

INDEX

	PAGE
Notice of Appeal	1
Grounds of Appeal	2
Summons Issued July 7, 1930	6
Complaint	7
Answer of Defendant Arnold Lasseff	10
Reply	12
Postea	13
Rule for Judgment	14
Testimony	15
Motion for Nonsuit	45
Motion for Direction of Verdict	65
Charge of the Court	67
Defendants' Exceptions to Court's Charge....	75

TESTIMONY FOR PLAINTIFF.

Martin R. Hoffman:	
Direct	15
Cross	23
Redirect	27
Recross	28
Carl Bitter:	
Direct	29
Cross	30
Redirect	32
Recross	34
Sidney Tunnington:	
Direct	34
Cross	36
Mrs. Marion Tunnington:	
Direct	37
Cross	38

	PAGE
Edmund Throckmorton:	
Direct	40
Cross	43

TESTIMONY FOR DEFENDANTS.

James Rosso:	
Direct	46
Cross	49
Mary Levins:	
Direct	53
Cross	55
James McNally:	
Direct	56
Cross	57
Joseph Steinman:	
Direct	61
Cross	61
Mrs. Sadie Lasseff:	
Direct	64
Cross	65

Notice of Appeal.

(Filed Dec. 16, 1931.)

New Jersey Supreme Court

MONMOUTH COUNTY.

10

MARTIN R. HOFFMAN,
Plaintiff,

v.

JAMES ROSSO and ARNOLD
LASSEFF,
Defendants.

Action at Law.

20

To

Messrs. BURLEW & CURRIE,
Attorneys for Plaintiff,
135 Main Street,
Matawan, N. J.

SIRS:

TAKE NOTICE, that the defendant, Arnold Lasseff, herein appeals from the judgment and every part thereof rendered in the Monmouth Circuit of the New Jersey Supreme Court, to the Court of Errors and Appeals of the State of New Jersey, and that he will within the time required by law file and serve upon you his grounds of appeal in said case, as provided by the rules and statute in such case made and provided.

30

POMEREHNE, LAIBLE & KAUTZ,
Attorneys of Defendant
Arnold Lasseff.

40

Grounds of Appeal.

(Filed Feb. 24, 1932.)

NEW JERSEY
COURT OF ERRORS AND APPEALS.

10

MARTIN R. HOFFMAN,
*Plaintiff-Appellee,**v.*JAMES ROSSO and ARNOLD LASSEFF,
Defendants-Appellants.

} Action at Law.

20

The above appellant, Arnold Lasseff, herewith sets down his grounds of appeal in the above entitled action:

1. That the trial court refused to grant a non-suit in favor of the said defendant against the plaintiff, because,

(a) There was no evidence that defendant was guilty of negligence.

(b) Because the plaintiff was guilty of contributory negligence as matter of law.

30

2. There was no evidence at close of plaintiff's case sufficient to charge defendant Lasseff with liability for the acts of the defendant, Rosso.

3. That there was no evidence which warranted the case going to the jury against defendant Lasseff, and the trial court should have directed a verdict in favor of defendant Lasseff, for lack of proof of agency between defendant Lasseff and defendant Rosso, operator of the car involved.

40

4. A verdict should have been directed in favor

Grounds of Appeal.

of defendant Lasseff, because at the close of defendant's case, the Court, on defendant's motion for a direction of verdict, held,

"It does not appear what that car was doing there, and what right apparently, Rosso had to take it." 10

5. The trial court erred in not directing a verdict in favor of defendant Lasseff, because there was no evidence in the case that defendant Rosso was the agent of defendant Lasseff, or that defendant Rosso was at the time of the accident under the direction, control or business of defendant Lasseff.

6. The trial court erred in instructing the jury that "Lasseff can only be held in this case in the event that the jury find under a fair preponderance of the proof by what might be termed the circumstantial evidence, that as a matter of fact there were a number of cars in the garage spoken of, that were owned individually by certain persons, such as Lasseff, with reference to the Packard car, that those cars were indiscriminately used by the members of a group of whom Rosso was one." 20

7. The trial court erred in its charge to the jury, stating: 30

"If it should appear as a fair inference under the preponderance of the proof that in fact several cars were in that garage which any member of the group had authority to use at any time, and that the Packard car owned by Lasseff was one of those vehicles, and that Rosso had an implied authority from Lasseff to use it for 40

Grounds of Appeal.

10 some purpose for which it was originally purchased or owned by Lasseff, then you could say, if you believe that the testimony bore such reasonable inference in fact, and you so find, that Rosso at the time was using the car of Lasseff under authority, and therefore the relation of principal and agent did exist," to which exception was taken.

8. The trial court erred in charging the jury, viz.:

20 "Now that is merely circumstantial evidence to which you are referred. It appears that the Packard car was at a garage in Perth Amboy. The owner of it is not produced as a witness. What right or authority Rosso had to take the car in the circumstances is left entirely to the circumstantial phase of the evidence."

9. The following part of the charge of the trial court to the jury was contrary to the evidence,

30 "If in fact the Lasseff car was indiscriminately used by Rosso and others with authority and the evidence warrants that inference under the greater weight of the credible nature thereof, it is for you to say—if you resolve that question, of course, against Lasseff then if the verdict goes against Rosso the assessment of damages would necessarily include Lasseff."

10. The trial court erred in charging the jury in manner following, since there was no evidence affirmative or contrary to support same, viz.:

40 "Whether Rosso subjected himself to pros-

Grounds of Appeal.

ecution for the violation of the Motor Vehicles Act in taking an owner's car without permission, in view of the fact that there was no prosecution subsequently is for your consideration as to the circumstantial nature of his relation to the car, so far as Lasseff is concerned at the time of the accident." 10

11. Because the trial court in its charge to the jury erred in stating the application of circumstantial evidence, viz.:

"From the legal standpoint it is undoubtedly a close question whether there is evidence here which justifies the holding of Lasseff under the circumstances. But since there may be a scintilla of evidence of a circumstantial nature I feel justified in leaving the question to the jury." 20

12. Because the verdict of the jury was contrary to law and the evidence.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys of Defendant
(Lasseff) Appellant.

30

40

Summons Issued July 7, 1930.

THE STATE OF NEW JERSEY TO JAMES ROSSO AND
ARNOLD LASSEFF:

10 YOU ARE SUMMONED to answer the annexed
 complaint of Martin R. Hoffman in an
 action at law in the New Jersey Su-
 preme Court, Monmouth County, and
 take notice that unless you file your
 answer to the said complaint with the
Clerk of the said New Jersey Supreme Court, at
Trenton, within twenty days after the service upon
you of this writ and the annexed complaint, the
plaintiff may proceed in the suit, and judgment
may be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice of
 the New Jersey Supreme Court, at Trenton, this
 7th day of July, Nineteen Hundred and Thirty.

FRED L. BLOODGOOD,
Clerk.

BURLEW & CURRIE,
Attorneys.

30

40

Complaint.

(Filed July 14, 1930.)

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

<p style="text-align: center;">MARTIN R. HOFFMAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">JAMES ROSSO and ARNOLD LASSEFF, <i>Defendants.</i></p>	}	Action at Law.
--	---	----------------

10

Plaintiff residing in the Borough of Keyport,
County of Monmouth and State of New Jersey,
says that: 20

FIRST COUNT.

1. On or about June 22, 1930, he was the owner
and operator of a certain automobile which was
being driven in a slow and careful manner in a
general southerly direction in and along Mon-
mouth Street and across Maple Avenue, both be-
ing public streets in the Boro of Red Bank, County
of Monmouth and State of New Jersey. 30

2. On or about the time and place aforesaid,
the defendant, Arnold Lasseff, was the owner of
a certain automobile which was being driven by
one James Rosso, as the servant or agent of the
defendant, Arnold Lasseff, and in furtherance of
the business and interest of the said defendant,
Arnold Lasseff, in a general westerly direction in
and along Maple Avenue and across Monmouth
Street, in a reckless, careless and negligent
manner. 40

Complaint.

3. The negligence of the defendant, James Rosso, consisted in the fact that he was operating the car of the defendant Arnold Lasseff at a fast, excessive and unreasonable rate of speed, under the circumstances, without proper regard for the rights of other vehicles on said highways; operated the aforesaid motor vehicle on the wrong side of the highway, without proper brakes on said car, without sounding any warning or signal of its approach; operated said car without making proper observation for vehicles lawfully on said highway, operated said car without making proper allowances for other vehicles lawfully on the highway; operated said car in violation of the Motor Vehicle Laws of the State of New Jersey; failed to yield the right of way to the plaintiff to whom it rightfully belonged at the aforesaid time and place; failed to retain control of the car which he was operating so as to avoid striking the plaintiff's car; and did otherwise and in divers other respects so recklessly, carelessly and negligently operate said car as to cause and permit it to crash into the plaintiff's car, damaging the same.

4. The negligence of the defendant, Arnold Lasseff, in addition to the individual negligence of the defendant, James Rosso, his servant or agent, as set forth above, consisted in the fact that he employed, permitted, or allowed careless, inexperienced and negligent agents or servants to operate his car at said time and place.

5. As a result of the several acts of negligence committed by the defendants as aforesaid, the automobile of the plaintiff was wrecked, ruined and damaged, whereby he was deprived of its use and value.

Complaint.

6. By reason of which plaintiff has been damaged by the defendant in the sum of One Thousand Dollars (\$1,000.00).

WHEREFORE, plaintiff demands from the defendants, or any one of them, under the First Count, the sum of One Thousand Dollars (\$1,000.00) damages, together with all costs and disbursements in this suit.

10

SECOND COUNT.

1. Plaintiff repeats and realleges with the same force and effect as if separately set out at length herein, paragraphs 1, 2, 3 and 4 of the First Count.

2. By reason of the negligent acts of the defendants, as aforesaid, this plaintiff was thrown from his seat in said automobile and suffered physical injuries, to wit: contusions and abrasions of the legs, arms and body; his nervous system was badly shocked, he was sore and stiff all over. All of which caused him much pain and suffering.

20

3. By reason of all of which the plaintiff was damaged by the defendants in the sum of Three Hundred and Fifty Dollars (\$350.00).

WHEREFORE, plaintiff demands under the Second Count from the defendants, or either of them, the sum of Three Hundred and Fifty Dollars (\$350.00) together with all costs and disbursements in this suit.

30

BURLEW & CURRIE,
Attorneys for Plaintiff.

40

Answer of Defendant Arnold Lasseff.

(Filed Aug. 18, 1930.)

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

10

<p>MARTIN R. HOFFMAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>JAMES ROSSO and ARNOLD LASSEFF, <i>Defendants.</i></p>	}	Action at Law.
--	---	----------------

20

Defendant, Arnold Lasseff, residing in the City of Newark, County of Essex and State of New Jersey, answering the complaint of the plaintiff says that:

ANSWER TO FIRST COUNT.

30

1. He denies paragraph 1 of the complaint.
2. He denies paragraph 2 of the complaint.
3. He denies paragraph 3 of the complaint.
4. He denies paragraph 4 of the complaint.
5. He denies paragraph 5 of the complaint.

He denies that the plaintiff is entitled to damages in the sum of One Thousand Dollars (\$1,000.00) on the first count, or any other count.

ANSWER TO SECOND COUNT.

40

He repeats each and every answer to the first count herein in answer to the second count of the plaintiff's complaint.

Answer of Defendant Arnold Lasseff.

He denies paragraph 2 of the second count of plaintiff's complaint.

He denies that plaintiff is entitled to damages in the sum of Three Hundred and Fifty Dollars (\$350.00) on the second count, or on any other count.

10

FIRST SEPARATE AND DISTINCT DEFENSE.

This defendant was not guilty of negligence.

SECOND SEPARATE AND DISTINCT DEFENSE.

The agents of this defendant were not guilty of negligence.

THIRD SEPARATE AND DISTINCT DEFENSE.

20

This defendant denies that the defendant James Rosso was his agent or servant, at the time, or at any time, as alleged in the said complaint.

FOURTH SEPARATE AND DISTINCT DEFENSE.

This defendant was not present at the time of the occurrence of the accident, nor were his servants or agents present, or contributed to the cause of said accident.

30

Whatever damages and injuries were sustained by the plaintiff, Martin R. Hoffman, at the time and place mentioned in the complaint, were caused and contributed to by his negligence in that he negligently and carelessly exposed himself to the risk of such an accident, and neglected to take precaution or to exercise care to guard and protect himself against such an accident, moreover at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner, and was not ex-

40

Reply.

10 exercising care or taking proper precautions, and
furthermore, was operating his said automobile
at a high and reckless rate of speed, contrary to
the Laws of the State of New Jersey governing
said motor vehicles and in not taking due care to
keep said car unto control as to avoid striking
other vehicles lawfully upon said highway.

WHEREFORE the defendant demands judgment
that the complaint herein be dismissed with the
costs and disbursements in this action.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for defendant Arnold Lasseff.

20

Reply.

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

MARTIN R. HOFFMAN,
Plaintiff,

v.

30 JAMES ROSSO and ARNOLD LASSEFF,
Defendants.

} Action at Law.

Plaintiff by way of reply to the Answer of the
defendant, Arnold Lasseff, says that: he denies
the First, Second, Third and Fourth separate and
distinct defenses contained in said Answer.

BURLEW & CURRIE,
Attorneys for Plaintiff.

40

Postea.

NEW JERSEY SUPREME COURT,
MONMOUTH COUNTY.

<p>MARTIN R. HOFFMAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>JAMES ROSSO and ARNOLD LASSEFF, <i>Defendants.</i></p>	}	Action at Law.	10
--	---	----------------	----

This case was tried before Judge Rulif V. Lawrence, Esq., with a jury at the Monmouth Circuit on December 1, 1931. The jury rendered a general verdict against the defendant Arnold Lasseff and in favor of the plaintiff for (\$1,000.00) One Thousand Dollars.

20

RULIF V. LAWRENCE,
Judge.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

30

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this fifteenth day of December, A. D. nineteen hundred and thirty-one.

FRED L. BLOODGOOD,
Clerk.

40

Rule for Judgment.

10 This case was tried before Judge Rulif V. Lawrence, Esq., with a jury at the Monmouth Circuit on December 1, 1931. The jury rendered a general verdict against the defendant Arnold Lasseff and in favor of the plaintiff for (\$1,000.00) One
 10 Thousand Dollars. Whereupon it is adjudged that the plaintiff Martin R. Hoffman do recover of the defendant Arnold Lasseff the sum of One
 Thousand Dollars damages, together
 \$1,000.00 with his costs which have been taxed
 71.82 at the sum of seventy-one dollars and
 ——— eighty-two cents, making in the whole
 \$1,071.82 the sum of One thousand seventy-one
 dollars and eighty-two cents.

