[HIGH COURT OF AUSTRALIA.]

BURSTON . . . . . APPELLANT;
PLAINTIFF,

AND

MELBOURNE AND METROPOLITAN TRAMWAYS BOARD . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1948.

MELBOURNE, *Oct.* 6, 7. SYDNEY, *Dec.* 6.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Negligence—Contributory negligence—Direction to jury—Defendant presenting to jury no defence except that injury caused solely by plaintiff's own negligence—Whether defendant entitled to direction as to effect of combined negligence—Plaintiff injured while boarding omnibus—Conflict of evidence as to whether omnibus in motion at critical time—Defence denying negligence—Intimation by jury of finding that omnibus was moving when plaintiff tried to board it—Redirection—Adequacy of direction—Verdict for plaintiff.

The plaintiff, having been injured while attempting to board a bus, brought an action for damages against the employer of the driver of the bus on the ground that the injury was due to the driver's negligence. The defendant denied negligence and also pleaded contributory negligence. At the trial of the action before a jury, there was a conflict of evidence as to whether the bus was stationary when the plaintiff attempted to board it. The plaintiff and other witnesses testified that it was. On the other hand, a witness for the defendant said that the plaintiff ran after the bus and tried to board it while it was in motion. The plaintiff's evidence was that the bus stopped near a stop sign; he approached the doorway, which was towards the front of the bus, to the left and the rear of the driver; another passenger was in the doorway and prevented the plaintiff from entering the bus; the plaintiff had one foot on the step and had grasped the stanchions at the sides of the door when the bus moved off; he lost his balance and fell to the ground. The evidence of the driver of the bus was that, before starting again after taking on a passenger, he looked towards the door and saw that the step was clear; he then looked ahead and moved off; he was not aware of the plaintiff's attempt to board the bus, but, hearing a cry, he stopped again and found the plaintiff on the ground. The defendant did not put the defence of contributory negligence to the jury, but relied solely on the defence of no negligence. The presiding judge directed the jury that the plaintiff's injury had been brought about by the plaintiff's own negligence or by the defendant's negligence or a combination of both;

H. C. OF A. 1948. BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

the jury had to determine whether the plaintiff had suffered his injury by attempting to board a stationary bus or by attempting to board a bus which was moving; if the bus was stationary at the time, the jury could find the defendant liable by way of negligence; if it was moving, that did not necessarily mean that the plaintiff could not recover, because the jury might think that the driver, exercising proper care could nevertheless have so acted as to avoid the injury to the plaintiff; if the jury thought so, the defendant would be liable; otherwise, the defendant would not be liable. After a retirement the jury returned into court with a request for further guidance. The foreman announced that the jury had agreed that the bus was moving when the plaintiff attempted to board it and, owing to the driver's vision being obscured by the man who entered prior to the plaintiff, the driver was unable to see the plaintiff's efforts to board the bus. The judge's further direction was that it was for the jury to determine whether the driver under such circumstances in starting the bus or in continuing it in motion was acting as a reasonable driver under those circumstances would act; the jury should bear in mind a traffic regulation which prohibited a person boarding a vehicle in motion and also the right of the driver to assume that other persons would obey the ordinary usages of traffic; bearing these matters in mind, the members of the jury were to make up their minds whether the driver was guilty of negligence in doing or omitting to do what a reasonable man in his position would not have done or omitted. The jury returned a verdict for the plaintiff, and the defendant sought a new trial on the ground that the judge's failure to direct the jury on the issue of contributory negligence amounted to a misdirection.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Dixon* and *Williams* JJ. dissenting), that in the circumstances of the case the judge's direction was adequate and a new trial should not be ordered.

Decision of the Supreme Court of Victoria (Full Court): *Burston* v. *Melbourne and Metropolitan Tramways Board*, (1948) V.L.R. 215, reversed.

APPEAL from the Supreme Court of Victoria.

Cyril Garnet Burston brought an action in the Supreme Court of Victoria against the Melbourne and Metropolitan Tramways Board, claiming damages for injury suffered through his having been thrown to the roadway while in the act of boarding an omnibus the property of the defendant. The plaintiff alleged in his statement of claim that his injury was the result of the negligent driving or management of the omnibus by the defendant's servant or agent. The defendant in its defence denied negligence and alleged that the plaintiff's fall was caused or contributed to by his own negligence in that he had failed to take reasonable precautions for his own safety and had attempted to join the omnibus when it was in motion, thereby contravening reg. 35 of the *Road Traffic Regulations* 1939 (Vict.). The plaintiff alleged by way of reply that, if his fall was caused or contributed to by his own negligence, the defendant by the exercise of reasonable care could have avoided the consequences of such negligence.

The action was tried before *Lowe* J. and a jury.

It appeared from the evidence that the bus which the plaintiff had attempted to board had only one doorway, behind and to the left of the driver's seat. There was no conductor, and the driver collected the fares from passengers as they entered. The plaintiff gave evidence that he had waited at a bus stop and that the bus pulled up a few yards past the stop. He stepped from the kerb and placed one foot on the step of the bus, at the same time grasping the stanchions on each side of the door. He was unable to proceed further because the passenger who had preceded him stood in the doorway, apparently paying his fare. While the plaintiff was in that position, the bus moved off; he was thrown to the ground and severely injured. His evidence was supported by other witnesses. The defendant, however, adduced evidence to the effect that the plaintiff had run after the bus after it had moved off and had attempted to board it while it was in motion. The driver gave evidence that he pulled up at the stop. One passenger entered the bus, paid his fare and, at the direction of the driver, moved inside the bus. The driver then saw that the step was clear and there was no-one at the stop. He prepared to move off, but first looked to the step again and again saw that it was clear. He then set the bus in motion and looked ahead; but, hearing a cry, he pulled up and found the plaintiff on the ground. He had not seen the plaintiff attempt to board the bus. The evidence is described in greater detail in the judgments hereunder.

Counsel for the defendant contended that the plaintiff alone was at fault and that there was no negligence on the part of the driver. Counsel did not put the defence of contributory negligence to the jury.

