

INDEX

Notice of Appeal	1
Stipulation as to State of Case	3
Notice of Appeal to Supreme Court of Public Service Railway Company	4
Notice of Appeal to Supreme Court of Joseph DeBaghian	6
Judgment Record:	
Complaint	9
Answer of Joseph DeBaghian	14
Answer of Public Service Railway Company	15
Reply	17
Judgment	18
Substitution of Attorney	18
Certificate of Clerk	19
Charge in Court of Common Pleas	20
Stipulation	25
Grounds of Appeal to Supreme Court of Pub- lic Service Railway Company	27
Grounds of Appeal to Supreme Court of Jos- eph DeBaghian	30
Opinion of Supreme Court	33
Notice of Appeal	35
Rule for Reversal and Remittitur, as to Pub- lic Service Railway Company	37
Rule for Reversal and Remittitur, as to Jos- eph DeBaghian	38
Certificate of Clerk	39

New Jersey State Library

New Jersey Supreme Court

Frank Mettie,
Plaintiff-Appellant,
vs.
Public Service Railway Com-
pany, a corporation,
Defendant-Appellee,
and
Joseph DeBaghian,
Defendant-Appellee.

Action at Law

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NOTICE OF APPEAL

To: Leonard J. Tynan, Esq., Attorney of Defend-
ant, Public Service Railway Company, and
Alexander M. MacLeod, Esq., Attorney of De-
fendant, Joseph DeBaghian.

Take notice that the above-named plaintiff,
Frank Mettie, hereby appeals from the judgment
of the New Jersey Supreme Court wherein said
Court reversed the judgment of the Passaic Coun-
ty Court of Common Pleas in the above-entitled
cause, to the New Jersey Court of Errors & Ap-
peals, and alleges as his ground of appeal that the
Supreme Court should have affirmed the judgment
of the Passaic County Court of Common Pleas,
whereas the said Court committed error in revers-
ing same.

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Respectfully etc.,
Mendelsohn and Mendelsohn,
Attorneys of Plaintiff-Appellant.

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Notice of Appeal

**NOTICE OF APPEAL OF PUBLIC SERVICE
RAILWAY COMPANY**

Filed February 2, 1924

PASSAIC COUNTY COURT OF COMMON
PLEAS

Frank Mettie,	Plaintiff,
vs.	
Joseph DeBaghian and Public Service Railway Company, a corporation,	Defendants.

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Action at Law

To: Mendelsohn & Mendelsohn, Esqs., attorneys
of plaintiff, and Alexander M. MacLeod, at-
torney of Joseph DeBaghian, defendant.

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Sirs:

Take Notice, that the defendant, Public Service
Railway Company, a corporation, appeals to the
New Jersey Supreme Court from the whole of the
judgment entered in favor of the said Frank Met-
tie and against the said Public Service Railway
Company and the said Joseph DeBaghian in the
above-entitled cause.

Dated, January 19, 1924.

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Yours truly,
Leonard J. Tynan,
Attorney of Defendant,
Public Service Railway Company.

Notice of Appeal

(Endorsed) "Service acknowledged January 19,
1924. Mendelsohn & Mendelsohn, attorneys of
plaintiff; Alexander MacLeod, attorney of Joseph
DeBaghian, defendant."

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Notice of Appeal

**NOTICE OF APPEAL
OF JOSEPH DEBAGHIAN**

Filed January 30, 1924

PASSAIC COUNTY COURT OF COMMON
PLEAS

Frank Mettie,

Plaintiff,

vs.

Joseph DeBaghian and Public
Service Railway Company,
a corporation,

Defendants.

Action at Law

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To Mendelsohn & Mendelsohn, Esqs., attorneys of
plaintiff, and Leonard J. Tynan, Esq., attor-
ney for Public Service Railway Co., defend-
ant.

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Sirs:

Take Notice, that the defendant, Joseph De-
Baghian appeals to the New Jersey Supreme Court
from the whole of the judgment entered in favor
of the said Frank Mettie and against the said Jos-
eph DeBaghian and the said Public Service Rail-
way Co., in the above-entitled cause.

Dated, January 30, 1924.

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Very truly yours,
Alexander M. MacLeod,
Attorney for Joseph DeBaghian,
Defendant.

Notice of Appeal

(Endorsed) "Service of a copy of the within
notice of appeal is hereby acknowledged this 30th
day of January, 1924. Mendelsohn & Mendelsohn,
attorneys for plaintiff; Leonard J. Tynan, attorney
for defendant, Public Service Railway Co."

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Judgment Record
JUDGMENT RECORD

**IN THE PASSAIC COUNTY COURT OF
COMMON PLEAS**

Frank Mettie,	Plaintiff,
vs.	
Joseph DeBaghian and Public Service Railway Co., a cor- poration of the State of New Jersey,	Defendants.

Mendelsohn & Mendelsohn, attorneys.

This cause was transferred from the Circuit Court to the Court of Common Pleas, by virtue of an order made in open court by Hon. Clifford L. Newman, in compliance with section 48 of an act relative to the Supreme and Circuit Courts (Revision of 1900) Compiled Statutes, volume 2, page 1720.

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Complaint

COMPLAINT

Joseph DeBaghian and Public Service Railway Co., a corporation of the State of New Jersey, the defendants in this cause, were summoned to answer unto Frank Mettie, the plaintiff therein, in an action at law upon the following complaint:

Plaintiff, by his attorneys, Mendelsohn & Mendelsohn, says that:

1. He resides in the City of Paterson, the County of Passaic and State of New Jersey.

2. Defendant, Joseph DeBaghian, resides in the City of Paterson, the County of Passaic and State of New Jersey.

3. Defendant, Public Service Railway Co., is a duly organized and existing corporation of the State of New Jersey.

4. On the 9th day of August, 1922, and for a long time prior thereto, there was situate in the City of Paterson, County of Passaic and State of New Jersey, a public street or highway, known as Hamburgh avenue, which runs in a generally northerly and southerly direction and which street is crossed or intersected on the northerly end by a public street or highway known as Belmont avenue and on the southerly end by another street or highway known as White street, both of which intersecting streets run in a generally easterly and westerly direction.

