

I N D E X

| | PAGE |
|--|------|
| Summons. | 1 |
| Complaint. | 2 |
| Answer. | 8 |
| Clerk's Docket | 10 |
| PLAINTIFF'S TESTIMONY: | |
| Therese Lambert—Direct | 13 |
| Cross. | 20 |
| Louis Lambert—Direct | 21 |
| Cross. | 24 |
| Charles H. Wert—Direct. | 25 |
| Cross. | 29 |
| Re-direct. | 30 |
| Re-cross. | 31 |
| Florence M. Wert—Direct. | 32 |
| Cross. | 37 |
| Re-direct. | 39 |
| Re-cross. | 41 |
| Dr. Raymond S. Seibert—Direct. | 43 |
| Hugh Caulfield—Direct | 45 |
| Cross. | 46 |
| Thomas A. Culliton—Direct. | 49 |
| Cross. | 53 |
| Motion for Non-suit. | 56 |

| | PAGE |
|--|------|
| DEFENDANT'S TESTIMONY: | |
| Patrick McHugh—Direct | 63 |
| Cross. | 66 |
| Re-direct. | 81 |
| Re-cross. | 83 |
| Edward J. Peartree—Direct | 86 |
| Cross. | 87 |
| Re-direct. | 89 |
| Re-cross. | 90 |
| Motion for Direction of Verdict. | 91 |
| Charge of the Court. | 93 |
| Notice of Appeal. | 100 |
| Opinion. | 101 |
| Notice of Appeal. | 105 |

SUMMONS.

(Filed August 31, 1922.)

THE STATE OF NEW JERSEY TO TRENTON AND MERCER
COUNTY TRACTION CORPORATION:

You are summoned to answer the annexed complaint of Martha Lambert, by (L. S.) her next friend, Louis Lambert, and Louis Lambert, individually, in an action at law in the Mercer County Court of Common Pleas. And take notice that unless you file your answer to said complaint with the clerk of the Mercer County Court of Common Pleas, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

Witness, ERWIN E. MARSHALL, Judge of the Court of Common Pleas of Mercer County, at Trenton, this thirtieth day of August, A. D. nineteen hundred and twenty-two. 20

HARRY A. HARTPENCE,
Clerk.

MARTIN P. DEVLIN,
Attorney.

system consisting of tracks, cars, wires, poles and other equipment located and operating in the various streets in the City of Trenton, and County of Mercer and State of New Jersey, and is engaged in carrying passengers for hire.

2. That on March 18, 1922, the plaintiff, while walking on, and crossing North Clinton Avenue, of the City of Trenton, County of Mercer and State of New Jersey, and while using all care and lawfully walking on and across said North Clinton Avenue in a northerly direction, and without any fault on her part, street car 204, owned and operated by the said defendant, through its servants, agents and employees, while traveling in a northwesterly direction on said North Clinton Avenue, did carelessly, negligently and recklessly, run into and collide with the said plaintiff, and did with great force, throw the said plaintiff to the said ground, and under the wheels of said car, thereby cutting, bruising and injuring the said plaintiff about the said head, body, arms and legs, and cutting off and amputating the left arm of the said plaintiff.

3. The negligence of the said defendant, by its servants, agents and employees consisted in that the said car was operated at a speed greater and higher than is consistent with the use of the highway by the plaintiff and others; and that the said defendant by its agents, servants and operators, failed to look in the direction in which the said car was traveling, so as to be able to observe the place and position of the plaintiff and others while using the said highway; and that the defendant, by its servants, agents and operators, failed to give a signal so as to warn said plaintiff and others of their approach, to the

said plaintiff and others, who were using the said highway; and the said defendant, by its servants, agents and operators, did operate the car at such a high rate of speed as to put the said car beyond a reasonable control, so as to protect the plaintiff and others against injury while using the said street and highway; and the failure of the said defendant, by its servants, agents and operators to have attached thereto guards and fenders, and to have the said
10 fenders and guards in a reasonably safe and workable condition, so that the plaintiff could be protected from injury; and the failure of the defendant by its servants, agents and operators to have said fenders and guards in a state of repair so that they could operate to protect the plaintiff from being run over by the wheels of the said car of the said defendant.

4. By reason whereof the plaintiff has been damaged, in that from the said injuries she has suffered
20 great pain and agony on her arms, body, head, legs, feet, hands and nerves, and was confined to the hospital for a period of about two months, and that she will in the future suffer great pain and agony on her arms, body, head, legs, feet, hands and nerves, and that she is permanently injured, in that her left arm has been amputated from the shoulder, and that she will endure pain and suffering permanently from
30 the loss of said arm, and from the injury to her nervous system, and that she will be deprived in the future of being able to earn a livelihood, and will be unable to pursue the occupation and the life of a normal and well person, and will be compelled in the future to expend large sums of money for medicine, medical services and nurses, and will be compelled in the future to forgo the occupations, the

enjoyments, and the opportunities of a normal person, by reason of the fact that her nerves are permanently injured and her body and side are permanently injured and that her left arm has been amputated and thereby she has suffered great losses and damages to the amount of \$25,000.

5. Plaintiff demands, as damages, the sum of \$25,000.

10

The plaintiff, Louis Lambert, of 553 North Clinton Avenue, Trenton, N. J., father of Martha Lambert, an infant, complains and says that:

1. That the defendant, the Trenton and Mercer County Traction Corporation, a corporation existing and acting under the laws of the State of New Jersey, is the owner and operator of a street car system consisting of tracks, cars, wires, poles and other equipment located and operating in the various streets in the City of Trenton, County of Mercer and State of New Jersey, and is engaged in carrying passengers for hire.

20

2. That on March 18th, 1922, the said Martha Lambert, infant daughter of the plaintiff, Louis Lambert, while walking on North Clinton Avenue, of the City of Trenton, County of Mercer and State of New Jersey, and while using all care and lawfully walking on and across said North Clinton Avenue, in a northerly direction, and without any fault on her part, street car No. 204, owned and operated by the said defendant, through its servants, agents and employees, while traveling in a northwesterly direction on said North Clinton Avenue, did carelessly, negligently and recklessly run into and collide with

30

the said plaintiff and did with great force throw the said Martha Lambert, daughter of the said plaintiff, to the ground, and under the wheels of the said car, thereby cutting, bruising and injuring the said plaintiff about the head, body, arms and legs, and cutting off and amputating the left arm of the said plaintiff.

10 3. The defendant, by its servants, agents and employees, was negligent, in that the said street car was operated at a speed greater and higher than is consistent with the use of the highway by the said Martha Lambert, daughter of the said plaintiff, and others; and that the said defendant, by its agents, servants and operators, failed to look in the direction in which the said car was traveling, so as to be able to observe the place and position of the said Martha Lambert, daughter of the said plaintiff, and others, while using the said highway; and that the
20 defendant, by its servants, agents and operators, failed to give a signal so as to warn the said Martha Lambert, the daughter of the said plaintiff, and others, of their approach, as the said Martha Lambert, daughter of the said plaintiff, and others, who were using the said highway, and the said defendant, by its servants, agents and operators, did operate the car at such a high rate of speed as to put the said car beyond a reasonable control, so as to protect the rights of the said Martha Lambert, daughter of the said plaintiff, and others using the said
30 street and highway; and the failure of the said defendant, by its servants, agents and operators to have attached thereto guards and fenders, and to have the said fenders and guards in a reasonably safe and workable condition, so that the said Martha Lambert, daughter of the said plaintiff, could be protected from injury; and the failure of the

defendant, by its servants, agents and operators to have said fenders and guards in a state of repair so that they could operate to protect the said Martha Lambert, daughter of the said plaintiff, from being run over by the wheels of the said car.

4. By reason whereof the plaintiff's daughter, Martha Lambert, has been damaged in that from the said injuries she has suffered great pain and agony on her arms, body, head, legs, feet, hands and nerves, and was confined to the hospital for a period of about two months, for which Louis Lambert, father of Martha Lambert, has been compelled to spend great sums of money for medical attention, nurses, medicine and hospital bills; and that she will in the future suffer great pain and agony on her arms, body, head, legs, feet, hands and nerves, and that she is permanently injured, in that her left arm has been amputated from the shoulder, and that she will endure pain and suffering from the loss of said arm, and from the permanent injury to her nervous system and side, and will be deprived in the future to pursue the occupation and the life of a normal and well person, and the plaintiff, Louis Lambert, father of Martha Lambert, will in the future be compelled to spend large sums of money for medicines, medical services and nurses, for his said infant daughter, Martha Lambert, and will in the future be deprived of the earnings and services of his said daughter for the reason that his said daughter is and will be unable to earn a livelihood and to pursue the life and occupation and means of earning a living and rendering the services of a normal and well person. All of which expense will continue up to and until the said Martha Lambert, daughter of the said plaintiff, reaches her majority and is eman-

10

20

30

icipated, by means whereof the plaintiff has been greatly damaged.

Plaintiff claims damages in the sum of \$15,000.

Plaintiff, Martha Lambert, by her next friend, Louis Lambert, demands damages in the sum of \$25,000.

Plaintiff, Louis Lambert, individually, claims damages in the sum of \$15,000.

MARTIN P. DEVLIN,
Attorney of Plaintiffs.

10

ANSWER.

(Filed May 6, 1924.)

MERCER COUNTY COURT OF COMMON
PLEAS.

20

MARTHA LAMBERT, by her
next friend, LOUIS LAM-
BERT, and LOUIS LAM-
BERT, individually,
Plaintiffs,

v.

30 T R E N T O N A N D M E R C E R
C O U N T Y T R A C T I O N C O R-
P O R A T I O N,
Defendant.

Action at Law.
Answer.

Defendant, a New Jersey Corporation, having its principal office and place of business in the City of

Trenton, in the County of Mercer and State of New Jersey, answering the complaint of the plaintiffs, says that:

ANSWER TO FIRST COUNT.

1. Paragraph 1 is admitted.
2. Paragraphs 2, 3 and 4 are denied.

10

ANSWER TO SECOND COUNT.

1. Paragraph 1 is admitted.
2. Paragraphs 2, 3 and 4 are denied.

FIRST SEPARATE DEFENSE.

Defendant, through its servants or agents, was guilty of no negligence resulting in injury and damage to the plaintiffs.

20

SECOND SEPARATE DEFENSE.

The plaintiffs are not entitled to recover in this action because the plaintiff, Martha Lambert, was guilty of contributory negligence at the time and place mentioned in the complaint in that she did not use due care for her own safety.

KATZENBACH & HUNT,
Attorneys of Defendant.

30

[ENDORSED]

Consent to the filing of the within answer as within time is hereby granted.

Martin P. Devlin,
Attorney of Plaintiffs.

CLERK'S DOCKET.

MERCER COUNTY COMMON PLEAS
COURT.

10 (Met on Monday, October 1, 1928, at 10:30 o'clock
A. M.)

PRESENT:

HON. ERWIN E. MARSHALL.

W. ROBERT PRICE, Stenographer.

20

MARTHA LAMBERT, by her
next friend, LOUIS LAM-
BERT, and LOUIS LAM-
BERT, individually,

Plaintiffs,

v.

TRENTON AND MERCER
COUNTY TRACTION COR-
PORATION,

30

Defendant.

Common Pleas Issue
#1.
Action at Law.

MARTIN P. DEVLIN, attorney for plaintiffs.

EDWARD L. KATZENBACH (GEORGE GILDEA), attor-
ney for defendant.

Ordered that the sheriff return a panel whereupon the following jurors were called and severally sworn:

| | |
|----------------------|------------------------|
| Walter F. Van Pelt, | William Williams, Jr., |
| Catherine Burroughs, | Frank Scheidnagel, |
| Edgar D. Davis, | John J. Cavanaugh, |
| Jane Armstrong, | Nellie H. Mulford, |
| Rufus Wills, | Anna Benck, |
| John W. Winnemore, | Margaret Cleary. |

Mr. Devlin for plaintiff called Theresa Lambert, 10
sworn; Louis Lambert, sworn; Charles H. West,
sworn; Florence M. Wert, sworn. Mr. Devlin for
the plaintiffs called as witnesses: Dr. Raymond S.
Seibert, sworn; Hugh Caulfield, sworn; Thomas A.
Culliton, sworn.

Mr. Gildea for defendant called Patrick McHugh,
sworn; Edward J. Peartree, sworn; rests. Mr. Gil-
dea moved for direction of a verdict in favor of
the defendant—motion denied—exception allowed.

After argument of counsel and charge by the 20
Court, the jury retired with Stella L. Francis, and
John J. Fallon, Court Attendants, duly sworn to
attend them to consider of their verdict and having
agreed upon their verdict came again into court and
by their foreman do say they find in favor of the
plaintiff, Martha Lambert and against the defen-
dant, for the sum of Twenty Thousand Dollars
(\$20,000.00) and in favor of the plaintiff, Louis
Lambert, and against the defendant for the sum of
Five Thousand Dollars (\$5,000.00) and so say they 30
all.

WHEREUPON, it is ordered that judgment final
be entered in favor of the plaintiff, Martha Lam-
bert, by her next friend, Louis Lambert, and against
the defendant, Trenton and Mercer County Trac-
tion Corporation, for the sum of Twenty Thousand
Dollars (\$20,000.00) and in favor of the plaintiff,

(The jury is sworn.)

(Counsel for the plaintiffs opens to the jury.)

(Counsel for the defendant opens to the jury.)

PLAINTIFFS' PROOF.

10

THERESE LAMBERT, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

Mr. Devlin: You admit that the corporation was the owner of the car? 20

Mr. Gildea: Yes.

Mr. Devlin: And the motorman was in your employ?

Mr. Gildea: Yes, the motorman was employed by the corporation, and the defendant corporation owns the car.

30

Q. Mrs. Lambert, on March 18, 1922, where did you live?

A. North Clinton Avenue, 553.

Q. Is that this side of Olden Avenue?

A. Yes, sir.

Q. Between Olden Avenue and what street?

A. Webster.

Q. And Webster?

A. In between.

Q. Webster is the next street to Olden Avenue coming toward town?

A. Yes.

Q. On the Saturday evening of March 18th, how many children did you have?

A. I had three, sir.

10 Q. Three children?

A. Three children. One is dead now.

Q. That evening you had a son. How old was he?

A. Yes, sir. He was six years old.

Q. And your daughter, the plaintiff here?

A. She was four. She would be five April 21st.

Q. And that evening, did they leave your home, those children?

A. I sent the boy out after his father's clothes. I did not know she was with him. I thought she was

20 in the other room with the baby.

Q. A little louder.

A. I thought my little girl was in the front room, bedroom, with my baby about four months old. I was in the kitchen when I sent my boy for his father's clothes and when my boy came back, he hollered, "Mother" —

Q. Don't say what he said. Where is the laundry? Right across the street from where you live?

A. Yes.

30 Q. You sent the boy to the laundry?

A. Yes.

Q. You learned the little girl had gone with him?

A. Yes, after the boy had come back.

(Question and answer repeated by the stenographer by request of counsel.)

Q. In that particular section of the city is it built up; the houses close together?

A. Why, yes, they are.

Q. Are there many stores there?

A. Yes, all stores, practically all.

Q. That Saturday evening, were they lit up?

A. Yes, they were.

Q. On the corner of that street and Clinton Avenue was there a large electric light?

10

Mr. Gildea: That is objected to.

The Witness: Well, I couldn't —

Mr. Gildea: I think if counsel wants the witness to describe the situation, she should do it in her own words.

The Court: Yes. I think counsel can arrange his questions in that way.

20

The Witness: I will say it the way he wants me to. Is that what he wants me to do? Does Mr. Gildea want me to describe the way the lights were?

Q. Describe the condition of the street so far as as lighting is concerned that evening.

A. The whole street is lit up. I don't know about then. I was not out on the street, because I was in the house at the time.

30

Q. The evening before at that hour, was the street lit up?

A. Yes, all of the street was lit up.

Q. Can you tell whether or not there were any arc lights at the corner of Webster and Clinton?

A. No, I could not.

Q. How about Mead Street; it is near too, isn't it?

A. Yes, it is near Webster Street.

Q. Is there any light there?

A. Yes, that is always lit up.

Q. Arc light?

A. Yes.

Q. And when you saw your daughter that evening, where did you first see her?

10 A. Why, she was under the trolley car, and they backed the trolley car off her; had to run over her twice, to get her out.

Q. Was she rushed to the hospital?

A. Yes, she was rushed to the hospital.

Q. What hospital?

A. McKinley.

Q. How long was she there?

A. Why, three months. I am not sure now. I can't say.

20 Q. Did you receive a bill from the hospital for that?

A. Not yet. Dr. Seibert is attending to that.

Q. Who attended the child?

A. Dr. Seibert.

Q. Did you receive a bill from him?

A. Not yet.

Q. Now, the condition of this child's health before the accident, what was it?

A. She was in perfect health, perfect health.

30 Q. Did she wear glasses before this accident?

A. No, she did not.

Q. How about the condition of her health since the time of the accident?

A. Why, I was sending her to school and the doctor at the school said she had to have glasses and I asked why did she have to have glasses —

Mr. Gildea: I object.

The Court: Don't say what he told you.

The Witness: And he said to carry her to —

Q. Don't say that. As a result of the doctor's advice, what did you have to do?

Mr. Gildea: That is objected to as leading, if the Court please. If there is a contention that the child's eyes were injured by the accident, I think there is a way of proving it. 10

Mr. Devlin: We haven't made a contention of that kind.

Mr. Gildea: You don't contend —?

Mr. Devlin: I don't say we do not. 20

The Court: I think it is relevant.

Mr. Gildea: The question is, what is the condition of the child's health today.

The Court: Why don't you ask the witness that?

Mr. Devlin: I have asked that. I said, "What is the condition of the child's health since the accident?" 30

A. Perfect health, so far, but her eyes—after she had her arm taken off, I had to have her taken to Dr. Dyer who was a doctor to me a lot. He sent us to Dr. Shaney on Clinton Avenue. He said —

Mr. Gildea: Don't tell us that.

Q. Don't tell us that. But as a result —

A. (Interrupting.) Her eyes was caused from a knock, like a bump on the head. The nerves are twisted —

The Court: No. You are telling what the doctor told you.

10

Mr. Gildea: I move that the answer be stricken out.

The Court: Yes, strike it out.

Mr. Devlin: I consent that it be stricken out.

Q. Don't answer this question until counsel has had time to object to it.

20

Mr. Gildea: I won't object if it is a proper question.

Mr. Devlin: I disagree with you as to what is a proper question. I will put the question first.

Q. As a result of the interview with the doctor, state whether or not the child had to have glasses?

A. Yes.

30

Q. Don't answer, please.

Mr. Gildea: If the Court please, I don't see how an interview with the doctor can make it necessary for the child to have glasses. I think if the child needs glasses it is because of the condition of her eyes and not because of an interview with the doctor.

Q. Dr. Shaney is an eye doctor?

A. Yes, he is.

Q. You visited the doctor to have her eyes treated?

A. I did.

Q. As a result of that visit—don't answer the question—as a result of that visit, state whether or not you had to provide the child with glasses as a result of that advice?

A. Yes, I did.

10

Q. Don't answer.

Mr. Gildea: The same objection.

The Court: Yes. Don't answer, Mrs. Lambert when an objection is made until after the Court passes on it.

The Witness: Yes. All right.

The Court: Well, at this time, I don't believe the question is relevant unless counsel can connect it up in some way showing that it was the result of the accident.

20

Mr. Devlin: I will withdraw it then.

The Court: Is it withdrawn?

Mr. Devlin: Yes, the question is withdrawn.

30

Q. Has she complained of any pain in her head?

A. Yes. She couldn't see. She could not read at school and she could not study her lessons or anything else.

Q. Do you know whether or not this child suffers any pain from the arm joint?

A. Yes, she does. She does on a rainy day. She says there is something like pins or something moving in there.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

10

Q. Webster Street—I mean, Mead Street is quite a distance above Webster, isn't it?

A. No, not far. It isn't very far, no, Mr. Gildea.

Q. How far would you say?

A. I could not say that.

Q. Well, it is a short block, isn't it?

A. Well, it is a very short block.

20 Q. In other words, when you go up toward Clinton Avenue, you come to Mead Street and there is a theatre on the corner of Mead Street?

A. Yes.

Q. And you go on up a ways and then on the right is Webster Street?

A. Yes, on the right.

Q. But there is some considerable distance between Mead Street and Webster Street, isn't there?

A. Yes, but not very much.

30 Q. So that the lights down at the corner of Mead Street would not light the street up between Webster and Olden Avenue?

A. Well, Webster Street has lights there also.

Q. You said you did not know whether or not there was a light there at the time of the accident.

A. Sure; they have to have one there. It comes out at South Clinton Avenue.

Q. I understood you to say you did not know

whether or not there was an arc light at the corner of Webster Street and Clinton Avenue.

