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HUDSON COUNTY CIRCUIT COURT.

Action at Law.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff,

—against—

RICHARD MURPHY,

Defendant.

Notice of Appeal.

(Filed Nov. 1, 1923.)

To Messrs. Lazarus, Brenner & Vickers, Attorneys for Defendant:

TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals, from the whole of the judgment entered in this cause.

ALEX. SIMPSON,
Attorney for Plaintiff.

Grounds of Appeal.

(Filed Nov. 15, 1923.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Action at Law.

On Appeal from Hudson Circuit.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff,

—against—

RICHARD MURPHY,

Defendant.

Plaintiff-appellant states the following grounds of appeal from the judgment of the Hudson County Circuit Court.

1. The trial Court incorrectly charged the jury:

> "If you find that the accident was caused by the negligence of this driver and that there was no contributory negligence on the part of this young man, then you have to go a step further and determine your verdict."

2. The trial Court incorrectly charged the jury:

> "She would be entitled to the services of that boy until he was 21 years of age; but you see, members of the jury, during the

time that he was rendering the services to the mother the law cast upon the mother a reciprocal duty; she was obliged to clothe him, she was obliged to care for him, to feed him. All that you see would come out of what he would earn during that time, so that the mother would not receive the full amount. If the boy was working for somebody else and brought the wages home, out of that the mother would have to feed him, clothe him and give him such spending money as would be required. You see, in other words, the mother would receive what the son had received for wages but she would have to pay out the amount required for his support. Now, her loss would not be the total amount that the son brought in, but the amount that was left after she had performed the duties of a mother to that son."

ALEX. SIMPSON,
Attorney for Plaintiff-Appellant.

Summons.

The State of New Jersey to Richard Murphy:

YOU ARE SUMMONED to answer the annexed complaint of Jennie Cooper, administratrix *ad prosequendum* of the estate of Archibald L. Cooper, deceased, in an action at law in the Circuit Court of the County of Hudson. And take notice, that unless you file your answer to said complaint with the Clerk of said Court, within 20 days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Willard W. Cutler, Judge of the Circuit Court of the County of Hudson, at Jersey City, this 2nd day of August, 1923.

ALEX. SIMPSON,
Attorney.

JOHN J. McGOVERN,
Clerk.

(Seal)

Complaint.

HUDSON CIRCUIT COURT,

Action at Law.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff,

—against—

RICHARD MURPHY,

Defendant.

The plaintiff who resides at No. 349 Central Avenue, in the City of Jersey City, in the County of Hudson, says that:

1. She is administratrix *ad prosequendum* of the estate of Archibald L. Cooper, deceased, and brings into Court letters of administration granted to her upon the said estate by the Surrogate of the County of Hudson.

2. Defendant, on the 29th day of May, 1923, at Jersey City, in the County of Hudson, was the owner of a certain automobile jitney used by the defendant in his business of a common carrier of passengers for hire; which automobile was being driven by a servant of the defendant along public highway known as Central Avenue, at the intersection of Lincoln Street, in the City of Jersey City.

3. The intestate of the plaintiff, on said 29th day of May, 1923, was killed through the negligence of the defendant.

4. The negligence of the defendant consisted in this: Defendant did not use reasonable care in the management, operation and control of the said automobile as a common carrier of passengers, but on the contrary, as intestate of the plaintiff was attempting to board said automobile, the agent and servant of the defendant in charge thereof, negligently and carelessly, suddenly and without warning started said automobile without affording plaintiff's intestate sufficient time to board same, and he was thrown therefrom and so injured that he died on the 29th day of May, 1923.

5. The intestate of the plaintiff was at all times in the exercise of due care for his safety.

6. The intestate of plaintiff left him surviving next of kin who have suffered pecuniary injury by reason of his death.

7. The within action is commenced within twenty-four calendar months after date of death of plaintiff's intestate. Plaintiff demands $50,000 damages.

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer.

HUDSON COUNTY CIRCUIT COURT.

Action at Law.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff,

—against—

RICHARD MURPHY,

Defendant.

Defendant residing in the City of Bayonne, County of Hudson and State of New Jersey, says that:

1. He has no knowledge as to the allegations contained in Paragraph 1 of the complaint, and therefore, neither admits nor denies the same.

2. He denies Paragraphs 2 to 5 inclusive, of the complaint.

3. He has no knowledge as to the allegations contained in Paragraph 6 of the complaint, and therefore, neither admits nor denies the same.

4. He admits Paragraph 7 of the complaint.

FIRST SEPARATE DEFENSE.

Defendant was guilty of no negligence which was the proximate cause of the happening of the accident alleged in the complaint and was guilty of no negligence which resulted in the death of plaintiff's intestate.

Rule for Judgment.

SECOND SEPARATE DEFENSE.

Plaintiff's intestate was guilty of contributory negligence.

LAZARUS, BRENNER & VICKERS,
Attorneys for Defendant.

Rule for Judgment.

(Entered Nov. 27, 1923.)

HUDSON COUNTY CIRCUIT COURT,

Action at Law.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff,

—against—

RICHARD MURPHY,

Defendant.

This action having been tried before Honorable Willard W. Cutler, Judge of the Hudson County Cricuit Court, with a jury, on October 16, 1923, in the presence of counsel for the respective parties, and the jury having returned a general verdict in favor of the defendant and against the plaintiff,

IT IS ORDERED, that judgment final be entered in favor of the defendant and against the plaintiff.

On motion of

LAZARUS, BRENNER & VICKERS,
Attorneys for Defendant.

Rule entered Nov. 27, 1923.

Case and Exceptions.

HUDSON COUNTY CIRCUIT COURT.

JENNIE COOPER, Admx., etc.,

—against—

RICHARD MURPHY.

Tried October 15, 1923, before Cutler, *J.* and a jury.

Alexander Simpson for the plaintiff.

Lazarus, Brenner & Vickers for the defendant.

JENNIE COOPER, sworn.

Direct examination by Mr. Simpson:

Q. What is your name? A. Jennie Cooper.

Q. Are you the mother of Archibald L. Cooper? A. Yes.

Q. How old are you? A. 37.

Q. How old was Archibald L. Cooper? A. 19.

Q. Did he have any brothers and sisters? A. Yes.

Q. What were their names and ages? A. George, 17; Howard, 15; Edward, 7; and Hulda, 6.

Q. The father was not living at the time of his death? A. No, sir; the father was dead two years.

Q. When and where did Archibald Cooper die? A. May 29, at the City Hospital.

Q. What was his business at the time of his death? A. He took charge of the store.

Q. What store? A. Gent's furnishing store, 349 Central Avenue, Jersey City.

Q. Whose store was it? A. It was my store.

Q. He ran it for you? A. He ran it for me; he was my oldest son.

Q. Since his death who has run it? A. I had to take my other son from school to help me along.

Q. Did you pay your son Archibald any salary? A. No, sir; I never paid him any salary.

Q. What did he do? A. He took charge of the store.

Q. How long had he been running the store? A. Three and a half years.

Q. Two and a half years? A. Three and a half years.

Q. What did he do in the store? A. Well, he took charge of the entire place, selling, taking care of the stock, took charge of the entire place; I had the other small children to take care of, sending them to school.

Q. What experience did you have in the gent's furnishing business? A. I have been taking care of the store ever since it was founded, ever since it was opened.

Q. Do you know what it would cost to hire a man to do what your son did in the store?

Mr. Brenner: I object to that.

Q. To take entire charge, about $75 a week.

The Court: One minute.

Mr. Brenner: No proper foundation has been laid.

The Court: I think the question itself is proper. It calls for a yes or no answer. You may object to the answer. I think the question is proper.

Mr. Brenner: I ask that that answer be stricken out.

The Court: Strike that out.

Q. Do you know of your own knowledge what it would cost to go out today and hire a man to do what your son did? A. Positively can't get them less than $75 a week.

Mr. Brenner: I ask to strike that out.

Q. Do you know how much it would cost to hire a man? You do know or you do not know? A. I do know.

Q. In what way have you gained your knowledge? A. I often had help in the store to help me out and I know just what it cost me.

Q. You have had to hire people to do that kind of work? A. Yes.

Q. Over what period of time did you hire them, one year or two years? A. Not exactly. I had them to help out; I had window dressers to do the work he did.

Q. You do not understand. You said you had hired people to do the work your son did. A. At busy seasons.

Q. How long had you owned the store? A. Three and a half years.

Q. Was it all during that time you had to hire people? A. During busy times of the season.

Q. That is how you get your knowledge of what people get paid to do the work your son did? A. Yes.

Q. Now I ask you, what would it cost you to hire a man to do the work your son did?

Mr. Brenner: May I cross examine?
The Court: Yes.

