

I N D E X

	PAGE
Notice of Appeal.....	1
 JUDGMENT RECORD:	
Bill of Complaint.....	2
Amended Complaint .....	5
Answer .....	10
Answer to Amended Complaint .....	12a
Reply .....	12e
Judgment .....	12g
Clerk's Certificate .....	12g
 PLAINTIFF'S TESTIMONY:	
William J. Benco—Direct.....	13
Cross .....	18
Asher Atkinson—Direct .....	20
Cross .....	25
Re-direct .....	25
Frank Lathan—Direct .....	34
Cross .....	40
Recalled—Direct .....	100
Harry T. Cullings—Direct.....	46
Cross .....	51
Re-direct .....	55
Re-cross .....	56
Recalled—Direct .....	104

	PAGE
John L. Stifel—Direct.....	56
Roy Woodward—Direct .....	59
Cross .....	65
Re-direct .....	65
Andrew Brennan—Direct .....	66
Cross .....	73
Re-direct .....	82
Recalled—Direct .....	91
Recalled—Cross .....	92
George A. Brennan—Direct.....	85
Cross .....	91
Charles S. Pryor—Direct.....	111
Joseph E. Finn—Direct.....	122
Cross .....	125
Trayton Ballard—Direct .....	127
Cross .....	132
Frank Zunino—Direct .....	133
Motion for Non-suit.....	103
DEFENDANT'S TESTIMONY:	
Albert Sutton—Direct .....	135
Cross .....	140
Emil Fitzke—Direct .....	144
Cross .....	145
Direction of Verdict.....	149

NOTICE OF APPEAL.  
NEW JERSEY SUPREME COURT.  
ESSEX COUNTY.

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GEORGE BRENNAN, adminis-  
trator, etc.,  
v.  
PUBLIC SERVICE RAILWAY  
Co.,

*Plaintiff,*

*Defendant.*

Action at Law.  
Notice of Appeal.

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*To Joseph Coult, Esq., Attorney of Defendant:*

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Take notice that the plaintiff appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of the State of New Jersey.

Respectfully,

JAMES MERCER DAVIS,  
*Attorney for Plaintiff.*

Dated May 1, 1925.

30

## JUDGMENT RECORD.

## BILL OF COMPLAINT.

## NEW JERSEY SUPREME COURT.

10

GEORGE BRENNAN, adminis-  
trator *ad prosequendum*  
of the Estate of EUGENE  
BRENNAN, Deceased,  
*Plaintiff,*

v.

PUBLIC SERVICE RAILWAY  
COMPANY,  
*Defendant.*

Judgment Record.  
Action at Law. On  
Postea.  
Judgment for  
Defendant.  
Joseph Coult, Jr.,  
Attorney.

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Public Service Railway Company, the defendant in this cause, was summoned to answer unto George Brennan, administrator *ad prosequendum* of the Estate of Eugene Brennan, Deceased, the plaintiff therein, in an action at law upon the following complaint:

30

(Summons issued August 31, 1922.)

The plaintiff says that:

1. Defendant is a corporation organized and existing under the laws of the State of New Jersey.

2. Defendant at all the times herein mentioned was using, supervising, controlling and operating a trolley railroad by running cars propelled by electricity over rails and tracks laid in an easterly and westerly direction on and along Albany Street, a public highway in New Brunswick, New Jersey.

3. Defendant, by its agents, servants and employees, at the times herein mentioned, was using, supervising, controlling and operating each of the two trolley cars herein mentioned. 10

4. At the times herein mentioned the defendant's westbound rails and tracks and eastbound rails and tracks with respect to each other at and near the place of accident herein referred to, were in a dangerous, unlawful, unsafe and negligent condition and state, by reason of the defendant having unlawfully, negligently and wrongfully neglected and failed to properly lay and maintain said rails and tracks at the said points and places so as to prevent accidents and injuries to persons lawfully riding on the front left step of its westbound cars and so as to be fit and safe for its carriage at the said points and places of such persons, at the times herein mentioned. 20

5. On September 14th, 1918, while the decedent was lawfully riding on the left-hand front step of one of defendant's trolley cars which was being used, supervised, controlled and operated by the defendant, by its servants, agents and employees, in a westerly direction on and along Albany Street, New Brunswick, New Jersey, toward George Street, and said car had reached a point on said Albany Street near but east of George Street, the said defendant by its servants, agents and employees negli- 30

gently, wrongfully, and unlawfully used, supervised, controlled and operated the said car on which the decedent was so riding and negligently, wrongfully and unlawfully used, supervised, controlled and operated another of its trolley cars in an easterly direction past or partly past said other car whereby the decedent suffered numerous serious and dangerous injuries in and about his body, namely: fracture of the vertebrae, injury to the spinal cord, 10 partial paralysis, injury to the abdomen, injuries to the nervous system and abrasions, and which wrongful acts, neglect and defaults of the defendant as herein mentioned and the aforesaid injuries to decedent resulting therefrom caused decedent's death on January 24th, 1921.

6. That said Eugene Brennan died intestate leaving him surviving his father, Andrew Brennan, and his brothers, Charles A., J. W., George A., L. J., 20 F. E., and Albert Brennan, all over the age of twenty-one (21) years. There are no deceased children or sisters leaving children them surviving, and the said father and brothers are the decedent's only next of kin.

7. On August 2, 1922, the Surrogate of Middlesex County, New Jersey, granted letters of administration *as prosequendum* upon the estate of the decedent to George Brennan, his brother, who accepted 30 the same.

8. That said decedent was over the age of twenty-one years when died intestate, and unmarried and leaving no issue.

9. That prior to his death the said decedent was in good health, in possession of all his faculties, and

until May 26, 1918, when he entered the United States Military Service, was steadily employed at his usual occupation as farmer; and his said father depended upon the said decedent for his support to a large extent, and his said father, Andrew Brennan, has been pecuniarily damaged by the decedent's death in a sum of \$25,000, together with the expenses of the administration of the decedent's estate, which will amount to about \$1,000; and his said brothers have also suffered pecuniary damage 10 to the amount of \$25,000.

10. This action, as required by the law of the State of New Jersey, is commenced or sued within two years after the death of the said Eugene Brennan.

The plaintiff demands \$51,000 of the defendant, with the costs and disbursements of this action.

JAMES MERCER DAVIS, 20  
*Attorney of Plaintiff.*

(Filed September 5, 1922.)

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AMENDED COMPLAINT.

The plaintiff says that:

1. Defendant is a corporation organized and 30 existing under the laws of the State of New Jersey.

2. Defendant at the times herein mentioned was using, supervising, controlling and operating a trolley railroad by running cars propelled by electricity over rails and tracks laid in an easterly and westerly

direction on and along Albany Street, a public highway in New Brunswick, New Jersey.

3. Defendant by its agents, servants and employees at the times herein mentioned on September 14, 1918, was using, supervising, controlling and operating each of the two trolley cars herein mentioned.

10 4. At the times herein mentioned on September 14, 1918, the defendant's westbound rails and tracks and eastbound rails and tracks, with respect to each other, at and near the place of accident herein referred to, were in a dangerous, unlawful, unsafe and negligent condition and state, by reason of the defendant having unlawfully, negligently and wrongfully neglected and failed to properly lay and maintain said rails and tracks at the said points and places so as to prevent accidents and injuries  
20 to passengers lawfully riding on the front left step of its westbound cars and so as to be fit and safe for its carriage at the said points and places of such passengers at the times herein mentioned on September 14, 1918, because the said westbound rails and tracks and eastbound rails and tracks were so close together at the said points and places as to cause its eastbound cars to pass so close to its westbound cars as to make it unsafe and dangerous for its said passengers so riding, and of which conditions of said rails, tracks and cars defendant had  
30 notice or should have had notice by reason of the length of time that said conditions had existed on and prior to September 14, 1918.

