thirty miles an hour when it was forty feet from you? A. (No answer.)

30 Q. Your friend said he was standing looking into Coles Street and you were right alongside him, isn't that right? A. Yes, sir.

Q. And your heads were both in the same direction, is that correct? A. Yes, sir.

Q. And still you want us to believe now you could see that car in back of you coming at twenty-five miles an hour? A. Yes, sir, I saw Free's car.

Q. Where you were standing with your friend? A. Yes, sir.

40 Q. Although the front of your head was facing

Sam Goldinov, cross.

up Newark Avenue you saw Free's car coming in your back, is that correct? A. (No answer.)

Q. Now if I have got your position wrong I want you to change it. I don't want anything but the absolute facts. Do you want to change your position now on the corner where you were standing? A. You didn't get my corner right, I don't think.

10

Q. I don't know. I am asking you, my friend. I wasn't there. I am only— A. Pardon me a minute. Do you know where Coles Street is?

Q. You will answer my questions. I am not trying to confuse you. Your friend testified that he stood on this corner. A. That is Coles Street, on Newark Avenue—the corner.

Q. You know this picture here? A. Yes, sir.

Q. You testified for the other lawyer? A. Yes.

20

Q. Is there any question about this picture now? A. Yes.

Q. Your friend said he stood on that corner with his face towards the other side of Coles Street, which would be west. Have you got that? A. That is Newark Avenue, isn't it, running towards—

Q. Well, was there any question about this diagram when you were testifying on direct examination? Is there any question about this diagram? If there is let us change it. Have you got this corner here? A. Yes, sir.

30

Q. Your friend was standing right here on this corner, he says, with his face the other side of Coles, looking west. Have you got that? A. Yes, sir.

Q. And said that he couldn't see anything in the back of him, couldn't see Free's car and only saw Gatkin's car when it came out of Coles Street into Newark Avenue. Now I asked you what position you were standing in and you said standing right

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Louis Gatkin, direct.

alongside, side by side and facing in the same direction. Is that correct? Is that correct now? A. (No answer.)

Q. You were both walking along together, weren't you? A. Huh?

10 Q. You were both walking along together? A. No.

Q. You were walking together? A. We were talking, yes. In the position I was standing I saw Free's car and Gatkin's car.

Q. Were you standing alongside of your friend with your face in the same direction as his was, as you have showed me right here now? A. Yes, sir, facing Newark Avenue.

20

LOUIS GATKIN, recalled.

Direct examination by Mr. Griffin:

Q. This night that you went to take the car to the garage you left your house or your father's home, you say? A. Yes, sir.

Q. And just describe the streets that you went from your home to the drug store on? A. I left on Jersey Avenue. Our garage is on Jersey Avenue. I live on Jersey Avenue.

30

Q. Where did you leave first? A. Jersey Avenue, 447.

Q. And when you left your home what streets were you on, Jersey Avenue? A. Yes.

Q. What street did you travel along? A. Jersey Avenue.

Q. Now, how far did you go on Jersey Avenue? A. To Eighth Street.

Q. Now, where is your garage? A. Jersey Avenue between Railroad Avenue and Newark Avenue.

40

Louis Gatkin, cross.

Q. Is that past Eighth Street? A. Before Eighth Street.

Q. Did you, as you proceeded from your home to Eighth Street, when you made your first turn pass directly in front of the doors to your garage?

A. Yes, sir.

10

Q. And how far is your garage to where you turned either left or right on Eighth Street, how many blocks? A. About ten blocks away.

Q. This was—you went past your garage ten blocks to Eighth Street? A. Yes.

Q. And then where did you go? A. One block over to Grove Street.

Q. One block? A. No, two blocks.

Q. You went over two blocks to Grove Street? A. Yes.

20

Q. How did you go then? A. I went along Eighth Avenue to Coles Street.

Q. Where is this drug store? A. The drug store is on Eighth and Grove.

Q. You went to Eighth and Grove and you went to the drug store, is that right? A. Yes, sir.

Cross examination by Mr. Milberg:

Q. You are sure that boy was never on the truck when you made any deliveries? A. No, sir.

30

Mr. Griffin: I object to that.

Mr. Milberg: I withdraw it.

(Defendant rests.)

40

Isidore Shefts, direct-cross.

ISIDORE SHEFTS, recalled in rebuttal.

Direct examination by Mr. Milberg:

Q. Mr. Shefts, you know Mr. Gatkin and know the boy? A. Yes, sir.

10 Q. You know that truck? A. Yes, sir.

Q. Did you ever see your boy on that truck with Mr. Gatkin and his son? A. Positively sure.

Q. Where did you see him? A. On Newark Avenue and near my store.

Q. Whereabouts on Newark Avenue? A. Near my store, 7981 Railroad Avenue.

Q. Yes. A. And then I seen him one time on Newark Avenue; and Mr. Katkin knows very well I have seen him with my boy on the truck and his boy.

20 Q. Did you ever talk to him about it? A. I never mentioned it because you know I didn't think of it.

Q. But you did see him on two particular occasions? A. Yes, positively.

Q. Did you ever see your boy on that truck coming to your store? A. Yes.

Cross examination by Mr. Griffin:

30 Q. Did you want your boy to ride on this truck? A. No, I didn't want him to ride on the truck.

Q. Did you ever say anything to Mr. Gatkin after you saw him on the truck on two occasions?

A. No, I never bothered him.

Q. You knew where Mr. Gatkin lived? A. Yes, I know.

Q. And you didn't tell him to keep your boy off the trucks? A. No.

40

Benjamin Shefts, direct.

BENJAMIN SHEFTS, recalled in rebuttal.

