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and Hygiene
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Notice of Appeal and Grounds.

(Filed August 15, 1931.)

New Jersey Supreme Court

HUDSON CIRCUIT.

FLORENCE BRANIGAN,
vs. Plaintiff,

ARTHUR W. DEMAREST,
Defendant.

Action at Law.
Notice of Appeal
and Grounds.

10

To REGINALD V. SPELL, Esq.,
Attorney of Arthur W. Demarest, Deft.,
26 Clinton Street,
Newark, New Jersey.

Sir:

PLEASE TAKE NOTICE that the plaintiff in the
above entitled cause appeals to the Court of
Errors and Appeals in the last resort in all causes
in New Jersey from the whole of the judgment
entered in this cause on the following grounds, to
wit:

20

1. Because the Trial Court erred in granting
defendant's motion for a non-suit.

2. Because the Trial Court erred in not sub-
mitting the above entitled cause to the jury im-
panelled therefor to render a verdict thereon.

30

Respectfully yours,

KINKEAD & KLAUSNER,
Attorneys of Florence Branigan,
Plaintiff.

(Endorsement.)

Receipt of a copy of the within Notice of
Appeal and Grounds is hereby acknowledged this
13th day of August, 1931.

REGINALD V. SPELL,
Attorney of Defendant.

40

Complaint.

(Filed July 18, 1929.)

NEW JERSEY SUPREME COURT,

HUDSON CIRCUIT.

10

FLORENCE BRANIGAN,
Plaintiff,

vs.

ARTHUR W. DEMAREST,
Defendant.

Summons issued July 3, 1929.

Kinhead & Klausner,
Attorneys for Plaintiff.Reginald V. Spell,
Attorney for Defendant.

20

The plaintiff, Florence Branigan, of the Town of Kearny, County of Hudson, and State of New Jersey, says that:

1. On April 17, 1929, the defendant, Arthur W. Demarest, was the owner of a certain automobile hereinafter referred to bearing 1929 New Jersey license #B-37829.

30

2. On the said date said automobile was being driven by the defendant, Arthur W. Demarest, in a northerly direction along Belgrove Drive, a public highway in the Town of Kearny, County of Hudson, at or near the intersection of the said Belgrove Drive with Wilkinson Terrace, in the said Town of Kearny.

40

3. At the said time and place, the plaintiff, Florence Branigan, was proceeding across the said Belgrove Drive from the easterly side to the westerly side thereof, at or near the intersection of the said Belgrove Drive with Wilkinson Terrace.

Complaint.

4. By reason of the negligent, careless and unskillful manner in which the said automobile of the defendant was then and there being operated and controlled, the same struck the plaintiff, Florence Branigan, thereby seriously injuring her.

5. The negligence of the defendant consisted in this: 10

(a) Defendant drove said automobile at an unlawful and careless rate of speed.

(b) Defendant failed to give any warning of his approach at the place aforesaid.

(c) Defendant failed to use due and proper care in the operation of the said automobile, and control of the same was lost. 20

(d) Defendant failed to equip said automobile with proper brakes, and other proper safeguards for the protection of pedestrians lawfully upon the highway.

(e) Defendant in driving the said automobile did not keep a proper lookout for persons upon the said highway and did not control the motion thereof so as to avoid striking persons lawfully upon the said highway. 30

(f) Defendant drove and operated said automobile in violation of the rules of the road, and laws of the State of New Jersey.

6. By reason of the careless and negligent actions of the defendant, the plaintiff sustained severe injuries, and was hurt, cut, wounded, bruised and injured, internally and externally in and about her face, head, shoulders, arms, legs and feet, which scars and injuries are of a per- 40

Complaint.

manent and lasting nature. She has suffered and will continue to suffer from the results of the said injuries.

10 7. By reason of the said injuries, the plaintiff has suffered and undergone, and will continue to suffer great pain and torment; her nervous system has been shocked, she has been made and will continue to be sick, sore, lame and disordered; she has suffered and will continue to suffer great losses by reason of the reduced earning capacity; she has been forced and obliged, and will continue to be forced to pay out a large sum of money for medicines and doctors' bills, and other large sums of money in efforts to recover from her said injuries.

20 Plaintiff demands against the defendant the sum of Fifty Thousand (\$50,000) Dollars damages.

KINKEAD & KLAUSNER,
Attorneys of Plaintiff.

Filed July 18, 1929.

30

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Answer.

(Filed August 21, 1929.)

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.FLORENCE BRANIGAN,
Plaintiff,*vs.*ARTHUR W. DEMAREST,
Defendant.Action at Law.
Answer.

10

The defendant, Arthur W. Demarest, residing in the Town of Westwood in the County of Bergen and State of New Jersey, says that:

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FIRST DEFENSE.

1. He denies each and every allegation alleged in the Complaint filed in the above entitled cause.

SECOND DEFENSE.

1. He says that the Plaintiff was at the time and place mentioned in the Complaint guilty of contributory negligence in that she so carelessly, negligently and improperly acted and conducted herself that by her said negligence she thereby caused and contributed to the cause of any damage sustained by her.

30

2. The negligence on the part of the Plaintiff consisted in this:

(a) She failed to exercise due care of her own safety.

(b) She voluntarily placed herself in a position of danger.

(c) She carelessly and negligently entered upon that part of the highway used by motor

40

Answer.

vehicles without first making proper observation as to approaching and passing vehicles.

(d) She attempted to run across the highway in front of approaching vehicles.

10 (e) By her own wrongful acts she caused any accident in which he participated, and she was otherwise careless, reckless and negligent.

THIRD DEFENSE.

1. He says that the accident described in the Plaintiff's Complaint, which is the basis of this action, was caused through no negligence or carelessness on his part, but was caused through the acts of a third party over whom this Defendant had no control.

20 REGINALD V. SPELL,
Attorney for Defendant.

Filed August 21, 1929.

Reply.

(Filed August 22, 1929.)

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

30

FLORENCE BRANIGAN

vs.

ARTHUR W. DEMAREST.

Action at Law.
Reply.

The plaintiff denies each and every allegation contained in the answer of the defendant.

40 KINKAD & KLAUSNER,
Attorneys of Plaintiff.

Filed August 22, 1929.

Postea.

(Filed May 22, 1931.)

NEW JERSEY SUPREME COURT,
HUDSON CIRCUIT.

FLORENCE BRANIGAN, Plaintiff, <i>vs.</i> ARTHUR W. DEMAREST, Defendant.	10 Action at Law. Postea.
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This case was tried before Judge Henry E. Ackerson, Jr., to whom the same had been duly referred for trial, with a jury, at the Hudson Circuit on May 5, 1931. 20

At close of the plaintiff's case, the Court, upon motion of the defendant, ordered a non-suit in favor of the defendant.

HENRY E. ACKERSON, JR.,
Circuit Court Judge.

Dated: May 18th, 1931.

Filed May 22, 1931.

30

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Order.

(Filed May 22, 1931.)

NEW JERSEY SUPREME COURT.

10

ARTHUR W. DEMAREST,
Defendant,

ads.

(T.) FLORENCE BRANIGAN,
Plaintiff.

Action at Law.
Order.

20

It is ordered that judgment of non-suit be and
hereby is entered in favor of defendant and
against the plaintiff with costs to be taxed *nisi*.

On motion of

REGINALD V. SPELL, Atty.

Entered May 22, 1931.
Costs \$51.50.

30

40

Judgment.

(Filed May 22, 1931.)

NEW JERSEY SUPREME COURT.

(T.) FLORENCE BRANIGAN,
Plaintiff,

vs.

ARTHUR W. DEMAREST,
Defendant.

10

Action at Law.
Judgt. of Non-Suit.
Reginald V. Spell,
Attorney.

Costs \$51.50.

Judgment entered this twenty-second day of
May, A. D. nineteen hundred and thirty-one, in
favor of defendant and against the plaintiff for
the sum of fifty-one dollars and fifty cents costs.

20

WM. S. GUMMERE,
C. J.

30

40

Testimony.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

T. FLORENCE BRANIGAN,
Plaintiff,

vs.

ARTHUR W. DEMAREST,
Defendant.

Jersey City, N. J., May 5th, 1931.

20 Before:

HON. HENRY E. ACKERSON, JR., J., and a jury.

Appearances:

KINKEAD & KLAUSNER, Esqs., for the plain-
tiff (by DAVID KLAUSNER, Esq.).

REGINALD V. SPELL, Esq., for the defendant
(by JOSEPH COULT, Esq., and WILLIAM
HANLON, JR., Esq.).

30

A jury was duly impanelled, and being found
satisfactory, they were sworn.

Opening to the jury by Mr. Klausner.

40

Mr. Coult: I loath to interrupt Mr. Klausner's
opening, but if there is not a map in this case—
we haven't any—I would prefer not to use a dia-
gram on the blackboard, because my experience
has been when you sketch these diagrams on a

T. Florence Branigan, for Plaintiff—Direct.

blackboard and they are erased it is very hard to learn from your record just what the witnesses are talking about. I have no objection to counsel using it for the purpose of his opening, but it is not drawn to scale, and I would object to having witnesses put marks on a diagram of that kind.

The Court: He is only indicating what he wishes to refer to in his opening. Of course, it is perfectly competent any other time. 10

Opening to the jury continued by Mr. Klausner.

Opening to the jury by Mr. Coult.

T. FLORENCE BRANIGAN, called as a witness in her own behalf, having been first duly sworn, testified as follows: 20

Direct examination by Mr. Klausner:

Mr. Klausner: Before proceeding, your Honor, is there any objection now to the use of this diagram?

Mr. Coult: My only point is, I don't think witnesses ought to be asked to come down and point out distances on the diagram. You see what confusion that makes on the record to have a diagram—— 30

The Court: All right, then, go ahead.

Q. Miss Branigan, you are the plaintiff, the person suing in this case? A. Yes, sir.

Q. Where do you live? A. 15 Wilkinson Terrace, Arlington.

Q. Where do you work? A. In the Metz Laboratories, Newark.

Q. Will you please speak up, Miss Branigan? A. Metz Laboratories, Newark. 40

T. Florence Branigan, for Plaintiff—Direct.

Q. How old are you, Miss Branigan? A. 24.

Q. On April 17, 1929, the date of this accident, where were you working? A. Metz Laboratories, Newark.

Q. As what? A. Stenographer.

Q. How much were you getting? A. \$28.50.

10 Q. A week? A. A week.

Q. Now, on the day of this accident, where were you coming from? A. I was coming from work.

Q. Where were you going? A. I was going home.

Q. And in order to get home what means of transportation did you use? A. I got a ride up to the Hudson Tubes and I walked through the park and got a 36 bus.

20 Q. Got what? A. 36 bus.

Q. You mean a Public Service bus? A. Yes, sir.

Q. Were there many people on the bus? A. Yes, it was crowded.

Q. Do you know the driver of that bus? A. I have been on his bus lots of times coming home.

30 Q. Outside of the fact that you saw him on the bus did you ever have occasion to see him otherwise? A. No; I never knew him before. I didn't know him otherwise.

Q. Do you know the name of the driver of that bus? A. I know it now, but I didn't know it then.

Q. And his name is? A. James Wallace.

Mr. Klausner: Mr. Wallace, please stand up.

(Person addressed as Mr. Wallace arises.)

40 Q. Is that the driver of the bus? A. Yes, sir.

T. Florence Branigan, for Plaintiff—Direct.

Q. Now, on what street did you live? A. Wilkinson Terrace.

Q. What town? A. Arlington.

Q. Now, when you were on this bus and came near Wilkinson Terrace, what did you do? A. I got off the bus and walked in front—

Q. Now, just a minute. About what time of the day was it? A. It was about a quarter after five. 10

Q. In the afternoon? A. In the afternoon.

Q. That was on April 17, 1929? A. Yes, sir.

Q. Was it still light? A. Yes, sir.

Q. What kind of a day was it? A. It was a very nice day. It was—the sun was out.

Q. Was it a clear day? A. Yes; very clear.

Q. Now, when the bus came to Wilkinson Terrace, where did it stop with reference—withdraw that. 20

Q. On what street was the bus travelling as it approached Wilkinson Terrace? A. On Belgrove Drive.

Q. In what direction was the bus going? A. It was going north.

Q. And on what side of the street was the bus? A. It was on the east.

Q. The east side of Belgrove Drive? A. Yes, sir.

Q. Now, as it approached Wilkinson Terrace and stopped at Wilkinson Terrace, can you tell us where it stopped with reference to Wilkinson Terrace? A. It stopped on the southerly corner of Wilkinson Terrace. 30

Mr. Klausner: Wilkinson Terrace at Belgrove Drive I assume it is admitted is a dead end street?

Mr. Coult: Oh, yes.

T. Florence Branigan, for Plaintiff—Direct.

Q. It is a dead-end street going east towards Belgrove Drive, and it is dead-end on the east-erly side of Belgrove Drive? A. That's right.