20 Judgment signed and entered December 5, 1931.

WM. S. GUMMERE,
 C. J.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

30 In testimony whereof, I have set my hand and the seal of said Court at Trenton, this twenty-eighth day of December A. D. nineteen hundred and thirty-one.

FRED L. BLOODGOOD,
 Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

MONMOUTH COUNTY.

<p>MARTIN R. HOFFMAN, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p>JAMES ROSSO and ARNOLD LASSEFF, <i>Defendants.</i></p>	}	<p>10</p> <p>Action at Law.</p>
--	---	---------------------------------

Freehold, N. J., December 1, 1931.

MARTIN R. HOFFMAN, sworn for plaintiff.

Direct examination by Mr. Currie: 20

Q. Mr. Hoffman, on June 22nd, 1930, did you own an automobile? A. Yes, sir.

Q. Were you involved in an accident with that car on that day? A. Yes, sir.

Q. Where did the accident occur? A. Red Bank, New Jersey.

Q. Whereabouts in Red Bank? A. Monmouth Street.

Q. Will you describe to the jury what kind of a street Monmouth Street is? A. Monmouth Street is a street going east and west, with intersections running north and south. 30

Q. Now, what is it surfaced with, Monmouth Street? A. It wasn't surfaced with anything, but it is supposed to be a stop street.

Q. Tell us what the surface of the street is; is it gravel, concrete? A. Concrete.

Q. You were involved in an accident on that day? A. Yes, sir. 40

Martin R. Hoffman, direct.

Q. Where did the accident occur? I mean at an intersection or not? A. Well, the accident occurred when I was just about half-way across the other side of the street.

Q. What street? A. Monmouth Street.

10 Q. What kind of a street is Monmouth Street?
A. Concrete.

Q. And Maple Avenue? A. Concrete.

Q. How wide is Maple Avenue? A. I wouldn't like to say.

The Court: Counsel may agree. Do you know?

Mr. Laible: I think it is about thirty feet wide and I think the other street is about
20 forty.

Mr. Currie: I think that Monmouth Street is the one which is thirty or forty feet and Maple Place is about forty.

The Court: Well, you may stipulate that Monmouth Street is about thirty or thirty-five feet wide and Maple Avenue about forty.

Q. Was there anyone in the car with you? A. Mr. Tunnington, Mrs. Tunnington, Mrs. Brown, her
30 mother, and Mr. Brown, her father, and myself.

Q. Where were those people sitting in the car?

A. Mr. Tunnington was in back with his mother-in-law and father-in-law. His wife was in the front seat with me.

Q. What time did the accident occur? A. About—a little after three, possibly 3:15.

Q. What was the condition of the weather? A. Clear.

40 Q. What was the condition of the road? A. Dry.

Martin R. Hoffman, direct.

Q. Which direction were you going and on what street prior to the happening of the accident?

A. I was going out Monmouth Street towards the railroad.

Q. That is, from the town part? A. From the town; yes, sir.

10

Q. In which direction was the car of the defendant approaching? A. He was coming from my left.

Q. As you reached this intersection what, if anything, did you do? A. I stopped, looked to the left, looked to the right, and nothing in sight. I put my car in first gear, over to second, and I was just going from second to high and I heard this terrible screeching of the brakes, and the next thing I knew I was up in the air. I could feel myself going over. And, of course, when we struck we were all packed in there, and it threw my windshield open and I could see out; and I looked and the Packard was passing me diagonally, just head towards me.

20

Q. Will you describe to the jury, Mr. Hoffman, where your car was after the accident? A. My car had just—if this was the corner my car, half of it was on the sidewalk and half out in the road.

30

Q. What corner was that? A. That was, I would say, Mount's corner, I guess it is known as.

Q. What business does Mount conduct there, if you know? A. Ford automobile.

Q. Now where was the front of your car headed? A. Facing back the way I just came from.

Q. Where was the Packard? A. The Packard was laying on its side, diagonally across, facing me.

40

Q. Prior to the happening of the accident did

Martin R. Hoffman, direct.

you hear any horn blown or signal given by the Packard? A. None whatever.

Q. Did you hear any sound made by the Packard? A. I heard the brakes. Anybody could.

10 Q. Will you describe to the jury what kind of a sound they made and how long it lasted? A. Well, it certainly was a terrible screech. You could hear those brakes. That is about all the noise after the concussion. You could hear that.

Q. At the time of the happening of the accident where was your car in relation to the intersection?

A. Well, we were over half-way across, pretty nearly—

20 Q. When you approached the corner and slowed down and made your first observation did you make any other observation before you crossed?

A. Just that one.

Q. Did you make any observation in the other direction? A. None whatever.

Q. What part of the Packard car struck your car? A. His right front wheel and guard.

30 Q. Where did it strike your car? A. One hundred per cent. in the rear hub, exactly. We have a large disk just like that and it hit it perfect; couldn't be any more perfect.

Q. What did you have done with your car after the accident? A. Had a man at the garage down there take it off the highway, and then I had an estimate from Mr. Bushler, and from what he told me I didn't think I would be safe to ride in the car; I made a deal and bought a new car.

Q. How old was the car at the time of the happening of the accident? A. I think pretty nearly three months old.

40 Q. What did you value the car at immediately prior to the accident? A. \$1,500.

Martin R. Hoffman, direct.

Q. What was it worth immediately after the happening of the accident? A. It cost me \$850 for trade.

Q. What was the value of your car? A. Well, that I don't know.

Q. Well, how much was the car for which you traded it? 10

Mr. Laible: I object to that, if your Honor please. That is the new car he traded in he wants to value.

A. \$1,600, the new car.

Mr. Currie: The materiality is just this: the witness testified that he paid \$850 and his old car for a new car and now I am asking him what the value of the new car is. 20

The Court: It may have some evidential value.

Mr. Laible: He was asked what he was allowed for it.

Mr. Currie: The first answer was that he gave \$850 for the new one.

By the Court:

Q. Which car are you talking about, the one that was broken? A. Yes, sir. 30

Q. How long had you had that car? A. I don't think it was three months old.

Q. Was it new? A. Yes, sir.

Q. And what did you pay for it? A. \$1,500.

Q. And you had an old car that you were allowed something for? A. Yes, sir.

The Court: \$800; that isn't of any significance at all. The fact is the new car cost \$1,500. Any finance charges in that? 40

The Witness: No.

Martin R. Hoffman, direct.

Q. How far had you run this car at the time of the accident? A. Around four thousand miles.

Q. Had you kept it regularly serviced? A. No.

Q. Listen. Did you keep it regularly serviced?

A. Oh, yes.

10 Q. They all say that, of course, naturally. That is the reason I was surprised. Was it in good condition just before the accident? A. First-class.

Q. What did you say it was worth? A. Well, it was worth what I paid, to me.

Q. No, that is not the test. What you could go out in the market and get for it at that time? A. Well, that I couldn't say.

By Mr. Currie:

20 Q. Mr. Hoffman, I show you here a photograph and ask you what this is. A. That is a picture of my car that was in the wreck.

Q. Does that picture truthfully show the exact condition of your car immediately following the accident before my repairs had been made? A. It does.

Q. I show you another photograph and ask you what that shows. A. That is my car.

30 Q. Does that present the condition of your car immediately after the accident, before any repairs had been made? A. It does.

Q. I show you another photograph. Does that show your car, its condition, immediately after the accident, before any repairs had been made? A. It does.

Mr. Currie: I offer those three photographs.

40 Q. When were those taken, Mr. Hoffman? A. Right after we got the car home. It was taken by Mr. Maag.

Martin R. Hoffman, direct.

By the Court:

Q. Within two or three months after the accident? A. Oh, yes.

(Photographs marked Exhibits P-1, P-2 and P-3.) 10

By Mr. Currie:

Q. Will you show the jury where your car was struck by the other car?

(Witness indicates to jury.)

Q. Just indicate on the picture.

(Witness indicates.)

Q. In this picture here, Mr. Hoffman, your top on the right side and the right rear fender and right front fender are damaged. Will you tell the jury how those damages were received? A. That was on the side that the car turned over. 20

Q. On what side did your car turn over? A. It was on the right-hand side, on the ground.

Q. Did you, Mr. Hoffman, receive any personal injuries in this accident? A. Well, my stomach.

Q. Did you receive any injuries in any other place? A. Knee. 30

Q. Which knee? A. Right knee; the left knee—excuse me.

Q. What other injuries, if any, did you receive? A. That is all.

Q. As a result of those injuries was it necessary for you to secure medical attention? A. I did.

Q. How many times were you treated by a doctor? A. I was to Dr. Smith's office at Perth Amboy and then I don't know how many times I spoke to Dr. Hartman. He comes in my place of business, which is a drug store. 40

Martin R. Hoffman, direct.

By the Court:

Q. How were you hurt? What was the matter with your stomach? A. I don't know and don't know yet, Judge. It is still sore.

10 Q. Sore? A. Yes.

The Court: Proceed.

A. Well, one doctor said—

Mr. Liable: Objected to.

Q. No, not what the doctor said; what do you say? It is your stomach, you know. A. Well, acid conditions from nervousness.

20 Q. Did you have that before the accident? A. No, sir.

Q. How was your knee hurt? A. Just skinned.

Q. Did that recover? A. Yes.

By Mr. Currie:

Q. Were you able to return to your work the next day, Mr. Hoffman? A. I wasn't in my place of business the next day. I had to appear at court in Red Bank.

30 Q. Well, physically you were able to work, weren't you, on the next day? A. Yes.

Q. Were you unable to work physically any day as a result of this accident? A. No.

Q. How long did those pains or injuries last? A. Well, I still have trouble with my stomach to the present day, right now.

Q. Is that as severe now as it was immediately following the accident? A. No.

40 Q. How about this cut or bruise on your knee? How long did that continue? A. About a week, I should say.

Martin R. Hoffman, cross.

Q. How about these bruises or contusions on your stomach; how long did they continue?

Mr. Laible: If your Honor please, I don't think the witness has testified to any bruises and contusions on his stomach.

10

The Court: He said his stomach was sore.

Q. How long did the soreness continue? A. It is still there right now.

Q. Did you secure the license number of the Packard car which struck you? A. I did.

Q. What was that license number? A. E16643.

Q. What date? A. 1930.

Mr. Currie: I offer the—

The Court: Any question?

20

Mr. Laible: No question that Lasseff owned the car. The only question is agency.

Mr. Currie: I offer that certificate.

(Paper marked Exhibit P-4.)

Mr. Currie: Cross examine.

Cross examination by Mr. Laible:

Q. Mr. Hoffman, Monmouth Street is a stop street, isn't it? A. They say so but there wasn't any stop sign there.

30

Q. But did you see it? A. Did I see that there wasn't any sign?

Q. Yes. A. I did.

Q. When did you see that? A. That morning.

Q. Did you look after the accident? A. I did.

Q. Right after the accident? A. Right after the accident.

Q. But you didn't see whether it was a stop street or not? A. It was not a stop street.

Q. No stop sign there? A. No stop sign there. 40

Martin R. Hoffman, cross.

Q. Had it been knocked over, do you know? A. Well, I was told afterwards it was knocked over.

Q. But you don't know who knocked it over? A. I heard it was knocked over by an accident but I don't know who.

10

By the Court:

Q. Did you know it to be a stop street? A. Well, Judge, your Honor, I always stopped there.

Q. Did you know it to be a stop street? A. No.

Q. I mean before this accident? A. Oh, before, yes.

Q. In other words, you had been over it before? A. I had been over it before.

20

Q. You knew it was a stop street? A. Yes, I knew it was a stop street.

By Mr. Laible:

Q. And do I understand you correctly when you say you came to a complete stop? A. I did.

Q. How far were you from the corner when you came to a complete stop? A. How far was I in close to the corner, you mean?

30

Q. Either close or in from the corner. A. Well, just to give passengers enough room to walk by.

Q. Well, how many feet would you say that was? A. Four or five feet.

Q. When you came to a complete stop I assume you went into neutral in your car? A. Yes, sir.

Q. And you looked to your left? A. Yes, sir.

Q. Did you see any car approaching at that time? A. Not at that time.

40

Q. For what distance did you have a view? A. I would say 300 feet; I wouldn't want to say.

Martin R. Hoffman, cross.

Q. And for a distance of 300 feet you say you didn't see any cars? A. No, sir.

Q. Approaching? A. No, sir.

Q. Is that correct? A. Yes, sir.

Q. Then you put it in first? A. Yes, sir.

Q. Look again? A. No, I don't know as I did. 10

Q. You continued on without looking either left or right again; is that right? A. Yes, sir.

Q. And how many feet had you gone before the collision happened? A. Well, I must have gone eighteen feet, I say, of that thirty feet.

Q. How many miles an hour were you traveling in those eighteen feet? A. I should say about eight miles.

Q. About eight miles an hour; correct? A. About that. 20

Q. And when you say eighteen feet do you mean the front of your car had traversed eighteen feet or the rear of your car? A. I don't understand your question.

Mr. Laible: The question is withdrawn.

Q. Do you mean the front of your car had gone, from the place where you say you had stopped, had that gone eighteen feet or the rear of your car had gone eighteen feet? A. I would say the front of my car. 30

Q. The front of your car had gone eighteen feet? And on which side of the street was the other car when it hit you? A. Which side of the street?

Q. Yes. I am speaking of Maple Avenue. A. The car that hit me, you mean, which side was he on?

Q. Yes. A. He was on about the center of the street, diagonally across. 40

Martin R. Hoffman, cross.

Q. You knew that Maple Avenue was a direct route from the shore, didn't you? A. I did, yes.

Q. And it is the main highway? A. Main highway, yes, sir.

10 Q. And you said you were going to the railroad station? A. Yes, sir.

Q. To catch a train? A. No.

Q. Were you going to stop there? A. No.

Q. Going right on? A. Going right home.

Q. And you testified, I believe, that you didn't know the value of your automobile just prior to the accident? A. I don't think I am an authority to say what it would really bring, along that line.

Q. You had gone about four or five thousand miles? A. Under five.

20 Q. And you had purchased it in February, hadn't you? A. I don't know.

Q. How much were you allowed for it? A. You mean on this last trade-in?

Q. I understood you—if I am wrong—I understood you to say that you didn't have it repaired? A. No, I didn't have it repaired.

