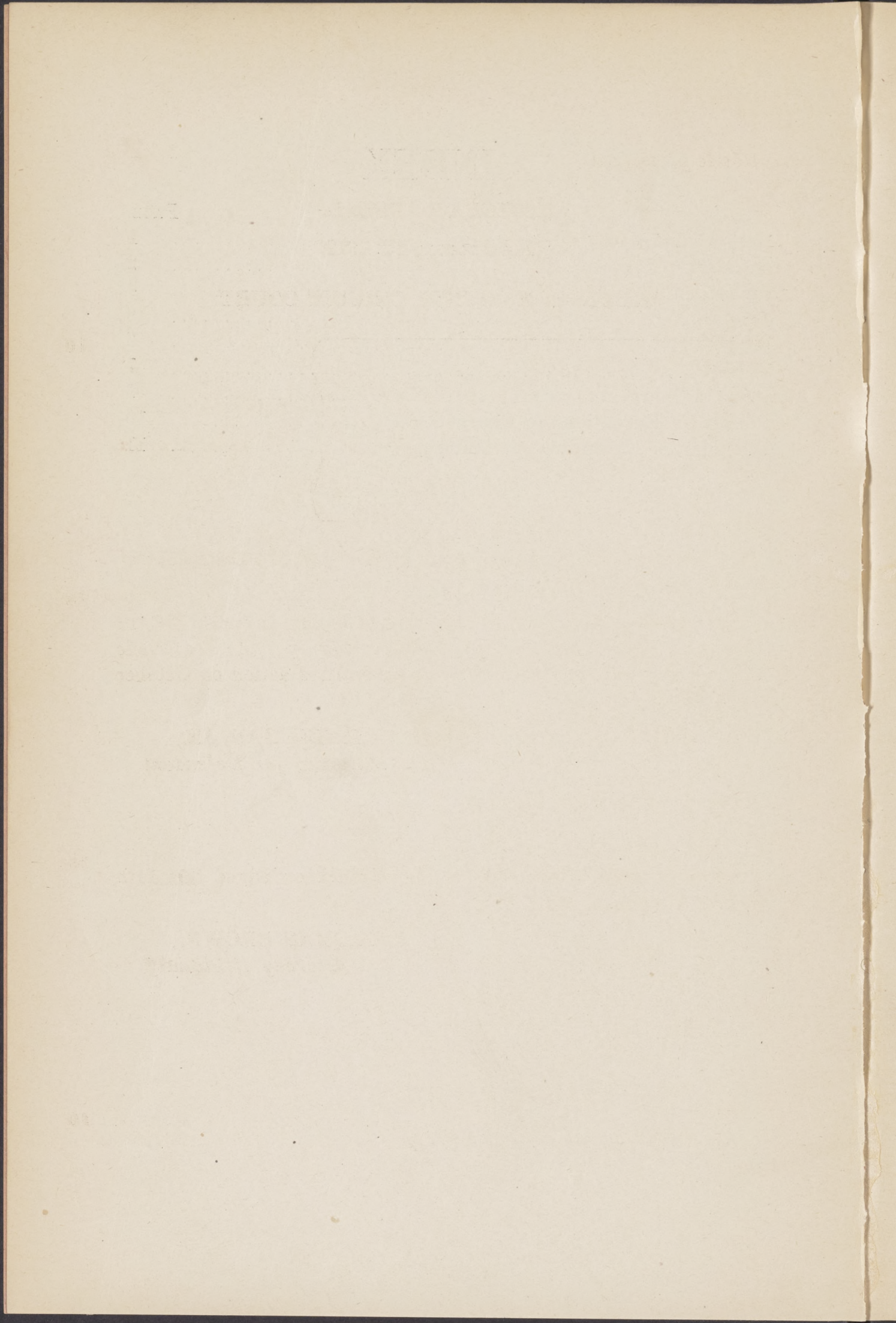


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Notice of Appeal.

NOTICE OF APPEAL.

Filed January 12, 1919.

MIDDLESEX COUNTY CIRCUIT COURT.

