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Notice of Appeal.

(Filed Dec. 18, 1918.)

District Court

OF THE

Second Judicial District

OF THE COUNTY OF HUDSON.

HARRY SETTEL,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY, a Corporation,
Defendant.

In Tort.

To

BENJAMIN WILLIAM MILLER,
Attorney of Plaintiff.

SIR:

TAKE NOTICE, that the defendant appeals to the New Jersey Supreme Court from the determinations and directions of the District Court of the Second Judicial District of the County of Hudson in the trial of the above entitled cause, which trial resulted in a judgment of non-suit against the plaintiff on the sixth day of December, Nineteen Hundred and Eighteen.

Dated, December 13, 1918.

GEORGE H. BLAKE,
Attorney of Defendant.

ENDORSED—"Service acknowledged December 14, 1918. Benj. Wm. Miller, Attorney of Plaintiff."

State of Demand.

(Filed October 7th, 1918.)

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

HARRY SETTEL,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY CO.
Defendant.

In Tort.

Plaintiff residing at 617 Hunterdon Street, Newark, New Jersey, says:

1. That on or about the 17th day of September, Nineteen Hundred and Eighteen, the defendant operated on Clinton Ave., Newark, New Jersey, trolley cars and was bound to operate them in prudent and safe manner.

2. The plaintiff, at the time aforesaid, by his servant, was carefully operating an automobile along said Avenue.

3. The defendant's agent disregarding his duty, as aforesaid, negligently and carelessly propelled one of the said trolley cars in such a negligent manner and with such speed as to collide with automobile of plaintiff, thereby damaging plaintiff's automobile.

4. Plaintiff was compelled to expend diverse sums of money for the repairs of said car.

Plaintiff demands as damages the sum of five hundred dollars ($500.).

BENJ. WM. MILLER,
Attorney for Plaintiff.

Transcript of Clerk's Docket.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF HUDSON CO.

HARRY SETTEL, *Plaintiff,* vs. PUBLIC SERVICE RAILWAY CO. *Defendant.*	In Tort.	10

BENJ. WM. MILLER,
Plaintiff's Attorney.

	Plaintiff's Costs	Defendant's Costs
Summons	2.10	
Mileage	.60	
Listing Fee	1.50	
Attorney's Fee		
Total Costs		
Execution		
Statement		
Bond		1.00

A summons in the above stated cause was issued on the seventh (7) day of October, 1918, returnable on the fourteenth (14) day of October, 1918, wherein the plaintiff demands of the defendant the sum of Five Hundred Dollars.

The plaintiff filed State of Demand October 7th, 1918.

The summons was served and returned as follows:

Transcript of Clerk's Docket.

I served the within summons October 7th, 1918, on Robert Ramsey, in charge of the office of the defendant company at Jersey City, N. J., by reading the same to him and delivering to him a copy thereof.

JOSEPH C. CAPRIO,
Sergeant-at-Arms.

October 14th, 1918.

This case was adjourned various times to December 6th, 1918.

December 6th, 1918.

The plaintiff and the defendant appearing, the cause was tried at this time.

Hattie Allen sworn as stenographer.

Harry Settel, Charles Schafstein, J. Randell Van Orten, Harry Cutler, and Abraham Hardman were sworn for the plaintiff.

James H. Donaldson, Mrs. Charles Klutz, Edward Foley, and Albert Gardner were sworn for the defendant.

The evidence being closed the Court rendered judgment of Non Suit, whereupon a judgment of Non Suit is entered December 18th, 1918.

Notice of Appeal and Bond approved by Judge, filed.

GEORGE H. BLAKE,
Defendant's Attorney.

A True Copy.
JAMES A. KELLY, [L. S.]
Clerk.

State of the Case for Appeal.

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE COUNTY OF HUDSON.

HARRY SETTEL, *Plaintiff,* vs. PUBLIC SERVICE RAILWAY COMPANY, a Corporation, *Defendant.*	In Tort.

December 6, 1918.

Before His Honor ARTHUR B. ARCHIBOLD.
Mr. Benj. Miller for Plaintiff.
Mr. Edwin C. Caffrey for Defendant.