A. There would have to be.

Q. Not would there have to be. Do you know whether or not there was one there at the time of the accident?

A. Well, I am not going to say yes.

Q. Then you won't say yes. You know that the arc light at the corner of Mead Street would not light the street up between Webster Street and Olden Avenue, would it? 10

A. Well, I don't know; because they are close together.

Mr. Gildea: That is all.

Mr. Devlin: That is all.

(Witness excused.)

20

LOUIS LAMBERT, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

Q. Mr. Lambert, you are a plaintiff in this case 30 on behalf of your daughter?

A. Yes.

Q. That is right, isn't it?

A. Yes.

Q. Speak a little louder so the jury can hear you.

A. Yes.

- Q. And what is your occupation?
A. Painter.
- Q. Were you a painter on March 18, 1922?
A. I was not.
- Q. You were not a painter?
A. Not at that time.
- Q. Where were you working at?
A. I was manager of an A & P store.
- 10 Q. Where did you live?
A. On North Clinton Avenue.
- Q. How many children at that time did you have?
A. Three.
- Q. And still have three children?
A. No. I have two.
- Q. One died?
A. One died.
- Q. And your wife and you lived on Clinton Avenue at that time?
A. Yes, sir.
- 20 Q. How long did you live there?
A. A little over a year.
- Q. In that section are the houses close together?
A. Very close.
- Q. Less than 50 feet apart?
A. Yes, sir.
- Q. In fact, a bit closer?
A. Yes.
- Q. Are there many stores in that section?
A. Practically all stores.
- 30 Q. Are you familiar with where Webster Street is and Olden Avenue and familiar with where Mead Street is?
A. Yes.
- Q. Will you tell us whether Webster Street and Mead Street have are lights at the corner?
A. They have.

The Court: At that time, Mr. Lambert; at the time of the accident.

Q. What would you say as to the evening of the accident, the 18th?

A. I was not right there at that time, so I cannot say.

Q. I did not ask you whether it was burning at that time. I asked you if there was a light there at that time.

10

A. There was a light there.

Q. A pole and an arc lamp. I did not ask you whether it was burning.

A. There was one there, but I don't know whether it was burning.

Q. But there was an arc light there before that time?

A. Yes.

Q. And one at Mead Street?

A. Yes.

20

Q. And how about stores in that section; are there many stores?

A. Practically all stores.

Q. What would you say about the stores being lit up?

Mr. Gildea: I object to that unless the witness knows the condition at that time.

Q. One moment; let me finish my question. What time were you at home that evening, in the early part of the evening? 30

A. I did not get home until around 9 o'clock.

Q. Were you in that section before nine o'clock that evening?

A. I was not.

Q. Do you know what the condition of the stores were that evening?

Mr. Gildea: I object, if the Court please, on the ground that the witness said he was not there and did not know what the condition was.

Mr. Devlin: I withdraw the question.

10 Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. Mr. Lambert, your son who was with your daughter at the time of the accident, he is living, isn't he?

A. Yes.

20 Mr. Gildea: That is all.

Mr. Devlin: That is all.

(Witness excused.)

30

CHARLES H. WERT, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

- Q. Mr. Wert, what is your occupation? 10
A. I drive a truck for the Standard Oil Company.
Q. Were you doing that on March 18, 1922?
A. Yes, sir.
Q. At that time, where did you live?
A. 644 North Clinton Avenue.
Q. And do you remember the Saturday evening of March 18, 1922 and an accident happening?
A. Yes, sir.
Q. Where is 664 North Clinton Avenue? 20
A. 644, I said.
Q. 644. Where is it?
A. It is about facing Sherman Avenue on North Clinton.
Q. Beyond Olden?
A. One block beyond Olden Avenue.
Q. You are married?
A. Yes.
Q. At that time you were married?
A. Yes, sir.
Q. You and your wife that evening got on a 30 street car?
A. Yes, sir.
Q. What place did you get on the street car?
A. North Clinton Avenue and Sherman.
Q. When you got in the car where did you and your wife sit?

- A. On the left-hand side, front side, right back of the motorman.
- Q. Who was nearest to the outside of the car?
- A. My wife sat next to the window.
- Q. And you sat next to your wife?
- A. I sat next to my wife.
- Q. Was there any person standing between you and the motorman?
- A. No, sir.
- 10 Q. What side of the car did the motorman stand on when he operated the car?
- A. On the left-hand side where the controls are.
- Q. Left-hand side of the car. Was it crowded so far as passengers are concerned? Are you able to say how many passengers were on the car; whether it was filled, not filled, or half-way?
- A. I don't know whether any was standing in the back; I couldn't see. There wasn't any standing in the front. I got a seat right away when I got in.
- 20 Q. When you got in the car, are you able to say whether the car stopped after you got on it?
- A. It stopped at Olden Avenue.
- Q. Did any passengers get on at Olden Avenue?
- A. I don't remember.
- Q. After the car passed Olden Avenue, or stopped at Olden Avenue—what kind of car was it?
- A. One man trolley car.
- Q. One man car. Single truck or double truck?
- A. Single truck.
- 30 Q. Driven by one man?
- A. Yes.
- Q. He collected the fares and all?
- A. Yes, he did it all.
- Q. Did you notice the lights in the street that evening?
- A. Well, the street was lit up.
- Q. When you say it was lit up, what do you mean?

A. Well, the street was very light.

Q. And how about the stores, were they lit up?

A. They were lit up.

Q. How about arc lights?

A. I did not just take notice of whether the arc lights was lit, but the street was so you could see very plain.

Q. Do you know of the arc light at the corner of Webster?

A. I know there is one there, but I did not take any particular notice of whether it was lit. 10

Q. How about Mead Street?

A. I don't know. It was too far away.

Q. Is there an arc light—the evening was dark, wasn't it; it was 8 o'clock?

A. It was 8 o'clock. It was after dark.

Q. Now, when you sat down in the car, did you hear any signals given?

A. No, I did not hear any signals.

Q. Between Olden Avenue and the car stop? 20

A. I did not hear any.

Q. Is your hearing normal?

A. Yes.

Q. If signals had been given you would have heard them?

A. Yes.

Mr. Gildea: I object to that as calling for a conclusion.

The Court: The question was answered before your objection was complete. 30

Mr. Gildea: Then, if the Court please, I move that the answer be stricken out on the ground that I did not have an opportunity to object before it was answered.

The Court: All right, Strike it out.

Q. When you were sitting there and after you passed Olden Avenue, what was the first thing you heard that attracted your attention?

A. I did not understand the question.

Q. After you passed Olden Avenue and the car started was there anything happened that called your attention?

10 A. Yes. When we got down the street, there was an accident.

Q. Tell us what happened.

A. Well, the first I knowed of it, I heard the brakes slammed on and a scream and the car jolted and the car stopped. When I heard the scream I jumped and it threw me toward the front of the car and the motorman says, "Oh, my God, what have I done?" and sat down.

20 Q. Now, state whether or not those things happened one right after the other?

A. Well, it was all right in an instant.

Q. Then what did you do?

A. I jumped out of the car as soon as he opened the door and looked under the car and saw the girl lying under the car on the track.

Q. What position was that child in?

A. It laid on its back with its head toward town and arms spread out.

Q. And the car was going toward town?

30 A. The car was going toward town.

Q. And what did you say about the arms of the child?

A. The arms was layed out and the wheels of the car sat on the child's arm right at the shoulder.

Q. Which wheel?

A. The right front wheel.

Q. And did you do anything?

A. Yes. They wanted to back the car up to get the child out. I said it was not necessary, just to back the car a few inches slow and we could slide the child out and we did. The car had not passed completely over the child.

Q. What rail of the track going toward town was the child's arm on?

A. The right-hand side one near to the curb.

Q. The one nearest the curb coming toward town?

A. Yes.

Q. And the fartherest rail across the street?

A. Yes, the one nearest the right-hand curb.

Q. What then did you do?

A. Well, after we got the child out from under the car, they took her to the hospital and I got back on the trolley car.

Q. Before the jolt, the scream, and the brakes, did you hear any signal given from that car?

A. No, sir.

Q. No bell or whistle?

A. I did not hear anything.

Q. What was the speed of that car as it came down the street?

A. Well, I would judge twelve to eighteen miles an hour.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. Did you see these children run across the street before the accident?

A. No, sir, I did not see them.

Q. You did not see the children at all?

A. I saw one child after the accident.

10

20

30

Q. Until after the accident?

A. Until after the accident, no.

Q. You say you felt a jolt when the brakes went on?

A. I felt a jolt of the car when he threw the brakes on.

Q. When he threw the brakes on. And how far did you go after you felt the brakes go on?

A. Well, that is hard. I couldn't say. I don't
10 know. It didn't go very far.

Q. Would you say it went about eight or ten feet?

A. Something like that; eight to ten feet.

Q. It did not go any farther than that?

A. I would not think so.

Q. Was there anybody on the front platform but the motorman?

A. There was nobody on the front platform but the motorman.

20

Mr. Gildea: That is all.

Re-direct examination.

By Mr. Devlin:

Q. When you were on that car, was there another car passed the car you were on?

A. Yes, sir.

30 Q. Whereabouts did that happen?

A. Right after we crossed Olden Avenue.

Q. And before or after the accident?

A. Before the accident.

Q. Sometime, or distance?

A. Oh, the car had gone on out before the accident.

Q. But what could you say, so far as you could see from the car, was the street—state whether or not the street was clear?

A. Straight out from the front of the car the street was clear. There was nothing in front of the car.

Q. The trolley car on which the motorman was has a glass front for him to stand there?

A. Yes.

Q. And he was on the left-hand side; his control 10 box he worked from the left side?

A. He was by the control box on the left side.

Q. That is the side you and your wife were sitting on?

A. Yes, sir.

Q. How many feet, to the best of your judgment, were you behind the motorman; that is, were you sitting behind the motorman?

A. Four or five feet.

20

Mr. Devlin: Cross-examine.

Re-cross examination

By Mr. Gildea:

Q. How far below Olden Avenue did you say you were when the car passed the other car?

A. Just as we crossed Olden Avenue.

Q. You passed the other car just as your car got 30 completely over Olden Avenue?

A. We had just crossed over Olden Avenue when the other car passed us.

Mr. Gildea: No further questions.

(Witness excused.)

FLORENCE M. WERT, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

- 10 Q. What is your name, Mrs. Wert?
A. Florence M. Wert.
Q. On March 18, 1922, where did you live?
A. 644 North Clinton Avenue.
Q. You are married?
A. Yes, sir.
Q. Your husband lived with you?
A. Yes, sir.
Q. And you have a family?
A. Yes, sir.
- 20 Q. How many?
A. Seven.
Q. And you and your husband—do you remember the evening of this accident?
A. Yes, sir.
Q. The time was on March 18, 1922. On that Saturday evening, you and your husband got on the trolley car; is that right?
A. Yes, sir.
Q. At what point?
- 30 A. Sherman Avenue.
Q. When you got on the car, where did you sit?
A. On the front seat; that is, for passengers.
Q. On what side of the car?
A. Left-hand side.
Q. Were you sitting next to the window?
A. Yes, sir.

- Q. Your husband sat beside you?
A. My husband, yes.
Q. Was any person between you and the motor-
man standing on the car?
A. No, sir.
Q. What side of the car was the motorman on?
A. Towards the left-hand side.
Q. Toward the left-hand side. Are you familiar
with that street?
A. Yes, sir. 10
Q. Is it built up thickly along there?
A. Yes, sir.
Q. Houses close together?
A. Yes.
Q. Less than 50 feet apart?
A. Yes, sir.
Q. And are you familiar with the corner of Web-
ster Street and Clinton Avenue, and the corner of
Mead Street and Clinton Avenue?
A. Well, I know where it is. 20
Q. Can you say whether or not there are arc
lights on those streets?
A. Well, there is an arc light there, yes.
Q. Do you remember whether or not it was lit
that evening?
A. No.

The Court: You don't remember or it was not lit;
which do you mean?

30

The Witness: I don't remember.

- Q. How about the stores along there, meaning
the stores along that section between Webster and
Olden Avenue?
A. Nearly all stores.

- Q. How about their being ——
 A. They were all lit up.
- Q. From where you sat in your car, or where you had your seat, did you see anything pass your car?
 A. Near Olden Avenue.
- Q. What?
 A. Near Olden Avenue a trolley passed.
- Q. Near Olden Avenue a trolley passed on the other track, near Olden Avenue?
 10 A. Yes, sir.
- Q. After that trolley passed, could you see out from where you were and in front of the street car?
 A. I could see out the side.
- Q. Were there any other wagons on the street at that time you could see?
 A. I could not say.
- The Court: Wagons or any kind of vehicle? Are you limiting that to wagons?
 20 Q. Anything—whether or not the street was clear.
 A. I could not see all along the street.
 Q. I beg your pardon.
 A. I could not see ——
 Q. I mean, so far as you could see?
 A. Yes.
- Q. I understand that so far as you could see you could not see anything?
 A. Not on the left.
- Q. Did you see anything of a child or children as you looked out the left side?
 30 A. I saw a small boy.
 Q. What did you see?
 A. Well, he left the left-hand curb and ran directly toward the front of the car we were on.
 Q. Did you see the little girl?
 A. No, sir.

Q. And then what happened? Did you hear anything or see anything?

A. Well, I felt a jolt and the car stopped and I thought he had hit the little boy that ran up to the front of the car.

Q. Your car stopped and there was a jolt. Did you hear anything said by anybody after the car stopped?

A. The motorman says, "My God; what have I done?"

10

Q. And before that happened, did you hear—is your hearing good?

A. Yes, sir.

Q. And was at that time. Did you hear any signals or warning given by the car?

A. No, sir.

Q. Will you answer, please?

A. No, sir.

Q. What have you to say about the speed of the car at that time; from the time it left Olden Avenue?

20

A. About fifteen miles an hour; about fifteen, as near as I could judge.

Q. About fifteen miles. The car stopped at Olden Avenue?

A. Yes, sir.

Q. Did you leave the car? What did you do after you felt the jolt and looked out?

A. I stood right on the top steps of the car after the doors were opened.

Q. And what did you see?

30

A. I seen them take a small girl out from under the car.

Q. Did you learn who that girl was?

A. Afterward.

Q. And you know it is Martha Lambert?

A. Yes.

Q. Did you learn who the boy was?

- A. I don't know who the little boy was.
- Q. Did you learn since that time who it was?
- A. Yes.
- Q. Who did you learn it was?
- A. I learned it was Mr. Lambert's boy.
- Q. When you first saw this little boy where was he?
- A. Just leaving the curb.
- Q. From the curb. You saw him leave the curb?
- 10 A. Yes, sir.
- Q. And come right across to the front of the car on your side?
- A. He had just left the curb when I seen him and he run right up to the front of our car.
- Q. How many feet, do you think, to the best of your judgment, is it from the curb line to the rail on which your car was running?
- A. About twenty or twenty-two.
- Q. About twenty or twenty-two. That is, there
- 20 is a space between the tracks, there is another track and a space between the tracks and the street. You think that is about twenty or twenty-two feet?
- A. Yes.
- Q. After the motorman stopped the car and you got out, did he do anything?
- A. Well, he felt a jolt and he sat down.
- Q. He fell back into his seat, did he? Did he sit down or stand up?
- A. No, just sat right down. There is a small
- 30 seat back of him.
- Q. Was he standing before?
- A. Yes.
- Q. He was standing before?
- A. Yes, he was.
- Q. His back was to you?
- A. Yes.
- Q. Could you see what he was doing?

(No answer.)

Q. The control he works in the car is to the left of the center?

A. I think so.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

10

Q. There was nobody on the front platform besides the motorman, was there?

A. No, sir.

Q. You did not see the little boy running across the street toward the car until after he had left the curb, did you?

A. He had just left the curb.

Q. And somewhere between the curb and the car tracks when you saw him? 20

A. He had just stepped from the curb.

Q. Was he running or walking?

A. Well, he was running.

Q. Running toward the track on which your car was running, wasn't he?

A. Yes.

Q. Running right straight across the street?

A. Almost.

Q. You couldn't see him until he came all way up to the car, could you? 30

A. No. I saw him from the side.

Q. Only a short distance?

A. Right from the curb.

Q. You saw him run from the point where you first saw him but you did not see him right up until he got to your car?

A. When he got almost to the car he reached for something.

Q. You were looking out the side window; is that right?

A. Yes.

Q. So, as he got closer to the car you could not see him any more?

A. Not when he got right up to the car.

Q. He was running about as fast as a boy of his
10 age could run; wasn't he?

A. Well, some boys can run faster than others.

Q. He was running hard, wasn't he?

A. He was running.

Q. You did not see the little girl at all?

A. No, sir.

Q. How far did the trolley car go after you felt the brakes applied?

A. It did not go very far. I don't just remember.

20 Q. About ten feet?

A. Something like that.

Q. What effect did the applying of the brakes have on you? Did it throw you forward in your seat?

A. There is an iron bar, I think, a cross in front of the seat; up against —

Q. Did it throw you against the iron bar?

A. Yes.

30 Q. The brakes were applied pretty hard, weren't they, to give you a jolt like that?

A. Well, I felt the brakes and the jolt; that is all.

Q. You say you think the trolley car was going about fifteen miles an hour. That is just your guess; you could not really tell how fast it was going, could you?

A. No, I could not.

Q. You could not tell within five miles of its speed, could you?

A. I could not at that time, but I could now because I drive myself.

Q. But you were not driving at that time?

A. No, sir.

Q. How long have you known Mr. Lambert, Mrs. Wert?

A. I have known Mr. Lambert about fourteen years.

Q. About fourteen years. And your husband is acquainted with Mr. and Mrs. Lambert?

A. Yes.

Mr. Gildea: That is all.

Re-direct examination.

By Mr. Devlin:

Q. You saw the boy as he left the curb stone?

Mr. Gildea: I object, if the Court please. The witness did not say that.

Mr. Devlin: I think she did. I will withdraw the question and put it otherwise.

Q. Where was the boy when you first saw him?

A. He had just stepped from the curb.

Mr. Gildea: That is not an answer. "Where was he?" is not replied to by saying what he had done. I think the question ought to be answered where in the street was he, or was he on the sidewalk. That was the question; not what was done.

Mr. Devlin: If you will state the kind of question you want asked, I will ask it.

Mr. Gildea: You ask your question.

Mr. Devlin: And you object to the very thing you want.

10 Mr. Gildea: I object to the answer.

Mr. Devlin: What was the question I put?

Q. (Repeated by the stenographer.) Where was the boy when you first saw him?

The Court: Where was he in the street or on the sidewalk; is that the question?

20 Mr. Devlin: I want to know where he was when she first saw him.

The Witness: He was in the street.

Q. With regard to the curb of the street, how near was he to the curb stone on the left-hand side?

A. Just about stepping from it.

Q. Stepping from the curb stone?

A. Yes, sir.

30 Q. Then you saw him coming all the way across the street to the car?

A. Yes, sir.

Mr. Gildea: I object to that as leading.

Mr. Devlin: I will withdraw that.

Q. When you saw him then, was he in your view?

A. Yes, sir.

Q. Then where did you see him go?

A. He came right toward the car that we were on.

Q. Which way did he go; lengthwise of the street straight across, or which way?

A. Just about straight across.

Q. Just about straight across until he got to your side of the car? 10

A. Yes, sir.

Q. Can you give us, as near as you can, in distance how far your car was from the boy when you first saw him?

A. About twenty feet.

Q. About twenty feet?

A. Something like that.

Q. Or more than that—which?

Mr. Gildea: I object to that, if the Court please. 20
This is counsel's own witness.

Mr. Devlin: She said about twenty feet. I asked her more or less than twenty feet.

Mr. Gildea: I object.

The Court: Objection sustained.

Mr. Devlin: That is all. 30

Re-cross examination.

By Mr. Gildea:

Q. When you say the boy was about twenty feet from you, you mean off at an angle to your left,

don't you? You don't mean he was twenty feet ahead of you?

A. To the side, to the left of the car.

Q. And that twenty feet would be made up largely of the distance that he was to the left of your car, wouldn't it?

A. He was at the left of the car.

Q. He was just a step from the curb stone when you saw him twenty feet away, and when you say
10 twenty feet, you mean twenty feet from where you were sitting?

A. Yes.

Q. And it was off at an angle to your left, wasn't it, toward the opposite side of the street?

A. Yes, sir.

Mr. Gildea: That is all.

Questions.

20 By Mr. Devlin:

Q. Assuming the car as going straight along the street, the boy is one step from the curb in the street as you have testified. Do you mean he was twenty feet from the front of the car or twenty feet from you in this line? Which do you mean?

A. Well, I just meant across from the side of the car and the street line.

30 Q. The side of the car and the street line?

A. From the street car and the curb.

Mr. Devlin: That is all.

(Witness excused.)

(Recess.)

AFTER RECESS.

DR. RAYMOND S. SEIBERT, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

10

Q. Doctor, you are a practicing physician in the city of Trenton?

A. I am.

Q. And have been for many years?

A. Yes, sir.

Mr. Gildea: We admit the doctor's qualifications.

