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TESTIMONY.

For Plaintiff.

For Defendant.

EXHIBIT.

NOTICE OF APPEAL.

Filed March 24, 1926.

New Jersey Supreme Court

ESSEX COUNTY CIRCUIT.

EDWARD KITTAY, *Plaintiff,*	*Action at Law.*
vs.	
JOSEPH CORDASCO, *Defendant.*	*Notice of Appeal.*

To Messrs. Pitney, Hardin & Skinner, attorneys for plaintiff.

SIRS:

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

Dated March 18, 1926.

Yours truly,

WM. GREENFIELD,
Attorney for Defendant.

Service of a true copy of the within Notice of Appeal is hereby acknowledged on this 18th day of March, A. D. 1926.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff.

Summons.

THE STATE OF NEW JERSEY TO JOSEPH CORDASCO.

(L. S.)

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

WITNESS William S. Gummere, Chief Justice of the Supreme Court at Trenton this eighth day of April, 1925.

EDWARD J. KELLEHER,
Clerk.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

COMPLAINT.

Filed April 15, 1925.

SUPREME COURT OF NEW JERSEY.

ESSEX COUNTY.

EDWARD KITTAY, *Plaintiff,* *vs.* JOSEPH CORDASCO, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiff, Edward Kittay, residing in the Borough of Manhattan, in the City, County and State of New York, says that:

FIRST COUNT.

1. The defendant resides in the County of Essex and State of New Jersey and conducts a jewelry business at 38 Cutler street, in the City of Newark, in the said county.

2. The plaintiff on October 10, 1924, for the mutual benefit and gain of the plaintiff and defendant, entrusted to the defendant three certain diamonds, having a total value of $2,111.40, to be safely kept and taken care of by the said defendant. The defendant gave to the plaintiff, as evidence of the delivery of the said diamonds to the defendant, a memorandum receipt, copy of which is attached hereto marked Exhibit A and hereby made a part hereof.

3. The defendant did not safely keep and did not take care of the said diamonds, but was

guilty of negligence in that behalf, in that the said defendant did carelessly place the said three diamonds in his trousers pocket and with said diamonds so carelessly kept, did attend an auction sale, did leave said auction sale in an automobile accompanied by a number of other men and did take lunch with some or all of said men at a public restaurant, failing to exercise, in the meantime, due precaution and reasonable care for the safety and protection of said diamonds. As a result of said negligence on the part of the defendant, the said diamonds were lost by him and the plaintiff has been unable to recover the same or any of them.

The plaintiff demands as damages on this First Count the sum of $2,500.00, with costs of suit.

SECOND COUNT.

4. The plaintiff repeats paragraph one of the First Count.

5. On or about October 10, 1924, the plaintiff delivered to the defendant three certain diamonds of a total value of $2,111.40.

6. The defendant agreed to return the said diamonds to the plaintiff upon demand.

7. On October 11, 1924, and at numerous times since said date, the plaintiff demanded and has demanded of the defendant that he return the said diamonds, but the defendant then and at all such times has refused to return the same.

The plaintiff demands as damages on this Second Count the sum of $2,111.40, with lawful interest from October 11, 1924, and the costs of this suit.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Complaint.

EXHIBIT A.

MEMORANDUM

From
E. Kittay, New York, Oct. 10, 1924.
87 Nassau St.

To Joseph Cordasco,
Newark, N. J.

These goods are sent for your inspection and remain the property of
and are to be returned on demand. Sale takes effect only from date of approval of your inspection.

1 Br. 2.30 cts. at $365 per ct.
2 Br. 3.80 " at 425 " "
if stone 1.81 is sold price 340 ct. Net
(Signed by Jos. Cordasco)

I hereby appoint and depute Charles F. Hummel to serve the within writ.
Witness my hand and seal this
8th day of April, 1925.

HARRY B. O'CONNELL,
Sheriff.

By CONRAD DEUCHLER,
(SEAL) Under Sheriff.

Sheriff Fees $3.78.

Served the within Summons and Complaint April 9, 1925, personally upon Joseph Cordasco, the within-named defendant, by delivering to him a true copy thereof at his place of business, 290 Fifteenth avenue, Newark, N. J.

HARRY B. O'CONNELL,
Sheriff.

By CHAS. F. HUMMEL,
Special Deputy.

ANSWER.

Filed April 24, 1925.

The defendant, Joseph Cordasco, residing in the City of Newark, County of Essex and State of New Jersey, answering the plaintiff's complaint, says:

ANSWER TO FIRST COUNT OF PLAINTIFF'S COMPLAINT.

1. The defendant admits Paragraph 1 of the First Count of the plaintiff's complaint.

2. This defendant admits Paragraph 2 of the First Count of the plaintiff's complaint.

3. This defendant denies so much of paragraph 3 of the First Count of the plaintiff's complaint wherein it avers that this defendant did not safely keep and did not take care of the said diamonds but was guilty of negligence in that behalf.

a. This defendant admits so much of Paragraph 3 of the First Count of the plaintiff's complaint, wherein the plaintiff avers that the said defendant did attend an auction sale, did leave said auction sale in an automobile accompanied by a number of other men and did take lunch with some or all of said men at a public restaurant; but denies that he failed to exercise due care and precaution for the safety and protection of said diamonds; and denies that as a result of said negligence on the part of the defendant, the said diamonds were lost by him; but avers that the said diamonds were stolen out of the defendant's pocket without fault or negligence on this defendant's part.

Answer.

ANSWER TO SECOND COUNT OF PLAINTIFF'S COMPLAINT.

4. This defendant hereby repeats the defendant's answers to Paragraphs 1, 2 and 3 of the First Count of the plaintiff's complaint.

5. This defendant admits Paragraph 5 of the Second Count of the plaintiff's complaint.

6. This defendant admits Paragraph 6 of the Second Count of the plaintiff's complaint.

7. Answering Paragraph 7 of the Second Count of the plaintiff's complaint, this defendant admits that the said request was made by the plaintiff for the return of said diamonds, but this defendant avers that he was unable to return the said diamonds by reason of the fact that the said diamonds were stolen out of this defendant's pocket without any negligence on his part; and denies that he has refused to return the same, but avers that he was unable to return the diamonds, by reason that the said diamonds were stolen out of this defendant's pocket without any negligence on his part, and therefore this defendant avers that the said plaintiff is not entitled to recover for the value therefor.

WILLIAM GREENFIELD,
Attorney for Defendant.

Reply.

REPLY.

Filed May 8, 1925.

The plaintiff denies each and every allegation contained in the defendant's answer and joins issue with the defendant in respect of both accounts of the complaint.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Postea.

POSTEA.

NEW JERSEY SUPREME COURT.

EDWARD KITTAY, *Plaintiff,* vs. JOSEPH CORDASCO, *Defendant.*	*Action at Law.* *Copy of Postea and Judgment.*

This case was tried before Judge Worrall F. Mountain, to whom the said case was duly referred for trial, with a jury, at the Essex Circuit, on February 23, 1926.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for Two Thousand One Hundred Eleven ($2,111.) Dollars and Forty (40) Cents.

Whereupon it is adjudged that the plaintiff, Edward Kittay, do recover of the said defendant, Joseph Cordasco, the sum of two thousand one hundred and eleven dollars and forty cents damages, together with his costs, which have been taxed at the sum of forty-nine dollars and forty-two cents, making in the whole the sum of two thousand one hundred and sixty dollars and eighty-two cents.

Judgment entered February 25, 1926.

$2,111.40
49.42

$2,160.82

WM. S. GUMMERE,
C. J.

A true copy.
EDWARD J. KELLEHER,
Clerk.

JUDGMENT.

NEW JERSEY SUPREME COURT.

EDWARD KITTAY, *Plaintiff,*	*Action at Law.*
vs.	*On Postea.*
	$2,111.40
JOSEPH CORDASCO,	*49.42*
Defendant.	*$2,160.82*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand one hundred and eleven dollars and forty cents, besides costs to be taxed *nisi.*

Entered February 25, 1926.

On motion of

PITNEY, HARDIN & SKINNER,
Attorneys.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Opening.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

February 19, 1926.

EDWARD KITTAY *vs.* JOSEPH CORDASCO.	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appear Pitney, Hardin & Skinner (by Shelton Pitney).

For the defendant appears William Greenfield.

A jury is called and sworn.

Mr. Pitney opens for the plaintiff.

Mr. Greenfield opens for the defendant.

Mr. Pitney: I notice there is a typographical error in the transcript on the schedule attached to the plaintiff's complaint.

The Court: The exhibit, you mean?

Mr. Pitney: Yes, your Honor.

The second item is "Two Brilliant 3.80 karats," which should be 3.83 karats at $325 per karat, and I ask leave to amend the complaint to that extent, changing it from 3.80 to 3.83.

Mr. Greenfield: No objection.

Edward Kittay, direct.

EDWARD KITTAY, plaintiff, sworn in his own behalf.

Direct examination by Mr. Pitney.

Q You are the plaintiff in this case? A Yes, sir.

Q What is your business? A Buying and selling diamonds.

Q Your office is where? A 87 Nassau street, New York.

Q State what you did on October 10, 1924? A On October 10, 1924, I delivered, on approval, to Joseph Cordasco, three diamonds, which he was to try to sell to his customers.

Q Where did you make that delivery? A At 38 Cutler street, at his place of business.

Q Did Mr. Cordasco give you a receipt for these diamonds? A Yes, sir, he signed a receipt.

Q I ask you whether that is the receipt? A Yes, sir, that is the original receipt; that is his signature.

Q Did you see him sign this?

Mr. Greenfield: Maybe we will admit that if I can see it.

Mr. Pitney: Very well. Here it is, Mr. Greenfield.

Mr. Greenfield: It is admitted.

Mr. Pitney: May I tear this page out of this memoranda?

The Witness: Yes.

Mr. Pitney: Is that satisfactory to the defendant's counsel?

Mr. Greenfield: Yes.

Mr. Pitney: I offer this page in evidence.
(Same is marked Exhibit P. 1.)
(Exhibit P. 1 read to the jury.)

Q Had you previously had business with Mr. Cordasco? A Yes, sir.

Q State what that was. A Why, I sold him several articles before that, but about a week before he asked me for a stone of about two karats, and I delivered to him two stones, together weighing 3.83 karats, one weighing two karats and one weighing a little bit less. I told him they must both go together at $325 a karat. Well, he showed them to his customer and he told me, he said he might be able to sell one, but I couldn't sell one; I wanted him to sell both, so I took the stones back and at that time he told me he might be able to sell a two and a half karat stone. So, he returned those stones the week before.

Q He had returned two stones, one weighing about two karats and one weighing a little less than two karats, the week before? A Yes, sir. Those are two stones that made 3.83 karats.

Q Then, he said he might have a call for a two and a half karat stone? A Yes, sir.

Q So, you returned on October tenth, and what did he ask you to leave with him on that date? A When he returned the other two stones he told me he could have sold one, so when I returned the following week with the larger stone I left him the 2.30 stone and I called for the two and a half karat stone, as that was the nearest I could furnish at the time, and I delivered two stones and I told him if he could sell one of them he could sell one at an advance of fifteen dollars a karat, and I asked

him which one he wanted, and he said, "You better leave both here, because I don't know which one my customer will want," so I left him the two stones, 3.83 karats, and one stone of 2.30 karats, making three stones in all.

Q What happened while you were in the store besides signing this memoranda receipt and the conversation you have given us? A Well, while I was in there a young man came in and told him they were going to auction off some furniture and fixtures in a banking firm and Mr. Cordasco said he would like to buy something. So, I said, "You better be careful of those diamonds," and he had put the diamonds in his pocket at that time.

Q Did you see him do that? A Yes, sir.

Q Which pocket? A His trousers pocket. I know that, and I told him to be careful, and he patted his pocket and said, "Don't you worry; I am going over to see my customer and I may have time to visit the auction."

Q What time was it you gave him those diamonds on October tenth? A In the neighborhood of noon-time.

Q Did he leave before you did from the store? A I left the very first.

Q Was anybody there in the store with him when you left? A There were two other gentlemen.

Q One of them was the one who had come to announce the auction? A No, I was in the store first and Mr. Cordasco was not there; his wife was there, and while I was there he came in with two other men, and after I delivered the stones to him the young man came in and asked him about the auction.

Q Have you got the stones back? A No, sir.

Q Have you ever been paid for them? A No, sir.

Q Have you ever been paid for any of them? A No, sir.

Q What did Mr. Cordasco report to you? A He called me up on the telephone and told me he had lost them.

Q When was that, the same day or the next day? A The next day. When I got in the next morning there had been a telephone message from Mr. Cordasco and I called up to find out what he wanted, and he told me about the stones.

Q What did he say? A He said the stones were lost. I said, "It is too bad. What are you going to do about it?" He said, "Well, I can't do anything about it."

Q Did you come over to Newark then? A Yes, sir.

Q Did you talk to Mr. Cordasco? A Yes, sir.

Q Tell what you did that day when you came back to Newark. A I came back to Newark in company with a Pinkerton detective to get a full report of what happened, and Mr. Cordasco reported that he lost the stones when he went to the auction and bought several things and then he went to Perri's restaurant and ate, and when he came out he said he felt in his pocket to see if the diamonds were there, and they were gone, and he went all over trying to find them again, and I asked him what he intended to do by me, and he said that I would have to look for myself, that it was my hard luck that he lost the diamonds.

Q You never got the diamonds back? A No, sir.

Edward Kittay, cross.

Q Were you the owner of these diamonds or not? A No, sir, I had them on memoranda from other diamond dealers.

Q You have had to pay for the diamonds? A I have had to pay for them since.

Mr. Greenfield: I object to that as a question of law, to determine whether he has to or not.

The Court: I will admit it. It is a question of fact.

Q Have you paid for the diamonds? A I have paid for them in cash.

Q In full? A Yes, sir.

Cross examination by Mr. Greenfield.

Q Do you carry insurance?