In charging the jury *Lowe* J. said :—" If a person does something under the circumstances as you find them from the facts which a reasonable and prudent man would not do under those circumstances, or he fails to do something in those circumstances which a reasonable and prudent man would do, then he is guilty of negligence. That is the test which you will have to apply in this case when you have determined for yourselves what the real facts are out of which the plaintiff's injuries arose. . . . The damage which has happened to the plaintiff . . . here has, on the concession of counsel in the way the case has been conducted, either been brought about by the plaintiff's own negligence or by the defendant's negligence or a combination of both, and when you are testing the plaintiff's conduct the test of negligence is exactly the same as the test you apply in regard to the defendant. Has

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

he done or omitted something which a reasonable man under the circumstances would not have done or would have done ? The test applies to him as it does to the defendant. In this case . . . the case can be put in a much shorter compass even than that, and the final question which . . . you will have to determine is whether the plaintiff suffered his injuries by attempting to board a bus which was then stationary or whether he suffered those injuries by attempting to board a bus which was not stationary but which was moving. If the bus was stationary at the time that he attempted to board it . . . it is not disputed, or at any rate . . . you may very well come to the conclusion, that the defendant is liable by way of negligence. That, I emphasize, is on the assumption that the bus was stationary at the time that he attempted to board it. On the other hand, suppose the bus were moving at the time he attempted to board it, that does not necessarily mean that the plaintiff is debarred from recovering, because you may think that the defendant's driver, exercising proper care as I have described it to you as required of him by law, could nevertheless have so acted as to avoid the plaintiff receiving injury, and consequently, when you have made up your minds what the real facts are, I think that you will wisely put to yourselves this question : 'Was the bus stationary when the plaintiff came to it or was it moving ? ' If it was stationary . . . you may well come to the conclusion that that imposes liability on the defendant for the injuries which the plaintiff has received. If it was moving, you have to ask yourselves a further question : 'Could the defendant's driver by the exercise of reasonable care have prevented the injuries which occurred to the plaintiff ? ' And if you think he could, that again imposes liability on the defendant. But if you think that he could not have avoided the injury to the plaintiff when the plaintiff attempted to board a moving bus, then that would mean that there was no liability on the defendant. . . . Has the plaintiff satisfied you that the driver of the bus did something in those circumstances which a reasonable man would not have done or that he failed to do something which a reasonable man would have done, and if you find that, then there is another question to ask, which I do not think will really trouble you in this case, and that is, was such act or omission, was such negligence the cause of the injuries which the plaintiff has sustained, and, while I have not got to determine it, I should think if you came to the conclusion that there was negligence you would not hesitate very long about drawing the further inference and answering the further question that the injuries of the plaintiff followed from such negligent act, if you find it

proved ? " His Honour subsequently redirected the jury as follows :—" Gentlemen, I want to add something as to one alternative that I discussed with you in charging you. I want to deal with the alternative if you should arrive at it, that the plaintiff attempted to board the bus while it was moving. Counsel has drawn my attention to the fact that I have not mentioned to you one traffic regulation which is in evidence in this case and which provides : ' No person shall alight from or board or join a vehicle which is in motion.' . . . Where there is a regulation made by a competent authority, which refers to traffic, that regulation is something which has to be taken into account by the tribunal which has to determine whether a person has been negligent. It does not follow that, because a person breaks that regulation and becomes subject to a penalty, necessarily you find that his act is the cause of his own injury. It is only one of all the incidents that you are to take into account. The other matter is this, that the driver of the bus is entitled to assume that other persons using the highway will obey the usages of traffic, and this prohibition against joining or boarding a vehicle in motion is one of those regulations in regard to traffic. It seems to me . . . that once you have found that the bus was in motion at the time that the plaintiff attempted to join it, then the allegation of negligence which is material in the plaintiff's case is the one which charges that the defendant's driver failed to keep any or any proper look out, and that, applied to such facts, would mean that if, by keeping a proper look out at the entrance to his bus he could have seen that, notwithstanding that he was starting, the plaintiff was about to join it and might have been injured by his going on, and that a prudent man in those circumstances would not have started, then he should not have started. That seems to me the aspect in which that part of the plaintiff's case must be put. I should think, and it is for you to judge as a matter of fact, that if you think the bus actually was moving, and the bus driver, as an ordinary prudent bus driver would, was looking ahead and not to the side, it would not be a case in which you would decide against him. The regulation should be taken into account and you must also take into account the fact that the bus driver is entitled to assume that other users of traffic will be observing the ordinary usages of traffic. It seems to me that that part of the plaintiff's case must depend on his establishing to your satisfaction two propositions, that the bus driver failed to keep any or any proper look out, and that by reason of it the plaintiff was injured." Later the jury returned into court, and the following took place :—The foreman : " We are seeking further

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

guidance. We have agreed that the bus was moving when Mr. Burston attempted to board it and that owing to the driver's vision being obscured . . . by the man who entered prior to Burston the driver was unable to see Mr. Burston's efforts to board the bus. That is as far as we had reached." His Honour: "Well, gentlemen, it is for you to determine whether the driver under such circumstances in starting the bus or in continuing the bus in motion, was acting as a reasonable driver under those circumstances would act. You bear in mind what I told you last with regard to the traffic regulation prohibiting a person joining or boarding a bus in motion, and you bear in mind also the right of the driver to assume that other persons will obey the ordinary usages of traffic, and bearing those matters in mind and bearing in mind what you have told me your finding is, that a man had got on ahead of the plaintiff and was standing in the doorway, you then have to make up your minds whether the driver was guilty of negligence in the sense that he did what a reasonable man would not do or omitted to do what a reasonable man in his position as driver would have done."

The jury found a verdict for the plaintiff for £1,000, and judgment was entered accordingly.

The defendant appealed to the Full Court of the Supreme Court and sought a new trial on the ground of misdirection and non-direction; in particular, on the ground that the judge's failure to direct the jury on the issue of contributory negligence amounted to a misdirection.

The Full Court (*Herring* C.J., *Martin* and *Fullagar* JJ.) ordered a new trial: *Burston* v. *Melbourne and Metropolitan Tramways Board* (1).

From this decision the plaintiff, by leave, appealed to the High Court.

Smithers, for the appellant. The finding expressed by the jury, when it returned into court, is inconsistent with the evidence of the driver of the bus that at or about the time of starting he saw that the step was clear; it indicates that at that time he was looking to the left and would have seen the plaintiff but for the man who was in the doorway. This means that the jury had rejected the defendant's evidence that the plaintiff ran after the bus after it had moved off—otherwise, on the direction they had already been given, they must have found against the plaintiff; indeed, the plaintiff's counsel had conceded this. It follows that, in the jury's view, the bus was just starting to move when the plaintiff

(1) (1948) V.L.R. 215.

attempted to board it. It is clear from the verdict that they found that the plaintiff's action in so doing was not the cause of the accident. It is submitted that, as a matter of law, they could properly so find and therefore that the verdict must stand unless the trial was vitiated by a deficiency in the direction. It is also submitted that in the circumstances of this case the judge's redirection was quite adequate to inform the jury of its duty in resolving the question whether the injury was due to the defendant's negligence; and this was the only real issue. There was in reality no issue of contributory negligence before the jury. It is true that it was raised by the pleadings, but counsel for the defendant—as he admitted in the Supreme Court on the application for a new trial—deliberately refrained from putting it to the jury. The defendant should not be allowed to raise it now and contend that the direction was inadequate by relation to it. Moreover, after the judge's redirection the plaintiff sought a direction on "last opportunity." If this had been given, it would necessarily have involved a direction as to contributory negligence; but this was opposed by the defendant. Accordingly, the defendant should not be allowed at this late stage to rely on inadequacy—if there was such—in the direction. If it was manifest that a miscarriage of justice would result, the position would be different; but that is not the case here.