5. On September 14, 1918, while the decedent was lawfully riding as a passenger on the left-hand front step of one of the defendant's trolley cars which

was being used, supervised, controlled and operated by the defendant, by its servants, agents and employees in a westerly direction on and along Albany Street, New Brunswick, New Jersey, toward George Street, and said car had reached a point on said Albany Street near but east of George Street, the said defendant, by its servants, agents and employees, negligently, wrongfully and unlawfully used, supervised, controlled and operated the said car on its said westbound rails and tracks on which the decedent was so riding and negligently, wrongfully and unlawfully used, supervised, controlled and operated another of its trolley cars on its said eastbound rails and tracks in an easterly direction past or partly past said other car, and which said rails and tracks were in the dangerous, unlawful, unsafe and negligent condition and state aforesaid, whereby the decedent, without warning, was struck by the car going in an easterly direction and squeezed between said two trolley cars, suffered numerous serious and dangerous injuries in and about his body, namely fracture of the vertebrae, injury to the spinal cord, partial paralysis, injury to the abdomen, injuries to the nervous system and abrasions, and which wrongful acts, neglect and defaults of the defendant as herein mentioned, and the aforesaid injuries to decedent resulting therefrom caused decedent's death on January 24th, 1921.

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6. That said Eugene Brennan died intestate, leaving him surviving, his father, Andrew Brennan, his mother, Helen Brennan, and his brothers, Charles A., J. W., George A., L. J., F. E. and Albert Brennan, all over the age of twenty-one (21) years. There are no deceased children or sisters leaving

children them surviving, and the said father, mother and brothers are the decedent's only next of kin.

7. August 2, 1922, the Surrogate of Middlesex County, New Jersey, granted letters of administration *ad prosequendum* upon the estate of the decedent to George Brennan, his brother, who accepted the same.

10 8. The said decedent was over the age of twenty-one years when he died intestate, and unmarried and leaving no issue.

9. That prior to his death the said decedent was in good health, in possession of all his faculties and until May 26, 1918, when he entered the United States Military Service, was steadily employed at his usual occupation as farmer; and his said father and mother depended upon the said decedent for  
20 their support to a large extent, and his said father and mother suffered pecuniary damage by the decedent's death to the amount of \$35,000, together with the expenses of the administration of the decedent's estate which will amount to about \$1,000; and his said brothers have also suffered pecuniary damage to the amount of \$25,000.

10. That this action is commenced or sued within two years after the death of such decedent. That  
30 the said wrongful acts, neglect and default of the defendant caused the death of decedent Eugene Brennan and are such as would, if death had not ensued, have entitled the decedent, Eugene Brennan, to maintain an action against the defendant which would have been liable if the death of the decedent had not ensued, and recover damages in respect thereof; and that the decedent, Eugene Bren-

nan, could have maintained such an action because said decedent entered the military service of the United States of America on May 26th, 1918, and continued in such service until he was discharged therefrom on October 5, 1920, and that the decedent's cause of action accrued on September 14, 1918, while he was in such military service, and that said decedent up to the time of his death could have commenced and instituted his said cause of action within two years next after his said cause of action accrued by reason of the laws of the State of New Jersey and of the United States of America in such case made and provided, to wit: 10

Law of the State of New Jersey for the year 1918, Chapter 128, and "An Act and law of the United States of America approved March 8th, 1918, and known as the Soldiers and Sailors Civil Relief Act," wherein it is provided "That the period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns, whether such cause of action shall have accrued prior to or during the period of such service." 20

That plaintiff demands \$61,000 of the defendant with the costs and disbursements of this action.

JAMES MERCER DAVIS,  
*Attorney of Plaintiff.* 30

(Filed February 9, 1923.)

## ANSWER.

The defendant, a corporation of the State of New Jersey, having its principal office at the City of Newark, in the State of New Jersey, says that—

1. It admits the allegations contained in paragraphs one, two, and three of the complaint.
2. It denies the allegations contained in paragraphs four and five of the complaint.
3. As to the allegations contained in paragraphs six, seven, eight, and ten of the complaint, it has no knowledge or information thereof sufficient to form a belief.
4. It denies the allegations contained in paragraph nine of the complaint.

## OBJECTIONS.

1. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the said complaint at the trial of this suit.
2. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because at the time of the beginning of this suit the plaintiff's intestate, if living, could not have maintained an action for the alleged wrongful act, neglect or default, because the said alleged unlawful act, neg-

lect or default occurred more than two years before the alleged death of the plaintiff's intestate.

3. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because the defendant corporation would not, at the time of the death of the plaintiff's intestate, have been liable if death had not ensued to an action for damages by the plaintiff's intestate. 10

4. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because the defendant corporation would not, at the time of the commencement of this suit, have been liable, if death had not ensued, to an action for damages by the plaintiff's intestate. 20

#### FIRST DEFENSE.

1. It avers that the negligence of the plaintiff's intestate contributed to the happening of the said alleged accident.

#### SECOND DEFENSE.

1. It avers that at the time of the beginning of this suit the plaintiff's intestate, if living, could not have maintained an action for the alleged wrongful act, neglect or default in that the alleged wrongful act, neglect or default occurred more than two years before the alleged death of the plaintiff's intestate. 30

## THIRD DEFENSE.

1. It avers that the defendant corporation would not, at the time of the death of the plaintiff's intestate, have been liable if death had not ensued, to an action for damages by the plaintiff's intestate.

## FOURTH DEFENSE.

10

1. It avers that the defendant corporation would not, at the time of the commencement of this suit, have been liable if death had not ensued, to an action for damages by the plaintiff's intestate.

## FIFTH DEFENSE.

20 1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to the plaintiff at any time within two years before the commencement of this suit.

## SIXTH DEFENSE.

1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to the plaintiff's intestate at any time within two years before the commencement of this suit.

30

## SEVENTH DEFENSE.

1. It avers that the defendant was not guilty of the said supposed trespasses, or any or either of them, or any part thereof, at any time within two years next before the death of the plaintiff's intestate.

EIGHTH DEFENSE.

1. It avers that the defendant was not guilty of the said supposed trespasses, or any or either of them, or any part thereof, at any time within two years next before the commencement of this suit.

NINTH DEFENSE.

1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to the plaintiff's intestate, at any time within two years before the death of the plaintiff's intestate.

JOSEPH COULT, JR.,  
*Attorney of Defendant.*

(Filed September 17, 1922.)

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ANSWER TO AMENDED COMPLAINT.

The defendant, a corporation of New Jersey, having its principal office at the City of Newark, in the said State of New Jersey, says that:

1. It admits the allegations contained in paragraphs one, two and three of the complaint. 30

2. It denies the allegations contained in paragraphs four, five, nine and ten of the complaint.

3. As to the allegations contained in paragraphs six, seven and eight of the complaint, it has no

knowledge or information thereof sufficient to form a belief.

OBJECTIONS.

10 1. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the said complaint at the trial of this suit.

20 2. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because at the time of the beginning of this suit the plaintiff's intestate, if living, could not have maintained an action for the alleged wrongful act, neglect or default, because the said alleged unlawful act, neglect or default occurred more than two years before the alleged death of the plaintiff's intestate.

30 3. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because the defendant corporation would not, at the time of the death of the plaintiff's intestate, have been liable if death had not ensued to an action for damages by the plaintiff's intestate.

4. It avers that the complaint does not set forth facts sufficient to constitute a cause of action in the plaintiff, and it reserves the right to move to strike out the complaint at the trial of this suit because the defendant corporation would not, at the time of the commencement of this suit, have been liable, if

death had not ensued, to an action for damages by the plaintiff's intestate.

FIRST DEFENSE.

1. It avers that the negligence of the plaintiff's intestate contributed to the happening of the said alleged accident.

SECOND DEFENSE. 10

1. It avers that at the time of the beginning of this suit the plaintiff's intestate, if living, could not have maintained an action for the alleged wrongful act, neglect or default in that the alleged wrongful act, neglect or default occurred more than two years before the alleged death of the plaintiff's intestate.

THIRD DEFENSE. 20

1. It avers that the defendant corporation would not, at the time of the death of the plaintiff's intestate, have been liable if death had not ensued, to an action for damages by the plaintiff's intestate.

FOURTH DEFENSE.

1. It avers that the defendant corporation would not, at the time of the commencement of this suit, have been liable if death had not ensued, to an action 30 for damages by the plaintiff's intestate.

FIFTH DEFENSE.

1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to

the plaintiff at any time within two years before the commencement of this suit.

SIXTH DEFENSE.

1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to the plaintiff's intestate at any time within two years before the commencement of this suit.

10

SEVENTH DEFENSE.