Q. You traded it in? A. Yes, I gave him a check for \$850 and my car for a new car.

30 Q. And you were allowed how much, do you know? A. No.

Q. You returned to work two days after the accident? A. Yes.

Q. You have worked steady ever since? A. I have worked ever since.

Q. Just one question. Were there traffic lights on that corner? You know what I mean by traffic lights, an automatic traffic light. Were there any lights there? A. There weren't any there.

40 Q. There weren't any there or they were not working? A. They were not working.

Martin R. Hoffman, redirect.

Q. Did you see the other car before it hit you at all? A. No.

Mr. Laible: That is all.

Redirect examination by Mr. Currie:

Q. How far were you from the curb-line on Monmouth Street when you made this observation to your left? 10

Mr. Laible: He said seven or eight feet.

A. About approximately that.

Q. Well, now, how far—where was the rear of your car at the actual time of the actual impact?

A. Why, we were over half-way across the street.

Q. How close was the front of your car to the curb-line on the westerly side of Monmouth Street, that is, towards the railroad station? A. Well, from the distance that my car was when we got out of it it must have been within five or six feet or four feet of that curb. 20

Q. Then how far did the front of your car travel from the time you made the observation until the time of the impact? A. Then that would be around twenty-five feet, I should say.

Q. Well, from seven feet east of the curb-line on Monmouth Street to within four feet of the westerly curb-line? A. Well, that is figuring the front part of my car. 30

Q. Yes, how far did the front part of your car travel from the time you made the observation till the time of the impact? A. Well, I guess that would be just a matter of guess. I should say twenty-five or thirty feet, not measuring it.

Q. How wide is Maple Place? A. Well, that I couldn't say. 40

Martin R. Hoffman, recross.

Q. Well, did it go the width of Maple Place?
A. Yes.

Q. And if Maple Place was forty feet it went
forty feet? A. Forty feet.

10 Mr. Laible: Now, if your Honor please,
I think that is for the jury to determine.

The Court: Oh, yes, he may answer. He
went the width of Maple Place; is that right?

The Witness: Yes, the width of Maple
Place.

By Mr. Currie:

Q. How fast was your car going during that
time? A. Eight miles, when it was under power.

20 Mr. Currie: That is all.

Recross examination by Mr. Laible:

Q. You say you were four feet from the curb
on the other side? A. Approximately. I couldn't
swear to that, because I didn't measure it, which
is about the only way you can come at it correctly.

Q. A little while ago on cross examination you
said it was in the middle of the street. A. When
I was hit?

30 Q. Yes; didn't you? A. I might have.

By the Court:

Q. Where were you when you were hit? A. I
was going across the street and I was more than
half-way across.

The Court: All right. Go on.

By Mr. Laible:

40 Q. You landed on what would be the northwest
corner; is that right? A. Yes.

Carl Bitter, direct.

Q. And where were the traffic lights with reference to this corner? A. That was right on the corner, on the same corner, northwest.

Q. And which side of your car hit the curb? A. I don't know. When I got out it was broken down.

Mr. Laible: That is all.

10

CARL BITTER, sworn for plaintiff.

Direct examination by Mr. Currie:

Q. Mr. Bitter, what is your business? A. Automobile dealer.

Q. And under what firm? A. Buehler & Bitter.

20

Q. Were you familiar with the Hudson sedan that Mr. Hoffman owned on June 22, 1930? A. I was.

Q. What kind of a car was that? A. A 1930 Hudson brougham.

Q. Do you know how old the car was at that time, Mr. Bitter? A. Why, I don't believe it was ninety days old.

Q. Did your firm make the sale of that car to Mr. Hoffman? A. We did.

30

Q. During that period had you had occasion to see the car from time to time? A. Mr. Hoffman—we always took care of his cars for the past five years, six years, and that particular car also. It was in the guarantee period and he always had it up to our service station for examination and so forth.

Q. Will you tell us, Mr. Bitter, just what the condition of that car was before the accident in which it was involved on June 22, 1930? A. Just as perfect as the car is now.

40

Carl Bitter, cross.

The Court: Are you satisfied with that answer?

Mr. Currie: We will come to that, your Honor.

10 *By the Court:*

Q. As a matter of fact the car was in good condition? A. It was a brand new car.

Q. What was it worth? A. \$1,650.

Q. The original price? A. That is the original price.

Q. No depreciation? A. Couldn't hardly be at that time.

Q. In ninety days no depreciation? A. Well, there would be a small depreciation at the time but
20 it was a brand new 1930 car.

Q. Well, how much, \$100? A. Well, there might be a depreciation of about \$200.

By Mr. Currie:

Q. Then you would say that the car was worth before the happening of the accident in June, 1930, \$1,450? A. That is the actual market value.

Q. What type motor did that car have? A. Straight eight Hudson motor.

30 Q. Did you see the car after the happening of the accident? A. I did.

Q. Did you make an appraisal of it then? A. I did.

Q. What was its value in its damaged condition immediately after the happening of the accident? A. About \$250.

Mr. Currie: Cross examine.

40 *Cross examination by Mr. Laible:*

Q. Mr. Bitter, this car was purchased from you in February, 1930, wasn't it? A. I don't know the exact date; 1930, the early part of the year.

Carl Bitter, cross.

Q. Did you sell it to him? A. Yes, sir.

Q. You, personally? A. Yes, sir.

Q. When you say ninety days the car was old you are just guessing at that, aren't you? A. No, I am giving the approximate time for the age of the car.

10

Q. If Mr. Hoffman said it was purchased in February it would be more than ninety days old at the time of the accident, wouldn't it, at the time of the accident in June? A. It might have been a hundred days old.

Q. Would you say a car that had gone four or five thousand miles had only depreciated \$200? A. Yes, a car kept like Mr. Hoffman's.

Q. So if it was a car that had gone four or five thousand miles, more or less, purchased from you, you would only take off a depreciation of \$200 in purchasing a new car? A. No, sir; that depends on how you keep the car and so on.

20

Q. Isn't there a certain amount of depreciation on every car the minute it is run? A. Yes, sir.

Q. And isn't that calculated at almost fifty per cent. of the value at the time? A. No, sir.

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

Q. And during that time you say that there is not a depreciation of almost fifty per cent. on any car the minute it is run? A. No, sir.

30

Q. Isn't that the way it is calculated by other automobile people? A. No, sir.

By the Court:

Q. As a matter of fact, the test is how much could you have gone out in the market and got for that car? A. You could have got between \$1,400 and \$1,450 at that time.

40

Carl Bitter, redirect.

Q. You could have sold it for that? A. Yes, sir.

By Mr. Laible:

10 Q. What did you allow for the old one in the trade? A. I don't remember the exact price; about \$300.

Q. And you sold him what kind of a car? A. Another Hudson brougham, exactly like that.

Q. For how much? A. \$1,650.

Q. He paid you \$850 cash, that is what he testified? A. Yes, and repairs also.

Q. So you allowed more than \$350? A. No, sir; there were repairs on the car also.

20 Q. Didn't you allow him more than \$350 on that car that he had paid you \$850 cash? A. I don't remember exactly which it was.

Q. You came here prepared to testify, didn't you? A. Yes, sir.

Q. And have you got your records here? A. I have got the record of all the damages.

Q. Have you got your records of what you allowed at the time this car was traded in? A. No, I haven't got records of that here.

30 Q. So if he paid you \$850 cash you must have allowed him more than \$350? That is, the difference in price? A. There are more details to the sale of a car than just the cash.

Q. I am asking you whether he paid you \$850 cash on a trade-in and traded that old car, the wrecked car, in for a new car plus \$850, you would allow him more than \$350, wouldn't you, on the \$1,650 car? A. Yes, sir.

Redirect examination by Mr. Currie:

40 Q. Did you appraise or estimate the cost of repairs on this car?

Carl Bitter, redirect.

Mr. Laible: Objected to.

The Court: It may have some significance. I will allow it.

A. Yes, I did.

Q. What was your appraisal or estimate of the repairs necessary to replace this car in the condition it was prior to the accident? A. I have an estimate here with me. 10

Q. Will you tell the Court and jury, after referring to that, what that sum is or was? A. \$689.71.

By the Court:

Q. And did that cover only the broken parts of the car, restoring it to condition? A. That covered every part of it. 20

Q. In the condition in which it was left after the accident? A. Yes.

Q. To restore it? A. Yes.

Q. How much? A. \$689.71.

Q. That would be the reasonable cost, would it? A. Yes, sir.

By Mr. Currie:

Q. Now, the fact that a car was in an accident, even though repaired to its same condition, does that have any effect on its resale value, Mr. Bitter? A. Well, it usually does. It always leaves some question. 30

Q. Does that make the car less saleable?

Mr. Laible: Objected to unless proven in this case.

The Court: Oh, yes; it must be confined to this specific vehicle.

Mr. Currie: I just want to show your Honor and the jury— 40

Sidney Tunnington, direct.

By the Court:

Q. Were there repairs made, Mr. Bitter? A. We made all the repairs.

Q. You made all the repairs? A. Yes.

10 Q. Was it in as good condition after the repairs were made as before the accident? A. Well, after that same day we had quite a lot of trouble with it.

Q. Well, what is your answer? A. Why, it was not in as good condition.

Recross examination by Mr. Laible:

Q. Of course, there were not as many cars selling last year as in the year previous? A. No.

20 Q. That might have had something to do with it, too? A. To do with what?

Q. The resale of the car. A. I don't know. I sold the car immediately after it was finished.

Q. Didn't have any trouble with it, did you? A. No, I didn't have any trouble.

SIDNEY TUNNINGTON, sworn for plaintiff.

Direct examination by Mr. Currie:

30 Q. Mr. Tunnington, do you know Mr. Hoffman, the plaintiff in this suit? A. Yes, sir.

Q. On June 22, 1930, were you riding in his automobile when it was involved in an accident? A. Yes, sir.

Q. Where did the accident occur? A. Occurred in Red Bank at the intersection of Maple Avenue and Monmouth Street.

40 Q. Do you remember what time of day or morning it occurred? A. Three-fifteen in the morning of Sunday, June 22nd.

Sidney Tunnington, direct.

Q. Where were you sitting in the car? A. I was sitting between my father and my mother-in-law in the back seat.

Q. Who else was in the car? A. Mr. Hoffman and my wife.

Q. What was Mr. Hoffman doing? A. Mr. Hoffman was driving and my wife sat alongside of him. 10

Q. Prior to the time of the accident do you remember Mr. Hoffman approaching this intersection? A. I do.

Q. What, if anything, did you do when he approached the intersection? A. Riding in the back seat I didn't take any particular attention but I did notice that he was driving very slow, because I was busy talking to my father and mother-in-law and never noticed. 20

Q. Do you know whether or not he changed gears or changed speed? A. From driving I did notice that; I noticed he changed gears but what gear he went into I couldn't tell.

Q. After he did that what did he do? A. Then he proceeded across the street very slowly.

Q. What happened as he was doing that? A. That I don't remember any more. I was stunned; didn't even see the lights of any car coming. 30

Q. Mr. Brown and Mrs. Brown, that is your mother and father-in-law respectively? A. Yes.

Q. Where do they live? A. Live in Scranton, Pennsylvania.

Q. Do you know whether or not they were coming? A. They were coming, but last night they wired that my mother-in-law was very sick with her trouble and couldn't make the trip.

Q. Is that the reason they are not here? A. 40

Sidney Tunnington, cross.

That is the reason they are not here. Otherwise she would have been.

Mr. Currie: Cross examine.

Cross examination by Mr. Laible:

10

Q. In other words, you were busy talking with your mother-in-law and father? A. Yes.

Q. You were not paying any attention to what was going on? A. Yes, I generally look out to see where I am going.

Q. Did you look out just before the accident? A. I didn't see anything.

Q. You didn't see anything? A. When the accident happened.

20

Q. Well, before the accident? A. Yes, before the accident I came to the street corner. I saw that.

Q. You saw the street corner? A. Yes.

Q. And what else did you see? A. Well, there was nothing there to see at that time in the morning.

Q. Did Mr. Hoffman bring his car to a complete stop? A. As I said before, I was busy talking, didn't notice. I know he changed gears; what

30

gears I don't know.

Q. You don't know whether he came to a complete stop or not? A. I don't know. I was busy talking.

Q. You really can't tell whether he came to a complete stop or not? A. Whether he got it stopped I don't know, but I know it was going so slow that I could have walked off of the car.

Q. What relation are you to Mr. Hoffman? A. No relation at all, just a friend; known him for

40

twenty years.

Mrs. Marion Tunnington, direct.

MRS. MARION TUNNINGTON, sworn for plaintiff.

Direct examination by Mr. Currie:

Q. Mrs. Tunnington, were you riding in Mr. Hoffman's automobile on the early morning of June 22, 1930, when it was involved in an accident? A. I was. 10

Q. Where were you sitting in the car? A. In the front seat with Mr. Hoffman.

Q. Do you remember prior to the happening of the accident what, if anything, Mr. Hoffman did?

A. I wasn't taking much notice, but he did stop.

Q. Where did he stop? A. On the right-hand corner.

Q. On what street? A. Monmouth Street. 20

Q. Was that at the intersection with Maple Place? A. Yes, it was.

Q. Now, after he did that what did he do? A. I am not familiar with driving; I can't tell you what he did do.

Q. Well, did he continue across the street? A. Yes, he did.

Q. Can you tell us whether he went fast or slow? A. He went slowly.

Q. Do you know whether or not he was engaged or did shift any gears of his car as he crossed the street? A. Yes, I think he did. 30

Q. Did you see the other car coming? A. No, I didn't.

Q. Do you remember the other car striking the car in which you were riding? A. I remember being in the air, that is all I know.

Q. You don't know where Mr. Hoffman's car was with relation to the intersection at the time it was struck? A. Half-way across the road. 40

Mrs. Marion Tunnington, cross.

Q. Do you know what part of Mr. Hoffman's car was struck by the other car? A. The left rear hub-cap.

10 Q. Did you see Mr. Hoffman's car after the accident, Mrs. Tunnington? A. I didn't for a few days.

Q. Well, did you see it as it laid there in the road? A. Yes, I did.

Q. Where did it lie? A. It was turned in the opposite direction in which he was going, on the side.

Q. Was it in the road or on the sidewalk? A. On the sidewalk.

Q. And what sidewalk was it on? A. The Ford and Lincoln agency.

20 Q. It was still on Monmouth Street? A. Yes.

Q. Did you see the other car, Mrs. Tunnington? A. No, I didn't.

Q. The Packard car? A. No, I didn't.

Mr. Currie: Cross examine.