Transcript of testimony taken at the trial of the above entitled cause on the sixth day of December, Nineteen Hundred and Eighteen, before his Honor Arthur B. Archibold, Judge of the said Second Judicial Court of the County of Hudson, such testimony having been taken by a stenographer, designated by the Judge of the said Court to transcribe the proceedings of the trial in the said action, and take down the testimony therein:

The Plaintiff opened his case.

The following witnesses were sworn and testified for the plaintiff: Harry Settel, Charles Sharfstein, Abraham Hardman, J. Randolph Van Orden and Harry Smith.

The testimony of the foregoing witnesses is omitted from the record as not pertinent to the subject matter on appeal.

The case of the plaintiff was closed, and the defendant, at the close of the plaintiff's case, moved for a non-suit. This motion was refused by the Court, and the defendant took an exception.

The defendant opened its case.

The following witnesses were sworn and testified for the defendant: William H. Donaldson, Mrs. Charles Klotz, Edward J. Foley and Albert Gardner.

The testimony of the foregoing witnesses is omitted from the record as not pertinent to the subject matter on appeal.

The defendant closed its case.

DECISION.

THE COURT: Sitting as a jury I must exercise the functions of a jury, and the same rule of law applies to me as would be applied to a jury, so I must find, if I find at all, that I am satisfied by a fair preponderance of evidence that the defendant was negligent. There are conflicting statements before me in the plaintiff's case and the defendant's case, and I must find according to that evidence. The question that arises, is the act of the plaintiff in crossing the trolley track, the act of a responsible, cautious, prudent man; I, sitting as a jury, must pass upon that, or was he not guilty of contributory negligence doing what he did. Now, we have the testimony of Mrs. Charles E. Klotz, who was absolutely disinterested. She says whether rightly or wrongfully that the automobile was crossing the street very slowly, and she says that the owner or driver of the automobile was crossing Clinton Avenue at Badger, directly across. All of the other testi-

mony with the exception of the testimony of the plaintiff and his chauffeur, is to the effect that he came out of Badger Avenue and started to turn into the trolley track. Now, this is the evidence I have before me and this is the evidence I am called upon to weigh, and I must say from the evidence presented here to me, that I am not satisfied by a fair preponderance of evidence of the negligence of the defendant. In view of that fact I am going to enter a non-suit in this case on the groud that the plaintiff was guilty of contributory negligence.

MR. CAFFREY: I move for judgment for defendant.

THE COURT: No, I will grant a non-suit on the ground of contributory negligence.

Mr. Caffrey prays an exception to the refusal of the Court to grant judgment for defendant.

Exception allowed.

I DO HEREBY CERTIFY the foregoing transcript as the state of the case for appeal in the above stated cause.

Dated, December 18, 1918.

ARTHUR B. ARCHIBOLD,

Judge.

Specification of Objections.

(Filed January 9th, 1919.)

NEW JERSEY SUPREME COURT.

HARRY SETTEL, *Plaintiff-Appellee,* vs. PUBLIC SERVICE RAILWAY COMPANY, a Corporation, *Defendant-Appellant.*	In Tort. On Appeal from the District Court of the Second Judicial District of the County of Hudson.

To

ENOCH L. JOHNSON,
Clerk of the Supreme Court.
and
BENJAMIN WILLIAM MILLER,
Attorney of Plaintiff-Appellee.

SIRS:

The following is a specification of the determinations and directions of the District Court of the Second Judicial District of the County of Hudson, in respect to which the appellant is dissatisfied in point of law:

1. Because the Court, although, when sitting as a jury, and after the close of the whole case, it had found that the defendant below was not guilty of negligence that contributed to the happening of the alleged accident, refused, although a motion for the same was made by the defendant below, to grant a judgment for the defendant below.

2. Because the Court, although, when sitting as a jury, and after the close of the whole case, it has found that the plaintiff below was guilty of negligence that contributed to the happening

of the alleged accident, refused, although a motion for the same was made by the defendant below, to grant a judgment for the defendant below.

3. Because, after the evidence of the plaintiff below had been given, and his case had been closed, and after the evidence of the defendant below had been given, and its case had been closed, and after the Court, sitting as a jury, and exercising the functions of a jury, and weighing the evidence, had determined, that the accident in question was not caused by the negligence of the defendant below the said Court refused, although requested so to do by the attorney of the defendant below, to grant a judgment for the defendant below.