Mr. Pitney: I object.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Did you pay personally for those diamonds? A By check; yes, sir.

Q I thought you said a moment ago you paid by cash? A My check is as good as cash.

Q How long have you been in business? A Three years.

Q Why did you say a moment ago "cash"? A Well, I considered my check as cash.

Q Why did you say on cross examination it was by check. You know the difference between cash and a check, don't you. You know the

difference between a check and cash, don't you? A Yes, sir.

Q You did know the difference when your counsel asked you whether you paid by check or cash and you said by cash, and when I asked you you said by check. You knew the difference of that, didn't you? A Yes, sir.

Q Did you pay by cash or check? A By check.

Q Have you your check here? A I have not.

Q From whom did you get those diamonds? A Two other diamond dealers.

Q (By Mr. Pitney.) State what their names are. A M. B. Altman, 65 Nassau street, and Samuel Moskowitz, 6 Maiden Lane.

Q (By Mr. Greenfield.) Samuel Moskowitz? A Yes, sir.

Q Did you receive any reimbursement for those diamonds from anybody?

Mr. Pitney: I object to that as not making any difference.

The Court: Sustain the objection.

(Argument.)

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q How long have you been dealing with Mr. Cordasco? A Previous to that, just for a very short time.

Q What do you say is a short time? A A couple of months.

Q You had left other diamonds with him? A On memoranda.

Q Any way? A I sold him some.

Q Were any of them on memoranda? A These were the only ones I remember he had on memoranda.

Q How about the ones he returned to you? A Those are the same stones.

Q Those were the same stones? A Yes, sir. He had two stones.

Q Did he return some stones to you? A Those same two stones he returned two of the three. He said he lost—

Q He retained? A Returned two of the three which he lost. He had those two a week previously and he returned them and then I gave them back to him again on memoranda.

Q That was the same stones? A Yes, sir.

Q The first diamonds you delivered to him, were they on memoranda? A Yes, sir.

Q Also on memoranda? A Yes, sir.

Q Did you have any trouble the first time to get the stones? A No, sir.

Q They were there when you called for them? A Yes, sir.

Q Did he return them to you at your place of business? A No, sir; I called for them.

Q He dealt with you after that, didn't he? A No, sir.

Q Or did he pay you some money since? A He owed me some money on a note for some goods he had purchased previously.

Q That was paid? A Yes, sir.

Q When you came back with the detective, as you say, did he tell you a story of how it happened, did he? A Yes, sir.

Q Did you attempt to verify it? A We went to police headquarters to see if he reported the loss.

Q Did he. A He reported a loss, yes, sir.

Q Did you also find out he put an ad in the public press advertising for them? A That I didn't look for.

Q Did he tell you? A He said, so, yes, sir.

Q Did you look for it? A No, sir.

Q Why did you go to police headquarters to ascertain whether he reported the loss?

Mr. Pitney: I object as improper cross examination.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Pitney: I offer in evidence the interrogatories and answers thereto propounded to the defendant.

Mr. Greenfield: No objection.

(Interrogatories are marked Exhibit P. 2.)

(The answers to interrogatories are marked Exhibit P. 3.)

(Exhibits P. 2 and P. 3 read to jury.)

PLAINTIFF RESTS.

Mr. Greenfield: I cannot see any negligence proven on the part of the defendant in this suit. The plaintiff claims he delivered to us the diamonds. Is that negligence if I carry money in my pocket, and if I do, to lose it. Assuming there is negligence, before the plaintiff can recover there must be proven gross negligence and not negligence alone.

(Argument.)

James Pathe, direct.

Mr. Greenfield: The plaintiff must fail unless he can show that the loss was due to some want of care on the part of the defendant or that some negligent act or omission on the part of the bailee, cooperated with the buyer to produce the loss. There is nothing in this case to show that.

The Court: That is not the law in this State. The reason is, probably, because when a man gives a chattel on goods to another he loses entire control of them and then when he comes back and says, "I have lost your goods," and then casts the burden of proving it upon the man who loaned the goods to him, it is a little too much.

In *Jackson* v. *McDonald*, 70 N. J. L. 594, it holds that when chattels are given to another and the chattels are destroyed, or are returned injured, or are not returned at all, negligence is presumed as the cause of the loss and the burden of proving that is not true is upon the defendant.

I will deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

JAMES PATHE, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Mr. Pitney: Is this to prove that Mr. Cordasco advertised in the newspapers following the loss?

Mr. Greenfield: Yes.

Mr. Pitney: I will admit that. I will admit it. It has no relevancy.

The Court: What has that to do in showing care?

Mr. Greenfield: In showing good faith, that we have done everything possible so, perhaps, the jury will not draw any wrong inference.

The Court: It is admitted and I do not think there is any use in proving it.

Mr. Greenfield: Will it be admitted as to the date?

Q When was that advertised? A I believe it was the twelfth.

Q The twelfth of October? A Yes, sir.

Q 1924? A Yes, I think so. I can open the book here.

Mr. Pitney: I object to the question as immaterial and irrelevant.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Greenfield: I will call for the Star-Eagle.

Mr. Pitney: It is admitted you advertised in the Star-Eagle.

Mr. Greenfield: I also ask for the date.

Mr. Pitney: I object.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Greenfield: May I have the witness sworn to keep the record straight?

The Court: What has that to do with the burden of proving negligence? I do not get your point of view as to putting this in.

Mr. Greenfield: I think it has to do with this: Here is a case where we are accused of retaining diamonds, and I say we have a perfect right to show the interest of the defendant, that is, every effort was made to locate the diamonds and if the Court says that is a question of fact for the jury I say that should also go to the jury for them to determine.

Mr. Pitney: We have not charged him with keeping the diamonds, we have charged him with losing the diamonds and failing to pay for them.

The Court: Swear the witness.

FRED SILBON, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q What is your business or occupation? A In the credit department of the Newark Star-Eagle.

Q Have you a record of advertising for lost goods? A Yes, sir.

Q What date was that?

Mr. Pitney: I object.

The Court: I will admit it.

James H. Manning, direct.

Q What date? A October eleventh.

Q By whom? Who advertised it? A Cordasco.

Q Cordasco? A Yes, sir.

Q What is the contents of the ad?

Mr. Pitney: I object.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Diamonds.

Q What was the merchandise advertised for? A Three loose diamonds lost at 28 or 38 Cutler street.

Cross examination waived.

JAMES H. MANNING, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q You are connected with the Police Department of the City of Newark? A I am.

Q What department? A Detective Bureau.

Q Have you charge of the reports of lost and stolen articles? A No, I have not.

Q Have you a record or any reports made to you of lost or stolen articles on October tenth or eleventh, 1924? A I have.

Q Was that report made to you personally? A Well, it was not made to me personally, it was made through police channels.

Q Were you there? A No, I was not there.

Q What record have you there? A I have a record here that it was reported to one of the precincts. Then, I interviewed Mr. Cordasco at his place of business 28 Cutler street on October eleventh.

Q You interviewed him? A Yes, sir.

Q Did you make any effort to locate the diamonds?

Mr. Pitney: I object to that as immaterial.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What, if anything, did you do to try and locate the diamonds? A We left our report with the record bureau in the event of any person disposing of any loose diamonds in any pawn shop in the City of Newark or elsewhere.

Q Did you locate them? A We did not.

Cross examination waived.

ANTHONY R. FINELLI, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q You are an attorney and counsellor-at-law of this State? A Yes, sir.

Q Been practicing how long? A Twenty-one years.

Q Do you know Mr. Joseph Cordasco? A Yes, sir.

Q Did you have charge of some auction sale on the tenth of October, 1924? A Why, I was the attorney for the receiver in a certain cause and was present at the sale in my capacity as the attorney.

Q Did you see Mr. Cordasco there? A Yes, sir.

Q How long did he remain there? A My recollection is that the sale lasted one hour, approximately.

Q Did you accompany Mr. Cordasco after he left the place? A I did.

Q How? A In a Chevrolet.

Q Who drove that car? A My daughter.

Q What seat did Mr. Cordasco occupy? A I occupied the rear seat.

Q With him? A Alone. Mr. Cordasco occupied the front right seat of my daughter.

Q Is your daughter here? A No.

Q Where is she? A At school.

Q From the auction place where did you go with Mr. Cordasco? A We left the east side of Cutler street and went in a northerly direction to Park avenue; we then turned up the hill west to the so-called Parkway Garage; that is at the northeast corner of Parker street and Park avenue, Newark.

Q And then, where did you go? A I and my daughter left; I don't know whether Mr. Cordasco left or whether he was with us. We merely went up there to bring the car back at the place where the car was kept all the time.

Q Did you see him after that, after he left you on that day, did you see him again? A My

recollection is indistinct. It may have been the very same afternoon.

Q Yes. A I think there is no doubt about it that it was the very same afternoon.

Q Where did you see him? A On Branford Place.

Q Did you go anywhere with him? A I made an appointment to go.

Q Did you meet him? A I did.

Q Where did you go after you met him, following the appointment? A As I recollect I went with the party first down to the rear of the City Hall and I think I stopped at the corner where Director Brennan has his office, and I think Mr. Cordasco and his party came from Police Headquarters or from that direction. We then got into the automobile and went up to the place where the sale took place.

Q What did you do there? A Why, I had the key, I had telephoned home for the key to the place and opened the door and admitted Mr. Cordasco and his party; I don't know who the other person was.

Q What did he do in there, did you observe? A Well, I should say stirring up papers and articles which may have been on the floor.

Q Do you know what he wanted you for to go up to the place? A Yes, sir.

Q What was that? A He had informed me he wanted to make a search of the store.

Q A search for what? A He informed me he had lost some diamonds.

Q Do you know whether he found any there? A No, I think the search was fruitless; not successful.

Q Where did you go after that? A I don't recollect. I just closed the store, locked it up, and my impression is I returned to my office.

Anthony R. Finelli, cross.

Q On the morning of the sale how big a crowd was there, do you know? A I should say there were at least a minimum of twenty persons.

Cross examination by Mr. Pitney.

Q What was the address of the store in which this sale was taking place? A 20-22 Cutler street, Newark.

Q That is on the same side of the same block as Mr. Cordasco's place of business, isn't it? A That is my impression, if Cordasco's place is on the west side of the street.

Q 20 Cutler street is a block in the direction this side of Park avenue, isn't it? A Yes, sir.

Q Were you present at 20 Cutler street when Mr. Cordasco came in? A Yes, sir.

Q You saw him come in? A I saw him in there.

Q Did you see him come in? A I do not recollect.

Q You do not know whether you were there when he arrived or not? A I was there.

Q Did you see him come in? A I don't recollect.

Q How do you know you were there when he came in? A We conducted the auction of the automobile on the street and then the party left the street to continue the auction of the office fixtures and other property inside the store on the opposite side of the street.

Q Who bought the automobile? A Mr. Cordasco.

Q Were you there when he was the successful bidder for the automobile? A Yes, sir.

Q Who was in charge of taking in the money for the things knocked down at auction? A Mr. Rizzoli, the trustee.

Q Did you see Mr. Cordasco take money out of his pocket to pay for the automobile? A No.

Q What time that morning of the auction did you arrive at 20 Cutler street? A My best recollection is it was a few minutes before eleven. I think the matter was set down for eleven o'clock.

Q You left there about one o'clock? A I left there at twelve o'clock.

Q So, you left with Mr. Cordasco? A Yes, sir.

Q You stated on your direct examination that you saw Mr. Cordasco that afternoon on Branford Place. Was that by chance or by appointment? A By chance.

Q Where is your office? A It is in the National State Bank Building, 810 Broad street, right opposite Branford Place.

Q When was it you made this appointment you refer to? A That very afternoon.

Q When you ran into him by chance on Branford Place? A Yes, sir.

Q Is Mr. Rizzolo here this morning? A I do not see him.

Q How old is your daughter? A Nineteen.

Q Did she have a driver's license? A Yes, sir.

Q What model Chevrolet was it Mr. Cordasco bought? A Well, it was a 1923 touring.

Q Open car? A Yes, sir.

Q Five-passenger? A Yes, sir.

Q No extra little seats in the back? A No, sir.

Joseph Cordasco, direct.

Q What else did Mr. Cordasco buy, if anything? A Office partitions, I should call them, office furniture, a typewriter, and probably other articles.

Q He bought a desk, didn't he? A I remember the desk, yes, sir.

Q Where did you leave Mr. Cordasco that day after the sale? A My recollection is it was at the Parkway Garage, Park street and Park avenue, Newark; we may have walked down to Mt. Prospect avenue.

Q Did you see him get into any car after you left him? A I don't remember.

Q Did you walk from the Parkway Garage? A Yes, sir.

Q Where did you walk to? A I walked east towards my home.

Q On what street? A Mt. Prospect avenue.

JOSEPH CORDASCO, defendant, sworn in his own behalf.

Direct examination by Mr. Greenfield.

Q Where do you live? A 390 Central avenue.

Q Newark? A Yes, sir.

Q How long have you been in Newark? A Twenty-five years.

Q What is your business? A Jeweler.

Q How long have you been in the jewelry business? A Eighteen years.

Q Where was your place of business on the tenth day of October, 1924? A 38 Cutler street.

Q How long have you been at 38 Cutler street? A That business, you mean?

Q Yes. A Fourteen years.

Q Your place of business is where today? A 290 Fifteenth avenue.

Q And your business is that of a jeweler? A Yes, sir.

Q General jewelry? A General jewelry.

Q Do you know Mr. Kittay? A Yes, sir.

Q Have you done any business with him? A I did.

Q About how long? A About two months it was before I took the diamonds.

Q Did you have any other diamonds belonging to him? A Yes, sir.

Q Besides those that were lost, did you? A I owed him some notes.

Q All right. You paid them? A Yes, sir.

Q What were those notes for? What did you give them for? A For a diamond wedding ring and a few other stones, I don't know, amounting to $300 or $400.

Q Now, on the tenth day of October he delivered some diamonds to you, did he? A Yes, sir.