Cross examination by Mr. Brenner:

Q. When was the last time you hired anybody to do any work in your store? A. Last Christmas.

Q. Whom did you hire at that time? A. Different people; any that I could trust.

Q. Do you know their names? A. Yes.

Q. What is the name of the person you hired? A. I had a lady; I had some of my friends helping.

Q. Who was the man you had to do the same kind of work your son was doing? A. I had a window dresser doing the same kind of work, and before that I had to pay him $15 to do that work.

Q. I am not asking about a window dresser. A. My son did that.

Q. But he was generally managing the business. A. Dressing windows and taking care of the store.

Q. Did you ever hire anybody as a clerk in the store? A. Not continually; just for a day or so in the busy seasons.

Q. But you never hired them by the week? A. No, sir.

Mr. Brenner: I object.

The Court: She may testify to that. It is an element to be considered by the jury.

Mr. Brenner: Exception.

(Question repeated as follows: "Q. Now I ask you what it would cost you to hire a man to do the kind of work your son did.")

A. $75 a week.

By Mr. Simpson:

Q. Your son was unmarried? A. Yes.

Q. You say 19 years old; and you have given us the ages of the others? A. Yes.

Q. You are the Jennie Cooper mentioned in the letters of administration issued by the surrogate? A. Yes.

(Letters of administration *ad prosequendum* offered in evidence and marked Plaintiff's Exhibit 1.)

JULIUS KAPLAN, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. 157 New York Avenue, Jersey City.

Q. On the day of this accident to Archibald Cooper were you on Central Avenue in Jersey City? A. Yes.

Q. Where were you on Central Avenue? A. 345 Central Avenue.

Q. Near what cross street is that? A. Lincoln Street.

Q. Did you see a jitney bus coming along Central Avenue? A. Yes.

Q. Which direction was it going? A. South.

Q. It was coming then towards the court house? A. Towards the court house, yes.

Q. Did you see anything happen when it got near any of the cross streets, or at the corner of a cross street? A. It was going very slow, just like that, and Cooper was going to get on the jitney bus, he had his right hand out, the bus didn't stop at all, it was going very slowly, the bus was going to turn into the curb; and he fell under the right wheel, the right rear wheel, and I picked him up.

Q. Where was he when you saw him? A. I saw him with one hand on; he was going to get on, and the bus swung in.

Q. When it swung over what did it do to him? A. It hit him.

Q. What happened to him? A. He fell.

Q. Where did he fall? A. I don't know; he must have fell under the bus. I picked him up about a foot——

Mr. Brenner: I object.

Q. Not what he must have done. A. I saw him in back of the bus about a foot from the hind wheel.

Q. Had the bus gone over him? A. I didn't see the bus go over him.

Q. What condition was he in? A. Laying flat on his back and he was hollering—his stomach—and I picked him up and brought him in my store.

Q. You say you saw him catch hold of the rail? A. Yes.

Q. How soon after he caught hold of the rail did the bus hit him? A. About a second.

Q. Then what happened? A. I brought him to my store and telephoned for a City Hospital ambulance.

Q. Where did this happen? A. Right at the corner of Lincoln and Central.

Q. Which corner? A. Northwest corner.

Q. Could you tell how slow the bus was going when he reached and caught hold of it just before it knocked him down? A. I can't tell by miles. Just about going this way, very slowly.

Cross examination by Mr. Brenner:

Q. Do you drive an automobile yourself? A. No, sir.

Q. Ever driven any automobiles? A. No, sir.

Q. Have you any idea of speed? A. No, sir.

Q. But you say this bus was going quite slow at the time the accident happened? A. Very slow.

Q. Where were you at the time the accident happened? A. In front of my door.

Q. In the front of your door? A. Yes.

Q. How far is your door from the corner? A. About forty feet.

Q. Forty feet from the corner? A. Yes, sir.

Q. That is from the corner of what street? A. Lincoln Street.

Q. That would be north of Lincoln Street? A. North of Lincoln Street.

Q. Does your door come out even with the show windows, or does it set back? A. The door

is about two feet in from the show window, but I was standing outside the show window.

Q. When was the first time you saw the man who was afterwards hurt? A. About three minutes before he was going to the corner. He said he was going to the baseball game.

Q. Was he talking to you? A. Yes.

Q. Friend of yours? A. Yes.

Q. Did you see the jitney come along? A. Yes.

Q. Where was the jitney when you first noticed it? A. Oh, about the middle of the block between Bowers and Lincoln Street. He said "I am going down to the corner and get the bus now."

Q. Where was he at the time, standing with you, when you saw the bus about the middle of the block? A. Yes; he said he was going down to the corner.

Q. I do not want you to tell us what he said. Just answer my questions, please. How long a block is that; is that a big block or a short block? A. Well, it is about three hundred feet.

Q. You say it then when it was about 150 feet from the corner of Lincoln Street? A. About the middle of the block.

Q. It was then about 110 feet from where you were standing? A. About 110 feet from where I was standing.

Q. When the bus was about 110 feet away, or about 110 feet away, your friend Cooper was still standing alongside of you? A. No; he was just starting to walk then. He said "There comes the bus."

Q. Started to walk toward the corner? A. Yes.

Q. Walking diagonally? A. Yes.

Julius Kaplan—for Plaintiff—Cross.

Q. The building line on the Boulevard at that point is quite a distance back from the curbline, is it not? A. This was not on the Boulevard; this was on Central Avenue.

Q. On Central Avenue? A. The sidewalk is only about eight or ten feet.

Q. You were standing about eight or ten feet back from the curb with him? A. Yes.

Q. And he started toward the corner forty feet away? A. Yes, sir.

Q. Did he walk or run? A. Walked.

Q. Walked pretty fast? A. Yes, sir; a pretty good walk.

Q. He was really going then in the same direction the jitney was going? A. Yes.

Q. He going diagonally and the jitney going straight? A. Yes.

Q. Did you keep your eyes on him or turn away from him? A. I kept my eyes on him.

Q. Was the jitney going slowly when you saw it 150 feet from the corner? A. Yes; it was going pretty slow on the whole block.

Q. Just a slow-moving jitney? A. Yes.

Q. So that there was not any particular reason for him to run to the corner because the jitney was running slow? A. Yes.

Q. Did he and the jitney arrive at the corner at about the same time? A. He was there before the jitney.

Q. On the sidewalk or in the street? A. On the sidewalk.

Q. This jitney, how far out was it from the curb as it was driving along Central Avenue? A. About four or five feet, something like that.

Q. When it got toward where he was standing you say it came in a little? A. Yes.

Q. About how far in? A. It was just turning in.

Q. About how far did it come in? A. May be about a foot or so. I just can't tell about that.

Q. Was that when he grabbed for the grab handle? A. Yes; when it was turning in.

Q. How far from the corner was he at that time? A. About three or four—three feet.

Q. Wasn't he further back than that? A. No.

Q. Positive of that? A. Positive.

Q. Which handle did he grab, do you know; front or rear? A. Front handle.

Q. With the right hand? A. Yes.

Q. He made a grab for the handle and lost his hold, didn't he? A. I do not know if he lost his hold.

Q. The first thing you saw was—— A. The first thing I saw was——

Q. Wasn't what you saw that he grabbed for the handle and then fell? A. Yes.

Q. And the bus came to a very quick stop? A. It came to a stop.

Q. And he was only about a foot to the rear of it when it stopped? A. When it stopped he was about a foot in back of the rear wheel of the bus.

Q. How close to the curb was the bus at that time? A. About three feet.

Q. Still about three feet away? A. Yes.

Re-direct examination by Mr. Simpson:

Q. You said the jitney bus turned in and hit him and knocked him down. What part of the bus hit him? A. The front part.

Q. Which part? A. The body where the en-

trance to the door there is, where he gets on the bus.

Q. Was it the step that hit his legs or the top of the body? A. It must have hit him here (indicating) because it knocked him over——

Mr. Brenner: I object to that.

The Court: Strike that out.

Q. You told me on direct he reached for the grab iron, got hold of it, that the man steered in toward the curb, hit him and knocked him down; is that so? A. Yes.

Q. What part of the bus hit him and knocked him down? A. The front part of the bus.

Re-cross examination by Mr. Brenner:

Q. Did you see what part hit him? A. I did not see what part, but the front part hit him when it turned in. I saw him fall and he hollered "Oh!"

Q. That is what I am trying to find out, whether you saw that or are you giving us your belief? A. No; what I saw. He had his hand on, and when he was getting up on the step it hit him and knocked him over.

Q. He never had his foot on the step, did he? A. He was getting on; he had one foot up on the step and hollered "Oh!" That was what made me run over to him.

Q. I thought you said a moment ago he was trying to get on the step? A. He had one hand on the rail and his foot on the step and he hollered "Oh!" and I ran and picked him up from in back of the automobile.

