

1940

# Kenneth White v. Kenneth J. Pinney as Pinney Beverage Company and A. C. Neslen : Abstract of Record

Utah Supreme Court

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Woodrow D. White; Attorney for Appellant; Gardner & Latimer; Attorneys for Respondents;

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# In the Supreme Court of the State of Utah

KENNETH WHITE,

*Appellant*

vs.

KENNETH J. PINNEY, doing business as the PINNEY BEVERAGE COMPANY, and A. C. NESLEN,  
*Respondents*

Case No.

APPEAL FROM THE THIRD JUDICIAL  
DISTRICT COURT  
HON. M. J. BRONSON, JUDGE

## ABSTRACT OF THE RECORD

WOODROW D. WHITE,  
*Attorney for Appellant*

GARDNER & LATIMER,  
*Attorneys for Respondents*

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**FILED**

FEB 5 1940

CLERK SUPREME COURT UTAH

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IN THE  
**SUPREME COURT**  
 OF THE  
**STATE OF UTAH**

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KENNETH WHITE,

*Appellant*

vs.

KENNETH J. PINNEY, doing business as the PINNEY BEVERAGE COMPANY, and A. C. NESLEN,

*Respondents*

Case No.

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APPEAL FROM THE THIRD JUDICIAL  
 DISTRICT COURT  
 HON. M. J. BRONSON, JUDGE

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ABSTRACT OF THE RECORD

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(Title of Court and Cause)

**COMPLAINT**

Comes now the plaintiff above-named and complaining against the defendants for cause of action alleges:

1. That at all times herein mentioned the defendant

Kenneth J. Pinney was and now is doing business under the name and style of the Pinney Beverage Company in Salt Lake City, Utah, and at all times herein mentioned was and now is an employee, servant, and agent of the defendant, Kenneth J. Pinney, doing business under the name and style of the Pinney Beverage Company, hereinafter referred to simply as Kenneth J. Pinney. That at all times mentioned herein the defendant Kenneth J. Pinney was engaged in the business of selling, hauling, and delivering beer, and in connection with said business owned and operated a fleet of trucks within Salt Lake County; that at all times herein mentioned and at the time of the grievances hereinafter complained of, the defendant A. C. Neslen was engaged as the employee, servant, and agent of the defendant Kenneth J. Pinney, in driving and operating one of the said trucks, the same being the property of the said Kenneth J. Pinney and then and there being used by the said Defendant Kenneth J. Pinney in the transporting and delivering of beer as aforesaid, the said truck being about a one and one-half ton truck with stake body and being then and there loaded with beer barrels, with a hand-truck or "dolly" used to load and unload beer barrels hanging on the left side of the said truck, said hand-truck or "dolly" being equipped with solid iron wheels with a thin hard-rubber tire.

2. That at all times herein mentioned the street known as Highland Drive was and now is a paved public street within Salt Lake County, with street railway tracks running down the middle of said curbing on both sides,

the said street being about 42 feet wide at the point where the grievances herein complained of occurred and is within a residential district of Salt Lake City.

3. That in the afternoon of the 23rd day of December, 1938 the plaintiff was standing at the rear of his truck at about 2330 South Highland Drive, the said truck being parked alongside of and against the curb on the west side of said street and facing south. That at said time the defendant A. C. Neslen, as the employee, servant, and agent of the defendant Kenneth J. Pinney, then and there proceeding in a northerly direction along said street, heedlessly, carelessly, negligently, and recklessly drove the truck hereinbefore described with the hand-truck or "dolly" hanging on the left side thereof past the point where plaintiff was standing, and did drive said truck at said time and place at an excessive and high rate of speed, to-wit: at a speed of 50 miles per hour; and as the said truck passed the plaintiff who was standing as aforesaid, a heavy wheel of solid iron construction with a thin hard-rubber tire flew from the said hand-truck or "dolly" which was hanging on the left side of the said truck, being then and there operated and driven by the defendant A. C. Neslen as hereinabove set forth, and struck plaintiff on the left leg, causing him to suffer severe and excruciating pain and inflicting grievous injuries consisting of a severe bruise of the tibia and periostitis of the fibula, and injuring the nerves and muscles of said leg so that plaintiff is unable to walk without severe pain and so that plaintiffs' leg becomes numb and cramped and parts thereof ache continually,

all to plaintiff's actual damage in the sum of Four Thousand (\$4,000.00) Dollars.

4. That as a result of said injuries plaintiff has been unable to carry on his work as theretofore and has lost business and time to the date hereof and has been compelled to employ someone else to carry on his business of selling flowers and plaintiff has been advised by his physician not to walk upon said injured leg, all to plaintiff's special damage in loss of business and time to the date hereof in the sum of One Hundred (\$100.00) Dollars.

5. That for the necessary medical care and treatment of the injuries so occasioned by the defendants' negligence as herein set forth plaintiff has become obligated to his physician in the reasonable amount of Seventy-Five (\$75.00) Dollars.

6. That the defendants and each of them were negligent, reckless, careless, and heedless in the operation of said truck and in the hanging of the said hand-truck or "dolly" on the side of said truck, in the following particulars:

A. That the defendant A. C. Neslen, acting in the course of his employment and driving the said truck of the defendant Kenneth J. Pinney, as hereinabove set forth did drive the said truck past the plaintiff at a high, excessive, and unlawful rate of speed, to-wit: 50 miles per hour, and at a speed that was greater than was rea-

sonable and prudent having due regard to the locality and the nature of said street and of plaintiff's presence behind his truck parked on the west side of said street, and having due regard to the size and construction of the defendant Kenneth J. Pinney's truck and to the dangerous condition created by the hanging on the side of said truck of a hand-truck or "dolly" with a heavy iron wheel being insecurely fastened on said "dolly" or hand-truck; and the defendants and each of them knew, or in the exercise of due care and ordinary prudence should have known, that the speed by which the said truck was being driven would cause the loose wheel on the hand-truck or "dolly" to fly off said hand-truck or "dolly" with great force and speed.

B. That the defendant A. C. Neslen, acting in the course of his employment and driving and operating the said truck as hereinabove set forth, did permit at the said time a "dolly" or hand truck to be hanging on the side of said truck, with a loose, heavy iron wheel being insecurely fastened or affixed to said hand-truck or "dolly" which was likely to and did fly off the said hand-truck or "dolly" to the injury of the plaintiff as herein set forth. That the defendants and each of them knew, or in the exercise of due care and ordinary prudence should have known, that the said heavy iron wheel was insecurely and unsafely attached to the said hand-truck or "dolly" and that such condition was dangerous to the public and to the plaintiff in particular.

7. That the aforesaid negligent, careless, heedless,



and reckless conduct on the part of the defendants as hereinabove set forth and as specifically alleged in the next preceding paragraphs was and is the direct and proximate cause of the injuries sustained by the plaintiff as hereinbefore set forth.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of Four Thousand (\$4,000.00) actual damages, in the sum of One Hundred (\$100.00) Dollars special damages, in the sum of Seventy-Five (\$75.00) Dollars for the medical care and treatment of plaintiff's injuries, and for his costs herein expended and such other and further relief as to the court may seem just and proper.

(Signed) Woodrow D. White,  
*Attorney for Plaintiff.*

(Duly Verified and Filed December 30, 1938.)

(Title of Court and Cause)

### DEMURRER

Comes now the defendant above named and demurs to the complaint of the plaintiff on file herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against the defendant.

(Signed) Gardner & Latimer,  
*Attorneys for Defendant.*

(Filed February 18, 1939.)

Minute Entry, February 18, 1939, P. C. Evans,  
Judge:

Upon motion of Woodrow D. White, counsel for the plaintiff, it is ordered that the defendant's demurrer to the plaintiff's complaint is overruled and the defendants are given five days after notice to answer.

(Title of Court and Cause)

### ANSWER

Come now the defendants above named and in answer to the complaint of the plaintiff on file herein admit, deny and allege as follows:

#### I

Answering Paragraph I of the complaint the defendants admit that on the 23rd day of December, A. D. 1938, the defendant Kenneth J. Pinney was doing business under the name and style of the Pinney Beverage Company in Salt Lake City, and County, State of Utah; admit that on the 23rd day of December, A. D. 1938, the defendant, A. C. Neslen, was driving a truck belonging to the defendant Kenneth J. Pinney in a northerly direction on Highland Drive in Salt Lake City, Utah, between 27th South Street and 21st South Street in a safe, careful, prudent and legal manner, at a reasonable rate of speed, to wit: not in excess of 18 miles per hour, and

with due regard to the rules of the road and to the rights of the drivers of other vehicles and of the pedestrians being then and there upon said highway, and that said truck being so driven was in all respects in good operating and mechanical condition. That attached to the chassis of said truck and underneath the body of said truck was a hand-truck or “dolly” which was occasionally used by the driver of said truck in delivering barrels of beer, and that said hand-truck or “dolly” was propelled on two small wheels of approximately seven inches in diameter and weighing approximately six pounds, and that each of said wheels was securely and safely fastened to its respective axle on said hand-truck; deny all other allegations in said Paragraph I.