20

Q. You are a surgeon also?

A. Yes, sir.

Q. You know Martha Lambert, the plaintiff in this case?

A. Yes, sir, I do.

Q. You attended her as a result of the accident on the 18th of March, 1922?

A. I did.

Q. What did you do?

A. I amputated what was left of her arm at the shoulder.

30

Q. Took the joint?

A. I did.

Q. What was the condition of the child when you were brought to attend her?

A. In a shocked condition.

Q. What was the condition of her arm?

A. Just about four inches of the arm remaining.

No other part of the arm did I see.

Q. And as a result you amputated?

A. Yes, sir.

Q. You took it off at the shoulder?

A. I did.

Q. Now, Doctor, will you just explain to the jury what you had to do in that case?

10 A. There was only a small portion here (indicating on body of plaintiff), say, four inches of the bone remaining, and that bone was stripped of muscle and skin and it was necessary to take the arm, amputate it right at the socket, and that is where (indicating) the head of this bone should be if there was any part of the arm there.

Q. There is no joint there, is there?

A. No joint, no, sir.

Q. She can never use an artificial arm, can she?

20 A. No, sir.

Q. What was your bill for the services, Doctor?

A. \$200.00.

Q. Your bill has not been paid yet?

A. No, it has not.

Mr. Devlin: That is all.

Cross-examine.

30 Mr. Gildea: No questions.

(Witness excused.)

HUGH CAULFIELD, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

Direct examination.

By Mr. Devlin:

Q. Officer Caulfield, you were a member of the police department on March 18, 1922, weren't you? 10

A. Yes, sir.

Q. And you remember an accident on Saturday evening of that year?

A. I do.

Q. On Clinton Avenue between Webster and Olden Avenue?

A. Yes.

Q. What did you see there?

A. Well, that little girl—when I seen her she was taken from under the car; she had been taken from under the wheels when I got there. 20

Q. Did you see her before she was taken from under the wheels?

A. No.

Q. Are you familiar with that district at that time?

A. Yes, sir.

Q. What have you to say about the lights at the corner of Webster and Clinton Avenue? 30

A. There is an arc light there.

Q. What?

A. There is an arc light there.

Q. How about Mead Street?

A. I would not be sure of that. There have been lights put up since that time.

Q. How about the stores in that section?

A. The stores were lit up.

Q. Were they lit up?

A. Yes.

Q. Where was the child when you saw her?

A. Why, Mr. Wert, I think, had taken her out and put her in the machine to take her to the hospital.

Q. Did you see anything around the tracks; any
10 blood there?

A. Yes. There was some blood and bone and skin on the track.

Q. What rail was it on?

A. It was on the rail next to the curb.

Q. On the rail next to the curb?

A. Yes.

Q. Do you mean the rails the cars run on going to Trenton?

A. The car was coming toward the city, the cen-
20 ter of town, on the right-hand side.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

Q. Where did the accident happen on Clinton
Street? Where would you say that is? Mark it; in
30 front of what house?

A. Opposite 540.

Q. Opposite 540 North Clinton, and that was between Webster Street and Olden Avenue, wasn't it?

A. Yes.

Q. About how many doors from Webster Street, do you know?

A. About two hundred or two hundred and fifty feet from Webster Street.

Q. About two hundred or two hundred and fifty feet from Webster Street. You say there are stores along there?

A. Both sides, yes.

Q. Every house isn't a store, is it?

A. Well, not every house. I believe now they have but not then.

Q. And the stores did not have the big electric 10 signs like they have in the center of town, did they?

A. No, not then. They have no large ones.

Q. Did you see whether or not there were any automobiles parked on either side of the street?

A. I did not see none, no.

Q. You didn't see none?

A. I seen the machine that was taking the child to the hospital.

Q. Didn't you see cars parked on the right-hand side of the street going up? 20

A. I did not see any on the right-hand side, so far as I remember. I did not see any I don't think.

Q. Ordinarily there are a great many automobiles parked up there, aren't they?

Mr. Devlin: I object to "ordinarily." This is a case of that evening.

Q. That Saturday evening—customarily at that time on Saturday evening, weren't there automob- 30
iles parked?

Mr. Devlin: That is objected to.

Mr. Gildea: Wait until I finish.

The Court: Finish the question.

Q. (Continuing.) Weren't there automobiles parked on North Clinton Avenue near those streets?

Mr. Devlin: I object to that unless it is on that evening.

Mr. Gildea: Counsel has tried to show this very condition with regard to the lighting.

10 Mr. Devlin: That evening I said.

Mr. Gildea: That evening? I will withdraw the question. Perhaps it is objectionable on that ground.

Q. Do you know, officer, whether or not there were any automobiles parked on the right-hand side of North Clinton Avenue going out—that would be the easterly side of North Clinton Avenue, between the place where this accident happened and Olden Avenue—do you know?

20 A. So far as I remember, there was no automobiles there, but there was plenty after the accident happened.

Q. There were plenty after the accident happened.

A. But before that, I could not say. There was automobiles there afterwards when the crowd gathered.

30 Mr. Gildea: That is all.

Mr. Devlin: That is all.

(Witness excused.)

THOMAS A. CULLITON, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Devlin:

Q. Mr. Culliton, where did you live in 1922, in 10
March?

A. 565 North Clinton Avenue.

Q. Do you remember the Saturday evening of an
accident there, on March 18th?

A. Yes, sir.

Q. Where were you when that accident happened?

A. On North Clinton Avenue in front of the—
right at the junction of the building occupied by the
East Trenton Furniture Store and the building to
the west. I don't know what the number is. 20

Q. Beg pardon.

A. I say, right at the junction of the building that
was occupied by the East Trenton Furniture Store
and the building on the west.

Q. What did you see that evening?

A. What did I see?

Q. Yes.

A. I did not see anything pertaining to the acci-
dent. I had passed the spot of the accident.

Q. You say you had passed what? 30

A. I had passed the spot where the accident oc-
curred.

Q. Where were you going?

A. I was going home.

Q. And what hour was it?

A. About eight o'clock.

- Q. What time did you pass the street car?
A. A street car passed me, yes.
- Q. A street car passed you?
A. Yes, just previous to the accident.
- Q. Before the street car passed you, did you notice anything on the street?
A. No.
- Q. As the car passed you, what have you to say as to its speed?
10 A. Well, the car seemed to be going pretty fast.
- Q. Which way was the car going that passed you?
A. There was two passed me, one going west and one going east.
- Q. Which passed you first?
A. The one going east.
- Q. Now, when you say going east do you mean toward (East) Trenton?
A. Yes.
- Q. Going east on Clinton Avenue?
20 A. Yes.
- Q. That was going the same way you were going?
A. Yes.
- Q. After that car passed you then another car passed you?
A. Yes.
- Q. Which way was that car going?
A. West.
- Q. West. Did you see the two cars pass each other? Did you notice that?
A. I was just about conscious of it.
- 30 Q. After the car passed you going toward Trenton; that is the last car that passed you, what did you hear or see?
A. I heard a scream.
- Q. Now, when the car that passed you and you heard a scream, what did you do?
A. I ran back.

Q. What did you find?

A. I found a little girl under the car.

Q. What was her position?

A. Why, she was lying on her back; one of her arms was caught under the front wheel of the trolley car going west.

Q. The front wheel was the right front wheel or the left front wheel?

A. I think it was the left front wheel. It has been quite a while ago. 10

Q. What?

A. It has been quite a while ago, but I think it was the left front wheel.

Q. When you say the left front wheel, do you mean the left front wheel facing downtown, facing Trenton?

A. Let me see; the front wheel of the car facing town.

Q. Facing town?

A. The left front wheel of the trolley car. I am not sure on that point. 20

Q. Do you mean the wheel nearer the curb or away from the curb?

A. I mean the wheel away from the curb, but I am not sure on that point, because it has been quite a while ago.

Q. You say you are not sure on that point. Do you remember testifying in this trial before on the 22nd of December, 1925?

A. I remember testifying at the trial but I do not remember what my testimony was. 30

Q. I am reading from the record, page —

Mr. Gildea: I object to his reading from the record.

Mr. Devlin: To refresh the witness' memory.

Mr. Gildea: I object to the use of the record of the former trial to refresh the witness' recollection, upon the ground that the record can only be used to impeach a witness and the plaintiff can't impeach his own witness.

10 Mr. Devlin: I am not impeaching the witness at all. It is the well known doctrine of refreshing a witness' memory. He says his memory is not clear on the subject. It happened six years ago, this accident. And I am calling his attention to the record of what he testified to then.

The Court: Is that all you have to say?

20 Mr. Gildea: I object to his testimony on a former trial being used to refresh his recollection. He can only refresh his recollection from memoranda made by himself or under his direction, and the only use to which it can be put is to impeach the witness and counsel can't impeach his own witness.

Mr. Devlin: This is memoranda made by his testimony by the record of this Court.

The Court: I will sustain the objection.

Mr. Devlin: I ask an exception.

30 The Court: You may have it.

(Exception noted.)

Q. Was the street lit up?

A. Yes, sir.

Q. Do you know whether there is an arc light at the corner of Webster and Clinton?

A. There is are lights all around the street.

Q. Did you hear any signals from that trolley?

A. No.

Q. Is your hearing all right?

A. Yes, sir.

Mr. Devlin: Cross-examine.

Cross-examination.

By Mr. Gildea:

10

Q. At the time of this accident, the arc lights were only on the street corner, weren't they?

A. No; there were arc lights all around on the street.

Q. Are you sure of that? That was six years ago.

A. Yes.

Q. There was an arc light, you say, on the corner of Webster Street?

A. There has been a good many years, yes.

20

Q. What did you say?

A. Yes.

Q. Was there any arc light between Webster Street and Olden Avenue?

A. Yes.

Q. Where?

A. Probably sixty feet from this accident—seventy-five feet.

Q. Which way; up above or below?

A. East.

30

Q. Just above it; sixty feet from the place this accident occurred and between the place where the accident occurred and Olden Avenue?

A. Yes.

Q. How far was the place of the accident above Webster Street, if you know; if you remember?

A. It was about in the center of the block between Webster and Olden Avenue; just about in the center of the block.

Q. And how far, if you can recall, how far did you walk from the time that trolley car passed you until you heard the—whatever you did hear to indicate there was an accident? How far had you walked?

A. Probably twenty-five feet.

10 Q. That was after the car had passed you?

A. Well, while the car was passing me.

Q. You did not walk twenty-five feet —

A. (Interrupting) I don't want to say how far from the end of the trolley car because they were both in motion.

Q. Well, take from the time this trolley car had completely passed you.

A. Yes.

20 Q. Of course, it only takes a second to pass. From the time you noticed this trolley car pass, how far did you walk before you heard the noise of the accident?

A. Twenty to twenty-five feet.

Q. Twenty to twenty-five feet?

A. Yes.

Q. How far back did you have to walk to get back to the place of the accident?

A. Fifty feet.

30 Q. Then when this trolley car passed you you were about twenty-five feet above—about fifteen feet above the place where the accident happened; is that right?

A. Fifteen or twenty.

Q. Fifteen or twenty?

A. Something like that.

Q. And after you heard the accident, you had to

walk back forty feet to the place where the accident occurred?

A. Forty or fifty.

Q. Then the trolley car was not traveling much faster than you were walking.

A. Yes, it was, considerably. I may have got mixed up on the figures a little bit, but the trolley car was moving a whole lot faster than I was.

Q. You see, if you walked twenty or twenty-five feet from the place where this car passed you before the accident occurred and the trolley car only travelled twenty or twenty-five feet past you before the accident took place, the trolley car was travelling twenty-five feet while you were walking twenty-five feet. 10

A. How long is the trolley?

Q. I can't say. It is not in evidence. You know how long a one-man trolley car is.

A. The trolley car passed me.

Q. Then the trolley car wasn't going very fast, was it? 20

A. Yes, it was going at a good rate of speed.

Q. What would you call a good rate of speed?

A. I would not want to say off hand. I was not paying particular attention to it.

Mr. Devlin: What was the answer to the last question?

Mr. Gildea: He said he was not paying particular attention to it and he would not want to say how fast it was going. That is all. 30

Mr. Devlin: That is all. We rest.

Mr. Gildea: There is a matter I would like to

present to your Honor in chambers if your Honor would hear me there.

The Court: Yes.

(The following occurred in the Judge's chambers, out of the hearing of the jury.)

10 Mr. Gildea: I move for a non-suit upon the ground that there is no evidence of negligence upon the part of the motorman of the defendant's trolley car which would justify finding that he was negligent. There has been no evidence produced as to how the accident happened. There has not been an eye witness called. There has been no witness upon the witness stand that saw the accident. All that appears from the testimony is that the defendant's trolley car was travelling down the street on the right-hand side where it belonged, and that it came
20 to a quick stop, stopping within ten feet after the brakes were applied, and that the motorman sat down and said, "My God, what have I done?" and that a child was under the front wheel; some testimony being to the right and some to the left. Conceding that it was the right-hand front wheel the child was under, there is, we contend, no evidence of negligence in that fact alone or any other fact that has been adduced.

30 Now I presume that the plaintiff's counsel will argue that the motorman's statement was of a character which would indicate guilt on his part. That we think is untenable because the motorman was driving the car and nothing could be inferred except that he said, "My God, what have I done?" meaning what had he done to the child, or what had the car done to the child. I think there was nothing

in that to indicate any negligence on his part. It is a perfectly natural statement anyone might make under similar circumstances. As the Chief Justice said to Mr. Devlin when this case was in the courts before, "What would you have him say, 'My God, what has the child done?'" There is no evidence of negligence, then, on the whole case, and we move for a non-suit on that ground.

The Court: What have you to say, Mr. Devlin? 10

Mr. Devlin: Well, the evidence in the case is contradicted so far that this car started at Olden Avenue after stopping. It was going at a speed running up to 18 miles an hour. The testimony is that there was no signal given. The testimony is from two witnesses in the car, that there was no signal given at all in the car, and so far as they could see, the street was clear and lighted. That the child that was hurt who was in company with the other child was seen leaving one step from the curb and came across, the child that was not hurt, and the other one must have been ahead of that one; it must have been on the track. It must have been ahead because that woman did not see it. And that child attempted to come across the track, she says, about twenty, twenty-two or twenty-four feet — 20

Mr. Gildea: She did not say that. She was not talking about the girl but about the boy. 30

The Court: Mr. Devlin is speaking about the boy. She did not see the girl.

Mr. Devlin: By the way she was found under the track, she must have been ahead of the boy; by

the way she was found under the car. Now then, here is a motorman that is running a one-man car along on the left-hand side of the car; not to the right or in the center, but on the left-hand side the controller was. This child must have been in front of him or it would not have been run down. It was found in front of him injured by the car, and it can be inferred that it came from one side or the other. We say it came from the one side. The witness is not here that saw that, because we could not find him. And the next thing we know there is a jolt of the brakes, a bump of the car, and he says, "My God, what have I done?" The Chief Justice, as he says, said, "What would you have him say; the thing he intended to do?" I said, "No, but I think if it was the child's fault he would have said, 'My God, look what that child did.' What he says, 'What have I done?' it shows he did it and not the child; he was the cause." That language speaks for itself. It is his negligence in the operation of his car that made him say that. That is what they call *res gestae*; when the events make a man speak this kind of thing, and fall back in his seat—those things.

The contentions are here that the street was lit up, clear, so far as the evidence shows; no obstruction of the vision. A car going in a closely congested district as high as 18 miles an hour; it is said from twelve to eighteen miles an hour. A child coming across the street—I don't care what direction it came from; it is immaterial; we say it came from the left-hand side. That it crosses, and the child that was hurt must have been ahead of the boy. He had, evidently, an opportunity to see if he was looking. The passenger saw the child before the child left the curb; that is, the child that was not hurt. If the passenger saw the child at one side, what

excuse has he got for not seeing her on the other side? Certainly, it indicates that he was not looking, and if he was looking, then his car was going faster than he could control it. That is the situation. The question of the child's negligence must go to the jury. But that it was negligence on the part of the motorman of the car to give no signals—that may have been the proximate cause of this accident. It was a lighted street; no obstruction appeared on it. The children were on the street and if he had been looking there is no question but what he could have seen it. No man has a right to operate a car or anything else without looking at where he is going. A signal should have been given. If he did see the child, the speed he was operating his car was greater than he could control his car. It is the duty of every one that uses the highway to be prepared to look for children crossing at any part of the street. Now, the inference of negligence must go to the jury; the failure to give a signal; the lighted street; and the facts showing that he was not looking, and if he was looking then the set of facts and affairs that the speed was greater than he could control his car, and the further fact that the accident happening made him speak what he said, "My God, what have I done?" unquestionably imputes the fault to him. "What have I done?" If it had been the child, he would have said, "Look what that child did." But the accident made him speak accusing himself. He did it. Those are three inferences of his negligence and there is none of contributory negligence, when you consider the fact that the child was under six years old—no, under five years old; the older one was under six. Now, that is the situation. There are no less than four inferences of negligence of his; failure of signal; failure to see; height of speed in a place where houses are

built up; and his accusing statement when he said, "My God, what have I done?" And when that child came from his left, as we say it did, it took her twenty-four feet before it reached the rail to his right; it took her twenty-four feet to come, without seeing it come forward, or the space between the car track and the space between the track and the car if on the other side it was ten feet. But the passenger saw it. He was in front of the passenger
10 from three to four feet. The passenger saw the child, had the passenger been operating the car, in plenty of time to control the car, when the passenger was not as near the child nor had as good view as he had, because the passenger's view was out of the side glass; his view was all around the street car. Those are inferences of negligence.

Mr. Gildea: If I may reply to those statements, in the first place, the operator did see the child.
20 That is the only inference that can be drawn because he applied the brakes and stopped the car within ten feet. There is nothing from which it can be inferred that he did not look. Insofar as any signal is concerned, there is no evidence that he had an opportunity to give any signal. The car immediately came to a very abrupt stop. There is nothing from which it could appear that he saw this child at a point where he had an opportunity to give a signal to warn the child. There is no evidence at all of
30 where the child came from or where the child was when he should have seen her or when he did see her, but that he did see her and stop the car is the only inference that can be drawn.

Now, in the absence of testimony as to where this child that was struck was when the trolley car approached, how can it be said that the motorman ought to have seen her before he did see her? There

is a total absence of testimony as to which side of the street the child came from or anything about it except that it was an accident. There is testimony that he said, "Oh, my God, what have I done?" He did not say, "My God, I killed a child." He questions himself; had he done anything he should not have done. The man said, "What have I done?" He did not say, "I have done something."

Mr. Devlin: That is an inference I can argue one 10
way and you can argue it the other.

Mr. Gildea: You have to take the plain meaning of the words. It is a question: "What have I done?" He did not say, "My God, I was negligent and killed that child;" he said, "What have I done?" "Have I done anything" is a question for himself; a spontaneous question; "What have I done?" That is not an admission that he had done or failed to do anything. That certainly could not justify anybody 20
in finding that by asking a question, "What have I done," he meant he had done something or failed to do something he should have done. That is just a spontaneous question. Certainly the burden is on the plaintiffs to show negligence and they have not produced testimony which unequivocally shows negligence, and there is not a bit of testimony in this case that shows this motorman should have seen the child before he saw her in time to do anything he did not do. The uncontradicted testimony is that 30
he made a very quick stop within eight or ten feet from the time the brakes were applied. He was allowed by law a speed of twenty miles an hour; the law permits him to go twenty miles an hour.

Mr. Devlin: Can you show an ordinance to that effect?

Mr. Gildea: Yes, certainly.

Mr. Devlin: Where houses are passed?

Mr. Gildea: Yes, certainly. The maximum speed is twenty miles an hour.

Mr. Devlin: The question of speed in negligence is a question depending on circumstances.

10

Mr. Gildea: Yes, but he was between streets, not at a street corner. He was travelling several miles an hour less than he was permitted by law. The most any witness would say he was going was twelve to eighteen miles an hour. There was no negligence. The fact he brought the car to a stop showed he had it under control. You can't stop in an inch; you should be allowed eight to ten feet to bring it to a stop. There is not one iota of

20 negligence in this case.

The Court: Have both sides finished?

Mr. Gildea: Yes.

Mr. Devlin: Yes.

The Court: I shall deny your motion, Mr. Gildea. I think the evidence discloses a situation where the
30 whole subject-matter ought to be referred to a jury for its determination, and I will allow you an exception.

(Exception noted.)

DEFENDANT'S PROOF.

PATRICK McHUGH, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Gildea:

10

Q. Mr. McHugh, keep your voice up, will you, so the last juror will hear what you have to say. You were motorman on the trolley car involved in this accident, weren't you?