1. It avers that the defendant was not guilty of the said supposed trespasses, or any or either of them, or any part thereof, at any time within two years next before the death of the plaintiff's intestate.

EIGHTH DEFENSE.

20

1. It avers that the defendant was not guilty of the said supposed trespasses, or any or either of them, or any part thereof, at any time within two years next before the commencement of this suit.

NINTH DEFENSE.

1. It avers that the said cause or causes of action did not, nor did any or either of them, accrue to the plaintiff's intestate, at any time within two years before the death of the plaintiff's intestate.

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JOSEPH COVLT, JR.,

*Attorney of Defendant.*

(Filed January 26, 1923.)

REPLY.

Plaintiff, replying to the answer of the defendant, says that:

REPLY TO "OBJECTIONS."

1. Denies the allegations of paragraph (1) 10 thereof.

2. Denies the allegations of paragraph (2) thereof.

3. Denies the allegations of paragraph (3) thereof.

4. Denies the allegations of paragraph (4) 20 thereof.

REPLY TO "FIRST DEFENSE."

1. Denies the allegations thereof.

REPLY TO "SECOND DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint. 30

REPLY TO "THIRD DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (1) of the amended complaint.

## REPLY TO "FOURTH DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

## REPLY TO "FIFTH DEFENSE."

10 1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

## REPLY TO "SIXTH DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

## REPLY TO "SEVENTH DEFENSE."

20 1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

## REPLY TO "EIGHTH DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

30 REPLY TO "NINTH DEFENSE."

1. Denies the allegations thereof and refers to and makes a part hereof, the allegations of paragraph (10) of the amended complaint.

JAMES MERCER DAVIS,  
*Plaintiff's Attorney.*

(Filed February 9, 1923.)

JUDGMENT.

This case was tried before Judge Nelson Y. Dungan, to whom the said cause was duly referred for trial, with a jury, at the Essex County Circuit, on May 8th, 1924.

The jury by direction of the Court rendered a general verdict against the plaintiff and in favor of the defendant. 10

Whereupon it is adjudged that the complaint of the No. Costs. plaintiff be dismissed without costs.

Judgment entered May 14, 1924.

WM. S. GUMMERE,  
C. J.

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I, EDWARD J. KELLEHER, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this fifth day of May, A. D. nineteen hundred and twenty-five. 30

(Seal)

EDWARD J. KELLEHER,  
Clerk.

## TESTIMONY.

NEW JERSEY SUPREME COURT.  
ESSEX CIRCUIT.

Monday, May 5, 1924.

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GEORGE BRENNAN, adminis- trator <i>ad prosequendum</i> of the Estate of EUGENE BRENNAN, Deceased, v. PUBLIC SERVICE RAILWAY COMPANY, a corporation.	}	Action at Law.
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Before HON. NELSON Y. DUNGAN, J., and a jury.

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For the plaintiff appear HAROLD BOUTON, JOHN P. BRAMHALL and JAMES E. McCABE, of the Washington, D. C., Bar, *pro haec vice*.  
 For the defendant, JOSEPH COULT, JR., HENRY H. FRYLING, of counsel.

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(A jury is called and sworn.)

(Mr. Bouton opens in behalf of plaintiff.)

(Mr. Fryling opens in behalf of defendant.)

WILLIAM J. BENCO, SWORN in behalf of plaintiff.

Direct examination.

By Mr. Bouton:

Q. Where do you reside?

A. New Brunswick, Piscataway.

Q. Did you live there in September, 1918? 10

A. Yes.

Q. Do you recall an accident that happened in New Brunswick, near Albany and George Street, in September, 1918?

A. Yes, I do.

Q. Where were you at the time of the accident?

A. I was working for the government houses and I went home from work; it was about six o'clock or seven o'clock, and I got a street car going towards the direction of the camps — 20

By the Court:

Q. Morning or afternoon?

A. Evening. I got a street car in front of the post office in New Brunswick and as the street car started it passed George Street and went on Albany Street.

By Mr. Bouton:

30

Q. You were on your way where?

A. I was going in the direction of the camp on my way home, and as we passed George Street the car met with another car about ten feet away from the crossing track, the street car came very slow, and I heard a crash, of windows broken glass, three win-

dows broken out, because I was facing that side where the cars met, so the street cars didn't pass away—didn't stop right away, I mean—then when the street cars stopped and I see a woman looking through the windows and they say, "There is a soldier killed."

Q. What were you doing?

A. Nothing; I was sitting still, I couldn't get time enough to get up.

10 Q. You stood up and then what did you do?

A. Then I went looking that way between the cars, and I didn't see anything, I didn't see any soldier, and I heard some woman —

Q. Never mind what you heard. Did you see any man between the cars?

A. No, sir.

Q. Did you see a part of anybody's body between the cars?

A. I only saw a soldier's head.

20 Q. Where was that?

A. That was near the back part of the car.

Q. Between the two cars?

A. Between the two cars, yes.

Q. How do you know he was a soldier?

A. I seen by the uniform; that is the only way I knew.

Q. As you looked, was it looking through the broken window that you saw this? How did you see it?

30 A. I looked between the people.

Q. When you looked between the people where did you look, were you still in the car, were you inside of the car?

A. I was inside of the car.

Q. Which direction were you looking?

A. Back direction; I was sitting near the center of the car and I was looking to the back of the car.

Q. Did you look towards the car on the next track?

A. Yes, sir.

Q. And was his head between the two cars?

A. His head was between the two cars, yes sir.

Q. As you looked what seat had you been sitting in, where had you been sitting in this car?

A. Near the center of the car.

Q. As you looked and saw the head of this soldier between the two cars what was his position when you looked and saw it, that is, was it in back of you 10 or in front of you?

A. In back of me.

Q. And how far back?

A. That soldier might be—my judgment—about three feet from the back end of the car.

Q. Which car?

A. The car I was sitting in.

Q. Did you get out of the car then?

A. I did.

Q. Did you look then any further to see if any- 20 body was between the cars?

A. Almost everybody went out of the car; I got out of the car and I didn't go behind the car, but I leaned underneath the car and I seen the soldier's feet.

Q. Were they on the ground or off the ground?

A. Off the ground.

Q. How far above the ground?

A. About one foot.

Q. The rest of his body was above, between the 30 two cars?

A. Yes, sir.

Q. Did you see him taken out from the two cars?

A. The conductor and motorman and some of them went on top of the cars and pressed the cars apart, and I seen the soldier dropping down and his

pants torn through his back and everybody was hurrying to get back to the car.

Q. When you went back and out of your car did you see the door, the left front door of that car, the other car, the vestibule door?

A. No, I seen the top of the car approaching to us.

Q. Well, then, did you see what kind of a door this was on this car?

10 A. Never noticed that.

Q. Did you hear the boy cry or groan?

A. I heard some moaning when we got out, but only these two times and very weakly.

Q. The car, that is the other car that you speak of, which direction was that coming to when you observed that, was it coming towards you, was it coming towards your car, the other car?

A. Yes, that was coming to the post office.

20 Q. Where was it coming from, in what direction, the same direction?

A. The other car was coming from the camp direction, but my car was coming to the camp direction.

Q. How many of these windows did you notice were broken?

A. As far as I could think about two or three were broken.

Q. In your car?

A. Yes, sir.

Q. Is that Camp Raritan?

30 A. Yes, sir.

By Mr. Bouton:

Q. You had been living there how long at Piscataway?

A. About eight years.

Q. What is your business?

A. Well, it was carpenter at that time, and I am contractor now.

Q. Did you travel much on that line at that time?

A. Yes, sir, every day.

Q. Did you at that time notice whether cars from camp were crowded with soldier boys as a regular thing?

A. Well, yes.

Mr. Fryling: I object to that as immaterial, what 10  
may have been the condition on other occasions.

Mr. Bouton: We think it is a very material and proper piece of evidence, for this reason, that the boys, as we hope, with your Honor's approval, we will show, frequently, not occasionally, rode on all parts of these cars and fares were collected on those parts, the bumper, the steps, and the boys even rode on top of the cars; that the conductor took the fares of these boys down at the camp and permitted them to ride to New Brunswick in that fashion, that it was 20  
the custom, that the company permitted it, their officials or their representatives permitted these boys to do that as a regular thing.

