

per complained of has been operative as a for-
 feiture of the grant. The testimony discloses
 that although the pier structure is privately
 owned it has at all times been open to free
 public use for purposes of recreation (see *Sea
 Isle City Realty Co. v. Sea Isle City*, 79 N. J.
 Law 469) and that it was not only there and
 available for such use when the grant was made, but
 for six years thereafter complainants encour-
 aged its existence and to that extent recognized
 its existence and use as consistent with the
 terms of the grant. It is not until after the
 pier was erected that during that period the
 structure interfered with the public use of the
 pier. The structure was erected and a small
 portion of the pier was abandoned in my judg-
 ment to the extent contemplated by the
 grant. If the structure is in any way violative
 of the terms of the grant damages for breach
 of the contract would seem to adequately sat-
 isfy any private rights that complainants may
 have other than specific performance.

Submitted December 23, 1918.
 Determined April 30, 1920.

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New Jersey
Court of Errors and Appeals

Notice of Appeal. 10

Filed Feb. 25, 1926.

NEW JERSEY SUPREME COURT

UNION COUNTY

WILLIAM SHUSTER, <div style="text-align: right;">Plaintiff,</div>	}	Action at Law
vs.		
MATHEW P. A. McDERMITT, or in the alternative, THOMAS McCORMICK, <div style="text-align: right;">Defendants.</div>		

To George R. Walsh, Esq.,
Attorney for Plaintiff. 30

Sir: 30

Take notice that the defendants Mathew P. A. McDermitt, appeals from the whole of the judgment entered in this cause, to the Court of Errors and Appeals.

Dated, February 11th, 1926.

Respectfully yours,
WIGHT, WIGHT & GOLENBOCK, 40
Attorneys for Defendant.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS

10	WILLIAM SHUSTER, Plaintiff-Respondent, vs. MATHEW P. A. McDERMITT, or in the alternative, THOMAS McCORMICK, Defendant-Appellant.	On Appeal from the Su- preme Court.
----	--	---

20 To George R. Walsh, Esq.,
Attorney of Plaintiff-Respondent.

Sir:

Take notice that the following are the grounds upon which the defendant, Mathew P. A. McDermitt, appeals from the judgment heretofore entered in this cause against him.

30 1. The said judgment was given for the plaintiff, William Shuster, and against the defendant, Mathew P. A. McDermitt, whereas by law of the land, judgment ought to have been given for the said Mathew P. A. McDermitt and against the said William Shuster.

40 2. The Judge before whom the trial of the issues joined between the parties was had, erroneously refused to grant defendant's motion for a non-suit at the close of plaintiff's case.

Summons

3. The said Judge erroneously denied defendant's motion for a direction of a verdict at the close of the whole case.

Dated, February 17, 1926.

Yours respectfully, 10

WIGHT, WIGHT & GOLENBOCK,
Attorneys of Defendant-Appellant.

Summons.

Filed Aug. 5, 1925. 20

The STATE OF NEW JERSEY to MATHEW P. A. McDERMITT and THOMAS McCORMICK.

You are summoned to answer the annexed complaint of WILLIAM SHUSTER in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon 30 you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-fourth day of July, nineteen hundred and twenty-five.

EDWARD A. KELLEHER,
Clerk. 40

GEORGE R. WALSH,
Attorney.

Complaint.

NEW JERSEY SUPREME COURT
OF UNION COUNTY

10	WILLIAM SHUSTER,	}	Action-at-Law.
	Plaintiff,		
	vs.		
	MATHEW P. A. McDERMITT, or in the alternative, THOMAS McCORMICK,	}	Action-at-Law.
	Defendants.		

20 FIRST COUNT.

The plaintiff, William Shuster, a resident of the Borough of Roselle Park, County of Union and State of New Jersey, complains as follows:

1. On or about July 7th, 1925, and for a long time prior thereto, defendant, Mathew P. A. McDermitt, was a deputy fire chief of the Fire Department of the City of Newark, New Jersey, and
30 as such had the use of a certain automobile with which to transact the duties incumbent upon him as such an officer.

2. On or about the said date the plaintiff was lawfully operating an automobile, of his own property in a Westerly direction along Miller Street, in the City of Newark, County of Essex and State of New Jersey, and did operate it in a careful and prudent manner.

Complaint

3. At or about the said time the defendant, Thomas McCormick, was operating the automobile, of which the defendant, Mathew P. A. McDermitt, had the use, in a Southerly direction along Railroad Avenue, in the City of Newark, County of Essex and State of New Jersey, and
10 did operate it in such a negligent and careless manner that the said automobile was caused to run into and against the automobile in which said plaintiff was riding.

4. Defendant, Thomas McCormick, was negligent in that: He drove said automobile at a great and excessive rate of speed without regard for the life, limb or property of others; he failed to give plaintiff any audible or noticeable warning
20 of his approach, by horn or otherwise; as he was obliged by law to do.

5. As a result of said collision plaintiff's automobile and other property was badly damaged, to wit:

Mud guards, body, running board, wheels, radiator, together with other parts of the said automobile made badly in need of repair or replacement by reason of said collision; load of produce
30 contained in the automobile of the plaintiff was completely destroyed and made of no value.

Plaintiff does not know whether the defendant, Thomas McCormick, was acting as agent of defendant, Mathew P. A. McDermitt, while driving the automobile at the time of said collision.

Complaint

SECOND COUNT.

The plaintiff, William Shuster, a resident of the Borough of Roselle Park, County of Union and State of New Jersey, complains as follows:

- 10 1. He repeats paragraph one of the first count of this complaint.
- 2. He repeats paragraph two of the first count of this complaint.
- 3. He repeats paragraph three of the first count of this complaint.
- 20 4. He repeats paragraph four of the first count of this complaint.
- 5. As a result of the said collision, the plaintiff was severely injured, sustaining lacerations of the arms, left thigh, sprained back, and other painful injuries about his head and body of a serious and permanent character.
- 30 6. By reason of the injuries received plaintiff has suffered and undergone great pain and torment, both of mind and body, and still suffers therefrom and will suffer therefrom for some-time to come.
- 40 7. Because of said injuries, plaintiff was confined to a hospital for treatment and was forced to expend large sums of money for said hospital accommodations, medicines and services of physicians in endeavoring to be cured and healed of his injuries aforesaid, and will in the future be compelled to spend additional monies for that purpose.

Amendment to Complaint

Plaintiff does not know whether the defendant, Thomas McCormick, was acting as agent of defendant, Mathew P. A. McDermitt, while driving automobile at time of said collision.

Plaintiff demands against defendant, Mathew P. A. McDermitt, or, in the alternative, Thomas McCormick, the sum of Five Thousand (\$5000.00) Dollars on the first count and Five Thousand (\$5000.00) Dollars on the second count.

GEORGE R. WALSH,
Attorney for Plaintiff.

Amendment to Complaint.

NEW JERSEY SUPREME COURT

UNION COUNTY

WILLIAM SHUSTER,	}	Plaintiff,
vs.		
MATHEW P. A. McDERMITT, or in the alternative, THOMAS McCORMICK,	}	Defendants.

Action at Law. 30

SECOND COUNT.

The plaintiff, William Shuster, a resident of the Borough of Roselle Park, County of Union 40

Amendment to Complaint

and State of New Jersey, amends the complaint by the addition of the following paragraph, to be numbered as paragraph #8:

10 8. Because of said injuries plaintiff was unable to carry on the business which he was conducting and in consequence thereof was caused to hire the service of a man to render the services plaintiff was unable to render, which man was necessarily hired for the period of five (5) weeks, from the date of the happening of the accident at the weekly salary of \$40.00.

GEORGE R. WALSH,
Attorney of Plaintiff.

20 It is hereby stipulated that defendants may avail themselves of the same allegations and defenses to this amendment, as contained in their answers and amended answers without the necessity of filing an answer to this amendment.

GEORGE R. WALSH,
Attorney of Plaintiff.

Amended Answer.

Filed Sept. 5, 1925.

NEW JERSEY SUPREME COURT

UNION COUNTY

10

WILLIAM SHUSTER,
Plaintiff,
vs.
MATHEW P. A. McDERMITT, or
in the alternative, THOMAS
McCORMICK,
Defendants.

Action at Law.

20

Defendants, Mathew P. A. McDermitt and Thomas McCormick, residing in the City of Newark, in the County of Essex and State of New Jersey, answering the complaint in the above-entitled action say:

FIRST COUNT.

1. They admit the allegations in paragraph 1. 30

2. They deny the allegations contained in paragraph 2, except they admit that the plaintiff was operating an automobile in a westerly direction along Miller Street, in the City of Newark, County of Essex and State of New Jersey, on or about said date.

40

Amended Answer

3. They deny the allegations contained in paragraph 3, except they admit that at or about said time, defendant, Thomas McCormick, was operating the automobile, of which the defendant, Mathew P. A. McDermitt, had the use, in a south-
 10 erly direction along Railroad Avenue, in the City of Newark, County of Essex and State of New Jersey.

4. They deny the allegations contained in paragraphs 4 and 5 of the complaint.

SECOND COUNT.

20 1. Defendants repeat paragraphs 1, 2, 3 and 4 above set forth in answer to paragraphs 1, 2, 3 and 4 of the Second Count of the complaint.

2. They have no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 5, 6 and 7 of the Second Count.

FIRST DEFENSE TO FIRST COUNT.

30 1. The alleged accident was caused by the contributory negligence on the part of the plaintiff, William Shuster, in that:

a. He drove his automobile at a high and excessive rate of speed.

40 b. He failed to have his machine equipped with proper appliances and brakes to bring it to a stop.

Amended Answer

c. He failed to regard the rights of other vehicles lawfully upon the public highway, and disregarded the warning and signal given by the defendants on their way to a response to a fire call.

d. He drove his machine in a manner contrary
 10 to the Motor Vehicle Act and the statutes of the State of New Jersey, and ordinances of the City of Newark.

FIRST DEFENSE TO SECOND COUNT.

1. Defendants reiterate and reallege the allegations contained in paragraph 1 and subdivisions a, b, c, and d above set forth as first de-
 20 fense to second count.

WIGHT, WIGHT & GOLENBOCK,
 Attorneys of Defendants.

Reply to Amended Answer.

Filed Sept. 5, 1925.

NEW JERSEY SUPREME COURT

UNION COUNTY

10

WILLIAM SHUSTER,
Plaintiff,

vs.

MATHEW P. A. McDERMITT, or
in the alternative, THOMAS
McCORMICK,
Defendants.

Action at Law.

20

FIRST DEFENSE TO FIRST COUNT.

Plaintiff denies each and every allegation contained in the said first defense to first count of the amended answer.

SECOND DEFENSE TO FIRST COUNT.

30 Plaintiff denies each and every allegation contained in the said first defense to second count of the amended answer.

GEORGE R. WALSH,
Attorney for Plaintiff.

40

Postea.

Filed Feb. 19, 1926.

WILLIAM SHUSTER,
Plaintiff,
vs.
MATHEW P. A. McDERMITT,
Defendants.