A. Yes, sir, I was.

Q. And do you recall the accident that happened in March, 1922? You recall the accident, do you?

A. Yes, sir.

Q. And you were coming down North Clinton Avenue, weren't you? 20

A. Yes, North Clinton Avenue.

Q. You will have to speak a little louder I am afraid, Mr. McHugh. Now, about what time did the accident occur?

A. Well, I left the East Trenton terminus at five minutes of eight. That was my leaving time.

Q. That was the end of the line?

A. The end of the line, yes.

Q. And where did this accident occur? 30

A. This side of Olden Avenue between Olden and Webster.

Q. Did you see this little girl that was hurt, before the accident?

A. My last stop was at Olden Avenue.

Q. Yes.

A. I picked up some passengers; how many, I don't know. I came along by the fire house. After going by the fire house about ten to twelve feet in front of me I seen those two run right direct into the outbound track, the little girl was—the little boy was a distance behind—directly into me.

Q. What did you do, if anything, when you saw the little girl run across the northbound track?

A. I did not give no attention to the bell.

10 Q. What did you do?

A. When I seen the danger—when I seen them coming I snapped the reverse as quick as I possibly could; in the meantime, the emergency brake.

Q. How far did you go after you put on the emergency brake?

A. Well, I may have gone a couple of feet.

Q. And how far was this little girl ahead of you on the other track when you first saw her?

20 A. I should judge from ten to twelve feet, running very fast. The little boy was farther back. The little boy was coming from the curb. He was running too. She ran directly in front of me. She made her way right to the outbound rail, and in the act of looking over her shoulder—she was young at the time—she goes down outside the fender. She did not come in contact with the fender; she went on the outbound track clearing the trip of the fender. At the same time the car was on full brakes and the wheel caught her. Which way she went
30 down, I don't know, because I looked back at her and could not exactly see, but I certainly seen her. I did everything possible and the car came to a stop as quick as I could.

Q. Was the car in good condition?

A. The car was in good condition.

Q. Was it clear or rainy?

A. No, it was dry, very dry.

Q. It was very dry?

A. Very dry.

Q. How long have you been a motorman for this company, since when?

A. I come here in 1917, I think.

Q. 1917?

A. Yes.

Mr. Devlin: Speak louder.

10

The Witness: 1917.

Q. And have worked for them ever since that time?

A. And have worked for them ever since that time.

Q. Did you have any children of your own at the time of this accident?

Mr. Devlin: That is objected to.

20

The Court: How can that be relevant, Mr. Gildea?

Mr. Gildea: Well, I suppose it is as relevant as some other things that have come out in the trial. Mr. Devlin had Mr. Lambert show he had one less child now than he had before the accident. I want to show that this motorman had a child at the time of the accident and that child also died. If one is relevant the other is relevant.

30

The Court: Do you press your objection?

Mr. Devlin: Why, he has told the jury all about it himself. I certainly don't admire that way of getting in evidence.

Mr. Gildea: As fair for one as the other.

Mr. Devlin: No, it is not. It was not proper; it was offensive, too.

Mr. Gildea: Do you object?

Mr. Devlin: I withdraw my objection now.

10 Q. All right. Mr. McHugh, did you have a child at the time of this accident?

A. Yes, I did. He is dead since.

Q. Is that child living now?

A. No, he is dead.

Mr. Gildea: That is all.

Cross-examination.

20 By Mr. Devlin:

Q. What was the answer?

A. He is dead.

Q. When did the child die?

A. Last January.

Q. When?

A. Last January; the first of last January.

Q. That is five years after this accident?

A. Five years.

30 Q. Mr. McHugh, that was a one-man car?

A. That was a one-man car.

Q. You will have to speak a little louder.

A. That was a one-man car.

Q. What they call a single truck?

A. Single truck.

Q. And you operated the car and collected the fares.

A. At Olden Avenue.

Q. That is your work; operating the car and collecting the fares?

A. Yes.

Q. At Olden Avenue you took passengers on.

A. At Olden Avenue I took passengers on, yes.

Q. And you give out transfers; it was your duty that day to give out transfers to those that wanted them?

A. Yes.

10

Q. Make change and also call out the streets as you go by; that is your duty and was your duty then?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now, that car had a bell on it, a signal?

A. Yes, sir.

Q. How long had you run that route?

A. Well, I could not exactly tell.

20

Q. What?

A. I could not say exactly how many years I was on it.

Q. You were running it quite some time?

A. Quite some time.

Q. Some years before this accident?

A. Yes.

Q. You were on the car in 1917 and this accident happened in 1922.

A. Yes.

30

Q. That is right?

A. Yes.

Q. Now, when your passengers got on, did you start that car before you got their fares paid?

A. I had every fare collected.

Q. I did not get your answer.

A. I had every fare collected.

Q. Had your car started before you collected them?

A. No, it had not.

Q. Did you give transfers there?

A. I couldn't say whether I did or not.

Q. You could not say whether you did or not?

A. No, I could not.

Q. When you started your car, there was plenty of light there, wasn't there?

10 A. Yes.

Q. An arc light on the corner of Webster Street on each side lit up; that is right, isn't it?

A. I could not say.

Q. You could not say?

A. No.

Q. And yet you ran that route quite a while before this accident?

A. Yes, but I couldn't say whether that light was lit or not.

20 Q. But it was dark; it was after daylight?

A. It was after daylight; the lights was lit in my car.

Q. The stores are lit ordinarily?

A. The stores are lit ——

Mr. Gildea: That is objected to. That is not a fair question to ask.

30 The Court: I sustain the objection.

Q. This was Saturday night, too?

A. Saturday night.

Q. The stores were open for business?

A. Yes.

Q. And when they are open, as a rule they are lit up on Saturday night?

A. Well, as a rule they are.

Q. Do you mean to say to your knowledge you don't know whether those stores were lit up, or not?

A. I could not exactly—I did not take any particular notice of the stores.

Q. Now, it was a fact that you had run that route for years before?

A. Yes, sir.

Q. You don't know whether these stores had their windows lit up on this Saturday night? Do you 10 mean to say that?

A. I don't remember.

Q. You don't remember?

A. Well, I didn't take any particular notice.

Q. I know it, but suppose you did not, don't you know it is the particular custom —

A. I know it is.

Q. (Continuing.)—for all the stores to be lit up on Saturday night; isn't that correct?

A. Yes,

20

Q. You don't know whether they were lit up this Saturday night?

A. No, I do not.

Q. You don't know it, do you?

A. No.

Q. It was light enough for you to see the track, wasn't it; the whole street?

A. Yes. There was lights in my car.

Q. Light enough for you. You stand in the vestibule of your car and there is glass all around you, 30 isn't there?

A. Yes.

Q. And you are standing at the left-hand side of the car; that is where the controller is, isn't it?

A. Yes.

Q. You are on the left-hand side?

A. Yes.

Q. How wide is the car; about ten or twelve feet?

A. No, I don't think it is.

Q. Well, is it nine feet, or eight feet?

A. Only about eight or nine.

Q. About eight feet. If you were going toward town on this track, the other track was on your left-hand side, wasn't it?

A. Yes.

10 Q. That is the track that goes out to East Trenton. One car passed you at Olden Avenue, didn't it?

A. Yes.

Q. And there were no other cars in the street?

A. There was no other cars.

Q. The street was clear; isn't that right?

A. I don't know whether there was automobiles or anything else standing there.

Q. You did not see any?

20 A. I did not see any, but I could not say.

Q. You said you saw the two children coming from the left curb; is that right?

A. Yes.

Q. You saw the two children come from the left curb; do you mean this girl and her brother; that is the two children you saw?

A. The girl was—yes.

Q. You saw them come from the left curb?

A. Yes, from the left.

30 Q. Now, your car track on this side between your right rail and the curb is about nine feet in that street. It is a distance of about eight or nine feet; isn't that right?

A. Yes, sir, something like that.

Q. Then there is a car track, or track into town, that is about five feet wide; isn't it, the car track?

A. Something about that.

Q. Then the space between the car tracks is about four feet wide; isn't that right?

A. Yes.

Q. And then there is another car track, the car track out to East Trenton, that is about five feet wide?

A. About five feet wide.

Q. And then there is a space between the car tracks and the curb on the left-hand side about nine or ten feet; is that right? 10

A. That is right.

Q. That makes that street about thirty-four feet wide? Am I right?

A. Something about that.

Q. Now, you were travelling on this track to Trenton, and these children you saw at the curb, and they crossed all the way over that space between the car track and the curb, then over the car track, then over the space between the car tracks, and the one child got on your right-hand rail; isn't that right? 20

A. Yes.

Q. Now, you saw those children coming. Why was it you were not able to stop your car in that time?

A. In that time?

Q. In that time?

A. In that time; the time was too short.

Q. The time was too short?

A. Yes, sir. 30

Q. What speed were you going as you came down that street toward town?

A. About half speed.

Q. Half speed?

A. Yes.

Q. How fast? You have told me half speed. How

fast can the car go that you were running, go if it is in high speed?

A. Go in high speed—well, it all depends on the distance you have full power on.

Q. Can your car go at 36 miles an hour in high speed?

A. Something about thirty-five.

Q. I mean the car you were operating?

A. Yes, when you have full power on.

10 Q. Then if you were going half speed, your car was going about eighteen miles an hour; isn't that true?

A. Well, I had not picked up half speed at the time, but I had the power on.

Q. You said half speed. If thirty-six miles an hour is full speed, then half of thirty-six miles must be half speed; isn't that right?

A. That is about right.

Q. Is that right?

20 A. That is right.

Q. You saw those two children. This child that was run down, was run over by the right wheel of that car; is that right—the wheel to your right; isn't that right?

A. Yes.

Q. But this child crossed from the left curb right over the space, the other car track, the space between the tracks, and right in front of your car before it was hit by the right-hand wheel; isn't that right? Isn't that right?

30 A. Her force of run —

Q. (Interrupting.) That was —

Mr. Gildea: Let him finish his answer.

The Witness: Her force of run brought her right there.

Q. And yet that child you—you saw it running all the way across, a distance of about twenty-four feet, right across the street?

A. Not twenty-four feet; about ten or twelve feet at the time.

Q. One moment. The left-hand curb was about twenty-four feet from your right rail. That is right, isn't it?

A. Yes.

Q. The street is about twenty-four feet wide? 10

A. Yes.

Q. You saw them coming and you said this child was about twelve feet in front of you when you first saw it in front of your truck. Is that right?

A. About ten to twelve feet in front of me to the left.

Q. To the left you say, but it was coming —

A. (Interrupting.) Coming just as fast as what I was going, almost.

Q. With respect to the rail you were running on, 20 how far was the child—the other rail that was going to east Trenton; how far was the child from that rail when you first saw it?

A. She was entering into it on the full force of run.

Q. And yet you have told us that you saw the two children leave the curb.

Mr. Gildea: No, I object.

Mr. Devlin: One moment. You object, Mr. Gil- 30
dea, but don't you interrupt me when I cross-examine the witness.

Mr. Gildea: I make an objection. That is not what the witness said.

The Court: You may complete your question, but don't answer, Mr. McHugh, until counsel has stated his objection.

Q. You have said you saw those children come from the left curb; isn't that right?

A. You mean, from the left side?

10 Mr. Gildea: Wait a minute. I don't think the witness said anything of that kind.

Mr. Devlin: I don't want to say what he said. We can go to the record. I don't want to say what he said.

Mr. Gildea: If you want to take time to read over the record, I will withdraw the objection.

20 Q. You have said in the record here that you saw those children come from your left-hand side.

Mr. Gildea: That is objected to. If it is in the record the witness does not need to say it again. Anyway, that is not a question; it is a statement.

Mr. Devlin: I want to cross-examine this witness.

The Court: I understood, Mr. Gildea, that you withdrew your objection to the question.

30 Mr. Gildea: I did to the first question but this is not a question; this is a statement. If counsel will ask a question ——

Mr. Devlin: I have asked a question.

Q. Didn't you say on cross-examination that you

saw these two children come from the left-hand curb?

A. Came from the left-hand curb?

Q. The left-hand curb. Isn't that right?

A. Yes.

Q. When you struck this child and put your brakes on you fell back on your seat, didn't you?

A. Well, that is what I did.

Q. Say yes or no.

A. Why, I just sat back when I seen the child under. 10

Q. And you said, "My God, what have I done?"

A. I don't know what I did say. I said something; "Oh, my God," or something like that.

Q. Do you remember testifying in this case before?

A. Yes, I remember it.

Q. Didn't you say on the trial before that you said, "My God, what have I done?" Didn't you?

A. Yes, something like that. Yes, that is what I said. 20

Q. Didn't you make that statement because as you were running your car down Clinton Avenue, you were not looking where you were going?

A. What?

Q. Didn't you make that statement, because you were not looking where you were going?

A. I was not looking where I was going?

Q. Yes.

A. No, I did not.

Q. What? 30

A. No.

Q. You did not?

A. No.

Q. Do you remember at the last trial of this case, page 93: "Q. What did you yell out? Did you say, 'Oh, my God, what have I done?'" "

A. Yes, that is right.

Q. (Continuing.) "A. I think that is what I did say when I seen the child struck." Is that right?

A. Yes.

Mr. Gildea: What page?

Mr. Devlin: Page 93.

10 Q. You did not ring your bell, did you?

A. I did not have time.

Q. Well, you did not ring it?

A. I did not ring it. I gave all my attention to the brakes when I seen myself in the pinch I was in.

Q. If you had been looking when you started at Olden Avenue, you would have seen and rung your bell, wouldn't you? Is that right?

A. I had been looking from the time I left Olden Avenue.

20 Q. And if you were looking then you did not see the child there; isn't that true?

A. I was looking and I did see the child coming right into the rail.

Q. If you had seen these children step off the curb on the left-hand side, would you have rung the bell?

A. Would I have rung the bell?

Q. Yes.

A. If I had time I would, but they were too close to me.

30 Q. They were too close to you?

A. They were too close to me at the time.

Q. If you had seen the children step off the curb would you have rung the bell?

A. If I had time I would have rung the bell.

Q. And the reason you did not see the children in time is because you were not looking?

A. They were too close to me. I seen the children as quick as anybody.

Q. You are familiar with East Trenton, aren't you?

A. Yes, sir.

Q. Did you see them when they stepped off the curb, the children—did you?

A. The girl was entering into the out bound rail.

Q. No. I did not ask you that question. Listen carefully to the question. Did you see the children when they stepped off the curb? 10

A. No, they had stepped off the curb. They were on the run. They were entering into the out bound rail.

Q. Between the curb and the building line there is the sidewalk; isn't there, on each side?

A. Yes.

Q. Isn't the duty of the motorman, and do you recognize it as your duty as a motorman, as you ride along the street, to watch for persons or children coming from the sidewalks? 20

A. Yes.

Q. That is true. By the way, will you tell me where that route extended; from where? Where did your route extend from that you were running at that time; East Trenton?

A. East Trenton.

Q. To where?

A. To the car barn.

Q. The car barn on Linden Street? 30

A. Yes.

Q. Do you know how many miles that is?

A. No, I do not.

Q. You do not know?

A. No, I do not.

Q. You have been running that route a number

of years, and you don't know how many miles that is?

A. No, I never inquired.

Q. Do you know what time you had to make from East Trenton down to the car barn?

A. I don't remember what time we had.

Q. How many years had you been a motorman on that route?

A. I had been on several routes.

10 Q. What?

A. I had been on several routes.

Q. On what route?

A. On that route? I could not state how long I was on it.

Q. You could not say?

A. No, I do not remember.

20 Q. Do you remember that on the first trial of this case, on page 85 of the record, that you said—you were asked a question, on page 85 of the record of the first trial: "Q. But this schedule, the schedule you were running on?" "A. I have forgotten, whatever it was, whether twenty-eight minutes or one hour and six minutes for the trip; I forget."

A. Why, I don't remember.

30 Q. Then on the next trial of the case you were asked this question, on page 89, line 4: "Are you able to tell us how many miles it is from Mulberry Street to Linden Street"—no, I withdraw that. On page 86, line 33, "Do you think you had to make that run in eighteen minutes that night from Mulberry Street to the barn?" And your answer was: "The running time was twenty-eight minutes." Do you remember that answer now?

A. No, I do not.

Q. (Reading.) "Q. Do you want to say that is true or untrue?" "A. I could not say just now; I don't remember."

- Q. Do you remember saying that at the last trial?
A. I don't remember.
- Q. You don't remember?
A. I don't recall.
- Q. Don't you think your time was 28 minutes from Mulberry Street to the car barn?
A. I could not say what the time was.
- Q. Weren't you speeding with the car to make up time?
A. No, I was not. I left on time. 10
- Q. But you had to go through Trenton, in the center of the city?
A. I left on time the same as always.
- Q. (Continuing.) Down Clinton Avenue, Perry, and Broad?
A. Yes.
- Q. Right down to the center.
A. I was running the car —
- Q. (Interrupting.) Was the fender on your car up or down? 20
A. What do you mean; up or down?
Q. Was the fender of your car up or down?
A. Well, it is set.
Q. What do you mean; set?
A. The fender is set there.
- Q. What?
A. The fender ought to be set.
Q. Was it set on this car?
A. Yes, the fender was set. 30
Q. Was it up or down?
A. It is set.
Q. Was it down to its usual length or up high?
A. It was in its working order.
Q. What do you call working order?
A. Well, when the trip drops—you hit the trip and it drops to the ground, to the rail.

Q. If your fender was all right, how did the child get under the fender?

A. She did not. She got under the outside rail when she went down. She was in the act of looking for the young one, she had left behind.

Q. You have heard the testimony that this child was found in between the rails with its right or left arm across the rail and your right wheel on the arm. Isn't that true? You heard that testimony?

10 A. Yes.

Q. Is that the way the child was found?

A. I could not say how the child was found.

Q. You could not say how the child was found?

A. I could not say how the child was found.

Q. If it was found that way, how did it get under your fender?

A. I could not see whether it was under the fender, or not.

Q. Your fender is in front of the wheel?

20 A. The fender is in front of the wheel, yes.

Q. Then if your fender was all right, how did the child get under it?

A. The child was on the outside of the drop, on the outside rail. She just made her way on the outside of the drop without coming in contact with the fender.

30 Q. Mr. McHugh, you have heard the witnesses testify that this child was found right between the rails with its head facing down, on its back, and your right wheel on its left arm right at the shoulder, with its arms out in this manner. (Illustrating.) If that is so, and that has been the testimony in this case, how do you explain how that child got under your fender if your fender was in its proper position?

A. The fender was in its proper position.

Q. Is that the best answer you have?

A. Yes.

Q. Are you still working for the company?

A. Yes, I am still working for the company.

Mr. Devlin: That is all.

Re-direct examination.

By Mr. Gildea:

Q. This fender you have been speaking about consists of two parts, does it not? 10

A. Yes, two parts; the trip and the drop.

Q. It is not like the old fashioned rope fender you let down and put up at the end of every run, is it?

A. No.

Q. And the front part of this fender is a gate, isn't it, that extends up and down under the front of the car? 20

A. Yes.

Q. So that when any object comes in touch with that gate, it throws the gate back, and that causes the fender to drop down to the rail. Is that right?

A. Yes, that is right.

Q. How high, if you know, was the gate of the fender above the rails?

A. I think it is half a foot over the rails.

Q. About half a foot?

A. About half a foot above the rails.

Q. Now, after you passed the fire house, how far did you travel with your car in half speed before you saw these children running across the street? Was it a short distance or a long distance? 30

A. After I passed the fire house? When I went by the fire house there was nobody in front of me and I had my mind on the car. I threwed the power

off going by the fire house which I generally do, and just as I put it on half speed, about ten feet in front of me runs those—I seen that little girl with the little boy right back of her, and the little girl entering the rail in full force of run.

Q. Just where was she when you first saw her?

A. She was entering the out bound rail.

Q. The northbound track?

A. Yes.

10 Q. The opposite track?

A. The opposite track.

Q. She was entering it when you first saw her?

A. When I first saw her.

Q. And the little boy was back of her?

A. Back of her, a little distance back.

Q. Can you give us any idea how fast in miles per hour your car was going when you saw the little girl entering the other track? How fast was your car going?

20 A. Well, I should say ten to twelve miles an hour.

Q. Ten to twelve miles an hour?

A. Ten to twelve miles an hour.

Q. And what do you mean when you say half speed, then? What did you do with your controller?

A. Well, that is one machine. I did not have a notch on the second machine. I turned it just after going by the fire house.

Q. You mean you had the controller half-way around?

30 A. I had the controller half-way around, yes.

Mr. Devlin: That is objected to as leading.

The Court: It is leading.

Mr. Devlin: I ask your Honor to instruct Mr. Gildea not to lead his witness.

Mr. Gildea: I will not object if your Honor will instruct Mr. Devlin to the same.

Mr. Devlin: I have been instructed and I have been cross-examining this witness, and I have a right to lead him.

Q. Mr. McHugh, does it make any difference in the speed of the trolley car how long the power has been on to a particular point? 10

A. Yes. It takes a little time before it comes to its full speed.

Q. Now, will a car that has the controller half-way around, go the same speed at the moment the controller is put there as it will subsequently?

A. No. It takes a little time longer.

Mr. Gildea: That is all.