4. Because, after the evidence of the plaintiff below had been given, and his case had been closed, and after the evidence of the defendant below had been given, and its case had been closed, and after the Court, sitting as a jury, and exercising the functions of a jury, and weighing the evidence, had determined from the evidence that the plaintiff below was guilty of negligence that contributed to the happening of the alleged accident, the said Court refused, although requested so to do by the Attorney of the defendant below, to grant a judgment for the defendant below.

Dated, December 20th, 1918.

Yours truly,

GEORGE H. BLAKE,

Attorney of Defendant-Appellant.

ENDORSED—"Service acknowledged December 20, 1918, Benj. Wm. Miller, Atty. of Plaintiff-Appellee."

Supreme Court Opinion

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1919.

HARRY SETTEL,
Plaintiff-Respondent,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Appellant.

On Appeal from District Court.

Argued February 18, 1919.
Decided June 4th, 1919.

When the judge of the District Court is sitting without a jury and before he has announced the decision, he may in his discretion on his iniative enter a non-suit against the plaintiff. In such a case, the acton of the Court, unless it has abused its discretion is no ground of error.

Before Justices Bergen, Kalisch and Black.

For Respondent, BENJAMIN WILLIAM MILLER, Esq.
For Appellant, MESSRS. HOFFMAN, TYNAN & CAFFREY.

The opinion of the Court was delivered by BLACK, J.:

This case was tried by the District Court without a jury, resulting in a non-suit for the plaintiff. The only mooted question in the case is the power of the Court to make the judicial ruling at the time it was made. The appeal is by the de-

fendant and the point is urged that the trial judge was bound to direct a verdict in favor of the defendant. This is the determination in respect to which the appellant is dissatisfied in point of law. The record shows that when the defendant closed its case the trial judge said: "In view of that fact I am going to enter a non-suit in this case on the ground that the plaintiff was guilty of contributory negligence." Mr. Caffrey: "I move for judgment for defendant." The Court: "No, I will grant a non-suit on the ground of contributory negligence" exception allowed. The testimony is not returned with the State of the Case. What the trial judge said about the testimony was a rehearsal or mere comments. It was not a finding of fact or decision in the case. We think the Court in granting a non-suit was within its judicial power to so act. It was an act of judicial discretion. The case of Greenfield v. Carey, 70 N. J. L., 613, and Ciesmelewski v. Domalewski, 90 ib., 34, 100 Atl., 179, cited by the appellant, are not in point.

The first decides that the plaintiff has a right to suffer a non-suit at any time before the jury have retired to consider their verdict. The second decides that when the court sitting as a jury has pronounced its judgment, the trial has progressed to a stage at which, under the statute, a voluntary non-suit is not a matter of right. In such a case, the verdict has not only been conisdered; it has been rendered. So, in Wolf Co. v. Fulton Realty Co., 83 N. J. L., 344; 84 Atl., 1041, it was held that the plaintiff has no right to submit to a voluntary non-suit after the judge has begun to announce his decision.

None of these cases, however, challenged the power of the trial court to enter a non-suit on its own motion before judgment was pronounced in favor of the defendant. This is quite different from the plaintiff's right to submit to a voluntary non-suit. The rule in reference to a dismissal or non-suit is thus stated. It is held, however, that while all legal right on the part of the plaintiff as ended the Court may in its discretion permit the plaintiff to recall such submission and dismiss without prejudice; and in such case the action of the Court, unless it has abused its discretion, is no ground of error. 14 Cyc., p. 402, par. 6, p. 401, par. 3, 9 R. C. L., p. 195, par. 6.

In addition to this, it is quite evident that the trial judge intended to bring this ruling within the District Court act P. L. 1898, p. 618, par. 167; 2 Comp. Sts. of N. J., p. 2003, par. 167, which provided that: "Every District Court shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given entitling either plaintiff or defendant to the judgment of said Court."

The judgment of the District Court is affirmed with costs.

Supreme Court Judgment

NEW JERSEY SUPREME COURT.