ANTHONY K. PETRIE,

Plaintiff,

vs.

PETER ROSENVINGE,

Defendant.

Action at Law.

Notice of Appeal.

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*To Thomas Brown, Esq., Attorney of Plaintiff, 174 Smith Street,
Perth Amboy, N. J.*

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Sir: Please take notice that the defendant appeals to the Court of Errors and Appeals of New Jersey from the whole of the judgment rendered in the above-entitled action on October 30th, 1919.

JOHN W. MCGEEHAN, JR.,
Attorney for Defendant.

Dated: December 10, 1919.

Service of the within notice is hereby acknowledged this 11th day of December, 1919.

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THOMAS BROWN,
Attorney of Plaintiff.

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Grounds of Appeal.

GROUNDS OF APPEAL.

Filed February 6, 1920.

New Jersey Court of Errors and Appeals

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ANTHONY K. PETRIE,

Plaintiff-Respondent,

vs.

PETER ROSENVINGE,

Defendant-Appellant.

Action at Law.

*Grounds of
Appeal.*

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To Thomas Brown, Esq., Attorney of Plaintiff-Respondent.

Sir: Take notice that the above appellant, Peter Rosenvinge, hereby sets down his grounds of appeal in the above-stated cause, as follows:

1. Because the Court failed and refused to grant the motion for a non-suit made by the defendant at the close of the defendant's case.

2. Because the Court failed and declined to direct a verdict in accordance with the motion of the defendant at the close of
30 the evidence in the trial of the case.

3. Because the Court charged the jury as follows, referring to the plaintiff:

“But he was carried some little distance on that bus, on the front step, and from all the evidence you would be justified in inferring that he was a passenger, although the question is for you.”

4. Because the Court charged in part as follows:

40

“But the primary and crucial question for you is how did the defendant drive his car, did he drive it as a prudent man would under the circumstances, exercising the high degree of care which the law exacts of one who is carrying passengers for hire.”

Grounds of Appeal.

5. Because the Court charged the jury in part as follows:

“But, remembering the high degree of care, it will be for you to say whether or not this defendant kept sufficiently far away from the bus that he was overtaking; and after all is not that the real question in this case. If a man in operating a bus will run so close to another vehicle that its usual or expected vibrations will bring it in contact, is that a reasonable exercise of care, if that be so? I do not say that it is. This may have been a movement of the car that was not to be expected, or unexpected, if the movement of the car ahead actually occurred. But, if it was a movement that naturally takes place in the operation of driving, gyrations, or slight variations from a straight line, if that be the fact, was it an act prudent for this driver to drive so close that those two cars came sufficiently near to drag this man off and hurt him?”

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6. Because the Court charged in part as follows:

“Did he take the risk of the driver of the car that was carrying him driving so near to another vehicle, in passing it, as to cause a collision, and throwing him into the road, if that occurred? If he had fallen off by any of the normal movements of the car, you would say at once, why, yes, he took the chances on that. But where the car runs so close to another car as to cause him to be struck by it, an entirely different question is presented, whether or not he took the risk of that sort of thing in getting on the car.”

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7. Because the Court failed entirely to charge the jury in any respect upon the law as to contributory negligence, although contributory negligence was an issue in the case.

8. Because the Court after charging repeatedly the degree of care which the law required toward the plaintiff in the event that the plaintiff was a passenger, failed to charge upon the measure of duty of the defendant to the plaintiff if the plaintiff were a mere trespasser and not a passenger.

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Respectfully yours,

JOHN W. MCGEEHAN, JR.,
Attorney of Defendant-Appellant.

Complaint.

Service of the within Grounds of Appeal is hereby acknowledged and consent to the filing thereof given as to time, this 2nd day of Feb. 1920.

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THOMAS BROWN,
Attorney of Plaintiff-Respondent.

COMPLAINT.

Filed.

MIDDLESEX COUNTY CIRCUIT COURT.