D. M. Campbell K.C. (with him *Bloomfield*), for the respondent. No inference can be drawn from the jury's announcement, when it returned into court, as to the speed at which they thought the bus was moving when the plaintiff attempted to board it; but, even if it could be inferred that the bus was only moving slowly, the plaintiff would have been guilty of some negligence: see *Charlesworth, Law of Negligence*, 2nd ed. (1947), p. 128; *Sandford* v. *Porter* (1); *Purnell* v. *Great Western Railway Co.* (2). At that stage—whatever the position may have been earlier—a direction on contributory negligence was called for; and the fact that no objection was taken at the trial to the absence of such a direction should not debar the defendant from raising it on the application for a new trial. The English cases in which it has been held that an objection not taken at the trial should not be allowed on appeal do not lay down an absolute rule, and they are not applicable to the circumstances of this case. [He referred to *Seaton* v. *Burnand* (3); *Barber* v. *Pigden* (4); *Weiser* v. *Segar* (5).] The judge's failure to deal with the question of contributory

(1) (1912) 2 I.R. 551.
(2) (1876) 1 Q.B.D. 636.
(3) (1900) A.C. 135.
(4) (1937) 1 K.B. 664, at pp. 671, 672.
(5) (1904) W.N. 93.

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

negligence amounted, in the circumstances of this case, to a misdirection; and the onus is thrown on the plaintiff to show that there was no miscarriage of justice. [He also referred to *Withers* v. *General Theatre Corporation Ltd.* (1); *Maezengarb, Negligence on the Highway* (1944), pp. 403, 408; *Cooper* v. *Swadling* (2); *Clouston & Co. Ltd.* v. *Corry* (3); *Braddock* v. *Bevins* (4).]

Smithers, in reply.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of Victoria directing a new trial in an action in which Cyril Garnet Burston sued the Melbourne and Metropolitan Tramways Board for damages for negligence. He alleged that while he was in the act of boarding an omnibus driven by a servant of the defendant Board he was thrown to the roadway and injured as a result of the negligent driving or management of the bus by the driver. The bus had only one entrance, there was no conductor, and the driver collected the fares from passengers as they entered the bus on his left and behind him. As a passenger was paying his fare he stood in the doorway and prevented the driver from having any view of the step.

The plaintiff gave evidence that he was waiting at a bus stop at the intersection of Fawkner and Barkly Streets, St. Kilda, that the bus drew up a few yards beyond the stop, and that another passenger got on to the bus first. His evidence was that he then proceeded to board the bus and grasped the stanchions on each side of the door and got his left foot on the step, but was prevented from getting his right foot on the step and from entering the bus by the presence on the step of the other passenger. While he was in this position (he said) the bus suddenly started, he tried to keep his hold, but failed, and was thrown to the ground after the bus had reached the other side of Fawkner Street. His evidence was that the bus was stationary when he tried to board it.

The distance from the place where the bus stopped to pick up passengers to the place where it stopped after the accident was shown by a plan to be eighty-four feet. The bus was twenty-eight feet long. It probably did not travel more than sixty or seventy feet before it stopped for the second time. The road was on an up grade and the bus was travelling slowly.

(1) (1933) 2 K.B. 536, at p. 553.
(2) (1930) 1 K.B. 403.
(3) (1906) A.C. 122, at p. 130.
(4) (1948) 1 K.B. 580.

Other witnesses gave evidence that they saw the plaintiff hanging to the stanchions and trying to get on to the bus and failing.

The evidence of the driver was that a passenger boarded the bus when the bus stopped, paid his fare and then, obeying a direction of the driver, moved inside the body of the bus. The driver said that he then saw that the step was clear and prepared to put the bus in motion. Before he actually did so, however, he gave another glance to the step and again saw that it was clear. He then started the bus and looked ahead along the road on which he was driving. He heard cries and stopped the bus, which was moving at three or four miles per hour, and found that the plaintiff had been injured.

The learned judge in his summing up directed the jury (1) that if the plaintiff boarded the bus when it was stationary it was open to the jury to find that the defendant had been guilty of negligence by starting the bus without seeing that the plaintiff was properly on the bus and that a verdict could then be found for the plaintiff. (There was no objection from either party to this direction.) (2) That if the plaintiff boarded the bus when it was moving the jury might properly find that the plaintiff was guilty of negligence, and that accordingly, subject to one qualification, he would not be entitled to recover. This second direction was perhaps too favourable to the defendant. It could have been added that the bus might have been moving so slightly that it might properly be found that there was not any negligence in the mere act of attempting to board it, even though a traffic regulation prohibits persons getting on to moving vehicles. But the breach of the regulation would be prima-facie evidence of negligence: *Henwood* v. *The Municipal Tramways Trust* (*S.A.*) (1). The defendant asked for a direction that a person who attempted to get on a vehicle after it was in movement was a trespasser to whom a driver owed no duty unless he actually saw him or otherwise became aware of him. In my opinion the learned judge rightly declined to give this direction. If a driver omits to take an ordinary precaution before putting his vehicle in motion, as for example, ringing a bell before starting (if that is an established practice) or (where there is no conductor) looking to see that no person is trying to get on the bus where he could easily have done so (as, it will be seen, the jury found in the present case) it may properly be held that such a driver was guilty of negligence causing an injury notwithstanding the negligence of a plaintiff in boarding a vehicle when it was in motion.

The qualification upon the second direction was stated by his Honour in the following words :—" If it (the bus) was moving, you

(1) (1938) 60 C.L.R. 438.

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Latham C.J.

have to ask yourselves a further question: 'Could the defendant's driver by the exercise of reasonable care have prevented the injuries which occurred to the plaintiff?' And if you think he could, that again imposes liability on the defendant. But if you think that he could not have avoided the injury to the plaintiff when the plaintiff attempted to board a moving bus, then that would mean that there was no liability on the defendant."

The jury was told that if they found that the plaintiff had attempted to board the bus when it was moving they might properly find him to be guilty of negligence, but that that negligence would not "necessarily" prevent him from succeeding if the jury was of opinion that "the defendant's driver, exercising proper care as I have described it to you as required of him by law, could nevertheless have so acted as to avoid the plaintiff receiving injury." (There was no suggestion in any evidence that the plaintiff could, after he had grasped the stanchions and put one foot on the step, have done anything to prevent what happened.) Accordingly, the jury had been told that the defendant was not liable if the plaintiff was negligent in the manner stated unless the exercise of proper care by the driver would have prevented the plaintiff's injury.

The jury retired and returned to court, when the foreman made the following statement:—"We have agreed that the bus was moving when Mr. Burston attempted to board it and that owing to the driver's vision being obscured by the man who entered prior to Burston, the driver was unable to see Mr. Burston's efforts to board the bus."

The jury did not accept the evidence of the plaintiff that the bus was stationary when he tried to get on and that it then started suddenly. The jury also did not accept the evidence of the driver that he looked at the step twice (or even once) before he started the bus and saw that the step was clear.

