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TESTIMONY.

For Plaintiff.

NOTICE OF APPEAL.

Filed January 21, 1926.

Essex County Circuit Court

EDWARD HENRY SHARPE, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY (a corporation), *Defendant.*	*Action at Law.* *Notice of Appeal.*

TAKE NOTICE, that Edward Henry Sharpe, the plaintiff in the above-stated action at law, appeals to the Supreme Court of the State of New Jersey from the whole of the judgment entered in said action in the Essex County Circuit Court.

Dated, Newark, N. J., January 21, 1926.

OTTO A. STIEFEL,
Attorney of Plaintiff.

To defendant Public Service Railway Company (a corporation), and Joseph Coult, its attorney.

GROUNDS OF APPEAL.

Filed February 17, 1926.

ESSEX COUNTY CIRCUIT COURT.

EDWARD HENRY SHARPE,
Plaintiff,

vs.

PUBLIC SERVICE RAILWAY COMPANY (a corporation),
Defendant.

Action at Law.

Grounds of Appeal from the Essex County Circuit Court to the New Jersey Supreme Court.

The grounds of appeal from the judgment in the above-entitled cause are as follows:

1. The Court erred in entering judgment on non-suit in said cause; the plaintiff was entitled to the verdict of the jurors sworn therein.

2. The Court erred in non-suiting the plaintiff at the trial of the cause; the plaintiff produced proofs at said trial sufficient to sustain his action and was entitled to a verdict of said jurors.

3. The jurors sworn in said cause might truly have found in favor of the plaintiff upon the proofs.

4. The proofs at the trial of the cause were sufficient in law to support a verdict of said jurors.

5. The learned Trial Judge erred in refusing to permit the plaintiff's witness Joseph J. Smith

to answer the following relevant, pertinent and material question directed to said witness by plaintiff's attorney, namely: "Can you tell whether they (trolley cars) were accustomed to stop?"; but sustained an objection to said question upon inadequate and insufficient grounds.

6. The Court erred in deciding that the plaintiff was chargeable with "contributory negligence" in the light of the proofs produced at the trial of the cause; in so deciding plaintiff was prejudiced; the jurors sworn in said cause might lawfully have found that plaintiff was free from "contributory negligence."

OTTO A. STIEFEL,
Attorney of Plaintiff.

Summons.

SUMMONS.

Filed April 4, 1924.

ESSEX COUNTY, *ss.*

The State of New Jersey to: Public Service Railway Company (a corporation): You are summoned to answer the annexed complaint of Edward Henry Sharpe in an action at law in the Essex County Circuit Court. And take notice, that unless you file your answer to said complaint with the Clerk of said Court at Newark, Essex County, New Jersey, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in this suit and judgment may be entered against you.

(L. S.)

WITNESS, Nelson Y. Dungan, Esq., Judge of the Essex County Circuit Court, at Newark, New Jersey, this 4th day of April, 1924.

JOHN H. SCOTT,
Clerk.

OTTO A. STIEFEL,
Attorney.

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

EDWARD HENRY SHARPE, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY (a corporation), *Defendant.*	*Action at Law.* *Complaint.*

Plaintiff Edward Henry Sharpe, who resides in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. Public Service Railway Company, the above-named defendant, is a corporation duly organized and existing under the laws of the State of New Jersey, and duly authorized as such to operate street railways in the City of Newark, County of Essex and State of New Jersey.

2. Said corporation, on the 25th day of April, 1922, in order to carry out the objects and purposes of its existence as such corporation operated a certain street railway in said City of Newark, which railway crossed the intersection of New street and First street, in said city, and the rails of which railway were laid in said First street and extended for a considerable distance in said First street both northerly and southerly from the intersection aforesaid.

3. Said corporation also on said day by and through its agents caused to be propelled and

moved upon the rails of said railway certain trolley cars, in the conduct of its business of operating the railway last mentioned, and in particular by and through its agents thereunto duly authorized caused to be propelled and moved upon said rails, on said day, between the hours of about 12:30 o'clock and one o'clock in the afternoon of said day a certain trolley car, so that the same was propelled and moved towards the intersection of said New and First streets, and approached and came close to said intersection at the same time at which plaintiff was approaching said intersection, while riding along said New street upon a motorcycle.

4. Said trolley car was being operated by a certain motorman, in the employ of the defendant company, and duly authorized to operate said trolley car on said company's behalf, at the time last mentioned. Said trolley car was being so operated, on behalf of said company by its said motorman, for the purpose of carrying out the purposes and objects of the existence of said defendant corporation.

5. At the time last mentioned plaintiff was riding, lawfully, upon and along said New street upon a motorcycle.

6. Plaintiff was unaware of the approach of said trolley car to the intersection of said New and First streets, while plaintiff was approaching said intersection as aforesaid.

7. No bell was rung and no other signal was given as said trolley car approached said intersection as aforesaid by which plaintiff might have been warned of the approach of said trolley car.

Complaint.

8. Said trolley car was by and through the motorman aforesaid operated and caused to move forward at a high and excessive rate of speed in disregard of plaintiff who was approaching the intersection aforesaid; the approach of said trolley car to said intersection was obscured from view by buildings and other structures on First street and on New street, which buildings and structures were situate between the lines of approach of plaintiff and of said trolley car to said intersection.

9. Plaintiff riding along New street as aforesaid had just reached or passed the easterly line of First street, going in a westerly direction in order to cross the intersection aforesaid by passing over New street towards the westerly line of First street and beyond, when said trolley car operated and caused to move forward as aforesaid suddenly shot into his view and was operated and caused to move forward at a high and excessive rate of speed, crossed said intersection, proceeding along said First street, and across the line of progress of this plaintiff.

10. Said trolley car was at all times heretofore mentioned in charge of and operated by the motorman mentioned in paragraph 4 hereof, on behalf of the defendant company.

11. Plaintiff, by reason of the operation of said trolley car across the intersection aforesaid in the manner aforesaid, and by reason of its sudden appearance without any bell or other signal and without plaintiff being aware of its approach, while riding on said motorcycle turned out and away from his line of progress across said intersection and along New street, in the endeavor and for the purpose of avoiding a

collision between plaintiff and said motorcycle on the one hand and said trolley car on the other hand, and for the purpose of avoiding what would have happened had he continued along his said line of progress under the influence of the momentum which he had attained at the moment when he first perceived said trolley car as it shot into his view, namely, being run over by said trolley car.

12. Nevertheless plaintiff and said motorcycle came into collision with said trolley car and especially plaintiff's body came into collision with said trolley car and with great force and violence so that plaintiff was much injured and hurt by said collision and was thrown to the ground and suffered fractures of his skull and many deep cuts and bruises and one of his teeth was displaced and many of his teeth were loosened, and plaintiff sustained other injuries to his body and person then and there by reason of such collision.

13. Plaintiff from the moment that said trolley car shot into view as aforesaid sought to do and did everything within his power to avoid the collision which ensued as aforesaid, but was unable to avoid said collision because of the suddenness with which said trolley car shot into plaintiff's view, the fact that no bell or other signal was given to indicate the approach of said trolley car (as aforesaid), the speed with which said trolley car was operated while approaching the intersection aforesaid and the speed with which said trolley car was operated across said intersection as aforesaid.

14. Said collision occurred without any fault or on the part of plaintiff.

15. Said New street and First street are public streets in said City of Newark.

16. Plaintiff while approaching First street as aforesaid and at all times thereafter until a moment before the collision was riding on said motorcycle on the right-hand side of said New street, that is, the northerly side of said street.

17. Defendant company acting by and through its said motorman disregarded its duty to plaintiff to operate its said trolley car at a safe and reasonable rate of speed while said trolley car was approaching said intersection and while said trolley car was crossing said intersection, and its duty to warn plaintiff of the approach of said trolley car proceeding as aforesaid at a high and excessive rate of speed.

18. Plaintiff by reason of the hurts and injuries suffered by him as set forth in paragraph 12 hereof was compelled to undergo medical and surgical treatment and was kept from his work for a long period of time and has suffered many dizzy spells and the sight of his right eye is seriously affected and he has been obliged to lay out and expend large sums of money for medicine and medical and surgical treatment, and has been obliged to forego gainful employment for long periods of time and has been unable to work at his trade as a roofer or earn wages as such and by reason of his physical disability as aforesaid has been unable to earn as much money as he would have earned but for such physical disability.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 of plaintiff's First Count as

fully as if the same were here repeated and again set forth word for word.

2. Nevertheless plaintiff's said motorcycle came into collision with said trolley car.

3. Plaintiff repeats paragraphs 13, 14, 15, 16 and 17 of plaintiff's First Count as fully as if the same were here repeated and again set forth word for word.

4. By reason of said collision of said motorcycle with said trolley car said motorcycle was much damaged and many parts thereof were bent and broken; plaintiff laid out the sum of $175.00, the reasonable costs of reasonably repairing said motorcycle to make good the damage which said motorcycle suffered as aforesaid and for the reasonable repair and replacement of the parts thereof which were bent and broken as aforesaid.

Plaintiff demands as damages under the First Count and on account of the matters and things therein set forth $20,000.00; plaintiff demands as damages under the Second Count and on account of the matters and things therein set forth $175.00 together with lawful interest from April 25, 1922.

OTTO A. STIEFEL,
Attorney of Plaintiff.

ANSWER.

Filed April 24, 1924.

ESSEX COUNTY CIRCUIT COURT.

EDWARD HENRY SHARPE, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY (a corporation), *Defendant.*	*Action at Law.* *Answer.*

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

FIRST COUNT.

1. It admits the allegations contained in paragraphs one, two, four and fifteen of the First Count.

2. It denies the allegations contained in the remaining paragraphs of the First Count.

SECOND COUNT.

1. In answer to paragraph one of the Second Count, it repeats its answer to paragraphs one, two, three, four, five, six, seven, eight, nine, ten and eleven of the First Count.

2. It denies the allegations contained in paragraphs two and four of the Second Count.

3. In answer to paragraph three of the Second Count, it repeats its answer to para-

graphs thirteen, fourteen, fifteen, sixteen and seventeen of the First Count.

FIRST DEFENSE TO FIRST AND SECOND COUNTS.

1. It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident, in that he endeavored to drive the motorcycle in question across a track upon which a trolley car was being operated, when the said trolley car was in such a position as to endanger his safety and the safety of the said motorcycle.

JOSEPH COULT,
Attorney for Defendant.

Judgment.

35958.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

EDWARD HARRY SHARPE, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY (a corporation), *Defendant.*	*Action at Law.* *On Non-suit.* *Judgment entered January 27, 1925.* *Costs $44.18.*

JOSEPH COULT, JR.,
Attorney of Defendant.

Judgment on non-suit in the above-entitled action at law was rendered on the twenty-seventh day of January, A. D. nineteen hundred and twenty-five, in favor of the defendant Public Service Railway Company, a corporation, and against the said plaintiff Edward Henry Sharpe for the sum of Forty-four dollars and eighteen cents costs of suit.

Judgment entered and signed January 27, 1925.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Recorded in Book 99, Circuit Court Judgments, page 494.

ESSEX CIRCUIT COURT.

January 27, 1925.

EDWARD HENRY SHARPE, *Plaintiff,* *vs.* PUBLIC SERVICE RAILWAY COMPANY (a corporation), *Defendant.*	*Action at Law.*

Before Hon. William A. Smith, *J.*, and a jury.

For the plaintiff appears Otto A. Stiefel, Esq.

For the defendant appears Joseph Coult, Jr.

A jury is called and sworn.