HARRY SETTEL, *Plaintiff-Appellee,* vs. PUBLIC SERVICE RAILWAY COMPANY, *Defendant-Appellant.*	In Tort. Judgment of Affirmance.

This case was heard before our Supreme Court at the February Term, 1919, and judgment of affirmance was rendered in favor of the plaintiff on the —— day of ——, 1919.

Whereupon it is adjudged that the said judgment of non-suit rendered on the 6th day of December, 1918, in the District Court of the Second Judicial District of the County of Hudson against the Plaintiff-Appellee, be and is hereby affirmed, with costs, and the record remitted to the court below to be proceeded with according to law and the practice of said Court.

Entered July 3, 1919.

On motion of
BENJ. WM. MILLER,
Attorney for Plaintiff-Appellee.

A true copy.
ENOCH L. JOHNSON, *Clerk.*

Notice of Appeal and Grounds of Appeal

(Filed August 22, 1919.)

NEW JERSEY SUPREME COURT.

HARRY SETTEL, *Plaintiff-Appellee,* vs. PUBLIC SERVICE RAILWAY COMPANY, a Corporation, *Defendant-Appellant.*	In Tort.

TO BENJAMIN WILLIAM MILLER,
Attorney of Plaintiff-Appellee.

Sir:

TAKE NOTICE that the defendant-appellant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the New Jersey Supreme Court in the above entitled cause. The grounds of appeal are as follows:

1. Because the said New Jersey Supreme Court affirmed the judgment of the District Court of the Second Judicial District of the County of Hudson, despite the fact that the latter court, although, when sitting as a jury, and after the close of the whole case, it had found that the defendant below was not guilty of negligence that contributed to the happening of the alleged accident, refused, although a motion for the same was made by the defendant below, to grant a judgment for the defendant below.

2. Because the said New Jersey Supreme Court affirmed the judgment of the District Court of the Second Judicial District of the County of Hudson, despite the fact that the latter court, although, when sitting as a jury, and after the close of the whole case, it had found that the plaintiff below was guilty of negligence that contributed to the happening of the alleged accident, refused, although a motion for the same was made by the defendant below, to grant a judgment for the defendant below.

3. Because the said New Jersey Supreme Court affirmed the judgment of the District Court of the Second Judicial District of the County of Hudson, despite the fact that in the latter court, after the evidence of the plaintiff below had been given, and his case had been closed, and after the evidence of the defendant below had been given, and its case had been closed, and after the Court, sitting as a jury, and exercising the functions of a jury, and weighing the evidence, had determined that the accident in question was not caused by the negligence of the defendant below, the said Court refused, although requested so to do by the attorney of the defendant below, to grant a judgment for the defendant below.

4. Because the said New Jersey Supreme Court affirmed the judgment of the District Court of the Second Judicial District of the County of Hudson despite the fact that in the latter court, after the evidence of the plaintiff below had been given, and his case had been closed, and after the evidence of the defendant below had been given, and its case had been closed, and after the Court, sitting as a jury, and exercising the functions of

a jury, and weighing the evidence, had determined from the evidence that the plaintiff below was guilty of negligence that contributed to the happening of the alleged accident, the said Court refused, although requested so to do by the attorney of the defendant below, to grant a judgment for the defendant below.

5. Because the said New Jersey Supreme Court affirmed the judgment of the District Court of the Second Judicial District of the County of Hudson.

Yours truly,

GEORGE H. BLAKE,
Attorney of Defendant-Appellant.

Dated, August 15, 1919.

(Endorsed) "Service acknowledged August 19, 1919. Benj. Wm. Miller, Attorney of Plaintiff-Appellee."

New Jersey Court of Errors and Appeals

HARRY SETTEL, *Plaintiff-appellee,* vs. PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Defendant-appellant.*	On Appeal from Supreme Court.

Brief of Defendant-Appellant

The Supreme Court affirmed the judgment of non-suit entered in the District Court, and the defendant-appellant is aggrieved because it believes that a *judgment for defendant* should have been entered in the District Court. Considering what the Judge of the District Court found the facts to be, we do not feel that we should be put to the inconvenience of having the plaintiff-appellee start a new suit against us for the same cause of action. The case in the District Court was fully tried out.