The Court: I do not find anything in the pleadings which would justify that. The pleadings say nothing about there being a custom or habit of permitting passengers to ride on any particular part of the car, and I assume that if this passenger was a passenger on this car and the fare was received, 30  
that would create a presumption that they treated him as a passenger regardless of what their practice and habit had been on other occasions. Objection sustained.

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Cross-examination.

By Mr. Fryling:

Q. The car that you were riding on was on Albany Street, wasn't it?

A. Yes.

Q. And was that car on Albany Street before you got to George Street?

10 A. No.

Q. You know where George Street is, do you?

A. I was on the Albany Street car.

Q. How was the car marked, "Middlesex?"

A. Yes, sir; going in the direction of Perth Amboy, Middlesex car.

Q. Where did you get on the car, you say at the post office?

A. Yes, sir.

Q. How far is that from George Street?

20 A. I think it is about fifteen or twenty feet from the George Street crossing that the car was on.

By the Court:

Q. The post office is in the middle of the block on Albany Street, isn't it?

A. Yes, sir.

Q. The corner of George and Albany Street, isn't it?

30 A. Yes, the post office is on the corner of George and Albany Street.

By Mr. Fryling:

Q. You say you got on at the post office; is that right?

A. I don't know how you mean.

Q. Did you get on this trolley car at the post office?

A. I went on the car in front of the post office.

Q. Was the car when you got on it at the corner of George Street; that is correct, isn't it?

A. Yes, sir.

Q. The trolley car was standing still when you got on it on Albany Street with its front up to George Street, is that right?

A. Yes, sir, that is the way. 10

Q. That car doesn't ride on George Street at all, does it?

A. This car was past George Street.

Q. The car that you got off doesn't turn into George Street, does it?

A. Yes, it passes George Street.

By the Court:

Q. It crosses George Street? 20

A. It crosses George Street.

By Mr. Fryling:

Q. And doesn't go into George Street at all.

A. This car I was on was across George Street; it was past George Street already.

Q. And the car coming in the opposite direction was on Albany Street, wasn't it?

A. Yes, both of them. 30

Q. About how far is Albany and George Street from the camp where you were going?

A. That car was near George Street; that was about four or five feet —

Q. How far is Albany and George Street, that corner, from the camp where you were going, Camp Raritan?

A. About four miles.

Q. On Albany Street, where it crosses George Street, there are two sets of tracks, aren't there?

A. Yes, sir.

Q. And the car that you were on was coming from the direction of New Brunswick toward Camp Raritan?

A. Yes, sir.

10 Q. And it was on the right-hand side of the street?

A. Yes, sir.

Q. The tracks are on the right side?

A. Yes, sir.

Q. And the two tracks are on the left of the street?

A. Yes, sir.

---

ASHER ATKINSON, sworn in behalf of plaintiff.

20

Direct examination:

By Mr. Bramhall:

Q. Where do you live?

A. New Brunswick.

Q. What is your profession?

A. Civil Engineer.

Q. How long have you been engaged in that business?

30 A. Since 1895.

Q. Are you familiar with the street railway conditions as to permanent ways and tracks at Albany Avenue and George Street, New Brunswick, in that vicinity?

A. I am.

Q. State whether or not you have made some maps there covering that particular place?

A. I prepared a map showing the location of tracks at the intersection of George and Albany and that vicinity.

Q. Is that map drawn to scale?

A. This map is drawn to a scale of one-half inch to one foot.

Q. Who took the measurements at that point? Did you participate taking the measurements there by which you afterwards drew this map?

A. Yes, sir.

10

Q. Did you draw this map yourself?

A. No; I helped on it. My assistant drew the map.

Q. Under your supervision?

A. Under my direction.

Q. Is it a correct map of the conditions there of the measurements, according to the scale it is drawn to?

A. Yes.

Q. When was this map made?

20

A. During the last month.

Q. State whether or not the tracks, as indicated on this map, are the same as they were at the time of this accident, which was September 14, 1918.

A. The tracks are the same as they were then.

Q. Is the grade the same and the distance between the tracks?

A. Yes, sir.

(The map referred to is marked Exhibit P1 for 30 identification.)

Mr. Fryling: I would like to cross-examine the witness on this.

The Court: You may.

By Mr. Fryling:

Q. As a matter of fact, these tracks in New Brunswick were all torn up within the last two months?

A. The paving has been replaced and the tracks have been resurfaced.

Q. Weren't there new tracks laid?

A. No, sir; the street was repaved.

Q. How do you know about those tracks?

10 A. I am city engineer of New Brunswick.

Q. So you are familiar with that situation there?

A. Yes, sir.

Q. How long have you been city engineer?

A. Nearly all the time, since 1891.

Q. Have you been all the time since 1918?

A. No, sir.

Q. From what period?

A. 1913 on.

20 Q. All the time since 1918 you have been city engineer?

A. Yes, sir.

Q. During any time from 1918 up to the present time have the tracks been changed at all?

A. Resurfaced them in connection with the repaving of the streets which was done last year.

Q. At that time or any other time weren't there any new tracks laid?

30 A. The original rails were laid in 1897 and these rails are different from the original rails put down in the same location as the original rails.

Q. When were these rails put down?

A. They were put down about 1909.

Q. Have there been any changes in the rails since 1909?

A. No material change.

Q. Any change at all?

A. They have been surfaced last year. Last year the tracks were surfaced and a new pavement.

Q. Since 1918 was there any change made in the rails or in the location of the rails?

A. No change in the location.

Q. Was it necessary to move the rails at all in re-surfacing the street?

A. No.

Q. So this map you are satisfied shows the exact condition the location of the rails as they were in 10 September, 1918?

A. It does, yes, sir.

(The map referred to is marked Exhibit P1.)

By the Court:

Q. North is toward the top?

A. Yes, sir. Albany Street runs nearly exactly east and west, and George Street practically north 20 and south.

Q. A little park in front of it?

A. On the southwest corner there is an open space.

Q. Your map does not extend quite as far back as the post office?

A. No, sir; the scale of the map is so large that I couldn't get it on the map.

By Mr. Fryling:

Q. In 1918 weren't those tracks completed all the way around into Albany Street?

A. Yes, sir.

Q. Curved tracks around George Street and Albany Street?

A. They were abandoned.

Q. Did those tracks in 1918 extend all the way around to and connect with the other tracks on Albany Street?

A. They haven't been used there for years.

Q. How about 1918, weren't they connected then?

A. One of these tracks. It was not used.

Q. Did it extend around into Albany Street?

A. I can't tell you whether it was or not.

Q. Then you don't know whether there was any  
10 change in that respect since 1918 or not, do you?

A. No.

Q. Are you any more positive about the other tracks?

A. Yes, I know.

Q. You know there were no other changes?

A. No changes down here.

Q. Was there any other change anywhere within  
the space covered by that map other than those  
20 things that you don't know about, the tracks coming  
out of George Street?

A. No.

By Mr. Bramhall:

Q. State the difference between the two tracks inside of the rail?

Mr. Fryling: Where?

30 Mr. Bramhall: On Albany Street, state the distance what is known there as the devil strip.

Witness: The tracks are four feet and four inches between the gauge line, that is, the inside rails of gauge is four feet, eight and a half inches.

Q. What is about the width of the tip of the rail?

A. The tip of the rails are just a trifle over four feet clear from one rail to the other.

Q. These run east and west?

A. Yes, sir.

Q. This track is what?

A. West.

Q. Take a pointer, pointing on the east side of George Street, on Albany, and how far both east and west is the track straight?

A. (Indicating on the map.) The track is straight 10 to the bridge.

Q. How far is that?

A. It is around 1300 feet.

Q. What bridge?

A. The Raritan Street Bridge.

Q. Is that the direction towards Camp Raritan?

A. Yes.

Cross-examination.

20

By Mr. Fryling:

Q. These tracks on Albany Street are double tracks for what distance east of George Street?

A. They are a double track to Woodbridge Avenue and Highland Park.

Q. About how far is that from the corner of Albany and George Street?

A. It is around a mile.

30

Re-direct examination.

By Mr. Bramhall:

Q. Did you have any occasion to measure a car on these tracks when the street cars are in use by the Public Service Corporation?

A. Yes.

Q. Do you know the number of this car that you measured?

(Objected to.)

