

30

No. 110 June Term, 1914.

New Jersey Court of Errors and Appeals.

IRVING SOLOMON, by next friend
Frank Solomon, and FRANK
SOLOMON, individually,

*Plaintiffs-Appellants,**vs.*

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant-Respondent.

10

At Law.
On Appeal.

BRIEF FOR DEFENDANT-RESPONDENT. 20

Statement.

This case was tried in the Hudson County Circuit Court before the Hon. Luther A. Campbell, Judge, and a jury. At the close of the plaintiffs' case a non-suit was directed. Plaintiffs appeal to this court therefrom.

Facts.

30

Defendant operates a trolley line in Jersey City from Pavonia Ferry on the Hudson River west-erly along Pavonia Avenue, and thence southerly along Henderson Street to Grand Street. On Sep-tember 8, 1913, plaintiff, Irving Solomon, an in-fant aged nine years, got upon the front step of a trolley car while the same was moving and fell therefrom, so that his right leg was injured, and was subsequently amputated above the knee. 40

Evidence.

Plaintiff testifies (p. 18) that he is nine years of age; goes to school No. 4; that on September 8, 1913, he lived on the corner of Henderson Street and Pavonia Avenue in Jersey City; that he had supper at six o'clock and then went out to play on the corner (Feldman's corner); that he turned a switch at the corner for a car, using a switch
 10 iron given him by the motorman; gave the iron back and the motorman called to him to get on and ride (p. 21) and rode down to Bay Street, where the motorman told him to get off and wait on the other side (pp. 22-23); the car came back and the motorman jerked his head and he got on the car (p. 24) on the front step on the right side; got both feet on the step, right hand holding to the bar and was trying to turn around to sit down on the platform when the car jerked
 20 and threw him off and ran over his right foot (p. 25); was taken to a drug store.

On cross examination he states (p. 26) that Bay Street is nine or ten blocks away from his home; that it was half past eight at night; that he had lived at this place for about a year and a half; that he had been going out at night playing for about six months prior to this date; that he knew trolley cars ran in front of his house and that it was dangerous to get on them (p. 27);
 30 that when he got on the car it was moving; got on the front step; was trying to turn around and almost as soon as he got on he went off (p. 28); that he held on as he was trying to turn around and did so because he knew that if he let go with both hands he was liable to fall (p. 28); that he saw the motorman turn on the thing (iron) on top of controller box around quick and then bring it back and the car jerked (he felt only *one* jerk, p. 29) and he fell down; that he was taken to
 40 the hospital; that he had been steadily going to

school at 9 A. M. until 3 P. M. and then from 3:30 P. M. to 5:30 P. M. to Hebrew school; then home to supper and then after supper went down to play with the boys and had been doing this for a long time (p. 32); that when he got on the car at Bay Street the motorman did not speak to him but nodded his head and he thought the motorman meant for him to run and get on the car (p. 33) and he went over and while it was going took hold with his right hand (p. 33).

James Dyas states (p. 35) that he was on the car; that the windows were down. "I got on at Montgomery Street and came along to Henderson Street or the car came along Henderson Street; near Bay Street, why, I was looking out of the car window, I seen something dark dash toward the car but I couldn't tell what it was, the form of a child or dog or animal or whatever it was, and then I heard a creaking of the car, like it went over something, and then people on the street halloed and I jumped out the front of the car;" picked the boy up and carried him to the drug store; the front vestibule door was open.

John Martin states (p. 37) that he is a policeman; that he did not see the accident, but got there afterward and arrested the motorman who was afterwards paroled.

Solomon Lichtenstein states (p. 39) that he is a druggist, his store being at No. 351 Henderson Street; that on the night of the accident the boy was brought into his store where he was given first aid treatment.

He was not cross-examined.

Dr. Alexander Heppler states (p. 40) that he was House Surgeon at the hospital and saw plaintiff after Dr. Ingber had dressed the wound; the leg was amputated above the knee by Drs. Heppler and Fink.

On cross examination he states this was the only injury.

Dr. Irving Ingber states (p. 42) that he was an interne at the hospital; that he was on the ambulance when it responded to the call; that he found a traumatic amputation below the knee, right leg; that he put on a tourniquet and took him to the hospital; he was in the hospital a month and called at the hospital for about a month.

10 Samuel Essig states (p. 44) that he does not understand English very well; that he was on Henderson Street between seven and eight o'clock; that he was on the left side going South; that he was a stranger in Jersey City; that he was looking for some one to tell him where to go "and at that time came the car and the boy was on the first stoop and the car stopped at the time * * * the boy came with the car; he jumped on the car." He continues (p. 45):

20 "Q. What did you see then? A. Then after I didn't hear if somebody ring the bell or something; the car begins to go, and it was a blazing on the electric and the car is going too quick on the first step—sort of shift—and then the boy falls down and the car was going a few feet, about six or eight feet, ten feet, I can't tell to be sure."

An interpreter was then sworn (p. 45) and he continues: that when he first saw the boy he was on the first step near the motorman.

30 (p. 46) "Q. What else did you see at that time? A. When the car started to go ahead the electric gave some sparks, some light, and the car all at once started to go ahead with a jerk. * * * Then the boy fell down."

40 On cross-examination he states that he lives at No. 275 Rivington Street, New York City; that he came to Jersey City to see a man on Monticello Avenue; he did not know where Monticello Avenue was; came over the Erie Ferry, walked up Pavonia Avenue to Henderson Street

and south on Henderson; he did not ask any one where Monticello Avenue was, but just kept on walking and did not know where he was going; that he knew no one in Jersey City and gave his name to no one, but that five or six weeks after the accident Mr. Solomon called at his house, and this was the first time he told any one his name or address since the time of the accident (p. 48); that he talked with Solomon and went with him to his lawyer's office; that when he first saw the car it was running and the boy was already on the car on the first step, standing and holding on with his right hand (pp. 49-50). He continues (p. 51):

"Q. Well, the first you saw then was the boy on the step and the next thing you saw him falling, wasn't it? A. Yes, only saw when he fell down.

"Q. That is all you saw is when he fell down? A. Yes, nothing more."

Samuel Feldman states (p. 51) that he was walking on Henderson Street to Newark Avenue (south) and was about ten or fifteen feet from Bay Street; he saw the boy standing on the car, one foot on the platform and one foot where the motorman stays—then "I heard the car give some shock and I looked around and I seen the boy laying outside—was laying in the car tracks there—near the car tracks. * * *

On cross-examination he states (p. 52) that his store is at Pavonia Avenue and Henderson Street, and he has lived there for about a year and a half; that he has seen the boy plaintiff playing around his corner many times. He continues (pp. 54-55):

"Q. Didn't you know this boy? A. No, I did not.

"Q. Didn't he live right near there? A. Well, I find out he was living there, although I didn't know if he belongs there before.

"Q. Lived in the house upstairs over the store? A. No.

"Q. Where does he live? A. I don't know even the number where he lives.

"Q. About where? A. I know around there somewheres, I don't know the number.

"Q. Where? A. It is around Henderson Street.

"Q. Haven't you been to see Mr. Solomon since this accident? A. No, never did.

10 "Q. Never saw him since? A. I seen him once.

"Q. Where does Mr. Solomon live? A. I don't know where he lives.

"Q. Don't know he lives right within a few feet of your store? A. Well, I heard about it. I never knew—I never knew where he lived.

"Q. Don't you know now that he lives within a few feet of your store? A. No, I didn't know.

20 "Q. Don't know it now? A. I don't know—Now I heard he living there. I didn't know where he lived.

"Q. Where did you hear he lived? A. I heard he lived on Henderson Street.

"Q. Eh? A. I heard he was living on Henderson Street there.

"Q. Where? A. Where, I didn't ask anybody.

"Q. Didn't ask anybody? A. Oh, no.

30 "Q. You knew Solomon before the accident, didn't you, the father? A. I seen him passing by; I never had an introduction to him.

"Q. You had seen the boy before the accident? A. The boy—I seen him; I never knowed it was him. If I seen him now I know I seen him around there somewhere.

"Q. Didn't know who he was? A. No."

40 He continues (p. 55) that when he first saw the car the boy was on it and it was moving; the boy had one foot on the step and one on the platform and that "I never took chances myself riding on a car like that" (p. 56); that the boy had hold with the right hand; that he stayed in that

position for about a minute or two. He continues (p. 57):

"Q. All the time the car was going? A. Well, the car—I had my eye up Newark Avenue and I seen—was looking up forward, and I seen—and I heard the car give that jerk and looked around and everybody hol-
lered the boy was run over.

"Q. How do you know that you heard the car give a jerk? A. Why, I paid attention to it.

"Q. What do you mean? A. It was a 10
funny walk the way the car gave.

"Q. What do you mean by a funny walk? A. The car generally walks quiet, and then the car gives a certain move.

"Q. A noise that you heard? A. Yes.

"Q. That is what you mean, isn't it? Then what made you look around? A. Yes, sir.

"Q. Then you saw the boy on the street? A. Yes, sir.

"Q. Is that right? Then you stayed there a few minutes? A. Yes. 20

"Q. Then you went on; is that it? A. Yes.

"Q. You did not see the boy get on the car, did you? A. No; well, I didn't see him get on the car."

Frank Solomon states (p. 58) that he is the father of the boy; that he lived at No. 499 Henderson Street for about two years (p. 58); that he was away, came home and heard his boy had been injured; that he had a store where he did 30
tailoring, cleaning, pressing and repairing (p. 60). He continues (pp. 60-65):

* * * * *

"Q. Now what was your business at the time he was hurt? A. I had a store up in Union Hill.

"Q. What kind of a store? A. Tailoring, cleaning, pressing and repairing.

* * * * *

"Q. Have you still got the business at 40
Union Hill?

"MR. SMITH: I object to it as irrelevant, incompetent and immaterial.

"THE COURT: I will sustain the objection at this time as to that question.

"MR. MARKLEY: I enter an objection.

"Q. Did the boy help you in your business?

A. Yes.

"Q. Tailoring business? A. Yes, sir.

10

"Q. In what way? A. He used to come up once in a while and we will send him out with a suit where it is pressed, and then he was a boy very much liked, and right next door to me was a man that he said, 'Mister, by my father makes suits, you just come in and give him a chance, a suit to make,' and this man comes to me, he says it help along my business.

"MR. SMITH: I object and ask that that part of it be stricken out as incompetent and irrelevant.

20

"THE COURT: I think that part may be stricken out. It may be relevant in some complete form, but it does not seem to be in proper form, the latter part of the answer.

"Q. In what other way, if any, did the boy help you? A. Used to give out once in a while circulars, put into the letter-boxes, blotters, letter-heads around the neighborhood.

"Q. Did he go to school during that time? A. Yes.

30

"Q. Until what time? A. Three o'clock, and he went to Hebrew school until about half-past five.

"Q. Since the accident has he gone to school? A. He is going now.

"Q. How long a period since the accident has he gone to school? A. Since the term started. He lost one term altogether, six months.

"Q. When did the term start? A. About two months ago.

40

"Q. Did he go unassisted? A. Sir?

"Q. Did he go unassisted? Did anybody have to assist him? A. Yes.

"Q. Who did? A. I did.

"Q. Did you help to take him to school?
A. Yes.

"Q. Did you go after him after school?
A. Yes.

"Q. For how long a time? A. All the time since about a month or so that he can help himself.

"Q. Until about last month he has been going unassisted? A. Yes.

"Q. Does that interfere with your business any?

"MR. SMITH: I object.

10

"A. Yes.

"THE COURT: Do not answer when there is an objection. I will sustain the objection, particularly because it brings forth a conclusion.

"Q. Did you give up your business?

"MR. SMITH: I object.

"THE COURT: I will overrule it.

"MR. MARKLEY: I ask an objection.

"Q. What happened to your business?

20

"MR. SMITH: I object.

"THE COURT: The question is overruled as calling for a conclusion.

"Q. Before the accident what time did you generally go to your business in the morning?

"MR. SMITH: Objected to as irrelevant, incompetent and immaterial.

"THE COURT: I will sustain the objection.

"MR. MARKLEY: We take an objection. 30

"Q. What time did you take your son to school every day?

"MR. SMITH: I object to it as irrelevant, immaterial and incompetent, and that it has no place in this action.

"THE COURT: What do you intend to prove?

"MR. MARKLEY: I intend to prove the time actually consumed by Mr. Solomon in taking the boy to school, contrasting that with the time he generally went to work before the accident, and the same 40

way in the afternoon, showing how he went and took the boy home from school, which necessitated him coming down from his place of business.

"THE COURT: Then what?

"MR. MARKLEY: I propose to prove that was the reason he gave up his business.

"THE COURT: Oh, no; that would be entirely improper as a question of damages. I will sustain the objection upon that statement of what your intended proof is.

10

"MR. MARKLEY: I note an objection.

"THE COURT: Yes, you may note it.

"Q. What were the profits of your business previous to the accident?

"MR. SMITH: I object.

"THE COURT: The question is overruled. You may have your exception if you wish.

"MR. MARKLEY: Just for the purpose of getting it on the record I will ask another question on the same line.

20

"Q. What was your profits after the accident?

"MR. SMITH: I object.

"THE COURT: Objection sustained.

"MR. MARKLEY: I note an objection, please.

"Q. Did the profits of your business decrease after the accident?

"MR. SMITH: I object.

"THE COURT: The objection is also sustained. You may have an objection noted.

30

"Q. What actual effect did the injury to Irving have on your business?

"MR. SMITH: I object.

"THE COURT: Objection sustained, to which you may have your objection entered."

Argument.

Plaintiff has served several reasons why the judgment of non-suit should be reversed, and we shall first take up those relative to the rejection of evidence.

40

The first complaint is as to the overruling of the question.

“Q. Did you turn the switch at Pavonia Avenue and Henderson Street for *any* of the cars of the Henderson Street line on that night?”

That charge of negligence was that plaintiff (boy) had turned a switch for a motorman of a Henderson Street car and in payment for such service the motorman had invited him to ride: and that while riding, on *that trip*, he had been thrown from the car by an unusual motion thereof. The only question at issue there was, had the boy turned a switch for the car which ran over him at the time or immediately prior thereto. Whether or not he had turned a switch for other cars had no relevancy, nor was the same competent. The fact that the boy had turned switches for other motormen at other times could not in any way in this case affect the defendant, nor could negligence be predicted upon such a fact. The question as framed was too vague and was such that it contained objectionable elements in that it permitted an answer that would include other cars than the one in question and therefore was not proper.

The second error assigned is that the Court overruled the question.

“Q. Did you turn the switch of that car more than once?”

The point at issue was whether on this trip the boy had turned the switch for the car, and in payment therefor had been invited to ride. Whether or not at some other time plaintiff had turned the switch when the car was in the charge of some other motorman, or even in the charge of the same motorman could have no bearing upon the action of the man in charge of the car *on this trip*, when it is claimed the accident happened. The Court permitted the plaintiff to introduce evidence as to what happened on *this trip*; the testimony that the motorman asked the boy to turn the switch on

this trip and invited him to ride and all other testimony as to circumstances surrounding the happening of the accident were admitted.

10 The evident purpose of the questions was to bring out testimony to the effect that there had been a practice existing upon the part of the motorman in charge of this car, and motormen of other cars, to permit plaintiff to turn switches and ride upon the cars free. Such would not be relevant or competent evidence, and the questions were properly excluded. Nor was plaintiff damaged by the exclusion of the question: all proper evidence as to matters surrounding the happening of the accident was admitted, and the plaintiff had the benefit thereof. If there could, by any possibility, have been error committed in the exclusion of the question, it was harmless error and would not justify a reversal.

20 The other exceptions were to the questions following addressed to the father of plaintiff, in an endeavor to prove his loss of business occasioned by his attendance upon his son.

"Q. Have you still got the business at Union Hill?" (p. 60).

"Q. Did you give up your business?" (p. 62).

"Q. Before the accident what time did you generally go to your business in the morning?" (p. 62).

30 "Q. What was your profits after the accident?" (p. 63).

"Q. Did the profits of your business decrease after the accident?" (p. 64).

"Q. What actual effect did the injury to Irving have on your business?" (p. 64).

These questions all related to the business of *the witness* and bore no relation to the accident, nor did they arise from anything in any way connected therewith.

40 The first question "Have you still got the business at Union Hill" was not admissible in any

way to this action. The action of the father was for "loss of services" of the son—whether or not the father still had his business, bore no relation to the loss of the service of the son nine years of age. The criterion is what were the services of the son lost by the father by reason of this injury worth? The avowed intention of counsel in asking the questions excluded was to prove the loss of business by the father by reason of his attendance upon his son. Aside from the absurdity of the statement that a man would deliberately give up his business in order to take his nine-year-old son back and forth to school, it is apparent that the questions objected to were inadmissible. If the plaintiff desired to introduce evidence to prove the additional expense incurred by the father in having some one to take the child back and forth to school, if such were necessary, no objection would have been made, and had the father proved that it was necessary to have some one so act, and *be acted* and then offered to prove that he was entitled to such compensation as such service was reasonably worth, no objection would have been offered—but to prove that the father gave up his business in order to escort the boy back and forth from school and then attempt to charge the value of the business or loss of profits thereof to defendant, was clearly incompetent and irrelevant and improper. In order to illustrate the case. Assume the child of some merchant prince, whose profit was \$1000.00 per day to have been injured, and the merchant to stay at home and act as nurse, could the defendant in an action brought to recover damages for such injury, be charged with the value of the time occupied in nursing by the father, at the same rates as he earned in his business? or would not the criterion be what were the services of a proper nurse worth?

In the case of *Barnes v. Keene*, 132 N. Y., 15 (Court of Appeals) the Court held:

10

20

30

40

"In an action by a father to recover for injuries to an infant child, the father, who had had experience as a nurse, took the entire charge of the child: after proving the value of his services as such, he proved under objection and exception that in order to care for his child he gave up a lucrative business engagement, and also proved the amount of the agreed compensation; the Court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse."

10

"HELD, error, that plaintiff was only entitled to recover the value of his services as nurse."

See also on this point:

Sedgwick on Damages (9th Ed.), Sec. 486a—486c.

Citing:

20

Hazard Powder Co. v. Volger, 58 Fed. 152;

Salida v. McKenna, 16 Colo., 523;

Howells v. N. Amer. Trans. Co., 24 Wash., 689;

Selleck v. Janesville, 104 Wis., 570;

Brinkman v. St. Landry C. O. Co., 18 La., 835;

Schmitz v. St. Louis I. M. & S. Ry., 46 Mo. App., 380;

Connell v. Putnam, 58 N. H., 534;

30

Woodward Iron Co. v. Curl, 153 Ala., 205;

Bigler v. Hopper-Morgan Co., 85 N. Y. Supp., 656.

POINT II.

No error was committed by the Trial Court in ruling that upon the evidence no negligence on defendant's part was shown.

The other points raised by appellants concern the action of the trial court in granting defendant's motion to non-suit, and are covered by paragraphs 1, 14 and 15 of their Grounds of Appeal. They are as follows: 10

"1. The Court erroneously non-suited the plaintiffs.

* * * * *

"14. The Court under the evidence ought to have submitted to the jury the question of the defendant's negligence.

"15. The Court under the evidence ought to have submitted to the jury the question of the negligence of the plaintiff, Irving Solomon." 20

They may be properly considered together as involving the one subject, that of the questions of negligence and contributory negligence raised by the evidence upon which the trial court granted the non-suit.

It is, then, defendant's insistent that no error was committed by the Trial Court in allowing its motion for a non-suit, because, in the first place no negligence on defendant's part had been shown under the evidence, and, secondly, because the evidence showed plaintiff, Irving Solomon, to have been guilty of contributory negligence. 30

Taking up first the question of negligence, it is our insistent that such inference was negatived by the evidence submitted by plaintiff, because

(a) Plaintiff, Irving Solomon, was not a passenger on the car, but a trespasser, or at most a mere licensee.

10 The admitted theory and state of facts on which plaintiff's cause of action was framed, as shown by the allegations of their complaint, and by the testimony of plaintiff Irving Solomon on his direct examination, was that the presence of the boy on the car at the time of the accident was by reason of an alleged invitation proceeding from the motorman, permitting plaintiff, Irving Solomon, to ride with him upon the step of the front platform where he was standing when he fell. By the very nature of the case, therefore, plaintiff was not one of defendant's regular fare-paid passengers, nor occupying the space provided for fare-paid passengers, upon the car. And the question at once arises as to what was his legal status there. It

20 is our contention here that this invitation by the motorman could not operate to give plaintiff, Irving Solomon, the status of a fare-paid passenger, nor impose upon this defendant the same duty toward him which it owes to its fare-paid passengers, but that he was no more than a trespasser, or at most a mere licensee. And the reason is that such invitation by the motorman was quite in contravention of his instructions and quite outside of the range of his

30 duties and the scope of his employment as a motorman; that in issuing such an invitation he was not acting for defendant and could not bind it.

The relation of carrier and passenger is in its nature and inception a contractual one, and its existence depends on the formation and existence of the appropriate form of contract, express or implied. In the formation of this contract the

40 carrier acts through its regular agents who are instructed for that purpose as to the manner in

which they may deal with the travelling public in the creation of the relation of passenger and carrier. Unless, therefore, the agent complies with his instructions his action cannot be held to be the legal act of his principal, the carrier, especially where the nature and limitations of those instructions and of his agency for his principal are obvious and familiar to all. Now the relation of common carrier is by the settled common law doctrine of centuries, than which no legal rule is as a matter of fact more familiar to the public, one of hire and reward. The relation is not created without a hiring; the reward and the duty are reciprocal and inseparable. This essential characteristic is determinative of the extent of the agency of those employees of carriers whose duty it is to deal with the travelling public. Their limitation of authority is as strict as the relation of common carrier, and it is as obvious as it is strict. When they exceed that authority they act only for themselves.

These considerations are as applicable to trolley cars as to stagecoaches. The scope of the employment of the car crew is strictly confined to admitting only those persons who tender the required fare, and it is their positive instruction and duty to exclude all others. Any invitation extended by them of their own motion to ride free is in nowise the act of their employer and principal, but is an entirely gratuitous assumption on their part.

Especially is this true of the motorman of the car. Whatever may be the duty of conductors of street cars with respect to determining who shall be passengers, the motorman, on the contrary, has nothing to do with those who are carried on the car. As a pure matter of everyday experience and common sense, this is the exact distinction between them, the line of demarcation of their respective activities. The motorman is exclusively, and necessarily so, concerned

10

20

30

40

with the mechanical operation and propulsion of the car. This limitation of his work was never more clear and obvious than to-day when the new pay-as-you-enter type of car everywhere in operation is so constructed as to prevent the admittance of passengers by the front platform, and in many of these cars the motorman is boxed in within a separate compartment, taking it out of his physical power to determine upon the admission of passengers. All the numerous contrivances which are now in operation upon street railways to require all passengers to pass the conductor upon entering the car, constitute so many expressive declarations and indications of the policy of the company in the assignment and dividing of the work of the car crew—beyond the possibility of misapprehension by the travelling public.

This distinction has been adverted to at least once by the Court of New Jersey. In *Sheets v. Connolly Street Railway Co.*, 54 Law (25 Vr.), 518 and 520, the Court significantly remarked:

“The car in question had no conductor, and the evidence showed that the driver’s duty was to collect fares besides attending to the brake and driving and controlling the horses, and looking out for passengers.”

The question thus raised by the case is one which is still an open one in New Jersey. The only case which at all approaches the matter, the Danbeck decision, cited in appellants’ brief, proceeded expressly on the ground of the plaintiff’s infancy, and avoided the question whether he was a passenger or not. The only contrary intimation to be found in the opinion is the reference to the English case of *Lynch v. Nurdin* (1 Q. B., 422), where Lord Justice Denman remarked that the defendant’s servant, having by most blameable carelessness tempted the child to climb aboard his wagon, ought not to reproach the child with

yielding to that temptation. But in *Friedman v. Snare & Triest*, 71 Law (42 Vr.), 605 at 617, this court repudiated the dictum with the remark that the authority of *Lynch v. Nurdin* has been distinctly discountenanced, if not necessarily overruled, by the later English decisions.

In the case of *Barlow v. J. C. H. & P. St. Ry. Co.*, 67 Law, 364, the court said in the course of its opinion that a twelve year old boy who jumped on the step of the front platform of a street car knew that the rear platform was the proper place for passengers. 10

In other states we think that no question is made of the correctness of the contention that the motorman of a street car has no authority to invite one to ride free on the front step, and that such a person does not become a passenger.

"Since the relation of passenger and carrier, in its inception, depends upon the existence of a contract, express or implied, it would seem, upon principle, that no employee could bind the carrier to such a relation, unless the employee possessed the requisite authority, as no contract can exist, by agency, without the requisite authority to make the contract, on the part of the alleged agent." 20

White, "Personal Injuries on Railroads,"
Sec. 561.

"The conductor of a train, however, has no authority to invite a person to ride without payment of fare and as a mere personal favor, and one thus riding is not a passenger. Persons accepting invitations from employees not having the control of the train or any apparent right to give permission to ride thereon, such as brakemen, engineers, yard-masters or baggagemen, are of course not entitled to be considered as passengers." 30

6 Cyc., "Carriers," 540.

"The principle, which we have elsewhere discussed, that subordinate employees, such 40

as conductors, brakemen, engineers, firemen and the like, cannot change or abrogate the rules of the company, requires that such persons cannot impose upon their employees the obligation of a public carrier of passengers by receiving persons on trains not provided for the carriage of passengers, or, as a general rule, by inviting them to ride in dangerous places not provided by their employers for passengers to occupy."

Elliot on Railroads, Sec. 1580.