Damages \$495.80
Costs 53.38
\$549.18

10

This case was tried before Judge Peter F. Daly, with a jury at the Union County Circuit, on the second day of February, Nineteen Hundred Twenty-six.

20

The jury rendered a general verdict against the defendant, Mathew P. A. McDermitt, and in favor of the plaintiff for Four Hundred Ninety-five Dollars and Eighty (\$495.80) Cents.

PETER F. DALY,
Judge of Union County Circuit Court.

Verdict.

30

The jury rendered a verdict for the plaintiff William Shuster and against the defendant, Mathew P. A. McDermitt, in the sum of \$495.80.

40

Testimony.

NEW JERSEY SUPREME COURT

UNION COUNTY CIRCUIT

January Term, 1926

10

WILLIAM SHUSTER

vs.

MATHEW P. A. McDERMITT, or,
in the alternative, THOMAS
McCORMICK.

20 Transcript of stenographer's notes of evidence
in the above-entitled cause, taken before Hon.
PETER F. DALY, Circuit Court Judge, and a Jury,
at the Union County Court House in the City of
Elizabeth, New Jersey, on the 2nd day of Feb-
ruary, A. D. 1926, at 11:30 A. M.

Appearances:

George R. Walsh, Esq., Counsel for the Plain-
30 tiff.

Wight, Wight and Golenbock (Henry K. Golen-
bock, Esq.), Counsel for the Defendant.

(A jury being empanelled and found satisfac-
tory, they were sworn.)

(Mr. Walsh opens the case for the plaintiff.)

40 (Mr. Golenbock opens the case for the defend-
ant.)

William Shuster—Direct

WILLIAM SHUSTER, the plaintiff, being duly
sworn according to law, on his oath saith:

Direct-examination by Mr. Walsh:

Q. Mr. Shuster, on July 7, 1925, you were the
owner of an automobile truck? A. Yes, sir. 10

Q. You were proceeding in a westerly direction
along Miller Street in the City of Newark? A.
Yes.

Q. Will you tell the Court and jury what oc-
curred at about five A. M. on the morning of
July 7th? A. Well, I was coming through Miller
Street—

Q. Talk to the jury. A. Coming Miller Street
with a load of produce and just before I got to 20
Miller Street, before I got to the railroad trains
there was a ton truck turned around and I stopped
to give him a chance. The street wasn't wide
enough to pass by with a wide truck, so I stopped
and turned around and went ahead. I was just
shifting into first, coming in the street, when I
got struck on the side of the rear wheel. Turned
the car around and upset it.

Q. You were proceeding on Miller Street? A.
Yes. 30

Q. Were you on the right-hand side? A. On
the right-hand side.

Q. How wide is Miller Street, if you know, ap-
proximately? A. I should say around thirty-
five feet.

Q. How wide is Railroad Avenue? A. I should
judge around twenty feet.

Q. About at what speed do you think the other
car was proceeding? 40

William Shuster—Direct

Mr. Golenbock: I object to the question, to what he thinks.

The Court: Objection sustained.

Q. At what speed was the car that struck yours
10 proceeding immediately before it struck yours?

Mr. Golenbock: As I understand it, your Honor, I got the impression as I understood him, he didn't say he saw the other car before he was struck. If that is so how can he testify to the speed of the car?

The Court: Well, if he didn't see it, of course I presume he will say so.

Q. Mr. Shuster, did you see the car, the other
20 car, at any time before it struck yours? A. No.

Q. You didn't see it? A. I didn't see it.

Q. What kind of an impact was it? Was it of great force or slight force? A. Was a great force.

Q. What happened to your car after it was struck? A. Well, my car, my truck was completely turned around: the produce scattered all over the street. It upset on the side and I was
30 pinned under.

Q. About how many feet, if you know, was your car moved because of the collision? A. I should say about fifteen or twenty feet.

Q. After the accident what were the positions of the two cars? A. My car was turned completely around so it almost faced back toward the market.

Q. And what was the condition of the other automobile? A. I couldn't really say that.

Q. Where did you go after the accident? A.
40 I went to the hospital.

William Shuster—Direct

Q. What was done there? A. I got first-aid treatment and then I was sent home, or I went home.

Q. How were you injured? Any cuts or bruises? A. Bruises on the arm, shoulder, where I was caught into the wheel on my groin,
10 and my side.

Q. Could you attend to your work? A. No.

Q. Were you in bed because of this? A. Yes.

Q. About how long? A. Well, a little over three weeks.

Q. You couldn't attend to your duties? A. No.

Q. What business are you in, Mr. Shuster? A. Butcher business.

Q. What did you have to do or find it necessary
20 to do to conduct that business? A. Well, I had to get a man to take my place to do the work.

Q. For how long? A. Five weeks.

Q. Five weeks. How much did you pay him? A. \$40 a week.

Q. That was \$200 in all? A. In all, yes.

Q. Did you hear a bell or gong or any other sound immediately prior to the accident? A. No, positively nothing.

Q. If there was one blown or any sound would
30 you have heard it? Would you have been in a position to hear it? A. Well, I don't think so; if there was a sound I don't think I would have heard it because at that time there was a train going over the bridge.

Q. Did you endure any pain or suffering because of the injuries? A. Yes, I still have a pain. I cannot lift or work like I used to work.

Q. You still work in your store however? A. 40

William Shuster—Direct

Well, I work there but practically I have to give it up.

Q. From the impact could you estimate the speed at which the other automobile was proceeding?

10

Mr. Golenbock: I object.

The Court: Objection sustained.

Q. Did you speak to Mr. McDermott immediately after the accident? A. I believe I did.

Q. Do you remember what was said? A. No, I do not.

Q. Did he say anything as to the speed at which he was proceeding?

20

Mr. Golenbock: I object to the question. The witness has already said he did not remember what he said.

The Court: Objection sustained.

Q. In what condition was your automobile immediately prior to the happening of the accident? A. Well, it was a new car.

Q. What was damaged because of the accident? A. I couldn't really tell you all that was damaged because it was pretty well broke up.

30

Q. Have you any idea what happened to it? A. Yes. I believe the body was—had to be practically all rebuilt.

Q. The mudguards damaged? A. Mudguards damaged, yes.

Q. The running board? A. Running board.

Q. The wheels? A. The wheels were damaged, but they were repaired.

40

Q. The radiator? A. No. No radiator.

William Shuster—Direct

Q. Did you have the automobile repaired? A. Yes, I had it repaired.

Q. By whom? A. Mr. Ploude of the Reliable Garage.

Q. When did you take the car to him? A. I didn't take it. He got it.

10

Q. When, do you know? A. I believe the same day it was struck.

Q. Did he see the car prior to the accident? A. Yes, sir.

Q. About how long before it? A. Well, he thought the day before he filled me with gas that day.

Q. You had some produce on the truck, you say? A. Yes.

20

Q. Was the produce destroyed, made valueless because of the accident? A. It was all destroyed, yes.

Q. What produce did you have in it? A. Well, general line of fruits and vegetables.

By the Court:

Q. How much was it worth? A. How much? Around \$94.

30

By Mr. Walsh:

Q. That was the only damage to property outside of your automobile, is that true? A. Yes.

Q. You owe here to Dr. Dennin the sum of six dollars? A. Yes.

Q. For medical treatment? You paid eight dollars for a radiograph or X-ray? A. Yes.

Q. And you paid \$200—

40

William Shuster—Direct

Mr. Golenbock: Wait a minute, now. I didn't object to the radiograph or X-ray picture or doctor's bill.

Mr. Walsh: I withdraw that.

10 Q. At the time of the collision what was the position of your car exactly in reference to Railroad Avenue? A. Well, the position of my car, I was going straight out through Miller Street and Railroad Avenue comes through this way (indicating).

Q. And was your car entirely past the center line of Railroad Avenue? A. Well, I don't think not quite on account if it was he wouldn't hit the rear wheel.

20 Q. At the time of the accident from the position of your car do you know whether or not the other automobile was on the right or left-hand side of Railroad Avenue?

Mr. Golenbock: I object to it. The witness said he didn't see it.

Mr. Walsh: If the Court please, he can testify from the position of his car as to the position of the other.

30 The Court: Objection sustained. He has already said twice that he didn't know where the other car was. He cannot make any deduction from the position of his own car.

By the Court:

40 Q. Didn't you say that after the accident you didn't see where the other car was? A. No, I did not.

William Shuster—Cross

Q. You didn't say that? A. I says I didn't see where it was.

Q. You said it twice.

Mr. Walsh: That is all.

CROSS-EXAMINATION by Mr. Golenbock: 10

Q. Mr. Shuster, you say you stopped, the car or some other car being ahead of you wanting to turn around? A. Yes.

Q. How far from the railroad was that car? A. It is right near the bridge.

Q. How far from this bridge you speak of as in the center of Railroad Avenue? A. The bridge and Railroad Avenue.

Q. The bridge is Miller Avenue? A. The 20 bridge is over Miller Street and right over Miller Street and right over Miller is Railroad Avenue.

Q. The bridge crosses Miller Street? A. Yes, the bridge crosses Miller Street.

Q. How far from the bridge was this car? A. What do you mean?

Q. When you saw the other car attempt to turn around you stopped? A. You mean the other 30 car?

Q. Yes. A. I stopped and let him turn. He was right up to the bridge.

Q. Right up to the bridge? A. Yes.

Q. How long had you been standing while waiting for this car to turn around? A. I wasn't standing there only about a minute or two, just time to back up and go ahead.

Q. Miller Street you say is about how many 40 feet wide? A. I should judge about thirty-five.

William Shuster—Cross

Q. What kind of car was this in front of you that wanted to turn around? A. A ton truck.

Q. This truck wasn't able to make a complete turn without first backing up and changing position? A. No, he made two turns.

10 Q. And during that time, why, you were standing still? A. I just came up as he was standing still.

Q. You estimated the time as taking about two minutes for this operation? A. Right.

Q. During the two minutes did you hear any horn or siren blown, or gong, or automobile?

The Court: He said no.

(Argument.)

20 Q. While you were standing waiting for the truck to turn around you heard no whistle or gong? A. No, I didn't hear anything.

Q. When this car had made its turn you continued on, is that right? A. Yes.

Q. Is that right? A. Right.

Q. First put your car in first speed? A. First speed.

30 Q. You continued on right through Miller Street going in a westerly direction, is that right? A. Towards Elizabeth.

Q. Towards where, Mr. Shuster? A. Elizabeth.

Q. At no time until the accident happened, did I understand you to say, did you see this fire automobile; that is right, isn't it? A. No.

Q. What happened to your car after the collision? Was it swerved or was it turned over?

40 A. It was turned around and upset.

William Shuster—Cross

Q. Now, when it was upset after turning around and upsetting was it in a position facing east? A. It was almost facing the direction I was coming from.

Q. The opposite direction to which you were going? A. Yes. 10

Q. Where had you been before this accident happened? A. Why, at the market.

Q. And had purchased the produce that you had on the wagon? A. Yes.

Q. What time of the morning was this? A. I should judge around five, four-thirty-five, somewhere around there.

Q. At the time of the accident how fast were you going? A. I wasn't shifted to high. I was 20 shifted—

By the Court:

Q. How fast were you going, Mr. Shuster? A. I would say I just had not got up no speed yet.

Q. How fast were you going? A. Well, I should judge three or four miles, three or four miles an hour.

By Mr. Golenbock:

Q. How long had you been driving a car, Mr. 30 Shuster? A. About six years.

Q. Now, going at the rate of three or four miles an hour within what distance could you have stopped your car? A. Well, I could stop it within five or six feet I should judge.

