Index.

Summons.

(Filed January 21, 1939)

STATE OF NEW JERSEY,

To: PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,

YOU ARE SUMMONED to answer the annexed complaint of JOHN BACA, in an Action at Law in the New Jersey Supreme Court, Bergen Circuit:

(Seal)

AND TAKE NOTICE, that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS: THOMAS J. BROGAN, Chief Justice of the New Jersey Supreme Court, at Trenton, New Jersey, this 13th day of January, 1939.

FRED L. BLOODGOOD,
Clerk.

HOBERMAN & HOBERMAN,
Attorneys for Plaintiff.

Complaint.

NEW JERSEY SUPREME COURT,
BERGEN CIRCUIT.

JOHN BACA,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,
Defendant.

Action at Law.

Plaintiff, John Baca, residing in the City of Englewood Cliffs, County of Bergen and State of New Jersey, says that:

FIRST COUNT.

1. On or about June 12th, 1938, and at all times hereinafter mentioned, the plaintiff, John Baca, was the owner of a motorcycle which he was operating in an easterly direction on 23rd Street at or near the intersection of Park Avenue with said 23rd Street in the City of West New York, County of Hudson and State of New Jersey.

2. At the said time and place the defendant, Public Service Coordinated Transport, a corporation, was the owner of an automobile bus which was being operated by its servant, agent or employee in a northerly direction on Park Avenue at or near the intersection of 23rd Street with said Park Avenue in the City of West New York, County of Hudson and State of New Jersey.

3. By reason of the negligent, careless and reckless manner in which the automobile bus was at that time and place being operated and controlled, the same ran into and collided with the motorcycle of the plaintiff, severely injuring said plaintiff and damaging the plaintiff's motorcycle.

4. The negligence of the defendant, by its servant, agent or employee, consisted in one or more of the following:

(a) The said automobile bus was being operated at an excessive rate of speed;

(b) The defendant failed to use proper care in the operation of its said automobile bus, whereby the control of the same was lost;

(c) The defendant failed to equip its automobile bus with proper brakes and other proper safeguards;

(d) The defendant's automobile bus was operated in violation of the rules of the road, traffic regulations, and the laws of the State of New Jersey;

(e) The driver of said automobile bus failed to give any warning of his approach at the place aforesaid;

(f) The defendant failed to keep the windshield and windows of its said automobile bus in such a condition, so as to allow a clear vision;

(g) The defendant, Public Service Coordinated Transport, a corporation, failed to use reasonable care in choosing a proper servant, agent or employee to operate its said automoblie bus.

5. By reason of the defendant's negligence, the motorcycle of the plaintiff was so damaged and incapacitated, that the plaintiff has been, and will in the future be, forced to pay out and expend large sums of money for the repair and reconstruction of the same, and the plaintiff has been deprived of the profits ordinarily derived from said motorcycle, during the time the said motorcycle was being repaired. As a further result of the negligence of the defendant, the value of the said motorcycle has greatly depreciated by reason of the damages sustained.

Plaintiff, John Baca, demands from the defendant, Public Service Coordinated Transport, a corporation, the sum of Five Hundred Dollars ($500.00) as damages.

SECOND COUNT.

1. Plaintiff, John Baca, repeats the allegations contained in paragraphs One (1), Two (2), Three (3), Four (4) of the First Count and makes them a part hereof.

2. By reason of the careless and negligent actions of the defendant, Public Service Coordinated Transport, a corporation, the plaintiff, John Baca, was seriously and permanently injured in and about the head, face, eyes, arms, shoulders, back and legs. His whole body was severely

bruised and he was cut, wounded, bruised, and injured internally and externally, which scars and injuries are of a permanent and lasting nature. He was confined, and will in the future be confined to the hospital, his bed, and his home for a long period of time, and he has suffered, and will in the future continue to suffer, great pain and torment both of the body and of the mind.

3. By reason of his injuries, the plaintiff, John Baca, has suffered great losses, and will in the future continue to suffer great losses, by reason of his reduced earning capacity, and the plaintiff has been deprived of large sums of money which he otherwise could and would have earned and he has been prevented, and will in the future be prevented from transacting and attending to his lawful and necessary affairs.

4. By reason of the said injuries, the plaintiff was forced and obliged to pay, and will in the future continue to pay, large sums of money for medicines, x-rays, operations, hospital and doctors' bills, and he has further expended, and will in the future continue to expend, large sums of money in efforts to cure himself of his said injuries.

Plaintiff, John Baca, demands from the defendant, Public Service Coordinated Transport, a corporation, the sum of Thirty Thousand Dollars ($30,000.00) as damages.

HOBERMAN & HOBERMAN,
Attorneys for Plaintiff.

Answer.

(Filed February 15, 1939)

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

JOHN BACA,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,
Defendant.

Action at Law.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, County of Essex and State of New Jersey, in answer to the plaintiff's complaint, says that:

FIRST COUNT.

1. In answer to paragraph one, it has no knowledge or information thereof sufficient to form a belief.

2. It admits the allegations contained in paragraph two.

3. It denies the allegations contained in paragraphs three, four, and five.

SECOND COUNT.

1. In answer to paragraph one, it repeats its answers to paragraphs one, two, three and four of the First Count.

2. It denies the allegations contained in paragraphs two, three and four.

First Defense to First and Second Counts.

It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident in that he drove the said motorcycle in a reckless and negligent manner and at a fast and excessive rate of speed, and without keeping proper control thereof, and without making proper observations of the approach of other vehicles on the highway and without giving warning of his approach and in operating said motorcycle without proper appliances for the stopping and guiding thereof and was otherwise negligent.

Second Defense to First and Second Counts.

It avers that the sole and proximate cause of the said alleged accident was the negligence of the plaintiff in that he drove the said motorcycle in a reckless and negligent manner and at a fast and excessive rate of speed and without keeping proper control thereof and without making proper observations of the approach of other vehicles on the highway and without giving warning of his approach and in operating said motorcycle without proper appliances for the stopping and guiding thereof, and was otherwise negligent.

Third Defense to First and Second Counts.

It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident in that he negligently and carelessly ex-

posed himself to the risk of such an accident and neglected to take precautions 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, reckless and negligent manner and was not exercising care or taking proper precautions and that he negligently, carelessly and recklessly placed himself in a position of danger at the time and place mentioned in the complaint.

HENRY H. FRYLING,
Attorney of Defendant.

Reply.

(Filed February 20, 1939)

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

JOHN BACA, *Plaintiff*, vs. PUBLIC SERVICE COORDINATED TRANSPORT, a corporation, *Defendant*.	Action at Law.

The plaintiff, in reply to the answer of the defendant in the above matter, says that:

1. He denies the allegations contained in the first defense to First and Second Counts.

2. He denies the allegations contained in the second defense to First and Second Counts.

3. He denies the allegations contained in the third defense to First and Second Counts.

HOBERMAN & HOBERMAN,
Attorneys for Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

JOHN BACA,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,
Defendant.

Action at Law.

Hackensack, N. J., April 29, 1941.

Before:

HON. JOHN C. BARBOUR, Judge, and a Jury.

Appearances:

For the Plaintiff,

MESSRS. HOBERMAN & HOBERMAN,

By SOL HOBERMAN, Esq.

For the Defendant,

HENRY H. FRYLING, Esq.,

By CARL T. FREGGENS, Esq.

(A jury was empanelled, accepted and sworn.)
(Mr. Hoberman opened the case to the jury.)
(Mr. Freggens opened the case to the jury.)

John Baca—Direct.

JOHN BACA, the plaintiff, called as a witness in his own behalf, being duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. HOBERMAN:

Q. John, where do you live? A. Englewood Cliffs.

Q. How long have you lived there? A. Ten years.

Q. Did you own a motorcycle on June 12, 1938? A. Yes.

Q. Were you riding in your motorcycle on that day? A. Yes.

Q. Did you have an accident with your motorcycle on June 12, 1938? A. Yes.

Q. What kind of a motorcycle was it? A. Harley-Davidson.

Q. What year was it? A. 1932.

Q. Where did the accident happen? A. I was —it was 12th of June.

Q. I beg pardon. What time was that? A. What time?

Q. Where did it happen? A. It was near by a quarter of seven.

Q. Where did it happen? A. West New York, 23rd Street and Park Avenue.

Q. What city? A. West New York.

Q. On what street were you riding? A. Riding 23rd Street, West New York.

Q. In which direction were you going? A. East side.

Q. You were going toward the Hudson River? A. Yes.

Q. Is 23rd Street in West New York a one-way street? A. Yes.

Q. In which direction was the bus going? A. North side.

Q. Going north on Park Avenue? A. Yes.

Q. When you were riding east on 23rd Street was there anything in front of you? A. Yes. There was one car, a small car, I know.

Q. There was a car riding in front of you? A. Yes.

Q. What kind of a car was it? A. A small car.

Q. How far in front of you was it as you were riding up 23rd Street? A. As I was by middle of the road the car was at the next corner.

Q. When this other car came to the corner, how far in back of it were you? A. I know it was far. I was by 15 feet, not far.

Q. You were 15 feet in back of the other car? A. Yes.

Q. When that other car came to the corner did it do anything? A. No.

Q. The car in front of you, when it came to the corner, did it do anything? A. Please, I cannot understand.

Q. When this other car came to the intersection did it slow down? A. Yes.

Q. And then did it go ahead, across the intersection? A. Yes.

Q. Now, then, you drove up to the corner, didn't you? A. Yes.

Q. What did you do when you got to the corner? A. I looked on the right side; I seen Public Service bus.

Q. You did see him on your right side, and how far down on your right side was that bus? A. About 150 feet.

Q. How far? A. 150 feet.

Mr. Freggens: How far was that, 110?
Mr. Hoberman: 150.
Mr. Freggens: 150 feet.

Q. Did you do anything with your motorcycle when you got to the corner?

Mr. Hoberman: I withdraw that.

Q. How fast were you going before you got to the corner? A. About 15 miles.

Q. When you got to the corner how fast were you going? A. About 12 miles.

Q. Then what did you do when you saw the bus 150 feet to your right? A. I drive straight ahead.

Q. You went straight ahead? A. Yes.

Q. Where was this other car at that time, the car in front of you? A. It was as I was, like about in the middle of the road. It was over already the next corner.

The Court: What was that answer?
(Answer read.)

Q. When you first saw this bus the first time how fast was it going? A. He go fast. Oh, he not go fast, not go fast.

Q. The first time, when it was 150 feet away? A. Not go fast, I know.

Q. When did you next see the bus? A. As I was by, off the middle of the road.

Q. How far away was the bus from you then? A. I see as I look him, right at the moment, as I see him the first time, he was about 150 feet.

Q. How far away was it the second time? A. The second time, about five feet.

Q. The second time you saw it was it going slow or fast? A. Fast.

Q. That was before it hit you? A. Yes.

Q. Did the bus hit you, or did you hit the bus? A. The bus hit me, right side.

Q. What part of the bus hit you? A. The left I know nothing more after.

Q. What part of the bus hit you? A. The left side, left side front.

Q. The left side front of the bus hit you? A. Yes.

Q. And what part of you or your motorcycle did the bus hit? What did the left side front of the bus hit? A. The right side.

Q. Whose right side? A. Me; hit me, right side.

Q. Did it hit your leg or your body, or your shoulder, or what? A. Leg, right side, leg.

Q. Your leg? A. Yes.

Q. Did you hear any signal? A. No.

Q. You did not hear a horn? A. No.

Q. Now, who got into that intersection first, you or the bus? A. (No answer.)

Mr. Hoberman: I withdraw that question.

Q. Who got into the cross street first? A. I was first.

Q. You were first? A. Yes.

Q. How do you know? A. I know, as I was first, and the bus go and hit me on the right side.

Q. When you reached the intersection you looked to the right, didn't you? A. Yes.

Q. Did you have your motorcycle repaired?

Mr. Hoberman: I withdraw that.

Q. Did you have your motorcycle fixed? A. No.

Q. What did you do with it? A. I sold him.

Q. For how much? A. $19.00.

Q. How much did you pay for it? A. $110.50.

Q. How long before the accident did you buy it? A. Oh, it was six months I used then.

Q. After the accident what happened to you? A. I don't know nothing.

Q. You were unconscious? A. Take me in the hospital, and I was up the next day, morning.

Q. You finally woke up the following morning in the hospital? A. Yes.

Q. What was the matter with you then? Where did it hurt you the next morning? A. The next morning I found frame by my leg.

Q. Which leg? A. Right side, right leg.

Q. Why was there a frame on your leg? A. It was broke.

Q. Where else were you injured? A. Left leg.

Q. What was the matter with your left leg? A. I have—I think seven stitches was—open, in the side, left side.

Q. Where else were you hurt? A. Here in the face I have a big hole.

Q. You had a cut on the right side of your head? A. Yes, and face.

Q. Where else? A. Right here on the top.

Q. On top of your head? A. Yes.

Q. Any other parts of your body hurt? A. Here I have burn (indicating).

Q. You are pointing to your right ankle, are you? A. Yes.

Q. What was the matter with that? A. Just the heel. I think as I lay down the motor was hot. It was burnt.

Q. How long did you remain in bed in the hospital? A. I was in bed eighteen weeks.

Q. What did they do to you or for you while you were in bed? A. First fix me, give me frame, pillow.

Q. Frame for your right leg? A. Yes.

Q. Then what did they do for your right leg? A. Gave me—I got then wire.

Q. Wire in your bone? A. Yes.

Q. What next? A. And big frame, and ripping after, a cast, plaster. I don't know what that is called. I have a—about 35 pounds pulling me at.

