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Notice of Appeal.

Filed Oct. 9, 1928.

District Court

OF THE FOURTH JUDICIAL DISTRICT,

OF THE COUNTY OF BERGEN.

FRANKLIN LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Notice of Appeal.

To ADDISON P. ROSENKRANS, Esquire.

Sir:

Take Notice that the defendant, Anthony Manzo, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the Fourth Judicial District of the County of Bergen, rendered in the above stated action on the 24th day of September, 1928.

DONOHUE & O'BRIEN,
Attorneys of Defendant.

Notice of Appeal.

Filed Oct. 9, 1928.

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ESTHER LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Notice of Appeal.

To ADDISON P. ROSENKRANS, Esquire.

Sir:

Take Notice that the defendant, Anthony Manzo, hereby appeals to the New Jersey Supreme Court from the judgment of the District Court of the Fourth Judicial District of the County of Bergen, rendered in the above stated action on the 24th day of September, 1928.

DONOHUE & O'BRIEN,
Attorneys of Defendant.

Docket Entries.

No. 487

State of New Jersey, } ss.:
Bergen County, }

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

Before—FREDERICK V. WATSON, ESQ., Judge.

ADDISON ROSENKRANS, Pltff's Atty.
DONOHUE & O'BRIEN, Deft's Atty.

FRANKLIN LEWIS, Plaintiff, vs. M. & V. MOTOR CO., a corporation, and ANTHONY MANZO, Defendants.	In Tort. Damage, $400.00

A summons was issued tested June 21 A. D. 1928 returnable July 2 A. D. 1928, at 9.30 o'clock in the forenoon at the Court Room of said Court in Bergen County. The Constable, or Sergeant-at-Arms, returned the summons as follows, viz.: I served the within summons June 22 A D 1928, on Anthony Manzo, Secty & Treasurer of the defendants by reading the same to him and delivering to him a copy thereof. Also as individual Anthony Manzo I served the within summons on him the 22 day of June 1928.

R. C. TIETGEN, Sergeant-at-Arms.

Plaintiff's demand was filed A. D. 192

August 6 A. D. 1928, the plaintiff appeared and the defendant did not appear and the trial of the cause was proceeded with as follows: On the 6th day of August, 1928 judgment was rendered for three hundred and fifty dollars $350.00.

On the part of defendant, Counterclaim filed July 6th, 1928. Rule to Show Cause filed Aug. 13, 1928. Order to Reopen filed Aug. 18, 1928. Notice of Appeal filed Oct. 9th, 1928. Bond approved and filed Oct. 15, 1928.

Whereupon it is on this 24 day of Sept. A. D. 1928, by this Court considered and adjudged that said Franklin Lewis, plaintiff, have judgment against the defendant Anthony Manzo, as follows: three hundred and fifty-one dollars and twenty-five cents $351.25.

That the plaintiff Franklin Lewis recover against the defendant Anthony Manzo the sum of three hundred & fifty-one dollars damages and twenty-three dollars seventy six cents $23.76 cost of suit.

Oct. 2 A. D. 1928, execution was issued to R. C. Tietgen, Sergeant-at-Arms, who returned the said execution as follows, viz.:

I returned the within writ the A. D. 192

Witnesses for Lewis:

Franklin Lewis; Esther Lewis; Emil Scherer; Fred. Rigler.

Witnesses for Manzo:

Anthony Manzo; Harry Allen.

Docket Entries.

Costs	County	Al
Summons, Copy	1.60	
Service and Return,		.90
Mileage,		2.20
Order, &c.,	1.00	
	1.00	
Listing Fees,	1.50	
		17.56
5% Attorney Fee,		
Execution,	.60	
Service and Return,		.75
Mileage,		1.20
Appeal,	1.00	
Copy of Docket,	.50	

I certify this is a true copy.

GUS FAUPEL,

(Seal) Clerk.

Docket Entries.

No. 488

State of New Jersey, } ss.:
Bergen County, }

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

Before—FREDERICK V. WATSON, ESQ., Judge.

ADDISON ROSENKRANS, Pltff's Atty.
DONOHUE & O'BRIEN, Deft's Atty.

ESTHER LEWIS, Plaintiff, vs. M. & V. MOTOR Co., a corporation, and ANTHONY MANZO, Defendants.	In Tort. Damage, $250.00

A summons was issued tested June 21 A. D. 1928 returnable July 2 A. D. 1928, at 9.30 o'clock in the forenoon at the Court Room of said Court in Bergen County. The Constable, or Sergeant-at-Arms, returned the summons as follows, viz.: I served the within summons June 22 A D 1928, on Anthony Manzo, Secty & Treasurer of the defendants by reading the same to him and delivering to him a copy thereof. Also as individual Anthony Manzo I served the within summons on him the 22 day of June 1928.

R. C. TIETGEN, Sergeant-at-Arms.

Plaintiff's demand was filed A. D. 192

Docket Entries.

August 6 A. D. 1928, the plaintiff appeared and the defendant did not appear and the trial of the cause was proceeded with as follows: On the 6th day of August, 1928 judgment was rendered for two hundred dollars $200.00.

On the part of defendant, Counterclaim filed July 6th, 1928. Rule to Show Cause filed Aug. 13, 1928. Order to Reopen filed Aug. 18, 1928. Notice of Appeal filed Oct. 9th, 1928. Bond approved and filed Oct. 15, 1928.

Whereupon it is on this 24 day of Sept. A. D. 1928, by this Court considered and adjudged that said Esther Lewis, plaintiff, have judgment against the defendant Anthony Manzo, as follows: one hundred and fifty-one dollars and fifty cents $151.50.

That the plaintiff Esther Lewis recover against the defendant Anthony Manzo the sum of one hundred & fifty-one and 50/100 dollars damages and thirteen dollars seventy-seven cents $13.77 cost of suit.

Oct. 2 A. D. 1928, execution was issued to R. C. Tietgen, Sergeant-at-Arms, who returned the said execution as follows, viz.:

I returned the within writ the A. D. 192

Witnesses for Lewis:

Franklin Lewis; Esther Lewis; Emil Scherer; Fred. Rigler.

Witnesses for Manzo:

Anthony Manzo; Harry Allen.

Docket Entries.

	Costs	County	Al
	Summons, Copy	1.60	
	Service and Return		.90
	Mileage,		2.20
	Order, &c.,	1.00	
		1.00	
10	Listing Fees,	1.50	
	5% Attorney Fee,		7.57
	Execution,	.60	
	Service and Return,		.75
	Mileage,		1.20
	Appeal,	1.00	
	Copy of Docket,	.50	

I certify this is a true copy.

GUS FAUPEL,

20 (Seal) Clerk.

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District Court Summons.

State of New Jersey, } ss.:
Bergen County, }

To the Sergeant-at-Arms of said Court, or any Constable of said County.

THE STATE OF NEW JERSEY,

SUMMON

(L.S.)

M & V MOTOR CO., a corporation and
ANTHONY MANZO

to appear before the District Court of the Fourth Judicial District of the County of Bergen to be held at the Court Room, Ridgewood, in said County, on the 2nd day of July, One Thousand Nine Hundred and twenty eight at nine-thirty o'clock in the forenoon, to answer unto

FRANKLIN LEWIS

in an action in Tort to the damage of the Plaintiff Four Hundred Dollars.

Witness, FREDERICK V. WATSON, ESQ., Judge of the District Court of the Fourth Judicial District of the County of Bergen, at Ridgewood aforesaid, the 21 day of June, in the year One Thousand Nine Hundred and twenty eight.

GUS FAUPEL, Clerk.

(A true copy).

District Court Summons.

State of New Jersey, }
Bergen County, } ss.:

To the Sergeant-at-Arms of said Court, or any Constable of said County.

THE STATE OF NEW JERSEY,

SUMMON

(L.S.)

M & V MOTOR CO., a corporation and
ANTHONY MANZO

to appear before the District Court of the Fourth Judicial District of the County of Bergen to be held at the Court Room, Ridgewood, in said County, on the 2nd day of July, One Thousand Nine Hundred and twenty eight at nine-thirty o'clock in the forenoon, to answer unto

ESTHER LEWIS

in an action in Tort to the damage of the Plaintiff Two Hundred and Fifty Dollars.

Witness, FREDERICK V. WATSON, ESQ., Judge of the District Court of the Fourth Judicial District of the County of Bergen, at Ridgewood aforesaid, the 21 day of June, in the year One Thousand Nine Hundred and twenty eight.

GUS FAUPEL, Clerk.

(A true copy).

State of Demand.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

FRANKLIN LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. State of Demand.

Plaintiff, Franklin Lewis, residing at Pompton Plains, N. J., says that:

FIRST COUNT.

1. On October 21, 1927, he was lawfully driving after nightfall, an automobile belonging to him, along a public road leading from Monticello to Forestburg, in the State of New York.

2. On that day defendant, M. & V. Motor Co., owned and possessed a motor truck which, by its then servant in that behalf, Anthony Manzo, it had negligently left standing after nightfall in said public road, and obstructing the same, smouldering with invisible but unextinguished fire, without a light or signal or guard, and without keeping any lookout or using any reasonable care to warn other users of said public road of the fact that its said truck was then standing therein.

3. In consequence of said negligence of defend-

ant, M. & V. Motor Co., by Anthony Manzo, its then servant in that behalf, and of defendant, the said Anthony Manzo, plaintiff's said automobile came into collision with said motor truck of defendant, M. & V. Motor Co., and was shattered thereby and ignited and consumed by said smouldering fire in said motor truck, whereby plaintiff's said automobile became utterly destroyed and rendered of no value to plaintiff.