Cross examination by Mr. Laible:

Q. Mrs. Tunnington, you were sitting in the front with Mr. Hoffman? A. I was.

30 Q. That would be on the right-hand side of him? A. Yes.

Q. It was a left-hand drive? A. Yes.

Q. Do you know what I mean by a left-hand drive car? A. Yes, I do.

Q. You didn't take any particular notice what Mr. Hoffman was doing? A. No particular notice.

Q. Whether he changed gears or not you don't know? A. Yes, I think he did.

40 Q. You think he did, you are not sure? A. I am not sure.

Mrs. Marion Tunnington, cross.

Q. Do you know whether he came to a stop there or not? A. He slowed up.

Q. Slowed up? A. I am not sure that he came to a dead stop.

Q. You are not sure? A. I am not familiar with driving. 10

Q. You would know whether a car came to a stop or not, wouldn't you? A. I think I would.

Q. But you are not sure whether he came to a stop that night or not? A. No.

Q. It was a clear night? A. Beautiful, clear.

Q. And there were no cars ahead of your car? A. There was no car ahead of our car.

Q. You had a clear vision? A. Yes.

Q. And you didn't see the other car there? A. I did not. 20

Q. How do you know it hit you in the hub-cap, because Mr. Hoffman told you that? A. Well, I was in the car.

Q. How do you know it was the hub-cap? A. Well, I seen it.

Q. You seen it when you got out? A. No, not when I got out.

Q. You couldn't see from the right-hand side of the car to the left-hand hub-cap, could you? A. I said I seen it later. 30

Q. You saw it later? A. Not that night.

Q. Some days afterwards? A. Some days afterwards, yes.

Mr. Laible: I think that is all.

Mr. Currie: That is all.

Edmund Throckmorton, direct.

EDMUND THROCKMORTON, sworn for plaintiff.

Direct examination by Mr. Currie:

10 Q. Mr. Throckmorton, where do you reside? A. I have an apartment on the corner of Maple Avenue and Monmouth Street.

Q. Were you home on the early morning of June 22, 1930? A. I was.

Q. And what were you doing at the time the accident occurred? A. I was asleep.

Q. Was your attention attracted to the accident? A. It was.

Q. What first attracted your attention that morning? A. The screeching of the brakes.

20 Q. Now, on what street does your room face, Mr. Throckmorton? A. It faces Monmouth Street but it is about twenty feet from the corner of Maple Avenue.

Q. Can you tell us from what direction the screeching of brakes came?

Mr. Laible: I object to that. I don't think he could decide.

30 The Court: Well, get him to the window. He is going to get up after a while and go to the window.

Q. As the result of hearing something what did you do?

Mr. Currie: I submit that anyone can tell from which direction a sound comes. I would like to have the witness answer it.

40 The Court: I don't know. He may have been deaf in one ear. What is the use of arguing?

*Edmund Throckmorton, direct.**By the Court:*

Q. Did you get up? A. Yes.

Q. Went to the window? A. Yes.

Q. Which side? A. Monmouth Street side.

Q. Did you look out? A. Yes.

10

Q. Could you see? A. Yes.

Q. Didn't have your glasses on? A. I didn't wear them.

Q. What did you see? Go ahead.

By Mr. Currie:

Q. What did you see there, Mr. Throckmorton?

A. I saw two cars lying broadside.

Q. And what kind of cars were they, if you know? A. Well, I couldn't tell from that distance exactly what they were.

20

Q. Did you later learn what kind of cars they were? A. Yes.

Q. What kind of cars were they? A. One was a Hudson and one was a Packard.

Q. Where was the Hudson? A. The Hudson laid on its broadside facing southwest and northeast. It laid right across the corner, with the rear part of the car up on the sidewalk, having broken the traffic light.

30

Q. In front of what business property is that sidewalk, Mr. Throckmorton? A. Mount & English Ford agency.

Q. Where was the Packard? A. The Packard was pointing toward the broadside of the Hudson, northwest and southeast, on its side.

Q. Do you remember whether or not the Packard was overturned? A. It was.

Q. And on what side was it? A. To my recollection of it it was on its right side.

40

Edmund Throckmorton, direct.

Q. Did you afterwards see any tracks or marks in the road, Mr. Throckmorton? A. The next day, yes.

10 Q. And from where to where did those marks extend? A. Well, I didn't measure the distance but it was about twenty feet up Maple Avenue to about the center of the intersection of the street.

Q. Did you see any glass or any oil marks on the road? A. Oh, yes.

Q. Where were they? A. Well, they were nearer to the northwest corner.

Q. That is the corner where the Ford and Lincoln agency is? A. Yes.

20 Q. Do you know what car the brakes you heard that night?

Mr. Laible: Objected to, unless he can answer yes or no.

The Court: Oh, yes; that would be clear implication. He didn't see it.

Mr. Currie: He heard it, your Honor.

The Court: Oh, I know, but how could he tell? Was there a difference in the squeal of brakes?

30 Mr. Currie: He can tell the direction from which they came. Two railroad trains, one on either side, you can tell which blew a whistle.

The Court: Well, now I will demonstrate to you that he doesn't know; at least I think he doesn't know. Repeat the question.

(Question repeated as follows: Do you know what car the brakes you heard that night?)

40 Mr. Laible: I object to it.

The Court: Objection sustained. Reframe it.

Edmund Throckmorton, cross.

Q. When you heard this noise that night, Mr. Throckmorton, did you know from which direction the noise came? A. It came from Maple Avenue on the south side of Monmouth Street.

By the Court:

10

Q. How do you know that? A. My windows were open.

Q. On that side? A. I could hear it.

Q. Where they open on Monmouth Street, too?
A. Yes.

By Mr. Currie:

Q. And is that the direction from which the Packard car came? A. Yes, sir.

Q. Do you know whether or not that stop sign was present on that corner on that day or not?
A. It was not.

20

Q. Why not? A. Because there was a man from Union Beach had an accident there and ran into it and carried it over into the lot across the street.

The Court: He evidently didn't like that sign.

A. He had a Ford car and didn't hurt him any.

30

Mr. Currie: Cross examine.

Cross examination by Mr. Laible:

Q. Mr. Throckmorton, I understand that you were asleep? A. Well, I was in bed.

Q. Just retired? A. No, I had been abed quite a while; since about ten o'clock.

Q. A good sleeper? A. Well, I get slept out sometimes.

Q. In about two hours you get slept out? A. I wouldn't say exactly as to that.

40

Edmund Throckmorton, cross.

Q. Were you asleep at this time? A. No, I was not asleep.

Q. Not asleep? A. I was in bed but not asleep.

Q. You heard the squeal of the brakes? A. Yes.

Q. One or two? A. One long continued squeal.

10 Q. Your house is situated where? A. On the southeast corner of Maple Avenue and Monmouth Street.

Q. And there is a gas station there, isn't there? A. No, sir.

Q. No gas station on the— A. No, no gas station there.

Q. What is it, on the southeast corner? A. There is an automobile—

20 Q. Building? A. Show room there underneath on the first floor.

Q. And did you occupy the apartment directly on the corner? A. No, there is a vacant room there, several vacant rooms.

Q. Where is your room located? A. Right next to the corner.

Q. On Maple Avenue or on Monmouth Street? A. On Monmouth Street.

Q. On Monmouth Street? A. Yes.

30 Q. So that your room faced Monmouth Street; is that correct? A. Yes.

Q. In a northerly direction; correct? A. Yes.

Q. And those two rooms are pretty wide, aren't they? A. Well, I should say about twelve feet wide.

Q. Now, when you heard the squeal of the brakes is that all you heard? A. At that time. Before I got to the window I heard the screech.

Q. Did you dress? A. No.

40 Q. Go downstairs? A. No.

Q. And just looked out of the window? A. Yes.

Motion for Nonsuit.

Q. What you are testifying is what you saw from this window? A. Yes.

Mr. Currie: That is all. The plaintiff rests.

MOTION FOR NONSUIT.

10

Mr. Laible: I would like to make a motion for nonsuit on the ground that the plaintiff himself has testified that he made one observation look and then started off and didn't look again and was hit. I submit, if your Honor please, under those facts he is guilty of contributory negligence as a matter of law and there should be a nonsuit. In fact there is no evidence at all of the defendant's negligence outside of the actual striking.

20

The Court: It appears in the case, according to the plaintiff's testimony, that he stopped his car at the corner indicated and proceeded into Monmouth Street; that he was either in the center or over the intersection of the highway when the collision occurred. His allegation is that before he started his car into the intersection he looked to the right and left and saw no car. A *prima facie* situation arises here as to whether he was in that part of the highway where if the driver of the defendant's car had been exercising authority and control over his car, especially as to vision, he would have seen the Hoffman car. The motion is denied. You may have an exception.

30

(Objection noted for defendants as ground of appeal.)

40

James Rosso, direct.

DEFENDANTS' TESTIMONY.

JAMES ROSSO, sworn for defendants.

Direct examination by Mr. Laible:

10 Q. Mr. Rosso, how old are you? A. Twenty-eight.

Q. And you live where? A. 68 Hoyt Street, Newark.

Q. Were you driving a car on June 22, 1930, about 3:30 A. M.? A. Right.

Q. Where did you get that car? A. Perth Amboy.

Q. Where did you get it?

By the Court:

20 Q. Where in Perth Amboy? A. Where?

Q. Yes. A. A garage on Fayette Street.

Q. Whose garage? A. I don't know who the garage belongs to.

By Mr. Laible:

Q. You had to go there to get it? A. Through Mr. Steinman.

30 Q. How did you go to get the car? A. I called Mr. Steinman up about the loaning of a car to take my friends out down the shore, and Mr. Steinman says, "All right, you can have one of the cars over in the garage." So he told me to get in the Cadillac.

Q. Now, when you went to the garage did you take the Cadillac? A. I couldn't start the Cadillac.

Q. What car did you take? A. The Packard was open and I took that.

40 Q. Do you know whose car that was? A. No, sir; I don't.

James Rosso, direct.

Q. Are you acquainted with Mr. Lasseff? A. No, sir; I am not.

Q. Did you know him that night? A. No, sir.

Q. Had you ever seen him? A. I never did.

Q. Did you know that was his car? A. No, sir.

Q. Did Mr. Lasseff ever give you permission to drive that car? A. I don't know the man. 10

Q. Now, you were driving this car and where had you gone? A. I went down to the shore.

Q. And coming back, what part of the shore had you gone, Asbury Park or what? A. Asbury.

Q. And coming back who was in the car? A. Friends of mine.

Q. Well, who were they? Give their names. A. James McNally, Miss Mary Levins, and I can't recollect the other man; I didn't know him so well. 20

Q. He was there at the time you picked Mr. McNally and Miss Levins up? A. Yes.

Q. And coming back did you have an accident? A. Yes, sir.

Q. What street were you on? A. I was on the highway. I don't know the name of that street there—Maple.

Q. In Red Bank? A. Red Bank.

Q. Now, what took place just prior to the accident? That is, what you saw and what you heard. 30

A. Well, I was coming on the highway there and before I approached the corner there, which I do on any highway, I blow my horn; and in order to avoid hitting this other car I turned left and my car turned over.

Q. Did you see the other car before the collision? A. No, sir, I didn't.

Q. Did you see it at any time? A. Why, I did.

Q. Where? A. Right on the center.

Q. Right in the center? A. Yes. 40

James Rosso, direct.

Q. And at the time; did you see him before the impact? A. No, sir.

Q. And what happened to the car after the collision? A. To my car?

10 Q. Both of them. A. I know my car turned over, as the car was up against a pole there on the opposite side.

Q. At the time of the collision what side of the street were you on? A. On the right.

Q. Were you in the center of the roadway or to the right of the center? A. To the right of the center.

Q. And where did the impact take place with reference to the intersection? A. It took place right on the road there in the center.

20 Q. What part of his car collided with your car, or your car collided with his? A. My car collided with his front.

Q. What part of your front? A. My right front collided with his left front.

Q. Front or rear? A. Front.

Q. What part of his car was in collision with your car? A. In the front.

30 Q. Where did he go after the impact? A. Why, he was up against a pole there.

Q. On the other side of the street or on that side of the street? A. On the other side of the street.

Q. And you were where? A. I was right in the center there.

Q. The same place where the impact took place or further up? A. The same place.

Q. Were you driving that car that night, Mr. Rosso, on any business of Mr. Lasseff? A. No, sir.

40 Q. Were you driving it for him or on his behalf? A. No, sir.

James Rosso, cross.

Q. I understood you to say you never knew Mr. Lasseff? A. No, sir.

Mr. Laible: Cross examine.

Cross examination by Mr. Currie:

Q. At or about this time what was your occupation? A. Why, just little odds and ends, kind of picked up work. 10

Q. You knew Benny Steinman? A. I did, yes.

Q. What was his occupation? A. I don't know.

Q. Don't you know that he was a bootlegger? A. No, sir.

Q. Do you say he was not? A. I don't know.

Q. Do you know Benny Steinman's wife? A. No, sir. 20

Q. Where did you call him, at his home in Woodbridge? A. I called him at the Madison Hotel.

Q. Do you know Mrs. Tonguinney? A. No, sir.

Q. Then you don't know whether it was Mrs. Tonguinney that you got on the telephone or Mrs. Steinman, do you? A. No, sir. What was that question?

Q. I say you don't know whether it was Mrs. Steinman that you got on the telephone or Mrs. Tonguinney, do you? A. No, sir; I don't. 30

Q. Do you live in Perth Amboy? A. No, sir.

Q. Ever been at Perth Amboy before? A. Yes, sir.

Q. How did you go to Perth Amboy that night? A. Friends of mine took me down.

Q. Who were they? A. I couldn't recall.

Q. What time did they take you down? A. In the afternoon.

Q. For what purpose did they take you down? A. Just to get a little work. 40

James Rosso, cross.