Q. They had your foot up and a weight on it? A. Yes.

Q. How long was your foot held up with a weight? A. Oh, twelve weeks.

Q. And after that what did they do with your right leg? A. After I get the high cast right away here on the top.

Q. You had a large cast from your chest down to your toes? A. Yes.

Q. How long were you in a cast? A. Six weeks.

Q. Did it hurt you while you were there? A. Yes.

Q. Where did it hurt you? A. All over, all I can move, the whole body.

Q. After you got off the bed did you get on a wheel chair? A. Yes, I used it about fourteen days.

Q. In the wheel chair? A. Yes.

Q. After the wheel chair where did you go? A. After the wheel chair I used them about fourteen days, crutches.

Q. Crutches? A. Yes.

Q. After the crutches what did you use? A. Cane.

Q. How does your right leg feel today? A. I can't bend.

Q. You can't bend? A. Not good.

Q. Will you please step down in front of the jury? A. (Witness leaves stand and walks before the jury.)

Q. All right. Stand there. Now, will you turn around this way, please? Will you bend your right leg? A. (Witness complies.)

Q. Can you bend it any more than that? A. Not more, cannot bend it.

Q. Now, will you bend your left leg? A. (Witness complies.)

Q. All right. A. (Witness resumes stand.)

Q. Are you able to walk up and downstairs all right? A. No.

Q. What is wrong? A. As I go down steps I must go first one leg, and after that the other leg.

Q. How long were you unable to work? A. Oh, I was by more like five months in the hospital, and after my boss take me back where I work in Englewood Cliffs, and he gave me five months, the winter, and paid me nothing.

Q. He paid you nothing for five months? A. Gave me $10.00 one month, monthly, as I buy cigarettes; not more.

Q. You were in the hospital how long? A. In the hospital I was eighteen weeks.

Q. Eighteen weeks? A. Yes.

Q. Then you went back to where you lived? A. Yes.

Q. Did you work as soon as you went back? A. No.

Q. How long weren't you able to work? A. About five months.

Q. Five months? A. Yes.

Q. And were you paid any wages for those five months? A. No.

Q. Then after eleven months you went back to work? A. Yes.

Q. How much were you paid before this accident for your work? A. Oh, $40.00 a month.

Q. Before the accident, John? A. Before the accident.

Q. You were paid $40.00 a month? A. Before, and after give me $50.00, my boss, $50.00.

Q. Now, the month before the accident, how much were you paid a month? A. The same month I had $50.00.

Q. $50.00? A. Yes.

Q. What else did you get? Did you get room and board? A. Yes, eat and sleep.

Q. Eat and sleep. Now, after the accident you lost eleven months from work? A. Yes.

Q. Then when you went back to work did you get your $50.00 again? A. No; give me $25.00.

Q. $25.00? A. Yes.

Q. For how long did you get $25.00? A. Three months.

Q. And after the three months did you get your $50.00 again? A. I get them $50.00, and I must buy for myself eat, and I have $50.00 a month.

Q. After you went back to work for $50.00 a month? A. Yes.

Q. But you were not given any food? A. No.

Q. You had your room, though? A. Yes, room I have.

Q. Does your right leg interfere with your work now? A. Well, I can't work right; I can't bend.

Q. What doctor took care of you at the hospital? A. Dr. Taft.

Q. How much is Dr. Taft's bill, do you know? A. I think $400.00.

Q. And how much is the hospital bill? A. $800.00.

Mr. Freggens: You will have the doctor come in?

Mr. Hoberman: Oh, yes, the doctor and the hospital.

Q. Were you also treated by Dr. Garibaldi? A. Took me once X-ray.

Q. He took an X-ray for you? A. Yes.

Q. Did he charge you anything for it? A. No charge nothing, and all winter give me lamp and heat.

Q. He gave you a lamp to use for heat treatment? A. Yes.

Q. But he didn't charge you anything for his services? A. No.

Q. Did you spend any money for medicines? A. Yes, I spent.

Q. How much? A. Nine or ten dollars.

Q. What kind of medicines did you use? A. Oh, what is called——

Q. Rubbing liniment? A. Yes, yes.

Q. Do you still use it? A. Yes, I use it steady, yes.

Q. Do you still use the lamp? A. Lamp no more.

Q. No more? A. No.

Q. Does anything hurt you now? A. Oh, yes. As I sit like now in the chair, like this, it is, the break come here and ache me all the time, the broke place here.

Q. The broken place in your leg still pains you? A. Yes.

Mr. Hoberman: All right. Take the witness.

CROSS EXAMINATION BY MR. FREGGENS:

Q. Mr. Baca, you have been operating motorcycles for a number of years, haven't you? A. How long?

Q. You have been operating a motorcycle for a number of years? A. (No answer.)

Q. I will ask another one. How long did you own your motorcycle that you had? A. Oh, I used that motorcycle five years.

Q. That is right. And you have driven motorcycles for five years before the accident? A. Yes.

Q. And this motorcycle was a 1932 Harley-Davidson; is that right? A. Yes.

Q. You were familiar with all the different controls on it, were you not? You knew how to stop it and how to start it? A. Yes.

Q. You used to go out for long rides throughout the country? A. Yes. I went some day out, yes.

Q. And you had been riding motorcycles for how many years before that? A. Before?

Q. Yes. A. Five years.

Q. Five years? A. Yes.

Q. Now, on this particular day when the accident happened it was raining, wasn't it? A. Before it was rain, yes.

Q. And the streets were all slippery? A. After, as I drive home, no, it was already dry.

Q. Wasn't it raining just before the accident? A. Before it was; before it was; yes, I know.

Q. And weren't the streets wet just before the accident? A. As I start to drive home it was already dry.

Q. You say they were dry? A. It was nice sun, yes.

Q. You are familiar with these two streets, are you not? You have been over 23rd Street before? A. Yes.

Q. And you had been on Park Avenue before, hadn't you? A. Yes.

Q. And as you were coming along, you say that you were riding behind another automobile? A. Yes, I saw before me another automobile, yes.

Q. How far were you behind that automobile? A. This automobile was—as I come to the corner, this automobile was by after the middle of the road.

Q. To get you straight, now, I do not want to confuse you—— A. Yes.

Q. When you got to the corner you say the automobile was in the middle of the road ahead of you? A. Yes.

Q. How fast was the automobile going? A. This automobile not go too fast; about fifteen miles.

Q. How fast was your motorcycle going? A. About fifteen miles.

Q. Fifteen miles an hour. And with conditions like they were that day, how long would it take you to stop? A. Please, I cannot understand.

Q. You say you were going fifteen miles an hour when you came up to the corner? A. Yes.

Q. If you put on your brakes how far would it take you to stop? A. Ah, slow, slow?

Q. If you put on your brakes to stop at fifteen miles an hour, how many feet would you go, John, before you would stop? A. I no stop, yes.

Q. No, no, no. But I mean if you wanted to stop. If you wanted to put on your brakes when

you got up to that corner, how many feet could you have brought your motorcycle to a stop in? Do you understand my question? A. Please, I cannot understand.

Q. Look, John; you are coming up to the corner? A. Yes.

Q. If you wanted to stop your motorcycle, how many feet would you travel before your motorcycle would be brought to a stop, at fifteen miles an hour, if you put on your brakes; how far would you go? A. Oh, I understand now.

Q. I see. A. Fifteen miles, as I want to stop, after I go by fifteen or twenty feet.

Q. Fifteen or twenty feet. And you say you saw the bus coming up, and the bus at that time was about 150 feet away? A. Yes.

Q. And how fast was the bus going? A. The bus going, not go too fast; not go too slow. I seen it.

Q. You know mileage. About, in miles, how fast was it going, John? A. About twenty-eight or thirty miles.

Q. And you don't call that fast? A. Me.

Q. That is not fast to you, twenty-eight or thirty miles an hour? A. Yes.

Q. I say that is not a fast speed? A. That is plenty.

Q. And you saw that it was going—— A. Yes.

Q. ——twenty-eight or thirty miles an hour? A. Yes.

Q. Is that right? A. Yes.

Q. Did you continue to watch the bus? A. Yes.

Q. What did the bus do? A. The bus driver go ahead.

Q. You mean he kept right on going? A. Yes.

Q. And you saw that all the time? A. Yes, I see it.

Q. In other words, from 150 feet away from the corner? A. Yes.

Q. He came along at the same speed; the bus kept right along at the same speed? A. No. As I come in, after the middle of the road, after I look the right side, the bus go too fast.

Q. You saw it. I do not want to confuse you. You saw it at twenty-eight or thirty miles an hour; is that right? A. Yes.

Q. Then it was 150 feet away? A. Yes.

Q. You said you continued to watch the bus; is that correct? A. Yes, I watched him, yes.

Q. And the bus kept on coming? A. Yes.

Q. At that same speed? A. No. After, as I see him the next time about five feet, go too fast, more fast.

Q. John, did you watch the bus from the time he was 150 feet away up until the time of the accident? Did you continue to look at the bus? A. As I look him first side, I see he was about 150 feet; and after, as I was in the middle of the road, he was about five feet, and right away he jumped.

Q. Now, then, John, you never saw this bus from the first time when it was 150 feet down on Park Avenue until the next time, when it was right in front of you, five feet away; is that right? A. Yes.

Q. What were you looking at? A. I look the right side, and right away I was finish already.

Q. In other words, you looked, and you saw this bus 150 feet down? A. Yes.

Q. And the next time you looked it was right in front of you? A. Yes.

Mr. Hoberman: I object to that. That is misinterpreting his testimony. He said he saw it five feet to the right of him, not in front of him.

The Court: He said five feet away.

Q. Where was it when it was five feet away? A. He was——

Q. What part of it was five feet away? A. Here I driving, here go; that is the way go bus. As I was here, after the middle of the road, he was about five feet, very short, and go too fast, and after he hit me.

Q. Why didn't you stop your motorcycle when you saw this bus coming at that fast rate of speed? A. I don't have time already.

Q. You saw the bus was coming fast up Park Avenue, didn't you? A. Yes.

Q. And you made no attempt to stop your motorcycle at all, did you? A. No. As I look the right side, was already about five feet, I can't stop. If I want to stop motorcycle——

Q. You knew if the two of you kept on going there was going to be a crash, didn't you? A. (No answer.)

Q. You knew if the bus kept on going, and you kept on going, there was going to be a crash, didn't you, John? A. Please, I can't understand that.

Q. You knew if the bus kept on coming up Park Avenue, and you kept crossing 23rd Street, the two of you were going to come together, didn't you? A. Yes.

Q. Then why didn't you stop your motorcycle? A. I can't stop.

Q. Why not? A. As I said, he kill me; I no have time.

John Baca—Cross.

Q. John, do you know what part of the bus was struck? Do you know what part of the bus was struck? A. Please, I can't understand good.

Q. Do you know what part of the bus and what part of your motorcycle came together? A. (No answer.)

Q. I will ask it again. You say the bus hit you? A. Yes.

Q. What part of the bus hit you? A. Oh, the left side, and broke my leg.

Q. I mean what part of the bus hit you? Do you know what part of the bus struck your motorcycle? A. (No answer.)

Q. Do you understand that question? A. Is somebody here?

Q. John, how long have you been in this country? A. Eleven years.

Q. Yes. Now, do you know what part of the bus struck your motorcycle?

Mr. Hoberman: If——

Mr. Freggens: Don't prompt him, please.

Mr. Hoberman: Sorry.

Q. Do you know whether the bus did not strike your motorcycle? A. Please, that is a question I can't understand.

Q. John, you say that there was an accident? A. Yes.

Q. What kind of an accident was it? A. I drove the motorcycle in the Public Service bus.

Q. What part of the bus struck your motorcycle? What part of the bus hit your motorcycle? A. Oh, right side.

Q. The right side of the bus? A. Yes—left side. Left side, and me, right side.

Q. In what part? A. Right leg broken. It is very hard. Is somebody here talk Slavish or Czech?

Q. I show you some pictures, John. Do you recognize these? A. (No answer.)

Q. Do you recognize these? A. No, I don't know if this is the same bus. I don't know.

Q. You don't know. I show you a picture of a bus, John, a panel smashed in right by the left rear wheel. Isn't that where you run into the bus? A. No. I know it was not.

Q. You say it was not that point there? A. No, that is not.

Q. I show you another picture showing the left side of a bus, near the rear wheel, with a circle like from the headlight. Wasn't that caused by the headlight of your motorcycle? A. No.

Q. What part of the bus do you say? A. The bus hit me, front, left side.

Q. What part of the bus hit you? A. Hit me, right side.

Q. You say the front of the bus hit your right side; is that right? A. Yes.

Q. How do you know that? A. I know. Otherwise was a few feet, and I drove straight.

Q. But, John, you do admit that you did not look at this bus from the time you made the first look, and it was 150 feet away, until the time of the second, when it was five feet away from you? A. Yes.