10

"The general doctrine is that a person can take passage on such trains only in such places as the rules of the company provide that passengers should be carried, and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or passenger can not impose upon a railroad company the high duty which a carrier owes to its passengers."

Elliot on Railroads, Sec. 1580.

20

"Where a boy boarded the car by permission of the gripman of the car, who had no authority to grant such permission the boy was a trespasser and not a passenger."

Nelles on St. Railways (2nd Ed.), Sec. 323.

30

"One riding upon a train by the invitation of the conductor, and without paying fare, is not entitled to the rights of a passenger, so as to recover for injuries received, in the absence of a showing that the conductor is empowered with authority to permit him to so ride."

Stalcup v. Louisville, N. A. & C. R. Co.,
16 Ind. App., 584; 45 N. E., 802.

"One riding upon a passenger train by the invitation of the conductor, without paying fare, can not claim the rights of a passenger in case of injury."

40

Higgins v. Cherokee R. Co., 73 Ga., 149.

"A railroad company is not liable for an

injury to a child who boarded a passenger train by the permission of the baggage master, who has no authority or control over the train."

Reary v. Louisville, N. O. & T. R. Co.,
40 La. Ann., 32; 8 Am. St. Rep., 497.

It nowhere appears that plaintiff, Irving Solomon, had not ordinary intelligence for his age or lacked capacity to understand the situation, or to appreciate that it is no part of the motor-man's work to designate who shall or shall not be passengers. 10

We submit that no help can be derived by appellants from these cases which seem to regard conductors as vested with a certain discretion to designate who shall or shall not be passengers. Clearly the motormen of trolley cars in use at the present day have no concern with passengers whosoever.

The following cases are of especial interest because of their close resemblance to the case at bar: 20

"One riding on a locomotive by agreement with the fireman to shovel coal for privilege of riding, without knowledge of conductor, is not a passenger."

Woolsey v. Chic., etc., R. Co., 39 Neb.,
798; 58 N. W., 444.

"A boy about 12 years old, at the request of the driver in charge of a bob tail street car, which met on a single track, got on the rear platform to which the horse was hitched, and drove back to a switch while the driver attended to the brake. 30

"HELD that he was not a passenger for hire, and the railway company was not liable for an injury caused by the negligence of the driver."

Marks v. Rochester Rwy. Co., 41 App.
Div., 66; 58 N. Y. Supp., 210. 40

"Where a boy boarded a car by permission of the gripman of the car, who had no authority to grant such permission, the boy was a trespasser, and not a passenger"

Drogmund v. Metrop. St. Ry. Co., 122 Mo. App. 154; 98 S. W., 1091; 6 St. Ry. Rep., 21.

In the case last cited the Court made the distinction which we have above noted, and whatever may be the scope of the conductor's employment, the motorman had no authority to invite persons to ride free upon the car:

"In the prior cases cited, the persons were permitted to ride on the cars by those in charge without paying fare, which the court held made them passengers; but in the case at bar, under the ruling in the latter case, the gripman had no authority to grant plaintiff permission to ride on the car in question. He was not, therefore, a passenger, and such is the ruling. *Padgitt v. Moll and Citizens' Railway Company*, 159 Mo., 143; 60 S. W., 121; 52 L. R. A., 854; 81 Am. St. Rep., 347. The Court committed an error in instructing the jury that, under the facts, they might find that the plaintiff's son was a passenger."

The case of *Finley v. Hudson Elec. Rwy. Co.*, 64 Hun, 373; 19 N. Y. Supp., 621; affirmed 74 N. Y., 618, is exactly on all fours with the case at bar. In that case it was held that the motorman of an electric railroad company is not acting within the scope of his employment or the line of his duty to the company, nor in furtherance of its interests nor for its benefits, when he invites a boy who has opened a switch to ride on the car, and the company owes the latter no duty as a passenger. The Court denied that the motorman in inviting the boy to ride free on the front platform step was acting within the scope of his employment:

"But it is claimed that the plaintiff was

getting upon the car by invitation of the motorman or conductor, in payment for his services in opening a switch for the motorman; assume that to be the fact, in doing so the motorman was not acting within the line of his duty, neither was he doing it in furtherance of the defendant's interest or for its benefit. No benefit was to be derived by the defendant from the motorman's act. Not only is it not within the scope of his employment to invite people to ride free, or to employ others to assist him in the performance of his duties and compensate them by free transportation, but in this particular case the defendant, for the purpose of breaking up a practice of the kind in question, had ordered their motormen not to permit or allow it, and had made rules against it.

10

* * * * *

"The scope of the motorman's duty as motorman, or driver of the car, was to conduct or drive the car carefully through the streets; as conductor, for he seems in this case to have been both motorman, or driver, and conductor, it was his duty to see to the welfare of passengers, or those seeking to become passengers; he owed as the servant of the defendant a duty to no one else; the plaintiff was not injured by reason of any neglect of duty that the defendant owed to other users of the streets; neither was he injured by any neglect of duty that the defendant owed to him as a passenger, or one seeking to become a passenger, and it was not within the scope of the conductor's duty to invite him on the car as a guest, and as such the defendant was under no obligation of duty to him.

20

30

"It seems to me that it was not a part of the motorman or conductor's business, or within the scope of his employment, or for the benefit of the defendant or in furtherance of its interest, to invite the plaintiff upon the car under the circumstances in this case, and hence that the defendant's assent thereto cannot be implied."

40

(b). Defendant Neither violated nor omitted any duty which it owed plaintiff, Irving Solomon, as such trespasser or licensee.

10 The considerably lesser duty of a carrier towards those who do not occupy the status of fare-paid passengers is well settled to be not the highest degree of practicable care, nor even a high degree of care, but simply ordinary or slight care, and is violated only where the particular set of facts can be said to warrant a reasonable inference of *gross* negligence, or where by some positive wilful, wanton or reckless act they are exposed to danger and injured.

20 "That a person enters upon an engine or car upon the invitation or with the acquiescence of an employee who has no authority to give such permission does not make him more than at most, a mere licensee, and the railroad company therefore is under no duty to protect him from injury, except that it shall not wantonly and wilfully injure him, and that it shall exercise ordinary care to protect him after discovering him in a dangerous position."

33 Cyc., 817-818.

30 "A person who, having no other lawful right to be upon the vehicle, is there without the consent of the carrier, has none of the rights peculiar to passengers and cannot recover damages for anything short of such negligence on the part of the carrier, occurring after notice of such person's presence as would give a right of recovery to any other trespasser."

Shearman & Redfield on Negligence (6th Ed.) Sec. 489.

40 "We think it clear, however, that the high duty of a public carrier of passengers does not exist unless the employee has authority to accept the person as a passenger, although the acts of the employees may relieve the person suffered to ride from the imputation of being a trespasser or intruder and impose upon the company the duty of exercising ordinary care.

We do not say that such acts may not impose some duty on the company, but we do give it as our opinion that they do not impose upon the company the duty of using the highest degree of practicable care."

Elliot on Railroads, Sec. 1581.

"A street railway company owes no duty to a trespasser except to refrain from wilfully, wantonly or recklessly exposing him to danger."

Ibid., Sec. 322.

10

"The company is not liable for injuries sustained by a boy while getting upon a car by invitation of the motorman or conductor to ride in payment for his services in opening a switch for the latter contrary to the company's rules and instructions not to allow other than passengers to ride."

Ibid.

"A carrier does not owe to a person riding without payment of fare that degree of care which is due a passenger, but is liable only for ordinary negligence."

20

Kansas City, etc., R. Co. v. Berry, 53 Kan., 112, 36 Pac., 53.

This being the measure of defendant's duty toward plaintiff Irving Solomon, and the manner in which alone such duty is omitted or violated, it is our insistment here that plaintiff had up to the close of his case submitted no evidence of any acts or omissions on the part of defendant's servants such as would have warranted a reasonable inference that they had failed to observe the ordinary care which was required of them.

30

The burden of plaintiff's complaint consists of the alleged jerk of defendant's car which is claimed to have caused Irving Solomon to lose his balance as he was turning on the step of the moving car. Of the precise character and cause of this sudden movement of the car he leaves no uncertainty by

40

his testimony although he could not be sure whether he had his back turned at the time or not (p. 30, l. 30), from which it would appear that the motorman pushed the iron controller handle quickly around and brought it back again; and his attorneys in their brief are at pains to explain that this double operation would naturally produce a jerk. It does not appear that he was occupying any sheltered or secure position, or steadying himself, in any way, so that he could be dis-

10 lodged therefrom only by the application of some considerable force; but he was occupied in turning around upon the narrow step of a car which he had boarded after it was already in motion and shifting, while in a standing position, the hand with which he had grasped the bar by which he had swung himself aboard from one hold to another. This is the extent of defendant's delinquency; let us examine its enormity.

20 We think that under any candid consideration this alleged delinquency of defendant when placed alongside of the duty here owing to Irving Solomon, will be found to fall very far short of measuring up to the gross negligence which alone will support a liability. Nowhere in this record will the most careful examination disclose any testimony concerning this jerk except that it was a jerk—and there is quite lacking any basis of inference that the jerk was other than the ordinary

30 one when the power is thrown first on, and then immediately off. Within the every day experience of thousands who travel on electric street railways—so much so as to be almost a matter for judicial notice—this operation entails nothing but the most ordinary and scarcely heeded forward motion of the car; it has passed under the direct observation of every one almost numberless times and is usually hardly deemed worthy a passing thought.

40 Now it is defendant's insistent here that in order to predicate gross negligence of a jerk of a car, it must be characterized by some *unusual and*

extraordinary force and violence; that no criterion for this purpose is to be found in those cases of passengers, cited by plaintiffs in their brief; and that it is altogether beside the question that the fact of plaintiffs being jerked from the car makes it *res ipsa loquitur* that defendant was guilty of such negligence as would render it liable to a *passenger*. We submit rather that the most helpful and illuminating test is to be derived from that class of cases which define the nature of the jerk or jolt which will raise a liability to a passenger who is travelling *inside* the car. Such passengers, by the well settled rule, assume the risk of all such jerks and jolts as are incident to the ordinary operation of the car, and may recover only where the jerk is one of extraordinary force and violence. 10

Nellis on Street Railways (2nd Ed.), Sec. 298;

6 Cyc. ("Carriers"), 624;

Pascall v. No. Jersey St. Ry. Co., 75 Law, 836. 20

But the mere sudden turn of the controller handle forward and then immediately backward is not productive of a jerk of sufficient force and violence as to be deemed extraordinary. And it is submitted that this is the test which should govern in the case of acts alleged to constitute such negligence as will raise a cause of action in favor of a trespasser or licensee. Judged by this test the conduct of the motorman, cannot, we think, be held a violation of the ordinary care which alone he owed plaintiff Irving Solomon. 30

"The starting of a car while a passenger is standing up is not ordinarily negligence, unless the start is made with an extraordinary jerk, attributable to a defect in the track or train, or skill of the gripman."

Pryor v. Metrop. St. Ry. Co., 85 Mo. App., 367. 40

"In an action to recover damages for the death of plaintiff's intestate, it appeared that decedent boarded one of defendant's cars, passed out on the front platform, and remained standing there till hurled over the lashboard by a violent jerk of the car. The only evidence as to the cause of such violent jerk was given by a passenger, who stated that he saw decedent falling, and experienced a jerk as if the driver *had put the brake on and then let it off*, or as if there was a rock on the track.

10

"HELD, that the evidence did not show any negligence on the part of the driver."

Bradley v. Second Ave. R. R. Co., 90 Hun, 419; 35 N. Y. Supp., 918.

It was long ago decided in this state that even as against a passenger, some more than ordinary jerk must be shown to constitute negligence in starting a street car. We submit that there is a clear analogy between suddenly whipping the horse attached to a horse car, and the action of the motorman here in turning the controller handle.

20

"It is no evidence of negligence in a driver of a horse car that he whipped a pair of horses when about to start a car full of passengers, unless there appears to be something unusual in the manner of his whipping them."

30

May v. No. Hudson Co. Rwy. Co., 49 Law (20 Vr.), 445; 9 Atl., 688;

No. Hudson Co. Rwy. Co. v. Rochat,
Law (Vr.), ; 10 Atl.,
710.

But appellants seek to escape the effect of the strict doctrines respecting the measure of duty to trespassers by invoking in favor of plaintiff, Irving Solomon, the rule of the Danbeck case that children trespassers and licensees are entitled to a considerably higher degree of care than are

40

adults. It is submitted, however, that when the reason and basis of that doctrine are examined, and compared with the facts and circumstances of this case, it will be found that no connection or application thereof can be established here. The rule thus set up rests upon the familiar habits of indiscretion, inappreciation and recklessness of danger which are the trait of children of tender years—and due care predicated thereon corresponds to the degree of that indiscretion. But a reading of this record will clearly show that plaintiff, Irving Solomon, cannot claim the benefit of this doctrine at least to any such extent as would seriously modify the degree of care which was due him under the preceding considerations. He was nine years old, and as may be gleaned even from the record, without the advantage of observing his demeanor, was of considerable intelligence and activity. He had been living at one end of the route on which this car ran, on Henderson Street near Pavonia Avenue, for a year and a half prior to the accident (p. 26, l. 27) and was, therefore, familiar with the locality and the presence and passage to and fro of the cars. He had been going out nights playing in the street with other boys for six months (p. 27, l. 20),—the accident happened about half-past eight at night, after he had been playing about the street for two hours and a half (p. 27, l. 3) and knew that it was dangerous to get on the cars (p. 27, l. 22).

It is, therefore, submitted that this testimony, especially when viewed in conjunction with the boy's demeanor upon the stand, supplied a sufficient basis for the finding of the trial court that he was not in the category of those children of tender years, nor of such inexperience or indiscretion as to raise perceptibly the measure of care owing to him as a trespasser or licensee. In determining this discretion and experience, evidence of the age and environment of the boy was a very significant element. It has been held in

10

20

30

40

New Jersey that age and environment are important factors to be considered.

Ritscher v. O. & P. V. Ry. Co., 79 Law, 464.

A minor living in this environment has been presumed to be familiar with the running of street cars and the danger of collision in crossing their tracks without care.

10

Fitzhenry v. Con. Trac. Co., 64 Law, 674.

Boys of his age have been held to be of sufficient discretion to be subject to the rules which bind adults in the use of streets occupied by trolley tracks.

Sheets v. Connolly Ry. Co. 25 Vr., 520 (child 10 years);

Flanagan v. N. Hud. Co. Ry. Co., 28 Vr., 699 (child 9 years);

20

Brady v. Consol. Trac. Co., 34 Vr., 25 (child 9½ years);

Fitzhenry v. Consol. Trac. Co., 35 Vr., 674 (child 9 years).

30

And in the determination of the degree of discretion possessed by minors in these circumstances perhaps the most important single element is the *demeanor of the child on the witness stand*. This factor is, of course, present only to the trial court. It must be presumed to have entered into the determination of the trial court. And appellate tribunals are very loath to disturb determinations of fact made upon evidence and considerations which in their nature cannot be preserved in the printed record. We submit, therefore, that this court should not, without clear and cogent counter-balancing testimony in the record overcoming the evidence of demeanor, reverse the finding of the trial court that plaintiff, Irving Solomon, was of such discretion that the measure of duty owing to an adult trespasser or licensee would be adequate to protect him.

40

POINT III.

Upon the evidence submitted for plaintiff, the Trial Court was justified in finding that Irving Solomon was guilty of contributory negligence.

But whatever may be the view of this court as to the propriety of the trial court's determination of defendant's motion for a non-suit on the ground of negligence, it is submitted, and defendant rests its case confidently upon the showing of the record on this subject, that the trial court did not err in its finding of contributory negligence. It is our insistent that plaintiff, Irving Solomon, by his action in taking and maintaining his position upon the step of the front platform of a car already in motion when he boarded it, instead of proceeding to a more sheltered portion of the car, or at least of the front platform, and then attempting to face about on this narrow foothold, exchanging hands upon the upright with which he had pulled himself aboard, and turning his back upon the motorman, at a time when he knew that the speed of the car would be quickened, so that he could not observe and anticipate the precise moment when it would become necessary to exert an effort to preserve his balance in so unsteady a position, was guilty of such contributory negligence as must bar his recovery.

The evidence on this subject is so clear as scarce to need any detailed review. The entire object and purpose of plaintiff is clear and patent from his testimony, and the theory of the complaint. He was accepting the motorman's invitation to ride free on the front platform; his intention (page 24, line 35) was to sit down on the platform with his feet on the step. Let us follow his movements, according to his testimony. When the motorman jerked or nodded his head (page 23, line 18; page 33, line 3) he came over to the front

of the car and holding with his right hand on the upright bar, got on the front step with both feet. At this time then, he was standing facing the motorman and with his back to the street with his right hand on the upright. It does not appear which upright he was grasping; but it must have been the bar attached to the dashboard, and not that upon the body of the car—for this would be the most natural and easy position—it would be much more awkward and unsteady for him to hold on with his right hand to the upright on the body of the car while facing the motorman; for that would bring his right hand directly across him and would tend to turn him so that he would face the rear of the car and make him tend to fall backward to the street from the mere forward motion of the car.

On this narrow foothold he remained throughout the entire occurrence. This is the most significant and controlling circumstance in the case.

His counsel rather disingenously observe that he was not riding on the step and had not yet reached the position he was to take on the platform, but was using the step as a means of boarding the car. But we think that the court is entitled rather to rely on plaintiff's own testimony than on his counsel's statements, viz.: that *he intended to ride on the step and not on the platform* (p. 24, l. 35). *Why did he not, if so sure of the motorman's permission, step up on the platform?* If he had the full status of a passenger as counsel claims why did he not enter the car? It nowhere appears that the car was at all crowded, although his counsel remarks that he was in the only position he could have occupied under the circumstances. Nor is there any testimony that plaintiff as stated by his counsel was occupying the particular place at the instance of the company's servant; it nowhere appears that the motorman designated the step as the place where the plaintiff Irving Solomon was to ride; the positive testimony is that the motorman never said a word

but merely jerked or nodded his head (p. 23, l. 16; p. 33, l. 3), so that the choice of place must have been the boy's own. He must therefore be assumed to have maintained this position on the step voluntarily.

From this insecure position facing the motor-man, it was necessary for him to turn, in order to sit down on the floor of the platform and rest his feet on the step, as was his intention. For this operation the narrow step was obviously very far from an adequate foundation—the step is scarcely wider than the two feet placed close together—so that he would at some point in the turn find it necessary either to stand on one foot, swinging the other out over the street, or to keep his feet close together on the step—which is the smallest area possible for the support and equilibrium of the body—or to place one foot *behind* the other, which is scarcely a wider or more secure base of support.

Furthermore, it would also become necessary, in the course of this turn, to *change hands* on the upright bar. In his first position his right hand would be nearest the bar which we have seen that he must have held; in the position which it was his intention to assume, his left hand would be next to it. Now, in making this change, in turning, there must have been a moment when he either had neither hand on this bar, or both hands. Now it nowhere appears in the testimony that he ever had both hands on the upright bar. On the contrary he stoutly maintained, on cross examination, that he had *one* hand on the bar throughout (p. 28). So that at one point in the turn he would have no support, but from below, and the very slightest motion of the car would throw him out of balance.

Yet another consequence of the turn was that in the course thereof, he necessarily turned his back upon the motorman. It was most important

for him, occupying this position, to watch for the first motion of the car; he knew that its speed was to be increased, and that the mere increase of speed, howsoever slight, would sway him toward the rear of the car and tend to make him lose his balance. His shifts and evasions on the cross examination show that he knew this (such was his intelligence) and he was endeavoring to give the impression that he kept his eye on the motor-man all the way around.

10 During all this time, it must not be forgotten, the car was not standing still, but was in motion, and had been since before he had boarded it, to his own knowledge, as appears from his testimony.

20 This aspect of the case, moreover, must be considered in conjunction with the testimony to which reference has been made under the preceding point, concerning his long residence in the neighborhood of the accident, his familiarity with the presence and operation of street cars, his habit of playing upon the street every afternoon and evening with other boys, and his admitted appreciation that it was dangerous to get on the cars.

30 And here also as under the preceding Point, it is of importance to remember, that there was other evidence before the trial court which cannot be reproduced before this court by any printed record. It had before it the boy himself, speaking, and observed his physical and mental development, his demeanor under the searching test of cross-examination.

40 Upon all these circumstances we beg to submit, the conduct of plaintiff Irving Solomon in assuming and maintaining the situation which he did, and his actions while in that situation, in view of of his experience and appreciation of the risk, cannot but be most convincing of his negligent disregard of his own safety. And we think that the trial court read aright the evidence and its

implications in passing on defendant's motion for a non-suit on the ground of contributory negligence.

There is little doubt that the act of plaintiff Irving Solomon in remaining on the steps of the front platform when the car was in motion and about to gather speed, instead of proceeding within the car or at least ascending to the safer position of the platform, and then attempting to turn round in this position, was such contributory negligence as would bar an adult from recovering. 10

It is not claimed by defendant, nor is it necessary to do so, that it was negligence per se for plaintiff Irving Solomon to ride upon the step of the car, and all the rulings to that effect which are cited in opponent's brief are neither here nor there.

But in view of the fact that there was no crowded condition of the car, nor indeed any testimony on the subject at all, nor any specific designation by the motorman (who merely jerked his head) of the step as the place on which the plaintiff Irving Solomon was to ride, it is our insistence that he came within the rule that one voluntarily riding in so exposed a position, is presumed to have been negligent. 20

It is submitted that in determining this question no assistance can be derived from any of the decisions in this State, because the point has never come before our courts. All the cases in this State of street car passengers who have been injured while riding on the platform, steps or running board have been cases where the passenger assumed this dangerous position of necessity because of the crowded condition of the car, or where the passenger was stepping down preparatory to alighting. Of this nature are the *Whalen* and *Trussel* cases cited by appellants, as examination of the opinions will show. And it is submitted that this is the extent to which the courts 30 40

have gone in New Jersey—that it is only the necessity which justifies the exposure to danger and prevents such exposure from amounting to negligence per se. Where such danger is voluntarily incurred, where the car is not at all crowded and no reason exists necessitating such conduct, a very different question is presented, for which we must turn to the rulings of other States.

10

“If a passenger is unnecessarily and voluntarily in a place of danger, his negligence is presumed, and puts the burden of proof upon the plaintiff to show that his riding in that position did not contribute to his injury. It is the duty of a passenger to go inside the car or train, if there is standing room inside, although there are no vacant seats.”

Nellis on Street Railways (2nd Ed.),
Sec. 315, and cases cited.

20

“As to street cars, the general rule as to riding on the platform is more liberal, and it is generally said not to be negligence per se to do so. * * * In many cases, however, it is said to be negligent to ride on the platform or steps of a street car in rapid motion unless the crowded condition of the car makes it necessary.”

6 Cyc. (“Carriers”), 654, 655, and cases cited.

30

It is not necessarily contributory negligence per se or as a matter of law for a passenger to ride on the platform, running board or step. This is especially true where the car is crowded so that there is no other place to ride. The question is usually one for the jury. But where a passenger voluntarily rides on the running board or front platform or steps thereof, when he could readily obtain a seat inside, it seems that he assumes the ordinary risks, and some authorities hold that this is prima facie evidence of negligence.”

40

Elliott on Railroads, Sec. 1096 cz, and cases cited.

"On the other hand, it is obvious that circumstances may exist under which *contributory negligence will be imputable* to a passenger who attempts to ride upon the platform of a street car. * * * It is obvious enough that there can be no recovery for injury sustained by a passenger on a street car platform, where standing thereon is an act of carelessness or a failure to exercise such care as men of ordinary prudence would exercise under the same circumstances. Accordingly, it has been held that a passenger on an electric motor car is guilty of contributory negligence in voluntarily riding on the steps of the front platform."

10

Thompson on Negligence, Sec. 2956, and cases cited.

A passenger upon a street car is generally considered guilty of contributory negligence in riding upon the steps of a street car when there are ample accommodations inside the car.

20

Francisco v. Troy & L. R. Co., 78 Hun, 13; 29 N. Y. Supp., 247;

Solomon v. Central Park N. E. R. R. Co., 1 Sweeney (N. Y. Supr. Ct.), 298;

Gaffney v. Union Trac. Co., 211 Pa., 91; 60 Atl., 488; 3 St. Rwy. Rep., 770;

Bumbear v. United Traction Co., 198 Pa. St., 198; 47 Atl., 961;

Wood v. Chester Traction Co., 36 Pa. Supr. Ct., 483;

30

Woodruff v. Roxborough, 201 Pa. St., 521; 51 Atl., 324; 88 Am. St. Rep., 827.

"A person is guilty of contributory negligence who being a habitual passenger of a street railway at the time of the accident, rides on the steps of the front platform, when there are ample accommodations within the car."

7 Am. St. Rep., 546, note.

"Where there is room to be seated inside in the passenger's proper place, and no special

40

and sufficient reason is shown why he should not avail himself of it, it is negligence per se to remain on the platform of a moving trolley car. Cases where the car is crowded, and no seat is available, rest on a different basis. There the traveller, if he is to get on at all, must stand on the platform, with its rods, etc., to hold by, or inside, with a strap for that purpose. He is presented with a choice of evils and his action must be judged by the jury."

- 10** *Thane v. Scranton Traction Co.*, 191 Pa. St., 249; 43 Atl., 136; 71 Am. St. Rep., 767.

See, also, to same effect:

- Kirchman v. Oil City St. Rwy. Co.*,
210 Pa. St., 45; 59 Atl., 270;
Bumbear v. United Traction Co., 198 Pa.
St., 198; 47 Atl., 961;
Arkin v. Frankford etc., Co., 142 Pa. St.,
47; 21 Atl., 781.