Q That is 1924? A Yes, sir.

Q The diamonds that are in question mentioned in the memoranda. That is right, is it? A Yes, sir.

Q What time of day was it when he delivered those diamonds to you? A A little before eleven.

Q Where was it he delivered them? A 38 Cutler street.

Q At your place of business? A Yes, sir.

Q Who was there at the time he delivered those diamonds to you? A Me and my wife and Mr. Kittay.

Q Who else? A Nobody else.

Q Was your brother there? A That's right, yes, sir.

Q Where is your brother now? A Dead.

Q When did he die? A Six months ago.

Q Did you have those same diamonds before in your possession? A Yes, sir.

Q How long before the tenth day of October, 1924? A About a week before.

Q What did you do? A Returned them back.

Q Why did you return them back? A I didn't like the color.

Q Then, were there any other diamonds left with you on the tenth day by Mr. Kittay? A When I returned the two diamonds I ordered one perfect one and he said, "I will bring it to you as soon as I get it in," and on the tenth day of October he brought the stone, the one I was interested in, and in the meantime he said, "Why don't you take two stones and sell them by one, than two." I bought those stones and I says, "I don't want to keep them in stock because they are a large size," and I says, "If you want to leave them here, all right, but I have no use for them, the only one I gave you an order for is a perfect stone," and he left the three stones with me that day.

Q When he felt those three stones with you what did you do with them? A I put them in my pocket. I had an order for one stone and they were in two separate parcels, one parcel with two stones and the other parcel had one stone, and I had the two together and I put them in my front pocket here (indicating).

Q The same pocket in which you keep your money—that is, when you have any? A No, a different pocket.

Q Why did you put it in a different pocket? A To make sure if I ever took any money out I wouldn't drop them.

Q Was Mr. Kittay present when you put those stones in your pocket? A Yes, sir.

Q Did he say anything to you? A No.

Q After you put them in your pocket did you go any place? A I was ready to deliver those stones.

Q Yes. A And I walked out of the door and I seen an auction going on three or four houses away from me, at 28-20, and this bank was an uncle of mine, the one that went bankrupt, and I knew the fixtures very well, and I was interested in some fixtures.

Q Yes. A So, I passed by and someone told me that an auction is going on today, because I wanted to buy some fixtures, so I walked in and stood by the rear office until the auction started.

Q Who was with you? A My brother, the one who is dead, and Mr. Verniro.

Q Did you buy anything at the auction? A Yes, sir.

Q What did you buy? A An automobile, a rolltop desk, a typewriter and a few chairs and the partitions.

Q How long had you remained in that auction place? A Well, I recall up until about one o'clock.

Q Then, where did you go? A We started in the Chevrolet automobile, me, Mr. Finelli and his daughter and drove the automobile up to Park avenue and to the Ridge street garage.

Q Who drove the automobile? A Mr. Finelli's daughter.

Q After you drove over with the automobile to that Park avenue garage, whatever it is, where

did you go from there? A I recall from there we walked down to my place of business.

Q With whom? A Mr. Finelli and I, nobody else.

Q Where did your brother go? A They left us over near the auction place.

Q Your brother and your friend did not go along in the Chevrolet car? A No.

Q But you met your brother and Verniro? A Yes, sir.

Q After you came back? A Yes, sir.

Q After you met him where did you go? A I had my automobile, not the Chevrolet, the one I had before.

Q The old one? A Yes, right in my business, and I went downtown and had some lunch.

Q Where did you have your lunch? A Down at Mr. Perri's restaurant.

Q Where is that? A Halsey street near Branford Place.

Q Yes. A Yes, sir.

Q Who was with you in your automobile when you went to Perri's? A Mr. Verniro, my brother, and I recall I took down counsel, too; Mr. Finelli down to his office and Mr. Rizzolo, too, as far as I remember.

Q Did you go into Mr. Perri's to have lunch there? A Yes, sir.

Q How long did you stay there? A About after two, about twenty after two.

Q From the time that you received those diamonds and put them in your pocket up to the time that you went into Perri's lunch did you ever take those diamonds out to look at them? A No.

Q Did you take them out of your pocket to show them to anyone? A No.

Q Are you sure they were not in the pocket where you kept your money? A No.

Q When did you first discover the loss? A After I had lunch in Mr. Perri's restaurant, and as I walked out ready to deliver those diamonds I told Mr. Verniro and my brother, I said, "I am going to deliver those diamonds, one of the three," and, of course, I was reminded to put my hand in my pocket and I did not find the diamonds in there.

Q Did you examine your pockets? A Yes, sir.

Q Were there any holes in the pocket? A No.

Q Are you sure? A Positively.

Q Were there any holes at the time you put the diamonds in your pocket? A No.

Q After you discovered the loss what did you do? A I told Mr. Verniro, I said, "Let's go and look for Mr. Finelli."

Q Where did you go? A I hurried back to locate the key to the place where the auction took place.

Q Did you find anybody? A So, I walked along Market street right in front of the Kinney Building on Market street and Broad street and I found Mr. Rizzolo and I asked him, "Have you the key to the place?" and he said, "No, Mr. Finelli has the key." I said, "Where is Mr. Finelli?" He said, "Having lunch down in the cafeteria." So, I went downstairs and he was having lunch at that time and I says, "Have you the key to the place?" I told him, I said, "I missed some diamonds and would try to locate them up there."

Q Did you go with Mr. Finelli to some place? A Mr. Finelli answered, "Wait until I get

through with my dinner and I will go along with you."

Q Did you go? A He came out and we took my automobile up to the place.

Q With whom? A Me, Mr. Finelli, and my brother.

Q What did you do when you went up there? A Well, there were a lot of papers on the desk and the place was so dirty I kept on moving every piece of paper in the place to try and locate the diamonds.

Q Did you find them? A No.

Q Where did you go next, did you examine the automobile? A No, from the auction place I went to see the automobile on Park avenue thinking maybe I dropped them in the automobile, and I looked all over the seat there with Mr. Finelli.

Q Did you find it? A I couldn't find anything.

Q From there where did you go? A Downtown to headquarters.

Q Did you report it? A Yes, sir.

Q After you reported it, did you see any officers, did any officers call to see you? A Yes, sir.

Q Do you remember Officer Manning, this gentleman here? A I think I do.

Q Was he there to see you? A They all look alike; there was some officer there from headquarters.

Q After the police officer came to see you where did you go next, if you did go anywhere? A From headquarters I went down to Perri's restaurant and asked Mr. Perri that I had lunch there and I missed some diamonds and wondered if I dropped them in his place. So, Mr. Perri

said, "Let's look for them," and he started to sweep up all over the place and took me in the back of the kitchen and looked in the garbage cans and dumped them and went little by little to try and see if he could find them in the ash can; I think we was there three-quarters of an hour, our man, and Mr. Perri's man.

Q Did you find them? A We didn't find them.

Q From there did you go any other place? A Not the same day; I went home.

Q Where did you go the next day? A I went down to report it to the Star-Eagle and the Evening News for three times.

Q And advertised for them? A Yes, sir.

Q Did you ever get any report or any reply? A No.

Cross examination by Mr. Pitney.

Q You expected to show those three diamonds to Mr. Insabella and his two brothers, did you not? A Yes, sir.

Q While Mr. Kittay was in your place of business at 38 Cutler street at the time he delivered the diamonds to you, who else was in your place of business? A My wife and I and Mr. Verniro and my dead brother.

Q Your brother, who died, and Mr. Verniro came in while Mr. Kittay was there, didn't they? A I don't remember; I think they were there. I don't remember, but they were in there while the transaction with Mr. Kittay took place.

Q While you were transacting the business they were in there, so they saw Mr. Kittay give you the diamonds? A Yes, sir.

Q They saw you put the diamonds in your pocket? A I don't know whether they did or not.

Q They were there when you put the diamonds in your pocket, were they not? A Yes, sir.

Q You have an office safe in your office, haven't you? A Yes, sir.

Q When did you hear about the auction, that there was going to be one? A The same hour.

Q While you were in your store there? A No, as I went out.

Q You do not seem to remember that Mr. Kittay, when he heard in your presence that there was going to be an auction, warned you to be careful of the diamonds, in your presence? A No, he didn't say that.

Q This auction sale was to be held at 20 Cutler street, wasn't it? A Yes, sir.

Q On the same side of the same block as your place of business was? A Yes, sir.

Q And Mr. Insabella's residence is at Hillside, New Jersey? A Yes, sir.

Q That is in Union County, isn't it? A Yes, sir.

Q So that instead of using your office safe, which was right there in your office, in order to have the diamonds about you that you were going to show to Mr. Insabella in Union County, you went to a store in the same block with the diamonds in your pocket? A Yes, sir.

Q And after the auction sale you came back to the store, didn't you? A No.

Q You said so on direct examination? A No.

Q Where did you go from the Parkway garage? A I walked down in front of my place and took my automobile and went downtown.

Q You went back to the front of your store? A Yes, sir.

Q That was some time around or just after one o'clock? A I imagine after one.

Q You had gone to the auction, or received the diamonds from Mr. Kittay just before eleven, hadn't you? A Yes, sir.

Q You did not get through luncheon until about 2:20? A Yes, sir.

Q When did you discover the loss of the diamonds first? A After having lunch.

Q It was later than 2:20 when you discovered the loss of the diamonds? A I recall after two.

Q It was after you left the restaurant? A Yes, sir.

Q And when you were out on the street? A Right in front of Mr. Perri's restaurant.

Q On Halsey street? A Yes, sir.

Q Did you go to see Mr. Insabella that day at Hillside? A No, sir.

Q Did you go to see either of his brothers? A No, sir.

Q At the time you took the three diamonds from Mr. Kittay that morning you said something to him about keeping one of the diamonds for your wife, didn't you? A No, sir.

Q Your wife was present, wasn't she? A No, sir.

Q Wasn't your wife present at this conversation? A Yes, sir.

Q Didn't you say something about keeping one of those diamonds for your wife, if you sold the other two? A No, sir; because I returned two.

Q Is your wife in court? A No, sir.

Q She is alive still, isn't she? A Yes, sir.

Q How much did you pay for the Chevrolet at the auction? A $190.

Q Did you pay for it in cash? A No, sir.

Q Did you make a deposit on it? A No, sir.

Q You made no deposit? A No, sir.

Q Did you make a deposit on the desk? A No, sir.

Q Or on the chairs? A No, sir.

Q Or on the partitions? A No, sir.

Q You made no deposit on anything you purchased at the auction? A After the auction was over I gave Mr. Rizzolo a check, in front of the door. I don't remember how much deposit I gave.

Q Were you carrying your check-book with you that day? A Yes, sir.

Q Where were you carrying that? A I had a blank right here (indicating).

Q Which pocket? A My coat pocket.

Q Where were the diamonds? A In this pocket here (indicating).

Q What suit did you have on? A I don't know what suit I had.

Q You don't remember what suit you had on? A I don't remember what suit.

Q You do not remember which suit? A No.

Q Is it the suit you have on now? A No. I have so many suits, I don't know which suit I put on.

Q Did you take that suit to the tailor after that loss? A No, sir.

Q What examination did you make of those trousers after you lost the diamonds? A I pulled my pocket out to see if there was any holes in my pocket; it is possible maybe I dropped it or it went out of my pocket, but the pocket was not broke.

Q At any time in the morning did you feel any hand going into your pocket as if someone was trying to pick it? A As I was coming out after the sale, I seen people pushing.

Q Answer the question. I say at any time during the morning did you feel any hand going into your pockets as if someone was trying to pick them? Did you feel any hand on your pocket, yes or no? Did you feel any hand on your pocket, yes or no? A No.

Q Tell me about this pushing by the crowd going out of the auction. A After the affair was over I wanted to go out and look at the automobile, and there was about fifteen or twenty people in there yet and I wanted to make myself sure to pass without touching anyone and I seen a couple of people pushing on both sides and I went outside of the door.

Q What else did you do then? A They auctioned off an automobile in front of the place.

Q You had been inside and came out to the auction? A Once I came out.

Q Then, you went back into the auction to buy other things? A No, sir.

Q Wasn't the automobile auctioned off first? A No, it was the last thing that was auctioned.

Q You heard Mr. Finelli testify that the automobile was auctioned off first? A No, sir, the last thing.

Q He was wrong about that? A Yes, sir.

Q To whom did you give the check in payment of your purchases at the auction? A Mr. Rizzolo.

Q Did you use your own fountain pen to draw that check? A Yes, sir.

Q What pocket did you return the fountain pen to when you drew the check? A The right front pocket.

Vito Verniro, direct.

Q To what pocket did you return the check-book? A I didn't have a check-book, I had two blanks in my pocket. I have a check-book here and it was a blank check out of it.

Q This is your signature, isn't it? A Yes, sir.

Q When you signed that did you make any complaint about the color of these stones? A What is that?

Q When you signed that did you make any complaint about the color of the stones at the time you signed this that morning about October tenth? A I made?

Q On that morning did you make any complaint, yes or no. A No. Well, I made a complaint.

Re-direct examination by Mr. Greenfield.

Q But you did speak to him about the color of the stones before? A Before that, yes, sir.

VITO VERNIRO, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q Where do you live? A 205 Clifton avenue, Newark.

Q How long have you been living in Newark? A Forty-three years.

Q Do you know Mr. Cordasco? A Yes, sir.

Q For how long have you known him? About twenty years.

Q Are you in anyway related to him? A No, sir.

Vito Verniro, direct.

Q What is your business? A Real estate and insurance.

Q And your place of business is where? A 13 Sheffield street, Newark.

Q On the 10th day of October, 1924, did you see Mr. Cordasco? A Yes, sir.

Q Where? A At his place of business.

Q At about what time? A Quarter to eleven.

Q Did you see anybody deliver any diamonds to him? A Yes, sir.

Q Is this the gentleman, Mr. Kittay? A Yes, sir.

Q You saw him there? A Yes, sir.