5. On the day and year aforesaid, Joseph De Baghian was the owner of a certain automobile

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Complaint

truck, jitney or omnibus, which he maintained and operated for the purpose of taking on and carrying passengers for hire and reward.

6. On the day and year aforesaid, the Public Service Railway Co. was the owner of a certain trolley car which it maintained and operated for the purpose of taking on and carrying passengers for hire and reward.

10 7. On the day and year aforesaid, defendant Joseph DeBaghian by himself, his servant and duly authorized agent for that purpose was running and operating his said automobile truck, jitney or omnibus for the purpose of taking on and carrying passengers for hire and reward, and while in the course of his said business, was running the said automobile truck, jitney or omnibus along the said highway known as Hamburg avenue between the said streets known as White street and Belmont avenue in the city aforesaid.

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8. While the defendant, Joseph DeBaghian was running and operating his automobile truck, jitney or omnibus in the aforesaid manner, the plaintiff was invited and taken on as a passenger upon the said automobile truck, jitney or omnibus for the purpose of being conveyed and carried thereon; and was then and there riding and being carried as such passenger upon the said automobile truck, jitney or omnibus of the defendant for a certain hire and reward which was then and there paid by plaintiff to the said defendant, Joseph DeBaghian, through his aforesaid agent and servant.

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Complaint

9. It did then and there become the duty of the defendant, Joseph DeBaghian, to exercise a high degree of care and caution for the safety and protection of the plaintiff while in the act of carrying and conveying him as such passenger.

10. On the day and year aforesaid, the defendant, Public Service Railway Co., by its agents and servants was running and operating its said trolley car for the purpose of taking on and carrying passengers for hire and reward and in the course of its said business was running and operating same in a northerly direction along Hamburg ave. between Belmont ave. and White street aforesaid, and it did then and there become its duty to operate same with care and caution so as to avoid running into or injuring other vehicles or pedestrians lawfully upon the said highway.

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11. Nevertheless, defendant, Joseph DeBaghian, disregarding his said duty, and while driving and operating his automobile jitney bus by his agent and servant as aforesaid, did carelessly, negligently and improperly run and operate the said jitney bus at a high and excessive rate of speed with poor and defective brakes; and carelessly, negligently and improperly failed to check, steer and guide his said automobile, and to keep it under proper care and control; and carelessly, negligently and improperly swung his automobile jitney bus violently upon the said highway without giving any sign or warning; and carelessly, negligently and improperly failed to check and bring to a stop his said automobile jitney bus, and carelessly and improperly failed to make any obser-

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12
Complaint

vations as to any other vehicles or obstructions then and there upon the said highway, so that by reason of the premises, the defendant by himself, his agent and servant ran into and collided with the said trolley car, with great force and violence, which was then and there being operated by the defendant, Public Service Railway Co., as aforesaid.

10 12. Defendant, Public Service Railway Co., also disregarding its duty as aforesaid, did by its agents and servants, carelessly, negligently and improperly run its said trolley car upon the said highway at a high and excessive rate of speed with poor and defective brakes, and carelessly, negligently and improperly failed to guide and control the course of the said trolley car; and carelessly, negligently and improperly failed to make any observations as to any other vehicles or persons lawfully then and there upon the said highway, and did carelessly, negligently and improperly fail to check the speed of the said trolley car and give any sign, signal or warning of its approach; and carelessly, negligently and improperly operated and ran same with great force and impact into and against the automobile truck, jitney or omnibus then and there being operated by the defendant, Joseph DeBaghian, as aforesaid, and on which plaintiff was then and there riding as a passenger.

30 13. As a result of the careless, negligent and improper conduct on the part of both of the defendants as aforesaid, the said automobile truck, jitney or omnibus and the said trolley car ran into, against and collided with each other with great

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Complaint

force and violence, and causing a large part of the said omnibus to be broken and torn away and striking and squeezing and crushing the plaintiff with great force and violence.

14. By reason of the premises, plaintiff was badly hurt and injured and had his arms and shoulders badly shattered and broken; had the nerves, muscles and tendons in his hands, arms and shoulders severely crushed and torn, sustained severe and painful internal injuries, suffered severe permanent injury to his spine and nervous system, received numerous severe and painful injuries, bruises, lacerations and contusions about the head, face, hands, fingers and other parts of his body.

15. As a result of the foregoing, plaintiff was rendered unconscious and was compelled to submit to an operation at the hospital during which time one of his fingers was amputated, and was subsequently compelled to submit to another operation for the purpose of removing certain bones, tendons, ligaments and nerves in his arms, and sustained a permanent injury to his nervous system and spine and other permanent internal injuries.

16. By reason of the premises, plaintiff became sick, sore, lame and disabled, and was confined to bed at the hospital for a long period of time, to wit: from thence to the time hereof, and will, in the future for a long period of time, be confined to bed and underwent great pain and suffering and will, in the future, be compelled to undergo great pain and suffering; and was deprived of his earn-

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Answer of Joseph Debaghian

ings from thence, to the time hereof, and will, in the future, be deprived of his earnings, and was compelled to expend and lay out large sums of money in connection with healing and curing himself of said injuries and will in the future be compelled to expend and lay out large sums of money in connection with curing and healing himself of his said injuries and will be permanently deprived of the use of his hands, arms and shoulders and will be permanently injured, maimed and disfigured about his head, face, limbs and entire body.

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Plaintiff demands as damages against the defendants, the sum of \$25,000 together with the costs of suit.

Mendelsohn & Mendelsohn,
Attorneys of Plaintiff.

ANSWER OF JOSEPH DEBAGHIAN

Defendant, Joseph DeBaghian, answering the complaint says that:

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1. Defendant has no knowledge or information sufficient to form a belief as to paragraph one of the complaint.

2. Defendant admits paragraph two of the complaint.

3. Defendant denies paragraph four of the complaint.

4. Defendant admits paragraph five of the complaint.

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5. Defendant denies paragraphs seven, eight, nine, eleven, twelve, thirteen, fourteen, fifteen and sixteen of the complaint.