Q. Now, you say that it stopped at the south-erly side of Wilkinson Terrace. On which side of the Avenue? A. On the left hand side, if I
10 was going down.

Q. No. Looking north. A. Looking north it would be on the—. What do you mean? The bus?

Q. The bus. A. It was on the right hand side.

Q. Now, as the bus stopped, what did you do? A. I got off the bus and I walked in front of it, but I didn't run.

Q. Do you remember whether you were the first or second person getting off the bus? A. I think
20 I was the first. I was either first or second. I was right at the front of the bus. He had stopped and I was right in front. I think I was first.

Q. When you were standing in front of the bus, who did you know that was there? A. I was talking to Mr. Woods.

Q. And Mr. Woods is in court today? A. Yes, sir.

Q. As you got off the bus what did you do? A. When I got off I looked back in the bus to see if
30 anybody else was getting out.

Q. Go ahead. A. Then I stopped and I saw other people were getting out and I walked in front.

Q. In front of what? A. In front of the bus. As soon as I got to the end of the bus at the same instant I put my foot out I got hit. That's all I remember.

Q. Did you look? A. I looked. First of all I looked—

40

Mr. Coult: Objected to.

T. Florence Branigan, for Plaintiff—Direct.

The Court: Well, we want to know. It is something we want to know.

The Witness: First I always looked, because I know how dangerous it is there.

Q. No, no, Miss Branigan, please.

The Court: Did you do anything as you came in front of the bus other than to proceed on? 10

The Witness: I looked right first and when I got to the end of the bus I looked left. That's when I got hit, the same instant I looked.

Q. You say at the same instant you looked you got hit. Where were you at that time? A. I was just at the end of the bus, just about to step. 20

Q. When you say at the end of the bus what end do you mean? A. Well, the end towards the middle of the street.

Q. The end towards the middle of the street? A. Yes, sir.

Q. Do you mean that would be the left side of the bus looking north? A. Yes, sir.

Q. Now, you got hit. Do you know what hit you? A. I don't remember anything then.

Q. You don't remember anything then? A. I just remember seeing the car. 30

Q. What is that? A. I just remember seeing the car, and that's all.

Q. And after you got hit, what happened to you? Do you know? A. I don't remember anything.

Q. Well, were you knocked unconscious? A. Yes, sir.

Q. When you next woke up where were you? A. In the West Hudson Hospital, Kearny. 40

T. Florence Branigan, for Plaintiff—Direct.

Q. Now, how long were you at the West Hudson Hospital in Kearny? A. Six days.

Q. Now, when you were there what did they do to you? A. Well, they bandaged my shoulder and my foot with adhesive tape and they put clamps in my head and bandaged my head; bandaged my head; put clamps in it.

Q. Your head? A. The back of my head and my eye. They put four stitches in my eye and they bandaged my shoulder, set it, and my foot was bandaged.

Q. Which foot? A. My left instep.

Q. Do you know what was the matter with your shoulder? A. It was a broken collarbone.

Q. Which shoulder was it? A. My left.

Q. You say they bandaged that? A. Yes, sir.

Q. From where to where? A. From my neck down to my waist.

Q. All around your body? A. All around.

Q. How long was that bandage all around your body from the neck to your waist? A. Three weeks.

Q. What did you say they did to your head? A. They put clamps in it.

Q. What do you mean by clamps? A. I don't know. That's the only thing I know.

Q. Where did they put them? A. In the back in two different parts.

Q. You say they did something to your eye? A. They put four stitches in it.

Q. Which eye? A. My right eye.

Q. What else hurt you, if anything? You told us something about your left foot. A. My instep.

Q. What was it? A. My left instep. I had a gash in it.

Q. What was the matter with it? A. I had a large gash in it.

T. Florence Branigan, for Plaintiff—Direct.

Q. You had a large gash in it? A. Yes, sir.

Q. In the left instep? A. Yes, sir.

Q. Any other part of the left foot? A. I have a scar on my right ankle on the outer side.

Q. What is that? A. I have a scar on the outer side of my right ankle.

Q. Outside of the left instep was any other part of the left foot hurt? A. And my toes were all black and blue. I guess they were crushed. I don't know. 10

Mr. Coult: I object and ask that it be stricken out, "I guess they were crushed."

The Court: Strike out the guess.

Q. Did they hurt you? A. Yes, sir. They still hurt me.

Q. What? A. I get a cramp in my left foot every once in a while. 20

Q. Outside of the left instep what hurt you? A. The back of my head hurts all the time.

Q. What is that? A. The back of my head, whenever I lay down on the back of it—I can't do that—it hurts too much.

Q. Where? A. In the back of my head.

Q. Where you were hurt originally as a result of this accident? A. Yes, sir.

Q. Does it still hurt you? A. Yes, sir. 30

Q. When you touch it how does it feel? A. It hurts when I touch it.

Q. At the present time does anything besides the back of your head hurt you? A. Well, when it is going to rain my shoulder hurts and my head hurts, both of them.

Q. Now, as a result of this accident and these injuries, did you have any pain? A. Well, yes, off and on.

T. Florence Branigan, for Plaintiff—Direct.

Q. Was that pain severe at all? A. At times it was.

Q. After the accident for how long a period was that pain severe? A. Oh, about seven weeks.

Q. Where particularly was the pain severe? A. In the head and my shoulder.

10 Q. What? A. In my head and my shoulder.

Q. And after that seven weeks did you have any pain? A. Well, I had nervousness. I was troubled with my nerves.

Q. What is that? A. I was troubled with my nerves after that.

Q. Who treated you at the hospital? A. Doctor Freibach and Doctor McLoughlin.

Q. And after you got home from the hospital who treated you? A. Doctor McLoughlin.

20 Q. Did he continue to treat you after you came home from the hospital? A. Yes, sir; for six weeks.

Q. Then after that time did you have occasion to go to any other doctors? A. I went to two or three other doctors.

Q. Who were they? A. Doctor Sullivan and Doctor Connolly.

Q. How many times did you go to Doctor Sullivan? A. Once.

30 Q. Once? A. Yes, sir.

Q. When was that? A. In December, 1929.

Q. How many times did you go to Doctor Connolly? A. Once and that was in March, 1930.

Q. What did you pay Doctor Sullivan? A. Three dollars I think.

Q. What did you pay Doctor Connolly? A. The same.

Q. What did you go to them for? A. For my nerves.

40 Q. Did they prescribe anything? A. Yes; I had to get some medicine.

T. Florence Branigan, for Plaintiff—Direct.

Q. Did you ever use that medicine? A. Yes, sir.

Q. Down to the present time? A. When I get troubled with my nerves I do.

Q. What? A. When I get troubled with my nerves I do.

Q. How often do you get trouble with your nerves? A. About maybe once in three weeks. 10

Q. Is this the hospital bill? A. Yes, sir.

Mr. Klausner: Any objection to that going in evidence?

Mr. Coult: Let me see it.

Mr. Klausner: I offer in evidence bill of West Hudson Hospital for \$61.45.

Mr. Coult: I merely concede that is the hospital bill.

Mr. Klausner: Any question about it? You may look at it again. 20

Mr. Coult: I am not admitting anybody is going to pay the hospital bill, but that is the hospital bill.

(Received and marked in evidence Exhibit P-1.)

Q. You received a bill from Doctor McLoughlin? A. Yes, sir.

Q. Is that the doctor's bill? A. Yes, sir. 30

Mr. Klausner: Would you rather I wait until the doctor comes before I offer it?

Mr. Coult: I do not think any of these bills are evidential yet, if the Court please. Of course, if I wanted to be fussy I could tell counsel to produce somebody to show the hospital bill is reasonable. As far as the doctor's bill is concerned I think he ought to testify the bill is reasonable. 40

T. Florence Branigan, for Plaintiff—Direct.

The Court: Yes.

Q. Miss Branigan, I am going to ask you to please just take off your coat. May I ask you just to come down here? (Witness complies.)

10

Mr. Klausner: If your Honor please, I would like to show the jury her two shoulders; the shoulder where the broken collarbone is, and the other shoulder also.

The Court: All right.

Q. Is this the shoulder that is broken? (Indicating left shoulder.) A. Yes.

Q. Just where is it? A. Right there.

Q. That lump there?

20

Mr. Coult: If the Court please, I think that is very leading.

The Court: Don't lead. Let her tell it.

Q. Just where was it that it is broken? A. Right there (indicating).

Q. This one is all right? (Indicating right shoulder.) A. Yes, sir.

Q. May I ask you to take your hat off, please? (Witness complies).

30

Q. I would like you to point out to the jury, point with your fingers, where it hurts you. (Witness indicates).

Q. Is there still a mark on your eye? A. Right there (indicating).

Q. Just show your other eye. (Witness complies).

Q. You say there is still a mark on your leg? A. Yes.

Q. We will dispose with showing that.

40

The Court: That is unusual modesty.

T. Florence Branigan, for Plaintiff—Cross.

Cross-examination by Mr. Coult:

Q. Miss Branigan, where do you work? A. Metz Laboratories, Newark.

Q. I can't hear you. A. Metz Laboratories, Newark.

Q. Metz Laboratories? A. Yes, sir.

Q. On this day that you got hurt about what time did you leave the office? A. 4:30.

Q. Is that the usual time, the usual closing time? A. Yes, sir.

Q. You caught your usual bus, I suppose? A. Yes, sir.

Q. Went home in the usual way? A. Yes, sir.

Q. I suppose you were in no special hurry to get home, were you? A. No, sir.

Q. And your home was about where the bus stopped, in that direction? A. Yes, sir.

Q. You say this bus was fairly well crowded? A. Yes, sir.

Q. You got up towards the front? A. I was there in the beginning.

Q. You were there in the beginning? A. Yes, sir.

Q. I think you said something about noticing whether other people were going to get off. A. I said when I got off the bus I looked back in the bus to see and I noticed people were getting off, because they always do.

Q. You say there were other people getting off at that same spot? A. Yes, sir.

Q. Did you notice how many others there were following you? A. From five to ten. I couldn't tell you exactly.

Q. This is one of the buses where you pay as you get out? A. No, sir; pay as you get on.

Q. Pay as you get on, so you didn't have to wait to pay your fare? A. No, sir.

10

20

30

40

T. Florence Branigan, for Plaintiff—Cross.

Q. I suppose the bus operator opened the doors for you? A. Yes, sir.

Q. And you stepped out, and then went around in front of the bus? A. Yes, sir.

Q. You knew, I suppose, that bus was going to stand there until these other people got out? A. Yes, sir.

Q. You had done this before, hadn't you? A. Yes, sir.

Q. Was that a customary thing for you, when you got out of the bus, for you to go right around the front and cross the street? A. Well, I always looked both sides.

Q. To see whether anything was coming? A. Yes, sir.

Q. On this occasion you never saw what hit you, did you? A. Well, I just got a glance of the car. I saw the car just at the same instant.

Q. Where was the car when you saw it? A. Right at the edge. As soon as I went to step from the end of the bus then the car hit me. I just saw it, and that's all.

Q. Did you see what part of the car hit you? A. It was around the middle somewhere.

Q. About the middle of the car? A. Somewhere around there.

Q. At the time this car hit you, you were moving, weren't you? A. I was just going to step, and it must have been very close to the bus, because I didn't have a chance to step.

Q. But you were moving at the time you collided with it, is that right? A. Yes, sir.

Q. You say it was just about in the middle of this car? A. Yes, sir.

Q. And it was just at that instant, the instant you were struck, you saw this car? A. Yes, sir.

T. Florence Branigan, for Plaintiff—Cross.

Q. The next thing you remember, you were in the hospital? A. Yes, sir.

Q. Were any X-rays taken of you in the hospital? A. I had seven.

Q. Did they take any X-rays of your head? A. I think it was four of my head and three of my shoulder.

10

Mr. Coult: That is all.

By the Court:

Q. You started to cross in front of this bus? A. Yes.

Q. Can you tell us where you started to cross? Were you going straight across to the opposite corner? A. Well, the bus was right in line with the crosswalk, so that's where I crossed, right there.

20

Q. Well, you mentioned a crosswalk. The bus was on the crosswalk? A. No; it was right on a line with it, just before the crosswalk, and that is where I was crossing.

Q. You mean by that you were crossing on the crosswalk? A. Yes, sir.

Q. Was there any indicated walk there? A. No; because it has only one side. See, there is a dead-end street.

30

Q. Were you going across from a point right opposite the southwest corner of Wilkinson Terrace and Belgrove Drive? Is that what you mean? A. Yes, sir.

Q. Now, when you got out to a point right even with the left-hand side of this bus, had you looked up until that point to see whether there was any traffic on the street? A. Yes, sir. First I looked right and then I looked left.

40

T. Florence Branigan, for Plaintiff—Cross.

Q. Where were you when you looked left? A. When I looked left I was just at the end of the bus.

Q. Beyond the bus? A. No; I was just about to take the last step—I mean the first step past the bus when I looked, and at the same instant
10 the car was there.