Mr. Stiefel opens for plaintiff.

Mr. Coult opens for defendant.

EDWARD H. SHARPE, plaintiff, sworn in his own behalf.

Direct examination by Mr. Stiefel.

Q How old are you? A Twenty-six.

Q Where do you live? A 409 Hawthorne avenue.

Q Newark? A Yes, sir.

Q On the 25th day of April, 1922, were you employed or in business? A I was employed by the Belmont Roofing Company.

Q Is that a Newark concern? A Yes, sir.

Q How long had you been employed by that concern? A Just when he needed men the

delegate sent us there and it happened this day we finished up our job.

Q When you say "delegate" you mean whom? A Our business agent.

Q The delegate of the Roofers' Union? A Yes, sir.

Q On that day between the hours of twelve and one o'clock were you riding on a motorcycle? A Yes, sir.

Q What sort of a motorcycle was it? A Harley, 1920.

Q When did you acquire it? A I couldn't say as to that.

Q Had you had it a long while or a short while? A Pretty short—well, about eight or nine months.

Q What was the condition of the car on that day with reference to its ability to make speed; tell us, if you can. A Why, I was just after coming back—I made a trip from Connecticut and on the way back we got in as far as Madison and my one valve either cracked or else the spring stuck and would not release the valve and that's what made it hit on one cylinder up to the time of the accident.

Q (By the Court.) How many cylinders had it? A Two.

Q (By Mr. Stiefel.) What effect did that have with regard to making speed with your motorcycle? A Why, it had all to do with it in the world. It didn't give you the power or the speed, either one.

Q Do they have brakes, those motorcycles? A Yes, two of them.

Q Were there any brakes on your motorcycle? A Yes, sir.

Q Were they working on that day? A Yes, sir; both the hand and foot brakes.

Q What sort of apparatus controls the supply of gas? A A regular gas cable that runs to the carburetor.

Q Was that working on that day or not? A Yes, sir.

Q Outside of the fact that one cylinder was not working was there anything the matter with the motorcycle particularly? A No, sir.

Q Where did you start from on that day between those hours of twelve and one to ride on this motorcycle? A The Belmont Roofing Company.

Q And from there you went where? A I continued across Jones street to Norfolk and over Norfolk to Bank, down Bank street to Newark, over Newark to New and up New street.

Q When you say up New street, do you mean going in an easterly or westerly direction? A West.

Q You have heard Mr. Coult say—

Mr. Coult: I object to that on account of the record.

The Court: No, it is not evidential.

Q Do you know whether New street is a slightly inclined street running up towards First street or not? A It is a very little.

Q First street intersects New street, I believe. Is that right? A First street runs across New street.

Q From the north to the south? A From the north to the south, yes, sir.

Q There are two trolley tracks on First street? A Yes, sir; one on each side.

Q Is First street a very wide street? A It is not. It is just about the ordinary size of side streets.

Q Just an ordinary sized street? A Yes, sir.

Q About how close, if you know, to the easterly line of First street is the most easterly trolley track at or about the intersection of First and New streets? A How far?

Q Yes; from the curb to the nearest tracks? A About eleven feet, six inches.

Q Are the tracks toward the middle of the street or do the tracks run like in South Orange close to the curb with a wide space intervening? A No, sir; the trolley tracks take up pretty near the street, from each side about the same distance.

Q And the space on each side from the nearest trolley tracks to the curb nearest that is about eleven feet? A Eleven feet and a half, yes, sir.

Q I understand from your testimony that you were approaching the intersection of First and New streets on that day between those hours? A Yes, sir.

Q At what rate of speed were you going? A Between seven and ten.

Q Is it possible that you might have been going a little faster than ten? A No, the machine would only do forty hitting on two cylinders and then there would have to be a very good straightaway.

Q Was there anything in front of you as you were approaching west on New street? A No, sir; nothing at all.

Q You had a clear view, outside of the houses and the buildings on the street itself from curb to curb. Were there any vehicles there or persons? A No, sir.

Q As you approached the intersection of New and First streets was there anything within your

view to prevent your going straight ahead? A No, sir.

Q Did you hear any bell or other noise, signal or any indication of the approach of a trolley car as you approached this critical corner? A No, sir.

Q Was there any automobile, person or motorcycle in front of you to interfere with your view straight ahead? A No, sir.

Q Were you on the right or left-hand side of the street? A Right.

Q About how far away from the curb on your right? Have you any idea or don't you know? A About six feet.

Q You did not cross the trolley tracks that run on First street, did you? A No, sir.

Q As you came near those tracks tell us in your own words what happened? A Well, when I was proceeding to go across, to go on up to the agent's house, when I got within about fifteen to twenty feet of the railroad tracks, that is, I could see, but I could not look to either the left or the right on account of the buildings come out on the corner of New street at First.

Q In other words—

Mr. Coult: I object. I do not think counsel should interpret the witness' answer.

The Court: Proceed.

Q In other words, you are trying to tell us now what structures are on the respective corners there. Name the corners so the record may be straight. A Do you mean the direction of the corners?

Q There are four corners there? A Yes, sir.

Q Northeast, northwest, southeast and southwest. A Yes, sir.

Q What corners do you refer to? A The northeast and the southeast corner facing as I am approaching.

Q The two corners on the easterly side of the street? A Yes, sir.

Q Go on. A And when I got within this distance of the rail, I kind of looked to the right and had a little exhaust whistle I had rigged on the rear cylinder—I had to take it off the front on account that it was not hitting; and I blew the exhaust whistle and looked to the right.

Q What did you see when you looked to the right? A Nothing at all, and I was going to continue right across First street and the first thing I knew I was rammed and the side of the trolley car was on top of me no matter which way I would turn.

Q Which trolley? A Bergen street.

Q The car proceeded from what direction? A From the south direction.

Q From your left or your right? A From my left.

Q At what rate of speed was that car going? A I should judge it was going within twenty-five or thirty miles an hour.

Q Did it make any sound to indicate its approach, any bell or whistle or the like? A The bell did not ring, but when it was too late, then, I heard the rumbling of the car.

Q Where was the car when you heard the rumbling of it? A Right on top of me.

Q What did you then try to do? A I tried to swing to the right and make a right turn, but my motor was at a standstill and I thought if I could swing to the right I could make a turn and

get out of the way and hit the curb and stop, but at the same time the overhang of the trolley car, I figured was half way passed me, at that time it must have hit my handle bars and swung me around to the left and I must have been facing towards the south.

Q Were you conscious after the accident? A Yes, sir.

Q You were conscious after the accident? A Yes, sir.

Q How long? A About sixteen hours.

Q I said were you conscious after the accident? Do you understand my question? A No, sir.

Q Tell us in your own words what happened after the accident. This occurred, as you have described, now, what happened to you after the accident? A Why, as far as I know I was taken to the hospital.

Q You say, "as far as you know." What do you mean by that? A I was unconscious after the car hit me.

Q You were unconscious? A Yes, sir.

Q You woke up in the hospital? A Yes, sir.

Q Did you at any time, before you had described seeing the trolley car, did you see that trolley car aproaching? A No, sir.

Q Did you know it was approaching through any means at all, just when you described seeing it? A No, sir; I did not.

Q You are sure it was coming from your left? A Yes, sir.

Q You are sure you looked to your right? A Yes, sir.

Q Now, Mr. Sharpe, do you know anything at all about the injuries, you received? A As far as my fractured skull—

Mr. Coult: If the Court please, I do not think he can give an opinion whether he had a fractured skull or not. Is that stricken out by consent?

Mr. Stiefel: Yes.

Q Tell us, as far as you can, what injuries you suffered that you know of. Mr. Coult does not want you to testify that you had a fractured skull, because you are not a doctor, but tell us what you know. I see a mark on your forehead. Tell us about that mark there. A Yes, sir. When I came out of the hospital I felt very dizzy and went to the doctor about it, and the doctor told me.

Mr. Coult: I object.

Q Did you have that mark on your forehead before the accident? A No, sir.

Q That mark apparently reaches from there to there (indicating). A Back to here (indicating).

Q Is that mark the result of this trolley accident? A Yes, sir.

Q What about your jaws, do you know of any effect that accident had on your jaws? A Yes, sir.

Q Tell us about that. A My jaws was out of shape for about five months and my teeth—

Q You say "out of shape." A Yes, sir.

Q Give us a clearer idea of what you mean by "out of shape." A My top jaw came down over my chin or else it was the bottom that forced in so that I could not open my teeth to eat anything and I had to be fed with a glass tube.

Q For how long did that continue? A About ten weeks afterwards.

Q After that? A After that my jaw started to go back in shape, but it never did go back into its regular shape. The dentist had to fix my teeth to fit my jaw.

Q The teeth were ground so they were proper? A Yes, sir.

Q Did you have any teeth extracted? A Yes, sir.

Q Tell us about that. A I had six of them taken out.

Q Indicate to us in what part of your mouth? A In the front.

Q The front upper or the front lower jaw? A The upper.

Q All from the upper? A Yes, sir.

Q What have you now instead of those teeth? A A bridge.

Q Did you have any sensations, after you left the hospital, in your head of a kind you did not have before the accident and if so tell us about them. A Yes, sir, when I returned from the hospital—

Q By the way, how long were you in the hospital? A My mother came up and took me out of the hospital.

Q How long were you there? A Three or four days.

Q Go on. A When I came out of the hospital I was out about two months and I started to feel myself getting pretty straight, that is, not too straight, I went down to see one of the bosses I used to work for, the delegate sent me to see Mr. Hetzel—I just imagined I could work—and I went down and they wanted to send men out on a job and we have a yard steward there, and he asked me to lift a row of felt and put it on a truck, and I stooped down to lift the roll up, but I never did come up.

Q What do you mean, "you never did come up"? A I got a dizzy feeling and fell and stayed down.

Q What did they do to you then? A Mr. Mink picked me up and told me I had better go home.

Q Did you go right home? A Not right away, I stayed around until I felt like myself and then I went home.

Q Did you thereafter suffer any dizzy spells? A I have them today.

Q Did you have them before the accident? A No, sir; I never had a headache.

Q When, if at all, did you start to work again at your business of a roofer? A Off and on about three months after, I used to work a day or so a week and some weeks I didn't work at all.

Q (By the Court.) When did you first start to work? A About three months after the accident.

Q (By Mr. Stiefel.) How many days did you work at the first attempt? A About three hours.

Q That is the occasion you told us about? A That is another one.

Q Why did you quit at the end of three hours? A I went out with the yard steward, who was the foreman of the gang, and we went to the Hill Theatre and we spaded off the gravel up there, which was a pretty hot day and made it worse, and he told me I had better quit. He tried to get me towards the center of the roof so I wouldn't get dizzy and fall off and then, he wouldn't trust it, because he would be responsible.

Q What were your sensations on that occasion? A Dizziness.

Q Are you permanently employed at the present time? A No, sir.

Q Why not? A Quite a few want higher men, because I can't go on a steep roof any more.

Q What happens when you go on a steep roof? A One thing I lost my nerve and get very dizzy.

Q Did you have plenty of nerve to go on roofs before the accident? A Yes, sir.

Q Did you get dizzy before the accident? A No, sir.

Q During the first year after the accident how much work did you do? A Out of the first year?

Q Yes. A All put together?

Q Yes, approximately. A A rough guess of about twelve full weeks, six full weeks.

Q During the first year after the accident, that is from April 25, 1922, to April 25, 1923. A Well, figure about three months' full salary weeks.

Q In that first year? A In that first year, yes, sir.