Alexander M. MacLeod,
Counsel for Defendant, Joseph DeBaghian.

*Answer of Public Service Railway Company***ANSWER OF PUBLIC SERVICE RAILWAY COMPANY**

Filed October 25, 1922

The defendant, Public Service Railway Company, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, answering so much of the complaint as refers to it, says that:

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1. As to the allegations contained in paragraph one of the complaint, it has no knowledge or information thereof sufficient to form a belief.

2. It admits the allegations contained in paragraphs three, four and six of the complaint.

3. It denies the allegations contained in paragraphs ten, twelve, fourteen, fifteen and sixteen of the complaint.

4. In answer to paragraph thirteen of the complaint, it denies that as a result of the carelessness and negligence and improper conduct on the part of this defendant the automobile truck, jitney or omnibus referred to and said trolley car ran into, against and collided with each other with great force and violence, causing a large part of the said omnibus to be broken and torn, and striking and squeezing and crushing the plaintiff with great force and violence.

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First Defense

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1. It avers that the plaintiff, Frank Mettie, was engaged in a common enterprise with the operator of the automobile truck in which he was riding, and that the negligence of the said operator contributed to the happening of the said al-

Answer of Public Service Railway Company

leged accident, in that said operator endeavored to drive the said automobile truck across a track upon which a trolley car was being operated when the said trolley car was in such a position as to endanger the safety of the said plaintiff.

Second Defense

10 1. It avers that the negligence of the plaintiff, or the servant or agent of such plaintiff, contributed to the happening of the said alleged accident, in that he endeavored to drive the automobile truck 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 the safety of the said plaintiff.

Third Defense

20 1. It avers that the negligence of the plaintiff contributed to the happening of the said alleged accident, in that he failed to keep a proper lookout and to warn the operator of the automobile truck in question of the approach of the trolley car in question.

Joseph Coult, Jr.,
Attorney of Defendant.

*Reply***REPLY**

Filed May , 1923

Plaintiff, replying to the answer of the Public Service Railway Company, one of the defendants herein, filed in this cause, says that:

Reply to First Defense

1. He denies that he was engaged in a common enterprise with the operator of the automobile truck or jitney bus in which he was riding and denies that he is in anywise or manner chargeable with the acts or negligence of the operator of the said jitney or omnibus, and further avers that said accident was due to the joint negligence of both defendants in the above-entitled cause, as is stated in the complaint filed in said cause. 10

Reply to Second Defense 20

1. He denies the matters contained in the second defense.

Reply to Third Defense

1. He denies the matters contained in the third defense.

Mendelsohn & Mendelsohn,
Attorneys of Plaintiff. 30

*Judgment***JUDGMENT**

This action was tried before Judge Joseph A. Delaney, with a jury, in the presence of counsel of the respective parties, at the Passaic County Court of Common Pleas, on December 11th and 12th, A. D. 1923.

The cause having been heard and submitted to the jury, they returned their verdict as follows: Six thousand dollars (\$6,000), in favor of the plaintiff.

10 Whereupon, it is adjudged that the plaintiff, Frank Mettie, recover of the defendants, Joseph DeBaghian and Public Service Railway Co., a corporation of the State of New Jersey, the sum of six thousand dollars (\$6,000), and his costs, which are taxed at the sum of ninety-two dollars and fifty-four cents (\$92.54), making in the whole, the sum of six thousand and ninety-two dollars and fifty-four cents (\$6,092.54).

20 Judgment entered and signed December 19th, A. D., 1923, at 3.22 P.M. Action No. 3134, Docket B, page 466.

John McCutcheon,
Clerk.

SUBSTITUTION OF ATTORNEY

Filed January 19, 1924

30 In the above-entitled cause, removed from the Passaic County Circuit Court of Common Pleas, it is hereby agreed that Leonard J. Tynan be, and he hereby is substituted as the attorney of the defendant, Public Service Railway Company, in my place and stead.

Dated January 18, 1924.

Joseph Coult, Jr.

*Certificate***CERTIFICATE**

State of New Jersey, }
County of Passaic, } ss.

I, John McCutcheon, Clerk of said County and Clerk of the County Courts thereof, Do Hereby Certify, that the foregoing is a transcript of the Judgment Record, in re: Frank Mettie, plaintiff, vs. Joseph DeBaghian and Public Service Railway Co., a corporation of the State of New Jersey, defendants, as the same is taken from and compared with the original entry thereof in Book "C" of Common Pleas Judgments, now remaining of record in my office. 10

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and County, at Paterson, this fifth day of February, A.D. nineteen hundred and twenty-four.

John McCutcheon,
Clerk. 20

CHARGE

The Court then charged the jury as follows:

The Court—The plaintiff in this case seeks to recover for injuries sustained while a passenger on a bus of the defendant, Joseph DeBaghian, on the evening of the ninth of August, 1922.

10 As I recall the testimony, plaintiff was riding as a passenger on the bus of DeBaghian on Hamburg avenue going south. The trolley car on the same street came in contact with the jitney bus, the trolley going south.

Our investigation in this case is directed to the question of who is responsible or who is liable to this plaintiff for the injuries that he sustained. The case resolves itself, gentlemen of the jury, largely into a question of fact. You are the sole judges of the question of fact. You are to determine this issue wholly from evidence that you have heard.

20 The plaintiff attempts in his suit to hold either or both of the defendants liable for the injuries that he sustained, and evidence has been produced here on the part of the plaintiff establishing the fact that both or either of these defendants were negligent in the operation of the cars in the hands of its employees and because of such negligence caused this accident. So I say, from the testimony you are to determine who was the proximate cause of the injuries that the plaintiff sustained.

30 If you conclude from the testimony that because of the negligent operation of this bus, and only from the negligent operation of this bus the plaintiff was injured, of course, your verdict must of necessity be directed against the owner of the bus.

If, on the other hand, you believe the trolley company through its agent was negligent in the operation of its trolley car, and because of such negligence, and only because of such negligence, this plaintiff was injured, of course, your verdict will be against the trolley company.

