

facts, the facts demonstrate that the testimony is either intentionally or unintentionally untrue, and leave no real question of conflict of evidence for the jury concerning which reasonable minds could reasonably differ." *Budaj v. Company*, 108 Conn. 474. "It is vain for a person to say he looked when, in spite of what his eyes must have told him, he moved into the path of an approaching car or train by which he was immediately struck." *Dando v. Brobst*, 318 Pa. St. 325. As in *Fraser v. Railway, supra*, the plaintiff "gave an impossible account of his conduct. . . . It is wholly contrary to reason that the car was not in plain sight" at the time he entered the highway. Under these circumstances the only possible conclusions that can be drawn from the plaintiff's testimony are, (1) that he saw the defendant's car and stepped in front of it without exercising any care for his own safety, or (2) that he did not see the defendant's car because "he was careless in the manner he looked for it." *Niemi v. Railroad, supra*. Either conclusion is equivalent to a finding that he was guilty of contributory negligence, and there must accordingly be

Judgment for the defendant.

All concurred.

Hillsborough, }
Jan. 4, 1938. }

PETER JESUKEVICH v. EDWARD LAPORTE.

Karl E. Dowd (by brief and orally), for the plaintiff.

Thomas J. Bois, Ivory C. Eaton and Robert E. Carter (Mr. Carter orally), for the defendant.

Per Curiam. Since Lapierre had no authority to delegate the performance of his duty as driver of the truck, the defendant cannot be held liable on the principle of *respondet superior*. *Jewell v. Railway*, 55 N. H. 84; *Clough v. Company*, 75 N. H. 84.

The case of *Grant v. Knepper*, 245 N. Y. 158, on which the plaintiff relies, is inapplicable. There are here no facts from which it could be found that Boardman, though unlicensed, was not a competent driver or that Lapierre knew, or even ought to have known, that he had no license. Furthermore there is no evidence that the accident was caused by Boardman's negligence or incompetence (if he was incompetent) and no evidence that Lapierre, even if he had been awake and vigilant, could have avoided the accident. See *Grant v. Knepper, supra*, 164.

Whether the plaintiff is entitled to be relieved of his agreement "is a question primarily of fact and may be raised only by petition to the Superior Court." *Venus Shoe Corporation v. Company*, 88 N. H. 478, 479, and cases cited.

Judgment for the defendant nisi.