Q Who else was there in the place? A Me, and Mr. Cordasco and his brother who died, and his wife and Mr. Kittay.

Q Did you see him give him any diamonds? A I saw Mr. Kittay give him the diamonds, and Mr. Cordasco examined them, but I don't know whether Mr. Cordasco put the diamonds in his pocket or in the safe.

Q You don't know where he put them? A No.

Q From there where did you go? A To the auction sale.

Q With whom? A Mr. Cordasco and his dead brother.

Q How long did you stay there? A Until about quarter to one.

Q Did Mr. Cordasco buy anything at the auction sale? He bought the goods that were mentioned? A Yes, sir.

Q From there where did he go? A From there he went in the automobile with Mr. Finelli to try it.

Q Did you see him at the time when he came back from the garage? A Yes, sir.

Q What did he do when he came back? A He got in his car and went down for lunch.

Q Did you stop anywhere on the way for lunch? A No, we did not.

Q Did you see him take out any diamonds? A No, I did not.

Q During the time he was with you? A No.

Q Did he show to anybody the diamonds while you were with him? A No, sir.

Q What car did he drive down or did you all drive down and get lunch? A In his Dodge car.

Q Who was with you in that car? A Mr. Cordasco and his dead brother, as far as I remember and myself.

Q Where did you go to have lunch? A At Mr. Perri's on Halsey street.

Q Were you sitting at the same table with Mr. Cordasco? A Yes, sir.

Q Was anybody else at that table beside yourself, his brother and Mr. Cordasco? A That's all.

Q Did he, in that place at the restaurant take out the diamonds and show them to anybody? A No, sir.

Q Or look at them himself? A No, sir.

Q After you had lunch where did you go? A After we had lunch we went outside and he told us that he was going to deliver those diamonds and he put his hand in his pocket and said the diamonds were gone, so I asked him to look in his pocket and see that there were no holes there and he did and there was no hole there, and after that we went down Market street to see Mr. Rizzolo regarding the key to the store, and while we were there we met him in front of the Newark Trust Company and he told us that Mr.

Finelli had the key, so Mr. Rizzolo and Mr. Cordasco's dead brother we go down to Mr. Finelli and I left them there.

Q Did you go back with him, with Mr. Cordasco and Mr. Finelli to search for the diamonds? A No.

Q Did you see him again that day? A At nighttime.

Q Where? A At his place of business.

Q Did you see those diamonds at nighttime? A No, sir.

Q Did you ever see those diamonds after that? A No, sir.

Q Did you go back to Perri's where they looked over the garbage can? A No, sir.

Cross examination by Mr. Pitney.

Q You say you are in the real estate business? A Yes, sir.

Q Who is your partner? A Nobody, myself.

Q Who was your partner on October 10, 1924? A Myself.

Q It is a fact that you have been in the real estate business with Mr. Cordasco? A Not as a partner.

Q Going into joint ventures with you? A We bought property.

Q You bought and sold property as partners? A Yes, sir.

Q Did you advise Mr. Cordasco that there was to be an auction sale? A No, I did not.

Q Was it his brother? A I don't know, because I know the place was going to be auctioned off.

Q Were you with him when he discovered he had lost the diamonds? A Yes, sir, in front of Perri's.

Vito Verniro, cross.

Q Just describe what he did and what he said as he discovered the loss. A No more than we got out of Perri's he told us he was going to deliver those diamonds so he put his hands in his pockets.

Q He said, "Those diamonds," didn't he? A Yes, sir, and he put his hand in his pocket to get them and he couldn't find them.

Q He did what? A He put his hand in his pockets to show them to us and he missed them and he held out his pocket and there was no holes there.

Q What was it he said? A He said there was no hole, "I lost the diamonds."

Q (By the Court.) Did you see the diamonds given to him? A I saw Mr. Kittay lay the diamonds on the show case; they were wrapped up.

Q (By Mr. Pitney.) Did you see them wrapped up? A Yes, sir.

Q How? A Mr. Kittay took them out of the paper and put them on the counter and Mr. Cordasco examined them and asked that Mr. Cordasco make the bill and he took—I don't know whether he put them in his pocket or not.

Q After the defendant decided to take them, what did you see done? A He wrapped them up in the paper again.

Q You guess, or you know? A I know.

Q Did you see them handed to Mr. Cordasco? A Yes, sir.

Q And you saw him put them in his pocket? A No, sir.

Q You did not see that? A No.

Q That was in Cordasco's store, was it? A Yes, sir.

Q Now, then, you went from there to the auction sale and then you came back to that store again, didn't you? A Yes, sir.

Q To get the Chevrolet car? A Mr. Cordasco told us to wait for him to drive down.

JOSEPH PERAGALLO, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q Are you connected with the restaurant known as Perri's restaurant on Halsey street? A Yes, sir.

Q Are you one of the proprietors? A Yes, sir.

Q Do you know Mr. Cordasco? A Yes, sir.

Q Did you see him on the 10th day of October, 1924, in your place? A I don't recollect the date. He was coming in there for some time, I know.

Q Do you remember the occasion when he reported or told you something about the loss of some diamonds? A Yes, sir.

Q What did you do? A I asked him where he lost the diamonds and he said, "I came in with some diamonds and after I left here I missed them."

Q And. A And I says, "Let's look over the table or the floor and get them to sweep up and see if we can locate them."

Q Was the place swept up? A Yes, my bus boy swept it up.

Q What did you do after that? A Well, I said to him, "Well, possibly if they were left on the table or something like that they might be in the garbage can there," so I said, "Come inside," and I got my dishwasher and there was two cans full of garbage and I had him go over

each one, one by one, and Mr. Cordasco was present.

Q Did you find anything? A No, sir.

Q Did he show you any diamonds that day? A I don't remember.

Q Before he reported to you did he display any diamonds? A No, sir.

Q That is all you know about it? A Yes, sir.

Cross examination waived.

ORAZIO INSABELLA, sworn in behalf of the defendant.

Direct examination by Mr. Greenfield.

Q What is your name? A Insabella.

Q Your first name? A Orazio.

Q Mr. Insabella, where do you live? A 265 Camden street.

Q Newark? A Yes, sir.

Q How long have you been living at the Camden street address? A About ten years.

Q Have you any brothers living in Hillside? A Yes, sir.

Q Do you know Mr. Cordasco? A Yes, sir.

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

Q What is your business? A Mason.

Q Was it to you that he was to deliver the diamonds? A No, sir.

Q Do you know anything about those diamonds? A Yes, sir.

Q What do you know about them? A I ordered one diamond in the early part of October.

Q You ordered one diamond in the early part of October? A Yes, sir.

Q That same month? A Yes, sir.

Q 1924? A Yes, sir.

Q Was the diamond delivered to you? A No, sir.

Q Did you ever see that diamond? A No, sir.

Q After you ordered it when did you see Mr. Cordasco next? A Joe Cordasco was calling me up on the ninth of October in the evening at my house and he said, "Mr. Insabella, we are going to make an appointment with you for tomorrow noontime, about three or half-past three and I am going to get a diamond for you."

Q That afternoon? A Yes, sir.

Q (By Mr. Pitney.) October tenth? A Yes, sir.

Q (By Mr. Greenfield.) Did you see Mr. Cordasco on October tenth? A No, sir.

Q When did you see him after that? Did you see him at all after that? A He was calling me up, it was in the evening, because I was waiting at 3:30 and he says to me, "I lost the diamonds," because I told him, "Mr. Cordasco, you let me wait all day long. I was up at the house and you did not show up," and then he says, "I lost the diamonds." I says, "That's too bad, I am awfully sorry to hear it."

Cross examination waived.

DEFENDANT RESTS.

PLAINTIFF RESTS.

Mr. Greenfield: I ask the Court to direct a verdict in favor of the defendant on the ground there is no proof. While the pre-

sumption is as your Honor ruled on the motion for a non-suit, the delivery of the merchandise and the failure to return it raising a *prima facie* case, the burden rests upon the defendant to rebut that. I think we have certainly rebutted that proof. That there is no proof of negligence, gross negligence, direct. The only proof was the proof of the plaintiff himself that the defendant put them in his pocket and there is proof that we have done everything possible to endeavor to locate those diamonds. There is no proof that putting them in the pocket in the manner described was negligent.

(Argument.)

Mr. Greenfield: This was a mutual contract entrusted to the defendant without pay.

Mr. Pitney: Are you seeking to amend your answer? Counsel admitted in the answer it was for the benefit of both parties.

Mr. Greenfield: Surely. Now, I say it was for our benefit if we sold it. There was no compensation and if that is not shown there must be gross negligence shown.

(Argument.)

The Court: The motion is denied for these reasons: The delivery of the diamonds to the defendant and the defendant admitting receiving them and the defendant failing to return them upon demand raises a presumption at law of negligence on the part of the defendant. That presumption is rebuttable. Testimony can be introduced to overcome the effect of it. In certain instances the question of whether the character of that testimony is sufficient is for the Court, and in certain instances it is for the

jury. If the testimony is uncontradicted and it is rebutted, the presumption of negligence—and no interpretation of it can be drawn from the testimony which makes it appear contradictory at all—becomes a question for the Court, so, your motion would under the circumstances be properly grounded, but if the question is reasonably subject to contradictory interpretations or is not creditable, or is testimony from which negligence can be inferable the question is for the jury as to whether the testimony is sufficient to rebut the presumption.

The Court: I will deny your motion.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Greenfield sums up for the defendant.

Mr. Pitney sums up for the plaintiff.

CHARGE TO JURY.

The Court charges the jury as follows:

MOUNTAIN, *J.:*

The plaintiff in this case, Edward Kittay, on October 10, 1924, gave to the defendant three diamonds on memorandum. The purpose was, obviously, that the defendant should sell the diamonds and then pay the plaintiff. The physical possession of the diamonds was delivered to the defendant and in the same act the plaintiff lost his dominion over them so far as the diamonds were physically concerned. Such a transaction

made the defendant, what we call in law, a bailee, and the plaintiff, what we call in law, a bailor.

The plaintiff alleges that he saw the defendant at the time the diamonds were delivered to him, put them in his trousers pocket, and he says that he warned the defendant to be careful of them. The next morning the defendant called the plaintiff up and told him that the diamonds had been lost. He further told the plaintiff that he had gone to an auction sale and then had gone to Perri's restaurant for lunch before discovering the loss. The defendant said that when he received the diamonds he placed them in his pocket as alleged by the plaintiff, and that this transaction took place in his store where he admitted there was a safe. He left the store and went to an auction sale on the same block where he made some purchases. Among other things that he purchased was an automobile. He had some friends with him and the automobile that he purchased he took to the Park avenue garage; it was driven by the daughter of one of his friends and was left there, and then he and his companion, Mr. Finelli, walked down to his place of business again for the purpose of getting his own car, a Dodge, and driving to the restaurant for lunch. At that place of business you may find that the defendant, had he desired to, could have utilized his safe for the reception of the diamonds, but he kept them in his pocket and drove in his old car to a restaurant which was on Halsey street near Branford Place in this city, and he stayed there until after two o'clock. He had an appointment that afternoon to meet a man by the name of Insabella who desired to purchase one of these diamonds. The latter testified that the meeting was to take place at three

or three-thirty, so that you may find the defendant claims he carried these diamonds with him from eleven o'clock until that time, because there is testimony indicating that he received them about eleven o'clock in the morning. After his luncheon at the restaurant he discovered their loss. He examined his trousers pockets and said there was no hole there, and that while he was at the auction he felt no one in his pocket and he communicated his loss to others and made a search for the diamonds and was unsuccessful in finding them, and because of the fact that he could not find them, he, of course, was unable to deliver them to the plaintiff upon demand.

When a piece of personal property, and a diamond is personal property, is delivered to a bailee, that is, one who receives it for another on a memorandum, the bailee, and that would be the defendant in this case, is not an insurer of the property. He does not insure that it will not be lost or injured or destroyed, and in this case there was no obligation on the defendant and no absolute responsibility to keep the diamonds safely and return them to the plaintiff, but the defendant was required under all the circumstances in this case to exercise ordinary care to prevent the loss of the diamonds and the failure to exercise that care would be negligence.

The burden of proof in this case is upon the plaintiff, and the rule of law is that it is necessary for the plaintiff, in making affimative proof in this case, to account for the disappearance of the personal property. It is his duty, of course, to show the circumstances under which the property was delivered to the defendant or to the bailee, because there is a rule of law where property, in the hands of a bailee, as it was in the

hands of the defendant in this case, is lost, that there is a presumption that the negligence of the bailee was the cause of the loss. That is a presumption at law, and that presumption is rebuttable, that is, the defendant can produce or adduce testimony to show that he did use ordinary care and that he was not negligent. For instance, assume a case where the relation of bailor and bailee existed between two parties to an action. If the plaintiff merely showed that he delivered the personal property to the defendant and that the defendant refused to return the property, whatever it was, to the plaintiff, the absence of any defense on the part of the defendant would make it incumbent upon the Court to direct a verdict for the plaintiff.

In this case the defendant has attempted, you may find, to meet the presumption I refer to. Perhaps you will find that the defendant has not met that presumption.

Because I let the case go to the jury I did so believing that it was a question of fact for you to determine as to whether the explanation offered by the defendant was sufficient to exculpate him of the charge of negligence by the plaintiff. If this testimony of the plaintiff had been uncontradicted that would not have been the case.

What is there in this case that strikes a contradictory note? That is a question of fact for you to determine. If you find that the defendant did exercise ordinary care and you find that as a matter of fact, thus barring him from negligence, your verdict would be for the defendant. If you find that the defendant did not exercise ordinary care, then, your verdict would be for the plaintiff.

The burden of proof in this case does not shift at all throughout the case. The plaintiff has the burden of proving that the defendant did not exercise ordinary care and was negligent.