Q. And you got this job driving this Packard limousine, didn't you? A. No, sir.

Q. What were you driving the car for? A. To take my friends out.

10 Q. Who were your friends in that particular crowd? A. Mr. McNally.

Q. You picked him up where? A. I picked him up down at the shore.

Q. Well, you didn't pick him up in Perth Amboy, did you? A. No, sir.

Q. Whereabouts at the shore did you pick him up? A. Down at Asbury.

Q. Whereabouts in Asbury? A. I don't know.

Q. As a matter of fact Mr. Benny Harrington was in the car, too, wasn't he? A. No, sir.

20 Q. Do you know Benny Harrington? A. Yes, sir.

Q. What is his business? A. I don't know.

Q. You never worked for Benny Harrington or Steinman? A. No, sir.

Q. Did you ever know Benny Steinman to do any work? A. I don't know.

Q. You don't know Benny Harrington to do any work, do you? A. No.

30 Q. Did you know Benny Steinman to own any cars of his own? A. I don't know.

Q. Did you know Benny Harrington to own any cars of his own? A. No, sir.

Q. As a matter of fact this car was kept in the garage where there was a fleet of huge cars present with this? A. Yes.

Q. And when you went there you had the privilege of taking any car, didn't you? A. No, sir.

40 Q. What car did you have the privilege of taking? A. I had the privilege of taking the Cadillac.

James Rosso, cross.

Q. Did you know who the Cadillac belonged to?
A. No, sir.

Q. You don't know whether the Cadillac also belonged to Mr. Lasseff or not, do you? A. No, sir.

Q. Don't you know that Mr. Lasseff is out of the country for the purpose of purchasing and importing liquor? 10

Mr. Laible: Objected to.

The Court: That may be interesting, but how is it competent?

Mr. Currie: I think the jury is entitled to know. I think it is competent testimony.

The Court: We are talking about an automobile accident down at Red Bank. If you think it has any materiality I will allow you to go along. 20

(Question repeated.)

A. I don't know.

Q. Don't you know that Mr. Harrington and Mr. Steinman are associated with him in that business?

A. I don't know.

Q. How many people were in the car at the time of the happening of the accident? A. There were five with myself.

Q. As a matter of fact there were nine in that car, weren't there, including yourself? A. Five with myself. 30

Q. Where were they sitting? A. Three in the back and myself and my friend in front.

Q. Is that Mr. McNally that was sitting in the front with you? A. No, sir.

Q. Who? A. A girl, a friend of mine.

Q. Now, as you approached this intersection did you see the traffic light blinking? A. I seen a caution light blinking. 40

James Rosso, cross.

Q. How far from the intersection were you when you saw that? A. I guess about from here to where you are standing.

10 Q. That short distance before you saw it, were you talking with your friend in the front seat? A. No, sir.

Q. Is that the reason that you didn't see it sooner? A. No, sir.

Q. Where was it in relation to the highway, on what side? A. On the right side.

Q. How fast were you going at that time? A. About twenty-five miles an hour.

Q. And at that rate of speed in how many feet could you stop your car? A. Why, about eight feet.

20 Q. Did you see the car of Mr. Hoffman at the time you saw the blinking light? A. No, sir.

Q. When did you first see the car of Mr. Hoffman? A. Why, when he was in the center of the intersection there.

Q. In other words, that he had passed out from the corner and got across in the center of the road before you first saw him? A. No, sir.

30 Q. Well, now, tell us where he was when you did see him, if that is not the place. A. Well, to avoid hitting him I swerved to my left and I seen Mr. Hoffman's car up against a pole there.

Q. Did you swerve before you saw him? A. I did.

Q. How did you know that there was any necessity for you to swerve if you swerved before you saw him? A. Repeat that again.

40 Q. How did you know that it was necessary for you to swerve if you at the time hadn't even seen him? A. Well, he was coming out at a good rate of speed, I know that, and I had—

Mary Levins, direct.

Q. As a matter of fact, Mr. Rosso, you didn't see Mr. Hoffman until he was right upon you, did you?

A. No, sir.

Q. He was then practically in the center of the road? A. That is right.

Q. And you turned to your left? A. Yes, sir. 10

Q. And in so doing what part of your car collided with him? A. My front part—

Q. What part, what side? A. My right front.

Q. What part of his car did it collide with? A. With his left front.

Q. How fast were you going at the time you collided? A. Well, how fast? About five miles an hour when I hit him.

Q. And at that slow rate of speed your car overturned? A. That is right. 20

Q. And Mr. Hoffman's car also overturned? A. Yes.

Q. Do you remember whether Mr. Hoffman's car was knocked high in the air or into the air? A. No, sir.

Mr. Currie: That is all.

MARY LEVINS, sworn for defendants. 30

Direct examination by Mr. Laible:

Q. Miss Levins, where do you live? A. Perth Amboy.

Q. And the night of this accident were you riding in the car with Mr. Rosso? A. Yes, sir.

Q. Did you know whose car it was? A. No, sir.

Q. How did you happen to be in the car? A. Miss Sweeney invited me to go with him.

Q. And you were coming up from what part of the shore, do you know? A. Asbury. 40

Mary Levins, direct.

Q. What part of the car were you riding? A. In the back.

Q. On the right or left-hand side? A. I was sitting in the middle.

10

Q. Do you know those streets there? A. Yes, sir.

Q. Do you know where Monmouth Street is? A. Yes, sir.

Q. You were on what street? A. Maple.

Q. Now, as the car approached Monmouth Street can you tell us what you saw, if anything? A. As we approached Monmouth?

20

Q. When you got to Monmouth Street can you tell us what you saw? A. Yes, just as we got to Monmouth Street coming down Maple Street this car shot across in front of us and Mr. Rosso went left to avoid hitting him, and as he did the car was on the right-hand side and drove us across and we overturned.

Q. Did that car stop at Maple Avenue, the other car? A. I didn't see it stop, no, it came right at us.

Q. Was it going fast or slow? A. Coming at a pretty good rate of speed.

30

Q. Were there any signals given by either driver, do you know, horns blown? A. Well, I believe Mr. Rosso blew his horn.

Mr. Currie: Objected to.

The Court: Yes, strike that.

Q. Have you any recollection at all? A. Yes, sir; I think he did.

Q. Not what you think.

40

The Court: You must think before you speak but you must not state what you think. You may give your best impression.

Mary Levins, cross.

Q. Is it your best impression that there was a horn? A. Yes.

Q. From which car? A. From the Packard.

Mr. Laible: Cross examine.

Cross examination by Mr. Currie:

10

Q. Were you injured, Miss Levins? A. Yes, sir.

Q. What injuries did you receive?

Mr. Laible: Objected to as immaterial and irrelevant.

Mr. Currie: I am asking that question for the purpose of identifying this witness as one of the occupants of the car and I am going to try to connect it up with a party who was injured of a different name.

20

The Court: If you will assure me that you will connect it up and not forget it later in the trial I will admit it.

Q. What injuries did you receive? A. I had a sprained shoulder.

Q. How many women were in the car, Miss Levins? A. Three.

Q. Do you remember the names of the others? A. Miss Sweeney, and I don't know the other lady's name. Miss Sweeney was the girl that got out.

30

Q. Did you know any of the other men in the car besides Mr. Rosso? A. Mr. McNally.

Q. Was he the only other man that you knew? A. Yes, sir.

Q. You say you got in the car at Perth Amboy? A. No, sir.

Q. Where? A. Asbury Park.

Q. Were you employed at that time in Asbury Park? A. No, sir.

40

Mr. Currie: That is all.

James McNally, direct.

JAMES McNALLY, sworn for defendants.

Direct examination by Mr. Laible:

Q. Mr. McNally, where do you live? A. Perth Amboy.

10 Q. Were you in the automobile driven by Rosso that night? A. Yes, sir.

Q. Where were you sitting? A. In the back.

Q. Well, right or left-hand side? A. Right side.

Q. Where did you come from? A. Asbury.

Q. Do you know Mr. Lasseff? A. No, sir.

Q. Did you know that car belonged to him that night? A. No, sir.

Q. Were you with Mr. Lasseff that night? A. No, sir.

20 Q. What street were you on? A. The highway.

Q. On the main highway? A. Yes.

Q. Is that Maple Avenue in Red Bank? A. If that is the name, yes.

Q. Do you know the name or don't you? A. No, I don't know the name.

Q. Well, you saw the accident, didn't you? A. Yes, sir.

Q. All right. Now, just tell us what you saw from the beginning to the end of the accident.

30 A. Well, there was a caution light on the corner working. As we approached the corner, there is a store there at the corner. Stutz automobile, big plate glass windows in it. When we was coming to the corner why I seen this green car, I think was the color of it, coming out pretty fast, about thirty miles an hour, I judge. This fellow that was driving the car of ours, he blew a horn and slapped on the brakes. To avoid going right into the center of the car he tried to avoid it by going
40 up that way. This car was too far over in the

James McNally, cross.

center of the road. If he was just over a little more to the right he would have been all right. This car coming out on the side was coming so fast the back wheel of it connected with the front wheel of our car and just pulled it right around that way, and as it did this man's car just turned right around and ours upset through the speed of his car. 10

Mr. Currie: I object to that as calling for a conclusion and ask that it be stricken out.

Q. Where did the Hoffman car finally stop? A. It stopped after it turned around.

Q. I mean in relation to the corner where did it stop? A. In relation to the corner?

Q. Yes. A. On the other side of the street against a pole. 20

Q. Did you see the car of Mr. Hoffman stop there at the street before he came out? A. No, sir.

Q. Was he stopped? A. No, sir.

Mr. Laible: Cross examine.

Cross examination by Mr. Currie:

Q. Where were you sitting in the car? A. I was sitting in the right-hand side in the back seat. 30

Q. Rear seat or on one of the auxiliary seats? A. Auxiliary seat, by the door.

Q. Do you know what kind of a car this other car was? A. Mr. Hoffman's?

Q. Yes. A. Hudson.

Q. Do you know what color it was? A. Green. I am not sure.

Q. Did you look at it after the accident? A. No, no.

Q. The only time then that you saw it was this 40

James McNally, cross.

fleeting glance when it darted in front of the car?

A. No, sir.

Q. When? A. When I was lifting the lady out of the seat and this gentleman was standing alongside of the car.

10 Q. Was anyone else in the back seat with you?

A. No, sir.

Q. Where were the other five people sitting? A. I didn't bother with them. I was looking out for myself.

Q. In your car? A. Yes, in my car.

Q. Well, what was this, an every man for himself outing that day? A. That is the way we go, every man for himself.

20 Q. What is the reason that you were taking this trip, Mr. McNally? A. The reason we were taking the trip—

The Court: He did say, however, that the ladies came first; that softens the situation a bit. Go ahead.

Q. What was the reason that you were in the car that you were riding in that night? A. What did you want me to do, walk home?

30 Q. Where were you? A. Down shore.

Q. Were you and Miss Levins down there? Where did this party assemble down at the shore?

A. Where did it assemble?

Q. Yes; where did you get in the car? A. Asbury Park.

Q. Whereabouts in Asbury Park? A. Oh, I don't know where.

Q. Did you get in the car at Brielle? A. I don't know.

40 Q. Quite sure it was Asbury Park? A. Yes.

Q. Was there anybody in it when you got in it? A. Was there anybody in it?

James McNally, cross.

By the Court:

Q. When you got in it, he says. A. The people was in it that said they was in it.

By Mr. Currie:

Q. Where did you first see the car? A. Never seen the car before. 10

Q. Didn't know it was kept in Perth Amboy? A. No, sir.

Q. You say that you are a garage mechanic? A. Yes, sir.

Q. In what garage were you employed at that time? A. In what garage?

Q. Yes. A. I operate a garage. I own a garage.

Q. What was the name of the garage? A. Dublin Service Station. 20

Q. Did Mr. Steinman keep his other cars in your garage? A. Did he keep them? I didn't know that he owned other cars; don't know whether he owns them today.

Q. Do you know that he owns any cars? A. No, sir.

Q. Doesn't he own a Lincoln coupe? A. No, sir.

Q. Didn't he own a Lincoln coupe at that time? A. No, he owes me thirty bucks. 30

Q. Wasn't that for work on a Lincoln coupe that he owed you thirty bucks? A. No, that was for minding cows for his father.

Q. Where did his father have a farm? A. Oh, it is a part of Perth Amboy.

Q. Right in the heart of the city there? A. Yes.

Q. Did Mr. Rosso keep this car there in your garage? A. I don't know.

Q. Do you store any cars in there? A. Well, I do. 40

James McNally, cross.

Q. Did you ever store any cars there belonging to Benny Harrington? A. No, sir.

Q. Do you know Benny Harrington? A. No, sir.

Q. Never heard of him? A. No, sir.

10 *By the Court:*

Q. Who is Lasseff? A. I don't know, sir.

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

Q. It was your garage, you say? A. No, it was not my garage.

The Court: All right. Go on.

By Mr. Currie:

20 Q. You didn't know Mr. Steinman had any right to allow Mr. Lasseff's car out then, did you? A. No, sir.

The Court: I didn't understand that this young man Rosso got the Lasseff car at the Dublin garage.

Mr. Currie: That is what I am trying to find out.

By the Court:

Q. Well, did he? A. No.

30 Q. Was the Lasseff car stored in your garage? A. No, sir.

By Mr. Currie:

Q. What garage was it stored? A. I don't know.

Q. You don't know that it had ever been in Perth Amboy, do you? A. No, sir.

Mr. Currie: That is all.

Joseph Steinman, direct—cross.

JOSEPH STEINMAN, sworn for defendants.

Direct examination by Mr. Laible:

Q. Mr. Steinman, do you know this car, Packard car? A. I don't know.

Q. Do you know Mr. Lasseff's car? A. No. 10

Q. Did you give Mr. Rosso permission to drive a car? A. I did.

Q. And do you know where the Lasseff car was that night? A. I don't know.

Q. Do you know where it had been? A. No, I don't. I don't know.

Q. What is your business? A. Perth Amboy Marine Motors.

Q. Do you own a garage? A. No, I own no garage. 20

Q. Did you see the Lasseff car that night, the Packard? A. What night was that?

Q. June 22, 1930. A. I seen a car; I don't know whether it was Lasseff's or not.

Q. Do you know who it was? A. I found out later it was Lasseff's.

Q. Do you know Mr. Lasseff? A. No, sir.

Q. Did you tell Mr. Rosso he could drive that car that night? A. I told him to drive my car, this Cadillac. 30

Q. Where was the Packard car stored that night, do you know? A. I couldn't tell you where it was stored.

Mr. Laible: Cross examine.

Cross examination by Mr. Currie:

Q. What is your father's occupation? A. Nothing at the present time.

Mr. Laible: Objected to. 40

Joseph Steinman, cross.

Q. What was he at that time? A. Nothing, retired.

Q. As a matter of fact this car was your car registered in your father's name, wasn't it? A. It was Mr. Isaac Steinman's car.