Direct examination by Mr. Milberg:

Q. You heard Mr. Gatkin and the son testify that you were never on the truck with them at any time while deliveries were made and the only time you were on was when you went to the garage. Tell this Court and jury what street you went to and where deliveries were made. A. I made delivery on Jersey Avenue between Wayne and Mercer. 10

Q. In what kind of a house was it you made this delivery to? A. Brick house.

Q. And what did you take there? A. Half a pound of butter.

Q. Do you know where you brought it to? A. No, I don't remember. 20

Q. Well, was it first floor or second floor or what? A. I think it was the first floor.

Q. First floor. Was that the first time you ever made a delivery there or did you ever make any other deliveries at that place? A. First time.

Q. Now, where else did you ever make any deliveries while Mr. Gatkin and the son were both on the truck? A. That is about the only place. 30

Q. Did you ever make any on Grove Street between Sixth and Seventh? A. Yes, we went there, but I didn't make any.

Q. Who made the deliveries at that place? A. His son.

Q. Did you ever make any or did you ever go to Sussex Street with him? A. Yes.

Q. Can you tell us what kind of house you stopped at in Sussex Street? A. I have forgotten what kind of house it was. 40

Benjamin Shefts, direct.

Q. Whereabouts, near what streets was it? A. It was near the river.

Q. And where did you sit when Mr. Gatkin and his son were on that truck? A. In front.

Q. And Louis was at the wheel? A. Yes.

10 Q. Who was on Louis' right? A. I was.

Q. And who was sitting next to you? A. No one.

Q. When the father was on the truck how did the three of you sit? Just describe the positions.

A. The father was in the back fixing the butter.

Q. In the back of the truck? A. Yes.

Q. And he never sat on the seat with you and Louis? A. No.

Q. And he was fixing what? A. Fixing the butter and straightening up the eggs.

20 Q. Now, can you tell us, Ben, what kind of truck it was? A. It was a Ford commercial truck.

Q. Closed or open body? A. Closed body.

Q. What was in this body? A. In the body was an ice box.

Q. How big about was this ice box? A. It was about as big as a large sized trunk.

Q. As large as what? A. A trunk.

30 Q. Do you know whether anything was kept in that ice box? A. Yes, butter and cheese were kept in there.

Q. How do you know? A. Because I saw them put in there.

Q. Did you ever help them take stuff out after you got through delivering? A. Yes.

Q. How did you take the stuff out and what did you do with it? A. I took some butter out and brought it into his house.

Q. Where is his house? A. Jersey Avenue.

40 Q. What floor does he live on? A. Basement.

Motion for Direction of Verdict.

Q. Where did you take it, into what part of the house? A. Into the kitchen.

Q. And what would you bring in there when you used to take these things off the truck? A. Used to bring in butter and sometimes eggs.

Q. And you brought it into his house? A. Yes, sir. 10

Q. How many times had you been in Mr. Gatkin's house? A. Quite a few times.

Q. Did you ever see Mr. Gatkin in his house? A. Yes, sir.

Q. Did you ever see Mrs. Gatkin, the mother of Louie? A. Yes, sir.

Mr. Milberg: That is our case.

Mr. Griffin: I want to move at this time for a direction of verdict on the ground that at the time of the happening of the accident, the driver of the defendant car, Louis Gatkin, was beyond the scope of his employment; that he had actually passed the garage that he was supposed to go to and that he went past the garage and went for some business or for some reason of his own, on his own business, and that it was while he was coming back that the accident happened; and I feel that the defendant Gatkin is not liable for the accident which happened while the employee was out of the scope of his employment. 20 30

(The Court thereupon adjourned until February 23, 1928.)

Argument of the Court.

February 23, 1928.

(The case was continued pursuant to adjournment.)

(Argument.)

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The Court: In view of the fact that the servant was engaged in an employment totally disconnected from the employer's employment from the time he reached a point in front of or at the garage to which he was to take this car on the night in question and from that moment he was engaged in an occupation upon his own behalf entirely disconnected from that of his employer and so disconnected as to free his employer from liability for what might have occurred while this driver was so engaged. Under the circumstances the motion to direct a verdict, so far as the defendant Morris Gatkin is concerned, will be allowed.

20

Mr. Milberg: Of course, I ask for an exception.

The Court: You may have an exception.

Mr. Milberg: I will take a nonsuit as to the other defendant.

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New Jersey Court of Errors and Appeals

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs-Appellants,

vs.

JOHN J. FREE and MORRIS GATKIN,
Defendants-Appellees.

Action at Law.

BRIEF FOR DEFENDANT-APPELLEE, MORRIS GATKIN.

This is an appeal from a judgment entered in favor of the defendant, Morris Gatkin, on his motion for a direction of the verdict.

The matter was tried before the Honorable Frank L. Cleary, Judge of the Hudson County Circuit Court. A voluntary non-suit was taken by the plaintiffs as to the defendant, John J. Free.

Facts.

This action was instituted to recover damages for injuries sustained by the infant plaintiff while riding in a delivery truck owned by the defendant, Morris Gatkin, and also for pecuniary losses sustained by his father as a result of the accident. The other facts material to this issue are substantially the following:—

The infant plaintiff was riding with Louis Gatkin, the son of Morris Gatkin, defendant, in an automobile truck owned by Morris Gatkin and used for the delivery of dairy products which was

the business in which the said defendant, Morris Gatkin, was engaged.