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ANTHONY K. PETRIE,

*Plaintiff,**vs.*

PETER ROSENVINGE,

*Defendant.**Action at Law.**Complaint.*

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The defendant in this cause was summoned to answer unto the said plaintiff therein in an Action at Law, upon the following complaint:

Says that to wit:

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1. On the 17th day of March, 1919, the defendant was in the business of operating by his servants, certain automobiles for the transportation of passengers, which passengers were received for hire and were carried through various streets of the City of Perth Amboy, and thence over a public street or highway known as Amboy Road, through the Township of Woodbridge.

2. On said date the plaintiff became a passenger on said automobile so operated by the defendant, to be safely carried as a passenger in said automobile from Perth Amboy over said public road or highway known as Amboy avenue, to place known as Fords Corner, in the Township of Woodbridge; the space in

Complaint.

the interior of the defendant's automobile being occupied by other passengers at the time that the defendant undertook to carry the plaintiff as a passenger aforesaid; the defendant did furnish and provide the plaintiff a place and position on the step of the automobile for the purpose of carrying safely and securely the plaintiff as a passenger from the City of Perth Amboy to Fords Corner as aforesaid; 10

3. It then and there became the duty of the defendant to operate said automobile with such care and caution as not to injure the plaintiff, who was then and there riding on the step of said automobile, by being struck from other automobiles passing along and upon said road;

4. It then and there became the duty of the defendant to warn the plaintiff of the passage of the automobile in which the plaintiff was riding so close to any other automobile then and there passing along said road, so as to avoid injuring the plaintiff; 20

5. Notwithstanding the duty of the defendant as aforesaid, he recklessly and carelessly operated his automobile, so as to cause an automobile then and there passing along and upon said road in an opposite direction to that in which the defendant's automobile was proceeding, to injure the plaintiff, who was riding on the step of the defendant's automobile, whereby the plaintiff was violently thrown to the ground and was lacerated and bruised about the head, arms, legs and body; his legs were broken and his teeth knocked out, and he otherwise sustained permanent injuries, all of which caused him great pain and suffering, and will cause him great pain and suffering as long as he lives, and by reason of said injuries the plaintiff was prevented from following his usual occupation, and will be prevented from following his usual occupation and employment as long as he lives. The defendant by means of the injuries aforesaid was obliged to lay out and expend large sums of money in endeavoring to be cured and will be obliged to lay out and expend large sums of money for the same reason as long as he lives, whereby the plaintiff has sustained damages in the sum of ten thousand dollars. 30 40

Judgment will be claimed for ten thousand dollars damages.

THOMAS BROWN,
Attorney of Plaintiff.

Answer—Reply.

ANSWER.

Filed.

The answer of the defendant, Peter Rosenvinge.

10 The defendant, answering the complaint filed by the plaintiff in the above-entitled cause says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is denied.

3. Paragraph 3 is denied, except that the defendant admits that it was his duty to operate said automobile with reasonable and proper care.

4. Paragraph 4 is denied.

5. Paragraph 5 is denied.

20 6. Plaintiff was guilty of contributory negligence in that he so carelessly, negligently, and improperly conducted himself while in and upon said jitney bus that he contributed by his said negligence to the happening of said accident.

JOHN W. MCGEEHAN, JR.,
Attorney of Defendant.

REPLY.

30 The plaintiff replying to the answer of the defendant in the above-entitled cause says:

1. He denies paragraph 6 of the Answer.

THOMAS BROWN,
Attorney of Plaintiff.

Judgment.

MIDDLESEX COUNTY CIRCUIT COURT.

ANTHONY K. PETRIE,

Plaintiff,

vs.

PETER ROSENVINGE,

Defendant.

Action at Law.

*Judgment for
Plaintiff.*

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This action was tried before Frank T. Lloyd, Judge, at the Middlesex Circuit, on the thirtieth day of October, nineteen hundred and nineteen. The cause having been heard and submitted to the jury, they returned their verdict as follows:

They say they find in favor of the plaintiff and against the defendant, and assess the damages at the sum of fifteen hundred dollars, whereupon it is adjudged that the plaintiff recover of the defendant fifteen hundred dollars, and his costs, which are taxed at \$56.51 (fifty-six dollars and fifty-one cents), making in the whole the sum of \$1,556.51 (fifteen hundred fifty-six dollars and fifty-one cents).