At the close of the whole case the Court (page 6) referred specifically to the fact that it was sitting as a jury, and found specifically that negligence on the part of the defendant below had not been shown, and found specifically that the plaintiff below was chargeable with contributory negligence. With these, its own findings, before it, the Court refused to order a judgment entered in favor of the defendant below, although speci-

fically requested so to do by the attorney of the defendant below.

It is evident that the Court's findings when sitting as a jury were equivalent to a jury finding of "not guilty." It was a finding for the defendant. All that remained was for the Court, sitting as a *Court,* to give judgment on what was the equivalent of a verdict for the defendant below. And the Court, instead of giving a judgment for the defendant below, gave a judgment of non-suit against the plaintiff below. Exception to the refusal of the Court to render judgment for the defendant below was duly taken (p. 7, l. 20).

There is apparently no doubt of the fact that the findings of the Court, sitting as a jury, as to questions of fact was and is conclusive. (Compiled Statutes, p. 2012, paragraph 205.) It follows that we were before the Supreme Court on findings of fact that the plaintiff below had failed to prove negligence on the part of the defendant below, and that the plaintiff below was himself guilty of negligence. The Statute under which the appeal was taken (Compiled Statutes p. 2016, paragraph 213 A) contains the following: "and the said Supreme Court may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be,———."

The defendant-appellant asked in the Supreme Court that an order be made that judgment for the defendant below be entered in the District Court instead of the judgment of non-suit that now is there.

Paragraph 160 of the Practice Act of 1903 contains the following: "the plaintiff shall have no right to submit to a non-suit after the jury have

gone from the bar to consider of their verdict;———."

When the Court, in the case at bar, sat professedly as a jury to consider the evidence, then the jury had "gone from the bar."

Greenfield vs. *Cary,* 41 Vroom, 613, refers to the fact that the District Court Act provides that the practice of the Circuit Courts, in so far as applicable, shall apply to District Courts excepting, however, in cases where there may be some express provision of law providing otherwise, and then holds,—"The right of the plaintiff to submit to a non-suit at any time before the jury have retired to consider of their verdict, being a part of the common law practice of the Circuit Courts, is applicable to the District Courts." While the above quoted case refers to Section 160 of the Practice Act of 1903, above quoted from, the decision is based upon the applicability of the *common law* practice of the Circuit Courts, and not upon the applicability to District Courts of Section 160 of the Practice Act of 1903.

Ciesmelewski vs. *Domalewski,* (New Jersey Supreme Court, 1917) 100 Atlantic Reporter, 179, holds that Section 160 of the Practice Act of 1903 applies to the District Court, and cites *Greenfield* vs. *Cary,* 41 Vroom, 613.

"Upon a trial before a district court judge without a jury, the plaintiff has no right to submit to a voluntary non-suit after the judge has begun to announce his decision."*George J. Wolf Co.* vs. *Fulton Realty Co.* (New Jersey Supreme) 84 Atlantic Reporter, 1041.

Obviously, at the time that the Court, in the case at bar, ordered that the plaintiff below be non-suited, such plaintiff below could not have submitted to a voluntary non-suit. He was not

even trying to. There was no motion for a non-suit before the Court. The motion for non-suit made by the defendant below at the close of the case of the plaintiff below had been denied by the Court, (p. 6, l. 3) and therefore was disposed of.

The Supreme Court opinion, which appears on page 10 of the printed case, holds that the cases of Greenfield vs. Cary, Ciesmelewski vs. Domalewski and Wolf Co. vs. Fulton Realty Co., above cited, are not in point in that they only concern the plaintiff's right to submit to a voluntary non-suit, and do not challenge "the power of the trial court to enter a non-suit on its own motion, before judgment was pronounced in favor of the defendant." This comment is undoubtedly correct; but nevertheless, the law as to the limitation upon the plaintiff's right to submit to a voluntary non-suit necessarily lends something to the thought that there is a limitation upon the trial court's right to enter a non-suit on its own motion. The Supreme Court opinion treats this right as existing "before *judgment* was pronounced in favor of the defendant." We submit that the "judgment" is not the true limitation. The true limitation is the *decision*. A court sitting without a jury does two things. In fulfilling the duties of a jury, the court arrives at a decision, which is equivalent to the verdict of a jury. Afterward, sitting as a court, the court gives judgment on the decision it arrived at when sitting as a jury. The *syllabus* of the Supreme Court opinion is based upon what a judge, sitting without a jury, may do "before he has announced the decision." This differs from the opinion itself, in which the period spoken of is "before judgment was pronounced

in favor of the defendant." The opinion, we believe erroneously, treats "decision" and "judgment" as the same thing.

