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**Complaint.**

(Filed July 27, 1929.)

NEW JERSEY SUPREME COURT.

10

MARGARET BERGIN,

*Plaintiff,*

*v.*

MAE GANLEY,

*Defendant.*

Action at Law.

20

Plaintiff residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

FIRST COUNT.

1. On or about the twelfth day of April, 1929, the defendant John Ganley was the owner of a certain automobile which he caused to be driven by his agent and servant, Mae Ganley, along a public highway in the City of Passaic, County of Passaic and State of New Jersey, known as Van Houten Avenue.

30

2. On the said day plaintiff was the owner and operator of an automobile that she was then and there driving along a certain highway in said city known as Pennington Avenue.

3. Thereupon it became the duty of the defendant, John Ganley, by his agent and servant, Mae Ganley, to exercise proper care in the operation of said automobile so as to avoid collisions

40

*Complaint.*

with other persons or vehicles lawfully using said highway.

10       4. The defendant, John Ganley, by his servant, Mae Ganley, neglected his duty as aforesaid, causing his automobile to be driven at an excessive rate of speed; without having the brakes of said car in repair; without giving a warning or signal of his approach, and in divers other respects caused his said automobile to be driven in a negligent manner so that the same crashed with great force and violence against the plaintiff's automobile, causing the plaintiff the following bodily injuries, to wit: She sustained contusions and lacerations of the head, face, body, limbs, fore-arms and internal injuries, the exact extent of which are as yet undetermined. Plaintiff suffered great pain and will for a long time in the future continue to suffer great pain. Plaintiff also suffered severe shock to her nervous system. Plaintiff was also prevented from assuming her daily occupation, and will be so prevented for a long time to come in the future. Plaintiff was also confined to her bed for a long period of time and by reason of such injuries that she sustained she was  
20  
30       obliged to spend divers sums of money for medical attention and incidents thereto.

WHEREFORE, plaintiff demands judgment on the first count in the sum of Five Thousand (\$5,000.00) Dollars.

## SECOND COUNT.

1. Paragraphs one, two, three and four of the first count are hereby repeated and made a part of this count.  
40       2. By reason of the collision aforementioned,

*Answer.*

plaintiff's automobile was greatly damaged thereby causing plaintiff to expend the sum of Five Hundred (\$500.00) Dollars to place her automobile in the same condition as it was prior to the said collision.

WHEREFORE, judgment is demanded on the second count in the sum of Five Hundred (\$500.00) Dollars.

Judgment will be demanded on both counts in the sum of Fifty-five Hundred (\$5500.00) Dollars.

ROEMER & COLE,  
Attorneys of Plaintiff.

10

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**Answer.**

20

(Filed September 14, 1929.)

The defendants, Mae Ganley and John Ganley, residing in the City of Passaic, County of Passaic, and State of New Jersey, for answer say that:

## FIRST DEFENSE TO FIRST COUNT.

1. They deny Paragraph 1.
2. They have no knowledge or information sufficient to form a belief as to Paragraph 2. 30
3. They deny Paragraph 3.
4. They deny Paragraph 4.

## FIRST DEFENSE TO SECOND COUNT.

1. They repeat their answers to Paragraphs 1, 2, 3 and 4 of the First Count.
2. They deny Paragraph 2. 40

*Reply.*

## SECOND DEFENSE TO EACH COUNT.

At the time of the alleged accident set forth in the complaint the plaintiff was guilty of contributory negligence in that she failed to exercise reasonable care for her own safety.

10

## THIRD DEFENSE TO EACH COUNT.

At the time of the alleged accident set forth in the complaint the plaintiff was guilty of contributory negligence in that she failed to look or listen or otherwise inform herself of the condition of which she complains.

## FOURTH DEFENSE TO EACH COUNT.

At the time of the alleged accident set forth in the complaint the plaintiff was guilty of contributory negligence in that she suddenly and without warning drove her automobile into the automobile of the defendant.

20

COLLINS & CORBIN,  
Attorneys of Defendants.

**Reply.**

30

(Filed September 12, 1929.)

Plaintiff replies to the Answer filed herein as follows:

1. She denies the second, third and fourth defense to each count, and joins issue with the defendants.

ROEMER & COLE,  
Attorneys of Plaintiff.

40

**Notice of Motion.**

(Filed December 1, 1929.)

To

ROEMER & COLE, Esqs.,  
Attorneys of Plaintiff,  
#45 Church Street,  
Paterson, New Jersey.

10

SIRS:

TAKE NOTICE that on Monday, December 2nd, 1929, at ten o'clock in the forenoon, or as soon thereafter as Counsel may be heard, we shall move before Honorable Newton H. Porter, at the Court House, Paterson, New Jersey, for an order permitting the defendants herein to amend their answer filed in this cause by attaching thereto a separate defense as per the attached amendment, alleging matter which has arisen since the filing of the original answer.

20

Dated Nov. 29th, 1929.

Respectfully,

COLLINS & CORBIN,  
Attorneys of Defendants.

30

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**Proposed Amended Answer.**

(Filed December 1, 1929.)

The defendants, Mae Ganley and John Ganley, hereby amend answer filed in this issue by adding thereto the following defenses:

1. The defendants herein, Mae Ganley and John Ganley, by summons duly issued, instituted

40

*Proposed Amended Answer.*

suit in the Passaic District Court against Margaret Bergin, the plaintiff herein.

10       2. Said action was brought by the plaintiff, Mae Ganley, to recover damages for personal injuries sustained by her arising out of an automobile collision had with the automobile owned by Margaret Bergin. Suit was also brought by the plaintiff, John Ganley, to recover for moneys expended by him for medical aid and for loss of services and consortium of his wife.

20       3. The cause of action alleged in the said suit is the same cause of action for which recovery is sought against the said Mae Ganley and John Ganley in this action.

4. The said suit of Mae Ganley and John Ganley against Margaret Bergin was tried before Honorable Frederick V. Watson, in the Passaic District Court on Friday, November 29th, 1929, and resulted in a verdict in favor of said Mae Ganley and John Ganley and against Margaret Bergin on which said verdict judgment has been entered in the Passaic District Court.

30       5. The verdict and the judgment rendered thereon in the action aforesaid, is *res adjudicata* and a bar to any action by the said Margaret Bergin against the said Mae Ganley and John Ganley in this action.

COLLINS & CORBIN,  
Attorneys of Defendants.

**Memorandum on Motion to Amend Answer.**

(Filed January 20, 1930.)

PORTER, J.:

Motion is made by defendants to amend the answer, by showing that a suit was brought by the defendants against the plaintiff in the Passaic District Court for damage arising out of the same occurrence upon which the case at bar is brought, and showing that a judgment was rendered in said suit in favor of the defendants herein, said judgment thereby operated as a bar to this action, the same being *res adjudicata*.

10

The motion is resisted on the theory that the District Court suit is not *res adjudicata* under the recent decision in the case of *Smith v. Fisher Baking Co.*, 147 Atl. 455.

20

As was pointed out in that decision, *res adjudicata* does not apply unless there be identity of the thing sued for, also that "the cause of action is not the negligent act, but the consequences following it, for to support an action there must be not only the negligent act but a consequential injury; the injury being the gravamen of the charge."

The gravamen of the suit at bar is the injury sustained by the plaintiff which was not at issue and could not be, in the District Court suit.

30

There being therefore no identity of the thing sued for in the two suits, *res adjudicata* does not apply.

The motion to amend is denied.

NEWTON H. PORTER,  
Judge.

40

Case.

NEW JERSEY SUPREME COURT,  
PASSAIC CIRCUIT.

10

MARGARET BERGIN,  
*Plaintiff,*

*v.*

MAE GANLEY and JOHN GANLEY,  
*Defendants.*

Action at Law.

Paterson, N. J., February 3, 1930.

Tried before Hon. NEWTON H. PORTER, Judge, and  
a Jury.

20

APPEARANCES :

MESSRS. ROEMER & COLE (by MR. HERMAN)  
for the Plaintiff.

MESSRS. COLLINS & CORBIN (by MR. EMORY)  
for the Defendant.

Twelve members of the jury panel were duly  
installed in the jury box.

30

Mr. Herman: Are any members of the jury as  
it is now constituted, clients of Collins and Cor-  
bin?

Mr. Emory: Objected to.

The Court: I will allow it.

Mr. Emory: Exception.

The Court: You may have it.

(No audible response).

Mr. Emory: Satisfactory to the plaintiffs.

Drawing of veniremen continued.

40

Mr. Herman: Mr. Evans, are you a client of  
Collins & Corbin?

Mr. Emory: Objected to.

*Case.*

The Court: I will allow it.

Mr. Emory: Exception.

The Court: You may have it.

(No audible response.)

The jury was duly examined by Mr. Emory and one venireman excused, and another venireman drawn to take the juror's seat in the box. 10

Mr. Herman: Mr. \_\_\_\_\_, are you a client of Collins & Corbin?

Mr. Emory: Objected to.

The Court: I will allow it.

Mr. Emory: Exception.

The Court: You may have it.

(No audible response.)

Mr. Herman: Satisfactory.

Mr. Emory: Satisfactory. 20

The jury was thereupon sworn.

Mr. Herman: If your Honor please, I have a motion to make, or an amendment, but I will make it after the opening.

Mr. Emory: I, likewise, have a motion to make, in case your Honor wishes—

The Court: Do you want to make both your motions now?

Mr. Herman: No, sir.

Mr. Emory: Mr. Herman, I think, would like to have the jury excused while I am making my motion. 30

The Court: I will excuse them for both motions.

Mr. Emory: With his motion, I will consent.

Mr. Herman: My motion is merely formal, if your Honor please.

The Court: All right. Open to the jury.

Thereupon, Mr. Herman opened the case to the jury on behalf of the plaintiff. 40

*Case.*

The Court: The jury will retire for a moment; you may leave the room, and go over in the jury room.

(The jury retires).

10 Mr. Herman: If your Honor please, it is stipulated by counsel that the first count be amended to read as follows: "On or about the 12th day of April, 1929, the defendant, Mae Ganley, was the owner of a certain automobile, which she drove along the public highways, in the City of Passaic, County of Passaic, and State of New Jersey, known as Van Houten Avenue;" and it is further stipulated between counsel that the above-entitled cause be discontinued as to John Ganley.

The Court: Very well; no objection to that?

20 Mr. Emory: No objection.

If your Honor please, in this case there was a motion argued before your Honor, by the defendant, to amend the answer, in the original answer, in which the defendant applied, and argued, to have the case made one of *res adjudicata*; I would like to have the Court enter on the record a ruling on that motion so that I may take an exception.

The Court: You may have it. I filed a memorandum, did I not?

30 Mr. Emory: I got a copy of one. I suppose it was filed.

The Court: Is this a Supreme Court issue?

Mr. Herman: Yes, sir.

Mr. Emory: The memorandum is headed, "Passaic County Circuit Court."

Mr. Herman: That was corrected, your Honor, please.

The Court: Was it?

40 Mr. Emory: I do not know about it, that it was.

## Case.

The Court: Let it be amended, as a part of the record.

Mr. Emory: I will file it with the stenographer, and I note an exception to the ruling.

The Court: You may have it.

Mr. Emory: At this time, I renew my motion for leave to amend the answer of the defendant to set up facts, which have arisen since the filing of the original answer, viz., the facts to the effect that a suit was brought between the same parties, resulting in a verdict by the jury in favor of the defendant— 10

Mr. Herman: If your Honor please, that is not so, but—

The Court: Yes; they are not the same parties.

Mr. Emory: If your Honor please, I make application for leave to amend the answer, so as to set up that there was a suit brought between the same parties. In your Honor's memorandum, the Court said, as I recall it, that the injury was a cause of action, and not the negligence act. 20

However, if that rule is to be construed strictly, as your Honor did in the memorandum, there certainly could never be a case of *res adjudicata*. However, if the injury is the cause of action, and only the injury, then, both the plaintiff and the defendant have a cause of action, as to each other, to have an adjudication, and the mere trial of one case would not bar the other from starting suit. In other words, I cannot conceive of a case, under your Honor's ruling, where the doctrine of *res adjudicata* would apply. 30

The Court: My ruling was the Court of Errors and Appeals' decision in the Baking Co. case.

Mr. Emory: With all due respect to the Court, I do not think that case applies here. 40

*Case.*

The Court: All right.

The Court (After extended argument by counsel): For the same reasons as stated by the Court in the written memorandum, the motion is denied.

Mr. Emory: I ask an exception.

10 The Court: You may have an exception. Now, you have offered my memorandum in evidence. I will exclude that, on second thought, because, strictly speaking, everything that is in evidence should go to the jury.

Mr. Emory: I did not mean to offer it in evidence, Sir. I merely meant to make the record of your Honor's ruling made part of the record.

20 The Court: I have no objections to that, and I think the record does show that, and if there is any doubt about it, let it be understood that my ruling is based on my memorandum, whence I renew, on those grounds. That makes your record straight, doesn't it?

Mr. Emory: Yes, sir.

The Court: Anything more? You see I agree with you, therefore there is no need of answering.

Mr. Herman: All right.

The Court: Bring in the jury.

30 (THE JURY RETURNS).

Mr. Emory thereupon opened the case to the jury on behalf of the defendants.

*Margaret Bergin, direct.*

PLAINTIFF'S CASE.

MISS MARGARET BERGIN, sworn.

*Direct examination by Mr. Herman:*

Q. Where do you live, Miss Bergin? A. 35  
Maplewood Avenue, Paterson, New Jersey. 10

Q. What is your occupation? A. Soloist in the  
Metropolitan Opera Company.

Q. Where were you on April 12, 1929? A. I was  
coming from New York, coming through on Van  
Houten Avenue, in the direction of Clifton.