Re-cross examination. 20

By Mr. Devlin:

Q. How long, then, will it take?

A. What is that?

Q. How long, then, will it take to get the speed you are talking about?

A. Well, I could not exactly say how long a time.

Q. A little louder.

A. I could not exactly say. 30

Q. The fact is that you don't know —

A. (Interrputing.) But it will not go as fast at first as it will after it goes a distance.

Q. How far will it have to go?

A. I don't know.

Q. You don't know?

A. No.

Q. And you are trying to impress the jury that you do know when you do not; isn't that right?

A. No, sir.

Mr. Gildea: I object.

The Court: The last question, I will overrule.

10

Q. You have told us you don't know the distance it will take to get the speed; isn't that right?

A. Yes.

Q. You don't know how long the controller has to be there before that speed has been attained, do you?

A. No.

Q. When you don't know, why don't you say so instead of guessing at it?

20 A. I don't know.

Mr. Gildea: I don't think that is fair, if your Honor please.

Mr. Devlin: I said the effect of his answer, Mr. Gildea, was to impress this Court and jury that he did know, and yet he admits he does not.

30 Mr. Gildea: That is a matter for argument, and not to be argued with the witness.

Mr. Devlin: I submit it is all a matter of argument.

The Court: I think the question was asked and answered.

Q. How many passengers did you have in the car at the time of the accident, do you know?

A. I could not say.

Q. Did you take their names?

Mr. Gildea: That is objected to as irrelevant.

A. I don't remember.

Mr. Gildea: Just a moment. Don't answer when I object. I don't see what bearing that has on the case. 10

The Court: I will sustain the objection.

Q. Can you tell us how many passengers were on the car?

A. No, I could not tell you.

Q. Did you take a list of them?

A. I don't remember.

Q. What? 20

A. I don't remember.

Q. You don't remember?

A. No, I do not.

Q. You have testified in this case—this is the third occasion; isn't that right?

A. Yes. I don't know whether I did take the name of somebody.

Q. Just a moment. You have testified three times in this case; this is your third time; isn't that right? 30

A. Yes.

Q. And haven't you informed yourself as to the facts surrounding the number of passengers in your car, the distance your car travelled and the time it took to stop it, in preparation for this trial; have you not?

A. No.

Q. You have not?

A. No, not that I know of.

Q. When you have an accident, are you instructed by your employers to take the names of persons on the car or who saw the accident?

Mr. Gildea: That is objected to as irrelevant.

The Court: I will sustain the objection.

10

Mr. Devlin: Exception.

The Court: You may have it.

(Exception noted.)

(Witness excused.)

20

EDWARD J. PEARTREE, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination.

By Mr. Gildea:

30 Q. Mr. Peartree, you are general manager of the defendant corporation?

A. I am.

Q. And you are familiar with the trolley car involved in this accident?

A. I am.

Q. How high above the ground is the apron or gate on it?

A. The gate is eight inches.

Q. Eight inches above the ground?

A. Yes.

Q. Now, what is the purpose of the gate on the front of the car?

A. The gate is directly in front of the apron of the fender. When the object hits it, it goes back and the apron drops; that is behind it; that is in front of the wheels under the platform.

Mr. Gildea: That is all.

10

Cross-examination.

By Mr. Devlin:

Q. And when that works, Mr. Peartree, what is the idea—what is the object of the gate?

A. Why, the gate is the trip. The apron is behind it. 20

Q. And what is the object of the trip; what is it supposed to do?

A. It is supposed to pick up anything that hits the gate.

Q. It is supposed to pick up anything that hits the gate?

A. It is supposed to pick up anything that hits the gate.

Q. Is the object of this fender or gate to prevent persons from being run over by the wheels? 30

A. If they fall or get hit in front of the car it is.

Q. If they fall or get hit in front of the car?

A. Yes.

Q. In other words, if a person is knocked down in front of the car in such a manner as to throw

them back on the track with their arms out, is that gate or fender supposed to catch them before they reach the wheels?

A. It does if they fall in front of it.

Q. I say, assuming the person falls in front of the car in the center of the track with their arms extended in this manner. (Illustrating.) Is it the object of your fender or gate to catch them and lift them up?

10 A. Yes, sir. If they fall on the side it does not because there is a clearance there. They go under the apron and the gate.

Q. The testimony in this case is that this child was between the rails of this track.

A. No, it was not. That is not the testimony. She was on the rail is the testimony I heard. There was no testimony I heard that she was between the rails.

Q. One moment. Don't argue.

20 A. I won't, but you said it was.

Q. The facts in this case were testified to; this child was in the tracks with its arms out, with the left arm under the wheel and the head facing toward town, and the feet the other way. If that child fell in that position, would your gate work?

A. Well, if she did, yes, if she fell in that position, but there is nothing to show me she did.

Q. Now, Mr. Peartree, the track from Olden Avenue on Clinton is fairly straight, isn't it?

30 A. Yes.

Mr. Gildea: That is objected to as not proper cross-examination. I called the witness to testify about fenders, not tracks.

Mr. Devlin: It seems to me as he is manager of the company I am not limited in my questions.

Mr. Gildea: He is not a party to the suit. He is limited on cross-examination.

Mr. Devlin: I will make him my own witness for that.

Mr. Gildea: Then I object to counsel making him his own witness until I rest.

Mr. Devlin: Well, if he is going to object, let it go. 10

Re-direct examination.

By Mr. Gildea:

Q. If the child or some other object on the track is lying flat and is less than eight inches; that is, eight inches above the ground, would it strike the gate, or wouldn't it? 20

A. No, it would not. It would go over it.

Q. And if the gate went over it, the fender would not work, would it?

A. No, sir.

Q. Is there any reason why these gates could not be made lower?

A. The obstructions along the highway. They have been approved by the Commission. They are not the old fashioned kind; they are later, improved fenders used by all street railways. They are used 30 all over the country.

Q. And is eight inches as low as it is practicable to have them?

A. Yes.

Re-cross examination.

By Mr. Devlin:

Q. Then your gates are no good for anything less than eight inches thick?

A. Who said so?

Q. I understood you to say that.

A. I did not say so.

10 Q. I mean, if anything is less than eight inches

A. (Interrupting.) I did not say they were no good.

Q. (Continuing.) That will not catch anything less than eight inches?

A. No; it has to be eight inches to trip the gate.

Q. Then, so far as safety is concerned this gate only protects things or persons eight inches thick and over?

20 A. Yes. The law says to use them.

Q. I am not talking about the law, but I am asking the plain question. Answer yes or no.

A. I said, "No." I answered that question. Less than eight inches there is no contact.

Mr. Devlin: That is all.

Mr. Gildea: We rest.

Mr. Gildea: If the Court please, I move for a direction of the verdict in favor of the defendant upon the same grounds as stated in my motion for a non-suit. I move for a direction of the verdict in favor of the defendant and against the plaintiffs, upon the ground that the evidence in the case has not disclosed any negligence upon the part of the motorman of the trolley car and that in the absence of any evidence of negligence upon his part or any other evidence of negligence upon the part of the company, your Honor should direct a verdict in favor of the defendant. I don't think it is necessary for me to state what the evidence discloses; your Honor has heard it all, and I think the only thing I need state for the ground of the motion is that there is no evidence of negligence upon the part of the defendant. For that reason I move for a direction of the verdict in favor of the defendant. 10

The Court: The motion will be denied. 20

Mr. Gildea: May I have an exception?

The Court: Yes, you may have an exception.

(Exception noted.)

Mr. Gildea: I would like to have an opening from counsel.

Mr. Devlin: Does the Court hold to that? 30

The Court: Counsel has asked for an opening.

Mr. Devlin: I want it distinctly understood before I make this opening that I shall have the closing.

The Court: You shall have that right. Before you begin the summation, I would like for counsel on both sides, if you have requests to charge, to hand them in so that the Court may have an opportunity to go over those requests before being called on to charge them.

10 Mr. Gildea: Your Honor, I have not had time to prepare any. I know that is no excuse. I ought to have taken time to do it.

The Court: If you expect to present anything in the way of requests to charge, I would like to have them.

Mr. Gildea: I haven't any.

The Court: Mr. Devlin, have you any?

Mr. Devlin: I haven't any.

20 The Court: I understand that neither side will present requests to charge. If you want more time to present, I will adjourn the case. I am not going to take requests to charge after I have charged the jury as I have done on previous occasions in this case. I am going to give you ample time to present your requests. If you want to prepare requests to charge you may do so and we will take an adjournment at this time and come in tomorrow.

30 Mr. Gildea: Well, I will not present any, your Honor. I would rather finish today.

(Counsel for the plaintiffs opens to the jury.)

(Counsel for the defendant sums up to the jury.)

(Counsel for the plaintiffs sums up to the jury.)

CHARGE OF THE COURT TO THE JURY.

The Court: Gentlemen of the jury: The issues you are called upon to determine at this time by your verdict are two actions, or, rather, one action brought by Martha Lambert by her next friend, Louis Lambert, and by Louis Lambert, individually, for damages which it is claimed were sustained by reason of the child, Martha Lambert, having been struck and injured by a trolley car owned and operated by the defendant, the Trenton & Mercer County Traction Corporation. The basis of this action is the alleged negligence on the part of the operator of this trolley car who was the agent or servant of the defendant corporation. 10

Negligence may be briefly defined as the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing of what such a reasonable and prudent person would not have done under similar circumstances. 20

Before there can be any recovery by either the father or by the child in this case, it must be established by a preponderance of the evidence that the defendant by its agent or conductor, the operator of this car, was negligent. If such negligence does not appear in this case and is not established by evidence sufficient to convince you of such negligence, then there should be a verdict of no cause of action, notwithstanding the frightful injuries that this child sustained, and the unhappy position in which she finds herself not only today but for the rest of her life. If that situation was brought about without the fault or negligence of the defendant 30

then neither she nor her father are entitled to recover.

If, however, after a careful consideration of all the evidence in the case, such negligence does appear to your satisfaction, then both the father, as the next friend for the child, and in his individual capacity are entitled to a verdict at your hands for the injuries sustained.

The occurrence out of which these actions grow
10 is one which happened more than five years ago, on the 18th day of March—more than six years ago, in fact, 1922. Mr. Patrick McHugh, a witness for the defendant who was on the stand here today, on that night was operating a trolley car owned by the defendant corporation. At around 8 o'clock on that evening, he left the terminus of the road at North Clinton and Mulberry Streets to go into the center of the city. First, I will refer to the testimony of Mr. and Mrs. Wert, who stated they lived
20 on North Clenton Avenue in the block east or north of Olden Avenue; that on the night in question, they boarded the trolley car operated by Mr. McHugh at the corner of Sherman Avenue and North Clinton Avenue. Mr. Wert testified that he and his wife seated themselves on the left-hand side of the trolley car on the first seat back of the conductor. Mr. Wert testified that the car proceeded along North Clinton Avenue as far as Olden Avenue where it stopped, then started again, and just after it started
30 ed from Olden Avenue, if my recollection of the testimony is correct, another trolley passed going in the opposite direction toward the Mulberry Street terminus of the trolley route. Within a very short time after that car had passed, Mr. Wert testified, as I recall his words: "Just after we had passed Olden Avenue, the first thing I heard was the brakes jammed on and heard a scream, and heard the

motorman say, 'Oh, my God, what have I done?' " Mr. Wert testified he did not see anyone in the street or in front of the car until after he had alighted after the car had stopped which was within a very short distance; I think, from eight to ten feet was his estimate, from the time the brakes were applied, until he alighted from the car, when he saw this little girl lying in the street upon her back with her head facing toward Trenton and her left arm under the front right wheel of the trolley car. He along with others assisted in taking the child from under the car and she was then sent to McKinley Hospital. 10

Mrs. Wert's testimony is quite similar to that of her husband, except that she says she was next to the window on the left-hand side of the trolley car, and looking out of the window, she saw a child, a boy, step down from the curb on the left-hand side of the street and start across the street in front of, or in the direction of the trolley car. She did not see any other child. Her testimony was to the effect that the car stopped and she saw this child being taken from under the trolley wheels. 20

The child was taken to the hospital, where an operation was performed by Dr. Siebert, to which he has testified, and in that operation he removed the left arm at the shoulder joint.

I think the Doctor's testimony was that when he first saw the child, there was only about three or four inches of the arm then attached to the shoulder, and that he found it necessary to amputate the arm at the socket. 30

Other witnesses who have testified in this case were Mr. Culliton and Mr. Caulfield, and the operator of the motor car, Patrick McHugh.

Mr. McHugh's testimony was, as I recall it, that he had stopped his car at the corner of Olden Avenue

and Clinton; that some passengers got on the car at that point; that he collected the fares from those passengers and then started his car in the direction of the center of town; that he threw off the power as he passed the fire engine house on North Clinton Avenue and after passing that, he turned on the controller or lever to half speed and started in the direction of the center of town. He says that as he was proceeding in that direction at a speed which
10 he estimates from ten to twelve miles an hour, he saw the little girl just as she entered the out bound track, and only a short distance in front; that he applied the brakes and brought the car to a standstill or stop.

All of the witnesses testified that there was no signal of a bell or other alarm given. Mr. McHugh testified that he had no time after he saw the child to give any signal; what he did do was to apply the brakes and stop the car as quickly as possible.

20 Now, as I have already said, the basis or foundation of this suit is negligence, and if after a careful consideration of all the evidence—and you are the sole judges of the credit to be given to the testimony of the various witnesses—you find that the operator of this car was negligent, then you will proceed to the second phase of the case, namely, the damages or compensation to be given to the plaintiffs in this case. Of course, when I say that, I am repeating what I have previously said; that if you find there
30 was no negligence, your verdict must be for the defendant, but should you find that there was negligence, then it will be for you to determine the amount in dollars and cents which, in your judgment, will compensate the girl for the pain and suffering which she has endured and which she may still be called upon to endure, for the inconvenience that she has and will continue to suffer by reason of

the loss of this arm, for any decrease in her earning powers, and for such loss as in your judgment you feel she has sustained by reason of this accident.

The father, of course, would be entitled to recover for any monies which he may have spent or may hereafter be called upon to spend for this child, occasioned by the injuries she has received, as well as for loss of earnings which he might suffer until such time as the girl would become emancipated or reach the age of twenty-one years. 10

In case you find that the plaintiffs are entitled to a verdict at your hands, then any verdicts given for the future losses sustained should be represented at their present value and not at their future value.

I think I have nothing else to charge to the jury at this time, and you will retire and give this case your very careful consideration and return a verdict based solely upon the evidence in the case.

20

(The following occurred out of the hearing of the jury):

Mr. Devlin: I take exception to that part of your Honor's charge, in the opening of the charge, where your Honor said that we had to convince them of the negligence; "establish by sufficient evidence to convince you."

The Court: What is the objection?

30

Mr. Devlin: It is because in a civil case you do not have to convince anybody but only preponderate.

The Court: I will correct that, if that is agreeable to both sides.

Mr. Gildea: I will take my chances.

Mr. Devlin: I will take an exception.

10 Mr. Gildea: I except upon the ground that your Honor said to the jury that the defendant would be liable if there was evidence of negligence without stating that the negligence, to make the defendant liable, would have to be the proximate cause of the injury.

The Court: Well, I will amplify that.

Mr. Gildea: I might except too on the ground that your Honor said in one place that the defendant was liable if negligence appeared without saying it must be the negligence of the defendant which must be the cause of the injury.

20 The Court: Members of the jury: I want to further state that wherever in my charge—I think perhaps it may be in two places—I used the expression that if there was evidence of negligence on the part of the defendant the plaintiffs would be entitled to recover—Is that the point, Mr. Gildea?

Mr. Gildea: If the jury found there was negligence.

30 The Court: That if the jury found there was evidence of negligence on the part of the operator of the trolley car, the plaintiffs would be entitled to recover—I want to amplify that by adding that if the negligence was the proximate cause of the injury, then the plaintiffs would be entitled to recover. Of course, if the negligence was not the proximate

cause of the injury it would be different and they would not be entitled to recover. Does that meet your objection?

Mr. Gildea: Yes. Of course, your Honor made it clear that means, if they find negligence.

The Court: That means if you find negligence and that negligence if found must be the proximate cause of the injury before the plaintiffs can recover. 10

Is there anything further from either counsel now?

All right, you may retire.

(The jury retired.)

NOTICE OF APPEAL.

MERCER COUNTY COURT OF COMMON
PLEAS.

10 MARTHA LAMBERT, by her
next friend, LOUIS LAM-
BERT, and LOUIS LAM-
BERT, individually,

Plaintiffs,

v.

TRENTON AND MERCER
COUNTY TRACTION COR-
PORATION,

Defendant.

Action at Law.
Notice of Appeal.

20

To Martin P. Devlin, Esq., attorney for plaintiffs:

Take notice that the defendant appeals to the New Jersey Supreme Court from the whole of the judgments entered in this cause, upon the following grounds:

1. The trial Court erred in refusing to grant a
30 non-suit at the close of the plaintiffs' case.

2. The trial Court erred in refusing to direct a verdict in favor of the defendant and against the plaintiffs after all parties had introduced all their evidence.

EDWARD L. KATZENBACH,
Attorney for Defendant.

[ENDORSED.]

Due service of the within notice is hereby acknowledged this 31 day of October, 1928.

Martin P. Devlin,
Attorney for Plaintiffs.

10

OPINION.

(Filed February 28, 1929.)

NEW JERSEY SUPREME COURT

No. 41. JANUARY TERM, 1929.

20

MARTHA LAMBERT, by next
friend, and LOUIS LAM-
BERT,

Plaintiffs-Respondents,

v.

TRENTON & MERCER TRAC-
TION CORPORATION,

Defendant-Appellant.

30

Argued January 18, 1929; decided February 28, 1929.

Appeal from Mercer County Common Pleas Court.

Before JUSTICES MINTURN, BLACK and CAMPBELL.

For appellant, EDWARD L. KATZENBACH.

For respondents, MARTIN P. DEVLIN.

10 *Per Curiam:*

There are two grounds of appeal presented and argued:

1. That the trial Court erred in refusing to non-suit, and

2. That the trial Court erred in refusing to direct a verdict in favor of the defendant below.

20 We are of the opinion that there was no error in either ruling of the trial Court.

At the time the motion for non-suit was made the proofs seem to have been that a trolley car of the appellant, operated by its motorman, Patrick McHugh, on March 18, 1922, was proceeding along North Clinton Avenue toward the City of Trenton; that the car stopped at Olden Avenue and then proceeded on its way and shortly after came to a sudden stop; the child, Martha Lambert, was found
30 under the right-hand forward end of the car; as the car was brought to a stop the motorman is said to have exclaimed, "Oh, my God, what have I done." The girl had evidently accompanied her brother upon an errand that took them to the farther or left side of North Clinton Avenue as measured by the direction in which the trolley car was proceeding.

A passenger on the car testified that she saw the boy as he left, or just after he left, the curb on the left-hand side, running toward the right-hand side of the street. There was no testimony in the plaintiff-respondent's case respecting the child, Martha, except that she was found under the car when it was suddenly stopped. Her left arm was so injured that it was necessary to amputate it at the shoulder.

Upon the defendant's case the motorman testified that he saw the girl about ten or twelve feet ahead of his car, running toward his car, and saw her just as she was entering on the outbound track—that being the track to his left—that immediately upon seeing the child he threw his power into reverse and applied the emergency brake. 10

The situation, thus developed, presents two well-settled principles, so firmly settled that neither requires any citation of authorities.

The first is that if a motion to non-suit is refused and the testimony at such time presents no proofs upon which the plaintiff is entitled to recover and such facts so lacking are subsequently supplied, such refusal to non-suit is not reversible error. 20

The second is that in a case of this character, if there are facts and circumstances from which negligence may be drawn and inferred and upon which the conclusions to be drawn by reasonable persons may differ, then a case is presented for a jury to pass upon and not the trial Judge.

Here such a situation exists, we think. At least two factual questions are presented, first, in the exercise of reasonable care, should the motorman, under the circumstances, have observed the child, Martha, before she reached the position in which he says he first saw her and if so, then by the exercise of reasonable care could he have brought his car 30

under such control or stopped it so that she would not have been injured and, second, assuming that, by the exercise of reasonable care, he would not have observed the child before he says he did, then under the circumstances did he use such reasonable care as should have been used to avoid injuring her.

Whether or not the proofs are of such weight, and so convincing, as would warrant the findings as reflected by the verdicts is beside the question. The
10 sole question is: At the time the proofs were closed was there any evidence upon the question of negligence to go to the jury? Unquestionably there was and that being so any error in refusing to non-suit was cured and it was not error to submit the cause to the jury, as was done.

The judgments under review are therefore affirmed, with costs.

20

30

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

| | | | |
|--|---|-------------------------------------|----|
| MARTHA LAMBERT, by her next friend, LOUIS LAM- BERT, and LOUIS LAM- BERT, individually, <i>Plaintiffs-Respondents,</i> | } | Action at Law. Notice of Appeal. | 10 |
| v. | | | |
| TRENTON & MERCER TRAC- TION CORPORATION, <i>Defendant-Appellant.</i> | } | | |

To *Martin P. Devlin, Esq., attorney for plaintiffs-respondents:* 20

Take notice, that the defendant-appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the judgments entered in the above entitled cause on the following ground:

The Supreme Court erred in affirming the judgments entered in said cause.