"It is contributory negligence for a passenger to ride on the steps of a motor car where there is abundance of room in the body of the car to seat all passengers."

- Francisco v. Troy & L. R. Co.*, 78 Hun,
13; 29 N. Y. Supp., 247.

“Where a street car passenger unnecessarily stands on the platform or steps in a dangerous position while the car is in motion, and because of so doing is thrown off and injured, he is guilty of negligence, precluding recovery.”

- File v. Wilmington City Rwy. Co., Del.*
; 80 Atl., 623.

“Where a passenger riding on the back platform on a street car gets on to the step while the car is in motion, and is thrown off by a sudden jerk, he is guilty of contributory negligence.”

- 40** *Gaffney v. Union Trac. Co.*, 211 Pa., 61;
60 Atl., 488.

"For a boy nine years old to ride on the steps of the front platform of a street car is presumptive evidence of negligence on his part, and the burden is upon him to rebut the presumption."

Solomon v. Central Park, etc., Rwy. Co.,
31 N. Y. Supp. Ct. (1 Sweeney), 298.

"A passenger in a street car, who, instead of taking a seat, stood on the front platform, was guilty of negligence which contributed to death caused by his being hurled over the front of the car by a sudden jerk." 20

Bradley v. Second Ave. Rwy. Co., 90
Hun, 419; 35 N. Y. Supp., 918.

"A person who goes upon the lowest step of a street car running over seven miles an hour, without steadying himself by grasping the handrail or otherwise, is negligent."

Sarko v. St. Paul City Ry. Co., 67 Minn.,
8; 69 N. W., 473. 20

"A passenger who rode on the platform of a street car was not relieved from the charge of contributory negligence by the fact that the conductor knew he was occupying such a position, or that it was customary for others to stand upon the platform; but that question must depend, among other things, upon whether there was a vacant seat in the car of which the plaintiff was aware, and which he might have taken, and whether his standing on the platform was more dangerous than occupying the seat." 30

Chicago Rwy. Co. v. Klauber, 9 Ill. Appeals, 613.

"Riding upon the front platform of an electric car, although there was room inside, and disregarding a notice on the platform that if passengers rode upon the platform they would do so at their own risk, was held to be negligence as a matter of law, barring a recovery for injuries resulting from the collision between the car and a wagon." 40

Pike v. Boston El. Rwy. Co., 192 Mass., 426;

Kiefer v. Brooklyn Heights Rwy. Co., 97 N. Y. S., 841.

10

"In an action for injuries received by a passenger who was thrown from a moving car by a sudden jerk, the passenger cannot recover if he was standing on the platform when there was room for him to sit or stand in the car, and the negligence of the motorman would not have caused the injury if the passenger had been inside."

McDonald v. Montgomery, 110 Ala., 161; 20 So., 317.

"Such riding bars recovery where there is room inside, even when it is done at the express invitation of the driver of the car to occupy that particular position."

20

Nellis on Street Railways (2nd Ed.), Sec. 315, note.

Citing:

Archer v. Fort Wayne & E. Rwy. Co., 87 Mich., 101; 49 N. W., 488; 48 Am. & Eng. Rd. Cas., 50;

Maguire v. Middlesex R. Co., 115 Mass., 239;

Butler v. Pittsburg & B. P. Rwy. Co., 139 Pa. St., 195; 21 Atl., 500;

30

Ashbrook v. Frederick Ave. R. Co., 18 Mo. App., 290.

The position which plaintiff Irving Solomon was preparing to take, as he testified that he intended, viz.: to sit on the floor of the platform, with his feet on the step, was one which under these circumstances was clearly such as to evince contributory negligence on the part of an adult—and so the courts have held:

40

"In an action against a street railway company for personal injuries it appeared

that plaintiff, a boy of thirteen, a passenger upon a crowded car sat upon the front platform, with his feet on the step, and his knees projecting several inches beyond the side of the car, and was struck on the knees and knocked under the car by a mortar box which builders had placed in the street only a few inches from the passing cars.

"HELD, a compulsory non-suit was properly ordered because of contributory negligence on the part of plaintiff, and absence of negligence on defendant's part."

10

Butler v. Pittsburgh & B. St. Ry. Co.,
139 Pa. St., 195; 21 Atl., 500.

"Plaintiff, while sitting on the platform of a street railway car, with his feet on the step, against the remonstrances of the driver, who told plaintiff that his position was unsafe and against the rules of the company, notices to that effect being posted up within view of the plaintiff, fell and sustained injuries.

"HELD, that he had no cause of action against the company."

20

Wells v. Lynn & B. R. Co., 129 Mass.,
351; 2 Am. & Eng. R. Cas., 27.

"A passenger seated on the platform of a car, with one foot on the bottom step and the other leg straight out, there being seats on the car, is negligent as a matter of law."

Wagner v. Atlantic Coast Line R. Co.,
N. C. a., ; 61 S. E., 171.

30

If merely standing upon the step would be held to bar a recovery, *a fortiori*, plaintiff Irving Solomon could not go through the operation of turning around thereon without being guilty of such contributory negligence as would conclude an adult.

"A man while standing on the front step of a horse car, bowing to his wife inside, was thrown from the car by its sudden jerk.

"HELD, that his contributory negligence precluded his recovering damages."

40

Ashbrook v. Frederick Ave. R. Co., 18 Mo. App., 290.

"Where a passenger after riding for some distance upon the step of a street car, releases his hold upon one grip bar, and is then thrown off by a lurch of the car, he is guilty of negligence."

Quinn v. Metrop. St. Rwy. Co., 218 Mo., 545; 118 S. W., 46.

10

"A passenger was guilty of contributory negligence when, standing upon the step of a car because of the crowded condition of the car and knowing of a curve in the roads, he released his hold on the bar for the purpose of paying his fare and was thrown from the car when rounding the curve."

South Covington & C. St. Rwy. Co. v. Physioc, 29 Ky. L. Rep., 14; 92 S. W., 305.

20

"A passenger of a street railroad car stood upon the very edge of the platform without holding on to anything, and with knowledge of the bad condition of the street car track, caused by accumulation of ice and snow, and he maintained this position after an opportunity had been given him to exchange for a place of comparative safety till thrown off by a jark of the car occasioned by said bad condition of the street.

"HELD, that he was guilty of such contributory negligence as precludes recovery."

30

Ward v. Central Park, etc., Co., 33 N. Y. Supr. Ct., 392; 11 Abb. Pr. (N. S.), 411; 42 Horo Pr., 289.

But appellants seek to avoid the effect of these rules which are binding on adults (thereby admitting that plaintiff's conduct falls within them) by the contention that plaintiff was not subject to them because of his infancy, so that he could not be deemed guilty of contributory negligence as
40 a matter of law, but that this question should

have been left by the trial court to the determination of the jury.

Plaintiff, Irving Solomon, testified that he was nine years and some months old at the time of this accident. And it is appellants' claim that this age was close to the line when negligence cannot be inferred as a matter of law, and that the law requires that when there is any doubt that a child is *sui juris* the jury must decide the question. Appellants' counsel seem from their argument, to take the ground that the mere age of this plaintiff settles in their favor the question whether the trial court erred in this matter, and that it is the law of this State that it is the duty of the trial court to submit to the jury the question of contributory negligence *in all cases* where the child is between the age of reason, which is usually about seven years, and the age when he is in law an adult, and which latter point of time appellants fix (judging by the quotation from the *Scott* case, on p. 21 of their brief) at fourteen. Appellants' counsel, it should be noted, have quite failed to argue the question whether the facts of the case showed plaintiff sufficiently developed to be capable of taking care of himself. We do not understand that any such duty rests upon the trial court, but rather that this period of the child's life is exactly that during which the court is at liberty to find him capable of exercising such care as would avoid the danger in question, as contrasted with the earlier and later periods, when this function is denied it.

As regards plaintiff's age alone, it is so far from concluding in his favor the question of contributory negligence that there are at least four cases in this State, already referred to *supra* (p. 30) and to be hereafter discussed, the Flanagan, Brady, Burke and Fitzhenry cases, where children of the age of plaintiff were held guilty of contributory negligence.

But this whole question rests on other considerations besides that of age alone. The trial court is entitled to determine for itself from *all the circumstances* whether the child is capable of observing due care, and whether as a matter of law he has failed to exercise the care to be expected of him under those circumstances. We think the case at bar provided an ample array of such circumstances to guide and justify the trial court in its finding.

- 10 Perhaps the most significant and controlling set of circumstances on which the trial court is entitled to rely in determining whether a child of nine years is *sui juris* are those of his *previous experience and his environment* at the time of the accident. This is well settled under the law of this State.

In *Fitzhenry v. Consol. Trac. Co.*, 64 Law (35 Vroom), 674; 46 Atl., 698, the court remarked:

- 20 "In the present case, the testimony is that the plaintiff lived only a block or two away from Newark Avenue when the accident occurred, and we must assume that she was familiar with the running of the trolley cars there and the danger of collision therewith in crossing their tracks, unless care is exercised."

- In *Anderson v. Central R. R. Co.*, 68 Law (39 Vroom), 269; 53 Atl., 391, this court observed
30 that familiarity with the locality where the accident occurred was controlling on the question whether a seven year old boy who ran across a railroad track without looking was *sui juris*:

- "The infant in this case was shown to have been in the constant and daily practice of crossing the tracks of the defendant company, and so acquired experience of the running of trains across the public highways at great speed, and in a mode which would
40 peril the safety of anyone who stepped on the track in front of them. No judgment

more mature than his was required to show him that safety in the place of known peril was to be obtained by observing whether or not a train was approaching the highway on which he was moving, and to abstain from crossing in front of an approaching train."

In *Ritscher v. Orange & Passaic Valley Railway Co.*, 79 Law (50 Vroom), 462, the Court cited the Anderson case as authority for the proposition that "in fixing a standard of care applicable to the boy, his age and his environment at the time of the accident are all important factors to be considered." 10

Upon these questions the record presents clear and convincing evidence justifying the action of the trial court. We have already noted under the preceding Point, the testimony as to plaintiff Irving Solomon's residence in the neighborhood and his familiarity with the presence and operation of the cars. At the risk of repetition, we desire again to call the attention of this court to the fact that plaintiff had been living on the street on which the cars were running and the accident happened, and near a cross-street (Pavonia Avenue) where other car tracks are located, for a period of two years and a half prior to this accident. He was accustomed to go daily back and forth from his home to Public School No. 4, located on Eighth Street (p. 31, l. 20), some blocks away and in the late afternoon, from half-past three till five, he went from No. 4 school to a Hebrew school, which we may assume to have been located at another place, since it is improbable that it was located in the Public School. He had been accustomed, after school, during the six months preceding the accident to go out after school on Henderson Street, where defendant's cars were constantly moving to and fro, to play with the other boys. And for the period of two weeks preceding the accident he had been going out at night, after dark, 20 30 40

to play on the street. And on the night of the accident, he had been playing on the street for two hours and a half, before the accident happened (p. 27, l. 3). We need not presume that he must have become familiar with the presence and constant passage of defendant's cars, because he expressly, admitted that he knew that trolley cars ran on Henderson Street in front of his house (p. 27, l. 20).

- We submit that this testimony as to plaintiff
- 10 Irving Solomon's environment and experience previous to this accident are most significant factors in this case. He was not living in rural community where trolley cars are not operated and automobiles are rare and where comparatively few vehicles pass along the streets. The actions, knowledge and responsibilities of a child living in a large city, accustomed to being alone on the streets, passing and repassing across street car tracks upon which trolley cars run;
- 20 whereon automobiles, autotrucks, electric engines, and vehicles, of all description are constantly passing to and fro, must be judged with reference to this distinction. It can hardly be contended that situated as he was he would be unaware of the dangers to be incurred by getting on trolley cars in other than the ordinary way.

- Another very important circumstance is the *obviousness of the risk*. It follows from the very
- 30 fact that plaintiff's age exceeds that below which he is totally incapable of exercising due care, that howsoever little he has advanced beyond that stage, there are some kinds of dangers which even he can and must appreciate. This circumstance is also settled in this State to be a factor in the determination of the trial court whether the child is *sui juris*.

- In *Brady v. Consol. Traction Company*, 63 Law (34 Vroom), 25; 42 Atl., 1054, a boy nine and a
- 40 half years old, while playing in the street, ran

in front of a trolley which he saw approaching and was struck by the further corner of the fender. The court, in discussing whether he was *sui juris* and could be held guilty of contributory negligence as a matter of law, remarked:

"As was said in *West Jersey Railroad Co. v. McEwan*, 26 Vroom, 574, 576, 'there is a substantial difference between being surprised by an unforeseen peril and being overtaken by one apprehended and recklessly incurred.' This difference is of special importance in dealing with children; for, to expect a danger where none is seen, requires a larger experience and the exercise of abler deductive faculties than does the appreciation of a manifest peril. 10

"The case in hand presents the latter condition. The plaintiff saw the car approaching, and there was no element of danger which he did not perceive or which a boy of his years was not capable of fully appreciating. He chose to run in front of the car, on his judgment that he could cross before it reached him, in spite of the evident danger of the attempt, and we think it should be held that he took the risk of failing in the effort which he designedly made." 20

In *Vorrath v. Burke*, 63 Law (34 Vroom), 18; 42 Atl., 838, where a girl twelve years old undertook to raise a cellar door from which she knew that the counterbalancing weights had been removed, and in so doing was injured, the court speaking by Mr. Justice Collins, makes the following significant observations respecting the obviousness of the risk, on the authority of the *Sheets* and *Flanagan* cases: 30

"The question here is not exactly that of negligence, but rather of the assumption of an obvious risk. The case, shows, indeed, that there was no other way to return to the house except through the apartment of another tenant, but that fact is immaterial. Even had the girl asked, and been refused, 40

permission to return by that way, she would not have been justified in assuming a risk that she thought to be dangerous. Liability, surely, cannot be made to depend on the degree of the risk. It is argued that, as she had come up safely she might assume that she could go down safely, but that was a mere matter of judgment, and the very argument implies ability to reason. If she was old enough for that she was old enough to be subjected to the consequences of a mistake."

10

It needs little if any argument to show the extreme and obvious peril of boarding a moving car by the front platform, of remaining on the step thereof while the car was in motion, with its speed momentarily about to be increased, and of attempting to make a turn of half-a-circle while standing on so narrow a foothold.

20

Nor was plaintiff a boy by any means lacking in intelligence, nor backward in his development. The record itself, the character of his answers, show him to be both bright and apt, of quick understanding and ready wit. The father's testimony likewise shows the brightness and intelligence of the boy; he was accustomed to drum up business for his father among the neighbors, to distribute and mail circulars and other advertising matter. This was not the work of a child of tender years and shows that he appreciated the daily concerns of adult persons, which children of tender years never do. And his answers upon cross-examination show that he was fully able to take care of himself in any verbal encounter, and, therefore, equally able to take practical care of his personal safety in his every day mode of life on the familiar highways of his neighborhood.

30

40

But the record itself was not the only evidence of the boy's mental development. It should not be forgotten in this connection that the trial court in deciding defendant's motion for a non-

suit had before it evidence the nature whereof prevents its reproduction in any printed record. It had the boy himself, speaking and acting, upon the witness stand, it discerned the quickness of his comprehension as shown by the changing expression of his face, his agility in action and movements, and his whole physical and general development and state of growth. These very important factors must be presumed to have guided the judgment of the trial court and entered into and controlled in no inconsiderable degree its determination that the boy was sui juris. Of this evidence this court cannot have the benefit in reviewing this determination. And it should require a very gross misapprehension of the evidence on the part of any trial court to warrant an appellate court upon a consideration of only part the evidence in reversing the determination of fact which was based thereon. It is submitted that due weight should here attach to the determination that plaintiff Irving Solomon appeared from actual observation to the trial court to be sui juris.

But we have in this case still more explicit evidence that plaintiff Irving Solomon here assumed a risk the character of which he knew and appreciated. Ordinarily in these cases it is necessary to infer from the age, experience, environment, and state of mental and physical development of the child, his ability, mental and physical to take care of himself. In a few cases the task is made easier because the *acts* of the child evince unmistakably his knowledge of the danger he was incurring. Thus in *Verdon v. Crescent Auto Co.*, 90 Law (51 Vroom, 201); 76 Atl., 346, the court remarked of a boy even younger than plaintiff here:

"The evidence shows that when he saw the automobile coming he knew that he was liable to be injured unless he ran out of its course;

and this he undertook to do, indicating that he fully appreciated the danger of his position."

But the present case goes even further. We are not driven to inferences of more or less remoteness, because we have the boy's own *express admission that he knew and appreciated the risk of injury which was involved in getting on these cars in any but the ordinary way.*

10 "Q. You knew trolley cars ran in front of the Henderson Street side of your house? A. Yes.

"Q. You knew it was dangerous to get on them, didn't you? A. Yes."

20 The importance of this statement, we submit, makes it controlling on the question of contributory negligence. It dispenses with the other and ordinary inquiry whether his acts showed such understanding, and gives us at a step the conclusion which in the ordinary case forms the goal and object of a lengthy investigation. And it is the settled law that such statements are of very great significance on a question of this nature.

"Notwithstanding the immaturity a minor, if it appears that he knew of the danger he will be held guilty of contributory negligence"

29 Cyc. ("Negligence"), 541.

Citing:

30

Loftus v. Dehail, 133 Cal., 214; 65 Pac., 379;

Herman v. Kumase, 190 Ill., 156; 60 N. E., 215; 83 Am. St. Rep., 123; 52 L. R. A., 652 rev'g 92 Ill. App., 232;

Carson v. Chic., etc., R. Co., 96 Ia., 634; 52 N. W., 545;

Hunt v. Graham, 15 Pa. Supr. Ct., 42;

Laylow v. Rogers, 3 Law L. R. A. (Pa.), 233;

40

Merryman v. Chic., etc., Rwy. Co., 85 Ia.,
634; 52 N. W., 545.

Appellant's counsel attempts to weaken the force of this admission by the argument that the question was not directed to the particular circumstances of this case. This, it should be noted, constitutes his sole argument on the question whether the boy was in fact *sui juris*. We submit that the argument is the merest quibble. The object of the whole inquiry, as the witness and his counsel both well know, was to determine whether the boy had that knowledge which an adult would be held to have, to wit, that it was dangerous to do what he did. That it was dangerous for an adult, we have already shown. The question was whether plaintiff knew this also. He admitted that he did. We submit that his answer practically settles the question. 10

It is submitted that the course of decisions in this state fully supports these conclusions and in nowise required the trial court to submit these circumstances to the jury. In many cases our courts have held boys of the age and capacity, environment and experience of Irving Solomon, *sui juris*. In *Sheets v. Connolly Street Rwy. Co.*, 54 Law (25 Vroom), 518, 24 Atl., 483, plaintiff, a girl of ten years old, was crossing a street by a diagonal sidewalk and was struck by a car for which she failed to look although no obstruction to view existed. The Court said: 20 30

"Plaintiff was a child of the age of ten years, and appears from the evidence to be (as the trial judge told the jury) of more than ordinary intelligence * * *. She was evidently *sui juris*, and the jury were told to consider the degree of care and discretion which would be expected from her. The jury found by their verdict that she was not guilty of contributory negligence. * * *

"The overwhelming weight of the evidence to the contrary evinces that the verdict must 40

be attributed to the prejudices of mistakes of the jury.* * *

"A determination that an intelligent child of the age of ten years is not negligent in crossing a street with its eyes and attention drawn in another direction from that in which it is moving cannot be sustained."

In *North Hudson County Railway Co. v. Flanagan*, 57 Law (28 Vroom), 696, 32 Atl. 216, a boy nine years old who was playing ball on the street started to run across in front of an approaching car, looking over his shoulder at another boy who was about to throw the ball at him and took no notice of the car till he reached the middle of the track and the car was only four feet away, when he stopped on hearing the driver's yell, and looked around and saw the car for the first time, but was instantly run down.

The Court said:

20 "It is urged, on behalf of the plaintiff, that this rule only applies when the person injured is *sui juris*; that the plaintiff, although nine years old, was backward, both mentally and physically, compared with the other boys of his age, and that it was for the jury to say whether he was of sufficient intelligence to be chargeable with negligence in crossing the street as he did. We do not think that there is anything in the evidence to warrant the idea that this plaintiff had not sufficient mental capacity to know the danger of attempting to cross a street directly in front of a moving horsecar, and to avoid such danger. A boy of his age, even if mentally not up to the standard of other boys of the same age, is not in law altogether exempted from the exercise of care and prudence in approaching a known danger, and, when the evidence shows that he has been the heedless instrument of his own injury, he cannot recover."

30

In *Brady v. Consol. Trac. Co.*, 63 Law (34 Vroom) 25, 42 Atl., 1054 already discussed (*supra*, p. 46), a boy nine and a half years old, while playing in the street, ran in front of a trolley

40

which he saw approaching and was struck by the further corner of the tender. The Court held he was *sui juris* and could be held guilty of contributory negligence as a matter of law.

On a second trial of the same case, a verdict for plaintiff having again been found, the Supreme Court allowed a new trial on the ground of contributory negligence in the following language:

"The plaintiff was a foot passenger crossing a street containing a car track. A duty devolved upon him before crossing to use his powers of observation to observe approaching cars which are within a distance, if run at lawful speed, to put him in danger. *Newark Passenger Railway Co. v. Block*, 26 Vroom, 605. Such a duty devolved upon an intelligent youth who was *sui juris*, as plaintiff is admitted to be. *Sheets v. Connolly Railroad Co.*, 25 Id., 518; *North Hudson Railway Co. v. Flanagan*, 28 Id., 696

10

* * * * *

"The case was tried on the theory that no negligence was chargeable to a child of plaintiff's age in playing upon a public street and running in play (as plaintiff did) across the street. It is unnecessary to determine whether theory is correct, because a verdict attributing to plaintiff the exercise of the care proper for a boy of his age, and finding no negligence in running across the street without observation as to approaching cars, is a verdict against evidence."

20

64 Law (35 Vr.), 373, 45 Atl., 805.

30

In *Fitzhenry v. Consolidated Traction Co.*, 64 Law (35 Vroom), 674, 46 Atl. 698, a girl nine years of age accompanied by her little brother having stopped on the curb of a street, was attracted by a friend waving her hand on the opposite side and started to cross at a quick pace (some witnesses said, at a run) proceeding diagonally, and had crossed the eastbound track along which a car had just passed and reached the first rail of the westward track when they were struck as they

40

stepped on it, by the fender of a car which plaintiff could plainly have seen approaching had she looked. The Court held plaintiff guilty of contributory negligence as a matter of law, in the following language:

10 “Under such circumstances as these, it is plain that an adult plaintiff could not recover because of contributory negligence. Does the youthfulness of the plaintiff, who was at the time nine years of age, prevent the operation of this rule, or at least make the question one for the jury? The plaintiff was admittedly *sui juris*, and of an age when she was required to exercise reasonable care, to a degree that is usually exercised by children of that age who are ordinarily careful. *Beach Cont. Neg.*, 136, and cases cited; *Consolidated Traction Co. v. Scott*, 29 Vroom, 682.

20 “It is true that in such cases the question of contributory negligence is generally, if not always, a question for the jury. But this doctrine will not warrant a recovery when the child suddenly puts himself in a dangerous place, where there was no reason to expect him, and too late for the danger to be averted by the person inflicting the injury. 7 *Am. & Eng. Encyc.*, 1 (2nd Ed.), 409, and note.

30 “The salutary rule of duty which requires the ordinary traveler, in crossing a street railway, to use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, is also binding upon the child that is *sui juris*; and if the facts are undisputed, and it appears clearly that he has acted in entire disregard of that degree of prudence which may be reasonably expected from one of his years, and he suffers injury thereby, he cannot recover, and in that case the question of contributory negligence becomes one for the Court to determine. 3 *Ell. R. R.* 1261; *Railway Co. v. Flanagan*, 28 Vr., 696; *Brady v. Trac. Co.*, 34 Vr., 25; *S. C. ante*, p. 373; *Collins v. South Boston Rwy. Co.*, 142 Mass., 301; *Hayes v. Norcross*, 162 Mass., 546.”

40

In *Anderson v. Central R. R. Co.* 68 Law (391,

a boy nine years old who had been in the constant and daily practice of crossing defendant's tracks, and was familiar with the crossing, was struck by a train of which a clear view was to be had at least fifty feet from the track. This Court held it not to be a jury question whether he was *sui juris*, in the following language

"The duty of taking care for one's personal safety, when in a place known to be dangerous, is imposed upon all minors who are *sui juris* as well as all adults. The degree of care for personal safety exacted from adults may, and doubtless does, differ from that exacted from minors. The latter lack experience and are of immature judgment. Such deficiencies will be most observable in infants of tender years, and may well be considered in determining whether they have exercised due care for safety. As infants increase in years, and as they approach majority, such deficiencies will be of less weight. Where they tend to characterize the infant's acts, as being prudent or imprudent, the question presented is usually a jury question.

"But when the act of an infant exposes him to a personal peril which he must recognize and appreciate, and when his personal safety may be secured by means indicated by the most immature judgment, his exposure of himself to the peril, without any precaution, will leave no question for a jury."

We submit that these decisions on the legal capacity of boys of the age of plaintiff have a most significant bearing on the present authority of the case on which plaintiffs' counsel rely, the Danbeck case. It has already been noted that that decision, which in its facts somewhat resembled the case at bar, proceeded, not on the ground that the Danbeck boy was a passenger, but on the ground of the higher duty owing to him as a minor *non sui juris*—he being nine years of age, the age of this plaintiff. Now it should be observed that of the decisions above discussed only

one, the Sheets case, preceded the Danbeck case—all the others followed it in point of time, and were decided on the light of the Danbeck case; yet they adopt a different conclusion.