If you feel, from the testimony, that both of the defendants, through their negligence approximately caused the injuries to the plaintiff, then, of course, your verdict will be against both of the defendants. 10

You and you alone are to determine how this accident happened and who is liable to the plaintiff.

That brings us to the question of damages. There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone and you are going to say from whom. What is he going to recover? You may not award punitive damages, there is no one to be punished here. You are simply to award such damages as will compensate, as will make whole the plaintiff for the injuries he had sustained. 20

What are these damages? The law lays down no set rule that would act as a guide in determining just what these damages are, but the law in its wisdom leaves it to men of the type and character that you are, in your mature judgment to determine.

There are certain elements that are to be considered in arriving at damages that may be allowed. The plaintiff has testified in this case, you will recall, as to his earning capacity. You will recall, also, testimony that has been adduced as to 30

Charge

the length of time he has been confined. You will recall the testimony in reference to the pain and suffering that he had endured. You will recall the testimony with reference to the permanent character of his injuries. You will recall the testimony with reference to the possibility of his earning capacity not being in the future what it was prior to the accident. All these are elements that go to make up the damages that may be allowed to the plaintiff for the injuries he has sustained. I will now leave the matter in your hands for your determination. Swear the officers.

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Defendant Public Service Railway Company excepts to the charge of the Court as follows:

Except to that part of the Court's charge in which he stated, "The question of who is responsible for damages for this injury is a question of fact for the jury."

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Except to that part of the Court's charge wherein the Court says, "The jury is to determine who is approximately responsible, that if the owner of the bus was negligent and he alone, your verdict will be against the owner of the bus, and if the trolley company alone was negligent your verdict will be against the trolley company and if you believe they were both negligent you will find both liable."

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Except to that part of the Court's charge in which he said "That the plaintiff is entitled to recover from someone and the jury is to say whom."

Defendant DeBaghian excepts as follows:

Except to that part of the Court's charge wherein he said, "You are to determine who was the proximate cause of the injuries sustained," and other words to that effect.

Charge

Where he said, "If the proof showed that the bus man was negligent then you will bring in a verdict against the bus man," and words to that effect.

And the same reference to, "If you find that the operator of the trolley car was negligent you will bring in a verdict against the Public Service Street Railway Company.

And, "If you feel both defendants through their negligence were the approximate cause of the injury to the plaintiff, your determination will be against both."

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Also wherein the Court says, "There is no question but that the plaintiff is entitled to recover from some one of the defendants."

And to that part of the Court's charge wherein he said, "The law lays down no set rule to act as a guide as to what damages may be allowed."

And, "You will recall the testimony as to the earning capacity of the plaintiff in the future."

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And also an exception to the Court's refusal to charge the three requests to charge on the part of the defendant DeBaghian.

(The jury was then recalled, and the Court charged further as follows:)

The Court—I have had handed to me, gentlemen, some requests to charge. The defendant, Joseph DeBaghian, requests the Court to make the following charges to the jury:

1. That the operator of the motor bus had the right to assume that no part of the person of the passenger would protrude beyond the outer line of motor bus, and that if the evidence satisfied the jury that the plaintiff's elbow or any part of his arm protruded beyond the line of the car, and that

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Charge

but for this fact, the accident would not have happened, then the plaintiff had failed to establish upon the part of the defendant, Joseph DeBaghian, and the verdict must be, as far as the defendant, Joseph DeBaghian, is concerned, "No cause for action."

2. The mere happening of an accident does not mean that the plaintiff should recover.

10 3. It is true that the defendant, Joseph DeBaghian, owes to the plaintiff a high degree of care, but it is also true that the plaintiff is bound to use and occupy the bus as a reasonable, prudent man should do under all the circumstances, and that if you find, as a fact, that the plaintiff did not use that degree of care as a reasonable, prudent man should do, under all the circumstances, then the plaintiff would be guilty of negligence and if you find that because of that negligence or lack of use of reasonable care on the part of the plaintiff, caused the injuries alleged, then your verdict should be, so far as the defendant, Joseph DeBaghian, is concerned, "No cause for action."

20 I so charge you and that part of the record in which I declined to charge these requests will be stricken out, and also counsel's exception to the refusal to charge.

(The jury then retire.)

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Stipulation

NEW JERSEY SUPREME COURT

Frank Mettie, Plaintiff-Appellee, vs. Joseph DeBaghian, Defendant-Appellee, and Public Service Railway Company, Defendant-Appellant.

Action at Law
on Appeal

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STIPULATION

It is agreed that at the trial of the above-entitled cause Joseph Coult, Jr., attorney of the defendant Public Service Railway Company, during his summation of the evidence adduced in the said cause, stated, to the Court and Jury, that he conceded that the plaintiff ought to recover damages in the case, but he should recover same from the defendant, DeBaghian, who was liable, and not from the defendant Public Service Railway Company. It is further stipulated that the defendant, Public Service Railway Company withdrew its defenses of contributory negligence. It is further agreed that Alexander MacLeod, attorney of defendant Joseph DeBaghian, during his summation of the evidence adduced in the said cause, stated to the Court and Jury that he conceded that the plaintiff ought to recover damages in the case but that he should recover same from the defendant, Public Service Railway Company, which was lia-

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Stipulation

ble, and not from the defendant, Joseph DeBaghian.

Dated April 25, 1924.

Mendelsohn & Mendelsohn,
Attorneys of Plaintiff-Appellee.

Alexander M. MacLeod,
Attorney for Defendant Joseph DeBaghian, Appellee Appellant

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Leonard J. Tynan,
Attorney for Defendant-Appellant
Public Service Railway Co.

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Grounds of Appeal of Public Service Railway Company

GROUNDS OF APPEAL OF PUBLIC SERVICE RAILWAY COMPANY, DEFENDANT-APPELLANT

Filed March 28, 1924

NEW JERSEY SUPREME COURT

Frank Mettie,
Plaintiff-Appellee,
vs.
Joseph DeBaghian,
Defendant-Appellee,
and
Public Service Railway Company,
Defendant-Appellant.

10

Action at Law
On Appeal
from the
Passaic County
Court of
Common Pleas.