SECOND COUNT.

1. Paragraphs 1 and 2 of First Count are repeated.

2. Plaintiff's said automobile contained, at the time and place aforesaid, certain personal property belonging to plaintiff, namely, one suit of clothes, one lumber jacket, two shirts, one razor, one fountain pen, one travelling bag, comb and brush, rain coat, two pairs of pajamas, besides other articles of his.

3. Paragraph 3 of First Count is repeated; and in consequence of the ignition of plaintiff's said automobile, the aforesaid personal property of plaintiff was consumed and lost by fire.

Plaintiff demands as damages Four Hundred Dollars on First Count and One Hundred Dollars on Second Count.

ADDISON P. ROSENKRANS,
Attorney for Plaintiff.

State of Demand.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ESTHER LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. State of Demand.

Plaintiff, Esther Lewis, residing at Pompton Plains, N. J., says that:

1. On October 21, 1927, she was riding, as an invitee, in an automobile belonging to and operated by Franklin Lewis, along a public road leading from Monticello to Forestburg, in the State of New York; and in said car she then carried certain personal property, belonging to her, namely, one coat, two dresses, one pair of slippers, one pair of bed room slippers, one lot of powder, rouge and cream, one silver powder container, one manicure set, one pair of rubbers, and one wrist watch.

2. On that day defendant, M. & V. Motor Co., owned and possessed a motor truck which, by its then servant in that behalf, Anthony Manzo, it had negligently left standing after nightfall, in said public road, and obstructing the same, smouldering with invisible but unextinguished fire, without a light or signal or guard, and without keeping any lookout or using any reasonable care to warn

other users of said public road of the fact that its said truck was then standing therein.

3. In consequence of said negligence of defendant, M. & V. Motor Co., by Anthony Manzo, its then servant in that behalf, and of defendant, Anthony Manzo, the said automobile of said Franklin Lewis came into collision with said truck of defendant, M. & V. Motor Co., and was ignited by said smouldering fire in said motor truck, whereby plaintiff's said personal property caught fire and became thereby destroyed and rendered of no value.

Plaintiff demands as damages Two Hundred and Fifty Dollars.

ADDISON P. ROSENKRANS,
Attorney of Plaintiff.

Counterclaim.

Filed July 6, 1928.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

FRANKLIN LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Counterclaim.

Defendants, residing in the town of Teaneck,

Counterclaim.

County of Bergen and State of New Jersey, by way of counterclaim against the plaintiff, say that:

1. On or about the 21st day of October 1927 the plaintiff, Franklin Lewis, was a joint owner of a certain automobile which he was driving along a public road leading from Monticello to Forestburg, in the State of New York.

2. On the above mentioned place and time the defendant M. & V. Motor Co., was operating a certain automobile bus by means of its servant Anthony Manzo said automobile was lawfully parked by the side of the road and numerous persons were engaged in fighting a fire on said Bus.

3. Plaintiff Franklin Lewis while operating said automobile at above time and place drove same at an excessive and unlawful rate of speed without proper lights, and without proper brakes and without keeping a look-out for persons or vehicles in its vicinity and without giving due signal of its approach and generally in such a careless and negligent manner so as to lose control thereof and ran into the automobile bus of the defendant.

4. By means of premises said automobile bus was damaged about the body, chassis, motor and wheels and plaintiff was forced to expend large sums of money in order to tow said automobile bus away from the scene of the accident.

5. By means of the premises various parts of said automobile bus which otherwise could have been salvaged, were destroyed and rendered useless. As a result thereof defendant M. & V. Motor Co., lost large sums of money which it would

otherwise had acquired. Defendant demands as damages on the counterclaim the sum of Five Hundred ($500) Dollars.

DONOHUE & O'BRIEN,
Attorneys of Defendants.

Counterclaim.

Filed July 6, 1928.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ESTHER LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Counterclaim.

The Defendants, residing in the town of Teaneck, County of Bergen, and State of New Jersey, by way of Counterclaim, against the plaintiff, say that:

1. On or about the 21st day of October, 1927 the Plaintiff Esther Lewis, was a joint owner of a certain automobile which was being operated by one Franklin Lewis and said Esther Lewis was engaged in a common enterprise with said Franklin Lewis.

Counterclaim.

2. Aforesaid automobile was being driven along a certain public road leading from Monticello to Forestburg in the State of New York, and said Esther Lewis was riding in said automobile at above mentioned place, and time.

3. On the above mentioned place and time the defendant M. & V. Motor Co., was operating a certain automobile bus by means of its servant Anthony Manzo. Said automobile was lawfully parked by the side of the road and numerous persons were engaged in fighting a fire on said bus.

4. Plaintiff Esther Lewis by means of her servant Franklin Lewis drove said automobile at an excessive and unlawful rate of speed, without proper lights and without proper brakes and without keeping a look-out for persons or vehicles in its vicinity and without giving due signal of its approach and generally in such a careless and negligent manner so as to lose control thereof and ran into the automobile bus of the defendant.

5. By means of the premises said automobile bus was damaged about the body, chassis, motor and wheels, plaintiff was forced to expend larger sums of money in order to tow said automobile bus away from the scene of the accident.

6. By means of the premises various parts of said automobile bus which otherwise could have been salvaged, were destroyed and rendered useless. As a result thereof defendant M. & V. Motor Co., lost large sums of money which it would otherwise had acquired. Defendant demands damages on the counterclaim the sum of Five Hundred ($500) Dollars.

DONOHUE & O'BRIEN,
Attorneys of Defendants.

Rule to Show Cause.

Filed Aug. 13, 1928.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

FRANKLIN LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Rule to Show Cause.

This matter being opened to the court by James W. Donohue, representing Donohue & O'Brien, attorneys for defendants, upon an application for a Rule to Show Cause why a new trial should not be granted in the above entitled cause, and sufficient reason appearing, it is, on this 8th day of August, Nineteen hundred and twenty eight, Ordered that the plaintiff show cause before this court at Ridgewood on the 18th day of August, Nineteen hundred and twenty eight, at 10 o'clock in the forenoon, or as soon thereafter as the matter may be heard, why a new trial should not be granted in the above entitled cause, or a judgment rendered in the favor of the defendants, instead of the plaintiff.

And it is Further Ordered, that a copy of this order and affidavits on which same was granted, be served upon the attorneys for the said plaintiff within five days from the date hereof. (Which service may be made by mailing the same by regis-

tered letter to said attorney at his address in Paterson)

And it is Further Ordered that in the meantime and until the further order of this court, all proceedings in said cause and on the execution issued on the judgment be and the same is hereby stayed.

And it is Further Ordered, that the granting of the within rule to show cause shall not be a waiver of any ground for appeal existing in favor of the defendants.

FREDERICK V. WATSON,
Judge.

Order.

Filed Aug. 18, 1928.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ESTHER LEWIS, Plaintiff, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants.	In Tort. Order.

This matter being open to the court by Harold J. Cavanaugh, representing Donohue & O'Brien, attorneys for defendants, upon a hearing of a Rule

to Show Cause why the judgment by default entered in the above entitled cause should not be set aside and a new trial granted and it appearing upon hearing counsel and upon reading affidavit filed in the above entitled cause by Anthony Manzo, one of the defendants, and sufficient grounds having been shown and it appearing that the defendants have a good defense as to the merits of the case, it is on this 18th day of August, 1928, Ordered that the judgment by default in the above entitled cause obtained on August 6, 1928, be set aside and all process upon said judgment be restrained.

And it is Further Ordered, that a new trial be granted in the above entitled cause and that it be set down for hearing as soon as may be conveniently heard by this court.

And it is Further Ordered, that a copy of this order be served upon the attorney of the plaintiff within 5 days upon the signing of this order.

FREDERICK V. WATSON,
Judge.

State of Case.

Filed Oct. 21, 1928.

DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE COUNTY OF BERGEN.

ESTHER LEWIS,
Plaintiff,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants.

In Tort.

State of Case.

FRANKLIN LEWIS,
Plaintiff,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants.

The two causes above mentioned were tried before the Honorable Frederick V. Watson, Judge of the District Court of the Fourth Judicial District of the County of Bergen at Ridgewood on the 24th day of September, 1928 without a jury, and the two cases above mentioned were tried together by consent of the respective counsel.