Q. Were you driving an automobile? A. Yes,  
I was driving a Hupmobile car.

Q. What time of the day was this? A. About  
five-thirty, or twenty minutes of six, when I was  
on Van Houten Avenue. 20

Q. Was anyone in your automobile with you, at  
the time? A. Yes, Mr. Burke.

Q. What kind of a day was it? A. Well, it was  
a dark day, sort of drizzling rain—just a drizzle  
of rain started.

Q. At the time you came along there, you say it  
was drizzling? A. Yes.

Q. Was it light or dark? A. Well, it was light—  
it wasn't dark—it was in the evening, but had been  
dusk coming on. 30

Q. Now, as you approached the intersection of  
Van Houten Avenue and Pennington Avenue, just  
tell the Court and jury what you did, if anything,  
and what happened? A. When I approached the  
intersection of Pennington Avenue, I was on Van  
Houten Avenue, going northerly; I looked right  
and left, and blew my horn. I was coming along  
at a slow rate of speed. I saw no one coming, and  
as I approached and was in the middle of the—  
center of the block of Pennington Avenue, this 40

*Margaret Bergin, direct.*

car of Mrs. Ganley came from my left at a terrific rate of speed, and she came up—coming up the hill—there is a hill that goes up towards St. Mary's Hospital there—she was coming and could not stop.

10 Q. What happened?

Mr. Emory: I object to that and ask that it be stricken out.

The Court: Objection sustained. Strike out, "she couldn't stop". She didn't stop, you know that?

The Witness: No.

The Court: But you don't know that she couldn't.

20 A. (Continuing.) And the cars crashed. When she ran into me, it knocked my front wheels out of line, the front left fender was demolished entirely, and the headlights.

Q. Where did your car wind up after the collision? Was your car on Pennington Avenue or Van Houten Avenue? A. As soon as the car struck, I tried to avoid her, and pulled on to Pennington Avenue, as far—I was about three feet from the curb—my car had to be lifted over after the accident happened.

30

Q. How many feet from the intersection was your car thrown into Pennington Avenue? A. From Van Houten Avenue, do you mean?

Q. Yes.

Mr. Emory: I object to counsel qualifying it as being thrown.

The Court: Objection sustained.

40 Q. How many feet from the corner was your car after the collision? A. My car was—she lifted, or

*Margaret Bergin, direct.*

dragged me up along, when she crashed into me; I couldn't tell you the exact number of feet.

*By the Court:*

Q. But was your car entirely in Pennington Avenue? A. My car was entirely in Pennington. 10

Q. On what side of Pennington, right or left? A. On the right side of Pennington Avenue.

Q. Your right side of Pennington Avenue? A. Yes.

*By Mr. Herman:*

Q. Did Mrs. Ganley's car come to a stop immediately? A. No, she went about two lengths of her car ahead on Pennington.

Q. You mean, past the point where you were stopped? A. Past the point where I was stopped. 20

Q. Were you rendered unconscious, as a result of the collision? A. When I stopped from pulling the car to avoid her, the wheel flew back and injured my wrist, and I looked down, my wrist was swollen up, and I couldn't use my hand. Mrs. Ganley got out of the car; she said to me—

Mr. Emory: I object—

A. —I have to get my husband— 30

The Court: Wait a moment. Mrs. Ganley is the defendant.

A. (Continuing.) And when she said, "I am in a hurry to get my husband—"

The Court: Just a moment.

Q. After the collision, did Mrs. Ganley say anything to you? A. Yes.

Q. What did she say? A. She said, "I have to 40

*Margaret Bergin, direct.*

get my husband." That is all she was concerned about.

10           The Court: Strike out "all she was concerned about." Don't give us conclusions, please, Miss Bergin; that is the jury's job.  
               The Witness: I am sorry.

Q. Were you able to drive your car away from the scene of the accident? A. No, my car had to be towed in from Passaic.

Q. And who towed it in? A. Atkins.

Q. Atkins? A. Ralph Atkins, Paterson Hupmobile Agency.

20           Q. As you recall, what parts of your car were damaged in this collision? A. The left fender, headlights, and the wheels were knocked out of line.

Q. Did you have the car repaired? A. Yes, I did.

Q. What year car was it? A. 1928.

Q. Coupe? A. Coupe.

Q. How much did you pay for the repairs?

Mr. Emory: If you have the bill, I have no objection.

30           A. I think, about a hundred and twenty-six dollars, from Mr.—

Mr. Herman: I think we have it.  
 (Producing paper.)

Mr. Emory: No objection.

The Court: How much is it?

Mr. Herman: A hundred and thirty dollars.

(Marked Plaintiff's Exhibit P-1.)

40           Q. Now, were you obliged to hire the services of a physician? A. Yes, I was.

*Margaret Bergin, direct.*

Q. Whom did you hire? A. Dr. Theodore Bender.

Mr. Emory: Will you speak just a little louder?

A. Dr. Theodore Bender.

10

Q. Of Paterson? A. Yes, of Paterson.

Q. How long were you under his care? A. I should judge over two months.

Q. Did you suffer any pain as a result of this accident? A. I suffered severe pain.

Q. Where? A. In my wrist, and of course, from the nervous shock.

Q. As part of your occupation, do you play the piano? A. Yes, I do; I have to use it to practice every day, scales.

20

Q. Were you able to play the piano afterwards? A. No, I was not; I was not able to play, to practice on it for four months.

Q. For four months? A. And my wrist, even now, is not right.

Q. How much was your bill? How much was the bill of Dr. Bender for the services which he rendered to you?

Mr. Emory: Will the doctor be here?

30

Mr. Herman: I expect him here.

Mr. Emory: I object to the question—I will withdraw the objection, provided this lady can tell.

Mr. Herman: I asked it, expecting to connect it up.

Mr. Emory: I have no objection to that.

The Court: She may say how much she paid the doctor, even if he does not come.

Mr. Emory: Of course, that will be subject to be stricken out later, on the ground

40

*Margaret Bergin, direct.*

it has not been proved to be a reasonable charge?

The Court: Yes, that may be. Have you paid the doctor?

The Witness: No, I haven't.

10

Q. How much was the bill?

Mr. Emory: If you will connect it up later, I have no objection.

The Court: All right.

A. \$200.00.

Q. Were you obliged to lose any time from your occupation, as a result of this accident? A. Yes, I was. I was engaged for a certain night, in Virginia, and I was not able to take it.

20

Q. How much were you to receive on that trip?

Mr. Emory: Objected to; the contract is the best evidence.

A. (Interrupting.) Five hundred.

The Court: Oh, no, it may have been a verbal contract.

Mr. Emory: Was it a verbal contract or written?

30

The Witness: Yes, they are most always verbal contracts.

Mr. Emory: All right; I withdraw the objection.

Q. How much were you to receive on that trip, Miss Bergin? A. \$500.00.

*By the Court:*

40

Q. Were there any other engagements which you were obliged—you paid your expenses out of that, Miss Bergin? A. Out of the five?

*Margaret Bergin, direct.*

Q. Yes. A. Yes.

Q. How much would they have been? Did you hire an accompanist, too? A. Yes.

Q. What would your net profit have been from the Virginia engagement, if you had accomplished it? A. I will have to figure it up.

10

Q. As near as you can. A. Well, about, I think \$375.00; I don't know exact.

The Court: All right; about \$375.

Q. Were there any other engagements, Miss Bergin, which you were obliged to forego as a result of these injuries, which you sustained? A. I had negotiated—

Mr. Emory: I object to the client's testimony, if your Honor please, as I understand—I think we are entitled to the proof of earnings in this matter, by her getting someone else to take her place.

20

The Court: Oh, I think not, not on that kind of an engagement. I think this is the kind of an engagement that she was unable to; she could not select somebody to do the work; she was called, because they wished her.

30

Mr. Emory: I ask an exception.

The Court: You see, if you can stretch your imagination to think that somebody would pay me for making a speech, then, of course, you can see, they would not expect somebody else, nor could I. They would want me, not somebody else. The probability was, and I think, they, perhaps, would prefer Miss Bergin to someone that she might send; I think that is probable.

40

Mr. Emory: May I have an exception?

The Court: You may.

*Margaret Bergin, direct.*

Q. Were there any other engagements that you actually did not attend, because of your incapacity? A. Yes, the Newark Music Festival in May.

Q. You were unable to attend to that? A. Yes, sir.

10 Q. What would your profit have been, had you done so? A. About four hundred dollars.

Q. About four hundred dollars? A. Yes.

Q. Any others? A. No; I also had intended to go to Europe, but from the accident, from the nervous shock I received, I was not able to go.

The Court: Well, that saved money for you, probably.

20 The Witness: No, it did not; I had three engagements.

Q. You had three engagements? A. I had three engagements in Europe, to sing in opera, and account of the nervous shock, the doctor advised me to give—I was not able to go and fulfill the engagement. Even had it been for pleasure, I could have gone, but in working, I had to be physically fit to do it.

30 Q. What would your profit have been from those three engagements, Miss Bergin? A. One hundred and fifty dollars for each engagement.

The Court: And there were three?

The Witness: Yes, there were three.

Q. Do you still suffer with any pains in your wrist, Miss Bergin?

Mr. Emory: Objected to—

A. (Interrupting.) Yes, I do.

40 Mr. Emory: —your Honor, please.

The Court: She has already testified that

*Margaret Bergin, cross.*

she was not right, and I suppose she is referring to her left wrist, when she said that. Next question.

Mr. Herman: Cross examine.

*Cross examination by Mr. Emory:*

10

Q. Had you been singing that afternoon of the accident, Miss Bergin? A. No, I had not.

Q. Just in for rehearsal? A. I was in, hearing the opera "Naomi."

Q. Oh, I see, as a spectator, rather than as a participant? A. Yes.

Q. What time did the opera get over, that is, finish? A. Well, I don't know; I came out a little before the opera was completely over; I always do, because we have to stand, when there isn't any room, and I just wanted to hear Mme. ——— singing her opera, and I left New York at about four-thirty.

20

Q. How did you come out? A. I came over the Forty-second Street ferry, driving up—

Q. On the Paterson Plank Road? A. On the Paterson Plank Road.

Q. As far as Rutherford? A. As far as—well, going to Rutherford, as far as going to Passaic, and I am coming up Van Houten, as the buses come up on Van Houten Avenue.

30

Q. You say, when you approached the corner, you looked to your right and left, and blew your horn? A. I did.

Q. What is the physical aspect of that corner? Are the houses built right out to the curb? A. No, they are not.

Q. You were going towards Clifton? A. I was going—that road goes right out into Clifton.

40

Q. As you were going towards Clifton, how are

*Margaret Bergin, cross.*

the houses on the near corners, on the first corner, you come to, how far back? A. Well, I don't know; they are on a terrace, I believe, there.

Q. Could you see into Pennington Avenue in both directions? A. Yes.

10 Q. Before you got to the corner? A. Yes.

Q. How far into Pennington Avenue could you see? A. Well, approximately, I couldn't tell you—you could see into Pennington Avenue.

Q. Well, is it as far as it is from where you are sitting to the door, the width of the room, or—

A. I cannot tell you the exact measurement—you could say—they weren't several houses, doors, if that is what you mean.

20 Q. No, I mean, can you give us an approximate idea? A. No, I cannot.

Q. Can you give us approximately how far it was? A. No, I don't believe I could.

Q. But you could see both to the right and left? A. Yes, you could see both to the right and left.

Q. I suppose you could see both to the right and left when you were quite some little distance, before you got to the corner there? A. Yes, a little bit.

30 Q. When you looked to the right and left, you did that, before you blew the horn? A. I did.

Q. Could you see anything at all? A. I saw nobody coming.

Q. Did you see anything coming? A. No.

Q. Then, you blew the horn? A. Yes.

Q. And you continued straight ahead? A. I did.

Q. Got half-way across, then the accident occurred? A. Yes.

40 Q. When you got half-way across, did you see Mrs. Ganley's car before it struck yours at all? A. Yes, when she was right upon me, she was coming

*Margaret Bergin, cross.*

at such a rate of speed, that she was upon me, and I pulled my car, as I said, as far as I could, to avoid her, to the right, but it was impossible.

Q. You did not look before you got to the corner? A. I looked, as I told you; there is a hill to come up there from Pennington Avenue. 10

Q. You could look before that? A. I looked, and I saw no one, and I proceeded slowly across; I saw no one until she was right upon me.

Q. The first time you got to the corner, was about, when you were half-way across? A. I was right, and I looked, and I saw no one, as I told you, and I proceeded to cross; as I got in the center of the block, Mrs. Ganley—I don't know where—she came right upon me and I pulled as hard as I could to avoid the accident. 20

Q. Pulled over sharply to the right? A. I pulled to the right, as hard as I could.

Q. What kind of a car was this that you were driving? A. Hupmobile coupe.

Q. Did this—did Mr. Atkins repair the automobile? A. Yes, sir.

Q. I see it says on here, approximate estimate; he did repair it, for the same figures, did he? A. Yes. 30

Q. And the point of impact of the two cars was your left front bumper, the headlight, the fender, and Mrs. Ganley's right rear? A. Yes.

Q. How often did Dr. Bender have to come and treat you? A. Well, I went two or three times a week, I went practically the first week, every day.

Q. You went to his office? A. Yes, that was, I was taken to his office, with friends of mine who had cars.

Q. He did not come to see you at home at all? A. No, Dr. Bender does not go out. 40

*Margaret Bergin, cross.*

Q. And the first week you went every day? A. After that, two or three days a week—practically every day.

Q. After that, about? A. About three times a week.

10 Q. And that continued for about two months, did you say? A. Yes.

The Court: Don't shake your head, please, "yes." You see, he is writing it all down.

Q. The man cannot write down a shake of the head. A. Pardon me.

Q. Is Dr. Bender a specialist? A. Yes, he is.

20 Q. In what type of medicine? A. Well, I cannot give you the medical term, but he is a specialist.

Q. No, is he a surgical specialist? A. Yes, he is a surgical specialist.

Q. Do you know? A. No, but I can think.

Q. You can think that much? A. Yes, I can think that much.

Q. Do you know what his charge is a visit? A. About ten dollars, I guess, a visit.

Q. Ten dollars a visit? A. Yes.

30 Q. When you have a contract for singing out of town— A. Yes.

Q. —as you did, in Virginia, do you take an accompanist from here with you? A. Yes, I do, from New York.

Q. What do you pay the accompanist? A. All according to the accompanist; I try to get a very good one, it would be fifty dollars, and I have to pay their—

Q. Yes? A. —expenses, when I take them out of town with me.

40 Q. Was this contract down in Virginia ordered in May? A. Yes.

*Margaret Bergin, cross.*

Q. Before the accident? A. Yes.

Q. Your contract in Newark, for instance, already in May? A. I had negotiated for it.

Q. Had it been closed? A. No, it had not been closed.

Q. It had not; this engagement on your contract— A. (Interrupting.) But after the accident, I no longer bothered about it; I knew I was unable to do it. 10

Q. These contracts that you spoke of in Europe, were they definitely closed before the accident? A. Definitely? Yes, sir.