It may occur to you when you retire to the jury room, as I say, that the manner in which these goods were carried on the person of the defendant indicated that he exercised, under all the circumstances, what we know as ordinary care, or it may occur to you that when the diamonds were handed to him in his place of business, where there was a safe, that the exercise of ordinary care under all the circumstances, considering the time of the day when he received the diamonds, and considering what he did in explanation of his activities between that time and the time of the delivery of the diamonds, I say it may occur to you that not to put them in the safe was negligent and did not indicate ordinary care. Perhaps you will, to trace his movements that morning, reflect that when he returned to the store after he had been at the auction that he had had an opportunity to put them in a safe place, if he so desired, and did not do so. In short, if you find that the plaintiff has sustained the burden of proof and that the defendant did not exercise ordinary care and that the diamonds were lost as a result of that, your verdict would be for the plaintiff for the value of these diamonds, which I have not computed, but I presume is correctly set forth in the transcript namely, $2,111.40. If you find, on the other hand, that the defendant did exercise ordinary care, remembering that he was not an insurer, then, your verdict should be for the defendant.

Charge to Jury.

I have been asked to charge you by the plaintiff several requests. The first I will charge.

1. "If you find that the defendant failed to exercise reasonable care in the safekeeping of the diamonds entrusted to him by the plaintiff, that is—such care as a reasonably careful owner of similar property would have exercised under the same or similar circumstances, your verdict must be for the plaintiff."

2. "Where one entrusts diamonds or other personal property to another and the transaction is for their mutual gain, the mere loss of the property by the one so entrusted, is such a fact that absence of ordinary care in the safekeeping of the property could be inferred."

3. "In this case the defendant admits that the plaintiff's delivery of the three diamonds to the defendant was for the benefit and gain of both."

The 4th and 5th will be denied.

Of the defendant's requests to charge I will charge the 5th and deny 1, 2, 3, 4 and 6.

5. "The mere fact that the Court denied the motion of a non-suit, does not, in any way, signify the Court's mind as to the liability on the part of the defendant. It is merely addressed to the Court on the question of law and the denial of the motion is not binding on the jury as to the facts and evidence of the case. The jury should only be governed by the facts and evidence adduced on the part of the plaintiff and defendant and not on the ruling of the Court as to the motion of non-suit."

(The jury retires.)

Mr. Greenfield: I respectfully pray an exception to your Honor's refusal to charge each request as requested.

Exception noted as ground of appeal.

Mr. Greenfield: Also I respectfully pray an exception to your Honor's charge, the part where your Honor said that the failure to return the goods upon demand the law presumes is negligence, and whatever your Honor said upon this particular point.

Exception noted as ground of appeal.

Mr. Greenfield: I respectfuly pray an exception to whatever your Honor said on the point near the last where the defendant returned to his store and had an opportunity to put the diamonds in a safe place and did not do so; that would be negligence.

Exception noted as ground of appeal.

PLAINTIFF'S REQUESTS TO CHARGE.

1. If you find that the defendant failed to exercise reasonable care in the safekeeping of the diamonds entrusted to him by the plaintiff; that is, such care as a reasonably careful owner of similar property would have exercised under the same or similar circumstances, your verdict must be for the plaintiff. CHARGED.

2. Where one entrusts diamonds or other personal property to another and the transaction is for their mutual gain, the mere loss of the property by the one so entrusted is such a fact that absence of ordinary care in the safekeeping of the property could be inferred. CHARGED.

3. In this case the defendant admits that the plaintiff's delivery of the three diamonds to the defendant was for the benefit and gain of both. CHARGED.

4. While actual proof that the diamonds were stolen from the defendant would excuse the defendant for their loss, in the absence of proof that the theft would not have occurred if the defendant had exercised reasonable care in their safekeeping, mere conjecture on the defendant's part that the diamonds were stolen may not properly be regarded as proof that they were stolen. DENIED.

5. If, from the proof, you find that it is as reasonable to infer that the diamonds dropped from the defendant's pocket or became lost in some other manner without the intervention of the act of any third party, as it is to infer that the diamonds were stolen from his person, your verdict must be for the plaintiff. DENIED.

DEFENDANT'S REQUESTS TO CHARGE.

1. Before the plaintiff can recover in this suit he must establish, by the greater weight of the evidence to the satisfaction of the jury, that the defendant was grossly negligent in the care and keep of the property in question, and if the jury is satisfied that the defendant took the usual precaution and care of the property in question, the same care as he would have taken of his own property of equal value, and if the property was stolen without any fault or negligence on his, the defendant's part, the plaintiff cannot

recover and there should be a verdict for the defendant. DENIED.

2. The jewelry in question having been delivered by the plaintiff to the defendant for the mutual benefit of both parties to the suit, and there being no special contract as to the manner of care to be exercised by the defendant, and the defendant exercised ordinary care, and is free from gross negligence, the plaintiff is not entitled to recover and there should be a verdict for the defendant. DENIED.

3. The bailee, the defendant, is not an insurer of the chattels entrusted to his care and is not responsible for losses resulting, without his fault or negligence, from such private causes as robbery, burglary or theft, and if the defendant took the same care and precaution of the property in question as that of his own, he was not obliged to take any more care, and if he is found free from gross negligence and the jury believes that he was robbed of those diamonds, the plaintiff cannot recover and there should be a verdict for the defendant. DENIED.

4. The defendant was not bound to exercise any extraordinary degree of care for the merchandise in question, and if the jury is satisfied that he took proper precaution and was free from gross negligence, and if the jury believes that the defendant lost the merchandise, through theft or otherwise, through no fault of his own, the plaintiff is not entitled to recover and there should be a verdict for the defendant.

DENIED.

5. The mere fact that the Court denied the motion of a non-suit does not in any way signify

the Court's mind as to the liability on the part of the defendant. It is merely addressed to the Court on the question of law, and the denial of the motion is not binding on the jury as to the facts and evidence of the case. The jury should only be governed by the facts and evidence adduced on the part of the plaintiff and defendant and not on the ruling of the Court as to the motion of non-suit.

CHARGED.

6. The burden is upon the plaintiff to prove all that he alleges in his complaint, namely gross negligence on the part of the defendant, and if the plaintiff fails to prove by the preponderance of the evidence that the defendant was grossly negligent, the plaintiff is not entitled to recover and there should be a verdict for the defendant.

DENIED.

REASONS.

Filed April 6, 1926.

New Jersey Court of Errors and Appeals

EDWARD KITTAY, *Plaintiff-Respondent,* *vs.* JOSEPH CORDASCO, *Defendant-Appellant.*	*Action at Law.* *On Appeal from the New Jersey Supreme Court, Essex County Circuit.* *Reasons for Appeal.*

To Pitney, Hardin & Skinner, Esqs., attorneys for plaintiff-respondent.

SIRS:

PLEASE TAKE NOTICE that the following are the grounds for appeal in behalf of the defendant-appellant from the judgment recovered in the New Jersey Supreme Court, tried before the Essex County Circuit Court, rendered in favor of the plaintiff and against the defendant:

1. Because the Court erred as a matter of law in refusing the defendant's motion of nonsuit when the plaintiff rested his case, on the ground that the plaintiff did not prove any negligence on the part of the defendant.

2. Because the plaintiff failed to show that the loss was due to some want of care or negli-

gent act or omission on the part of the defendant-bailee.

3. Because the Court erred as a matter of law in excluding the testimony of James Pathe of the Newark News wherein counsel for the defendant offered to prove the date of advertising the loss of the goods in question.

4. Because the Court erred as a matter of law in refusing the defendant's motion to direct a verdict in favor of the defendant and against the plaintiff, there being no negligence shown by the plaintiff on the part of the defendant in the case of the diamonds in question while in defendant's custody.

5. Because the Court erred as a matter of law in denying the defendant's motion to direct a verdict in favor of the defendant, there being no testimony contradicting the defendant's that the diamonds were lost or stolen, not through any negligence on the defendant's part.

6. Because the Court refused to charge the jury with the defendant's First, Second, Third, Fourth and Sixth Specific Requests.

7. Because the Court erred as a matter of law in charging the jury as follows: "That the failure to return the goods upon demand, the law presumes negligence."

8. Because the Court erred as a matter of law in its charge to the jury, "That it was negligence on the part of the defendant not to place the diamonds in the safe when he returned from the auction sale."

WM. GREENFIELD,
Attorney for Defendant-Appellant.

Reasons for Appeal.

Service of a true copy of the within Reasons for Appeal is hereby acknowledged on this 5th day of April, A. D. 1926.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff-Respondent.

Exhibit P. 1.

EXHIBIT P. 1.

Memorandum

New York, Oct. 10, 1924

From
E. Kittay
87 Nassau St.

To Joseph Cordasco
Newark, N. J.

These goods are sent for your inspection and remain the property of
and are to be returned on demand. Sale takes effect only from date of approval of your inspection.

1 Br. 2.30 cts. at $365. per ct.
2 Br. 3.83 cts. at $325. " "
if stone 1.81 is sold price 340 ct. Net

(Signed by Jos. Cordasco)

Exhibit P. 2.

EXHIBIT P. 2.

NEW JERSEY SUPREME COURT

ESSEX COUNTY.

EDWARD KITTAY, *Plaintiff,*		*Action at Law.*
vs.		
JOSEPH CORDASCO, *Defendant.*		*Interrogatories.*

SIR:

PLEASE TAKE NOTICE that the plaintiff requires answers under oath by the defendant to the following interrogatories within 10 days from the date of service hereof upon you:

1. At what hour on October 10, 1924, did the plaintiff, Edward Kittay, deliver to you the three unset diamonds which are the subject of this action?

2. Where was such delivery made to you?

3. By what means of conveyance did you go from the place of delivery to the auction sale referred to in the pleadings and to whom did such conveyance belong?

4. At what place or places did you stop en route to said auction?

5. Who accompanied you on the trip referred to in questions 3 and 4?

6. How long did you remain at the auction?

7. What purchases did you make at the auction?

Exhibit P. 2.

8. What other jewelry or stones (beside said three diamonds) did you have on your person at any time on October 10, 1924, and to whom did such other jewelry or stones belong?

9. At what hour did you leave the auction?

10. With whom did you leave the auction?

11. Where did you next go?

12. Where did you have lunch on that day, October 10, 1924?

13. With whom did you have your lunch on that day?

14. In whose automobile did you go from the auction to lunch?

15. At what hour and where did you first miss the diamonds?

16. Between the time of delivery to you and the time you first missed the diamonds, did you remove them from your pocket?

17. If the answer to the last question be in the affirmative, then state when, where and in whose presence you so removed the diamonds?

18. At what time and place are you able to assert positively that you last had possession of the diamonds?

19. Did you intend to display the three diamonds to a customer?

20. If the answer to question 19 is in the affirmative, state the name of the customer and address where you expected to display the diamonds to him.

21. Did you have an office safe for the safekeeping of precious stones, etc. at your office,

Exhibit P. 2.

38 Cutler Street, Newark, N. J., on October 10, 1924?

22. Who, in your belief, stole the diamonds as stated in your answer?

23. When, where and how, to the best of your belief, were they stolen?

24. Was any other article, property or possession stolen from you or lost by you on that day, October 10, 1924?

25. If the answer to question 24 is in the affirmative, state to whom the stolen article or property belonged and where, when and how, to the best of your belief, such theft or loss occurred.

PITNEY, HARDIN & SKINNER,
Attorneys of Plaintiff.

Dated—Newark, N. J.
October 10, 1925.

TO: William Greenfield, Esq.,
Attorney of Defendant,
130 Market Street,
Newark, N. J.

Exhibit P. 3.

EXHIBIT P. 3.

NEW JERSEY SUPREME COURT
ESSEX COUNTY CIRCUIT.

EDWARD KITTAY, *Plaintiff,* vs. JOSEPH CORDASCO, *Defendant.*	*Action at Law.* *Answer to Interrogatories.*

To Pitney, Hardin & Skinner, Esqs.,
Attorneys for Plaintiff,
Prudential Building,
Newark, N. J.

SIRS:

PLEASE TAKE NOTICE that the following are the Answers to the Interrogatories served upon William Greenfield as my Attorney, on October 10, 1925:

1. The plaintiff delivered the diamonds to me about 10:45 in the forenoon.

2. The delivery was made at No. 38 Cutler Street, Newark, New Jersey.

3. I walked from the place of delivery to the auction sale.

4. Did not stop at any place.

5. My brother and friend accompanied me.

6. I remained at the auction place until 1 P. M. of that day.

7. I bought a Chevrolet automobile, typewriter, roll top desk and chair.

Exhibit P. 3.

8. I did not have any other jewelry or stones, besides the said three diamonds.

9. I left the auction place at about 1 P. M. of that day.

10. I left the auction place with my brother and friend and Mr. Finelli and his daughter.

11. From the auction place, Mr. Finelli's daughter drove the car that I had purchased, and went to a garage on Park Avenue, near Ridge St., Newark, N. J., and from the garage we walked down to my place and I then took my own car and went to lunch.

12. We went down to Perri's lunch room on Halsey Street, City.

13. I had my lunch with my brother and my friend.

14. I did not go direct from the auction place to the lunch room, but we took the automobile that I purchased at the auction sale to the garage on Park Avenue, and from the garage we walked down to my place and then I took my own car and went to lunch.

15. I first missed the diamonds at 2:15 P. M. of that day, outside the lunch room.

16. I did not remove the diamonds, from my pocket.

17. See answer to interrogatory No. 16.

18. At the time I put the diamonds in my pocket and left my place to go to the auction sale.

19. I did intend to display the diamonds.

20. I expected to display the diamonds to Mr. Inzebella, living in Hillside, N. J., and two other brothers living in Newark, N. J. I was to meet the two other brothers at Hillside, N. J.

Exhibit P. 3.

21. Yes, I have an office safe.

22. I don't know. I wish that I did have some idea, but I haven't any idea as to whom the person is who stole the said diamonds.

23. Do not know.

24. See answer to Interrogatory # 23.

25. See answer to interrogatory #24.

JOSEPH CORDASCO,
Defendant.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

JOSEPH CORDASCO, of full age being duly sworn according to law, on his oath deposes and says that he is the defendant in the suit in which the foregoing Answers to Interrogatories are made, and that he is familiar with the case, and that the facts set out in the said Answers and Statements made therein, are true to the best of his knowledge as he verily believes.