It appears that at the time of the accident, Louis Gatkin, son of Morris Gatkin, was operating the said automobile on Coles Street near Newark Avenue in the City of Jersey City when a collision occurred between the automobile, above mentioned, and an automobile owned by the other defendant, John J. Free (p. 26, l. 22). It further appears that the defendant, Morris Gatkin, had given the keys to the automobile to his son, Louis Gatkin, a short time previous to the happening of the accident and directed him to drive the car to the garage (p. 48, l. 11). The garage in question is located on Jersey Avenue between Railroad Avenue and Newark Avenue (p. 82, l. 40).

The testimony of the infant plaintiff and Louis Gatkin is contradictory as to the circumstances in which the infant plaintiff boarded the automobile to ride with the said Louis Gatkin. It is uncontradicted however, that the infant plaintiff boarded the said automobile on Mercer Street (p. 23, l. 30) and rode with the said Louis Gatkin until the accident occurred. Louis Gatkin then drove the automobile along Jersey Avenue *past the very doors of the garage where he was instructed to leave the car* and proceeded ten blocks further to a drug store (p. 82, ll. 30-40; p. 83, ll. 1-12) where he went to purchase medicine for himself (p. 56, l. 19). After purchasing the medicine at the drug store which was located at the corner of 8th and Grove Streets in Jersey City (p. 83, l. 22) Louis Gatkin proceeded to drive along Coles Street, and when he reached a point near Newark Avenue, the accident in which the infant plaintiff received his injuries, occurred.

Appellant's brief erroneously states that Louis Gatkin passed the street on which the garage was located. As a matter of fact the record shows

that he passed the doors of the garage itself (p. 83, l. 2). The statement of facts in the plaintiff's brief also contains the assertion that there is a direct contradiction of testimony on the question of whether the defendant, Morris Gatkin, had knowledge of the fact that Louis Gatkin was going to the drug store to purchase medicine and reference is made to page 44, l. 34 of the record to show the contradiction. There is nothing in the record at that point or in any other place to justify the statement that there was testimony to the effect that Morris Gatkin knew that Louis Gatkin was going to purchase medicine at a drug store. To the contrary the record shows that it remains uncontradicted that Morris Gatkin had no knowledge of the fact that Louis Gatkin was going to the drug store for medicine for the said Louis Gatkin (p. 48, ll. 17-21).

THE LAW

POINT I.

The Court did not err in directing a verdict in favor of the defendant by finding, as a matter of law, that the servant was not acting within the scope of his employment at the time of the accident.

Plaintiff in his brief cites the case of *Riley vs. Standard Oil Company* (231 N. Y. 301), and relies on this case in support of his contention that there is a question for the jury to determine whether the defendant's employee was acting in the scope of his employment at the time of the accident. The facts in that case, while from a reading of the plaintiff's brief appear to be similar in the case *sub judice*, contain features which draw

a sharp distinction between that case and the one *sub judice*. In the Riley case, Judge Andrews, in delivering his opinion, said in addition to what is contained in plaintiff's brief, as follows:

“We are not called upon to decide whether the defendant might not have been responsible had this accident occurred while Million was on his way to his sister's house. That would depend on whether this trip is to be regarded as a new and independent journey on his own business distinct and that of his master, or as a mere deviation from the general route from the mill and back. Considering the short distance and the little time involved, considering that the truck, when it left the yards, was loaded with the defendant's goods for delivery to its mill, and that it was the general purpose of Million to return there, it is quite possible a question of fact would be presented to be decided by a jury. At least, however, with the wood delivered, with the journey back to the mill begun at some point in the route, Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached.”

The facts, as stated by Judge Andrews in the Riley case show that the decision therein was predicated on the fact that the servant was still engaged in the defendant's work in that he was still charged with returning the barrels which were on the truck to the defendant's warehouse and that, being charged with that duty, and being in the performance of the same at the time the accident happened, his employer became liable for his negligent act.

In the case *sub judice*, however, the defendant's employee, whose simple duty it was to take the truck to the garage, went past the very doors of the garage where he was bound to leave the truck. The moment he passed the doors of this garage, the relationship of master and servant ceased be-

cause the servant had, at that point, breached his duty and was on a personal errand for his own benefit. The situation is the same as if the defendant had put the car in the garage in compliance with his instructions and had then taken the same out for his own purposes.

In the Riley case the servant was still obliged, as part of his duties, to return the barrels to the warehouse. In the case at bar the servant had failed in his duty to put the car in the garage and thereafter became a wrongdoer.

Under the case of *Raynor vs. Sheffler* (79 N. J. Law 340) he was guilty of a conversion. In the case at bar the facts, as above stated, remain undenied, and therefore there was nothing to submit to the jury on the question of whether the servant was acting within the scope of his employment.

In the Riley case, above mentioned, three of the seven judges dissented from the majority opinion. Judge McLaughlin, in rendering a dissenting opinion in which the other dissenting judges concurred, said as follows:—

“The uncontradicted facts show, it seems to me, that Million, at the place where and the time when the accident occurred, was not acting for defendant. His act at and immediately prior to the accident was not a mere deviation from his duty or an irregular method of its performance. He was doing an independent act of his own and outside of the services for which he had been employed. When he started from the yard to deliver the wood to his sister’s residence, he broke the connection between himself and his master, temporarily terminated the employment, and did not re-enter the same until he had again reached the yard. The return from his sister’s residence to the yard was just as much a part of his personal errand as was going to her residence. I cannot believe that the liability of the defendant here is to be determined by the way in which the truck was

headed. Rights of property do not rest upon such a slender thread.

The view, above expressed, that Million did not re-enter the defendant's service until he had returned to the yard after delivering the wood is sustained by authority."