The learned judge had already told the jury that when the bus was moving it was the duty of the driver as an ordinary prudent bus driver to look ahead and not to the side. Accordingly, the finding of fact shows that the jury was of opinion that if the driver had obtained a view of the step at the time of starting he would have seen that Burston was trying to board the bus, or at least waiting to board it. In fact he started it without seeing whether or not any person was about to get on or actually getting on behind the man standing in the doorway.

After retiring again the jury brought in a verdict for the plaintiff for £1,000. This verdict, in the light of the finding of fact, means that the jury decided that, if the driver had in fact done what he

said he did, the accident would not have happened and the plaintiff would not have been injured. The plaintiff was trying to get on to the bus immediately behind the other passenger. If that passenger had been moved out of the way so that the driver's vision was not obscured he would, according to the jury, have seen the plaintiff's efforts to board the bus. Then either he would not have started the bus or continued it in motion, or the plaintiff would have got on easily enough and safely.

It was common ground at the trial that if the plaintiff boarded a moving bus he was guilty of negligence. This proposition, as I have said, was perhaps too favourable to the defendant. If the plaintiff did board the bus when it was moving (whether such action was negligent or not) it was obvious that his action was a contributory cause to his injury. Otherwise there was no point in the learned judge saying that if the plaintiff boarded a moving bus the jury could properly find for the defendant unless the driver could, by the exercise of ordinary care, have avoided causing injury to the plaintiff.

The Full Court ordered a new trial of the action upon the grounds that the trial judge did not explain the possible effects in law of any negligence of the plaintiff, that there was no discussion of the subject whether the negligence, if any, of the persons concerned, was so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, and that the jury would not appreciate that they were being asked for a decision on the question " Whose negligence was it that substantially caused the injury ? " It was further said in the Full Court :—" It seems possible that such a verdict was based on the view that the negligence of the driver was greater or more heinous than that of the plaintiff, and that the jury never appreciated that if each party was guilty of some negligence which brought about the injury, the plaintiff could not recover unless he could show that the driver, by the exercise of reasonable care, could have avoided the results of his neglect."

I refer first to the criticism of the summing up contained in the words " the learned judge did not explain the possible effects in law of any negligence of the plaintiff." In my opinion it was assumed by all parties throughout the trial that if the plaintiff boarded a moving bus this was negligence on the part of the plaintiff. It was obvious that it was a cause contributing to his injury and that, accordingly, the plaintiff should fail unless, as the learned judge stated several times, the driver could, by the exercise of ordinary care, have avoided the consequences of the plaintiff's negligence.

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Latham C.J.

Upon the facts of this particular case it appears to me that there was no defect in the summing up by reason of there being no direction as to the consequence of the acts of the plaintiff and the driver being so nearly contemporaneous as to make it impossible for either to avoid the consequences of the other's negligence. The negligence of the driver which the jury found was negligence which occurred before he started the bus. The jury found that the driver moved off without troubling to see whether anyone was trying to get on the bus or not, and that that was negligence which caused the plaintiff's injury.

The learned judge pointed out, in a further direction given after the jury had made its finding of fact, that the bus driver was entitled to assume that other users of traffic would observe the ordinary usages of traffic and would therefore not commit a breach of a regulation made under the traffic regulation which prohibited persons getting on a vehicle which was in motion. His Honour said that it would be necessary for the plaintiff to establish two propositions—that the bus driver failed to keep any, or any proper, lookout, and that "*by reason of it*" the plaintiff was injured. It was therefore clearly put to the jury that if the injury to the plaintiff was due to the plaintiff's own action, and not to any action of the driver in starting the bus without looking at the step, the plaintiff ought not to recover.

It cannot be denied that it was "possible" that the verdict was based on the view "that the negligence of the driver was greater or more heinous than that of the plaintiff." So also it is possible that the verdict was based upon other unjustifiable views—sympathy for the plaintiff, dislike of the defendant, &c. But there is nothing that I can discover in the proceedings to support the proposition that the particular possibility mentioned was the ground of the verdict.

In my opinion the summing up was adequate: it properly explained to the jury the matters which arose for determination upon the evidence in this particular case.

The defendant did not ask at the trial for the direction which he now says should have been given. Counsel for the defendant stated upon the appeal in the Supreme Court that he did not realize the omission until after he had read the transcript of the summing up. He also said that he refrained from pressing the issue of negligence of the plaintiff, because he considered that he had a strong case on no negligence of the defendant's driver, and that discussion of the effect of contributory negligence of the plaintiff might weaken the effect of his client's denial of negligence. The

application was made for a new trial by reason of omissions of the learned judge to give directions which were never asked for, and in particular, it was said, for failing to give sufficient directions as to the effect of the plaintiff's negligence. As I have said, in my opinion sufficient directions were given. But I express my opinion that it is an unsatisfactory ground for granting a new trial that counsel did not appreciate the effect of the summing up at the time, and that he preferred to abstain from emphasizing a point which, upon an application for a new trial, is represented to be of outstanding importance. However, it is not necessary, in the view which I take of the summing up, to determine whether, whenever there is a failure to give a full direction to a jury upon a matter of law, it is a ground for ordering a new trial that the appellate court is of opinion that counsel for the applicant did not appreciate the significance or the effect of the summing up at the time.

In my opinion the appeal should be allowed and the judgment for the plaintiff should be restored.

STARKE J. Appeal by the leave of this court from a judgment of the Supreme Court of Victoria setting aside a verdict and judgment for the plaintiff—the appellant here—and ordering the new trial of an action in which the plaintiff alleged negligence on the part of the defendant—the respondent here—its servants or agents in driving or managing an omnibus whereby the plaintiff was thrown to the ground and injured.

No question of any public importance is raised by the appeal but merely whether the direction of the trial judge to the jury occasioned any substantial wrong or miscarriage of justice.

The order under appeal involves a third trial of the action in which is claimed £3,000 damages but the verdict set aside was for the sum of £1,000.

According to the plaintiff he was waiting for a bus belonging to the defendant at a compulsory stopping place where passengers were picked up and set down. The bus slightly overran the stopping place and the plaintiff hurried up to the entrance of the bus (which was near the driver at the front of the bus) so as to board it. But another passenger was boarding the bus as the plaintiff tried to get on and blocked the entrance. The plaintiff asked this passenger to move up but he did not do so. The plaintiff, nevertheless, got his left leg on the step of the bus and pulled himself up on two stanchions and his right leg level with the step of the bus. As the plaintiff was swinging his right leg forward the bus started, with a very sharp jerk, without any warning. The jerk

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Starke J.

caused the plaintiff to lose his balance and he slipped down and fell under the bus some eighty to eighty-five feet away from the stopping place according to a plan in evidence. He was seriously injured.

According to evidence led by the defendant a passenger did enter the bus at the stopping place. He obscured the driver's view of the step but was asked to move up and he did so. The driver then had a clear view of the step and saw that no one was on the step and that all was clear. So, he put his bus in motion and proceeded on his journey.

Evidence was also led by the defendant that the plaintiff was observed running beside the bus and attempting to board it but that he appeared to slip on the step, fell to the roadway and the back wheel of the bus passed over his leg.