Q The second year after that? A I couldn't say about how much I did, because they had plenty of work there and it was all steep roofing work and I used to go to the yard mornings and from the yard home.

Q Did you do as much work the second year as you did the first? A About the same, maybe a little more.

Q That would bring us to 1924 and since then how much work have you done? A Why, I done pretty good in 1924 on all flat surface roofs in

Mount Vernon, New York. Hetzel sent us up there on four high schools that took quite good in 1924.

Q When you say Hetzel, you mean the Newark concern? A Yes, sir; the estate.

Q You worked on flat roofs? A Yes, sir.

Q You did not lose much time during this last year? A No, sir.

Q What wages were you receiving at the time of the accident? A Seven dollars a day.

Q About how many days a week could you work? A Four.

Q That was the average? A Yes, sir.

Q I suppose weather conditions— A Yes, sir.

Q —are a factor? A Yes, sir.

Q So, you were making about $28 a week at that time? A A little better than that.

Q How many weeks during the year could you work at that rate? A Four days a week?

Q Yes. A About thirty-six.

Q Now, when you told us that you worked about three months, I think it was during the first year, do you mean three months of these kind of weeks working four days a week, or do you mean thirty days? A No, sir; spread apart. Maybe one month I wouldn't work and the next month got a week out and go to work one day and maybe lay off the rest of the week, and go to work the next week and get maybe three days.

Q Do you mean three months' steady work? A Not steady, all put together, about three months.

Q How much money—what did you earn during those three months, as near as you can tell? This is the first year after the accident? A About $400.

Edward H. Sharpe, cross.

Q Prior to the accident about how much would you earn per year? A Over a whole year?

Q Yes. A Somewheres around eight or nine hundred.

Q Mr. Sharpe, did you employ a physician? A Yes, sir.

Q By the way, what doctors treated you at the hospital? A Dr. Martland, I believe.

Q After you left the hospital, whom did you employ? A Dr. Boyle.

Q Dr. Boyle is out of the city today? A Yes, sir.

Q You have not paid Dr. Boyle yet? A No, sir; I asked him three or four times—

Q What happened to your motorcycle after the accident after you was able to get around? What did you do with it? A I didn't do anything at all with it; I just let it go. I put the brother in charge and told him to do as he pleased about it—he seemed to be crazy about getting one and fixing one up, and he got disguested with it himself, and must have turned it over to a junk dealer and got rid of it, as far as I know. I haven't seen it since.

Q You have not seen it since? A No, sir.

Cross examination by Mr. Coult.

Q This was a Harley-Davidson motorcycle? A Yes, sir.

Q 1920 model? A Yes, sir.

Q And except for the fact it was only firing on one cylinder it was in good condition, outside of that? A Outside of carbon, yes, sir.

Q How long had it been firing on one cylinder only? A Well, the accident was on Tuesday, I

believe, and it was on Monday I returned from Connecticut.

Q What was the matter with that one cylinder? A One valve lifted and stayed up; it was either the spring broken or the valve was warped.

Q You had a sticky valve? A It was either broken or cracked or sticky.

Q Is isn't much of a job to fix a sticky valve, is it? A I had big ideas of getting rid of it.

Q Of what? A The motorcycle itself.

Q You didn't want it? A No.

Q You were going to sell it with one broken valve? A No, I was going to take it down after I got the money for the parts.

Q It isn't much of a job to put in a valve spring, is it? A Yes, sir; it is.

Q Any more so than it would be to put in an overhead valve in an automobile? A Yes, sir; you have to take the whole motor out.

Q Did you ever have one fixed? A Yes, sir.

Q You can do it yourself? A Yes, sir; any motor at all.

Q How long would it take you to do it? A About eight hours.

Q Eight hours to fix a valve spring? A I wouldn't take it down just to put a new valve in.

Q How long would it take you to fix one valve? A About three hours.

Q On this occasion your cycle was only firing on one cyclinder? A Yes, sir.

Q You say if it fired on two cylinders you could get about twenty miles an hour? A Yes, sir; if we get a good rolling start.

Q Couldn't it do better than that? A No.

Q What was the matter with your car that it couldn't go over forty? A I wouldn't want it to go much more than that.

Q You take a Harley-Davidson model, you can get more speed out of it than that? A No, sir; not unless you get a special job, alloy fly-wheel and pistons.

Q You have had experience with motorcycles how many years? A Seven.

Q You repaired them yourself and fixed them? A Yes, sir.

Q You think an ordinary stock Harley-Davidson motorcycle in good condition could not go more than forty miles an hour? A Certainly they can. I had a 1920 model with a horizontal motor. My motor was not a 74 Harley; they haven't them on the market today, the one I was driving.

Q I am talking of the particular model you had. A They don't have them today.

Q The one you had experience with, you don't think would make over forty miles an hour? A No, sir; not that type.

Q There is a little upgrade there at the place where the accident happened, isn't there? A Yes, sir.

Q It was your intention to cross First street? A Yes, sir.

Q Are you familiar with the locality pretty well? Did you know there were trolley cars going on that street? A Yes, sir; that is why I stopped and looked to the right.

Q You knew there were two lines of trolley tracks? A Yes, sir.

Q And that trolley cars were likely to come both ways or either way? A Yes, sir.

Q You did look to the right? A Yes, sir.

Q Where were you when you looked to the right? A Sitting on my machine.

Q Where was your machine? How far had you gotten? A How far?

Edward H. Sharpe, cross.

Q Yes. A How far from where the trolley line was?

Q From any place you want to place up there; where were you when you looked to the right? A On New street going west.

Q How near the trolley tracks? A Twelve feet, fifteen feet—just so I could peek around the corner of the building.

Q When you were fifteen feet of the trolley tracks you looked to the right? A Yes, sir.

Q Was that the first time you looked? A That was the first time I looked; yes, sir.

Q How fast were you going when you took that look? A Between seven and ten miles an hour.

Q Good working condition? A Yes, sir.

Q Within what distance could you stop that motorcycle in the condition it was in then at the time you took that look, if you had to? A If I had to?

Q Yes. A Going at what rate of speed?

Q The rate of speed you were traveling then. A In half the distance from here to where you are sitting.

Q That would be— A About six feet.

Q There is no doubt in your mind about that? A No, sir.

Q Now, you heard this trolley car before you saw it? A Yes, sir.

Q Did you see it before you heard it? A No, sir.

Q Which, both at the same time? A It all happened at once.

Q You said something about hearing the rumbling of the car. A When too late; it was already on top of me.

Q Did you see it or hear it first? A I heard it first.

Q It was then too late to avoid the accident? A Yes, sir.

Q After you heard it, did you look at it? A It was right on top of me.

Q You looked as soon as you heard it? A Yes, sir; but it was already on top of me.

Q How close was it? A About a thousandth of an inch.

Q You had not seen it before that? A No, sir.

JOSEPH J. SMITH, sworn in behalf of plaintiff.

Direct examination by Mr. Stiefel.

Q You live in Newark? A Yes, sir.

Q Where? A A 711 South Twelfth street.

Q How long have you lived there? A About fifteen years.

Q What line of business are you engaged in? A Manufacturing.

Q Manufacturer of what? A Celluloid optical goods.

Q How long have you been in the celluloid business? A About twenty years.

Q What is the name of the concern you are connected with now? A Newark Noveloid Company.

Q They manufacture in this city? A Yes, sir.

Q Do you know Mr. Sharpe? A Yes, sir.

Q At the time of this so-called accident, April 25, 1922, were you in the celluloid novelty business? A Yes, sir.

Q And had a factory where? A 272 New street.

Q How far away from First street is that? A I guess that is about two or three blocks.

Q About two or three blocks? A Yes, sir.

Q Is that east of First street or west of First street? A East.

Q I understand Mr. Sharpe was at one time employed by you? A He was a fireman for me some time ago.

Q How long ago? A I judge about three years ago.

Q Before the accident? A Yes, sir.

Q On this particular day between twelve and one o'clock were you walking or— A Driving a car.

Q What kind of a car? A Marmon.

Q Your own car? A Yes, sir.

Q How long had you been driving a car? A About ten years.

Q May I ask you whether you are an experienced driver? A Well, I feel that way.

Q Do you know anything about the speed of vehicles moving on the road? A I have a fair knowledge of speed.

Q The speed of your own car and the speed of others? A Yes, sir.

Q Did you or did you not see Mr. Sharpe on this critical day between the hours of twelve and one approaching First street on New? A Yes, sir, I saw him.

Q Where were you with reference to him? A At the time of the accident?

Q A little while before, just a few minutes before. A When I first saw Sharpe on his motorcycle I think he was between Norfolk and the street west of that; I don't know the name of the street; there was another street there.

Q He was east of First street? A Yes, sir.

Q You were proceeding in a westerly direction? A Yes, sir.

Q The same direction as Sharpe? A Yes, sir.

Q You saw him on his motorcycle? A Yes, sir.

Q You saw him on his motorcycle? A Ahead of me, yes, sir.

Q How did you know it was he? A I recognized him. He stopped for a moment in front of the shop to see some of the men.

Q You were following him in your car? A Yes, sir.

Q Did you see him at the intersection of the approach of First and New streets? A Yes, sir.

Q At what rate of speed was he going on his motorcycle, slow or fast? A He was going pretty slow.

Q Were you looking ahead or where? A Why, I was looking straight ahead.

Q Was anyone in the car with you? A No.

Q You were all alone? A Yes, sir.

Q Nothing to distract your attention? A No.

Q Did you have a clear view of the street except Mr. Sharpe? A Yes, sir.

Q Was there any automobiles, passengers or other vehicles to obstruct your view? A No.

Q How far behind him were you just as he approached or got to the corner of First and New streets? A About the length of this court room he was.

Q (By the Court.) How far is that? A About fifty feet.

The Court: Seventy-five feet, I would judge.

Q (By Mr. Stiefel.) Were you going very rapidly? A No, sir.

Q Did you hear any gong or noise indicating the approach of any trolley car? A Not until that car passed after the accident occurred.

Q Did you hear any warning going before it came into sight? A No.

Q You saw that trolley car of which Mr. Sharpe has spoken? A Yes, sir.

Q You heard his testimony? A Yes, sir.

Q At what rate of speed was that trolley car going, Mr. Smith? Describe it. A Why—

Q Of your own judgment. A Why, that car crossing New street must have been going at least twenty-five miles an hour.

Q You say that car which crossed New street was going at least twenty-five miles an hour? A Yes, sir.

Q You say at least; do you think it may have been going faster than twenty-five miles an hour?

Mr. Coult: I object as leading.

The Court: Ask your next question.

Q What do you mean by at least? A The car was going very fast, faster than they usually go at a slow rate of speed.

Q Did you see that car come into view in the line of sight in New street? A Why, that car shot right by New street; what I mean by that, there was no stop at the corner of New street; it just simply kept on from Warren street, going right through.

Q Going at this rate of speed it must have been going fast. Did you see the collision between Mr. Sharpe's motorcycle and this trolley car? A Yes, sir.

Q Describe that to the Court and jury as well as you can. A Well, the motorcycle was on up ahead of me about this distance I stated before and the next thing I knew this car shot out on First street and Sharpe ran into the car; that's all I know.

Q Did you see whether he tried to get out of the way? A He swung to the right at first to try to get out of the way, but he couldn't get out of the way; it was impossible for him to get out of the way.

Mr. Coult: I object to that conclusion of the witness and ask that it be stricken out.

The Court: I will strike it out.

Q How close to the trolley car approximately, not by inches, but try to give us your knowledge, your recollection of how close to the trolley car Mr. Sharpe was at the moment when this car shot in front of him? A He was about up to the curb, up to the crossing.