Q. And the reason you did not stop your motorcycle was—when you saw this bus coming so fast—was that you were afraid you would get killed, is that right, if it hit you? A. (No answer.)

Q. Is that the reason, John? A. I do not have time to stop already.

Q. What? A. I don't have time to stop already.

Q. But you saw this bus increase its speed; is that right? A. Yes.

Q. And you still tried to continue across the street; is that right? A. Yes. The bus go too fast, and I was slow.

Mr. Freggens: That is all.

REDIRECT EXAMINATION BY MR. HOBERMAN:

Q. John, you didn't see the bus increase its speed, from the time you first saw it 150 feet away until the second time, did you? A. Yes.

Q. When you first got to the intersection and looked to the right, the bus was 150 feet away? A. Yes.

Q. And at that time you saw it was going not too slow and not too fast; they were your own words; is that right? Then the next time you saw it, it was four feet away? A. About five—four or five feet.

Q. Between the first time you saw it and the second time you saw it, did you see it again, in between then? A. No. I see him, and right away was hit me, knocked me down.

Q. Then you did not see it from the first time, 150 feet away, until the second time it was five feet away? A. Yes.

Q. What was your answer? A. Yes.

Mr. Hoberman: That is all.

Mr. Freggens: That is all.

Mr. Hoberman: I want to offer the records and X-rays in evidence, and put the doctor on.

Mr. Freggens: The records are not admissible.

The Court: Of course, there is nothing before the Court yet.

Mr. Freggens: I thought we might save time. I will admit your hospital bill, if you want to state the amount.

Mr. Hoberman: The witness is here, if you do not mind.

Mr. Freggens: All right. I thought I would save a little time.

CATHERINE GRAINEY, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. HOBERMAN:

Q. Miss Grainey, are you connected with the North Hudson Hospital? A. Yes, sir.

Q. In what capacity? A. As record librarian.

Q. Did you bring with you the records of John Baca who was confined to your institution? A. Yes, sir.

Q. Have you a record of the length of time he was confined? A. Yes, sir.

Q. What are the dates? A. Mr. Baca was admitted to North Hudson Hospital on June 12th, 1938, and discharged on November 5th, 1938.

Q. Have you the records that were used in his case? A. Yes, sir.

Q. How many sets are there? A. Well, there are 25 films altogether.

Q. And have you a bill indicating the charges

that the hospital has made to John Baca? A. Yes, sir.

Q. What is the amount of that bill? A. $822.50.

Mr. Hoberman: I offer the hospital bill in evidence.

Mr. Freggens: No objection.

(Paper marked Exhibit P-1.)

Q. And you have there a daily record of the treatment given to John Baca, and the regular chart used in his case? A. Yes, sir.

Mr. Hoberman: I offer that in evidence.

The Court: The objection will be sustained.

Mr. Hoberman: May I have it marked for identification?

The Court: It may be marked for identification.

(Papers marked Exhibit P-2 for identification.)

Q. Have you the X-ray films that were taken of John Baca? A. Yes, sir.

Mr. Hoberman: I offer the X-ray films in evidence.

Mr. Freggens: No objection to those.

The Court: All right, if there is no objection.

Mr. Freggens: No, I won't raise an objection.

(X-ray films marked Exhibit P-3.)

CROSS EXAMINATION BY MR. FREGGENS:

Q. That hospital bill has not been paid, has it? A. No; it is still unpaid.

BY THE COURT:

Q. Was he a ward patient? A. Yes, your Honor.

DR. HERMAN L. TAFT, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

DIRECT EXAMINATION BY MR. HOBERMAN:

Q. Dr. Taft, are you a licensed, practicing physician of this State? A. I am.

Q. For how long have you been a licensed physician?

Mr. Freggens: I will be willing to admit his qualifications, if you want me to.

Q. Doctor, where is your office? A. Weehawken, New Jersey.

Q. Did you treat John Baca for injuries he sustained on June 12, 1938? A. I did.

Q. When did you first see him? A. On June 12th, 1938.

Q. What was his condition at that time? A. He had a fracture of the right femur, to the right thigh-bone, just above the knee. He had a very large laceration of the left thigh. He had a

concussion of the brain. And he had a large hematoma, which is a fluid collection of blood, underneath the skin of the right thigh.

Q. What did you do for him? A. Well, he was treated by traction; that is, in bed; a certain amount of weight put on the leg, to bring the bones into alignment. The first few days, the first week or twelve days, rather, it was—the pull was by adhesive because of the hematoma present; but then it was changed to a wire through the bone, with direct pull on the bone. He was in that for about eight weeks, I would say.

Q. Did you operate on him when the wire was placed through the bone? A. I did.

Q. Was it necessary to wire both bones to keep them in alignment, or was this a temporary wiring? A. No. The idea of wiring is that—in order to get sufficient pull on the bone. If you can visualize the bones being overlapped, like that (indicating), in order to bring them down you have to have constant pull; so, therefore, in order to do that, we put a wire through the—either through the lower bone or through the lower leg, in order to get sufficient pull to bring the lower part of the bone down to meet the upper part of the bone. You can't get—some times you cannot get sufficient pull through the skin.

Q. And that wire is placed right through the—— A. Right through the bone.

Q. Through the leg, and through the bone, in order to pull up? A. Yes.

Q. Did you put the stitches in his left thigh? A. Now, I can't recall that. That may have been done by the interne.

Q. Would the hospital records refresh your memory? A. It probably would. I think I did, but I am not sure of that. It is a long time ago. The interne did that in the emergency room.

Q. Were there any scars remaining from his injuries? A. Yes.

Q. And where were those scars, if you remember? A. Well, there was one large scar of the left thigh, where that large laceration was, and——

Q. Were there any scars on his right cheek? A. Now, just one minute. He had numerous abrasions and contusions. Now, whether——

Q. All right, Doctor. How long did he remain in the traction apparatus? A. He remained in the traction apparatus for eight weeks.

Q. And then what did you do after that? A. Then he had a plaster cast applied, from the chest to the toes, on the right side.

Q. And was he still required to remain in bed after the cast was put on? A. No, I think he was —they got him up in a chair about that time.

Q. But all during the time the traction apparatus was on, he was in bed? A. That is correct.

Q. And what was the position of his leg at that time? Was it elevated? A. Yes.

Q. And he had to remain in that position for how long? A. Well, for a period of approximately nine weeks, I would say. A little over nine weeks.

Q. Did you have occasion to examine him again recently? A. Yes, I did.

Q. And that was at your office? A. That was at my office.

Q. What was his condition at that time? A. Well, at that time he was walking with a limp

due to the inability to flex his right thigh—right knee. He only had 20 degrees of flexion. Actually there is—normally there should be about 160 degrees of flexion, from a straight knee to as far back as it will hit the thigh, so that he had a very little motion in that knee. There was no actual—there was no measurable shortening at that time.

Q. Is there anything that can be done for that lost motion in his right leg at this time? A. I think at this time it is too late to increase that motion.

Q. You believe he will have that permanently? A. As a permanent defect.

Q. In your opinion, Doctor, does that reduction of flexion in the right knee affect his employment? A. I imagine it would, if he is a gardener. He would be unable to bend that knee.

Q. Did you submit a bill for your services? A. I did.

Q. How much was it? A. $400.00.

Q. Is that a reasonable charge for your services? A. I believe so.

Mr. Freggens: No questions.

By the Court:

Q. Did you treat him as a ward patient or as a private patient, Doctor? A. Well, that is—there is a special ward for compensation and liability cases. I mean——

Q. Can you not just answer the question, whether he was treated as a ward patient or as your private patient? A. He was treated as my private patient.

Q. He was? A. Yes.

Motion for Non-suit.

By Mr. Hoberman:

Q. Did you file a lien for $400.00? A. I did.

Mr. Hoberman: Thank you, Doctor.

That is the plaintiff's case.

The Court: Before we go into the defence we will take a mid-morning recess, and while that is taken, if there is no objection, we will draw the jury for the next case.

These jurors can go inside.

(The jury left the Court Room.)

(Mid-morning recess.)

Mr. Freggens: I have a motion to make.

(The following motion was made not in the presence of the jury.)

Mr. Freggens: If the Court please, I respectfully move for a non-suit on two grounds. First, there is no proof of negligence on the part of the defendant company; second, that there is conclusive proof of contributory negligence as a matter of law on the part of the plaintiff.

Now, the testimony here is only the testimony of the plaintiff, and that is that he was driving about fifteen miles an hour behind this other automobile, as it approached the corner, and then he cut his speed down to twelve miles an hour. He said he made an observation then, "And I saw the bus 150 feet away, going at twenty-eight, thirty miles an hour," that the bus was not going too fast at that time, but the next time he looked he

was in the middle of the road, and the bus was five feet away, and at that time the bus was going much faster.

I say that in that state of the circumstances he failed to make reasonable observations for his own care and safety, and I say that, although he is entitled to be given every reasonable inference to be drawn from the testimony, from his conduct he showed that he failed to act as a reasonably prudent man would under the circumstances.

The case is not unlike the case of *Walling* v. *General Woodcraft Company,* 110 N. J. L. 561. In that case the plaintiff was proceeding along Main Street in Matawan, and there was a street which came in at an angle, into Main Street, but dead-ending there. From the southeast this street called Atlantic Avenue enters Main Street at a sharp angle of approximately 35 degrees, but does not cross it. A truck of the defendant, operated by its servant, was proceeding on Atlantic Avenue toward Main Street. The two vehicles, out of sight of each other, were approaching on converging paths. In the angle between Atlantic Avenue and Main Street, and extending to the sidewalk line there was a store building, of flat iron shape, and southerly from the corner building were two other buildings with only a few feet of open space between the several buildings. So that—I am just reading it—"So that for upwards of 100 feet back from the corner, plaintiff's view of Atlantic Avenue was practically cut off." Atlantic Avenue was 30 feet wide and Main Street was 33 feet wide, between

curb lines, and the distance from the southerly point of intersection diagonally across Atlantic Avenue, on the line of Main Street, and up to the northerly point of intersection, was somewhat more than fifty feet of clear road surface.

In that case plaintiff's evidence was that he was driving on Main Street, in a rain, at 18 to 20 miles an hour; that he did not slacken his speed; that he blew his horn 30 feet from the intersection. He testified that he could have stopped his car in 20 feet. When he was beyond the house line, and about 48 feet from the point of collision, he had a view of Atlantic Avenue, and he observed the truck approaching at a speed of 25 or 30 miles an hour. The truck did not stop, nor did the plaintiff stop his car, or attempt to do so until just before the front of plaintiff's car came into collision with the rear of the truck, which had proceeded into Main Street. Plaintiff testified that he attempted to turn sharply to his right to avoid the collision, but the two vehicles collided and plaintiff's automobile turned over; that he could not turn to the left because cars were approaching from the opposite direction.

So that those factors in the case are almost identical in this case. Here this man says he was going at 15 miles an hour, reduced his speed to 12. He said he had a view of this bus 125 feet away. He said the bus was going 25 or 30 miles an hour. That is the same speed as in this *Walling* case. He said he did not attempt to stop. In that case the

truck did not stop, and the plaintiff did not stop his car, or attempt to do so until just before the front of plaintiff's car came into collision with the rear of the truck, which had proceeded into Main Street.

I say the factors right in that case are proven in this particular case; and in that case the Court non-suited the plaintiff; and the Appellate Court said that it was proper, giving all benefits to the plaintiff on his case, and said that, "the conduct of plaintiff in acting as he did was so obviously careless and in violation of ordinary prudence, that the trial judge properly held that he was guilty of negligence and that such negligence contributed to his injury."

I say that is the fact in this case. This man saw this bus coming at the speed he did. Where was he looking? He had a right to go across the street; the bus had a right to travel. It seems improbable that the bus came from nowhere in the distance of 150 feet to the time it was five feet from him. I say he did not use reasonable care and prudence in the operation of his motorcycle, and was guilty of negligence as a matter of law.

So far as proof is concerned, the only proof is that he saw it 150 feet away, going at a speed of 25 or 30 miles an hour, and the next thing he saw it five feet away from him. And I say, so far as that is concerned, he has just proven an accident. There has been no proof there of negligent conduct. Proof of an accident, without proof of negligence showing the cause of the accident, is not actionable.

On those grounds I ask for a non-suit.

Motion for Non-suit.

Mr. Hoberman: If your Honor please, there are two grounds upon which the motion for non-suit is based; first, that the defendant was not guilty of negligence; and, second, that the plaintiff was guilty of contributory negligence.

As Mr. Freggens stated, every reasonable inference must be given to the plaintiff, in deciding a motion for a non-suit. I think we have proven that, as far as negligence is concerned, the defendant, just prior to the time he struck the plaintiff, was going at a very fast rate of speed. There was no definite speed stated, but the plaintiff stated he was going very fast when he saw it five feet away the second time. He said that no signal was given. Those two things are items of negligence, if you Honor please, which the jury should consider.