This departure from the doctrine of the Danbeck case is made clear beyond all doubt by the case of *Barlow v. J. C. H. & P. St. Rwy. Co.* in 67 law (38 Vr.) 364, a case which offers on its facts a most significant and instructive parallel to the case at bar. In the Barlow case an eleven
 10 year old boy, who had been selling newspapers in a trolley terminus for some period before the accident, sprang upon the step of the front platform of a moving car the door being closed; he claimed on the witness stand that he intended to become a passenger and pay fare, although he had passed by the rear platform where passengers were entering; he rapped on the door but the motorman did not open it nor slacken speed, and he was thrown from the steps shortly afterward
 20 by the jolt of a collision between the car and a wagon. We have already referred to the remarks of the Court in disposing of his contention that he thought he might become a passenger by entering at the front platform (*supra*, p.). The point of the case for this discussion appears from the holding of the Court, speaking, it should be noted, by Mr. Justice Gilbert Collins, now the attorney of this plaintiff, that he “was of sufficient age and intelligence to be held to the general rules applicable to adults.” In support of this
 30 conclusion, Justice Collins cited the Sheets, Fanagan, Brady and Vorrath cases already referred to. But the significant feature of the Barlow case is that Mr. Justice Collins in arriving at his conclusion expressly refers to and declines to follow the Danbeck decision. The Barlow case must therefore be regarded as expressly limiting the Danbeck case to infants who are younger than plaintiff, Edward Barlow.
 40

None of the other cases cited in appellants' brief on this point have any controlling influence here. Each is marked by features which clearly set it apart from the case at bar.

Plaintiff seems to set considerable reliance upon *Traction Company v Scott*, in 58 Law 592. But the Scott boy was only seven and a half years old—at least two years younger than Irving Solomon and only six months beyond the age where children are conclusively presumed *non sui juris*. The nature of the danger, moreover, was very different from that here—it was not an extreme and obvious one. The Court in the Brady case, after laying down the rule of obvious danger before referred to expressly makes this very distinction between the Scott case and the Brady case:

“The question of negligence in persons of immature age is almost always one for the determination of the jury. It was held to be such in *West v. New Jersey Railroad and Transportation Co.*, 3 Vroom, 91; S. C. 4 Id. 430, and in *Traction Co. v. Scott*, 29 Id. 682; but the language of the opinion in *North Hudson County Railway Co. v. Flanagan*, 28 Id., 696, indicates that it is not always so.

“In the two cases first named, the alleged negligence consisted in the child's failure to infer the probable existence of a danger not apparent to his senses, while in the case now before us the dangerous proximity and movement of the car were actually perceived by the plaintiff. As was said in *West Jersey Railroad Co. v. McEwan*, 26 Vr., 574, 576, ‘there is a substantial difference between being surprised by an unforeseen peril and being overtaken by one apprehended and recklessly incurred.’ This difference is of special importance in dealing with children; for, to expect a danger where none is seen, requires a larger experience and the exercise of abler deductive faculties than does the appreciation of a manifest peril.

“The case in hand presents the latter condition.”

The quotation from the Scott case on page 21 of appellants' Brief does not represent (as appellants' counsel would seem to imply) the Court's declaration of the rule obtaining in New Jersey, but was simply its distinction between the facts of that case and those of the foreign cases which are cited in the quotation. The subsequent decisions in the Brady and other cases settled the rule for New Jersey.

10 We submit that this effectually disposes of the Scott case as an authority here. Its only value in this case might be as containing a definition of the general rule governing trial courts in the determination whether infants over seven and under fourteen are *sui juris*.

And similarly for the David case, which appellants' counsel seem to consider as having worked some change in the rule obtaining in this state. The boy in that case was also only seven years old.

20 The Court in its opinion distinguished that case from the Fitzhenry and Anderson cases in the following language:

30 "No doubt, where it appears beyond dispute that the child acted in entire disregard of the degree of prudence which may reasonably be expected of one of his years, and thereby contributes to his injury, then the question, contrary to the usual rule, becomes one for the Court to determine. *Fitzhenry v. Consolidated Traction Co.*, *supra*; *Anderson v. Central Railroad Co.*, 39 Vroom, 270.

"In the present case there was the tender age of the decedent and his comparative inexperience; there was the train passing on the other track to distract his attention; there was the evidence that the crossing gong did not ring; there was the evidence that the train which hit him gave no statutory signal."

In *Keenan v. Public Service Railway Company*, cited by appellants, the boy was also younger than 40 Irving Solomon—eight years and four months.

All the other case which might be found in the

reports are similarly either considerably above or below the age of Irving Solomon.

We desire in this connection to call the Court's attention to the ruling of a case cited by appellants, *Ecliff v. Wabash, St. L. & P. R. Co.*, 64 Mich., 196; 31 N. W., 180. In that case a boy 12 years old rode on the front of an engine which was reversed and travelling with its tender foremost. He was killed in a collision. The Court said:

“But it is claimed by plaintiff's counsel that a child of 12 years cannot be charged with the same discretion and judgment as an adult, and that it is sufficient if the boy in this case exercised reasonable care according to his age and capacity. And it is further contended that this reasonable care, to be so exercised, is a question in all cases to be determined by a jury under the particular circumstances in each case. It is true, the caution required is according to the maturity and capacity of the child, to be determined in each case by the facts in such case; and the degree of discretion in avoiding danger depends upon the age and knowledge of the child. And when there is any conflicting evidence as to the danger likely to be incurred, or as to the act or acts in getting in the way or reach of such danger, or as to the age or capability of the child, the question of the contributory negligence of the person injured or killed should be submitted to the jury; or, if all the circumstances of the case, when the facts are undisputed, are such that ordinarily prudent men would be liable to differ in their views as to the negligence imputed, then such negligence should not be determined by the court, but the question left to the jury under proper instructions.

“In this case there is no conflict of evidence upon these points to be considered in determining whether or not the boy was negligent. The plaintiff's intestate was of ordinary intelligence, and usually bright for his age, as his mother testifies. Although delicate in health, he was full of animal spirits, and out of doors a great deal. He

10

20

30

40

was, of course, more heedless and thoughtless of danger than a man; but he was living in the immediate vicinity of railroad trains, and accustomed to them. He must be presumed to have known of the great peril and danger of riding where he did. The fact that it was a place of great danger is a matter of common knowledge, and is intensified by the fact that no one upon this train was injured but these two boys, who, in the position they were, could not well escape hurt by such an accident. A boy of 12 years knows as well as an adult that upon the top of freight cars, or in front of the engine, when reversed, between that and the cars, is not a safe place when the train is moving. The fact that a boy of that age is more reckless and not as cautious as a man, in the face of such danger, is not of itself enough to excuse him. I can see no reason for submitting a question as plain and clear as this one to a jury. There could be but one result if the judgment and oaths of the jurors were not warped and disregarded because of the natural sympathy that goes out instinctively towards the sufferer in such a case as this.

"The plaintiff's intestate was guilty of contributory negligence in riding as he did upon the train, and no fault of the company or its employes, short of gross or wanton carelessness, can excuse him from the results of such negligence."

Morse, J., in *Ecliff v. Wabash, St. L. & P. Ry. Co.*, 31 N. W. Rep., 183.

We submit that the judgment of the trial court that defendant violated no duty which it may have owed plaintiff Irving Solomon and that he was *sui juris* and guilty of contributory negligence was correct and should not be disturbed.

The judgment should be affirmed.

EDWARDS & SMITH,
Attorneys of Plaintiff-Appellee.

WILLIAM D. EDWARDS,
EDWIN F. SMITH,
WILLIAM G. McLOUGHLIN,
Of Counsel.

INDEX.

	PAGE.
Notice of Appeal	1
Certificate of Transcript	3
Petition for Appointment of Next Friend	3
Order Appointing Next Friend	5
Complaint	6
Answer	15
Reply	17

TESTIMONY.

FOR PLAINTIFFS.

IRVING SOLOMON:

Direct	18
Cross	26
Re-Direct	33

JAMES DYAS:

Direct	35
Cross	35

JOHN MARTIN:

Direct	37
Cross	38

SOLOMON LICHTENSTEIN:

Direct	39
--------------	----

ALEXANDER HIPPLER, M. D.:

Direct	40
Cross	41
Re-Direct	41

IRVING INGBER, M. D.:

Direct	42
--------------	----

SAMUEL ESSIG:

Direct	44
Cross	46

SAMUEL FELDMAN:

Direct	51
Cross	52
Re-Direct	58

FRANK SOLOMON:

Direct	58
Motion to Non-Suit	66
Rule for Judgment	67

Notice of Appeal.

(Filed, May 18, 1914.)

Hudson County Circuit Court.

IRVING SOLOMON, by his next friend,
Frank Solomon, and FRANK
SOLOMON, individually,

Plaintiffs,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant.

Action at
law.
Notice and
grounds of
Appeal.

10

To :

EDWARDS & SMITH, ESQS.,

Attorneys of Defendant.

20

TAKE NOTICE that the plaintiffs appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds.

1. The court erroneously nonsuited the plaintiffs.

The following questions were overruled to the witness Irving Solomon.

30

2. "Did you turn the switch at Pavonia Avenue and Henderson Street for any of the cars of the Henderson Street line on that night?"

3. "Did you turn the switch for that car more than once?"

To the witness Frank Solomon:

4. "Have you still got the business at Union Hill?"

40

Notice of Appeal.

5. "Does that interfere with your business any?"

6. "Did you give up your business?"

7. "What happened to your business?"

8. "Before the accident what time did you generally go to business in the morning?"

9. "What time did you take your son to school
10 every day?"

10. "What were the profits of your business previous to the accident?"

11. "What was your profits after the accident?"

12. "Did the profits of your business decrease after the accident?"

13. "What actual effect did the injury to Irving have on your business?"

14. The Court under the evidence ought to
20 have submitted to the jury the question of the defendant's negligence.

15. The Court under the evidence ought to have submitted to the jury the question of the negligence of the plaintiff, Irving Solomon.

COLLINS & CORBIN,
Attorneys of Plaintiffs.

Certificate to Transcript.

(Filed May 23, 1914.)

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year within contained, in a certain appeal to this writ annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Petition for Appointment of Next Friend.

(Filed Jan. 15, 1914.)

TO HONORABLE WILLIAM H. SPEER,

The petition of Frank Solomon hereby shows unto your Honor that he is the father of Irving Solomon, an infant of the age of nine years, one of the plaintiffs in the above stated action; that he believes that the said Irving Solomon has a just and good cause of action against the Publie Service Railway Company, a corporation the defendant named in said action, because of injuries sustained by the said Irving Solomon on the 8th day of September, 1913, by being thrown from a car operated by the defendants' servants on Henderson Street near Bay Street, Jersey City, N. J., through the negligence of the said defendant by its then servants and agents.

Your petitioner prays your Honor to admit him to prosecute the said action for the said Irving Solomon as his next friend.

FRANK SOLOMON,
Petitioner.

Dated, January 14, 1914.

Petition.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

Frank Solomon being duly sworn according to law on his oath says: I am the petitioner named in the foregoing petition, and the facts set forth therein are true.

10 Sworn and Subscribed to }
at Jersey City, N. J., this } Frank Solomon.
14th day of January }
A. D. 1914, before me: }
EDWARD MARKLEY,
Notary Public, New Jersey.

I hereby consent and agree to the prosecution of the above action by me as next friend of Irving Solomon, according to the prayer of the attached petition.

20 FRANK SOLOMON.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

Sam Scherman, being duly sworn according to law on his oath says that he was present and saw Frank Solomon, the petitioner named in the attached petition, sign the said petition and the consent thereunder, and that same were signed
30 on the 14th day of January, 1914.

SAM SCHERMAN.

Sworn and subscribed to }
at Jersey City, N. J., this }
14th day of January, }
A. D., 1914, before me: }

EDWARD MARKLEY,
Justice of the Peace and Notary Public,
Hudson County, New Jersey. (L. S.)

40 Let the within petition be filed.
Dated, Jan. 15, 1914.

WM. H. SPEER,
Judge.

Order Appointing Next Friend.

(Filed, Jan. 15, 1914.)

It appearing upon reading the petition of Frank Solomon and the consent of said Frank Solomon, and the affidavit of Frank Solomon thereto attached, that the said Irving Solomon claims to have a good cause of action against the said defendant, and is an infant under the age of 21 years, to wit, of the age of 9 years. 10

It is Ordered that Frank Solomon be admitted to prosecute said action for the said Irving Solomon in the above stated Court, against the said Public Service Railway Company, a corporation, as next friend of the said Irving Solomon.

WM. H. SPEER,
Judge.

Dated, January 15, 1914.

On motion of

COLLINS & CORBIN,
Attorneys of Plaintiffs. 20

30

40

Complaint.

(Filed, Jan. 20, 1914.)

The plaintiffs, Irving Solomon by his next friend, Frank Solomon, and Frank Solomon, individually, both residing at 499 Henderson Street, Jersey City, N. J., say that:

First Count:

10 1. On September 8, 1913, the defendant was and still is a corporation of the State of New Jersey, and operated a trolley line in and through certain public streets in the City of Jersey City, N. J., by running trolley cars propelled by electricity over rails laid upon said streets.

20 2. On said date defendant by its servants was operating a trolley car in a northerly direction on a certain street in Jersey City known as Henderson Street, and brought said car to a stop at or near the intersection of said Henderson Street with a certain other street known as Bay Street, for the purpose of permitting passengers to alight therefrom and embark thereon.

30 3. At the front end of said car there was a platform to and across which passengers were required to pass in order to enter the body of said car. In order to reach said platform passengers were required to mount one step placed at the side of said platform and reaching therefrom to the ground.

40 4. After said car had come to a stop as aforesaid, the plaintiff, Irving Solomon, a boy of the age of nine years, at the invitation of the motorman of said car, attempted to embark thereon and while in the act of boarding said car, and while in a dangerous position, the defendant's servants negligently started said car without warning to the plaintiff and thereby caused said car to give an extraordinary and unusual jerk or lurch, which

Complaint.

was greater and more violent than was reasonably necessary in the reasonably safe operation thereof, and without giving said plaintiff a reasonable opportunity to board said car with reasonable safety, and by reason of the said extraordinary and violent starting and jerk or lurch of said car, plaintiff was thrown to the ground and under said car with great force and violence, and thereby received the injuries and suffered the damages hereinafter stated. 10

5. That in the operation and management of said car, defendant was negligent in this, that it caused the same to start suddenly while the said plaintiff, at the invitation of its servant, was in the act of embarking thereon, and before the said plaintiff had a reasonable opportunity to board the same, and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof, and was also negligent in this, that while the plaintiff was in a dangerous position which was known or should have been known to the defendant's servants in the exercise of reasonable care on their part, and before the plaintiff had a reasonable opportunity to change his position to one of reasonable safety the defendant's servants, without warning, suddenly and violently started said car, thereby causing said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof. 20 30

6. By reason of the defendant's negligence, as aforesaid, the plaintiff, Irving Solomon, was violently thrown to the ground and under said car, the wheels of said car passing over the said plaintiff's right leg, cutting same off below the knee, 40

Complaint.

necessitating the amputation of said leg above the knee in order to save said plaintiff's life. The said plaintiff received other bodily injuries, underwent great pain and suffering and has been permanently injured.

SECOND COUNT:

10 1. On September 8, 1913, the defendant was and still is a corporation of the State of New Jersey, and operated a trolley line in and through certain public streets in the City of Jersey City, N. J., by running trolley cars propelled by electricity over rails laid upon said streets.

20 2. On said date defendant by its servants was operating a trolley car in a northerly direction on a certain street in Jersey City known as Henderson Street, and brought said car to a stop at or near the intersection of said Henderson Street with a certain other street known as Bay Street for the purpose of permitting passengers to alight therefrom and embark thereon.

30 3. At the front end of said car there was a platform to and across which passengers were required to pass in order to enter the body of said car. In order to reach said platform passengers were required to mount one step placed at the side of said platform, and reaching therefrom to the ground.

40 4. After said car had come to a stop as aforesaid the plaintiff, Irving Solomon, a boy of the age of nine years, at the invitation of the motor-man, embarked thereon, and was sitting on the front platform of said car with his feet resting on the step leading from said platform to the ground, and while in said position the defendant's servants negligently started said car without warning and while plaintiff was in a dangerous

Complaint.

position, and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof, and by reason of the sudden and violent starting of said car and said jerk or lurch, the plaintiff was thrown to the ground and under said car with great force and violence, and thereby received the injuries and suffered the damages hereinafter stated. 10

5. That in the operation and management of said car the defendant was negligent in this, that it caused the same to start suddenly while the said plaintiff, at the invitation of its servant, was in a dangerous position thereon, and before the said plaintiff, Irving Solomon, had a reasonable opportunity to obtain a position of safety on said car; and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof. 20
and was also negligent in this, that while the plaintiff was in a dangerous position, which was known or should have been known to the defendant's servants in the exercise of reasonable care on their part, and before the plaintiff had a reasonable opportunity to change his position to one of reasonable safety, the defendant's servants, without warning, suddenly and violently started said car, thereby causing said car to give an extraordinary and unusual jerk lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof. 30

6. By reason of the defendant's negligence as aforesaid, the plaintiff, Irving Solomon, was violently thrown to the ground and under said car, the wheels of said car passing over the said plain- 40

Complaint.

tiff's right leg, cutting same off below the knee, necessitating the amputation of said leg above the knee in order to save said plaintiff's life. The said plaintiff received other bodily injuries, underwent great pain and suffering and has been permanently injured.

THIRD COUNT:

10 1. On September 8, 1913, the defendant was and still is a corporation of the State of New Jersey, and operates a trolley line in and through certain public streets in the City of Jersey City, N. J., by running trolley cars propelled by electricity over rails laid upon said streets.

20 2. On said date defendant by its servants was operating a trolley car in a northerly direction on a certain street in Jersey City known as Henderson Street, and brought said car to a stop at or near the interesection of said Henderson Street with a certain other street known as Bay Street, for the purpose of permitting passengers to alight therefrom and embark thereon.

30 3. At the front end of said car there was a platform to and across which passengers were required to pass in order to enter the body of said car. In order to reach said platform passengers were required to mount one step placed at the side of said platform, and reaching therefrom to the ground.

40 4. After said car had come to a stop as aforesaid, the plaintiff, Irving Solomon, a boy of the age of nine years, at the invitation of the motor-man of said car, attempted to embark thereon and while in the act of boarding said car, and while in a dangerous position, the defendant's servants negligently started said car without warning to the plaintiff, and thereby caused said car to give

Complaint.

an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof, and without giving said plaintiff a reasonably opportunity to board said car with reasonable safety, and by reason of the said extraordinary and violent starting and jerk or lurch of said car, plaintiff was thrown to the ground and under said car with great force and violence and thereby received the injuries and suffered the damages hereinafter stated. 10

5. That in the operation and management of said car, defendant was negligent in this, that it caused the same to start suddenly while the said plaintiff, at the invitation of its servant, was in the act of embarking thereon, and before the said plaintiff had a reasonable opportunity to board the same, and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof; and was also negligent in this, that while the plaintiff was in a dangerous position which was known or should have been known to the defendant's servants in the exercise of reasonable care on their part, and before the plaintiff had a reasonable opportunity to change his position to one of reasonable safety, the defendant's servants, without warning suddenly and violently started said car, thereby causing said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof. 20 30

6. By reason of the defendant's negligence, as aforesaid, the plaintiff, Irving Solomon, was violently thrown to the ground and under said car, the wheels of said car passing over the said plain- 40

Complaint.

tiff's right leg, cutting same off below the knee, necessitating the amputation of said leg above the knee in order to save said plaintiff's life. The said plaintiff received other bodily injuries, underwent great pain and suffering and has been permanently injured.

10 7. As the result of said injuries the said plaintiff, Frank Solomon, has been, and will be in the future deprived of the services of the said plaintiff, Irving Solomon, his son, and has been forced to pay out large sums of money for medical attendance, and other expenses incident upon his injuries.

FOURTH COUNT:

20 1. On September 8, 1913, the defendant was and still is a corporation of the State of New Jersey, and operated a trolley line in and through certain public streets in the City of Jersey City, N. J. by running trolley cars propelled by electricity over rails laid upon said streets.

30 2. On said date defendant by its servants was operating a trolley car in a northerly direction on a certain street in Jersey City known as Henderson Street, and brought said car to a stop at or near the interesection of said Henderson Street, with a certain other street known as Bay Street for the purpose of permitting passengers to alight therefrom and embark thereon.

3. At the front end of said car there was a platform to and across which passengers were required to pass in order to enter the body of said car. In order to reach said platform passengers were required to mount one step placed at the side of said platform, and reaching therefrom to the ground.

40 4. After said car had come to a stop as afore-

Complaint.

said the plaintiff, Irving Solomon, a boy of the age of nine years, at the invitation of the motor-man, embarked thereon, and was sitting on the front platform of said car with his feet resting on the step leading from said platform to the ground, and while in said position the defendant's servants negligently started said car without warning and while plaintiff was in a dangerous position, and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof, and by reason of the sudden and violent starting of said car and said jerk or lurch, the plaintiff was thrown to the ground and under said car with great force and violence, and thereby received the injuries and suffered the damages hereinafter stated. 10

5. That in the operation and management of said car the defendant was negligent in this, that it caused the same to start suddenly while the said plaintiff, at the invitation of its servant, was in a dangerous position thereon, and before the said plaintiff, Irving Solomon, had a reasonable opportunity to obtain a position of safety on said car; and thereby caused said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof; and was also negligent in this, that while the plaintiff was in a dangerous position, which was known or should have been known to the defendant's servants in the exercise of reasonable care on their part, and before the plaintiff had a reasonable opportunity to change his position to one of reasonable safety, the defendant's servants, without warning, suddenly and violently started 20 30 40

Complaint.

said car, thereby causing said car to give an extraordinary and unusual jerk or lurch which was greater and more violent than was reasonably necessary in the reasonably safe operation thereof.

10 6. By reason of the defendant's negligence as aforesaid, the plaintiff, Irving Solomon, was violently thrown to the ground and under said car, the wheels of said car passing over the said plaintiff's right leg, cutting same off below the knee, necessitating the amputation of said leg above the knee in order to save said plaintiff's life. The said plaintiff received other bodily injuries, underwent great pain and suffering and has been permanently injured.

20 7. As the result of said injuries the said plaintiff, Frank Solomon, has been and will be in the future, deprived of the services of the said plaintiff, Irving Solomon, his son and has been and will be in the future forced to pay out large sums of money for medical attendance and other expenses incident upon his injuries.

The plaintiff, Irving Solomon, demands \$50,000 damages, and the plaintiff, Frank Solomon, demands \$10,000 damages.

COLLINS & CORBIN,
Attorneys of Plaintiffs.

30

40

Answer.

(Filed, Feb. 5, 1914.)

Defendant, a domestic corporation, answering the complaint herein says:

AS TO FIRST COUNT.

1. It admits paragraph one (1).
2. It denies paragraph two (2).
3. It admits so much of paragraph three (3) **10**
as alleges that there is a platform at the front end of a car, and that there is a step from said platform to the ground.
4. It denies paragraphs four (4) and five (5) and six (6).

AS TO SECOND COUNT.

1. It admits paragraphs one (1).
2. It denies paragraph two (2). **20**
3. It admits so much of paragraph three (3) as alleges that there is a platform at the front end of a car, and that there is a step from said platform to the ground.
4. It denies paragraphs four (4), five (5) and six (6).

AS TO THIRD COUNT.

1. It admits paragraph one (1).
2. It denies paragraph two (2). **30**
3. It admits so much of paragraph three (3) as alleges that there is a platform at the front end of a car and a step from said platform to the ground.
4. It denies paragraphs four (4), five (5), six (6) and seven (7).

Answer.

AS TO THE FOURTH COUNT.

1. It admits paragraph one (1).
2. It denies paragraph two (2).
3. It admits so much of paragraph three (3) as alleges that there is a platform at the front end of a car and a step from the platform to the ground.

- 10 4. It denies paragraphs four (4), five (5), six (6) and seven (7).

FOR DEFENSE TO SAID ACTION DEFENDANT SAYS:

1. That neither of said plaintiffs sustained any injury or suffered any loss by reason of any negligence of defendant, or any of its servants.

2. That neither of said plaintiffs sustained the injury or suffered the loss alleged in the complaint.

- 20 3. That plaintiff, Irving Solomon, was guilty of contributory negligence in the following respects:

(a) By stealing a ride upon the step of said car without the knowledge or consent of the defendant, or any of its servants.

(b) By attempting to steal a ride upon the step of said car without the knowledge or consent of defendant or any of its servants.

- 30 (c) By attempting to jump on a car of defendant while the same was moving at a speed which made such act dangerous.

(d) By running after and jumping upon the step of said car while the same was moving at a speed which made such act dangerous.

EDWARDS & SMITH,
Attorneys of Defendant.

Reply.

(Filed, Feb. 14, 1914.)

Replying to that part of defendant's answer entitled, "For defense to said action defendant says," the plaintiffs deny every allegation in paragraphs 1, 2 and 3 thereof.

COLLINS & CORBIN,
Attorneys of Plaintiffs.

10

Testimony.**Hudson County Circuit Court.**

IRVING SOLOMON, by his next friend,
FRANK SOLOMON, and FRANK
SOLOMON, individually.

vs.

PUBLIC SERVICE RAILWAY COM-
PANY.

20

Transcript of shorthand notes of testimony taken on the 30th day of April, 1914, before Judge Campbell and a jury.

20

APPEARANCES:

Collins & Corbin, Esqs. (Mr. Bain, and Mr. Markley, for plaintiff.

Edwards & Smith, Esqs., for defendant.