Q. Was that when he fell? A. Yes; when he fell.

Q. He was actually partly on the bus when he lost his hold and fell? A. I don't know if he lost his hold.

Q. When you saw him let go and fall you were looking right at him? A. Yes; when he hollered "Oh!" I don't say that he was on or off; he had his hand on and hollered "Oh!" and I ran over to him.

Q. You saw this? A. Yes.

Q. Did you actually see his hand on the grab handle? A. Yes.

Q. Did you actually see his foot on the step? A. Yes.

Q. Where was the other foot, still in the street or in the air? A. He picked up his right foot to get on.

Q. It was in the air? A. Yes.

Q. So that the position you saw him in was his right hand on the front grab handle? A. Yes.

Q. His left foot on the step? A. His right foot on the step.

Q. And his left foot in the air? A. Yes.

Q. The next thing you saw was that he was falling off? A. Yes.

Q. And at that time the bus was still proceeding slowly along? A. Very slowly, yes.

Q. At about the same speed it had been going down the street? A. No, much slower than it had been; very slow.

Q. It had slowed down even more than it had coming down the block? A. Yes.

Q. When you saw the part of the bus strike

him that was when he was falling, wasn't it? A. No; when he had his foot on the step, then when the bus wanted to turn in it struck him.

Q. I know, but if he had one foot on the step and the other foot in the air there was not any way in which he could be struck at that time?

Mr. Simpson: I object as argumentative.

A. I don't know——

Mr. Brenner: Withdraw it.

Q. Was it while his foot was on the step and his hand on the grab handle that you say he was struck? A. Yes.

Q. And what was it that struck him? A. The automobile.

Q. What part of the automobile? A. The left side of the entrance.

Q. Was that while he was getting on that it struck him? A. While he was getting on.

Q. Was that what made him loosen his hold, do you know? A. It must have been. I don't know what made him lose his hold, but it must have made him lose his hold.

Mr. Brenner: I ask that that be stricken out as not responsive.

Mr. Simpson: It seems to me that is responsive.

The Court: I think it is a conclusion. I will strike out the conclusion. The rest of it may stand.

John Shea—for Plaintiff—Direct.

JOHN SHEA, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. 417 New York Avenue.

Q. Were you on Central Avenue the day of this accident? A. Yes; I was on the bus.

Q. You were on this bus? A. Yes.

Q. Where were you on the bus; where were you sitting? A. Near the front on the right hand side.

Q. Did you see when the bus came toward this cross street, I think it is Lincoln Street? A. No, sir; I was looking on the opposite side.

Q. What is the first you saw of this accident? A. I was looking on the opposite side for a chum of mine, and I felt a jar; I looked out and saw a body lying behind the wheel.

Q. You felt a jar, did you? A. Yes, sir.

Q. What kind of a jar was it you felt? A. Back wheel up in the air.

Q. The back wheel went up in the air? A. Yes.

Q. And you looked out and saw this body lying down? A. Yes, sir.

Q. What part of the bus were you in, the back part of the front part? A. Front part.

Q. And with your back toward the side where the entrance was? A. Yes.

Q. So that you could not see what was happening at the entrance, could you? A. No, sir.

Q. How was the bus going just before you heard this jar; was it going slow? A. I didn't notice.

Q. You didn't pay any attention to it? A. No, sir.

Q. How far were you sitting from the driver? A. One seat behind the driver.

Q. When you felt this jar, or heard the jar, and looked out and saw the body, what was the next thing you did? A. The chauffeur told me to sit there, and I sat there; he got out and he came back again and pulled the bus up to the curb and he told me to sit there, and took my name, and another bus came along and the chauffeur called me into that bus.

Q. The chauffeur what? A. Called me from the bus I was sitting in into the other bus.

Q. You were on the other bus and went on your way? A. Yes.

Q. You did not see what happened to this body lying underneath; did you see them take the body away? A. I seen them pick it up, but I didn't see where they took it.

Q. How near was your bus to the corner when you felt the jar—that is to the intersecting corner there where it would stop naturally? A. About a door or two from the corner.

Q. After you had felt the jar how far did the bus go before it stopped? A. The body was laying about three feet behind the wheel.

Q. What position was the body in? I mean was the head outside of the wheel or inside of the wheel? A. Outside the wheel.

Q. About what part of the body was even with the rear wheel? I mean was the stomach even with the rear wheel or the feet or what part? A. I think it was the stomach.

Q. Could you tell whether the man was bleeding or not? A. No, sir.

Q. Did you notice just before you felt the jar the bus turn in to the curb? A. No, sir.

Q. Did you notice whether it made any movement or weren't you paying any attention? A. I wasn't paying any attention.

Q. You won't say whether it did or did not turn in to the curb? A. No, sir.

Q. When it stopped how far was the wheel from the right hand curb; about how far would you say it was? A. The left hand wheel was inside the trolley tracks.

Q. That is the wheel away from the curb? A. Yes.

Q. And where was the right hand wheel; how far was that from the curb? (No answer.)

Q. If you do not know, say so. A. I couldn't say.

Cross examination by Mr. Brenner:

Q. Can you show us from where you are sitting how far the front wheel was from the curb—indicate to any place in the room? A. I guess about from there to here.

Q. That is, assuming this side of the Judge's bench is the side of the jitney? A. Yes.

Q. You would say it was that distance from the curb? A. Yes.

Mr. Brenner: About six feet?
Mr. Simpson: All right.

Q. Did you notice the bus before the accident happened, the distance it was from the curb as it was running along; was it about the same distance or a bigger distance or a lesser distance? A. I should judge about the same distance.

Q. So that when the bus came to a stop after the accident happened it was about the same distance from the curb as it had been right along, is that correct? A. Yes.

Q. You understand me, don't you? A. Yes.

Q. And you didn't feel any turning of that bus toward the curb, did you? A. No, sir.

Q. So far as you could observe, it was going straight along when this accident happened? A. Yes.

Q. When the bus came to a stop did you notice how far away it was from the corner of Lincoln Street? (No answer.)

Mr. Brenner: I will withdraw that a moment.

Q. Do you know that the place the accident happened was Lincoln Street and Central Avenue? A. About a door or two away from the corner.

Q. No; I want to find out whether you know what street that was; do you know what street the accident happened? A. Yes.

Q. You know that was Lincoln Street? A. Yes.

Q. What I want to find out is the distance the front of the bus was away from the north side of Lincoln Street at the time the bus came to a stop after the accident happened; did you notice that? A. No, sir.

Q. Did you notice where the bus came to a stop after the accident happened; after you felt this jar and felt the bus stop, how far was it away from the corner? (No answer.)

Q. You said something about one or two doors;

was that when the accident happened or after it was all over? A. The body was laying on the ground about two doors from the corner.

Q. Oh, the body was lying on the ground two doors from the corner? A. Yes.

Q. And the body was lying about three feet back of the bus, you say? A. Yes.

Q. When you say one or two doors from the corner, do you mean one or two stores from the corner? A. Yes.

Q. How wide are those stores, do you know? A. One store had two windows and the other store had one window.

Q. Assuming this is the corner where you are now sitting; will you show us how far away the bus stopped from this rail to any part of the Court room? You said one or two stores. Now show me in the Court room about how far you would say that is from this front rail here. Would it be as far as the rear of the Court room? A. No, sir.

Q. It would not be that far? A. No, sir.

Q. Would it be as far as the first bench here? A. No, sir; it would be about up to those second poles there.

Q. Which second poles? Back here at the second bench? A. Yes, sir.

Q. Back to about here where I am now, or not as far as that, or further? A. It was not as far as that.

Q. How about here? A. I guess that is about right.

Q. That is about the distance the front of the bus was from the corner, or the body was from the corner? A. No; I understood you to ask me how wide the stores were.

Q. I want to get the distance the body was from the corner. You said it was about two stores. A. Yes, sir.

Q. Would that be the distance, up to here, from that rail of the witness box where you are sitting? A. Yes.

Q. That would be the distance of where the body was lying from the north corner of Lincoln Street? A. Yes.

Q. Is that correct? A. Yes.

Mr. Brenner: Can we agree on that distance?

Mr. Simpson: Whatever you say.

Mr. Brenner: About 35 feet.

Mr. Simpson: All right.

Q. Did the bus make any change in its speed or when the accident happened was the bus going about the same speed as it had been going for some distance before?

Mr. Simpson: I object to that. He says he does not know anything about when the accident happened; all he felt was a jar.

Q. When you felt the jar of the bus had the bus increased its speed before that or lessened its speed or war it going at about the same speed? A. I did not notice.

Q. You did not notice the speed at which it was going at the time the accident happened? A. I did not notice.

Q. But you did know it was going slowly, or don't you know it? A. I guess if it had been going fast——

Q. I only want what you know. You didn't take any notice of it? A. No, sir.

Q. All right.

Re-direct examination by Mr. Simpson:

Q. You told me you paid no attention to anything until you heard the jar, is that right? You didn't pay any attention to anything until the jar attracted your attention, is that right? A. Yes, sir.