Q. Couldn't you, going at the rate of three or four miles an hour, stop instantly? A. Well, I probably, I don't think so though.

Q. What kind of car were you driving that day? 40 A. International truck.

William Shuster—Cross

Q. Were the brakes in good order? A. Yes, sir; it was a new car.

Q. How old was it? A. About five months.

Q. It had the ordinary shifts? A. Yes.

10 Q. And it had the emergency and the foot brake? A. Foot brake and the emergency brake.

Q. Nothing the matter with your hearing, is there, Mr. Shuster? A. No.

Q. You say you paid a man to do your work. Who was the man? A. Mr. Ploude.

Q. Is he here in court? A. Yes.

Q. How did you pay him, cash or check? A. Some check, sometimes cash.

20 Mr. Walsh: Pardon me, you are referring to the work in the store?

Mr. Golenbock: Referring to the man he said he had to hire in order to do his work.

Mr. Walsh: Mr. Ploude is the automobile man.

Q. I am talking about the man who worked for you in the butcher business. A. That is the man. That is the butcher.

30 Q. How did you pay him, check or cash? A. Sometimes checks and sometimes cash.

Q. Have you got the checks here? A. No, I have not.

Q. What kind of work did you do before the accident? A. Butcher business.

Q. Were you behind the counter? A. Yes.

Q. You were also going to market to get produce? A. Yes.

40 Q. What kind of work do you do now? A. I am just helping out now.

William Shuster—Cross

Q. You stand behind the counter cutting meat? A. Yes.

Q. Tending to customers? A. Tending to customers.

Q. You still go to market, don't you? A. Sometimes, yes. 10

Q. You don't always go to market because you don't have occasion to go to market all the times? A. Yes.

Q. You go to market as much or as often as you did before the accident, isn't that right? A. No.

Q. Who goes to market for you now? A. I guess my brother goes down now.

Q. Is your brother working for you? A. He 20 does the grocery department of the business.

Q. And he had charge of the grocery department before the accident? A. Yes.

Q. And even before the accident he would at times go to market and get produce, isn't that right? A. No.

Q. He did not? A. Never.

Q. What part of Miller Street were you driving your car on immediately before the accident? A. Well, Miller Street, what part? I don't get 30 that question.

Q. Were you to the right of the road or center or where? A. Right up to the right, sure.

Q. You recall, don't you, that at the end of the abutment on Miller Street there is a narrow sidewalk and outside of the sidewalk there are iron pillars supporting the bridge? A. Yes, sir.

Q. Were you right close to the pillars? A. Yes. No, not right close, about five feet from 40 the curb.

Louis Ploude—Direct

Q. You were in bed two weeks, you say? Is that right? A. Three weeks.

Q. How soon after the accident did you go back to the store? A. Well, I should judge about four weeks afterwards.

10 Mr. Golenbock: I guess that is all.

LOUIS PLOUDE, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

20 Direct-examination by Mr. Walsh:

Q. Mr. Ploude, you know the automobile of Mr. Shuster that was involved in this accident? A. I do.

Q. This accident happened on July 7, 1925. Did you see it prior to that time? A. Yes.

Q. How long before? A. The day before.

Q. You have been in the automobile business? A. Yes.

Q. For how long? A. About fifteen years.

30 Q. Are you familiar with the value of automobiles? A. Partly.

Q. Have you bought and sold them? A. Yes.

Q. Were you familiar with the market value of automobiles on July 7, 1925? A. Well, partly, yes.

By the Court:

Q. What do you mean by partly? A. Well, it is hard to say on the value of all cars.

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Louis Ploude—Cross

By Mr. Walsh:

Q. Were you acquainted with the value of automobiles? A. Yes.

Q. Were you acquainted with the value of this car on or about July 7th? A. Yes.

Q. Immediately prior to the accident? What was the condition of the car? A. The car was in good condition all the way through. It is a new car.

Q. Did you sell the car to Mr. Shuster? A. No.

Q. What was the market value of the automobile?

Mr. Golenbock: I object to the question. I don't think this witness has yet qualified.

The Court: All right, you can take up the time if you wish to qualify him.

Special CROSS-EXAMINATION by Mr. Golenbock:

Q. Do you know what kind of a car this was? A. Yes.

Q. What kind of car was it? A. International Harvester.

Q. Did you ever sell and buy International trucks? A. Yes.

Q. When was the last time prior to the accident? A. I was the instigator of selling the truck to Mr. Shuster. I bought him a second-hand—

Q. I understood you before to say that you had nothing to do with the selling of the car. A. I brought the two people, the parties, together on selling the car. I didn't sell the car. The sales-

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Louis Ploude—Direct

man sold the car. He was in the market for the car and I told the salesman—

Q. And that is the only time wherein you have had any connection with selling an International truck? A. That one particular truck, yes.

10 Q. Haven't you sold any other trucks? A. Yes.

Q. Which one? A. Chevrolet.

Q. How many trucks have you sold of the Chevrolet? A. I guess maybe about ten.

DIRECT-EXAMINATION (continued) by Mr. Walsh:

Q. What business are you in now? A. Gar-
20 arge business.

Q. What was the market value of the car immediately prior to the happening of this accident, if you know? A. About eight hundred.

Q. About \$800? A. Yes.

Q. When did you see the car after July 7th after this accident? A. I went over Newark and got it.

Q. The same day? A. Same day.

Q. What did you find damaged? A. Top body,
30 fender, rear axle, running board, wind-shield, flare boards, tail gate, wheel, tire rack—I don't remember everything on it.

Q. What was the market value of the automobile in the condition it was immediately after the accident? A. Five hundred fifty or six hundred.

Q. About five hundred fifty or \$600? A. Yes.

Q. And immediately before about \$800? A. Yes.

40 Q. Then it depreciated about—

Louis Ploude—Direct

Mr. Golenbock: That is for the jury to say how much it depreciated.

Q. You repaired the automobile? A. Yes. I didn't; my man did.

Q. Did you supervise the work? A. Yes. 10

Q. You repaired everything that was damaged due to the collision? A. Yes. My man did; I didn't.

Mr. Golenbock: I would like to have counsel say now whether he is going to depend on depreciation or cost of repairs.

Mr. Walsh: Well, I will. It doesn't make any difference.

The Court: Don't argue about it. Go on 20 with your question and I will pass on it when objections are made if they are made. You have a perfect right to show the amount of repairs that was necessary because of injury done to a car. That is not the test, but at the same time that is evidential to assist the jury in determining the damages.

Q. You supervised the work? A. Yes. 30

Q. You made the charge? A. Yes.

Q. What was the charge? A. I think it was \$187.50 or \$187.80. I just forget it.

Q. Was that a reasonable charge for the work and materials furnished? A. Yes.

Q. That was paid. Is that the bill and receipt? A. Yes.

Mr. Walsh: I offer this in evidence.

The Court: It is admitted. 40

Louis Ploude—Cross

(Paper referred to entered in evidence and marked Exhibit P-1.)

By the Court:

10 Q. Does that include anything that was not repairs due to injuries done? A. No, only the injury done to the car.

Q. Would that make the car any better than it was before the accident in any particular? A. No.

20 Q. Why not? Weren't there some new parts put in? A. No. Only new parts put in were boards and brackets. They were in there originally and put the same brackets back again—that is, new ones.

Q. How old was this car? A. I should judge about nine months, eight months, something like that.

CROSS-EXAMINATION by Mr. Golenbock:

Q. This bill that you rendered is for \$187.80 covering all repairs made to the car, is that right? A. Yes.

30 Q. And after the repairs were made this car was as good as it was before the accident? A. Yes.

Q. Now, is that the only bill that you rendered to Mr. Shuster? A. That is the only one I gave him. He only wanted a receipt for the amount of work I done.

Q. You say here "repair body, \$150." Did you give him any other itemized bill for that amount? A. No.

40 Q. What was the matter with the body when you say you charged \$150 for the repair of it?

William Shuster—Direct

A. That is for material and labor on the body, taking the body off the truck, putting in floor boards, side boards. The top was damaged too, and put in new canvas on the top.

Q. All of that including labor? A. Yes.

Q. What is this item of \$25 labor? A. Tak- 10
ing out the rear axle.

Q. Is this a copy of the bill or itemized bill you have in your book? A. Yes, just to the amount.

Q. May I look at it please? A. Sure. That is what parts was used on this car.

Mr. Golenbock: No other questions.

Mr. Walsh: I would like to recall Mr. 20
Shuster, if the Court please.

WILLIAM SHUSTER, the plaintiff, re-called:

Direct-examination by Mr. Walsh:

Q. Mr. Shuster, what kind of automobile was the defendant Mr. McCormick driving? A. I don't know. 30

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

Q. Was it a roadster or a touring car? A. Touring car style.

Q. This was a truck of how many tons? A. A ton truck.

Q. That touring car caused your automobile to be removed how many feet because of the collision? A. I should say about twenty feet, fifteen or twenty. 40

William Shuster—Cross
Thomas McCormick—Direct

CROSS-EXAMINATION by Mr. Golenbock:

Q. Mr. Shuster, I show you a photograph and ask you what that represents. A. What I should judge that would represent Railroad Avenue and
10 Miller Street. I should judge it would be by the bridge, but Railroad Avenue is never a wide street like that. I couldn't really tell you.

Q. I show you another photograph and ask you what that represents, if you know. A. That may represent Miller Street, but Miller Street is never that wide, I don't think.

20

THOMAS McCORMICK, a witness produced on behalf of the plaintiff, being duly sworn according to law on his oath, saith:

Direct-examination by Mr. Walsh:

Q. You are one of the defendants in this action, Mr. McCormick? A. Yes, sir.

Q. At the time of this collision what kind of automobile were you driving? A. Chrysler road-
30 ster.

Q. Were you driving under the direction of Mr. McDermitt? A. Why, yes, sir.

Mr. Walsh: That is all.

Mr. Golenbock: That is all.

Mr. Walsh: Plaintiff rests.

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Motion for Non-suit

MOTION FOR NON-SUIT

Mr. Golenbock: I desire to move, if your Honor please, for a nonsuit on the ground that from the evidence of the plaintiff he was guilty of contributory negligence as a
10 matter of law and as a matter of fact.

He testified that he was traveling with his automobile along Miller Street and that he was crossing Railroad Avenue, that he didn't see this automobile coming from his right, nor had he looked to see whether there were any automobiles coming from that direction or any direction; that the first thing he knew was this collision oc-
20 ccurring at the intersection of Railroad Avenue and Miller Street. I believe that the law imposes upon a man the duty of looking at an intersection—

The Court: Why argue this? That would be a question of contributory negligence and contributory negligence is a matter of affirmative defense. It cannot be passed on by the Court in a motion for non-
30 suit.