Respectfully yours, 30

EDWARD L. KATZENBACH,

Attorney for Defendant-Appellant.

Dated March 20, 1929.

[ENDORSED.]

Service of the within notice of appeal is hereby acknowledged this 21st day of March, 1929.

Martin P. Devlin,
Attorney for Plaintiffs-Respondents.

10

20

30

91

New Jersey Court of Errors and Appeals

MARTHA LAMBERT, by her
next friend, Louis Lambert, and
LOUIS LAMBERT, individ-
ually,

Plaintiffs-Respondents,

vs.

TRENTON AND MERCER
COUNTY TRACTION
CORPORATION,

Defendant-Appellant.

ACTION AT LAW
ON APPEAL

BRIEF OF DEFENDANT-APPELLANT

This is an appeal from an affirmance by the Supreme Court of judgments totaling \$25,000.00 recovered by the plaintiffs in the Mercer County Court of Common Pleas. The plaintiff Martha Lambert sued for damages for the loss of her left arm, and her father, Louis Lambert, brought suit for the medical expenses incurred in caring for his injured daughter and the loss of her services in the future. The jury gave a verdict of \$20,000.00 for the child and one of \$5,000.00 to the father.

GROUND OF APPEAL

The only ground of appeal is that the evidence did not warrant the submission of the case to the jury. Exceptions were duly taken to the refusal of the trial Court to grant a non-suit (p. 62), and to the Court's refusal to direct a verdict for the defendant (p. 91).

FACTS

Martha Lambert, then a child slightly less than five years of age (p. 14), was struck by a trolley car belonging to the defendant on North Clinton Avenue, in Trenton, at a point about half way between Webster Street and Olden Avenue (p. 54), on March 18, 1922, at about eight o'clock in the evening (p. 27). She lived on the west side of North Clinton Avenue (p. 13) and had gone across the street with her six-year-old brother to get her father's clothes which were at a laundry (p. 14). It was, of course, dark at the time (p. 27). On the way home the little girl ran out into the street ahead of her brother and directly in the path of a south-bound trolley, running on the right hand side of the street (pp. 64, 71). She ran in a westerly direction toward her home on the west side of the street.

The plaintiffs did not call to the witness stand at this trial any person who saw the child struck or anyone who saw the child before the accident. Martha Lambert did not testify, nor did her brother who was with her.

The mother and father of the injured child, both of whom testified, did not see the accident and were not at the place of the accident when it occurred. Charles H. Wert and his wife, who were called by the plaintiffs as witnesses, were passengers upon the trolley car, but did not see the little girl before the accident (pp. 29, 34). Mrs. Wert saw the boy, but did not see the little girl (p. 34).

Mr. Wert testified as follows: He was sitting in the first seat on the left side of the trolley. His wife sat in the same seat and next to the window. There was no one standing between them and the motor-

man, and nobody but the motorman standing in the front of the car (p. 26). The stores along the street were "lit up." The accident happened after dark, about eight o'clock, and he did not hear any signals between the time the car left Olden Avenue, the first stop above the place of the accident, and the place of the accident (p. 27). The first thing that attracted his attention was the application of the brakes and a scream as the car jolted and stopped. He heard the motorman say, "Oh, my God, what have I done?" as he sat down. He then got out of the car and saw the little girl lying on the track with her arm under the right front wheel (p. 28). He assisted in removing the child and stated that she was on the rail nearest the west curb. He said the speed of the trolley car was, he would judge, between twelve and eighteen miles an hour. He did not see the child at all before the accident (p. 29). The trolley went something like eight or ten feet after the brakes were applied (p. 30). He could see the street directly in front of the car before the accident and it was clear. The motorman's "control" was to the left. He was four or five feet behind the motorman. Just as the car in question crossed Olden Avenue it passed another car going in the opposite direction (p. 31).

Mrs. Wert testified that she was sitting next to the window on the front seat on the left side of the trolley car (p. 32). No one was standing between her and the motorman. There were arc lights on the street corners. She did not remember whether the arc lights were lit or not. Nearly all the buildings along the street contained stores (p. 33). They were all lit up. Near Olden Avenue a trolley passed

going in the other direction. She could not say whether there were any other vehicles along the street or not. There was nothing to be seen on the left side of the street. She saw the Lambert boy after he left the easterly curb, and she saw him run directly toward the front of the car she was on. She did not see the little girl (p. 34). Then she felt a jolt and the car stopped, and she thought the little boy had been hit. She heard the motorman say, "My God, what have I done?" Before that time she did not hear the gong on the trolley. She said she judged that the trolley car was going about fifteen miles an hour. She saw someone take a small girl from under the car, and learned afterward that it was Martha Lambert (p. 35). She thought it was about twenty or twenty-two feet from where she sat to the left curb line of the street (p. 36). The little boy had left the curb when she first saw him and he was running toward the track on which the car was traveling. He ran almost straight across the street (p. 37). When he got almost to the car he reached for something. She could not see him when he got up close to the car. She did not see the little girl at all. After she felt the brakes applied she said the car did not go very far, about ten feet, she thought. When the brakes were applied she was thrown up against an iron crossbar in front of the seat in which she was sitting. She really could not tell how fast the car was going; she just guessed (p. 38). At the time of the accident she could not judge speed because she did not drive an automobile. She and her husband have been acquainted with the Lamberts for about fourteen years (p. 39). When she first saw the little boy he was about twenty feet

from the car (p. 41). The twenty feet between the car and the boy was made up largely by the distance from the side of the trolley to the point near the left curb where she first saw him (p. 42).

Officer Caulfield testified that when he reached the place of the accident the little girl had been taken from under the car. He also testified concerning the street lights (p. 45), and that the stores were lit up. He saw blood marks on the rail next to the curb on the track which runs toward the city. The accident happened opposite 540 North Clinton Avenue (p. 46), or about two hundred or two hundred twenty-five feet from Webster Street. He did not recall any automobiles parked near the place of the accident (p. 47).

Thomas A. Culliton, the last witness called by the plaintiffs, did not see the accident. He was walking north and had passed the place of the accident before it occurred (p. 49). Just before the accident a trolley car passed him. It seemed to be going pretty fast. In fact, two cars passed him, one going west and one going east (by east it is believed the witness meant north). He did not say which car was going "pretty fast." After the last car passed him he heard a scream and ran back to where the trolley car was (p. 50). The little girl was on the track under the car; one of her arms was caught under the front wheel. He did not know which wheel (p. 51). He testified concerning the street lights. He said there was a light sixty or seventy-five feet above the place of the accident, or nearer to Olden Avenue (p. 53). The accident happened about the center of the block between Webster Street and Olden Avenue. He walked from twenty to twenty-five feet after the trol-

ley car passed him before he heard the noise of the accident. He then turned around and walked fifty feet back to the place where the accident occurred (p. 54). He said the trolley traveling west was traveling considerably faster than he was walking. He was asked what he meant by a good rate of speed and he said he would not want to say off-hand because he was not paying particular attention to it (p. 55).

The foregoing was all of the evidence offered by the plaintiffs, and when that testimony had been offered the defendant moved for a non-suit. The motion was denied and an exception granted (p. 62).

The defendant called to the witness stand the motorman of the trolley car in question. He testified that his last stop before the accident was Olden Avenue (p. 63). He picked up passengers there, and after he had passed the fire house on North Clinton Avenue, which is below Olden Avenue, about ten or twelve feet in front of him he saw a little girl, followed by a little boy, run directly toward his car, passing over the outbound or northbound track and directly into his car. (The little boy stopped before he reached the southbound track.) When he saw the little girl he put on the reverse as quickly as he possibly could and applied the emergency brake. When he first saw her she was ten or twelve feet ahead of him, running very fast. The little boy was farther back coming from the curb. He was running. The little girl ran directly in front of the car and reached the right rail, when she went down under the car; one of the wheels caught her. He did everything possible and brought the car to a stop as quickly as he could. The car was in good condition and the

weather was dry (p. 64). He had been a motorman for the defendant company since 1917 (p. 65). The car he was operating was a one-man, single truck car (p. 66). The car had a bell on it. He had every fare collected (p. 67) before he started the car. He could not say about the arc lights. It was after dark and the lights on his car were lit (p. 68). The stores along the street were usually lit up on Saturday night. He did not notice them on the night in question. The lights on his car enabled him to see the track ahead. He was surrounded by glass, and he stood at the front of the car. The controller was on the left hand side of the car in front (p. 69). He gave the distance between the rails, and between the tracks, and between the tracks and the curb (p. 70). The street was about thirty-four feet wide. He did not have time to stop the car in time to avoid the accident (p. 71). The child who was struck crossed the street from the left hand side (p. 72). The child was traveling almost as fast as the trolley. When he saw her she was entering the outbound or northbound track (p. 73). After he had stopped his car he said, "My God, what have I done?" or something like that. He did not say that because he felt that he had not been paying attention (p. 75). He did not have time to ring the bell, but gave all of his attention to stopping the car (p. 76). He was looking and did see the children crossing the street. He would have rung the bell if he had had time, but the children were too close (p. 76). He saw the children as quickly as anybody could have seen them, and when he first saw the girl she was entering the outbound rail. (By outbound rail the witness meant northbound track, the track which runs away from

the center of the city.) He did not know what the length of his run was in miles (p. 77). He did not recall the running time, but he had left on time and was not in a hurry. The fender on his car was in working order and in proper position (p. 79). He explained the working of the fender (pp. 80, 81). His trolley car was traveling about ten or twelve miles an hour when he saw the little girl enter the other track. He explained what he meant by half speed (p. 82). He said when the controller of the trolley is turned half way round the car does not immediately get up the speed that it will subsequently make when the controller has been in that position for some time. He could not tell exactly how far the car would have to go to get up its maximum speed at half power (p. 83).

Edward J. Peartree, General Manager of the Traction Company, explained the working of the fender on the car in question, and stated that the gate of the fender, which an object must strike to make the fender work, is eight inches above the ground (p. 87). Unless an object on the track is at least eight inches above the ground the fender will not pick it up. He said this is the lowest fender which is practicable on trolley cars (p. 89).

At the close of the testimony the defendant moved for the direction of a verdict in its favor. The motion was denied and an exception allowed (p. 91).

While this is the second time that this case has been in this Court for review, the present record is entirely different from the former record, for the reason that at the previous trial the plaintiffs produced as a witness one of their friends, whose name was Bennett, and who claimed to have been on North

Clinton Avenue at the time of the accident. He did not testify at the last trial. It was perfectly obvious at the former trial that his testimony was false, but with his testimony in the case a question for the jury probably was presented. In the absence of Bennett at the last trial no witness testified to having seen the injured child before the accident except the motorman.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A NON-SUIT OR DIRECT A VERDICT FOR THE DEFENDANT.

At the trial the defendant contended that there was no evidence which raised a jury question as to its negligence. The plaintiffs' contention was that they were entitled to go to the jury upon four phases of the case, namely, the speed of the trolley car, the motorman's exclamation at the time of the accident, the question of whether or not the motorman saw the child crossing the street as soon as he should have seen her, and the matter of ringing the bell upon the trolley car.

The Supreme Court in its opinion said that the case presented two questions for the jury: First, should the motorman have seen the child before she reached the position in which he says he first saw her, and, if so, could he have brought his car to a stop sooner, and second, if he did see the child as soon as he could have seen her in the exercise of reasonable care, did he thereafter use reasonable care to avoid injuring her? It seems to us that the testimony does not show negligence in either of these respects.

With reference to the speed of the car, the uncon-

tradicted testimony in the case was that the trolley car was brought to a stop in not more than eight or ten feet. There was no evidence that the car was exceeding the legal speed of fifteen miles an hour. (P. L. 1915, p. 293.) On witness (Mrs. Wert), who admitted that she was guessing, put the speed at about fifteen miles an hour, and according to another witness it was anywhere between twelve and eighteen miles an hour, which means, we believe, that so far as the witness (Mr. Wert) could tell, the car might have been going 12, 13, 14, 15, 16, 17 or 18 miles an hour, and he could not tell which. The burden of proof being upon the plaintiffs, this was not proof of illegal or negligent speed. The witness Culliton said that two trolley cars passed him, one going in each direction. One car was going pretty fast, but he did not say which car (p. 50). He said he was not paying particular attention to the speed of the cars (p. 55). When the car came to a stop the front right wheel rested upon the little girl's arm, but had not passed completely over it (p. 29), which showed that a quick stop had been made and clearly indicates that the car was not going fast. The motor-man's testimony with reference to the speed was that he put the power half way on when he got by the fire house, and just as he put on half speed he saw the little girl (pp. 81, 82). He was then going about ten to twelve miles an hour. He made it clear that the car does not obtain its maximum half speed the moment the power is turned half way on (pp. 72, 83). The power was off as his car passed the fire house (pp. 81, 82).

It is respectfully submitted that this testimony as to the speed of the trolley, at a point midway between

two intersecting streets, does not show any negligence upon the part of the motorman or of the Company.

In the argument upon the motion for a non-suit, plaintiffs' counsel contended, and he still contends, that because the motorman of the trolley car exclaimed, "My God, what have I done?" this raised a question for the jury. The trial Court apparently agreed with him. The contention that the statement of the motorman was a confession or admission of negligence seems to us hardly worthy of consideration. If it meant anything, it meant that the operator of the trolley car had sufficient imagination to appreciate the horror of a situation where a child is caught beneath a large, steel trolley car and probably badly mangled, and that he regretted that his trolley car had injured the child. Its only relevancy was to show that it was the trolley car driven by this particular motorman that struck the child. Plaintiffs' counsel contends that the statement has to do with the conduct of the motorman immediately prior to the occurrence, and that it indicates that he had done something that he should not have done, or omitted something that he should have done. Construing it to mean, "What have I done to cause this accident?" would not make it a confession of negligence, but a self-searching inquiry as to whether or not he had done anything improper. It seems reasonable to us, in view of the situation then confronting the motorman, to say that his exclamation merely expressed the horror which he felt because of the fact that this little child was fastened under his trolley car. Certainly in no view of his statement can it be said that it is an admission of negligence. The very theory

upon which statements of this kind are admitted is that they are spontaneous and made before there has been an opportunity to weigh the circumstances and form a reasoned judgment. As has been said before, the statement was relevant because it was evidence that it was this trolley car that struck the child. It had no other bearing upon the issues in the case.

There was no evidence that the motorman was not attending to his duty of operating the trolley car; there was no evidence that he was not looking in the proper direction, or that he was doing anything that he should not have done at the time. The fact that he brought the car to such a quick stop (within eight or ten feet, according to the plaintiffs' witnesses, and there was no contradiction of this) showed that he was paying strict attention to his duty.

Plaintiffs' counsel contends that there is significance in the fact that the injured child reached the last rail of the track before being run over. This is easily explained by the fact that the girl continued running fast, and while the trolley was traveling the eight or ten feet which it traveled after the brakes were applied, its speed was gradually decreasing.

The Supreme Court took the view that there was a question for the jury as to whether or not the motorman should have seen the child sooner than he did see her. He said he saw her coming from the left curb as she was about to enter the track to his left, which track ran parallel with the track upon which his car was traveling. She was then ten or twelve feet ahead of his car and was running fast. This accident happened at night in the middle of a block. There was no evidence of any street light at the exact point of the accident, which was about two miles

from the center of the city. There was nothing to show that the motorman should have seen the child before he saw her by the light from the car. She was but nine feet from the curb on the far side of the street to his left when he saw her, and she was to his left and but ten or twelve feet ahead of his car, running across the street.

In the case of *Boyer v. Great Atlantic, etc., Company*, 99 N. J. L. 451, this Court held that a nonsuit should have been granted in a case where a boy jumped from the back of a trolley car upon which he was stealing a ride into the path of a horse-drawn truck going in the opposite direction. The Court said in that case:

“In driving upon a highway a driver’s duty is to make observations as to possible or probable dangers from all directions. In so doing, it necessarily follows that a driver cannot at all times direct his attention to a single object. There must be a time when his attention will be drawn, at least momentarily, from one object to another.”

It is respectfully submitted that the fact that the motorman saw the little girl as she ran swiftly across the street, at night, showed that he was looking ahead and paying attention to his duties.

Plaintiffs’ counsel also contends that the fact that the bell upon the trolley car was not rung is evidence of negligence. We think that what was said in the case of *Graham v. Consolidated Traction Company*, 64 N. J. L. 10, 13, is peculiarly applicable to this case. That was a suit against a traction company for the death of a boy who was playing upon a sidewalk and dashed into the street and was struck by a trolley car. It is true that the case was in the Su-

preme Court on a rule to show cause why the verdict should not be set aside, but what that Court said is pertinent here, as will appear from the following quotation:

“The clear evidence is that the boys, in their play on the sidewalk, gave no indication that they intended to cross the track. No signal nor warning as to them would have been appropriate or required. When they rushed from the sidewalk and ran directly in front of the car, the motorman made every effort to arrest the motion of the car. The car was visible and visibly moving; the signal by the gong would have been of no avail. From the evidence, an inference of failure of duty in this respect could not reasonably be drawn.”

The motorman in the present case testified that he did not ring the bell because he did not have time to do so. The child was running directly toward the path of his car and only ten or twelve feet ahead of it (p. 64). He saw that an accident was inevitable unless he could bring the car to a stop in time to avoid an accident, and this is what he tried to do (p. 76). It is clear from his testimony that he had no opportunity to ring the bell. He was confronted with an emergency, not created by himself, but created by the child, and in that emergency he used the fraction of a second at his disposal in an effort to stop the car, instinctively realizing that a warning could do no good, but that checking the car might enable the child to get across. She did get almost across the track.

In the case of *North Hudson County Railway Company v. Flanagan*, 57 N. J. L. 696, decided by this Court, the plaintiff, a boy, nine years of age, was playing a game of ball in the street through

which a horse railway was operated. The street ran north and south, and the plaintiff and his companions were playing upon the easterly side. As a car of the defendant was approaching from the south, the plaintiff started to run across the street in front of it for the purpose of avoiding being hit by the ball which was about to be thrown at him by one of the players and was run down. The Court of Errors and Appeals said:

“If it were necessary for us to decide this point (whether or not the plaintiff was guilty of contributory negligence) in order to dispose of this case, we should be inclined to hold that the plaintiff was guilty of contributory negligence in acting as he did. But it is not necessary to put our decision upon this ground, for the reason that we find nothing whatever in the evidence to justify the conclusion that the defendant was negligent in the management of its car. It was moving at an ordinary rate of speed as it approached the spot where the accident occurred, and the driver appears to have had both his horses and his car under control.”

It was held that a non-suit should have been granted.

We believe that the well settled rules of law dealing with negligence and proof of negligence entitled the defendant to a non-suit, and, having been denied that, to the direction of a verdict in its favor.

The mere happening of an accident without proof of facts from which the violation of a duty due plaintiff by defendant may be legitimately inferred does not constitute negligence.

Kingsley v. D., L. & W. R. Co., 81 N. J. L. 536.

In an action for negligence, the trial judge is not justified in leaving the case to the jury where the evidence is equally consistent with the absence as with the existence of negligence in defendant.

Hummer v. Lehigh Valley R. Co., 75 N. J. L. 703.

Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence.

McCombe v. Lehigh Valley R. Co., 95 N. J. L. 187, 189.

In the case of *Alvino v. Public Service R. Co.*, 97 N. J. L. 526, 527, this Court said:

“Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. * * *

“To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of the defendant than with the absence of it. * * *

When the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail (*Cotton v. Wood*, 8 C. B. (N. S.) 568), because there is always a presumption against negligence and in favor of innocence.”