## II

Answering the allegations of Paragraph II, the defendants admit the allegations therein contained.

## III

Answering Paragraph III of the complaint, the defendants admit that on the 23rd day of December, A. D. 1938, the plaintiff was standing in the highway at approximately 2330 South Highland Drive but under the circumstances and in the manner hereinafter fully set forth; deny all other allegations in said Paragraph.

## IV

Answering Paragraph IV of the complaint, these defendants allege that they have no knowledge or information concerning the allegations therein contained, and

upon such ground deny each and all of the said allegations.

## V

Answering Paragraph V of the complaint, these defendants allege that they have no knowledge or information concerning the allegations therein contained, and upon such ground deny each and all of the said allegations.

## VI

The defendants deny each and every allegation contained in Paragraph VI of the complaint.

## VII

The defendants deny each and every allegation contained in Paragraph VII of the complaint.

## VIII

The defendants deny each and every allegation set forth in the complaint of the plaintiff, except as otherwise in this answer admitted, qualified, or denied.

Further answering the complaint of plaintiff and by way of an affirmative defense thereto the defendants allege that on the 23rd day of December, A. D. 1938, the plaintiff was standing on the traveled portion of the highway at about 2330 South Highland Drive in Salt Lake City, Utah, and while being so then and there, and immediately prior to and at the time of the accident alleged in the complaint, the plaintiff acted in a negligent, careless, imprudent and illegal manner in this:

that at said time and place the plaintiff failed to observe any lookout for vehicles passing the point where he was standing and took no precautions whatsoever to protect himself against being injured in any manner by said vehicles so passing while the plaintiff was then and there standing in the travelled portion of the said highway; that if a small wheel from the hand-truck attached to the defendant's truck did become detached therefrom and strike the plaintiff's leg, then such accident and collision was the sole proximate result of the negligence and carelessness of the plaintiff as hereinabove set forth and was not caused proximately or at all by any negligent act or omission on the part of the defendants or either of them.

WHEREFORE, the defendants pray that the plaintiff take nothing by his complaint, but that the same may be dismissed by this Court and that the defendants recover their costs incurred herein.

(Signed) Gardner & Latimer

*Attorneys for Defendants*

(Duly Verified and Filed March 9, 1939.)

(Title of Court and Cause)

## REPLY

Comes now the Plaintiff above named, and replying to Defendants' Answer on file herein, admits, denies and alleges as follows :

1. Replying to paragraph (1) Plaintiff denies that the Defendant A. C. Neslen was driving the said truck in a safe, careful, prudent and legal manner at a reasonable rate of speed, to-wit: not in excess of 18 miles per hour, and with due regard to the rules of the road and to the rights of the drivers of other vehicles and of the pedestrians being then and there upon said highway, and denies that said truck was so driven or was in all respects in good operating and mechanical condition, but alleges the facts to be as set forth in Plaintiff's complaint.

2. Replying to paragraph (3) Plaintiff denies that he was standing in the highway under the circumstances and in the manner set forth in Defendant's Answer.

3. Replying to the allegations contained in the affirmative defense of the Defendants set forth on page (3) of the Answer, Plaintiff denies that he acted in a negligent, careless, imprudent and illegal manner; denies that at said time and place plaintiff failed to observe any lookout for vehicles passing the point where he was standing; denies that he took no precaution whatsoever to protect himself against being injured in any manner by said vehicles so passing while Plaintiff was standing behind his truck properly parked on said highway at said place, and denies that the accident and collision set forth in Plaintiff's complaint was the sole proximate result of the negligence and carelessness of the Plaintiff, and alleges that said accident was proximately caused by the negligent acts and omissions of the Defendants as set forth in Plaintiff's Complaint.

4. Plaintiff denies each and every allegation in said Answer contained inconsistent and contrary to the allegations set forth in Plaintiff's Complaint.

WHEREFORE: Plaintiff prays that said Answer be dismissed and that Plaintiff be given the relief prayed in his Complaint.

(Signed) Woodrow D. White  
*Attorney for Plaintiff*

(Duly Verified and Filed March 29, 1939.)

### STATEMENT OF THE EVIDENCE

BE IT REMEMBERED, that on the 19th day of April, 1939, the above-entitled matter came on for trial before the Honorable M. J. Bronson, Judge, sitting with a jury, the plaintiff being represented by Woodrow D. White, Esq., and the defendants being represented by Messrs. Gardner & Latimer, Esqs., with Hamilton Gardner, Esq., present.

Kenneth White, the plaintiff herein, testified as follows:

My name is Mahonri Kenneth White. I am the plaintiff and reside at 2901 South 18th East. I am a farmer and florist and was following that occupation on December 23, 1938, on which date I had occasion to be in the vicinity of the 2300 block on Highland Drive. I had a customer known as the Maxwell Floral who was



located at 2333 South Highland Drive, his place of business being on the east side of the street. My truck was parked about six or eight inches away from and parallel with the curb on the west side of the street, facing south, and opposite the Maxwell Floral Shop. Mr. Maxwell who operates a greenhouse there came out to my truck to make a purchase and I opened the back doors of the truck and handed him a dozen gladiolas. As I was handing him the flowers I was struck by a wheel. I was standing nearest the curb. As the wheel hit my left shin I was thrown back against the bumper of the car so my elbow went down between the bumper and the back of the truck. When the wheel hit me it threw my leg around and hit the back of my leg on the flange of the door which was about three-fourths open. The pain following my being struck on the leg by the wheel was very severe; the front where the wheel hit was inflamed and the back of my leg was cut. I first saw the truck when it had gone past me approximately 150 — maybe 200 feet. In my opinion the truck was travelling around fifty miles per hour when I first saw it. I should judge the diameter of the wheel was about eight inches. It was of solid steel construction with a hole through for the axle and a hard rubber tire. Part of the rubber was considerably nicked around the outside of the wheel. I then got in my truck and started towards Sugar House to overtake this truck that had gone by and when I reached 2160 Highland Drive a truck resembling the one I was looking for was making a delivery across the street. I pulled in back of the truck and got out and took the wheel over to the side



of it. I noticed a dolly, about three and one-half feet tall with a pair of handles, hanging on the side about a foot back from the driver's seat on the left side. After I found that the wheel belonged to that dolly I observed two gentlemen coming out of the beer stand, one of whom was the defendant, A. C. Neslen. I gave Neslen the wheel and told him it had struck me on the shin. I don't recall what he said when I showed him my leg. The injury affected me so that I could hobble around but I couldn't carry myself very well. I went immediately home from this beer place. The next day I had a helper with me in my work. I employed him about eight days before the injury to help me with my Christmas business. I used him through the Christmas season and until approximately January 24. I used him on the truck after December 24 because I wasn't able to do my work myself. I paid him \$12.00 a week. I operated my truck at most four or five days between December 23 and January 20. I didn't operate the truck for the full period between those days on account of the pain in my leg and the doctor had ordered me to stay off it. I was able to walk on my leg pretty well after about three weeks. The bone in my leg aches, my leg continually cramps and after I have been on it for quite a while it gets inflamed or warm on top. It gets hot, and then my three toes draw up and go numb for a little period. I usually take my shoe off and rub it for a while and after two or three minutes it leaves. I am bothered with that condition at the present time. It occurs only when I am on my feet for quite a period of time, after a long walk, or after

two or three hours of work. I called on Dr. Clawson the morning following my injury. He examined me at his office and had my leg X-rayed, poulticed, and bandaged. Since this initial treatment I called on him about three or four times and then twice in February.

### CROSS-EXAMINATION

Dr. Clawson's initials are Thomas A., Jr., and his offices are on the 4th floor of the Medical Arts Building. I couldn't say for sure that I worked on Christmas day. I didn't work on December 26, nor on December 27. I was at home bathing my leg. I didn't do any farm work on December 23, 24, or 26th, but I did deliver flowers. I do not have a hot house but in the winter months I job for two or three California concerns. I didn't drive the truck on the 25th, 26th, 27th, 28th or 29th. I did what I could at home. Dr. Clawson did not make any incision or sew up my shin. At the back of the leg there was an open wound about a half inch wide and the front was bruised. The skin on my shin was scuffed-like and scabbed. I would say that Highland Drive at about 2333 South is about 43 feet from curb to curb, with a car track in the center. The street is quite rough, and of tarry construction. I have stopped at that address approximately four or five times a week and there is a lot of traffic on Highland Drive, particularly two days before Christmas at 4:30 in the afternoon. I did not look toward the east at all when I was standing there with the flowers in my hand as I wasn't contemplating going across. I was looking at my customer. I did not look down the

street to see if any cars were coming. I didn't see the truck involved in the accident until it had passed me. I didn't look to see if a truck was going by. I didn't look to see if there was any other danger in the road. Mr. Maxwell was standing to my left. My truck is about seven feet wide at the back. I was standing at the west end of my truck as I opened the door. I would say that the wheel which struck me weighed about six pounds and it was the only thing in the vicinity that I found that might have struck me.