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Entered: October 30, 1919.

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Court's Charge to Jury.

MIDDLESEX COUNTY CIRCUIT COURT.

September Term, 1919.

 ANTHONY K. PETRIE,

vs.

 PETER ROSENVINGE.

Charge to the jury, by HON. FRANK T. LLOYD, Circuit Court Judge, as follows:

Gentlemen of the Jury:

The defendant was a carrier of passengers for hire. The law denominates such a person a common carrier, and as such it was his duty to exercise a high degree of care in the transportation of those whom he received as passengers. The first question presented for your consideration in this case is whether the plaintiff was a passenger on this bus on the occasion when he got hurt. The testimony is that he got on the bus, on the front step, with another person. There is dispute as to whether the bus was standing or moving. Regardless of whether it was standing or moving, it still leaves the question open to you whether he was a passenger or whether he was a trespasser.

The plaintiff testifies that he got on without objection from the bus driver, who is also the defendant; that he later on handed up his fare through another passenger who was on the bus. Usually when people get on buses that are intended to carry passengers they are intending to be passengers. And when they are received the inference would be natural that such persons are passengers, because that is the business of the carrier, and that is the purpose of the traveling public. So, therefore, the question is presented to you whether or not, under the circumstances of this case, this plaintiff actually became a passenger. The defendant says that he warned him to get off and told him that he must not ride there, that it was against the law. One witness called by the defense testified substantially to the same thing. But he was carried some little distance on that bus, on the front steps, and from all the evidence you would be justified in inferring that he was a passenger, although the question is for

Court's Charge to Jury.

you; and if you do so decide, the next question presented is whether or not he was injured through the negligence of the driver's conduct in driving the bus.

It seems that the accident that took place arose from too near approach of this vehicle and another; however it was produced, that was the effective cause of the plaintiff's injuries; it so happened that another car, engaged perhaps in the same business, was traveling on the road ahead, and the defendant undertook to pass it, and in doing so, as it passed, the two came so near together that the plaintiff was caught and injured in the way you have had described. The question does not concern so much the conduct of the driver of the other car with regard to his negligence, although that may throw light upon whether or not the defendant was negligent in driving his car; but the primary and crucial question for you is how did the defendant drive his car, did he drive it as a prudent man would under the circumstances, exercising the high degree of care which the law exacts of one who is carrying passengers for hire. It has been suggested in the case on the one side that the only explanation is that the overtaking car, the defendant's car, went so near to the rear part of the other one that the collision occurred. Another suggestion has been made, and some testimony on it to the effect that by the irregular movements of the car ahead there was an unexpected closeness resulted of those portions of the car, which, coming so near together, caused the plaintiff's injuries, and that that was the cause of it. But, remembering the high degree of care, it will be for you to say whether or not this defendant kept sufficiently far away from the bus that he was overtaking; and after all is not the real question in this case. If a man in operating a bus will run so close to another vehicle that its usual or expected vibrations will bring it in contact, is that a reasonable exercise of care, if that be so? I do not say that it is. This may have been a movement of the car that was not to be expected, or unexpected, if the movement of the car ahead actually occurred. But, if it was a movement that naturally takes place in the operation of driving, gyrations, or slight variations from a straight line, if that be the fact, was it an act prudent for this driver to drive so close that those two cars came sufficiently near to drag this man off and hurt him?

It seems to me there is an important phase of this case which bears your closest scrutiny, and that is, regardless of the action

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Court's Charge to Jury.

of the man ahead, was the driver of this car giving sufficient clearance, in his attempt to pass the other one, to justify you in saying that that was the exercise of a high degree of care towards these passengers, provided, of course, always, that the plaintiff was a passenger.