Then the Court goes on to cite in support of its contention in the dissenting opinion, the case of *Hartnett vs. Gryzmish* (218 Mass. 258). In that case the plaintiff was injured by a collision between the automobile of the defendant, driven by his chauffeur and a bicycle on which plaintiff was riding. The chauffeur had taken the car from the garage to go to his house to dinner. He had eaten his dinner and was going from his house to the house of the defendant in order to take out defendant's mother as he had been directed to do by the master, when the collision occurred. The plaintiff was non-suited and judgment to this effect was affirmed by the Supreme Court; the Court saying:—

"If the evidence of the chauffeur as to the purpose for which he was driving the car at the time of the accident is to be believed, then the plaintiff has failed to show that he was at that time acting within the scope of his employment, but has shown rather that he was acting for his own private purpose."

The facts in the following case seem to be directly in point with the case *sub judice*. In *Colwell vs. The Aetna Bottle & Stopper Company* (82 Atl. Reporter 388), a chauffeur was ordered to take an automobile to the Bradford Street garage, wash and put it up for the night. He drove the car to the garage and instead of doing as directed, took the car to carry another employee to his home, then drove to a restaurant where he had his supper, and was returning to the garage when the accident occurred. It was held that the

servant was not acting within the scope of his employment and defendant was not liable for the injuries caused by the servant's negligence while thus acting.

The Court said: "He had no authority, either express or implied, to use the machine for another employee or for his own convenience in going to get his supper. His use of the automobile from the time he left the Bradford Street garage and during the whole circuit that he made from that point . . . back to the Bradford Street garage, was unauthorized and beyond the scope of his employment. The case follows within a very distinct and important line of cases in this country, the principals of which are well set forth in *Steffen vs. McNorton* (142 Wisconsin 49) (26 L. R. A., N. S. 382) . . ."

In the case of *Fleischner vs. Durgin* (207 Mass. 435), it was held that an owner of an automobile who employs a chauffeur to take the car from a garage to a repair shop is not liable for an injury inflicted upon a stranger by the negligent operation of the car while the chauffeur was on an errand of his own, requiring a journey six or seven times as long as was required by his employment, into a crowded part of the city, although at the time of the injury, he was returning toward his original destination.

In the case of *Der Ohannessian vs. Elliott* (233 N. Y. 326) the Court held that the owner of an automobile is not liable for the negligent act of his chauffeur whom he directed to take the car to the garage at 7:30 in the evening, stating that he did not need it until the next morning, where the chauffeur, instead of following his directions, took the car to get his supper and thereafter started on a ride away from the garage on a purpose of his own in the course of which an accident occurred.

The case of *Debelius vs. Benson & Company* (129 Md. 693) (100 Atl. 505), decided as follows:

“Where the only duty of an employee as to an automobile was to return it from the employer’s place of business to the garage where it was kept, and instead of returning the machine the employee, accompanied by another person, drove out to the garage where the machine was kept and continued on, and while using the machine for his own purposes about the city, an injury resulted from its negligent operation, it was held that the employer was not liable since the employee was not acting within the scope of his employment.”

In the case of *Stenzler vs. Standard Gas Light Company* (226 N. Y. 681), which case was decided in 1919, it was held that the defendant company was not liable where the evidence showed that its automobile truck had been loaned to an organization composed of its employees for an excursion and that the superintendent returned with the members of the party and told the driver of the truck to go to the garage after he had taken other members home, and the driver disobeyed the instructions and went to his own home whence he drove with some of his relatives back to the garage, and an accident occurred on the way.

Plaintiff also cites and relies on the case of *Dunne, et al. vs. Hely* (6 Advanced Reports 435). That case differs materially from the case *sub judice* in that the servant in that case was still engaged in the act of taking the truck toward the garage and merely followed a route which was different from the direct route. Furthermore, in the Dunne-Hely case the servant was authorized to take the car for the purpose of going home to have his supper, and was doing an act in returning the automobile to the garage which was perfectly compatible with his service to his employer and in pursuance of his service to his employer.

In the case at bar the relationship of master and servant ceased when the servant drove past the doors of the garage where he was directed to take the car and the relationship was not resumed because the act which the servant was doing in taking the car back to the garage, after having completed a personal errand, was not part of the master's service.

In the case of *Donaldson vs. Ludlow and Squire* (94 N. J. Law 306), a cursory examination of the facts will demonstrate that there is no parallel between the situation in that case and the one at bar. The question was decided solely on the authority of *Raynor vs. Sheffler* (79 N. J. Law 340), which involved the question of bailment. The *dictum* in the case was not controlling or applicable because in the case at bar the servant passed the garage itself, and not the street on which the garage was located, and for the further reason that the Court said that the master *might be liable* for the servant's negligence in an action of tort under the doctrine of *respondeat superior*, but did not decide the question.

It seems to the defendant that the conclusion is irresistible that the servant was acting for his own purposes and not within the scope of his employment.

The cases cited by the plaintiff in his brief which hold that where there is a slight deviation from the course of employment, it is a question for the jury whether the servant was acting within the scope of his employment, seem to have their foundation in the theory that there is a possibility stated in the cases so cited that the employee's act might have been for the benefit of either the employee or the employer, as the jury may find, and therefore the question should properly be submitted to the jury.

In the case *sub judice*, however, there is no doubt or question from the facts as disclosed by the record, that there could not have been any possibility of benefit to the employer. The employee had already transcended his authority to use the automobile when he passed the doors of the garage to which the car was directed to be taken and drove ten blocks further for his own purposes. Assuming that the defendant had placed the automobile in the garage for the shortest possible time and had then taken it out for the purpose of getting his medicine, there is no doubt that the Court would find that he was doing an unauthorized act which was in no wise in the course of his employment.