Q. This car didn't hit the bus, did it? A. No, but it was very close.

Q. How far was it away from the bus? A. I guess about a foot. It was very close.

Q. Well, had you gone beyond the front of the bus before you looked? A. No, sir.

Q. Where was the car when you saw it? A. It was—I don't know. It just came with the same instant I saw it, then it happened.

20 Q. You can't tell us how far it was away? A. Well, just as soon as I went to walk in front of the bus—I mean the end of the bus—I got hit.

The Court: Can it be agreed as to whether this is a residential district or a business district?

The Witness: It is a residential section.

Mr. Klausner: I think there should be no question it is a residential district, with the houses less than one hundred feet apart.
30

Mr. Coult: That is right; yes, sir.

The Court: All right. Let that appear on the record.

Q. Was there any traffic light there in that street opposite Wilkinson Terrace or any police officer at the time? A. No, sir.

Q. Can you give us any idea about how wide Belgrove Drive is at that point? A. It is about
40 forty or forty-five feet.

Basil Wood, for Plaintiff—Direct.

Q. Forty or forty-five feet? A. Yes.

Q. How near was the bus from which you alighted to the east curb of Belgrove Drive? A. Well, it was just so you could step off. You could step right onto the curb.

Q. From the bus? A. Yes, sir.

Q. Do you know whether or not anybody had preceded you in front of this bus? A. Well, I was either first or second. 10

Q. Not getting off, but I mean anybody going across the street? A. No; nobody went across.

Q. You were the first? A. Yes, sir.

Q. Well, do you know how it was from the facts of the case that you were struck by this car if, as you say, you looked when you came to the left end of this bus and were struck almost immediately, if you had not gone beyond the bus? A. Well— 20

Q. The automobile didn't hit the bus? A. Well, just as I stepped, it must have been my knee, because my knee was hurt a bit, too, then.

Q. Do you mean you stepped out before you looked? A. While I was looking. This is the end of the bus (indicating). I didn't expect any car to be on top of the bus. It was right close to it.

(Witness excused.)

30

BASIL WOODS, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Klausner:

Q. Where do you live, Mr. Woods? A. 426 Belgrove Drive. 40

Basil Wood, for Plaintiff—Direct.

Q. Arlington? A. Yes.

Q. On April 16, 1929, did you live at that address? A. Yes, sir.

Q. On the night of this accident were you on this Public Service bus in question? A. Yes, sir.

10 Q. Where were you coming from? A. -Work.

Q. What? A. Work.

Q. Did you see Miss Branigan, the plaintiff in this case? A. Yes, sir.

Q. As you approached Wilkinson Terrace were you standing or sitting? A. I was right in front. I was standing in the front part of the bus talking to Miss Branigan.

Q. You know her? A. Yes, sir.

20 Q. Do you remember whether or not the bus stopped at Wilkinson Terrace? A. Yes, it did.

Q. With reference to Wilkinson Terrace where did the bus stop? A. Well, on the near side, I would say.

Q. On the near side? A. Yes, sir.

Q. What do you mean by the near side of Wilkinson Terrace? A. That would be the right hand side of Wilkinson Terrace.

Q. This bus was going in what direction? A. North.

30 Q. It was going north? A. Yes.

Q. And Belgrove Drive at that point is a dead end street? A. Yes, sir.

Q. If Wilkinson Terrace had been a street going beyond Belgrove Drive on what side of Wilkinson Terrace would you say the bus stopped? A. Why, the south side.

Q. With reference to the crosswalk, where did it stop at Wilkinson Terrace? A. Well, the same side.

Basil Wood, for Plaintiff—Direct.

Q. No. I mean, assuming that Wilkinson Terrace was a street going across, and they had these crosswalks, with reference to the crosswalk where did it stop, this bus; did it stop at the crosswalk or beyond it? A. At the crosswalk.

Q. Now, when the bus stopped, what did you see Miss Branigan do? A. Why, she got off.

10

Q. What did you next see with reference to Miss Branigan? A. The next I saw of her she was laying in the middle of the street.

Q. What is that? A. She was laying in the middle of the street right in front of the bus.

Q. At that time did you hear any horn blown? A. No; I didn't.

Q. Was the bus standing still all during this time? A. After Miss Branigan got off?

Q. After Miss Branigan got off? A. Yes, sir.

20

Q. And when you saw her in front of the bus was the bus still standing still? A. Yes.

Q. Did you see the automobile which hit Miss Branigan before the accident? A. No; I didn't.

Q. Did you see it after the accident? A. No; I didn't.

Q. Did you immediately get off the bus after Miss Branigan got hit? A. Well, after the commotion, I seen there was commotion; I knew something had happened; I got off and I saw her laying in the street.

30

Q. Did you see the other automobiles anywhere around? A. No; I wasn't looking for any automobiles.

Q. Now, when you got off the bus, had Miss Branigan moved at all? A. No; she was laying still when I saw her. The next I saw of her she was laying in the street still.

Q. Where was her head? A. Why, as I remember, it was pointing north.

40

Basil Wood, for Plaintiff—Direct.

Q. Directly north? A. Well, I wouldn't say. I couldn't exactly say directly north. It seemed to me she was laying diagonally across. Her feet was towards the middle of the street.

Q. The feet went towards the middle of the street and the head went in a northerly direction?

10 A. Yes, sir.

Q. In a diagonal position? A. Yes.

Q. With reference to the bus where were her feet and head? A. Well, she was laying—the bus was pointing this way; she was laying that way. Near the center as I can remember of the bus.

Q. The entire part of her body in front of the bus? A. Yes.

20 The Court: Well, with reference to how far in the street she got, where was she?

The Witness: You mean ahead of the bus?

The Court: Well, she was starting to cross the street. How near to the center lay her body?

The Witness: To the center of the bus?

The Court: Of the street?

The Witness: Oh, well, she wouldn't be over five or six feet from the curb.

30 The Court: From the curb?

The Witness: Yes, sir.

The Court: Was she anywheres near the center of the street?

The Witness: No, no.

The Court: Five or six feet from the curb?

The Witness: I would say that, as near as I can remember.

40 The Court: That would be how far, if at all, to the side of the bus?

Basil Wood, for Plaintiff—Direct.

Mr. Klausner: The left side, your Honor.

The Court: Yes.

The Witness: How near her body was to the side of the bus?

The Court: Yes, the left.

Mr. Klausner: That's right, your Honor. 10

The Witness: Her legs would be pointing west.

Q. But from the left side of the bus where were her legs? A. Just in that position (indicating). This is the bus going north on Belgrove Drive.

The Court: Her feet were nearer to the bus than her head was?

The Witness: Well, she was laying directly in front of the bus, and her feet I should say would be nearer the left side of the bus and her head pointing in to the curb. 20

The Court: Her head pointing in to the curb?

The Witness: Pointing to the curb. That would be the east side.

The Court: To have her feet near the bus and have her head facing east—was her body ahead of the bus? 30

The Witness: Oh, yes.

The Court: It was not out beyond the left side of the bus at all?

The Witness: No; it was right in front of it.

The Court: As she lay there her head was nearer to the curb than her feet were?

The Witness: Yes.

The Court: Did her feet protrude out beyond the bus? 40

Basil Wood, for Plaintiff—Cross.

The Witness: Towards the center of the street.

The Court: Beyond the bus, the side of the bus?

10 The Witness: Well, it was not—they were not beyond the bus; they were inside of the bus, the side of the bus.

The Court: Considering the left side of the bus as extended right up the street, were her feet or any part of her feet to the west of the left side of the bus?

The Witness: No.

The Court: So she was right in front of the bus?

The Witness: Right in front of the bus.

20 Q. What did you do, Mr. Woods? A. Why, as soon as I seen—got out and seen her laying there I picked her up and my whole thought was getting her to the hospital to get some assistance.

Q. Was she bleeding? A. Yes; she was bleeding in the eye and the head.

30 Q. What part of her head? A. If I remember, it was the back of her head that was bleeding. It was all damp and I saw it was blood. My hands were all blood and my coat was all blood when I got home where I had picked her up.

Q. Did you notice whether or not after the accident she had both shoes on? A. No; there was one shoe off. I noticed that when I got to the hospital she only had one shoe on.

Cross-examination by Mr. Coult:

Q. Well, you didn't see the young lady get hit?
A. What is that?

40 Q. You didn't see the young lady get hit? A.
No, sir; I didn't.

Basil Wood, for Plaintiff—Cross.

Q. You said you saw her on the bus; saw her get off? A. Yes, sir.

Q. The next thing you saw she was laying in the roadway? A. That's right.

Q. What part of the bus were you in? A. Right in front.

Q. Seated or standing? A. Standing. 10

Q. Were you on the right hand side or the left hand side of the bus as you looked forward? A. As the bus was going up I was looking east.

Q. What? A. As the bus was going north I was looking out of the window east.

Q. Which side of the bus were you on, right or left or in the center? A. Right side.

Q. You were on the right side up near the front? A. Yes.

Q. Did you see this young lady laying in the street before you got out of the bus? A. No, sir. 20

Q. You got out first. What made you get out? A. When I seen the commotion.

Q. What do you mean by "commotion"? A. Why, someone was hollering. Somebody says "There is something happened"; and I got out of the bus to see what it was.

Q. Then you found her laying out in the street? A. Yes, sir. •

Q. I think you said in answer to one question her head was about five feet to the east of the west side of the bus. Is that what you said? Didn't you make such a remark, as I got it? A. I said she was about five feet from the curb. 30

Q. Well, you said to counsel for the plaintiff, as counsel for the plaintiff took this piece of paper and took this pencil—you used the paper and the pencil something in this fashion, didn't you? A. Yes.

Basil Wood, for Plaintiff—Cross.

Q. All right. Now, you were asked how far the feet were to the east of the west line of the bus, weren't you? A. To the west?

10 Q. To the west. Were they to the west? A. Yes. This is the side of the bus and this is west and her feet was this way. This is her feet and this is her head. This is east over here (indicating).

Q. What we are trying to find out is this: Were the young lady's feet to the west or the east of the west side of the bus? Here is the west side of the bus. A. Yes; it was to the west.

Q. To the west of it? A. Yes.

Q. Then you mean they were out this way? A. They were not out beyond the bus, no, sir.

20 Q. Then they were to the east of the west side of the bus, is that right? A. What is that?

Q. Her feet were to the east of the west side of the bus, is that correct? A. They were more to the west than they were to the east, as I take it, showing that way.

Q. Well, how far was her head from the curb? A. About five feet.

Q. How wide was the bus? A. I couldn't say exactly. Probably eight or nine feet.

30 Q. She was lying in a diagonal direction, was she? A. Yes, sir.

Q. How much further out were her feet than her head from the curb? A. Probably a foot or two foot. I don't know. I couldn't attempt to tell you that.

Q. Then her feet must have been very nearly in line with the west side of the bus, weren't they? A. No; her feet was quite a ways in.

Q. How far in? A. Well, I would say three feet.

James Wallace, for Plaintiff—Direct.

Q. How far was she in front of the bus? How much distance was there from the front of the bus to her feet? A. About eight or ten feet, I would say.

Q. The bus was stopped at the crosswalk? A. Yes.

Q. And she was eight or ten feet in front of the crosswalk when you saw her lying there? A. As near as I can remember. That's just approximate. I couldn't swear to that. 10

Q. You don't know how far she went after she was struck either to the right or straight ahead? A. No; I don't.

Mr. Coult: That is all.

(Witness excused.)

20

JAMES WALLACE, called as a witness in behalf of the plaintiff, having been first duly sworn testified as follows:

Direct examination by Mr. Klausner:

Q. On April 17, 1929, by whom were you employed? A. Public Service Co-ordinated Transport. 30

Q. In what capacity? A. Bus driver.

Q. Were you the driver of the bus about which we have been hearing this morning? A. Yes, sir.

Q. As you approached Wilkinson Terrace what did you do? A. I pulled to the curb and stopped.

Q. And when you stopped with reference to Wilkinson Terrace on what side of Wilkinson Terrace did you stop? A. The nearest side.

Q. From which you came? A. Yes, sir.

40

James Wallace, for Plaintiff—Direct.

Q. And you were going in what direction? A. North.

Q. So that you stopped on the southerly side of Wilkinson Terrace? A. Yes, sir.

Q. And at that point Wilkinson Terrace is a dead end street? A. Yes, sir.

10 Q. As you stopped, did you see Miss Branigan, the plaintiff, that day? A. I saw her get on the bus and saw her get off.

Q. About what time of the day was it? A. Around five or five fifteen.

Q. In the afternoon? A. Yes, sir.

Q. Was it a clear day? A. Yes, sir.

Q. And when you stopped and you saw her get off, can you tell us whether or not she was the first or second person that got off the bus? A.
20 She was either the first or second.

Q. By the way, you have been subpoenaed by the defense as well as by us in this case, haven't you?

Mr. Coult: I object to that.

The Court: Sustained.