10 There is another rule of law which comes into this case which admits your consideration, and that is as to the plaintiff's own conduct. He was undoubtedly riding on the front step of this car; there was a man just ahead of him; the car was filled, and the testimony generally is that there was no room inside. Un-
 20 doubtedly he took all the risks that were incidental to that position, in the normal and proper operation of the car. But did he take the risk of the accident that overtook him? Did he take the risk of the driver of the car that was carrying him driving so near to another vehicle, in passing it, as to cause a collision, and throwing him into the road, if that occurred? If he had
 30 fallen off by any of the normal movements of the car, you would say at once, why, yes, he took the chances on that. But where the car runs so close to another car as to cause him to be struck by it, an entirely different question is presented, whether or not he took the risk of that sort of thing in getting on the car.

If all of these questions are solved in favor of the plaintiff, you come to the damages. If any of them are solved against the plaintiff you do not need to concern yourselves with damages. But, if you reach the question of damages, then compensation is the rule. It is compensation for the pain and suffering, compensation for the reasonable expense of getting himself cured,
 40 compensation for whatever permanent injury he sustained in the loss of teeth, if there has been such an injury, and whatever is reasonable and fair, taking into consideration the loss of his time and services.

Mr. Brown. I would like an exception to that part of the charge wherein you left it to the jury to say whether or not the plaintiff took the risk of the defendant driving his automobile too close to the other car.

40 *The Court.* I did not say that. I think you are wrong about what I said. I said took the risk of the normal and usual operations of the car.

Mr. Brown. Yes, that is true.

Exceptions to Charge.

The Court. And then if one of the usual and normal operations was what happened, then, of course, he took the risk of that. But I said he did not take the risk of driving so near the car—

Mr. Brown. I think your Honor put that in the interrogative form. That is the objection I have to it. 10

The Court. All right. Note the exception.

Exception allowed. Sealed accordingly.

FRANK T. LLOYD,
Judge.

Mr. McGeehan. The defendant excepts to that portion of the charge which, after stating that it is a jury question whether or not the plaintiff was a passenger, "but, gentlemen, he had been carried for some distance and you would be justified in finding h was a passenger." 20

Exception allowed. Sealed accordingly.

FRANK T. LLOYD,
Judge.

Mr. McGeehan. The defendant excepts to that portion of the charge where the Court states the question is, did the defendant drive it with the high degree of care that the law exacts of carriers of passengers, on the ground that such instruction assumes that the jury would find that the plaintiff was a passenger.

Exception allowed. Sealed accordingly. 30

FRANK T. LLOYD,
Judge.

Mr. McGeehan. The defendant excepts to that portion of the charge which states, remembering the high degree of care the question is, did he keep sufficiently far away from the other vehicle, when attempting to pass it, on the ground that the high degree of care which is charged is applicable only to one possible finding of the jury.

Exception allowed. Sealed accordingly. 40

FRANK T. LLOYD,
Judge.

Exceptions to Charge.

Mr. McGeehan. The defendant excepts to that portion of the charge which states, did he, meaning the plaintiff, take the risk of the driver passing so near to the other car, on the ground that there is no proof as to how near the driver of the defendant's car passed to the other vehicle.

10 Exception allowed. Sealed accordingly.

FRANK T. LLOYD,
Judge.

Mr. McGeehan. The defendant excepts to the failure of the Court to charge the degree of care which the defendant was bound to exercise, as to the plaintiff, if the jury found that he was not a passenger, but a trespasser.

Exception allowed. Sealed accordingly.

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FRANK T. LLOYD,
Judge.

Mr. McGeehan. The defendant excepts to the failure of the Court to charge at all upon the law of contributory negligence.

Exception allowed. Sealed accordingly.

FRANK T. LLOYD,
Judge.

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New Jersey Court of Errors and Appeals

ANTHONY K. PETRIE,

Plaintiff-Respondent,

vs.

PETER ROSENVINGE,

Defendant-Appellant.

Action at Law.

BRIEF FOR PLAINTIFF-RESPONDENT.

Statement.

The appeal in this case is from a judgment rendered in the Middlesex Circuit, where the case was tried before a judge and jury.

The appellant relies on this appeal wholly on alleged errors in the charge of the Trial Judge.