Mr. Bramhall: I expect to show that he measured a car and we will be able to show that it was one of the cars involved in this accident.

10 Q. Tell me what the number was.

A. Car No. 1909.

Q. And what type of car is this as to being single or double truck?

A. This car was a double truck car.

Q. Closed?

A. Closed car, with vestibule.

Q. When was this measurement made?

A. April 18, 1924.

20 Q. What was the width over all of this particular car?

A. The width over all of the steps was 18 feet 2 1-2 inches, the width of the car, including the molding running alongside of the car, was 8 feet 1 1-2 inches.

Q. More concretely, how much was the overstep, overhang of the car, and then the molding of the car?

A. The step overhung the gauge line 21 inches.

Q. Take the other measurements, the molding line from the gauge line.

30 A. The overhang there would be half an inch less.

Q. An inch less?

A. The total of the width, half an inch on each side.

By Mr. Fryling:

Q. You mean 20 1-2 inches?

A. Yes, sir.

Q. Is there any difference in the width of the car where the vestibule shows the car body up to the front of the car or back conversely with the body of the car?

A. There is a slight taper in the vestibule, so it is wider where it joins the body of the car and a little wider at the front, and I took the average at the middle step, where I measured it.

Q. And you gave the overhang?

A. Yes; 21 inches.

10

Q. What do you mean by the overhang?

A. I measured from the gauge line of the rails to practically the middle of the street.

By the Court:

Q. By gauge line you mean inside of the rail?

A. Gauge line is the inside of the rail.

Q. And the width is 4 feet 8 1-2 inches?

A. Yes, the width of the two rails is 4 feet 8 1-2 inches.

20

By Mr. Bramhall:

Q. That is the distance between the tracks or the devil strip?

A. That is the width of the car, rail to rail, 4 feet 8 1-2 inches, and 4 feet 4 inches across the devil strip.

Q. That is the strip that is sometimes called the inner space between the two operating tracks?

A. Yes, sir.

30

By Mr. Fryling:

Q. You say that this examination that was made of this car was made a short time ago?

A. Yes, sir.

Q. And you were informed, were you not, in the course of your examination that that car had been changed since 1918?

A. As I understood it, it had been changed so it would be suitable for one man operating it.

Q. It had been made into a one man car; is that right?

A. Yes, sir. One of the doors on the vestibule was fastened.

By Mr. Bramhall:

10 Q. When they changed this from the two man car, conductor and motorman, was there any change in the width?

A. No.

Q. State if that made any difference in the width of the car?

(Objected to.)

The Court: If he knows.

20 A. Only that the door was fastened shut; that is all that I noticed.

Q. Did you ever see this particular car before?

A. I have seen many cars like that.

Q. As far as you know, you never saw this particular car before April, 1918?

A. I don't know as I have seen car 1909 before.

By the Court:

Q. When you speak of the step overhang, you mean the overhang from the gauge line?

30 A. Yes, sir.

Q. From the inside of the rail?

A. From the inside of the rail to a point directly outside to the edge of the step.

Q. Twenty-one inches?

A. Yes, sir.

(Adjourned to tomorrow, Wednesday, May 7, 1924, at ten o'clock A. M.)

SECOND DAY.

Wednesday, May 7, 1924.

(Continued pursuant to adjournment.)

(Present, counsel as before stated.)

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Mr. Bouton: The plaintiff would like to amend  
the pleadings by adding thereto two additional  
amounts, and in pursuance of that we have served  
the defendant with a notice that we would do so this  
morning, together with a statement of the count as  
we proposed them, and at this time, if it please your  
Honor, we would like to get the approval of your  
Honor. The circumstances we feel particularly justify  
this application, for this reason, that when this  
accident occurred, your Honor knows it was just before  
the end of the war, and the boys that knew about  
this, or that we thought might know, were scattered  
all over. I can say without exaggeration that it has  
required more investigation than any case of the kind  
that I have had anything to do with, that some of our  
witnesses were only located within a month of this  
date, and with the assistance of the government we  
scoured the country and tried to find the boys who  
were in the camp at the time and knew about it and  
left addresses which they moved away from.

10

20

30

The Court: What is the amendment?

Mr. Bouton: The amendment is this, as we indicated the other day, that we would like to state the custom and practice, as we state, the company permitting passengers to ride on the outside of the car.

That is the second count. The third count in an alternative way is to the effect that he was permitted to ride irrespective of custom on the outside of the car and that the company owed him a duty in that regard, and that he was injured through their negligence, not using that degree of care.

10 Mr. Fryling: I object to the amendment. The objection is made on several grounds. In the first instance, the amendments as set out are outlawed and we ought not to be made to answer some other complaint that is debarred by statute. The accident happened in 1918, and we are not in a position to secure witnesses on customs at that time. That is one objection, that this amendment is too late, after the statute has run.

The Court: Do you mean that the Court cannot allow an amendment legally?

20 Mr. Fryling: I make that for two reasons, first, addressed to the discretion of the Court and the statute has run. Another objection is that the amendment does not go to the substance.

30 The Court: That was my impression, whether the complaint itself set forth a cause of action on the original complaint. What I would like to hear you upon is whether the mere statement of negligence is sufficient to support that count. You do not even in that count allege that he was a passenger.

Mr. Bouton: We don't in that count say that he was a passenger.

The Court: The mere permitting him to ride on the car does not make the defendant liable for neg-

ligence. I am inclined to do this, if you think that these second and third counts do set up a cause of action, upon motion of Mr. Fryling to strike them out, that gives you an opportunity to note an objection on the record. If I refuse to exercise my discretion, of course, you have no remedy at all, but you have a remedy if I allow the amendment, and then, as a legal proposition immediately strike it out. That is not a matter of discretion then. The allowance of the amendment will be denied.

10

(Plaintiff's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

Mr. Bouton: Would your Honor consider a motion to amend the first count, which includes the statement of the custom, so that we might be in a position —

The Court: The amendment which you propose is not a proper amendment.

20

Mr. Bouton: May we move to add to the first count that on September 24, 1918, a sufficient time prior thereto to have given the said defendant notice, it was the custom and practice of the defendant to permit persons to board its cars at Nixon's Station, New Brunswick, New Jersey, and to carry such persons as such passengers on the outside of the cars from Nixon's Station.

30

The Court: (To defendant's counsel.) Suppose I am inclined to permit that as an amendment to the first count, will you be embarrassed in any way by your defense?

Mr. Fryling: Your Honor will appreciate the fact that a great many pleadings have been made in this case.

Mr. Bouton: That on September 14th, 1918, and for a sufficient time prior thereto to give the said defendant notice, it was the custom and practice of the defendant to permit persons as passengers to board its cars at Nixon's Station, New Jersey, on  
10 its line at Nixon's Station, and to permit said persons as passengers to ride on the outside of the cars, including its steps, from said Nixon's Station to New Brunswick, New Jersey, and that pursuant to said custom and practice the decedent, Eugene L. Brennan, was permitted as a passenger to board said car and to ride on the front step of the said car from said Nixon's Station to New Brunswick.

Mr. Fryling: I make the same objection to that.  
20 I object to the amendment at this time because it sets forth a new cause of action in accordance with the statute of limitations and in accordance with the Death Act, that it is not within two years. It places the defendant at this late date where it is difficult to secure witnesses that the defendant might have secured way back in 1918, which we might have secured if the amendment had been set forth at the proper time.

30 The Court: From what I understand from what you said a moment ago you allege that you are not as well prepared to proceed with your defense as you would be if after allowing this amendment the Court withdrew a juror and gave you time to make such preparations?

Mr. Fryling: Yes.

The Court: Then the amendment will be allowed and if counsel thinks that this is an abuse of the discretion of the Court, an exception to the allowance of the amendment will be noted.

(Exception noted as ground of appeal.)

Mr. Fryling: I pray an exception also on the ground that it is not permissible to amend at this time because of the lapse of two years. 10

(Exception noted as ground of appeal.)

Mr. Fryling: The complaint as amended does not set forth a ground of action and on that ground the amendment ought not to be permitted.