Q. Then you do not know whether the bus turned in or did not turn in, do you? A. No, sir.

Q. You were simply sitting in the bus paying no attention to anything until you felt a jar; then you looked out and saw a body behind the bus, and that is practically all you know? A. Yes.

Q. Now, when this bus did stop, the front of it—you were sitting near the front? A. Yes.

Q. How near was it to the corner when it came to a dead stop; when it stopped right there how far was the corner away? A. About the length of this desk.

Q. To where; to me? A. No; from this end to the other end.

Q. When it stopped the front of it was about as far as from here to here? A. Yes.

Q. From the corner? A. Yes.

Mr. Simpson: How much is that; four or five feet?

Mr. Brenner: Five feet I guess.

Q. And the body was behind the rear you say? A. Yes.

Q. How far behind the rear? A. About three feet.

Q. You do not know how long the bus was, do you? A. No, sir.

WILLIAM LAUNDERS, sworn.

Direct examination by Mr. Simpson:

Q. You are a police officer connected with Jersey City? A. Yes.

Q. Were you in the vicinity of this accident? A. I was at Bowers Street and Central Avenue.

Q. How far is that from the place of the accident? A. About two hundred feet.

Q. What was the first you knew about the accident? A. The driver of the bus came back and told me his bus had run over a man.

Q. Did he tell you under what circumstances he had run over him? A. No, sir; he didn't say a word.

Q. Just said he had run over a man? A. His bus had just run over a man.

Q. Then you went back with him? A. Yes, sir.

Q. What did you find? A. When I got to the scene of the accident the man—they picked the man up and brought him in a store; he was in the store when I got there.

Q. Was he conscious or unconscious? A. He was conscious.

Q. Was the bus stopped? A. The bus was stopped, yes, sir.

Q. How near to the corner had the bus stopped? A. About seven or eight feet.

Q. How far away from the curb was it? A. About three feet.

Q. And it was standing in that position? A. Yes.

Q. Did you examine the bus, whether there was blood on the front or rear wheels? A. No, sir, I didn't.

Q. You didn't examine the bus? A. No, sir.

Q. Did you question this man who owned the bus about how the accident happened? A. He told me that he didn't know where this man come from.

Q. He did not see him at all? A. He didn't see him at all.

Q. Did he tell you he didn't know anything about him until somebody had hollered to him that he had run over a man? A. He didn't say that.

Q. What did he say? How did he explain running over him? You say he said he didn't know where the man came from; did he see the man at all? A. He said he didn't see the man at all. He don't know where he come from; and I went then and called an ambulance.

Q. And had him taken to the hospital? A. Yes, sir.

Q. What kind of a bus was this; can you tell us about how high it was? A. About twelve feet I guess. I am not sure.

Q. Did it have cross seats or seats up and down? A. I had cross seats.

Cross examination by Mr. Brenner:

Q. When you got to the scene of the accident you say the bus was about seven feet from the

corner; that would be the north corner of Lincoln Street? A. Yes, sir.

Q. That would be the front of the bus that was about seven feet away? A. Yes, sir.

Q. The bus was pointed straight, wasn't it? A. Yes.

Q. The front wheels and the rear wheels an even distance from the curb? A. Yes.

Q. And both the front wheel on the right hand side and the rear wheel on the right hand side about three feet from the curb? A. Yes, sir.

Q. The bus was not at all pointed in toward the curb? A. No, sir.

Q. Absolutely straight? A. Straight.

Q. Did you notice any marks in the road where this man had been lying before he was picked up? A. No, sir.

Q. Any blood marks? A. No, sir.

Q. You do not know just where he was picked up in back of the bus? A. I don't know just where he was picked up. When I got there he was in the store.

Q. Actually in the store at that time? A. Yes.

Q. This man who was driving the bus ran down to Bowers Street? A. Yes.

Q. And informed you of the fact he had had an accident? A. Yes.

Q. And got you to come right back with him and call the ambulance? A. Yes.

Mr. Simpson: It is admitted I understand that this was a jitney bus owned and operated by the defendant and that the deceased came to his death as a result of the injuries?

Mr. Brenner: That is admitted.

PLAINTIFF RESTS.

Motion for Nonsuit.

Mr. Brenner: I move for a nonsuit on the ground there has been no negligence established on our part and that the deceased was guilty of contributory negligence as a matter of law. The evidence as I understand it is that this bus had not at any time come to a stop, that it was being driven along toward the corner of Lincoln Street and that the accident happened before the corner had been reached and happened because this man tried to board a moving bus. I think under all the testimony that there is no question of negligence that could go to the jury.

The Court: I think it is a question for the jury.

Mr. Brenner: Exception.

(Plaintiff's case re-opened.)

BELLA ASCHER, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live? A. 82 Hancock Avenue.

Q. Were you on Central Avenue November 29, the day Mr. Cooper was run over? A. I was.

Q. Where were you; what part of Central Avenue? A. I was at the southwest corner of Central Avenue and Lincoln Street.

Q. Where were you going; which direction? A. I was going south; that is I had just crossed over; I wasn't going yet.

Q. Crossed aver Central Avenue? A. I had crossed over on that corner.

Q. Which corner were you on? A. Southwest corner.

Q. And did you see this jitney bus that was in the accident? A. I happened to be facing that way.

Q. What was the first you noticed of anything wrong? A. The first thing I noticed was that the boy was laying there at the rear wheel of the bus.

Q. Was he behind the bus; was the rear wheel on him or what was the condition when you first noticed him? A. As if it was just passing over him.

Q. The rear wheel passing over him? A. Yes, sir.

Q. Did you notice whether the front of the bus was turned in toward the curb or not at the time you noticed him?

Mr. Brenner: I object to that.

A. That I did not notice.

The Court: When there is an objection do not answer.

Q. How far did it go after you saw the rear wheel go over his stomach? A. Not very far.

Q. Then did it stop? A. Yes, sir.

Q. How was it going at the time the rear wheel went over his stomach, fast or slow? A. Slow.

Q. Going quite slowly, wasn't it? A. Rather slow.

Q. How far was the rear wheel from the curb —that is how far was the curb from his body when the rear wheel went over him? A. I could not exactly say how many feet.

Q. Could you show us here how far you think it is in this room? Measure it anywhere in the room. Suppose this was the curb, where was the rear wheel; how far away; if this was the curb where this black book is—as far as where you are sitting? A. I do not think as far as that; probably up to there (indicating).

Mr. Simpson: How far is that?
Mr. Brenner: About four feet.

Q. Then what was the next thing that you saw? A. I saw some men come along and pick him up, running out of the store.

Q. You did not see him at the time he was trying to get on the bus, if he was; you didn't see him then? A. No.

Q. You did not see him until the wheel was going over him? A. No.

Q. Did you hear anybody crying out so that it attracted your attention? A. I do not know what attracted my attention.

Q. When the bus stopped where was it with reference to the corner; had it reached the corner or was it out into Lincoln Street? You say it stopped entirely, it stopped within three feet, the young man was lying behind it on the ground. How far was the bus then from the corner, or had the front of it reached the corner? A. It wasn't far; it was only a short distance from the corner. I saw this.

Q. Had the front of the bus reached the corner or passed the corner or was it about at the corner when it stopped? A. It stopped at the corner.

Q. And the body you think was about three

feet behind the rear wheel? Is that what you said? A. About that.

Cross examination by Mr. Brenner:

Q. Were you walking at the time you stopped to look around, or had you been walking? A. I had just crossed over the corner.

Q. Which street did you cross, Lincoln or Central Avenue? A. I crossed Central Avenue to go to the corner of Lincoln Street—southwest corner of Lincoln Street. I crossed from the opposite side, over towards it.

Q. You were on the southwest corner when the accident happened? A. Southwest corner, yes.

Q. That would be on the same side of Central Avenue that the jitney bus was on? A. That was the same side.

Q. And you crossed over to the side of Central Avenue on which the jitney bus was proceeding south, is that correct? A. Yes.

Q. Did you notice the jitney bus before the accident had happened? A. No.

Q. You did not notice it coming down Central Avenue at all? A. No; I hadn't noticed.

Q. When you crossed Central Avenue didn't you look up toward the north to see whether it was safe to cross? A. It was the safe way to cross.

Q. And you didn't notice just where the jitney bus was? A. No; I didn't notice.

Q. When you did notice it, just about as the accident happened, did the jitney bus appear to be coming straight along in the roadway, that is the front and rear wheels about an equal distance from the curb? A. Well, I could not say.

That I do not know. I did not take notice of the front and rear at the time.