The only question on these facts was whether the defendant or the plaintiff was responsible for or substantially caused the accident.

Contributory negligence was pleaded but the case presented did not support the plea.

Neither party suggested that the substantial cause of the accident was a want of care on both sides.

"In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law" (*The Bernina* [2] (1)).

The plaintiff, naturally, did not make such a case, and the defendant insisted that the substantial cause of the accident was the negligence of the plaintiff and doubtless, did not consider it wise, for tactical reasons, to suggest any negligence on its part. The parties chose their own battleground and neither can complain if the trial judge adopted it for the purposes of his charge to the jury.

Now I do not propose to go at length through the charge of the trial judge to the jury at the close of the evidence for no objection was taken to it at the trial or upon appeal. But, I think, the trial judge put the practical questions to the jury in the following passage:—"The final question which I think you will have to determine is whether the plaintiff suffered his injuries by attempting to board a bus which was then stationary or whether he suffered those injuries by attempting to board a bus which was not stationary but which was moving. If the bus was stationary at the time that he attempted to board it, I think it is not disputed, or at any rate I think you may very well come to the conclusion, that

(1) (1887) 12 P.D. 58, at p. 89.

the defendant is liable by way of negligence. . . . On the other hand, suppose the bus were moving at the time he attempted to board it, that does not necessarily mean that the plaintiff is debarred from recovering, because you may think the defendant's driver, exercising proper care . . . could nevertheless have so acted as to avoid the plaintiff receiving injury. . . . If it was moving, you have to ask yourselves a further question: Could the defendant's driver by the exercise of reasonable care have prevented the injuries which occurred to the plaintiff? And, if you think he could, that again imposes liability on the defendant. But if you think that he could not have avoided the injury to the plaintiff when the plaintiff attempted to board a moving bus, then that would mean that there was no liability on the defendant."

The jury after considering the case for a couple of hours returned into court and desired further guidance. The foreman said that the jury had agreed that the bus was moving when the plaintiff attempted to board it and that owing to the driver's vision being obscured by the man who entered the bus prior to the plaintiff the driver was unable to see the plaintiff's efforts to board the bus.

The trial judge directed the jury that it was for them " to determine whether the driver under such circumstances in starting the bus or in continuing the bus in motion, was acting as a reasonable driver under those circumstances would act. You bear in mind what I told you . . . with regard to the traffic regulation prohibiting a person joining or boarding a bus in motion, and you bear in mind also the right of the driver to assume that other persons will obey the ordinary usages of traffic, and bearing those matters in mind and bearing in mind what you have told me your finding is, that a man had got on ahead of the plaintiff and was standing in the doorway, you then have to make up your minds whether the driver was guilty of negligence in the sense that he did what a reasonable man would not do or omitted to do what a reasonable man in his position as driver would have done."

It was submitted for the plaintiff that the learned judge should direct the jury " on the matter of the last opportunity " which was only relevant if a case of contributory negligence on the part of the plaintiff was relied upon by the defendant. But the defendant would have none of it: it insisted that the proper direction was if the jury came to the conclusion that the bus was in fact moving when the plaintiff attempted to board it, then the driver was under no obligation to assume that a person would do so and had no duty in regard to that person unless he knew in fact that he was attempting or did intend to attempt to board the bus and that it was quite

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Starke J.

an irrelevant consideration whether or not somebody was standing in the doorway once the bus had actually moved off because it could not affect the driver's duty in any way. So the defendant refrained from contesting contributory negligence on the part of the plaintiff as a fact because its counsel was concerned mainly with the defence of no negligence. But he was an experienced counsel in this class of case and was doubtless alive to the fact that directions upon the subject of contributory negligence might easily weaken his defence denying negligence on the part of the defendant. Again the defendant refrained from suggesting that the case involved a want of reasonable care on the part of both the plaintiff and the defendant in which case the plaintiff failed.

So I think the learned trial judge was justified in reverting to his original position that the question was whether the plaintiff or the defendant was responsible for or substantially caused the accident.

The jury found for the plaintiff and that finding is quite consistent with the evidence.

Apparently the jury was of opinion that the plaintiff was attempting to board the bus as it moved slowly off but the driver did not see the plaintiff because his vision was obscured by another passenger.

It did not accept the driver's evidence that this passenger had moved away and that he had a clear view of the step when he started the bus. It is quite consistent, also, with the verdict that the jury did not accept the view that the plaintiff ran alongside the bus for some distance in order to board it.

In my opinion, the verdict of the jury should be sustained.

But the learned judges of the Supreme Court on the motion for a new trial placed much reliance upon the decision of that Court in *Holford* v. *The Melbourne Tramway and Omnibus Co. Ltd.* (1). There *Cussen* J. observed that the practice in Victoria, and he thought in England as well, had been uniform that an error in law in the direction of the judge on a material issue may be taken advantage of on an application for a new trial though no objection be taken at the trial. It is to be noticed that the learned judge speaks of an error in law in the direction of the judge on a material issue. But a material issue is not necessarily all issues of fact arising on the pleadings. The parties may decline to contest or refrain from contesting various of those issues and thus remove them from the area of controversy. They are not then " material issues " within the rule stated by *Cussen* J.

The rule itself is not inflexible and its application must depend upon the circumstances of particular cases. It is a guide to the

(1) (1909) V.L.R. 497.

exercise of the court's discretion in granting or refusing new trials, and, so understood, I entirely assent to it. But, I do not think that the rule governs or should be applied to the present case.

This appeal should be allowed, the new trial ordered by the Supreme Court set aside and the verdict of the jury restored.

DIXON J. This is an appeal by leave from an order of the Full Court of Victoria directing a new trial in an action for personal injuries. At the former trial the plaintiff had obtained a verdict. The new trial was ordered on the ground of the insufficiency of the direction of the trial judge to the jury, more particularly a direction given in response to a request for further assistance which the jury made having regard to a certain view of the facts at which the jury said that they had arrived.