JOSEPH CORDASCO.

Sworn and subscribed to before me on this Twelfth day of October, A. D. 1925.

ANNA ROTHMAN,
A Notary Public of New Jersey.

Service of a true copy of the within Answer is hereby acknowledged on this 12th day of October, A. D. 1925.

PITNEY, HARDIN & SKINNER,
Attorneys for Plaintiff.

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

New Jersey Court of Errors and Appeals

EDWARD KITTAY, *Plaintiff-Appellee,* *vs.* JOSEPH CORDASCO, *Defendant-Appellant.*	*Action at Law.* *On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-APPELLEE.

This is an appeal from a judgment of the Supreme Court for the plaintiff in an action at law which was tried at the Essex Circuit before Judge Worrall F. Mountain and a jury. The plaintiff's verdict was for $2,111.40 and the judgment thereon, including costs, was entered on February 25, 1926, for $2,160.82.

FACTS.

The plaintiff-appellee, Edward Kittay, is a diamond dealer (Case, p. 12, l. 11), and on October 10, 1924, was in possession of three diamonds which he had accepted from other dealers on memoranda (Case, p. 16, l. 5).

The defendant-appellant, Joseph Cordasco, is a jeweler whose place of business on October 10, 1924, was at 38 Cutler street, Newark, New Jersey (Case, p. 29, l. 38).

The action was by the plaintiff, as bailor, against the defendant, as bailee, to recover the value of said three diamonds which the plaintiff, in turn, delivered to the defendant upon memorandum receipt and which were lost by or stolen from the defendant. The memorandum receipt

is Exhibit P. 1 in evidence (Case, p. 63).* The complaint charged that the loss or theft was caused by the negligence of the defendant in the custody of the diamonds. The defendant's answer admitted the delivery, that the bailment was for the mutual benefit and gain of the parties and that the value of the diamonds was $2,111.40. (See paragraph 2 of complaint, Case, p. 3 and defendant's answer thereto, Case, p. 6, l. 16). It asserted that the diamonds had been stolen from the defendant and denied any negligence (Case, p. 6, l. 19).

Prior to the trial the plaintiff propounded and the defendant answered interrogatories, printed as Exhibits P. 2 and P. 3 at pages 64 to 69 of the State of Case. The defendant's answers to the interrogatories, with his answer to the complaint, were alone sufficient to support the plaintiff's cause of action, as will appear by the references to them, hereinafter made.

The plaintiff delivered the three diamonds to the defendant and took the latter's receipt at about 10:45 A. M. on October 10, 1924, at the defendant's said place of business, 38 Cutler street, Newark. (See defendant's answers to the first and second interrogatories, Case, p. 67, l. 27.) The defendant expected to display the diamonds to a Mr. Insabella and his two brothers at Hillside, Union County, New Jersey (Case, p. 36, l. 24 and defendant's answer to twentieth interrogatory, Case, p. 68, l. 36). Mr. Insabella testified that the defendant had made an appointment with him for 3 or 3:30 P. M. on October 10, 1924 (Case, p. 48, ll. 13-17).

* Note:—The copy of the memorandum receipt attached to the complaint contains stenographic errors amended at the trial (Case, p. 11, l. 31) and the Exhibit (P. 1) should be referred to as a correct copy.

The plaintiff brought the diamonds to the defendant in two separate parcels, one parcel containing two of them and the other the third (Case, p. 31, l. 33). The defendant's witness, Verniro, testified that he saw the plaintiff lay the diamonds on the defendant's show case, at which time they were wrapped up (Case, p. 45, l. 19). He saw the plaintiff take the diamonds out of the paper and put them on the counter and saw the defendant examine them and wrap them up in the paper again (Case, p. 45, l. 29). Both the plaintiff and defendant testified that the defendant placed the diamonds, after rewrapping them, in his trousers pocket (Case, p. 14, l. 19 and p. 31, l. 32).

The plaintiff testified that just after he had delivered the diamonds to the defendant, a young man entered the defendant's store and announced that there was going to be an auction of the furniture and fixtures of a bankrupt banking firm and that the defendant had replied that he would like to attend the auction (Case, p. 14, l. 12), whereupon he, the plaintiff, cautioned the defendant as follows *(id.,* l. 15):

> "So, I said, 'you better be careful of those diamonds,' and he had put the diamonds in his pocket at that time.
>
> Q Did you see him do that? A Yes, sir.
>
> Q Which pocket? A His trousers pocket. I know that, and I told him to be careful, and he patted his pocket and said, 'Don't you worry; I am going over to see my customer and I may have time to visit the auction'."

In his store, the defendant had an office safe for the safekeeping of precious stones (see interrogatory 21, Case, p. 65 and answer thereto, top of p. 69). The auction was to be held at 20 Cutler street, on the same side of the same

block as the defendant's store (Case, p. 37, l. 23). Upon placing the diamonds in his trousers pocket, the defendant left his store and walked to the auction at 20 Cutler street where he "stood by the rear office until the auction started" (Case, p. 32, l. 22). He was accompanied by his brother and by the witness Verniro (*id.*, l. 24). The defendant remained at the auction until about 1 P. M. (Case, p. 32, l. 31) and bought a desk, a typewrtier, some chairs and partitions and a Chevrolet automobile (*id.*, l. 28) which was auctioned in front of the store after the contents had been auctioned inside.

On cross examination, the defendant was asked whether at any time during the morning at the auction he felt any hand at his pocket and he replied:

> "A As I was coming out after the sale, I seen people pushing." (Case, p. 40, l. 5.)

The question was repeated and he replied that he had not felt any hand in his pocket. He was then asked:

> "Q Tell me about this pushing by the crowd going out of the auction. A After the affair was over I wanted to go out and look at the automobile, and there was about fifteen or twenty people in there yet and I wanted to make myself sure to pass without touching anyone and I seen a couple of people pushing on both sides and I went outside the door." (Case, p. 40, ll. 14-20.)

After the auction the attorney for the trustee of the bankrupt firm, Mr. Anthony R. Finelli, accompanied the defendant in the Chevrolet car which the defendant had purchased. They were driven by Mr. Finelli's daughter from 20 Cutler street to the Parkway Garage at the northeast corner of Parker Street and Park Avenue, Newark, New Jersey (Case, p. 35, l. 31).

From the garage the defendant walked down to 38 Cutler street, his place of business, where he was again joined by his brother and the witness Verniro, and with them went in his Dodge car to lunch. (See answer to interrogatory 14, Case, p. 68, l. 15 *et seq.* and Case, p. 33, l. 26.) The three men lunched at Perri's Restaurant on Halsey street, near Branford Place. (See answer to twelfth interrogatory, Case, p. 68 and Case, p. 33, l. 20.) They remained there until about 2:20 P. M. (Case, p. 33, l. 32). Upon leaving the door of Perri's Restaurant, the defendant missed the diamonds (Case, p. 68, answer to fifteenth interrogatory). His direct testimony upon that point is as follows:

> "Q When did you first discover the loss? A After I had lunch in Mr. Perri's restaurant, and as I walked out ready to deliver those diamonds, I told Mr. Verniro and my brother, I said, 'I am going to deliver those diamonds, one of the three,' and, of course, I was reminded to put my hand in my pocket and I did not find the diamonds in there." (Case, p. 34, ll. 5-12.)

Mr. Verniro's direct testimony upon that point was as follows:

> "A After we had lunch we went outside and he told us that he was going to deliver those diamonds and he put his hand in his pocket and said the diamonds were gone." (Case, p. 43, ll. 31-34.)

On cross examination Mr. Verniro testified (Case, top p. 45):

> "Q Just describe what he did and what he said as he discovered the loss. A No more than we got out of Perri's he told us he was going to deliver those diamonds so he put his hands in his pockets.
>
> Q He said, 'Those diamonds,' didn't he? A Yes, sir, and he put his hand in his

pocket to get them and he couldn't find them.

Q He did what? A He put his hand in his pockets to show them to us and he missed them and he held out his pocket and there was no holes there.

Q What was it he said? A He said there was no hole, 'I lost the diamonds'."

It appears from the defendant's answer to the eighteenth interrogatory that *at no time between the moment when he placed the diamonds in his trousers pocket about 10:45 A. M. and the moment when he discovered the loss of the diamonds at 2:15 or 2:20 P. M. did the defendant place his hand in his pocket or feel the outside of his pocket to ascertain whether the diamonds were still there.* We quote the eighteenth interrogatory and the answer thereto from pages 65 and 68 of the case:

"Q At what time and place are you able to assert positively that you last had possession of the diamonds? A At the time I put the diamonds in my pocket and left my place to go to the auction sale."

Thus, the defendant failed to protect his pocket throughout the auction, notwithstanding the "people pushing on both sides" (Case, p. 40, l. 19).

When the defendant reported the loss, the plaintiff paid the dealers who held his receipts, in full (Case, p. 16, l. 18), but the defendant always refused to pay the plaintiff any part of the value of the diamonds (Case, p. 15, l. 6).

THE DEFENDANT'S PROOF.

With the exception of the defendant's testimony at the top of page 32 of the State of Case, that he placed the diamonds in a different pocket than the pocket in which he carried his money, "to make sure if I ever took any money out I would not drop them," the defendant offered no proof to show that he exercised due care in the custody of the diamonds.

The defendant proved that *subsequent to his discovery of their loss,* he took the following steps to *recover* the diamonds:

A. He advertised the loss in the Newark Evening News and the Newark Star Eagle (see testimony of defendant's witnesses, James Pathe, of the News (Case, p. 20) and Fred Silbon, of the Star Eagle (Case, p. 22)).

B. He reported the loss to the police department of the City of Newark (see testimony of defendant's witness Detective Manning (Case, p. 23)).

C. He got Mr. Anthony R. Finelli, attorney for the trustee in bankruptcy, to open the office where the auction had that morning been held and stirred up the papers and the articles on the floor (Case, p. 26, l. 28 and p. 35, l. 12).

D. He went to the Parkway Garage to examine the seat of the Chevrolet car in which he had been sitting en route from the auction to the garage (Case, p. 35, l. 20).

E. He returned to Perri's restaurant. Regarding his efforts there, he testified as follows:

> "Asked Mr. Perri that I had lunch there and I missed some diamonds and wondered if I dropped them in his place. So, Mr. Perri said, 'Let's look for them,' and he

> started to sweep up all over the place and took me in the back of the kitchen and looked in the garbage cans and dumped them and went little by little to try and see if he could find them in the ash can; I think we was there three-quarters of an hour, our man, and Mr. Perri's man." (Case, p. 35, l. 38, *et seq.)*

It is submitted that the defendant's proofs, summarized above, are immaterial to the issue. At the outset of the defendant's case, plaintiff's attorney offered objections from time to time to the introduction of such testimony, and the trial court, referring to the proof of advertising, remarked to the defendant's attorney: "I do not get your point of view as to putting this in" (Case, p. 22, l. 8). The proofs were pressed by the defendant, however, and plaintiff's attorney, without apprehension that his case would be prejudiced, ceased to object. The jury was justified in regarding the defendant's activities as tardy efforts to recover the diamonds, lost or stolen through his negligence.

ARGUMENT.

As this argument is being prepared before service of the appellant's brief upon us, the argument will be addressed to the appellant's reasons for appeal (Case, pp. 60-61). If the defendant's brief requires reply, an additional section will be added to this brief.

POINT I.

It was not error to refuse the defendant's motions for a non-suit and a directed verdict.

"Reasons" numbered 1, 2, 4 and 5 may be regarded as stating two points (Case, pp. 60-61):

(a) That the trial court erred in denying the motion for a non-suit; and

(b) That the trial court erred in refusing to direct a verdict for the defendant.

Both points are squarely answered by this court in its recent unanimous decision:

Carter v. *Allenhurst*, 2 A. R. 909, 125 Atl. Rep. 117. In that case Mr. Justice Katzenbach said:

> "The grounds of appeal are based upon the refusal to non-suit and to direct a verdict for the defendant. We think the trial court ruled properly in overruling the motions to non-suit and direct a verdict. The testimony offered by Miss Carter and the defendant presented a well-defined issue of fact as to whether or not the plaintiff left with the defendant her jewelry for safe-keeping. Miss Carter testified that she delivered her jewelry at the usual place to an employe of the defendant. This employe denied that on this day Miss Carter delivered any jewelry for safe-keeping while she was bathing. This was an issue of fact which could only be decided by the jury. It was not a question for the determination of the court. If Miss Carter did deliver the jewelry to the defendant for safe-keeping, this constituted a bailment, and the relationship between the parties was that of bailor and bailee. It then became the duty of the defendant as bailee to use ordinary care in safe-keeping Miss Carter's jewelry, for the defendant was paid for this service in the consideration paid for the bath house. This presented another question of fact for

> the determination of the jury, namely, did the defendant use ordinary care in the discharge of its duty towards the plaintiff? With these questions of fact raised by the evidence, the trial judge would not have been justified in either entering a non-suit or directing a verdict."

In the *Carter* case the bailment itself was denied by the defendant. In the instant case the bailment was admitted; negligence denied.

The plaintiff recognizes that the burden of proof, in the language of Mr. Justice Katzenbach, "remained upon the plaintiff throughout the trial." To that extent, the earlier ruling of the Supreme Court in the case of *Jackson* v. *McDonald,* 70 N. J. L. 594, seems to have been modified, or, at least, clarified, by the opinion in the *Carter* case.

But the disappearance of the articles bailed creates a *prima facie* presumption of negligence which must be rebutted by the bailee's proof. In that respect the *Carter* case reaffirmed the earlier cases. This court said of the plaintiff, Carter:

> "By showing that she had deposited her jewelry with the defendant according to the method prescribed by the defendant, and that it had not been returned to her, Miss Carter proved such facts, if believed by the jury, that the absence of ordinary care in the safe-keeping of her property could be inferred."