As far as contributory negligence is concerned, it seems to me that the plaintiff could have done nothing else. He came to the intersection; he said he slowed down from fifteen to twelve miles an hour; he looked to the right; he saw the bus 150 feet away. That is a reasonably safe distance for the bus to be away. And he continued across. He got to the center; he looked again; the bus was coming very fast at the intersection, and right on top of him. He did not have time to do anything else.

It seems to me, if your Honor please, it is not only a question of negligence on the part of the defendant, but it seems to me that, as far as the case has gone, it is clearly a case of defendant's negligence, without any

fault on the part of the plaintiff. And what I mean by that is, without giving him any reasonable inferences from his testimony, without taking everything he testified to as true, just taking conditions as he normally testified to them, there is negligence on the part of the defendant.

I feel, if your Honor please, that this case is more in line with the case of *Miller* v. *Grossman,* in 140 Atlantic 292.

The Court: What is the law citation?

Mr. Hoberman: I have not that, your Honor. I have the actual case. It is an automobile case.

Mr. Freggens: That is a Supreme Court case.

Mr. Hoberman: That is a case, your Honor, where the defendant's automobile bus struck the right front of the plaintiff's automobile, at an intersection similar to ours. I think the direction each was taking was similar.

In addition to that we have, your Honor, the Motor Vehicle Act, which states that the person who reaches an intersection first has the right of way. From the evidence in this case the plaintiff reached the intersection first, because when he got to the intersection the defendant was about 150 feet to the right.

I feel, your Honor, that the jury should consider that fact, and consider the speed of the defendant, and should consider all the other facts surrounding this accident; and it surely is a question for the jury rather than for the Court.

The Court: In *Miller* v. *Grossman,* 6 Misc. 190, the question before the Supreme Court

was whether or not the trial judge in the District Court had determined the question of fact properly, and found that there was evidence justifying the determination of the Court below. It is to be noted that there was evidence that the bus in that instance proceeded more than 25 feet after it struck the plaintiff's automobile before it was brought to a stop. There is no recital of the facts as to observations made, so that we get practically no nourishment out of that case.

The case comes very, very close to being entirely barren of any proof of negligence on the part of the defendant. The testimony of the plaintiff, who was the only fact witness so far, of course, is that he was proceeding in an easterly direction on 23rd Street, he made an observation, saw a truck approaching at not too fast a rate of speed. He was then about 150 feet to his right. I think on cross examination he said the rate of speed was somewhere around 28 or 30 miles an hour. He did not see the bus again until he was five feet from the bus, and then the bus seemed to be traveling faster. Well, I suppose, when you see a bus five feet from you, it would naturally seem to be traveling fast, especially if in the traversing of that five feet you came into contact with the bus.

He says that he was traveling 15 miles an hour, and slowed down to 12, and I do not recall any testimony that he thereafter increased his speed. So he proceeded across Park Avenue at the rate of, presumably, about 12 miles an hour, and the bus continuing on traversed the 150 feet, plus part of

the width of 23rd Street, while he traversed part of Park Avenue.

The evidence does not show just what the difference is in the width of the streets. It was referred to in the opening of counsel, but, of course, that is not evidence.

There is no evidence to show the nature of the vicinity, whether it was residential or otherwise; but this was an intersection, and, of course, that required care on the part of the defendant and the plaintiff.

The only evidence from which the jury might infer negligence would be the difference in the distance traversed by the two vehicles, and taking the speed of 12 miles an hour as the speed of the motorcycle (of course I just assume that the jury is going to believe that the motorcycle was traveling 12 miles an hour; we must take that as true at this stage. The Court cannot take into consideration the ordinary concept of the speed of motorcycles), assuming that it was going 12 miles an hour, then the bus must have been going three or four times that speed to travel 150 feet while the motorcycle traveled across Park Avenue. The jury might reasonably infer that that was a speed greater than was justified at an intersection. That is the only evidence I can see in the case.

On the question of contributory negligence the courts are loath to non-suit on that ground, unless it conclusively appears.

In *Walling* v. *General Woodcraft Company,* 110 Law 561, cited by the defendant, we have an intersection collision, although

there the two streets converged rather than intersected at right angles. Both vehicles continue without stopping or attempting to stop until just before the front of plaintiff's car came into collision with the rear of the truck which had proceeded into Main Street. The trial judge in passing upon the motion for a non-suit said:

"In the circumstances I feel obliged to hold that the plaintiff was not in the exercise of care and caution which ordinarily and reasonably would be required of a careful driver, in that his own statement is that he was driving his car at 18 or 20 miles an hour at an intersection, and in the circumstance it would appear to have been in violation of the provision of the Traffic Act. One cannot go blindly into an intersection and then because there is a collision by the unexpected appearance of a vehicle also having a right upon the highway and then say that he is free from negligence himself."

"Appellant urges that where fair-minded men might honestly differ as to plaintiff's conduct, tested by what an ordinarily prudent person would do in the circumstances, the question is for the jury and not for the Court. This is the undoubted law. In the instant case, however, we conclude that the conduct of plaintiff in acting as he did was so obviously careless and in violation of ordinary prudence, that the trial judge properly held that he was guilty of negligence and that such negligence contributed to his injury. He not only drove into the intersection without observing whether or not a

vehicle was approaching on his right, but, after seeing the truck, he continued for a number of feet without making any effort to slacken the speed of his car or, if need be, to stop, until too late to avoid contact with the truck, which had entered the intersection ahead of him, and which he observed was proceeding on its course, without intention of yielding the way to plaintiff."

The facts in the *Walling* case differ somewhat from the facts in this case. In this case the plaintiff did make an observation, and did observe the approach of the bus on his right. Thereafter, after seeing this bus coming at not too fast a rate of speed, some 25 or 30 miles an hour, he proceeded on across without again seeing the bus until he was within five feet of it.

We are not concerned with the question of right of way at this stage, as I see it, because the statutory right of way is not of great value when you come to deciding a question of negligence; and the statutory right of way does not give one the right to proceed blindly across the intersection, even though he may have the right of way.

This man proceeded blindly across the intersection, without taking any precaution, according to his own testimony; and one cannot go blindly across an intersection after seeing a bus 150 feet away traveling at 25 or 30 miles an hour, or traveling at not too fast a rate of speed, without observing whether the bus is going to stop or going to continue, without observing whether the bus is continuing at that speed or going

faster, without making an effort to slacken the speed of his motorcycle until he could see what the bus was going to do.

For him to drive 12 miles an hour while this bus was traveling 150 feet, and to make no second observation, was clearly disregarding his own safety; and I find that as a matter of law he was guilty of negligence which contributed to the happening, and therefore the motion for a non-suit will be granted.

Mr. Hoberman: I pray an exception.

The Court: Exception allowed.

Postea.

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

JOHN BACA,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,
Defendant.

Action at Law.

This case was tried before his Honor, JOHN C. BARBOUR, Circuit Court Judge, to whom the said cause was duly referred for trial, with a jury at the Bergen Circuit on April 29th, 1941.

After the evidence on the part of the plaintiff had been given, and the plaintiff's case had been closed, the said judge determined from the evidence that the plaintiff had not made out a case for the consideration of the jury, and on motion of the attorney of the defendant, granted a nonsuit.

JOHN C. BARBOUR,
Judge.

Final Judgment.

NEW JERSEY SUPREME COURT,
BERGEN COUNTY.

JOHN BACA,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation,
Defendant.

COPY OF JUDGMENT FORM.

This case was tried before his Honor, JOHN C. BARBOUR, Circuit Court Judge, to whom the said cause was duly referred for trial, with a jury at the Bergen Circuit on April 29th, 1941.

After the evidence on the part of the plaintiff had been given, and the plaintiff's case had been closed, the said judge determined from the evidence that the plaintiff had not made out a case for the consideration of the jury, and on motion of the attorney of the defendant, granted a nonsuit.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed and that the defendant, Public Service Coordinated Transport (a corporation), do recover of the said plaintiff, John Baca, its costs, which have been taxed at the sum of sixty-eight dollars and eighty cents.

Costs $68.80.

Final Judgment.

Judgment entered and signed May 3, 1941.

THOMAS J. BROGAN,
Chief Justice.

A True Copy:
FRED L. BLOODGOOD,
Clerk.

Notice of Appeal.

(Filed June 9, 1941)

NEW JERSEY SUPREME COURT,
BERGEN CIRCUIT.

JOHN BACA, *Plaintiff,* vs. PUBLIC SERVICE COORDINATED TRANSPORT, a corporation, *Defendant.*	Action at Law.

To: HENRY H. FRYLING,
Attorney of Defendant.

SIR:

PLEASE TAKE NOTICE, that the plaintiff, JOHN BACA, appeals to the Court of Errors and Appeals of New Jersey from the judgment of non-suit entered in this cause on April 29th, 1941.

Dated: May 31st, 1941.

HOBERMAN & HOBERMAN,
Attorneys of Plaintiff.

SOL HOBERMAN,
Of Counsel.

Grounds of Appeal.

(Filed June 27, 1941)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN BACA, *Plaintiff-Appellant,* vs. PUBLIC SERVICE COORDINATED TRANSPORT, a corporation, *Defendant-Respondent.*	On Appeal from Supreme Court, Bergen Circuit.

Appellant states the following grounds of appeal:

1. The trial judge erroneously granted a non-suit in favor of the defendant, on motion of attorney for the defendant.

2. The trial judge erroneously determined that the plaintiff had not made out a case for the consideration of the jury and ordered a non-suit at the end of the plaintiff's case.

3. The trial judge erroneously determined that the plaintiff was guilty of contributory negligence and granted a non-suit.

HOBERMAN & HOBERMAN,
Attorneys of Plaintiff-Appellant.

SOL HOBERMAN,
Of Counsel.

New Jersey Court of Errors and Appeals

JOHN BACA, *Plaintiff-Appellant,* vs. PUBLIC SERVICE COORDINATED TRANSPORT, a corporation, *Defendant-Respondent.*	Action at Law. On Appeal from the New Jersey Supreme Court, Bergen Circuit.

BRIEF FOR PLAINTIFF-APPELLANT

Statement of the Case.

This appeal brings before this Court for review a judgment of non-suit, ordered by the trial judge in favor of the defendant, in an action wherein the plaintiff sought to recover damages for personal injuries and property damage as a result of a collision between his motorcycle and an automobile bus of the defendant corporation at the intersection of two public highways in the city of West New York, New Jersey. The only question involved is whether or not the trial court properly non-suited the plaintiff at the conclusion of his case on the ground that the plaintiff had not made out a case for the consideration of the jury or on the ground that, as a matter of law, the plaintiff was guilty of contributory negligence.

The facts disclose that the plaintiff was driving his motorcycle in an easterly direction on 23rd Street in West New York, New Jersey (P. 11), which was a one-way street (P. 11). As he approached the intersection of Park Avenue and 23rd Street there was a small automobile about

15 feet in front of him (P. 12). This small car slowed down when it reached the intersection and then continued across (P. 12). The plaintiff continued to the intersection and slowed down to 12 miles per hour (P. 13). He looked to the right and observed the Public Service Bus about 150 feet away (P. 12). At that time the bus was not going fast (P. 13). The plaintiff continued across and when he reached the middle of the intersection he again looked to the right (P. 13). He then saw the defendant's automobile bus about 5 feet away and going fast (P. 13 and 14). The left front of the bus then struck the right leg of the plaintiff and the right side of his motorcycle (P. 14). The driver of the defendant's bus gave no signal (P. 14). The plaintiff reached the intersection first (P. 14). After the plaintiff was struck, he was knocked unconscious and taken to the hospital (P. 15).

Specification of Grounds of Appeal.

1. The trial judge erroneously granted a nonsuit in favor of the defendant because the plaintiff succeeded in showing negligence on the part of the defendant.

2. The question whether the defendant was guilty of negligence should have been submitted to the jury.

3. There was no evidence of any contributory negligence on the part of the plaintiff.

4. The question whether the plaintiff was guilty of contributory negligence should have been submitted to the jury.

POINT 1.

The trial judge erroneously granted a non-suit in favor of the defendant because the plaintiff succeeded in showing negligence on the part of the defendant.

The only testimony concerning the manner in which the accident occurred was presented by the plaintiff. He testified that he approached the intersection and slowed down from 15 to 12 miles per hour (P. 13). He looked to the right and saw the defendant's bus 150 feet away (P. 12). He then continued into the intersection and when he reached approximately the center he again looked to the right and saw the defendant's bus coming at him very fast (P. 14). The bus gave no signal (P. 14). The left front of the bus then struck the right side of the plaintiff's motorcycle (P. 14).

From this testimony, it appears that the defendant failed to use reasonable care in the following respects:

A—The driver of the defendant's automobile bus failed to yield the right of way to the plaintiff, who entered the intersection first.

> This is a violation of the *Motor Vehicle Act,* Revised Statutes of 1937, 39:4-90, the first sentence of which reads as follows, "The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection."

B—The defendant's driver failed to blow his horn or give any signal to warn the plaintiff that he intended to pass in front of him.

In the case of *Graff* vs. *Louis Stern Sons,* 103, N. J. L. 13, 135 A 336, the court said, "The fact that the defendant's driver gave no signal or warning of his approach, while not conclusive as to his negligence, is a circumstance to be considered in deciding whether or not the defendant's driver operated his truck with reasonable care in the circumstances presented to him."