40

Irving Solomon—Direct.

PLAINTIFF'S TESTIMONY:

IRVING SOLOMON, called.

BY MR. SMITH:

Q. How old are you? A. Nine.

Q. Do you go to school? A. Yes.

10 Q. What school? A. No. 4.

Q. Sunday school? A. No, sir; not now.

Q. Don't go to church at all, do you? A. No, sir.

Q. Do you know what an oath is? A. No, sir.

MR. SMITH: Suppose your Honor examines him; you are the person to be satisfied.

BY THE COURT:

20 Q. Irving, do you know what a lie is? A. Yes, sir.

Q. Do you know what telling the truth is? A. Yes, sir.

Q. Do you know whether or not it is wrong to tell a lie? A. Yes.

Q. Is it wrong to tell a lie? A. No, sir.

Q. Eh? A. No, sir.

Q. Is it not wrong to tell a lie? A. No, sir.

Q. Eh? A. No, sir.

30 MR. BAIN: I do not think the boy comprehends.

Q. Do you know what an untruth is? A. Yes, sir.

Q. You tell something that is not true and isn't so? A. Yes.

Q. Is that wrong to do that? A. Yes, sir.

Q. What will happen to you if you tell an untruth? A. Be a sin.

40

Irving Solomon—Direct.

Q. That is all right. The Court is satisfied.

MR. SMITH: I think so.

(The witness is sworn.)

DIRECT EXAMINATION BY MR. BAIN:

Q. How old are you? A. Nine.

Q. On September 8, 1913, where did you live?
A. On Henderson Street. 10

Q. Near what other street? A. Pavonia Avenue.

Q. Was it on the corner of Henderson Street and Pavonia Avenue? A. Yes.

Q. Do you remember being hurt on that night?
A. Yes, sir.

Q. About what time did you have your supper on the night you were hurt? A. Six o'clock.

Q. What did you do after eating supper? A. I went down stairs and played on the corner. 20

Q. On what corner? A. Near Feldman's store.

Q. Feldman's store is on what corner? A. Henderson Street and Pavonia Avenue.

Q. Then what did you do after you stopped playing there? A. A motorman called me—

MR. SMITH: I object to the question as too general and it is not germane to the issue.

THE COURT: I will overrule the objection. 30

A. The motorman called me to switch the track.

MR. SMITH: I object.

MR. BAIN: I will withdraw the question, so as not to have any question about it.

Q. Did you turn the switch at Pavonia Avenue and Henderson Street for any of the cars of the Henderson Street line on that night? 40

Irving Solomon—Direct.

MR. SMITH: Objected to on the ground that it is irrelevant, incompetent and immaterial.

THE COURT: I shall for the present sustain the objection.

MR. BAIN: Note an objection.

10 Q. Did you, on the night that you were hurt, turn the switch at Pavonia Avenue and Henderson Street for the car that ran over you? A. Yes, sir.

Q. Did you turn the switch for that car more than once?

MR. SMITH: I object.

A. Yes, sir.

MR. SMITH: You are going back.

20 MR. BAIN: May I not show the facts and circumstances? Here is the same car.

THE COURT: That is not the question the Court is now trying. The third question back was objected to and the Court sustained the objection; then you asked a second one, which was not objected to and was a proper question, because your witness was then directed to the occurrence which was either coincident with or directly preceding the happening of the accident itself. Then you come back, do you not to the same point?

30

MR. BAIN: What I am leading up to—may not be fair to say it in the presence of the jury—is this, that all of this happened on three trips back and forth of the same car, all part of one circumstance.

(Question repeated.)

Irving Solomon—Direct.

Q. On that evening?

THE COURT: I will sustain the objection. The answer may be stricken out. You may note your objection.

MR. BAIN: Objection.

Q. After you turned the switch for the car that ran over you on the night that you were injured what did you do?

10

(Objected to. Question withdrawn.)

Q. After you turned the switch for the car on that night what did you do? A. He called me to get on and I went to ride down to Bay Street.

Q. Who called you to get on? A. The motor-man.

MR. SMITH: I object on the ground that whatever the motorman did would have no binding effect on the part of this company unless that boy was going to be a fare-paid passenger.

20

MR. BAIN: No proof of what my friend says. The statement of counsel is not evidence.

THE COURT: Of course, strictly, there is no direct evidence yet of what you suggested. I will overrule the objection for the time being.

30

Q. What did you turn the switch with?

(Objected to. Question withdrawn.)

Q. How did you turn the switch?

(Objected to as irrelevant, incompetent and immaterial.)

(Question permitted.)

A. The iron bar.

40

Irving Solomon—Direct.

Q. Where did you get the iron bar?

(Objected to.)

A. From the man.

(Objected to as immaterial, incompetent and irrelevant. Objection overruled.)

Q. From whom? A. From the motorman.

10 Q. What did you do with the bar after you turned the switch?

(Objected to.)

A. Gave it back to him.

(Objected to. Objection overruled.)

Q. Then after you turned the switch did you get on the car?

20 (Objected to as leading. Objection sustained.)

Q. What did you do after you turned the switch? A. I gave the bar back to him.

Q. Then what did you do after you gave the bar back? A. Called me on.

Q. Who called you on? A. The motorman.

Q. Did you get on the car then? A. Yes.

Q. How far did you ride? A. Down to Bay Street.

30 Q. What happened when you got down to Bay Street? A. He told me to wait on the other side.

Q. Who told you to wait on the other side?

A. The motorman.

Q. On that particular car? A. Yes.

Q. What car was it? A. 312.

Q. 312? A. Yes.

Q. Of what line? A. Henderson.

40 Q. Then after you got off at Bay street what did you do?

Irving Solomon—Direct.

(Objected to as irrelevant, incompetent and immaterial. Objection overruled.)

A. He told me to wait on the other side.

Q. Who told you to wait? A. The motorman.

Q. On the other side of what street? A. Bay Street.

Q. Then did the car come along again? A. Yes.

Q. Did the motorman do anything or say anything to you? A. Not the first time. 10

Q. Well, now, at the time you were hurt, that is, on the trip of the car on which you were hurt, what did the motorman do when the car came back to Bay Street on its way to Pavonia Avenue? A. He went like that (indicating); jerked his head.

THE COURT: He turned his head from one side to the other.

Q. Then what did you do? A. I got on. 20

Q. Was the motorman looking at you at that time? A. Yes.

MR SMITH: I object; it must be a conclusion on the part of the witness.

Q. Well, was the motorman's face turned towards you when you got on?

(Objected to as leading.)

Q. Was the motorman's face turned toward you when you got on? A. Yes. 30

Q. On which corner of Bay Street did you get aboard the car? A. On the nearest side to Newark Avenue.

Q. On the nearest side to Newark Avenue? A. Yes.

Q. Was it on the westerly side or the easterly side of Henderson Street? A. On the east.

Q. On the easterly side of Henderson Street. 40

Irving Solomon—Direct.

You know the directions of the compass down there, do you, Irving? A. Yes.

Q. So that you got on the car on the southerly side of Bay Street and on the easterly side of Henderson Street; is that right? A. Yes.

10 Q. Just tell us how you got on the car? Just explain to the jury how you got on the car? What did you do? A. I was playing—I was playing on the corner when he called me to switch the track.

Q. No, no; don't go back to that. Just tell the jury and the court how you actually got on the car, what you did?

MR. SMITH: At the time he was hurt?

THE COURT: Yes.

Q. At the time you were hurt. Did you step up on the step of the car? A. Yes, sir.

20 Q. On which platform was it, the front or rear? A. The front.

Q. Did you get both feet up on the step? A. Yes, sir.

(Objected to as leading. Question withdrawn.)

Q. How did you step on to the car? A. With my right hand holding on to that bar there like.

Q. Had your right hand on the bar? A. Yes.

30 Q. What did you do with your feet? A. Got on.

Q. On what? A. On the front step.

Q. After you got on the front step then what happened? A. I was trying to turn around.

Q. Trying to turn around? For what purpose were you turning around? A. To sit down.

Q. Where? A. On the platform.

Q. Was that the way you rode before? A. Yes.

40 Q. Then what happened? A. The car jerked and threw me off.

Irving Solomon—Direct.

Q. What do you mean by jerk? A. Going fast and then stopped.

Q. What's that? A. Starting off fast and stopped.

Q. Started off fast and stopped; then were you thrown down on the street?

(Objected to.)

A. Yes.

10

(Question withdrawn.)

Q. What happened after that? What happened then after the car started with a jerk? A. It threw me down off the car.

Q. Then what happened? A. Then the car ran over me.

Q. Where did it run over, what part of your body? A. My foot.

Q. Which foot was it, Irving? A. Right.

20

Q. Now do you remember, Irving, what happened after your foot was cut off? A. Yes.

Q. On that night? A. Yes.

Q. Well, what happened immediately after your foot was cut off? A. They brung me into a drug store.

Q. Do you remember that? A. Yes, sir.

Q. And into which drug store did they bring you? A. On the corner of Bay Street.

30

Q. Bay and Henderson Street? A. Yes.

Q. Then do you remember anything after that? A. Yes.

Q. What do you remember after you were brought into the drug store? A. I asked them for a drink of water.

Q. Asked who? A. The man.

Q. Did you get a drink of water? A. Yes.

40

Irving Solomon—Cross.

CROSS EXAMINATION BY MR. SMITH:

Q. You lived on Henderson Street, son, didn't you? A. Yes.

Q. You say this time you were down at Bay Street? A. Yes.

Q. Were you? A. Yes.

Q. Bay and Henderson? A. Yes.

10 Q. How far away is that from where you lived? Let's see; Bay, First, Ninth and Tenth—it is about nine or ten blocks, isn't it? A. Yes.

Q. What time of the night was this? A. Half past eight.

Q. Half past eight at night, was it? A. Yes.

Q. You were out in the street playing? A. Yes.

Q. Had you been playing along there every night for how long? A. No, sir.

20 Q. Well, how long had you been going out nights playing? A. What?

Q. How long had you been going out nights playing on the street after dark? A. Only a little while.

Q. How many nights? For how long a time? A year? A. No, sir.

Q. How long did you live at that place? A. About a year and a half.

Q. Well, had you been going out nights playing? A. Yes.

30 Q. Right along? A. No, sir.

Q. When did you start going out so late at night?

MR. BAIN: Objected to as immaterial, incompetent and irrelevant.

THE COURT: I do not think it is; I will overrule it.

MR. BAIN: An objection.

40 A. I don't know what you mean.

Irving Solomon—Cross.

Q. What I mean is how long had you been going out after supper before this accident to play on the street? A. Two hours and a half.

Q. That same night? Did you go out the night before that? A. No, sir.

Q. For how long a time? A. About two weeks.

Q. Just about two weeks? A. Just about two weeks.

Q. Hadn't been on the street before that? A. No. 19

Q. After supper? A. Just played with the boys.

Q. Yes, playing with the boys. What I want to know is how long a time had you been doing that. Had you been doing it for six months? A. What?

Q. Going out after supper and playing with the boys? A. Yes.

Q. You knew trolley cars ran in front of the Henderson Street side of your house? A. Yes. 20

Q. You knew it was dangerous to get on them, didn't you? A. Yes.

Q. On this night when you got down at Bay Street and the car came along the car was going when you got on it, wasn't it? A. No, sir.

Q. Wasn't it? A. No, sir.

Q. Now think, Irving; wasn't it? A. No, sir.

Q. Didn't you say so up at the court? A. I did not. 30

Q. Didn't you say so? A. No, sir.

Q. Didn't you say the car was going a little? A. Yes; just a little.

Q. Well, it was going, wasn't it? A. Not so fast—yes, sir.

Q. I didn't ask you how fast, Irving. Now, think. I am asking you if the car was not going when you got on it? A. It was like still standing.

Q. Eh? A. It was just like standing still.

Q. But it was going, wasn't it? A. The wheels were just moving. 40

Irving Solomon—Cross.

Q. And the car was moving, wasn't it, with the wheels, eh? A. Yes.

Q. Certainly. When you got on you got on the front step as the car was going, didn't you? A. Yes; just a little.

Q. Then when you got on you took hold, did you? A. Yes.

Q. Sure now; took hold of something? A. Yes, sir.

Q. Then got on the step? A. Yes, sir.

Q. Then went to turn around? A. Yes.

Q. It was almost as soon as you got on that you went off, wasn't it? A. Yes.

Q. When you turned around you didn't have hold of anything, did you? A. Yes; I had hold like that, and then I was going to get like that (indicating).

Q. Just show me. You say you had hold, caught hold with one hand, did you? A. Yes.

Q. And then with the other? A. Then I was going to turn around like that (indicating).

Q. You were going to turn around like that? A. Yes.

Q. Is that right? A. And sit down.

Q. Why did you keep hold with one hand when you were going to turn around? A. So I shouldn't fall.

Q. So you shouldn't fall. You knew if you let go with both hands you were liable to fall, didn't you? A. Yes.

Q. So you kept hold with one hand? A. Yes.

Q. And started to turn around? A. Yes.

Q. So you could sit down, you say? A. Yes.

Q. Where were you going to sit? A. On the platform.

Q. On the platform of the car? A. Yes, sir.

Q. The door open? A. Yes, sir.

Q. Sure? A. Yes, sir.

Irving Solomon—Cross.

Q. Sure that door was open? A. Yes, sir.

Q. When you were going to sit down on the floor? A. Yes.

Q. The car going all the time, wasn't it? A. Just a little.

Q. Eh? A. Stopped after when I was about on, then it began to jerk and I fell down.

Q. It was stopped after you were on? A. Yes.

Q. Is that right? A. Yes.

10

Q. Then began to jerk? A. Yes.

Q. How many jerks did you feel? A. One.

Q. One jerk. Didn't see the motorman do anything, did you? A. He just turned on the thing.

Q. Did you see that? A. Yes.

Q. Did you see that? A. Yes, I was like that.

Q. Did it jerk while you were looking at him?

A. I wasn't looking at him; I was just like this.

Q. Then you didn't see him, did you? A. Yes, like that.

20

Q. I say you didn't see him, did you? A. Yes, sir.

Q. Then why did you say it didn't jerk when you were looking at him? It jerked when you that.

Q. Then you were not looking at the motorman, were you? A. Yes.

Q. You were looking at the motorman when you were turned around; is that right? A. Yes.

30

Q. Sure now? A. Yes.

Q. What did you see him do? A. He pushed that iron quick and then stopped it again.

Q. Pushed the iron around? A. Like that, and then brought it back again.

Q. You saw him do that? A. Yes.

Q. Saw him push the iron around and bring it back again? A. Yes.

Q. You mean the iron on the top of the box, the controller? A. Yes.

40

Irving Solomon—Cross.

Q. The handle? A. Yes.

Q. Pushed it again and brought it back? A. Yes.

Q. Is that right? A. Yes.

Q. That was while you were turning around, wasn't it? A. Yes.

Q. Sure now? A. Yes.

Q. So you had been watching that? A. Yes.

10 Q. So you were watching that? A. Yes.

Q. Why were you watching him? A. Because I had to look over that way to look on the floor.

Q. If you were turned around how is it you were looking that way? A. Because I was facing that way.

Q. When you were turnig around your back would be to the motorman, wouldn't it? A. Yes.

Q. When you were going to sit down? A. Yes.

20 Q. You were turning around so when the car jerked? A. Yes.

Q. Then where was your face when you were turning; which way was your face? A. Like that.

Q. Facing the motorman? A. No; right that way.

Q. Which way? Straight ahead of the car? A. Yes; over that way, slanting.

Q. Was it toward the east or toward the west? A. East.

30 Q. That would bring your back right to the motorman, wouldn't it? A. Yes.

Q. That is the time you say you felt the jerk, wasn't it? A. Yes.

Q. When you went down you went down to the ground, did you? A. Yes.

Q. Did you see the car stop? A. No, sir.

Q. You don't know who picked you up, do you? A. Yes.

Q. Who? A. Jim Dice.

40 Q. Did you see him pick you up at that time? A. Yes.

Irving Solomon—Cross.

Q. Where does Jim Dice live? A. I don't know where he lives.

Q. Don't you know? A. No, sir.

Q. Were you taken home or did you go to the hospital, son? A. Taken into the drug store and then the ambulance came.

Q. And took you to the hospital? A. Yes.

Q. I see. Still going to school? A. Yes, sir.

Q. How long have you been going to school before? A. Since the beginning of the term. 10

Q. Since the beginning of the term? A. Yes.

Q. And after that what did you do, just play? A. No, sir; I went to Hebrew school.

Q. That was after three o'clock? A. Yes.

Q. What time did you get through with the Hebrew school? A. Half past five.

Q. Is that right? A. Yes.

Q. You went to day school in the morning, didn't you, nine o'clock in the morning? A. Yes. 20

Q. What school did you go to? A. No. 4.

Q. Where is that? A. On Eighth Street.

Q. That was from nine to three, wasn't it? A. Yes.

Q. Then from after three until half past five you went to Hebrew school? A. From half past three to half past five.

Q. From half past three to half past five you went to Hebrew school? A. Yes. 30

Q. Then did you get your supper? A. Yes; when I came home.

Q. After supper what did you do? A. Went down stairs and played with the boys.

Q. Down stairs to play with the boys? A. Yes.

Q. That, I suppose, is what you had been doing right along for a long while? A. About two weeks.

Q. About two weeks; is that right? A. Yes. 40

Irving Solomon—Cross.

Q. Before that what were you doing? You went to school and to Hebrew school, didn't you?
A. Yes.

Q. Didn't you go out and play afterwards? A. No, sir.

Q. After school? A. After half past three? After three o'clock? No, I went right to Hebrew school.

10 Q. After you went to Hebrew school and had your supper then did you go to play? A. Yes.

Q. That is what I mean; you have been doing that for a long while? A. Yes, sir.

Q. Now, Irving, weren't you hitching on that car? A. No, sir.

Q. Didn't you tell Dr. Furey—you remember Dr. Furey coming to see you? Didn't you tell him that you were hooking a ride? A. No, sir.

20 Q. Sure now? A. Yes, sir.

Q. You are sure you were not standing on the corner with other boys, were you? A. I was playing on the corner with other boys.

Q. What other boys were you playing at Bay Street? A. No boys; none at all. t

Q. No boys at Bay Street? A. No boys.

Q. Sure now? A. Yes.

Q. Don't know anybody up there at Bay Street? A. No, sir.

30 Q. Nobody at all, and you were just standing at the corner of Bay Street and Henderson, were you? A. Yes, sir.

Q. All alone? A. Yes.

Q. No other boys there? A. Sometimes Brady used to come with me.

Q. Was Brady with you then? A. No, sir.

Q. Nobody else that you knew on the corner? A. No, sir.

40 Q. When you went to get on the car at Bay

Irving Solomon—Re-Direct.

Street the motorman did not say anything to you, did he? A. Yes.

Q. What did he say? A. Nodded his head.

Q. He didn't speak? A. No, sir.

Q. You say you saw a motion of his head? A. Yes.

Q. That is the night time? A. Yes, sir.

Q. The motorman going along and you standing on the corner and you saw him make a motion with his head? A. Yes. 10

Q. You thought by that he meant to run and get on the car? A. Yes.

Q. So you ran over, didn't you? A. I got on the car.

Q. Didn't you run over from the corner? A. I walked over and then I got on the car.

Q. You walked over? A. Two steps and then I got on the car. 20

Q. Just two steps and then you got on the car? A. Yes.

Q. That is all that occurred until you fell off? A. Yes.

Q. Had to jump on the car when you got on it, didn't you? A. No, sir.

Q. Did not? A. Put one foot up on the car.

Q. Well, it was going and took hold with your right hand, did you? A. Yes.

Q. Is that right? A. Yes. 30

RE-DIRECT EXAMINATION BY MR. BAIN:

Q. Irving, you said that for several weeks before the accident you played about the corner of Henderson Street and Pavonia Avenue; is that right? A. Yes, sir.

Q. Did you ever do anything else at that corner except play? A. No, sir.

Q. Were you playing on the corner of Hender- 40

Irving Soloman—Re-Direct.

son Street and Pavonia Avenue during the whole time between supper time and the time you were hurt on that evening? A. Yes, sir.

Q. Did you do anything else except play at that corner on that night, on the night that you were hurt? A. No, sir.

10 Q. Were you at the corner of Pavonia Avenue and Henderson Street during all the time between supper time and the time you were hurt? A. Yes, sir.

Q. Did you leave that corner for any time? A. No, sir.

Q. Did you go away at all from that corner? A. We was always playing on the corner.

Q. What's that? A. We was always playing on the corner.

20 Q. Yes, but did you stay on the corner during the whole time, that is, every minute after you had your supper and up to the time you were hurt?

MR. SMITH: I object to it as incompetent, irrelevant and immaterial.

THE COURT: I will sustain the objection.

MR. BAIN: Enter my objection.

Q. What did you say the motorman said when you got off at Bay and Henderson Street? A.
30 To wait on the other side.

James Dyas—Direct.

JAMES DYAS, SWORN.

DIRECT EXAMINATION BY MR. BAIN:

Q. Where were you, Mr. Dyas, at the time of the accident to Irving Solomon? A. On the car.

Q. On the car that ran over him? A. Yes.

Q. Just state what you recall of the accident?

A. Well, I was at the front window of the car.

Q. Was it a closed car? A. Closed car; the windows were down, and I got on at Montgomery Street and came along to Henderson Street, or the car came along Henderson Street; near Bay Street, why, I was looking out of the car window, I seen something dark dash toward the car but I couldn't tell what it was, the form of a child or dog or animal or whatever it was, and then I heard a creaking of the car, like it went over something, and then people on the street holloaed and I jumped out the front of the car.

Q. Did you pick the little boy up? A. Yes.

Q. Where did you carry him? A. To the drug store on the opposite corner.

Q. Did you see if his leg was cut off? A. It was not off at that time; it was just hanging on by strips.

Q. That is all you know about the accident? A. That is all.

Q. That was a Henderson Street car of the Public Service Company? A. Yes.

Q. How was the front vestibue door of the car at that time? A. It was open.

Q. Was it open or closed? A. Open. That is the way I got out.

CROSS EXAMINATION BY MR. SMITH:

Q. It was open when you got out? A. Yes.

Q. You did not see it before that, did you? A. Yes.

James Dyas—Cross.

Q. Notice it before that? A. Yes.

Q. Sure of that, are you? A. Yes.

Q. What is your business? A. Driver.

Q. For who? A. Miller & Berghoff.

Q. What is the address? A. 9 Boland Street.

Q. You say you got on the car at Montgomery Street? A. Yes.

10 Q. Where were you going? A. Pavonia Avenue.

Q. Where to? A. Friend of mine.

Q. Who? A. Mr Calango.

Q. How do you spell it? A. You get me; I can't spell it myself.

Q. Pronounce it again? A. Nick Calango.

Q. Where does he live? A. Henderson near Pavonia Avenue; I don't exactly know the number.

20 Q. What is his business? A. Barber

Q. At that place? A. Yes.

30

40

John Martin—Direct.

JOHN MARTIN, sworn.

DIRECT EXAMINATION BY MR. BAIN:

Q. Mr. Martin, what was your occupation on September 8, 1913? A. Policeman.

Q. Jersey City department? A. Yes.

Q. Where were you at the time of the accident to Irving Solomon? A. Station house, City Hall. 10

Q. Were you called out that night? A. I was sent out on the telephone message to see what the accident was.

Q. Over here to the scene of this particular accident? A. Bay and Henderson Street.

Q. Did you go to the corner of Henderson Street and Bay Street that night? A. Yes.

Q. What did you find when you got there? A. I found this boy lying on the floor of the drugstore with his limb crushed. 20

Q. Where was the car? Did you notice the car? A. The car was standing on the northbound track just a little bit north of Bay Street.

Q. Little bit north of Bay Street? A. Yes.

Q. That is toward Pavonia Avenue? A. Yes.

Q. Did you pay any attention to the number of the car? A. Yes; I got the number of the car.

Q. What number was it? A. 312.

Q. Did you call an ambulance, or was an ambulance called? A. The ambulance already had been called but wasn't in there. 30

Q. Did you wait at the drugstore until the ambulance arrived? A. Well, the ambulance arrived just as I was going away with the motorman and put him under arrest.

Q. That is about all you recall, isn't it, of the entire matter? A. That is about all, yes.

John Martin—Cross.

CROSS EXAMINATION BY MR. SMITH:

Q. You had not received any instructions to arrest the motorman, had you? A. No; only that that is just—

Q. A practice to arrest the motorman every time there is an accident? A. There is an accident of that kind.

10 Q. Even though you don't know really what caused the accident the practice is to arrest the motorman and take him to the station house? A. That is the practice, to arrest him.

Q. The motorman was afterwards discharged, wasn't he? A. I told you he was paroled the next morning.

Q. And then discharged afterwards?

(Objected to.)

20 A. I don't know.

MR. SMITH: You brought it in.

THE COURT: There is nothing to show this witness knows.

(Answer repeated.)

MR. SMITH: Of course if you don't know, officer, you don't know. I will ask Mr. Markley; he knows.

30

Solomon Lichtenstein—Direct.

SOLOMON LICHTENSTEIN, sworn.

DIRECT EXAMINATION BY MR. BAIN:

Q. Mr. Lichtenstein, what was your occupation or profession on September 8, 1913? A. Druggist.

Q. Where was your store? A. 351 Henderson Street, corner of Bay.

10

Q. Were you in your store on the night when Irving Solomon was hurt? A. Yes.

Q. Just state what you know of the accident, what you actually saw? A. He was brought into the store. I was in the store. I have not seen the accident, but he was brought in the store and I applied some antiseptics and gave him some stimulants and then called the ambulance. The motorman or the conductor, I don't remember who, but some one from the car—

20

MR. SMITH: The motorman or the conductor.