### RE-DIRECT EXAMINATION

At the time I was struck the traffic was not heavy. I did not see or hear the wheel before it hit me. On the occasions that I drove the truck to town between December 23rd and January 20th my helper made the deliveries and solicited the orders. It pained me to walk into the places of business, and it pained me to drive the car. About five feet of the truck extended to the east of the point where I was standing when the accident occurred.

T. H. Maxwell, called on behalf of the plaintiff testified:

My name is T. H. Maxwell. I am a florist and my residence and place of business is 2333 Highland Drive. I saw plaintiff on December 23, 1938 in the early afternoon. Mr. White's truck was parked parallel to the curb and facing south on the west side of the street, as close

to the curb as he could get it. I went across the street with Mr. White to see some gladiolas he had in his truck. As he took flowers out of his truck and handed them to me this wheel buzzed right past, just seemed like it almost shaved me, but I didn't see it until it hit Mr. White. I was standing just a little in front of him; my back was to the east and he was facing me. The wheel hit him on the shin and bounced. I noticed that his leg was knocked back far enough to trip him over. Mr. White picked the wheel up just on top of the curbing.

### CROSS-EXAMINATION

I have been in business where I am now for about eight years. There is a lot of traffic on Highland Drive at that point.

### RE-DIRECT EXAMINATION

At the time the injury occurred there didn't seem to be so very many cars on the street.

W. L. Butterworth, a witness called on behalf of the plaintiff, testified:

My name is W. L. Butterworth and I live at 955 East 9th South. I work for the Postal Department. On December 23, 1938 I was delivering parcel post in the vicinity of Sugar House at an inn just south of 21st South. I met Mr. White just as I was leaving this inn. A truck loaded with beer supplies was parked just in

front of the inn. It had a cab and an open staked body and was loaded with barrels, bottles, cases, and supplies. As I recall the name of Pinney Beverage Company appeared on the truck. I recall that an elderly gentleman was called out of this little eating establishment that day and there is a marked similarity to the defendant, Mr. Neslen, and I would say he is the gentleman. There was a conversation between him and Mr. White regarding a certain wheel that Mr. White held in his hand. Mr. White showed me where he had been struck with this wheel. I observed the wheel. As I recall, it was eight inches in diameter and the tire, I would say, was an inch to an inch and one-quarter wide. It was a wheel of solid iron construction with a solid rubber tire covering. Hanging on the side of the beer truck was a small dolly or cart that is used in transporting kegs. It was hanging just behind the cab probably one or two feet behind the rear of the cab so that the wheels protruded out, if in place. When I first saw the hand-truck or dolly it was minus one of the wheels. Mr. White took the little wheel he had in his hand and attempted to place it on, to see if it fit on the dolly that was hanging on the truck and from my observation, it did. The wheel was identical with the other wheel which was on the dolly. Mr. White then handed the wheel to the more elderly of the two men that were there, I believe, Mr. Neslen. As I recall Mr. White asked him if he was the driver and operator of the truck and explained to him that this wheel had struck him while the car was passing and that it had injured his leg; and proceeded to show us where it had hit him.

## CROSS-EXAMINATION

I have known the plaintiff practically all my life and he asked me to testify for him.

Dr. Thomas A. Clawson on behalf of plaintiff testified:

My name is Thomas A. Clawson, Jr. and I reside in Salt Lake City. I am a licensed physician and a graduate of the University of Maryland. I specialize as a diagnostician and internal medicine. I examined Kenneth White on December 24, 1938. At the time he came to the office he had a swelling of the lower third of the left leg. It was quite a large swelling on the outer side of the leg and in the posterior part of the leg there was a cut about five inches from the base of the foot. The whole lower leg and ankle were swollen. There was a bulgy swelling just about the location of the cut. I made an X-ray at that time (Exhibit C). This X-ray shows a swelling of the soft tissues and extended particularly on the fore lateral side of the leg. The X-ray also shows a swelling of the fibula on the outer margin of the bone. There is rather a circumscribed swelling, enlargement. The X-ray of plaintiff's left leg taken on February 4, 1939 (Exhibit B) shows the same as Exhibit C, except that soft tissue swelling is not present in the later picture. The bone condition is the same as was seen in the first exhibit. There has been no change in the bone. There are a number of structures that are present in the leg. There are the muscles, the blood vessels, the nerves, and

the bone. An injury to the leg, such as Mr. White had, might injure any of those structures. There was an injury to the muscle because of the swelling that I found at the time I examined Mr. White. There has been apparently an injury to the nerves because of the persistence of numbness and pain he has complained of in the foot below the side of the injury. The testimony that plaintiff still suffers a burning sensation along the left forepart of his foot and a cramping in the three toes of his left foot would indicate that there is probably a slight injury to the peroneal nerve. Due to the swelling and inflammation resulting in the trauma to the muscles, the leg would be sore. A soreness in the muscles of the leg might persist for several weeks or months. As long as there is a great deal of pain and some swelling, it is best for a patient to use an injured part as little as possible. On the average most of the swelling and pain would be gone in two or three or four weeks and to favor that member for a period of two or three weeks would be advisable. At the time I saw Mr. White I put a sterile dressing and some medicine on the cut back of the leg and advised him to go home and get off the leg and keep heat on it. If the soreness persisted I advised him to stay off it and continue the treatment. I think he was at the office four or five times. My fee for the X-rays and medical treatment would be about thirty-five dollars, which in my opinion is reasonable.

## CROSS EXAMINATION

The purpose of the February 4th examination was



to determine the status of the leg at that time. No treatment was given. All treatments in connection with the injury were given at my office. The cut on the back of the leg healed up very readily. It was about one-half inch long and not very deep. It did not require surgery or stitching. There is an enlargement of the bone in Exhibit B. The bone itself is not swollen; the swelling is in the outer tissues. The treatments given in December followed each other within a few days. I told him to keep off the leg but not to go to bed. There was no open cut on the front part of the leg, just swelling. There was no abrasion, just a bruise, which later developed a black and blue condition. No medicine was prescribed. Only the back part of the leg was bandaged for the cut and heat was prescribed for the swelling. The patient did not have an osteomyelitis. He had a little inflammation in the periosteum, probably which lasted for only a short time. On February 4, the cut was healed but from the symptoms he complained of he still had an irritation of the nerves. He complained of pain at that time but there was no external evidence of anything. On February 4 there was still that thickening about the periosteum of the bony structure.

## REDIRECT EXAMINATION

From the appearance of the injury it would be reasonable to expect that plaintiff would continue to suffer disability on February 4, 1939 and that the injury to the nerves would continue to that date, and it would be possible for the nerve injury to exist at present.



## RECROSS EXAMINATION

I have not examined Mr. White since February 4. I saw his leg the other day before the trial. From my standpoint there was no condition of improvement since February 4 and this week when I saw him. I didn't and can't see any difference in looking at the leg. There has been no retrogression. He asked me why he was continuing to have cramping and why he continued to have pain when he was on his feet for any length of time and I told him it was probably due to an injury to his nerves.

## REDIRECT EXAMINATION

Exhibit B, being an X-ray taken on February 4, shows the injury to the bone to be the same as in the first picture. In the first picture there seems to be a slight fuzziness at the peak of the swelling which isn't present in the last picture.

## RECROSS EXAMINATION

The bone itself in the front of the leg is surrounded by thin muscles; the leg muscles are behind the bone.