Q. But did it appear in any wise turned toward the curb or did it appear to be straight as you recall it? A. I did not take particular notice of that. I just happened to notice the boy.

Q. When you say the jitney bus when it came to a stop was the distance from the Bibles here to the front of the witness stand, that would be the front of the bus, was that distance back from the corner; that would be north of that corner; is that correct? A. The front wheels was even with the corner—the front of the bus stopped at the corner. The front of the bus was even with the corner.

Q. You described it a little while ago as being about this distance, the width of the desk; do you want to change it now to make it even with the corner, or do you still say it was that distance? A. I mean the rear was that distance.

Q. That could not be, Madam.

Mr. Simpson: I object to arguing with the witness.

Q. The bus is longer than this desk, isn't it? A. Yes.

Q. The front wheels you say were right at the corner? A. The front wheels was even with the corner.

Q. The rear wheel could not be that distance of the width of this desk from the front wheel, could it? A. No; I mean that was the distance away from the boy at the time I seen him.

Q. You mean the bus had passed on after

striking the boy, after going over him, and had gone that distance of about four feet? A. About three or four feet, I should judge.

Q. And he was lying that distance from the rear of the jitney, is that correct? A. When it stopped at the corner, yes.

Q. And the front of the jitney was even with the corner? A. At the time it stopped that was how it appeared.

Q. Do you know the length of a jitney? A. No.

Q. Did you notice how close the right hand side of the jitney was to the curb after it had come to a stop? A. No.

Q. You did not notice that? A. No.

JAMES PERRETT, sworn.

Direct examination by Mr. Brenner:

Q. You were the driver of this bus? A. Yes.

Q. Have you an interest in that bus besides just being the driver? A. No, sir.

Q. Just drive for Mr. Murphy? A. Yes.

Q. You recall the day the accident happened? A. Yes.

Q. You recall the day an accident happened on your bus? A. Yes.

Q. Where were you going to on that day; were you on your regular route? A. Yes, sir; towards the Junction.

Q. Going south on Central Avenue? A. Yes, sir; south.

Q. Right before this accident happened were you going slow or were you going fast? A. I was going slowly, sir.

Q. About how fast were you going? A. About nine miles an hour.

Q. About nine miles an hour? A. Yes, sir.

Q. Did you see anyone waiting at the corner of Lincoln Street and Lincoln Avenue to board your bus? A. There was nobody there.

Q. Were you looking ahead of you? A. I certainly was.

Q. Could you see the corner of Lincoln Street and Central Avenue in the direction in which you were going? A. Yes.

Q. That would be the northwest corner? A. On the right hand side of my bus.

Q. You say no one was waiting there? A. No, sir.

Q. What first attracted your attention to the fact that an accident had happened? (No answer.)

Q. If you do not understand me just say so? A. I do not.

Q. What was the thing that made you know that there was an accident? A. The raising up of my right rear wheel, sir.

Q. Could you feel that from the position in which you were sitting? A. I certainly could.

Q. What did you do when you felt that? A. I got immediately out to see the trouble.

Q. Was the car going or at a stop at that time? A. Stopped; dead stop.

Q. Did you stop your car before you felt that bump or after you felt that bump? A. After the bump.

Q. That is what I am trying to get. The first thing you felt was a bump? A. Yes.

Q. What did you do to bring your car to a stop? A. Dead stop.

Q. What did you do to bring your car to a stop? A. I jammed on my foot brake tighter; I had my foot brake on there and I pulled the emergency and stopped it suddenly.

Q. And did the bus come to a stop suddenly? A. It did; quick.

Q. Before you felt this jar did you see anything at all? A. Yes, sir.

Q. What was the thing you saw? A. A man's right hand appeared at my door—a man's right hand appeared at my right hand side, on the right hand side of the door—on the right hand side.

Q. Before you saw that hand did you see anyone at all? A. No one, sir.

Q. No man standing there? A. Not that I saw; only walking up and down the sidewalk.

Q. Did you see anyone running toward your bus? A. No one running toward my bus.

Q. Anyone standing in the roadway at all? A. No one standing in the roadway at all; the roadway was clear.

Q. When you saw this hand come through the air toward this grab iron how far were you out into the street from the curb? A. My right hand wheel was on the outside of the cartracks about five feet.

Q. Five feet from the curb? A. Yes.

Q. Were you running parallel with the curb or had you turned in? A. Parallel—keeping right straight down.

Q. Did you have any passengers on, that day? A. Yes, sir; one boy.

Q. Who was that one? A. The witness.

Q. The young boy that was on the stand before —John Shay? A. Yes, sir.

Q. Did you know Shay before this accident happened? A. Never saw him in my life.

Q. Had you decreased the speed of that bus any, or were you going at the same rate of speed before the time you stopped? A. Had I decreased the speed?

Q. Yes—I will withdraw it. You remember coming down that block toward Lincoln Street? A. Yes.

Q. What is the street you reached before you reached Lincoln Street? A. Bowers Street, sir.

Q. Between Bowers Street and Lincoln Street, did you keep on at the same rate of speed until you stopped your car, or did you change the rate of speed? A. No, sir; no change at all; coming down the hill, we come down there with brakes set.

Q. Coming down with your brakes set? A. We have got to, sir.

Q. And going at about nine miles an hour? A. Yes.

Q. Had you ever increased that beyond nine miles an hour or had you ever lessened that under nine miles an hour from the time you left Bowers Street up until the time you felt this bump of your hind wheel? A. Until the time I felt the bump?

Q. Yes. A. Yes, sir. Immediately I saw that hand come out.

Q. Up until the time you saw the hand come out had you lessened or increased your speed? A. No, sir.

Q. When you saw the hand come up what did you do? A. I jammed up my foot-brake tighter, which I already had about half set, and pulled the emergency up.

Q. And the next thing you felt the bump? A. The next thing I felt the bump.

Q. How far were you from the corner at the time you noticed this hand come out? A. I was almost two stores, approximately 30 or 35 feet.

Q. How far was the front of your car from the corner at the time you came to a dead stop? A. Six feet from the crossing, where passengers cross over.

Q. How far out into the roadway were you, from the curb, at the time you came to a dead stop? A. About four feet.

Q. Front and real wheel? A. The four wheels were square.

Q. An even distance from the curb? A. The four wheels were square, running straight down.

Q. Had you turned your bus in toward the curb at all? A. Not at all, sir.

Q. Had been going perfectly straight? A. Nothing to turn for.

Q. Had you turned it? A. No, sir.

Q. Going perfectly straight? A. Absolutely, down the street.

Cross examination by Mr. Simpson:

Q. You told the policeman you did not know anything had happened until your rear wheel went over this man? A. No.

Q. What did you tell the policeman? A. I told him an accident had happened; I said "For God's sake call an ambulance."

Q. Didn't you tell him you did not know anything about it until you felt the rear wheel go over a man? A. No, sir; I didn't.

Q. Did you tell him you didn't know how it

happened? A. I told him I didn't know how it happened.

Q. Told him you did not know anything about how it happened too, didn't you? A. No, sir.

Q. What do you mean, "No, sir?" That you did tell him that or that you did not tell him that? A. I do not know how it happened, no.

Q. You told him you did not know how it happened? A. I did tell him that, yes.

Q. You tell us now you saw a hand in front of you come out of the air, that you put on your foot brake and jammed on your emergency and then you felt the rear wheel go over, that is what you say now? A. Yes.

Q. You did not tell the policeman anything about the hand coming out of the air, did you? A. No, sir; I should say not; I was too busy, sir.

Q. Where was the entrance to your bus, on your right hand or your left hand? A. On the right hand, sir.

Q. It was a regular jitney bus, wasn't it? A. Yes, sir.

Q. What did you charge on it? A. Ten cents, at that time.

Q. To ride from where to where? A. From Lake and Leonard street to the Junction or any part thereof.

Q. From where? A. Lake and Leonard street.

Q. Atlantic street? A. Lake and Leonard street to the Junction or any part thereof.

Q. And you picked up people on the southwest corner on your way to the Junction; your proper place to pick up people was the southwest corner? A. Yes; the right hand side of the road, yes.

Q. That was the proper place for you to pick up passengers, at the southwest corner? A. Yes, sir.

Q. As your bus came along a man who wanted to get on your bus would stand at the southwest corner? A. Yes.

Q. That is where you would be looking for him? A. Yes.

Q. Was your door at your entrance open or closed? A. Closed.

Q. When you got to this street? A. To Lincoln street.

Q. Is that door all glass or partially wood and partially glass? A. There are six panes of glass in it and about two feet from the bottom is wood.