A. —he came in the store to telephone, I don't know where, but after he want to leave and I had the door closed and he asked me to open it—

MR. SMITH: I object.

Q. That is unnecessary. Then you gave the boy first-aid treatment really? A. Yes.

30

Q. What was the nature of his injury as you saw it? A. His leg was cut off.

Q. Above or below the knee at that time? A. Below, yes.

Q. You did not see the accident itself? A. No, sir.

Q. Your store is on the westerly side of Henderson Street? A. Yes.

Q. So that if the boy got on the car on the east-

40

Dr. Alexander Heppler—Direct.

erly side the car was between you and the boy when he got on?

THE COURT: He says he saw nothing of the accident.

NO CROSS EXAMINATION.

10 DR. ALEXANDER HEPPLER, SWORN.

DIRECT EXAMINATION BY MR. BAIN:

Q. Doctor, you are a physician in the State of New Jersey, are you? A. I am, yes, sir.

Q. Where were you on September 8, 1913? A. Jersey City Hospital.

Q. In what capacity? A. House surgeon.

Q. Do you recall Irving Solomon being brought
20 to your institution? A. I do, yes.

Q. Did you examine him at the time or treat him? A. I did.

Q. Will you just state the nature of his injuries when he was brought in? A. When he was admitted to the hospital I was operating, I did not see him; Dr. Inger dressed the case, but I looked at the dressing immediately after the operation and found that he had an amputation of the
30 right leg about the junction of the middle and upper third below the knee, with a lacerated wound that extended about an inch and a half above his knee on the inner side, with loss of muscle and tissue above the knee.

Q. Did you treat him or operate him after that time? A. Dr. Fink, the attending surgeon at that time, was notified and came up and operated and amputated above the knee that same evening.

40 Q. Was that necessary, Doctor, from your

Dr. Alexander Heppler—Cross, Re-Direct. . .

knowledge of the case? A. Yes, it was necessary.

Q. Did you assist in the operation? A. I assisted.

CROSS EXAMINATION BY MR. SMITH:

Q. As I understand then what you did is to operate and amputate above the knee? A. Yes.

Q. Just fixed the leg up? A. Yes.

10

Q. Is that right? A. Yes.

Q. As a matter of fact, that was the only injury, wasn't it, the injury to the leg that you found? A. That was the only injury as I remember.

RE-DIRECT EXAMINATION BY MR. BAIN:

Q. What was the general condition of the boy at the time he was brought in? A. He was in good condition when he was brought in, but immediately following the operation he went into a condition of shock and was in serious condition for about two days.

20

Q. A condition bordering life and death?

MR. SMITH: I object.

MR. BAIN: I will withdraw it.

30

40

Dr. Irving Ingber—Direct.

DR. IRVING INGBER, SWORN.

DIRECT EXAMINATION BY MR. BAIN:

Q. Dr. Ingber, are you a practicing physician of the State of New Jersey? A. No, sir; I am not.

10 Q. What is your position? A. I am an interne at the Jersey City Hospital.

Q. How long have you been in that institution? A. Eleven months.

Q. Had you had any previous medical education? A. Yes.

Q. At what place? A. Long Island College Hospital.

Q. How long? A. Four years.

Q. Were you at the Jersey City Hospital on September 8, 1913? A. I was.

20 Q. Do you recall the occasion when Irving Solomon was brought to the institution? A. I do.

Q. Did you examine him upon his arrival? A. I was the ambulance surgeon; I saw him after he got hurt.

Q. Did you go down to the scene of the accident with the ambulance? A. I did.

30 Q. Just state what you found when you got to that point? A. Well, when I got down there I found the patient on the floor of the drug store and examined his injury and found that he had what we term a traumatic amputation, an amputation caused by accident, below his knee.

40 Q. Which leg? A. Right leg and below the knee, and a portion that was cut off was hanging on by some muscle shreds. I completed the amputation there; I severed the lower portion of the limb in order to complete it, because the limb was of no use, and I put a tourniquet—or put a rubber band around the leg above the knee in order

Dr. Irving Ingrer—Direct.

to stop the hemorrhage—it was bleeding profusely, and put a bandage on him and took him up to the hospital and when I got him there I redressed it.

Q. Did you again treat him after that time or were you present when he was treated? A. What do you mean, at the operation?

Q. Well, was there any treatment between the time when he arrived and the operation? A. Yes; I gave him all the necessary treatment for shock. 10

Q. Then were you present at the operation? A. No, I was not.

Q. Did you treat him after the operation or dress the wound? A. I did. I treated him after he was discharged from the hospital; he used to come down stairs to the clinic to be redressed.

Q. How often? A. Oh, used to see him about two or three times a week and then I had him come around about once a week and then about once every three weeks. 20

Q. Are you still at the institution? A. Yes.

Q. Is he still going there? A. No.

Q. He stopped, has he? A. Long ago.

Q. How long was the boy in the hospital? A. I don't know exactly. He was in about a month, approximately. I am not sure.

Q. For how long a time, approximately, did he continue to come three or four times a week? A. Oh, for about a month or two. 30

Q. Then how long after he was first treated at the institution did he finally cease going there? A. About two or three months after, I am not sure. That is not the absolute correct statement.

Q. As near as you can recall? A. As near as I can recall, about two or three months.

NO CROSS EXAMINATION

Samuel Essig—Direct.

SAMUEL ESSIG, SWORN.

DIRECT EXAMINATION BY MR. BAIN:

Q. Mr. Essig, do you understand the English language well? A. Not much, counsellor.

Q. You understand what I say to you now, do you? A. May be I can't give you no answer on any question.

10

THE COURT: Well, try him.

Q. Where were you on the 8th of September, 1913, between seven and eight o'clock? A. Where I was?

Q. Yes. A. I was in Henderson Street; I went from Pavonia Avenue, from the East Ferry and I was that time in Henderson Street.

Q. Did you see the accident to Irving Solomon?
20 A. Yes.

Q. Where were you at that time? A. That time?

Q. Yes; at the time of the accident? A. I was from Pavonia Avenue about six or seven blocks, I can't tell you the name from the streets, because I am a stranger here.

Q. Six or seven blocks from what street? A. From Pavonia Avenue

Q. On which side of Henderson Street were you? A. I was on the left side.

30

Q. Left side going the direction you were going?
A. Yes.

Q. How close were you to the point where Irving was hurt? A. How far?

Q. Yes; at the time he was hurt? A. I was on the sidewalk and the accident was happen on the tracks.

Q. Just tell the jury and judge what you saw at that time? A. I was standing—I was looking

40

Samuel Essig—Direct.

for a man that shall tell me where I to go, because I got a card there a man on which is his house, and I want to go down his house, only I am a stranger and I was standing looking for a man that shall give me a right answer, and at that time came the car and the boy was on the first stoop and the car stopped at that time.

Q. Did you see the boy get on the car? A. No, sir; the boy is coming from another block. 10

MR. SMITH: What's that?

A. The boy came with the car; he jumped on the car.

Q. The boy was on the car when you saw him?

A. Yes.

Q. He was on the car? A. Yes.

Q. What did you see then? A. Then after I didn't hear if somebody ring the bell or something; the car begins to go, and it was a blazing on the electric and the car is going too quick on the first step—sort of shift—and then the boy falls down and the car was going a few feet, about six or eight feet, ten feet, I can't tell to be sure. 20

(Answer repeated by stenographer.)

MR. BAIN: Wouldn't it be better to have that through the interpreter?

THE COURT: What language does he speak? 30

A. German.

(German interpreter called, and last question repeated by stenographer.)

A. After the accident strange people took the boy and carried him inside the drug store.

Q. When you first saw the car where was the boy? A. On the first step nearly to the motor-man. 40

Samuel Essig—Cross.

Q. Then what did you see? A. The car starting to go ahead.

Q. What else did you see at that time? A. When the car started to go ahead the electric gave some sparks, some light, and the car all at once started to go ahead with a jerk.

Q. Then what did you see after that? A. Then the boy fell down.

10 Q. Did you go with him into the drug store? A. No, sir.

Q. Then what did you do after that? A. The people around there picked him up from the ground, and I went there to see what the boy—who it was.

Q. See the little boy in the court room that you saw in the accident? A. Yes, sir.

20 Q. Then what did you do after that? A. I went away. I went to a saloon. I feel very badly, and I took a whiskey. Then I took the car and went home.

CROSS EXAMINATION BY MR. SMITH:

Q. Where do you live? A. New York—275 Rivington Street, City of New York.

Q. What is your business? A. I work in a mattress factory—spring and mattress factory.

30 Q. Where? A. 225 Rivington Street.

Q. Whose place is it? A. G. Einigel.

Q. You say you were coming to Jersey City to look at a house, did you? A. Not to look at a house; to see a man.

Q. Where was the man? A. I don't know, I am a stranger, but I have got a card here.

Q. Still have the card with the name on it? A. That is the card with the name of the man on it who invited me to come (producing card).

40 Q. And the card says, "L. Lockman, real estate," doesn't it?

Samuel Essig—Cross.

MR. BAIN: I object to the reading of the card.

Q. Can you read the card? A. Yes, sir.

Q. Read it for us then.

MR. BAIN: I object. The card is the best evidence. How can he read a written document in evidence?

MR. SMITH: It is not a document. 10

MR. BAIN: Let him state the name.

THE COURT: He may refer to the card as a means of refreshing his memory, and say if that is the man he was going to see.

A. "L. Lockman, real estate."

THE INTERPRETER: "L. Lockman, real estate."

A. Yes, that is the party who gave the card 20
into my hands.

THE COURT: Who was the man?

A. "L. Lockman, real estate, 150 Monticello Avenue, Jersey City, N. J."

Q. That is the man you came to see? A. Yes, sir.

Q. Ever been over to see him before? A. No, sir.

Q. How did you come to Jersey City, over what 30
ferry? A. Erie ferry.

Q. Did not know how to get to Monticello Avenue, did you? A. No, sir.

Q. What did you do, walk from the ferry up to Henderson Street? A. Yes, I went on foot.

Q. Walked on Henderson Street and then came down on Henderson Street? A. Yes.

Q. Did you ask anybody where Monticello Avenue was before you got to Henderson Street? A. 40
No, sir.

Samuel Essig—Cross.

Q. Just kept on walking? A. Yes, sir.

Q. You did not know where you were going, did you? A. I did not.

Q. Just kept walking? A. I am a stranger.

Q. Did you know anybody over on Henderson Street near Bay Street? A. Not a single person.

Q. Did you know Mr. Solomon? A. No, sir.

Q. Know anybody that lives in that vicinity?

10 A. Nobody.

Q. Did you give your name to anybody? A. Yes, I did give my name.

Q. To whom? A. To Mr. Solomon.

Q. How did you know you gave it to Mr. Solomon? A. He personally introduced himself to me? A. Five or six weeks after the accident happened.

20 Q. Five or six minutes? A. Five or six weeks after the accident happened.

Q. Where? A. In Rivington Street.

Q. That was the first time that you had told anybody your name and address from the time of the accident, wasn't it? A. Yes.

Q. Five or six weeks after the accident? A. Yes.

30 Q. Then since then have you been talking with Mr. Solomon as to what happened there? A. Yes, sir. He asked me questions and asked me if I was present when it happened, and I told him I was present.

Q. How many times have you talked with him? A. Twice.

Q. Where? A. Once at the lawyer's office and the other time at my apartment.

Q. Did Mr. Solomon take you to the lawyer's office? A. Yes, sir; I didn't know where to go so he showed me the way.

40 Q. You were walking south, were you, on Hen-

Samuel Essig—Cross.

derson Street, on the left hand side? A. Left hand side.

Q. Were you near a corner? A. Yes.

Q. Which corner? A. As the witness indicates, towards Pavonia.

Q. Towards Pavonia? A. That is what he said.

Q. Then you were looking for somebody to read your card, were you? A. No, not he should not read the card, but show me the way where to go. 15

Q. To Monticello Avenue? A. Yes, sir.

Q. You say you saw the car come along? A. Yes, sir.

Q. Was the car moving when you first saw it? A. Yes, she running.

Q. Where was it when you first saw it? A. She approached me.

Q. From where? Was it on the other side of Bay Street or on the side nearer to you? A. I don't know where Bay Street is. 20

Q. The street that was crossing there? A. Yes, the car came over the crossing towards Pavonia Avenue.

Q. Then when you saw it the boy was on it, was he? A. Yes, he was already on the car.

Q. What position was he in? A. He was on the first step.

Q. What dong, standing? A. He stood there, yes. 30

Q. How was he holding on? A. Certainly with the right hand.

Q. How far did the car go while he was holding on with the right hand? A. From backward I don't know how far he went.

Q. Backward? What do you mean by backward? A. When the car went backwards how long he went on I don't know.

Samuel Essig—Cross.

Q. The car went backwards? A. When the car came from my back, I suppose he means. I could not see.

Q. The car came from your back? A. Certainly.

Q. Which way were you walking? A. I stood there. I looked for a proper party to look at the card, to show me where to go.

10 Q. Which way were you facing then? A. To the front of the street.

Q. Does he mean he was facing into Henderson Street? A. Yes, sir.

Q. Looking up where? A. I looked forward, looking for a man to read this card.

Q. How were you standing? Were you standing at the curb-stone looking across the street?

A. I stood on the sidewalk and looked across the street.

20 Q. You saw the car come from behind you? A. I stood this way and the car approached me from the left hand side.

Q. Were you facing the car? A. Yes, sir, I fronted the car.

Q. Facing the car. So the car went in front of you? A. So is the car going.

30 THE INTERPRETER: The witness indicates from right to left. I stood this way looking this direction.

Q. Was the car going from Pavonia Ferry, going the other way? A. That I don't know.

Q. Was it going towards Pavonia Avenue, or was it going the other way? A. The car went the way you go to Pavonia Avenue.

40 Q. Then the first thing that you saw was that the car was moving the boy was standing on the step, holding on with the right hand? A. Yes, sir.

Q. Was the boy's back towards you? A. He stood sideways.

Samuel Feldman—Direct.

Q. He stood sideways, and the car was going all the time? A. Yes, sir.

Q. Did you see the boy turn around? A. I didn't observe when the boy turned around.

Q. Well, the first you saw then was the boy on the step and the next thing you saw him falling, wasn't it? A. Yes, only saw when he fell down.

Q. That is all you saw is when he fell down?
A. Yes, nothing more. 10

SAMUEL FELDMAN, sworn.

DIRECT EXAMINATION BY MR. BAIN:

Q. Mr. Feldman, where were you at the time of the accident to Irving Solomon, on September 8th? A. I was walking up Henderson Street to Newark Avenue. 20

Q. How close were you to Bay Street at that time? A. Oh, about ten or fifteen feet, probably.

Q. Did you see the car that ran over the boy? A. I seen, when I was standing—I seen the boy standing on the platform there.

Q. Saw the boy stand on the platform of the car? A. One foot on the platform and one foot where the motorman stays.

Q. Where was the car then? A. Why, near the corner. 30

Q. Near the corner of Bay Street? A. Bay Street.

Q. Then what did you see after that? A. I heard a sudden jolt of the car.

MR. SMITH: What's that?

A. I heard the car give some shock and I looked around and I seen the boy laying outside—was laying in the car tracks there—near the 40

Samuel Feldman—Cross.

car tracks, and people running out and picked him up.

Q. You are sure he was standing on the platform of the car when you saw him? A. Yes.

MR. SMITH: I object to it as directly leading.

10 THE COURT: Well, of course it is, but it is answered.

MR. BAIN: Only repetition.

THE COURT: To strike it out won't do much good.

Q. Then where did you go after that? A. Went up to Newark Avenue. I stood there a few minutes, and then I walked up to Newark Avenue.

20 Q. Were you facing the car at the time the boy fell? A. Yes, I couldn't help it, I was walking up and I seen the car coming.

Q. At that time did you know that the boy's name was Irving Solomon? A. No, I did not.

Q. Where did you find that out? A. The next day I found out. The people was running there up in the store and they was telling me about it, that the boy is from the same neighborhood.

Q. What store? A. My store, 160 Pavonia Avenue.

30 Q. That was the way that you learned that the boy was Irving Solomon, was it? A. Then I found out it was him.

CROSS EXAMINATION BY MR. SMITH:

Q. Where is your store? A. 160 Pavonia Avenue.

Q. Is that on the corner of Henderson? A. It is on the corner of Pavonia and Henderson.

40 Q. On the corner of Pavonia and Henderson? A. Yes.

Samuel Feldman—Cross.

Q. How long have you been there? A. Been there about a year and a half.

Q. Eh? A. About a year and a half, about nineteen months.

Q. One and a half years? A. Yes.

Q. You were going towards Newark Avenue?
A. Yes.

Q. Walking? A. Walking, yes.

Q. Did you know Irving Solomon before this time? A. Well, I had seen him, I never spoke to him. 10

Q. Did you know who he was? A. If I know Solomon before?

Q. The boy? A. The boy, no, I did not.

Q. Didn't know him when he was playing around the street? A. I seen him in the street before, but I never knew who the boy was. I seen many more there. 20

Q. How many times did you see him playing around the corner there during the year and a half you were there? A. I didn't take notice exactly how many times I saw him. I seen more children around there, not only him.

Q. About how many times did you see him?
A. Something I cannot tell.

Q. See him once? A. Well, I guess I seen him more than once.

Q. See him a hundred times? A. I don't know how many times I seen him. 30

Q. Did you see him two hundred times? A. Something I can't tell.

Q. Did you see him three hundred times? A. Something I can't tell.

Q. He had a practice of playing on that corner, didn't he? A. On my corner there all kinds of children around there.

Q. Why, certainly, there were all kinds of children. A. There is always children there. 40

Samuel Feldman—Cross.

Q. Didn't you know this boy? A. No, I did not.

Q. Didn't he live right near there? A. Well, I find out he was living there, although I didn't know if he belongs there before.

Q. Lived in the house upstairs over the store? A. No.

10 Q. Where does he live? A. I don't know even the number where he lives.

Q. About where? A. I know around there somewhere, I don't know the number.

Q. Where? A. It is around Henderson Street.

Q. Haven't you been to see Mr. Solomon since this accident? A. No, never did.

Q. Never saw him since? A. I seen him once.

Q. Where does Mr. Solomon live? A. I don't know where he lives.

20 Q. Don't know he lives right within a few feet of your store? A. Well, I heard about it. I never knew—I never knew where he lived.

Q. Don't you know now that he lives within a few feet of your store? A. No, I didn't know.

Q. Don't know it now? A. I don't know—Now I heard he living there. I didn't know where he lived.

Q. Where did you hear he lived? A. I heard he lived on Henderson Street.

30 Q. Eh? A. I heard he was living on Henderson Street there.

Q. Where? A. Where, I didn't ask anybody.

Q. Didn't ask anybody? A. Oh, no.

Q. You knew Solomon before the accident, didn't you, the father? A. I seen him passing by; I never had an introduction to him.

Q. You had seen the boy before the accident? A. The boy—I seen him; I never knowed it was him. If I seen him now I know I seen him

40 around there somewhere.

Samuel Feldman—Cross.

Q. Didn't know who he was? A. No.

Q. Never bought anything in your store? A. No.

Q. Never? A. No.

Q. What kind of a store do you keep there?

A. Liquor.

Q. Liquor store? A. Yes, sir.

Q. A saloon? A. A saloon.

Q. On the crner? A. On the corner.

10

Q. I see. Did you give your name to Mr. Solomon after the accident? A. Well, people—I heard some others, and I told them if I saw him I would tell him I knew about it.

Q. Didn't you send somebody to him? A. No, I did not.

Q. He came to you? A. I told a man in the neighborhood that I saw it, and I suppose that they let him know about it and he came down and he asked me.

20

Q. You say you were walking south on Henderson Street? A. Yes.

Q. How near Bay Street? A. How near?

Q. Yes. A. About ten or fifteen feet, something I cannot exactly tell.

Q. From the corner? A. Yes.

Q. See the car come along? A. Yes.

Q. Where was it when you first saw it? A. Where was what?

30

Q. The car? A. Coming down from the Newark Avenue side, and I was going up from Pavonia Avenue.

Q. How far was it away from you? A. The car was near the corner, and I was the middle of the—not far from the corner, the car was coming from the Newark Avenue side, from Bay,—between Morgan and Bay or between Steuben and Bay Street, I think.

40

Samuel Feldman—Cross.

Q. How far away was the car from Bay Street towards Newark Avenue, when you first saw it?

A. It was near the corner, I don't know exactly how far.

Q. Well, how far? As far as from you to the wall? A. Well, about as far as from me to the door from me or more.

10 Q. As far as from you to the wall—from Bay Street? A. I was away about—altogether from me where I was and the car was.

Q. From you to the wall? A. Yes, sir.

Q. What was the car doing, going? A. The car—the boy was on the car.

Q. Yes; you have got the boy now. I asked you about the car. Was the car moving when you first saw it? A. Yes, the car was moving.

20 Q. When you first saw it did you see the boy? A. Yes, sir.

Q. According to your ideas the boy had one foot on the step and one foot on the platform? A. Yes.

Q. Is that right? A. Yes.

Q. Which foot did he have up on the platform, the right or left? A. This is something I didn't notice.

Q. Didn't notice that? A. No.

30 Q. How did you notice he had one foot on the step and one foot on the platform? A. I seen him standing that way. I never took chances myself riding on a car like that.

Q. What do you mean by taking chances? A. I am always on the car when I get on. The car generally stops when I get on the car.

Q. The car was going at this time? A. Yes.

Q. The boy had one foot on the step and one foot on the platform? A. Yes.

40 Q. Had hold with the right hand? A. Yes.

Q. That is when you saw him? A. Yes.

Samuel Feldman—Cross.

Q. How long did he stay in that position when you saw him? A. About a second—I didn't have time—

Q. Can't you judge? A. I don't know exactly.

Q. Was it a minute? A. Well, it was a minute or—

Q. Two minutes? A. Something I cannot tell.

Q. Two minutes? A. Something I can't tell.

Q. Don't know whether it was one minute or ten minutes? A. It wasn't ten minutes. 10

Q. Well then you do know something about it? A. It was not five minutes.

Q. Was it five minutes? A. No. It was a minute or two.

Q. A minute or two? A. Yes.

Q. All the time the car was going? A. Well, the car—I had my eye up Newark Avenue and I seen—was looking up forward, and I seen—and I heard the car give that jerk and looked around and everybody hollered the boy was run over. 20

Q. How do you know that you heard the car give a jerk? A. Why, I paid attention to it.

Q. What do you mean? A. It was a funny walk the way the car gave.

Q. What do you mean by a funny walk? A. The car generally walks quiet, and then the car gives a certain move.

Q. A noise that you heard? A. Yes. 30

Q. That is what you mean, isn't it? Then that made you look around? A. Yes, sir.

Q. Then you saw the boy on the street? A. Yes, sir.

Q. Is that right? Then you stayed there a few minutes? A. Yes.

Q. Then you went on; is that it? A. Yes.

Q. You did not see the boy get on the car, did you? A. No; well, I didn't see him get on the car. 40

Samuel Feldman—De-Direct.

Frank Solomon—Direct.

RE-DIRECT EXAMINATION BY MR. BAIN:

Q. What kind of noise was it you heard on the car? A. Some jerk of the car, that is, it didn't walk right away—the car ought to walk—I heard something funny, and I didn't know what it was and I looked around and I heard the people hol-
 10 lering the boy was running over.

FRANK SOLOMON, sworn.

DIRECT EXAMINATION BY MR. MARKLEY:

Q. Where do you live, Mr. Solomon? A. 212 Second Street.

Q. How long have you lived there? A. Seven months.

20 Q. Where did you live before that? A. 499 Henderson Street.

Q. Are you the father of the boy that was hurt? A. Yes.

Q. And you lived at 499 Henderson Street at the time of the accident? A. Yes.

Q. How long did you live there? A. About two years.

Q. Where is 499 Henderson Street? Near what
 30 intersecting street? A. Pavonia Avenue.

Q. Is this your only child?

MR. SMITH: I object.

A. It is the only boy.

MR. SMITH: I object to it as irrelevant, incompetent and immaterial.

MR. MARKLEY: I will withdraw it.

Q. Where were you on the day of the acci-
 40 dent? A. I was coming from my work.

Q. Talk to the Judge. Came from your work,

Frank Solomon—Direct.

and what time did you get home from your work?

A. I am generally home about ten o'clock, half past ten.

Q. Go home about that time this afternoon?

A. Yes.

Q. Where did you work? A. Well, I was—I got a store in Union Hill.

Q. Have a store in Union Hill? A. Yes.

Q. How long did you have a store there? A. 10
About nineteen months, pretty near about two years.

Q. What time did you get home? A. About half past nine or quarter to ten.

Q. What did you find when you got home? A. When I went home I went to go in to buy a pack of cigarettes, when I met a fellow from the neighborhood who knew me and stopped me and say—

MR. SMITH: I object. 20

Q. Never mind the conversation; what did you do? What did you find? A. I found all my children and my wife was crying—

MR. SMITH: I object to it as irrelevant, incompetent and immaterial.

Q. Was there anything unusual—don't tell me what your folks said or your wife said—what did you find? A. They were all crying, that is what I found when I came home. 30

MR. SMITH: I ask that it be stricken out.

MR. MARKLEY: I consent.

Q. Did you find the boy Irving was hurt? A. Yes.

Q. Was he home? A. No, sir.

Q. Where did you find he was? A. He was in the hospital, the same minute when I came home.

Q. Tell me where you found he was? A. In 40
the hospital.

Frank Solomon—Direct.