Dr. Horace C. Holbrook testified on behalf of plaintiff as follows:

My name is Horace C. Holbrook. I am a licensed and practicing physician. (Qualifications were admitted by Mr. Gardner.) I have been specializing in orthopedics

for eighteen years. I am acquainted with the plaintiff. I was called in consultation as to his condition. The patient had a disabled leg which had suffered a traumatic injury which involved the lower third of the leg. There was a swelling coming up as high as the middle half of the leg, involving the lower half. There was rather marked tenderness over this same area, more particularly about three inches above the ankle joint. Some discoloration of the skin accompanied this swelling, and tenderness to pressure. The leg was hot, as you nearly always have in inflammatory conditions. There was an open wound on the back part of the leg with a little exudate or serum coming from the wound. The greatest amount of swelling was almost on the external lateral surface, say three inches above the external ankle and almost on the side; although that swelling was somewhat spindle-shaped and involved an area of five or six inches, with the peak of the swelling in the center and a little ways back of the tip of the tibia. The injury indicated a rather severe blow but not with a sharp instrument, more of a broad surface was covered at the time of the blow, except this point at the back, which probably was hit by something more sharp and pointed. When I examined the patient that day the leg was practically disabled and he was having considerable pain, because it was quite swollen and he had received a rather severe traumatic blow or injury and was at that time in a condition of disability. Ordinarily, you would expect the best results to follow resting—that is, in that condition, the disability would continue for some two to three weeks. I think if the

patient used the leg either to walk upon or to drive an automobile that he would suffer pain from such use for a period of three weeks or more. If the patient was still at the present time complaining of a burning sensation along this part of the foot, indicating the region just on the side of the foot, just back of the small toe, and of a cramping of the toes and a numbness, I think he had that same condition at the time I examined him. That is, he claimed it was more pronounced in that area. I think that he had injury to the soft part, swelling and trauma of the tissues in the neighborhood of this swelling, which I have described, and therefore, had some nerve involvement which was giving the pain in this part of the foot which has been described; that is, the external anterior part of the foot. I think the peroneal nerve would be affected. The paroneal nerve proceeds down along the fibula, in company with the vessels, and branches out and supplies the external half of the foot, particularly the third, fourth, and fifth toes. I think the nerve condition continues to the present date in view of the findings and the story symptoms and history of the case. The judgment to the amount and severity of the pain necessarily would be based entirely upon his story; but the reasonableness of that story has ground for belief. There will be, most likely, disturbance with the nerves as long as there is thickening and swelling in and about the bone, which is still existent. I would expect the nerve condition to gradually disappear over a period of the next few months. Exhibit B shows a thickening enlargement of the fibula and the fibula area about four inches

above the external malleolus, which corresponds with the maximum seat of swelling and tenderness at the time of the first examination. I was called into consultation by Dr. Clawson twice—when these pictures were taken. My bill is twenty-five dollars for the two examinations and it is reasonable.

### CROSS EXAMINATION

I did not participate in the treatment of plaintiff. My testimony is largely based upon the examinations made December 24 and February 4th with Dr. Clawson, plus conversations had with the patient in the meantime. I examined the patient, however, within the last week. He asked me if I would testify. On December 24 all I saw was enlargement and swelling and a cut. There was no necessity for surgery. We considered two methods of treatment and applications of heat was the treatment which suited Dr. Clawson's idea better than putting the leg in a cast, largely because it had an open wound at the back which he didn't want to become infected. I told him he would be infinitely better off if he didn't use it and kept it in rest and used hot packs. I did not regard the cut in the back of the leg as serious. I concurred in the treatment as one method and would expect him to make good recovery.

### REDIRECT EXAMINATION

I would have strongly urged that cast be put on the leg if he hadn't the open wound.

Kenneth White, the plaintiff, was recalled and testified as follows:

### CROSS EXAMINATION

I have heard the testimony of Dr. Holbrook and Dr. Clawson and I would be willing in fairness to submit now to a physical examination, including X-rays by doctors to be appointed by the court and have those doctors come in and testify.

Plaintiff rests.

Upon motion of Mr. Gardner the jury were ordered and excused to view the hand-truck and the automobile truck. (Minute entry April 20, 1939, M. J. Bronson, judge.) Thereafter the hand-truck viewed by the jury was produced in court by the defendants at the request of the plaintiff's attorney. Plaintiff was allowed to re-open.

The defendant, A. C. Neslen, called as a witness for plaintiff, testified:

I am employed by the Pinney Beverage Company, Mr. Kenneth J. Pinney, and I was employed by that company on December 23, 1938. I went to work on that day at eight o'clock in the morning and left work a little after five.

No cross-examination.

W. L. Butterworth was recalled to the stand and on

behalf of plaintiff testified:

I was present when the wheel from the hand-truck involved in this case was delivered to the defendant, Mr. Neslen. I do not recognize either of the wheels on the truck produced in court. I have never seen either of those wheels before. They differ from the wheel which I saw on December 23, 1938, in that the wheel I saw had no grease cup on it. The outer rubber surface was thinner. The hub of the wheel, the diameter of the surface, where it fits on the hub, was larger. The axle was larger. I would say that the axle on the other truck was close to an inch, or a little larger. The axle on this truck appears to be between an inch and three-quarters of an inch. The thickness of the rubber tire was approximately a quarter of an inch on the wheel I saw there and the iron surface holding the rubber band showed in a few spots. The hand-truck on December 23rd was hanging down the flat side of the truck, right behind the cab.

### CROSS EXAMINATION

I recall that the accident took place on the 23rd of December, about five months ago and I had never seen that wheel before I saw it on that day. I made no measurements on that day and did not weigh the wheel. I was only there a short time when Mr. White gave the wheel to Mr. Neslen. I took hold of the wheel. Mr. White called me in today at noon and I discussed this truck with him just before I got on the stand to testify. Mr. White called my attention to a few of the circum-

stances of difference. Except for that, I could have told the difference between the two wheels, without measuring the wheel, without weighing it, and only having seen it once and that five months ago. I make a practice of measuring by sight machinery and noting peculiar things about its surface. I am not a machinist, but a postman. One reason I took close notice of the wheel was the circumstances under which it was presented to me. It impressed itself on my mind. I didn't let the jury know about it yesterday before talking it over with Mr. White because the subject matter never came up, as I recall. I remember counsel asked me to describe the wheel and I did describe it.

Q. You described its diameter and you made an estimate of its weight, and you described, as I recall your testimony, something about the rubber on it, didn't you?

A. I made a statement like that. I can't say why I didn't tell about the details I described today when counsel asked me yesterday about the wheel.

### REDIRECT EXAMINATION

The differences which I didn't discuss with the plaintiff before court this afternoon were the thickness of the rubber surface and the weight of the wheel. As a matter of fact I pointed out some differences to the plaintiff.

Kenneth White was recalled and testified for plaintiff:

I examined the hand-truck when it was brought into



court. The wheels on it are definitely not the wheels that I had the experience with. The wheel I had the experience with is not on the truck at the present time. The wheel that struck me on the leg had a much thicker place for the axle to go through. It didn't have that groove in the side of it where this is scooped out; and the rubber tire on it was just about worn to the surface. The rubber tire covering on these wheels is, I would say, a half inch. The rubber is entirely different. The rubber on the wheel that struck me was coarser. It was the old-fashioned harder rubber type. The wheel that struck me was greased through a hole in the wheel, not through an alemite cup such as that one.

### CROSS EXAMINATION

The first time I ever saw the wheel was after it struck me. I never seen it since, nor any wheel like it. I did not take any measurements, only in mind. I did not weigh it in my mind or any other way. When I testified about the wheel on the witness stand yesterday I think I did describe the rubber on the wheel that struck me. I would have described it if you had given me an opportunity. I said the rubber was worn. When I noticed this in court this afternoon, I was positive in my mind this wasn't the wheel I had the experience with, naturally, I did try to see what differences there were. I don't think anybody asked me yesterday to describe how the wheel was lubricated. If the question had been put to me so I felt an answer was coming on that subject, I would have given it. I described the wheel yesterday



to the best of my ability. I think yesterday I described the hole in the wheel, if I recall that I said it was an inch in diameter or thereabouts. Mr. Butterworth and I did discuss the wheel just before court convened, and back and forth we pointed out some differences between this wheel and the one that hit me on the 23rd of December. I had the wheel in my possession approximately ten minutes.

### REDIRECT EXAMINATION

Mr. Butterworth, when we discussed the differences between the wheels on the hand-truck and the one which hit me, pointed out some differences to me and I indicated some to him.

Plaintiff rests. Motion for non-suit made and denied.

A. C. Neslen, one of the defendants, testified on behalf of the defendant as follows:

I am one of the defendants in this action and I drive a truck for the Pinney Beverage Company and was so engaged on December 23, 1938. We made a delivery of two half barrels of beer at what they call Dinty Moore, about 48th South Main, at Murray, late in the afternoon. From there we went up 48th South to Highland Drive to LaVon's Inn and we made a delivery there. From there we came right in on Highland Drive to Sugar House and stopped at the Dixie Inn. I drove the same truck on December 23rd that I had out here this morning, with

the little truck here on it. The big truck is a one and a half ton truck of International make with four cylinders. On that day it was loaded with two barrels of beer and the rest was all case beer, bottled beer. I would imagine we had a litte over a ton in weight on the truck that day. We delivered two barrels at Dinty Moore's and in making the delivery used the small hand-truck. We did not notice anything wrong with the hand-truck when making the delivery in Murray—the truck seemed to be perfectly all right in every respect so far as I knew anything about it. When I finished delivering the beer in Murray I fastened it back in place on the truck where we always hang it. There is a chassis of the truck runs along this way (indicating) and the handles go in like this and this handle part goes in past the stringers on the chassis. Then we lift this part up here and right on the edge there is another flange comes up here, like this (indicating). It is fastened on the side of the truck. We push that up in there and it sets right down in, cleats in that way. It holds this perfectly solid all the time. I am familiar with Highland Drive in the 2300 block and know where the floral shop of Mr. Maxwell's is. There is a street car track and the pavement is a little rough and bumpy going down that way. I judge it was around three-thirty when I passed Maxwell's. There is quite a little traffic both ways at about that place and at about that time of day. And that was the condition on the day of the accident. In fact, there were two cars ahead of me when I was going up the street. On the day of the accident and in the vicinity of Maxwell's Floral Shop I wasn't