Q. Where were you to sing in Virginia? A. I can give you right here the notice from the office, if they would help you any.

Q. No, I do not mean that—the town? A. “Roan,” Virginia—it has been so long ago that I have—(referring to paper) Richmond, Virginia. 20

Q. As you say, you would get this accompanist, pay the expenses for both of you down there? A. Yes, sir.

Q. And back again? A. Yes.

Q. And had to pay the accompanist fifty dollars? A. For playing for me.

Q. That would be her fee? A. Yes, that is her fee, but I have to pay their expenses. 30

Q. You have to pay their expenses in excess of that? A. (Witness indicates affirmatively.)

Q. You say the contract price of the concert in Virginia was five hundred dollars? A. Yes.

Q. You do not play the piano in concert at all, do you, just sing? A. Just sing.

Q. So your disability as far as playing the piano is concerned, was for your practice? A. Yes, but every day we have to practice ourselves, we have to go over our work, scales, many hours alone. 40

*George H. Burke, direct.*

Q. You felt that you could not sing the scale without playing the piano at the same time? A. Well, I could sing a scale, but in going over our work, one likes to get the sound of the notes, in playing over your music, especially opera roles.

10 Q. It was your left wrist that was injured, wasn't it? A. Yes.

Q. Is it your custom— A. (Interrupting.) No, my right wrist.

The Court: Your right?

The Witness: My right.

Q. Didn't you say before it was your left wrist? A. I don't believe I did.

Q. It was your right wrist? A. Yes, sir.

20 Q. Do you always play the piano, when you are practicing? A. Most always, assuredly.

Q. You had actually begun rehearsal for the Newark festival? A. Oh, yes.

Q. Now, this car of Mrs. Ganley was coming from your left, was it not? A. Yes.

Mr. Emory: That is all.

---

GEORGE H. BURKE, sworn.

30

*Direct examination by Mr. Herman:*

Q. Mr. Burke, where do you live? A. Hamilton Club, Paterson, New Jersey.

Q. What is your occupation? A. Secretary of the Big Brother League in New York City.

Q. Do you know Miss Bergin, the plaintiff in this case? A. I do.

Q. Were you with her on April 12th of last year? A. I was; yes, sir.

40

Q. Where were you coming from? A. Coming from New York.

*George H. Burke, direct.*

Q. Miss Bergin was driving her automobile? A. Yes, sir.

Q. Now, as you were coming up Van Houten Avenue, in the City of Passaic, what happened? A. Well, we were driving along, we reached Pennington Avenue—

10

Q. A little louder. A. I say, we were driving along Van Houten, reached Pennington Avenue; I was sitting in the back of the car. As we got to the intersection, I looked out and seen this automobile coming down upon us; I shouted to Miss Bergin, "You are hit." She evidently saw her; I saw her working at the wheel, coming right around, and the car came and hit us on the left-hand side, knocked us three feet in the gutter on Pennington Avenue.

20

Q. How far into Pennington Avenue, Mr. Burke, if you recall? A. How far what?

Q. How far into Pennington Avenue was Miss Bergin's car thrown? A. It was thrown right around the corner, about three feet of the gutter, so that that must have been—moved her about three feet into the gutter; it was disabled, bumped her in.

Q. Was Mrs. Ganley's car going fast or slow? A. Very fast; I happened to look out the side window—

30

Mr. Emory: I object to any further testimony; he has answered the question.

The Court: "Very fast."

Mr. Emory: He said, "Very fast."

Q. How far past Miss Bergin's car did the Packard go after the impact? A. The Packard went right across the street, hit her car on the left, knocked her right around, and went across the street.

40

*George H. Burke, direct.*

Q. How many feet further than Miss Bergin's car did it go, after the impact? A. After the impact?

10 Q. Yes. A. Well, she would clear the curb; I guess she must have been seventeen feet up on the hill—there is a hill that comes, right up there; she was just up on the brow of the hill like.

The Court: Off the road, you mean?

The Witness: No, she was in the road, the Packard car was in the middle of the road, just a little off the—

20 Q. What can you say as to the rate of speed, with which Miss Bergin was driving, as she approached the intersection? A. Miss Bergin was driving very slow, sort of a dark day—she was going slow anyway.

Q. What was the weather? A. It was a dark day.

Q. Was it raining—drizzling? A. It had been drizzling, yes.

30 Q. Did Mrs. Ganley blow a horn? A. She didn't, blow anything. We were going over, right, no signs of her there at all. So the car hit her, knocked Miss Bergin right around; I was at the back seat, and I just saw it—just happened to look out, and I saw her coming down, turned right around, knocked her car off the road; Miss Bergin had the right of way, of course, and she was going over—

Mr. Emory: May I ask to have that stricken out?

The Court: Strike it out. Next question.

Mr. Herman: Cross examine.

40 *By the Court:*

Q. How fast were you going, would you say, Mr. Burke, if you know? A. Our car was going?

*George H. Burke, cross.*

Q. Yes. A. I don't know, she kind of pulled up, she slowed up to go across.

Q. Slowed up the car, you mean? A. Yes, to go across.

Q. Were you hurt? A. No.

Mr. Emory: Beg pardon?

10

A. (Continuing.) No, I was hurt in the knee, but I didn't know it until two or three days after.

The Court: All right.

*By Mr. Herman:*

Q. Miss Bergin was hurt, was she not? A. Yes, she was hurt very badly; she couldn't run that car.

Mr. Emory: I object to that, the qualifying of Miss Bergin's injury.

20

The Court: But she couldn't run the car; let that stand.

Mr. Emory: That is beyond dispute.

*Cross examination by Mr. Emory:*

Q. Had you been to the opera with Miss Bergin?

A. No, I was up to the opera to get tickets, and I saw her in the hallway of the theatre there.

30

Q. You just happened to meet her there? A. Just happened to meet her there.

Q. So you rode home with her? A. Yes.

Q. Were you paying close attention to how she was driving the car? A. I was just sitting in the back, I knew she was going slow.

Q. Sitting in the back, resting? A. No, just sitting there riding.

Q. Weren't talking with her at all? A. No, not at all, except as I say, I said, "You are hit," when I saw the car coming, dashing up across in front of her.

40

*George H. Burke, cross.*

Q. You didn't look before you got to the intersection? A. I wasn't looking, no. When the car come down, first, I looked at the intersection there and I saw it.

10 Q. The first you knew of an accident at all was when the car was on top of you? A. When she was hit, yes.

Q. You say Miss Bergin's car was hit on the left-hand side? A. What is that?

Q. Didn't you say Miss Bergin's car was hit on the left-hand side? A. Hit, on the front, knocked her around.

20 Q. Was it the front, of the left-hand side? A. Left-hand side, but by the light, as I remember it—hit on the right by the light, knocked her right around.

Q. By the headlight, you mean, the front lights? A. Left light; she was hit by the side, knocked right around into Pennington Street.

The Court: Left headlight, was it, Mr. Burke?

The Witness: Yes.

30 Q. She turned to the right, to avoid this? A. When I said, "You are hit," I remember seeing her trying to turn, but it was too late; she was already hit.

Q. She was trying to turn, when you said, "You are hit"? A. She was busy, I guess; I could see her working her arm, and the contact came right away.

Q. She was going on, as you hollered, I think, "You are hit"? A. Going right straight.

40 Q. Had she started before you said, "You are hit"? A. She seemed to be right busy, at it, when I shouted out, she had already started.

*William Haberland, direct.*

Q. Just about the same time? A. Yes.

Mr. Emory: That is all.

Mr. Herman: If your Honor please, we have the testimony of an eye-witness, which, if Mr. Emory consents, I will read to the jury, rather than to go to the trouble and expense of getting this witness here. He is an out of town man.

10

The Court: All right.

(Side bar discussion.)

Mr. Herman: It is stipulated by counsel that testimony of William Haberland, the reported testimony of William Haberland be read. Mr. Haberland was an eye-witness, who saw the accident, and it is what he would say.

20

Mr. Emory: It is stipulated and agreed that Mr. Haberland would testify the same as what Mr. Herman will now read, if he were called.

The Court: All right.

The following testimony was read by counsel.

“WILLIAM HABERLAND, sworn.

30

*Direct examination by Mr. Herman:*

Q. Where do you live, Mr. Haberland? A. 414 Passaic Avenue.

Q. Passaic? A. Yes, sir.

Q. On or about April 12th of this year, did you witness an accident at the intersection of Pennington and Van Houten Avenues, in Passaic? A. Yes, sir.

Q. Were you on the road at that time? A. Yes, sir; I was driving my car.

40

*William Haberland, direct.*

Q. On what street were you driving? A. I was driving on Van Houten Avenue, toward Passaic Park.

Q. About what time was it? A. It was about quarter of six.

10 Q. A quarter of six? A. In the evening.

Q. What was the condition of the weather, about that time? Was it a clear day, or a rainy day? A. I think it was raining.

Q. As you approached the intersection of Van Houten Avenue and Pennington Avenue, will you please tell the Court and Jury what you observed, if anything? A. I observed—”

20 Mr. Emory: If your Honor please, I object to the answer to this question.

(Side bar discussion.)

The Court: The question is really what did you see him do, if anything?

Mr. Emory: Yes.

The Court: What is the answer?

30 The answer was read to the Court by Mr. Herman as follows: “I observed the Packard Six sedan, coming up Pennington Avenue, coming up the hill, at a rate of speed, which is unsafe to maintain.”

The Court: No, strike that out.

Mr. Herman: Strike it out, at this time, and skip to the next question.

The Court: The answer to that question is improper, a conclusion of the witness, therefore, it will not be read.

Mr. Herman: Yes.

Mr. Emory: Yes.

40 The Court: Next question.

“Q. You saw a Packard car coming up the hill?  
A. Yes.

*William Haberland, direct.*

Q. From your observation, would you say that that car was going fast or slowly? A. Fast.

Q. As it approached the intersection of Pennington and Van Houten Avenues, what did it do, if anything? What did the driver do, if anything?

A. Kept right on going.

10

Q. Did you notice whether the driver stopped at the intersection? A. The driver did not stop at the intersection.

Q. Did he slow up, at the intersection? A. No, sir.

Q. What did you do? A. I stopped to avoid her from hitting me. She had the right of way.

Q. That is, she had the right of way, as against you? A. Yes.

Q. Did you see Miss Bergin there at the time? Did you see her car? A. Yes, but I was not watching her, because she was on her side of the street, and did not interfere with my driving.

20

Q. You were only watching the Packard? A. The Packard.

Q. What did you observe? A. As I had slowed down, and was then about ten or fifteen feet off the intersection, the Hupmobile six—

Q. (Interrupting.) Is that the car Miss Bergin was driving? A. Yes,—and was struck by the Packard.

30

Q. What happened, with regard to its position? A. The Hupmobile—the driver of the Hupmobile tried to avoid the Packard by swinging sharply to her right, and the Packard tore the bumper and one of the front wheels and the headlights to one side.

Q. Where did it throw the Hupmobile, if anywhere? A. It pulled the Hupmobile in the direction in which the Packard was moving.

40

*William Haberland, direct.*

Q. When did you first observe the Hupmobile car? A. When?

Q. Miss Bergin's car. A. When the Packard was on Van Houten Avenue—"

10 Mr. Emory: I object to the answer on that question.

(Continuing reading.) "—I knew it was getting dangerous for the Hupmobile."

The Court: Strike it out, that is a conclusion; the jury will disregard it, please.

Mr. Emory: I do not think you need to read the next one at all.

"Q. Can you sketch it for us? A. Yes, I think so."

20 Mr. Herman: The witness draws a sketch, which I now offer in evidence.

The Court: Let it be marked in evidence. The sketch is produced; let it be marked in evidence.

(Marked Plaintiff's Exhibit P-2.)

"Q. Does that show the point of contact? A. Yes."

30 Mr. Herman: The crash took place at about the point where the two lines meet (indicating to the jury).

"Q. Where did those cars wind up, after the crash? A. The Packard continued—"

Mr. Emory: That is what he has marked.

"A. The Packard continued up to about here, I should say (indicating).

Q. Where did the Hupmobile go? A. The Hupmobile remained right where it was hit.

40 Q. Was it turned at all into Pennington Ave-

*William Haberland, cross.*

nue? A. The front was turned in, because the driver swung into the right.

Q. You say the Packard car did not stop at the intersection, but continued at a fast rate of speed, right across the intersection? A. Yes, sir. It did not stop here, but kept right on going (indicating).” 10

Mr. Herman: Indicating this point.

Mr. Herman thereupon read to the jury the following, the cross examination by Mr. Perretti, at the trial previously mentioned.

“Q. What kind of a car were you driving, Mr. Haberland? A. A Pontiac 1928 Business Coupe.

Q. Why didn't you proceed across Pennington Avenue? A. Because—” 20

Mr. Herman: Leave that question out.

“Q. Why didn't you proceed across? A. It was the Packard's right of way.

Q. It was the Packard's right of way? A. Yes.

Q. The Packard came to the intersection, before you did, did it not? A. We would have met, we would have reached—

Q. So that you stopped to permit this car which had the right of way to go across? A. Yes, sir. 30

Q. You stopped before you came to the corner? A. Yes, sir.

Q. How far before? A. Fifteen feet.

Q. Fifteen feet before the corner? A. Yes.

Q. When did you first see the Packard car? A. About twenty-five feet from the intersection.

Q. You were twenty-five feet away from the intersection? A. Yes.

Q. When you first saw it, where was the Packard car? A. The Packard car was about twenty- 40

*William Haberland, cross.*

five feet from the intersection, on Pennington Avenue.