Mr. Golenbock: But I think in the first instance, if your Honor please, there ought to be some semblance of negligence as well on the part of the defendant.

The Court: You have not been arguing that.

Mr. Golenbock: I am getting to it.

I further desire to move for a non-suit on the ground that there has been no evi-
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Mathew P. A. McDermitt—Direct

10 dence of any negligence on the part of the
defendant. I don't think there is a scin-
tilla of evidence, either direct or by impli-
cation, that the defendants, either one of
them, are guilty of negligence; and I sub-
mit, if your Honor please, that there ought
to be a non-suit granted.

(Argument.)

Adjourned until 1:30 o'clock p. m.

20 Afternoon session 1:30 o'clock p. m.

(Argument.)

The Court: I will deny the motion for a
non-suit. You may have an exception.

MATHEW P. A. McDERMITT, the defendant,
being duly sworn according to law on his oath,
saith:

30

Direct-examination by Mr. Golenbock:

Q. Mr. McDermitt, you are connected with the
Fire Department of the City of Newark? A.
Yes, sir.

Q. What is the official title? A. Deputy Chief.

Q. On this particular morning of the accident
what was your capacity in regard to the depart-
ment? A. Acting Chief Engineer, Monroe Fire
40 Department.

Mathew P. A. McDermitt—Direct

Q. Where were you stationed that morning?

A. In the quarters of the Chief Engineer, Lafay-
ette and Mulberry Street.

Q. Was it a part of your duty to respond to
fire alarms? A. Yes, that particular fire box,
fire alarm, a special box. 10

Q. What time that morning did this alarm
sound to which you were responding at the time
of the accident? A. Around five o'clock, 5:04,
something like that.

Q. What car were you being driven in? A.
I was driven in the Chief's car.

Q. What kind of car was that? What make
was that? A. Chrysler car.

Q. Runabout? A. Runabout car, yes, sir. 20

Q. Who was in the car at the time of the ac-
cident? A. The driver and myself.

Q. And who was the driver, Chief? A. Fire-
man Thomas McCormick.

Q. Now, this car—has it any contrivance for
giving a warning or signal of your coming or
going? A. Yes, sir; we have a siren and a bell.

Q. How is that siren hooked up? A. It is
hooked up so that you can put your foot on it
all the time and press it. 30

Q. In other words, you press— A. You press
a button and it forms a contact.

Q. Will this siren continue to blow constantly?
A. As soon as I have got my foot on that button.

Q. How about the gong? A. I pulled that with
my hand. It is a bell.

Q. A bell? A. Yes, sir.

Q. Do you recall the accident, Chief? A. Very
well. 40

Mathew P. A. McDermitt—Direct

Q. Previous to the time of this collision what were you doing in connection with the siren and the bell from the time that you left the fire house?

A. Well, we were going along at the rate of about twenty-five miles an hour, between twenty and twenty-five miles an hour, responding to a fire at the Fink place on Frelingheusen Avenue. Mulberry Street where the Railroad Avenue is, a direct line to Miller Street, to Wright Street, and we generally take that road down because of the amount of traffic on it and strike that given point on Wright Street so as to come out on Frelingheusen Avenue. I was pushing the siren and ringing the bell constantly.

20 Q. Chief, I show you a photograph and ask you whether that is a correct representation of the avenue upon which your car was being driven?

A. Yes, sir.

Mr. Golenbock: I offer this in evidence.

(Photograph entered in evidence and marked Exhibit D-1.)

Q. I show you another photograph. A. That represents the intersection of Miller Street and
30 Railroad Avenue.

Mr. Golenbock: I offer this in evidence.

(Photograph entered in evidence and marked Exhibit D-2.)

Q. The photograph which the jury now has is the one facing— A. The way that I am going.

Q. Along Railroad Avenue? A. Yes, sir.

Q. At the intersection of Miller Street? A.
40 Yes.

Mathew P. A. McDermitt—Direct

Q. Now, Chief, when you got to Miller Street what happened? A. Well, as we were closing in on Miller Street I said to my driver, Tom, I says, "You are coming to Miller Street intersection, bad pulling." That means to reduce the speed from the way we were going in between the
10 intersections.

Q. When you said that what did he do in reference to the speed of the car? A. Well, he pulled it down about twelve or fifteen miles an hour.

Q. Then what happened? A. As we got in the intersection this morning a man put out with his car, made no attempt to stop, kept on going and turned to the right to go into Miller Street, and his car kept on coming, and he virtually caught
20 the rear part of his car and the front part of our car on the left-hand side and bent the fender and wheel, and in doing so with the momentum of our car and his car it upset his car facing as it was towards Broad Street, I would say west like, and went over. He told me, he said, now, I said, "Why didn't you put your brakes on? Why didn't you pull up? Couldn't you hear me?" He said, "No, I couldn't hear you then. There
30 was a train going overhead." I said, "That is all the reason more why you should have stopped." He said to me, "Well, I saw it and I didn't know what to do. I attempted to get out from my car." I said, "I saw you trying to get out from behind the wheel but I saw you couldn't do it."

Q. In respect to the intersection of Miller Street and Railroad Avenue where was it that the actual collision occurred? A. The actual collision
40

Mathew P. A. McDermitt—Direct

ion occurred, I would say on the north side of Miller and Railroad Avenue.

Q. Now, I show you this photograph, marked Exhibit D-1. Will you please indicate with a pencil by a mark "X" to show the actual position of the cars at the time of the collision?

The Court: Use ink. The pencil won't take on that.

(Witness marks photograph.)

Q. Did you examine the car to see what was the matter with it, Chief? A. Well, after I got him out by breaking the seat of his car, the back of his car to get him out, lifted him out, the driver and I put him on his feet. I said, "Now, walk. See how you are." Well, he said, "My back, up around my shoulders bother me a bit." I said, "Move around." He was moving around all right. I said, "Here, you are going to the hospital." He said, "Oh, no, I am not going to the hospital." I said, "Yes, you are." I says, "Didn't you hear my siren blow?" He said, "No, no, absolutely not. Well, I couldn't hear anything. There was a train going over my head." Well, I said, "You should look out for yourself." In the meantime about two hundred feet down the line a lot of hucksters at a market there, they all came running up, and knowing me very well I said, "Boys, let us get this truck set up on her pins and push it around on the corner." So they all gathered up the barrels and boxes too, and we backed the truck down. In the meantime a policeman came running up, so I explained the situation to him. I said, "John, you had bet-

Mathew P. A. McDermitt—Direct

ter get an ambulance and you send this man to the hospital." He says, "That is right." So we sent him off to the hospital. I telephoned to my mechanic to come in, and a wrecker took our car in because we couldn't bring our car in under its own.

Mr. Walsh: If the Court please, I don't think it is necessary.

Mr. Golenbock: It is preliminary.

Q. Was the car of the plaintiff moved away by its own power? A. Its own power. I drove it away.

Q. You drove it away? A. I drove it away, yes, sir. I left it out in front of one of the produce dealers' places.

Q. Chief, in your estimation how far can the siren be heard when it is blown? A. Well, a siren can be heard easy a mile away, easy a mile under ordinary conditions. I mean by that if there is not too much noises, for instance like a steam engine going overhead, you couldn't very well hear the siren, but if you are on a public highway with a wagon and it not enclosed, why you ought to hear it a mile away.

Q. This was very early in the morning and not much traffic on the road? A. Five o'clock in the morning. No traffic up on Railroad Avenue at all.

Q. Assuming that there was an engine overhead, could that siren be heard a block away? A. Yes, it ought to be heard a block away.

Mr. Golenbock: Take the witness.

Mathew P. A. McDermitt—Cross

CROSS-EXAMINATION by Mr. Walsh:

Q. Mr. McDermitt, before you arrived at the intersection of Railroad Avenue and Miller Street what did you say your speed was? A. About twenty-five miles an hour.

10 Q. About twenty-five? A. Yes.

Q. And then at the intersection you cut down? A. Oh, I guess down between twelve and fifteen miles.

Q. Between twelve and fifteen miles? A. Yes.

Q. You are familiar with the traffic act regulating the speed at intersections? A. Yes, sir; I am.

Q. Isn't it true that Railroad Avenue is a one-
20 way street? A. No.

Q. It is not very much traveled, is it? A. Oh, yes, traveled a good deal in the day time.

Q. This morning you say there was no traffic on Railroad Avenue? A. Traffic doesn't amount to anything in the morning so early.

Q. At this time was there much traffic on Miller Street? A. Well, there was a truck. I saw a truck go by in that way as we were coming out as I remarked to my driver, but there was nothing
30 else at that time.

Q. This Chrysler is quite a fast car anyway, isn't it? A. What?

Q. This Chrysler is quite a fast car? A. I don't know what you call fast. When you say fast, a Chrysler is a fast car, you must know more about a Chrysler than I do. I can't tell you what she can do. I never tried it out. We go to fires and we limit her to twenty-five miles an hour.

40 Q. This is Railroad Avenue? A. Yes, sir.

Mathew P. A. McDermitt—Cross

Q. That is Railroad Avenue? A. That is Railroad Avenue coming on up here.

Q. Where were you proceeding? A. Going this way (indicating.)

Q. Where was Mr. Shuster? A. Mr. Shuster was coming out of here and going across here. 10

Q. Coming out here? A. No. This is the bridge.

Q. Over along there, this bridge? A. No, not over here. Here is the bridge right here (indicating).

Q. But this would be the other side of it? A. No. He is coming out like this here (indicating). He is coming out just like that.

Q. But on the right-hand side of the roadway, 20 isn't that true? A. Yes.

Q. And the accident happened just about as he crossed the roadway entirely? A. That is his truck, yes, sir.

Q. As you approached that intersection did you realize that it was very difficult for a man proceeding on his right near this bridge to see what was on his right? A. No. He couldn't see what was on his right for a distance over ten feet, twenty feet. He could see coming this way, he
30 could see twenty feet up the railroad.

Q. But it was very difficult for him to see, isn't that true? A. Very hard.

Q. There was no obstruction on your left, you were on the right-hand side of the street and there may have been thirty feet to the obstruction? A. Yes.

Q. And there was an obstruction about ten feet away from him, is that true? A. Well, I don't 40

Mathew P. A. McDermitt—Cross

know if you call that an obstruction. There is a bulwark there coming up there under the bridge.

Q. When did you see his car? A. When I saw the front end.

Q. The front end? A. Yes.

10 Q. How far from the intersection were you? A. Well, we were practically right on top of the intersection and we turned to the left to go up Miller Street.

Q. How is it, then, that you explain that you were at the intersection and he was on your left-hand side of the street when you first saw him, and still and all you struck him at the right of Railroad Avenue? A. Why, he followed me up.

20 He didn't attempt to stop his car. He attempted to get out of his car, lost control of his car entirely, and followed it up. We attempted to make a very short turn on the street.

Q. You struck him in the rear? A. No, not on the rear. We struck him on the step. That is in the front of the car, and the extreme rear of the car, the rear fender, the rear mudguard—that struck him right in underneath that step. He struck us; we didn't strike him.

30 Q. About how fast was he going, do you know? A. He was going the limit of his car. It is because he had no control over it.