Reference is made by the appellant to testimony of witnesses without having the testimony transcribed and submitted as a part of the state of the case. These references should not be considered.

The Court charged the jury (p. 8) that the defendant was the owner of a bus upon which the plaintiff took passage. The bus was crowded, so that the plaintiff was obliged to ride on the front step, and while so riding the plaintiff paid the defendant his fare. The defendant knew that the plaintiff was riding as a passenger on the step of the bus. While the plaintiff was riding in the position stated the defendant, in attempting to pass another bus being operated in the same direction, drove so near the vehicle that he was overtaking that the effect thereof caused injuries to the plaintiff. The two automobiles came so close together that the plaintiff was caught and injured "in the way that you have had described" (referring to the testimony in the case).

The following questions were submitted by the Trial Judge in his charge: (a) Whether the plaintiff was a passenger? (b) The conduct of the driver of the bus that was overtaken? (c) The plaintiff's own conduct in riding on the step of the bus with a man ahead of him? (d) And the defendant's negligence. The

Court also charged that the plaintiff took all risks that were incidental to his position on the bus and that if he had fallen off by any of the normal movements of the car, he took his chances on that. All of these questions were resolved in favor of the plaintiff and the jury awarded him damages in the sum of fifteen hundred dollars.

The appellant has abandoned and waived all his grounds of appeal except two, as follows:

1. That the Court failed to charge upon the measure of duty of the plaintiff in the event that the plaintiff was a passenger, failed to charge upon the measure of duty of the defendant to the plaintiff if the plaintiff were a mere trespasser and not a passenger.

2. The Court failed to charge the jury in any respect upon the laws to contributory negligence.

POINT I.

The Court properly charged the measure of duty the defendant owed to the plaintiff.

The jury could not be mistaken by the charge of the Court as to the duty the defendant owed to the plaintiff. The charge of the Court was to the effect, and is not disputed, that the defendant was a carrier of passengers, and, therefore, a common carrier, and that it was his duty to exercise a high degree of care in the transportation of passengers. Then the Court charged the jury (p. 8): "The first question presented for your consideration in this case is whether the plaintiff was a passenger on the bus on the occasion when he got hurt. In this connection he charged the jury that according to the plaintiff's testimony he got on without objection from the driver of the bus of the defendant; that later on the plaintiff handed him his fare through another passenger, and that, therefore, "the question as presented to you (the jury) is whether or not under the circumstances in this case the plaintiff actually became a passenger."

The Court further charged (p. 10), "if all these questions (which includes the question of the plaintiff being a passenger) are solved in favor of the plaintiff, you come to the damages; if any of them are solved against the plaintiff you do not need to concern yourself with damages." The charge included every condition that existed, whether that of trespasser, licensee or any other relation between the plaintiff and defendant.

The jury having found a verdict in favor of the plaintiff under the charge of the Court, they must have concluded that the plaintiff was a passenger on the bus of the defendant; consequently, the defendant was bound to exercise a high degree of care to carry the plaintiff safely in and upon whatever part of the autobus he was riding, whether with the express or implied consent of the defendant.

Scott v. Bergen County Traction Co., 34 Vroom 407;
Hansen v. North Jersey Street Railway Co., 35 *Id.* 686;
City Railway Co. v. Lee, 21 *id.* 435;
Consolidated Traction Co. v. Thlaheimer, 30 *id.* 474;
Whalen v. Consolidated Traction Co., 32 *id.* 606;
Trussell v. Morris County Traction Co., 79 N. J. Law
 535.

It was not negligence *per se* for the plaintiff to ride on the step of the automobile. *Trussell v. Morris County Traction Co.*, 79 N. J. Law, p. 536; *Donohue v. Public Service Railway Co.*, 79 N. J. Law, p. 541.

In the Donohue case, *supra*, it was suggested that the plaintiff was guilty of contributory negligence by standing on the running board of a trolley car. While standing in that position he was injured. The suggestion was made that the plaintiff was guilty of such negligence because of his position on the trolley car, that he could not recover, or, in other words, the same suggestion was made as to contributory negligence as in the case at bar.