Q. When you stopped the bus you say you saw Miss Branigan get off the bus? A. Yes, sir.

Q. Did any other people get off the bus after she did? A. Yes; there was quite a few.
30

Q. Tell us about how many? A. Over five; not over ten.

Q. Did you see Miss Branigan after she got off the bus? Did you see her doing anything? A. No.

Q. Did you see her when she got off the bus, where she was going? A. Yes.

Q. Where did she go? A. She went west.

Q. With reference to your bus? A. She walked
40 west towards Wilkinson Terrace.

James Wallace, for Plaintiff—Direct.

Q. Well, did you see her walk in front of your bus? A. Yes, sir.

Mr. Coult: Your Honor, that is very leading.

The Court: Yes; don't lead him.

Q. She got off your bus and you say she walked towards Wilkinson Terrace? A. Yes, sir.

Q. Did you see her walking? A. Yes; I saw her walking.

Q. Now, with reference to your bus where was she walking? A. I don't understand that question.

Q. Well, she got out from the bus and started walking towards Wilkinson Terrace? A. She passed in front of the bus towards Wilkinson Terrace.

Q. Now, as she passed in front of the bus how was she walking? A. Normally.

Q. You saw her immediately before being hit? A. I saw her—

Mr. Coult: I object to that. I think that is leading. Counsel is doing the testifying.

The Court: This isn't leading.

Q. Please answer the question. A. Yes.

Q. Where was she? A. She was just about past the west side of the bus.

The Court: You saw this, now, didn't you?

The Witness: Yes, sir.

Q. Did you actually see her hit? A. No, sir.

Q. Did you see her after she was hit? A. Just a fraction of a second. I saw her falling.

10

20

30

40

James Wallace, for Plaintiff—Direct.

Q. And when she was falling, about where was she with reference to your bus? A. She was right directly in the path of my bus.

Q. Did you see the car that hit her? A. Just got a flash of it, see? I couldn't tell which car it was.

10 Q. What is that? A. I couldn't tell which car it was.

Q. You say that you saw just a flash of the car that hit her. What do you mean by that? A. Well, I couldn't distinguish it after I got out.

Q. You say you didn't see it actually at the moment of contact, but you saw it immediately afterwards?

Mr. Coult: That's leading.

20 The Court: Yes; give him a chance to testify.

Q. Well, did you see it at the moment of contact? A. No, sir.

Q. How soon after that moment of contact can you say you saw it?

Mr. Coult: I object.

The Court: Sustained. He couldn't tell. He couldn't possibly answer that.

30 Q. Did I understand you to say you saw her falling? A. Yes, sir.

Q. Did you see any car at that time, any other automobile? A. No, sir.

Q. And as she was falling, with reference to the left side of the bus, where was she? A. She was directly in front of the bus, all of her.

Q. But with reference to the left side of the bus where was she as she was falling? A. She fell towards the curb.

40 Q. And when she fell, where were her feet with reference to your bus? A. I couldn't see her

James Wallace, for Plaintiff—Direct.

after she was on the ground. I couldn't see from my seat where she was.

Q. Did you get out of the bus? A. I had to get out in order to see where she was.

Q. When you got out, did you see where she was? A. Yes.

Q. Let us assume this is your bus; this is the front of the bus, and this is Miss Branigan, and this is her head, and this is her legs; will you just put the pencil down how she was lying when you got out and saw her in front of your bus? Where were her feet with reference to the left side of your bus? A. They were within the bus boundaries, pointed slightly towards the bus.

10

Q. Say that this is the left side of the bus; were they to the right or left of the left side of the bus? A. They were to the right.

20

Q. About how far to the right of the left side of the bus were they? A. Well, about three foot.

Q. About how wide is your bus? A. I should say nine foot wide.

Q. How long is your bus? A. I can't tell how long it was. I don't know.

Q. You don't know about how long? A. No.

Q. Is it a regulation bus? A. It is a regular Public Service bus.

Q. With reference to her head, where was her head facing? A. Her head was facing the curb.

30

Q. What did you do when you got out? Pardon me. Did you see Mr. Woods, the man who just testified? A. I don't remember him at the time now, but I guess at the time I seen him pick her up. I can't recognize him now.

Q. But there was some man who picked her up? A. There was.

Q. What did you do, if anything? A. I stopped the next car that came along and told him to take her to the hospital.

40

James Wallace, for Plaintiff—Direct.

Q. Did the defendant, Mr. Demarest, appear on the scene of the accident? A. Yes, he did.

Q. How soon after the accident happened? A. Shortly.

Q. About how shortly? A. Well, a minute or so.

10 Q. And did he talk to you? A. Just told me his name and where he lived.

Q. And you took it down? A. Yes, sir.

Q. And where was his car at that time? A. Well, it was a good distance away.

Q. How far away? A. Well, opposite Butler Place. Almost two blocks away.

Q. Going north on Belgrove Drive the first street to the north of Wilkinson Terrace is what? A. Harding Terrace.

20 Q. And the next street is what? A. Butler Place.

Q. And did I understand you to say his car was near Butler Place? A. Yes, sir.

Q. And he came over and gave you his name and address? A. Yes, sir.

Q. Can you tell us about how wide Belgrove Drive is? A. I don't think it is over thirty feet wide.

30 Q. Can you tell us about how wide Wilkinson Terrace is? A. I couldn't tell you.

Q. Can you tell us about what the distance is from Wilkinson Terrace to Harding Terrace? A. About two hundred feet, I should say.

Q. And about how many feet is it from Harding Terrace to Butler Place? A. The same distance again.

Q. After the accident what did you do? You told someone to take her away, you say? A. Yes, sir.

James Wallace, for Plaintiff—Cross.

Q. Now, during all this time, from the time that you stopped to let Miss Branigan off until Mr. Demarest, the defendant, came over to you after the accident, had your bus moved? A. Not an inch.

Cross-examination by Mr. Coult:

10

Q. How long had you worked for the Public Service at the time of the accident? A. I was working altogether a year and a few months.

Q. How long had you worked on this particular run on this bus? A. I had been working about three months on this particular run.

Q. Was this a pay-as-you-leave or pay-as-you-enter bus? A. It is a pay-as-you-enter.

Q. You had taken the fares of these passengers where? At the terminal? A. In Newark and along the route.

20

Q. Now, what were your duties at the time this bus was stopped, as to passengers getting off? A. Just to wait until they got off.

Q. Did you open the door for them? A. Yes, sir.

Q. As far as you can recall Miss Branigan was the first passenger off the car, wasn't she? A. Yes, sir.

Q. You say you saw her get down and walk in front of your bus? A. Yes, sir.

30

Q. How far did you see her get? How far did you follow her with your eyes? A. Well, just a short distance.

Q. How far did she go? A. She had not cleared the side of the bus yet.

Q. You saw her get to a point as far as the side of the bus? A. She was directly in front of me when I took my eyes off her.

40

James Wallace, for Plaintiff—Cross.

Q. How far had she gone towards the end of your bus when you last saw her? A. I should say about six feet.

Q. Just had three feet to clear the bus when you last saw her? A. Yes, sir.

10 Q. You don't know what she did after that, do you? A. No, sir.

Q. And the next you saw of her she was falling? A. Yes.

Q. And she came toward your left into your view, didn't she, and she fell across the front of your bus? A. She came from the curb towards Wilkinson Terrace.

Q. I am talking about the view you got of her when she fell. When she fell she came from your left, didn't she? A. Yes, sir.

20 Q. How far did you see her go before she struck the ground? A. Well, she passed out of sight within an instant because my bus is pretty tall and the radiator is long and it obstructed my view of her.

Q. Which way were you looking when you saw her falling? A. Looking straight ahead.

Q. And she came into the line of your vision from the left, is that right? A. Yes, sir.

30 The Court: Did you hear any signal given from any of the cars passing at that time?

The Witness: No, sir.

The Court: Would you say there was no horn blown?

The Witness: I didn't hear any.

Q. Now, there was traffic on this street all the time, wasn't there? A. Yes.

40 Q. Fairly heavy traffic? A. Well, at that time there is quite a few cars going up and down.

James Wallace, for Plaintiff—Cross.

Q. Can you remember how many cars passed you while your bus was standing still there? A. No; I wasn't paying any attention to the car.

Q. You know that there were other automobiles going north on the street at the same time your bus was going north before it came to this stop, right? A. Yes, sir.

10

Q. And were you moving along with traffic before you stopped? A. Well, there was no one ahead of me at all. No one within sight ahead.

Q. You don't know what was behind you? A. I could see only one car.

Q. How far was that car behind you? A. Well, he was about fifty feet, I should say.

Q. That was before you stopped? A. Yes.

Q. Was that the first car that passed you? A. I don't know whether he passed me or not. I didn't pay any attention. I was busy watching my passengers getting off.

20

Q. But you do recall there was a car which was traveling about fifty feet behind you before you came to a stop? A. Yes.

Q. And in stopping, I suppose you pulled up gradually to the curb, brought your car to a stop and opened the doors? A. Yes, sir.

Q. Did you have the doors opened by the time the car stopped? A. Just as soon as I came to a stop I opened the doors.

30

Q. This young lady was the first one off? A. Practically the first.

Q. She was all ready to get out when you had the doors opened. You came to a stop, opened the door, and she walked right out in front of the bus? A. Yes, sir.

(Witness excused.)

40

Elizabeth Babst, for Plaintiff—Direct.

ELIZABETH BABST, called as a witness for the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Klausner:

10 Q. Mrs. Babst, where do you live? A. 178 Windsor Street, Kearny.

Q. Do you remember the date of this accident?
A. Yes, I do.

Q. Where were you on the day of this accident, immediately before it? A. Well, on a shopping trip to Newark.

Q. Were you on this bus, also? A. Yes, sir.

20 Q. As you approached Wilkinson Terrace, were you standing or sitting? A. Well, I was at the rear end of the bus. The bus was crowded.

Q. And as the accident happened, did you hear any commotion? A. Nothing at all until I got off the bus.

Q. At the place where the accident happened?
A. Yes.

30 Q. And when you got off the bus, did you see Miss Branigan? A. Not right away until I seen the crowds rush forward, and I turned and I happened to see something lying in the street, and with that I saw her picked up and carried to the sidewalk.

Q. And when you saw her lying in the street, with reference to the bus, where was she lying?
A. Well, it appeared to me she lie forward of the bus. It looked to me like a bundle of clothes when I first saw it. We were quite a ways from the accident. I was walking towards Halsted Street, down, not up.

40 Mr. Klausner: That is all.
Mr. Coult: No questions.

(Witness excused.)

Thomas Branigan, for Plaintiff—Direct.

THOMAS BRANIGAN, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Klausner:

Q. Are you the father of the plaintiff, Miss Branigan? A. Yes, sir. 10

Q. Does she still live with you? A. Yes, sir.

Q. And she lived with you on April 17, 1929? A. Yes, sir.

Q. When did you learn of this accident? A. When I came home from work my wife told me, and I went right up.

Q. Now, after the accident, did the defendant, Mr. Demarest, come to your home? A. I believe it was the next day he came with a shoe. 20

Q. What is that? A. He came with her shoe the next day.

Q. Which shoe? A. The left shoe, I believe it was.

Q. And when he came to your home, did he have his car with him? A. Yes, sir.

Q. And did he show you his car? A. He showed me his car.

Q. And did he show you where the car hit the girl? A. The rear right mudguard. 30

Q. I show you a picture and ask you whether that picture is a photograph of Mr. Demarest's car as it was on the day after the accident when he came to your home and showed you where the car hit the girl? A. Yes, sir. The other one is a better one, I believe.

Mr. Klausner: Just a minute. I offer this in evidence.

(Received and marked in evidence exhibit P-2.) 40

Thomas Branigan, for Plaintiff—Direct.

Q. I ask you to make a mark on exhibit P-2 where he pointed out—withdraw that. Is there anything on that photograph marked P-2 showing where the car—where he told you the car hit the girl?

10 Mr. Coult: I will concede the mark on the rear fender which appears on these pictures is the point of contact. The right rear fender is the point of contact, right where we say it was.

Q. Is this other photograph a photograph of his car, the car after the accident when he came to you and showed you where the car hit the girl?
A. Yes, sir.

20 Mr. Klausner: I offer it in evidence.
Mr. Coult: No objection.

(Received and marked in evidence P-3.)

Mr. Klausner: And it is admitted that the point of contact is where the point of indentation is on the right rear fender?

Mr. Coult: Yes, sir.

30 Q. How long was your daughter home after she came home from the hospital? A. I would say five weeks.

Q. How long after the accident do you say she went back to work? A. Six weeks.

Q. After the accident? A. About six weeks.

Q. What was the condition of health of your daughter before the accident? A. Perfect, perfect.

40 Q. Since the accident, what does she complain of? A. She has nervous attacks once in a while, very frequently.

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Q. Do you know about how much she spent for medicines? A. I couldn't tell you.

Q. What is that? A. I couldn't tell you that, about the medicines.

Q. I can't hear you. A. I couldn't tell you what she spent for medicines.

Mr. Coult: No questions.

(Witness excused.)