Mr. Franklin Lewis was the first witness sworn on behalf of the plaintiffs and he testified that he resides at Pompton Plains, New Jersey, and on October 21, 1927, he was driving an Essex coach,

late 1925 model, along the road between Port Jervis and Monticello in New York State, and that he and his wife were the sole occupants of the car; that he was going northerly on this road, which is a concrete road, and that the accident hereinafter referred to took place about 8 o'clock or between 8 and 8:15; that it was dark and that he was driving on the right side of the road; that he saw two cars coming with brilliant head lights; that he passed the first car and as he came toward the second car about fifty feet in front of him he saw what appeared to be ploughed ground and that he crashed up on something and when he got out he found that his car had ridden up on top of the remains of a bus chassis which was about three feet off the ground. This bus chassis, he testified, occupied the entire right side of the road; that when he got out he saw some small fire and that a few seconds thereafter his car caught fire due to the gasoline from his broken gasoline tank igniting; that his car and his personal property in the car was destroyed and he enumerated different articles of clothing which he was carrying with him, and testified to what he had paid for the same and when he had bought them; also that his car was in good condition at the time of the accident; that he did not see any lights or warnings on the bus chassis and that he did not see any flames in or around it until after he got out of his car when he saw but a small fire the few seconds before his car burst into flames. That he had traveled over the highway about twenty times and knew it to that extent; that the road was not in the course of construction and was a hard, concrete road; that where the accident took place there was a down grade of a slight degree and that there was a

straightaway from where the bus was on the road to a point in back of it and in the direction from which he had come of between 500 and 800 feet; that he was traveling about 30 miles an hour and that the road was a road in open country and that as soon as he saw this thing on the road which looked to him like ploughed ground about 50 feet before he came to it; he applied his brakes immediately; that the concrete road had a dirt shoulder about 1½ to 2 feet wide and that the bus was all the way to the right on the concrete but not all the way over to the edge of the ditch. That Mr. Manzo, one of the defendants, appeared a few seconds after he got out; that as he approached the bus, his vision was partially destroyed by reason of the brilliant head lights of the two cars coming in the other direction; that he had good headlights on his car and that they lit up the road ahead, but that because of the slight grade in the direction in which he was going, they did not light up the bus chassis because it was too low on the ground; that as he approached the bus chassis, when he was at a point of 300 or 400 feet south of the bus, the first of the other cars was about 100 feet north of the bus and the second was between 200 and 300 feet north of the bus; that it was not raining at the time, but that it had just about started to drizzle and that the combination of the rain drops on his wind shield and the brilliant light of the approaching car did obstruct his vision. That Mr. Manzo in speaking afterwards to Mrs. Lewis said to the effect of 'Don't worry, lady. It wasn't your fault.'

The next witness who testified in behalf of the plaintiff was Mrs. Esther Lewis, who testified that she is the wife of Mr. Lewis, the other plaintiff;

that the accident happened at 8 o'clock and that it was dark; that Mr. Lewis was driving on the right hand side of the road at about 30 miles an hour; that she did not think she was talking to Mr. Lewis just before the accident; that two cars were coming the other way and as they went by, they saw this thing like ploughed ground on the road and hit it; that she, in looking ahead was blinded by the head lights of the other cars and that the obstruction which she later found out to be the remains of a burning bus had no lights placed about it, and that she did not see any flames; that both she and her husband evidently saw it at the same time because he grabbed his brake; that the car ran up on the chassis to the cowl; that she had to jump 3 or 4 feet to the ground and that she got out of the door on the right hand side and went around the back of the bus, and around the back left wheel of the bus she saw some flames and that a few seconds thereafter their car caught fire from the gasoline which came out of their broken gas tank; that she had different items of personal property and clothing with her which she enumerated in detail giving the date of the purchase and the purchase price thereof.

The next witness called by the plaintiff was Scher, a mechanic, who qualified to testify to the difference in the value of the Lewis car, and who said that it was a car he had sold in the fall of 1925, that he had gotten it back and then sold it to Mr. Lewis in the fall of 1926, and that Mr. Lewis had used the car a year; that he had gone over the car just before Mr. Lewis started out on the trip on which he had the accident and that it was in very good shape, and that its value was $400 at that time.

The next witness called in behalf of the plaintiff was Mr. Frederick Riegler. He testified that he lives in Forestburg, New York, and that the accident happened about one mile north of Forestburg Corners and about seven miles south of Monticello, and that the woodlands along the road where the accident happened belong to him, and that his house was about 300 feet north of where the bus was burning, and that from his house you could not see the bus, but that was because his house was set in from the road and that the road from a point in front of his house went in a straightaway to the bus; that he came on the scene when the bus first caught fire, which was about 6:30 o'clock, and that the whole bus burned and the body crashed in and pieces fell in around the chassis and also off on the road to the left of the chassis.

That Mr. Manzo was there and that a lot of other people came there and that later Mr. Manzo left to get a wrecker and that when he left there were a lot of men watching the fire; that when Mr. Manzo left the bus was all in flames; that about 7:30, he left the fire because the flames were no longer such as would be dangerous to his woodlands along the road; that he heard the crash of the accident and went down and saw everything in flames; that when he left at 7:30, from a point on the road in front of his house looking back at the bus he saw smoke and flames which would come through.

The plaintiffs rested their cases and the defendant placed on the stand, Mr. Anthony Manzo, one of the defendants, who testified that on the date before mentioned, he was driving the bus to Mon-

ticello for demonstration purposes; that it was a large bus and that it caught fire about one mile north of Forestburg Corners, and that despite his efforts and the efforts of others who came on the scene it burned, and that while it was still burning he left to go to Monticello to get wreckers to remove it from the road as soon as that could possibly be done. That he had just come back with the wreckers when the accident took place, and that he had gone to Branch's Garage in Monticello and there employed them to send out two wreckers, and had accompanied them by riding in the second wrecker; that the two cars spoken of by Mr. Lewis as coming in the opposite direction were the two wreckers; that when he had gone for the wreckers there were a great many people watching the burning bus, and among them was the Road Supervisor and also among them, the Road Commissioner; that he left all of them there watching the burning bus, which, when he left, was burning with high flames; that when they got back it was dark; that the bus was in a long straightaway of road which was straight and clear about 300 or 400 feet north of the bus, and about 800 feet straightaway south of the bus; that Lewis's car came northerly in the same direction that the bus was traveling and that he saw him run up on the bus chassis; that when this happened, the first wrecker was about 100 to 150 feet past or southerly from the bus, and that the wrecker in which he was riding was just about even with the bus. That Mr. Lewis did not appear to slow down before striking the bus, and he made no attempt to steer away from it, and that after hitting the back of the bus, the ruins of which together with the bumper made sort of a run-way up

it, and that Lewis's car went 22 feet along the bus until its front wheels rested at the dashboard or cowl. That at this time and just before Lewis struck the bus, there were flames around the entire back of the bus and more particularly at the left rear wheel of the bus.

Another witness called in behalf of the defendant was Mr. Allen, who said that he drove the first wrecker, which was the first car mentioned by Mr. Lewis as coming in the opposite direction, and that when he approached the place where the bus was, he was looking for it and when he was 200 to 300 feet north of it, approaching it from the direction of Monticello, he saw it and saw flames around the back of it and left rear side of it. That he proceeded past it and stopped about 100 feet south of it so as not to block the road around the wreck to prevent other cars passing readily. That before he came to a stop and as he came to a stop, he saw Lewis's car which was about 300 feet from him and approaching him from the opposite direction; that this car was going fast, about 40 miles an hour, and that when the car got about even with him and had not slacked up his speed, he knew the accident was bound to happen, and at this moment he was alighting from his car and watched Lewis's car run down the road on to the bus. That from where he was, he could see the bus, and there were flames around the back of it and most noticeably under the left rear fender. That Lewis did not appear to slacken his speed nor attempt to turn away from the wreck, but hit it and then bounced through the air with the front of his car higher than the rear, and settled on top of the bus with his front wheels about up to the cowl of the bus. That within a few seconds

thereafter, Lewis's car caught fire. That just before Lewis's car struck the bus, he saw the flames around the back of the bus and that the light especially from the flames around the left rear were much larger and gave much more light than a lantern. That Mr. Lewis's head lights showed to him the wreck on the road. That the other wrecker was behind him, but just how far behind him he could not say. That he, Manzo and the wreckers and crew, stayed until about midnight when Manzo instructed someone to stay there and watch over the wreck and left a light there.

Mr. Riegler was called in rebuttal by the plaintiffs and testified that the Road Commissioner mentioned by Mr. Manzo as having been there when he left to get the wreckers was the Town Road Commissioner and not the State Road Commissioner.

Counsel for the defendants moved for a direction of verdict in favor of both defendants, specifying that no negligence had been shown against either defendant that was the proximate cause of the accident and that the plaintiff, Franklin Lewis, was guilty of contributory negligence as a matter of law.

His Honor directed a verdict in favor of the defendant, M. & V. Motor Company, but denied the motion as to the defendant, Anthony Manzo, to which an exception was taken by defendants' counsel.

Counsel then summed up and his Honor said in effect the following:

That this was the trial of two suits instituted by the plaintiffs against the defendant corporation and Manzo for damage resulting from the burning

of the automobile of plaintiff, Franklin Lewis, and loss of his personal property and loss of personal property of the plaintiff, Esther Lewis. That the accident happened in New York and that neither party has pleaded the laws of New York nor proven them as to road law or speed, and that the laws of the State of New Jersey do not apply, and that while violations of our motor vehicle law are not negligence, they would, in a proper case, be evidence of negligence. That the laws of New York, not having been proven and the laws of New Jersey not applying, the Court must base his determinations upon the common law, to wit, determine negligence by the test of whether a reasonable man would have acted as did the parties under the circumstances.

That the night was misty and it had just started to rain; that it was not a dry, clear night; that the pavement was concrete; that the defendant, Manzo, driving the bus, met with an accident and the bus caught fire at about 6:30 o'clock, and that this bus burned and that in the end was practicaliy destroyed; that Manzo stayed there after the bus burned for a while and that while the bus was burning left to get help, and justified his action by saying that state officers were in the vicinity but he had no assurance that they would take care of the situation when he left; that there was no evidence that he left them in charge of the vehicle; that in so doing, that is, leaving the burning bus under these conditions, he did not act as a reasonable man would have acted under the circumstances and therefore the defendant, Manzo, was guilty of negligence, and therefore would be responsible un-

less the plaintiffs were guilty of contributory negligence.