It seems to the defendant that the situation at bar is the same as the one just presented. To decide that in this case the master was responsible for the servant's act while the car was being used, as the record disclosed, would be to extend the rule of master and servant to the point of abrogation.

For the reasons above stated it is respectfully submitted that the direction of a verdict by the Trial Court is correct and should be sustained and judgment for the defendant affirmed.

Respectfully submitted,

EDWARD GRIFFIN,
Attorney and of Counsel with
Defendants-Appellees.

New Jersey Court of Errors and Appeals

BENJAMIN SHEFTS, by his next
friend, ISIDORE SHEFTS, and
ISIDORE SHEFTS, individually,
Plaintiffs-Appellants,

v.

JOHN J. FREE and MORRIS GATKIN,
Defendants.

Action at Law.

On Appeal from
Hudson County
Circuit Court.

BRIEF FOR PLAINTIFFS-APPELLANTS.

From a directed verdict in favor of defendant Morris Gatkin plaintiffs appeal directly from the Hudson County Circuit Court, where the cause was tried before Hon. FRANK L. CLEARY and jury. Plaintiffs submitted to voluntary nonsuit against defendant John J. Free.

The undisputed facts are:

Defendant Morris Gatkin engaged in the butter and egg business and residing at No. 477 Jersey Avenue, Jersey City, was the owner of a Ford commercial automobile used for the delivery of his goods. His son, Louis Gatkin, about eighteen years old at the time of the accident in question, was the chauffeur, making the deliveries and entrusted with the management of the automobile. The son was a member of his father's household, receiving in addition to his board about \$7 per week (Case, pp. 47, 51, 54).

On the evening of September 23, 1925, the defendant told his son to take the car to the garage

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situated on Jersey Avenue, between Railroad and Newark Avenues, about four blocks from the house. On his way to the garage, the son proceeded to a drug store located on Eighth and Grove Streets, about ten blocks from the garage, for medicine which a doctor had prescribed for him. After procuring the medicine, he immediately drove to the garage along Coles Street, a paved street. At the intersection of Coles Street and Newark Avenue, a distance of about a block from the garage, defendant's car collided with another automobile, caused by the alleged negligence of defendant and resulting in injuries to plaintiff, Benjamin Shefts, an infant twelve years of age, who sought compensation in this action.

Defendant's witness, Louis Gatkin, testified:

"I was on my way to the garage but I didn't feel like walking to Eighth Street for my medicine so I thought I would drive over" (Case, pp. 55, 56).

Also:

"Q. You wanted to take this trip to the drug store and then go to the garage? A. Yes, sir (Case, p. 64).

"Q. You wanted to get that medicine before you went to the garage, is that right? A. Yes, sir" (Case, p. 65).

Defendant denied knowing that his son intended to stop at the drug store before storing the car in the garage (Case, p. 48) although plaintiff's testimony contradicts this (Case, p. 44, line 34, and bottom p. 23).

At the close of the case, defendant moved for a direction of a verdict which the Court granted, to which exception was taken. The Court held:

"In view of the fact that the servant was engaged in an employment totally disconnected

from the employer's employment from the time he reached a point in front of or at the garage to which he was to take this car on the night in question and from that moment he was engaged in an occupation upon his own behalf entirely disconnected from that of his employer and so disconnected as to free his employer from liability for what might have occurred while this driver was so engaged. Under the circumstances the motion to direct a verdict so far as the defendant Morris Gatin is concerned, will be allowed" (Case, p. 88).

Argument.

Appellants urge that the Court erred in removing the case from the jury, for three reasons, all of which will be argued under one point, viz.:

(a) Assuming, but not conceding, that the act of defendant's son in first driving to the drug store was for his own personal business, nevertheless, such conduct did not constitute an abandonment of the master's service; it was not a "frolic"; it was merely a slight deviation of a character and degree insufficient to constitute a departure from the scope of the employment.

(b) When after procuring his medicine, defendant's son started the machine on its journey for the purpose of placing it in the garage, he had resumed his master's business and defendant was from that time responsible for his acts.

(c) Acquiescence or consent to the son's conduct could be implied from the circumstances; at least, it was a question of fact for the jury.

POINT I.

The Court erred in directing a verdict in favor of the defendant, by finding as a matter of law, that the servant was not acting within the scope of his employment at the time of the accident.

The law is well settled since the opinion of Baron Parke in 1834 in case *Joel v. Morison*, 6 Carr. & P. 501, that if a servant, being on his master's business takes a detour for purposes of his own, the master will be responsible. This rule New Jersey has uniformly followed.

In the case of *DeBello v. Reep & Blackford, Inc.*, 2 N. J. Misc. 456, affirmed by this Court in 101 Law 218, the Court said:

"It is true that he was deviating from the course that he would otherwise have taken, but it is also true that he was still, at least in part, on an errand assigned him. *The course he was taking was a detour, but it was not an abandonment of the general course of his travel.*"

To the same effect, is the recent case of *Dunne v. Hely*, 6 Adv. Rep. 435, 140 Atl. 327, wherein Mr. Justice KALISCH, speaking for this Court said:

"It is to be observed that it is not the circumstance of a deviation made from the direct route that determines the question of liability of a master for the tortious act of his servant, but, rather, whether the act of deviation *per se* was so disconnected from the master's service as to exonerate him from liability."

The testimony of the defendant's own chauffeur is that he was taking the car to the garage and in first driving to the drug store he departed

slightly from his course, but he still had in immediate view the reaching of the garage. The dominant purpose was to perform the master's service. To say that the son was merely going on a mission of his own, is to lose sight of the main purpose he had in view, viz., that of delivering the automobile to the garage. He said:

"I was on my way to the garage, but I didn't feel like walking to Eighth Street for my medicine, so I thought I would drive over" (pp. 55-56).