Q. How fast were you going when you first saw the Packard car? A. I should judge from twenty-eight to thirty.

10 Q. So that you were traveling from twenty-eight to thirty miles an hour, and were twenty-five feet away from the intersection when you first saw the Packard, which also was twenty-five feet away from the intersection; is that right? A. Yes.

Q. Then you stopped fifteen feet from the intersection, is that right? A. Yes, sir.

Q. You stopped within ten feet? A. Yes, sir.

Q. You said something about the Packard car coming up a hill. What hill do you refer to? 20 Where is there a hill there? A. It is a slight grade from the Lackawanna Railroad tracks up to Pennington Avenue.

A. A slight grade? A. Yes.

Q. But the hill that you refer to is across Pennington Avenue? Isn't that right? A. Yes.

Q. Would you call that a hill from the viaduct to Van Houten Avenue? A. No, sir.

Q. That is no hill, is it? A. No.

30 Q. When you said the Packard came up the hill at a fast rate of speed, you did not mean that, did you? A. The approach to the hill.

Q. The approach to the hill? A. Yes.

Q. What was the damage done to the Packard car? A. I think—I am not positive of this statement—I think it needed a new door and new windows and the side and fender. I am not positive.

Q. What was the damage to the Hupmobile? 40 A. A wheel, a bumper, front part of the chassis and headlight.

Q. Which front part, right or left? A. Standing in front, facing the car, the right.

*William Haberland, cross.*

Q. Ordinarily known as the left side of the car?  
A. Yes.

Q. Was the Packard car on the right-hand side of its road at all times, as far as you could observe? A. Yes, sir.

Q. Was the Hupmobile on the right-hand side of the road? A. Yes, sir. 10

Q. Now, looking at the diagram—the Hupmobile was on its extreme right, isn't that right on Van Houten Avenue? A. Yes.

Q. It was on the right-hand side of the road?  
A. Yes.

Q. The Packard was on its right-hand side of Pennington Avenue? A. Yes.

Q. Now, tell us how far across the intersection of the middle of Van Houten Avenue and Pennington Avenue, did the impact take place? A. You mean, how far from the center point of that square (indicating)? 20

Q. That is it, the very center. Drawing an imaginary line between both streets, along both streets, how far from that point on the center, did the accident take place? Look at your diagram.  
A. About five feet from the curb.

Q. About five feet from the curb? A. Yes.

Q. How wide is Van Houten Avenue? A. I have no idea, sir. 30

Q. How wide do you think this street is; what is your observation? A. I should think it is about thirty-five feet.

Q. Thirty-five feet, Van Houten Avenue? A. I can't swear to any definite figure.

Q. How wide is Pennington Avenue? A. Pennington and Van Houten, I should judge, are about the same width. 40

Q. Now, you came to a stop before you reached the corner, did you not? A. Yes.

*William Haberland, cross.*

Q. Fifteen feet away? A. Yes.

Q. When you came to that stop, had the Packard car reached Van Houten Avenue yet? A. Yes, sir.

Q. So that it got to the crossing before you did?  
A. Yes.

10 Q. So you let it go by? A. Yes.

Q. As that car was going by, did you observe the Hupmobile? A. Yes, sir.

Q. Where was the Hupmobile when you first saw it? A. Very close to the intersection.

Q. Very close to the intersection? A. Yes.

Q. How far would you say? A. Not more than ten feet, at the most.

Q. Ten feet from the intersection? A. Yes.

20 Q. How fast was the Hupmobile going, do you know? A. About twenty, at the most.

Q. Twenty, at the most? A. Yes.

Q. You first saw it when it was ten feet away from the corner? A. Well, the Packard was obstructing my view.

Q. That is right. The Packard obstructed your view? You could not see the Hupmobile, could you? A. I could see another car there, but I couldn't see the distance between the Packard and the Hupmobile.

30 Q. You couldn't tell how fast that car was going, because the Packard obstructed your view; is that it? A. Yes, sir.

Q. Are you positively certain as to the position of the cars after the accident? A. Yes, sir.

Q. You are sure? A. Yes.

Q. Your recollection is certain? A. Yes.

Q. The Packard was where? A. The Packard car had gone a little further after it had hit the Hupmobile.

40 Q. How much further? A. About the length of the car.

*William Haberland, cross.*

Q. About the length of the car? A. Yes.

Q. Now, you say the Packard struck the Hupmobile? Is that right? A. Yes.

Q. What part of the Packard struck the Hupmobile? A. Broadside, the doors.

Q. The doors struck the Hupmobile? A. That is where the two cars met. 10

Q. Was the Packard going sideways, or going forward? A. Going forward.

Q. In what position was the Packard after it came to a stop? A. Straight ahead.

Q. It was not at an angle in the road, was it? A. No, sir.

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

Q. Did you get out of your car? A. Yes, sir; I turned my car around. 20

Q. What? A. I turned my car around.

Q. You were stopped, weren't you, when this accident took place? A. Yes, sir; but I could not leave the car in the middle of the street.

Q. Where did you turn it? A. I turned it around in the intersection.

Q. In the intersection? A. Yes.

Q. Did you get out? A. Yes.

Q. Did you talk to the parties? A. Yes, sir." 30

Mr. Herman: That is all.

The Court: Is that all?

Mr. Herman: If your Honor please, I would like to reserve the right to call Dr. Bender. He is actually performing an operation at the hospital, I learned he cannot be here until two o'clock.

The Court: Very well; I will let you put him on when he comes, if we are not through by then. 40

(THE PLAINTIFF RESTS.)

## DEFENDANTS' CASE.

The Court (After side bar discussion):  
Counsel for the defendant cannot formally  
prove by the Clerk of the District Court of  
Passaic of a previous trial in this cause.

10

Mr. Emory: Three previous trials.

The Court: How?

Mr. Emory: Three cases, which were  
tried, one between John A. Ganley vs. Mar-  
garet Bergin, one between May Ganley vs.  
Margaret Bergin. I do not offer the third  
one at all.

Mr. Herman: You must offer the third,  
because the three cases were tried together  
at the time.

20

Mr. Emory: There were three different  
distinct cases, tried in the District Court.  
They were consolidated by the order of the  
Court, but they were tried at one time, al-  
though there were three separate, distinct  
cases. In each case a verdict resulted in  
favor of each plaintiff, namely, John A. Gan-  
ley and Mae Ganley vs. the defendant, Mar-  
garet Bergin.

30

The Court: Objection is made on the  
ground that the same is not evidence, and  
is not *res adjudicata*. For the reasons al-  
ready expressed by the Court, the objection  
is sustained, and an exception allowed.  
That gives you the record.

Mr. Emory: All right.

The Court: Now, that gives you the  
record.

Mr. Emory: I have one witness here.

40

The Court: All right.

*Mae Ganley, direct.*

MRS. MAE GANLEY, sworn.

*Direct examination by Mr. Emory:*

Q. Where do you live, Mrs. Ganley? A. 428 Terhune Avenue, Passaic.

Q. Did you on the 12th of April, 1929, have an accident with your automobile? A. I did. 10

Q. You were driving at the time, weren't you? A. Yes.

Q. Going on what street? A. Going on Pennington Avenue.

Q. In the City of Passaic? A. Yes, sir.

Q. Where did the accident occur? A. At the corner of Pennington and Van Houten Avenue.

Q. Do you know which direction you were travelling on Pennington Avenue? That is, whether north, east or west, whatever it is? A. Well, I call it north. 20

Q. You were going north? Now, when you approached the intersection of Pennington Avenue and Van Houten Avenue, just what did you do? A. Well, that was a stop street, I had stopped for a car coming in the opposite direction, that was coming from my left, and I started—

Q. On Pennington Avenue, you mean? A. Yes, and I started across, and I was practically in the middle of the street, when I saw this other car coming; and there was no way to avoid it by stopping there, so I kept on going, and I was practically across the road when I was hit, the rear of the car. 30

Q. You say you were stopped when you came to the signal. How far from the actual four corners was it that you stopped, from the first corner, from the nearest one? A. You mean where I stopped? 40

*Mae Ganley, direct.*

Q. Yes. A. Just where they had the stop sign.

Q. Where the sign is? A. Yes.

Q. How far back is that from the corner, do you know, in feet, about? A. About twenty-five feet, anyhow.

10 Q. When stopped, could you see in both directions, down Van Houten Avenue? A. I could.

Q. Did you look? A. Yes.

Q. Could you see anything coming? A. Only the car that I went past.

Q. A car you let pass? A. Yes.

Q. That car came from your left? A. Yes.

Q. Then, when you started, what gear did you start in? A. First.

20 Q. What gear were you in when the accident happened? A. Just got to second.

Q. You had just gotten in second? A. (No audible response.)

Q. By the way, Mrs. Ganley, where were you going that night? A. To meet my husband at the station.

Q. At what station? A. Passaic Park.

Q. How far is that from the scene of the accident? A. Oh, about five or six blocks.

30 Q. What time was this train due? A. Ten to six.

Q. Five-fifty? A. Yes.

Q. What time did the accident occur? A. It was half-past five.

Q. Can you give us an idea of about how fast you were going at the time the impact actually occurred? A. I couldn't have been going over fifteen miles an hour.

40 Mr. Herman: I ask that that be stricken out, if your Honor please.

The Court: Well, I think I will let that

*Mae Ganley, direct.*

stand. You mean that you were going about that speed, or not in excess of that?

The Witness: No, no more than that.

The Court: I think that is what she means.

Q. Can you tell whether Miss Bergin's car was going fast or slow? A. Well, by the look of it, when I saw it coming, it was going very fast.

10

Q. Can you give us an idea in miles per hour? A. Easily thirty-five miles an hour.

Q. Now, when the accident occurred, what part of your car was struck? A. The right rear.

Q. Was it the fender or the door? A. Oh, all of the side—the side and the door, and the windows were all smashed in.

20

Q. On the right-hand side? A. And the fennder.

Q. What happened to your car as a result of being struck? I do not mean what was the damage, but I mean was it pushed anywhere, or stopped right at the scene of the accident? A. No, I was pushed on a little bit, and I was pushed to the side.

Q. Then, what did you do? A. I just drove on, as far as I could get it.

Q. When you say, as far as you could, what do you mean by that? A. About ten feet.

30

Q. That is, over the curb? A. I was forced to the curb, when I was hit.

Q. I mean, you drove over to the right-hand curb? A. Yes.

Q. Now, at the time of the actual impact, where was the front of your car with relation to the car tracks, of Van Houten Avenue and Pennington Avenue? A. The front of the car?

Q. Yes. A. It was across Van Houten Avenue, it was on Pennington Avenue.

40

*Mae Ganley, direct.*

Q. The front of your car was already entering into Pennington Avenue? A. Yes.

Q. And the rear of your car was already extended back to the intersection? A. Yes.

10 Q. Where did Miss Bergin's car stop after the accident? A. It was in Pennington Avenue, too.

Q. Behind yours, or in front? A. Yes.

Q. That is, behind yours? A. Yes.

Q. That is, behind the point at which you had pulled, so you could park the car? A. Yes.

Q. Now, it has been testified, that after the accident, you said to Miss Bergin, "I was in a hurry to meet my husband at the station," or substantially that; did you say that? A. I did not.

20 Q. You told her you were on your way to the station? A. Yes.

The Court: Don't lead, please.

Mr. Emory: Excuse me, sir.

The Court: Just what did you say to Miss Bergin?

The Witness: I didn't say anything; I asked her for a cushion for the baby.

The Court: Didn't tell her anything about the husband?

30 The Witness: No. I said to the man that she was with, that I was on my way to the station.

The Court: To meet your husband?

The Witness: Yes; I asked if I could get him.

Q. Did you tell them you were in a hurry? A. No, I was not in a hurry.

The Court: You were not in a hurry?

40 The Witness: No.

The Court: All right.

*Mae Ganley, cross.*

Q. How was the weather on that day, Mrs. Ganley? A. It had been raining before that; it was not raining then.

Q. The streets were wet? A. Yes.

Q. Slippery? A. Yes, they were slippery.

The Court: Just you and your baby in the car? 10

The Witness: That is all.

The Court: All right.

Mr. Emory: Cross examine.

*Cross examination by Mr. Herman:*

Q. Where were you coming from, Mrs. Ganley? A. Coming from my home.

Q. From your home; what time was it? A. It was about twenty-seven minutes after five. 20

Q. Twenty-seven minutes after five? A. (No answer.)

Q. What makes you so positive as to the exact time? A. Because I know what time it was.

Q. Did you look at a clock before you left? A. I did. I realized I was so early to go to the train.

Q. You realized that you were so early? A. (No answer.)

Q. What clock did you look at? A. At home. 30

Q. And it was twenty-five minutes after five? A. No, not then.

Q. What time was it when you looked at it then? A. When I left the house.

Q. When you looked at the clock, what time was it about? A. About seventeen after five.

Q. Your husband's train comes into the station at ten minutes of six? A. Right.

Q. And the station is only about five or six blocks from your home? A. Not from my home; from the accident. 40

*Mae Ganley, cross.*

Q. How far is it from your home? A. About ten blocks.

Q. Ordinarily, it would take you about how long to go there? A. About ten or fifteen minutes.

10 Q. Took you ten or fifteen minutes to go ten blocks? A. Yes.

Q. You are sure about that? A. I do it every night.

The Court: The answer is yes.

Q. Well, how long are the blocks? A. Well, they are long.

Q. How long? A. I cannot say how long a block is, a good city block.

20 Q. You say that at seventeen minutes after five, you started to go to the station, which is ten blocks away, to meet your husband coming in on a train this time, at the station, at ten minutes to six, is that right?

The Court: The answer is yes.

A. That is right.

The Court: Don't shake your head, please.

30 Q. That is right? A. (No answer.)

Mr. Herman: That is all.

Mr. Emory: Dr. Russell did not answer.

The Court: Is that the only witness?

Mr. Emory: That is the only witness.

The Court: Well, then, we will take a recess until two o'clock.

(NOON RECESS.)