That the wife, Esther Lewis, was merely a passenger in the car driven by the plaintiff, Franklin Lewis, and that contributory negligence could not be imputed to her, and that he found in favor of the plaintiff, Esther Lewis, in the sum of $151.50.

That as to the plaintiff, Franklin Lewis, the defendant contended and offered evidence to show contributory negligence. That a witness of the defendant, Allen, says Lewis was going at a high and dangerous rate of speed; that both plaintiffs, however, testified that they were going about 30 miles an hour in the open road is permissible, and therefore it would not seem that because of this speed, the plaintiff was guilty of contributory negligence, but, then should the plaintiff, Franklin Lewis, have seen the obstruction in the road. The Court said he thought not.

There was some testimony that at a reasonable distance one could see the conflagration. That Mr. Allen said that he saw the flames, but that was because he was looking for them. That the rear tire and part of the bus was on the road and burning. That the rear part of the chassis was lower than the other portion of the bus and that the fire or the existence of fire was not known to the plaintiffs and that to require him to anticipate the presence or existence of the fire on the road was more than could be expected.

That he found the plaintiff, Franklin Lewis, was not guilty of contributory negligence and awarded him a verdict in the sum of $351.25.

Certificate of Judge.

I, Frederick V. Watson, Judge of the District Court of the Fourth Judicial District of the County of Bergen, do certify that the above State of Case settled by me this nineteenth day of October, 1928, contains all of the material testimony adduced at the trial of the above entitled causes.

FREDERICK V. WATSON,
Judge.

Specifications of Determination Appealed From.

NEW JERSEY SUPREME COURT.

ESTHER LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

In Tort.

Specifications of Determination Appealed From.

FRANKLIN LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

Anthony Manzo, the above named appellant, specifies the following determinations of the District

Specifications of Determination Appealed From.

Court of the Fourth Judicial District of the County of Bergen, with which he is dissatisfied according to law:

1. Because the trial judge erred in denying the defendant's, Anthony Manzo, motion for a direction of a verdict at the conclusion of the entire case.

2. Because there was no evidence adduced throughout the whole case to show negligence on the part of the defendant, Anthony Manzo, which proximately caused the accident resulting in damage to the plaintiffs.

3. Because the plaintiff, Franklin Lewis, was guilty of contributory negligence as a matter of law.

DONOHUE & O'BRIEN,
Attorneys of Defendant-Appellant.

Rule on Affirmance.

Filed July 13, 1929.

NEW JERSEY SUPREME COURT.

ESTHER LEWIS, Plaintiff-Respondent, vs. M. & V. MOTOR COMPANY and ANTHONY MANZO, Defendants-Appellants.	In Tort. On Appeal from the District Court of the Fourth Judicial District of the County of Bergen. Rule on Affirmance.

This cause having been duly submitted at the January Term, 1929, of this court, on briefs, by Donohue & O'Brien, of counsel for defendant-appellant, Anthony Manzo, and Addison P. Rosenkrans, of counsel for plaintiff-respondent, and the court having considered the same, and finding no error in the record or proceeding in the District Court of the Fourth Judicial District of the County of Bergen:

It is thereupon, Ordered and Adjudged that the judgment of the District Court of the Fourth Judicial District of the County of Bergen, in favor of the plaintiff and against the defendant, Anthony Manzo, be affirmed, with costs, and that the record be remitted to the District Court of the Fourth Judicial District of the County of Bergen

to be proceeded with in accordance with this judgment and the practice of said court.

Entered July 13, 1929.
On motion of
ADDISON P. ROSENKRANS,
Attorney of Plaintiff-Respondent.

Rule on Affirmance.

Filed July 13, 1929.

NEW JERSEY SUPREME COURT.

FRANKLIN LEWIS, Plaintiff-Respondent, vs. M. & V. MOTOR COMPANY and ANTHONY MANZO, Defendants-Appellants.	In Tort. On Appeal from the District Court of the Fourth Judicial District of the County of Bergen. Rule on Affirmance.

This cause having been duly submitted at the January Term, 1929, of this court, on briefs, by Donohue & O'Brien, of counsel for defendant-appellant, Anthony Manzo, and Addison P. Rosenkrans, of counsel for plaintiff-respondent, and the court having considered the same, and finding no error in the record or proceeding in the District Court of the Fourth Judicial District of the County of Bergen:

Rule on Affirmance.

It is thereupon, Ordered and Adjudged that the judgment of the District Court of the Fourth Judicial District of the County of Bergen, in favor of the plaintiff and against the defendant, Anthony Manzo, be affirmed, with costs, and that the record be remitted to the District Court of the Fourth Judicial District of the County of Bergen to be proceeded with in accordance with this judgment and the practice of said court.

Entered July 13, 1929.
On motion of
ADDISON P. ROSENKRANS,
Attorney of Plaintiff-Respondent.

Opinion of Supreme Court.

Filed July 3, 1929.

NEW JERSEY SUPREME COURT.

#418 January Term 1929.

ESTHER LEWIS,
Plaintiff-Respondent,

vs.

M. & V. MOTOR COMPANY and ANTHONY MANZO,
Defendants-Appellants.

FRANKLIN LEWIS,
Plaintiff-Respondent,

vs.

M. & V. MOTOR COMPANY and ANTHONY MANZO,
Defendants-Appellants.

Submitted January Term 1929. Decided June , 1929.

On appeal from Fourth District Court of Bergen County.

For Appellants: DONOHUE & O'BRIEN.

For Respondents: ADDISON P. ROSENKRANS.

Before: Justices TRENCHARD, KALISCH and LLOYD.

Per Curiam:

These were automobile accident cases in which verdicts were awarded to the plaintiff Esther Lew-

is for personal injuries, and to her husband Franklin Lewis for loss of services and expense of curing her. The accident happened about 8:15 on the evening of October 21, 1927, and was caused by the automobile driven by Franklin Lewis colliding with a bus of the defendant. Motions were made for direction of a verdict and refused. The defendant Manzo alone appeals, setting forth as ground for reversal that the court should have found for the defendants.

We think the cases, tried without a jury, presented questions of fact for the trial judge. The plaintiffs' evidence showed that they were proceeding on their proper side of the road at approximately thirty miles an hour and suddenly came upon the unlighted remains of the defendant's burned bus. The car collided with it, caught fire and was in turn destroyed. Both plaintiffs were injured.

The evidence of the defendant Manzo was that the bus caught fire about 6.30 o'clock in the evening; that he left it on the road to get a wrecking car; that he got back just about the time of the accident and that the bus was then still burning.

These conflicting proofs simply raised an issue of fact for the trial Judge. From these he could conclude that at the time of the accident the fire had gone out and that it was negligent for the driver to have left the burning bus without guard or light, knowing that when the fire ceased burning, the bus would remain a menace to other users of the highway.

Whether the plaintiffs were guilty of negligence presented a fact question as to the plaintiff Franklin Lewis and possibly as to Mrs. Lewis. Certainly the court could not say as matter of law that such negligence existed.

The judgments are affirmed.

Notice of Appeal.

Filed Sept. 13, 1929.

NEW JERSEY SUPREME COURT.

ESTHER LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

On Appeal, etc

Notice of Appeal.

FRANKLIN LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

To ADDISON P. ROSENKRANS, Esquire,
Attorney for Esther Lewis and Franklin Lewis.

Take Notice that the defendant-appellant, Anthony Manzo, hereby appeals to the Court of Errors and Appeals in the Last Resort in all causes, from the whole of the judgment entered in this cause.

Dated, August 14th, 1929.

DONOHUE & O'BRIEN,
Attorneys of Defendant-Appellant.

Ground of Appeal.

Filed Sept. 20, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ESTHER LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

On Appeal, etc

Ground of Appeal.

FRANKLIN LEWIS,
Plaintiff-Appellee,

vs.

M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO,
Defendants-Appellants.

To ADDISON P. ROSENKRANS, Esquire,
Attorney for Plaintiffs-Appellees.

The defendant-appellant states the following ground of appeal:

The Supreme Court erred in giving judgment on the record filed in that Court in favor of the plaintiffs-appellees instead of for the defendant-appellant, and erred in overruling the reasons filed in the Supreme Court for the reversal of the judgment below.

DONOHUE & O'BRIEN,
Attorneys for Defendant-Appellant.

1470CT.T.1929

New Jersey Court of Errors and Appeals

ESTHER LEWIS, Plaintiff-Appellee, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants-Appellants.	On Appeal from Supreme Court.
FRANKLIN LEWIS, Plaintiff-Appellee, vs. M. & V. MOTOR COMPANY, (a corporation) and ANTHONY MANZO, Defendants-Appellants.	

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

This is an appeal from the Supreme Court on the affirmance by that Court of the judgments rendered in favor of Esther Lewis and Franklin Lewis, plaintiffs-appellees against the defendant-appellant, Anthony Manzo, originally entered in the District Court of the Fourth Judicial District of Bergen County.

The cases were started in that District Court as separate cases but by consent were consolidated at

New Jersey State Library

the trial, and the appeal to the Supreme Court was a single appeal on the consolidated cases.