To: Mendelsohn & Mendelsohn, Esqs., attorneys of plaintiff-appellee, and
Alexander M. MacLeod, Esq., attorney of defendant-appellee.

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Sirs:

Take Notice that the following are the grounds of appeal which the defendant-appellant, Public Service Railway Company, will urge why the judgment heretofore rendered against it in the above-entitled cause should be reversed, set aside, and for nothing holden:

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1. The Court, despite the objection of the attorney of the defendant-appellant, Public Service Railway Company, charged the jury as follows:

Grounds of Appeal of Public Service Railway Company

“Our investigation in this case is directed to the question of who is responsible or who is liable to this plaintiff for the injuries that he sustained. The case resolves itself, gentlemen of the jury, largely into a question of fact.”

- 10 2. The Court, despite the objection of the attorney of the defendant-appellant, Public Service Railway Company, charged the jury as follows:

20 “The plaintiff attempts in his suit to hold either or both of the defendants liable for the injuries that he sustained, and evidence has been produced here on the part of the plaintiff establishing the fact that both or either of these defendants was negligent in the operation of the cars in the hands of its employees and because of such negligence caused this accident. So I say, from the testimony you are to determine who was the proximate cause of the injuries that the plaintiff sustained.”

3. The Court, despite the objection of the attorney of the defendant-appellant, Public Service Railway Company, charged the jury as follows:

30 “If you conclude from the testimony that because of the negligent operation of this bus, and only from the negligent operation of this bus the plaintiff was injured, of course, your verdict must of necessity be directed against the owner of the bus.

Grounds of Appeal of Public Service Railway Company

“If, on the other hand, you believe the trolley company through its agent was negligent in the operation of its trolley car and because of such negligence, and only because of such negligence, this plaintiff was injured, of course, your verdict will be against the trolley company.

10 “If you feel, from the testimony, that both of the defendants, through their negligence approximately caused the injuries to the plaintiff, then, of course, your verdict will be against both of the defendants.

“You and you alone are to determine how this accident happened and who is liable to the plaintiff.”

- 20 4. The Court, despite the objection of the attorney of the defendant-appellant, Public Service Railway Company, charged the jury as follows:

“There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone and you are going to say from whom.”

Yours truly,

Leonard J. Tynan,
Attorney of Defendant-Appellant,
Public Service Railway Company 30

Dated: March 24, 1924.

(Endorsed) “Service acknowledged March 25, 1924. Mendelsohn & Mendelsohn, attorneys of plaintiff-appellee; Alexander MacLeod, attorney of defendant-appellee.”

Grounds of Appeal of Joseph Debaghian

because of such negligence, and only because of such negligence, this plaintiff was injured, of course, your verdict will be against the trolley company.

“If you feel, from the testimony, that both of the defendants, through their negligence approximately caused the injuries to the plaintiff, then, of course, your verdict will be against both of the defendants.

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“You and you alone are to determine how this accident happened and who is liable to the plaintiff.”

4. The Court, despite the objections of the attorney of the defendant-appellant, Joseph DeBaghian, charged the jury as follows:

“There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone and you are going to say from whom.”

20

Very truly yours,
Alexander M. MacLeod,
Attorney of Defendant-Appellant,
Joseph DeBaghian.

Dated: March 24, 1924.

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(Endorsed) “Service of the within grounds of appeal is hereby acknowledged this 28th day of March, 1924. Mendelsohn & Mendelsohn, attorneys of plaintiff-appellee; Leonard J. Tynan, attorney of defendant-appellee.”

Opinion of Supreme Court

(Filed October 20, 1924)

NEW JERSEY SUPREME COURT

May T., 1924

Frank Mettie,	
vs.	
Joseph DeBaghian	
and	
Public Service Ry. Co.	10
Same	
vs.	
Same.	

Appeals from Passaic Circuit Court.

Argued before Gummere, Chief Justice and Justices Parker and Katzenbach.

For the appellants, Alexander M. MacLeod and Leonard J. Tynan.

20

For the respondent, Peter J. McGinnis.

Per Curiam.

This was an action brought by the plaintiff against the two defendants to recover compensation for injuries received by him in a collision between a trolley car of the Public Service Railway Company and a jitney bus of the defendant DeBaghian, in which the plaintiff was riding. The trial resulted in a verdict against both defendants, the jury assessing the plaintiff's damages at \$6000. From the judgment entered upon that verdict both defendants have appealed.

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A number of reasons are urged for the reversal of this judgment. We find it necessary, however,

Opinion of Supreme Court

to consider only one of them, and that is directed at the following instruction to the jury: "There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone, and you are going to say from whom." This instruction seems to us palpably erroneous, for it overlooks the fact that the jury might have found that the collision occurred notwithstanding that both the motorman and the driver of the jitney were using due care in the operation of their respective vehicles. It is true that, as appears from a stipulation of the parties, counsel for the railway company in summing up to the jury conceded that the plaintiff ought to recover damages from the defendant DeBaghian, and that counsel for the defendant DeBaghian in his summing up conceded that the plaintiff ought to recover damages from the railway company. But these concessions made by counsel, in which each one attempted to impose liability upon the client of the other, could not operate to impose liability upon either defendant. If each counsel had admitted that his own client was legally responsible to the plaintiff, a different situation, of course, would have been presented; but in the present case, notwithstanding the admission or assertion of counsel for the respective defendants, the question still remained for the jury to determine whether the accident occurred by reason of the negligence of the employee of either the one or the other of the defendants, or solely from a cause for the existence of which neither one of them was responsible.

The judgment under review will be reversed for the reason indicated.

Notice of Appeal

NEW JERSEY SUPREME COURT

Frank Mettie, Plaintiff-Appellant, vs. Public Service Railway Com- pany, a corporation, Defendant-Appellee, and Joseph DeBaghian, Defendant-Appellee	Action-at-Law
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NOTICE OF APPEAL

To: Leonard J. Tynan, Esq., Attorney of Defendant, Public Service Railway Company and Alexander M. MacLeod, Esq., Attorney of Defendant, Joseph DeBaghian.