Q. Do you know whether it was going six miles an hour? A. If it was going five miles an hour, striking us as it did and with us going at our speed, we would be bound to upset his car because it was overloaded.

Q. His car was upset? A. Yes.

40

Thomas McCormick—Direct

Q. How far did your car go after that? A. We didn't go. We stopped.

Q. You stopped? A. Yes.

Q. And his car was pushed? A. No, turned right over, turned just like that.

Q. After the collision where was his car? A. 10 The tail end of it was right about here at the end of Miller and Railroad Avenue, right here (indicating), and our car was all in Miller Street facing west.

Q. You say you were going about twelve to fifteen miles an hour? A. Yes, when we saw him.

Q. In fact, it may have been more than that? A. No, no, it wasn't no more than that.

Mr. Walsh: That is all. 20

Mr. Golenbock: That is all, Chief.

THOMAS McCORMICK, one of the defendants, re-called.

Direct-examination by Mr. Golenbock:

Q. Mr. McCormick, on July 7, 1925, were you 30 connected with the Fire Department of Newark? A. Yes, sir.

Q. What was your position? A. Why, I was assigned as a chauffeur to the chief engineer.

Q. Where were you stationed? A. At Lafayette and Mulberry Street.

Q. Early that morning did you respond to a fire call with the Chief or Acting Chief? A. Yes, sir.

Q. You were driving the car? A. Yes, sir. 40

Thomas McCormick—Direct

Q. What car was that? A. Why, a Chrysler roadster runabout. I don't just exactly know.

Q. Open car? A. Open car.

Q. You and the Acting Chief were in the car at the time? A. Yes, sir.

10 Q. You were taking the route to the scene of the fire through what street? A. I proceeded down south on Mulberry into New Jersey Avenue, Railroad Avenue, and had to keep going on to turn into Frelingheusen Avenue—the shortest route to the fire.

Q. How fast were you going before you came to the crossing of Miller Street? A. I judge between twenty and twenty-five miles an hour.

20 Q. In responding to fires you had been driving on this car for some time, had you not? A. Well, no. I was only on that I guess about six weeks or so.

Q. Is there any regulation or rule pertaining to the driving as to the speed of the car in responding to a fire? A. Why, there is a restriction of no more than twenty-five miles an hour proceeding to a fire.

30 Q. And coming to the intersection of Miller Street and Railroad Avenue did the Chief say anything to you about slacking up? A. He said to me if I remember right, he said, "We have a bad crossing here. You better pull up a little bit," something on that line.

Q. Did you pull up? A. I immediately pulled up on the foot brake, eased it up.

40 Q. Now, then, when you got to the crossing what happened? A. When I got to the crossing there I saw a truck come out of Miller Street

Thomas McCormick—Direct

traveling west. I immediately tried to get into Miller Street on my right by pulling the wheels to the right, this man being close to the curb of the sidewalk did not particularly give me much chance to get in there, but I got it past him about, had my car in that direction, around you know, when I hit his car on the left-hand side between the fenders, I think it was, and the car upset it, the left side of our car. 10

Q. When the collision occurred had both cars passed the length of Railroad Avenue? A. Passed the length?

Q. Passed Railroad Avenue. A. No.

Q. In reference to the corner, on what corner did this accident happen? A. It happened on northwest corner—just let me get that right. 20

Q. Well, now, looking at this photograph marked Exhibit D-1, will you indicate where this accident happened? A. I judge it happened right about there (indicating).

Q. Indicating the mark the Chief made. A. Yes, right around there (indicating).

Q. When you first saw this car you say you made a turn into Miller Street turning sharp on your right; is that right? A. Yes, sir. 30

Q. Did the plaintiff's car make any attempt to stop or did it stop or did it continue on? A. It did not seem to me where he attempted to stop it at all. It seemed like he was trying to continue to go across the street at the same time I was trying to get away there.

Q. Had he continued to cross Railroad Avenue until the two cars met? A. Did he continue across? 40

Thomas McCormick—Cross

Q. Yes. A. No, he didn't actually continue across, no.

Q. I mean, was his car going until the actual collision occurred? A. Oh, yes.

10 Q. Was your siren and bell being sounded? A. Yes, sir.

Q. From when to when? A. Why, immediately leaving quarters the Chief started to ring the bell, blow the siren, and continued to ring it all the ways down Mulberry Street into New Jersey Avenue.

Mr. Golenbock: That is all.

20 CROSS-EXAMINATION by Mr. Walsh:

Q. You knew when you were approaching Miller Street that there was the obstruction there for anyone proceeding along Miller Street, isn't that true? You knew that railroad arch? A. Yes, I know all of that. In fact, all them blocks are the same way.

Q. You knew it was very difficult for them to see anything coming from the right? A. Well, it is just as difficult for me, too.

30 Q. Well, was it so difficult for you? A. Oh, yes.

Q. The obstruction was nearer Mr. Shuster than it was you, isn't that true? A. Well, I don't think so.

Q. Wasn't he on the right-hand side of his road on Miller Street? A. Yes.

Q. How many feet do you figure he was from this obstruction? A. I couldn't tell you.

40 Q. If he were on his right do you think it would be five or six feet? A. I couldn't just tell you because I couldn't see him at all.

Motion for Direction of a Verdict

Q. Did you see him coming from that tunnel?

A. No, sir; not until he got right in front of the car.

Mr. Walsh: That is all.

Mr. Golenbock: That is all. That is our case. 10

Mr. Walsh: That is all we have.

MOTION FOR DIRECTION OF A VERDICT

Mr. Golenbock: I now renew my motion for a nonsuit and also for a direction of a verdict on the ground that there is no evidence that has been shown that the defendant has been guilty of any negligence, and there is the positive proof that the plaintiff has been guilty of contributory negligence as a legal proposition. 20

The Court: The motion is denied. You may take an exception. It is for the jury to determine.

(Mr. Golenbock sums up the case for the defendant.)

30

(Mr. Walsh sums up the case for the plaintiff.)

The Court: Which one of these defendants do you pick?

Mr. Walsh: Mr. McDermitt.

40

Charge to Jury.

January Term, 1925.

Court's charge to the jury, by Hon. Peter F. Daly, Circuit Court Judge, as follows:

10 Gentlemen of the Jury: It is true that in case you find that the defendant Chief McDermitt is legally responsible from the facts in this case for this accident, then the plaintiff would be entitled to a verdict which would adequately compensate him for the injuries that the accident subjected him to, and for the pain and suffering he endured, and that would reimburse him for the expenses which he was reasonably and necessarily obliged
20 to bear because of the proper treatment of his injuries. You will reimburse him for the expenses that he was necessarily put to because of his own incapacity when he was required, as he claims, if you believe it, to employ someone to run his business. He would also be entitled to be compensated for the pain and suffering that he went through as a result of these injuries. He would also be entitled to be compensated for the difference between the value of his car before the acci-
30 dent and the value of his car after the accident, as a result of the accident.

But your minds will not be concerned with the question of damages until you have first concluded from a preponderance of the evidence in the case that it was the Chief's negligence in this case that caused the accident, and that not only was his negligence a proximate or a directly producing cause of the accident, but that the plaintiff himself was
40 free from contributory negligence.

Charge to Jury

Now, it is indeed true that notwithstanding the special demands made upon an official of the Fire Department to get to a fire as speedily as is reasonably possible, there is no difference made by the traffic regulations so far as the care and prudence in the use of a car by a chief of a fire department is concerned than that degree of care
10 required from the ordinary person in the driving of a car. At the same time in determining whether or not there is negligence you always must consider all of the circumstances involved in the transaction; you must consider the special demands made upon the user of the car.

Now, this question of speed—you know that our Traffic Law has fixed a definite rate of speed.
20 When you are out in the country—what you call open country where the houses are more than one hundred feet apart—why, that is one fixed rate of speed. When you get into the cities where it is more congested, why, there is a lower rate of speed; and then there is another rate of speed when you are making an intersection or when you are passing another vehicle on the right, depending on the circumstances. Those regula-
30 tions have been enacted as the result of experience and with the thought of trying by rule to make the use of the streets as safe as possible for the drivers of these different kinds of vehicles as well as for the pedestrians.

But you can easily see that if you are out on the Lincoln Highway alone, and there is not another automobile within miles of you either one way or the other, and there are no cross-streets,
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Charge to Jury

and there are no houses, and there is nobody around, you might go a hundred miles an hour and you would not be negligent so far as anybody else was concerned. You may be crazy so far as your own interests are concerned if you are the
 10 only one in the car, but not negligent as to others. The point about it is this: that these traffic regulations are there to be obeyed, but it depends upon the circumstances of each particular situation as to whether or not a violation of any of these traffic regulations is in itself negligence. It is for the good sense of the jury to determine in each case whether there is negligence.

20 A violation of the traffic law, if it is proved, is an element or factor for the jury to consider in determining whether or not there is negligence, but they after all are the masters in determining whether or not there has been negligence. Take this right-of-way as to street intersections; there is another traffic regulation, and that is there to be obeyed, but the violation of the right-of-way in itself is not negligence, but if that violation is the directly producing cause of the injuries to another
 30 then it is negligence. In other words, it is to be considered as an element or factor for the jury to pass upon in determining whether or not there has been negligence.

There is no difference so far as the traffic regulations are concerned as to whether the street on the right is narrower than the street on the left and therefore because it is narrower it loses its right-of-way. That is not so.
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Charge to Jury

What is a right-of-way after all? It is pretty hard to define. It is not for example like the case of water traffic. When two steam-vessels are crossing, so as to involve risk of collision, the vessel on the left must keep out of the way of the vessel on the right. Right-of-way on the road
 10 cannot be made the matter of a hard and fast rule. It depends on the circumstances of each case, and right-of-way under our Traffic Law may be illustrated or explained like this: If you are driving your car along, say, Broad Street here, and you are coming to a street on your right, and you see an automobile coming on that street to your right, you are bound as an ordinarily prudent man to reasonably estimate the distance and
 20 speed of that car, and as an ordinarily prudent man to estimate the distance and speed of your own car, and if as a result of such estimation as that, from the standpoint of an ordinarily prudent person you should have the judgment that if you keep going at your rate of speed and if that other man keeps going at his rate of speed, you would meet at the intersection or there is a reasonable danger of meeting at that intersection, or there is a reasonable possibility of meeting at that intersection,
 30 then you have the duty to slacken your speed, or stop if necessary, so that the driver on your right may safely cross the intersection. That is practically and substantially what right-of-way generally means. Yet, even though a man has the right-of-way, if there is a "hog" on the other street who is ignoring the law, still, the man who has the right-of-way has the duty all the time to
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Charge to Jury

protect himself as an ordinarily prudent person would do. Even though there is a "hog" on the road you are always under the obligation to yourself of looking out for yourself to do what an ordinarily prudent person would do to avoid
 10 injury to himself, even though the injury is threatened from the act of one who is ignoring or violating the rule of the road.

Now, in this case the plaintiff was driving along. He did not have the right-of-way. The right-of-way was with the Chief in his car, yet at the same time the Chief was chargeable with exercising the prudence and care that a reasonably prudent person would exercise under the
 20 time, place, and circumstances.