Q. What hospital? A. City hospital.

Q. What did you do then? A. I was waiting in the hospital. When I found him I was there talking—

MR. SMITH: I object.

10 Q. What did you do when you went there to the hospital? A. I went over and tried—I was trying to help him all I could.

Q. Did you go to the hospital? A. City Hospital.

Q. You went there? A. Yes.

Q. Did you find that your boy was there? A. Yes.

Q. How long did you stay at the hospital? A. About three o'clock in the morning.

20 Q. Then what did you do after that? A. Went home.

Q. When did you next again see your boy? A. About six o'clock next morning.

Q. Where? A. In the City Hospital.

Q. How long was Irving at the hospital? A. I believe about a month.

Q. Now what was your business at the time he was hurt? A. I had a store up in Union Hill.

Q. What kind of store? A. Tailoring, cleaning, pressing and repairing.

30 Q. Did you have any other business? A. Yes.

Q. What? A. I got a job as cutter.

Q. Have you still got the business at Union Hill?

MR. SMITH: I object to it as irrelevant, incompetent and immaterial.

THE COURT: I will sustain the objection at this time as to that question.

MR. MARKLEY: I enter an objection.

Frank Solomon—Direct.

Q Did the boy help you in your business? A. Yes.

Q. Tailoring business? A. Yes, sir.

Q. In what way? A. He used to come up once in a while and we will send him out with a suit where it is pressed, and then he was a boy very much liked, and right next door to me was a man that he said, "Mister, by my father makes suits, you just come in and give him a chance, a suit to make," and this man comes to me, he says it help along my business. 10

MR. SMITH: I object and ask that that part of it be stricken out as incompetent and irrelevant.

THE COURT: I think that part may be stricken out. It may be relevant in some complete form, but it does not seem to be in proper form, the latter part of the answer. 20

Q. In what other way, if any, did the boy help you? A. Used to give out once in a while circulars, put into the letterboxes, blotters, letter-heads around the neighborhood.

Q. Did he go to school during that time? A. Yes.

Q. Until what time? A. Three o'clock, and he went to Hebrew school until about half past five. 30

Q. Since the accident has he gone to school? A. He is going now.

Q. How long a period since the accident has he gone to school? A. Since the term started. He lost one term altogether, six months.

Q. When did the term start? A. About two months ago.

Q. Did he go unassisted? A. Sir?

Q. Did he go unassisted? Did anybody have to assist him? A. Yes. 40

Frank Solomon—Direct.

Q. Who did? A. I did.

Q. Did you help to take him to school? A. Yes.

Q. Did you go after him after school? A. Yes.

Q. For how long a time? A. All the time since about a month or so that he can help himself.

10 Q. Until about last month he has been going unassisted? A. Yes.

Q. Does that interfere with your business any?

MR. SMITH: I object.

A. Yes.

THE COURT: Do not answer when there is an objection. I will sustain the objection, particularly because it brings forth a conclusion.

20

Q. Did you give up your business?

MR. SMITH: I object.

THE COURT: I will overrule it.

MR. MARKLEY: I ask an objection.

Q. What happened to your business?

MR. SMITH: I object.

THE COURT: The question is overruled as calling for a conclusion.

30

Q. Before the accident what time did you generally go to your business in the morning?

MR. SMITH: Objected to as irrelevant, incompetent and immaterial.

THE COURT: I will sustain the objection.

MR. MARKLEY: We take an objection.

Q. What time did you take your son to school every day?

40

Frank Solomon—Direct.

MR. SMITH: I object to it as irrelevant, immaterial and incompetent, and that it has no place in this action.

THE COURT: What do you intend to prove?

MR. MARKLEY: I intend to prove the time actually consumed by Mr. Solomon in taking the boy to school, contrasting that with the time he generally went to work before the accident, and the same way in the afternoon, showing how he went and took the boy home from school, which necessitated him coming down from his place of business. 10

THE COURT: Then what?

MR. MARKLEY: I propose to prove that was the reason he gave up his business.

THE COURT: Oh, no; that would be entirely improper as a question of damages. I will sustain the objection upon that statement of what your intended proof is. 20

MR. MARKLEY: I note an objection.

THE COURT: Yes, you may note it.

Q. What were the profits of your business previous to the accident?

MR. SMITH: I object.

THE COURT: The question is overruled. You may have your exception if you wish. 30

MR. MARKLEY: Just for the purpose of getting it on the record I will ask another question on the same line.

Q. What was your profits after the accident?

MR. SMITH: I object.

THE COURT: Objection sustained.

MR. MARKLEY: I note an objection, please.

Frank Solomon—Direct.

Q. Did the profits of your business decrease after the accident?

MR. SMITH: I object.

THE COURT: The objection is also sustained. You may have an objection noted.

Q. What actual effect did the injury to Irving have on your business?

10

MR. SMITH: I object.

THE COURT: Objection sustained, to which you may have your objection entered.

Q. Now, Mr. Solomon, did you spend any money in the course of the injury to Irving, to help him in effecting a cure—in crutches or anything? A. Yes.

20

Q. What did you buy. Now tell us in detail. A. I bought him two pair of crutches, and every couple of weeks he needs new rubbers for his crutches.

Q. How much did a pair of crutches cost? A. One dollar and seventy-five cents.

Q. You bought two pair? A. Yes.

Q. How much did the rubbers cost? A. Only five cents.

Q. How many of those did you buy? A. I couldn't remember. I had to buy them every ten days or every two weeks, the pair.

30

Q. Did you spend any other money or money for anything else in helping Irving? A. Yes.

Q. What? A. Well, the time I took him around to the hospital I had a carriage to take him home.

Q. What did that cost? What did you pay for the carriage? A. Four dollars, I believe.

Q. Anything else that you paid out? How did you take Irving to the hospital when you took him to have his leg dressed?

40

Frank Solomon—Direct.

MR. SMITH: I object. There is no testimony that he took him there.

Q. Did you take Irving to the hospital to have his leg dressed? A. Yes.

Q. How often? A. It was twice a week sometimes.

Q. For how long a time did you take him? A. For the time of about three months.

Q. How did you go to the hospital? A. Went with the car.

Q. Car both ways? A. Yes.

Q. How much did you pay for carfare? A. Twenty cents it cost me each time.

BY THE COURT:

Q. How many times did you go there? A. Twice a week.

Q. Have you figured that up so you could give the total number of trips you made? A. I did not. I did not figure it.

BY MR. MARKLEY:

Q. How long a time did you go to the hospital after he came out? A. About three months, I guess, about two or three months, I don't remember exactly.

Q. How many times a week did you go? A. Twice a week.

Q. Can you remember any other money that you laid out? A. Well, the moneys—just cash money, I don't remember exactly. I never took no notice about it, I don't remember exactly. It cost me expense for the boy to keep him, but I don't know.

(No cross examination.)

PLAINTIFF RESTS.

MOTION TO NON-SUIT.

Motion to Non-Suit.

MR. SMITH: If the Court please, I move for non-suit on the ground that there is no evidence of negligence on the part of the defendant company; that the boy was a trespasser or at most a mere licensee; that the company owed him no duty, and that he was not a passenger; that the act of the motorman in inviting him to ride, if such an act can be inferred from the evidence, was not within the scope of his employment, and his act in so doing was not in any sense the act of the defendant company, and the company owed him no duty, and that the plaintiff, the boy, was guilty of contributory negligence.

(Discussion.)

THE COURT: Upon the motion for non-suit in the case at bar, under the case of David v. West Jersey and Seashore Railroad Company, reported in 87 Atlantic, at 440, and the cases cited under paragraph 3, of that opinion, notably Fitzhenry v. Consolidated Traction Company, 64 New Jersey Law, 634, Anderson v. Central Railroad Company, 68 N. J. Law, 270, the court feels itself unable to escape the situation that in this case the plaintiff was sui juris, and that being so, on the testimony on the part of the plaintiff, I am unable to escape and I am also unable to throw off of myself the obligation that these cases I have just cited places upon me, and that is, that the plaintiff was guilty of contributory negligence, and upon that ground the motion for non-suit is granted.

MR. BAIN: Your Honor wil kindly note an objection.

THE COURT: You may have your objection.

Rule for Judgment.

(Filed, May 4, 1914.)

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit on May 3rd, 1914.

This cause having been heard and evidence of the plaintiff submitted to the Court and jury, the attorneys for the defendant move that said evidence is not sufficient in law to sustain the plaintiff's cause of action; whereupon the Court finds such evidence insufficient as aforesaid and ORDERS that the plaintiff be NON-SUITED and whereupon it is adjudged that the plaintiff be non-suited as against the defendant and that the defendant recover of the plaintiff the sum of Forty-two dollars and sixty-seven cents for his costs of suit which are taxed at the said amount. 10

Judgment entered this May 4th, 1914.

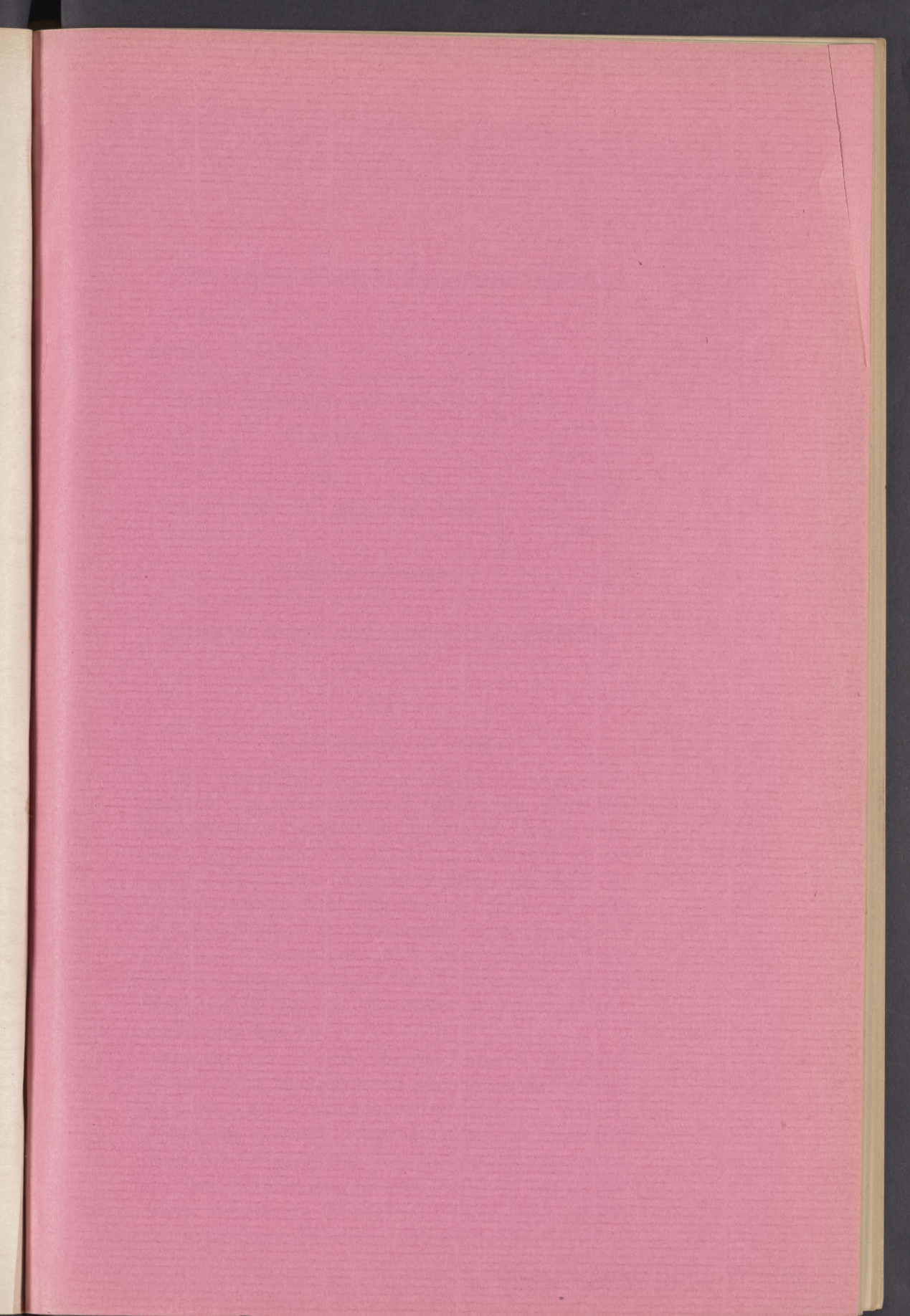
LUTHER A. CAMPBELL, 20
Judge.

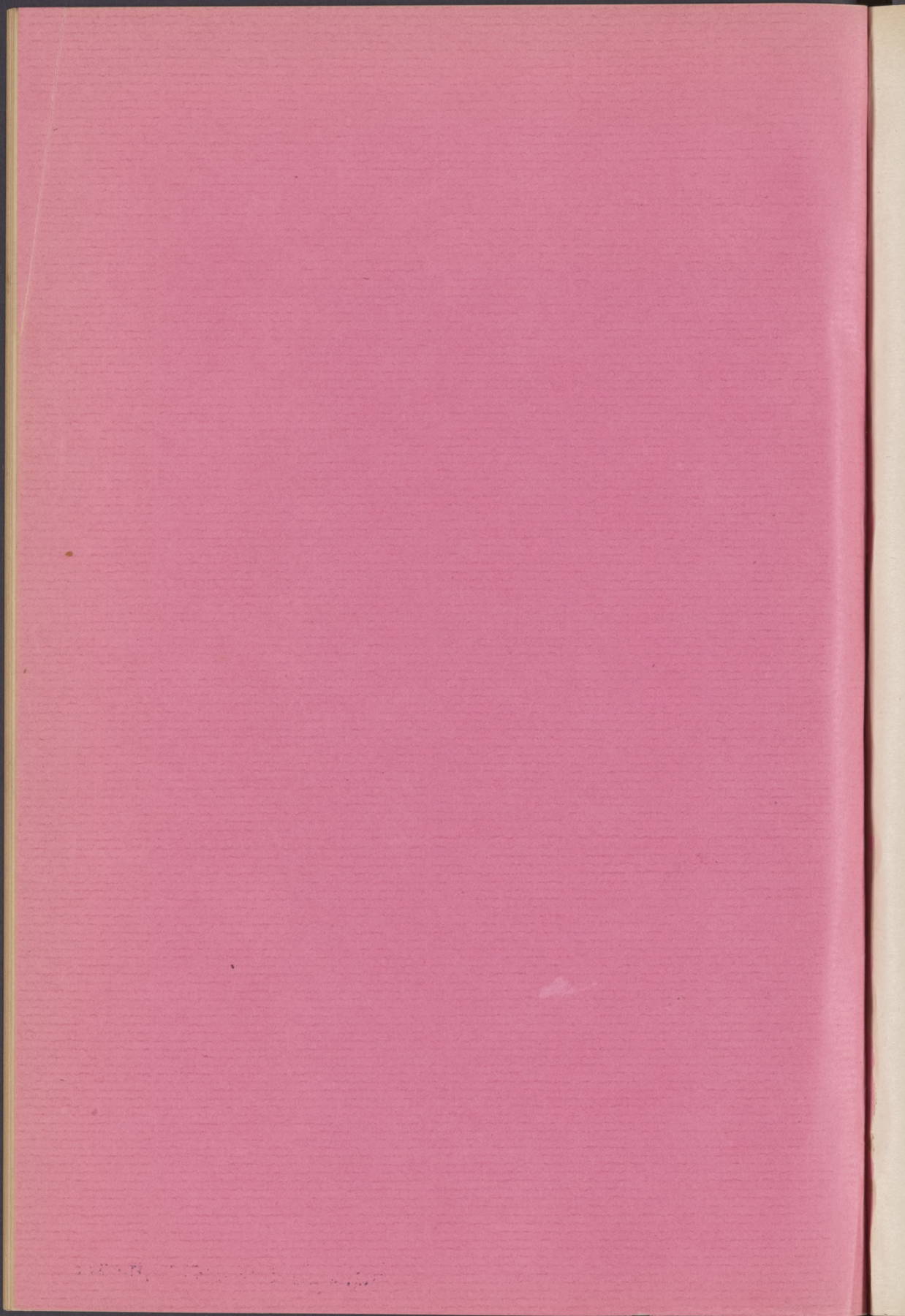
Attest:

John F. Crosby,
Clerk.

30

40





New Jersey Court of Errors and Appeals.

IRVING SOLOMON, by his next
friend, Frank Solomon, and
FRANK SOLOMON, individually,

Plaintiffs-Appellants,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant-Respondent.

On Appeal
from
Hudson
County
Circuit
Court. 10

BRIEF FOR PLAINTIFFS-APPELLANTS.

(1)

Statement of Case.

20

This appeal is from a judgment of non-suit in favor of the defendant and against the plaintiffs. The suit was brought on behalf of Irving Solomon, by his next friend Frank Solomon, to recover damages for personal injuries sustained by Irving through being run over by one of the cars of the defendant on Henderson Street in Jersey City, on September 8, 1913, and by Frank Solomon to recover damages for the loss and expense sustained by him as the father of Irving (Complaint, pp. 6-14). 30

On the day in question the home of the Solomons was at the corner of Henderson Street and Pavonia Avenue in Jersey City (p. 19, ll. 13-14). Defendant operated a line of trolley cars running from the ferry of the Erie Railroad Company at the foot of Pavonia Avenue, westerly along Pavonia Avenue to Henderson Street, and thence southerly along Henderson Street to Grand Street, 40

the cars being let into Henderson Street from Pavonia Avenue by means of a switch. The boy, Irving Solomon, who was nine years of age, shortly after eating his supper on the day of the accident, went into the street to play (p. 19, ll. 19, 20). One of the defendant's trolley cars came westerly along Pavonia Avenue and the boy was called by the motorman to turn the switch leading into Henderson Street (p. 19, ll. 24-32). He turned the switch with an iron bar given to him by the motorman (bottom of p. 21 and top of p. 22), and was invited by the motorman to go on the car (p. 22, ll. 22-27). He got on the car and rode as far as Bay Street, a distance of nine or ten blocks, where the motorman let him off and told him to wait on the other side of the street until the car made the return trip (p. 22, ll. 31-34). This car was number 312, operating on the Henderson Street line, and was a closed car with vestibule doors at the front end. When the car reached Bay Street on the return trip, the motorman motioned to the boy to get aboard (p. 23, ll. 12-18). He boarded the front steps of the car on the easterly side of Henderson Street and on the southerly side of Bay Street (bottom of p. 23, top of p. 24), the front vestibule door being open (p. 35). The boy got upon the step with both feet, holding on to the hand-rail of the car with his right hand, and turned around to sit down on the platform, when, as he said, the car jerked and threw him off (p. 24). He fell to the street and the wheels of the car passed over his right foot (p. 25). The boy was carried into the drug store, first aid administered and he was removed to the City Hospital where his right leg was amputated above the knee (pp. 25, 29, 40, 42, 43). Frank Solomon, the father of the boy, claims damages because of the expense to which he was put by reason of the injuries to his son and for the loss of services of his boy. The two actions were joined under Section 4 of the Prac-

tice Act of 1912. There is no evidence which contradicts these facts. At the close of plaintiffs' case, motion for nonsuit was made on behalf of defendant and such motion was granted (p. 66). It is from such judgment and from the erroneous exclusion of evidence by the trial Judge that this appeal is taken (pp. 1, 2).

(2)

Grounds of Appeal.

I. The Court erroneously nonsuited the plaintiffs.

10

II. The trial judge erroneously refused to permit Irving Solomon, a witness in his own behalf, to answer the following questions:

"Did you turn the switch at Pavonia Avenue and Henderson Street for any of the cars of the Henderson Street Line on that night?"

"Did you turn the switch for that car more than once?"

20

III. The trial judge erroneously refused to allow Frank Solomon, a witness in his own behalf, to answer the following questions:

"Have you still got the business at Union Hill?"

"Does that interfere with your business any?"

"Did you give up your business?"

"What happened to your business?"

30

"Before the accident, what time did you generally go to business in the morning?"

"What time did you take your son to school every day?"

"What were the profits of your business previous to the accident?"

"What were your profits after the accident?"

"Did the profits of your business decrease after the accident?"

"What actual effect did the injuries to Irving have on your business?"

40

(3)

Brief of the Argument.**I.****The Court erroneously non-suited Plaintiffs.**

At the close of plaintiffs' case, counsel for defendant moved for nonsuit on its behalf on the following grounds:

- 10 (a) There was no evidence of negligence on the part of defendant Company.
- (b) The boy was a trespasser or at most a mere licensee.
- (c) The Company owed him no duty in that he was not a passenger.
- 20 (d) The act of the motorman in inviting him to ride, if such an act can be inferred from the evidence, was not within the scope of his employment, and his act in so doing was not by any means the act of the defendant Company and the Company owed him no duty.
- (e) Plaintiff, the boy, was guilty of contributory negligence (p. 66).

The trial judge nonsuited plaintiffs on the single grounds that the boy, Irving Solomon, was *sui juris* and that he was guilty of contributory negligence, but we assume that this Court will pass upon all of the grounds upon which the motion for nonsuit was made.

Gillespie v. Ferguson Co., 78 N. J. L., 470, 473;

Sadler v. Young, 78 N. J. L., 594, 597;

Meisel v. Merchants National Bank, 88 Atl., 1067;

Herrera v. Manhattan Electric Co., 88 Atl., 1082.

40 We shall therefore discuss the grounds upon which the motion for nonsuit was made in order.

(a) *There was evidence of negligence on the part of defendant and the question of negligence was for the jury.*

The boy was upon the car at the express instance and invitation of the motorman and was a passenger, as will hereafter appear. The undisputed testimony is that he was thrown from the car, while he was standing upon the step and in the act of turning around, by the sudden jerking or starting of the car (pp. 24, 25, 29, 45, 46, 51). This sudden jerking or starting of the car after the boy had boarded it and while he was in the act of turning around was negligence on the part of the motorman, which is attributable to the Company. 10

The following was the opinion of our Supreme Court in the case of *Schmidt v. North Jersey Street Railway Co.*, (58 Atl., p. 72):

"The plaintiff desired to take a car of the defendant company at the corner of South Seventh Street and Springfield Avenue, in the City of Newark. This point was a usual stopping place for the defendant company's cars. The plaintiff raised his hand as a signal for the motorman to stop, and the car slowed down almost to a standstill. Just as the plaintiff attempted to step on, and while in the act of doing so, the motorman called to him to take the next car, and immediately put on his power. In the language of the plaintiff, 'The car shot off, and so did I.' On this case, we think the jury was justified in finding negligence on the part of the defendant company's servant, and also that there was no negligence on the part of the plaintiff, although a person attempting to board a moving car takes the risk of injury resulting from its ordinary motion, he does not assume the risk of injury from sudden and negligent increase of the motion of the car." 20 30

It was held in the case of *Speer v. West Jersey & Seashore Ry. Co.*, 74 N. J. L., p. 282, that it is negligence in the conductor of a trolley car, which 40

has come to a stop at a street corner for the purpose of taking on passengers, to start it until he has exercised due care to ascertain whether all the persons there waiting to take it have safely boarded the car.

See also:

- Davis v. Camden R. Co.*, 73 N. J. L., p. 415; 65 Atl., p. 896;
Wood v. Public Service R. Co., 74 N. J. L., p. 51;
 10 *Giovanelli v. Erie R. R. Co.*, 76 Atl., p. 424; 288 Pa., p. 33;
Coyle v. People's Ry. Co., 80 Atl., 638;
 Pennewill, 454 (Pa.).

20 The granting of a motion for nonsuit on the ground that there was no negligence on the part of defendant was improper because the evidence justified an inference of a breach of duty on the part of defendant's motorman and consequently on the part of the defendant and brings the case within the maxim "*res ipsa loquitur*."

30 In the case of *Scott v. Bergen County Traction Co.*, 63 N. J. L., p. 407, affirmed 64 N. J. L., p. 363, it was held that the occurrence of a sudden lurch or jerk of a street railway car of sufficient violence to throw a passenger off the platform, who was then preparing to alight, and awaiting the stoppage of the car for that purpose, justifies an inference of a breach of duty upon the part of those operating the car within the maxim *res ipsa loquitur*. See also *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L., p. 474.

40 The question of negligence on the part of defendant was for the jury. There is no dispute in the testimony that the boy was thrown from the car by its sudden jerking or starting and on such evidence defendant's negligence was a question for the jury.

The case in hand is much stronger than that

of *Budner v. Public Service Corporation*, 74 N. J. L., p. 298, in which a passenger boarded an open car and attempted to get upon the front platform and was told by the conductor to get off; and turned around and went along the running board of the car, and then the car gave a sudden jerk when they put on full force, and the passenger fell to the ground and was injured. In that case it was held that in the absence of evidence to the contrary, it was for the jury to say whether the defendant's negligence was established by the testimony. The verdict was reversed because it was against the weight of evidence.

The case of *Faul v. North Jersey St. Ry. Co.*, 70 N. J. L., 795, cannot be relied upon as authority for the position that there was no evidence of negligence in the case in hand. In the *Faul* case a passenger was riding on the platform. The car slowed down to pass a wagon and then resumed speed. The passenger said he was thrown from the car by a jolt. The only supporting testimony as to the jolt was by one man who said that as the car approached the wagon the motorman slowed the car. The witness did not see what the motorman did when speed was resumed, but he felt the car go ahead and he swung a little bit to one side. No passengers testified as to any jolt. The concluding sentence of the opinion is as follows:

"The accepted rule in actions founded upon negligence is that when the plaintiff shows that he was injured through some act of the carrier's servant, which might have been prevented by due care, that if the carrier proves that such care was in fact exercised, negligence cannot be inferred by the jury."