See also:

Jackson v. *McDonald, supra;*

Manson v. *Pullman Porters' Association,* 60 Atl. Rep. 1120;

Levine v. *Wolff,* 78 N. J. L. 306, 308;

Dantes v. *McGann,* 98 N. J. L. 55;

Brady v. *Franklin Motor Car Co.,* 42 N. J. L. J. 16.

As in the *Carter* case, the defendant, Cordasco, "offered no explanation as to the loss." We have noted that the defense presented by the answer was that the diamonds had been *stolen* from the defendant without negligence on his part (Case, pp. 6-7). The twenty-second and twenty-third interrogatories (Case, p. 66) asked: "Who, in your belief, stole the diamonds?" and "when, where and how, to the best of your belief, were they stolen?" The defendant replied (Case, p. 69):

> "I don't know. I wish I did have some idea, but I haven't any idea."

At the trial, the defendant testified that it was "possible maybe I dropped it or it went out of my pocket but the pocket was not broke" (Case, foot of p. 39). It is perfectly evident from the searches of automobile, auction room, ash cans and garbage pails, made by the defendant after he discovered his loss, that he believed it to be just as likely that he had lost the stones as that they had been stolen from him.

The jury was plainly entitled to find that the defendant was negligent in not having placed the diamonds in his office safe while he attended the auction. When he received the stones, at his own store, it was more than four hours prior to his appointment with his customers in Hillside, Union County. We quote from the cross examination of the defendant (Case, p. 37, l. 21, *et seq.*):

> "Q This auction sale was to be held at 20 Cutler street, wasn't it? A Yes, sir.
>
> Q On the same side of the same block as your place of business was? A Yes, sir.
>
> Q And Mr. Insabella's residence is at Hillside, New Jersey? A Yes, sir.

Q That is in Union County, isn't it? A Yes, sir.

Q So that instead of using your office safe, which was right there in your office, in order to have the diamonds about you that you were going to show to Mr. Insabella in Union County, you went to an auction in the same block with the diamonds in your pocket? A Yes, sir.

Q And after the auction sale you came back to the store, didn't you? A No.

Q You said so on direct examination? A No.

Q Where did you go from the Parkway garage? A I walked down in front of my place and took my automobile and went downtown."

We have already alluded to the defendant's failure to protect his pocket while at the auction, or even to verify the continued presence of the stones therein, at any time until after 2 P. M.

We have also referred to the warning given by the plaintiff when he learned of the defendant's plan to attend an auction.

II.

It was not error on the part of the trial court to refuse to charge the jury as requested by the defendant.

The sixth reason for appeal, Case, p. 61, is that the court refused to charge the jury in accordance with the defendant's first, second, third, fourth and sixth requests.

Those requests are printed at pages 57 to 59 of the State of Case.

All of the five requests refused embrace a common fatal defect. By each of them, the jury

would have been instructed that the plaintiff's recovery depended upon whether he had proved *gross* negligence on the defendant's part. We may summarize as follows:

REQUEST	*PHRASEOLOGY*
1	"Plaintiff must establish that the defendant was *grossly* negligent in the care and keep of the property in question."
2	As the defendant "is free from *gross* negligence, the plaintiff is not entitled to recover."
3	"If defendant is found free from *gross* negligence * * *, the plaintiff cannot recover."
4	"If the jury is satisfied that defendant * * * was free from *gross* negligence, * * * plaintiff is not entitled to recover."
6	"The burden is upon the plaintiff to prove * * * *gross* negligence."

The requests were repetitious misstatements of the law of this state, now settled in *Carter* v. *Allenhurst*, 2 A. R. 909, 125 Atl. Rep. 117. We need not again refer to that case at length nor to the other legal defects in the requests to charge.

III.

The defendant's third reason for appeal is without merit.

The third reason (Case, p. 61) was that the court erred in excluding the testimony of James Pathe of the Newark Evening News "wherein counsel for the defendant offered to prove the date of advertising the loss of the goods in question."

Apart from the immateriality of the offered proof, it appears that the witness, James Pathe, answered the question before objection taken. We quote from page 21 of the State of Case:

> "Q When was that advertised? A I believe it was the twelfth.
>
> Q The twelfth of October? A Yes, sir.
>
> Q 1924? A Yes, I think so. I can open the book here.
>
> Mr. Pitney: I object to the question as immaterial and irrelevant.
>
> The Court: Sustain the objection."

IV.

The trial court did not err in its charge to the jury, as asserted by the defendant's seventh and eighth reasons for appeal.

We cannot find in the judge's charge the sentences referred to in the seventh and eighth reasons for appeal (Case, p. 61): "that the failure to return the goods upon demand, the law presumes negligence," and "that it was negligence on the part of the defendant not to place the diamonds in the safe when he returned from the auction sale."

We will have to content ourselves, therefore, by quoting from the charge, which adhered

closely and correctly to *Carter* v. *Allenhurst,* 2 A. R. 909, throughout:

> "The burden of proof in this case is upon the plaintiff, and the rule of law is that it is necessary for the plaintiff, in making affirmative proof in this case, to account for the disappearance of the personal property. It is his duty, of course, to show the circumstances under which the property was delivered to the defendant or to the bailee, because there is a rule of law where property, in the hands of a bailee, as it was in the hands of the defendant in this case, is lost, that there is a presumption that the negligence of the bailee was the cause of the loss. That is a presumption at law, and that presumption is rebuttable, that is, the defendant can produce or adduce testimony to show that he did use ordinary care and that he was not negligent." (Case, p. 52, l. 32, *et seq.*)
>
> "The burden of proof in this case does not shift at all throughout the case. The plaintiff has the burden of proving that the defendant did not exercise ordinary care and was negligent.
>
> It may occur to you when you retire to the jury room, as I say, that the manner in which these goods were carried on the person of the defendant indicated that he exercised, under all the circumstances, what we know as ordinary care, or it may occur to you that when the diamonds were handed to him in his place of business, where there was a safe, that the exercise of ordinary care under all the circumstances, considering the time of the day when he received the diamonds, and considering what he did in explanation of his activities between that time and the time of the delivery of the diamonds, I say it may occur to you that not to put them in the safe was negligent and did not indicate ordinary care. Perhaps you will, to trace his movements that morning, reflect that when (*sic* for "as") he

returned to the store after he had been at the auction that he had had an opportunity to put them in a safe place, if he so desired, and did not do so. In short, if you find that the plaintiff has sustained the burden of proof and that the defendant did not exercise ordinary care and that the diamonds were lost as a result of that, your verdict would be for the plaintiff for the value of these diamonds, which I have not computed, but I presume is correctly set forth in the transcript namely, $2,111.40. If you find, on the other hand, that the defendant did exercise ordinary care, remembering that he was not an insurer, then, your verdict should be for the defendant."

POINT V.

Reply to Appellant's Brief.

A. Under Point II of his brief, the appellant argues that the trial court erred in sustaining the plaintiff's objection to a question put to the plaintiff upon cross examination, as follows:

> "Q Why did you (the plaintiff) go to police headquarters to ascertain whether he (the defendant) reported the loss?"

It suffices to point out that the appellant did not assign the alleged error as one of the reasons for appeal, which are printed on pages 60-61 of the State of Case.

The appellant argues on page 9 of his brief that the question went "to show the honesty and good faith on the part of the defendant, and should have been allowed." The plaintiff-appellee is quite willing to admit that the appellant reported the loss to police headquarters and did not dispute the fact at the trial. Neither the complaint nor the plaintiff's proofs attempted to show any dishonesty or bad faith on the de-

fendant's part. The defendant's honesty was not sought to be questioned in any way and was not relevant. The only issue was whether the defendant had exercised "ordinary care in the discharge of his duty toward the plaintiff."

Carter v. *Allenhurst,* 2 A. R. 909, 911, 125 Atl. Rep. 117.

Furthermore, whatever reason the *plaintiff* may have had for going to police headquarters to ascertain whether the defendant had there reported the loss of the diamonds, such reason could not conceivably have tended, as the appellant argues, "to show his honesty and good faith."

B. The appellant's brief does not argue the sixth, seventh and eight reasons for appeal, which have been discussed under Points II and IV of this brief. As said reasons for appeal appear to have been abandoned, it will be unnecessary to amplify Points II and IV of this brief.

C. In the argument addressed to the refusal to non-suit and to the refusal to direct a verdict for the defendant, the appellant's brief confuses the duties of a gratuitous bailee with those of a bailee under a bailment for the mutual benefit and gain of the parties. This Court has recently recognized that where the bailment is gratuitous, the bailee is responsible "only for gross neglect or for the violation of good faith."

Weinstein v. *Sheer,* 98 N. J. L. 511, 514,

and see:

Davey v. *Jones,* (Sup.) 42 N. J. L. 25, 28.

The appellant's brief, however, admits that the bailment in the case at bar was for the mutual benefit of the plaintiff and defendant (see middle of p. 3 of the appellant's brief). We have already pointed out that the answer also

admitted that such was the nature of the bailment. The brief, however, then cites *Smith* v. *Elizabethport Bank,* 69 N. J. L. 288, and other cases, in which it was conceded that the bailment was gratuitous. It is elementary that where the bailment is an incident to the conduct of the bailee's business, from which he derives profit, it is a bailment for the mutual benefit of the bailor and bailee, although the bailee receives no compensation for the bailment as such. 6 *Corpus Juris*, p. 1100.

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

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New Jersey Court of Errors and Appeals

EDWARD KITTAY, *Plaintiff-Respondent,* *vs.* JOSEPH CORDASCO, *Defendant-Appellant.*	*Action at Law. On Appeal from the New Jersey Supreme Court, Essex County Circuit.*

BRIEF OF WILLIAM GREENFIELD, Of Counsel for Defendant-Appellant.

This action was instituted by the plaintiff to recover the sum of $2,111.40 being the value of three diamonds entrusted by the plaintiff, who was a diamond dealer, and delivered to the defendant, who was and still is in the jewelry business in the City of Newark, and were delivered to the defendant at Newark on October 10, 1924, for which the defendant signed a Memoranda Receipt, marked Exhibit P. 1, page 63 of the Printed State of the Case. The diamonds were left with the defendant, and if he did not sell, he was to return the goods, and if sold, to pay the money for it. The defendant was to use those diamonds as an exhibit to a prospective purchaser for one of the diamonds. He was to take the same over to the prospective purchaser's residence for him to select, of which facts, the plaintiff was informed and therefore had full knowledge how the diamonds were to be handled. See testimony of the defendant, Joseph Cordasco, pages 30-32 of the Printed State of the Case.

The defendant put those diamonds in his pocket in the presence of the plaintiff as testified to by plaintiff, on page 14 of the Printed State of the Case, as follows:

> "Q What happened while you were in the store besides signing this memoranda receipt and the conversation you have given us? A Well, while I was in there a young man came in and told him they were going to auction off some furniture and fixtures in a banking firm and Mr. Cordasco said he would like to buy something. So, I said, 'You better be careful of those diamonds,' and he had put the diamonds in his pocket at that time.
>
> Q Did you see him do that? A Yes, sir.
>
> Q Which pocket? A His trousers pocket. I know that, and I told him to be careful, and he patted his pocket and said, 'Don't you worry; I am going over to see my customer and I may have time to visit the auction.'

The defendant thereafter left his place of business with the diamonds in his pocket, which were placed in the left-hand trouser pocket, and not the pocket that is generally and customarily used, to keep money, to which the defendant testified and uncontradicted by the plaintiff. The defendant went to the auction sale, and from there he went to deliver an automobile purchased by him to the garage and from the garage, the defendant went to a Halsey street restaurant and there had noon lunch. When the defendant left the restaurant, he discovered that the diamonds were missing from his pocket. The pocket was carefully examined in the presence of witnesses who testified at the trial of the above cause. Found no holes in the pocket. The place where the auction sale took place was carefully examined in the presence of Lawyer Finelli. Before going back to the auction place, the

restaurant was carefully searched, all garbage cans were searched, as testified to by Joseph Peragallo, page 46 of the Printed State of the Case. Thereafter the plaintiff went to the place where the auction sale took place, accompanied by Lawyer Finelli, which place was carefully searched, and also the automobile in which they were riding. A report was made to the Police Department, as testified to by James H. Manning, of Police Headquarters, page 23 of the Printed State of the Case, and corroborated by the plaintiff himself, but said diamonds were never recovered.

Title to said diamonds never passed to the defendant but was retained by the plaintiff. A pure simple bailment for the mutual benefit of the plaintiff and defendant. There being no evidence of any negligence on the part of the defendant. The only thing testified to by the plaintiff, was that he left the diamonds with the defendant, and in his presence, the defendant put the diamonds in his pocket, in preparatory, to show them to a prospective purchaser, and if not approved, to be returned to the plaintiff. On that evidence, counsel for the defendant, after the plaintiff rested his case, moved for a motion of non-suit.

POINT 1.

It is earnestly urged before this Court, that the Learned Court erred in refusing a non-suit. A non-suit should have been granted, because there was no evidence of any negligence on the part of the defendant. It is a well established principle of law, that before the plaintiff in a suit, as in the case at bar, can recover for property entrusted to the defendant, upon the express condition, that title is to be retained by

the plaintiff, and if sold, to pay for said goods, recovery, can only be had when gross negligence is proven. In other words, the defendant acted as broker or agent for the plaintiff. Negligence on the part of the defendant must be proven and not presumed.

Smith v. *Elizabethport Bank,* 69 N. J. L., page 288. Opinion by Van Syckel, *J.,* Court of Errors and Appeals.

At page 289, the Court says:

"Conceding that the bank was a gratuitous bailee, we think that the evidence fails to show, on the part of the bank, any want of ordinary care which the law exacted of it in that relation. Hence, the plaintiff was not entitled to recover and there was a verdict for the defendant."