Now, then, the question for you to remember is this: Because the plaintiff could not see to his right on account of the elevated railroad and abutment there what effect would that have on the ordinarily prudent person to be more careful because he could not see, knowing that there was a street on the right and that whoever was on that, under the Traffic Laws, had the right-of-
 30 way? And the same of the Chief coming the other way, because you know the Chief though he was not driving, yet it is admitted that Fireman McCormick, who was assigned to this particular work, was the agent and under the direction of the Chief. There was an abutment there. This man to his left could not see him coming. Was he negligent in the rate of speed that was followed, or otherwise, in reaching the intersection?

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Charge to Jury

Were they both negligent? I do not conclude that either of them was negligent; it is not my right to say so to you. But where is there any negligence upon the part of Chief McDermott or his driver? That is the first question. Before
 10 you can consider the liability of Chief McDermitt you must be satisfied from a preponderance of the evidence in this case that Chief McDermitt's driver was so negligent that it was a directly producing or proximate cause of this accident.

If you find that the plaintiff has sustained that burden of proof and has satisfied your minds through a preponderance of evidence that there was negligence upon the part of Mr. McDermitt and that it was a directly producing cause of the
 20 injury, then you will take up the other question. For even though that is so, could Mr. Shuster the plaintiff, in the exercise of the conduct of a reasonably prudent person, under the time, place, and circumstances, have avoided this accident? Because if he could from the standpoint of a reasonably prudent person, and did not do it, then he was guilty of contributory negligence; and contributory negligence is such negligence that
 30 without it there would have been no injury to the plaintiff even though there was negligence upon the part of the defendant.

So you will take this case and fully decide it according to the facts of the case, giving a square deal to both sides by rendering a verdict that will simply represent your honest, impartial minds as controlled and determined by the facts in the case alone.

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11 MAY.T.1927

**New Jersey Court of Errors
and Appeals**

WILLIAM SHUSTER,
Plaintiff-Appellee,

VS.

MATHEW P. A. McDERMITT, or in the alternative,
THOMAS McCORMICK,
Defendant-Appellant.

*Defendant's Appeal.—Action at Law.—Plaintiff's
Points in Reply.*

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

(Italics, etc. unless otherwise noted, are ours.)

This action was brought against Mathew P. A. McDermitt, or in the alternative, Thomas McCormick, to recover for injuries to the property and person of the plaintiff which resulted from a collision between the automobile in which defendants were riding, the same at that time being operated by defendant McCormick, and the automobile owned and operated by the plaintiff.

There are two counts in the complaint, and each contains an allegation of negligence on the part of the defendant McCormick and states that plaintiff does not know whether the said

McCormick was acting as agent of defendant, McDermitt. The first count is based upon the property damage sustained by plaintiff as a result of defendant's alleged negligence. The second count is based upon the personal injuries suffered by the plaintiff as a result of defendant's alleged negligence.

The complaint prays for damages against defendant McDermitt, or, in the alternative, defendant McCormick, in the sum of five thousand dollars (\$5,000.) on the first count and five thousand dollars (\$5,000.) on the second count.

Defendant's answer is, in effect, a general denial and sets up the defense of contributory negligence.

At the end of plaintiff's case, a motion for a non-suit was made and denied, and an exception allowed.

When defendant's case was in, defendant's motion for a non-suit was renewed and a motion was made in their behalf for the direction of a verdict. These motions were denied and exception allowed.

Before the court charged the Jury, plaintiff's counsel elected to proceed against defendant McDermitt. The Jury brought in a general verdict against McDermitt in the sum of four hundred and ninety five dollars and eighty cents (\$495.80).

The grounds of appeal are the denial of the motion to non-suit and the denial for the motion for a direction of a verdict.

APPELLANT'S ARGUMENTS.

APPELLANT'S ARGUMENTS ARE TWO IN NUMBER, NAMELY:

I.

There was no evidence that McCormick, the driver of the car, was negligent, and there was plenty of evidence that plaintiff was guilty of contributory negligence, and for these reasons a non-suit or a direction of a verdict should have been granted.

II.

There being no proof of negligence on the part of the Deputy Chief, there should have been a non-suit or direction of a verdict as to McDermitt because he was not responsible for any negligence of the driver McCormick under the doctrine of respondent superior.

POINT ONE IN REPLY.

THERE WAS AMPLE EVIDENCE OF DEFENDANT'S NEGLIGENCE, AND THE SAME WAS PROPERLY GIVEN TO THE JURY FOR CONSIDERATION.

There was evidence of negligence on the part of McCormick in that the plaintiff's truck, which was proceeding at right angles to defendant's automobile, was struck on the right

side of the rear wheel, as testified by plaintiff (p. 15); that the collision or impact was of great force (p. 16); that plaintiff's truck, an International Harvester (p. 27), one ton truck (p. 31), was caused to be moved a distance of about 15 or 20 feet, and to be upset on its side and completely turned around, (p. 16), through the striking of plaintiff's truck by defendant's car of less weight, a Chrysler Roadster (p. 32).

Plaintiff had stopped at bridge and, at time of accident, "had got up no speed", having been going at the rate of three or four miles an hour (p. 23), and the entire length of the truck was almost completely across Railroad Avenue, as testified to on page 20 as follows:

Q. "And was your car entirely passed the center line of Railroad Avenue?" A. "Well, I don't think not quite on account if it was he wouldn't hit the rear wheel".

Plaintiff's case was replete with evidence that defendant, McCormick, was not driving as a reasonable and prudent man under the circumstances and conditions, in that he was proceeding at an excessive rate of speed and did not permit plaintiff to pass, although all but a small part of plaintiff's car had crossed and passed the center line of Railroad Avenue, and that accomplished while plaintiff's car was being operated at only three or four miles an hour in first gear. The defendants had ample opportunity to observe the car of plaintiff, the same having first approached the intersection and having first entered the intersection area and, after so entering said area, having practically completed the journey across the street when the collision of which complaint made occurred.

The case at bar is markedly similar to that decided by this court in *Healey et als. v. Braested*, 98 N. J. L. 520, in which Justice Kalisch in his opinion at page 521 says:

"The trial disclosed the following facts: The plaintiff, William Healey, was driving a motorcycle along Griffith Street in a westerly direction. In the side car attached William Glenfield, a minor, twenty years of age, was seated. The defendant was driving an automobile in a northerly direction along Webster Avenue, approaching Healey's motorcycle on the right hand side and ran into it. Griffith Street crosses Webster Avenue at right angles. The testimony tended to show, that at the time of the collision; the motorcycle had reached a point a little beyond the center line of Webster Avenue, and was on the right hand side of Griffith Street, going at a speed of eight or nine miles an hour, and had been just changed from second speed to first speed when it was run into at the rear wheel by defendant's automobile, with such force that the motorcycle was thrown over to a fence alongside of a grocery store on Griffith Street west of Webster Avenue, and that the automobile proceeded along Webster Avenue, beyond Griffith Street, a distance past seven houses before it was stopped. Although there was no direct testimony of the speed of the automobile, nevertheless, the jury would have been warranted in finding, from the force of the impact with the motorcycle and the distance the auto-

mobile proceeded thereafter, before it was stopped that the latter was being driven at an excessive rate of speed."

In *Healey et als. v. Braested, supra*, there was no direct testimony as to speed and yet the jury held warranted in finding that the automobile was being operated at an excessive rate of speed because of the force of the impact and the distance the automobile proceeded thereafter. Surely, in the instant case, the plaintiff's testimony that the impact was of great force and propelled his one ton truck a distance of 15 or 20 feet, was an adequated substitute, in his case, for direct testimony as to speed, and the jury was warranted in finding therefrom that defendant's car was being operated negligently, and at an excessive rate of speed.

POINT TWO IN REPLY.

THERE WAS NO EVIDENCE OF CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF, AND THE COURT WAS CORRECT IN DENYING THE MOTIONS FOR A NON-SUIT AND FOR THE DIRECTION OF A VERDICT.

It is to be presumed that plaintiff acted as a reasonable and prudent man under the circumstances, and that he did look in the direction from which defendants proceeded, as well as in the opposite direction, before he proceeded across Railroad Avenue.

The record is barren of proof as to whether or not plaintiff looked, there merely being some testimony that he did not see defendant's

car. In the case of *McComb v. Public Service*, 95 N. J. L. 188, at page 189, this court in stating the necessity of proving negligence, remarks:

"Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

And again in *Alvina v. Public Service*, 97 N. J. L. 526, at page 527:

"There is always a presumption against negligence and in favor of innocence. A probability is not sufficient."

In appellant's brief at page 4, mention is made of the following testimony appearing on page 17 of the record, Q. "If there was one blown or any sound would you have heard it", A. "Well, I don't think so; if there was a sound I don't think I would have heard it because at the time there was a train going over the bridge". It is the contention of plaintiff that this remark was meaningless and, therefore, harmless because he testified not as to a fact but as to that which he thought at the time of the trial and, although he spoke with positiveness, he cannot be bound by such comment for he was not an expert concerning the intensity and effect of sound.

The statement in appellant's brief at page 5 that "plaintiff deliberately, although he could not see, proceeded blindly into the path over which the defendants had the right of way", is unfounded, in view of the fact that there is no evidence in the record to substantiate such comment.

At page 7 in the brief of appellant, consideration is had of the statements said by McDermitt to have been made by plaintiff immediately after the happening of the accident, (p. 37) and alleges that such were not denied. Although the remarks attributed to plaintiff were not specifically denied in rebuttal testimony, they were contradicted by the testimony of Shuster, (p. 16) where he said that he did not see the defendant's car before the collision. This testimony of plaintiff sufficiently contraverted remarks of McDermitt so as to obviate the necessity of specific denials.

The plaintiff is not, as a condition precedent to a right to maintain his action, bound to prove affirmatively that the injury was not contributed to by his own negligence, under the penalty of being non-suited. This was held in the case of *N. J. Express Co. vs. Nichols*, 33 N. J. L. 437 (cited by appellant) where the court said at page 439:

“In any cases where the plaintiff's conduct was, to some extent, contributory to his injury, he has been allowed to recover. In fact it would be difficult to conceive of any case in which the conduct of the party injured might not, in some sense, be said to have contributed to his injuries”.

And, in the matter of *Pennsylvania Railroad Co. vs. Righter*, 42 N. J. L. 180, at page 183, the rule is again stated in the following terms:

“If, in spite of his negligent act, the injury would have occurred by means of the negligent conduct of the defendant,

or if his injury is disconnected from his act by an independent cause, then there is no legal contribution to the injury”.

As said by this court in the cause of *McLaughlin vs. Danbolt*, 100 N. J. L. at page 129:

“Cases of collision on highways almost invariably involve questions of concurrent negligence on the part of both actors, presenting in a peculiar sense questions for a jury.”

Contributory negligence is a defense and the burden of establishing it rests upon the defendant. *Osborne v. DeYoung*, 99 N. J. L. 204.