Take notice that the above-named plaintiff, Frank Mettie, hereby appeals from the judgment of the New Jersey Supreme Court wherein said Court reversed the judgment of the Passaic County Court of Common Pleas in the above-entitled cause, to the New Jersey Court of Errors & Appeals, and alleges as his ground of appeal that the Supreme Court should have affirmed the judgment of the Passaic County Court of Common Pleas, whereas the said Court committed error in reversing same. Dated: November 10th, 1924.

Respectfully etc.,

Mendelsohn & Mendelsohn,
 Attorneys of Plaintiff-Appellant.

30

Notice of Appeal

Service of a copy of the within notice of appeal is hereby acknowledged this 12th day of November, 1924.

Leonard J. Tynan,
Attorney of Defendant-Appellee
Public Service Railway Company

And as of Nov. 14, 1924

Alexander M. MacLeod,
Atty. of Defendant-Appellee,
Joseph DeBaghian.

10 Filed Nov. 15, 1924.

Edward J. Kelleher, Clerk.

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Rule of Reversal and Remittitur

NEW JERSEY SUPREME COURT

Frank Mettie,
Plaintiff-Appellee,

vs.

Joseph DeBaghian,
Defendant-Appellee,

and

Public Service Railway Com-
pany, a corporation,

Defendant-Appellant.

Action-at-Law
On Appeal from
Passaic County
Court of
Common Pleas

10

RULE OF REVERSAL AND REMITTITUR

The Court having heard the arguments of Counsel in the appeal in the above-entitled case, and having inspected the judgment and proceedings removed by the said appeal, and having duly considered the grounds of appeal,

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It is, on this twenty-second day of October, 1924, Ordered, that the said judgment in the Passaic County Court of Common Pleas, recovered by the said Frank Mettie against the said Public Service Railway Company, a corporation, be in all things reversed, set aside, and for nothing holden, and that the said cause be remitted to the Passaic County Court of Common Pleas to be proceeded in according to law.

Entered October 22, 1924, on motion.

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Leonard J. Tynan,
Attorney of Public Service Railway
Company, Defendant-Appellant

Rule of Reversal and Remittitur
NEW JERSEY SUPREME COURT

10	Frank Mettie, Plaintiff-Appellee, vs. Joseph DeBaghian, Defendant-Appellant, and Public Service Railway Com- pany, a corporation, Defendant-Appellee.
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Action at Law
On Appeal from
Passaic County
Court of
Common Pleas

RULE OF REVERSAL AND REMITTITUR

The Court having heard the arguments of counsel in the appeal in the above entitled cause and having inspected the judgment and proceedings removed by the said appeal and having duly considered the grounds of appeal.

20 It is, on this twenty-seventh day of October, 1924, Ordered, that the said judgment in the Passaic County Court of Common Pleas, recovered by the said Frank Mettie against said Joseph DeBaghian be in all things reversed, set aside, and for nothing holden, and that the said cause be remitted to the Passaic County Court of Common Pleas to be proceeded in according to law.

Entered October 27th, 1924, on motion,

30	Alexander MacLeod, Attorney of Joseph DeBaghian, Defendant-Appellant.
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Certificate of Clerk

I, Edward J. Kelleher, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above-stated cause.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this second day of December, A.D., Nineteen hundred and twenty-four.

Edward J. Kelleher, 10
Clerk.

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New Jersey Court of Errors and Appeals

Frank Mettie, Plaintiff-Appellant, vs. Joseph DeBaghian, Defendant-Appellee, and Public Service Railway Com- pany, a corp., Defendant-Appellee,)	On Appeal from Supreme Court
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BRIEF ON BEHALF OF APPELLANT

This appeal brings up for review a judgment of the Supreme Court reversing a judgment found in the Passaic Court of Common Pleas against both defendants. A single question only was before the Supreme Court, which is discussed in the opinion of the Court in the State of case at page 33, and the appeal to this Court is from the Supreme Court's conclusion on this single point. The question arose in the following manner:

The plaintiff while a passenger on a bus of the defendant, DeBaghian, was injured as a result of a collision of that bus with a car of the defendant, Public Service Railway Co. The bus and trolley were traveling in opposite directions and pursued their way in full view of each other until they collided with each other. Plaintiff sued both defendants, and when the evidence was all in and counsel commenced summing up it was conceded that the facts were such that there was negligence for

which the plaintiff was entitled to recover damages, the only contradiction being as to which of the two defendants should be charged. As the argument of counsel was not reported stenographically, and as some question afterwards arose on the matter, counsel for the parties entered into a stipulation which is set forth at page 25 of the State of Case. This stipulation we contend justified the Court in charging the jury as he did that:

“This brings us to the question of damages. There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone and you are going to say from whom.”

(P. 21, l. 15-20.)

The Supreme Court held that the Court committed error in charging as above quoted for the reason that:

“This instruction seems to us palpably erroneous, for it overlooks the fact that the jury might have found that the collision occurred notwithstanding that both the motorman and the driver of the jitney were using due care in the operation of their respective vehicles.”

(P. 34, l. 6-10.)

The Court in dealing with the stipulation said:

“It is true that, as appears from a stipulation of the parties, counsel for the railway company in summing up to the jury conceded that plaintiff ought to recover damages from defendant, DeBaghian, and that counsel for the defendant DeBaghian in his

summing up conceded that the plaintiff ought to recover damages from the railway company. But these concessions made by counsel, in which each one attempted to impose liability upon the client of the other, could not operate to impose liability upon either defendant.”

(P. 34, l. 12-21.)

This view of the Supreme Court as we have stated misconceived the purport of the stipulation. The stipulation did not merely state that the counsel for each defendant took the position that the other defendant was responsible to the plaintiff only. What the stipulation shows was conceded by counsel, that irrespective of who was to pay the plaintiff was entitled to damages, that is, in effect it was a concession to the court and jury that the plaintiff was injured as the result of the negligence of one of the defendants.

The exact language of the stipulation on that point is, that the Public Service Railway Co., conceded “That the plaintiff ought to recover damages in the case.” (P. 25, l. 22.) The defendant, DeBaghian conceded “That the plaintiff ought to recover damages in the case.” (P. 25, l. 31.) It is true that in each case counsel charged to the jury that it was the other defendant who really was responsible, but that did not in the slightest degree lessen the fact that both defendants had conceded that the plaintiff's position was that negligence had been established, so as to take that question out of the dispute.