In connection with the statement of facts herein set forth, defendant-appellant desires to state that from the Per Curiam opinion written by the Supreme Court in affirming the judgments, it would appear that that Court confused the facts and circumstances of this case with one of the many other cases before the Court for its decision, and that in the great press of judicial business, the Supreme Court had in mind at least in part the facts of some other case. The justification for appellant's belief in this is that the Opinion starts off as follows (State of the Case, p. 36, l. 39):

> "These were automobile accident cases in which verdicts were awarded to the plaintiff Esther Lewis for personal injuries, and to her husband, Franklin Lewis, for loss of services and expense of curing her."

Further down in the Opinion, the Court said:

> "Both plaintiffs were injured."

An examination of the entire State of Case, including the States of Demand and all of the pleadings and testimony, fails to show that any claim was made for personal injuries, or that either of the plaintiffs were injured at all. The suits brought were solely and simply for property damage suffered by said Esther Lewis and Franklin Lewis.

In another part of the Court's Opinion, the Court said:

> "These conflicting proofs simply raised an issue of fact for the trial judge. From these he could conclude that at the time of the accident, the fire had gone out and that it was negligent for the driver to have left the burning bus without guard or light, knowing

that when the fire ceased burning, the bus would remain a menace to other users of the highway."

While this particular phase of the question will be touched upon under appellant's point that the entire case shows no negligence on the part of appellant which could have proximately caused the accident, nevertheless we desire to call the attention of the Court at the outset that while there was this conflicting proof, nevertheless, the trial judge found in his settled state of facts that the fire was there because he said (State of Case, p. 30, l. 25) that witness, Mr. Allen, saw the flames, but only saw them because he was looking for them, and the trial court then excused the plaintiff from failure to see them by stating that it would be unreasonable to require him to anticipate the presence or existence of the fire on the road, and since it was not his duty to anticipate the presence of the fire, it was not negligent for him not to have seen it. The trial judge could have found as the Supreme Court mentioned in its opinion, but the trial judge did not so find.

A brief statement of the facts is as follows:

On October 21, 1927, appellant was driving a large motor bus on the road between Port Jervis and Monticello, in New York State and about one mile north of Forestburg Corners, and at about 6:30 o'clock of that day, the bus accidentally caught fire and burned up. After making attempts to put it out, which were unsuccessful, and while the bus was still burning strongly, he left to go to Monticello to get help and to obtain the services of wreckers to remove the remains from the road when possible; that about 8 o'clock when he had just returned in one of the two wreckers a Monti-

cello garage had sent out, the accident between plaintiff's car and the bus occurred; that plaintiff, Franklin Lewis, was driving his car northerly along the same road on which the bus stood and in the same direction in which the bus had been going, and drove it on top of the burning remains of the bus chassis and body. The bus had burned to the extent that the body had fallen in and the top of the chassis and body was about three feet from the ground.

The plaintiff, Franklin Lewis, drove his car without diminishing the speed or apparently attempting to avoid the accident into the back of these burning remains and up a slight skidway the fallen pieces made onto the body of the bus as far as the cowl of the bus. After he and his wife, who was riding with him, got out, their car caught fire from the burning bus and was completely destroyed. In addition to the loss of the automobile, both plaintiffs lost items of wearing apparel which they had with them. The plaintiffs testified that they did not see any light or flames about the remains of the burning bus; that it was then dark and that they were blinded by the headlights of the approaching automobiles shining on their windshield on which there were rain drops, it having just started to rain, and that they did not see the bus chassis until they were about 50 feet from it, when an unsuccessful attempt was made to stop.

The defendant and Mr. Harry Allen, who was driving the first wrecker to arrive on the scene, testified that just before the accident happened, the bus was burning and that the flames were clearly visible especially around the left rear part of the bus, and these flames were seen by Mr. Allen who was in the roadway about 100 feet in back of the bus, and in the direction from which

the plaintiff came; that before the accident when Mr. Manzo left for help, there were a great many people at the scene of the fire, including the road commissioner and the road supervisor.

The Court, thereupon, held that the defendant, Manzo, was guilty of negligence in leaving the bus unattended and that the plaintiff, Franklin Lewis, was not guilty of any contributory negligence, and awarded a judgment in favor of the plaintiff, Franklin Lewis, in the sum of $351 with costs, and in favor of the plaintiff, Esther Lewis, in the sum of $151.50 with costs, and before such award, denied defendant's motion for a direction of a verdict, which was based upon the ground that there was no evidence showing negligence on the part of the defendant, Manzo, which proximately caused the accident, and, further, on the ground that the plaintiff, Franklin Lewis, was guilty of contributory negligence as a matter of law.

POINT I.

The Supreme Court erred in affirming the judgments below and in overruling Appellant's contention that the Trial Court erred in denying Defendant's motion for a directed verdict, based upon the ground that there was no negligence shown on the part of the Defendant which proximately caused the accident.

In connection with this point, appellant desires to call to the Court's attention the fact that in the settled State of the Case, the trial court set forth the testimony on each side, then made his findings upon the testimony, stating also the legal basis for the verdict entered. The findings of the trial judge on the questions of fact were practically in favor of the defendant-appellant's contentions raised at the trial, but the trial court disagreed with the legal contentions of defendant-appellant, the more important of which is here mentioned.

An examination of the Statement of the Case certified to by the trial judge as containing all of the material testimony adduced at the trial fails to show any negligence on the part of the defendant, which could have proximately caused the accident.

The basis of the trial judge's finding of negligence on defendant's part was that he left the burning bus to get help, and attempted to justify this action by the fact that state officers were at the scene, (State of the Case, page 29, line 27), and that the defendant, leaving as he did, was guilty of negligence. The uncontradicted testimony shows that after the bus caught fire, defendant and others attempted to put it out but were

unsuccessful (State of the Case, page 26, line 3) and that after it had got beyond control and possibility of extinguishing it was passed, and while it was still burning with high flames (State of the Case, page 26, line 25) he left to go to Monticello to get wreckers to remove the remains from the road as soon as that could possibly be done.

According to Mr. Lewis (State of the Case, page 23, line 12), the concrete road has a dirt shoulder about 1½ to 2 feet wide, and while the bus was not all the way over to the edge of the ditch, it was all the way over to the right of the concrete.

On uncontradicted testimony, when the defendant left for help (State of the Case, page 26, line 20) there were a great many people watching the burning bus, and among them was the road commissioner and also the road supervisor. Obviously, when he left there was no occasion for the defendant to place any lights about a bus which was blazing with high flames, and his so leaving the bus watched by the road supervisor and the road commissioner, even though he did not specifically leave them in charge of the vehicle, was certainly not the action of an unreasonable or imprudent man.

The trial judge said (State of the Case, page 29, line 17) that he would have to determine negligence by the test of whether a reasonable man would have acted as the parties did under the circumstances, and his finding of negligence on the defendant's part was a finding that Manzo did not act as a reasonable and prudent man under the circumstances, but this finding is not borne out by the uncontradicted facts of the case. While the defendant did not specifically order them to care for the vehicle while he went for help, he could certainly assume that the road commissioner and

the road supervisor, upon whom this duty devolved, would perform it if necessary.

But, in any event, the mere leaving of the bus assuming it to be negligent had nothing to do with the causing of the accident since it could not be the proximate cause thereof. *The only reasonable basis for any finding of liability in the case would be that the defendant had failed in a duty to place a light on the vehicle standing in the road to warn others of its presence.*

The facts of the case show by uncontradicted evidence and found by the judge demonstrate that there was no need to place any such warning light as a lantern on the bus either at the time when he left it when it was blazing in high flames, or at the time when the accident happened when the bus, and particularly the rear of the bus, was still in flames clearly visible. That these flames existed appears as above mentioned by the testimony of Mr. and Mrs. Lewis, the testimony of Mr. Manzo and the testimony of Mr. Allen, who saw them from a distance of at least 100 feet in back of the bus and who stated (State of the Case, page 28, line 8) that they gave much more light than a lantern would have, and the trial judge found that these flames were there and that one could see the conflagration from a reasonable distance (State of the Case, page 30, line 24).

It was here that the Supreme Court was misled on the question of fact because after mentioning a bit of the testimony of the plaintiffs and of the defendant, it held that here was a situation of controverted facts presenting a question of fact for the trial judge and that his verdict constituted a finding of these facts in favor of the plaintiff.

The Supreme Court should have noted that the trial court by finding that Mr. Allen and Mr. Man-

zo did see the flames of the burning bus at the time of the accident, and that the testimony of Mr. and Mrs. Lewis mentioned the flames there which they saw upon alighting constituted in all a finding the facts in favor of the defendant, and therefore, although the Supreme Court says in its Opinion that the trial court could have concluded that at the time of the accident, the fire had gone out, nevertheless, the trial judge as shown by the State of the Case which he himself settled did not so conclude, but based his verdict upon the erroneous proposition of law that because the existence of the fire was unknown to the plaintiff, it was more than could be expected to require him to anticipate the existence of that fire upon the road (State of Case, p. 30, l. 30) and that Mr. Allen only saw the flames because he was looking for them.

The Supreme Court in its Opinion also mentioned the fact that the Lewis car caught fire when it collided with the burning bus. Obviously if the bus was not burning at that time, Lewis' car would not have caught fire. Certainly, if the flames were there lighting up the burning remains of the bus and visible to Mr. Allen from a distance of 100 feet, they would have been visible to the plaintiffs had they looked, and their failure to see these flames until after they had struck the bus shows how ineffectual any ordinary warning such as a lantern would have been had it been placed there.