The distinction between the *Faul* case and the one at bar is plain. In the former the car was slowed down to avoid a wagon and speed then resumed, an ordinary and careful manner in which to operate a car, while in the latter the car was suddenly started before the boy had a reasonable

opportunity to board it, which was entirely un-
 called for and a negligent operation. In the
 former there was no evidence of what the motor-
 man actually did, while in the latter the undis-
 puted testimony is that the motorman pushed the
 controller around and brought it back (bottom
 of page 29), which double operation would natur-
 ally produce a jerk. In the former, the passen-
 gers' testimony of a jolt was supported only by
 that of one witness who said that the movement
 10 swung him to the side a little bit, the latter fact
 being emphasized by the court, while in the latter
 the jerking is corroborated by two witnesses. In
 the former, testimony was evidently presented by
 defendant because the case was reviewed on the
 refusal of the trial court to direct a verdict for
 defendant, while in the latter defendant presented
 no evidence and the case is being considered only
 on plaintiff's evidence. The distinction is too
 great to permit the *Faul* case to be used as an
 20 authority in this case. On the other hand there is
 ample authority for the position that the negli-
 gence of defendant in the present case was for the
 jury.

Budner v. Public Service Corporation,
Supra;

McCullom v. Atlantic City and Shore
Railroad Co., 77 N. J. L., p. 603;

30 *Oakerson v. Atlantic City and Shore*
Railroad Co., 77 N. J. L., p. 769;

Gottlob v. North Jersey St. Ry. Co., 73
N. J. L., p. 305.

The negligence of the motorman and conse-
 quently of the Company, his employer, was not
 only in starting the car with a sudden jerk, but in
 starting the car at all while the boy was in a
 dangerous position. He was bound not only to
 prevent any extraordinary jerk in the starting of
 the car, but, in view of the dangerous position into
 40 which he had invited the boy, (and which he knew,

or should have known, as the boy was almost under his feet), to take reasonable care to avoid any act which might result in the boy's being thrown from the car and injured, and if by the mere starting of the car while the boy was in that position, the boy was thrown off, the motorman was negligent. There was no dispute as to the cause of the boy's being thrown from the car, which he said was by its sudden jerking, and his testimony is corroborated by that of the witnesses Samuel Essig (p. 45), and Samuel Feldman (p. 51). We submit that this undisputed testimony was sufficient to entitle a jury to find negligence on the part of the motorman and consequently on the part of the defendant, his employer. 10

(b) *The boy was lawfully on the car as a passenger and was not a trespasser.*

The undisputed testimony is that the boy boarded the car at the corner of Pavonia Avenue and Henderson Street and rode to Bay Street, a distance of nine or ten blocks to the south along Henderson Street, where he got off and awaited the return of the car when he again boarded it at the instance of the motorman. It is well settled that a child boarding a street car at the invitation of either the motorman or the conductor is a passenger and entitled to the same degree of care as a passenger. 20

- Danbeck v. N. J. Traction Co.*, 57 N. J. L., 463; 31 Atl., 1038; 30
Wilton v. Middlesex R. Co., 107 Mass., 108;
Wilton v. Middlesex R. Co., 125 Mass., 130;
Ecliff v. Wabash, St. L. & P. R. Co., 64 Mich., 196; 31 N. W., 180;
Hestonville Passenger R. Co. v. Grey, 1 Walk (Pa.), 513;
Duff v. Allegheny Val. R. Co., 91 Pa. St., 458; 36 Am. Rep., 675; 40

- Buck v People's Street R. & Electric Light & P. Co.*, 108 Mo., 179; 18 S. W., 1090, affirming 46 Mo. App., 555;
Evansville Street R. Co. v. Meadows, 13 Ind. App., 155; 41 N. E., 398;
Brennan v. Fair Haven & W. R. Co., 45 Conn., 284; 29 Am. Rep., 679;
Siegrist v. Arnot, 10 Mo. App., 197;
Muehlhausen v. St. Louis R. Co., 91 Mo., 332; 2 S. W., 315;
10 *Little Rock Traction Co. v. Nelson*, 66 Ark., 494; 52 S. W., 7;
Denison v. S. R. Co. v. Carter, 98 Tex., 196; 82 S. W., 782;
Transfer Co. v. Smith, 137 Ky., 319, 322; 125 S. W., 725; 29 L. R. A. (N. S.), 312;
R. Co. v. Moore, 83 Ga., 453; 10 S. E., 730;
20 *So. Covington St. R. Co. v. Burns*, 150 Ky., 348, 150 S. W., 343; 6 Cyc., 541;
Note in 37 L. R. A. (N. S.), 420; where most of the cases are collated.
Thompson on Negligence, Vol. 3, secs. 3321, 3322.

The case of *Danbeck v. N. J. Traction Co.*, *supra*, is the only one of direct authority in this State on this particular point that we can find, but it is supported by the other cases cited. In that case a boy who had not yet reached his tenth year got upon the platform of a street car to get money from the conductor with which to purchase for him a paper of cigarettes. The boy's statement was as follows:

40 "The conductor called me to the car and asked me to go and buy him a package of cigarettes and I said 'Yes'; I jumped upon the car; he had his hands in his pocket to get me the money * * * and the car gave a

lurch and the conductor jounced against the door and then against me and knocked me off."

The Supreme Court, speaking by Beasley, C. J., said:

"We think, therefore, that at the trial in this case the judge applied to it the legal rule when he told the jury that if the plaintiff was in the car by the invitation of the conductor, that thereby it became the duty of the company and its agents 'to exercise all reasonable care to prevent injury coming to the plaintiff in consequence of the position of danger he was invited to assume.' 10

"This doctrine is in harmony with the decisions. In the case of *Muelhausen v. St. Louis Railway Co.*, 91 Mo., 332, it was held that a child who was permitted to ride without the payment of fare had the rights of a passenger to the extent, at least, that he was entitled to the diligence due to a person of his age and discretion. A precisely similar rule was enforced in *Buck v. People's Street Railway Co.*, 18 S. W. Rep., 1090, the facts being that a small boy was riding in the car at the invitation of the driver, and there was a recovery on the ground just mentioned, that the company was bound to take the same care of him that it did of its other passengers. 20

"The following cases afford exemplifications of the enforcement of the same principle: *Ekman v. Minneapolis Street Railway Co.*, 34 Minn., 24; *Railroad Company v. Stout*, 17 Wall, 657; *Metropolitan Street Railway Company v. Moore*, 83 Ga., 453; *Wilton v. Middlesex Railway Co.*, 107 Mass., 108." 30

This case was cited by this Court in *Friedman v. Snare & Triest Co.*, 71 N. J. L., 605, 617, for the proposition that it was an action by a child injured while riding as a *gratuitous passenger* upon a railway car, having entered it upon the invitation of the conductor. It is also cited with approval in the dissenting opinion in that case at page 623. The case in hand is much stronger 40

than the Danbeck case, for the boy was permitted to ride upon the car in return for a service performed ~~not~~ for the motorman alone but for the Company, the switching being necessary to the operation of the car.

Another case directly in point is *Wilton v. Middlesex R. Co.*, 107 Mass., 108, *supra* (a case reserved for the consideration of the full court), in which Morton, J., speaking for the Supreme Judicial Court of Massachusetts, said:

10

"The facts which the plaintiff offered to prove, bearing upon this question, are as follows: The plaintiff, a girl of nine years of age, was walking with several other girls upon the Charlestown bridge about seven o'clock in an evening in July. One of the defendants' cars came along very slowly, and the driver beckoned to the girls to get on. They thereupon got upon the front platform. It was admitted that the plaintiff was not a passenger for hire, and that the driver had no authority to take the girls upon the car and carry them, unless such authority is to be implied by the fact of his employment as driver.

20

"Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation.

30

"A master is bound by the acts of his servants in the course of his employment. They are deemed to be the acts of the master. *Ramsden v. Boston & Albany Railroad Co.*, 104 Mass., 117, and cases cited. The driver of a horse-car is an agent of the corporation, having charge, in part, of the car. If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such act is not one outside of his duties, but is an act within the general scope of his agency, for

40

which he is responsible to his master. In the case at bar, the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions.

"It follows, that the plaintiff, being lawfully upon the car, though she was a passenger without hire, is entitled to recover, if she proves that she was using due care at the time of the injury and that she was injured by the negligence of the driver."

10

The above action was by the child. Subsequently the parents brought an action and also recovered.

Wilton v. Middlesex R. Co., 125 Mass., 130.

See also

Littlejohn v. Fitchburg R. R. Co., 148 Mass., p. 478, at page 484.

20

In Thompson's Work on Negligence, Vol. 3, Sec. 3322, it is stated that:

"Disregarding the distinction stated in the last preceding paragraph, and proceeding upon the view that the conductor of a railway train or of a street car is the person designated by the incorporated carrier to decide who shall and who shall not be permitted to ride upon its train or vehicle, and to enforce his decision by the employment of the necessary force—many courts have taken the view that persons so invited or permitted to ride, albeit in violation of the rules of the company, cannot be deemed trespassers when so riding, but are entitled to the rights of passengers. It was so held in the case of a station agent riding to his home on a passenger train of the company; of a person riding on a railway train without paying fare, but with the permission of the conductor, although the train was neither intended nor operated for the carriage of passengers, and although the conductor had no authority

30

40

from the company to permit such person so to ride; of a person invited by the superintendent of a logging road to ride upon one of its trains without the payment of fare; of boys habitually allowed to ride upon a freight train by the employes of the company; of a boy ten years old riding upon a street car without the payment of fare, by invitation of the motorman, who had authority to receive and let off passengers; of children riding upon street cars by invitation of the conductor; and of a shipper's employe riding on a train with the consent or permission of the conductor—the conclusion being that, while not a passenger in the ordinary sense of the term, he was not a trespasser, and might maintain an action against the company for injuries received through the negligence of its servants in charge of the train.”

10

The boy was not a trespasser, or mere licensee, but was a passenger.

(c) *The Company was under a legal duty toward the boy to use at least such care as would be due to a passenger, and probably a higher degree of care.*

20

There can be no doubt that the boy was invited on the car by the motorman, for his testimony to that effect is uncontradicted, and it is fair to infer that he was permitted to ride upon the car in return for turning the switch for the motorman, that being the duty of the latter. Under the circumstances, the boy was lawfully upon the car, and was a passenger as above stated. As such he was entitled to the protection afforded a passenger.

30

No citation of authority is necessary for the proposition that a common carrier of passengers must use a high degree of care to protect them from danger that foresight can anticipate. By foresight is meant not fore-knowledge absolute, or that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it

40

can be classed among events that, without due care, are likely to occur, and that due care would prevent. This Court has so held in the following cases:

Rivers v. Penn. R. R. Co., 83 N. J. L., 513, 515;

Hansen v. N. J. R. Co., 64 N. J. L., 686;

Scott v. Bergen Traction Co., 63 N. J. L., 407, 64 N. J. L., 362.

The negligence charged in the complaint is two-fold, viz: first, the sudden starting of the car, and, second, the starting of the car while the boy was in a dangerous position (Complaint, p. 6, et seq.). There is no doubt that if the car started with extraordinary suddenness or an extraordinary jerk, the motorman, and consequently the Company, was negligent; but even if there was no extraordinary suddenness in starting, still the motorman was negligent. 10

The boy was in the act of turning around on the step, and just before the jerk he saw the motorman push the controller quickly forward and bring it back again. The boy's language was that he pushed the "iron" on top of the box quickly forward and then back again. The motorman did one of two things, he either turned on the current or loosened the brakes, and therefore, the facts clearly come within the rule laid down in *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L., 474, supra. When the boy boarded the car it was at a standstill, or almost so, and he got both feet on the step, and was turning around to sit down when the car started. He was in a dangerous position. In fact, he had not fully boarded the car, but was in the act of doing so. He was trying to reach a place of safety. The motorman had no right to start the car until the boy was safely seated on the platform, and in doing so he was negligent. 20 30 40

- Schmidt v. No. Jersey St. R. Co.*, 58 Atl.,
 72;
Speer v. West Jersey R. Co., 74 N. J. L.,
 282; 65 Atl., 896;
Davis v. Camden R. Co., 73 N. J. L., 415;
 63 Atl., 843;
Wood v. Public Service R. Co., 74 N. J.
 L., 52;
Giovanelli v. Erie R. Co., 76 Atl., 424;
 228 Pa., 33;
 10 *Coyle v. People's Ry. Co.*, 80 Atl., 638;
 Pennewill, 454 (Pa.).

(d) *The invitation by the motorman to the boy to board the car was within the scope of his employment.*

- In the case of *Wilton v. Middlesex R. Co.*, 107
 Mass., 108, it was said that a master is bound
 by the acts of his servant in the course of his
 employment, and that the driver of a horse car
 20 is an agent of the corporation having charge in
 part of the car and that if, in violation of his
 instructions, he permits persons to ride without
 pay, he is guilty of a breach of his duty as a
 servant and that such act is not one outside of
 his duties, but is an act within the general scope
 of his agency for which he is responsible to his
 master. In that case, a girl of nine years was
 invited on a car by the driver and it was admit-
 30 ted that the plaintiff was not a passenger for
 hire and that the driver had no authority to take
 the girl upon the car, unless such authority could
 be implied by the fact of his employment as a
 driver. The Court further said:

"It follows that the plaintiff, being law-
 fully upon the car, though she was a passen-
 ger without hire, is entitled to recover if
 she proves that she was using due care at
 the time of the injury and that she was in-
 40 jured by the negligence of the driver."

In the case before the Court, the motorman was

in control of the actual running of the car and even though there was also a conductor, as we assume to have been the case (although there is no evidence on the subject), there is no evidence whatever that the conductor challenged the boy's right to ride upon the car; nor is there any evidence that under the circumstances the motor-man had no right to permit the boy to ride. At any rate, the question was a jury question which would not be affected by the mere rules of defendant Company. The point does not need much discussion. See cases cited under (b) *supra*. 10

(e) *The boy was not guilty of contributory negligence.*

The learned trial Judge apparently solved all of the grounds for non-suit, except that of contributory negligence, in favor of the plaintiffs, but non-suited on the last named ground. The trial Judge found first that the boy was *sui juris*, as a matter of law, and that he was guilty of contributory negligence. The boy was only nine years of age and close to the border line where a child is presumed to be incapable of that judgment and reason which might render him capable of contributory negligence. His age was so close to that line that the question whether he was *sui juris* must depend upon the disclosed facts. Counsel for defendant cleverly suggested to the boy that he knew it was dangerous to get on the cars running in front of his house and the boy answered that he did (p. 27). It cannot be possible that this child was considered *sui juris* because of that statement. It might well be that he knew it would be dangerous to jump upon a car moving fifteen or twenty miles an hour, as the cars might in front of his house. The question is not whether he knew it would be dangerous to jump upon such cars, but whether he knew that it was dangerous for him to get upon the particular 20 30 40

car at the particular time and under the particular circumstances that he boarded it.

This Court has repeatedly held that where there is any doubt as to the child being of the age and capacity that in law constitutes one *sui juris* the question should be submitted to the jury.

Traction Co. v. Scott, 58 N. J. L., 682, 34 Atl., 1094;

David v. West Jersey R. Co., 84 N. J. L., 684; 87 Atl., 440;

10

1 Thomp. Neg., Sec. 310, p. 292, et seq.

In *Traction Company v. Scott*, 58 N. J. L., 682, 689, supra, this Court, speaking by Hendrikson, J., said:

"Where there is a question whether the child is of sufficient age and discretion to be capable of some care for his own safety, the question of his capacity and its degree is for the jury. 2 Thomp. Neg., 1182.

28

"In an action, by a child eight years old, against an electric street railway company, for injuries caused by being run over by defendant's car, the question whether plaintiff was *sui juris* was held to be a question for the jury. *Stone v. Dry Dock Railway Co.*, 21 N. E. Rep., 712; 115 N. Y., 104, followed; *Bennett v. Brooklyn Heights Railway Co.*, 37 N. Y. Supp., 447."

In *David v. West Jersey R. Co.*, 84 N. J. L., 684; 87 Atl., 440, supra, this Court speaking by Trenchard, J., said:

30

"In the present case it is unimportant whether, as an academic question, the courts can properly hold that an infant of a given age is, as a matter of law, *non sui juris*, or whether that question is one of fact. There has been a time in the life of every person of mature judgment, as all agree, when he was incapable of exercising the care and judgment necessary to avoid and avert danger and was *non sui juris*. There is a time, also, when he is in law an adult and respon-

40

sible as such. Between these two periods is a transition stage, during which his responsibility depends upon matters of fact. *MacDonald v. O'Reilly*, 45 Oreg., 589. In this transition period he may or may not be guilty of contributory negligence. *Traction Company v. Scott*, 29 Vroom, 682; *Fitzhenry v. Consolidated Traction Co.*, 35 Id., p. 674."

Assuming for the purpose of argument that the boy should be held to be *sui juris*, as a matter of law, although we submit that that was a jury question, there was no evidence of contributory negligence.

10

He was not negligent in boarding a car the wheels of which were just turning, and which, to use his childish language "was just like standing still" (p. 27). It is not negligent as a matter of law to board a slowly moving car.

Schmidt v. North Jersey R. Co., 58 Atl., p. 72 (supra);

20

Schmidt v. North Jersey R. Co., 66 N. J. L., p. 424;

Murphy v. North Jersey R. Co., 71 N. J. L., p. 5; 58 Atl., p. 1018;

6 Cyc., p. 44.

The boy's position on the car was not the result of contributory negligence on his part. He was not riding on the step but used the step as a means of boarding the car. He had hold of the handrail. He had not yet reached the position he was to take on the platform at the time the accident happened and had no opportunity to do so. He was in the act of turning around to sit down when he was thrown off. He was in the only position he could have occupied under the circumstances—and that through no negligence of his. Even had he been on the platform he would not have been negligent. In the case of *Scott v. Bergen County Traction Co.*, 63 N. J. L., page 407, it was held that it is not negligence

30

40

per se for a passenger to ride upon the platform of an electric street railway car.

Trussell v. Morris County Traction Co.,
79 N. J. L., p. 533;

Whalen v. Bergen County Traction Co.,
63 N. J. L., p. 407; affirmed 64 N. J.
L., p. 362;

6 Cyc., p. 653;

4 American Digest (Dec.), Sec. 331 (4).

- 10 This is not a case of a passenger at liberty to take a place inside of the car but one who occupies a particular place, not only with the permission of, but at the instance of the company's servant.

- The cases cited make it plain that even an adult would not have been chargeable with contributory negligence as a matter of law under these circumstances, and certainly this mere child can not be, for he is not required to exercise the full degree of care of an adult.
- 20

Justice Trenchard in the case of *David v. W. J. & S. S. R. R. Co.*, *supra*, said:

- 30 "The degree of care required of such a child is such as is usually exercised by persons of similar age, judgment and experience. *Traction Company v. Scott*, *supra*. The reason for the rule is this: The conduct of a child should not be measured by the standard of care applied to an adult, because the immaturity of youth ordinarily embraces not only imperfect knowledge of natural facts and laws and of the proper relation between cause and effect, but when possessed of these elements necessary to the exercise of reasonable care, it still lacks the discretion, thoughtfulness and judgment presumed to be an attribute of the ordinary prudent adult and which may be said to come only with experience. Thoughtlessness, impulsiveness and indifference to all but patent and imminent dangers are natural traits of childhood, and must be taken into account when we come to
- 40

classify the conduct of the child. *Mann v. Missouri, &c., Railway Co.*, 123 Mo., App., 486."

In *Traction Company v. Scott*, 58 N. J. L., 682, 689, *supra*, this Court, speaking by Hendrickson, J., said:

"And when a child has reached the age of discretion, and is considered *sui juris* as a matter of law, the degree of care and caution required of him will be no higher than such as is usually exercised by persons of similar age, judgment and experience. And whether that degree of care and caution has been exercised by the child in a given case, is usually, if not always, a question of fact for the jury. 10

"The counsel for defendant below, in the argument here, called the attention of the Court to the fact that the question of contributory negligence of infants is usually one for a jury, but not always, citing *Thompson v. Buffalo Railway Co.*, 39 N. E. Rep., 709; *Nagle v. Allegheny Valley Railroad Co.*, 88 Pa. St., 35; *Dietrich v. Baltimore &c. Railway Co.*, 58 Md., 347, where the Court, as a matter of law, found the plaintiff's intestates to have been guilty of contributory negligence and withdrew the cases from the jury. It is noticeable, however, that in those cases the intestates were all of the age of fourteen years, and the facts showed that they had acted in entire disregard of the care and caution that might be reasonably expected from persons of their age and experience." 20 30

The question of contributory negligence, if there was any, was for the jury to pass upon. The general rule stated in 6 Cyc., p. 644, is as follows:

"As to street cars, the general doctrine that it indicates negligence to attempt to get on board while moving is not so strictly applied, and it has been announced in a great majority of cases in which the subject has been passed on that it is not negligence *per se* to do so. More particularly it has been held not to be negligence in itself to attempt to 40

board a street car after it has been slowed up in response to the signal of one desiring to get on board, although it has not come to a full stop. But in general the question is one of fact for the jury, to be determined under the circumstances of the case."

10 In the late case of *Keenan v. Public Service Ry. Co.*, 90 Atl., p. 273, where a boy of eight years walked from behind one car directly in front of another going in an opposite direction, a case which may have been very strong against the plaintiff, this Court held that the question of contributory negligence was for the jury.

See also case of *Yarluckie v. West Jersey, etc., Ry. Co.*—opinion of this Court filed June 15, 1914.

20 The cases of *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L., p. 674; *Anderson v. Central Railroad Co.*, 68 N. J. L., p. 670, and *David v. W. J. & S. R. Co.*, 84 N. J. L., p. 686; 87 Atl., p. 440, cited by the learned trial Judge as authority for granting a non-suit in this case, we submit do not support the motion. In the *Fitzhenry* case, a girl of nine years, in the evening and in daylight, attempted to cross Newark Avenue just west of Railroad Avenue in Jersey City. Plaintiff, who had her little brother by the hand, stopped at the curb on one side of the street and was attracted by a friend on the other side and started to cross. She walked from behind an eastbound car and according to the testimony into the fender of a westbound car which could have been seen had she looked. Justice Hendrickson, writing the opinion of this Court said (*italics ours*):

30 "It is true that in such cases the question of contributory negligence is generally, if not always, a question for the jury. But this doctrine will not warrant a recovery when the child suddenly puts himself in a dangerous place, *where there was no reason to expect him, and too late for the danger to be averted by the person inflicting the injury.*"

40

In the present case the child did not suddenly put himself in a dangerous place, where there was no reason to expect him, and too late for the danger to be averted. He was not only expected but invited onto the car, and the motorman might have averted the danger by not suddenly starting the car.

The case of *Anderson v. Central R. R. Co.* was one in which a boy about nine years old was struck by a swiftly moving train at a highway crossing with which he was familiar and where the view at 50 feet was for a long distance. Chancellor Magie, writing the opinion of this Court, said:

“But when the act of an infant exposes him to a personal peril which he must recognize and appreciate, and when his personal safety may be secured by means indicated by the most immature judgment, his exposure of himself to the peril, without any precaution, will leave no question for a jury.”

The boy in the case at bar exposed himself to no personal peril which he could recognize or appreciate. He had doubtless seen others get upon slowly moving cars and was not negligent in doing so under the authorities, if that is the point. He could not recognize or appreciate that the motorman would suddenly start the car and throw him off. The reasonably prudent way to secure his safety in boarding the car was by grasping the handrail, which he did. He was not thrown in boarding, for he got both feet upon the step and his hand on the rail and was then thrown, when he was in a place of comparative safety if the motorman had been as careful as he should have been.

In the case of *David v. W. J. & S. S. R. Co.*, a boy between seven and eight years of age was killed by a train at a railroad crossing, and this Court sustained a refusal of the trial Judge to nonsuit, on the ground of contributory negligence.

The circumstances, in each of these cases differ

materially from those of the present case, and we submit the cases emphasize the error of the non-suit.

10 This mere child was permitted to ride on the car, and was a passenger in point of law; he boarded it at a time and place which he might reasonably assume to be safe and prudent, as afterwards was proved to be so by his actual boarding in safety; he had no good reason to assume or
 20 believe that the car would be suddenly started and he would be thrown off, as was the case; there was no occasion for the motorman to suddenly start the car with a jerk while the boy was in the act of turning around, and the child would have been safe had he not done so; that action of his was plainly negligence for which his employer, the defendant, is responsible.

The questions of fact were for the jury.

20 We submit that the granting of motion for non-suit was erroneous.

II.

The trial judge erroneously refused to admit certain testimony on behalf of plaintiffs.

30 Irving Solomon, a witness in his own behalf, was asked whether he had turned the switch for the same car more than once on the night that he was injured (bottom page 19 and top of page 20). The object was to show that he had turned the switch and had ridden upon this same car on several trips immediately preceding that on which he was injured, and the manner in which he rode, which would have been strong corroboration of his position at the time he was injured, the several trips of the car being really part of a single set of circumstances. We submit that such testimony was proper.

40 Frank Solomon, a witness in his own behalf, was asked a series of questions, the answers to which

would have disclosed the loss sustained by him because of the loss of services of his son (pp. 62, 63, 64). These questions are set forth as grounds for appeal at the head of this brief. He was asked particularly about his business, and what actual effect the injuries to his son had on that business. We submit that such testimony was proper.

Conclusion.

We respectfully submit that the judgment should
be reversed and a new trial ordered. 10

Dated, June 16, 1914.

COLLINS & CORBIN,
Attorneys of Plaintiffs-Appellants.

GEO. S. HOBART,
ROBERT J. BAIN,
Of Counsel.

20

30

40