driving any more than between twenty and twenty-five miles per hour, at the most. I went right from there to the Dixie Lunch. I did not hear, see, or feel, or otherwise observe anything happen to my truck as I passed Maxwell's Floral Shop that day. I drove in a drive in place at the Dixie Inn. The small truck was fastened the same as we always fasten it. The truck here in court was the same truck as was on the main truck on the day of the accident, and the wheels on this truck in court today are the same wheels as were on that small truck on December 23, 1938, the same wheels we always have on it. As far as I know no other wheel has ever been on this truck than the two wheels that were on the day of the accident. We have never changed wheels. I saw plaintiff about ten days to two weeks after the accident coming out of the Maxwell Floral Company with one of these large cartons what they ship flowers with—I imagine, about maybe four feet long, a couple or two feet and a half wide. He had it up in his hand in front of him and walked out to the sidewalk and stopped and looked down the road. He then proceeded across the street as we were going south in the truck. He started walking across the street kind of limping. Before the Murray delivery on the day of the accident we had been using this particular hand-truck in the forenoon on what we call the "keg route," and we always use this to take beer in and out of places of business. On the morning of the accident we used the hand-truck all of fifteen times. It seemed to work perfectly. We have had the truck and used it every day for a year or a year and a half.

## CROSS EXAMINATION

We do not have a different style hand-truck than the one here. These trucks are equipped with the same wheels and the same greasing. I did not look at my speedometer when I was in the vicinity of the Maxwell Floral Shop. I drive just about the same there all the time. Sometimes I traveled in between the car line on account of it is a little smoother there than other places. Mr. White walked inside the Dixie Lunch with the wheel in his hand. I have never seen Mr. Butterworth before and did not see him on that day. I did not see any mail carrier while I was at the Dixie Lunch on that day. Mr. White walked out of the Dixie Lunch behind me and I looked over to see if the wheel was my wheel and I saw the wheel was off and I put the wheel he gave me in the car. When we got in that night I put the wheel on. It looked like one of the wheels off my truck and I was surprised to find he had it in his hand. The hand-truck was about two and a half feet above the street. It hangs right underneath the chassis. The wheels are underneath the truck. We have never hung the hand-truck on the side of the truck and it was not hanging on the truck that way on that day. Even when we make stops relatively close together we put it right in the same place. When it is in place, it is flush with the car. The wheel is attached to the hand-truck with a cotter key. The cotter key was gone when the wheel was off the truck. We grease the truck about once or twice a week. We don't always take the cotter key out when we grease

it. I have never taken it out. I made no other inspection of the hand-truck except greasing it. As long as it is all right, it is all right. If there is anything wrong with it, we notice it, of course. I have used this particular hand-truck for a little over a year; it is always attached to the same truck which I always use to deliver beer in. They do not use this hand-truck to load beer; they use two other trucks that are larger—ten or twelve inch wheel, I guess. They would be too heavy to handle on the delivery of beer. One of those trucks would not fit on the attachment on the truck. One of those large hand-trucks could not be hung on the side of the truck. It could shake off. There is no place to hang it on there.

LaMar Sharp testified on behalf of the defendants as follows:

My name is LaMar Sharp and I live at 454 South 5th East and work for the Pinney Beverage Company, for whom I have been employed for about a year and a half. I was working for them on December 23, 1938, helping Mr. Neslen. I have been with him most of the time. I have driven a truck all last summer and my experience enables me to estimate the speed of trucks in which I am a passenger. I have a habit to always watch the speedometer whether I have been driving or not. I recall making a delivery of a barrel of beer at Murray. This hand-truck was used. My testimony would be the same as Mr. Neslen's with respect to how the hand-truck is attached to the main truck. The truck in court today is the same as was attached to the larger truck on De-

ember 23, 1938. The wheels on that truck are the same as the wheels on the truck in court today. All wheels on trucks of that size are uniform. As we drove through the 2300 block on Highland Drive the afternoon of this accident our speed was somewhere between twenty and twenty-five miles per hour. I know where the Maxwell Floral Shop is and as we passed it I did not notice anything unusual happen on the afternoon of December 23. I did not hear any sound or noise, nor did I see anything. I had no knowledge of an accident of any kind. I did not know anything was wrong with the car. There was nothing unusual or different about the hand-truck when I used it at Murray. It was in good working order. Mr. Neslen's testimony about greasing it would be my testimony. I first saw Mr. White when I had entered the Dixie Lunch and placed the case of beer beside Mr. Neslen, and just turned around as Mr. White entered the place. That was when I saw him deliver the wheel to Mr. Neslen. The next time I saw plaintiff was around ten days or two weeks at the same place of the accident. Mr. Neslen was with me. We were traveling south on Highland Drive and I saw Mr. White coming down the steps with this box and appeared to be walking perfectly normal and he stopped at the curb, as most people would, and looked up and down for traffic, and then he stepped off the curb to walk across the road, and he was limping slightly.

### CROSS EXAMINATION

The second time I saw Mr. White he was about half

way down the steps of the Maxwell Floral. I saw him walk across the sidewalk which runs north and south. I would say he was twelve to fifteen feet east of the sidewalk when I first saw him. He appeared to be walking normally. He was carrying a paper box in front of him. Our truck was down north, maybe a hundred feet when I first saw him. I don't think we were going over fifteen or twenty miles per hour. We did not slow down when we saw him. The plaintiff walked across the road in front of us. We did not have to slow down to avoid hitting him at that time. I saw him walk the balance of the distance to his truck. After he stepped off the gutter he walked clear across the road with a limp. While we were coming up he walked fifteen or twenty feet to the curb and stopped to see if cars were coming. I did not look back to see him get into the truck. If you should go down to the Pinney Beverage Company today you would see a truck of a different style than this truck here. When Mr. White stepped inside of the inn, you could see the wheel in his hand. He showed it to Mr. Neslen inside of the inn. I did not observe them go over to the truck to see if the wheel would fit on the truck but I observed that the right wheel was missing from the hand-truck. The hand-truck was not greased that day in my presence. I have never taken the cotter pin out of the wheels on this truck. I have never examined it to see what condition it was in. I don't know as anyone at the Pinney Beverage Company in my presence has ever examined the cotter pin to see what condition it was in. I did not see Mr. Butterworth at the inn when



I was there, nor did I see him outside of the inn. I didn't see him that day. I can't say that I was watching the speedometer as we passed the Maxwell Floral the day of the accident. I based my judgment entirely upon my habit in observing speed when riding in automobiles and not upon any definite particular recollection of how fast I was going at that particular time and place.

Defendants rest.

Kenneth White, plaintiff, testified in rebuttal:

Q. Mr. White, you have heard the defendant, Mr. Neslen, and also Mr. Sharp, testify that some ten days or two weeks after the 23rd of December they observed you walking out of the Maxwell Floral Shop with a box in your hand. Did you on that day see the defendant, or the witness Mr. Sharp, or the truck in which they were riding?

A. No.

Plaintiff rests.

(Title of Court and Cause)

# PLAINTIFF'S PROPOSED INSTRUCTIONS TO THE JURY WHICH THE COURT FAILED AND REFUSED TO GIVE

No. 1. You are instructed that under the evidence



of this case the defendants are guilty of negligence as a matter of law, and that the negligence of the Defendants was the direct and proximate cause of the injury sustained by the Plaintiff, and you are instructed that the only thing that you are called upon to consider in your deliberations is the amount of damage which Plaintiff sustained, if any.

No. 2. You are hereby instructed that under the evidence in this case the Plaintiff was not guilty of contributory negligence in any way, and if you shall find that the injury he sustained was caused by negligence of the Defendants, or either of them, then you must find for the Plaintiff.

No. 4. If you shall find and believe from the evidence that the Plaintiff's truck was parked parallel to the curb on the west side of Highland Drive in the 2300 block in the afternoon of December 23, 1938, and that Plaintiff was standing behind the truck in the act of delivering flowers to a Mr. Maxwell, florist, you are instructed that the Plaintiff under those circumstances was under no duty to maintain a constant look-out and his failure to maintain a look-out under those circumstances may not be considered as contributory negligence.