Q. How high up would the wood come with reference to where you were sitting? A. About to here, sir.

Q. You could see right through the glass if you were looking? A. You could see the street.

Q. How high above the wood did this hand appear? A. Up to the handle, sir.

Q. How high is the handle bar above where the wood ends in the door? A. I should think about two and a half feet.

Q. And all you saw was a hand come out to the handle bar; you did not see the arm? A. I did not see the arm, no, sir.

Q. You did not see a body? A. No, sir.

Q. Although there was glass right to your right and nothing to obstruct your view of this handle bar; you could see the handle bar? A. I could see the handle bar.

Q. And all you saw was a hand; is that right? A. When I say a hand I mean what goes with the hand; the arm and like that.

Q. Did you see an arm? A. But I didn't see a man.

Q. Did you see the arm? A. I saw a hand and arm.

Q. How near your bus was it? A. When he stepped off?

Q. You did not see him step off. A. He must have to have brought the arm out; I am speaking relatively.

Q. You say you saw nothing but an arm. How near was this arm to your grab iron when you first saw it? A. I should judge about one foot. sir.

Q. It just extended itself in the air; it did not come near your grab iron, just extended in the air? A. Extended in the air.

Q. It was not moving toward your grab iron? A. Moving toward my grab iron, toward my bus.

Q. How far was your bus away from it when it was moving toward your bus? A. One foot, sir.

Q. When it was moving toward it? A. When the hand was moving toward my handle.

Q. That hand moving toward your handle was a foot away and your bus was going very slow, wasn't it? A. Yes.

Q. And then the next thing you knew was your right wheel going up in the air? A. Yes, sir.

Q. Now, you told Mr. Brenner, as I understood you, that you did not put on your brake until you felt the right rear wheel going over something; then afterwards you said you put on your brake when you saw the hand. Now, which is true? A. I made the statement, sir, that I put on my brakes immediately I saw that hand come out.

Q. You saw the hand a foot away; you put on your brakes; why didn't you stop to a dead stop then, if you were going so slow, when you saw the hand? A. You can't stop those cars at nine miles an hour so quick.

Q. You mean to say that approaching a place where you had to receive passengers and seeing a hand coming toward your rail that your car was going at such a speed you could not stop it until your car went over this man's body and went three or four feet more; is that what you mean to say? A. No, sir; I don't.

Q. Isn't that exactly what happened? A. No, sir.

Q. Didn't you see the hand coming toward your handle? A. From the rear of my bus.

Q. Didn't you see the hand coming toward your handle? A. From the rear of my bus.

Q. Your handle is not in the rear, is it? A. Yes.

Q. You have a handle in the rear of your bus? A. I have a handle in the rear of my bus, where that door is.

Q. When you speak of the rear do you mean behind the door or behind the rear wheel? A. Right behind the door.

Q. You have two handles, one on one door and the other on the other? A. Yes, sir.

Q. You saw a hand coming about a foot from the handle? A. Yes.

Q. And you immediately tried to stop? A. Yes.

Q. At a place where you ought to receive passengers, the proper place to receive them, at that corner? A. Yes.

Q. And although you saw the hand coming to your grab iron at a place where you ought to re-

ceive passengers, you were not able to stop your bus until your rear wheel went over this man's body and your bus went three feet? A. I am supposed to stop at corners for passengers.

Q. Don't argue with me. Is it not a fact you tried to stop and could not stop until your bus went over a man and three feet beyond the body; is that right? A. Yes; that is right.

Q. That is all.

Re-direct examination by Mr. Brenner:

Q. When this hand was thrust out was it before you reached the corner or when you were at the corner? A. 25 or 30 feet this side of the corner.

Q. Do you stop at that corner without a signal? A. Never.

Q. Or do you stop only on signal? A. Only when there are passengers there to give us signals. We are not allowed to stop in the middle of the block. That is police orders.

Q. You spoke something about your regular stop being at the southwest corner; it is the southwest or the northwest corner? A. Regular corner.

Q. Is it the near side or far side? A. The near side.

Q. That would be the northwest. A. I do not know the directions. It is this side, nearest to Leonard street.

Re cross examination by Mr. Simpson:

Q. Where do you say this hand came out, the near corner or the far corner? A. About in that direction (indicating).

Q. No; did the hand come as you were approaching the near corner or after you had left the near corner? A. I did not leave the near corner.

Q. So that the hand came to you as you were approaching the near corner? A. Yes.

Q. Now, you have no regular stops at all, have you? A. Yes; Summit Avenue Tube Station.

Q. Is that the only one you have? A. We consider Bowers Street a regular stop.

Q. As you come down from Lake Street what you do is look at every near corner, and if you see a man that wants to get on you slow up for him if you get a signal? A. Yes.

Q. You do not always stop, do you?

Mr. Brenner: I object to that, as immaterial.

The Court: I do not think it makes any difference. The question is what he did in this case.

Q. As I understand it, you told Judge Brenner you never stopped unless you saw people waiting and saw a signal, is that right? A. That is right, sir.

Q. You did not see this man's body at all? A. I did.

Q. Before you ran over him? A. No, sir.

Q. All you saw was an arm? A. Yes; it looked like a hand coming out to strike a match on the side.

Q. What? He was going to light a cigarette from your jitney? A. Strike a match on the side.

Q. Going to light a cigarette from your jitney? A. They oftentimes do.

Q. Although you were supposed to take on passengers there, when you saw this hand you thought all he was going to do was light a pipe? A. Well, it was similar to that.

Q. If you did see this hand and did see this arm, why did you tell the policeman you did not know anything about how the accident happened? A. I did not tell him.

Q. You have already said you did tell him you did not know anything about how the accident happened? A. He said "Where did he come from?" I said "I do not know. I do not know how the man got under there."

Q. Didn't you tell me a minute ago that when the policeman asked you how the accident happened, didn't you say you didn't know how it happened? A. I do not know how it happend.

Q. If you saw all this you have described to us, the arm and all that, why didn't you tell the policeman that at the time he asked you? A. He did not ask me a question like that. We were busy getting an ambulance.

Q. You went to the station house, didn't you? A. After it was all over.

Q. And you made a statement? A. I made that statement after I had seen Archibald Cooper in the ambulance.

Q. You made a statement at the police station? A. I certainly did.

Q. You said nothing to anybody about seeing any arm, in the police station; didn't you say in the police station you did not know how it happened? A. No.

Q. What did you tell them in the police station? A. The same as I have told you.

Q. You told them about an arm? A. I told them I saw a hand within a foot from the car, from the rear.

Q. That is what you said you saw? A. Yes.

Q. How long have you been driving a jitney? A. Seven years, sir.

TESTIMONY CLOSED.

(Adjourned to October 16, 1923.)

(October 16, 1923.)

Mr. Brenner: I desire to move for a direction of a verdict on the ground that there was no negligence established which was the proximate cause of the happening of this accident, and that the deceased was guilty of contributory negligence as a matter of law, and on the further ground that the proof in the case does not comply with either the pleadings or the opening.

The Court: I will let it go to the jury. It is a question of fact.

Mr. Brenner: Exception.

The Court's Charge.

Members of the jury:

The defendant in this case was operating a jitney bus in Jersey City. That jitney bus was being driven by an employee of this defendant. It is not disputed in this case that if there was any negligence on the part of the driver of that

bus the owner was responsible for such negligence. This bus was being driven along Central Avenue in Jersey City on the 29th day of May of the present year. As it approached the intersection of Central Avenue with Lincoln Avenue an accident occurred in which the young man, Archibald L. Cooper, was run over by this jitney bus, and as the result of that accident he died, as I understand it, in the hospital the same night. Now, the mere fact that a death occurred does not make the defendant liable, because under the old common law there could be no recovery for money damages by reason of the death of any person; but the legislature has modified and changed that situation so that under certain circumstances there can be a recovery for the pecuniary injury which may result from the death of such person, but only under certain circumstances; and the statue reads as follows, in part: "That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the party who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

So, members of the jury, you see that the first question for you to decide is, not whether this young man was killed by being run over by this jitney bus, but whether it was caused by the neg-

ligence or wrongful act of the driver of that bus. Now, he was operating that bus, he was operating it as a jitney bus, and he was bound to use the care and caution that a reasonably prudent person would have used under like circumstances. Here was a man—you have heard how he approached the bus and how the accident occurred. Now, if you find from all the evidence you have heard that the death of this young man was caused by an accident and that accident was the result of the negligence of the driver of that bus, then the plaintiff in this case can recover, unless you find that the young man was guilty of contributory negligence. Now, contributory negligence is negligence on the part of the person injured, which negligence on his part contributed to the accident.

You have heard from the evidence of the witnesses how this accident occurred, and if you find that the accident was due to the negligence of the driver of that jitney bus then you are to say whether from the evidence you find that this young man was guilty of negligence in attempting to enter the bus in the manner he did. Now, he was bound to use the care and caution that an ordinary, prudent person would use in entering that bus. You are to say whether or not he used that care and caution, and if he did not see that care and caution whether the failure to use that care and caution contributed to the accident. If it did, then the plaintiff in this case cannot recover, even if you find that the driver of the bus was also guilty of negligence, because contributory negligence is a defense in an action of this kind. You see, members of the jury, you have

that duty to perform; you have to determine the question of negligence and the question of contributory negligence.