This case was decided at the February Term of the Supreme Court, 1924. Since then, however,

cases somewhat similar in character have come before the Court, and the Court has taken an entirely different position than in the case at bar. We refer to the case of *Dougherty v. Public Service*, 126 Atlantic Rep., page 466, and *Quigley vs. Public Service*, 128 Atlantic Rep., page 551.

In the case of *Dougherty v. Public Service*, decided October 7th, 1924, the Supreme Court held:

“Where passenger was injured by collision between truck and street car, who both pursued their way in full sight of each other until collision was inevitable, circumstances were such as to justify instruction assuming that there was negligence on part of one of the parties.”

In the opinion the Court said:

“It is also argued that the Court assumed that one defendant or the other must be liable, ignoring the possible theory of pure accident. We incline to think that the circumstances of the accident were such as to indicate without any question, negligence on the part of one of these parties, and that, for the purpose of this rule, the charge on this phase of the case was fairly justified.”
126 Atl. Rep., p. 467.

It will be observed that the court dealt not only with the case on all fours, so far as the facts were concerned, viz., collision of the bus and trolley, which resulted in the injury of a passenger on one of its vehicles, but the court said that the trial

judge was justified under the circumstances in “ignoring the possible theory of pure accident.” (Atl. Rep., 126, p. 467.)

In the *Quigley* case (128 Atl. Rep., p. 551), a passenger was injured by a collision of a trolley car and bus; the case is exactly on all fours with the case at bar. In that case the court said:

“The appellant, however, by virtue of this same exception, seeks to obtain a reversal on other portions of the charge in which the appellant asserts in its brief there is ‘the assumption that one or both defendants was liable to the plaintiff, thereby barring from the case the element of pure accident, devoid of negligence on the part of either defendant.’ But we think the exception not broad enough to raise that question. The exception clearly related to those portions of the charge in which the judge instructed that they might, from the facts of the case, draw the inference of negligence of one or the other or both defendants. And there is strong reason in this case why the exception taken should not be extended beyond its reasonable bounds. From the opening of counsel of both defendants, and the examination and cross examination of witnesses, it is quite clear that recognition of negligence somewhere pervaded the trial. There was no request to charge. There was no claim by either defendant that the accident was an unavoidable one or one for which neither party would be responsible.

“Counsel for the Public Service Railway Co., in his opening said, ‘And it is for you gentlemen to say who was negligent in the case;’ and counsel for the bus owner presented to the jury the question in this language, ‘Who was negligent; who caused the collision?’ Both openings assumed that there was negligence. It certainly could not have been the plaintiff who was sitting quietly in the bus; therefore, it must have been intended as an assertion that one or the other operator was negligent. If the court following the lead of counsel in portions of the charge rather assumed the same fact, it was at least excusable, and an exception based upon the theory of an erroneous charge in that respect would have to be sufficiently clear and explicit to cover the objectionable parts of the charge to be availed of in this appeal.

“The judgment will be affirmed with costs.”

(128 Atl., p. 552.)

The Court in the case at bar charged that to hold either defendant, negligence must be established. His language on this part of the subject was:

“If you conclude from the testimony that because of the negligent operation of this bus, and only from the negligent operation of this bus the plaintiff was injured, of course your verdict must of necessity be directed against the **owner of the bus**. If on the other hand, you believe the trolley com-

pany through its agent was negligent in operation of its trolley car, and because of such negligence, and only because of such negligence, this plaintiff was injured, of course your verdict will be against the **trolley company**. If you feel, from the testimony, that both of the defendants, through their negligence, approximately caused the injuries to the plaintiff, then, of course, your verdict will be against both of the defendants.”

(State of case, p. 20, l. 30-40; p. 21, l. 1-10.)

Previous to the charge as above quoted the court also charged the jury that the plaintiff's effort to hold “either or both defendants liable was because of the fact that both or either of defendants were negligent in the operation of the cars, etc.”

(P. 20, l. 26.)

We further contend that if both counsel could have argued to the jury as their sole line of argument that the other defendant was liable, because such other defendant was negligent, then the court would not have been justified in submitting to the jury the question of a pure accident, as that was not the issue raised by the respective counsel in the case. Why should the court be asked to charge the jury to consider the question of pure accident, when both counsel argued to the jury that negligence was present? This is aside from the question of the stipulation which we say goes farther as we are now arguing.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and the verdict obtained at the Circuit sustained and that judgment should be entered in favor of the plaintiff.

WARD & MCGINNIS,
Attys. of Frank Mettie,
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

FRANK METTIE, <i>Plaintiff-Appellant,</i> <i>vs.</i> JOSEPH DE BAGHIAN, <i>Defendant-Appellee,</i> <i>and</i> PUBLIC SERVICE RAILWAY COM- PANY, a corp., <i>Defendant-Appellee.</i>	}	<i>Action at Law. On Appeal from Su- preme Court.</i>
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BRIEF OF JOSEPH DE BAGHIAN, DEFENDANT-APPELLEE

The only point argued by the plaintiff-appellant is the effect of the stipulation (p. 25 of the printed case).

The case of *Niebel v. Winslow*, (New Jersey Court of Errors and Appeals), 88 N. J. L. 191, holds that:

“In an action of negligence, the burden of proving the negligence of the defendant is upon the plaintiff, and, as a proposition of law for the jury’s guidance at the close of the case, it never shifts to the defendant.

This right of the defendant to have the plaintiff bear the burden of the affirmative is a substantial one, the denial of which is injurious error.”

See also *Fanshawe v. Rawlins*, 89 N. J. L. 344, and *Collins v. Central R. Co. of N. J.*, 91 N. J. L. 615.