Q And then the car shot in front of him? A Yes, sir.

Q Did the car go beyond him, Mr. Smith? A The car didn't stop until it was almost down to the next corner.

Q Well, it went a considerable distance then beyond the intersection of New and First streets? A Yes, sir; a considerable distance.

Q Did you stop after the accident? A Oh, yes.

Q What did you do in connection with the accident? A Why, several boys picked Sharpe up and put him in my car and I took him to the hospital.

Q Was he conscious or unconscious? A Unconscious.

Joseph J. Smith, cross.

Q Did you know that the trolley car was approaching before it shot into view, Mr. Smith? A No, I did not.

Q Are you accustomed to pass this corner frequently or not? A Yes, sir; I pass that corner three times a day.

Q On that day you did, did you, at that time? A When we were located in that section I used to pass that corner three times a day.

Q How long had you been located in that section? A About five years.

Q So, you were quite familiar with this corner? A Yes, sir; I know that corner very well.

Q Had you often seen trolley cars pass that corner? A Yes, sir.

Q Can you tell us whether they were accustomed to stop?

Mr. Coult: I object to that. It does not make any difference what other trolley cars did.

The Court: Sustain the objection. That is objectionable unless there is some reason to make it a dead stop. Just his experience and what he says would not be sufficient; I mean if it was a place where it stopped, if it was required, that would be all right.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Cross examination by Mr. Coult.

Q You were going west on New street in an automobile? A Yes, sir.

Q How fast were you traveling? A I was going about fifteen miles an hour.

Q This motorcycle passed you in the course of your progress from your place up to the top of the hill, did it? A No.

Q It did not? A No.

Q Do you remember being interviewed in this case, don't you? A Why, I think there was someone came up from the Public Service, came up to my office.

Q That was on the second day of May, 1922, or thereabouts? A I don't remember the date.

Q Well, on the occasion of this interview didn't you tell the gentleman who interviewed you that this motorcycle passed you on the right side and was going about twice as fast as this automobile? A No, I don't remember that.

Q Will you say you did not say it? A I don't really know what you are alluding to there.

Q I am asking you whether or not on May 2, 1922, or whenever this time was, you did not tell him that this motorcycle passed you when you were in your automobile on the right side and was going about twice as fast as your automobile? A I don't remember that.

Q Now, I ask you this: Will you say you did not say it? A I told you I don't remember.

Q You do not remember whether you said it or not? A I don't remember whether I said that.

Q Is it a fact he passed you? A I don't remember him passing me.

Q You don't know whether he passed you or not? A No.

Q Might it be so, he did pass you? A I don't think so.

Q You were, you say, the length of this room behind him at the time of this accident? A Yes, sir.

Q At that time how far could you see to your left down First street? A At the time of the accident I could probably see just the intersecting corners; that is all I could see either way there.

Q So, all you saw of this car, then, was its appearance on the building line of New street and its disappearance by the building line on New street to your right? A Yes, sir.

Q And during the time it made that progress you made an estimate of its speed, which you testified to here, of twenty-five miles an hour? A Approximately.

Q You say when you first saw that trolley car that the plaintiff here was about on the crosswalk of First street? A Yes, sir.

Q So, when the plaintiff was on the crosswalk approaching the trolley tracks the trolley car was also on the south crosswalk of New street, wasn't it? A I don't exactly know where the trolley car was, because I wasn't looking at the trolley car.

Q You couldn't see it before he got to the crosswalk, could you? A No.

Q So, when you first saw the plaintiff on his motorcycle he had just about as far to go as the trolley car had in order to get to the point of collision? A I don't get that right.

Q You said he was at the crosswalk when you first saw the trolley car? A Yes, sir.

Q And the trolley car was on the crosswalk about when you first saw it—on the south crosswalk? A I don't know where the trolley was; all I could see was the trolley car whizzing by.

Q You said when you first saw the trolley car first coming from the south this gentleman and his motorcycle were at the crosswalk ap-

proaching the trolley tracks. You still adhere to that, don't you? A When he was on the crosswalk that trolley car was almost in front of him. The center of the trolley car was almost in front of him when he was on the crosswalk.

Q And what part of the trolley car did he collide with? A I think it was towards the rear end.

Q Towards the rear end? A Yes, sir.

Q Did he reduce his speed any from the time that trolley car first appeared and the time he ran into the rear end of it? A I couldn't tell you; I was quite a little distance away; I wouldn't you say he did or didn't.

Q Do you remember seeing him take his foot off the rests and drag his foot along the ground just before the collision? A I believe I did see that.

Q That is one of the things you told our man? A Yes, sir.

Q How long did he drag his foot along the ground? A That I couldn't say, but I did see him drag his foot to stop the machine.

Q (By the Court.) How far did the trolley car go before it stopped? A I don't know how many feet exactly, but it was a considerable distance from the other corner after it stopped.

Q It cleared the north crosswalk? A It was more than halfway down to the next street.

BENJAMIN A. FURMAN, sworn in behalf of plaintiff.

Direct examination by Mr. Stiefel.

Q You are employed by the trolley company in this case, are you not? A I am.

Q You examined my client, Mr. Sharpe? A I did.

Q Will you tell us briefly what you discovered as the result of your examination? A I saw him on May second at his home.

Q What year? A 1922. A week after the accident. At that time he had a scalp wound which extended from the inner side of the right eye running up over the forehead for about two inches and then going straight back along the hair line about three or four inches further, so the whole scalp wound was about six inches long. I saw him with his doctor, Dr. Boyle, and the doctor removed the dressing from the wound at that time, and the wound was perfectly clean, I mean it was not infected—skull wounds are apt to get infected; this was not at that time. He also had some minor abrasions on his face; I think he had a small cut in the right eye, and if not mistaken he had an abrasion or small cut over the bridge of his nose. Of course, the main injury was the scalp wound, the large scalp wound I described. He had a black and blue mark on his thigh which was of slight significance. I believe that was all.

Q How about his jaws and cheek? A No mention was made of his jaws and cheek at that time by the doctor and he made no mention of it, so I did not examine his jaws and cheek at that time.

Q Did he speak to you at all at that time? A Oh, yes, he was perfectly conscious and gave me his name and told me a few things about how it happened.

Q You have heard the plaintiff testify as to dizzy spells. Is that an unusual sequel of such an injury as he received? A I wouldn't say it

is unusual; they usually do have dizzy spells after a bad scalp wound.

Q Do you know whether an X-ray picture was taken of the injury to his head? A I believe they were taken.

Q For you? A No, they were taken in the hospital.

Q Do you know whether the cut reached the bone of the skull or not? A I only know what I read on the history at the City Hospital.

Q Was it possible with such a severe external, such external evidence of injury as was visible to you at the time of the examination, that the blow might have reached and affected his skull, doctor?

Mr. Coult: I object to that question on the ground we are dealing with probabilities, not possibilities.

The Court: Sustain the objection.

Q In your opinion did the wound reach as far as the bone of the skull? A Well, I couldn't tell that. I could only see the external evidence of the wound. The wound was sewed up at the time when I saw it.

Q It was sewed up at the time? A Yes, I don't know how deep it went.

Q You only made this one examination? A No, I made a second examination.

Q When was that? A June 16, 1924, in my office.

Q On that second examination did you inquire into the plaintiff's account as to his symptoms and so on? A Yes, sir.

Q Did he speak to you then about dizzy spells? A He did.

Q What did he tell you about his dizzy spells?

Mr. Coult: I object as that is a self-serving declaration.

Q What did you discover then? A He was in about the same condition as he is now. He had his scalp wound, about two and a half inches of which was visible and the rest hidden under the hair. The bridge of his nose was a little bit thickened.

Q Did he complain to you or did you examine to see whether he had any sensation on the side of his face that was injured? A No, I did not.

Q You had a report from the company, did you not, doctor? A Yes, sir.

Q In this connection? A Yes, sir.

Q Didn't you have a report "In the neighborhood of the deep cut on plaintiff's forehead he claims there is no sense of feeling"? A No, they only sent me a letter to examine him, the plaintiff.

Cross examination waived.

PLAINTIFF RESTS.

Mr. Coult: I respectfully move for a non-suit in this case on the ground that contributory negligence appears as a conclusion to be irresistibly drawn from all the evidence so far adduced.

(Argument.)

The Court: It is not disputed in this case that the plaintiff did not look to the left. He says he was going from seven to ten miles an hour and could stop within six feet. That the distance from the curb to the first trolley rail was eleven and a half feet, and he undoubtedly

could see a long distance to his left when he got on the crosswalk, and while it is negligence *per se* not to look, but if looking would become effective and disclose the object of danger, I think it was his duty to look, and under the circumstances I think it is a clear case of contributory negligence and I will grant the motion.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Opinion.

NEW JERSEY SUPREME COURT.

#115—October Term, 1926.

EDWARD HENRY SHARPE,
Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY COMPANY,
Defendant-Respondent.

Submitted October 15, 1926. Decided May , 1927

On Appeal from Essex Circuit Court.

Before Justices KALISCH, KATZENBACH and LLOYD.

For Appellant: OTTO A. STIEFEL.
For Respondent: JOSEPH COULT.

The opinion of the Court was delivered by LLOYD, *J.*

This is an appeal from a judgment of non-suit in the Essex Circuit Court. The Plaintiff Edward Henry Sharpe brought an action against the Public Service Railway Company to recover damages for injuries to himself and to his motorcycle received in a collision with one of the company's electric cars. At the conclusion of the plaintiff's case the trial judge, deeming the plaintiff clearly guilty of contributory negligence, granted the non-suit.

It is settled that two questions are always involved where negligence or contributory negligence is

alleged. The first is whether the conduct of the person so charged constituted negligence. The second is whether the negligence contributed to the injuries sustained. Under ordinary conditions these questions are for the determination of the jury and not for the court. Smith vs. Public Service Corporation, 78 N. J. L., 478.

If, however, upon the evidence adduced it shall clearly appear that such negligence does exist and that it has a casual relation to an injurious accident, the question becomes one of law for the court. N. J. Express Co. vs. Nichols, 33 N. J. L., 434.

The view taken in the court below that the case as proved by the plaintiff invoked the application of the latter rule was, we think, upon a review of the evidence, justified. The facts as established by the plaintiff and his witness Smith developed the following situation: The railway company operates a double line of trackage on First Street in the City of Newark. First Street runs north and south, and the easterly rail of the north bound track is 11½ feet from the easterly curb line. The accident occurred between 12 and 1 o'clock in the day of the 25th of April 1922. The plaintiff was riding a motorcycle, going west on the northerly side of New Street (which crosses First Street at right angles) at the rate of seven to ten miles per hour, and according to his own testimony could stop his motorcycle within six feet. As he approached the intersection "he kind of looked to the right" and sounded a little exhaust whistle that he had rigged up temporarily on his motorcycle. Without looking to the south in the direction from which the trolley car was approaching he proceeded to cross First Street without stopping or reducing his speed. As he neared the north bound east

track his motorcycle ran into the side of the passing trolley car and close to its rear end. His motorcycle was damaged and he himself injured. It further appeared that the trolley car was in plain sight not only of the plaintiff when he reached the curb line of First Street, but also of the witness who was fifty to seventy-five feet back of him.