Now, it is not what counsel say the witnesses have sworn to that should govern you. You are the sole judges of what the evidence has been. You are to determine, yourselves, in the jury room, from your recollection of the evidence, what those witnesses have testified to, and you are to determine the weight and credibility of the evidence of those witnesses, and having done that then you are to say whether or not the plaintiff has established by a preponderance of the evidence the fact that the proximate cause of the accident was negligence on the part of the driver. When you have decided that question, if you find that it was caused by the negligence of the driver, then you are to say whether or not the defendant has established that the deceased was guilty of contributory negligence. You see, the burden of proving that the driver was negligent rests on the plaintiff; the burden of proving that the young man Archibald was guilty of contributory negligence rests on the defendant.

If you find that the driver was not negligent, then your verdict would be for the defendant. If you find that the driver was negligent but the young man was guilty of contributory negligence, then your verdict would be a verdict for the defendant; but if you find that the accident was caused by the negligence of this driver and that there was no contributory negligence on the part of this young man, then you have to go a step further and determine your verdict, which must be in favor of the plaintiff for an amount of money—a pecuniary verdict.

The Court's Charge.

Now, a case of this kind differs from the ordinary case of damages, because you are limited to just such damages as the statute says you may award. Ordinarily you might award damages for loss of society, for sorrow, for other questions of that character, but in a death case you are limited to the pecuniary injury resulting from the death. You see, it is simply a money question. The legislature says you cannot consider anything else; it is simply the question of how much the next of kin have lost by reason of the death. This young man was between 18 and 19 years old; you will remember what the evidence was as to his age. He was under age, and the law provides in a case of that kind that the earnings of an infant, that is a person under 21 years of age, shall go to the father, or in case the father in dead then to the mother, until that child is of age or emancipated, that is until the child goes away from the home and cares for itself. Now, the mother says that it would take a certain sum to employ some one to do the work that the boy did. She would be entitled to the services of that boy until he was 21 years of age; but you see, members of the jury, during the time that he was rendering the services to the mother the law cast upon the mother a reciprocal duty; she was obliged to clothe him, she was obliged to care for him, to feed him. All that you see would come out of what he would earn during that time, so that the mother would not receive the full amount. If the boy was working for somebody else and brought the wages home, out of that the mother would have to feed him, clothe him and give him such spending money as would be required. You

see in other words the mother would receive what the son had received for wages but she would have to pay out the amount required for his support. Now, her loss would not be the total amount that the son brought in, but the amount that was left after she had performed the duties of a mother to that son. That is the only loss which the mother has had which you may take into consideration. The question for you to determine, in addition to what she lost during the minority of this son, is the question of how much you can say he would naturally have given her after he became of age; and you see that is a question for you to determine. You have to take all the elements of uncertainty into consideration in arriving at that amount. The boy might have died from a natural cause; he might have married and had a home of his own; he might have left home after he was of age and never given anything to his mother's support or the support of his brothers and sisters. You see, you have to take that into consideration, and after considering all these facts then determine what the pecuniary injury to the next of kin would be by reason of the death of this young man; and then you have to discount that because you see it is the pecuniary value at this time. If he worked for somebody else and was bringing home his money to his mother, or was working for his mother, that would come in in driblets, as we might say, so much every week, so much every two weeks, so much a month or during the year; but in this case if you find for the plaintiff it is a lump sum, so what you find would be the pecuniary injury by reason of his death would have to be discounted so as to make it the present value of that loss.

The Court's Charge.

Now, members of the jury, that is the case which you have to decide. It is an important matter for both the plaintiff and the defendant. It is important for the mother, who represents herself and the next of kin, because this is the only action which she can bring. She is entitled to have her case presented to you. It is important for the defendant, because if the defendant is not responsible, because there was no negligence on the driver's part, or because the deceased was guilty of contributory negligence, he should not be made to compensate for his death. You see, it is an important matter. First, determine the liability. If you find there is no liability you need not consider the question of damages. If you find there is liability, that is that the death was caused by the negligence of the driver and that the plaintiff was not guilty of contributory negligence, then determine the amount of your verdict and ascertain it in the way and manner which I have indicated.

Mr. Simpson: I ask a formal exception to the charge where you say "If you find the plaintiff was not guilty of contributory negligence you should give a verdict; and also to the charge where you said they deduct the keep of the child.

The Court: All right.

New Jersey Court of Errors and Appeals.

Action at Law.

On Appeal from Hudson Circuit.

JENNIE COOPER, Administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased,

Plaintiff-Appellant,

—against—

RICHARD MURPHY,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT.

Facts.

This was an action under the Death Act by an administratrix for the death of a young man, Archibald L. Cooper, who was 19 years of age. His mother, who sued, was a widow and he took charge of the business for her, rendering her services. He attempted to board a jitney bus on Central Avenue, Jersey City, as it approached the corner of Lincoln Street, and was thrown under the wheels and killed, by reason of the failure of the operator to use care and to keep a lookout for passengers. The jury brought in a verdict for defendant. Only two grounds of appeal are before the Court. Both have reference to the instruction of the Court. They are printed in the State of Case, pages 2 and 3.

POINT I.

The Court instructed the jury that it was the duty of the plaintiff to exculpate the intestate from contributory negligence, thereby placing not only the burden of proof as to negligence but as to freedom from contributory negligence in the following language:

> "If you find that the driver was negligent but the young man was guilty of contributory negligence, then your verdict would be a verdict for the defendant; but if you find that the accident was caused by the negligence of this driver, and that there was no contributory negligence on the part of this young man, then you have to go a step further and determine your verdict."

The effect of this was to charge the jury that they could not find a verdict unless they found the intestate free from contributory negligence. If the jury's mind were uncertain as to contributory negligence but were fixed as to the negligence of the defendant, this Charge did not permit them to find a verdict for the plaintiff, because it told them they must first find the intestate of the plaintiff free from contributory negligence. This is not the burden put on the plaintiff; the plaintiff need only establish the negligence of the defendant. The contributory negligence to be established, must be established as a defense, and therefore, to charge the jury that they could not find a verdict unless they found the intestate of the plaintiff free from contributory negligence was to put greater burden upon the plaintiff than the law does.

See the case of *Baker* v. *Fogg,* 95 N. J. L. 230, holding contributory negligence is defense and not a matter of plaintiff's proof.

Rhodehouse v. *Director General of Railroads,* 95 N. J. L. 355; 111 Atl. 662, holding that "contributory negligence is a defense and the burden of establishing it is upon the defendant."

It does not meet this argument to say that a verdict for plaintiff could not have been found if the plaintiff's intestate was guilty of contributory negligence; that of course is the law, but if there was no finding by the jury as to contributory negligence because they were not satisfied of the negligence of the intestate of the plaintiff, this instruction did not make contributory negligence a matter of defense but made it a requisite to appear affirmatively as a fact before a verdict could be recovered.

POINT II.

The Court erroneously instructed the jury that the amount of damages was the pecuniary contributions of the decedent, from which must be subtracted his maintenance. The measure of damages was such sum as would represent the present value of the financial contributions or value of services rendered by the decedent, if he had lived, but this Charge made it obligatory on the jury to subtract from the value of this sum, the expenses of maintenance. The expenses of maintenance, being natural obligations, would exist irrespective of any contributions by the intestate, and the pecuniary loss would not be a sum representing the earnings minus the expenses

of upkeep, but would be the sum, as laid down in this state, which would be the reasonable worth of the services.

See:

Parker's Digest, 2nd Volume, title "Death," column 3343 *et seq.;*
Brown v. *Erie,* 87 Law 487; point 5 of syllabus;
Danskin v. *Penn.,* 83 Law 922;
Morhart v. *North Jersey,* 64 Law 296.

The practical result of this Charge as to damages is shown in the verdict, for if the jury subtracted what they assumed was the expense of maintenance up to the time of his death from the value of the services, in their opinion the result was zero, that is, no damage and they found for the defendant. A like request made in the trial of another cause, that the Court should charge a rule of damages such as was charged in this case, was held to be an improper request and the refusal of the Court to so charge not error.