10 Q. Didn't you buy the car and register it in your father's name? A. My father bought the car.

Q. Did you give him— A. No, sir.

Q. Did your father live with you at Woodbridge at that time? A. No, sir.

Q. Do you live in Woodbridge? A. At one time; yes, sir.

Q. At that time did you live in Woodbridge?

20 Mr. Laible: If your Honor please, I think it is all immaterial. He is now referring to the Lincoln car.

The Court: Ordinarily that would be so, but counsel is attempting to bring out some sort of relation of the parties in the case.

(Question repeated as follows: At that time did you live in Woodbridge?)

A. What time was that?

Q. June, 1930. A. No, sir.

30 Q. Where did you live? A. Hotel Madison.

Q. Did you hear Mr. Russo say that he called your wife regarding this car? A. I had no wife at the time.

Q. Was it Mrs. Tonguinney that he spoke to, do you know? A. No, sir.

Q. Do you know Mr. Harrington? A. I do.

Q. Is he an associate of yours in business? A. No, sir.

40 Q. Isn't it a fact that Mr. Lasseff, Mr. Harrington and yourself at this time were associated in the liquor retailing business? A. It is not a fact.

Joseph Steinman, cross.

Q. Were you in the liquor distributing business?

A. Never.

Q. Never participated in that business? A. Never participated.

Q. Is this Perth Amboy Marine Motors an incorporated company? A. It is.

10

Q. Where is its place of business? A. Its place of business now is in Woodbridge.

Q. It is in Woodbridge where, at any— A. 568 St. Georges Avenue.

By the Court:

Q. How near is that to Raritan Bay? Isn't the shop or the Perth Amboy Marine Motors now located on the bay or river? A. No, it is not located on the bay.

20

Q. How far inland is it? A. It is quite inland.

By Mr. Currie:

Q. As a matter of fact it is engaged in converting Liberty motors into boat motors? A. Any kind of motors.

Q. Into boat motors? A. Yes.

Q. It doesn't manufacture any motors from its own design, does it? A. Yes.

30

Q. Its own design? A. We have our own designs.

Q. What is your connection with the company?

A. I am on call.

Q. Do you hold any official position with the corporation? A. It is not a corporation.

Q. I thought you said it was. A. I understood you to say company.

Q. Who else is associated with you in that business? A. Myself at the present time.

40

Mrs. Sadie Lasseff, direct.

Q. At that time who else was in the business?

A. Joseph Altman.

Q. Why were you allowing Mr. Rosso to have a car that night? A. Well, I knew Mr. Rosso very well and he called me up for a car. I would do that for any friend.

10

Q. Where did Mr. Rosso live? A. I don't know. He lived in Newark somewhere.

Q. How did you become so well acquainted with him? A. Oh, about two or three years ago we met.

Q. Was that at sea or on land? A. On land.

Q. What was Mr. Rosso doing at that time? A. Mechanic, I believe, I don't know.

Q. You really don't know, you didn't bother to inquire nor did he tell you? A. Didn't bother to inquire.

20

Q. You never employed him? A. No, sir.

Q. Did I understand you to say that you didn't know Mr. Lasseff? A. I do not.

Q. Never saw him? A. No, sir.

Mr. Currie: That is all.

MRS. SADIE LASSEFF, sworn for defendants.

30

Direct examination by Mr. Laible:

Q. Mrs. Lasseff, you are the wife of Arnold Lasseff? A. Yes, sir.

Q. Where do you live? A. 215 Wainright Street, Newark, New Jersey.

Q. And on June 22, 1930, do you know where your husband was? A. No, sir. He was out of the country, I knew that; I didn't know where.

40

Q. You don't know what place he was? A. No, sir.

Motion for Direction of Verdict.

Q. How long had he been away at that time?
A. Well, he had been away six or seven weeks.

Q. And how long after June 22, 1930, was it before he returned home? A. About the same amount of weeks.

Q. Do you know where he is at the present time? A. Well, he is out of the country but I don't know any definite address. 10

Q. How long has he been away now? A. Seven weeks.

Q. Do you know when he is returning home?
A. No, sir.

Mr. Laible: Cross examine.

Cross examination by Mr. Currie:

Q. How many cars did your husband own on June 22, 1930? A. None. 20

Q. None? A. As far as I know.

Q. Then you don't know anything about your husband's business? A. No.

Mr. Currie: That is all.

(Both Sides Rest.)

MOTION FOR DIRECTION.

Mr. Laible: Now, if your Honor please, I move for a direction on behalf of the defendant Lasseff on the ground that there is no proof here as to agency. True, there is a presumption of agency by the proof of ownership, but under the cases in this state, if that has been satisfactorily overcome, there must be a direction of a verdict, and that is held— 30

The Court: That is right, you needn't state those cases. I am familiar with them. The question will be, I assume, whether this testimony that 40

Motion for Direction of Verdict.

has been offered here is to be believed or whether this car was used in a general way by certain individuals having some business or relation.

Mr. Laible: That would be true, if your Honor please.

10 The Court: And whether, therefore, a legal presumption has been overcome.

Mr. Laible: Yes, but there is no evidence that even Lasseff assented to that or that it was used in his business.

The Court: It does not appear what that car was doing there and what right, apparently, Rosso had to take it. What is your reaction to that, Mr. Currie?

(Mr. Currie replies.)

20 The Court: I incline to the view that this is a question of fact for the jury rather than one of law for the court; because after all it depends on whether or not the jury believes that Lasseff had some general relation to this group of men here to whom reference has been made. In the circumstances it would seem to be for the jury as to whether this evidence is credible enough to overcome the presumption of law.

(Mr. Laible replies.)

30 The Court: I think I will let the jury pass upon the weight of the testimony here.

(Objection noted for defendants as ground of appeal.)

(Recess until 12:55 P. M.)

Charge of the Court.

Members of the Jury:

You will understand, I take it, that the mere happening of the accident on which this suit is based will not justify the jury in awarding compensation to the plaintiff as sought unless it appear under the greater weight of the credible legal evidence that the collision of the vehicles in question was due to the negligence of Rosso. In other words, if there was no negligence on his part that is the end of the case and it will be unnecessary for you to consider any other question. 10

You will, therefore, take up and consider, when you come to deliberate upon this case, that primary question: has it been shown under the fair preponderance of all the proof in the case that the collision of the cars was due to the negligent driving of Rosso? In other words, he was charged with the duty of being careful. While he had an equal right with Mr. Hoffman, the plaintiff, on the highways in question at the time, so far as the plaintiff's case is concerned, he, Rosso, was bound to exercise that degree of care and caution which prudence would suggest to the ordinary and reasonable person. He was charged with the duty of exercising ordinary and reasonable care such as would be expected under the immediate circumstances and conditions in order to prevent the car which he was driving from colliding with that of Hoffman. 20 30

It appears that the collision occurred at the intersection of streets in Red Bank, and if it has been shown under the fair preponderance of the proof that the cause of the collision was the negligence of Rosso, then, of course, you would take up the second question that is raised as a defense, and that is that even though Rosso may be shown 40

Charge of the Court.

to have been negligent, if at the same time it appears that Mr. Hoffman himself was guilty of contributory negligence, then he can recover nothing. That requires that you examine the evidence in the case in order to get a mental picture of how the collision occurred. Mr. Hoffman testifies that he knew the street out of which he came, Monmouth Street, was a stop street. It so happens that the sign at the time had been kicked over or knocked over on some previous occasion; but nevertheless, he, Hoffman, was familiar with the street and knew that it was one of the posted streets at Red Bank requiring motorists to stop at the intersection.

Now, it is unnecessary to give you in detail the law in relation to a stop street. It means exactly what the sign would indicate: that the duty of a motorist on coming out of such a street would be to stop and then to exercise that degree of care which an ordinarily and reasonably prudent person would in seeing to it that as he took his car out into Monmouth Street it should not interfere to the injury of other motorists having equal rights upon that street.

If, therefore, you find that Rosso was negligent, either in driving the car which he occupied at an excessive rate of speed or failing to look for other motorists at the corner, such as Hoffman, for example, and in failing to act as an ordinarily and reasonably prudent person would, but at the same time you find that Hoffman was guilty of contributory negligence, in other words, that phase of negligence which is said to be present in a given case when the injured person by his own negligence has contributed to his injury in such a way that but for it he would not have received

Charge of the Court.

injury from the negligence of the other party, then I say he could not recover.

If you find, however, that Rosso was negligent under the fair preponderance of all the proof in the case, and that the defendants have not made out a case of contributory negligence against Hoffman, then he, Mr. Hoffman, would be entitled to receive a sum which in your judgment would compensate him for the difference in value of his car immediately before the accident and after the accident before repairs.

There is some concrete evidence to the effect that the car was substantially new, three or four months old. The number of miles it had been driven was indicated to you by Mr. Hoffman. It was in a condition immediately before the accident which he termed excellent, and the valuation he placed on it of \$1,200 or \$1,300—whatever the figure was or whatever the witness may have stated—you will recall. After the accident it is said to have been worth \$250 in its broken condition. Therefore, subtracting the latter figure from the value before the accident would give you the measure of loss under the law due Mr. Hoffman.

In addition to that he claims that he received some personal injury, a bruise to the stomach and some injury to the knee, and which you will recall, so far as his testimony was concerned. Just what sum would compensate him, if you find him entitled to recover under the rules of law I have given you, is for you to say. Evidently he had no permanent injury; I think he testified this morning that he was still feeling the effects of the injury to his stomach. However that may be, you will ascertain the nature of the injuries, the extent of them, the pain and suffering that in all

10

20

30

40

Charge of the Court.

reasonable probability accompanied them, and then say what in your judgment would compensate him for such injuries. Counsel has suggested to you that originally they contemplated asking for \$350, upon the theory that they had no real
10 idea at the time as to the extent of the injury. There is, however, an important question here, if you resolve the question of negligence and contributory negligence in favor of Mr. Hoffman, that you will be required to give deliberate attention to. It involves the question, can the other defendant, Lasseff, be held responsible for the negligence of Rosso in the circumstances of the case. I may say to you that it is rather a close question that is there involved. Out of an abundance of cau-
20 tion, however, I have concluded to let the jury pass upon the weight and credibility of the testimony that has been offered here with respect to the defendant Mr. Lasseff. There are a number of angles to which principles of law apply; and of course the chief one is whether it has been shown here under the fair preponderance of the proof that any relation whatever of principal and agent existed at the time of the accident between
30 Lasseff, the owner of the Packard car, and Rosso, its driver. There is no doubt that the owner of a car may loan it to someone else, and the borrower would be solely responsible for negligent operation in the event of an accident. I may loan you my car at your request, and if it be a loan, I, the owner, and you, the borrower, for a purpose of your own in which I have no interest whatever, and you as borrower, while driving the car, do a negligent act to the injury of some third
40 person, you are liable and I am not. Because the law is that no relation of principal and agent exists

Charge of the Court.

there. Technically speaking, that relation is what we know in the law as a bailment; I, as owner of the car, loaning you the car; you, the borrower. The only condition, so far as we are concerned, is that after you are through with the car in accordance with the condition of the lending you will return it to me in the same condition in which it was at the time I allowed you to have it. Now, so far as a third person there is concerned, the person who borrows would be solely responsible for its negligent operation. The owner would not. If, however, you find in this case that Rosso borrowed the Lasseff car, and that is established to your satisfaction under the fair preponderance of the proof, then Mr. Lasseff will have to be let out of the case.

Then, again, if it should appear in fact to the jury under the evidence that Rosso just took the car without any permission of Lasseff whatever, express or implied, there Lasseff would not be liable for the negligence of Rosso in operating it. Or, again, if the owner of the garage where the car was parked impliedly allowed Rosso to take the car without authority of the owner, Lasseff would not be liable. Lasseff can only be held in this case in the event that the jury find under the fair preponderance of the proof, by what might be termed the circumstantial evidence, that as a matter of fact there were a number of cars in the garage spoken of, that they were owned individually by certain persons, such as Lasseff with reference to the Packard car; that those cars were indiscriminately used by the members of a group of whom Rosso was one; if you believe the testimony; I don't know whether you do or not. He disclaims any such relation. But if it should

Charge of the Court.

appear to the jury as a fair inference under the preponderance of the proof that in fact several cars were in that garage which any member of the group sought to be set up here by counsel for the plaintiff had authority to use at any time, and that the Packard car owned by Lasseff was one of those vehicles, and that Rosso had an implied authority from Lasseff to use it for some purpose for which it was originally purchased or owned by Lasseff, then you could say, if you believe that the testimony bore such reasonable inference in fact, and you so find, that Rosso at the time was using the car of Lasseff under authority, and therefore the relation of principal and agent did exist. If that be so and it is established to your satisfaction under the fair preponderance of the proof in the case, or the greater weight of credible legal evidence, then you may say that since the relation of principal and agent existed at that time, that Lasseff would be responsible for Rosso's driving, if the negligence be shown under the rule of preponderance of proof and no contributory negligence be shown on the part of Hoffman, the plaintiff.

Now, that generally is the statement of the law as applicable to this case. You do have the negative statement here of Rosso and two or three other young men who came here and testified, one who was in the Rosso car at the time, but is not quite clear whether he got into it at Asbury Park as the result of some previous arrangement or not, or how he came to be in the car—and that is a mere comment of mine. The result is that so far as Rosso is concerned and the occupants of the car at the time, there is no evidence directly that

Charge of the Court.

Lasseff ever gave Rosso any authority to use the car as it was then being used.

Now, that is merely circumstantial evidence to which you are referred. It appears that the Packard car was at a garage in Perth Amboy. The owner of it is not produced as a witness. What right or authority Rosso had to take the car in the circumstances is left entirely to the circumstantial phase of the evidence. Why he should have done so in view of the statement of Steinman that he could use his own Cadillac car and instead of doing so took the Packard car of Lasseff, is not clear in the evidence. Whether he, Rosso, subjected himself to prosecution for the violation of the Motor Vehicle Act in taking an owner's car without permission, in view of the fact that there was no such prosecution subsequently, is for your consideration as to the circumstantial nature of his relation to the car, so far as Lasseff is concerned at the time of the accident. It may be said that if in fact the Lasseff car was indiscriminately used by Rosso and others with authority, and the evidence warrants that inference under the greater weight of the credible nature thereof—it is for you to say—if you resolve that question, of course, against Mr. Lasseff, then if the verdict goes against Rosso the assessment of damages would necessarily include Lasseff. As I say, I am not clear about the testimony at all, because it is not my function to pass upon its weight and credibility. That is yours. You are judges of the fact. And from the legal standpoint it is undoubtedly a close question whether there is evidence here which justifies the holding of Lasseff under the circumstances. But since there may be a scintilla of evidence of a

10

20

30

40

Charge of the Court.

circumstantial nature I feel justified in leaving the question to the jury.