10

Mr. Klausner: Doctor McLoughlin was supposed to be here at 10:30. I telephoned his office, and they say he left his office about an hour ago. Outside of the doctor's testimony, I rest our case, and ask for permission to introduce his testimony when he does appear.

20

The Court: All right.

Mr. Coult: I understand you have rested so far as liability is concerned?

Mr. Klausner: Yes, with the exception of the doctor's testimony.

Mr. Coult: I move for a non-suit on the ground that there is no negligence proved on the part of the defendant which was the proximate cause of the injuries which this lady has sustained, and on the further ground that contributory negligence on the part of the plaintiff appears as an irresistible conclusion on her whole testimony.

30

Mr. Klausner: May I interrupt before the case proceeds? The pleadings do not admit ownership and control by this defendant.

Mr. Coult: We make no point of that.

Mr. Klausner: You did not stipulate it.

Mr. Coult: We stipulate it now, that this car in this accident was owned and driven by the

40

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10 defendant in this case at the time of the happening of the accident. The testimony as to the happening of this accident is uncontroverted. I call your Honor's attention to a number of things. In the first place, speaking of the defendant's negligence, there is no evidence of speed at which this car was driven. I do not think any inference at all could be drawn from the fact that the car some time after the accident was at a point some distance up the street. There is no evidence he went that far as the result of speed.

The Court: That is true.

20 Mr. Coult: There is evidence no signal was given. That, however, is not the proximate cause of this accident. Even if it is negligence, it is not the proximate cause of the accident, because on this young lady's own story this car was partially past her when she stepped into it. I do not see that you can get any other conclusion from the facts in this case than that the front of this car was actually past her when she stepped into it. The point of contact is on the rear fender. She never made any observation until the actual instant of collision. She said that at the instant of collision she saw that there was a car there. She was never in front of it, there is no evidence 30 she was in front of it. There is no evidence of anything on earth the defendant's driver could have done to avoid this accident. Under those circumstances, it seems to me there is nothing left for your Honor to do except to non-suit this case.

The Court: You have offered all the testimony you have?

40 Mr. Klausner: I have. I just want to also introduce, with your Honor's permission, the interrogatories and answers to the interrogatories in this case.

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The Court: It is rather late now. You have rested your case. What have you to say to this motion?

Mr. Klausner: May I respectfully submit these interrogatories and answers to interrogatories which I just noticed I had in the papers and which I neglected to offer?

10

The Court: You wish, then, to reopen your case?

Mr. Klausner: Yes.

The Court: Is there any objection?

Mr. Coult: Of course, I will object, if the Court please.

The Court: Of course, this is discretionary with the Court. I do not want to have the case come back again, to be opened up for the purpose of any additional testimony, so I will grant your offer.

20

(Interrogatories read to the jury as follows. Questions by Mr. Klausner, answers by Mr. Coult.)

No. 20. On what date within one month prior to April 17, 1929, were the brakes on said automobile last inspected? A. March 27, 1929.

No. 26. Were the brakes on the automobile bearing license number B-37829, N. J., 29, in good working order immediately prior to the accident on April 17, 1929? A. Yes.

30

No. 30. Did you warn the plaintiff of your approach immediately prior to the accident? A. No.

No. 31. If the answer to the 30th interrogatory is in the affirmative, what warning did you give? (By Mr. Coult: It is not in the affirmative, it is "no").

40

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No. 32. At what speed were you driving the automobile bearing license number B-37829, N. J., 29 immediately prior to the accident and at the time of the accident? A. I did not look at the speedometer, but in my opinion I was travelling between twenty and twenty-five miles an hour.

10

No. 33. Did you see the plaintiff before the accident? A. I had a fleeting glimpse of someone a second immediately prior to the accident.

No. 34. If the answer to the 33d interrogatory is in the affirmative, state the distance that the plaintiff was from the automobile being license number B-37829, N. J., 29, when you first saw said plaintiff? A. Two feet or less from the right running board.

20

No. 35. For how long a time before the accident did you have a free and unobstructed view of the plaintiff? A. None.

No. 36. If there was an obstruction to the view of the plaintiff before the accident, what was the form and locality of said obstruction? A. Bus on my right.

30

No. 37. If there was such an obstruction, how many feet were you from the point of collision when you first saw said obstruction? A. I cannot answer specifically, but I did see the bus before reaching the intersection.

No. 39. Did you apply the brakes to the automobile bearing license number B-37829, N. J., 29, immediately prior to the accident? A. Yes.

40

No. 40. If the answer to the 39th interrogatory is in the affirmative, how many feet did you travel after so applying the brakes? A. Approximately thirty feet.

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No. 41. If the brakes on the automobile bearing license number B-37829, N. J., 29, were applied before the accident, how far were you from the point of collision when such application of brakes was made? A. About two and a half feet.

The Court: I will assume that you have now renewed your motion for a non-suit on the ground of contributory negligence. 10

Mr. Coult: I said it was an irresistible conclusion on the whole case. It seems to me it is stronger with these answers than it was before.

(Argument.)

The Court: The motion is denied.

Mr. Coult: Your Honor, may I have a three-minute recess to determine whether or not I will put in any defense? 20

The Court: All right.

(Recess.)

(After recess.)

Mr. Coult: I rest.

I now move for a direction of a verdict on the same ground, and I would like to be heard a little bit further.

Since these interrogatories have gone in you have a little more information as to how this accident happened. This is the plaintiff's proof now. While he is not bound by it, he is bound by those portions of it which were read, so you have this situation: This young lady was two feet or less from the right running board; two feet or less from the right running board of the car when she first came into view from behind the bus. Now, she says that she was looking to her left at the instant when the accident occurred, and at the same 30 40

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time she was just putting her foot out to take a step. I do not see how those two items of proof can possibly be reconciled in any other way than to conclude the front of this car was past this lady when she walked into it. If this car was any distance away and the driver had an opportunity to observe this lady and she was on the crosswalk and she came out and took a look and went over we would have a different situation altogether. Taking her testimony, together with what has been offered here by the plaintiff in this case, and the interrogatories, you have the clearest picture in the world of the plaintiff walking into the side of an automobile which had already traveled past her. It seems to me that is a physical fact that cannot be overcome in this case, and if that is so that must be contributory negligence, your Honor, it cannot be anything else. There is no rhyme, reason or explanation for it. The point I make is settled by the photographs. The distances are settled by the interrogatories. What the girl did is settled by her own testimony. You have these three things together: She didn't see this car; she didn't, in fact, know what hit her; and she didn't see it until after it was too late and the accident occurred. You have the distances in these interrogatories, as well as the speed. He was going twenty to twenty-five miles and hour, and she was a foot and a half from the running board. I cannot see how the minds of reasonable men could differ as to the legal conclusions to draw from those items of evidence.

Now, under those circumstances, I shall urge again, and urge seriously, your Honor to direct a verdict in favor of the defendant in this case. This is how the accident happened. There is no

Motion for Non-suit.

doubt about it. There is no sense in our putting in proof in substantiation of our defense if it has been proved here by the plaintiff. We say this lady walked into the rear right running board of this car, and that is what she did. It seems to me if there ever was a cause to justify the Court in directing a verdict, this is it. I respectfully move your Honor to make this direction. 10

The Court: While in ruling before I had in mind that the jury could not do anything else, I think the Court must naturally take the responsibility in a case like this upon itself. I cannot see how men with reasonable minds would hold this girl free from contributory negligence. All the evidence shows that she walked into the car. She herself also virtually admits it, because at the time she took the step forward the car was there. I, of course, realize that at the crossing the girl probably had the right-of-way, but as was rightfully held in the case of *Bora v. Yellow Cab*, 103 N. J. L., at 377, that did not absolve her of all care for her own safety. While it may be the defendant here was negligent, certainly it would tend to show that this young woman was guilty of contributory negligence, so I will direct a non-suit. 20

Mr. Coult: Non-suit? 30

The Court: Yes.

Mr. Klausner: May I have an exception?

The Court: Yes.

New Jersey Court of Errors and Appeals

FLORENCE BRANIGAN,
Plaintiff-Appellant,

vs.

ARTHUR W. DEMAREST,
Defendant-Respondent.

Action at Law.
On Plaintiff's
Appeal from
New Jersey
Supreme Court,
Hudson Circuit.

BRIEF FOR PLAINTIFF-APPELLANT.

Statement of Facts.

This action was instituted to recover for injuries and losses to the plaintiff by reason of the negligent operation by the defendant of his automobile on April 17, 1929. It was tried before Judge Henry E. Ackerson, Jr., with a jury, on May 5, 1931.

Plaintiff's version of the accident was as follows:

On April 17, 1929, Florence Branigan, the plaintiff, was a passenger in a bus traveling in a northerly direction along Belgrove Drive, Kearny, N. J. The bus stopped at the intersection of Belgrove Drive with Wilkinson Terrace to discharge passengers. Miss Branigan, one of the first off the bus, looked back and saw other passengers alighting after her (State of Case, p. 14, l. 18). She then proceeded to cross the street in front of the bus, looking first right (north), then left (south), and had just reached the westerly side of the bus (State of Case, p. 15, l. 18), but

had not passed it (State of Case, p. 15, l. 18; p. 24, ll. 1-10), when she was hit by a car owned and driven by the defendant. She was thrown forward and to the east, so that she lay in a diagonal position, head toward the curb, feet toward the bus, no part of her body west of the bus (State of Case, p. 29, l. 15 to p. 30, l. 20). She sustained severe injuries, for which this suit was brought.

There was evidence that the defendant, traveling very close to the bus when passing it (State of Case, p. 23, l. 13), gave no warning of his approach and was traveling at an excessive rate of speed (see *infra*).

At the end of plaintiff's case, defendant moved for a non-suit. This was denied and no exception taken (State of Case, p. 49, ll. 18-19). Counsel then rested, and without placing defendant or any other witness on the stand moved for a direction of verdict in his favor. The Court directed a non-suit, to which exception was properly taken (State of Case, p. 51, l. 32), resting its decision upon the ground that the plaintiff's evidence showed her guilty of contributory negligence.

From the judgment entered thereon plaintiff appeals.

It may be that the above procedure in granting a non-suit after a prior refusal and in response to a request to direct a verdict is in itself reversible error. Plaintiff-appellant prefers, however, to rely upon the substance of the error done her, *i. e.*, failure to submit the case to the jury when under the evidence and the authorities a clear jury question as to negligence and contributory negligence was presented.

ARGUMENT.

POINT I.

The Trial Court erred in directing a non-suit and in not submitting the case to the jury.

A.

Negligence of the Defendant.

There was clear evidence of the negligence of the defendant. This was recognized by the Trial Court (State of Case, p. 51, l. 25).

This accident happened at a crosswalk (State of Case, p. 23, l. 26) in a residential district where houses are less than 100 feet apart (State of Case, p. 24, ll. 23 to 32) with no traffic light or police officer, where the plaintiff, as a pedestrian, had the right of way. Further, the defendant gave no signal or warning of his approach (State of Case, p. 27, l. 18; p. 40, l. 30; p. 47, Interrogatory #30). At the time of the accident, the defendant was passing a bus from which plaintiff had alighted.

It was testified that the defendant passed like "a flash" (State of Case, p. 36, l. 5), and did not stop until his car was two blocks away (State of Case, p. 38, ll. 8 to 25). His own admission by interrogatories shows a speed of from twenty to twenty-five miles per hour, and that he traveled thirty feet after applying brakes (State of Case, p. 48, Interrogatories Nos. 32, 39 and 40).

The statute applicable to the circumstances at the time of the accident provides as follows:

"ARTICLE IX.

Speed and Speeds.

"1. Any person who shall drive any vehicle upon a highway, carelessly and heedlessly, in

willful or wanton disregard of the rights or safety of others, or without due caution and circumspection, and at a speed or in a manner so as to endanger, or to be likely to endanger, any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in section two of this article.

“4. Subject to the provisions of section one of this article, and except in those instances where a lower speed is specified in this act, it shall be *prima facie* lawful for the driver of the vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe, it shall not be lawful. . . .

“(b) Fifteen miles an hour when approaching within fifty feet, and in traversing, an intersection of highways, when the driver's view is obstructed. A driver's view shall be deemed to be obstructed when, at any time during the last fifty feet of his approach to such intersection, he does not have a clear and uninterrupted view of such intersection, and of traffic upon all of the highways entering such intersection, for a distance of two hundred feet from such intersection.” P. L. 1928, Chapter 281, pp. 736 and 737.

The law is well settled that violation of a regulatory statute, while not in itself negligence, is sufficient evidence of negligence to warrant submission to a jury.

Evers vs. Davis, 86 N. J. L. 196;

Doyon vs. Massoline Motor Car Co., 98 N. J. L. 540;

Diemer vs. Shepard, 140 Atl. 578 (not officially reported).

The defendant was passing a standing bus discharging passengers. Under similar circum-

stances, the cases have held such action by a defendant constituted negligence warranting submission to a jury, and justifying a verdict for a plaintiff so injured.