In these circumstances we think, as did the trial judge, that not only is the inference of negligence on the part of the plaintiff irresistibly manifest, but it is equally manifest that but for that negligence the accident could not have occurred. The rights of the parties on the highway were equal, and the fundamental duty of using reasonable care in approaching the intersection rested upon both the plaintiff and the defendant. There was evidence in abundance of the negligence of the defendant's motorman in that he was operating at high speed and without warning. On the other hand there was, as we have said, also conclusive evidence of the failure of the plaintiff to use that ordinary degree of care which if it had been exercised would have saved him from the untoward consequences which resulted.

In the early days the highways were used by pedestrians, equestrians and drivers of horse drawn vehicles. The high powered motor in automobile and trolley car had not yet appeared. The cases involving the operation of the horse drawn vehicle of necessity dealt with a factor which is not present in the automobile or a motorcycle, namely, the independent volition of the horse, and to some extent this independent volition and its want of complete controllability have entered into the reasoning upon which an absolute duty to look has not been always imposed, on the theory that the driv-

er's attention must necessarily be in large measure devoted to the control of his animal. The advent of automotive power measurably eliminates this element, and want of complete control of the horse in contrast to the more amenable motor is recognized in our traffic laws in that while an automobile is permitted to run at the rate of thirty miles per hour on the open highway, the horse is limited to twelve miles per hour along a public road. The rule respecting pedestrians has been uniform that they must use their powers of observation before crossing trolley tracks. Newark Passenger Railway Co. vs. Black, 55 N. J. L., 605; Jewett vs. Railway Co., 62 N. J. L., 424; Schuler vs. Railway Co., 46 N. J. L., 824, and the same rule has been applied to the rider of a bicycle. Passman vs. W. J. & S. S. R. R., 68 N. J. L., 722. The automobile and motorcycle are scarcely less effectively controllable than one's own limbs or a bicycle, and the reasoning which dealt with horse drawn vehicles we think should not be extended beyond the exigencies which those conditions required.

Counsel for the appellant has cited numerous cases such as Traction Company vs. Scott, 58 N. J. L., 682, and Consolidated Traction Co. vs. Haight, 59 N. J. L., 581, and while from these cases and others it may be said that failure to look is not in all cases necessarily negligence, no one of them holds that such failure may not be negligence per se. Illustration of cases holding a failure to look negligence debarring recovery are Salatanow vs. Jersey City Railway Co., 70 N. J. L., 154; Harbison vs. Camden & Suburban Ry., 74 N. J. L. 254, and cases there cited in this court, and Hackney vs. West Jersey & Seashore R. R., 78 N. J. L., 454,

in the Court of Errors and Appeals. In the last named case, in a carefully written opinion by Justice Reed, after reciting the facts to the effect that the plaintiff in that case was driving parallel with the trolley tracks on Atlantic Avenue in Atlantic City, that he drove until he reached a street crossing known as Frankford Avenue where he attempted to cross the tracks, and in doing so was struck by an approaching trolley car and killed; that plaintiff's wagon was loaded with brush and the plaintiff could neither look behind nor to the side, it was said: "While this is a settled rule (the obligation to look) respecting the duties of a pedestrian crossing a trolley track, it has been held that it is not per se negligence for the driver of a vehicle not to look for a trolley car before crossing a street railway. In no case, however, has it been held that in no situation is it negligence per se for the driver of a vehicle to attempt to cross without looking;" and a judgment of non-suit was sustained. If as matter of law the plaintiff in a case where he did not look because his observation was obstructed by the load on his vehicle was held to be guilty of contributory negligence, obviously when one can look and does not do so he is chargeable with even greater culpability.

While, therefore, it is not always negligence per se for the operator of a motor vehicle to fail to look when approaching a street railway crossing, yet under exceptional circumstances it may so clearly appear that the failure to look demonstrates negligence and a casual relation between such negligence and the ensuing collision may be so patent as to present and entire question of law for the

court and upon which it may enter a non-suit. Such a case we think is here presented. The trolley car with which the plaintiff collided had nearly crossed the intersecting New Street and the motorcycle struck the trolley near the rear end. The slightest observance at a proper time of the conditions before him would have indicated the dangerous situation presented, and it was the want of this observance, together with heedless proceeding in the face of danger, which in part at least brought to the plaintiff his misfortune.

The judgment of non-suit will be affirmed.

Justice Kalisch dissents.

Affirmance of Judgment.

On June 1st, 1927, after due hearing, there was entered in the Supreme Court of New Jersey, its judgment affirming the judgment of the Essex Circuit Court, in this cause.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

Filed May 12, 1928.

EDWARD HENRY SHARPE, Plaintiff-Appellant, vs. PUBLIC SERVICE RAILWAY CO., Defendant-Respondent.	Action at Law. Notice of Appeal.

Take Notice, that the plaintiff, Edward Henry Sharpe, appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in the Supreme Court in this cause; on the following grounds:

1. That the Supreme Court should have reversed the judgment of the Essex County Circuit Court and should have set aside the judgment of nonsuit in said Circuit Court.

Dated, May 8th, 1928.

OTTO A. STIEFEL,
Attorney of Plaintiff-Appellant.

To: HENRY FRYLING,
Attorney of Public Service Railway Co.

New Jersey Court of Errors and Appeals

EDWARD HENRY SHARP, Plaintiff-Appellant, vs. PUBLIC SERVICE RAILWAY COMPANY, a corporation, Defendant-Appellee.	Action at Law. On Appeal from New Jersey Supreme Court.

SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

The oral argument developed quite clearly that the outstanding questions in the case are:

(a) Does the fact that plaintiff looked to the right instead of to the left, as he was entering First Street, bar him from recovery; was it negligence *per se* to look to the right instead of to the left?

(b) Is point 7 in appellant's brief well founded?

Defendant in this connection relied not only upon the opinion below and the cases cited on pages 6, 7 and 8 of defendant's printed brief, but also brought to the Court's attention two cases not mentioned in that brief, namely, *Ruggieri* vs. *Public Service,* 86 N. J. L. 698, and *Brown* vs. *R. R.,* 68 N. J. L. 618

Study by us of the two cases last mentioned requires that we should emphasize the fact that not

a single one of the cases upon which defendant relies (whether in the printed brief or cited orally), controls or is even in point in respect to the case *sub judice.*

The plaintiff now in court was injured at a *street crossing;* his case involves a street intersection accident which occurred while he was guiding or was causing to be propelled a motor vehicle upon which he was seated.

His case, therefore, is controlled by the rules and principles laid down or approved in *Dennis* vs. *North Jersey Street Railway Company,* 64 N. J. L., 439.

In the Dennis case the Court said:

> "The plaintiff was not bound, as matter of law, to stop, look or listen for the approach of the car before going over the crossing. The precise question whether he was in the exercise of reasonable care was for the jury."
> 64 N. J. L. at page 441.

As far as appellant's counsel can discover, the rule of law thus recognized has never been disapproved by this court.

The judgment in the Dennis case was reviewed by this court and the judgment of the Supreme Court was affirmed for the reasons there stated. (Affirmance reported in 65 N. J. L., 312).

The second syllabus at the head of the opinion in the Dennis case reads:

> "The principle of law is now well established, and must be applied, that it is not negligence *per se* or negligence in law for a person driving a vehicle in approaching a street crossing over which he intends to cross, to fail to look for an approaching street car, in order to avoid danger from it. The question whether he was negligent or

not must be submitted to the jury for them to determine as a question of fact."
64 N. J. L., p. 439.

Plaintiff's counsel cannot find that the principle of law declared to be established in the Dennis case has ever been challenged in this court. Examination of Shepard's New Jersey Citations apparently disclose that this court has never by direct reference disapproved or criticized what in the Dennis case was declared to be the "well established" principle of law. We know of no decision of this court—*involving a collision between vehicles at a street intersection*—*which* impairs the doctrine of the Dennis case.

With this in mind we point out:

(a) *Brown* vs. *R. R.*, 68 N. J. L. 618, cited on the oral argument by defendant, involves a foot-passenger case.

(b) *Ruggieri* vs. *Public Service*, 86 N. J. L. 698, involves a foot-passenger case.

(c) *Hackney* vs. *West Jersey* (cited on page 6 of defendant's brief), was not a street intersection case; plaintiff there, driving alongside of trolley tracks, "*made a turn*" on to the trolley tracks without looking.

(d) *Harbinson* vs. *Camden* (cited on page 7 of defendant's brief) was upheld by a divided court (76 N. J. L., 824); it involved another "turning" case, that is, plaintiff rode alongside the trolley tracks for a distance and then, without looking, turned to cross them.

(e) *Solatinow* vs. *Jersey City* (cited on page 8 of defendant's brief—a Supreme Court case), was another "turning" case;

> plaintiff, without warning, attempted to turn and cross trolley tracks; "the motorman, if he saw her, would have no reason to suppose that she intended to turn upon and attempt to cross the tracks on which he was running his car."

Thus the two cases cited during the oral argument by defendant's counsel, whether taken apart from those cited in defendant's brief or together with the latter, *only serve to emphasize that the case sub judice is in a different category;* it is in that class of cases in which this court has judicially declared the law to be well established that it is not negligence *per se* or negligence in law for a person driving a vehicle in approaching a street crossing over which he intends to cross, to fail to look for an approaching street car—the question of negligence or not must be submitted to a jury.

Under all the facts in this case (including the absence of evidence of approach of the trolley car as Sharp approached the intersection, plus the regard shown by him for possible vehicles approaching from his right), we submit that his case is controlled by the Dennis case and not by any of the cases cited orally or in defendant's printed brief.

Respectfully submitted,

OTTO A. STIEFEL,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals

EDWARD HENRY SHARPE, Plaintiff-Appellant, vs. PUBLIC SERVICE RAILWAY COMPANY, (a corporation), Defendant-Appellee.	Action at Law. On Appeal from New Jersey Supreme Court.

APPELLANT'S BRIEF.

Statement of the Case.

The action at law involved in this appeal is grounded upon the negligence of defendant (through its servant) in the operation of a trolley upon a public street in the City of Newark, known as Bergen Street or First Street. No question as to right of the defendant to maintain its tracks or to operate a street railway upon that street is involved. Such rights are admitted.

The complaint sets forth that plaintiff, on April 25, 1922, was riding lawfully upon and along New Street, seated on a motorcycle, and while so engaged approached the intersection of New and First Streets.

At that time (but unknown to plaintiff) the trolley car which is involved was approaching the intersection of said streets. It gave no warning of its approach. Plaintiff so testified and one Joseph J. Smith, called on behalf of plaintiff, fully corroborated him, thus:

"Q. (By Mr. Stiefel.) Were you going very rapidly? A. No, sir.

Q. Did you hear any gong or noise indicating the approach of any trolley car? A. Not until that car passed after the accident occurred.

Q. Did you hear any warning gong before it came into sight? A. No." (State of Case, p. 33, ll. 1 to 10.)

Plaintiff's testimony is set down as follows:

"Q. Did you hear any bell or other noise, signal or any indication of the approach of a trolley car as you approached this critical corner? A. No, sir." (State of Case, p. 18, ll. 3 to 10.)

It was operated at such a high and excessive rate of speed that (after the collision about to be described), it went "*more than halfway down to the next street before it stopped.*"

The testimony of plaintiff's witness Smith, directed to this point, is set down on page 38 of the state of the case as follows:

"Q. (By the Court) How far did the trolley car go before it stopped? A. I don't know how many feet exactly, but it was a considerable distance from the corner after it stopped.

Q. It cleared the north crosswalk? A. It was more than halfway down to the next street."

Plaintiff described the speed of the car and the accident as follows (pp. 19-20, State of the Case):

"Q. What did you see when you looked to the right? A. Nothing at all, and I was going to continue right across First Street and the first thing I knew I was rammed and the side of the trolley car was on top of me no matter which way I would turn.