In order justly to appreciate the difficulties involved in the question whether the jury were adequately instructed, it is, I think, necessary to examine the circumstances of the accident by which the plaintiff sustained personal injury and the conflicting views which upon the evidence it was open to adopt of the manner in which the accident was caused. The plaintiff fell from the step of a bus he was attempting to board and the near side back wheel of the bus passed over his left leg, inflicting serious injuries. The door of the bus was forward. It was situated immediately at the rear of the engine and of the seat of the driver, whose duty it was to receive the fares of passengers through an aperture on his left in the glass screen behind him as they entered. It was a north-bound bus on a route through Barkly Street St. Kilda and the accident occurred where Fawkner Street enters that thoroughfare. The exact spot where the plaintiff's body lay after the wheel had passed over his leg is fixed by common consent. It was opposite a hydrant placed on the western kerb of Barkly Street on the northern side of Fawkner Street. Fawkner Street runs into Barkly Street from the south-west at an angle which is 135 degrees on that side, that is at the north-western corner of the two streets, and, of course, forty-five degrees at the opposite or south-western corner. The crossing is therefore a wide one, although Fawkner Street is not a broad road. On the southern side of the crossing is the bus stop. It is about eighty-five feet south of the point at which the plaintiff lay after the accident, and there can be little doubt that where he lay was the point at which he fell to the ground. The plaintiff's account of the accident was simple. He said that he was waiting at the bus stop on the kerbside of Barkly Street, but that the bus did not stop opposite the sign. It went some distance past the

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Dixon J.

stop and then drew up. He stepped from the kerb and went forward to the door in order to board it. Another intending passenger came from the contrary direction diagonally across Barkly Street from the north-east and reached the step before him. The passenger who was a man of stoutish build stood in the door apparently paying his fare. The plaintiff grasped the two stanchions one in each hand and placed his left foot on the step and requested the passenger preceding him who blocked his way to move in. As the plaintiff raised his right foot to complete his mounting of the step, the bus moved off with a sharp jerk. He lost his balance, and slipped down until he fell on the ground, where the back wheel passed over his leg. A not unimportant point is the fixing of the distance by which the bus overshot the bus stop before it drew up to take on the passenger or passengers. Upon this point the plaintiff gave two versions. At the trial he said that the bus, which was twenty-eight feet long, passed the bus stop by two-thirds of its own length. But it appeared that at an earlier trial, a trial that proved abortive owing to the failure of the jury to agree on a verdict, the plaintiff had said that the bus had travelled about twenty-five yards beyond the stop before it came to a standstill. The plaintiff called three witnesses who had seen the accident from the street. One of them had been walking northward in Barkly Street some distance south of the bus stop, another had walked in the same direction past the bus stop and the bus as it pulled up, and the third had seen the accident from the south side of Fawkner Street. They supported the plaintiff's account of the accident in substance. But two of them placed the point at which the bus had become stationary at a distance measuring fifteen yards from the bus stop to the front of the bus. The third did not see the bus come to a standstill, and his attention was drawn to the bus by exclamations as the plaintiff slipped down the stanchions. It had then reached a position which, if the witness correctly described it, must have been thirty yards from the stop. He said that the bus was moving slowly. The explanation of the accident upon which the defendant relied rested upon the evidence given by the bus driver and by a bystander, a lady who saw it from the pavement of Barkly Street standing at a point about 140 feet to the north, the junction of Grey Street with Barkly Street intervening. She had a clear view notwithstanding the distance. Her account of the accident was that the bus drew up at the bus stop, that it then moved off and slowly crossed the mouth of Fawkner Street and that the plaintiff ran after it and attempted to board it while it was doing so. He drew level with the door and tried to climb in but slipped down. The bus driver

swore that he drew up at the stop and that one person entered the bus. That person paid his fare and then at the request of the driver moved away from the door, leaving the step clear. There was no-one at the stop and the driver moved off. As he drove over the mouth of Fawkner Street he heard someone cry " stop the bus." He did so and found the plaintiff on the ground, injured, under the rear of the bus. He had not seen him attempt to board the vehicle. In fact once the driver had turned his attention to driving the bus and was looking ahead it is very likely that he would not be sensible of an attempt made to board the moving vehicle. For he is seated well forward and behind him is a glass screen between him and the door and at his left elbow is the tiny counter for the receipt of fares. The door would be at his left rear.

On the foregoing summary of the evidence it will be seen that the conflict between the parties might be resolved into the simple question whether on the one hand the plaintiff had been thrown off the step by the stationary bus suddenly starting whilst he was in the course of entering it, or on the other hand the plaintiff had run after a moving bus and, overtaking it, had tried unsuccessfully to board it while in motion and had so met with disaster.

The first alternative would mean that the defendant's driver should be held guilty of negligence in starting a bus suddenly while a passenger was in the process of entering it. There would be nothing to support a defence of contributory negligence.

The second alternative would mean that the plaintiff's own act was the cause of his injury. There would be no foundation for a charge of negligence against the driver, whose duty it was to look ahead once he had resumed his journey. Had he been aware of the plaintiff's attempts to board the moving bus, all he could have done was to stop the vehicle and, if the defendant's case was accepted, it might be doubted whether he could have done that in time. But he could not be considered in fault in being unaware of those attempts.

In either of these respective cases there was no room for successive acts of negligence or defaults.

It is substantially in the manner stated that the parties presented their respective cases to the jury.

The defendant's counsel did not suggest that, if his client were negligent, such negligence was answered by contributory negligence on the part of the plaintiff. He appears to have concentrated on the fact, which he asked the jury to find, that the bus had moved off before the plaintiff sought to board it. But it seems that counsel for the plaintiff, besides his principal case, namely, that the

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

Dixon J.

plaintiff had been jolted off his balance by the stationary bus starting as he attempted to enter it, did also say that even if the bus were moving before the plaintiff began to board the vehicle, yet the driver should have seen him and stopped, and that on the contrary the driver had allowed the previous passenger to obstruct his view so that he did not see the plaintiff.

In his charge to the jury the learned judge told them that the plaintiff's injuries had either been brought about by the plaintiff's own negligence or by the defendant's negligence or a combination of both. His Honour at once went on to say that the case could be put in a shorter compass, and he proceeded to put it as a question whether the plaintiff had been injured as he was trying to board a stationary bus by the driver's negligence in starting it or by his own act in attempting to board a moving bus. But the learned judge did not leave the case as depending upon this simple issue. He added that, supposing the bus was moving as the plaintiff attempted to board it, that did not necessarily mean that the plaintiff could not recover, because the jury might think that the driver exercising proper care might nevertheless have avoided the injury to the plaintiff. His Honour said: "If it was moving, you have to ask yourself a further question: 'Could the defendant's driver by the exercise of reasonable care have prevented the injuries which occurred to the plaintiff?' And if you think he could, that again imposes liability on the defendant. But if you think that he could not have avoided the injury to the plaintiff when the plaintiff attempted to board a moving bus, then that would mean there was no liability on the defendant." Now it is apparent that some difficulty exists in constructing from the evidence an hypothesis of fact which would imply negligence in the driver causing the injury, once it is found against the plaintiff that the bus had moved off before he boarded it and had resumed its journey. However the jury appear to have been equal to the task. After a retirement of about an hour and three-quarters they returned into court with a request for further guidance. The foreman read the following statement—"We have agreed that the bus was moving when Mr. Burston (the plaintiff) attempted to board it and that owing to the driver's vision being obscured by the man who entered prior to Burston the driver was unable to see Mr. Burston's efforts to board the bus." The foreman added: "That is as far as we have got." The learned judge then gave them a short redirection and after retiring for another ten minutes the jury returned a verdict for the plaintiff for £1,000.