Heinsmann vs. Kumpf, 9 Misc. Rep. 265; 153 Atl. 370;

Newham vs. Nazzara, 9 N. J. A. R. No. 1, p. 1, Jan. 3, 1931; 152 Atl. 467 (not yet officially reported).

B.

Contributory Negligence of Plaintiff.

The Court directed a non-suit on the ground that the evidence of the plaintiff showed her guilty of contributory negligence.

It is respectfully submitted that she took all the precautions a reasonably prudent person under the circumstances could take; indeed, all the precautions any person could take. She was not guilty of *any* act of contributory negligence. Certainly, the evidence does not show such acts as to bar her recovery as a matter of law.

In dealing with the motion for a non-suit, or to direct a verdict for the defendant, it was the duty of the Trial Court to accept all of the evidence of the plaintiff, resolving all reasonable inferences and doubts in her favor.

Jones vs. Public Service Railway Co., 86 N. J. L., 646, Supreme Court, 1914, Black, J., at page 647:

“It is an elementary principle of law, illustrated in many cases, that a motion for a non-suit or to direct a verdict for the defendant, based upon the insufficiency of the evidence to establish a cause of action, admits the truth of the plaintiff’s evidence and of every

inference of fact which can be legitimately drawn therefrom, but denies the sufficiency in law. *Fox v. Atlantic, &c., Co.*, 84 N. J. L. 726; *Dallas v. Sea Isle City*, *Id.* 679.”

Fox vs. Great Atlantic & Pacific Tea Co., 84 N. J. L. 726, Supreme Court, 1913, Kalisch, J., at page 727:

“A motion for a nonsuit admits the truth of the plaintiff’s evidence, and of every inference of fact that can be legitimately drawn therefrom but denies its sufficiency in law. *Weston Co. vs. Benecke*, 53 Vroom, 445.”

Thornton vs. Cater, 94 N. J. L. 435, C. E. A., 1920, Gummere, C. J.

The situation then is as follows:

The plaintiff descended the bus as the first or second passenger, which bus had stopped at a crosswalk (State of Case, p. 23, l. 26) for that purpose at a street intersection. The houses in that section are less than 100 feet apart (State of Case, p. 24, ll. 23-32). She exercised the following precautions for her own safety:

When she got off the bus, she looked back to see if any one else was getting out. She stopped and saw other people were getting out, then walked in front of the bus to cross the street (State of Case, p. 14, l. 28). She looked right (north), first, and when she got to the side of the bus, she looked left (south). As she looked left, she was hit by the defendant’s automobile (State of Case, p. 15, ll. 10-18).

At the time she was hit, she had not passed the end of the bus. This was established clearly by her testimony in response to questions on direct examination, by the Court, and upon cross-examination.

On direct examination:

“Q. You say at the same instant you looked you got hit. Where were you at that time?

A. I was just at the end of the bus, just about to step.

Q. When you say at the end of the bus what end do you mean? A. Well, the end towards the middle of the street.

Q. The end towards the middle of the street? A. Yes, sir.

Q. Do you mean that would be the left side of the bus looking north? A. Yes, sir” (State of Case, p. 15, ll. 18-27).

On cross-examination:

“Q. Where was the car when you saw it?

A. Right at the edge. As soon as I went to step from the end of the bus, then the car hit me. I just saw it and that’s all” (State of Case, p. 22, l. 22).

By the Court:

“Q. Now, when you got out to a point right even with the left-hand side of this bus, had you looked up until that point to see whether there was any traffic on the street? A. Yes, sir. First I looked right and then I looked left.

Q. Where were you when you looked left?

A. When I looked left I was just at the end of the bus.

Q. Beyond the bus? A. No; I was just about to take the last step—I mean the first step past the bus when I looked, and at the same instant the car was there.

Q. This car didn’t hit the bus, did it? A. No, but it was very close.

Q. How far was it away from the bus? A. I guess about a foot. It was very close.

Q. Well, had you gone beyond the front of the bus before you looked? A. No, sir.

Q. Where was the car when you saw it? A. It was—I don’t know. It just came with the same instant I saw it, then it happened.

Q. You can't tell us how far it was away?
 A. Well, just as soon as I went to walk in front of the bus—I mean the end of the bus—I got hit” (State of Case, p. 23, l. 35 to p. 24, l. 22).

This is also substantiated by the testimony of Mr. Wallace, the bus driver, who testified on direct examination as follows:

“Q. Did you actually see her hit? A. No, sir.

Q. Did you see her after she was hit? A. Just a fraction of a second. I saw her falling.

Q. And when she was falling, about where was she with reference to your bus? A. She was right directly in the path of my bus” (State of Case, p. 35, l. 35 to p. 36, l. 5).

“Q. Did I understand you to say you saw her falling? A. Yes, sir.

* * * * *

Q. And as she was falling, with reference to the left side of the bus, where was she? A. She was directly in front of the bus, all of her” (State of Case, p. 36, l. 30).

And on cross-examination as follows:

“Q. You say you saw her get down and walk in front of your bus? A. Yes, sir.

Q. How far did you see her get? How far did you follow her with your eyes? A. Well, just a short distance.

Q. How far did she go? A. She had not cleared the side of the bus yet.

Q. You saw her get to a point as far as the side of the bus? A. She was directly in front of me when I took my eyes off her.

Q. How far had she gone towards the end of your bus when you last saw her? A. I should say about six feet.

Q. Just had three feet to clear the bus when you last saw her? A. Yes, sir.

Q. You don't know what she did after that, do you? A. No, sir.

Q. And the next you saw of her she was falling? A. Yes" (State of Case, p. 39, l. 30 to p. 40, l. 12).

The position of her body immediately after the accident (lying diagonally, her feet about 3 feet east of the westerly side of the bus, head toward the curb, entire body within the bus boundaries) further corroborates the above statements to the effect that she had not yet passed the left end of the parked bus when she was hit.

Testimony of Mr. Wallace:

"Q. When you got out, did you see where she was? A. Yes.

Q. Let us assume this is your bus; this is the front of the bus, and this is Miss Branigan, and this is her head, and this is her legs; will you just put the pencil down how she was lying when you got out and saw her in front of your bus? Where were her feet with reference to the left side of your bus? A. They were within the bus boundaries, pointed slightly towards the bus.

Q. Say this is the left side of the bus; were they to the right or left of the left side of the bus? A. They were to the right.

Q. About how far to the right of the left side of the bus were they? A. Well, about three foot.

Q. About how wide is your bus? A. I should say nine foot wide.

Q. How long is your bus? A. I can't tell how long it was. I don't know.

Q. You don't know about how long? A. No.

Q. Is it a regulation bus? A. It is a regular Public Service bus.

Q. With reference to her head, where was her head facing? A. Her head was facing the curb" (State of Case, p. 37, l. 9 to l. 31).

Testimony of Mr. Wood:

"Q. Now, when you got off the bus, had Miss Branigan moved at all? A. No; she was

laying still when I saw her. The next I saw of her she was laying in the street still.

Q. Where was her head? A. Why, as I remember, it was pointing north.

Q. Directly north? A. Well, I wouldn't say. I couldn't exactly say directly north. It seemed to me she was laying diagonally across. Her feet was towards the middle of the street.

Q. The feet went towards the middle of the street and the head went in a northerly direction? A. Yes, sir.

Q. In a diagonal position? A. Yes.

Q. With reference to the bus where were her feet and head? A. Well, she was laying—the bus was pointing this way; she was laying that way. Near the center as I can remember of the bus.

Q. The entire part of her body in front of the bus? A. Yes.

The Court: Well, with reference to how far in the street she got, where was she?

The Witness: You mean ahead of the bus?

The Court: Well, she was starting to cross the street. How near to the center lay her body?

The Witness: To the center of the bus?

The Court: Of the street?

The Witness: Oh, well, she wouldn't be over five or six feet from the curb.

The Court: From the curb?

The Witness: Yes, sir.

The Court: Was she anywheres near the center of the street?

The Witness: No, no.

The Court: Five or six feet from the curb?

The Witness: I would say that, as near as I can remember.

The Court: That would be how far, if at all, to the side of the bus?

Mr. Klausner: The left side, your Honor.

The Court: Yes.

The Witness: How near her body was to the side of the bus?

The Court: Yes, the left.

Mr. Klausner: That's right, your Honor.

The Witness: Her legs would be pointing west.

Q. But from the left side of the bus where were her legs? A. Just in that position (indicating). This is the bus going north on Belgrove Drive.

The Court: Her feet were nearer to the bus than her head was?

The Witness: Well, she was laying directly in front of the bus, and her feet I should say would be nearer the left side of the bus and her head pointing in to the curb.

The Court: Her head pointing in to the curb?

The Witness: Pointing to the curb. That would be the east side.

The Court: To have her feet near the bus and have her head facing east—was her body ahead of the bus?

The Witness: Oh, yes.

The Court: It was not out beyond the left side of the bus at all?

The Witness: No; it was right in front of it.

The Court: As she lay there her head was nearer to the curb than her feet were?

The Witness: Yes.

The Court: Did her feet protrude out beyond the bus?

The Witness: Towards the center of the street.

The Court: Beyond the bus, the side of the bus?

The Witness: Well, it was not—they were not beyond the bus; they were inside of the bus, the side of the bus.

The Court: Considering the left side of the bus as extended right up the street, were her feet or any part of her feet to the west of the left side of the bus?

The Witness: No.

The Court: So she was right in front of the bus?

The Witness: Right in front of the bus''
(State of Case, p. 27, l. 35 to p. 30, l. 19).

The evidence therefore shows Miss Branigan in the act of crossing a public highway at an intersection and on the crosswalk. She proceeded slowly, had looked first right and then left, and was still within the front boundaries of the bus from which she had alighted, when the defendant's car hit her. *There was nothing she could have done to avoid the accident, no other precaution any reasonably prudent person would take which she neglected.*

Considerable stress was laid by counsel in moving for a non-suit and for a direction of verdict upon the fact that the point of contact was the rear fender. Counsel also assumes further, and the Court follows, that Miss Branigan walked into the car, and therefore adjudges her guilty of contributory negligence for that reason.

This conclusion ignores completely the testimony above indicated that the plaintiff had not passed the left side of the bus when she was hit.

It is far more probable (and must be taken into serious consideration since all reasonable inferences are to be resolved in favor of the plaintiff) that the defendant's car swerved in front of the bus immediately prior to the moment of contact. There is not one scintilla of evidence on the part of the defendant negating such a conclusion, particularly in view of the failure of the defendant to take the stand and give us the benefit of his testimony.

The decision of the Court as shown by its statement in granting the non-suit ("I cannot see how men with reasonable minds would hold this girl free from contributory negligence. All the evidence shows that she walked into the car. She, herself, virtually admits it, because at the time

she took the step forward, the car was there . . .”) (State of Case, p. 51, l. 15) expresses a lack of belief in the testimony of the plaintiff and two witnesses, Mr. Wallace and Mr. Wood, and a personal belief on the part of the Court in the contributory negligence of the plaintiff.

It is, of course, elementary that the credibility of witnesses is a matter entirely within the jurisdiction of the jury under proper instructions. It makes no difference legally what the Court's opinion is in regard thereto or to contributory negligence.

The law as laid down by the Court of Errors and Appeals in *Pesin vs. Jugovich*, 85 N. J. L. 256, is:

“Where fair-minded men might honestly differ as to whether the conduct of the plaintiff was such as an ordinarily prudent person would have pursued under the conditions existing at the time he was called upon to act, it cannot be said as a matter of law that he was guilty of contributory negligence.”

The test is not what opinion the Judge may draw, but what opinion the jury could draw from the evidence. To justify a non-suit upon the ground of contributory negligence, the contributory negligence must so conclusively appear as to leave no room for an honest difference on that topic.

Thus in *Brewster vs. New York Cent. & H. R. R. Co., et al.*, 80 N. J. Law 447, the Court said, at page 451:

“ . . . to justify such non-suit the contributory negligence of the plaintiff must clearly appear, conclusively as a fact, or by necessary exclusive inference from the plaintiff's evidence, and where the evidence, when the plaintiff rests, leaves the question of the plaintiff's contributory negligence in doubt,

the determination of that question must be submitted to the jury."

And in *Schramm vs. Parker*, 72 N. J. L. 243, Court of Errors and Appeals:

"Where there is doubt whether a person is guilty of negligence which contributed to the injury, the question is for the jury."

Jones vs. Public Service Railway Co., 86 N. J. L. 646, Supreme Court, 1914, Black, J., at page 647:

"It is an elementary principle of law, illustrated in many cases, that a motion for a non-suit or to direct a verdict for the defendant, based upon the insufficiency of the evidence to establish a cause of action, admits the truth of the plaintiff's evidence and of every inference of fact which can be legitimately drawn therefrom, but denies the sufficiency in law."