Q. Which trolley? A. Bergen Street.

Q. The car proceeded from what direction? A. From the south direction.

Q. At what rate of speed was that car going? A. I should judge it was going within twenty-five or thirty miles an hour.

Q. Did it make any sound to indicate its approach, any bell or whistle or the like? A. The bell did not ring, but when it was too late, then, I heard the rumbling of the car.

Q. Where was the car when you heard the rumbling of it? A. Right on top of me.

Q. What did you then try to do? A. I tried to swing to the right and make a right turn, but my motor was at a standstill and I thought if I could swing to the right I could make a turn and get out of the way and hit the curb and stop, but at the same time the overhang of the trolley car, I figured was half passed me, at that time it must have hit my handle-bars and swung me around to the left and I must have been facing towards the south."

Plaintiff's view as he approached the street intersection was obstructed by buildings on the corners (p. 18, l. 20, to p. 19, l. 10).

There was no "automobile, person or motorcycle in front" of plaintiff to interfere with his view straight ahead (p. 18, ll. 10-12).

As plaintiff approached the trolley track in First Street, he "kind of looked to the right" and blew a whistle attached to his motorcycle (State of the Case, p. 19, ll. 10-15).

The trolley car approaching him from his left without any signal, was upon him so suddenly that despite his best effort (as above described in plaintiff's testimony) to escape collision, his motorcycle handle-bar was struck, he was thrown to the ground and severely injured (pp. 21 and 22, State of the Case).

At the conclusion of plaintiff's case defendant's attorney requested the Court to enter a judgment of non-suit. That motion, the Court's language in granting the motion and the exception noted as ground of appeal are set down at the end of the printed state of the case as follows (pp. 41-42, Printed State of the Case):

> "Mr. Coult: I respectfully move for a non-suit in this case on the ground that contributory negligence appears as a conclusion to be irresistibly drawn from all the evidence so far adduced.
>
> (Argument.)
>
> The Court: It is not disputed in this case that the plaintiff did not look to the left. He says he was going from seven to ten miles an hour and could stop within six feet. That the distance from the curb to the first trolley rail was eleven and a half feet, and he undoubtedly could see a long distance to his left when he got on the crosswalk, and while it is negligence *per se* not to look, but if looking would become effective and disclose the object of danger, I think it was his duty to look, and under the circumstances I think it is a clear case of contributory negligence and I will grant the motion.
>
> Plaintiff's counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal."

The judgment of the Circuit Court is set forth on page 13 of the state of the case.

Notice of Appeal (p. 1 of the State of the Case) was duly given and there were filed Grounds of Appeal (State of Case, p. 2), substantially as follows:

Grounds of Appeal.

1. The entry of the judgment of non-suit was error; plaintiff was entitled to the verdict of the jurors sworn; the proofs were sufficient to sustain plaintiff's action and the jury might truly have found in his favor.

2. The decision of the Trial Court that plaintiff was chargeable with "contributory negligence" —as a matter of law—was error.

3. The learned Trial Judge erred in refusing to permit the plaintiff's witness Joseph J. Smith to answer the following relevant, pertinent and material question directed to said witness by plaintiff's attorney, namely: "Can you tell whether they (trolley cars) were accustomed to stop" but sustained an objection to said question upon inadequate and insufficient grounds.

In this court the affirmance of the Circuit Court judgment has been assigned as the Ground of Appeal.

ARGUMENT.

POINT I.

Proof of defendant's primary negligence must have been sufficient, for defendant's motion was grounded *solely* upon this claim, viz: "that *contributory negligence* appears as a conclusion to be irresistibly drawn from all the evidence so far adduced."

> "The motion to non-suit for contributory negligence necessarily concedes 'primary negligence' on defendant's part." *Zanzonico* v. *Yellow Cab Co.*, 4 N. J. A. R. 458.

4 Misc 458

The rate of speed at which the car was going; its approach without warning or signal; the lack of any endeavor to stop ("why, that car shot right by New Street") (State of Case, p. 33, ll. 32-33); the fact that it came upon Sharpe from his left—all these circumstances tend to spell operation of the trolley car without regard to the rights of other vehicles approaching the street intersection in question.

The state of the case being what it is, we will assume that no new claim, not indicated upon the trial below and of which we have no notice now, will be made or advanced upon this appeal.

POINT II.

There should have been submitted to the jury below the question: Is defendant chargeable with contributory negligence?

The pronouncements of this Court below and the Court of Errors in analogous cases are numerous.

The principal pronouncements upon which we relied in presenting the appeal below to the Supreme Court are as follows:

> "The plaintiff was not bound, as matter of law, to stop, look and listen for the approach of the car before going over the crossing. The precise question whether he was in the exercise of reasonable care was for the jury. Traction Co. v. Scott, 29 Vroom 682; Traction Co. v. Haight, 30 Id. 577; Traction Co. v. Glynn, Id. 432; Traction Co. v. Lamberton, Id. 297; Electric Railway Co. v. Miller, Id. 423; Traction Co. v. Chenowith, 29 Id. 416; affirmed 32 Id. 554." *Dennis* v. *N. J. S. R. Co.*, 64 N. J. L. 439 at 441; affirmed 65 N. J. L. 312, upon opinion below.

The opinion in the Dennis case proceeds further as follows:

> "The remaining question is whether the trial court erred in its instructions to the jury.
>
> Error on this branch of the case is assigned on the refusal to charge the jury that 'a person crossing a street in a wagon is bound to look for approaching vehicles, and if neglecting so to do is hurt, he will be considered to have contributed to the injury by his negligence and will be barred from recovery against the person who inflicted it.
>
> It will be perceived that the request is that, as matter of law, if the plaintiff fails to look for an approaching car and is hurt, it is contributory negligence.
>
> This proposition has never been supported by any case in New Jersey, nor is it founded in reason in determining the liabilities of those who are in the common use of the highway. The request would have been proper perhaps if it had contained the further provision that if the failure to look for the approaching car was the want of ordinary care under the circumstances, and that such neglect contributed to the accident, then no recovery could be had. The mere failure of the plaintiff in his wagon to look for the approaching car, is not negligence in him, unless it contributed, in some degree, to his injury. Consolidated Traction Co. v. Scott, 29 Vroom 682. And if the failure to look for an approaching car be established, still the further fact must be found by the jury, that it was the want of the exercise, under all the circumstances, of reasonable care, and that it contributed to the injury, before the defendant can be relieved of liability."

The above noted pronouncements of this Court of Errors and Appeals were cited or noticed by

the Supreme Court in its disposition of the present cause upon the appeal from the Circuit Court (103 N. J. Law, 583; also State of the Case).

The present case is declared by the Supreme Court to be one in which the plaintiff was so clearly guilty of contributory negligence as to preclude submission of the proofs to a jury.

In February of this present year 1930, this Court of Errors and Appeals cited the opinion below in this cause and in that connection said:

> "The second case, cited by appellant (Sharp v. Public Service Railway Co., 103 N. J. L. 583), lays down the proper rules for distinction between the functions of court and jury in such cases. Mr. Justice Lloyd, writing the opinion of this court, said:
>
> "It is settled that two questions are always involved where negligence or contributory negligence is alleged. The first is whether the conduct of the person so charged constituted negligence. The second is whether that negligence contributed to the injuries sustained. Under ordinary conditions these questions are for the determination of the jury, and not for the court. Smith v. Public Service Corp., 78 N. J. L. 478.
>
> "If, however, upon the evidence adduced it shall clearly appear that such negligence does exist, and that it has a casual relation to an injurious accident, the question becomes one of law for the court. New Jersey Express Co. v. Nichols, 33 N. J. L. 434."
>
> In that case, a judgment of non-suit was affirmed because it clearly appeared among other things, that the plaintiff rode his motorcycle across a street intersection, without stopping or reducing his speed, and ran into the side of a trolley car near its rear end, without looking in the direction, from

> which it was approaching in plain sight. The court held that the inference of negligence on plaintiff's part, was irresistibly manifest, and that it was equally manifest that, but for that negligence, the accident would not have occurred. Vol. VIII No. 6 N. J. Adv. Rep. *German* v. *Harris*.

106 N. J. L. 521

If the facts (which this Court thus drew from the published opinion and not from the printed State of the Case below) were all the facts involved and thus a correct picture of the "accident" were presented, this appeal would not have been prosecuted.

The one great outstanding fact of the case which at once produced the injury and precludes a judge-decision in respect to contributory negligence, is the grossly negligent onset of the trolley car, which noiselessly came upon the scene at such a rate of speed as to be carried by its momentum more than one-half a block beyond the scene of the accident before it came to a stop.

As Sharpe approached the intersection of the two streets, no vehicle was in sight; when he got to a point at which he could look down the street to his right, he did so; seeing nothing that required him to stop or reduce his speed and hearing nothing, he continued to advance; the first warning of catastrophe was the "rumbling" of the trolley car, which "the first thing" he knew, was "on top" of him.

We maintain that Sharpe had the right to "assume that every traveler on the highway" would use "reasonable care" (German vs. Harris, Vol. VIII, N. J. Adv. Rep. No. 6, page 36, 1st syllabus).

If he had seen or heard or in some other way had became aware of the approach of the trolley car before reaching the intersection or at the intersection, the case would be different. Sharpe

looked to the right when he got to the intersection assuming that vehicles approaching from the left would approach at reasonable and controllable speed and give some heed to his presence there; instead of that, plainly, the trolley car "shot right ahead", as the expression is, and was "on top" of Sharpe before he could successfully steer his motorcycle to the right.

We quote below Sharpe's testimony (in part) to support our view of the facts. The great speed of the trolley car was proved by the witness Smith (ante, page 2 of this brief).

The great speed of that trolley car was necessarily an *integral* factor of the problem before the Supreme Court on the appeal below. Everything is relative—negligence, contributory negligence, care, neglect. We urge our view that the Supreme Court erred in neglecting this *factor* upon its solution of the problem of relativity, before it.

At the end of the opinion below there appear these words: "*the heedless proceeding in the face of danger, which in part at least brought to the plaintiff his misfortune.*" The plaintiff was not heedless when he looked to the right; nor was he heedless when in the absence of any warning sound he assumed that those approaching him from his left would use some degree of care and would not bear down upon him in the manner in which the trolley car actually did.

The quotations from the testimony are:

> Q. Was there anything in front of you as you were approaching west on New Street? A. No, sir; nothing at all.
>
> Q. You had a clear view, outside of the houses and the buildings on the street itself from curb to curb. Were there any vehicles there or persons? A. No, sir.
>
> Q. As you approached the intersection of

New and First Streets was there anything within your view to prevent your going straight ahead? A. No, sir.

Q. Did you hear any bell or other noise, signal or any indication of the approach of a trolley car as you approached this critical corner? A. No, sir.

Q. Was there any automobile, person or motorcycle in front of you to interfere with your view straight ahead? A No, sir.

Q. Were you on the right or left-hand side of the street? A. Right.

Q. About how far away from the curb on your right? Have you any idea or don't you know? A. About six feet. (State of Case, page 17, line 32, to page 18, line 18)

Q. What did you see when you looked to the right? A. Nothing at all, and I was going to continue right across First Street and the first thing I knew I was rammed and the side of the trolley car was on top of me no matter which way I would turn.

Q. Which trolley? A. Bergen Street.

Q. The car proceeded from what direction? A. From the south direction.

Q. From your left or your right? A. From my left.

Q. At what rate of speed was that car going? A. I should judge it was going within twenty-five or thirty miles an hour.

Q. Did it make any sound to indicate its approach, any bell or whistle or the like? A. The bell did not ring, but when it was too late, then, I heard the rumbling of the car.