In the case of *Raymond* vs. *Sauk County,* 167 Wis. 125, 166 N. W. 29, L. R. A. 1918 F 425, the Court held:

> "The negligence of a municipality in failing to put up signs or give other warnings that a highway had been made slippery and dangerous by the application of tar and oil

> thereon cannot justify a recovery by a traveler injured in broad daylight as a result of such condition, such signs or warnings being only for the purpose of giving notice of the existence of a defect, and under the facts the traveler had such notice from the condition of the road itself."

In 42 Corpus Juris 843, Motor Vehicles, Section 500:

> "However, a light need not be placed upon a barrier where the existence of the barrier is shown by other lights in the vicinity," citing *Gerrie* vs. *Port Huron,* 226 Mich. 630, 198 N. W. 236.

Both the authorities and common sense dictate the inadvisability of holding a man liable for failin to place a light upon something such as a blazing obstacle which is lighting itself.

It may be noted that the defendant acted as a reasonable and prudent man would have under the circumstances by placing a light on the wreck at midnight when the flames had gone out. (State of Case, page 28, line 12).

In the case of *Powers* vs. *Standard Oil Company,* 98 N. J. Law, 730, 119 Atl. 273, at page 274, Justice Minturn said:

> "The efficient proximate or intervening cause in such a situation is tantamount in law to the force or operating factor, without which the accident could not have happened. Such a power must have been active, operative, and carrying and containing within itself the possibility and potentiality for harm."

The actions of the defendant either in leaving the bus for help before the accident or failing to place a lantern on it while still blazing as at the

time of the accident can in no way be construed to have been an active, operative power containing in itself the potentiality for harm without which the accident could not have happened. Thus, the finding of negligence by the trial judge on these facts does not square with the holding of our Supreme Court in the above case requiring that negligence to be proximate and operative.

The Supreme Court in its opinion made no comment upon that phase of the case covered by the above cited precedents, and made no comment upon a most important factor which brings the case at bar directly within a decided case of the Court of Errors and Appeals of this State, i. e. the case of *Osbun* vs. *De Young* herein mentioned.

The accident in this case could not have happened had the plaintiff kept a proper lookout and operated his car so that he could have seen the flames that were there, and had he not operated his car at an excessive rate of speed without slowing down or attempting to avoid the accident although it was dark and although his windshield was covered with rain drops, and this, together with the glare of the approaching head lights, obstructed his vision. Were he not guilty of this negligence, the accident could not have happened and this was the sole cause of the accident.

In the case of *Pugh* vs. *Catlettsburg*, 214 Ky. 312, 283 S. W. 89, 46 A. L. R. 939, the Court held:

> "The failure to place lights upon a pier supporting a viaduct is not the proximate cause of injury to a motorist who runs into such pier when blinded by the lights of an approaching car."

In the case of *Osbun* vs. *De Young*, Court of Errors and Appeals, November 1923, 99 N. J. Law

204, 122 Atl. 809, at page 812 Mr. Justice Kalisch, speaking for the Court, said:

> "For it is firmly settled that it is only where the plaintiff's act is a negligent one, and approximately contributes to the defendants' negligence that caused the plaintiff's injury that the latter is debarred of a recovery. The leading cases in this state which illustrate this doctrine are New Jersey Express Co. v. Nichols, 33 N. J. Law, 434, 97 Am. Dec. 722; New York, Lake Erie & Western Railroad Co. v. Ball, 53 N. J. Law, 283, 21 Atl. 1052; Menger v. Lauer, 55 N. J. Law, 205, 26 Atl. 180, 20 L. R. A. 61. *Moreover, in view of the driver's testimony that he was blinded by the arc light so that he could not see ahead more than 8 or 10 feet, it becomes impossible to conceive how there could be any casual connection between the absence of a tail light or an obscuration of it with the driver's negligent conduct in failing to stop his car until his vision was improved, or at least to reduce the speed of the car so that it could be stopped in time to avoid a collision with an obstacle in the way 8 or 10 feet ahead.*"

The case at bar comes directly within the law as laid down in the Osbun case above. In fact the case at bar is even stronger in view of the fact that while there was no lantern or light, the flames were present as a warning had the plaintiff been able to see them. It was his failure to stop until his vision was clear that prevented his seeing these warning flames.

The latest case appearing on this point i. e. case of *Devine* vs. *Chester,* 144 Atl. 322, repeats this sound law, the Court there using these words:

> "We see no merit in the defendant's contention that he was absolved from negligence

> because of glaring headlights obstructing his vision. Under such circumstances, it is necessary for a driver to stop or slow his car in order to avoid going where he cannot see. Hammond v. Morrison, 90 L. 15, 100 Atl. 154."

It is respectfully submitted that in all the evidence adduced at the trial, there was nothing to show negligence on the part of the defendant proximately causing the accident, and that, therefore, the affirmance of the judgments in favor of the plaintiffs, Franklin Lewis and Esther Lewis, was improper.

POINT II.

The Supreme Court erred in affirming the judgment of the Trial Court and in overruling Appellant's contention that the Trial Court erred in refusing to direct a verdict in favor of the Defendant on the ground that Plaintiff-Appellee, Franklin Lewis, was guilty of contributory negligence so clearly as to preclude recovery.

The Supreme Court held that certainly it would not say as a matter of law that contributory negligence existed but appellant contends that this is a case where the court not only could but should have found Franklin Lewis guilty of such negligence that to permit a recovery to stand would be unconscionable. The Courts of this state have many times held that where contributory negligence is so strong as to cause the Court to say that no reasonable men could differ on it, a man so guilty, as a matter of law, is precluded by his conduct from recovery. Such a case is this one.

Plaintiff's car was driven at an excessive rate of speed under the circumstances. The accident happened at about 8 o'clock in the evening; it was dark (State of the Case, page 22, line 10) that his vision was partially destroyed by reason of brilliant headlights of two on-coming cars, (State of the Case, page 23, line 17) that it had just started to drizzle, and the combination of rain drops on his windshield and the brilliant lights of the approaching cars obstructed his vision, (State of the Case, page 23, line 30), and that he was traveling about 30 miles an hour (State of the Case, page 23, line 4). Mrs. Lewis likewise testified (State of the Case, page 24, line 3) that their car was going about 30 miles an hour, and Mr. Allen testified (State of the Case, page 27, line 25) that it was going about 40 miles an hour.

The Trial Court, in its decision, held that 30 miles an hour in the open road is permissible, but it is contended that under all of the circumstances as outlined above, and assuming that the plaintiff was only traveling at 30 miles an hour, he was, nevertheless, guilty of clear contributory negligence by driving at such a speed, in view of the darkness, the rain drops on his windshield and the glaring headlights, depriving him of at least partial visibility.

In addition to this, the evidence shows that he saw the remains of the burning bus on the road about 50 feet before he came to it, (State of the Case, page 23, line 10) that he applied his brakes immediately; that the road was a concrete road, but despite this, he went all of the distance of 50 feet to the back of the bus, and after running up on the top of the chassis and remains about three feet from the ground, (State of the Case, page 22, line 19) his car ran on the wrecked chassis all the

way to the cowl of the bus, the body of which, from the back to the cowl, was 22 feet long, (State of the Case, page 27, line 1). This testimony is mentioned to demonstrate at what a clearly negligent speed plaintiff, Franklin Lewis, must have been going in order to travel 50 feet on the road with his brakes on, and then mount the bus chassis and ride 22 feet along it before hitting the cowl and stopping.

The plaintiff, Franklin Lewis, was guilty of contributory negligence in operating his car and failing to stop it when blinded by the headlights of the wreckers approaching in the opposite direction. As mentioned in the testimony just above set forth, it was dark, just starting to rain, the windshield of Lewis's car was covered with rain drops and he admitted that his vision was partially destroyed by reason of the brilliant headlights of the oncoming cars, and that the combination of rain on the windshield and dazzling headlights obstructed his vision, and likewise the testimony of Mrs. Lewis to this effect. Under all of the circumstances, the courts in this state have held that it was his duty to slow down or come to a stop until he was offered a reasonably clear vision ahead.

In one of the outstanding cases in this state, *Osbun* vs. *De Young,* 99 N. J. Law 204, 122 Atl. 809, the Court held that under such circumstances, it was his duty to stop, and in that case cited the case of *Hammond* vs. *Morrison,* 90 N. J. Law 15, 100 Atl. 154, in which there was an attempt on the part of the defendant to escape liability by alleging that he was temporarily blinded by reason of the glare of lights upon his windshield, and in that case, Chief Justice Gummere clearly and briefly set forth the law as follows:

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

The plaintiff, Franklin Lewis, utterly failed to even attempt to perform this duty imposed upon him by both law and common sense and continued to proceed at a rapid rate of speed until striking the burning bus.

The plaintiff, Franklin Lewis, was guilty of contributory negligence as a matter of law in failing to keep a reasonably proper lookout while proceeding on the road.