The case of *Borra vs. Yellow Cab Co.*, 103 N. J. L. 379, was cited by the Trial Court as authority for the proposition that the plaintiff is not absolved of all care for her safety when crossing an intersection (State of Case, p. 51, l. 23). As an abstract proposition of law, this is subject to no criticism. In the instant case, it is respectfully submitted, such a statement, and the inferences to be drawn therefrom, is unwarranted in view of the very evident care that the plaintiff did take for her own safety.

It might be noted that in the cited case the Court of Errors and Appeals held that under the facts (which showed violation of the Traffic Act by the defendant and an injury to the plaintiff in crossing at an intersection), the questions of negligence of the defendant and contributory negligence of the plaintiff had been properly left to

the jury, and affirmed a judgment for the plaintiff.

In the following cases, similar situations arose and were passed upon:

Heinsmann vs. Kumpf, 9 Misc. 265; 153
Atl. 370, Supreme Court, Justices
Parker, Campbell and Bodine.

Plaintiff's intestate was a passenger on a public bus proceeding from Camden towards Atlantic City on the White Horse Pike at about six o'clock in the evening of a June day. The bus stopped at or near the corner of a cross street known as Linden Avenue for the purpose of letting off some passengers, of whom the deceased was one. As the bus was standing there, and apparently after most of the passengers had alighted who desired to do so, the defendant, driving his own car, came up behind and endeavored to pass the bus while it was at a standstill. Defendant admitted that he approached the bus at about 35 miles an hour, but claims he took his feet off the accelerator and his car slowed down to 20 miles or something less, and that he did not apply his brakes until he was even with the front of the bus, and saw the deceased directly in front of him only a foot or two away in the act of crossing the road, and as the defendant claims running. At this point, he applied his brakes for the first time.

The Court refused to set aside a verdict in favor of the plaintiff as against the weight of evidence, saying, at page 266:

"In this situation, it seems reasonably clear to us that the jury were entitled to find negligence on the part of the defendant in undertaking to pass, at a speed of twenty miles an hour, a standing bus from which pas-

sengers had just alighted, in view of the fact that one or more of those passengers would be likely to cross the street and, as often happens, in front of the bus instead of waiting for it to go by. We consider that the jury might well say that it was the duty of the defendant, in the exercise of proper care, to anticipate such an occurrence and to provide for it. As to the contributory negligence of the deceased, that, in our estimation, was also a jury question; and apparently this court seems to have considered it unnecessary to deal with it on the previous rule. Contributory negligence is a matter of defense and the burden of proving it is on the defendant."

Note in this case the facts that—

(a) apparently most of the passengers had alighted who desired to do so.

(b) The deceased was *running* across the street.

(c) The defendant did not see the deceased until the latter was "directly in front of him, only a foot or two away in the act of crossing the road."

It is respectfully submitted that on the remaining facts the cited case is precisely in point with the instant case, and that on the differences noted, the cited case is weaker than the instant case.

Newham vs. Nazzara, 9 N. J. A. R. No. 1, p. 1, Jan. 3, 1931; 152 Atl. 467 (not yet officially reported), Supreme Court, Trenchard, J.

Here, also, plaintiff had alighted from a bus stopped at a street intersection to discharge passengers. Note also that in this case the plaintiff had proceeded in front of the bus and had seen

the defendant's on-coming car. Standing in the roadway, he was hit. The Supreme Court reversed a judgment of non-suit, saying at page 2:

"In such posture of the proofs the jury would have been justified in finding that the accident was the result of negligence upon the part of the driver of the defendant's automobile. The law imposed upon him the duty of using due care to observe whether or not people were crossing at this crosswalk at the street intersection, and to use due care to have his car under such control as not to jeopardize the safety of pedestrians who were using due care in crossing after having alighted from a bus then unloading at such crosswalk. We so held in effect in *Huenegarth v. Kroner*, 1 N. J. Misc. 113. See, also, *Tischler v. Steinholtz*, 99 N. J. Law, 149.

* * * * *

"Considering all of the evidence we think that reasonable men might well have differed upon the question of contributory negligence and therefore that question should have been submitted to the jury.

"The plaintiff had a right to assume that the driver of the defendants' automobile would exercise proper caution in approaching the street crossing. *Clarkson v. Levy*, 8 N. J. Adv. R. 95; *Venghis v. Nathanson*, 101 N. J. L. 110; *Tischler v. Steinholtz*, *supra* . . ."

Klein vs. Kobrin, et al., 2 N. J. Misc. 1147, Supreme Court, 1924, Chief Justice Gummere, and Justices Parker and Katzenbach.

Here there was evidence that the plaintiff was not crossing the street at the crosswalk, but stepped out into the street between two parked automobiles in the middle of the block and attempted to cross the street without looking in either direction, just as the defendant's car was passing this point. There was also evidence that

the car was not being driven at excessive speed. As against this, there was evidence that the plaintiff came out of a store and walked to the crosswalk, and started across the street; when she stepped over the first rail of the track nearest to her, she was struck by the defendant's car. She stated that she had looked up and down the street before leaving the curb and saw nothing coming. There was evidence offered to the effect that the driver did not blow the horn and that the car was traveling at a speed of twenty-five miles per hour. On this evidence, this Court, on appeal, held, that a motion to non-suit at the close of the plaintiff's case, and a motion to direct a verdict for the defendant, at the close of the defendant's case, on the ground of the contributory negligence of the plaintiff, and failure of proof of the defendant's negligence, were properly denied, and the judgment for the plaintiff was affirmed.

42 Corpus Juris, 1149.

"A pedestrian who crosses the street at a public crossing in front of a car stopped to permit him to proceed is not as a matter of law guilty of negligence in failing to see or avoid a motor vehicle which approaches from the rear of the standing automobile and passes around it."

American Dye Works vs. Baker, Court of Errors and Appeals, Kentucky, 276 Southwestern 133; 1925, Hobson, C.

Plaintiff crossed an east to west thoroughfare from the northwest corner to the southwest. She passed behind a street car which had been stopped and then proceeded east to a space of about six feet between where the street car had been and where another automobile was parked at the curb. A truck of the defendant came from the west going east at from 18 to 20 miles per hour without

stopping or giving any signal of his approach or checking his speed in any way. The driver ran through the open space of six feet and struck Miss Baker on the foot crossing without seeing her or knowing he had struck her until the car ran over her.

On appeal, the Court of Appeals affirmed a judgment for the plaintiff.

The Court said in this case:

“By the first instruction, the court also told the jury that if the driver of the defendant’s truck passed the truck standing just behind the street car while it was still standing, then it was his duty when passing that standing truck to have his own car under such control that he could stop it at a moment’s notice. *It may be conceded that it was his duty in passing the standing truck to exercise ordinary care for the safety of persons on the street crossing and to have his car under such control that with the means at his command he could avoid injury to them after his view was unobstructed. That truck obstructed his view until he passed it. When he had passed it going at the rate he was traveling in a moment he would be upon the street crossing. The fact that he struck Miss Baker without even seeing her and that when struck she was on the south side of his truck, shows he struck her in a moment after he passed the other truck or else he would have seen her. . . .*” (Italics ours.)

And also further down:

“It is earnestly insisted that the Court should have told the jury that if Miss Baker came into the path of his car so close in front of it that he could not by the exercise of ordinary care and the use of the means at his command have stopped his car and avoid striking her if he had been running at a reasonable rate of speed, they should find for the defendants. As to street cars, the rule has been thus laid down by this Court:

“Under such circumstances, the street car company cannot run its cars at an unreasonable rate of speed and then claim that they are excused from liability on the ground that the person injured came so suddenly on the track in front of the approaching car that the motorman could not in the exercise of ordinary care prevent the injury. This principle applies only in cases where the car is being operated at reasonable rate of speed.” (Citations).

“There is no reason why a less stringent rule should be applied to automobiles. The instructions of the court properly follow this rule. A truck operated at a dangerous rate of speed is as deadly as a street car similarly operated.” (Italics ours.)

Note also the lack of evidence that the plaintiff looked in any direction before crossing and the positive indication that the driver had no opportunity to see her before she stepped in front of his car.

Webster vs. Motor Parcel Delivery Co.,
1919, 41 Cal. A. 657, 183 Pac. 220, Dist.
Court of Appeal, Richards, J.

In this case, pursuant to a local ordinance and provisions therefor, plaintiff had parked her car in the center of Clay Street, Oakland, California, at about 8 o'clock in the evening of December 1, 1917. Having done so, she walked out from the rear of her machine westerly with the intention of crossing to the westerly side of Clay Street and was immediately and when about three feet from the westerly end of her machine, struck by an automobile of the defendant driven by one of its agents. Note the absence of any indication in the report of this case to the effect that she was crossing at an intersection or cross walk or that she looked before crossing.

The Court affirmed a judgment for the plaintiff holding sufficient indication of negligence of the defendant by "proceeding within $2\frac{1}{2}$ to 3 feet from the rear ends of the automobiles which were parked in the center of the street."

With regard to contributory negligence, the Court made the following illuminating statement and finding:

"The next contention of the appellant is that the evidence established conclusively that the plaintiff was herself guilty of contributory negligence and hence was not entitled to recover and in support of this contention, the appellant insists that the evidence shows that the plaintiff stepped out suddenly from behind her automobile directly in the path of the approaching machine without looking and when it was too near to be stopped in time to avoid a collision. The plaintiff's testimony however in that regard is that after having parked her own machine, she stepped to the back of her car with the intention of looking northerly past the rear end of another car parked next to her or to see what if anything was coming and before essaying to cross the street in a northwesterly direction to the street to which she was going; that *as she was taking the step or two out which she had to take in order to see around the adjoining car*, she was struck down by the defendant's automobile which approached rapidly and without warning. If the trial court accepted this statement as true, we think its finding that the plaintiff was not guilty of contributory negligence would be sufficiently supported thereby." (Italics ours.)

Following this case, it would seem that Miss Branigan would not have been contributorily negligent even if she had taken a step past the end of the bus as she looked to see if a car was coming.

It is elementary that under our practice contributory negligence is an affirmative defense, the burden of proving which rests on the defendant.

Baker vs. Fogg & Hires Co., 95 N. J. L. 230, Supreme Court, 1920, Williams, J., at p. 232:

“Contributory negligence is a matter of defense under our present practice and not a ground for taking the case away from the jury upon the plaintiff’s proofs. . . .”

Further, “negligence and contributory negligence are pre-eminently questions of fact for the jury.” *Dickerson vs. Mutual Grocery Co.*, 100 N. J. L. 118; 124 Atl. 785.

Fox vs. Great Atlantic & Pacific Tea Co., 84 N. J. L. 726, Supreme Court, 1913, Kalisch, J., at p. 728:

“Unless it is established by the evidence beyond fair debate that the plaintiff was negligent and that the negligence directly contributed to the injury complained of, the motion to nonsuit or direct a verdict will be denied.” *Mahnken v. Freeholders of Monmouth*, 33 Vroom, 404; *Bauer v. North Jersey Street Railway Co.*, 45 *Id.* 624; *Napurana v. Young*, *Id.* 627; *Turner v. Hall*, *Id.* 214.

“The rule is well stated in 1 Thomp. Negl., Sec. 1322. The learned author says: ‘Cases of collision on highways almost invariably involve questions of concurrent negligence on the part of both the actors. As the circumstances attending such injuries are within the range of everyday observation and experience, the question of contributory negligence, in those cases is in a peculiar sense a question for a jury, though, of course, within the limits of the principle that there must be evidence reasonably tending to that conclusion, and subject also to the rule, that, in cases where the evidence tends only to that conclusion the judge can decide it as a matter of law.’

Schramm vs. Parker, 72 N. J. L. 243, Supreme Court, 1905, Fort, J.:

“Where there is doubt whether a person is guilty of negligence which contributed to his injury, the question is for the jury.”

Brewster vs. N. Y. Central R. R. Co., 80 N. J. L. 447, Supreme Court, 1910, Vredenburgh, J., at p. 451:

“... to justify a nonsuit his contributory negligence must clearly appear, conclusively as a fact, or by necessary exclusive inference from the plaintiff's evidence, and where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff in doubt, the determination of the question must be submitted to the jury. *Pennsylvania Railroad Co. vs. Middleton*, 28 Vroom, 154; *Dan-skin v. Pennsylvania Railroad Co.*, 50 *Id.* 526.”

Conclusion.

Controlled by these decisions and under the evidence of the case, the trial court was under a legal duty to submit the disputed questions of fact, particularly negligence and contributory negligence, to a jury for their determination, regardless of its personal opinion as to the credibility of witnesses or the weight of the testimony. Therefore, we respectfully submit the judgment of non-suit should be reversed with costs.

October, 1931, Term.

KINKEAD AND KLAUSNER,
Attorneys for and of Counsel with
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

FLORENCE BRANIGAN,
Plaintiff-Appellant,

vs.

ARTHUR W. DEMAREST,
Defendant-Respondent.

ON APPEAL
FROM NEW
JERSEY
SUPREME
COURT.

BRIEF FOR DEFENDANT-RESPONDENT.