Q. Where was the car when you heard the rumbling of it? A. Right on top of me.

Q. What did you then try to do? A. I tried to swing to the right and make a right turn, but my motor was at a standstill and I thought if I could swing to the right I could make a turn and get out of the way and hit the curb and stop, but at the same time the overhang of the trolley car, I figured was half way past me, at that time it

must have hit my handle bars and swung me around to the left and I must have been facing towards the south.

(State of Case, page 19, line 17 to page 20, line 8).

Q. How near the trolley tracks? A. Twelve feet, fifteen feet—just so I could peek around the corner of the building.

Q. When you were fifteen feet of the trolley tracks you looked to the right? A. Yes, sir.

Q. Was that the first time you looked? A. That was the first time I looked; yes, sir.

Q. How fast were you going when you took that look? A. Between seven and ten miles an hour.

Q. Good working condition? A. Yes, sir.

Q. Within what distance could you stop that motorcycle in the condition it was in then at the time you took that look, if you had to? A. If I had to?

Q. Yes. A. Going at what rate of speed?

Q. The rate of speed you were traveling then. A. In half the distance from here to where you are sitting.

Q. That would be— A. About six feet.

Q. There is no doubt in your mind about that? A. No, sir.

Q. Now, you heard this trolley car before you saw it? A. Yes, sir.

Q. Did you see it before you heard it? A. No, sir.

Q. Which, both at the same time? A. It all happened at once.

Q. You said something about hearing the rumbling of the car? A. When too late; it was already on top of me.

Q. Did you see it or hear it first? A. I heard it first.

Q. It was then too late to avoid the accident? A. Yes, sir.

Q. After you heard it, did you look at it? A. It was right on top of me.

Q. You looked as soon as you heard it? A. Yes, sir; but it was already on top of me.

Q. How close was it? A. About a thousandth of an inch.

Q. You had not seen it before that? A. No, sir.

(State of Case, page 29, line 8 to page 30, line 13).

POINT III.

If plaintiff, by reason of what he saw or heard, had become conscious of the swift approach of the trolley car and then had failed to take due precautions, he might be chargeable with contributory negligence.

"The motion to non-suit, upon the ground of contributory negligence, was properly denied, based as it was upon plaintiff's presumed consciousness of the situation, as he attempted to cross the tracks, and his alleged failure to exercise proper care in that respect. Whether having seen the approaching car at what to him, under the circumstances, seemed to present a reasonable opportunity to enable him to cross, in the absence of clear negligence, equivalent to manifest indifference to the inevitable result, and harboring as he might a reasonable expectation that the car would, at least, lessen its speed as it approached the crossing, it cannot be declared as a matter of law that the case was not for the jury. Our decisions are to the contrary. Napodensky v. West Jersey Railroad, 85 N. J. L. 336; Schnackenberg v. Delaware, Lackawanna and Western Railroad Co., 89 Id. 311."

Hyman v. *Atl. C. R. R.*, 101 N. J. L. at 125, bottom, and 126 top.

POINT IV.

Had plaintiff continued to go straight ahead, he would undoubtedly have been *across* the tracks when the trolley car reached him. Then we might have had a *death* case with which to deal. Then we would have been able to show that plaintiff was actually *across* the tracks before the trolley car reached the point of collision. *The fact that plaintiff as soon as he heard the "rumble" of the trolley car sought to avoid collision proves that he was not indifferent "to the inevitable result," and so his case comes well within the purview of the case above cited.* Despite the accident, the trolley car continued its wild course, making the accident clearly the result of that course, without any participation by plaintiff.

POINT V.

The absence of all indication of the trolley car approaching plaintiff from the left as he came to the corner made reasonable his glance to the right to discover whether under the law of the road he should stop or slow down for traffic approaching from his right.

That traffic might well have the right of way and certainly should have been a primary object of plaintiff's concern. In the absence of indication of rapid approach of traffic from the left, plaintiff's failure to successfully guard against that rapid approach should not be attributed to him as a legal fault.

POINT VI.

Plaintiff not seeing or hearing the approach of a trolley car as he neared the corner was not bound to anticipate that a glance to the left would disclose that approach—so swift that the car shot past the corner and only stopped at a point more than midway in the adjoining block.

POINT VII.

Had the Court not excluded the testimony of the witness Smith offered to prove that trolley cars were accustomed to stop at the given street intersection, it might have been possible to better understand the mental responses and operations of a normal person approaching that intersection.

The question excluded, the exception and discussion are set down as follows (Printed State of the Case, p. 35, ll. 19-35):

> "Q. Can you tell us whether they were accustomed to stop?
>
> Mr. Coult: I object to that. It does not make any difference what other trolley cars did.
>
> The Court: Sustain the objection. That is objectionable unless there is some reason to make it a dead stop. Just his experience and what he says would not be sufficient; I mean if it was a place where it stopped, if it was required, that would be all right.
>
> Plaintiff's counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal."

Trolley cars stop at many corners; at many corners traffic conditions require frequent stops. These facts serve to establish for any given corner a particular character. It may well be that the corner of First Street and New Street in Newark was a corner which plaintiff might well regard as a "safe" corner, at which no extraordinary precautions were necessary.

POINT VIII.

The judgment below should be reversed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

EDWARD HENRY SHARPE, *Plaintiff-Appellant,*	*Action at Law.*
vs.	*On Appeal from Supreme Court.*
PUBLIC SERVICE RAILWAY COMPANY, a corporation, *Defendant-Appellee.*	

BRIEF OF DEFENDANT-APPELLEE.

The plaintiff appeals from a judgment of the Supreme Court (*Sharpe* v. *Public Service Railway Co.*, 103 N. J. Law, 583) affirming a judgment of non-suit in the Essex County Circuit Court in an action arising out of a collision between a trolley car and a motorcycle, which was alleged to have been caused by the negligence of the defendant company.

The motion for non-suit was based on the ground that contributory negligence of the plaintiff appeared as an irresistible conclusion from the whole proof and was granted upon that ground. The propriety of the non-suit was attacked in the Supreme Court by Grounds of Appeal 1, 2, 3, 4 and 6. The single ground of appeal in this Court is the affirmance by the Supreme Court of the judgment of non-suit entered in the Circuit Court.

First street in Newark runs north and south. New street intersects it at right angles. The plaintiff was driving his motorcycle west on New street toward the intersection. The trolley car which was involved in the accident was northbound on First street. The motorcycle collided with the right *side* of the trolley car *near the*

rear. There was evidence that the trolley car was traveling rapidly without signal of its approach to the intersection.

POINT I.

The non-suit was justified by the proof.

Plaintiff was traveling west on New street (State of Case p. 16, l. 20) slightly upgrade (p. 16, l. 30); First street carries two lines of trolley tracks (p. 16, l. 36); it is 11 feet 6 inches from the easterly curb of First street to the nearest track (p. 17, l. 10); plaintiff was traveling between 7 and 10 miles per hour (p. 17, l. 25) about 6 feet from the right-hand curb of New street (p. 18, l. 15) and had a clear view of New street from curb to curb (p. 17, l. 35); he heard no signal of the approaching car (p. 18, l. 5).

The important portions of plaintiff's testimony as to the happening of the accident are as follows:

> (P. 18, l. 20) "Q As you came near those tracks tell us in your own words what happened? A Well, when I was proceeding to go across, to go on up to the agent's house, when I got within about fifteen to twenty feet of the railroad tracks, that is, I could see, but I could not look to either the left or the right on account of the buildings come out on the corner of New street at First."
>
> (P. 19, l. 10) "Q Go on. A And when I got within this distance of the rail, I kind of looked to the right and had a little exhaust whistle I had rigged on the rear cylinder—I had to take it off the front on account that it was not hitting; and I blew the exhaust whistle and looked to the right. Q What did you see when you looked to the right? A Nothing at all, and I was going to continue right across First street and the first

thing I knew I was rammed and the side of the trolley car was on top of me no matter which way I would turn."

(P. 28, l. 25) "Q It was your intention to cross First street? A Yes, sir. Q Are you familiar with the locality pretty well? Did you know there were trolley cars going on that street? A Yes, sir; that is why I stopped and looked to the right. Q You knew there were two lines of trolley tracks? A Yes, sir. Q And that trolley cars were likely to come both ways or either way? A Yes, sir. Q You did look to the right? A Yes, sir. Q Where were you when you looked to the right? A Sitting on my machine. Q Where was your machine? How far had you gotten? A How far? Q Yes. A How far from where the trolley line was? Q From any place you want to place up there; where were you when you looked to the right? A On New street going west. Q How near the trolley tracks? A Twelve feet, fifteen feet—just so I could peek around the corner of the building. Q When you were fifteen feet of the trolley tracks you looked to the right? A Yes, sir. Q Was that the first time you looked? A That was the first time I looked; yes, sir. Q How fast were you going when you took that look? A Between seven and ten miles an hour. Q Good working condition? A Yes, sir. Q Within what distance could you stop that motorcycle in the condition it was in then at the time you took that look, if you had to? A If I had to? Q Yes. A Going at what rate of speed? Q The rate of speed you were traveling then. A In half the distance from here to where you are sitting. Q That would be— A About six feet. Q There is no doubt in your mind about that? A No, sir. Q Now, you heard this trolley car before you saw it? A Yes,

sir. Q Did you see it before you heard it? A No, sir. Q Which, both at the same time? A It all happened at once. Q You said something about hearing the rumbling of the car. A When too late; it was already on top of me. Q Did you see it or hear it first? A I heard it first. Q It was then too late to avoid the accident? A Yes, sir. Q After you heard it, did you look at it? A It was right on top of me. Q You looked as soon as you heard it? A Yes, sir; but it was already on top of me. Q *How close was it? A About a thousandth of an inch. Q You had not seen it before that? A No, sir.*''

The plaintiff produced one other witness to support his case. This gentleman was a former employer of the plaintiff (p. 31, l. 10); he happened to be driving an automobile behind the plaintiff and following him (p. 32, l. 16); plaintiff was going slowly (p. 32, l. 20); as plaintiff got to the corner of First and New streets this witness was about 50 feet or 75 feet behind him (p. 32, l. 32); there was no warning gong before the trolley car came in sight (p. 33, l. 10); the trolley car when it came in sight was going faster than cars usually go, about 25 miles an hour (p. 33, l. 20).

This witness described the accident as follows:

(P. 34, l. 1) ''Q Describe that to the Court and jury as well as you can. A Well, the motorcycle was on up ahead of me about this distance I stated before and the next thing I knew this car shot out on First street and *Sharpe ran into the car;* that's all I know. Q Did you see whether he tried to get out of the way? A He swung to the right at first to try to get out of the way, but he couldn't get out of the way; it was impossible for him to get out of the way. Mr. Coult: I object to that conclusion of the

witness and ask that it be stricken out. The Court: I will strike it out. Q *How close to the trolley car* approximately, not by inches, but try to give us your knowledge, your recollection of how close to the trolley car *Mr. Sharpe was at the moment when this car shot in front of him? A He was about up to the curb, up to the crossing.* Q And then the car shot in front of him? A Yes, sir. Q Did the car go beyond him, Mr. Smith? A The car didn't stop until it was almost down to the next corner. Q Well, it went a considerable distance then beyond the intersection of New and First streets? A Yes, sir; a considerable distance."