As to the defendant, Joseph De Baghian, therefore (and the existence of another defendant could have no effect upon the rule), it was neces-

sary for the plaintiff to show negligence; the happening of the accident was no proof of negligence; therefore proof that the co-defendant was not negligent would not in itself furnish the slightest proof that this defendant was negligent, and yet the Trial Court, which should not have allowed a presumption of negligence as to this defendant to arise from the happening, not alone did so, but in effect went much farther, and by charging that in any case the plaintiff could recover, in effect charged that the presumption against this defendant was conclusive, unless the jury found such a conclusive presumption against our co-defendant alone.

The Trial Court charged,—(p. 21, l. 16) “There seems to be no question in this case but that the plaintiff is entitled to recover. He is entitled to recover from someone and you are going to say from whom.”

The Supreme Court in its opinion says,—(p. 34, l. 6) “This instructions seems to us palpably erroneous, for it overlooks the fact that the jury might have found that the collision occurred notwithstanding that both the motorman and the driver of the jitney were using due care in the operation of their respective vehicles.” And again,—“—the question still remained for the jury to determine whether the accident occurred by reason of the negligence of the employee of either the one or the other of the defendants, or solely from a cause for the existence of which neither one of them was responsible.”

The state of the case as presented by the plaintiff-appellant is before us without any evidence, and we must, therefore, assume that the Supreme Court, who had the evidence before it, found therein facts from which the “jury might have found that the collision occurred notwithstanding that both the motorman and the driver of the jitney were using due care in the operation of

their respective vehicles.” And that the accident might have occurred “solely from a cause for the existence of which neither one of them was responsible.”

By a reading of the evidence it might have appeared that the jury could have determined from the facts in the case that the collision was the result of pure accident without negligence on the part of any one.

In the case of *Connolly v. Public Service Railway Company* (New Jersey Court of Errors and Appeals, 94 N. J. L., p. 157), the Court said:

“The case went to the jury which returned a verdict for the defendant, and from the judgment rendered on that verdict this present appeal is taken. The printed case does not exhibit any of the testimony or other evidence taken on the trial, and the errors alleged are predicated solely upon the judge’s charge.

“In the absence of any of the testimony submitted we, of course, are unable to determine what conclusions of fact the jury were entitled to draw, and we have no knowledge of the circumstances of the accident except so far as portions of the charge may throw some light thereon.

“The first point made is, that the trial judge erred in instructing the jury that there is no speed limit for trolley cars in New Jersey, and that a trolley car may be operated at any speed consistent with the safety of the passengers and with the safety of pedestrians and others on the street. Appellant’s counsel is correct in saying that the trial judge plainly overlooked the provisions of the so-called Traffic Act of 1915 (Pamph. L., p. 290), where the limit of speed is prescribed in localities where the houses

are on the average more than one hundred feet apart, and on page 296, paragraph 27, where it is laid down that no street car shall be operated at a greater speed than fifteen miles per hour in places where the houses are on the average of less than one hundred feet apart, provided the tracks on which such street car is operated are laid upon any public street. The judge gave instructions with respect to the general duty of care to be exercised by the motorman of a street car which, as a matter of common law, are unexceptionable, and the question is whether this judgment should be reversed because of his statement to the jury that there was no speed limit for trolley cars, &c. In determining this question, it should be borne in mind that the judge was speaking to a particular case; that section 27 of the Practice Act of 1912 provides that 'no judgment shall be reversed * * * on the ground of misdirection * * * unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party.' Pamp. L. 1912, p. 382. We are unable to say that this error injuriously affected the rights of the plaintiff. There is nothing in the case before us to show that the trolley car was moving at any speed in excess of the statutory rate, and if there were no such evidence it was quite immaterial whether the judge erroneously instructed the jury with respect to the statute or not. No case, therefore, is made for a reversal on this ground."

The harmful character of the errors in the charge of the Trial Court seems obvious, for the case, so far as concerns the defendant Joseph De Baghian, was clearly for the jury on the question of the negligence of the said defendant.

The case of *Ruckman v. Bergholz*, 37 N. J. L., p. 437, holds:

"It should be clear that a misdirection in a charge has done no injury to the party complaining of it, and if there is reasonable doubt on that head he is entitled to the benefit of it."

Here the Court is deprived of any assistance that the testimony might render, and this Court must at least assume that the error complained of in the Supreme Court was harmful as the Supreme Court found.

The plaintiff-appellant relies upon the case of *Dogherty v. Public Service Railway Co.*, 126 Atlantic Reporter 466, wherein, however, a reading of the opinion shows the evidence justified the conclusion that the accident referred to could not have happened without negligence on the part of one or the other of the defendants. The Court said that the Trial Judge was justified under the circumstances in that case in ignoring the possible theory of pure accident. In the case at bar, however, the Supreme Court, who had the evidence before it, says the "jury might have found that the collision occurred notwithstanding that both the motorman and the driver of the jitney were using due care in the operation of their respective vehicles," and the accident might have occurred "solely from a cause for the existence of which neither one of them was responsible."

The plaintiff-appellant also relies upon the decision in the case of *Quigley v. Public Service Railway Co.*, 128 Atlantic Reporter, p. 551, in which case the Court merely holds that under the given facts an exception, based upon the theory of an erroneous charge, would have to be sufficiently clear and explicit to cover the objectionable parts of the charge to be availed of in that appeal.

In the present case there is no question raised as to the sufficiency of the exception taken by this defendant, at the trial of the cause, to the error complained of.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

ALEXANDER M. MacLEOD

Attorney for and of counsel
with Joseph De Baghian
Defendant-Appellee

INDEX

Notice of Appeal	1
Answers and Complaint	2
Answer	3
Restraint to Answer	4
Substitution of Attorney	5
Judgment	6
Notice for Direction of Verdict	7
Charge to Jury	8
Verdict of Appeal	102

Testimony

<i>For Plaintiff</i>	
Edik Larentz	
direct examination	13
(recalled) direct	24
George H. Muller	
direct examination	25
cross	18
re-direct	21
re-cross	22
Louis Quinn, Jr.	
direct examination	24
Grace Brandscomb	
direct examination	25
John Larentz	
direct examination	26
cross	20
Otto Mollenberger	
direct examination	24
cross	25
Adolf Janitschek	
direct examination	27
cross	28
re-direct	29