If a jury had returned a verdict of "not guilty," could the Court then order a judgment of non-suit? Obviously, no. And if the Court, sitting professedly as a jury, had made a finding of "not guilty," could the Court, sitting as a Court, render a judgment of non-suit on such a finding? Obviously, no. The only possible judgment would be a judgment for the defendant.

The trial judge said, (p. 7), "I am not satisfied by a fair preponderance of evidence of the negligence of the defendant. In view of that fact I am going to enter a non-suit in this case on the ground that the plaintiff was guilty of contributory negligence." We believe that this was a decision that there was no negligence on the part of the defendant, and that the plaintiff was guilty of negligence. That being the decision, and the decision necessarily preceding any judgment that the judge was "going to enter" thereon, we submit that even though the syllabus of the Supreme Court opinion be correct, this case does not fall within it, for here there *was* a decision that precluded any such entry of non-suit as the syllabus refers to. When the judge said, "I am not satisfied by a fair preponderance of evidence of the negligence of the defendant," we believe that he had decided the case. The above remark of the trial judge is not quoted in the Supreme Court opinion. There is, however, a quotation of the trial judge's statement:—"In view of that fact I am going to enter a non-suit in this case on the ground that the plaintiff was guilty of contributory negligence." The

Supreme Court opinion then says, "What the trial judge said about the testimony was a rehearsal or mere comments. It was not a finding of fact or decision in the case." We differ with the Supreme Court. Both the statement of the judge that he was not satisfied, by a fair preponderance of the evidence, of the negligence of the defendant, and his finding of contributory negligence on the part of the plaintiff, were, in our opinion, findings of fact, and, together or separately, or either one standing alone, constituted a decision in the case.

The Supreme Court opinion states that it is quite evident that the trial judge intended to bring his ruling within a provision of the District Court Act which reads as follows: "Every District Court shall have power to non-suit the plaintiff in every case in which satisfactory proof shall not be given entitling either plaintiff or defendant to the judgment of said court." We submit that such statute has no application when the court announces, at the close of the whole case, that he is not satisfied of any negligence on the part of the defendant, and that the plaintiff was guilty of contributory negligence. Such findings make it evident that satisfactory proof *was* given entitling one of the parties to the judgment of the court.

The Supreme Court opinion states that "while all legal right on the part of the plaintiff has ended, the Court may in its discretion permit the plaintiff to recall such submission and dismiss without prejudice; and in such case, the action of the Court, unless it has abused its discretion, is no ground of error, 14 Cyc. p. 402, par. 6, p. 401, par. 3, 9 R. C. L. p. 195, par. 6."

One of the above references calls attention to the case of St. Louis S. W. Ry. Co. vs. White Sewing Machine Co., (Ark.) 64 S. W. Rep. 96, which states, "The Court may, in it discretion *and to prevent injustice and wrong,* permit the plaintiff to recall the submission and dismiss without prejudice, and in such case the action of the Court, unless it has abused its discretion, is no ground of error. The record shows that the Court suggested to plaintiff's counsel that the dismissal without prejudice would be permitted, *since the Court did not believe that a fair trial of the plaintiff's case could be had upon the record as it then stood and believed the dismissal to be in the interest of justice.*"

We submit that in the case at bar there is nothing to indicate that the trial Court believed that a fair trial could not be had upon the record as it stood. On the contrary, the Court found an absence of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. There was not the slightest suggestion that the interest of justice required a dismissal. If "the action of the Court, unless it has abused its discretion, is no ground for error," we submit that this non-suit, in face of the court's findings, was an abuse of discretion. Such an extraordinary power in a judge could only be justified by fear of a miscarriage of justice. We submit that when no such fear exists the exercise of the power is an abuse of discretion. *And we submit that it is for the trial judge to point out that such fear exists.* And when the trial judge makes no reference to any such fear and deliberately finds an absence of negligence on the part of the defendant and contributory negligence on the part of the plaintiff (the latter

an affirmative, and not a mere negative finding) there is certainly not the slightest inference possible that a fair trial was not had and that dismissal would be in the interest of justice. The Supreme Court opinion comments on the fact that the testimony is not returned with the state of the case. As this appeal is based entirely on the trial judge's findings from the testimony and the lack of proper relation between his determination when sitting as a jury and his judgment when sitting as a court, the production of the testimony would be useless.