He described the relative positions of the two vehicles before the accident as follows:

(P. 37, l. 35) "Q You said when you first saw the trolley car first coming from the south this gentleman and his motorcycle were at the crosswalk approaching the trolley track. You still adhere to that, don't you? A When he was on the crosswalk that trolley car was almost in front of him. *The center of the trolley car was almost in front of him when he was on the crosswalk? Q And what part of the trolley car did he collide with? A I think it was towards the rear end.*"

From the testimony it is apparent that the plaintiff himself had no idea of the proximity or remoteness of the trolley car at any time before he drove into danger. He said the first intimation of its presence was the rumble of its progress. As soon as he heard the car he looked (p. 30, l. 10); it was then, as he put it, "on top of" him; "about a thousandth of an inch" away.

The failure of the plaintiff to look for and see the trolley car before the accident might not

warrant the granting of a non-suit if there was proof, or a reasonable inference to be drawn from the proof, that the trolley car was so far distant when the plaintiff attempted to assert his right of way as to permit him to cross over in safety if the motorman used ordinary care. But Smith, the only witness who saw the trolley before the accident, conclusively eliminates any such theory when he testifies "when he (plaintiff) was on the crosswalk that trolley car was almost in front of him. The center of the trolley car was almost in front of him when he was on the crosswalk."

It has been pointed out that the distance from the east curb line was 11½ feet, according to the plaintiff's testimony, and the plaintiff was positive that he could have stopped his motorcycle at any time within 6 feet (p. 29).

The minds of reasonable men could not differ in determining that the failure of the plaintiff to look to the left when he had a clear view and when he could have stopped his motorcycle and have avoided the collision, constituted a want of ordinary care under the circumstances, and that such neglect contributed to the accident.

In *Hackney* v. *West Jersey & S. R. Co.*, 78 N. J. L. 454, 78 Atlantic 747, the Court of Errors and Appeals affirmed a verdict directed for the defendant in a case where the evidence and circumstances showed that the failure to look for an approaching trolley car was a negligent act on the part of the plaintiff which contributed to his injury. Mr. Justice Reed said:

> "In several of the cited cases it was held that the failure to conform to this requirement of observation by the pedestrian was a ground for non-suit or direction of verdict. While this is a settled rule respecting the

duties of a pedestrian crossing a trolley track, it has been said that it is not per se negligence for a driver of a vehicle not to look to a trolley car before crossing a street railway. In no case, however, has it been held that in no situation is it negligence per se for the driver of a vehicle to attempt to cross without looking. The rule is that the driver of a vehicle, as well as a pedestrian, must take reasonable care to avoid a collision before attempting to cross a trolley track. While the facilities for observation may be greater in the case of a pedestrian than in the case of a driver of a vehicle, yet the rule of reasonable care applies equally to both. When the failure to look in the driver of a vehicle is manifestly negligence, that driver is guilty of contributory negligence. McHugh *v.* North Jersey Street Railway Co., 46 Atl. 782; Hannon *v.* North Jersey Street Railway Co., 65 N. J. Law 547, 47 Atl. 803."

The case of *Harbinson* v. *Camden & Suburban Ry. Co.,* 74 N. J. Law 252, 65 Atlantic 868, affirmed 76 N. J. Law 824, 71 Atlantic 1134, was a writ of error out of the Supreme Court to the Camden Common Pleas to review a judgment of non-suit. The plaintiff was riding a bicycle near the defendant's car tracks and attempted to cross in front of a moving car without looking back.

Chief Justice Gummere said in the opinion:

"On the facts stated the non-suit was properly ordered on either of two grounds: * * *.

"In the second place, the failure of the plaintiff to look behind him before attempting to cross over, and so ascertain whether or not he would be in jeopardy by doing so from the approach of the car, was itself an act of negligence, which was largely, if not wholly, responsible for the accident. That

such failure on the part of the plaintiff will bar a recovery for injuries received by him has been frequently declared by our courts. * * *.

The judgment under review should be affirmed."

The second section of the syllabus in the case of *Solatinow* v. *Jersey City, H. & P. St. Ry. Co.*, 70 N. J. Law 154, 56 Atlantic 235, is as follows:

"If a person drives upon a trolley track without exercising reasonable observation to ascertain whether there is danger from an approaching car, he is guilty of contributory negligence."

In the opinion of Mr. Justice Van Syckel (p. 156) it is said:

"The plaintiff, also, was guilty of contributory negligence in failing to look for the approach of a car. Hannon *v.* North Jersey Street Railway Co., 36 Vroom 547; Jewett *v.* Paterson Railway Co., 33 *Id.* 425; North Hudson Railway Co. *v.* Flanagan, 28 *Id.* 696; Fitzhenry *v.* Consolidated Traction Co., 35 *Id.* 674; McHugh *v.* North Jersey Street Railway Co., 46 Atl. Rep. 782."

The opinion of the Supreme Court in the case at bar (*Sharpe* v. *Public Service Railway Co.*, 103 N. J. Law 583) is, we respectfully submit, an extremely well reasoned, logical and thoroughly annotated one. So far as its quality is concerned, it, literally speaks for itself, and we will not comment further upon it. It is referred to and quoted from with explicit approval by this Court in the case of *German* v. *Harris*, Vol. VIII, N. J. Adv. Rep. No. 6, p. 36, at p. 39 (not yet officially reported).

Counsel for appellant in his brief, referring to the German case, says: "If the facts (which

this Court thus drew from the published opinion and not from the printed state of the case below) were all the facts involved and thus a correct picture of the 'accident' were presented, this appeal would not have been prosecuted." He then proceeds to point out that the "one great outstanding fact" of this case which, he says, "precludes a judge-decision in respect to contributory negligence" is the alleged great negligence of the defendant in that there is evidence that its trolley car was proceeding rapidly and without warning. He seems to wish to make one of two points, to-wit, that the facts in the instant case in this respect are not sufficiently recited in the Supreme Court opinion; or that this Court, in its reference to said opinion in the German case, did not glean sufficient of said facts from said Supreme Court opinion. Perhaps he wishes to make both points. In other words his single complaint seems to be that this Court, in referring with approval in the German case to the opinion of the Supreme Court in the present case, and the Supreme Court, in its said opinion in the instant case, did not give proper consideration to the alleged negligence of the defendant disclosed by the plaintiff's case.

A reading of the Supreme Court opinion discloses that such a point is absolutely without merit; that the facts were very fully and accurately stated; that, far from not giving proper consideration to the evidence relating to defendant's negligence, said opinion (in 103 N. J. Law 583 at the top of p. 586) summed up the testimony of this point as follows:

> "There was evidence in abundance of the negligence of the defendant's motorman, in that he was operating at high speed and without warning. On the other hand, there was, as we have said, also conclusive evi-

> dence of the failure of the plaintiff to use that ordinary degree of care which, if it had been exercised, would have saved him from the untoward consequences which resulted."

In the same way, a reading of the German case discloses that the Supreme Court opinion in the instant case has been liberally quoted from and the pertinent facts set out in detail (Vol. VIII N. J. Adv. Rep. 36 at p. 39). It follows, and we respectfully submit that there can be no doubt, that the opinion of the Supreme Court in the case at bar was thoroughly perused and digested by this Court when considering the German case, and that there is no possible doubt that what the Supreme Court said with reference to defendant's negligence was noted by this Court.

The German case is, of course, clearly distinguishable from the case at bar. That, however, does not alter the unqualified stamp of approval placed by this Court, in it, upon the reasoning and conclusions of the Supreme Court in the case *sub judice.*

In attempting to make said point counsel for appellant also seems to have lost sight of the fact that the judgment of non-suit was affirmed by the Supreme Court, entirely regardless of the negligence of the defendant and assuming an "abundance" of it, upon the ground (bottom of p. 585) "that not only is the inference of negligence on the part of the plaintiff irresistibly manifest, but it is equally manifest that but for that negligence the accident could not have occurred."

It is undisputed that plaintiff, an adult in full possession of his faculties, riding a motorcycle about 6 feet from the curb on his right (p. 18, l. 15), and proceeding at a speed of from 7 to 10

miles an hour, at which he could have stopped within 6 feet, in broad daylight, attempted to cross a street upon which he knew trolley cars were likely to come from either, or both, directions without even once looking in one of said directions, *i. e.,* to his left, the direction from which the trolley he ran into came; that said trolley car was in plain view, not only of the plaintiff when he reached the near curb, or a point 11½ feet from the nearest rail, or the near crosswalk, a point slightly more distant from the nearest rail, but also of his witness, Smith, who was 50 to 75 feet behind him; that according to Smith, and this is also undisputed, the *center* of the trolley was almost in front of plaintiff when latter was at the *near crosswalk,* so that the conclusion also appears irresistible that the *center* of the trolley was then nearly across the intersection and that had plaintiff at that time only looked in *front* of him, not to mention to his left, he must have seen the trolley in ample time to avoid running into it. The plaintiff, nevertheless, continued on and ran into the *side* of the trolley car *at a point close to its rear end,* and did not see it until he was about *"a thousandth of an inch"* from it.

In this situation we respectfully submit that the testimony of the plaintiff and his witness are conclusive of the fact, to use the language of the Supreme Court at the bottom of p. 585 (italics ours), "that not only is the inference of negligence on the part of the plaintiff *irresistibly manifest,* but it is *equally manifest* that but for that negligence the accident could not have occurred."

To quote from said opinion again, near the bottom of p. 587, "If, as matter of law, the plaintiff in a case where he did not look because

his observation was obstructed by the load on his vehicle was held to be guilty of contributory negligence, obviously, when one can look and does not do so he is chargeable with even greater culpability. * * * The slightest observance at a proper time of the conditions before him would have indicated the dangerous situation presented, and it was the want of this observance, together with heedless proceeding in the face of danger, which in part at least brought to the plaintiff his misfortune."

POINT II.

It was not error to exclude the question mentioned and argued under Point VII of Appellant's Brief.

The exception which forms the basis thereof is as follows:

> (P. 35, l. 17) "Q Had you often seen trolley cars pass that corner? A Yes, sir. Q Can you tell us whether they were accustomed to stop?
>
> Mr. Coult: I object to that. It does not make any difference what other trolley cars did.
>
> The Court: Sustain the objection. That is objectionable unless there is some reason to make it a dead stop. Just his experience and what he says would not be sufficient; I mean if it was a place where it stopped, if it was required, that would be all right.
>
> Plaintiff's counsel prays an exception to this ruling of the Court.
>
> Exception noted as ground of appeal."

There was no evidence of a dead or compulsory stop for all cars at the south corner of New and First streets, and the question evidently related to the stoppage of cars for passengers. It was

properly excluded on the ground that it was not competent to show what other cars had done previously on approaching that crossing. But it was also irrelevant because the *plaintiff* had already testified that *he expected* cars at this crossing from either direction, (plaintiff's testimony p. 28, l. 35) and whether witness *Smith* knew that cars customarily stopped there would have no significance if the plaintiff believed that cars were to be expected moving from that direction.

There is no suggestion in the plaintiff's testimony that his reason for failing to look to the left was because he thought the car would stop at the south crossing. Then, too, the position of the car at the time when the plaintiff came to the near crosswalk, as described by Smith (that is to say, in a position which already partially blocked the street) would make the circumstances of its previously stopping at the south crosswalk entirely unimportant. In fact, from the whole testimony, the car may have stopped at the south crosswalk and started again before the accident happened.

It is submitted that the exclusion of this question was not error and certainly did no harm to the plaintiff.

We respectfully submit that the judgment of the Supreme Court, affirming the judgment of non-suit of the Circuit Court, should be affirmed.

Respectfully submitted,

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