In the Donohue case, page 541, the Court stated, "if it were true (that is to say, if he were standing on the running board) it would not be negligence *per se*, or an assumption of any risk not incidental to that position in the ordinary and proper operation of the car." The Trial Judge charged the jury the same rule ~~of~~ law.

In the case of the *City Railway Co. v. Lee*, 25 Vroom, page 435, Justice Knapp quoted with approval the language of a Massachusetts Supreme Court case as follows:

"The seats inside the car are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the travelling public, seem to regard this prac-

tice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger. There is, therefore, no basis upon which the Court can decide on the evidence that the plaintiff did not use ordinary care."

POINT II.

The Court properly charged the jury on the law of negligence, including that of the plaintiff, if any.

The appellant should not prevail under this point for the reason that it does not appear by the Court's charge that there was any negligence on the part of the plaintiff that contributed to his injuries, and the appellant is bound by the State of the Case submitted.

There being no evidence of contributory negligence it was unnecessary for the Court to charge expressly thereon.

Johnston v. Bowers, 69 N. J. Law at 544.

"It will be presumed in the absence of instructions to the contrary that the Trial Court submitted all disputed questions of fact to the determination of the jury."

Marsh v. Newark Heating Co., 57 N. J. Law, 36, 39;

Chess v. Vockrath, 75 N. J. Law, 671, 672.

From a reading of the State of the Case it does not appear that contributory negligence was pertinent to the charge of the Trial Judge, and if it was, failure to charge thereon when not requested to do so would not be a ground for reversal. *Chess v. Vockrath*, 75 N. J. Law at 672, and a list of cases therein cited.

Packard v. Bergen Ry. Co., 54 N. J. Law, 557;

Mead v. State, 53 N. J. Law, 606.

In any event, the Court charged the jury fully on the risks assumed by the plaintiff (p. 10), and pointed out clearly the duty and responsibilities of each of the parties, and finally charged (p. 10) that in order for the plaintiff to recover the jury must resolve of all the questions submitted to them in favor of the plaintiff, which included the question of his own negligence.

The questions were all solved in favor of the plaintiff, and therefore the judgment should be affirmed.

Respectfully submitted,
 THOMAS BROWN,
 Attorney of Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

<p>ANTHONY K. PETRIE, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs</i></p> <p>PETER ROSENVINGE, <i>Defendant-Appellant.</i></p>	}	<p><i>On Appeal from</i> <i>Middlesex</i> <i>County</i> <i>Circuit Court.</i></p> <p><i>Action at Law.</i></p>
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BRIEF OF JOHN W. MCGEEHAN, JR., FOR DEFENDANT-APPELLANT.

This is an appeal from a judgment rendered in the Middlesex County Circuit Court, in favor of the plaintiff for fifteen hundred dollars.

Sufficient of the facts in this case to raise the assignments of error, herein argued, are found in the charge of the Court on pages 8 to 10, inclusive. From them it will appear that the plaintiff boarded a jitney bus operated by the defendant and thereafter and until sustaining the injuries that are the basis of his suit rode upon the step of the jitney bus; that the plaintiff, while the defendant was undertaking to pass another bus, was injured by the defendant's bus and the other bus coming in such close proximity to each other as to catch and injure the plaintiff between them. There was dispute in the testimony as to whether the irregular movements of the defendant's car or the other car which it was passing caused the plaintiff's injuries, the plaintiff contending that it was the negligence of the defendant in his operation of his car that caused the accident and the defendant's testimony being that it was caused by the irregular and unexpected movements of the car he was passing.

The plaintiff testified that he got on the step of the bus without objection from the bus driver, who is also the defendant; that he later on handed up his fare through another passenger who was on the bus.

The defendant says that he warned him to get off and told him that he must not ride there, that it was against the law. One witness called by the defense testified substantially to the same thing.

Grounds of Appeal.

The grounds of appeal are found on pages 2 and 3 and are based solely upon errors of the Court in its charge to the jury, the first and second grounds of appeal being hereby waived.