The testimony shows that the burning bus was in a straightaway of road which extended between 500 and 800 feet in back of the bus (State of the Case, page 23, line 3) and about 300 to 400 feet in front of the bus, (State of the Case, page 23, line 27). The car Mr. Lewis was driving and in which he approached the bus from its rear had good headlights which lit up the road ahead (State of the Case, page 23, line 20) and which lit up the wreck on the road (State of the Case, page 28, line 9), and in addition to this, there were flames around the back of the burning bus, the existence of which is shown by the testimony of Mr. Lewis that when he got out of his car and before it caught fire, he saw some small fire around the bus (State

of the Case, page 22, line 33); the testimony of Mrs. Lewis that she saw fire around the back of the bus when she got out of her car before it caught fire, (State of the Case, page 24, line 20), the testimony of Mr. Manzo that just before Lewis struck the bus there were flames around the entire back of the bus, particularly at the left rear wheel part (State of the Case, page 27, line 3); the testimony of Mr. Allen, who was in a position to see everything both before, during and after the accident, he saw flames around the back of the bus when he was with his parked wrecker, about 100 feet south or in back of the bus (State of the Case, page 28, line 1), and that these flames were larger and gave more light than a lantern would have, and the existence of these flames was found as a matter of fact by the trial judge when he said, (State of the Case, page 30, line 23) that there was testimony that one could see the conflagration at a reasonable distance, and that Mr. Allen saw these flames because he was looking for them, that the rear tire and part of the bus was on the road and burning.

In view of the fact that he had lights on his car with the aid of which he should have seen the obstacle in the road, and the additional fact that this obstacle was lighted in a most effective way by burning flames, the failure of Lewis to see it demonstrates his clear negligence in failing to keep a reasonable lookout.

In the case of *Gallagher* vs. *Montpelier and W. River Railroad Company,* 137 Atlantic, 207, 52 A. L. R. 744, the Court said:

> "While a driver on the highway by day or night has the right to assume that it will not be obstructed unlawfully or in such a manner as to cause him injury while he him-

> self is in the exercise of due care and caution, he cannot close his eyes and go forward in reckless disregard of what may happen; his conduct must measure up to that of a careful and prudent person in like circumstances. * * * It is just as essential that a traveler in an automobile in the night time keep his eyes open as it is he adopt proper lights and speed."

In the case of *Frye* vs. *Washington Township*, 291 Pa. 240, 139 Atlantic 871, the court said in defining the duties of the driver:

> "It was his duty to observe the surrounding conditions as he drove and exercise ordinary prudence to avoid threatened harm."

In addition to these items of negligence above set forth, uncontradicted testimony also shows that although he saw the burning bus 50 feet before he got to it, Lewis failed to stop, and that he made no attempt to avoid the accident by turning aside; that he struck the bus in the back middle. His failure to stop after seeing the bus 50 feet before getting to it can lead only to one of two inferences, either, that he tried to stop and could not because of improper brakes, or because of excessive speed, or that he completely failed to attempt to stop, and, either of these inferences must lead to the conclusion of negligence on Lewis's part.

It is respectfully submitted that even should appellant be in error in its contention set forth in Point I that the defendant, Manzo, was guilty of no negligence which proximately caused the accident, nevertheless, the plaintiff, Franklin Lewis, should have been precluded from recovery by the contributory negligence on his part above set forth, and that Lewis's negligence was of so clear a char-

acter and demonstrated by uncontradicted testimony or admissions on his part as to make it contributory negligence as a matter of law, thus precluding all recovery.

It is respectfully submitted that for the reasons above set forth the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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1470CT.T.1929

New Jersey Court of Errors and Appeals

Esther Lewis, Plaintiff-Appellee, vs. M. & V. Motor Company, a corporation, and Anthony Manzo, Defendants-Appellants. Franklin Lewis, Plaintiff-Appellee, vs. M. V. Motor Company, a corporation, and Anthony Manzo, Defendants-Appellants.	In Tort On Appeal from Supreme Court

Brief for Plaintiffs-Appellees

STATEMENT OF FACTS

For an appellant to write a "Statement of Facts" with meticulous exactness, uncolored by self-interest, requires a higher state of grace than human nature commonly attains. In this case and under this head, the appellant has so far erred—here grossly and there subtly—as to require a re-statement on our part.

On October 21, 1927, between 8:00 and 8:15 P. M., the plaintiffs, a husband and wife, residing at Pompton Plains, Morris County, N. J., were riding north in the husband's car—an Essex coach—on a concrete public road running from Port Jervis and Forestburg to Monticello, all in

the State of New York. ***Obstructing their course, the framework of a motor bus, which had caught fire at least an hour and a half or an hour and three quarters earlier, stood in the road, without a light or a guard.***

The night was dark and a drizzling rain had just set in.

The rear of the chassis, which part plaintiffs were approaching, had sagged down; and an inclined plane or sloping runway, starting from the ground at the rear and running up to the forward parts of the framework (whatever was combustible had been burnt off), was formed by the rear bumper and such indestructible parts as had slid or shuffled to the rear.

To the plaintiffs, approaching the rear of the ruined bus, no fire was visible.

A half or three quarters of an hour earlier, the fire had so far burned out that a countryman, residing about three hundred feet north of the wreckage, and whose woodlands abutted the public road, went home because no longer apprehensive of fire hazard to his forest. The plaintiffs, perceiving in the road a shadowy appearance as if of ploughed ground, applied their brakes, reduced their speed (which in this open country had been about thirty miles an hour), and ran up the incline—a sort of sloping bridge—on the chassis, and stopped. Getting out of their car, they then saw, underneath the chassis of the bus, a little fire; their own gasoline tank had sprung a leak; and in a few seconds their escaping gasoline came in contact with the fire beneath the bus; and flames enveloped their car and licked it up.

Defendant, Manzo, the driver of the bus, left it while still burning, sometime before 7:30 o'clock (at least a half or three quarters of an hour before plaintiffs came along). His destination was Monticello, and his object to get a wrecker to remove the framework of the bus. A number of people then still lingered about the scene—among them the countryman whose home was three hundred feet north, and a town road commissioner (the road appears to have been a state, not a town, highway); ***but defendant does not pretend to have arranged with any of them, or to have requested any, either to keep a lookout until his return or to place a lantern in the rear of the bus.*** Nor was there any evidence that he even anticipated, however groundlessly, that while he went miles away any person would voluntarily remain of his own forethought or concern for the public safety, without being requested to keep watch.

Nothing in the Per Curiam opinion of the Supreme Court (Case, pages 36-37) justifies the statement in appellant's brief (Page 2 of that brief) that that Court confused the facts in this case with those of another. The ***amount*** of damages were not in question; and whether the recovery was for one thing or another was immaterial to the issues in the appeal to that Court. The specifications of determinations appealed from centered solely in the refusal of the trial court to enter judgment of no cause of action in each case, in accordance with defendant's theory that there was ***no*** evidence of negligence on his part, and that there was ***conclusive proof*** of contributory negligence on the part of the plain-

tiffs (See Specifications of Determination Appealed from, Case, Pages 31-32). The Supreme Court did inadvertently mis-state the elements of plaintiffs' damages, which were, not for personal injuries, but property loss; but that was a thing of no moment. On the ***essentials*** the Supreme Court had a firm grip, accurate and comprehensive, as the mere reading of it will abundantly disclose. That Court decided ***this*** case in its Per Curiam opinion, and not some other; and the circumstances which it details indubitably settle the fact.

Appellant directs further criticism to that point in the opinion of the Supreme Court whereat it is said:

> "From these he could conclude that at the time of the accident the fire had gone out, and that it was negligent for the driver to have left the burning bus without guard or light, knowing that when the fire ceased burning, the bus would remain a menace to other users of the highway." (Case, page 37.)

Appellant's brief concludes its comment (Page 3 of that brief), upon this quotation by saying: "The trial judge could have found as the Supreme Court mentioned in its opinion, but the trial judge did not so find," the contention being that "the trial judge found in his settled state of facts that the fire was there because he said (State of Case, p. 30, l. 25) that witness, Allen, saw the flames."

We do not so understand it. What the trial

judge said was, "That Mr. Allen ***said*** that he saw the flames, but that was because he was looking for them." The paragraph in which this sentence appears is somewhat ambiguous; but if it should be inferred that the trial court found the fact to be that there was any visible fire upon the road, it can not be doubted but that he found that the chassis of the bus obscured and hid it from travellers approaching it from the rear. We quote from his findings (Case, page 30, lines 29-34):

> ***"That the rear part of the chassis was lower than the other portion of the bus*** and that the fire or the existence of fire ***was not known to the plaintiffs*** and that to require him to anticipate the presence or existence of the fire on the road was more than could be expected."

This sentence appears to express a finding of facts; but the preceding sentences in the paragraph appear to us to be mere recital of "some testimony" in the proofs.

To one approaching the bus from the direction in which plaintiffs were travelling, "the fire had gone out" altogether.

We shall show presently that the statement in appellant's brief (Page 4) that "The plaintiff, Franklin Lewis, drove his car without diminishing the speed" is at variance with the accordant testimony of both plaintiffs, and not contrary to any finding of fact. So with the statement (Page 4 of appellant's brief) that the driver, Franklin Lewis, was "blinded" by approaching headlights.

I.

THERE WAS NO ERROR IN AFFIRMING THE JUDGMENTS IN SO FAR AS AFFIRMANCE JUSTIFIED THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR JUDGMENT IN HIS FAVOR ON HIS THEORY THAT HE WAS NOT NEGLIGENT OR, IF NEGLIGENT, THAT HIS NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT.