A great deal depends, in my opinion, upon the sufficiency of the redirection to cover the situation raised by, or arising from, the

jury's written statement. His Honour began by telling the jury that it was for them to determine whether the driver under such circumstances *in starting* the bus or in *continuing* the bus in motion, was acting as a reasonable driver under the circumstances would act. It will be seen that his Honour treated the jury's statement as possibly meaning that the driver might, but for the obstruction of the preceding passenger, have seen the plaintiff trying to enter the bus before the driver moved off or as possibly meaning that he might but for the obstruction have seen him struggling while the bus was moving to board it. The two possibilities raise very different questions of the responsibility of the driver and the plaintiff respectively.

The learned judge proceeded to tell the jury to bear in mind the traffic regulation forbidding persons to join vehicles in motion and also the reliance the driver was entitled to place on other persons obeying the ordinary usages of traffic and, further, the obstruction created by the previous passenger. Bearing these things in mind they were to make up their minds whether the driver was guilty of negligence in doing or omitting to do what a reasonable man in his position would not have done or omitted. That was all.

Now a little consideration will show that the jury's statement was consistent with more than one hypothesis of fact. The outstanding fact in the case is that the place where the plaintiff fell to the ground is eighty-five feet from the bus stop. The jury can scarcely have supposed that the bus moved over the greater part of that distance while the plaintiff held the stanchions and struggled to gain or regain his position on the step of the bus. They must have supposed that his attempt to enter the moving bus commenced at some point very much closer to the hydrant in proximity to which he fell to the ground.

How far away it is impossible to say. But if they accepted the evidence of the lady called for the defendant (and her evidence reads well) it confirmed the driver's evidence that he did draw up at the stop. On this hypothesis, therefore, it may be taken that the driver was well on his journey and that the plaintiff had run after him. If that is the state of facts the jury had in mind it appears to me that they were in great need of guidance. For they might have thought that at or near the bus stop the preceding passenger got in and obscured from the driver the fact that the plaintiff also was then and there waiting to get in. A jury might well consider it neglect on the driver's part to move off without making sure that no other passenger was waiting. His Honour's statement would or might to their minds cover such negligence. But what place as an effective cause of the accident could such

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

DIXON J.

negligence have? The supposition is that thereupon the plaintiff chases the bus for some considerable distance and attempts to board it while it is gathering speed. Even if that were not regarded as a new and independent cause, at least it may be treated as contributory negligence. Take another hypothesis covered by the jury's finding. They may have thought that the bus did stop twenty-five, thirty or some greater number of feet from the bus stop, that is at some point between sixty and say forty feet from the hydrant. They may have considered that the plaintiff reached a place opposite the door where, but for the form of the earlier passenger, he might have been seen by the driver. Suppose they considered it negligence on the part of the driver not to take measures to ascertain that no-one else was there before he moved off again? In that case there must arise the question whether it was or was not contributory negligence on the part of the plaintiff to attempt to avoid being left behind by seeking to join the moving bus.

Then a third possibility may be taken. The statement of the jury covers a view of the facts in which the plaintiff hurries after a moving bus, the driver of which has up to that point been guilty of no neglect. The plaintiff runs after it, overtakes it and attempts to board it.

The direction of the judge would encourage the jury to examine the question whether the neglect of the driver to make the previous passenger stand elsewhere and thus remove an obstruction both to his possible line of vision and to the entry of the plaintiff might not be a ground of liability. But on that view the driver is assumed to have turned from the duties as conductor to those of driver and to have his attention legitimately directed to the road.

It would not have been negligence on his part to fail to look towards the door at that stage, and there is no evidence that by mirrors or otherwise he could have seen the plaintiff as he attempted to climb aboard unless he turned his head and looked over his shoulder. As to the obstruction the previous passenger may have caused to the plaintiff, that does not seem to me to have been in the jury's minds, but if it were, it would again call for a consideration of a question of contributory negligence.

These possible views of what may be covered by the jury's statement are by no means exhaustive. But they are meant only as illustrations of the difficulties the statement raised. The point is that they are not covered by the direction which the learned judge gave and that much injustice might have been done to the defendant if any of them formed the basis of the verdict. Indeed if an attempt is made to answer the question—in what did the jury

find the driver was negligent, it will not be found easy to state an item of negligence which is sustainable as a breach of duty and yet is not open to a defence of contributory negligence or to the answer that it was not an effective cause.

The use made above of the examples given does not mean that it was necessary in the direction that was called for by the jury's statement to deal with them or any of them specifically. It means only that the jury's statement had the following consequences. It made the question of contributory negligence an important one; it brought into relief the necessity of excluding the notion that once the journey had been resumed the driver's failure afterwards to see the plaintiff, if it was only then that he appeared at the doorway, could amount to negligence; it raised possibly the question whether negligence on the part of the driver in moving off leaving an intending passenger standing should be considered the cause of an injury sustained by attempting to board the vehicle while in motion.

A general direction covering these points would have sufficed to deal with the jury's problem. Clearly enough they felt there was a problem and brought it back to the court for guidance. Their problem may have been deeper than they knew. No doubt one course open was to ask them to elucidate their statement. That might have made the whole matter simple. But of course it might have had the opposite result.

The situation with which the learned judge was suddenly confronted was not an easy one. But I think that it at least called for (1) a direction designed to make it plain that notwithstanding any initial negligence in failing to see that the plaintiff was seeking to board the bus before it moved off, the plaintiff's contributory negligence, if such it was, in boarding it in motion would be a defence; (2) a direction making it clear that if without negligence the bus moved off and the plaintiff overtook it and sought to board it in motion the obstruction of the previous passenger's form could not matter in the absence of evidence that without diverting his attention from the roadway ahead the driver would but for the obstruction have seen the plaintiff's attempt to join the vehicle.

Three objections were made on behalf of the plaintiff to the grant of a new trial on the grounds indicated above.

First, it was objected that during the trial itself no reliance was placed by the defendant upon its plea of contributory negligence. The answer is that upon the case as it stood before the jury returned for guidance there was no room for contributory negligence as an answer to initial negligence. It is true that the plaintiff's counsel, presumably in his final address, is said to have told the jury that notwithstanding the plaintiff's boarding the bus in motion, if he

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

DIXON J.

did so, the defendant might be liable if they thought the defendant's driver might reasonably have avoided the consequences of the plaintiff's act. That opened the way for the troubles that ensued. But strictly it did not make contributory negligence a relevant defence. Rather it assumed initial negligence on the part of the plaintiff and a further opportunity of avoiding the accident on the part of the defendant.

Curiously enough the learned judge spoke of combined negligence but did not explain the consequence of combined negligence or pursue the reference he made to it.

Secondly, it was objected that, after the jury retired again when the judge had redirected them in response to their request for guidance, the plaintiff's counsel sought a direction on last opportunity which, if it had been given, would have necessitated an explanation of contributory negligence. The defendant's counsel opposed the application and asked for a direction that on the jury's statement there could be no negligence unless the driver was aware of the plaintiff's attempt or intention to board the bus. The request of the plaintiff's counsel in fact went much too far and while the view of the defendant's counsel was not in all respects correct, that was only because he evidently did not advert to some of the hypotheses.