*Dr. Theodore Bender, direct.*

PLAINTIFF'S CASE REOPENED.

THEODORE BENDER, M. D., sworn.

*Direct examination by Mr. Herman:*

Q. Dr. Bender, you are a practicing physician of the State of New Jersey? A. I am. 10

Q. Have been practicing for how long? A. For about eighteen years.

Mr. Emory: I will admit the doctor's qualifications.

Q. Your office is in Paterson? A. It is.

Q. Did you have occasion to treat Miss Margaret Bergin, during April, 1929, for injuries? A. I did.

Q. What was the nature of those injuries? A. There was a diffuse contusion of the right wrist, and a contusion of the extensor tendons of the thumb, and the index finger on the right hand. 20

Q. Would that contusion of the tendon result in any impairment of the use of the hand? A. A temporary impairment, yes.

Q. Assuming that the patient was a piano player, would that hinder the patient from pursuing her occupation? A. Until such time as the recovery did occur. 30

Q. Would you say that such an injury, as you treated Miss Bergin for, was painful? A. I should think it would be.

Q. When you first began to treat Miss Bergin, was she in a state of shock? A. She was in a state of mild shock.

Q. What is the difference between mild shock and severe shock, doctor? A. In severe shock, the patient is remarkably prostrated, and is usually semi-comatose, and, I might add, then the patient is usually in such a condition that they have to be 40

*Dr. Theodore Bender, cross.*

transported, rather than being able to walk to one's office.

Mr. Emory: That is when the shock is severe?

10

The Witness: When the shock is severe.

Q. Yes? A. Yes, certainly.

Q. How long was Miss Bergin under your care, doctor? A. I should say, approximately two months.

Q. During this period, was there a loss of use in the right hand? A. A total loss of use for that period of time.

20

Q. Have you examined Miss Bergin's hand since that time? A. Yes, I had the occasion of examining the hand, I think it was, about two or three months ago; the exact date, I am not sure, but I know it was within the last three months.

Q. Would you say that there was a complete restoration of the usage of the hand at the time you last examined her? A. Apparently so, yes.

Q. Now, what was the charge that you rendered Miss Bergin for your services? A. I think it was about two hundred dollars.

30

Q. Would you say that was a reasonable charge? A. In so far as I am concerned, yes.

Mr. Herman: Cross examine.

*Cross examination by Mr. Emory:*

Q. Doctor, you say the only injury that she had was a contusion of the right wrist, and a contusion of the thumb and index finger? A. No.

Q. What? A. I don't think I made that statement.

40

Q. I, perhaps, misunderstood you. What was the injury? A. She had a contusion of the right

*Dr. Theodore Bender, cross.*

wrist, and a contusion and injury to the tendons of her thumb and the index finger.

Q. Which of these injuries took the longest to clear up? A. The tendon injuries.

Q. So that her wrist came back to recovery more quickly than the tendon injuries? A. Yes, I should think it would, and did. 10

Q. Do you recollect whether or not you treated her at home or at your office? A. No, she came to my office.

Q. You have described the symptoms of mere shock. She didn't have any of those symptoms that you described, did she? A. I did not describe very many symptoms.

Q. No, you described some. A. Yes.

Q. In other words, the thing you told was what constituted severe shock? A. In a gross way, yes. 20

Q. She did not show no symptoms, did she? A. No.

Q. She was able to transport herself to your office all right? A. Just a moment, she walked into the office.

Q. About how often did she come? A. Oh, I should judge the first week she came every day, and thereafter, probably two or three times a week. 30

Q. Over the period of two months? A. Over the period of two months, yes.

Q. Had she recovered the use of her hand at the end of two months? A. Yes, I think she could, as far as I could say, she had apparent recovery.

Q. There was no nervous disorder, was there? A. In what respect?

Q. Well— A. Do you mean locally, or generally?

Q. Generally, yes. A. Oh, I should think there would be a bit—there was muscle disturbance of course. 40

*Dr. Theodore Bender, cross.*

Q. How long did that continue? A. Well, until the time she ceased to come to me for her wrist.

Q. In other words, when you discharged her, after two months, she was completely cured? A. As far as her mentality is concerned, that is a thing, I couldn't tell you about, because that is a thing, that is out of my province.

Q. There were no further objective symptoms, that you could see yourself, that had any injurious effect? A. No.

Q. When you examined her, two or three months ago, she was all right as far as I could see; of course, I limited myself to the examination of the wrist.

Q. I mean, individually, as you could find— A. Yes, the mental state would come in, and mental disturbances is something, I believe, out of my province; that belongs in the field of—

Q. There was no apparent injury, Doctor? A. Locally?

Q. Yes. A. No.

*By Mr. Herman:*

Q. Having suffered shock, as Miss Bergin suffered, would she be able to participate in a concert and render concerts, in your opinion, Doctor? A. In her particular case, I should say no, that she was not able to pursue her usual occupation.

*By Mr. Emory:*

Q. Doctor, do you recall the case well enough to tell us whether she was very much mentally disturbed, generally, as a result of the accident? A. At the time, I think, she had some, yes, and as I can recall, she came into the office, she was highly nervous, excited, talked quickly; at the time

*Dr. Theodore Bender, cross.*

she had a rapid pulse, she was pale, she showed some indication of an intense mental disturbance.

Q. That was on the day of the accident? A. That was on the day of the accident.

Q. As she came in, subsequent to that time, I suppose the mental disturbance was less and less each time? A. Oh, yes. 10

Q. Did it take the full two months to clear up? A. Yes, apparently so. One cannot gauge mentally.

Q. And the objective symptoms, that you could read, showed to all appearances that she was all right? A. Yes.

Q. Can you tell us about how long it took for this nervous disturbance to clear up? A. You mean, generally? 20

Q. Yes. A. Approximately a week or less.

Q. In other words, in a week, she had gotten over her nervousness as far as you could see? A. Yes.

Q. And the only thing that hung on after that, was this injury to the wrist and tendon? A. (No audible response.)

Q. Would it be all of the two full months before she could play the piano again, at all? A. Yes, I think, somewhat longer than two months I should think; at the time she was discharged, she had apparent, functional control of her hand, but the question of how much pressure she could bring on the keys, is a different proposition entirely. 30

Mr. Emory: All right; that is all.

The Court: The defendant has not rested.

Mr. Emory: The defendants rest.

(DEFENDANTS REST.)

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*Court's Charge to the Jury.*

The Court: Any rebuttal?

Mr. Herman: Yes. I will recall Miss Bergin.

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PLAINTIFF'S REBUTTAL.

10

MISS MARGARET BERGIN, recalled.

*Direct examination by Mr. Herman:*

Q. Miss Bergin, is there a stop street sign at the intersection of Pennington Avenue, on Pennington Avenue? A. No, there is not.

Mr. Herman: That is all.

The Court: Cross examine.

20

Mr. Emory: No questions.

The Court: That is all.

Mr. Herman: We rest.

Mr. Emory: We rest.

(BOTH SIDES REST.)

Mr. Emory summed the case to the jury on behalf of the defendant.

Mr. Herman thereupon summed the case to the jury on behalf of the plaintiffs.

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**Court's Charge to the Jury.**

Ladies and Gentlemen of the Jury:

Late in the afternoon of April 12th, of 1929, there was a collision between two automobiles on the corner of Van Houten Avenue and Pennington Avenue, in the City of Passaic, which caused damage to the cars and the occupants, and as a result of that collision, Miss Margaret Bergin has brought

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*Court's Charge to the Jury.*

suit in this Court against Mrs. Mae Ganley, in which suit she asks to be compensated for the damage that she suffered in that accident, which she says was the proximate result of the negligence of Mrs. Ganley, in the driving of her car.

She says that her car was damaged—Miss Ber- 10  
gin's car damaged, and it cost \$130 to have it re-  
paired. She says that she was shocked as a result  
of the collision, and had an injury to her hand,  
her wrist, which incapacitated her for a couple  
of months, and caused her pain and suffering,  
and necessitated her seeking medical aid, and that  
her physician treated her about once a day for the  
first week, and then several days a week there-  
after for two months, and charged her \$200; that 20  
her profession is that of an opera singer, and that  
because of this injury she was unable to keep her  
professional engagements, nor was she able to  
play the piano while practicing, because of the in-  
jury to her hand, and she says that she lost be-  
cause of her inability to keep her engagements  
about \$1,225; that she had a contract to sing at  
Richmond, Virginia, which would net her \$375;  
that she was to appear at the May Festival at  
Newark, which would net her about \$400; and that 30  
she had three different engagements to sing in  
Europe, which would have netted her \$150 each,  
as I recall the figures.

She says that she should be compensated for  
these money losses and expenses, and in addition  
to that, that she should be compensated in such  
sum as you think proper for the pain and suffer-  
ing that she had, and the disability that she suf-  
fered, because of this accident.

The defendant says, in answer to this suit, that 40  
the fault was not hers, but rather the fault was

*Court's Charge to the Jury.*

that of Miss Bergin; that Miss Bergin was guilty of negligence, and that raises a question of fact.

10 In all cases where questions of fact are raised, those questions are submitted to the jury for the jury's determination. It is the function, and the sole function, of the jury to determine questions of fact. It is the function and duty of the Court to define the law to you, and decide all questions of law. Here you have questions of fact as to the negligence of the driver of the Ganley car, Mrs. Ganley, and also the negligence of the Bergin car, Miss Bergin, the plaintiff here.

20 Negligence is never presumed in the law, but must always be proved, and the law casts the burden upon the shoulders of the plaintiff to establish, by the clear weight of the testimony, the truth of the allegation, viz., that there was negligence on the part of Mrs. Ganley in this case, which was the proximate cause of this accident.

30 Negligence has been defined by the Court to be the omission to do something which a reasonable person, guided by those considerations, which ordinarily regulate the conduct of human affairs, or the doing of something which a reasonably prudent person would not do. The test is not that of the most particular person. The standard is not that of the most skillful driver, but, rather, how would a reasonably prudent person act under a given circumstance. That is the test.

40 Now, Miss Bergin says that Mrs. Ganley did not act as a reasonably prudent person should have acted under the circumstances and conditions that existed at this time and place; that the weather was bad, that it was either raining, or had been, the streets were wet, and that Mrs. Ganley drove without regard to the rights of Miss Ber-

*Court's Charge to the Jury.*

gin; that she drove at a reckless rate of speed, that she drove without due care, that she did not observe Miss Bergin on the highway.

On the contrary, Mrs. Ganley says that is not so. She says, "This was a stop street, and I stopped; I was not going thirty-five miles an hour as one of the witnesses said here; I stopped and waited for a car to pass. I was on Pennington Avenue, and I waited for this car to pass on Van Houten, and then I proceeded. I looked before I proceeded, and Miss Bergin was not anywheres around, and I got almost across the street when I was struck by Miss Bergin's car in the rear, so it was not my fault; she was the one that was careless, not I."

10

Now, you see that story is not the same as Miss Bergin's, who says that she came along and slowed down when she came to this corner, and looked and observed and saw nothing, and then started to cross, and this other car turned suddenly, coming very fast, and the collision was inevitable, and resulted.

20

Who is telling the correct story? These things happen very quickly, and because people do not all agree as to the details of an occurrence, does not, of course, necessarily mean that anyone is testifying falsely. You may all look out of the window and see an occurrence and you would perhaps have twelve different versions of the occurrence. What one would see, another would not. It depends on your powers of observation, among other things. So you may reconcile these diverse stories of this accident, because of faulty recollection, or because of lack of observation, or because they are mistakenly of the opinion that the testimony that they give is correct. On the other hand, you may not be able to reconcile

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*Court's Charge to the Jury.*

the stories and may conclude that some of the witnesses are testifying falsely, and if you should so decide, and the falsity is with respect to a material fact, and was given for the purpose of deceiving you, you have a right to disregard everything that such a witness may have testified to.

10 In other words, you are the sole judges of the credibility of the witnesses. You reconstruct this scene, and decide whose fault it was. First, you decide whether there was negligence on the part of Mrs. Ganley and if you find there was none, if you find that she did nothing that a reasonably prudent person would not have done, under the circumstances, then, of course, she would be guilty of no act of negligence, and your consideration of the case is at an end, and your verdict must be  
20 no cause for action.

But if you should decide that there was an act of negligence on the part of Mrs. Ganley, which was the proximate cause of this accident, then you would examine into the next question as to whether there was negligence also on the part of Miss Bergin; and if you should find there was, and such negligence contributed in any way to the accident, then again, there must be a verdict  
30 of no cause for action.

But if you should find there was no negligence on the part of Miss Bergin, and negligence on the part of Mrs. Ganley, which caused the accident, which was the proximate cause of the accident, then there must be a verdict in favor of Miss Bergin and against Mrs. Ganley.

Now, something has been said by counsel with respect to the right of way. It is true that under  
40 the law, a person approaching on the right of another, has the right of way over the other, and

*Court's Charge to the Jury.*

so, here, if these two vehicles came to the intersection of these two streets at the same time, Miss Bergin had the right of way, because she was at the right of Mrs. Ganley; but if Mrs. Ganley got there first, and sufficiently in advance to have made it proper for her to have gone across, then Miss Bergin did not have the right of way. Other things being equal, the person who arrives at an intersection has the right of way. That is not necessarily the answer to this proposition, however; it is but one factor to be taken into consideration. A person may violate the Traffic Act, and still not be guilty of an act of negligence.

10

For instance, the law limits the speed at which a motor vehicle may be driven, and limits the speed to forty miles an hour in the open country, where houses are not close together. A person may go faster than forty miles an hour and not be guilty of any act of negligence, depending upon the circumstances and conditions. The test is not, what does the law say, but how would a reasonably prudent person act. That is the test, as I said a while ago.

20

Did Mrs. Ganley act as a reasonably prudent person would have acted under the circumstances and conditions, or not? Did Miss Bergin act as a reasonably prudent person should, or not? Because she is charged by the affirmative defense of Mrs. Ganley with being negligent, and that her negligence contributed to this accident. You must be satisfied that that is true, by the same rule of the clear weight of the testimony, and in that case, it being an affirmative defense, the burden is on Mrs. Ganley to establish the negligence of Miss Bergin.