C—The defendant's automobile bus was traveling at a fast rate of speed at an intersection.

In the case of *Meyer & Peter* vs. *Creighton,* 83 N. J. L. 749, 85 A 344, the court said, "The rate of speed of 45 miles an hour, which the plaintiff's evidence shows the defendant's motor vehicle was running in the public highway when it overtook and collided with that of the plaintiff's, was expressly forbidden by the law just quoted, and such fact, I think, should, under the circumstances of the collision above recited, be held to be evidence of the defendant's negligence sufficient to put him upon his defense, and justified the denial of the defendant's motion. Independently of any statute, the driving of any vehicle on a public highway at a rate of speed that is inconsistent with such control of the vehicle as is necessary to avoid running down other vehicles going in the same direction is some proof of negligence."

D—The driver of the defendant's automobile bus failed to reduce his speed at the intersection.

In the case of *Spawn* vs. *Goldberg,* 94 N. J. 335, 110 A 565, the court said, "We have

> pointed out that it was the duty of the driver of the defendant company's motortruck to use reasonable care to avoid injuring others, and it was a breach of that duty to fail to stop the machine or slacken its speed when that was the only way in which injury to others could be avoided."

E—The driver of the defendant's bus increased his speed at the intersection and failed to control its motion so as to avoid striking the plaintiff.

> In the case of *Cottrell* vs. *Champion* (No State Report), 145 A 322, the Supreme Court held that the negligence of automobile driver, in approaching intersection at excessive speed and making no effort to stop in order to avoid collision with automobile crossing street, was held for the jury.

It seems to me, therefore, that this evidence alone, without the inferences of fact and presumptions to be drawn therefrom, show the defendant to be guilty of negligence which was the proximate cause of the injuries to the plaintiff. The order of non-suit entered by the trial judge, because a case had not been made out for the consideration of the jury, was therefore erroneous.

POINT 2.

The question whether the defendant was guilty of negligence should have been submitted to the jury.

In passing upon a motion to non-suit, the Court must take as true, all the testimony which sup-

ports the plaintiff's case. *Maudsley* vs. *Richardson & Boynton Co.*, 101 N. J. L. 561, 129 A 139.

In determining whether the non-suit was properly directed, every presumption of fact must be resolved in favor of the plaintiff, and every inference of fact which can be legitimately drawn from the testimony and which is favorable to the plaintiff is admitted as true. *Fox* vs. *Great Atlantic & Pacific Tea Co.*, 84 N. J. L. 726, 87 A 339.

From the evidence heretofore pointed out, it may be presumed and inferred that the defendant failed to observe the plaintiff; that the driver of the defendant's bus attempted to cross the intersection between the plaintiff and the car in front of him; that the driver of the defendant's bus increased his speed at the intersection in order to do so. It is also reasonable to infer that the driver of the defendant's bus failed to keep a proper look-out for other vehicles and failed to observe the plaintiff at the intersection.

If we, therefore, add the presumptions of fact and the reasonable inferences of fact to the definite testimony, set out in Point 1, we have a question for the jury to consider and a question of fact on which the minds of reasonable men may differ.

It is therefore respectfully submitted that the trial Court's action in ordering a non-suit was error.

POINT 3.

There was no evidence of any contributory negligence on the part of the plaintiff.

The plaintiff, prior to reaching the intersection, was proceeding at the rate of 15 miles per hour

(P. 13). When he reached the intersection he slowed down to 12 miles per hour (P. 13). He then made his observation of the defendant's bus, and saw it 150 feet to the right of him. The bus was at that time traveling from 28 to 30 miles per hour (P. 22). The plaintiff continued across the intersection and when he reached the middle of the road, he looked and saw the bus 5 feet to the right of him and coming very fast (P. 13).

The trial Court apparently found that the plaintiff was guilty of contributory negligence because he did not make sufficient observation. It seems to me that the plaintiff was justified in assuming that his passage across the intersection would be observed by the defendant's driver and that the bus driver would utilize the full width of the street to prevent running him down. The duty of using reasonable care between persons on a highway is mutual and the plaintiff had the right to assume that the driver of the defendant's automobile bus would act as a reasonably prudent man under the circumstances.

In *Pool* vs. *Brown,* 89 N. J. L. 314, 98 A 262, the Court said,

> "It is the duty of the driver to have his vehicle under proper control and make reasonable observations as to conditions existing in the public streets, and act as a prudent man would act under the circumstances. This obligation is mutual between all users of the public highway, and each person may assume that others, traveling on the highway, will comply with such duty. *Tischler* vs. *Steinholtz,* 99 N. J. L. 149, 122 A 880."

In *Electric Railway Co.* vs. *Miller,* 59 N. J. L. 432, 36 A 885, 39 A 645, the Court said,

> "The case presented essentially a question of fact, upon testimony more or less conflicting, and therefore resolved itself into a jury question. It was deducible from the testimony that the plaintiff had reached the crossing first, and was therefore, in a position legally to expect that he would be accorded the right of way."

It is undisputed that the plaintiff reached the intersection first. He justifiably assumed that he would be accorded the right of way. He made observations which disclosed that under the conditions observed he had time to proceed across the intersection. He then continued across and when in the center of the highway, he made another observation, but was struck by the defendant's bus before he had time to do anything. None of these facts, in my opinion, indicate a failure to use due care by the plaintiff at the time and place of the occurrence. The trial Court's action in non-suiting the plaintiff was therefore erroneous.

POINT 4.

The question whether the plaintiff was guilty of contributory negligence should have been submitted to the jury.

Contributory negligence is a defense and the burden of establishing contributory negligence is upon the defendant. *Osbun* vs. *De Young,* 99 N. J. L. 204, 122 A 809; *Kelly* vs. *Johnson* (No state report), 137 A 849. It must clearly appear that the plaintiff's negligence was a proximate cause of the accident before a non-suit may be

ordered. The evidence submitted on behalf of the plaintiff is presumed to be true and all reasonable inferences of fact which can be legitimately drawn from the evidence is resolved in favor of the plaintiff. *Thornton* vs. *Cater,* 94 N. J. L. 435, 111 A 158.

The trial Court reviewed the testimony of the plaintiff and in his opinion, said (page 40):

> "The testimony of the plaintiff, who was the only witness so far, of course, is that he was proceeding in an easterly direction on 23rd Street, he made an observation, saw a bus approaching at not too fast a rate of speed. It then was about 150 feet to his right. I think on cross examination he said the rate of speed was somewhere around 28 or 30 miles an hour. He did not see the bus again until he was 5 feet from the bus, and then the bus seemed to be traveling faster. Well, I suppose, when you see a bus 5 feet from you, it would naturally seem to be traveling fast, especially if in the traversing of that 5 feet you came into contact with the bus."

And then (page 41), the trial judge continues,

> "The only evidence from which the jury might infer negligence would be the difference in the distance traversed by the two vehicles, and taking the speed of 12 miles an hour as the speed of the motorcycle (of course I just assume that the jury is going to believe that the motorcycle was traveling 12 miles an hour; we must take that as true at this stage. The Court cannot take into consideration the ordinary concept of the speed

> of motorcycles), assuming that it was going three or four times that speed to travel 150 feet while the motorcycle traveled across Park Avenue. The jury might reasonably infer that that was a speed greater than was justified at an intersection."

The supposition that when a person sees a bus 5 feet from him, it would naturally seem to be traveling fast, does not give the plaintiff the benefit of all reasonable inferences. Nor does a consideration of the ordinary concept of the speed of motorcycles resolve the evidence in favor of the plaintiff. It seems to me that fair minded men would differ in reaching a decision from the testimony adduced plus the presumptions and reasonable inferences to which the plaintiff is entitled.

There are any number of cases which indicate that the question of contributory negligence, under such circumstances, should have been presented to the jury for determination.

> "Whether the plaintiff, in observing the approach of the automobile, exercised due care in the conduct of his horse and wagon, so as to acquit himself of the charge of contributory negligence, in the view of conflicting testimony, was equally a jury question. *Pesin* vs. *Jugovich,* 85 N. J. L. 256, 88 A 1101; *Kennen* vs. *Public Service Co.,* 85 N. J. L. 639, 90 A 273; *Westcoat* vs. *Decker,* 85 N. J. L. 716, 90 A 290."

> "Whether the defendant, under the circumstances in the exercise of ordinary care could have avoided running into the motorcycle was not a court question, but clearly a

question for a jury to decide. *Fox* vs. *Great Atlantic & Pacific Tea Co.*, 84 N. J. L. 726, 87 A 339; *Jones* vs. *Public Service Railway Co.*, 86 N. J. L. 646, 92 A 397; *Daly* vs. *Case*, 88 N. J. L. 295, 95 A 973."

All through the previous discussion, the same question seemed to present itself. What could the plaintiff have done under the circumstances? He was going slow, he made observations, he had the right of way, and he was struck by the front of the defendant's bus whose driver gave no signal. What else could a reasonably prudent person have done under the circumstances?

Conclusion.

For these reasons the appellant respectfully submits that the judgment of non-suit be set aside, with costs, and a new trial be ordered.

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New Jersey Court of Errors and Appeals

JOHN BACA, Plaintiff-Appellant. *v.* PUBLIC SERVICE COORDINATED TRANSPORT, a corporation, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court, Bergen Circuit.

BRIEF OF DEFENDANT-RESPONDENT.

Statement.

On June 12, 1938, appellant, while operating his 1932 Harley-Davidson motorcycle in an easterly direction on 23rd Street, West New York, N. J., which is a one-way street, sustained personal injuries and damage to his motorcycle when the motorcycle was in collision with a bus owned by the respondent, and which was traveling north on Park Avenue. The testimony failed to disclose the width of the respective streets. Appellant was the only witness in his case with respect to the manner in which the accident occurred, and when he rested his case the trial court, on motion of the respondent, non-suited appellant on the grounds that he was guilty of contributory negligence as a matter of law.

Appellant sets forth three grounds of appeal (See page 49, Printed State of Case), which can be grouped under the single heading of whether the trial court erroneously determined that the plaintiff was guilty of contributory negligence as a matter of law.

POINT I.

The trial court did not err in non-suiting the appellant on the ground that he was guilty of contributory negligence as a matter of law.

Appellant testified on direct examination that on June 12, 1938, at about a quarter to seven o'clock, he was operating a 1932 Harley-Davidson motorcycle in an easterly direction on 23rd Street, West New York, N. J., that said street is a one-way street (p. 11, ll. 12-40); that a bus was going north on Park Avenue; that when he was in the middle of the 23rd Street block there was a car in front of him which was at the next corner, and when this car came to the corner appellant was fifteen feet in back of it; that when this other car came to the intersection it slowed down and went across the intersection, and when appellant came to the corner he saw a Public Service bus about one hundred fifty feet away (p. 12); that before he got to the corner his motorcycle had been traveling about fifteen miles an hour, and when he got to the corner he reduced its speed to about twelve miles an hour; that when he saw the bus one hundred fifty feet to his right, appellant drove straight ahead, at which time the automobile which was ahead of him "was over already the next corner" (p. 13, ll. 10-25). He testified that when he saw the bus the first time it went fast but, "not go fast", and the next time he saw the bus was when appellant was in the middle of the road (p. 13, ll. 30-35).

He was asked (p. 13, ll. 35-40; p. 14, ll. 5-37):

> "Q. How far away was the bus from you then? A. I see as I look him, right at the moment, as I see him the first time, he was about 150 feet.

Q. How far away was it the second time? A. The second time, about five feet.

Q. The second time you saw it was it going slow or fast? A. Fast.

Q. That was before it hit you? A. Yes.

Q. Did the bus hit you, or did you hit the bus? A. The bus hit me, right side.

Q. What part of the bus hit you? A. The left I know nothing more after.

Q. What part of the bus hit you? A. The left side, left side front.

Q. The left side front of the bus hit you? A. Yes.

Q. And what part of you or your motorcycle did the bus hit? What did the left side front of the bus hit? A. The right side.

Q. Whose right side? A. Me; hit me, right side.

Q. Did it hit your leg or your body, or your shoulder, or what? A. Leg, right side, leg.

Q. Your leg? A. Yes.

Q. Did you hear any signal? A. No.

Q. You did not hear a horn? A. No.

Q. Now, who got into that intersection first, you or the bus? A. (No answer.)

Mr. Hoberman: I withdraw that question.

Q. Who got into the cross street first? A. I was first.

Q. You were first? A. Yes.

Q. How do you know? A. I know, as I was first, and the bus go and hit me on the right side.

Q. When you reached the intersection you looked to the right, didn't you? A. Yes.

Q. Did you have your motorcycle repaired?''

It will be noted that appellant's brief only has one reference to the cross examination of the appellant, which reference appears on page seven, line four of his brief, and refers to the speed of the bus at the first time appellant observed it.