Mr. Laible: I would like to ask your Honor about that motion.

10 The Court: I may say that I had occasion to rule upon two motions by counsel for Mr. Lasseff and also for Mr. Rosso, in the presence of the jury, and I decided them or ruled adversely thereon to the defendants. You understand that when the Court rules on motions of that nature it is merely upon the legal aspect; it has nothing to do with the facts in the case, and it is not to be in any wise used prejudicially by the jury in considering the case. I express no opinion as to the
20 direction in which the verdict should go in this case, because you are judges of the fact; and the fact that I rule adversely to the defendants on points of law raised, you will understand that that was merely exercising my function with reference to the law, not to the facts. You are the judges of those.

Mr. Laible: I am just informed here, now, that Rosso filed no answer. If that is so no formal verdict could go against him. Talking in reference
30 to the question at issue, negligence would be a subject for consideration by the jury, and leaving the only defendant for consideration Lasseff.

Mr. Currie: I take it he has waived that by coming here and taking part in the action.

Mr. Laible: No, that cannot be so; he is merely here as a witness.

Defendant's Exceptions to Court's Charge.

DEFENDANT'S EXCEPTIONS.

Mr. Laible: I except to your Honor's ruling that Rosso's appearance here and testifying and offering a defense cannot be considered as a waiver of his filing an answer. It was not shown that he was here under subpoena. 10

2. I do take exception to your Honor's statement where your Honor said that Lasseff can only be held in this case where the jury find by a preponderance of the proof by circumstantial evidence that there were a certain number of cars owned by other people in the garage and used indiscriminately by others, by a group, having admitted by a fair preponderance of the proof that there was implied authority that Lasseff for some purpose in the original purchase, you could say from inference that Rosso was using the car by authority from Lasseff, then you may say that a fair preponderance of proof of the relation of Lasseff arises. I take exception because there is nothing in the proof in relation to that, whereby an inference can be even raised. 20

3. I take further exception to that part of the charge wherein your Honor left it entirely to the circumstances in the case and whether it is not clear whether Rosso subjected himself to a prosecution, and that any such transaction subsequently had is for the benefit of the jury. There is no evidence to the contrary or to the affirmative that there was such a transaction. 30

4. I further take exception to your Honor's charge to the effect that the Lasseff car was indiscriminately used with authority and the evidence 40

Defendant's Exceptions to Court's Charge.

might warrant an inference as to the relationship between Lasseff and Rosso.

10 5. Further, I ask an exception to that part of the charge where you say, "Since there may be a scintilla of evidence of circumstances in the case."

Mr. Currie: He is speaking of your Honor's comment that it is a close question of law.

Mr. Laible: Also to your Honor's comment on the fact that it was a close question, in the latter part of your charge, on the question of fact.

20 The Court: Now that counsel have exhausted their challenges to the Court's charge I may say that I think that you will understand that wherever I commented on the evidence it was merely stating it; you are judges of the fact; and if the comments of the Court are of no value to you, you disregard them; incidentally, the remarks of counsel are in the same category. And I might further say that as I have examined the pleadings I find that Rosso filed no answer. The result is that he is merely here as a witness, and the sole question for you is whether a case has been made out by the fair preponderance of the proof under the rules of law which I have given you as to the
30 defendant Lasseff.

New Jersey Court of Errors and Appeals

MARTIN R. HOFFMAN,
Plaintiff-Appellee,

v.

ARNOLD LASSEFF,
Defendant-Appellant,

and

JAMES ROSSO,
Defendant.

Action at Law.
On Appeal from
Supreme Court,
Monmouth
County.

BRIEF OF APPELLANT.

The appellant, Arnold Lasseff, appeals from a verdict by a jury in the Supreme Court, Circuit of Monmouth County, before Honorable RULIF V. LAWRENCE, Judge, on December 1, 1931, rendered in favor of the plaintiff, Martin R. Hoffman, against the defendant Arnold Lasseff for \$1,000 damages and \$71.82 costs.

The cause of action was based upon injuries to plaintiff and damages to his automobile, resulting from collision by an automobile driven by James Rosso, in the Borough of Red Bank, on June 22, 1930.

The plaintiff alleged that the colliding vehicle was being driven by said James Rosso, as the servant or agent of, and in furtherance of the business and interests of the appellant, Lasseff, in a negligent and careless manner (Case, pp. 7-8).

The liability of the appellant is predicated upon the question of agency between the appellant, Lasseff, and the other defendant, Rosso.

It was not discovered until the close of the case that the defendant Rosso was not held in the case, he having filed no answer (Charge, State of Case, p. 76, bottom).

POINT I.

Grounds of Appeal Nos. 3-4-5.

A verdict should have been directed in favor of defendant Lasseff, because at close of defendant's case, the Court, on defendant's motion for a direction of verdict held,

"It does not appear what that car was doing there, and what right, apparently, Rosso had to take it" (State of Case, p. 66, line 11).

The evidence up to the motion for a direction of verdict showed:

Appellant, Lasseff, owned the Packard car that collided with the Hudson sedan owned by plaintiff (State of Case, p. 23, line 15 and p. 29, lines 11-14).

The Packard car of appellant was at the time of the accident being driven by the defendant James Rosso (State of Case, p. 46, line 5).

There is absolutely no testimony that in any manner connects the driver, Rosso, of the Packard car with the appellant, Lasseff, as agent, servant or otherwise, and this was apparent to the Court down to the time when motion for a direction of verdict was made (State of Case, pp. 65-66).

There is no testimony in plaintiff's case, either direct or by inference, that Rosso even drove the Packard car. This fact is first established in the

defense testimony by Rosso himself (Case, p. 46), who testified:

“Q. Were you driving a car on June 22, 1930, about 3:30 A. M.? A. Right.

“Q. Where did you get that car? A. Perth Amboy.

“By the Court:

“Q. Where in Perth Amboy? A. Where?

“Q. Yes. A. A garage on Fayette Street.

“Q. Whose garage? A. I don’t know who the garage belongs to.

“By Mr. Laible:

“Q. You had to go there to get it? A. Through Mr. Steinman.

“Q. How did you go to get the car? A. I called Mr. Steinman up about the loaning of a car to take friends out down the Shore, and Mr. Steinman says, ‘All right, you can have one of the cars over in the garage.’ So he told me to get in the Cadillac.

“Q. Now, when you went to the garage did you take the Cadillac? A. I couldn’t start the Cadillac.

“Q. What car did you take? A. A Packard car was open and I took that.

“Q. Do you know whose car that was? A. No, sir, I don’t.

“Q. Are you acquainted with Mr. Lasseff? A. No, sir, I am not.

“Q. Did you know him that night? A. No, sir.

“Q. Had you ever seen him? A. I never did.

“Q. Did you know that was his car? A. No, sir.

“Q. Did Mr. Lasseff ever give you permission to drive that car? A. I don’t know the man.”

On cross examination, page 50, State of Case, the same witness, viz. (line 3):

“Q. What were you driving the car for? A. To take my friends out.”

At line 28:

“Q. As a matter of fact, this car was kept in the garage where there was a fleet of huge cars present with this? A. Yes.

“Q. And when you went there you had the privilege of taking any car, didn't you? A. No, sir.

“Q. What car did you have the privilege of taking? A. I had the privilege of taking the Cadillac.

“Q. Did you know who the Cadillac belonged to? A. No, sir.”

Defense witness, Joseph Steinman (Case, p. 61, line 21):

“Q. Did you tell Mr. Rosso he could drive that car that night? A. I told him to drive my car, this Cadillac.”

There is no testimony in the entire case that shows any connection between the driver of the Packard car owned by the appellant, Lasseff, and the man Rosso, who drove said car at the time of the accident.

“Proof of ownership, without more, of an automobile which was being driven upon a public highway, raises a presumption of fact that the automobile was in possession of the owner, if not personally, then through his servant, the driver.

“Such proof likewise raises a like presumption that the driver was acting within the scope of his employment.

“Both, or either, of these presumptions may be entirely wiped out by uncontradicted proof to the satisfaction of the Court to the contrary, in which case the matter is a Court and not a jury question.” *Oslack v. Kraus*, 9 N. J. Adv. Rep. 580 (not yet reported in N. J. L. Reports); *Doran v. Thomsen*, 76 L. 754; *Missell v. Hayes*, 86 L. 348.

“In an action brought against the defendant as the owner of an automobile operated by its

employee, for alleged negligence of the driver of the car, the right of recovery depends upon whether or not defendant was legally responsible for the negligent act of its employee under the doctrine of *respondeat superior*, and the burden of proving that fact rests upon the plaintiff." *Sweeney v. York Motors Corp.*, 101 N. J. L. 247.

It is contended that the evidence established that although the automobile involved in the action was owned by appellant, Lasseff, and under the law was presumed to be under his control and operation, the uncontradicted proofs established that the car was out of his control, was not being used by or for him at the time of the accident, and that, therefore, the presumption of law was so clearly overthrown as to require the Court to deal with the question as one of law and not as one of fact for the jury.

Patterson v. Surplless, 151 Atl., page 755,
107 L. 305;

Doran v. Thomsen, 76 L. 754;

Mahan v. Walker, 97 L. 304.

It was established beyond question, that the appellant, Lasseff, at the time of the accident, and at the time of the trial was not in this country (State of Case, p. 64, line 36, *et seq.*); testimony by the wife of the appellant, viz.:

"Q. On June 22, 1930, do you know where your husband was? A. No, sir. He was out of the country, I knew that. I didn't know where.

"Q. You don't know what place he was? A. No, sir.

"Q. How long had he been away at that time? A. Well, he had been away six or seven weeks.

"Q. And how long after June 22, 1930 was it before he returned home? A. About the same amount of weeks.

“Q. Do you know where he is at the present time? A. Well, he is out of the country, but I don't know any definite address.”

The evidence, uncontradicted, shows that the appellant's automobile was taken by the defendant Rosso, for his own business and purposes and without the consent or knowledge of the appellant; that Rosso asked one Steinman to loan him a car, and Steinman told Rosso to take his (Steinman's) car, a Cadillac; that Rosso, not being able to start the Cadillac, took the Packard car, which belonged to the appellant, Lasseff, whom the defendant Rosso did not know (Case, p. 46, line 18, *et seq.*).

These proofs clearly establish that the Packard car was being used solely by Rosso for his own purpose, hence, no liability could be predicated on a relation of master and servant or principal and agent. *Tischler v. Steinholtz*, 99 L. 149; *Okin v. Essex Sales Co.*, 103 L. 217, affirmed 104 L. 191; *Le Strange v. Krivit*, 10 N. J. Misc. Rep., Advance Sheets, page 146, decided Jan. 20, 1932 (not yet in N. J. L. Reports).

And this evidence, uncontradicted, clearly rebuts the presumption arising from the fact of ownership as to resolve the question into one of law for the Court, as such. *Le Strange v. Krivit*, 10 New Jersey Advance Reports, Advance Sheets, page 147; *Tischler v. Steinholtz*, 99 L. 152.

In *Patterson v. Surpless*, Court of Errors and Appeals, Oct. 1930, 151 Atlantic Reporter 754, 107 N. J. L. 306:

“Presumption exists that use of automobile by another is under the control and direction of owner. It was established that the owner at the time of the collision was in Canada, and had been there for several days, and that the automobile was taken out of garage by pros-

pective son-in-law for his own business purposes, and without owner's knowledge."

The Court, at page 755:

"It is contended that, as to the defendant, Surpless, the evidence established that although the automobile involved in the action was owned by him and under the law was presumed to be under his control and operation, the uncontradicted proofs established that the car was out of his control, was not being used by or for him at the time of the accident, and that, therefore, the presumption of law was so clearly overthrown as to require the court to deal with the question as one of law, and not as one of fact for the jury. We think this contention is sound."

Proof of ownership of automobile raises presumption of owner's possession thereof, or through his servant.

Such presumption may be entirely wiped out by uncontradicted proof, in which case the matter is a Court and not a jury question. *Corsaro v. Ambrose*, 153 Atl. 712 (Supreme Court, March 1931 (not yet in New Jersey Law Reports). Citing: *Doran v. Thomsen*, 76 N. J. L. 754.

POINT II.

Ground of Appeal No. 6.

The Court erred in instructing the jury that:

"Lasseff can only be held in this case in the event that the jury find under a fair preponderance of the proof by what might be termed the circumstantial evidence, that as a matter of fact there were a number of cars in the garage spoken of that were owned individually by certain persons, with reference to the Packard car, that those cars were indiscriminately used by the members of a group of whom Rosso was one."

It is respectfully submitted that this part of the charge was misleading in that the learned trial judge did not sufficiently amplify the same by explaining to the jury in language to the effect that such indiscriminate use must have been for the business or purpose of the owner of such car so used, and that such indiscriminate use of certain cars stored in a garage for the pleasure or business of the user, other than for the purpose, direction or business of the owner, or without permission of the owner, would not render the owner of the car so used liable.

That the master is responsible for the negligence of his servant when acting within the scope of his employment is elementary law, but he is not responsible if the negligence was committed by the servant when engaged in some private matter of his own, is equally elementary.

Doran v. Thomsen, 76 N. J. L. 754-757.

Ground of Appeal No. 7.

The trial court erred in its charge to the jury, stating (Case, p. 71, bottom of page; 72, top):

“If it should appear as a fair inference under the preponderance of the proof that in fact several cars were in that garage which any member of a group had authority to use at any time, and that the Packard car owned by Lasseff was one of those vehicles, and that Rosso had implied authority from Lasseff to use it for some purpose for which it was originally purchased or owned by Lasseff, then you could say, if you believe that the testimony bore such reasonable inference in fact, and you so find, that Rosso at the time was using the car of Lasseff under authority, and therefore the relation of principal and agent did exist.”

There is no evidence anywhere in the case to support even an inference that the Packard car involved was one of a group of several, such as the Court implied, or that Rosso at the time of the accident was using the Packard car under authority from Lasseff, or by authority of any other person. The evidence, on the contrary, shows that Rosso took the Packard car without authority, for his own pleasure, and because he could not start the Cadillac, which he had permission to use from its owner, Steinman.