30

So you will reconstruct this scene out of the

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*Court's Charge to the Jury.*

10 mouths of these witnesses that have testified, and the testimony that has been read to you, so that you may know what the facts are, and when you have found the facts, then, of course, you will find your verdict in accordance with those facts, as I have indicated you must do. If you find there is negligence, I repeat, on the part of Mrs. Ganley, that was the proximate cause of this accident, and no negligence on the part of Miss Bergin, there must be a verdict in favor of Miss Bergin and against Mrs. Ganley. If you find there was no negligence on the part of Mrs. Ganley, or even though there was negligence on her part, there was also negligence on the part of Miss Bergin, your verdict must be no cause for action.

20 You must decide this case from your recollection of what the testimony was, not from mine. It is your job to remember the testimony and decide it from your own recollection. I have not attempted to analyze all of the testimony, nor to have referred to all of it. I have just in a general way told you what the respective versions of this accident were, but if in doing so I have misstated the testimony in any particular, you will, of course, disregard any misstatements that I may have made with respect to the testimony, but, rather depend  
30 on your own recollection of what it was.

You may retire.

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(JURY RETIRES.)

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No exceptions were taken to the charge on behalf of either party.

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**Postea and Judgment.**

(Filed February 5, 1930.)

The above-entitled action was tried before the Honorable Newton H. Porter and a jury on February 3, 1930, and the jury rendered a verdict in favor of the plaintiff and against the defendant, Mae Ganley, in the sum of Twelve Hundred Fifty (\$1250.00) Dollars. 10

The complaint in the above-entitled action was amended to read that Mae Ganley was the owner and operator of the automobile referred to in Paragraph One (1) of the First Count.

A discontinuance as to the defendant, John Ganley, was entered on the minutes by consent of counsel.

Whereupon it is adjudged that the plaintiff Margaret Bergin do recover of the said defendant Mae Ganley the sum of One thousand two hundred and fifty dollars damages together with her costs which have been taxed at the sum 20

\$1,250.00	of seventy dollars and sixty-six
70.66	cents making in the whole the sum
—————	of One thousand three hundred
\$1,320.66	twenty dollars and sixty-six cents.

Judgment signed and entered February 5, 1930. 30

WM. S. GUMMERE,  
C. J.

**Notice of Appeal.**

(Filed April 17, 1930.)

To

10 ROEMER & COLE, Esqs.,  
Attorneys of Plaintiff,  
#45 Church Street,  
Paterson, N. J.

SIRS:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated Feb. 10, 1930.

20 Respectfully,

COLLINS & CORBIN,  
Attorneys of Defendant.

Service acknowledged February 12, 1930.

ROEMER & COLE,  
Att'ys of Plaintiff.

30

**Grounds of Appeal.**

(Filed April 22, 1930.)

The appellant, Mae Ganley, states the following grounds of appeal:

1. The Trial Court erroneously refused to allow the defendant to amend her answer when thereunto moved by counsel for the defendant subject to notice of motion whereas said motion should have been granted on the ground that the proposed

40

*Grounds of Appeal.*

amendment would set up facts which had arisen since the filing of the original answer and which, if proven, would be a complete defense to the action.

2. The Trial Judge erroneously refused to allow the defendant to amend her answer when the motion therefor was renewed by counsel for the defendant on the trial of the case whereas said motion should have been granted on the ground that the proposed amendment would set up facts which had arisen since the filing of the original answer and which, if proven, would be a complete defense to the action. 10

3. The Trial Court erroneously refused to permit the defendant to produce testimony of a trial between the same parties in the Passaic District Court the result of which trial, if proven, would constitute a complete bar and defense to this action. 20

COLLINS & CORBIN,  
Attorneys of Defendants-Appellants.

Service acknowledged April 21, 1930.

ROEMER & COLE,  
Att'ys of Plaintiff. 30



## New Jersey Court of Errors and Appeals

MARGARET BERGIN,  
*Plaintiff-Respondent,*

*v.*

MAE GANLEY,  
*Defendant-Appellant.*

Action at Law.

On Appeal from  
New Jersey  
Supreme Court.

### BRIEF IN BEHALF OF DEFENDANT- APPELLANT.

(1)

#### Statement of the Case.

This appeal brings before this Court for review a judgment of the Supreme Court in favor of the plaintiff-respondent (hereinafter called the plaintiff) and against the defendant-appellant (hereinafter called the defendant) in the amount of \$1,250 (p. 59).

This action was brought by Margaret Bergin against this defendant and John A. Ganley to recover damages for personal injuries received by her in an automobile accident which occurred on the 12th day of April, 1929 (pp. 1, 2, 3). At the trial the plaintiff discontinued as to John A. Ganley (p. 10, lines 10-20).

Before trial a motion was made by this defendant to amend her answer to set up a plea of *puis darrein continuance* (p. 5). That proposed amendment to the answer alleged that in an action brought by this defendant against the present

plaintiff to recover damages for personal injuries sustained by her in the same accident for which the present suit was brought she had recovered a judgment against the present plaintiff on November 29th, 1929, and that said judgment was *res adjudicata* in the present action and a bar to any recovery by the present plaintiff as against this defendant (*idem*).

The accident in question was between an automobile owned and operated by this defendant and an automobile owned and operated by the plaintiff.

The trial court denied the motion on authority of *Smith v. Fischer Baking Co.*, 147 Atl. (E. & A. of N. J.) 455, 7 A. R. 1054. Exception to that ruling was noted (p. 11, lines 1-10). At the trial the motion to amend was renewed and again denied and exception noted (pp. 11-12). These exceptions are preserved in the grounds of appeal (pp. 60-61).

During the trial the defendant offered proof by the Clerk of the Court in which the previous judgment was rendered of the pleadings and judgment. This offer was overruled by the trial judge for the same reason that he denied the motions to amend (p. 40). Exception was noted and is preserved in the grounds of appeal (p. 61).

The trial court submitted the case to the jury and a verdict was rendered in favor of the plaintiff for \$1,250 and judgment entered (p. 59). It is from that judgment that the present appeal is taken (p. 60).

## (2)

### Grounds of Appeal.

The grounds of appeal (pp. 60-61) have been given in the statement of the case, *supra*. They are three in number but only two in point of fact.

The questions presented are, first, whether the trial court erred in refusing to permit the defendant to file a plea *puis darrein continuance* for the purpose of pleading and proving the judgment in favor of the defendant and against the plaintiff which was rendered on November 29th, 1929; and second, whether the defendant was not entitled under the general issue to prove said judgment as a bar even though it was not pleaded on the grounds (a) that under the settled law such proof was admissible under the general issue; and (b) under the settled public policy of his State as laid down by this Court said judgment should be a bar in any event.

## (3)

## BRIEF OF THE ARGUMENT.

## I.

**The trial court erred in refusing to permit the defendant to plead and prove the judgment obtained by the defendant against the plaintiff because said judgment was *res adjudicata* and therefore a bar to the plaintiff's right to recover.**

This action arose out of an automobile collision between two cars, one owned and operated by the plaintiff (p. 13, lines 1-25), and the other car owned and operated by the defendant (p. 10, lines 10-20). This action was instituted by the service of a summons and complaint which was filed on July 27, 1929 (p. 1). The answer was filed on September 14, 1929 (p. 3).

After the filing of the answer, the action of this defendant against the plaintiff to recover for per-

sonal injuries sustained by the defendant as a result of the same collision, came to trial in the Passaic District Court on November 29, 1929, before a judge and a jury and a verdict was rendered in favor of this defendant (plaintiff in that action) and against the plaintiff in this action (defendant in that action) and judgment thereafter was accordingly entered in favor of this defendant and against the plaintiff.

*It will be noted that that judgment was rendered two and a half months after the filing of defendant's answer in this action (p. 6).*

It was therefore impossible for the defendant to set up that judgment as a bar to the present action at the time of the filing of the answer herein on September 14, 1929.

Therefore, the only way in which the defendant could set up this new matter which arose since the filing of the answer, was by a motion to amend. Such a motion was made by notice dated November 29, 1929, the very day on which the District Court judgment was entered, which was duly served on the attorneys for the plaintiff herein and was returnable for argument on Monday, December 2, 1929 (p. 5).

The motion was argued before Circuit Judge NEWTON H. PORTER, sitting for the Supreme Court as a Supreme Court Commissioner. After argument of counsel, the Court reserved decision and on January 20, 1930, filed a memorandum in which the motion to amend was denied (p. 7).

The amendment to the answer which was proposed was clearly a plea *puis darrein continuance* for it set up matter which had arisen since the filing of the answer of this defendant and the proposed amendment, if proven, would have constituted a complete defense to the action. It was not something which the defendant had overlooked in the filing of her answer.

Section 121 of the Practice Act of 1903 (P. L. 1903, p. 571, Sec. 121) had the following provision with respect to such a plea:

“Pleas *puis darrein continuance* shall be pleadable only by permission of the Court or a judge; and the court or a judge in allowing such a plea may direct that the pleading thereof shall not be a waiver of former pleas.”

That Section of the Practice Act was repealed by Section 34 of the Practice Act of 1912 (P. L. 1912, p. 383, Sec. 34).

The revision of 1877 shows that the Practice Act of that time in Section 131 had the identical provision as that contained in the 1903 Act (2 Rev. of N. J., p. 868, Sec. 131).

In view of the repealer in the 1912 Act we revert to the common law. By the Tenth Article of the Constitution of 1844 it is declared that the common law and statute laws then in force shall remain in force until they expire by their own limitation or be altered or replaced by the Legislature. *Dixon v. Swenson*, 101 N. J. L. 22, 26.

In the leading case of *Van Winkle v. Alling*, 17 N. J. L. 446, 448, the Supreme Court held:

“It has more than once, recently, been decided, that the rules of practice of the court of King’s Bench, recognized here, at the time of our revolution, are in force, and regulate the practice of this court, except so far as they have been superseded by Acts of Assembly; or by new and positive rules of this court; and excepting also, such rules of the King’s Bench, as are rendered useless, by the organization of this court, or are incompatible with the nature and genius of our judicial institutions.”

The *Van Winkle* case has been repeatedly followed. See *Ocean City Hotel Co. v. Sooy*, 80 N. J. L. 41, 42.

The common law rule settled by the decisions of the King's Bench is that a plea *puis darrein continuance* could not be rejected when offered but that if the allegations contained in the plea were not sufficient as a defense the proper practice was to attack such a plea by demurrer.

The leading decisions of the King's Bench so holding are:

*Paris v. Salkeld*, 2 Wils. 137, 95 Eng. Rep. (full reprint) 729;

*Lovell v. Eastaff*, 3 T. R. 554, 100 Eng. Rep. (full reprint) 729;

*Prince v. Nicholson*, 1 Marsh 70, 128 Eng. Rep. (full reprint) 718.

In *Paris v. Salkeld*, *supra*, the King's Bench held:

"The C. J. and CLIVE J. at first seemed to think that it was in the discretion of the Court whether they would receive this plea or not; but BATHURST J. said, he thought the Court were bound to receive it, and could not determine whether it was a good plea or not, but only upon a demurrer; upon which the Chief Justice ordered the matter to be debated at another day, as to this point, whether it was in the discretion of the Court to reject this plea; whereupon it was spoken to a second time, when the Court were all clearly of opinion that they had it not in their power to reject the plea; and the Chief Justice said, that such discretion was contrary to the genius of the common law of England, and would be more fit for an Eastern monarchy than for this land of liberty; *nulli negabimus, &c. justitiam*; and there is no difference between a plea *puis darrein continuance* and other defense, but this, viz. that the fact which warrants this plea first existed or happened since the last, and before the next continuance; it is a defense which the party could not possibly make when he first pleaded, and which he is bound

to make after the last continuance, and before the next."

In *Lovell v. Eastaff*, *supra*, at page 731, LORD KENYON, C. J., speaking for the King's Bench, held:

"And as to this part of the rule, I think we are bound to discharge this also, on the authority of the case of *Paris v. Salkeld*; where the Court, after great consideration, held that it was not discretionary in them to receive a plea *puis darrein continuance*, but that they were bound to receive it; and the opinion of WILMOT, Ch. J. is conveyed in language peculiarly forcible."

It would seem from the foregoing authorities that the defendant as a matter of right was entitled to file a plea of *puis darrein continuance*. The reason for the rule is apparent. Such a plea dealt with new matter arising after the original plea or answer had been filed. It could not have been pleaded in the original answer because it did not exist. If the new matter which arose since the filing of the plea or answer was a complete defense, then the defendant should, as a matter of right and not as a matter of discretion in the trial court, have the right to file it. That rule is unassailable from the standpoint of either logic or principle.

Sections 23 and 24 of the Practice Act of 1912 which are the only sections dealing with amendments of pleadings (P. L. 1912, 381, secs. 23 and 24) provide as follows:

"23. AMENDMENTS.

"No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy

by any procedure; but in such case, the court shall, upon terms, order the writs, pleadings and other proceedings to be so amended, or new writs, pleadings or other proceedings to be respectively so issued, filed or taken, that the court may completely and finally hear and determine the whole matter in controversy between the parties and grant the proper remedy.

“24. SAME SUBJECT.

“In addition to the present powers of amendment, the court may, upon terms, permit, before or at the trial, the statement of a new or different cause of action in the complaint or counter-claim.”

Rule 94 of the Supreme Court rules, October Term, 1929, provides that Supreme Court Commissioners (such as Judge PORTER) can make orders with respect to “objections to pleadings, amendments thereof, striking out pleadings and leave for additional pleadings.”

Section 32 of the Practice Act provides that the Supreme Court can make rules to supersede the common law regulations (P. L. 1912, p. 383, sec. 32).

We have been unable to find any rule changing the common law rule with respect to a plea *puis darrein continuance* and we therefore respectfully submit that the common law rule should be held applicable to the case at bar.

Assuming, however, that there was a certain discretion in the trial court with respect to allowing this amendment, the discretion to be exercised by the trial court is a *legal* discretion and not an arbitrary discretion. Unless the refusal to permit the amendment has some legal ground to support it, it was error for the trial court to refuse the amendment.