The Court: I suppose for the reason already given, because the decedent, you claim, had not a right of action against the defendant at the time of his death. 20

Mr. Fryling: That is one reason, and the other reason that the allegation of the complaint as amended, irrespective of the question of time, does not set forth a ground of action, because from the allegation in the complaint it appears that the decedent assumed the risk of the position he took upon the step and that in itself prevents a recovery. I think that appears in the pleadings, and I make that as an objection. 30

(Exception noted as ground of appeal.)

Mr. Fryling: The same objections and the same defenses set forth in the answer to the amended com-

plaint apply to the complaint as now amended and that I may add, in addition thereto, this defense, that the plaintiff's decedent assumed the risk of the position that he took upon the car and that thereby the plaintiff is not entitled to recover.

The Court: You may make a denial of the custom. The objection will be overruled.

10 (Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

---

FRANK LATHAN, sworn in behalf of defendant.

Direct examination.

20

By Mr. Bouton:

Q. Where do you reside?

A. New Brunswick, New Jersey.

Q. Where did you reside on September 14, 1918?

A. New Brunswick, New Jersey.

Q. Do you recall observing any accident that happened between two trolley cars at the corner of Church and Albany Streets on that date?

30

A. I do.

Q. Where were you at that time?

A. I was on the southeast corner of Church and Albany Street.

Q. About what time of day was it, do you recall?

A. About seven o'clock in the evening; probably a little later.

Q. Right at the church were you?

A. Yes, sir.

Q. Did you or did you not just prior to the accident observe any trolley car coming from the direction of Camp Raritan?

A. I did.

Q. Did you or did you not as you observed that car notice whether or not there was any soldier standing on the left front step of that trolley car?

A. One soldier.

Q. Where was it that you saw the car? 10

A. From Nelson Street, saw it as far away as Nelson Street, this side of Nelson Street.

Q. You say this side of Nelson Street?

A. At George Street.

Q. How far a distance was it?

A. I believe Mr. Atkinson said the other day —

Q. No; what you observed yourself.

By the Court:

20

Q. You say this side. I suppose you mean toward where you were standing, toward Nelson Street?

A. Yes, sir.

Q. Was it half-way up?

A. Just below half-way.

By Mr. Bouton:

Q. You mean nearer Nelson Street from the first 30 half-way point?

A. From where I first seen it, yes.

Q. At that time was the same person as described standing on that step?

A. There was a soldier standing on the step.

Q. At the time when you first saw it. Will you then proceed to tell us what you saw in the way of

an accident that happened from the time you observed this car approaching with the soldier on the step?

A. A car coming up from Albany Street at Camp Raritan, another car coming from the trolley office, that is where the post office is, coming down, made a crossing on its way to Camp Raritan —

By the Court:

10 Q. You mean across George Street?

A. Yes, sir, the car was across.

By Mr. Bouton:

Q. Proceed and explain how you observed the accident.

20 A. While looking into an angle from where I stood, as I said before, I seen a soldier; there was a civilian on the third step; I didn't specify that before because I wasn't asked the question. From the angle I stood there was a trolley car coming up and one going down; the one going down was going fast because the one coming across just over George and Albany Streets didn't come as fast as the one coming up.

Q. Did they each proceed?

A. Yes, sir; one up the hill and one down.

Q. Describe it.

30 A. And all at once I heard a holler, then the trolley cars were stopped; I walked across the way, which was in the rear of the car that just left New Brunswick for Raritan, and I seen there was a soldier fastened in there.

Q. What was his position as you saw it?

A. There was other people that got ahead of me; as much as I saw he was in between the two cars.

Q. Just describe as well as you remember it his position between these two cars, was it vertical, diagonal or horizontal?

A. He was vertical.

Q. What was his position with respect to being between the front and rear of the car on which you had seen him standing?

A. It appeared to me that he was fastened between the two cars, just about like this. (Indicating.)

Q. I mean the distance from either end of the car 10 on which he was standing?

A. I should judge about the center of the car.

Q. Between the center of both cars?

A. About that.

Q. Did you observe whether he was standing on the ground or whether he was above the ground?

A. I couldn't say that much.

Q. Do you recall his position with respect to his head, for example, where that was in respect to the frame work of the car, the windows of the car? Was 20 it above the windows?

A. Yes, I should judge above the windows, pretty much of it.

Q. Did you observe how he was gotten out of this position?

A. I seen soldiers on the top of the car and forced the car apart like this (illustrating) with their feet, and then lifted him up.

Q. Was there a door next to the step on which this soldier stood? 30

A. Yes, sir.

Q. Did you observe the nature of this construction, whether it was of wood or other material?

A. Two glass panels was above the woodwork.

Q. How is that?

A. Woodwork below and two glass panels on the top.

Q. How high would you judge above the front platform the wood extended, approximately?

A. I should judge, about four feet further—not as much as that.

Q. Above that what was it?

A. The windows.

Q. Do you recall the boy in between, as you described, two cars made any exclamation of pain or anything of that kind?

10 A. I heard some moaning.

Q. Do you remember how long it took to get him out?

A. I couldn't say the exact time, but I should say ten minutes anyhow before they got him out from between the cars.

Q. Do you recall the exact position of the soldier as you saw him coming towards you, as he was standing on the steps?

20 By the Court:

Q. Was he standing or sitting?

A. Standing facing the door, holding the handle.

Q. Facing out?

A. Facing in toward the car.

By Mr. Bouton:

30 Q. Was he standing at the front of the steps or at the rear part of the step?

A. It seemed to me the soldier was at the rear of the civilian ahead of him.

By the Court:

Q. You mean that the civilian —

A. The civilian was the first one on the step, on the front of the car.

Q. What was the position of the civilian?

A. Facing in the same way, as far as I could observe.

By Mr. Bouton:

Q. Did you observe a car? State from your recollection how far in your opinion the side of the two cars appeared to be as they approached each other at this point?

A. I would say about ten inches; maybe not that much.

10

Q. Did you afterwards, when you approached the accident, notice whether the boy was in uniform?

A. Yes.

Q. Did you at the time of the accident find out who he was?

A. Why, it is customary —

Q. What did you observe?

A. I asked the soldiers there if they knew who he was. One fellow, a soldier —

20

Mr. Fryling: I object to what some one told the witness.

Q. Can you describe his appearance?

A. No, I cannot.

Q. Can you describe his build in a general way? Was he a very small man, or medium, stouter or a very large man?

A. Not from the position I seen him, I couldn't say.

30

Q. Can you describe any feature of his that you are particularly reminded of?

A. The only thing I knew was somebody in uniform.

Cross-examination.

By Mr. Fryling :

Q. Where do you live now?

A. New Brunswick, New Jersey.

Q. Whereabouts in New Brunswick?

A. 56 Wilton Street.

Q. What is your business?

10 A. I am a machinery inspector at the present time.

Q. For whom?

A. Cranford Manufacturing Company.

Q. In 1918 what was your business?

A. I was a boss barber, a business at the corner of George and Albany Streets, until 1918, but I sold the business out.

Q. You spoke of your practice of making an investigation of some kind?

A. No, I didn't.

20 Q. Didn't you say something about your practice? I understood you to say something about your practice at the time of this accident?

A. I can't recall saying anything of that kind.

Q. You had no cause to make any investigation of this accident?

A. Certainly not.

Q. You were standing on the southeast corner?

A. On the southeast corner by the church. I think that is the southeast corner.

30 Q. And the trolley car on which these two men were riding on the step were bound westward?

A. The way I study it out —

By the Court:

Q. Going toward the trolley station.

A. The in-coming car from Camp Raritan was going west.

By Mr. Fryling:

Q. You were on the southeast corner here. (Indicating.)

A. Yes, sir.

Q. And the car with the man on the step was going that way? (Indicating on map.)

A. Yes, sir.

Q. Which direction is Nelson Street?

A. Nelson Street is down below, running the same way as George Street. 10

Q. This accident, you say it happened about seven o'clock?

A. Daylight saving time.

Q. Might it have been twenty minutes after seven?

A. Yes, sir.

Q. And was it daylight at the time?

A. Yes, sir.

Q. Where did you first notice the car that was going west? 20

A. That is the incoming car?

Q. The one on which the soldier was?

A. They were down the block at George and Nelson Streets.

Q. How near George Street was it when the accident happened?

A. I should say about thirty feet below the switch.

Q. And at George Street there are switches in every direction, are there not? 30

A. Yes, sir.

Q. The cars stop at George Street?

A. The cars are always supposed to stop before they get to the corner.

Q. All cars before approaching the intersection of George and Albany Street stop at the near side of the street?

A. Yes, they was at that time.

Q. And the car that was going west was coming up close to a place where it was about to make a stop and it was going slowly?