The case of *Hammond v. Morrison*, 90 N. J. L. 15, submitted by appellant, is distinguishable from the present case in that there the defendant attempted to excuse himself upon the ground that the decedent, just before the collision, was temporarily blinded because street lights which he had passed were reflected into his eyes by the windshield of his car, so that decedent was unable to see in front of him; while in the present case, there is no evidence that Shuster was unable to see in front of him or to his right along Railroad Avenue. On the contrary, it is apparent that the plaintiff in this matter was in a position to, and could see out into and along Railroad Avenue and to his right in the direction from which defendants proceeded. Again, the rule of presumption against negligence may be well applied.

“The truth of the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom must be admitted on a motion

to non-suit or direct a verdict in favor of the defendant." *Alvina vs. Public Service Company, supra*, being declaratory of the rule laid down in *McComb vs. Public Service Co. supra*, holds that a motion for a non-suit admits the truth of the plaintiff's evidence. Therefore, the court's refusal to non-suit was proper.

The speed at which the defendants say they attempted to drive entirely across Miller Street, as testified by McDermitt at between 12 and 15 miles per hour (p. 40), may well be considered as constituting negligence on the part of defendants, as may the facts testified by McCormick (p. 46):

Q. "If he were on his right do you think it would be five or six feet from the obstruction"? A. "I can't just tell you because I couldn't see him at all". (p. 47) Q. "Did you see him coming from that tunnel?" A. "No sir; not until he got right in front of the car".

From the above testimony, and the fact that defendants approached the intersection at a high rate of speed, whereas plaintiff made his approach at a low rate of speed, there is but one fair inference to be drawn, namely, that defendants did not use reasonable care to observe the presence of users of the highway at their left.

POINT THREE IN REPLY.

THERE IS NO EVIDENCE THAT McCORMICK WAS THE AGENT OR SERVANT OF McDERMITT AND SUBJECT TO HIS CONTROL, AND THE LATTER IS RESPONSIBLE AND LIABLE FOR NEGLIGENCE OF FORMER.

In the plaintiff's case (p. 32) the question was asked of McCormick, "Were you driving under the direction of Mr. McDermitt? to which defendant replied "Why, yes, sir."

In addition, McDermitt testified at page 40: "I saw a truck go by in that way as we were coming out as I remarked '*to my driver*', but there was nothing else at that time".

McDermitt appears to have been the person in charge and control of the car as indicated by his statement (p. 42) "Why, he followed *me* up".

Deputy Chief McDermitt, undoubtedly exercised control over McCormick, and the management of the car was under his direction as appears from his testimony at page 37: "Well, as we were closing in on Miller Street I said to *my driver*, Tom, I says, you are coming to Miller Street intersection, bad pulling".

It was the function of the Jury to determine the meaning and effect of such evidence.

The court charged the jury in the following manner: "It is admitted that Fireman McCormick who was assigned to this particular work was the agent and under the direction of the Chief". No exception was taken to the charge and the appellant may not now raise the point.

In *Mittelsdorfer vs. West Jersey etc. R. R. Co.* 77 N. J. L. 702, it is stated:

“No party ought to be allowed to surprise or mislead his adversary nor to raise here for the first time a point which might be obviated had it been made in the court below.”

“The doctrine is founded upon the inflexible rule that the party who objects in the course of a trial must bring his objections to the mind of the trial Judge, so that the Judge may correct erroneous expressions or explain what would otherwise mislead.”

And in *Addis vs. Rushmore*, 74 N. J. L. at page 651, it is stated:

“The party excepting must, at the time, point out the error complained of, so that if committed by inadvertence or for want of clearness of expression, or for any other reason, it may be corrected by the court.”

Regardless of the trial court's conception of an admission of agency, the recited excerpts of testimony are indicative of the liability of McDermitt.

The appellant quotes from the case of *McGuire vs. Grant*, 25 N. J. L. 356, decided by the Supreme Court but in that case the following enlightening facts are stated at page 369:

“The acts with which the defendant was sought to be charged were not done by the defendant himself, nor by persons acting under his immediate direction.

The defendant neither commanded an illegal act to be done, nor co-operated in doing the act which occasioned the injuries. The laborers were neither his servants in fact nor in law.”

The case of *Courtinard vs. Gray Burial Co., etc.*, 98 N. J. L. 493 relied upon by appellant, is distinguishable from the instant case and by inference favors appellee's contention, for the facts are as follows:

“That as the defendants neither hired, directed nor controlled the driver nor exercised any power, authority or supervision over him, but left him to the exclusive management, direction and control of the vehicle, the relationship of master and servant did not exist especially in the absence of any testimony to show that the driver consented, expressly or implied to the transfer of his services, pro hac vice to the defendant.”

In *Courtinard vs. Gray Burial, supra*, Justice White in his concurring opinion at page 498, uses the following language:

“It is the control or right to control which fixes the liability and it is because there was no evidence that the Caseys exercised or had the right to exercise such control so far as the driving of the hearse in question was concerned that I vote to reverse.”

Justice Kalisch in the same case, in his dissenting opinion at page 502 says:

"Servants who are employed and paid by one person may nevertheless be, ad hoc, the servant of another in a particular transaction, and that, too, where the general employer is interested in the work."

The case of *N. Y. D. L. & W. R. R. Co. vs. Steinbrenner*, 47 N. J. L. 170, recognizes the rule which is determinative of McDermitt's liability in the present case and there, at page 190, the court states the law as follows:

which may render the hirer of horses and
 "There may be special circumstances servants responsible for the neglect of a servant, though not liable by virtue of the general relationship of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of."

From the foregoing citations it is clear that McDermitt, by directing and exercising control over the driver, caused the relationship of master and servant, or principal and agent, to exist, (evidence of either relationship being sufficient for the purpose herein) and thereby rendered himself liable for the negligence of McCormick, the driver.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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11 MAY.T.1927

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

WILLIAM SHUSTER,
 Plaintiff-Appellee,

vs.

MATHEW P. A. McDERMIT, or in
 the alternative, THOMAS Mc-
 CORMICK,
 Defendant-Appellant.

Defendant's
 Appeal.

Action at
 Law.

Appeal from
 the Supreme
 Court, Tried
 at Union

Circuit
 Before Daly,
 J., and a
 Jury.

Verdict for
 Plaintiff
 Against De-
 fendant Mc-
 Dermitt.

APPELLANT'S BRIEF.

Statement of the Case.

(Italics, etc., unless otherwise noted, are ours.)

This action was commenced to recover against McDermitt, a Deputy Fire Chief of the Newark Fire Department, and McCormick, a member of the Newark Fire Department, driver of the automobile assigned to the Chief Engineer, damages for personal injuries sustained by plaintiff as a result of a collision between the automobile driven by McCormick, in which McDermitt was riding, on July 7, 1925, proceeding to a fire in the routine of duty, and an automobile driven by plaintiff.

The complaint consists of two counts (p. 4). They are alike in their allegation of negligence. The only such allegation (p. 5) is that McCor-

mick, who was operating the car, which McDermit as Deputy Chief had the use, operated it negligently.

There is no allegation of negligence against McDermit.

The complaint alleges (pp. 5, 7) "plaintiff does not know whether the defendant, Thomas McCormick, was acting as agent of defendant, Mathew P. A. McDermit, while driving the automobile at the time of said collision."

The answer was, in effect, a general denial except an admission that "defendant, Thomas McCormick, was operating the automobile, of which the defendant, Mathew P. A. McDermit had the use" (p. 10).

It affirmatively set up contributory negligence.

At the close of plaintiff's case the only evidence of McDermit's connection with the matter had come from McCormick. He was asked (p. 32)—"Were you driving under the direction of Mr. McDermit?" and he answered "Why, yes, sir."

A motion to non-suit was made and denied (p. 34), and exception allowed.

McDermit testified (p. 34) that: he was a Deputy Chief of the Newark Fire Department; there was an alarm of fire about five o'clock on the morning of the accident, to which he responded (p. 35)—"I was driven in the Chief's car." The driver was "Fireman Thomas McCormick."

McCormick testified (p. 43) that he was a Fireman of the Newark Fire Department "Assigned as a chauffeur to the chief engineer." He re-

sponded to the fire call driving the acting Chief who had the use of the car (pp. 43, 44).

A motion was made to direct a verdict in favor of defendants upon the grounds that there was no negligence shown and that contributory negligence was shown as matter of law on the part of plaintiff, which motion was denied, and exception allowed.

After the summing up of counsel plaintiff picked McDermit to proceed against, apparently discontinuing as against McCormick (p. 47) although no formal order appears to have been entered.

The jury brought in a verdict against McDermit for \$495.80 (p. 13).

This appeal was taken, the grounds of appeal being the denial by the Court of the motion to non-suit and to direct a verdict (p. 2).

There was no evidence of negligence on the part of McDermit, the Deputy Chief.

The judgment against him must rest solely for its support upon the doctrine of *respondeat superior*.

ARGUMENT.

I.

There was no evidence that McCormick, the driver of the car, was negligent, and there was plenty of evidence that plaintiff was guilty of contributory negligence, and for these reasons a non-suit or a direction of a verdict should have been granted.

Plaintiff was in his automobile truck, proceeding in a westerly direction along Miller street,

Newark. He had a load of produce. Just before he got to the railroad track a ton truck turned around and he had to stop (p. 15). The street was not wide enough to pass by with a wide truck "so I stopped and turned around and went ahead." He was just shifting into first, coming in the street, when his automobile was struck on the side of the rear wheel, turned around and upset. He did not see the car which struck him (p. 16). He says he heard no bell but (p. 17)—"Q If there was one blown or any sound would you have heard it? A Well, I don't think so; if there was a sound I don't think I would have heard it *because at that time there was a train going over the bridge.*"

At the conclusion of plaintiff's case there was no evidence of negligence of the driver, McCormick, unless it could be inferred from the mere happening of the accident, but it could not be so inferred because, as the Court charged the jury (p. 52)—"Now, in this case the plaintiff was driving along. He did not have the right-of-way. The right-of-way was with the Chief in his car, yet at the same time the Chief was chargeable with exercising the prudence and care that a reasonably prudent person would exercise under the time, place, and circumstances. Now, then, the question for you to remember is this: Because the plaintiff could not see to his right on account of the elevated railroad and abutment there what effect would that have on the ordinarily prudent person to be more careful because he could not see, knowing that there was a street on the right and that whoever was on that, under the Traffic Laws, had the right-of-way?"

It was not denied that the right-of-way was with the defendants and that, notwithstanding, plaintiff deliberately, although he could not see, proceeded blindly into the path over which the defendants had the right-of-way.

There was, therefore, at the close of plaintiff's case, plenary evidence of plaintiff's contributory negligence and no evidence whatever of negligence on the part of either of the defendants.

While it is true that contributory negligence is a defense and the burden of establishing it rests upon defendant (*Osborne v. De Young*, 99 N. J. L. 204), nevertheless, where there is plenary evidence of contributory negligence, the Court should non-suit or direct a verdict.

N. J. Express Co. v. Nichols, 33 N. J. L. 437.

Chief Justice Gummere in *Hammond v. Morrison*, 90 N. J. L. 15, in the Supreme Court, said:

"No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Having seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being."

This case was approved by this Court in *Osborne v. De Young*, 99 N. J. L. 204.