We respectfully submit that even if Rosso had obtained permission from the appellant to use the Packard car for the purpose of making a pleasure trip, such fact would not have rendered Lasseff liable, for the mere loaning of one's car to another, to be used by the latter for his own purposes, does not render the owner liable for the careless act of the loanee, driving it. *Marsh v. Sassanoff*, 154 Atl. Rep. 751, at 752 (not yet reported in New Jersey reports).

Ground of Appeal No. 8.

The trial court erred in charging the jury (State of Case, p. 73, line 3, *et seq.*):

“Now that is merely circumstantial evidence to which you are referred. It appears that the Packard car was at a garage in Perth Amboy. The owner of it is not produced as a witness. What right or authority Rosso had to take the car in the circumstances is left entirely to the circumstantial phase of the evidence.”

It is respectfully submitted that the evidence on this question was clear that the owner, Lasseff, was not in this country at the time of the accident, nor at the time of the trial (Case, pp. 64-65), and the testimony of Rosso that he took the

Packard car owned by Lasseff, when he could not start the Cadillac owned by Steinman, is uncontradicted, and raises no presumption by inference or circumstance that Rosso had any authority whatsoever to use said Packard car. *Patterson v. Surpless*, 151 Atl. Rep. 754, 107 N. J. L. 305.

Ground of Appeal No. 9.

The following part of the charge of the trial court to the jury was contrary to the evidence (Case, p. 73, line 20) :

“If in fact the Lasseff car was indiscriminately used by Rosso and others with authority and the evidence warrants that inference under the greater weight of the credible nature thereof, it is for you to say—if you resolve that question, of course, against Lasseff then if the verdict goes against Rosso the assessments of damages would necessarily include Lasseff.”

Nowhere in the case is there any testimony that the Packard car owned by Lasseff was ever used by Rosso and others by any authority from Lasseff.

The only testimony that any one ever used said car is that Rosso had it at the time of the collision, and there is no testimony that he had any authority to use it, and that part of the charge of the trial court, viz.: that “the evidence warrants that inference under the greater weight of the credible nature thereof,” is without foundation in fact or by inference, and was misleading to the jury.

Ground of Appeal No. 10.

The trial court erred in charging the jury in manner following, since there was no evidence, affirmative or contrary, to support same, viz. (Case, p. 73, line 13, *et seq.*) :

“Whether he, Rosso, subjected himself to prosecution for the violation of the Motor Vehicle Act in taking an owner’s car without permission, in view of the fact that there was no prosecution subsequently is for your consideration as to the circumstantial nature of his relation to the car, so far as Lasseff is concerned at the time of the accident.”

There is no testimony in the entire case, nor even a suggestion anywhere, to indicate that there was or was not prosecution against Rosso for taking appellant’s car without permission; and this part of the charge had no basis or foundation in the proofs for jury consideration.

Ground of Appeal No. 11.

The trial court in its charge to the jury erred in stating the application of circumstantial evidence, viz. (Case, p. 73, line 31):

“From the legal standpoint it is undoubtedly a close question whether there is evidence here which justifies the holding of Lasseff under the circumstances.

“But since there may be a scintilla of evidence of a circumstantial nature I feel justified in leaving the question to the jury.”

Discussing this department of proof, BLACKSTONE says that:

“When a fact cannot itself be demonstrated, that which comes nearest to proof of it, is proof of the circumstances necessarily or usually attending it; this proof creates a presumption which is relied upon till the contrary is proved.” 3 Black. 371.

It is respectfully submitted that any such evidence in the plaintiff’s case, creating a presumption of agency or of master and servant, was extinguished by the uncontradicted proofs of the defense, hereinbefore argued.

POINT III.

Ground of Appeal No. 12.

The verdict of the jury was contrary to law and the evidence.

The trial court in its charge to the jury (Case, p. 72, bottom, *et seq.*), said:

“The result is that so far as Rosso is concerned and the occupants of the car at the time, there is no evidence directly that Lasseff ever gave Rosso any authority to use the car as it was then being used.”

There is no testimony or evidence in plaintiff's case that provides any basis for inference of agency between Rosso and Lasseff.

Under the rule in *Tischler v. Steinholtz*, 99 L. 149, the presumption of control and direction by the owner, Lasseff, was clearly met by proofs on defendant's case, that Rosso took the car without permission from the owner; that he took the appellant's Packard car because it happened to be in the same garage in which the Cadillac car was standing, and because he was unable to start the Cadillac.

In view of the state of the testimony at the time when both sides rested, the finding of the jury was in disregard of the great preponderance of the evidence.

In an action brought against the owner of an automobile for the alleged negligent driving of its employee, the proofs showed that the employee secured permission of his employer to demonstrate the car to a Mr. S; that after completing the demonstration, instead of returning the car to its place of storage, he went to call on a friend in the City of Newark, and at the latter's suggestion, and

without securing the permission of his employer, drove with his friend to Asbury Park, and it was while on this trip that the accident occurred. Held, that under this evidence, which was uncontradicted, the jury was not justified in awarding a verdict against the defendant. *Sweeney v. York Motors Corp.*, 101 L. 247, citing *Wilson v. Penn. R. R.*, 63 L. 385.

In the case of *Vonella v. Shubert*, 8 N. J. Misc. Rep. 777 (Supreme Court, October, 1930), proofs submitted on part of defendant showed that a party of friends, to whom defendant Shubert was one, had rented summer quarters in Long Branch, and that defendant, who owned an automobile, left it in a garage near this house during his absence from Long Branch for the use of the other members of the party, such use being for their own pleasure or business; that on the occasion of the accident the defendant was away from Long Branch and Mrs. Holt, by virtue of this permission granted by him, was using the car for the purpose of taking a friend of hers to the hospital, the Court held:

“These facts are not only sustained by a great preponderance of evidence but were not attempted to be controverted. Accepting them as true, the verdict, which is based upon the theory that Mrs. Holt in driving the car was acting as the agent or for the benefit of Shubert, is without legal support, and for this reason the rule to show cause will be made absolute” (*Ibid.*, p. 778).

It is, therefore, respectfully submitted that the judgment below should be reversed because:

1. There should have been a direction of verdict in favor of the defendant-appellant.

2. The charge of the trial court to the jury was erroneous and misleading in matters of law and fact.

3. The verdict of the jury was contrary to the weight of the evidence.

Respectfully submitted,

POMEREHNE, LAIBLE & KAUTZ,
Attorneys of Appellant.

New Jersey Court of Errors and Appeals

MARTIN R. HOFFMAN,
Plaintiff-Appellee,

vs.

ARNOLD LASSEFF,
Defendant-Appellant,

and

JAMES ROSSO,
Defendant.

Action at Law.

On Appeal from
Supreme Court,
Monmouth
County.

BRIEF OF APPELLEE.

This is an action arising out of an automobile accident which occurred in the Boro of Red Bank, Monmouth County, on June 22, 1930. The jury found a verdict in favor of the plaintiff as against the defendant Lasseff who was the owner of the car. Throughout the trial, the plaintiff contended that Lasseff was engaged in the illicit liquor traffic and this car, at the time of the accident, was being operated by one of his drivers for him in this business with a few passengers to disguise the true circumstances of its being on the highway. Of course, it was impossible to get an admission of this fact from the defendant's witnesses—defendant himself failed to appear—but the

jury could judge the truth or falsity of this contention thru the answers which these witnesses made to the questions and their appearance which stamped them definitely as being members of such a group of law violators.

POINT I.

Grounds of Appeal Nos. 3-4-5

The question of ownership was established by the testimony of the plaintiff as to the license number of the car which struck him and the production of a certificate from the motor vehicle department showing that at this time the car was registered and owned by the defendant Lasseff (State of Case, p. 66, line 20). Under the familiar rules of law, this raised a presumption that the car was being operated upon the highway at this time by the servant or agent of the defendant and in furtherance of his business or interests. The defendant Lasseff attempted to overcome the legal effect of this by denials upon the part of the driver and other witnesses that the defendant Lasseff had anything to do with this particular ride. The weakness of this defense was apparent to the jury when it was observed that there was no appearance by the defendant Lasseff nor any deposition by him explaining the circumstances under which the car was so readily available for use as it appeared to be. Even a casual reading of the testimony will indicate that defendant Lasseff was an individual about whom none of the defendant's witnesses cared or dared to give any information. His wife didn't even know his business, or at least wouldn't admit knowing it (P. 65,

1. 25), and even denied knowing that he owned this expensive Packard sedan (P. 65, 1. 20). Her testimony lent color to plaintiff's contention that her husband was a bootlegger of liquor when she admitted he made frequent trips out of the country but wouldn't admit knowing for what purpose he went (P. 64, 1. 30-40). Strange as it may seem all of the defendant Lasseff's witnesses denied knowing the defendant (P. 49, 1. 1), (P. 60, 1. 11), (P. 61, 1. 27). This was too much for anyone to believe. The refusal of all defendant's witnesses to give a clear and convincing account of their occupations also indicated that they were bootleggers. The physical appearance of these witnesses stamped them as such. This car was kept in a garage with many high priced cars such as used by this fraternity under similar circumstances (P. 46, 1. 32). This car was part of their fleet as Rosso testified.

"Q. How did you go to get the car? A. I called Mr. Steinman up about the loaning of a car to take my friends out down the shore, and Mr. Steinman says, 'All right, you can have one of the cars over in the garage.' So he told me to get in the Cadillac.

"Q. Now, when you went to the garage, did you take the Cadillac? A. I couldn't start the Cadillac.

"Q. What car did you take? A. The Packard was open and I took that.

"Q. Do you know whose car that was? A. No, sir; I don't."

Even Rosso wouldn't say that Steinman wasn't a bootlegger (P. 49, 1. 15). In fact, Rosso admitted he came to Perth Amboy to get a job

(P. 49, l. 40) and this was the job he got, driving Lasseff's car in this bootlegging enterprise. It was significant that the garage owner where these high powered cars were kept was not called to testify nor was any explanation given by defendant Lasseff as to how his car was there in that garage at that time.

Surely, such testimony did not produce such uncontradicted proof as would justify the court in granting a direction of a verdict as it undoubtedly left much to be explained and was not to be believed. Therefore, the court did not err in refusing to grant the motion (*Doran vs. Thomsen*, 76 L. 754) (*Missell vs. Hayes*, 86 L. 348). No such case was presented as in the case of *Patterson vs. Surpluss* (107 L. 306). Defendant's proofs were most unreliable and not worthy of belief.

The case was properly left with the jury under the proofs. The jury was equally justified in refusing to believe the defendant's proofs as true and awarding a verdict to the plaintiff. This case was directly in line with the principle enunciated in the cases of *Tischler vs. Steinholz*, 99 L. 149; *Hart vs. Brusnahan, et al*, 137 A. 845; *Gustin, et al vs. Calandriello*, 144 A. 312 (Case No. 1)) and *Crowell, et al vs. Padolsky*, 98 L. 552.

POINT II.

Ground of Appeal No. 6

In view of the fact that there was conflicting and doubtful proof offered by the defendant to overcome the presumption of agency as set forth above, the court in limiting the jury to the extent complained of under this point

committed no error toward defendant but rather one toward plaintiff. The jury was entirely justified in finding that defendant's proofs did not overcome the presumption of agency as in fact they did not. Therefore, this limitation if in fact it was error was harmless insofar as this defendant was concerned. Certainly, under the cases heretofore cited (Hart vs. Brusnahan, et al, Gustin, et al vs. Calandriello, supra), the jury was justified in putting plaintiff's verdict upon a broader ground than this. Besides, under the whole charge, it was apparent that the court indicated this applied only in case of use for the business of owner.

Ground of Appeal No. 7

Defendant here assumes that his evidence was worthy of belief which it was not. Proofs clearly showed that this car was parked in a garage with other high powered cars which were available for use of these men who were engaged in this bootlegging business. Rosso's testimony that it was a pleasure trip was so false as no jury could or would have believed it after having had the opportunity to observe his demeanor on the stand, taking notice of his looks, and observing the inconsistency of his statements.

Ground of Appeal No. 8

The defendant here also assumes that the testimony of his witnesses was to be taken as given, which was not the case. No explanation was given by Rosso as to how he dared to take the defendant Lasseff's car when he was sent for the Cadillac. This certainly impliedly

showed he has a right to take it for the purpose which Steinman sent him. Nor is Steinman's testimony that it was a loan to be believed, taking the other circumstances into effect. Circumstances pointed out the fact that Rosso had the car in the bootlegging business of the defendant Lasseff.

Ground of Appeal No. 9

Again, it is submitted that the jury should not have been limited to this narrow view of the whole case as was pointed out above in the arguments under Grounds of Appeal No. 6, 7, and 8. If this was error, it surely was harmless error so far as this defendant was concerned.

Ground of Appeal No. 10

Any error of which the defendant could complain as regards this was cured by defendant's request at close of charge and by reason of which the court directed the jury to disregard his comments. It was, however, clearly apparent and proper for the jury to consider that the defendant Lasseff made no objection to this use of the car by Rosso nor offered to prove the institution of any criminal action against him for taking the car without permission if in fact he did. This failure upon the part of the defendant was proper comment for the court and the counsel of plaintiff and indicated plaintiff's contention that Rosso was told to take the car on Lasseff's business.

Ground of Appeal No. 11

Under this ground, defendant again erroneously assumes that his proof was worthy of

belief. It was not and so the court properly left the case with the jury as cited above. The court here charged harmful to plaintiff for there was no close question at all considering the unworthiness of defendant's testimony to contradict the presumption of agency arising from ownership.

POINT III.

Ground of Appeal No. 12

The argument here made that the verdict was against the great preponderance of the evidence admits that defendant's proofs were the subject of some contradiction. Such an argument is not proper upon appeal but only upon a rule to show cause. The cases cited by him were all decided not upon an appeal but upon such a rule. It is, therefore, no ground for consideration in this appeal (Byrne Co. vs. Snead & Co., 98 N. J. L. 258,) (Van Sciver vs. Public Service Co., 96 N. J. L., 13). Besides, his contention is unsound in view of the foregoing in which it has been repeatedly pointed out that defendant's proofs were unreliable and not worthy of belief. Under such circumstances, the jury was justified in rejecting them.

CONCLUSION

It is therefore, respectfully submitted that this appeal should be dismissed for the reasons aforesaid. There should have been no direction of a verdict in view of defendant's unsatisfactory proofs. The charge of the court was not erroneous, misleading, nor harmful to this

defendant. Defendant's contention that the verdict was contrary to weight of evidence is not subject to appeal.

Respectfully submitted,

BURLEW & CURRIE,
Attorney for Appellee,

EDWARD W. CURRIE,
of Counsel.