A. The one going west?

Q. Yes.

A. Was it about to make a stop?

Q. Yes.

A. Was it slowing up to make a stop at George Street?

10 Q. Yes.

A. It was slowing up some.

Q. Where was the other car?

A. It had already made the crossing and was just about starting out from the opposite side of the crossing.

Q. That came straight down Albany Street?

A. Yes, sir.

Q. And it stopped at the near side of George Street?

20 A. It made its crossing.

Q. Had it stopped in George Street?

A. It was stopped up there to pick up passengers.

Q. You saw it cross George Street?

A. Yes, sir.

Q. And at the time the accident happened both the cars were moving?

A. Yes, sir.

Q. Both going slowly?

30 A. Yes, sir—one was going fast.

Q. Which one?

A. The in-coming car was going fast.

Q. Which one do you mean?

A. The one coming from Raritan.

Q. That is the one with the men on the step?

A. Yes, sir.

Q. Neither one was in motion, going very fast?

A. No, not very fast.

Q. And the civilian that was on the step, have you seen him since the accident?

A. I know him.

Q. Would you be able to recognize him now?

A. I believe I could.

Q. Is he in the court room?

A. Yes, sir.

(A man in the audience arises.)

10

Q. Is that the man you refer to as the civilian that was on the step?

A. Yes, sir.

Q. That is Mr. Sutton. You say that Mr. Sutton was standing on the step and he was towards the front part of the car?

A. I wouldn't say positive about that; I wouldn't say now; it is a long time ago. I am sure Mr. Sutton was the first one on the step.

Q. He was the first one on the step of the car? 20

A. Yes, sir, that is the way I observed it.

Q. The man that was injured was standing on the same step facing the door?

A. Yes, sir.

Q. Mr. Sutton was not injured, was he?

A. I couldn't say.

By the Court:

Q. Were they on the lowest step of that car or 30 one step up?

A. The step that approaches out from the platform.

By Mr. Fryling:

Q. You mean the lower step?

A. Yes, sir.

Q. (Showing witness photograph.) I show you a photograph. Do you recognize that as a car like that? Was it a car like that?

A. Yes, sir, but I couldn't say that was the same car.

10

(The photograph referred to is marked Exhibit D1 for identification.)

Q. And the door was closed?

A. Yes, sir.

Q. Was the car crowded?

A. Yes, sir.

Q. As far as you could see, did any part of the two cars come together as they passed?

20

A. You mean touch?

Q. Yes.

A. I didn't see anything like that. The only thing I seen was the man pinned in between the two cars.

By the Court:

Q. Did you hear any crash?

A. No, I didn't hear any crash.

30 By Mr. Fryling:

Q. When you say there was about ten inches between the two cars, you didn't measure that distance, did you?

A. No, sir, I didn't.

Q. Did you go out to these two cars, look between them?

A. I did.

Q. And that is where you get your idea from that the cars were about ten inches?

A. I am not specifying that was exactly ten inches. I looked at the two cars and I seen the man.

Q. You gave that evidence because of the fact that you got in a position on the street that you could look between the two cars?

A. Yes, sir.

Q. When you looked from the corner you couldn't 10 see?

A. No, I couldn't see.

By the Court:

Q. When you made your observation were you west or east of these cars?

A. I was facing east.

Q. West of the cars, of course?

A. Yes, sir.

Q. Towards George Street?

A. Yes, sir.

20

By Mr. Fryling:

Q. When the westbound car came to a stop how close to George Street was it?

A. About thirty feet.

Q. How close to the tracks?

A. That is what I am talking about.

Q. Below the switch?

A. No, sir.

Q. How far below the switch was it?

A. About two stores below it.

Q. You mean it happened thirty feet east of the switch?

A. Yes, sir.

30

- Q. That is where the car stopped?  
A. Below the switch.  
Q. When the westbound car came to a stop, how far was it below the switch?  
A. About thirty feet.
- 

HARRY T. CULLINGS, sworn in behalf of plaintiff.

10 Direct examination.

By Mr. Bouton:

- Q. Where do you reside?  
A. Syracuse, New York?  
Q. Were you in the military service on September 14, 1918?  
A. Yes, sir.  
20 Q. Where were you stationed at that time?  
A. In Raritan, New Jersey.  
Q. How long had you been there?  
A. Since September 8th.  
Q. Did you know Eugene L. Brennan?  
A. Yes, sir.  
Q. How long had you know him?  
A. About six months.  
Q. Was he in service at that time?  
A. Yes, sir.  
30 Q. Where was he stationed?  
A. Camp Dix.  
Q. Where was he stationed on September 14, 1918?  
A. Camp Raritan, New Jersey.  
Q. The same camp as yours?  
A. Yes, sir.

By the Court:

Q. Where had you been stationed before September 18th?

A. Camp Dix.

Q. He went to Raritan the same time you did?

A. Yes, sir.

Q. So he had been there since September?

A. Yes, sir.

By Mr. Bouton:

10

Q. You had been transferred on that date?

A. Yes, sir.

Q. Were you with Brennan when he proceeded to go to New Brunswick?

A. I left camp with him, yes, sir.

Q. About what time was that?

A. It was between six and seven, around 6.30, I think, we left camp.

Q. Where did you go from the camp?

20

A. To Nixon Station.

Q. How far is that?

A. About a quarter of a mile from the gate.

Q. Was there a trolley there?

A. There was one right there. It waited about a couple of minutes.

Q. And then did the trolley car come?

A. Yes, sir.

Q. And then did you and he board the trolley car?

30

A. Yes, sir.

Q. Then this trolley car proceeded where?

A. Proceeded to New Brunswick.

Q. What, if anything, can you say about finding at New Brunswick that Brennan, with whom you had been, had been injured?

A. I got off the street car as we cressed about the block beyond the bridge.

Q. You did?

A. Yes, sir.

Q. You left the car?

A. I left the car in front of a hotel there, Klein's Hotel.

By Mr. Bouton:

10

Q. Tell us what you ascertained concerning Brennan?

(Objected to.)

(Objection sustained.)

Q. Did you see Brennan after you got off the car?

A. No, I didn't.

20 Q. Did you see Brennan after you got off the car at New Brunswick?

A. Not after I got off at New Brunswick, I didn't see him, no, sir.

Q. Did you see two cars together at the corner of George and Albany Streets?

A. I was walking down the street; I got off the car —

(Objected to as leading.)

30

The Court: The question is rather leading.

By the Court:

Q. Did you see anything after you got off this car near the corner of George and Albany Streets?

A. I got off the car in front of this hotel and I walked down the street and as I walked down the street I met another soldier who told me ——

(Objected to.)

Q. Did you see the two cars?

A. I saw these two cars and the crowd around them and a soldier told me ——

10

By Mr. Bouton:

Q. What did you see?

A. I walked down the street, I ran down to the accident, to where these two cars were, and I looked between the cars and I saw a soldier between the two cars.

Q. Did you get close enough to see whether it was Brennan?

20

(Objected to as leading.)

Q. Did you get close enough to observe who he was?

A. No, sir; I could not tell who he was at the time.

Q. Did you in any way, from your own observations, not necessarily then, or later, find out who it was?

Mr. Fryling: I object to that unless it is answered 30  
yes or no.

The Court: It should be answered yes or no.

A. Yes, sir; I did.

Q. Who was it?

(Objected to.)

By the Court:

Q. I thought you said a minute ago you did not see Brennan after you left the car?

A. Yes, sir.

Q. Did you ever see Brennan after that?

A. Yes, sir.

10 Q. When?

A. At the hospital.

Q. Is that the first after you left him on the car to know that it was Brennan?

A. No, sir.

Q. My question is, when next after you left the car at Klein's Hotel did you see Brennan to know it was Brennan?

A. As they picked him up from between the street cars.

20 Q. Were you there when he came out from between the street cars?

A. Yes, sir, I just said that I was.

By Mr. Bouton:

Q. Did you have anything to do with separating the two cars?

A. No, sir, I didn't.

30 Q. Did you, at that time that you observed this body of Brennan's between the cars —

(Objected to.)