He did not abandon his master's business merely because at the same time that he was attending to it, it served another purpose. His act did not vitiate that part of the service which was legitimate and useful.

The fallacy of the ruling of the Court below is obvious when it is considered that *if defendant's servant had taken a circuitous route, stopping at the drug store and then proceeding to the garage, there would be vicarious liability under the adjudications of this Court.*

Ferris v. McArdle, 92 Law 580, at p. 585;
DeBello v. Repp & Blackford, *supra*;
Dunne v. Hely, *supra*.

To hold otherwise because the servant took a direct route which was the shortest possible distance and in so doing passed the garage for the purpose of stopping at the drug store and then returned to the garage, does not seem consonant with reason or justice; especially, when the son's own testimony was that he was taking the car to the garage. There was no evidence nor intimation that the servant abandoned the master's business. Consideration should also be given to the shortness of the distance involved and the time consumed.

If the servant, instead of traveling along Jersey Avenue to the drug store and garage, had before reaching the garage turned off to the east and proceeded along Grove Street to Eighth Street where the drug store was situated and then continued on to the garage as he did, there can be no doubt but that the defendant would be liable. It does not appear reasonable or just to deny vicarious liability because of the taking of the direct route under the circumstances. Innocent persons should not suffer because of a distinction so subtle.

The only cases in this State wherein the employer was exempted are those in which the Court found a wilful, malicious, or malevolent intention to disobey and deceive the master and to appropriate his property.

Illustrative of this are the cases of *Cronecker v. Hall*, 92 Law 450, where this Court found that the conspicuous and accentuating factor was the malevolent and mischievous intent.

In *Evers v. Krouse*, 70 Law 653, the act from which the defendant was relieved was of an intentional or malicious purpose of the servant. *No such intent or malevolent purpose can be inferred from the evidence in this case.* Neither does this case come within the category of the class of cases where the servant is "on a frolic of his own." His sole aim was to deliver the car to the garage where he was instructed to take it and *the visit to the drug store was merely incidental* to the accomplishment of that purpose. At no time was there an abandonment by the servant of his master's service.

Here there was at most a slight deviation or a temporary departure from the master's service. The accident happened while the defendant's son was taking the car to the garage and therefore he was clearly acting in the course of the master's

business. The test is, was the act done in prosecution of the master's service, not whether it was done in accordance with his instruction. *Although he deviated, he was performing the act of delivering the auto to the garage.* He who employs a servant and puts under his control an automobile must know, as everyone knows, that it is not improbable that he will, on occasion, depart from strict instructions. As a fact of practical experience, this is beyond dispute. A further test is, in view of what the servant was employed to do, was it probable to do what he did? A departure from the path of duty may become so great as to amount to an abandonment of the service in the minds of all reasonable men; it should then be a question of law for the Court. On the other hand, there is an area beyond and around the place within which the strict terms of the employment require the servant to remain, into which common experience and observation of human nature suggest that he will, as inclination dictates, probably go; that is, a risk which properly belongs to the business and injury to innocent third persons by the servant while within this area should ordinarily be accepted as a burden upon the business itself. Whether the servant is within this permissible "zone" of deviation depends on the facts. The facts may be such that reasonable minds could draw but one conclusion. The question would then be one of law for the Court. In the case at bar, however, *the accident having occurred while the servant was on his way to the garage and within a block therefrom, and the object of his departure being to procure medicine at a drug store within a short distance from the garage, we respectfully submit that the reasonable mind might well reach a different conclusion as to whether the servant was within the area of probable devi-*

ation, and therefore, within his employment when the accident occurred. That question should have been submitted to the jury. In other words, we do not think that the Court was warranted, as a matter of law, in holding that the accident occurred at a time and place while the servant was entirely upon his own business and outside the course of the employment.

Kohlman v. Hyland, 50 A. L. R. 1437, 54 N. D. 710, 210 N. W. 643.

As Mr. Justice KALISCH properly said in *Dunne v. Hely*, *supra*:

“The fallacy of this contention lies in the assumption that the question whether there was a deviation from the master’s employment to the extent that such deviation was tantamount to an act disconnected from the servant’s employment, is purely a legal one, whereas according to settled authority, it is a mixed question of law and fact.”

Adopting the quotation suggested by Mr. Justice KALISCH in *Dunne v. Hely*, it is undoubtedly the law that if the accident happened a block before the garage when the son was enroute to the drug store, liability would have rested upon the defendant. To say that because the accident occurred one block from the garage when the son was on the journey from the drug store to the garage, the master is relieved from liability seems to us most illogical, unreasonable and unjust when the rights of innocent third persons in which category the plaintiffs fall, are involved. Furthermore, we reiterate that the dominant purpose in the mind of the defendant’s son and the sole object in view was to store the car in the garage. Such niceities of distinction should not be invoked to relieve the master of his vicarious liability.

In the case of *Jennings v. Okin*, 88 Law 659, Mr. Justice MINTURN, speaking for this Court, in the case where defendant's son after having accomplished the purpose which he was instructed to perform, proceeded to deliver two friends to the railroad station which resulted in an accident for which the suit was brought, said that the deviation and detour under the circumstances presented an issue for the jury.