Thirdly, it was said that in the terms employed in the jury's written statement read in the light of the evidence and the summing up there could be discerned enough to sustain the verdict. The jury, it was claimed, had concluded that the plaintiff had presented himself at the bus door before it started, that the bus driver had failed to see him owing to his own neglect to move on the obstructing passenger, and that the plaintiff had attempted to board the bus as it moved off in circumstances implying no negligence on his part. This appears to me to be a speculation as to the view of the jury. There is no sufficient ground for much of it and in particular no ground for thinking that the jury ever considered whether the plaintiff's act might be negligent and so bar his recovery.

In my opinion the redirection to the jury in response to the request of the jury was inadequate and there must be a new trial. The situation was such as to raise a real probability of a miscarriage. The jury's statement was prima facie a finding for the defendant unless its effect could be displaced and nothing the learned judge said to the jury indicated any definite ground for displacing it; at all events none that was not open to an answer on grounds that were not explained to the jury.

In the Full Court much attention was paid to the question whether a new trial may not be directed on a point not taken by counsel

at the trial. To my mind that is not the question in the present case, because an entirely new phase opened up when the jury read their statement.

But I perhaps should add that the question whether the failure of counsel to raise a contention at the trial precludes an application for a new trial is not in my opinion to be determined as an abstract proposition of law. The court's jurisdiction to order a new trial depends upon the demands of justice. Often it would be unjust to set aside a verdict for a reason which but for the default of the party moving would never have existed. What is done and omitted at the trial is an important consideration to be weighed in determining a new trial application, but in the absence of a specific enactment or rule, it affects the exercise of discretion but does not amount always to a positive bar. There is not a rigid rule of law or practice.

In my opinion the appeal should be dismissed.

McTIERNAN J. I am of the opinion that this appeal should be allowed. The Chief Justice has fully set out the facts and the directions given by the learned trial judge. I agree with the judgment of the Chief Justice.

The summing up was in my opinion adequate and correct.

The finding that the jury made before returning their verdict was fully warranted by the evidence. It was upon the facts then found that the jury sought further directions. The argument centres upon the directions given by the learned trial judge upon those facts.

The meaning of the finding is of first importance. It necessarily implies a number of circumstances which it does not express. The finding means that the plaintiff attempted to board the bus before it attained such a speed that it became the driver's duty to look ahead; that at the time the plaintiff attempted to board the bus it was still stationary or so much in the initial stages of moving off that it was still the driver's duty (there was no conductor) to look around at the entrance to see if any intending passenger was boarding or attempting to board it; that the driver did so; that when the driver did this the plaintiff was attempting to board the bus; that the driver could not see the plaintiff because the driver's view was blocked by the passenger who was entering the bus in front of the plaintiff; that the driver started or accelerated the bus without knowing whether a passenger, the plaintiff, was behind the man who blocked the view and was attempting to board the bus.

Upon the finding the learned trial judge gave the jury the following direction: "Well, gentlemen, it is for you to determine

H. C. OF A. 1948.

BURSTON v. MELBOURNE AND METROPOLITAN TRAMWAYS BOARD.

McTiernan J.

whether the driver under such circumstances in starting the bus or in continuing the bus in motion, was acting as a reasonable driver under those circumstances would act. You bear in mind what I told you last with regard to the traffic regulation prohibiting a person joining or boarding a bus in motion, and you bear in mind also the right of the driver to assume that other persons will obey the ordinary usages of traffic, and bearing those matters in mind and bearing in mind what you have told me your finding is, that a man had got on ahead of the plaintiff and was standing in the doorway, you then have to make up your minds whether the driver was guilty of negligence in the sense that he did what a reasonable man would not do or omitted to do what a reasonable man in his position as driver would have done." The jury returned a verdict for the plaintiff. The Full Court made these observations: "But it seems possible that such a verdict was based on the view that the negligence of the driver was greater or more heinous than that of the plaintiff, and that the jury never appreciated that if each party was guilty of some negligence which brought about the injury, the plaintiff could not recover unless he could show that the driver, by the exercise of reasonable care, could have avoided the results of his neglect. As there is nothing in the charge which would put the jury on guard or convey to it the effect of combined negligence, we think there may well have been a real miscarriage of justice due to the omissions in such charge."

I am unable to agree that the inference could be reasonably drawn from the facts which the jury's finding establishes that the plaintiff was guilty of any negligence. The driver's negligence in driving off without satisfying himself that no passenger was attempting to board the bus behind the man who was blocking the entrance left the plaintiff with no alternative but to hang on to the stanchions as best he could. That he did not succeed in pulling himself up on to the platform of the bus or was not agile enough to let go the stanchions safely, was not negligence.

WILLIAMS J. When the jury retired to consider their verdict the broad issue between the parties was whether the plaintiff had boarded the bus when it was stationary or when it was moving. It was not in dispute that in the former event the accident was caused by the negligence of the driver. It was not seriously in dispute that in the latter event the accident was caused by the negligence of the plaintiff. The learned trial judge did however in the course of his summing up mention that in the latter event the plaintiff was not necessarily debarred from recovering because the jury might think that the driver exercising proper care could

nevertheless have so acted as to avoid the plaintiff receiving injury. His Honour did not however direct the jury as to the matters which they would have to consider before they could find for the plaintiff in these circumstances, but invited the attention of the jury to what he said was the real question in issue, that is to say "was the bus stationary when the plaintiff came to it or was it moving."

The jury were not however prepared completely to accept the evidence of either party. This led them to return to court after an interval and inform his Honour that they had agreed that the bus was moving when the plaintiff attempted to board it and that owing to the driver's vision being obscured by the man who entered the bus prior to the plaintiff, the driver was unable to see the plaintiff's efforts to board the bus. This was the crucial stage of the trial. The jury were seeking guidance upon the legal rights of the parties where they had agreed on facts on which they considered that it was open to them to hold that it was negligent for the plaintiff to board a moving bus, and that it was also negligent for the driver to have the bus in motion while his vision of the step was blocked by the passenger who entered prior to the plaintiff. They should have been directed that, if they were satisfied that the plaintiff was guilty of negligence in boarding the bus when it was moving, he could not recover unless they were satisfied that, notwithstanding such negligence, the driver by the exercise of reasonable care could have avoided the consequences of the plaintiff's negligence.

I am of opinion that his Honour's summing up, and in particular his direction to the jury when they returned into court, was reasonably capable of being understood to mean that if they thought that it was negligent for the driver to be driving the bus with his vision of the step blocked when the plaintiff was attempting to board it, the plaintiff was entitled to recover. I do not think that his Honour made it clear to the jury that the plaintiff was only entitled to recover if this and not his own negligence was the effective cause of the accident.

I would therefore dismiss the appeal.

Appeal allowed with costs. Order of Supreme Court set aside. Judgment for plaintiff restored. Defendant to pay costs of plaintiff in Supreme Court of trial and of application for new trial.

Solicitors for the appellant: *Doyle & Kerr.*
Solicitor for the respondent: *F. T. Krcrouse.*

E. F. H.