On cross examination appellant testified that he had been operating the motorcycle for five years before the accident and was familiar with the different controls thereon, and knew how to stop and how to start it and had used it for long rides throughout the country (p. 20, ll. 1-25); that it had rained on the day of the accident, but at the time of the accident the streets were dry, the sun was shining (p. 20, ll. 30-40); that he was familiar with both 23rd Street and Park Avenue and had been over them before; that as he was traveling on 23rd Street there was an automobile ahead of him, and when he got to the corner this automobile was in the middle of the road ahead of him; that the automobile and his motorcycle were both going about fifteen miles an hour (p. 21, ll. 1-30), and that at fifteen miles an hour if he wanted to put on his brakes he could have stopped his motorcycle in fifteen or twenty feet (p. 22, ll. 10-18); that when he saw the bus approaching it was about one hundred fifty feet away, not going too fast or too slow, but at a speed of about twenty-eight or thirty miles an hour (p. 22, ll. 20-25).

He was asked (p. 22, ll. 27-40):

> "Q. And you don't call that fast? A. Me.
> Q. That is not fast to you, twenty-eight or thirty miles an hour? A. Yes.
> Q. I say that is not a fast speed? A. That is plenty.
> Q. And you saw that it was going— A. Yes.
> Q. —twenty-eight or thirty miles an hour? A. Yes.
> Q. Is that right? A. Yes.
> Q. Did you continue to watch the bus? A. Yes.
> Q. What did the bus do? A. The bus driver go ahead.
> Q. You mean he kept right on going? A. Yes.

Q. And you saw that all the time? A. Yes, I see it."

(p. 23, ll. 5-40):

"Q. In other words, from 150 feet away from the corner? A. Yes.

Q. He came along at the same speed; the bus kept right along at the same speed? A. No. As I come in, after the middle of the road, after I look the right side, the bus go too fast.

Q. You saw it. I do not want to confuse you. You saw it at twenty-eight or thirty miles an hour; is that right? A. Yes.

Q. Then it was 150 feet away? A. Yes.

Q. You said you continued to watch the bus; is that correct? A. Yes, I watched him, yes.

Q. And the bus kept on coming? A. Yes.

Q. At that same speed? A. No. After, as I see him the next time about five feet, go too fast, more fast.

Q. John, did you watch the bus from the time he was 150 feet away up until the time of the accident? Did you continue to look at the bus? A. As I look him first side, I see he was about 150 feet; and after, as I was in the middle of the road, he was about five feet, and right away he jumped.

Q. Now, then, John, you never saw this bus from the first time when it was 150 feet down on Park Avenue until the next time, when it was right in front of you, five feet away; is that right? A. Yes.

Q. What were you looking at? A. I look the right side, and right away I was finish already.

Q. In other words, you looked, and you saw this bus 150 feet down? A. Yes.

Q. And the next time you looked it was right in front of you? A. Yes."

(p. 24, ll. 11-40):

"Q. Where was it when it was five feet away? A. He was——

Q. What part of it was five feet away? A. Here I driving, here go; that is the way go

bus. As I was here, after the middle of the road, he was about five feet, very short, and go too fast, and after he hit me.

Q. Why didn't you stop your motorcycle when you saw this bus coming at that fast rate of speed? A. I don't have time already.

Q. You saw the bus was coming fast up Park Avenue, didn't you? A. Yes.

Q. And you made no attempt to stop your motorcycle at all, did you? A. No. As I look the right side, was already about five feet, I can't stop. If I want to stop motorcycle——

Q. You knew if the two of you kept on going there was going to be a crash, didn't you? A. (No answer.)

Q. You knew if the bus kept on going, and you kept on going, there was going to be a crash, didn't you, John? A. Please, I can't understand that.

Q. You knew if the bus kept on coming up Park Avenue, and you kept crossing 23rd Street, the two of you were going to come together, didn't you? A. Yes.

Q. Then why didn't you stop your motorcycle? A. I can't stop.

Q. Why not? A. As I said, he kill me; I no have time."

(p. 25, ll. 5-40):

"Q. John, do you know what part of the bus was struck? Do you know what part of the bus was struck? A. Please, I can't understand good.

Q. Do you know what part of the bus and what part of your motorcycle came together? A. (No answer.)

Q. I will ask it again. You say the bus hit you? A. Yes.

Q. What part of the bus hit you? A. Oh, the left side, and broke my leg.

Q. I mean what part of the bus hit you? Do you know what part of the bus struck your motorcycle? A. (No answer.)

Q. Do you understand that question? A. Is somebody here?

Q. John, how long have you been in this country? A. Eleven years.

Q. Yes. Now, do you know what part of the bus struck your motorcycle?

* * * * *

Q. Do you know whether the bus did not strike your motorcycle? A. Please, that is a question I can't understand.

Q. John, you say that there was an accident? A. Yes.

Q. What kind of an accident was it? A. I drove the motorcycle in the Public Service bus.

Q. What part of the bus struck your motorcyle? What part of the bus hit your motorcycle? A. Oh, right side.

Q. The right side of the bus? A. Yes—left side. Left side, and me, right side."

(p. 26, ll. 8-40):

"Q. I show you some pictures, John. Do you recognize these? A. (No answer.)

Q. Do you recognize these? A. No, I don't know if this is the same bus. I don't know.

Q. You don't know. I show you a picture of a bus, John, a panel smashed in right by the left rear wheel. Isn't that where you run into the bus? A. No. I know it was not.

Q. You say it was not that point there? A. No, that is not.

Q. I show you another picture showing the left side of a bus, near the rear wheel, with a circle like from the headlight. Wasn't that caused by the headlight of your motorcycle? A. No.

Q. What part of the bus do you say? A. The bus hit me, front, left side.

Q. What part of the bus hit you? A. Hit me, right side.

Q. You say the front of the bus hit your right side; is that right? A. Yes.

Q. How do you know that? A. I know. Otherwise was a few feet, and I drove straight.

Q. But, John, you do admit that you did not look at this bus from the time you made the first look, and it was 150 feet away, until the time of the second, when it was five feet away from you? A. Yes.

Q. And the reason you did not stop your motorcycle was—when you saw this bus coming so fast—was that you were afraid you would get killed, is that right, if it hit you? A. (No answer.)

Q. Is that the reason, John? A. I do not have time to stop already."

(p. 27, ll. 5-11):

"Q. What? A. I don't have time to stop already.

Q. But you saw this bus increase its speed; is that right? A. Yes.

Q. And you still tried to continue across the street; is that right? A. Yes. The bus go too fast, and I was slow."

* * * * *

(p. 27, ll. 16-35), on re-direct appellant testified:

"Q. John, you didn't see the bus increase its speed, from the time you first saw it 150 feet away until the second time, did you? A. Yes.

Q. When you first got to the intersection and looked to the right, the bus was 150 feet away? A. Yes.

Q. And at that time you saw it was going not too slow and not too fast; they were your own words, is that right? Then the next time you saw it, it was four feet away? A. About five—four or five feet.

Q. Between the first time you saw it and the second time you saw it, did you see it again, in between then? A. No. I see him, and right away was hit me, knocked me down.

Q. Then you did not see it from the first time, 150 feet away, until the second time it was five feet away? A. Yes.

Q. What was your answer? A. Yes."

We have deemed it advisable to set forth most of appellant's testimony in question and answer form as it appears in the State of Case, because many of the questions were not answered, and some of the answers were not definite, and for the further reason that appellant gave two distinct versions as to how the accident occurred.

One version was that as his motorcycle was traveling east on 23rd Street, approaching Park Avenue, it was traveling at a speed of fifteen miles an hour; that there was an automobile ahead of the motorcycle traveling at approximately the same speed; that when the motorcycle arrived at the intersection, the automobile above referred to was either in the middle of the intersection or had crossed it entirely. Appellant claims that when he arrived at the intersection he reduced the speed of his motorcycle to twelve miles an hour and that he looked to the right and saw the bus traveling north on Park Avenue at a speed of twenty-eight or thirty miles an hour, which to him was "plenty" fast; that he drove straight across the intersection and did not again see the bus until it was five feet away from him, at which time it was traveling faster than previously. He at no time applied his brakes to avoid the accident. There is nothing in the testimony to show the exact position of the motorcycle and the bus at the time of the collision, or their respective positions thereafter. There is some testimony that appellant was in the middle of the intersection at the time of the collision.

On the testimony so introduced appellant traveled from the corner of the intersection to the middle thereof at a speed of twelve miles an hour, while the bus, traveling at twenty-eight or thirty miles an hour, went one hundred fifty feet in the same period of time. On the basis of these two

speeds the bus was travelling two and one-half times as fast as appellant's motorcycle, and appellant would have had to travel sixty feet while the bus was traveling one hundred fifty feet on this ratio. Appellant testified the accident occurred in the middle of the intersection.

The other story was developed upon cross examination of the appellant. He testified (p. 22, ll. 32-40, p. 23, ll. 5-20):

> "Q. And you saw that it was going— A. Yes.
> Q. —twenty-eight or thirty miles an hour? A. Yes.
> Q. Is that right. A. Yes.
> Q. Did you continue to watch the bus? A. Yes.
> Q. What did the bus do? A. The bus driver go ahead.
> Q. You mean he kept right on going? A. Yes.
> Q. And you saw that all the time? A. Yes, I see it.
> Q. In other words, from 150 feet away from the corner? A. Yes.
> Q. He came along at the same speed; the bus kept right along at the same speed? A. No. As I come in, after the middle of the road, after I look the right side, the bus go too fast.
> Q. You saw it. I do not want to confuse you. You saw it at twenty-eight or thirty miles an hour; is that right? A. Yes.
> Q. Then it was 150 feet away? A. Yes.
> Q. You said you continued to watch the bus; is that correct? A. Yes, I watched him, yes.
> Q. And the bus kept on coming? A. Yes.
> Q. At that same speed? A. No. After, as I see him the next time about five feet, go too fast, more fast."

He admitted on further cross examination that he never saw the bus from the time it was one hundred fifty feet away from him on Park Avenue

until it was right in front of him and but five feet away (p. 23, ll. 28-32). He was asked what he was looking at and he said that he looked "* * * the right side, and right away I was finish already." (p. 23, ll. 35-37). He testified that he didn't stop his motorcycle when he saw the bus coming at the fast rate of speed because, "I don't have time already" (p. 24, l. 20), and that he had seen the bus was coming up Park Avenue fast (p. 24, l. 22). He testified that he didn't stop his motorcycle because he could not stop it (p. 24, l. 25). He was asked: (p. 24, ll. 34-40)

> "Q. You knew if the bus kept on coming up Park Avenue, and you kept crossing 23rd Street, the two of you were going to come together, didn't you? A. Yes.
> Q. Then why didn't you stop your motorcycle? A. I can't stop.
> Q. Why not? A. As I said, he kill me; I no have time."

He further testified (p. 25, ll. 32-36):

> "Q. John, you say that there was an accident? A. Yes.
> Q. What kind of an accident was it? A. I drove the motorcycle in the Public Service bus."

and again (p. 26, ll. 31-40):

> "Q. But, John, you do admit that you did not look at this bus from the time you made the first look, and it was 150 feet away, until the time of the second, when it was five feet away from you? A. Yes.
> Q. And the reason you did not stop your motorcycle was—when you saw this bus coming so fast—was that you were afraid you would get killed, is that right, if it hit you? A. (No answer.)
> Q. Is that the reason, John? A. I do not have time to stop already."

On the first of these two versions of how the accident happened, according to appellant's testimony, when he arrived at the intersection he reduced his speed to twelve miles an hour, at which time he saw the bus approaching from his right, one hundred fifty feet away, at a speed of twenty-eight or thirty miles an hour. Appellant continued straight across the intersection, and when he was in the middle thereof he saw the bus but five feet away, traveling as he said at a faster rate of speed. At no time did appellant apply his brakes in an attempt to avoid the collision, although he testified that traveling at a speed of fifteen miles an hour he could stop in fifteen or twenty feet. He admitted that he "drove the motorcycle in the Public Service bus" (p. 25, ll. 35-36).

The other story is that when appellant came to the corner he saw the bus one hundred fifty feet away, traveling at a speed of twenty-eight or thirty miles an hour, which to him was plenty fast; that he continued to watch the bus and saw it all the time; that the bus kept on coming and then went faster and he knew that if the bus kept on coming up Park Avenue and he kept crossing 23rd Street the motorcycle and the bus were going to come together, but that he could not stop his motorcycle as he did not have time. He admitted that he continued straight across the street; that the bus was going too fast and he was going too slow.

The trial court in granting the motion for the non-suit said (p. 43, ll. 23-40; p. 44, ll. 5-15):

> "We are not concerned with the question of right of way at this stage, as I see it, because the statutory right of way is not of great value when you come to deciding a question of negligence; and the statutory right of way

does not give one the right to proceed blindly across the intersection, even though he may have the right of way.

This man proceeded blindly across the intersection, without taking any precaution, according to his own testimony; and one cannot go blindly across an intersection after seeing a bus 150 feet away traveling at 25 or 30 miles an hour, or traveling at not too fast a rate of speed, without observing whether the bus is going to stop or going to continue, without observing whether the bus is continuing at that speed or going faster, without making an effort to slacken the speed of his motorcycle until he could see what the bus was going to do.

For him to drive 12 miles an hour while this bus was traveling 150 feet, and to make no second observation, was clearly disregarding his own safety; and I find that as a matter of law he was guilty of negligence which contributed to the happening, and therefore the motion for a non-suit will be granted."