As a practice matter, it appears in the case last quoted from that the trial court "suggested to plaintiff's counsel that the dismissal without prejudice would be permitted," etc. In the case at bar, the trial court did not make any suggestion. The non-suit did not follow a motion invited by the court from the plaintiff's attorney. There was no motion by plaintiff's attorney. The court, without any motion, excuse, or suggestion, and after stating that it was not satisfied by a fair preponderance of evidence of the negligence of the defendant, stated that it was going to enter a judgment of non-suit on the ground that the plaintiff was guilty of contributory negligence; and despite defendant's motion for judgment for defendant, the trial court granted the non-suit on the ground of contributory negligence.

The attributes of a court "sitting as judge and jury" are discussed in Weston Electrical Instrument Company vs. Benecke, 53 Vroom, 445, and in Higgins vs. Goerke Kirch Co. (New Jersey Court of Errors and Appeals) 106 Atlantic Reporter, 394. In each of those cases the trial judge treated as questions of law matters which

he should have treated as questions of fact. In the Weston Co. case the judge non-suited the plaintiff when the facts were such that they should have been weighed by him as a jury would weigh them, and it was held error even though on those facts the judge might have found for the defendant. The case holds that the rules as to non-suits are the same, and have the same application, when the trial is by the court, as when it is by a jury. In the Higgins case, there was evidence to go to a jury on the questions both of negligence and contributory negligence, and despite this fact the trial judge found "no negligence *in law*" on the part of the defendant. This was held to be error. In the case at bar, while the evidence was not sent up to the Supreme Court as a part of the record, the findings of the trial judge, *sitting as a jury,* were sent up; and as both sides had put in their evidence, and the case had been closed (p. 6) those findings, to-wit, that the judge, sitting as a jury, was "not satisfied by a fair preponderance of evidence of the negligence of the defendant" (p. 7, l. 10), but that "the plaintiff was guilty of contributory negligence," (p. 7, l. 14), placed the judge in a position where, *sitting as a court,* there was only one possible judgment for him to give, to-wit, a judgment for the defendant. We are not concerned with those few unusual cases in which the record shows that the judge, because he does not believe that a fair trial of the plaintiff's case can be had upon the record as it stands, and because he believes that justice demands such a course, dismisses the case without prejudice instead of giving final judgment. In the case at bar there is not the slightest hint in the trial judge's finding (p. 6) that there had been anything unfair

about the trial, or that the cause of justice demanded the doing of what he did. And we venture the assertion that no case will be found in which there was a dismissal without prejudice at the close of the whole case and in which such dismissal was accompanied by findings of fact which on their face compel a judgment for the defendant. A discretionary dismissal in the cause of justice would be without any findings and merely because justice required it. But in the case at bar the court *made a decision.* No person reading his remarks (p. 6) could conclude otherwise than that he intended to make a decision, and that he did make a decision. Such decision precluded the possibility of a dismissal without prejudice. The Higgins case says, "If the judge, sitting as a jury, had said he did not think plaintiff had shown negligence, his finding would be impregnable on an appeal raising only matters of law;" In the case at bar, the trial judge said that very thing. And if, on appeal, such a finding is impregnable against attack, it should be just as impregnable when the appellant, instead of attacking it, relies on it. And when the trial judge, in addition, found that the plaintiff himself was negligent, which is an affirmative finding, there remained no excuse for his refusal to give judgment for the defendant.

Respectfully submitted,

LEFFERTS S. HOFFMAN,
LEONARD J. TYNAN,
GEORGE H. BLAKE,
Attorneys of and of counsel with
Defendant-Appellant..