No. 5. If you shall find and believe from the evidence that on the 23rd day of December, 1938, the Defendant A. C. Neslen was an employee of the Defendant Kenneth J. Pinney, doing business as the Pinney Bever-

age Company, and was acting in the course of his employment on that day, and that he drove and operated a truck belonging to his employer past the point where Plaintiff was standing behind his truck in the 2300 block on Highland Drive, then I instruct you that the Defendants, and each of them, owed a duty to Plaintiff to maintain the said truck and anything thereupon attached in a good state of repair so as not to inflict injury upon anyone lawfully on the said highway, and if you shall further find that the defendant permitted at the said time a dolly or hand-truck to be hanging on the side of said truck from which an iron wheel became detached and struck Plaintiff, inflicting injuries, then I instruct you that the thing that caused the injury complained of was under the exclusive control of the Defendants, and the accident is such as in the ordinary course of things could not have happened it those having the exclusive control and management of their equipment used proper care, and it affords reasonable evidence in the absence of explanation by the Defendants, that the accident arose from want of care and was caused by the negligence of the Defendants and you must therefore find for the Plaintiff.

(Filed April 21, 1939.)

(Title of Court and Cause)

MEMBERS OF THE JURY:

At this point it becomes the court's duty to instruct

you upon the law applicable to this case. May I, therefore, have you attention.

### INSTRUCTION NO. 1

(Note: The Court's Instruction No. 1 consists entirely of an almost verbatim recital of the pleadings, which are set forth in full elsewhere in this Abstract; and inasmuch as no exceptions were taken by either party to the Court's Instruction No. 1 and inasmuch as it did not refer at all to the evidence, for the sake of brevity that instruction is not set forth herein.)

### INSTRUCTION NO. 2

You are instructed that the statements made to you in instruction No. 1, next preceding, are not to be regarded by you as a statement of the facts as proven in the case, but are to be taken by you merely as a general and summarized statement of what the respective parties to this action claim to be the facts. Where it is stated in these instructions and in the taking of evidence that a fact claimed by one party is admitted by another you are to consider such fact so claimed and so admitted as an established fact in the case. Beyond that you are not to draw any conclusions concerning the facts from a mere recital by the court of the claims of the respective parties.

Unless you are specifically instructed to the contrary you are not to assume from these instructions or any others given you, nor from any words uttered or re-

marks made by the court during the trial that the court means to give or desires to be understood as giving an opinion to you as to what the proof is or what it is not, or what are the facts or what are not the facts in the case.

Generally speaking it is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, you must then apply such facts to the law as given you in these instructions. Under your oath as jurors you must accept the instructions given you by the court as the law applicable to this case. You have no right to consider or be controlled by anything else as the law except as given you by the court. The court is the exclusive judge of the law and you are the exclusive judges of the facts.

### INSTRUCTION NO. 3

You are instructed that the burden of proof as to any disputed or controverted fact rests upon the party who alleges that fact. In each instance where either party to this action alleges and relies upon the existence of any fact, and the existence of such fact is denied by the opposing party, the burden of proof rests upon the party alleging such fact to prove his allegation by a preponderance of the evidence, unless such allegation is a mere traverse or denial in affirmative form of an allegation made by his adversary. But by this you are not

to understand that the evidence making this proof or preponderance of the evidence must come wholly or even partly from the witnesses or evidence of the party charged with the burden of proof. It may come from either side or from both sides of the controversy. In considering where lies the preponderance of the evidence as to any issue in this case, you should consider all the evidence in this case pertaining thereto whether given for plaintiff or for defendant. In case you find that a party upon whom rests the burden of proof as to any fact alleged by him has failed to prove the same by a preponderance of the evidence, or that the evidence thereon is equally balanced, you must find against such party upon such issue.

#### INSTRUCTION NO. 4

You are instructed that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstance would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

#### INSTRUCTION NO. 5

By “proximate cause,” you are instructed, is meant that cause which in a natural and continuous sequence, unbroken by any new cause, produced the injury, and without which the injury would not have occurred.

## INSTRUCTION NO. 6

Ordinary care implies the exercise of reasonable diligence, and implies such watchfulness, caution and foresight as, under all the circumstances of the particular case, would be exercised by a reasonably careful, prudent man.

## INSTRUCTION NO. 7

Defendant as an affirmative defense to plaintiff's cause of action alleges that he was guilty of contributory negligence or negligence which contributed to the accident and his resulting injuries.

Contributory negligence is defined to be where a person injured as the result of an accident has proximately contributed to the accident by his want of ordinary care, so that but for such want of ordinary care on his part the accident would not have happened. In this connection I instruct you that when an accident occurs and injuries are received by one person, which are in part due to the negligence of another, and it also appears that the person injured contributed to the accident resulting in his or her injuries in some degree by his or her own negligence, the law does not undertake to compare the relative negligence of each but lays down the rule that if the person injured proximately contributed in any degree to the accident and resulting injury by his or her own negligence, he cannot recover, regardless of whether the other person was more or less negligent. If,

therefore, you find from the evidence in this case that the plaintiff himself failed to use ordinary care for his own safety at the time and place complained of and that such failure proximately contributed to the accident and his resulting injuries, then your verdict must be in favor of the defendants, no cause of action.

### INSTRUCTION NO. 8

You are instructed that the burden of proving contributory negligence on the part of the plaintiff is on the defendants, and this they must prove to your satisfaction by a preponderance of the evidence in the case, unless such negligence is proven by the plaintiff's own evidence. If the evidence on the issue of contributory negligence of the plaintiff preponderates in favor of the plaintiff, or if the evidence thereon is equally balanced, then and in that event you are instructed that you should find such issue in favor of the plaintiff and against the defendants.

### INSTRUCTION NO. 9

If you shall find or believe from the evidence that on the 23rd day of December, 1938, in the 2300 block on Highland Drive, the plaintiff was standing behind his truck and that he was struck by a wheel which became detached from a hand-truck hanging on the side of the truck being operated by the defendant Neslen, then you are instructed that the test for determining whether the plaintiff was contributory negligent is what a reasonable



person would have done under the circumstances, and you are instructed that negligence is not imputable to a person failing to look for danger if under the surrounding circumstances he had no cause to apprehend any.

#### INSTRUCTION NO. 10

The jury is instructed that if it believes from the evidence that both the plaintiff and the defendant were guilty of negligence, and that the negligence of each directly contributed to the injury to the plaintiff, there can be no recovery in this case, and your verdict will be for the defendant.

#### INSTRUCTION NO. 11

If you find that the evidence upon the question of defendants' negligence preponderates in favor of the defendant, or that it is equally balanced, your verdict should be for the defendant, no cause of action.

#### INSTRUCTION NO. 12

You are instructed that the driver of a motor vehicle upon a public highway is not required to maintain such vehicle in perfect mechanical condition but only has the duty to keep such vehicle in that mechanical condition which would be maintained by a reasonable, prudent operator of a motor vehicle under the same or similar circumstances. If a mechanical defect exists in a motor vehicle being operated on a public highway which is not known to the operator of said vehicle and which could not

be discovered by reasonable and prudent inspection of said vehicle, then such operator is not liable for any injuries to other persons resulting from such operation. In other words, a mechanical defect in a motor vehicle being so operated places no liability upon the operator thereof unless such defect is either known or should have been known from a reasonable, prudent inspection.

Consequently, if you find under the facts and circumstances in this case that there was any mechanical defect existing in the truck being operated by the defendants at the time of this accident and such defect was not known to the defendants or could not have been discovered by a reasonable, prudent inspection of said vehicle, then the defendants are not liable and your verdict must be for the defendants, no cause of action.

### INSTRUCTION NO. 13

On the other hand I instruct you that if you believe from a preponderance of all the evidence in the case that the wheel of the hand truck or "dolly" was at the time and place alleged by plaintiff, thrown, projected or catapulted in some manner against the plaintiff by reason of some defect in defendants' equipment and if the defendants have failed to satisfy your minds that they did not know of such defect in their equipment, responsible for the "dolly" wheel being thus thrown, if you find it was so thrown; or have failed to satisfy your minds that the defect, if any, was of such a nature that it could not have been discovered by them by a reasonable, prudent

inspection, then your verdict should be in favor of the plaintiff.

That is to say, if you find the plaintiff was standing at the rear of his truck and that the truck was parked parallel to and near the west curb of Highland Drive and facing south, and the wheel in question was thrown from the truck of defendants and struck plaintiff as defendants' truck passed plaintiff on the east side of Highland Drive going north, and if you further find plaintiff was not negligent in being where he was and doing what he was doing, or such negligence of plaintiff, if any, did not proximately contribute to his injuries, if any, you must return a verdict in favor of plaintiff, unless you believe that the defect in defendants' equipment, if you find the wheel was thrown against plaintiff because of a defect in the equipment, was unknown to defendants, or could not have been discovered by them upon a reasonable prudent inspection, in which event, if you believe either of these two alternatives you should find in favor of the defendants and against the plaintiff, no cause of action.

#### INSTRUCTION NO. 14

You are instructed that if you should find from a preponderance of the evidence that the "dolly" wheel was thrown or projected from defendants' truck as it passed the place where plaintiff was standing and struck plaintiff inflicting the injuries complained of, such finding is alone sufficient to raise an inference of negligence

on the part of the defendants which you may, but need not apply. Unless you should find that such inference of negligence is overcome from all the evidence in the case you should find for the plaintiff.