It is contended that the ground upon which the trial court based his decision is erroneous. That decision was rested solely on the authority of the case of *Smith v. Fischer Baking Co.*, 147 Atl. 455, 7 A. R. 1054, decided by this Court (p. 7). That case is clearly distinguishable from the case at bar. The trial court in its opinion said that as was pointed out in the *Smith* case the doctrine of *res adjudicata* does not apply unless there be identity of the thing sued for and that the cause of action is not the negligent act involved but the consequences following it. The trial court, therefore, concludes (p. 7) that the gravamen of the suit at bar is the injuries sustained by the plaintiff which was not at issue and could not be in the other suit because there the gravamen of the suit was the injuries sustained by the defendant. The trial court, therefore, concluded, "there being therefor no identity of the thing sued for in the two suits, *res adjudicata* does not apply."

The error into which the trial court fell in applying the *Smith* case to the case *sub judice* is apparent when it is pointed out that in the *Smith* case the first suit, which was lost, was by the chauffeur of a certain automobile for the personal injuries sustained by him whereas the second suit was a suit by the owner of that automobile to recover for the damage thereto. This Court in the *Smith* case held:

"We are of the opinion that, where injury is caused to property and person by the same negligent act, distinct causes of action exist, and therefore a judgment in one cause is not a bar to an action to recover in the other.

"If the judgment record of the district court which was offered in evidence was material at all, it could have been material only to support the defense of *res adjudicata*.

(2, 3) "But a matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, of the quality of the persons for and against whom the claim is made, and the judgment in the former suit be so in point as to control the issue in the pending action. To render a prior judgment *res adjudicata* the record must show that the issue was taken on the same allegations which are the foundation of the second action. The test is whether the proof which would fully support the one case would have the same effect in tending to maintain the other. *Hoffmeier & Son v. Trost*, 83 N. J. Law, 358, 85 A. 221; *Mershon v. Williams*, 63 N. J. Law, 398, 44 A. 211.

"In *Gardner v. Raisbeck*, 28 N. J. Eq. 71 at page 75, the court says: 'In *Behrens v. Sieveking*, 2 M. & C. 581, the lord chancellor said that in order to support the plea it was necessary to show that the proceedings in which the plaintiffs were alleged to have failed were taken for the same purpose as the suit in which the plea was filed; for, he adds, the issue might have been the same, while the object was different, and the circumstance that the matter had been tried, as a matter of evidence, could not be conclusive; that the defendant had to show that the subject matter was the same, that the right came in question before a court of competent jurisdiction, and that the result was conclusive, so as to bind the judgment of every other court.'

"Applying these tests to the case in hand, it is plain that the judgment in the district court was immaterial."

It is clear that the foregoing reasoning does not apply to the case at bar. It is equally clear that the language of this Court in the *Smith* case immediately following that quoted *supra* does apply and that the case of *Carter v. Public Service Gas Co.*, 100 N. J. Law 370, is the case directly in point and

controlling in this case. This Court said (italics ours):

“The defendant contends that *Ochs v. Public Service Railway Co.*, 81 N. J. Law, 661, 80 A. 495, 36 L. R. A. (N.S.) 240, has been overruled by *Carter v. Public Service Gas Co.*, 100 N. J. Law, 374, 126 A. 456. Not so. These cases are clearly distinguishable. *Ochs v. Public Service Railway Co.*, *supra*, held that, where injury is caused to both property and person by the same negligent act, distinct causes of action exist, one for property damage and one for personal injuries, and the judgment in one case is not a bar to an action in another; the court pointing out ‘that our legislature has recognized a distinction between the right to recover for injuries to property and those to the person’ as indicated by its course of legislation in respect thereto. The court therein also held that ‘the cause of action is not the negligent act but the consequences following it, for, to support an action, there must be not only the negligent act, but a consequential injury; the injury being the gravamen of the charge.’

“*Carter v. Public Service Gas Co.*, *supra*, was not an action for damages arising from negligence. It was rather a suit against a corporation for damages for an alleged assault and battery, committed by its servant, and the court held that a judgment recovered *by such servant against the plaintiff on a similar charge, which it was stipulated arose out of the same occurrence and events, was res adjudicata in the latter suit.*

(4) “Since the judgment record of the district court offered in evidence in the present suit disclosed an entirely separate and distinct action from the one at bar, with a subject-matter entirely different (the district court action being for personal injury and this action being for property damage), the record of the district court was properly excluded by

the trial judge as being of no probative value in support of the plea of *res adjudicata*."

It will be noted that in the *Carter* case the servant of the Public Service Gas Company recovered damages against the plaintiff, Carter. It will also be noted that Carter did not sue for the damage to the servant of the Public Service but for the damage suffered by Carter. In short, Carter sued for the injuries sustained by her and the Public Service's agent sued for the injury sustained by him, each claiming that a particular occurrence (a fist fight between the two resulting in personal injuries to each) was caused by the wrongful act of the other.

So in the case at bar the plaintiff claims that her personal injuries were caused by the wrongful conduct of the defendant. The defendant in the previous action in which she recovered a judgment claimed that it was the wrongful conduct of the plaintiff which caused the accident.

The present action, as well as the previous one between these parties, involved the same circumstances, the same occurrence, the same issue. The only difference is that each was suing for the damages sustained by each.

The previous judgment decided the controversy as to who was responsible for the accident and that judgment held that it was the plaintiff's wrongful act which caused the accident. That judgment, unreversed, is conclusive between the parties.

The *Smith* case (*supra*) is further distinguishable on the ground that in the first action the suit was by the chauffeur to recover for his personal injury while in the second suit the chauffeur was not a party at all but the suit was brought by the owner of the car to recover for the damage thereto. These were two separate and distinct actions for

two distinct and different claims by two different persons against the same defendant. In short, there was no identity of parties in the two actions and no identity of subject-matter. Neither plaintiff had control over the other or the cause of action of the other. In the case at bar both actions are between the identical two persons except that their positions are reversed. The plaintiff in the first action is now the defendant and the present plaintiff was the defendant in the first action. The issue between them is the same and the two suits involve the exact occurrence. Each party claims that the other was solely responsible for the occurrence. The decision in each case involves the same law and the same facts. The only thing that is not common to both actions is the damage sustained by each.

It has been repeatedly held that a judgment which remains unreversed is conclusive between the parties to the action not only as to the entire cause of action in the first suit but also as to any and all questions litigated in that suit; the test being expressed very succinctly in *23 Cyc.*, 1158 (which quotation is cited in its entirety in the Supreme Court's decision in *Hoffmeier v. Trost*, 83 N. J. L. 358, 360):

"A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action is to ascertain whether the same evidence, which is necessary to sustain the second action, would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar."

In the case of *Ward v. Ward*, 22 N. J. L. 699, this Court said:

"I take the well settled rule of law to be this, that when a material traversable fact di-

rectly in issue between two parties has been ascertained by the finding of a jury, and judgment final has been rendered upon that verdict, and remains unreversed, that finding is conclusive between those parties, and it does not lie in the mouth of either afterwards to gainsay it. It rests upon the principle that there should be an end of litigation."

In *Carter v. Public Service*, 100 N. J. L. 374, *supra*, the facts were that one, Ryerson, an agent of the defendant, while in the act of removing a gas meter from the premises of the plaintiff became engaged in an affray with the plaintiff and subsequently brought suit for the alleged assault and battery in the Orange District Court where he obtained a verdict. Subsequently the plaintiff brought suit against the Public Service which set up the prior judgment in the District Court in favor of their agent and contended that that judgment was *res adjudicata*. The trial judge directed a judgment of nonsuit and held that the District Court judgment was *res adjudicata* and a bar to the plaintiff's action in the Circuit Court and that judgment was affirmed by this Court by a unanimous vote.

That judgment in the prior suit constitutes a conclusive determination even though the subject-matter (the injuries) are different has been held in numerous cases:

*The City of Paterson v. Baker*, 51 N. J. E. 49;

*In Re Walsh's Estate*, 80 N. J. E. 565, 569;

*Sarson v. Moccia*, 90 N. J. E. 433, 437;

*Cashin v. Alamac Hotel*, 98 N. J. E. 432, 442;

*McGarvey v. Young*, 100 N. J. E. 174, 180;

*McMichael v. Horay*, 90 N. J. L. 142, 146;

*Bragg v. King*, 104 N. J. L. 4, 15.

In *City of Paterson v. Baker* (*supra*), at page 57, the Court of Chancery held (italics ours):

“This summary of some of the leading cases shows, I think, that it is now established, beyond dispute or doubt, that the judgment of a court of competent jurisdiction, on a question of law or fact, or on a question of mixed law and fact, once litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, *not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies, touching the same subject-matter, though the property involved in the subsequent litigation is different from that which was involved in the first.*”

The case of *McMichael v. Horay* (*supra*) is practically identical in its fact situation with the one *sub judice* for in that case the plaintiffs in the first action which was in the Camden District Court were the defendants in the case cited and the defendants in the District Court action were the plaintiffs in the case cited. Both actions arose out of the same transaction although the first was for trespass and the second for conspiracy in instituting the prior action. This Court in that case held that the judgment in the prior case was conclusive and constituted a complete defense to the Supreme Court action. This Court at pages 144 and 145 held:

“Vice Chancellor VAN FLEET, in *City of Paterson v. Baker*, 51 N. J. Eq. 49, quoting from *Cromwell v. Sac County*, 94 U. S. 351, said (at p. 53 of 51 N. J. Eq.) that parties and those in privity with them are concluded, not only as to every matter offered and received to sustain or defeat the demand, but as to any other admissible matter which might have been offered for that purpose; for example, a judgment rendered upon a promissory note is con-

clusive as to its validity and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, &c. Again, the same Vice Chancellor, in the same case, quoting from *Beloit v. Morgan*, 7 Wall. 619, said (at p. 56 of 51 N. J. Eq.) that the judgment of a court having jurisdiction of the parties and the subject-matter of the suit is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different. The doctrine of the City of Paterson *v.* Baker was approved by the Court of Errors and Appeals in *re* Walsh's Estate, 80 N. J. Eq. 565, 569, 570."

It is therefore apparent that the trial court fell into the error of thinking that because the defendant in the case bar recovered for personal injuries sustained by her, that such a judgment was not *res adjudicata* in the case at bar because the present plaintiff was suing to recover for the personal injuries sustained by her. It is clear from the authorities cited that even though the plaintiff in this action may be suing to recover for the damages sustained by her, still, the former judgment is *res adjudicata* if each controversy is over the identical subject-matter, although the damages to be recovered is the loss suffered by the party who happens in the particular suit to be the plaintiff. Otherwise, there never would be a case in which the doctrine of *res adjudicata* would apply because never can one person sue for the damages sustained by the other where both suffer damage as the result of the identical occurrence.

It is therefore clear that the ground upon which the trial court based its decision is erroneous. It is equally clear that the amendment should have been permitted and if it had been, and proof had been accepted of the previous judgment, that the

defendant would have had a complete defense to the present action. We therefore respectfully submit that the trial court erred in refusing to permit the defendant to plead and prove the previous judgment between the same parties which decided the present controversy in favor of the defendant.

## II.

**Even though the prior judgment in favor of the defendant was not pleaded, still, the defendant had a right to prove that judgment, and it was error for the trial court to refuse to accept such proof.**

On the defendant's case the defendant offered proof of the prior judgment which was refused for the reasons stated on refusal to permit the amendment of the answer, and exception was duly noted and that exception is preserved in the grounds of appeal (pp. 40, 61).

As heretofore pointed out, the general rule was that a plea *puis darrein continuance* must be filed before proof would be admitted of a defense arising after the filing of the original answer or plea. However, the common law recognized an exception to that doctrine, namely, that in an action on the case, such matter, arising after the commencement of the action and after issue joined, was admissible under the general issue. See *49 Corpus Juris*, 563.

*Chicago v. Babcock*, 131 Ill. 358; 32 N. E. 271;

*Papke v. Hammond*, 192 Ill. 631; 61 N. E. 910, 914.

2 *Greenleaf on Evidence*, par. 231.

In the leading case of *Moreton v. Hardern, et al.*, 4 Barn. & C. 223, 107 Reprint 1042, the King's

Bench in 1825 held that an action on the case was proper for negligence.

In the case at bar the general issue was pleaded (p. 3).

Therefore the defendant had the right to offer proof of the prior judgment which was *res adjudicata*. In 49 *Corpus Juris*, 563, *supra*, the rule is stated as follows:

“An action on the case has been held to be an exception to the general rule requiring a plea *puis darrein continuance* for matters of defense arising after commencement of the action and issue joined, and in such an action defendant has been permitted to give in evidence, under the general issue, a release, a former recovery, a satisfaction, or any other matter *ex post facto*, which shows that the cause of action has been discharged or that in equity and good conscience plaintiff ought not to recover.”

That conclusion was likewise reached by this Court by a somewhat different method of reasoning in the case of *McMichael v. Horay*, 90 N. J. L. 142, 145, where this Court held:

“It is true that the judgments recovered by the respondents against the appellant in the Camden District Court were not pleaded as estoppel in bar to the appellant’s action against them in the Supreme Court, the judgment of nonsuit in which is now being reviewed.

“This court held in *State v. Heyer*, 89 N. J. L. 187, that a question not presented and argued in the court below will be held to have been waived and abandoned, and will not be considered in an appellate tribunal. But this must be read in the light of our holding in *State v. Shupe*, 88 *Id.* 610, where it was decided that a court of last resort need not hear a party on a question which could have been, but was not, raised in an intermediate court of appeal, except where the question goes to the

jurisdiction of the subject-matter or where a question of public policy is involved. The true doctrine is that a court of appeals need not, not that it cannot, decide a question arising on a record before it, which was not raised in a court below, whether that court be an intermediate court of appeals or a court of first instance; and it is the constant practice of appellate courts to notice and decide questions of jurisdiction, and especially questions of public policy, residing in records before them, without those questions having been raised below.

“The doctrine of *res judicata* is one of public policy. On this phase of the question Vice Chancellor VAN FLEET remarked in *City of Paterson v. Baker, supra* (at p. 59 of 51 N. J. Eq.):

“The doctrine under consideration is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, but a rule of justice, unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation and repose of society.”