From this very decision it is contended by counsel for the defendant, that the plaintiff must go further than prove the delivery of the merchandise to the defendant. As in the case at bar, he *must prove gross negligence,* before he can recover. Reading the State of the Case there is not a scintilla of evidence that indicates any negligence on the part of the defendant in the care, keeping or handling of the diamonds, in question. The plaintiff knew that the diamonds were to be shown to a prospective purchaser. Surely, he did not expect the defendant to carry those diamonds in his fist or put a padlock on his pockets. It was put in the pocket, not used by the defendant, as testified to by him. Negligence is not to be inferred. It must be proven. It is true that it may be proven by act or conduct, yet, proof of negligence must be shown, before the bailee can be held responsible, for the loss where it may be lost by theft or robbery. Particularly, in the case at bar, the bailment was for the mutual benefit of both. Hence, gross

negligence, is equivalent to fraud, and must be proven by the plaintiff. Since, no such proof can be presumed, and no such proof adduced in the case at bar, the Court should have granted a motion of non-suit.

> "In Foster *v.* Essex Bank, 17 Mass., page 479, Chief Justice Parker considered the doctrine entirely settled, that a mere depositary, without any special undertaking, and without reward, is not answerable for the loss of goods deposited, but in case of gross negligence, which is equivalent to fraud, in its effect upon contracts."

The Court held that it was a contract for the benefit of both parties. Gross negligence must be proven, and there being no such proof, the Court below erred in rendering a verdict for the plaintiff.

Corpus Juris, on Bailments. Page 1121, Section 61:

General Rule:

> "Where a bailment is for mutual benefit, the bailee, in the absence of special contract, is held to the exercise of ordinary care in relation to the subject matter thereof. In the absence of special agreement the bailee is not an insurer of the chattel intrusted to his care, and is not responsible for losses resulting from dangers necessarily incident to its use, from infirmity of the article itself, or the *act or negligence of a third person, or from accident, without negligence on his part.* Nor is the bailee liable for losses due to the contributory negligence of the bailor, his agents or servants. Under the term 'accident' is included any casualty produced by physical causes which are irresistible in their nature, such as fire and storm, the perils of the sea, unprecedented floods or other acts of God. *So a bailee is not liable for losses resulting without his negligence* from such public disasters as the inroads of a hostile

army, or the confiscation or destruction of goods by military authority, or from *such private causes as robbery, burglary or theft.*"

At page 1124, Section 63, *Corpus Juris:*

"*He is not liable as an insurer, nor is he bound to exercise an extraordinary degree of care.* Where the bailor of goods for exhibition knows of the manner in which the goods are to be safeguarded and consents thereto, he cannot afterward assert that such method was negligent."

The defendant put those diamonds in his pocket. It is true, he was told to be careful, but no suggestion of any kind or in what other manner he was to take those diamonds to the prospective purchaser.

Counsel desires to call the Court's attention to the case of *Belt R. & Stockyard Co.* v. *McClain,* Appellate Court of Indiana, Division No. 2, 106 N. E. R., page 742, at pages 744 and 745.

This suit was brought to recover for the value of two mules left with the appellant who was a stockyard concern and *provided stalls and stables* to leave cattle and horses of the persons who brought cattle to be sold to the stockyard as accommodation and as an inducement to the farmers to bring their stock to the company. There was a fire and the mules were destroyed by said fire, on failure to provide a watchman and easy access to the stables so as to save the mules from being burned.

Lairy, J., on page 744, Section 8:

"Only one of the reasons assigned as grounds for a new trial is presented on appeal, and that is that the verdict of the jury is not sustained by sufficient evidence. The *evidence clearly shows* that the relation of bailor and bailee existed, and that the

> bailee failed to return to the bailor the property intrusted to his care. This would be sufficient to make a prima facie case in favor of appellee if it did not also appear *without dispute that the subject of bailment was destroyed by fire.* This latter fact is sufficient to rebut the prima facie case made by proof of the bailment and failure to return the property bailed. *Under such a state of the evidence, the plaintiff must fail, unless he go further and show,* either that the fire was due to some want of care on the part of the defendant, or that some negligent act or omission on the part of the bailee co-operated with the fire to produce the loss."

Nowhere do we find in the case at bar that the bailee did not do everything that was necessary and incident, in the line of business conducted by the plaintiff and defendant. There is no evidence on the part of the plaintiff that he told the defendant to take extraordinary precaution against the loss of the diamonds. Simply told defendant to be careful. No evidence whatever, that he was negligent or not careful. Upon discovery of the loss, he did everything possible to reclaim the same.

In the case of *Belt R. & Stockyard Co.* v. *McClain, supra,* the Court further says at page 745, Section 11:

> "The only other charge of negligence which appellant was called upon to meet was that defendant negligently left no one in or about said barn to watch the same or to give notice in case of fire. In order to show that this precaution was negligently omitted, it was necessary to prove not only that it was omitted, but also to show conditions or circumstances *which would justify the jury in finding that such precaution was reasonably required in the exercise of ordinary prudence,* under the conditions and circumstances shown.

> Unless the conditions and circumstances shown *by the evidence* are of such a character as that the ultimate fact may be rightfully and reasonably inferred therefrom, the finding of such ultimate fact is not sustained by evidence."

In the case at bar nothing was shown that the plaintiff in any way or at any time attempted to contradict or dispute the defendant and his witnesses' testimony, that the defendant did not take all the precaution that was necessary. He put the diamonds in his pocket which was not torn, did not leave them lay anywhere, and did not exhibit them to anybody in a public place. The defendant proved by uncontradicted and undisputed evidence, that he put the diamonds in his pocket, and only discovered the loss, when he was about to deliver them to a prospective purchaser.

It is respectfully submitted on the evidence and law herein cited, the plaintiff failed to show negligence or that he neglected to take proper precaution in the care and keeping of the diamonds. The plaintiff should have been non-suited.

POINT 2.

The Court erred in sustaining the plaintiff's objection on cross examination of the plaintiff, on pages 18 and 19 of the Printed State of the Case.

> "Q When you came back with the detective, as you say, did he tell you a story of how it happened, did he? A Yes, sir.
>
> Q Did you attempt to verify it? A We went to police headquarters to see if he reported the loss.
>
> Q Did he? A He reported a loss, yes, sir.

Q Did you also find out he put an ad in the public press advertising for them? A That I didn't look for.

Q Did he tell you? A He said, so, yes, sir.

Q Did you look for it? A No, sir.

Q Why did you go to police headquarters to ascertain whether he reported the loss?''

There was an objection to the examination, as improper. Objection was sustained, and the Court granted an exception. It is respectfully submitted that the objection was harmful error where the plaintiff himself testified that when the loss was reported to him, he went to Police Headquarters to verify the information concerning the loss. It seems to me that the purpose and object was relevant and material to the defendant, as it goes to show the honesty and good faith on the part of the defendant, and should have been allowed. It was for the jury to judge the honesty of the defendant. The objection was harmful error and for that reason the verdict should be set aside and a new trial ordered.

It is respectfully submitted that the Court erred as a matter of law in excluding the testimony of James Pathe of Newark News, pages 20 and 21 of the Printed State of the Case. Counsel for the defendant in order to refute any insinuations or innuendos that the jury may draw from the facts, that the defendant did not return the diamonds, and to show honesty and good faith, in his endeavor to locate the diamonds, the defendant advertised in the public press. It is an elementary principle, that in all litigations the greatest factor, is good faith and honesty, in business dealings. In this particular case, the defendant did everything possible, and when he attempted to show what he did, it was error to exclude.

POINT 3.

Reasons 4 and 5, may be argued as one, on the ground that the Court refused to direct a verdict in favor of the defendant and against the plaintiff. It is an elementary principle of law, that when the plaintiff fails to sustain the burden of proof of his case, and where, as in the case at bar, the plaintiff failed to establish any negligence either ordinary or gross, and the defendant having accounted for the failure to return the diamonds to the plaintiff, as in the case at bar, and no contradictory testimony offered on the part of the plaintiff, nor any evidence whatever of any negligence in that defendant did not do anything that which a prudent person could and would have done, or that he did not take care of the property as he would of his own property of the like kind and character, hence, the Court should have directed a verdict in favor of the defendant.

> *Gray* v. *Merriam,* Supreme Court of Illinois, reported in 35 N. E. Repr., page 810, at page 812.

Opinion by Magruder, J.

Citing Schouler on Bailments and Carriers, Section 35, says "That the gratuitous bailee is liable only for slight care and diligence according to the circumstances, and cannot be held for loss or injury unless *grossly negligent.*"

In the case at bar, no proof whatever, either by inference or innuendos, that the defendant was so grossly negligent, that he was guilty of a fraud. On the contrary, the manner in which the diamonds were kept, was known to the plaintiff. If he thought it was not the proper place, by putting same in his pocket, (the Court must bear in mind that it was placed there in the presence of the plaintiff) the plaintiff could have de-

manded the return of same or that he, the defendant, place the diamonds in a more secure place, and the plaintiff having consented to the manner in which the diamonds were kept by the defendant, he cannot now complain that the defendant did not place said diamonds in the safe. The mere fact, that the defendant did not place the diamonds in his safe, does not prove negligence.

In the case of *Bradley* v. *Cunningham,* 23 Atl. Rep., page 932, Supreme Court of Errors of Connecticut, *Opinion by Seymour, J.*

In this suit there was a judgment for the plaintiff on the theory that the hearse was moved from the first stable to a barn and the barn caught fire and destroyed the hearse and by reason of the defendant's moving the hearse from the original place, which was covered by insurance, the insurance policy was defeated, and the defendant was held responsible. The Court reversed the judgment and directed a verdict against the defendants (plaintiffs below) on the theory that there was no proof that the plaintiff (the defendant below) had any knowledge of any such insurance. There was no proof that there was a *special agreement or contract* that this hearse should be kept in the first stable where it was originally kept.

The Court says on page 933:

"The Court below was, in effect, invited to pass upon the question of negligence which it is now claimed is not in the case. The claims made by the defendant, however, in the trial, call upon us to decide whether the Court erred in holding that in removing the hearse from his livery stable to his barn, without informing the defendants (the plaintiffs below) of his intention so to do, that they might keep their insurance in force, the

> plaintiff was guilty of negligence. This is a case where the question of negligence is presented as a question of law. It respects the duty of the plaintiff under given circumstances."

Browne's Law on Bailments, page 22. *Burden of Proof:*

> "The degree of care is proportioned to the nature of the property, but *negligence* is not inferable from that alone; it must be made affirmatively to appear."

It is respectfully submitted that there is no claim or any proof, when the defendant, in the case at bar, by placing the diamonds in his pocket, when he received them, and carried same on his person, up to the time of delivery to a prospective purchaser, exposed the same to any extraordinary risk.

> *Darby Candy Co. of Baltimore City* v. *Hoffberger,* Court of Appeals of Maryland, 73, Atl. Rep. 565. *Opinion by Briscoe, J.*

At page 566:

> "The law is well established that the fact of negligence is for the jury where there is evidence legally sufficient to prove it, but in the absence of such evidence it is the duty of the court to withdraw the case from the consideration of the jury."

The Learned Judge cites numerous other cases on same page, particularly, *Baltimore Refrigerator Co.* v. *Kreiner,* 109 Md. 361.

> "In all of these cases the rule is distinctly established that the onus of proving want of reasonable and proper care is on the bailor, and that the bailee is not liable for an accidental injury not caused by negligence. And this is so because bailees for hire are not insurers of the bailed property. The burden of proof is also upon the plaintiff to show causal connection between the defendant's acts or omissions, to constitute

> negligence, and the injuries complained of. And where under the evidence the injuries complained of may have resulted, either from the defendant's negligence, or from some other cause or causes, for which he is not responsible, the plaintiff cannot recover."

In the case at bar, there is no proof whatever, not the slightest, that the defendant in any way acted, conducted or behaved himself in a negligent manner in the care and keeping of the diamonds in question. The only evidence was, that when the plaintiff delivered the diamonds to the defendant, the plaintiff told the defendant, "You better be careful of those diamonds." The diamonds having been placed by the defendant in his pocket, in the presence of the plaintiff. The defendant in detail, explained how he missed the diamonds, and what he did in his endeavor to recover same which was uncontradicted, in fact, corroborated by the plaintiff himself. It seems to me there was no question for the jury, and at the close of the plaintiff's case, the defendant's motion of non-suit should have prevailed. And after the defendant had testified and explained in detail and accounted for the loss of same, the Court should have directed a verdict for the defendant.

It is respectfully submitted that the verdict should be set aside and a new trial granted. Counsel is not unmindful of the law, that a verdict will not be set aside because of a preponderance of testimony against it if there is some substantial testimony in which the verdict may be based.

State Bank v. *Holcomb,* 12 N. J. L., page 191;

Washington Bank v. *King,* 14 N. J. L., page 45.

The Courts *do set aside verdicts of Juries* where it appears against the *overwhelming weight of the testimony.*

Hatches v. *Penn. R. R.,* 69 N. J. L., page 227;

Humphris v. *Raritan Copper Works,* 60 Atl. Rep. 62

In the case at bar there is no evidence whatever, to support the plaintiff's case. Assuming that the plaintiff did make out a prima facie case in that he delivered the diamonds in question to the defendant, and he, the defendant, failed to return the same to the plaintiff, it is respectfully submitted that that alone does not relieve the plaintiff from the burden of proof which rests upon him, throughout the case, that the defendant was grossly negligent, and that the negligence amounted to a fraud, and unless he was successful in sustaining that burden, the plaintiff must fail.

It is respectfully submitted that on the evidence adduced and on the law herein cited, the plaintiff utterly failed. But, on the contrary, the defendant admitted he received the diamonds and established by the preponderance of evidence, which was uncontradicted, that the diamonds were lost and that the loss was not caused by any negligence on the part of the defendant.

It is respectfully submitted on the evidence, facts and law, the verdict should be set aside and a new trial ordered.

Respectfully submitted,

WM. GREENFIELD,
Attorney and of Counsel for
Defendant-Appellant.