### INSTRUCTION NO. 15

You are instructed that if you shall find and believe from the evidence that the defendant A. C. Neslen was an employee of the defendant Kenneth J. Pinney of the Pinney Beverage Company at the time and place that plaintiff received the injury, and was at that time and place acting in the course of his employer's business, then you are instructed that the defendant Kenneth J. Pinney is equally liable with the defendant A. C. Neslen in the event you find the negligence, if any, of A. C. Neslen proximately caused the injury to plaintiff, if any.

If you shall find that the defendant A. C. Neslen was not on said day and at the said time acting in the course of his employment and was not an employee of Kenneth J. Pinney and the Pinney Beverage Company, that would not relieve the defendant Neslen from liability for injuries proximately caused by his negligence, if injuries were so caused, but you must under such circumstances return a verdict in favor of the defendant Kenneth J. Pinney, "no cause of action".

### INSTRUCTION NO. 16

You have in this case been permitted to view the motor truck and the hand truck or dolly. The sole pur-

pose of a view of these articles by a jury is to enable them to better understand and more fully appreciate the evidence produced in open court, and is not for the purpose of discovering new evidence by you, or to permit you to make independent investigators of yourselves into the facts of the case. The purpose of a view is to better illustrate so that you can better understand the evidence that has been produced in court, and that is its only purpose.

### INSTRUCTION NO. 17

Should you find by a preponderance of all the evidence in this case that the plaintiff is entitled to recover you will then award him such sum as you shall further find from a preponderance of all the evidence in the case will reasonably compensate him for such damages as he may have sustained to his person, not to exceed as general damages \$4,000.00. No precise rule can be given you for determining the amount to be allowed. You are to be guided by the evidence in the case and allow him such sum as will reasonably compensate him for such damages as he may have sustained in the way of bodily injuries, if you find from a preponderance of the evidence he sustained bodily injuries; and if you find he sustained bodily injuries—and only if you so find—you may then also allow such further sum as will reasonably compensate him for physical pain and suffering, if any.

If you find from a preponderance of all the evidence in the case that plaintiff suffered loss to his business as a

direct result of his injuries, if any you find, you may award him such sum as will reasonably compensate him therefor, not to exceed \$100.00, and such further sum as you may believe was reasonably expended or liability incurred by him for medical services, not to exceed \$75.00.

### INSTRUCTION NO. 18

You are instructed that the amount of plaintiff's claim for damages as set forth in his complaint is not any guide to you in fixing the amount of damages. There is no standard that a litigant is required to follow in stating such an amount in the complaint, and different litigants are apt to fix damages for injuries of similar character in widely different amounts. You are, therefore, to determine from the evidence, aided by the experience that you have in the affairs of life in common with the rest of mankind, such an amount as in your judgment will be reasonable compensation for the injury which plaintiff has sustained, if you find that he has sustained any injuries.

### INSTRUCTION NO. 19

The fact that I have instructed you upon the measure of damages, should you find that the plaintiff is entitled to damages, is not to be taken as any indication that I either believe or do not believe that plaintiff is entitled to recover such damages. These instructions are given you to guide you in case you find from the evidence that

plaintiff is entitled to recover damages, as it is my duty to charge you fully upon all the law in the case. But should you determine from the evidence that plaintiff is not entitled to recover damages, then and in that event you will entirely disregard all the instructions which I have given you upon the measure of damages.

### INSTRUCTION NO. 20

These instructions, though numbered separately, are to be considered and construed by you as one connected whole. Each instruction should be read and understood with reference to and as a part of the entire charge, and not as though one instruction separately was intended to present the whole law of the case upon any particular point. Your verdict should be reached upon a consideration of all of the evidence in the case, and with reference to these instructions, and should be given without fear or favor to any person, and without concern for the consequences.

### INSTRUCTION NO. 21

If, after a careful, honest and impartial consideration of these instructions and all of the evidence admitted in the case, any of your number should honestly and conscientiously differ on the matter of damages, weight and effect to be given to the evidence and the verdict to be rendered, then I instruct you that you may disagree. In other words, you are not called upon to surrender your honest convictions concerning the effect of the



evidence in this case, or as to the verdict to be rendered, for the mere purpose of agreeing upon a verdict.

### INSTRUCTION NO. 22

The court charges you that it is the imperative and sworn duty of the jury to hear and determine this case on the testimony of the witnesses given on the trial. In determining questions of fact, you are not at liberty to indulge in conjectures not based on evidence introduced in the case; nor are you at liberty to follow your own ideas of what the law is or ought to be. On the contrary, you should look solely to the evidence for the facts, and to the instructions given you by the court for the law, and return a verdict according to the facts established by the evidence and law laid down by the court. Sympathetic feelings have no place whatever in the trial of a case in a court of justice. You should disregard all such influence and determine the case according to the law and the evidence given you in open court, and with fairness and impartiality.

### INSTRUCTION NO. 23

It is your duty to consider all of the evidence together, fairly, impartially, and conscientiously. You should arrive at your verdict solely upon the evidence introduced before you upon the trial. You should not consider, or be influenced by, any evidence offered but not admitted, nor any evidence stricken out by the court, but only such evidence as has been admitted in the case.

You should not consider, or be influenced by, any statement of counsel as to what the evidence is, unless they state it correctly, or by any statement of counsel of facts not shown in evidence, if any such has been made. You should not be influenced by any statements the court may have made in ruling upon questions of law or otherwise in your hearing, if any have been made, that seem to indicate any opinion upon any question of fact.

### INSTRUCTION NO 23-A

Should you find for the plaintiff and against both defendants, your verdict should be in substantially the following form: "We, the jurors impaneled in the above entitled cause, find the issues in favor of the plaintiff and against the defendants, and assess his damages in the sum of \$....." (Here insert the amount of damages to be awarded).

Should you find for both of the defendants and against the plaintiff, your verdict should be in substantially the following form: "We, the jurors impaneled in the above entitled cause, find the issues in favor of the defendants, and against the plaintiff, no cause of action."

Should you find in favor of the plaintiff and against the defendant A. C. Neslen only, then your verdict should be in substantially the following form: "We, the jurors impaneled in the above entitled cause, find the issues in favor of the plaintiff and against the defendant A. C.

Neslen, and assess his damages in the sum of \$.....”  
 (Here insert the amount of damages to be awarded).  
 “We further find in favor of the defendant Kenneth J.  
 Pinney and against the plaintiff, no cause of action’ ”.

You are instructed that in the event you find in favor of the defendant A. C. Neslen and against the plaintiff then you must find in favor of the defendant Kenneth J. Pinney, and against the plaintiff, no cause of action.

### INSTRUCTION NO. 24

By a preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although, all things being equal, it may be so determined.

If you find a conflict in the evidence you should reconcile it, if you can, upon any reasonable theory; and if you cannot do so, then you must determine what you do believe.

You are the exclusive judges of the facts submitted to you, and of the credibility of the witnesses. In judging of their credibility you have the right to take into consideration their deportment upon the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor or the want of it, their opportunities to know and under-

stand, and their capacity to remember.

You have the right to consider any fact or circumstance in evidence which, in your judgment, affects the credibility of any witness.

You should weigh the evidence carefully and consider all of it together. You should not pick out any particular fact in evidence or any particular statement of any witness and give it undue weight. You should give only such weight to inferences from the facts proven as in fairness you think they are entitled to.

You should consider all the evidence impartially, fairly and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such a verdict as will do justice between the parties.

You should not consider any testimony offered but not admitted, nor any evidence stricken out by the court, but only such evidence as has been admitted in the case.

If you believe that any witness on either side of this case has wilfully testified falsely on any material matter, then you have the right to disregard the entire testimony of such witness, unless his testimony is corroborated by other credible evidence.

When you retire to consider of your verdict, you will elect one of your members as foreman. Your verdict must be in writing, signed by your foreman, and when

found must be turned by you into court. A concurrence of at least six members of the jury is necessary to your verdict, and six jurors thus concurring may find a verdict.

(Signed) M. J. Bronson, Judge

(Given and filed April 21, 1939)

Thereupon the jury retired and thereafter returned the following verdict into court:

(Title of Court and Cause)

### VERDICT

We, the jurors impaneled in the above case, find the issues in favor of the defendants, and against the plaintiff, no cause of action.

(Signed) Mrs. Charity Andrus, Foreman.

Dated and filed April 21, 1939.

Thereupon the Court entered a judgment upon said verdict for the defendants and against the plaintiff, no cause of action, with costs to the defendants.

(Filed April 22, 1939).