The rule is stated in 39 *Corpus Juris*, page 1297, Section 1493:

"The mere deviation or departure by a servant from the strict course of duty, although for a purpose of his own, does not in and of itself constitute such a departure from the master's business as to release him from liability for injuries inflicted by the act of the servant. The liability of the master depends upon the degree of deviation and all the attending circumstances. A slight deviation by the servant will not release the master from liability. To relieve a master from liability for the servant's acts, on the ground that the servant had deviated from his service, the deviation must be so substantial as to amount to an entire departure therefrom and be for purposes entirely personal to the servant. Nevertheless, if the servant totally departs from the master's business for a purpose exclusively his own, the master is not liable for his acts."

We respectfully submit that in view of all the circumstances of this case the Trial Court should have submitted the issue to the jury for its determination.

When after procuring his medicine the defendant's son started the machine on its journey for the purpose of placing it in the garage he had resumed his master's business and defendant was from that time responsible for his acts.

If it be granted for the sake of argument that the journey of the defendant's son to the drug store was his personal errand of a character for which the defendant was no longer answerable, nevertheless, we contend that he again resumed his master's service and was in the course and scope thereof at the time of the occurrence of the accident.

It is to be borne in mind, however, that the undisputed testimony is that the only object in view which the son at all times had was to take the car to the garage. This is precisely what he was doing at the time of the accident. He had nothing else on his mind. He had no other end in view; no other destination but defendant's garage. So long as he was engaged in taking the automobile to the garage he was engaged in the prosecution of his master's business and he is liable for his acts. The liability ceased, if at all, only when he was not engaged in taking the car to the place where he was directed to take it.

The undisputed testimony is that at the time of the accident the chauffeur had completed his errand and was on his way to deliver the car to the garage. Under settled law, when after completing his personal errand, the machine started on its journey to the garage the servant resumed his master's business and defendant from that time was responsible for his act. His carelessness after he resumed his master's business was the *causa causus* of the accident. At most, there was but a

temporary departure and when the object of the departure had been accomplished, as it was, he was again engaged in furtherance of the master's business.

By way of illustration, if the son had abandoned the machine at the drug store at Eighth and Grove Streets and another servant had been sent to take it from that place to the garage, there is no doubt but that the defendant would have been liable for what had happened—because he would be delivering the car to the garage in the prosecution of his master's business. This is exactly what defendant's son was doing.

In *39 Corpus Juris*, 1298, page 1495, the rule is thus stated:

“Notwithstanding the servant's deviation or departure from his employment for purposes of his own, if, at the time of the act complained of, the servant had fulfilled his purpose and resumed the prosecution of the master's business, the master will be liable for his act. The servant will have been considered to have resumed the prosecution of his master's business where after the fulfillment of his own purpose he is returning to resume his duties. It is not necessary for him to have reached the zone of his employment or the territory in which he was employed to work.”

One of the leading cases in this country expounding the modern tendency of allowing recovery against the master in cases of detour and departure and adopting the law cited *supra* in *Corpus Juris*, is *Riley v. Standard Oil Company*, 231 N. Y. 301, 132 N. E. 97, Court of Errors and Appeals of New York. The facts being: the chauffeur was directed to drive from the defendant's mill to a freight yard of a railroad about two miles away, obtain there some paint, and return at once to the mill. The chauffeur drove directly to the freight

yard and after placing the barrels on the truck, discovered some waste pieces of wood which he also placed on the truck. Instead of returning to the mill, he drove in the opposite direction for a distance of four blocks to his sister's house where he left the wood. This errand served no purpose of the defendant nor did the defendant have knowledge of or consent to the act. The chauffeur then returned and started for the defendant's mill, but before reaching the freight yards he negligently ran over the plaintiff. The Trial Judge submitted the issue to the jury, which action the Court of Appeals affirmed.

Mr. Justice ANDREWS in rendering the opinion said:

"No formula can be stated that will enable us to solve the problem whether, at a particular moment, a particular servant is engaged in his master's business. We recognize that the precise facts before the court will vary the result. We realize that differences of degree may produce unlike effects. But, whatever the facts, the answer depends upon a consideration of what the servant was doing, and why, when, where and how he was doing it.

"A servant may be 'going on a frolic of his own,' without being at all on his master's business. He may be so distant from the proper scene of his labor, or he may have left his work for such a length of time, as to evidence a relinquishment of his employment. Or the circumstances may have a more doubtful meaning. That the servant is where he would not be had he obeyed his master's orders in itself is immaterial, except as it may tend to show a permanent or a temporary abandonment of his master's service. Should there be such a temporary abandonment, the master again becomes liable for the servant's acts when the latter once more begins to act in his business. Such a re-entry is not effected merely by the mental attitude of the servant.

There must be that attitude coupled with a reasonable connection and time and space with the work in which he should be engaged. No hard-and-fast rule on the subject either of time or space can be applied. It cannot be said of a servant in charge of his master's vehicle, who temporarily abandons his line of travel for a purpose of his own that he again becomes a servant only when he reaches a point on his route which he necessarily would have passed had he obeyed his orders. He may choose a different way back. * * *

"Considering the short distance and a little time involved—considering that the truck, when it left the yards, was loaded with the defendant's goods for delivery to its mill, and that it was the general purpose of Million to return there,—it is quite possible a question of fact would be presented to be decided by a jury. At least, however, with the wood delivered, with the journey back to the mill begun, at some point in the route Million again engaged in the defendant's business. That point, in view of all the circumstances, we think he had reached. *Jones v. Weigand*, 134 App. Div. 644, 119 N. Y. Supp. 441."

There are other jurisdictions which rule that when a servant has completed his personal errand and is returning to the place where he was instructed to go, he is thereupon in pursuance of the master's business; viz., *Cumming v. Republic Truck Co.*, 241 Mass. 292, 135 N. E. 134; *Mastrilli v. Herz*, 124 Atl. 835 (Conn.).