See *Maher* v. *Magnus Co., Inc.,* 1 N. J. Mis. Reports, page 469, where the Court said:

> "It is said that this charge was erroneous in that the Court should have directed the jury to subtract from the estimated earnings that would have enured to the benefit of the next of kin, not the cost of rearing the deceased from the time of the injury until he arrived at full age, but the entire cost of rearing him from birth; and appellant claims that this proposition is supported by the case of *Graham* v. *Consolidated Traction Co.,* 64 N. J. L. 10. We are quite unable to read any such meaning into the language of the

> opinion in that case. On the contrary we have always understood the rule to be that the computation of pecuniary injury commences with the fatal accident, or perhaps the death, no matter which, for present purposes, and both earnings and cost of education are calculated from that point. The test question is, what was the pecuniary value of the life of the decedent to the party or parties injured? And in answering this it seems plain that the decedent should be taken as he was at the time of his death, as a concrete fact. As such a living being at that time he was at least worth to the next of kin what they could reasonably expect to receive from his earnings or contributions in the future less what it would cost them, if obligated to support and educate him for such support and education until he should be of age."

In *Graham* v. *Consolidated Traction Co.*, 64 N. J. L. 10, C. J. Magie said:

> "The damages properly to be awarded in the case were such as would compensate the father for the reasonable expectation of pecuniary benefit from the deceased during the period of minority when he owed services to his father, and thereafter when he would become emancipated by being of full age."

It is respectfully submitted that the verdict of the Hudson County Circuit Court should be reversed and a trial de novo granted.

Respectfully submitted,

ALEX. SIMPSON,
Counsel for Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

JENNIE COOPER, Administratrix *ad pros.* of the Estate of ARCHIBALD L. COOPER, deceased, Plaintiff-Appellant, *v.* RICHARD MURPHY, Defendant-Appellee.	On Appeal.

BRIEF FOR DEFENDANT-APPELLEE.

Statement of Facts.

This action was instituted by Jennie Cooper, administratrix *ad prosequendum* of the Estate of Archibald L. Cooper, deceased, to recover for the death of her son, she alleging that such death resulted from the wrongful act of the defendant.

The suit was commenced in the Hudson County Circuit Court, and resulted in a verdict being found in favor of the defendant. From this verdict an appeal was taken into this Court upon two grounds, both of which are based on exceptions to the charge of the Court, the claim being that the Court erred in its charge on the question of contributory negligence, and on the further question of the measure of damages.

ARGUMENT.

POINT I.

The Court's charge on contributory negligence was not erroneous.

The portion of the charge of the Court on contributory negligence to which plaintiff excepts, but only a portion of which is set forth in the brief, is in the following language:

> "If you find that the driver was not negligent, then your verdict would be for the defendant. If you find that the driver was negligent, but the young man was guilty of contributory negligence, then your verdict would be for the defendant; but if you find that the accident was caused by the negligence of this driver, and that there was no contributory negligence on the part of this young man, then you have to go a step further and determine your verdict."

(Here follows portion omitted in the brief.)

> "Which must be in favor of the plaintiff, for an amount of money—a pecuniary verdict" (Case, p. 52, lines 29-40).

The plaintiff argues that by this portion of the charge the Court in effect stated to the jury that it was incumbent upon the plaintiff to exculpate intestate of contributory negligence, before a verdict could be rendered favorable to the plaintiff. A careful examination of this charge will, however, indicate quite the contrary. It first shows that if the driver were not negligent, that there could not be a recovery, and likewise if the finding was that both were negligent, the verdict must be in favor of the defendant; but, on the other hand, if the jury found the driver negligent and the evi-

dence did not satisfy them of the contributory negligence of the decedent, that then they were required to determine their verdict, and, as the Court says: "WHICH MUST BE IN FAVOR OF THE PLAINTIFF FOR AN AMOUNT OF MONEY—A PECUNIARY VERDICT."

In this particular portion of the charge nothing is said concerning the burden of establishing either negligence or contributory negligence, but it follows another portion of the charge, which specifically directs the attention of the jury to the proof which is required for the establishment both of negligence and contributory negligence, the Court using this language:

> "You are the sole judges of what the evidence has been. You are to determine yourselves, in the jury room, from your recollection of the evidence what those witnesses have testified to, and you are to determine the weight and credibility of the evidence of those witnesses, and having done that, then you are to see whether or not the plaintiff has established by a preponderance of the evidence the fact that the proximate cause of the accident was negligence on the part of the driver. When you have decided that question, if you find that it was caused by the negligence of the driver, then you are to say whether or not the defendant has established that the deceased was guilty of contributory negligence. YOU SEE, THE BURDEN OF PROVING THAT THE DRIVER WAS NEGLIGENT RESTS ON THE PLAINTIFF; THE BURDEN OF PROVING THAT THE YOUNG MAN ARCHIBALD WAS GUILTY OF CONTRIBUTORY NEGLIGENCE RESTS ON THE DEFENDANT." (Case, p. 52, lines 10-28.)

It will be noted that this portion of the charge immediately precedes the portion complained of and particularly states that the burden of estab-

lishing contributory negligence on the part of the deceased, is upon the defendant.

The cases cited in the brief of the plaintiff have absolutely no application, because they merely hold that it is not the plaintiff's duty to show that he is free of contributory negligence, but that on the contrary the burden is cast upon the defendant to establish negligence on the part of the plaintiff, contributing to the occurrence.

The Court in this case, following the rule in the cases cited by the plaintiff, charged the jury in such a manner as to leave no doubt in the minds of the jurors that the burden of proving contributory negligence rested upon the defendant, and the charge, therefore, we must respectfully contend, in this respect is not erroneous.

POINT II.

The charge of the Court on the measure of damage was not erroneous.

On the question of the amount of damages that could be allowed to the plaintiff in the event of a recovery, the Court used the following language:

> "Now, the mother says that it would take a certain sum to employ someone to do the work that the boy did. She would be entitled to the services of that boy until he was 21 years of age; but you see, members of the jury, during the time that he was rendering the services to the mother the law cast upon the mother a reciprocal duty; she was obliged to clothe him, she was obliged to care for him, to feed him. All that you see would come out of what he would earn during that time, so that the mother would not receive the full amount. If the boy was working for somebody else and brought the wages home, out of that the mother would have to feed him, clothe

> him and give him such spending money as would be required. You see in other words the mother would receive what the son had received for wages, but she would have to pay out the amount required for his support. Now her loss would not be the total amount that the son brought in, but the amount that was left after she had performed the duties of a mother to that son. That is the only loss which the mother has had which you may take into consideration. The question for you to determine, in addition to what she lost during the minority of this son, is the question of how much you can say he would naturally have given her after he became of age; and you see that is a question for you to determine." (Case, p. 53, lines 25-40; Case, p. 54, lines 1-20.)

The mother testified that her son had no other employment except the service which he had rendered for her in operating the store which she owned (Case, p. 10, lines 1-10), and that this service was worth the sum of $75 a week, because it would cost her that amount to engage someone else to render the same or like service. (Case, p. 13, lines 1-10.)

The effect of the charge of the Court, therefore, was that the jury was to consider the amount of the value of the services rendered, using as a guide the amount which the deceased would have received as wages, which she would have been entitled to, had he been employed elsewhere, from which the jury were required to deduct the cost of his maintenance during minority, and that she should receive such further amount as the jury could say that he would have contributed to her after having reached his majority.

This charge in all respects follows the requirements of the reported cases in this State and is not contrary in any respect to the language ap-

proved in the cases cited in support of the argument of the plaintiff.

Maher v. *Magnus Co., Inc.*, 1 N. J. Mis., 469;
Graham v. *Consolidated Traction Co.*, 64 N. J. L., 10.

Admitting, however, for the purpose of this argument that the charge in respect to the matter of damage is erroneous, the error is harmless. Before the jury would be justified in finding a verdict in favor of the defendant, under the charge of the Court they were obliged to find either that the defendant was free of negligence or that the deceased was guilty of contributory negligence. Any other verdict would be contrary to the charge of the Court. It must necessarily be assumed that the jury did not disregard the instructions given them.

It is argued that the jury could in its calculation determine that the amount of the value of the services would not exceed, but would be less than the cost of maintenance; but even though they arrived at this determination, under the charge of the Court they would still be obliged to find a verdict for the plaintiff, even though that verdict be for a nominal amount.

We submit that the only rational interpretation of the verdict of the jury is that it was arrived at by a finding of no negligence upon the part of the defendant or contributory negligence upon the part of the deceased, and that they were not, therefore, obliged to and did not consider the question of damage. In this situation, therefore, whatever the Court may have said on this proposition, although it be conceded to be erroneous. was harmless, and, therefore, can be given no consideration on this appeal.

Livesey v. *Helbig*, 87 N. J. L., 303; 94 A., 47;
Borgensky v. *Delaney Co.*, 82 N. J. L., 564;
Gromer v. *George, et al.*, 90 N. J. L., 644;
101 A., 263.

It is respectfully submitted that for the reasons above urged the verdict and judgment thereon must be affirmed.

Respectfully submitted,

LAZARUS, BRENNER & VICKERS,
of Counsel for Defendant-Appellee.

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