On the motion for the non-suit the respondent cited *Walling* v. *General Woodcraft Co., et al.,* 110 N. J. Law 561, 166 Atl. 77, decided by this Court. In that suit, which was an appeal from a judgment of non-suit, and which was unanimously affirmed by this Court, the plaintiff was driving on Main Street, Matawan, N. J., in the rain, at eighteen or twenty miles an hour, and as he approached Atlantic Avenue, which came into Main Street at an angle from the southeast, plaintiff did not slacken his speed, but blew his horn thirty feet from the intersection. He testified he could stop his car in twenty feet. When he was beyond the house line and about forty-eight feet from the point of collision he had a view of Atlantic Avenue and observed the truck approaching at a speed of twenty-five or thirty miles an hour. The truck did not stop, nor did the plaintiff stop his car or attempt to do so until just before the front of

plaintiff's car came into collision with the rear of the truck, which had proceeded into Main Street. Plaintiff testified that he attempted to turn sharply to his right to avoid collision, but the two vehicles collided and plaintiff's automobile turned over; that he could not turn to the left because cars were approaching from the opposite direction.

The learned trial judge, in passing upon the motion to non-suit, said (110 N. J. Law 561):

> "'In the circumstances I feel obliged to hold that the plaintiff was not in the exercise of care and caution which ordinarily and reasonably would be required of a careful driver, in that his own statement is that he was driving his car at 18 or 20 miles an hour at an intersection, and in the circumstances it would appear to have been in violation of the provisions of the Traffic Act. One cannot go blindly into an intersection and then because there is a collision by the unexpected appearance of a vehicle also having a right upon the highway and then say that he is free from negligence himself.'"

In its affirmance this Court said, at page 563:

> "* * * In the instant case, however, we conclude that the conduct of plaintiff in acting as he did was so obviously careless and in violation of ordinary prudence, that the trial judge properly held that he was guilty of negligence and that such negligence contributed to his injury. He not only drove into the intersection without observing whether or not a vehicle was approaching on his right, but, after seeing the truck, he continued for a number of feet without making any effort to slacken the speed of his car or, if need be, to stop until too late to avoid contact with the truck, which had entered the intersection ahead of him, and which he observed was proceeding on its course, without intention of yielding the way to plaintiff."

In *Zochowski* v. *Zukowski,* 114 N. J. Law 437, 176 Atl. 364, decided by this Court, the injured plaintiff was an invitee in the truck owned and driven by defendant-appellant, Zukowski, which was involved in a collision with a Chevrolet car owned and operated by the defendant, Harwood, at the intersection of Second and Bergen Streets, Harrison, N. J. Verdicts in the Circuit Court were rendered against both defendants, but the defendant, Zukowski, was the only one to appeal. Said defendant moved for a non-suit, and, at the close of the case for the direction of a verdict, both of which were denied.

At the close of the plaintiff's case there were proofs and legitimate inferences from which the jury might find that the appellant and plaintiff were traveling southerly in appellant's truck along Second Street (which runs north and south) approaching its intersection with Bergen Street (which runs east and west) at a speed of 15-20 miles an hour; that the defendant Harwood was approaching in his car along Bergen Street in a westerly direction, and that appellant's view as he looked easterly toward Bergen Street was obstructed by a high board fence until within 10 feet of Bergen Street; that when appellant was at a point 10 feet from Bergen Street he had notice of the approach of Harwood's car, which was then about 75 feet away and traveling toward Second Street at a speed of approximately 50 miles an hour; that after appellant's truck had actually reached Bergen Street, plaintiff observed that Harwood's car was about 30 feet away from the truck and still traveling at the same or a greater rate of speed toward Second Street; that despite the fact that Harwood's car did not slacken its speed, appellant continued on his course at 15-20 miles per hour, sounding no alarm,

and when appellant had traversed about three-fourths of the way across the intersection, the defendant Harwood attempted to swing in front of appellant, and appellant thereupon pressed on the brakes but the collision occurred.

The two streets were approximately 36 feet in width and the location are generally regarded as a business district. The traffic on Second street was not controlled by a traffic officer or by signal.

In dealing with the question of the liability of the defendant, Zukowski, this Court said; (114 N. J. Law 440):

> "Under the facts as presented by the plaintiff, the jury could reasonably determine that the appellant was negligent in the operation of his truck in proceeding into Bergen street at a rate of speed estimated as between 15 and 20 miles per hour, into the path of an approaching automobile, moving at a rate of speed in excess of 50 miles per hour and at a distance variously estimated at 35 and 75 feet away.
>
> "It is true that appellant was approaching from the right, and technically possessed of the right of way; but this Traffic Act regulation does not constitute a hard and fast rule. It is a right that should be exercised reasonably in the light of the circumstances existing at a given time and place. Carero et al. *v.* Breslin, 128 A. 883, 3 N. J. Misc. 507.
>
> It was for the jury to determine whether or not appellant properly availed himself of the right of way. From the evidence the jury might have found that appellant saw a car approaching at a reckless rate of speed, and that a collision would be inevitable if he did not control his own truck; that he made no attempt to avoid a collision until at the very last moment when it was too late.
>
> Apart from the consideration of breaches of the provisions of the Traffic Act, the jury might have found, and no doubt did find, that

the act of crossing an intersection in the face of apparent danger was negligence.

We think that the trial court properly denied defendant's motion for a nonsuit."

Of course, the plaintiff in the above case was not charged with any contributory negligence as he was an invitee, but if we substitute the defendant, Zukowski, for the appellant in this case, it is apparent that the appellant in this case was guilty of contributory negligence as a matter of law.

In the case of *Spawn* v. *Goldberg, et al.,* 94 N. J. Law 335, 110 Atl. 565, cited by appellant, a situation somewhat like that in *Zochowski* v. *Zukowski* above referred to, was presented. The plaintiff, a passenger in a jitney motor bus owned by one Goldberg, was injured when it was in collision with a motor truck of the Liberty Trucking Company at the junction of Clinton Avenue and La Grange Place, in Newark, N. J. The trial resulted in a verdict against both defendants, but the defendant Trucking Company alone appealed. Said defendant had moved for a direction of a verdict at the close of the case, which was denied, and, in affirming the judgment the Supreme Court said (94 N. J. Law 336):

"* * * It is a general rule that drivers of automobiles and other vehicles, when using streets and highways, are bound to exercise reasonable care towards other travelers—in other words, they must use that degree of care which an ordinarily prudent person would exercise under the same circumstances—and this rule is applicable to such travelers when approaching one another or meeting at street or highway intersections, and each is bound to exercise reasonable care not to collide with the other.

"Now the collision in question occurred at the junction of two city streets, the defend-

ant's motortruck coming out of La Grange place, and the jitney bus, in which the plaintiff was riding, traveling on Clinton avenue, both proceeding towards the junction point of the two streets.

"We think that it was open to the jury to find, as they did, that both drivers failed to observe reasonable care in the circumstances. The evidence tended to show that each drove straight toward the junction point at a speed of 15 miles an hour, and neither slackened speed nor changed direction until the instant of collision, although each had full view of the other for 75 feet from the point of collision.

"We have pointed out that it was the duty of the driver of the defendant company's motortruck to use reasonable care to avoid injuring others, and it was a breach of that duty to fail to stop the machine or slacken its speed when that was the only way in which injury to others could be avoided.

"The defendant company, however, insists that its driver was not negligent because he had the right of way by virtue of the Traffic Act (chapter 156, P. L. 1915, p. 285), which enacts that 'every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right.' *But as to that contention, it is a sufficient answer to say that such provision was not intended to provide an exclusively hard and fast rule, applicable to all hazards and in all situations, regardless of actual conditions, and thus liberate from responsibility one who adheres to the regulation, and is otherwise reckless and indifferent to the situation of others;* and so the fact that the driver of the jitney bus in which the plaintiff was riding failed to accord to the defendant the right of way as directed by the Traffic Act is not in itself a sufficient reason for a direction of a verdict for the defendant, when, as here, such fact is but one factor in the situation, which, considered as a whole, presents a jury

question as to the defendant's negligence under all the circumstances, Paulsen *v.* Klinge, 92 N. J. Law, 99, 104 Atl. 95; Winch *v.* Johnson, 92 N. J. Law, 219, 104 Atl. 81. (Italics ours.)

"The motion for a nonsuit also was rightly denied, for the same reason."

In the *Spawn* v. *Goldberg, et al.,* case *supra,* the plaintiff likewise was not charged with contributory negligence, she being a passenger in the jitney bus.

In *Knudson* v. *Schwartz,* 7 N. J. Misc. 678, 147 Atl. 46, which was before the Supreme Court on a rule to show cause, the case arose out of a collision at 1:30 A. M. at the intersection of New Brunswick Avenue and Convery Place in Perth Amboy, N. J., between a Ford milk truck operated by the plaintiff and proceeding westerly on New Brunswick Avenue and a Durant sedan driven by the defendant coming northerly on Convery Place. The defendant filed a counterclaim, but the jury found against him on his claim and in favor of the plaintiff. The court set the verdict aside as being against the weight of the evidence, stating that the plaintiff claimed that he had come within a foot of a full stop and that the defendant caught the front of his truck in passing. The jury plainly disregarded the convincing evidence of the defendant's car, which showed no injury in front or rear, but the plainest possible marks of a heavy blow squarely in the middle of the right side, a smashed runboard and a deeply dented right front door. The court said that it was quite obvious that the truck was moving at a considerable speed, and this was confirmed by the fact that it was caught firmly enough in the defendant's car to be swung completely around to his right, facing back to Perth Amboy. The Court further said (7 N. J. Misc. Rep. 679):

> "* * * Whatever be the negligence of Schwartz in crossing New Brunswick Avenue at a rate of speed sufficient to move a loaded truck in this manner, Knudson admits that he saw it coming, and coming 'so fast that he knew he could not make it across in front of it.' He adds that he put on his brakes and stopped; the mute evidence of Schwartz's car shows that he did not. *The case seems clearly to present a situation in which, admitting that Knudson had the right of way, which may well be the case, it was obvious to him that Schwartz was not going to respect his rights; and in that situation he was guilty of contributory negligence by going on.* Connolly *v.* Public Service Railway Co., 94 N. J. Law 157, 109 A. 507. Knudson's case is not helped by his knowledge that Convery place was the main road from the Jersey shore, and that the crossing of this road with the main road between Perth Amboy and New Brunswick was inherently dangerous." (Italics ours.)

Attention is called to the case of *Sharpe* v. *Public Service Ry. Co.*, 103 N. J. Law 583, 137 Atl. 526, affirmed by this Court 109 N. J. Law 272, 160 Atl. 492. In that case a motorcycle operated by the plaintiff was involved in an intersection collision with a street car which was approaching from his left. The plaintiff testified that he had made an observation to his right before entering the intersection, but not to his left, and the motorcycle ran into the side of the passing trolley car, close to its rear end. The trial court granted a non-suit, which was affirmed on appeal by the Supreme Court, and this Court. In the Supreme Court opinion, which was adopted by this Court, it pointed out that the trolley car was in plain sight, not only of the plaintiff when he reached the curb line, but also of one of his witnesses who was fifty or seventy-five feet in back of him. It stated (103 N. J. Law 586):

> "* * * The automobile and motorcycle are scarcely less effectively controllable than one's own limbs or a bicycle * * *"

And again (103 N. J. Law 588):

> "* * * The slightest observance at a proper time of the conditions before him would have indicated the dangerous situation presented, and it was the want of this observance, together with heedless proceeding in the face of danger, which in part at least brought to the plaintiff his misfortune."

So we say, that when appellant saw the bus traveling at twenty-eight or thirty miles an hour, and continued to watch it, and knowing that if the bus kept on coming up Park Avenue and he kept on crossing 23rd Street the two of them were going to come together, he was guilty of contributory negligence as a matter of law. The slightest exercise of care by him, either by stopping his machine or turning aside, would have avoided the accident, but he kept traveling in a straight direction, without making any attempt to apply his brakes, or in any manner to slow up the speed of his motorcycle.

In *Sharpe* v. *Public Service Ry. Co., supra,* Mr. Justice Lloyd, speaking for the Supreme Court further said, (103 N. J. Law 584, 585):

> "It is settled that two questions are always involved where negligence or contributory negligence is alleged. The first is whether the conduct of the person so charged constituted negligence. The second is whether that negligence contributed to the injuries sustained. Under ordinary conditions these questions are for the determination of the jury and not for the court. Smith *v.* Public Service Corporation, 78 N. J. Law, 478, 75 A. 937, 20 Ann. Cas. 151.

> "If, however, upon the evidence adduced, it shall clearly appear that such negligence does exist and that it has a causal relation to an injurious accident, the question becomes one of law for the court. N. J. Express Co. *v.* Nichols, 33 N. J. Law, 434, 97 Am. Dec. 722."