And that is precisely what the proofs demonstrate, as indicated by the charge of the Court, the plaintiff did in this case. He was proceed-

ing into a public thoroughfare upon which he did not have the right-of-way. He could not see and he made no attempt to investigate. He blindly went out into the path of the Chief's car which had the right-of-way. There was no disputed question of fact, and there should have been a non-suit upon the ground of contributory negligence at the close of the plaintiff's case or a direction of a verdict at the close of defendants' case.

There was no evidence either of negligence of the Deputy Chief, or of the driver of the Chief's car, at the close of plaintiff's case. The only evidence was that the accident happened. Plaintiff knew nothing about how it happened. The fact of the happening of the accident is not sufficient upon which to predicate a charge of negligence.

Kingsley v. D. L. & W., 81 N. J. L. 536.

There is always a presumption against negligence.

Alvina v. Public Service, 97 N. J. L. 526.

At the close of the whole case there was no proof of negligence either of the driver of the Chief's car or of the Chief.

The testimony of defendant McDermit was that: they were responding to an alarm of fire; it was about five o'clock in the morning (p. 35); the car is equipped with a siren and a bell; the siren and the bell were constantly going (p. 35); they were proceeding between twenty and twenty-five miles an hour; as they came to Miller street the Deputy Chief said—"You are coming to Miller street intersection, bad pulling;" the driver pulled down to about twelve or fifteen miles an hour; as they got to the intersection the plaintiff "put out with his car, made no at-

tempt to stop, kept on going and turned to the right to go into Miller street, and his car kept on coming, and he virtually caught the rear part of his car and the front part of our car on the left-hand side and bent the fender and wheel, and in doing so with the momentum of our car and his car it upset his car facing as it was towards Broad street"; after the accident the Deputy Chief and the plaintiff had a conversation and the following occurred (p. 37):

"I said, 'Why, didn't you put your brakes on? Why didn't you pull up? Couldn't you hear me?' He said, 'No, I couldn't hear you then. There was a train going overhead. I said, 'That is all the reason more why you should have stopped.' He said to me, 'Well, I saw it and didn't know what to do. I attempted to get out from my car.' I said, 'I saw you trying to get out from behind the wheel but I saw you couldn't do it.'"

The Deputy Chief says the siren could be heard a mile away, certainly a block away (p. 39).

McCormick said that when the Chief said to him that he had a bad crossing (p. 44) he immediately slowed down (p. 44—"When I got to the crossing there I saw a truck come out of Miller street, traveling west. I immediately tried to get into Miller street on my right by pulling the wheels to the right, this man being close to the curb of the sidewalk did not particularly give me much chance to get in there, but I got it past him about, had my car in that direction, around you know, when I hit his car on the left-hand side between the fenders, I think it was, and the car upset it, the left side of our car."

When McCormick saw plaintiff's car he was making a turn into Miller street, turning sharp

on McCormick's right. He says: "It does not seem to me where he attempted to stop it at all. It seemed like he was trying to continue to go across the street at the same time I was trying to get away there"; the bell and the siren was constantly sounding (p. 46).

The plaintiff did not deny the statement of the Deputy Chief on page 37 as to the conversation the Deputy Chief says he had with him. The plaintiff says (p. 18) that he believes he spoke to the Chief after the accident but doesn't remember what was said.

At the close of defendants' case it appeared, without contradiction, that plaintiff deliberately proceeded out into a street against the right-of-way *without either ability to see or to hear*. He could not see where he was going because of the obstruction. He could not hear anything proceeding along the street, even the gong or the siren of an automobile of the Fire Department, because of a passing train. He was not only deprived of the use of one sense but of both senses by the means of which he could know whether there was danger in the path that he was pursuing.

There was contributory negligence as matter of law and the motion to direct a verdict should have been granted upon that ground.

At the close of the whole case there was no evidence of negligence of the driver McCormick. He was proceeding, responding to a fire. He had the right-of-way. His siren and bell were ringing. He slowed down as he approached the intersection. The car of plaintiff suddenly came out of the street to his left. It made no attempt to stop. From the driver's standpoint the collision was inevitable.

There was no negligence charged against McDermit and no attempt to prove negligence so far as he was concerned.

A verdict should have directed because there was no proof of negligence on the part of defendant.

II.

There being no proof of negligence on the part of the Deputy Chief there should have been a non-suit or direction of a verdict as to McDermit because he was not responsible for any negligence of the driver McCormick under the doctrine of respondeat superior.

The Court, in its charge to the jury, said (p. 52)—"And the same of the Chief coming the other way, because you know the Chief though he was not driving, yet it is admitted that Fireman McCormick, who was assigned to this particular work, was the agent and under the direction of the Chief."

I cannot find any such admission in the evidence. The complaint expressly disavows knowledge as to whether McCormick was acting as agent of McDermit (pp. 5, 7). In the plaintiff's case the following question and answer appears (p. 32):

"Q Were you driving under the direction of Mr. McDermit? A Why, yes, sir."

It appears in the defendants' case, without contradiction, what the driver meant by this. The proven fact was that both McDermit and McCormick were officers of the Newark Fire Department, McDermit a Deputy Chief, and McCormick, a driver.

The driver, McCormick, was "assigned as a chauffeur to the Chief Engineer." At the particular moment the Deputy Chief was in charge and McCormick, as the driver assigned to the Chief Engineer was driving the Chief's car in which was McDermit as Acting Chief.

McCormick was only driving "under the direction" of McDermit in the sense of being directed by his superior officer to respond to a certain fire. Both were engaged in official duties. McDermit, as McCormick's superior officer, had the power to direct him where to drive, and, undoubtedly, to make suggestions to him to slow down at an intersection, as he did, but he had no power to compel the driver to drive in any certain manner. To drive the car was McCormick's duty. To direct the car where to go was McDermit's duty. It was not McDermit's duty to instruct McCormick with respect to the manner in which he drove.

And, if he did instruct McCormick, it was in the sense of a superior officer instructing an inferior, not in the sense of a master instructing a servant.

In no sense was the driver McCormick a servant of Deputy Chief. Both were servants of a municipality, each with his assigned duties.

The doctrine of *respondeat superior* rests for its foundation upon the ability of the master to select, discharge and direct the servant. In the position in which these two men were placed, McDermit had no possible right to select the "servant" or to discharge him. The driver was assigned by the Department without any intervention upon the part of McDermit.

Nor did he have, in the sense required by the rule of *respondeat superior*, the right to direct

McCormick. McCormick's duties were prescribed by the Department, not by McDermit.

The failure of McDermit, if there were such a failure, to see to it that McCormick was not negligent could not make him responsible for the negligence of McCormick for, while McDermit might have made *suggestions* to McCormick, McCormick would have been well within his rights to have driven the car as he saw fit so long as he took it in the direction indicated by the Deputy Chief.

But if it was McDermit's duty to direct McCormick, the driver, in the details of the operation of the car, *he performed that duty* for he instructed McCormick, as they neared the intersection, to slow down. Only one man can drive a car. There is no proof that the Deputy Chief knew anything about driving. He was not required to. For aught that the record shows he may never have driven an automobile and may never have had a license to drive. He could not interfere with the actual driving of the car without interfering with the rights of McCormick, and there is no proof that he had the necessary knowledge to interfere with the driving of the car.

If there were *any* duty resting upon him when, as he saw that they were approaching an intersection, he told the driver to slow down, he performed his duty—for what more could he have done under the circumstances? He could give no more than a general direction and that he gave.

If the relationship of *master and servant* had existed, the fact that the master gave the servant proper instructions could not save the master

from responsibility if the servant negligently performed his duties (*Driscoll v. Carlin*, 50 N. J. L. 28; *McCann v. Consolidated*, 59 N. J. L. 481), but this would be upon the ground that the servant was about the master's business and that the master, having the right of selection of the servant, is responsible for the servant's negligence even if that negligence be in spite of his express instruction.

No such rule can be applied here for, in the first place, McDermit had no right of selection of McCormick, and, in the second place, McCormick was not about McDermit's business, but rather both were about the City's business.

In *McGuire v. Grant*, 25 N. J. L. 356, at page 371, the Supreme Court said:

"A master is responsible for the tortious acts of his servant which were done in his service. This responsibility grows out of, is measured by, begins and ends with his control over them. If it is his duty to control them in what they do, he is responsible for his neglect. But where workmen do not stand in such relation to the person sought to be charged, as to make it his duty to control them, they are not his servants, and he is in nowise responsible for their acts, except in some cases where, by subsequently adopting and sanctioning those acts, he renders himself legally a participator in them."

In *Courtinard v. Gray Burial, &c., Co.*, 98 N. J. L. 493, this Court said, at page 495:

"The reasoning of that distinguished jurist throughout the opinion, makes it manifest, supported by a wealth of authority, that the doctrine of master and servant, from which emanates the principle of respondeat superior, is based in essence upon the legal theory inherent in the maxim, *qui facit per alium facit per se*, involving funda-

mentally the fact of control, direction and representation in the service at hand. He thus defines the relationship: 'That liability flows,' says he, 'from the relation of master and servant, a relation incident to which is the power to select the servant, and direct him in the execution of the duties of his employment; and to discharge him when found to be incompetent; and also the duty to so control his acts that no injury may be done to third persons.'"

And at page 496—

"Fundamentally, as we have demonstrated in subsequent cases, the theory of master and servant, like that of principal and agent, is based upon the legal conception of representation in a chosen and accepted line of service, by which the employee practically becomes, for that particular duty, the *alter ego* of the master. It becomes manifest, therefore, that the vicarious responsibility of a third party for injury resulting from the negligent act of another can be legally or logically supported upon no other recognized conception. An enumeration of the cases will serve the purpose of elucidating the principle. *Rodenburg v. Clinton Garage Co.*, 84 N. J. L. 545; *Holler v. Ross*, 68 *Id.* 324; *Doran v. Thomsen*, 76 *Id.* 754; *Missell v. Hayes*, 86 *Id.* 348; *Jennings v. Okin*, 88 *Id.* 659; *Cronecker v. Hall*, 92 *Id.* 450; *Mann v. Max*, 93 *Id.* 191; *Karas v. Burns Bros.* 94 *Id.* 59; *Zampella v. Fitzhenry*, 97 *Id.* 517."

And for the same principle see 39 *Corpus Juris*, title "Master and Servant," page 35, sec. 4; page 1269, sec. 1454.

It is submitted, therefore, that there could be no recovery against McDermit without proof of actual negligence upon his part, having to do with the operation of the car, and, inasmuch as the only proof is that, as they approached this intersection, he told the driver to slow down,

which, from the plaintiff's standpoint, was the proper thing for him to have done, there should have been, at the close of defendants' case, a non-suit, and, at the close of the whole case, a direction of a verdict upon the ground that there was no negligence shown upon the part of the defendant, McDermit.

A motion was made to direct a verdict upon the ground that defendant had not been shown guilty of negligence and also on the ground that plaintiff had been shown guilty of contributory negligence.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

WIGHT, WIGHT & GOLENBOCK,
Attorneys for Appellant.

Service of the Fitchin Brief is hereby
acknowledged this October 23rd
1926

George A. Allen

Attorney for Plaintiff-Appellee

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