All that was shown in the present case was that there was an accident which consisted of the striking of a small girl with a trolley car which was being operated along the public highway at night, at a moderate rate of speed, and that the motorman of the trolley car when he saw the girl dashing across the street ten or twelve feet ahead of the trolley and

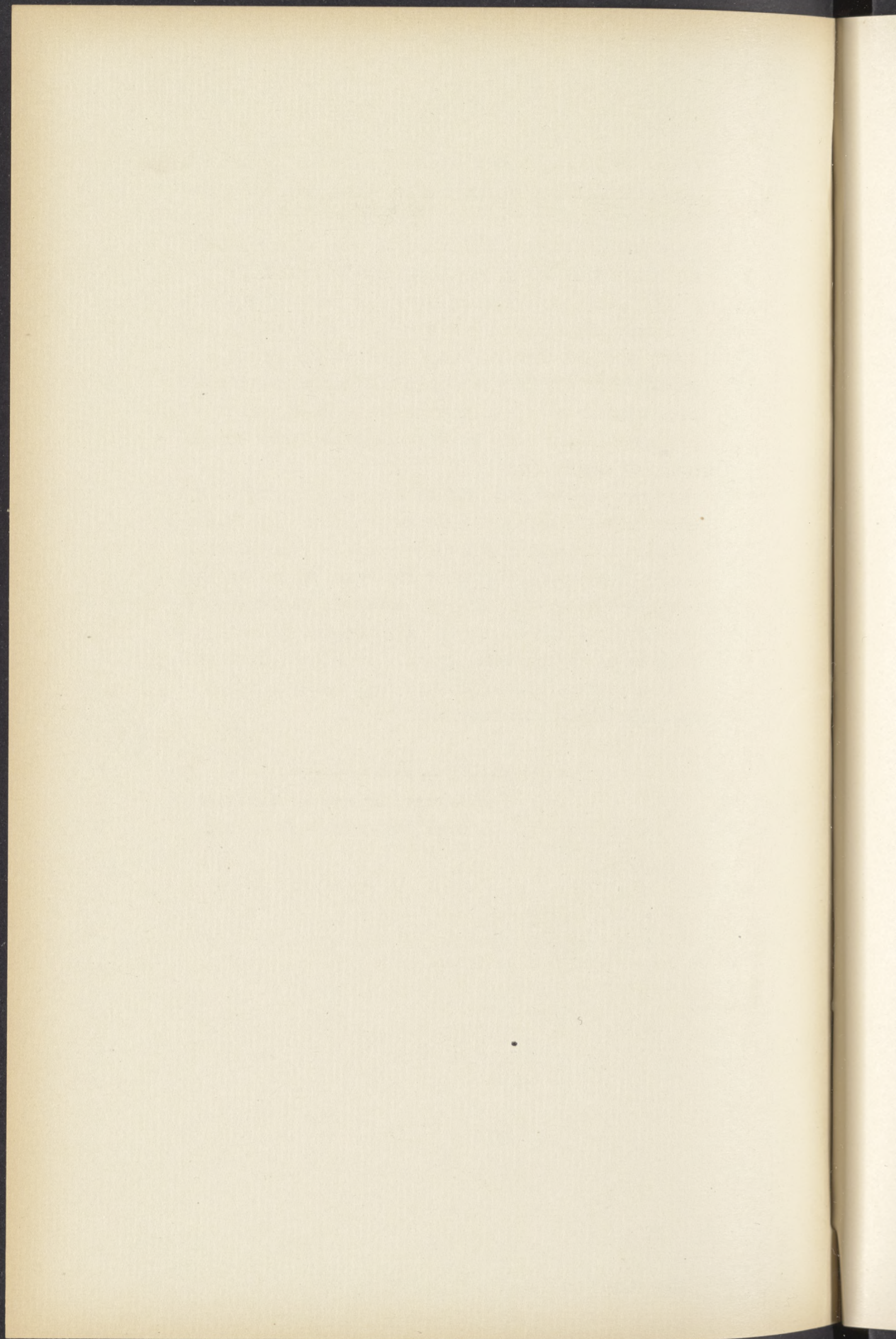
to the left of it, in the middle of a block, applied the brakes and brought the car to a stop within a distance of eight or ten feet. This distance was given by witnesses for the plaintiffs as well as the motorman, and was not in any sense contradicted.

The child was coming from the motorman's left, and had not reached the parallel track to his left when he first saw her and applied his brake. It seems to us that such evidence does not overcome the presumption of freedom from negligence, and is not more consistent with negligence than with the absence of negligence.

In this case we feel that we were improperly called upon to prove freedom from negligence. The plaintiffs proved nothing but an accident. The Supreme Court practically concedes this and intimates that in endeavoring to prove the innocence of the motorman we did not succeed. The defendant was not obliged to prove its innocence. That was presumed.

It is respectfully submitted that the judgments in this case should be reversed.

EDWARD L. KATZENBACH,
*Attorney for and of Counsel
with Defendant-Appellant.*



New Jersey Court of Errors and Appeals

MARTHA LAMBERT, by her next
friend, Louis Lambert, and
LOUIS LAMBERT, individually.
Plaintiffs-Respondents,

vs.

TRENTON AND MERCER
COUNTY TRACTION COR-
PORATION,
Defendant-Appellant.

On Appeal from a
Judgment of the
Supreme Court
Affirming the Judg-
ment of the Mercer
County Court of
Common Pleas.

10

BRIEF OF PLAINTIFFS-RESPONDENTS

FACTS

20

The facts of the case are that plaintiff, an infant about five years of age, on March 18, 1922, was crossing the street known as North Clinton Avenue from the South to the North Side. The defendant, Trenton & Mercer County Traction Corporation, owns and operates cars on the said North Clinton Avenue, and on the evening in question was operating a car in a westerly direction. Plaintiff, Martha Lambert, was crossing the street, and was run down by a car near the north rail of the western track, and was knocked flat on her back with her arms spread, and the wheel of the car went over the left arm, and so injured the arm up near the shoulder that it had to be amputated. The amputation took off the shoulder joint and left the arm flush with the body. 30

Two suits were commenced, one by the father, Louis

Lambert, and the other by the child through its next friend, Louis Lambert, its father, August 31, 1922. The case was tried on May 7, 1924. The jury returned a verdict of two thousand five hundred dollars (\$2,500) for the father, and twelve thousand five hundred dollars (\$12,500) for the child. The defendant appealed to the Supreme Court. The Supreme Court reversed the case because of an instruction given by the Court as a result of a request submitted by counsel of the plaintiff.

- 10 The opinion of the Supreme Court is found in N. J. Adv. Rep., Vol. 3, No. 9, p. 237, February 8, 1925.

The case was retried on the 22d and 23d days of December, 1925, and the jury returned a verdict of \$22,500 for the child, and \$2,500 for the father. The case was argued May Term, 1926, and reversed October Term, 1926.

- This case was appealed to the Court of Errors and Appeals January Term, 1927, and at the request of the Court of Errors, was reargued in October, 1927, and the
20 reversal of the Supreme Court was sustained by a tie vote of the Court, and announced in December, 1927.

The case was again tried on October 1, 1928. The jury returned a verdict to Martha Lambert, plaintiff for \$20,000 and a verdict to her father, Louis Lambert, for \$5,000. The case was appealed to the Supreme Court; argued January 18th, 1929, and affirmed February 28th, 1929.

PLAINTIFF'S FACTS

30

THERESA LAMBERT (Page 13, S. C.), mother of three children. A son 6 years old and the plaintiff, her daughter, who would be 5 years old on April 21, 1922, are the children who went across the street to a laundry while she was attending to the baby. The laundry was right across the street from where she lived at No. 553 North Clinton Avenue. The street at that point had many stores all lit up on Saturday evening. On North Clinton Avenue and Mead Street, there is a large arc

light. She saw her daughter under the trolley car. The condition of the child's health before and after the accident was good, but since the time of the accident she has to wear glasses.

LOUIS LAMBERT (Page 22, S. C.), father of the plaintiff, testified that the houses where he lived are close together, less than 50 feet apart—practically all stores, and that Webster Street and Clinton Avenue, and Mead Street and Clinton Avenue have large arc lights on the corners. 10

CHARLES WERT (Page 25, S. C.), testified that on March 18th, on the evening of the accident he lived at No. 644 North Clinton Avenue, east from the point of the accident; that he and his wife got on the street car in question at North Clinton and Sherman Avenues. Sat on the front seat on the left-hand side, in back of the motorman; his wife sat next to the window. No person stood or sat between him and the motorman; that the controls operated by the motorman were on the left-hand side of the car. The car stopped at Olden Avenue and Clinton Avenue. Was a one-man trolley car (single truck), driven by one man, who collected the fares and made the change. The street was very light and the stores were all lit up. Could see the street very plainly. Arc light on the corner of Webster and Clinton Avenue, about 8 o'clock in the evening. Heard no signals given between Olden Avenue and the point of the accident. Said hearing normal and if signal was given he would have heard it. First heard the brakes slammed on and a scream; the car jolted and then stopped. Threw him toward the front and the motorman said, "Oh, my God, what have I done," and sat down. All happened at the same instant. Got out of the car and saw the child lying under the car on the track, on its back with its head toward town and arms spread out. Right front wheel of the car on child's right arm at the shoulder. The rail on which the child's arm was stretched across was the rail nearest the curb. Got 20 30

the child out from under the car and she was taken to the hospital. Speed of the car was from 12 to 18 miles an hour. Thinks the car went 8 or 10 feet after he felt the jolt and heard the scream. Another car passed right after it crossed Olden Avenue before the accident. Straight out from the front of the car the street was clear. There was nothing in front of the car. The front of the car where the motorman stood had glass all around. The distance he sat behind the motorman was about 5 feet.

- 10 FLORENCE M. WERT (Page 32, S. C.), said she lived with her husband at No. 644 North Clinton Avenue. On Saturday evening, March 18th, she boarded the car at Sherman and North Clinton Avenues. Was sitting next to the window on the front seat on the left-hand side of the car. Husband sat beside her. No person between her and the motorman who was standing on left-hand side of the car. Houses were close together, less than 50 feet apart. Arc light on the corner of Webster and North Clinton Avenues. At that place the properties are nearly
- 20 all stores, all lit up. Near Olden Avenue a trolley car passed on another track. So far as she could see there were no vehicles or wagons on left-hand side of the street. She saw a small boy leaving the left-hand curb. She then felt a jolt; the car stopped and she heard the motorman say, "My God, what have I done?" Heard no signals or warnings given by the motorman. Thinks the speed of the car was about 15 miles an hour. Saw them take the plaintiff out from under the car.

- 30 Said the brakes went on so fast that she was thrown against the iron bar in front of her. Said the boy was stepping from the left-hand curb coming straight across. Thinks the distance was about 20 feet.

DR. SEIBERT (Page 43, S. C.), testified he was a surgeon. He amputated plaintiff's arm at the shoulder, including the joint. There was just about four inches of the bone remaining; did not see other part of the arm. It was in such a condition that it had to be amputated

right at the socket. Said she could never use an artificial arm.

OFFICER HUGH CAULFIELD (Page 45, S. C.), There was an arc light on Webster and Clinton Avenues. There was blood, skin and bone on the rail next to the curb on the track that runs toward the city on the right-hand side. The accident happened between Webster and Olden Avenues, opposite No. 540 North Clinton Ave. Saw no cars parked on the right-hand side of the street so far as he could remember. So far as he knows there were no automobiles near the place at the time of the accident, but many after the accident happened. 10

THOMAS A. CULITON (Page 49, S. C.). Said he passed the point where the accident occurred on his way home about 8 o'clock. A street car passed him previous to the accident. Car was going pretty fast. One passed going west and one going east. One going east passed him first. When the last car passed he heard a scream. He ran back, saw a little girl lying on her back with one arm caught in the wheel of the trolley car going west. 20 Not sure whether it was the wheel near the curb or the one away from the curb, because it is so long since the accident happened. There are arc lights all around the streets. Heard no signal from the motorman. His hearing is all right. Arc light on the corner of Webster Street and Olden Avenue. Another arc light 60 feet east between the place where the accident occurred. Accident occurred about the center of the block between Webster and Olden Avenue. Said he walked about 20 or 25 feet after the trolley going west passed him. When he 30 turned he walked about 50 feet to get to the place of the accident. Ownership of the car was admitted. Plaintiff rested.

DEFENDANT'S FACTS

PATRICK MCHUGH (Page 63, S. C.) Motorman, who drove the car that injured the plaintiff, said he stopped at Olden and Clinton Avenues to take on passengers. Saw about 10 or 12 feet in front of him the two children run right direct into the outbound track, the little girl ahead and the little boy a distance behind. He did not give attention to the bell. He snapped the reverse as quickly as he could and also the emergency
10 brake. She went down on the outbound track clearing the trip of the fender. Dry evening. Been in the employ of the company since 1917.

On cross-examination (Page 66 to 81, S. C.), he testified it was a one-man car, single truck. Operated the car and collected the fares, gave out transfers, made change and called the streets. On that route quite some years before the accident, that there was plenty of light. Did not remember whether the stores were lit up or not,
20 but knew it was the custom for all the stores to be lit up on Saturday nights. Light enough for him to see the whole street. Glass all around the vestibule in which he stood. Said the street was clear; did not see any automobiles in the street in front of him.

Saw the two children come from the left curb about 8 or 9 feet between the curb and the rail of the other track. Width of the track about 5 feet; the space between the two tracks 5 feet wide; the track on which he was riding was about 5 feet wide and the space between
30 the car track and the curb about 9 feet in width, making the street in all about 34 feet wide and the children crossed from the curb all the way over to the space between the car track and the curb, then over to the car track and then the space between the car tracks, and one child, the plaintiff, got on the right-hand rail of the track on which he was riding. Said the time was too short to stop his car. Said his car was going half speed. In full speed the car

goes 35 miles an hour. Admitted half speed between 15 and 18 miles an hour. Admitted the child travelled about 24 feet and did not see her until she was about 10 or 12 feet in front of him to his left. When he saw the children coming he just sat back when he saw the child under the car and said, "My God, what have I done?" He did not ring his bell; gave all his attention to the brakes. Said if he had seen the children leave the curb he would have rung his bell. Said it was his duty as a motorman to watch for children or persons coming from sidewalks; did not know how far the distance of his route from the car barn on Mulberry Street to the car barn on Centre and Lalor Streets. He had been running the route for a number of years. When he was asked the time it took to make the route, said he did not remember. Said the fender was set on the car in front of the wheel and he is still working for the company. 10

MR. PEARTREE (Page 86, S. C.) Testified that the fenders were held 8 inches from the ground in front of the wheels. That an object less than 8 inches lying flat would not be stricken by the fender. 20

REASONS FOR APPEAL BY THE DEFENDANT

1. The trial Court erred in refusing to grant a non-suit at the close of the plaintiff's case.
2. The trial Court erred in refusing to direct a verdict in favor of the defendant and against the plaintiffs after all parties had introduced all their evidence. 30

We submit the Court below was correct in refusing the first reason, which was to non-suit.

The facts were the plaintiff and her brother started to cross the street from the south to the north side. Street was about 34 feet wide from curb to curb. It had two

sets of tracks—one running east and one running west. The distance from the south curb to the first rail of the eastbound track was about 9 feet in width; the eastbound track was about 5 feet wide; space between the tracks about 4 feet. The space between the rails of the westbound track about 5 feet, and the space between westbound track and curb, about 9 feet. The street had many stores well lit up for Saturday evening business; nothing in front of the car to obstruct the view of the
10 motorman who stood on the left-hand side of the car, operating it. Front of car had a glass vestibule all the way around. Mrs. Wert, a passenger in the car, sitting on the first seat on the left-hand side of the car, saw the brother, who was behind the plaintiff, coming from the curb. No bells or signals given. Car operated by one man. Felt heavy jolt of the car; brakes applied suddenly, throwing passengers forward. Motorman, who was standing, fell back and exclaimed, "My God, what have I done?" The car stopped, the plaintiff found lying
20 under the front of the car with head pointing west; feet east; right arm stretched out pointing south; left arm stretched out pointing north over the northerly rail of the westbound track with the right arm and shoulder under the right-hand wheel of the car. Speed of the car gaged from 12 to 15 miles an hour preceding and at time of the accident.

With this state of facts the inference was the child crossed the street from the south to the north side and travelled a distance of about 23 feet with nothing to ob-
30 struct the view of the motorman; no bells rang or warnings given. This would infer that the motorman was not looking where he was going or if he was looking, then he was going so fast that he was unable to control his car so as to stop it in time to avoid the accident. The facts inferred there was no reason for the motorman to fail to see the child coming from any side of the street and it was his duty to observe the street for children on the sidewalks

and street. When the plaintiff rested there was no legal reason why she should be non-suited, but the facts raised a violent inference of negligence on the part of the motor-man.

Vroom v. North Jersey Street Railway Co., 70 N. J. L. 819, Court of Errors and Appeals:

"2. In an action for damages resulting from an injury caused by negligence, it is the duty of the trial judge, when requested to non-suit or direct a verdict, to determine whether any facts have been established by evidence from which negligence may be reasonably inferred; if the real facts have not been established by the evidence he must submit them to the jury." 10

Bauer v. North Jersey Street Railway Co., 74 N. J. L. 624, Court of Errors and Appeals:

"If, under the proof, reasonable minds may differ as to whether a person who is injured upon a crosswalk while in the act of crossing a trolley track in front of an approaching car is guilty of contributory negligence, the question is for the jury." 20

Markey v. Consolidated Traction Co., 65 N. J. L., p. 82, N. J. Supreme Court. Affirmed 65 N. J. L., p. 682.

Traction Co. v. Heitman, Admr., 61 N. J. L., p. 682, Court of Errors and Appeals. 30

Ritscher v. O. & P. V. Ry Co., 79 N. J. L., p. 462, N. J. Supreme Court.

Peterpolo v. Public Service Railway Co., 81 N. J. L., p. 390, Court of Errors and Appeals.

The fact that the accident occurred at a point not a crossing. This does not warrant a non-suit or affect the

liability of the defendant as the Court of Errors has repeatedly held, that a pedestrian has a right to cross the street at a point not a crosswalk so long as he exercises reasonable care for his own safety. *Fox v. Great Atlantic & Pacific Tea Co.*, 84 N. J. L., p. 726, Court of Errors and Appeals, and *McAvoy v. Paterson Brewing Co.*, 78 N. J. L., p. 633, also Court of Errors and Appeals. Both cases held:

- 10 “3. A pedestrian has a right to cross a street at a point not a crosswalk and in doing so is bound only to use reasonable care for his safety.”

While we insist there should not be a non-suit, yet the cases quoted below sustain the legal proposition that if there was not enough evidence to infer liability on the defendant, yet the Court had the right to compel the defendant to put in his case, and if the facts adduced by the defendant raised inferences of negligence, then the question of lack of negligence in the facts of the plaintiff would be cured, and the case would go to the jury so they could
20 draw the conclusion favorable or unfavorable to the defendant.

Goldfarb et al. v. Phillipsburg Transit Co., 137 Atl. Rep., p. 593. Court of Errors and Appeals. (Not officially reported).

30 Plaintiff, about 5 years of age, on July 13, 1925, bright and clear evening, between 6 and 7, was crossing the street opposite her home to play with some other children on the other side. While recrossing to return home, she was run down by the defendant. Testimony that she started to cross when the trolley car made its appearance. Motorman saw the children half way between sidewalk and curb and he was about 20 feet away from them. He slowed down the car; the child stopped; then started to walk toward the car and the car started to go forward. Defendant presented testimony that plaintiff walked into the side of the car. Car was under proper control and

moving slowly. Motorman did not know accident happened until it was over. Did not see any child running toward the car. Thought he was clear enough to pass the children and there were none in front of the car. Defendant contended no negligence was shown on the part of defendant company and that he was not chargeable with negligence in failing to keep a lookout for the child on the sidewalk, which child suddenly ran into the street directly in front of the approaching car. The Court said that on the latter evidence the case must go to the jury. Court affirmed the decision below and said: 10

“There was testimony to show that the child had started to cross the street, when a trolley car coming from the west made its appearance; that the motorman, to use his own language, “saw a lot of children fooling around; that they were then about halfway between the car tracks and the curb;” that the motorman first saw these children when he was about 20 or 30 feet away from them; that the motorman saw the child, and slowed down his car; that the child stopped; that she then started to walk toward the car, and the car started to go forward; that the motorman failed to give warning of the approach of his car; that some one shouted a warning to the motorman; that the child and the car collided; that the hinge struck her; that she was seen to fall near the front door; that she then rolled under the car; that the trucks of the car ran over her; that the car continued to move its full length; that Anna laid across the rail, about three feet behind the rear of the car; and that the mangled child was then picked up and taken to Easton Hospital.” 20 30

Requests were made to direct a verdict on the ground that there was no negligence shown on the part of the defendant; and it was not negligence for failing to keep a proper lookout for the child on the sidewalk in the middle

of the block, which child suddenly ran into the street directly into the side of the approaching car. The court said:

“As these requests, in substance, merely attack the propriety of submitting the case to the jury, we have concluded to base our affirmance of the judgment herein upon the broad ground that the whole evidence presented a proper case for submission to the jury.”

- 10 The defendant made a motion for a non-suit at the end of the plaintiff's case. We submit that the facts as appeared in evidence did not justify the granting of that motion, but assuming that they did, the motion should not have been granted because it was the right of the court to hear the defendant's case; and if the facts brought forward by the defendant made a case for the jury, then the motion to non-suit was of no value to the defendant.

The Supreme Court in the case of *State v. Bacheller*, 89 N. J. L., p. 436, says on this question:

- 20 N. J. Supreme Court:

“In civil trials the practice of compulsory non-suits, not being derived from the common law, was sui generis in this state, and in the early days the rule adopted was, that such a motion, although made at the close of the plaintiff's case, would not be decided until the defendant had rested his case.

- 30 “This practice became so unpopular with the bar that it led to the compromise rule, as we now have it, by which the motion is decided before the defendant opens his case, but on review of its denial, the defendant's testimony will be considered if it supports the ruling against him. *Perth Amboy Manufacturing Co. v. Condit*, 21 N. J. L. 659; *Voorhees v. Woodhull's Executors*, 33 N. J. L. 482; *Delaware, Lackawanna and Western Railroad Co. v. Dailey*, 37 N. J. L. 526.”