The bus became aflame upon a public road in the open country at 6:30 P. M. on October 21, 1927 (Case, page 25, lines 1-21). The road was not a byroad, untraversed or solitary, but a main thoroughfare between Port Jervis on the south and Monticello on the north. The defendant did not fall into his plight at two or three o'clock in the morning, when the highway might have been quite deserted and no help within reach. He himself says that when he left the scene for Monticello—a town seven miles to the north—"there were a great many people watching the burning bus," and in the group was the "Road Supervisor and also among them a Road Commissioner" (Case, page 26) but what the scope of the official duties of either of the latter no where appears; "that he left all of them there watching the burning bus, which, when he left, was burning with high flames"; "that when they got back" (from Monticello at 8:00 or 8:15 o'clock) "it was dark" (Case, page 26). Frederick Riegler, who lived three hundred feet away, says that when Manzo left, "there was a lot of

men watching the fire" and "the bus was" then "all in flames"; that before he, Riegler, went home at "7:30," "The whole bus burned and the body crashed in and pieces fell in around the chassis and also off on the road to the left of the chassis"; and that, as he proceeded homeward, he saw, upon glancing backward, an occasional spurt of flame and smoke. But the conflagration was then far on the wane; it was no longer a menace to his forest land along the highway (Case, page 25).

That a burning bus, with greasy parts, with containers of lubricating oil and gasoline fuel, all flaming riotously, would soon burn out from the the very fury with which it burnt, and that, with the subsiding fire, the spectators would drift away, each to his own affairs, are things which the defendant must have foreseen and was bound to have anticipated.

Just when he left, neither he nor Riegler says (and no other witness testifies until 8:00 or 8:15 o'clock); but Riegler makes it clear that defendant left ***sometime before 7:30,*** when Riegler left with the fire then only fitfully showing life. (Case, page 25.)

The defendant left without asking any bystander to do him the favor—or if none should prove so neighborly or obliging, without ***bargaining*** with any one—to remain on guard in his absence. As the trial court found, the defendant "had no assurance," when he left the burning bus, "that the" bystanders "would take care of the situation when he left" (Case, page 29); and he sought no such assurance, nor endeavored to leave any one in charge.

The bus stood in the very path of cars driving north; it "occupied the entire right side of the" concrete driveway (Case, page 22); no part of it was pulled out to the right on the dirt shoulder, one and one half or two feet wide, which lay between the right hand edge of the driveway and a ditch (Case, page 23).

To state the facts is to have demonstrated Manzo's negligence in leaving the vehicle enwrapped in rapidly devouring flame, on an unlit public highway, in the deepening night, without making any provision and without trying to make any provision, for the protection of other users of the road.

In appellant's brief (Page 8, lines 1-2) appears the unsupported statement that the duty of safeguarding or warning motorists of the menace of the forsaken bus lay upon the road commissioner and the road supervisor. There is no evidence of it, and we cannot conjecture what obligations their respective offices entailed. We suppose that these officials (if, in fact, there were two of them) had to do with the mending of the surface of the road, and were under no duty to draw obstructing objects from the highway or to set a watch to prevent harm therefrom to passersby.

Manzo's heedlessless was the proximate cause of the plaintiff's accident. The plaintiffs came along at a reasonable rate of speed, unwarned of the obstruction and with the right to assume that the road was clear.

It may or may not be true that the defendant (appellant) and his witness, Allen, approaching the wreck from a direction opposite to that of the plaintiffs and whose vision was not curtained off by the rear bumper and fallen and slumping debris which formed a sloping incline for the plaintiffs' car, saw fire as they drew near the hulk of the bus. They were not only in front of the bus, while the plaintiffs were behind it; but they were traversing the opposite side of the road, and expected to find fire, and knew where to look for it and were in fact looking for it (Case, page 27).

The plaintiff's testimony was that when they got out of their car, the only fire then visible was a "small fire" (Case, page 22, line 21), which plaintiff, Esther Lewis, located "around the back left wheel" of the bus (Case, page 24, lines 21-22); both say that until their car stopped, neither saw ***any*** fire, and that both, at a distance of fifty feet in the rear of what proved to be the bus, discerned what looked to them to be furrowed soil (Case, page 22, lines 12-15, and page 24, line 10).

It may be that the disturbance of the chassis stirred some slumbering embers into fresh flame as their car, with the brakes applied (not jammed down with the pavement wet with drizzling rain) and with diminished speed, ran upon the framework of the bus.

The trial court was, in this instance, the trier of the fact; he gave credence to the plaintiffs'

story, not to that of Manzo and Allen, and the Supreme Court, on appeal from the District Court, could not weigh the evidence.

The trial court did not find as a fact (as is asserted on page 8 of appellant's brief) that the flames were visible there and could be seen from a reasonable distance (Case, page 30, lines 24-35). He seems on the contrary to have found that the rear of the chassis with the debris which had shuffled or fallen about it shut off a view of the fire to persons approaching from the rear, if "some testimony" of the actual presence of visible fire was to be credited at all.

The Supreme Court was right in saying: "The car collided with it" (the bus), "caught fire and was in turn destroyed" (Case, page 37, lines 20-21). Commenting upon this, appellant's brief remarks (Page 9): "Obviously if the bus was not burning at that time, Lewis' car would not have caught fire." But this is not obvious, and after all the vital question is not whether there was active fire or sleeping embers just before the bus was jarred or stirred by contact with the car, but whether it was observable to one coming from the rear. The trial court appears to have found that it was not.

II.

THE SUPREME COURT RIGHTLY FOUND THAT THE TRIAL COURT WAS JUSTIFIED IN ITS FINDINGS THAT PLAINTIFFS WERE FREE FROM CONTRIBUTORY NEGLIGENCE.

The motion for judgment for plaintiff on the theory of contributory negligence was directed against one plaintiff only, Franklin Lewis, the driver (Case, page 28), Esther Lewis being merely a passenger (case, page 30).

Appellant's argument is, first, that the speed of plaintiffs' car was excessive in the circumstances.

The witness, Allen, testified that he drove the first of the two wreckers, and brought his wrecker to a standstill one hundred feet south of the bus; that the plaintiff's car was then three hundred feet south of him, and was moving at the rate of 40 miles an hour; and he appears to have allowed the plaintiffs to pass without a word of warning (case page 27). But the plaintiffs say that they did not exceed 30 miles an hour (case, pages 23 and 24) and diminished their speed when first sensible, as they believed, of some irregularity in the surface of the road 50 feet in front of them (case, pages 23 and 24). The trial court found the speed to be as reported, not by Allen, but by the plaintiffs (case, page 30).

Their speed then, as determined by the trial Court, was below the rate allowed by the law of this State; and it was open country with little or no traffic at the time; no one in fact speaks of meeting with other vehicles.

Appellant says also that plaintiffs should have sooner perceived the obstruction. The trial court said not. There was, in fact, a slight downward grade in the road, (case, page 22, lines 38-40 and page 23), as plaintiffs approached the location of the bus; plaintiffs' headlights were good but the chassis being low on the ground (no part of it higher than three feet is the accordant testimony), and the road dipping slightly, the rays from his lamp failed to throw the bus into relief (case, page 23).

Appellant further says that the driver, Franklin Lewis, should have slackened his pace because of the interference with his vision by the headlights of the wreckers. The fact is that no car, bearing lit lamps, ever passes along the road in opposite directions at night without causing ***some*** interference with the drivers' vision. But the driver in this instance did slacken his speed.

Precisely what does Franklin Lewis say on this point? We quote from the record (case, page 23):

> "As he approached the bus, his vision was partially destroyed by reason of the brilliant headlights of the two cars coming the other direction; that he had good headlights on his car and that they lit up the road ahead, but that because of the slight grade in the direction in which he was going, they did not light up the bus chassis because it was too low on the ground; that as he approached the bus chassis, when he was at a point of 300 or 400 feet south of the bus, the first of the other cars was about

> 100 feet north of the bus and the second was between two and three hundred feet north of the bus; that it was not raining at the time, but that it had just about started to drizzle and that the combination of the rain drops on his wind shield and the brilliant light of the approaching car did obstruct his view."

He also said that "as soon as he saw this thing on the road which looked to him like ploughed ground about 50 feet before he came to it, he applied his brakes immediately" (case, page 23, lines 9-12).

Now Allen was in the first of those two cars, and he says that when Lewis passed him, he, Allen, was 100 feet south of the bus. Hence his headlights, having been left in Lewis' rear, and pointing south, while Lewis was north bound, were no factor in this accident. The second car or wrecker was that in which Manzo rode; and Manzo says that when Lewis came in contact with the bus, Allen's car had passed the bus and was 100 feet down the road and that the wrecker, in which he, Manzo, rode, "was just about even with the bus" (case, page 26).

But this is not a case where a driver was either quite blinded by an approaching light or has pressed onward with unabated speed. Both Lewis and his wife say that when 50 feet south of what proved to be the frame work of the bus, Franklin Lewis applied the brakes; and a mechanic Seher, who overhauled or inspected the car just before this trip, said it was in very good shape (case, page 24). With the road damp from

mist and wet with the drizzling rain drops some caution would have to be taken in the application of the brakes. And if none is taken, a car under such conditions of the roadway does not respond to the brakes as on a dry driveway.

Lewis says the accident occurred because his own "good headlights," although they "lit up the road ahead," did not definitely illuminate the bus chassis, partly because of the downward grade and partly because the chassis lay so low to the ground (case, page 23). Seeing nothing more than a roughened road surface, he lowered his speed. He was on, or all but on, the runway formed by the bumper and fallen parts, before he knew the true nature of what lay before him, and then stopped on this rainy night in 22 feet.

The trial court was justified in his determination of the facts and in his rendition of the judgment; and the Supreme Court committed no error in so concluding.

Respectfully submitted,
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