POINT ONE.

(Paragraph 8 in Grounds of Appeal).

The Court, after charging repeatedly the degree of care which the law required toward the plaintiff in the event that the plaintiff was a passenger, failed to charge upon the measure of duty of the defendant to the plaintiff, if the plaintiff were a mere trespasser and not a passenger.

It is submitted that in view of the testimony of the defendant, corroborated by a witness, that he warned the plaintiff "to get off and told him that he must not ride there, that it was against the law," it became a jury question as to whether or not the plaintiff was a trespasser in continuing to ride upon the step of the bus.

This is recognized by the Trial Court in the beginning of the charge (page 8), where it says:

"The first question presented for your consideration in this case is whether the plaintiff was a passenger on this bus on the occasion when he got hurt."

"Regardless of whether it was standing or moving, it still leaves the question open to you whether he was a passenger or whether he was a trespasser."

And again (page 8):

"So, therefore, the question is presented to you whether or not under the circumstances of this case the plaintiff actually became a passenger."

But despite this recognition of the important question of whether the plaintiff possessed the status of passenger or trespasser, and that the jury might properly determine this either way, the Court thereafter and throughout the remainder of the charge, instructed the jury as to the high degree of care which devolved upon the defendant and that if he were negligent in the operation of the car the plaintiff would be entitled to recover, virtually as if the case were one in which the plaintiff was admittedly a passenger and omitting further reference to the possible determination that he was a trespasser. We deem it unnecessary to specifically point out the repeated references to the high degree of care the defendant was bound to exercise, the constant

use of the words "negligent," "prudent," etc., in testing the defendant's actions. Suffice it to say that absolutely no instruction was given to the jury to the effect that if the plaintiff were found to be a trespasser and not a passenger that the defendant then owed him only the duty to abstain from wilful injury to the plaintiff and that negligent operation of the car in that case would not render him liable.

The proposition is elementary that a carrier owes no duty to a trespasser except to abstain from wilful injury and the situation presented in the case at bar is similar with that contained in *Barlow v. Jersey City, etc., Ry. Co.*, 67 N. J. L. 364. It is submitted that the Court should have properly charged the jury to this effect and that its failure to do so not only constituted harmful error of omission, but the actual charge, in omitting this, misled the jury and gave to it the idea that the defendant's negligence or non-negligence alone determined his liability.

POINT TWO.

(Paragraph 7 in Grounds of Appeal).

The Court failed entirely to charge the jury in any respect upon the law as to contributory negligence, although contributory negligence was an issue in the case.

A perusal of the charge of the Trial Judge will disclose that not a single statement is made to the effect that if the plaintiff contributed by his own negligent conduct to the accident he could not recover. It is true that the Court (beginning page 10) does ask a number of questions as to what risk the plaintiff assumed in riding on the step of the moving jitney bus, but it does not even upon this point say what the effect upon his right to recover would be if the plaintiff were injured through an occurrence that he did take the risk of. It is submitted that when the defense of contributory negligence in a tort case is interposed that a defendant has the right to have the jury instructed upon the general law governing this point without special request from counsel, such as would be necessary where particular instructions are desired on special or peculiar phases of a case.

Attention is called to the case of *Trussell v. Morris Co. Traction Co.*, 79 N. J. L. 533, in which the Court said:

"the evidence warranted the inference that the decedent was riding upon the step of the platform with the consent of the defendant company"

and even then the Court, in reversing the judgment of non-suit, held that the alleged contributory negligence of the plaintiff's decedent was a jury question. So, in the case at bar, on the issue and on the evidence a jury question as to contributory negligence was presented and the jury should have been given general instructions on the law governing it.

The remaining points raised in the Grounds of Appeal having been covered in Point One, they are not herein separately advanced.

For the reasons above assigned it is hereby respectfully urged that the verdict of the jury in favor of the plaintiff be set aside and a new trial granted to the defendant.

JOHN W. MCGEEHAN, Jr.,
Attorney for and of Counsel with Defendant-Appellant.