(Title of Court and Cause)

NOTICE OF PLAINTIFF'S MOTION  
FOR NEW TRIAL

To the Above-Named Defendants and to

Gardner & Latimer, their Attorneys:

You and each of you will please take notice that Kenneth White, the above-named plaintiff, hereby intends to move the above-entitled court for an order granting him a new trial in the above-entitled action upon the following grounds and for the following reasons:

1. Accident or surprise, which ordinary prudence could not have guarded against.
2. Newly discovered evidence, material for the plaintiff, which the plaintiff could not with reasonable diligence have discovered and produced at the trial.
3. Insufficiency of the evidence to justify the verdict of the jury and the said verdict is against law.
4. Irregularity in the proceedings of the court, jury, and adverse party, and orders of the court and abuses of discretion by which the plaintiff was prevented from having a fair trial.
5. Error in law occurring at the trial and excepted to by the plaintiff.

The said motion will be made upon affidavits and upon the minutes of the Court.

(Signed) Woodrow D. White,  
*Attorney for Plaintiff.*

Received copy of the foregoing Notice this 25th day of April, 1939.

(Signed) Gardner & Latimer,  
*Attorneys for Defendants.*  
(Filed April 25, 1939.)

(Title of Court and Cause)

## NOTICE

To the Above-Named Defendants and to

Gardner & Latimer, their Attorneys:

You and each of you will please take notice hereby that on Saturday, May 13, 1939, plaintiff will call up for disposition before the Honorable M. J. Bronson, Judge of the above-entitled court, at the hour of 10:00 a. m., plaintiff's motion for a new trial in the above-entitled cause.

Dated this 9th day of May, 1939.

(Signed) Woodrow D. White,  
*Attorney for Plaintiff.*



Received copy of the foregoing Notice this 10th day of May, 1939.

(Signed) Gardner & Latimer,  
*Attorneys for Defendants.*

(Filed May 10, 1939.)

### MINUTE ENTRY

May 13, 1939, M. J. Bronson, Judge

Pursuant to oral stipulation of respective counsel herein, it is ordered that the hearing on the plaintiff's motion for a new trial be and the same hereby is continued to May 20, 1939, at the hour of ten o'clock A. M.

### MINUTE ENTRY

May 20, 1939, M. J. Bronson, Judge

The plaintiff's Motion for a new trial now comes on for hearing, Woodrow D. White appearing in behalf of the plaintiff, and Hamilton Gardner appearing in behalf of the defendants. Whereupon said motion is argued to the court by respective counsel and submitted and by the Court said motion is taken under advisement with leave to counsel for the plaintiff to submit a memorandum of authorities.

### MINUTE ENTRY

June 30, 1939, M. J. Bronson, Judge

The plaintiff's motion for a new trial herein having

been heretofore taken under advisement, the Court having considered and being now fully advised in the premises, it is ordered that said motion for a new trial be and the same hereby is denied.

(Title of Court and Cause)

### ORDER

Upon motion of the plaintiff, and good cause therefor appearing, IT IS HEREBY ORDERED that the plaintiff's time for preparing and settling, serving and filing his bill of exceptions in the above-entitled cause may be extended for a period of an additional sixty days.

Dated this 28th day of July, 1939.

(Signed) M. J. Bronson,  
*Judge.*

(Filed July 28, 1939.)

(Title of Court and Cause)

### ORDER

Upon motion of the plaintiff and good cause therefor appearing, it is hereby ordered that the plaintiff's time for preparing, settling, serving, and filing his bill of exceptions in the above-entitled cause may be extended

for a period of sixty days from September 22, 1939.  
Dated this 14th day of September, 1939.

(Signed) M. J. Bronson,  
*Judge.*

(Filed September 14, 1939)

(Title of Court and Cause)

### ORDER

Upon motion of Woodrow D. White, attorney for plaintiff, and good cause therefor appearing, it is ordered that plaintiff may have until December 10, 1939 within which time to serve, prepare, and file his bill of exceptions in the above-entitled cause. Dated this 20th day of November, 1939.

(Signed M. J. Bronson,  
*Judge.*

(Filed November 18th, 1939.)

### BILL OF EXCEPTIONS

The Bill of Exceptions was stipulated to by the attorneys for the parties hereto (Transcript P. 295), was certified to by the the District Court (Transcript P. 296), and was filed in the Clerk's Office of the said Court December 2, 1939.

(Title of Court and Cause)

NOTICE OF APPEAL

To the Above-Named Defendants and to  
Gardner & Latimer, their Attorneys:

You and each of you will please take notice that the plaintiff hereby appeals to the Supreme Court of the State of Utah from the judgment of the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, and from the whole thereof, made and entered in said court in favor of the defendants and against the plaintiff on the verdict of the jury impaneled in said cause, which verdict was rendered and filed in said court on April 21, 1939, and which judgment thereafter became final upon the overruling by said court on June 30, 1939 of plaintiff's motion for a new trial.

Dated this 15th day of December, 1939.

(Signed) Woodrow D. White,  
*Attorney for Plaintiff.*

Received copy of the foregoing Notice of Appeal and also the copy of the attached Undertaking on Appeal this 15th day of December, 1939.

(Signed) Gardner & Latimer,  
*Attorneys for Defendants.*

(Filed December 16, 1939.)

(Title of Court and Cause)

CLERK'S CERTIFICATE

Case No. 62277

I, William J. Korth, Clerk of the above entitled Court, do hereby certify that the above and foregoing and hereto attached files contain all the original papers filed in this Court in the above entitled case, including the original Bill of Exceptions and Notice of Appeal, together with full, true and correct copies of original orders made by the Court. The whole constituting the Judgment Roll therein. And that the same is a full, true and correct transcript of the record as it appears in my office. And I further certify that an Undertaking on Appeal, in due form, has been properly filed and that the same was filed on the 16th day of December, A. D. 1939.

And I further certify that said Judgment Roll is this date transmitted to the Supreme Court of the State of Utah, pursuant to such appeal.

Witness my hand and the Seal of said Court at Salt Lake City, Utah, this 9th day of January, A. D. 1940.

William J. Korth,  
*Clerk Third District Court.*

By (Signed) Alvin Keddington,  
*Deputy Clerk.*

(Title of Court and Cause)

## ASSIGNMENTS OF ERROR

Comes now the Appellant in the above-entitled action and assigns the following errors of the trial court, upon which he relies for a reversal of the judgment in said action and the order denying the motion for a new trial:

1. The trial court erred to the prejudice of the appellant in failing and refusing to give appellant's requested Instruction No. 1 (Transcript p. 196.)

2. The District Court erred to the prejudice of the appellant in failing and refusing to give appellant's requested Instruction No. 2 (Transcript p. 196.).

3. The District Court erred to the prejudice of the appellant in failing and refusing to give appellant's requested Instruction No. 4 inasmuch as the said Court had submitted the issue of contributory negligence to the jury, although there was no evidence warranting the submission of that issue to the jury. (Transcript p. 196.)

4. The District Court erred to the prejudice of the appellant in failing and refusing to give appellant's requested Instruction No. 5 (Transcript p. 196.)

5. The District Court erred to the prejudice of the appellant in giving to the jury its Instruction No. 8 for the reason that there was no evidence warranting the

submission of the issue of contributory negligence to the jury (Transcript p. 197).

6. The District Court erred in giving its Instruction No. 10 to the prejudice of the appellant, for the reason that there was no evidence warranting the submission of the issue of contributory negligence to the jury (Transcript p. 197).

7. The District Court erred to the prejudice of the appellant in giving Instruction No. 11, for the reason that the negligence of the defendants was shown as a matter of law (Transcript p. 197).

8. The District Court erred to the prejudice of the appellant in giving Instruction No. 12, for the reason that the negligence of the respondents was shown as a matter of law and for the further reason that the mechanical condition of the vehicle being driven by the Defendant Neslen was not in issue (the defect was in the hand-truck), and for the further reason that the jury were therein instructed that there would be no liability if the defect was not known to the defendants, and that is not a proper statement of the law. (Transcript p. 197.)

9. The District Court erred to the prejudice of the appellant in giving Instruction No. 13, for the reason that the negligence of the respondents appeared as a matter of law, and for the reason that the jury were told in the said instruction that if the defect in the equipment was simply unknown to the defendants they must find in



favor of the defendants; and that is not a proper statement of the law. (Transcript p. 197.)

10. The District Court erred to the prejudice of the appellant in giving Instruction No. 16, for the reason that in said instruction the jury were told that they had been permitted to view the motor truck and hand-truck; and the court was thereby commenting upon the evidence. (Transcript p. 197-8.)

WHEREFORE, appellant prays that the judgment be reversed on account of said errors and that he be granted a new trial.

Dated this 20th day of January, 1940.

(Signed) Woodrow D. White,  
*Attorney for Appellant.*

Served and filed.

#### SUPPLEMENTAL ASSIGNMENT OF ERROR

11. The District Court erred to the prejudice of the appellant in giving to the jury its Instruction No. 7 for the reason that there was no evidence warranting the submission of the issue of contributory negligence to the jury. (Transcript, page 197)