“In the case before us the motion to nonsuit was not made upon the ground of estoppel by record, nor were the judgments pleaded as *res judicata*, nor was the nonsuit granted for that reason; but that makes no difference, as a judgment entered upon a nonsuit directed by the trial judge, and brought up for review, will be affirmed if correct on any legal ground, although the reason given by the court below is erroneous. *Gillespie v. J. W. Ferguson Co.*, 78 N. J. L. 470. We have not considered, and therefore do not decide, whether the ground upon which the trial judge rested the motion to nonsuit is tenable or untenable. We prefer to put our decision upon the ground of public policy, which, for the repose of society, decrees that judgments rendered by competent

tribunals, having jurisdiction of the subject-matter and the parties, shall be forever at rest."

Since the doctrine of *res adjudicata* is one of public policy as stated by this Court in the *McMichael* case and since this defendant attempted immediately after the rendition of the judgment in the District Court to plead it both before and at the trial of this action, and since this defendant also offered to prove the judgment, it is apparent that the defendant here is in a far better position to raise this question than the defendant in the *McMichael* case, who not only failed to plead it when he had ample time to do so, but also failed to present or argue the point in the court below. Clearly, since it is the constant practice of this Court to notice and decide questions of public policy residing in records before it, as stated in the quotation above from the *McMichael* case, the conclusion is inevitable that in the case at bar this question of public policy, which the defendant sought in every way to timely raise, should be decided, especially since justice requires that this defendant should not be compelled to pay the plaintiff for an occurrence for which this defendant has already received a judgment which has been paid by the plaintiff to this defendant.

### III.

#### CONCLUSION.

For these reasons we respectfully submit that the judgment below should be reversed and a *venire de novo* ordered.

Submitted May Term, 1930.

EDWARD A. MARKLEY,  
*Of Counsel.*

COLLINS & CORBIN,  
*Attorneys of Defendant-Appellant.*

## New Jersey Court of Errors and Appeals

Margaret Bergin,  
Plaintiff-Respondent,

vs.

Mae Ganley,  
Defendant-Appellant.

Action at Law.

ACTION AT LAW

APPEAL FROM NEW JERSEY SUPREME

COURT.

### BRIEF OF PLAINTIFF-RESPONDENT

#### THE FACTS

This is an appeal by the defendant-appellant (hereinafter referred to as the defendant), from a final judgment recovered in favor of the plaintiff-respondent (hereinafter referred to as the plaintiff) in the sum of Twelve Hundred Fifty (\$1250.00) Dollars (Case p. 59). The facts arise out of an automobile collision.

The plaintiff, while driving her automobile in the City of Passaic, New Jersey, on April 12, 1929, was run into by the automobile of the defendant. As consequences of the collision, she suffered injuries to her person, and her automobile was damaged. For the damages she sustained she sued. (See complaint, pp. 1, 2 and 3.) Issue was joined. (Pp. 3 and 4.)

The present defendant had also commenced an action for personal injuries in the Passaic District Court. Counsel for the plaintiff sought to remove the District Court action to the Circuit Court, but Collins & Corbin, attorneys for the defendant, objected to such removal on the ground that the same was not within the purview of P. L. 1928,

Chapter 152, Page 308, which provides only for the removal in cases where the demand is liquidated; nor would counsel at any time thereafter, when subsequently thereunto requested, consent to consolidate the Circuit and District Court actions.

The present counsel of the defendant were actively associated in the trial of the District Court action, and succeeded in moving the same on November 29, 1929 (the Circuit Court action not having at that time been reached on the Circuit Court calendar). When the cause was to be tried at the Circuit, the defendant asked leave to file a supplemental plea, the purport of which was to set forth new matter (case pp. 5 and 6), to the effect that on November 29, 1929, the defendant below had been plaintiff in an action in the Passaic District Court in a suit for personal injuries; that in the Passaic District Court a verdict had been rendered in favor of the defendant below, and that such verdict therefore constituted **res adjudicata** to the action then still pending at the Circuit.

Objection being made, the trial court denied defendant's motion, for reasons stated in its memorandum (p. 7), whereupon in due course the cause proceeded to trial. At the trial, counsel for the defendant also attempted to offer in evidence the record of the Passaic District Court. The offer was overruled (p. 40).

A verdict was rendered in favor of the plaintiff in the sum of Twelve Hundred Fifty (\$1250.00) Dollars (Case, p. 59), and judgment entered.

Defendant appeals and assigns the rulings of the court in the respects above mentioned as error. The reasons assigned will be argued together, as one.

## ARGUMENT

## I.

## THE ACTION OF THE TRIAL COURT WAS PROPER.

The action of the plaintiff was commenced in the New Jersey Supreme Court (p. 1). The defendant, if she desired, might have set up anything by way of counterclaim in that action in that court. The plaintiff, however, could not set up a counterclaim to the defendant's suit in the Passaic District Court, because her claim exceeded that court's jurisdiction, as is evident from her complaint and the jury's verdict rendered, pursuant to it (p. 59); nor could plaintiff have compelled the removal of the defendant's District Court action to the Circuit, in view of P. L. 1928, Chapter 152, Page 308, which provides only for the transfer to the Circuit Court in cases where the demand upon which the removal is sought to be based sets forth a liquidated demand. That Statute provides that:

"Whenever in any answer to any action brought in any District Court now or hereafter created under the provisions of the act to which this is a supplement, the defendant shall file any setoff, counterclaim, discount or recoupment for **liquidated damages**, wherein it shall be made to appear that the amount claimed in such setoff, counterclaim, discount or recoupment shall exceed the sum or value limited for the jurisdiction of said court, such action shall, upon application on behalf of the defend-

ant, accompanied by an affidavit of such defendant or his or her duly authorized agent, that he or she verily believes that the amount of such claim, when established by proof, will be greater than the sum or value limited for the jurisdiction of said court, and that said set-off or counterclaim, discount or recoupment is filed in good faith and not for the purpose of delay, upon order of the court, be transferred with the record thereof, and all papers filed in the cause, for hearing and determination, to the Circuit Court of the county in which such District Court is situate, which shall thereupon proceed therein as if the cause or matter had been originally commenced in that court; the record shall when necessary include a transcript of all entries and proceedings in the cause; **providing**, same shall not be transferred unless the judge of the Circuit Court to which it is intended to transfer said cause, shall, upon due proof, and four days' notice, which shall operate as stay of suit in District Court until application is disposed of, and permitting adversary to read in opposition ex parte affidavit or affidavits, make an order that he finds that there is reasonable cause to believe that the setoff, counterclaim, or other defensive action is founded on fact and that there is reasonable chance for success upon the trial of same by the party who files said setoff, counterclaim or other defensive action."

The theory of the proposed amended answer was that the verdict in the Passaic District Court constituted **res adjudicata**. **Res adjudicata** has been defined by our Court of Errors and Appeals as follows:

“But a matter is not **res adjudicata** unless there be identity of the thing sued for, of the cause of action, of the persons and parties, of the quality of the persons for and against whom the claim is made, and the judgment in the former suit be so in point as to control the issue in the pending action. To render a prior judgment **res adjudicata**, the record must show that the issue was taken on the same allegations which are the foundation of the second action. The test is whether the proof which would fully support the one case would have the same effect in tending to maintain the other. *Hoffmeier & Son v. Trost*, 83 N. J. Law, 358, 85 A. 221; *Mershon v. Williams*, 63 N. J. Law, 308, 44 A. 211.” *Smith v. Fischer Baking Co. et al.*, 7 N. J. Advanced Reports, 1054 (not yet officially reported), 147 A. 455.

Justice Trenchard, in the *Smith* case (*supra*), speaking for the court, went on to say:

“In *Gardner v. Raisbeck*, 28 N. J. Eq. 71, at page 75, the court says: ‘In *Behrens vs. Sieveking*, 2 M. and C., 581, the Lord Chancellor said that in order to support the plea it was necessary to show that the proceedings in which the plaintiffs were alleged to have failed were taken for the same pur-

pose as the suit in which the plea was filed; for, he adds, the **issue might have been the same, while the object was different**, and the circumstance that the matter had been tried, as a matter of evidence, could not be conclusive; that the defendant had to show that the subject matter was the same, **that the right came in question before a court of competent jurisdiction**, and that the result was conclusive, so as to bind the judgment of every other court.' ”

The court, in the same decision, referring to the case of *Ochs vs. Public Service Railway Co.*, 81 N. J. Law, 661, also said:

“The court therein also held that the cause of action is not the negligent act but the consequences following it, for, to support an action, there must be not only the negligent act, but a consequential injury; **the injury being the gravamen of the charge.**” (Bold ours.)

In the case of *Mershon vs. Williams*, 63 N. J. Law, 308, 44 A. 211, Lippincott, J., speaking for the court, said:

“\*\*\*\*\*The record of the former judgment only works an estoppel as to those matters capable of being controverted between the parties at the time of the proceedings in the action.” (Citing cases.)

Bearing these principles in mind, it is apparent that the action of the trial court in refusing to permit the proposed amendment was proper. It is

obvious that where several people are injured in a collision, and where property is also damaged, separate and distinct causes of action immediately arise and this fact is recognized by the trend of our legislation in that regard. (Smith vs. Fischer Baking Co., supra). We do not think that it can be seriously argued that in such a situation the legislature intended to permit the party sustaining a slight injury to rush into the District Court and there obtain a judgment which he could later set up as **res adjudicata** to an action which he knew must necessarily be instituted in an upper court by the other party, who had sustained grievous damages. The District Court could not, obviously, take jurisdiction of the suit of the party seriously hurt. It would therefore be necessary to institute suit in one of our upper courts.

This conclusion could properly be arrived at in the absence of P. L. 1928, Chapter 152, Page 208, supra. Certainly, since the enactment of this statute, the legislative intention is clear and unassailable, that the defense of **res adjudicata** could not be made available under the circumstances such as existed in this case. The legislative intent may be arrived at even more conclusively by a reference to P. L. 1925, Chapter 120, Page 341, which provides as follows:

“Whenever in any answer to any action brought in any District Court now or hereafter created under the provisions of the act to which this is a supplement, **the defendant shall file any set-off, counterclaim, discount or recoupment**, wherein it shall be made to appear that the amount claimed in

such set-off, counterclaim, discount or recoupment shall exceed the sum or value limited for the jurisdiction of said court, such action shall, upon application on behalf of the defendant, accompanied by an affidavit of such defendant or his or her duly authorized agent, that he or she verily believes that the amount of such claim, when established by proof, will be greater than the sum or value limited for the jurisdiction of said court, and that said set-off, counterclaim, discount or recoupment is filed in good faith and not for the purposes of delay, upon order of the court, be transferred with the record thereof, and all papers filed in the cause, for hearing and determination, to the Circuit Court of the county in which such District Court is situate, which shall thereupon proceed therein as if the cause or matter had been originally commenced in that court; the record shall, when necessary, include a transcript of all entries and proceedings in the cause; providing, same shall not be transferred unless the judge of the Circuit Court to which it is intended to transfer said cause, shall upon due proof, make an order that he finds that there is reasonable cause to believe that the set-off, counterclaim or other defensive action is founded on fact and that there is reasonable chance for success upon the trial of same by the party who files said set-off, counterclaim or other defensive action."

Prior to the enactment of P. L. 1928, Chapter 152, Page 208, supra, the District Court action of the defendant and the present action of the plaintiff could and would have been consolidated. Since the enactment of the 1928 amendment, such removal was rendered impossible. In the case at bar, the defendant can not deny that a formal attempt was made to remove the District Court action to the Circuit. The attempt by the plaintiff to have both actions tried together and consolidated was resisted successfully by the defendant, by her present counsel.

To permit the defendant to set up the defense of *res adjudicata* would, in effect, be depriving the plaintiff of any right to recovery whatever under the circumstances, and would deprive her of due process and the right to avail herself of the use of our courts, to which she is legally entitled, without question. Such a construction is impossible unless the court is compelled to find that P. L. 1928, Chapter 152, Page 208, supra, is unconstitutional and null and void, which construction of a proper statute is inconceivable.

As is judicially known, a litigant can not hope to have his cause heard in the Circuit Court before months have elapsed. To say that such a litigant should be foreclosed from having his day in court because the other party to the accident could obtain a speedy determination in the District Court would, we think, do violence to the intention of the legislative enactment. Such conduct is not only not contemplated, but should be completely discouraged for the abuse and injustice that would follow.

In addition to what has been said, it is obvious that the District Court could not have had jurisdiction of the cause of action of the plaintiff, nor could the plaintiff have conferred jurisdiction on that court by consent.

From the foregoing, it appears that two elements requisite to the application of the doctrine of **res adjudicata** were not present, namely, that the causes of action of the plaintiff were not the same as the cause of action of the defendant, and that the District Court could not have assumed jurisdiction of the causes of action of the plaintiff, so that the plaintiff's causes of action were not in controversy in that court. (Smith vs. Fischer Baking Co., supra; Mershon vs. Williams, supra.) The action of the trial court, therefore, in refusing to permit the proposed amendment was proper.

Its action in refusing to permit the record of the District Court in evidence was a logical sequence to its ruling on the proposed amendment.

"If the judgment record of the District Court offered in evidence was material at all, it could have been material only to support the defense of **res adjudicata**." (Smith vs. Fischer, etc., supra.)

The record of the District Court would have shown a cause of action entirely separate and distinct from the cause of action pending before the Passaic County Circuit of the New Jersey Supreme Court. If the amendment was improper, obviously any evidence tending to support the matter contained in it was irrelevant as having no

probative value whatsoever. (Smith vs. Fischer Baking Co., supra.) The action of the trial court in this regard, therefore, was also proper.

### CONCLUSION

For the reasons discussed, it is respectfully submitted that the action of the trial court in refusing to permit the proposed amended answer and in refusing to allow the record of the Passaic District Court to be admitted in evidence was proper, and that the judgment entered on the verdict of the jury should therefore be affirmed, together with costs.

Respectfully submitted,  
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