Perth Amboy Man. Co. v. Condit & Bowles, 21 N. J. L. 659. Court of Errors and Appeals.

"5. Although motion to non-suit be improperly refused, yet if the defect in the evidence be subsequently supplied, the judgment will not be reversed."

Delaware, Lackawanna and Western Railroad Company v. Dailey, 37 N. J. L. 527. Court of Errors and Appeals. 10

"4. Refusal to non-suit for failure of proofs not error, if the defect was supplied by evidence taken in the progress of the cause."

Bostwick, Executor, v. Willett, 72 N. J. L. 21. New Jersey Supreme Court.

"1. The refusal of a non-suit for failure of proofs is not reversible error if such proofs were afterwards supplied by either party in the progress of the trial." 20

Van Cott v. North Jersey Street Railway Co., 72 N. J. L. 229. Court of Errors and Appeals.

"After the allowance of a bill of exceptions to the refusal of the trial court to non-suit the plaintiff for failure of proofs showing the negligence of the defendant's motorman, a witness, produced on behalf of the defendant, testified that the motorman, seeing the plaintiff in the act of crossing the street, slackened the speed of his car so as to bring it to a semi-halt, whereupon the plaintiff, who likewise had temporarily halted, made a swift run to cross the track in front of the car, but was struck by the car, to which "an extra burst of speed" had been imparted. Held, that after the admission of this testimony, both the negligence of the motorman and the contributory 30

negligence of the plaintiff became questions of fact for the jury, and that the refusal of the trial court to non-suit the plaintiff for failure of proofs showing negligence is not reversible error where such proofs are afterwards supplied by the defendant during the progress of the trial."

VanNess v. North Jersey St. Ry. Co., 77 N. J. L., p. 551. Court of Errors and Appeals.

10 "2. Error in refusing to non-suit at the close of plaintiff's case for lack of proof is rendered harmless when such proofs are afterwards supplied during the trial."

Lewis v. National Cash Register Company, 84 N. J. L. 598. N. J. Supreme Court.

20 "1. Where the defendant entered upon its defence, it is immaterial whether, when it moved for a non-suit, plaintiff was entitled to prevail if it appears that at the close of the case there was any evidence to warrant the verdict in her favor."

Harrison v. Dickerson, 87 N. J. L., p. 92. N. J. Supreme Court.

30 "3. At the conclusion of the plaintiff's case it appeared that the contract sued upon was made upon Sunday, and a motion to non-suit on that ground was made and refused. The defendant was then placed on the stand, and from his testimony it was made to appear that the contract was not made on Sunday, but on Friday or Saturday. Upon review it was held that the error in the refusal to non-suit was cured by the later testimony, which made the question one for the jury."

SECOND REASON.

"The trial Court erred in refusing to direct a verdict in favor of the defendant and against the plaintiffs after all parties have introduced all their evidence."

We submit the ruling of the Court below is correct.

After the plaintiff rested, the only witness to the accident for the defendant was the motorman, Patrick McHugh, who took the stand. He said he stopped the car at Olden and Clinton Avenues to take on passengers. The accident occurred on Clinton Avenue, between Olden Avenue and Webster Street (Page 64, line 20, S. C.). Said the little girl, the plaintiff, was running ahead of the little boy, who was coming from the curb, and he threw his brakes on; that it was a dry evening; was a one-man car with a single truck; that he operated the car and collected fares (Page 66, S. C.). Plenty of light in the street when the car was running and the stores were all lit up, Saturday evening. (Page 68, S. C.). He ran the route for years before. Was standing on the left-hand side of the car where the controller is. He saw the two children coming from the left curb. Page 70, line 20, S. C.). Distance from the curb was about 9 feet to the rail and the eastbound track about 5 feet; space between the two tracks 4 feet and the other track on which he was riding 5 feet; space from the rail of the westbound track to curb 9 feet, making the street about 32 feet wide. (Pages 71-73-75, S. C.). Saw the children at the curb cross all the way over that space between the car track and the curb, then over the car track, then over the space between the car tracks and the one child got on his right-hand rail. (Page 71, lines 14 to 22, S. C.). Said the time was too short in which to stop his car. Was going at half speed. Full speed of the car 35 miles an hour. (Page 72, line 12, S. C.). When he put the brakes on, fell in his seat and said, "My God, what have I done?" (Page 75,

line 18-19, S. C.), and he did not ring his bell or give any warning (Page 76, line 10, S. C.). Said it was his duty as a motorman to watch for persons or children coming from the sidewalk, (Page 77, line 20, S. C.). Claimed he did not remember how long it took to run from one end of his route to the other. (Page 78, S. C.). The child was on the outside rail (Page 80, line 5, S. C.). He is still working for the company.

Combining the testimony of the motorman, the only
 10 witness for the defendant who saw the accident, with the
 testimony of the witnesses for the plaintiff, as the case
 stood when the plaintiff rested, we submit there is no
 doubt about the negligence of the motorman. By his
 testimony he admitted there was plenty of light in front of
 his car, and dry weather; the street was clear of every
 obstruction; though it was 8 o'clock in the evening, the
 street was illuminated by the lights of the stores and arc
 lights. Admits he saw the children leave the curb; he
 did not give any signal; that when he struck the child he
 20 said, "My God, what have I done?"—thereby indicating
 that the happening was due to his want of care and made
 him speak, and when he spoke, his statement was self-
 accusing.

On the motorman's testimony alone, the negligence of
 the defendant is completely established.

I quote below many cases in our State of infant chil-
 dren and the facts of those cases are not as strong in their
 inferences of negligence as the case at bar. In those cases
 the courts applied the law as to contributory negligence,
 30 non-suit, and direction of a verdict so clearly that the mo-
 tion for the direction of a verdict in the case at bar was
 properly denied.

Newman v. Phillipsburg Horse Car R. R. Co. 52 N.
 J. L., p. 446; New Jersey Supreme Court.

"1. An infant of tender years is not to be

charged with the negligence of the person having it in charge.

"2. The plaintiff, about two years of age, being under the care of her adult sister, wandered on to the track of the horse railroad company, and was there run over by the carelessness of the driver of the car. Held, that plaintiff's right of action was not lost, even if the sister's carelessness of supervision in part was cause of her injury."

10

Traction Co. v. Heitman's Adm., 61 N. J. L., p. 682. Court of Errors and Appeals.

"1. That a child two years and three months old—to whom contributory negligence cannot be imputed—was suffered to roam unattended in the public street cannot relieve a traction company from liability for its negligence in the management of its car, resulting in the child's death.

"2. A motorman in charge of an electric traction car moving in the public streets, where he has reason to expect little children are playing, must exercise a high degree of watchfulness in the operation of his car."

20

Markey v. The Consolidated Traction Company, 65 N. J. L., p. 82. New Jersey Supreme Court. Affirmed in Court of Errors and Appeals, 65 N. J. L., p. 682.

Infant between 4 and 5 years old, run down by a street car. Was undisputed that the plaintiff was standing on the curbstone; that he suddenly left the curb and started across the street; that as soon as the motorman saw the plaintiff walking across the street, he reversed his power and put on his brakes, using every effort to stop his car promptly. The court said the motorman was unable to stop his car in time and required the case to go to the jury to determine whether the rate of speed was so high as to indicate negligence.

30

It was assigned as error upon the refusal of the Court below to charge the jury that, "if it appeared from the evidence that the plaintiff walked with his back toward a moving car, and stepped upon the track, so close to it, that the motorman could not stop the car in time to avoid the accident, the plaintiff cannot recover."

The Court refused this request and said:

10 "The facts stated in it, assuming them to have been established by the evidence, do not necessarily lead to the conclusion either that the motorman was free from blame, or that the plaintiff was guilty of contributory negligence. Nor can it be said as a matter of law that the act of the plaintiff, in walking backward toward the moving car, was negligence, and it is questionable whether a child of that age is old enough to care for its own safety and the question of his capacity, and its degree to do so, is for the jury." Affirmed by the Supreme Court and later affirmed by the Court of Errors and Appeals, and the court held:

20 "1. A jury should not be controlled in its action, except when the testimony will support no other verdict than that which is directed.

"2. The capacity of a child between four and five years of age to care for its own safety is a question for the jury and not for the court.

"3. A child who, by reason of its mental capacity, is non sui juris, is not to be charged with the negligence of the person in whose custody it is."

30 *Kaufman v. Bush*, 69 N. J. L., p. 645. Court of Errors and Appeals.

"2. Where there is testimony competent to prove that a child five years of age, who had started to cross a highway at a public crossing in full daylight, was run down after going only four or five feet from the sidewalk by a horse, which, when the plaintiff left the sidewalk, was seen approach-

ing the crossing at a high rate of speed from a point somewhere about the middle of the block, there was no error in the trial court in refusing to non-suit the plaintiff (the child) or in leaving to the jury the question whether or not the driver, when he approached the crossing, was using reasonable care to observe its condition and to have his horse under such speed and control as the conditions observable by him required of a prudent driver.”

10

VanCott v. North Jersey Street Railway Company,
72 N. J. L., p. 229. Court of Errors and Appeals.

In this case it was said that from the testimony it was questionable whether a case of negligence had been made out by the plaintiff, but the defendant's witnesses testified the child stood for a moment on the curb and then made a couple of steps to walk in a diagonal direction across the street, and looked and saw the car, and then made a few steps—running style; the motorman rang the bell at that time, which attracted the child's attention. She stopped about the first rail. The car slackened speed and the bell rang. As it slackened speed, she made a swift run to cross the track in front of the car. The car then started after she remained stationary, and put an extra burst of speed on. Held:

“After the allowance of a bill of exceptions to the refusal of the trial court to non-suit the plaintiff for failure of proofs showing the negligence of the defendant's motorman, a witness, produced on behalf of the defendant, testified that the motorman, seeing the plaintiff in the act of crossing the street, slackened the speed of his car so as to bring it to a semi-halt, whereupon the plaintiff, who likewise had temporarily halted, made a swift run to cross the track in front of the car, but was struck by the car, to which “an extra

20

30

burst of speed" had been imparted. Held, that after the admission of this testimony, both the negligence of the motorman and the contributory negligence of the plaintiff became questions of fact for the jury, and that the refusal of the trial court to non-suit the plaintiff for failure of proofs showing negligence is not reversible error where such proofs are afterwards supplied by the defendant during the progress of the trial."

10

Napurana v. Young, 74 N. J. L., page 627. Court of Errors and Appeals.

Plaintiff, under 6 years of age, was on a crosswalk, following her mother, who had already crossed. At the time of the accident, which was about the middle of the street, the servant of defendant was driving a team of horses on a slow walk. With him on the wagon, was a colored man. No proof they were talking to each other, or the driver was not giving attention. On this state of
20 facts the trial judge non-suited. The court below gave reason for non-suit that there was no want of care shown on the part of the driver; just a mere inference founded on naked facts; lack of positive testimony showing driver was not doing his duty. Reversed by the Court of Errors and Appeals. Held:

30

"1. A jury may infer negligence from the facts and circumstances which reasonably impute it.

"2. If the proof shows that a child of six years of age was run down at a crosswalk by the driver of a team of horses going slow, and who had full opportunity to observe the child, and nothing else appears, whether or not there was negligence in the driver is not a court question, but is for the jury, and it is error to direct a non-suit."

Fogarty v. Jersey City Railway Co., 76 N. J. L., p. 459, New Jersey Supreme Court.

Plaintiff, a boy about 6 years of age, started to cross the street from west to east and attempted to climb up an embankment of hardened snow two and a half feet, the base of which was close to the car track. While climbing, he slipped, fell on the tracks and met with injuries, which resulted in the amputation of one leg. Defendant offered testimony that plaintiff was one of the number of boys who were playing on the top of the snow bank trying 10 to touch the car when it passed, and while doing so, slipped on the embankment upon the track. Motorman knew nothing of the accident until he was arrested, but remembered seeing three or four boys at the top of the snow bank. Court said driver of car must expect children to be playing in the street. Sustained the Court below and held:

"1. It is for the jury to say, under the evidence, whether a boy six years of age, while attempting to climb a snowbank immediately adjoining a 20 street railway track, and who fell and was injured by defendant, was guilty of contributory negligence.

"2. It was for the jury to say, under the evidence, whether the motorman and conductor of the car, who saw the boy attempting to climb a snow bank adjoining the track, exercised reasonable care under the circumstances to avoid injuring him."

30

Carleo v. D. L. & W. R. R. Co., 77 N. J. L., p. 607. Court of Errors and Appeals.

Plaintiff, between 2½ and 3 years old, on May 29, 1905, about 6 P. M., was picked up on the ground along side or near the crossing of defendant's railroad, after the train had passed. Left hand crushed and mutilated. The point on the street where train hit the child was in doubt,

because after contact with the fast moving train, he was seen to have been carried forward a distance of many feet. Whether the contact with the child occurred at the crossing, or whether it was at a point not at the crossing, was in dispute, but no one saw the child when the train came in direct contact with it. Court held:

10 "1. The plaintiff, a boy between two and one-half and three years of age, while walking in Scotland Street, in the city of Orange, toward and on his way across the defendant's railroad tracks at their crossing of that street, was struck and permanently injured by one of defendant's express trains. It appeared by the evidence produced by the plaintiff at the trial of his action against the defendant for damages by reason of this injury that the defendant's gateman, who was in charge of their safety gates erected over that public street, had failed to lower them before and at the passage over the crossing of the colliding train, and that no signal of its approach, either by bell or whistle, had been given, and it was held 20 that no error had been committed in the refusal of the trial court to grant defendant's motions to non-suit and to direct a verdict.

30 2. Contributory negligence cannot legally be imputed to a child of such tender years, and if the defendant's negligence in its management of its train upon the public street was the proximate cause of the accident, or a material factor in it, the child's conduct in attempting to cross the tracks there, no matter how careless such an act would have been in a person sui juris, cannot be invoked by the defendant as a shield to protect it from the consequences of its own breach of duty."

Baker v. Public Service Railway Co., 79 N. J. L., p. 249, New Jersey Supreme Court.

Plaintiff, a child under 7 years of age. The judge charged the jury that contributory negligence could not be attributed to her. The defendant urged the question should be left to the jury. Supreme Court sustained the Court below and held:

"1. Where a child is under seven years of age, there is a presumption that it is not guilty of contributory negligence, and in the absence of proof to the contrary, the judge is justified in taking this question from the jury." 10

Ritscher v. Orange & Passaic Valley Railway Co., 79 N. J. L., p. 462, N. J. Supreme Court.

"Plaintiff, a boy six years and ten months of age, while returning home from school and while running in order to escape being struck by a stone, which he expected a pursuing boy to throw at him, ran across the defendant's street railway track and was injured by an approaching car. The accident happened in the neighborhood of the school and while the car, according to the plaintiff's case, was proceeding at a high rate of speed, and without giving any warning of its approach, Held, that the question whether the plaintiff was guilty of contributory negligence was for the jury, as was also the question whether upon a denial of these facts the defendant was guilty of negligence." 20

Rosenberg v. Holt, 102 N. J. L., p. 159. Court of Errors and Appeals. 30

Plaintiff, boy 4 years of age, riding a tricycle on the sidewalks of a narrow street called Colloway Avenue, Atlantic City. Defendant's truck ran partly upon the sidewalk where the boy was riding, and struck the tricycle and injured the boy. Corner known to be dangerous.

Children generally congregated there for play. Court held:

10 “Where there was testimony that a truck traveling “pretty fast” ran upon a sidewalk and injured a boy riding a tricycle, and that the corner where the accident occurred was known to be dangerous and it was generally observed that children congregated upon the sidewalk for play, the question of negligence was one for the jury and not for the Court.”

McAvoy v. William I. Segal, N. J. Adv. Rep. Vol. 6, No. 10, p. 128, Date: March 10, 1928.

20 Plaintiff, infant 6 years old, was crossing Washington Avenue, Ventnor City, from the west side to the east side, when truck approached. Three witnesses to the accident, the mother for the plaintiff; the driver of the automobile truck and his helper for the defendant. The truck came from the girl's left. Accident happened 3 feet from the curb. The defendant contended plaintiff, without warning, stepped from the sidewalk into the street in a manner that should not be fairly anticipated by the driver of the automobile truck. The driver testified that “just then she bolted out in front of me; I knocked her down.” On appeal, the judgment of the Atlantic County Circuit Court was affirmed.

30 *Nichols v. Grunstein*, N. J. Adv. Rep., Vol. 7, No. 6, page 236, Date: February 9, 1929. Court of E. & A. The deceased, a child about 7 years old, on way from school with brother, who was two or three years older. The defendant's truck was approaching some distance away. The little girl started to run across the street pulling her hand away from her brother, who was holding her. He called to her to stop because he observed the truck moving rapidly toward them. The deceased girl

did not stop. He ran after her. Was not able to overtake her in time to prevent the accident.

“1. Between the time in life when a person is incapable of exercising the care and judgment necessary to avoid and avert danger and the time when such person is in law an adult, and responsible as such, there is a transition period during which responsibility depends upon matters of fact, and in this transition period such person may or may not be guilty of contributory negligence. 10

2. The degree of care required of a child old enough to be capable of negligence is such as is usually exercised by persons of similar age, judgment and experience. In order to determine whether such a child has been guilty of contributory negligence, it is necessary to take into consideration the age of the child, and its experience and capacity to understand and avoid danger to which it is exposed in the actual circumstances and situation under investigation; and it is usually a question for the jury to determine whether the child had been guilty of contributory negligence. 20

3. A child, “about seven years old,” was killed by a motor truck at a street intersection. She was on her way home from school with her brother, who was two or three years older than she. As the defendant’s truck was approaching, the little girl started to run across the street, pulling her hand away from her brother who had hold of it. He called to her to stop, because he observed the truck moving rapidly towards them. The little girl did not stop and he ran after her although not able to overtake her in time to prevent the accident—Held, that the question of the child’s contributory negligence was for the jury and not for the court.” 30

ANSWER TO CASES QUOTED BY DEFENDANT-APPELLANT AND QUESTIONS RAISED BY DEFENDANT AS TO THE LAW OF SIGNALS AND SPEED OF THE TROLLEY CAR. THE CASES DO NOT APPLY TO DEFENDANT-APPELLANT'S FACTS AND THE SIGNAL AND SPEED LAW IS AS QUOTED BELOW:

- North Hudson County Railway Company v. Flanagan*, 57 N. J. L., p. 696. Court of Errors and Appeals.
- 10 Plaintiff, a boy 9 years old, had head turned in opposite direction to which he was running. In other words, he was running one way and looking another. Court did not decide the case on this question but on the question that the facts did not disclose any negligence on the part of the defendant. Besides, the plaintiff was running diagonally across the street and watching a boy who was going to throw a ball at him.

- Graham v. Consolidated Traction Company*, 64 N. J. L., p. 10, New Jersey Supreme Court.
- 20 Deceased was a boy 4 years and 4 months old. The case was reversed not on the question of negligence but on the size of the damages.

- Boyer v. Great Atlantic and Pacific Tea Company*, 99 N. J. L., p. 451, Court of Errors and Appeals.
- 30 Deceased was a boy 7 years of age. Jumped from back of trolley car on which he was stealing a ride. Truck came from opposite direction; passed trolley car. boy jumped off and ran into front wheel of the truck. Question was decided on failure to show negligence of the defendant.

As to the question of the necessity of ringing bells or giving warning, see *Ritscher v. O. & P. V. Ry. Co.*, 79 N. J. L., p. 462. N. J. Supreme Court.

Boy 7 years old, was running in order to escape from

being struck by a stone which he expected a pursuing boy to throw at him.

SIGNALS BY TROLLEY CARS

At common law, it was the duty of a street car to give a signal as to its approach on the street. *Traction Co. v. Scott*, 58 N. J. L., p. 682. Court of Errors and Appeals. *Chiapparine v. Public Service Ry. Co.*, 91 N. J. L., p. 581, Court of Errors and Appeals. 10

According to the *Traffic Act*, Pamp. L. 1915, p. 291 & 292, Sec. 8, Subdiv. 3:

“The motorman or driver of any street car on approaching road, intersection or street crossings, shall sound his signal bell in quick succession at a reasonable distance from such intersection, and shall also sound such signal when approaching teams or carriages or persons, and no persons, after striking of the bell, shall delay or hinder the passage of the car.” 20

SPEED OF TROLLEY CARS IN CITIES

As to the speed of a street car in a city, see *Traffic Act*, Pamp. L. 1915, pages 293 & 296, Sec. 11, Subdiv. 27.

“No street car shall be operated at a greater speed than fifteen miles per hour in places where the houses are on an average of less than one hundred feet apart, provided the tracks on which said street car is operated are laid upon any public street.” 30

We submit the judgment of the Mercer Court of Common Pleas and the Supreme Court should be affirmed.

Respectfully submitted.

MARTIN P. DEVLIN & SON,
Attorneys,
and MARTIN P. DEVLIN,
Counsel of Plaintiffs-Respondents.