Mr. Justice Katzenbach, speaking for this Court, in *Brigden* v. *Pirozzi, et al.*, 97 N. J. Law 535, 117 Atl. 602, said (97 N. J. Law 537):

> "* * * There is, perhaps, no principle of law better settled than that if it clearly appears that the plaintiff's conduct did contribute to the accident, then the court should exercise control of the case and grant a nonsuit or direct a verdict for the defendant, but if the case presents a fairly debatable question whether the negligent act of the plaintiff did so contribute to the accident, then the question of the plaintiff's contributory negligence is one for the determination of the jury. Central Railroad Co. *v.* Moore, 24 N. J. Law, 824; Pennsylvania Railroad Co. *v.* Righter, 42 N. J. Law, 180; Mahnken *v.* Freeholders of Monmouth, 62 N. J. Law, 404 (41 Atl. 921)."

We contend that the testimony given by the appellant proves conclusively that his conduct amounted to a wilful, reckless or heedless proceeding in the face of a known danger and, as such, constituted a clear case of contributory negligence, properly dealt with by the trial court.

There was no proof of any disturbing elements interfering to annoy or distract the appellant, and it seems to us inconceivable that the bus could have traveled one hundred fifty feet while the appellant traveled only from the corner to the middle of the intersection without appellant observing the course and speed of the bus. He says at one time that he continued to watch it from the

first time that he saw it until the time of the accident, and knew that if he kept on going and the bus kept on going there would be an accident. Yet, in another breath, he claims the second time he saw the bus it was five feet away from him.

The situation in *Schnackenberg* v. *Delaware, L. & W. R. Co.*, 86 N. J. Law 517, 93 Atl. 701, decided by the Supreme Court, is applicable. In that case, plaintiff sued for personal injuries received at a railroad crossing of the defendant. During the early morning hours, when it was dark, he was driving a one horse bakery wagon approaching the crossing. He was familiar with the crossing, as he had passed it every morning at the same time for five months immediately preceding the accident. There were no noises or disturbances at the time to interfere with his sense of hearing. He was driving slowly, and stopped, looked, and listened when he arrived at a point opposite a garage about 30 feet from the tracks. He said he could see from that point a distance of 400 feet in the direction from which the engine which struck him came. There was nothing between the garage and the track except occasional telephone poles and the darkness of the morning to obstruct his view. Having made his observations he started his horse on a walk, still looking east and west, and the nearer he approached the track the greater was the scope for observation. He heard no bell or whistle, and said he did not see the engine, which carried a strong headlight, until his horse was upon the track, and the engine was practically upon him, killing his horse and injuring him.

The court stated that the above statement presented the plaintiff's version of the accident, and in its judgment it clearly convicted him of con-

tributory negligence, further stating (86 N. J. Law 519):

> "It seems to us inconceivable that with a complete view of the track for a distance of four hundred feet, with no disturbing element intervening to annoy or to distract him, this plaintiff could, as we must view it, drive upon the track with his eyes open to the possibilities of impending danger, and claim that he was unable to see the conditions or to appreciate the dangers inhering in the situation. *He cannot, practically, invite a calamity of this character by his negligence or indifference, and make it the basis of a legal injury.* Volenti non fit injuria is the maxim at the basis of the doctrine of contributory negligence, and may properly be invoked here. (Italics ours.)
>
> If the defendant had moved for a nonsuit it should have been granted. * * *"

To this effect is the case of *Schwanewede* v. *North Hudson County Railway Co.*, 67 N. J. Law 449, 51 Atl. 696. The plaintiff saw a trolley car coming at full speed when he was twenty feet from the track, but nevertheless kept on driving. The Supreme Court, in reversing the trial court and holding that either the motion to non-suit or to direct a verdict should have been granted, said (67 N. J. L. 450) (italics ours):

> *"A plaintiff cannot take chances of this kind and hold himself free from contributory negligence. There is a difference between an unforeseen peril and being overtaken by one recklessly incurred.* West Jersey Railroad Co. *v.* Ewan, 26 Vroom 574, 576.
>
> *If it appears that the trolley car motorman is not going to respect your rights to cross the street first, you must wait, or you are guilty of contributory negligence, if hurt.* Earle *v.* Consolidated Traction Co., 35 Vroom 573."

In *Connolly* v. *Public Service Railway Co.*, 94 N. J. Law, 157, 109 Atl. 507, the plaintiff's intestate, while crossing a public highway on foot, came into collision with a moving trolley car and sustained injuries causing his death. There was a verdict for the defendant and on appeal this Court approved the following charge by the trial court, (94 N. J. Law 160):

> " 'It was his duty to observe up and down the street, and to determine, if he could by the reasonable exercise of his powers of observation, after looking and listening, whether or not there was approaching a trolley car, so close that he could or could not go upon the tracks in safety and whether or not he exercised reasonable care.' "

The syllabus reads:

> "The rule enunciated in the opinion for affirmance in Earle *v.* Consolidated Traction Co., 64 N. J. Law 573, 46 Atl. 613, viz., '*The first to reach the crossing has the right to pass over first, but if it appears that the motorman does not intend to respect his right of priority and that the driver (or pedestrian) cannot, in the exercise of reasonable prudence, exercise his right, he is guilty of contributory negligence if he fails to wait or turn aside, if he can do so by the use of due care, and thus protect himself from injury,' followed and approved.*" (Italics ours.)

In *Shuler* v. *North Jersey Street Ry. Co.*, 75 N. J. Law 824, 69 Atl. 180, the facts are stated in the syllabus as follows:

> "The plaintiff alighted from a street car, passed around the rear platform, and was struck by the corner of the fender of a car approaching at excessive speed on the other track just as he reached the nearest rail of that track. He looked for the approaching car just as he was struck."

This court, in reversing the trial court and holding that a non-suit should have been granted on the ground of contributory negligence, said (75 N. J. Law, 825) (italics ours):

> "The excessive speed of the car is persuasive of negligence on the part of the defendant, but we fail to see how it relieves the plaintiff of the charge of contributory negligence for not looking, or for not waiting until the obstruction to his vision by the car from which he had alighted was removed. *The speed of the car in no way prevented him from seeing its approach, and the faster it was going the less excuse he had for advancing in a direction across its track. If it were going so fast that the motorman obviously did not intend to respect his right, he would have been guilty of negligence in attempting to cross.* Earle *v.* Consolidated Traction Co., 35 Vroom 573."

In *Hann* v. *Salem & Pennsgrove Traction Co.*, 94 N. J. Law 162, 109 Atl. 509, the plaintiff's decedent's automobile and defendant's trolley car had been traveling side by side for quite a distance when the automobile drew slightly ahead (no witness testified to more than 30 feet) and, without any signal, suddenly swerved left upon the tracks. The side curtains of the automobile were down and fastened. The trial court directed a verdict for the defendant, and this court, in unanimously affirming same, said (94 N. J. Law 164) (italics ours):

> "In the second place, even if it be assumed that there was negligence of the motorman (of which as just stated, we find no proof), the uncontroverted facts show contributory negligence of the decedent. No one can tell whether he looked, or if he looked, whether he saw the car; *but in either of the three hypotheses, his negligence is manifest. If he did see the car within thirty feet as he turned, it*

> *was foolhardy to attempt to pass ahead of it when it was moving at the speed testified to.* If he failed to look at all, or to look effectively and thus did not ascertain the proximity of the car, he was similarly guilty of negligence contributing to the accident. Harbison *v.* Railway Co., supra, and cases cited. In cases of this class there is a general presumption of care on the part of the deceased (Danskin *v.* Pennsylvania Railroad Co., 79 N. J. L. 526, 83 Id. 522,) but such a presumption cannot persist in the face of a situation like that here exhibited."

In *Pennsylvania R. R. Co.,* v. *Righter,* 42 N. J. Law, 180, this court said, at page 187 (italics ours):

> "I am unable to see any reason why, if he had used his eyes with any degree of care, he could not have seen the approaching train in time to arrest the progress of his carriage and avoid the collision. It was his duty to approach the track with caution, and to have his horses at such a gait and under such control as would allow him to arrest their movements at once. Deany himself does not say that he looked at that point. There is, however, the testimony of three witnesses, who say that they saw him look. *But such testimony cannot aid the plaintiff where it is clear that, if he looked with care, he must have seen the train. If a traveler, says Dr. Wharton, by looking along the road, could have seen an approaching train in time to escape, it would be presumed, in case of collision, that he did not look, or, looking, did not heed what he saw.* Whart., on Neg., Section 382."

In *Carambas* v. *Armin Bergida,* 103 N. J. Law 313, 136 Atl. 729 affirmed 140 Atl. 719, 104 N. J. Law 433, which arose out of a collision between two automobile trucks, at a street intersection, the Court cites *Pool* v. *Brown,* 89 N. J. L. 314, which holds:

> " 'The driver of the automobile was under a legal duty to use reasonable care to avoid colliding with other vehicles or persons in the public highway. His duty was to be on the alert, to observe persons who were in the street, or about to cross the street, and to use reasonable care to avoid colliding with them. He was under a duty to have his automobile under proper control. He was under an obligation to take notice of the conditions existing in the public street and to propel his car in a manner suitable to those conditions.' "

and said:

> "* * * So, here, it was the duty of the plaintiff to be on the alert, to observe other vehicles that were in the street, or were about to cross it, and to use reasonable care to avoid colliding with them. * * *"

There is no question in the case as to whether the appellant saw the respondent's bus. He saw it traveling approximately two and one-half times as fast as he was and claims it was one hundred fifty feet away from him when he arrived at the intersection; that he was traveling twelve miles an hour and the bus between twenty-eight and thirty miles an hour. He claims at one time that he continued to watch it and that just before the collision it went faster, and another time that he did not again see it until it was five feet away from him. He says the accident happened in the middle of the intersection, and, yet, he would have had to travel sixty feet while the bus traveled one hundred fifty feet at the respective speeds he claims both vehicles were being operated. There is no testimony with respect to the width of the intersection, but if the intersection was one hundred twenty feet wide, a greater duty would be cast upon the appellant in crossing a wide intersection and more flexibility in the maneuvering of his motorcycle would be present by reason of the

width of such intersection. It is apparent that appellant attempted to cross the intersection with a total disregard for his own safety and of others on the highway.

We have referred to the case of *Earle* v. *Consolidated Traction Co.*, 64 N. J. Law 573, 46 Atl. 613, cited in *Connolly* v. *Public Service Railway Co.*, 94 N. J. Law 157, 109 Atl. 507. In that case which was decided by this Court, and which was an action to recover damages for personal injury, the trial court non-suited the plaintiff. The accident occurred at night. A trolley car which was well lighted by electricity was traveling on Montgomery Street, Jersey City, N. J., moving toward the Boulevard, over which it was to pass, and the plaintiff was driving a speedy horse toward Montgomery Street, over which he was to pass. The plaintiff says he was driving on a jog when he first saw the car approaching, and that he was then fifty feet from Montgomery Street and the trolley car was about thirty feet from the Boulevard. On his cross examination he stated that he saw the car slowing up as if to stop; that it did not stop, just halted; it stopped for an instant and then went on again; it did not come to a dead stop—it halted; it gave me an impression of having stopped, but it did not stop; it only stopped for an instant; I won't say it stopped; I will say it halted; it stopped for an instant and then went on. The proofs show that the Boulevard was one hundred feet wide, of which forty feet were used for sidewalks, leaving the driveway sixty feet in width. The Court said, at page 574, 575:

> "The question therefore is whether, from from his own statements, it is manifest that he took an apparent risk of injury, and attempted to cross over in advance of the car in the presence of a danger which he could not

have failed to see in the exercise of that care and prudence which it was his duty to use.

This question, we think, must be resolved against the plaintiff, and that he is therefore chargeable with contributory negligence.

He saw the car when at a distance of fifty feet from it. When he came nearer the trolley track, he was also near to the car which was well lighted. He was left in doubt, at least, whether the car actually stopped.

Reasonable prudence required him to wait until he assured himself whether the motorman intended to stop or go ahead.

He knew the car could not move except upon its track, and he also knew that he had a wide driveway on which he could turn his horse away from the trolley track and out of danger.

If he was driving slowly, as was his duty under the circumstances known to him, there could have been no difficulty in avoiding the collision by waiting or turning away from the track.

If he was driving at a rapid gait so that he could not control his horse, he was negligent for his own safety.

He was on the east side of the Boulevard where the car was in front of him, and instead of avoiding the car by waiting or turning away from the track as he should have done, he pulled to the west side of the road and attemped to cross in advance of the car.

In this he was clearly guilty of contributory negligence."

The non-suit in the above case was affirmed by a divided court, but it has been cited on numerous occasions by this Court, and especially in *Connolly* v. *Public Service Ry. Co.*, 94 N. J. Law 157, 109 Atl. 507, in which Mr. Justice Parker, speaking for this Court, said at page 161:

"While it is true that the original decision in the Earle case was by a divided court, the rule then laid down by six judges of this court, and which the trial judge in the present

case followed, has been recognized and considered in the foregoing line of cases and several others in the Supreme Court not cited above, and we deem it to be sound in principle, so long as the facts of the case are such as to make it applicable. * * *"

It is respectfully submitted that the conduct of appellant was in such disregard of his own safety that he was guilty of negligence which contributed to the happening of the accident, and the action of the trial court in granting the non-suit was proper.

Respectfully submitted,

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INDEX