The above entitled matter was tried in the Hudson Circuit of the New Jersey Supreme Court on May 5th, 1931. At the close of the entire case the trial court ordered a non-suit. It is from this order that this appeal is taken.

The accident from which this action arose occurred on April 17, 1929 near the intersection of Belgrove Drive and Wilkinson Terrace, Kearny, New Jersey. On that date at about 4:45 P. M. the plaintiff having alighted from a northbound bus was attempting to cross in front of the bus from the easterly side of Belgrove Drive to the westerly side of that street, when she came in contact with the right rear fender of the defendant's automobile. The point of impact on the car was not in dispute (S. C., 44, l. 25). At the time of the accident the defendant's car was proceeding in a northerly direction on the easterly side of Belgrove Drive and was either passing the standing northbound bus of which the plaintiff had been a passenger, or had just passed it. Both the auto-

mobile and the plaintiff were in motion at the moment of impact (S. C., 22, l. 35). The plaintiff assigns as error, first, the granting of the motion for a non-suit and second, the refusal of the trial court to submit the issues to the jury. We will treat with both grounds under the caption "Point One."

POINT ONE.

The Court did not err in granting a motion for a non-suit and in refusing to submit the issues to the determination of a jury.

It is elementary that the legal duty resting upon each party to this suit was identical, that is to say, that each owed to himself and to the other the obligation of using such care as a reasonably prudent person would have used under like or similar circumstances.

We agree with the appellant in the statement that any evidence of dereliction of this duty proximately resulting in damage raises a jury question as to negligence or contributory negligence as the case may be. Nor do we question the soundness and accuracy of the appellant's argument that the settled law is that on a motion for non-suit the moving party admits the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom.

However the law is equally well settled that questions of negligence and contributory negligence become questions of law for the determination of the Court when no inferences of negligence on the part of the person sought to be charged therewith may be drawn from the evidence, or when an examination of all of the evi-

dence and of all of the legitimate inferences to be drawn therefrom irresistibly impels the conclusion, upon the certainty of which the minds of reasonable men could not differ, that the person charging negligence was himself guilty of a failure to use reasonable care which proximately caused or contributed to his injuries. It is our contention that the evidence adduced in this case places the case in this category.

Plaintiff testified that the northbound bus having stopped at the southeast corner of the intersection of Wilkinson Terrace and Belgrove Drive, she alighted and walked in front of the vehicle in order to cross to the westerly side of the street (S. C., 14, l. 15). She came to what she called the "end" of the bus, which from all the testimony appears to have been the left side of the bus (S. C., 15, l. 25). At the instant she stepped past the end of the bus she was struck by a northbound automobile (C., 14, l. 35). This was her testimony on her direct examination and clearer exposition of contributory negligence would be difficult to find. The very fact that she was struck the instant that she stepped past the left side of the bus indicates that she either made no effective observation to her left before leaving the place of safety in front of the bus and entering a place of danger in the roadway to the left of the bus, or else that she deliberately walked into the defendant's automobile. In either event there is no inference which may be legitimately drawn from this testimony which would lead one to believe that she made any effort to protect her safety before walking into the travelled part of the highway.

On cross examination she again stated that she walked around in front of the bus (C., 22, l. 8); that she looked to both sides (C., 22, l. 15); that when she looked she saw the defendant's auto-

mobile and at that very instant she was struck. She said she was moving at the time of the collision (C., 22, l. 35) and that the point of impact was just about at the center of the automobile (C., 22, l. 38).

She was then examined by the Court and she stated that when she came to the left side of the bus she looked first to her right and then to her left (C., 23, l. 38); that as she was about to take the first step past the side of the bus she saw the defendant's car, that the defendant's car was about one foot to the left of the bus; that she saw the defendant's car simultaneously with the collision. The clearest picture of the accident may be obtained from a portion of the testimony which she gave in reply to the interrogation of the trial judge.

“Q. Well, do you know how it was from the facts of the case that you were struck by this car if, as you say, you looked when you came to the left end of this bus and were struck almost immediately, if you had not gone beyond the bus? A. Well——

Q. The automobile didn't hit the bus? A. Well, just as I stepped, it must have been my knee, because my knee was hurt a bit, too, then.

Q. Do you mean you stepped out before you looked? A. While I was looking. This is the end of the bus (indicating). I didn't expect any car to be on top of the bus. It was right close to it” (C., 25, ll. 15-30).

In the light of the cross examination and the interrogation by the trial judge, it seems clear that no inferences may be drawn from the plaintiff's testimony which are not unfavorable to her. On the contrary, the only deductions which can be made is that she walked past the side of the bus without making an effective observation before so

doing; that when she did make an observation she had already placed herself in such a position that an accident could not have been avoided.

She called as a witness in her behalf, one Basil Woods (C., 25, l. 32). This witness had been a passenger upon the bus from which Miss Branigan alighted and had been talking to her at the front of the bus just before they reached Wilkinson Terrace. He stated that the plaintiff got off the bus at Wilkinson Terrace and Belgrove Drive. The next time he saw her was when she was lying in the street directly in front of the bus (C., 27, l. 15). He did not see the defendant's car before the accident (C., 27, l. 25).

James Wallace was called as a witness by the plaintiff. He testified that he was the bus driver in charge of the bus upon which the plaintiff had been a passenger (C., 33, l. 32). He stated that after the bus came to a stop, Miss Branigan got off and walked in front of the bus (C., 35, l. 1). He did not see her at the time she was struck, but he said that immediately before she was struck she was just past the west side of the bus (C., 35, l. 30). The plaintiff called no other witnesses. It will be readily seen from examination of the testimony of witnesses Wallace and Woods that they gave no evidence to show negligence on the part of the defendant, nor did they offer any testimony which indicated that Miss Branigan took any more care than she herself testified to. The only other evidence in the plaintiff's case which went to the question of negligence, was the answers to interrogatories which had been furnished by the defendant. We print these questions and answers at length (S. C., 47, ll. 25 to 49; L. 10).

- No. 20. On what date within one month prior to April 27, 1929, were the brakes on said automobile last inspected? A. March 27, 1929.

- No. 26. Were the brakes on the automobile bearing license number B-37829 N. J. 29 in good working order immediately prior to the accident on April 17, 1929? A. Yes.
- No. 30. Did you warn the plaintiff of your approach immediately prior to the accident? A. No.
- No. 31. If the answer to the 30th interrogatory is in the affirmative, what warning did you give? (By Mr. Coult: It is not in the affirmative, it is "no").
- No. 32. At what speed were you driving the automobile bearing license number B-37829, N. J. 29 immediately prior to the accident and at the time of the accident? A. I did not look at the speedometer, but in my opinion I was travelling between twenty and twenty-five miles an hour.
- No. 33. Did you see the plaintiff before the accident? A. I had a fleeting glimpse of someone a second immediately prior to the accident.
- No. 34. If the answer to the 33d interrogatory is in the affirmative, state the distance that the plaintiff was from the automobile being license number, B-37829, N. J. 29, when you first saw said plaintiff? A. Two feet or less from the right running board.
- No. 35. For how long a time before the accident did you have a free and unobstructed view of the plaintiff? A. None.
- No. 36. If there was an obstruction to the view of the plaintiff before the accident, what was the form and locality of said obstruction? A. Bus on my right.

- No. 37. If there was such an obstruction, how many feet were you from the point of collision when you first saw said obstruction? A. I cannot answer specifically, but I did see the bus before reaching the intersection.
- No. 39. Did you apply the brakes to the automobile bearing license number B-37829, N. J. 29 immediately prior to the accident? A. Yes.
- No. 40. If the answer to the 39th interrogatory is in the affirmative, how many feet did you travel after so applying the brakes? A. Approximately thirty feet.
- No. 41. If the brakes on the automobile bearing license number B-37829, N. J. 29 were applied before the accident, how far were you from the point of collision when such application of brakes was made? A. About two and a half feet.

The gist of these answers to interrogatories is that the defendant was travelling at a speed of between twenty and twenty-five miles an hour; that he had a fleeting glimpse of the plaintiff a second before the accident occurred and that at that time she was two feet or less from his right running board. If it may be inferred from these interrogatories that the defendant was negligent, there is certainly nothing in the answers to indicate that such negligence proximately caused the plaintiff's injuries. Assuming however, for the purpose of this argument, that some inference of negligence proximately causing the injury complained of may have been drawn from these interrogatories, there was no inference to be drawn from them which was at variance with the infer-

ences of contributory negligence which affirmatively appeared in the plaintiff's case.

In support of the argument that the plaintiff was not guilty of contributory negligence as a matter of law and that the question of contributory negligence should have been submitted to the jury, plaintiff cites the cases of *Heinzman vs. Kumpf*, 9 Misc. 265; 153 Atl. 370, and *Newham vs. Nazarro*, 9 N. J. A. R. #1, page 1, January 3, 1931; 152 Atl. 467 (not yet officially reported).

In the *Heinzman* case there is no suggestion as to how far the plaintiff was from the front of the defendant's automobile when she first came into the path of the car. However it is stated in the decision that the front of the defendant's automobile collided with the plaintiff. This of course presents an entirely different situation from that which is present in the case at bar. In the present case the plaintiff was at no time in front of the defendant's car. Further than that, in view of the stipulation that the point of contact on the defendant's car was at the right rear, it is apparent that when the plaintiff first reached the place in the street where she was struck, all but the rear of the defendant's car had already passed.

In the *Newham* case there was evidence from which the jury might have inferred that before passing the front of the standing bus the plaintiff observed the defendant's car fifty feet distant; that the plaintiff proceeded to cross the street and reached the middle of the street; that when he had reached the middle of the street he observed that the driver did not intend to stop his car. The plaintiff then stopped walking and was struck while standing still.

In the present case the plaintiff was struck when she was not more than a foot past the side of the

standing bus, while in the *Newham* case the plaintiff had reached the middle of the street and had thus established his position in the street. In the present case the plaintiff walked directly into the right rear of the defendant's car, whereas in the *Newham* case the plaintiff while standing still was run into by the front of the defendant's car. It was eminently just that a judgment of non-suit in the *Newham* case should have been reversed, for in that case the minds of reasonable men would certainly have differed on the question of contributory negligence. In the case at bar, however, there is nothing in the plaintiff's conduct to commend it as that of a reasonably prudent person, and that being true, there is no conclusion to be arrived at by the minds of reasonable men other than she was guilty of contributory negligence.

There is some suggestion in the plaintiff's brief that an inference may be drawn that the defendant's automobile swerved in front of the bus immediately prior to the moment of contact and struck the plaintiff before she had reached the left side of the bus. There was no testimony from which an inference may be legitimately drawn which would support this theory. It is true that plaintiff said that just as she reached the side of the bus she looked to her right and looked to her left and while she was about to take the next step forward she was struck. It must be borne in mind however that she said that at the time she was struck she was moving and that when she said that she was about to take the next step, the only inference to be drawn is that she was in the act of taking the next step. This is perhaps most clearly shown in the interrogation by the Court, where in reply to the Court's question of whether or not she meant that she stepped out before she looked, her reply was that she stepped out while

she was looking (C., 25, l. 25). The suggestion in the brief therefore, that the plaintiff was standing still and that the defendant's car swerved in front of the bus and struck her while she was standing still, is not based upon the plaintiff's testimony nor upon any inferences which may be properly drawn from the plaintiff's testimony.

We submit that the case is precisely in point with the New Jersey case of *Conrad vs. Green*, 94 Atl. 390 (not reported in the New Jersey State reports). In that case the plaintiff while crossing from the north side of the street to the south side, passed in front of a standing westbound trolley car. His vision of west bound vehicles was cut off by the trolley car. As he passed the left side of the trolley car he was hit by the defendant's automobile which was proceeding in a westerly direction and which had come up behind the trolley car. On this state of facts the plaintiff was non-suited, from which non-suit an appeal was taken.

The Court affirming the court below held:

"The elemental rule of care required that the plaintiff should make some observation that would be reasonably effective for his own safety. The only observation he made was one that conclusively showed him that no effective observation could be made by reason of the standing car. If in this condition of affairs he walked directly in front of this obstruction to his vision, he took no care at all of the sort that the law requires. A delay of a fraction of a minute or a slight detour to the west in passing in front of the standing car would have offered some opportunity for an effective observation as to possible danger from the only source from which it might be apprehended. The course pursued by the plaintiff afforded him no opportunity to make any observation of the sort that, as a reasonably prudent man, he was required to make."

If there be a distinction between the present case and the *Conrad* case, it is difficult to see wherein the distinction lies. The plaintiff in our case was presented with precisely the same conditions as those which were present in the *Conrad* case. Just as in the *Conrad* case, she made no effective observation before leaving the front of the standing vehicle. Having undertaken to continue past the front of the bus when she was unable to make an effective observation, and having proceeded no further than a step past the side of the bus when the accident occurred, she was certainly guilty of negligence without which the accident would not have happened.

We therefore contend that the judgment should be affirmed.

Respectfully submitted,

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