The case of *Riley v. Standard Oil Company*, *supra*, has been cited with approval in numerous jurisdictions throughout the country.

Mr. Justice HOTCHKISS in *Dockweiler v. American Piano Co.*, 94 Misc. 712, 160 N. Y. S. 270, said:

"Where there has been a temporary abandonment, I think the servant cannot be ordinarily said to have returned to his master's

service till he has, compatible with his regular or lawful duties, at least, reached a point in a zone within which his labors would have been consistent with an act of deviation merely had the original act been such in those other circumstances as to have been one of deviation and not one of temporary abandonment."

Surely in the instant case, when the defendant's son was en route to the garage and within a block from the garage, he had certainly reached a point where his act can be construed as nothing more than a slight deviation for which the defendant should have been answerable.

In the case of *Donaldson v. Ludlow, et als.*, 94 Law 306, the facts were: the defendant hired an automobile for use in his business and had it in charge of his driver. The driver finished his deliveries at 5:30, stopped at his house for supper, left at 6:30 to go to the garage, passed the street on which the garage was located, and went into a place to buy tickets for himself for a fight, intending to return to put the car in the garage afterwards. He left the car unlocked in one of the most frequented streets in Newark, was gone about ten minutes in which time the automobile was stolen. This was an action upon a contract of bailment and the Court allowed recovery against the master in spite of the fact that the servant was doing an unauthorized act and had actually passed the street on which the garage was located.

Although this was an action upon a contract of bailment, the Court rendered an opinion on the doctrine of *respondeat superior*, which was dictum. We respectfully urge, however, that since this case presents facts identical with the case at issue, the Court should give this dictum great weight and due deference. *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 Law 85.

Mr. Justice SWAYZE, in rendering his opinion, anticipated the occurrence of a situation as is now involved in the case at issue and deliberately rendered his opinion thereon, though it was not necessary to his decision. He said:

“He not only put it in the power of the servant to make this unauthorized use which resulted in the loss of the automobile *and might be liable for the servant's negligence in an action of tort under the doctrine of respondeat superior.*”

Acquiescence or consent to the son's conduct could be implied.

It is to be remembered that the defendant's chauffeur was an unemancipated son, eighteen years of age, who resided in his father's household and received a stipend of \$7 a week in addition to the home benefits. This feature of the case and the circumstances under which the accident occurred most assuredly distinguishes it from a situation where the servant might have been a stranger to the master. The Court below took the view that the mission of the son for the purpose of procuring medicine which a doctor had prescribed, was purely a personal errand and from its direction of a verdict in favor of the defendant ruled that acquiescence or consent of the parent could not be inferable.

We respectfully disagree with this view for several reasons. In the first place, there was some evidence on the part of the plaintiff resulting from a conversation with the defendant, from which it might be inferred that the defendant knew that the boy was to proceed for his medicine first (Case, p. 44, line 32), and the admission of the boy (Case, bottom p. 23). In the next place, we consider

that the physical well-being of the defendant's son, who at the same time was his chauffeur, was just as much of interest to the parent as it was to the son. What the son did in driving to the drug store was a normal, reasonable and probable act in the course and scope of his employment. This present case is not at all analogous to a situation where a son proceeds with an automobile on a joyride with strangers with a definite object in view to depart from and abandon the mission upon which he was originally directed. The boy, being unwell, under medical attention, proceeded to procure medicine which was a necessity and which the parent was obliged to furnish and supply. Moreover, the undisputed evidence was that the definite end in view of the son was to deliver the car to the garage and the journey to the drug store was merely incidental to the accomplishment of the definite end. *It certainly was probable that if the parent had in advance been asked permission by the son, the defendant would have granted the permission that the son drive the eight or ten blocks to the drug store, rather than walk. The contrary would be most unusual and improbable. Viewing the situation from its most unfavorable aspect this circumstance presented a question for the jury to determine for it certainly was an act, the acquiescence or consent to which the minds of reasonable men might differ upon.*

In the case of *Ferris v. McArdle*, 92 Law 580, decided by this Court, the facts were that the chauffeur of the defendant proceeded to his supper. Before he reached his home an accident occurred. A verdict in favor of the plaintiff was unanimously affirmed on the ground that although there was no express direction given to the chauffeur to go to his home for supper on the night

in question, nevertheless the driver having done the same thing many times under like circumstances to the knowledge of the master, consent or acquiescence to this course of conduct was justified and a motion refusing to direct a verdict was denied.

The same facts were presented in the case of *Dunne v. Hely, supra*. In that case the chauffeur after having made his deliveries, went to his home for supper and while enroute from his home to the garage, he was requested by some boys to take them to a candy store which was in the neighborhood of the garage but not on the direct route to it, and, while he was on his way to the candy store, the accident happened. It was there contended that the servant acted beyond the scope of his employment. The Court affirmed the judgment in favor of the plaintiff and determined that the question presented was a mixed question of law and fact; that the act was not disconnected from his employment as a matter of law, so as to exonerate the defendant from liability.

We respectfully submit that if it was reasonable for the jury to infer acquiescence or consent to the conduct of the servants in the above stated cases in using the automobile to proceed to their respective homes for supper, which concededly were purely personal errands, then it was improper for the Court to direct a verdict, for in view of the circumstances of the case, the relationship between the chauffeur and the master, it would have been legitimate for the jury to infer that the defendant in this case acquiesced or consented to the use of the automobile for the purpose of driving to the drug store. Under all the circumstances the case should have been submitted to the jury.

The judgment should be reversed.

Respectfully submitted,

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