(Objection sustained.)

Q. Did you find at that time any article of apparel of Brennan's that you knew to be his?

A. Yes, sir.

Q. What?

A. His hat.

Q. Where did you find that?

A. I found the hat on the street.

Q. Where on the street?

A. Right in front of the car somewhere.

Q. Which car?

A. The car going in.

Q. Where?

10

A. Into New Brunswick.

Cross-examination.

By Mr. Fryling:

Q. You got on the car at the Raritan Camp, did you?

A. Yes, sir.

Q. What was the name of the street where you got off?

20

A. I couldn't tell you the name of the street.

Q. How far from George Street?

A. I should say it is around two or three blocks.

Q. Do you know where George Street is?

A. Yes, sir.

Q. When the car got to the place where you got off did the car stop for you to get off?

A. Just slowed up a little.

Q. Did it stop?

30

A. No, sir.

Q. How many stops did the car make from the time you got on until the time you got off?

A. I couldn't tell you.

Q. It made several stops?

A. It may have stopped on the other side of the bridge. I can't remember.

Q. From Camp Raritan up to the place where you got off there are a number of places where the car had made stops, are there not?

A. After the car left me?

Q. No; before you got off. From the time that you got on the car there are several places where the car stops?

A. Yes, sir; to take on and off passengers.

10 Q. And it had made several stops from the time you got on until you got back?

A. I couldn't remember.

Q. You don't know anything about it? You know it made some stops?

A. I couldn't say.

Q. When you got off the car there were a number of soldiers on the car, were there not?

A. Yes, sir.

Q. And they all had soldier hats on?

A. Yes, sir.

20 Q. When you got off at Klein's Hotel in what direction did you walk?

A. Towards the center of the city; I think that is George Street.

Q. You got off before the place you wanted to go to?

A. Yes, sir.

Q. And you continued to walk in the same direction the car was going?

A. Yes, sir.

30 Q. How far did you walk?

A. I walked about a block; the car proceeded down.

Q. Did you go in Klein's Hotel?

A. No, sir.

Q. Where were you going?

A. Not anywhere in particular.

Q. You say you continued to walk about a block in the same direction this car was going?

A. Yes, sir.

By the Court:

Q. Had you ever been to New Brunswick before?

A. No, sir.

Q. This was your first trip?

A. Yes, sir.

10

Q. Do you know whether this was Brennan's first trip?

A. Yes, sir, it was our first pass out.

By Mr. Fryling:

Q. Where did you go after you walked this block?

A. I proceeded down the street.

Q. Walked further than a block?

A. Yes, sir.

20

Q. Why did you say you walked a block when you walked more than a block?

A. You say how far did I walk?

Q. Yes.

A. I kept right down to the center of the city.

Q. Why did you say you walked a block? Is that all you walked?

A. I kept on walking towards the center of the town.

Q. Tell us how far you walked?

A. I walked until I met this other soldier.

30

Q. Where did you meet the soldier?

A. On the corner.

Q. What street?

A. I couldn't tell you the street.

Q. You say you know where George Street is?

A. Yes, sir.

Q. Was it at George Street that you met the soldier?

A. No, sir.

Q. How far from George Street was it?

A. About a block and a half from George Street toward the camp.

Q. When you met this last soldier, where did you go?

A. He told me there that ——

10 Q. Never mind that. Where did you go?

A. I continued on.

Q. You continued in the same direction that you were going before?

A. Yes, sir.

Q. How far did you go?

A. Right down to the accident.

Q. Did you go all the way down to George Street?

A. Yes, sir.

Q. When you got down there, what did you do?

20 A. I saw there was an accident.

Q. Just tell us exactly where you went?

A. I went right down to the cars, right out into the street and looked at the cars.

Q. When you got there what were they doing?

A. They were sitting on the top of the car rocking the cars apart.

Q. When they took this man out from between the two cars did you see him?

A. Yes, sir.

30 Q. Did you know who he was then?

A. Yes, sir.

Q. Or didn't you find out until afterwards who he was?

A. Yes, sir.

Q. What did you do then?

A. I immediately went right up to the hospital.

Q. Did you go with him?

A. No, sir.

Q. He was taken to the hospital?

A. Yes, sir.

Q. And then you went to the hospital yourself?

A. Yes, sir.

Q. So that you yourself saw him between the cars and you recognized him at that time?

A. Yes, sir.

Re-direct examination.

10

By Mr. Bouton:

Q. How many other soldiers got on the car at the time down there at Nixon?

A. I couldn't count them, there were so many.

Q. About?

A. I should say over 125, maybe; the car was packed; hanging all over the car.

Q. When you saw that tell us what you saw as to any places in addition to the inside of the cars there were people on? 20

(Objected to as not re-direct examination.)

(Objection overruled.)

Q. Tell us with respect to this car where there were people standing?

A. Every seat was taken; the aisles were filled and the back platforms were filled, and they were standing all around the back and front platforms; the front platform was filled, too. 30

Q. Proceed and tell us if there were any other places on which there were soldiers.

A. Hanging on the steps, on the back, around the back of the car.

Q. What do you mean by around the back?

A. Around the bumper, around the back, that iron post there.

Q. And the car proceeded in this condition to New Brunswick, did it?

A. Yes, sir.

Q. And continued in this condition up to the time you got off?

10 A. Yes, sir.

Re-cross examination.

By Mr. Fryling:

Q. Some people got off before you got off?

A. Maybe one or two, possibly, yes.

Q. There might have been more than two?

A. No, sir.

20 Q. The car didn't stop?

A. Not very often, because there was no room for other people to get on.

Q. I understand you don't recall how many stops the car made?

A. No, sir.

Q. You don't recall how many people got off the car at the time you got off?

A. No, sir.

30

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JOHN L. STIFEL, SWORN in behalf of plaintiff.

Direct examination.

By Mr. Bramhall:

Q. Where do you reside?

A. Toledo, Ohio.

Q. You are a practicing physician and surgeon?

A. Yes, sir.

Q. Of what school are you a graduate?

A. Johns Hopkins School, Baltimore, Maryland.

Q. What year?

A. 1917.

Q. What other schools or hospitals have you been connected with?

A. I spent a year in the Royal Victoria Hospital in Montreal.

10

Q. Any other hospitals?

A. No.

Q. Except the ones that you practice in with your patients?

A. Since then.

Q. Were you at one time in the military service of the United States?

A. Yes, sir.

Q. What organization were you attached?

A. The Medical Corps.

20

Q. When did you enter the military service?

A. In '18, July.

Q. Where were you stationed at various times?

A. I was stationed first at Lakewood, New Jersey, for a month, and at Raritan Arsenal, Metuchen, New Jersey.

Q. Where were you stationed on September 14, 1918?

A. At the Raritan Arsenal.

Q. I will ask you if you had occasion to examine a soldier who was in the service by the name of Eugene L. Brennan?

30

A. Yes, sir, I did.

Q. When did you first see Mr. Brennan?

A. I saw Mr. Brennan first in New Brunswick in September, the 14th of September, I think it was. He

was in St. Joseph's Hospital, it was either the 14th or 15th of September; it was the morning after he had been in an accident.

Q. Did you examine him to find out what his condition was?

A. I examined him very superficially, took him back to camp in the ambulance and then examined him carefully as soon as I got him back to camp.

10 Q. Do you know what injuries you found him suffering from on that occasion?

A. He had, in the first place, some superficial injuries, bruises, very severe bruises to his shoulder, one hip and some other skin bruises. In addition to that he had a paralysis of his leg and the muscles of his abdomen and thorax, which I thought was due to what we call fracture, dislocation of what we call the cervical vertebra.

20 Q. Did you afterwards determine the nature and the extent of the injuries, if any, to his spine and spinal column and vertebra?

A. Yes, sir, I did.

Q. Where were those injuries?

A. There was an injury to the spinal cord which practically busted it entirely, so that no nerves could pass up or down the spinal cord.

Q. What condition did that leave him in at that time?

30 A. That left him paralyzed from the arms and shoulders down. The arms were not involved, but the muscles of the abdomen and thorax and legs were completely paralyzed.

Q. How long did you have him under your treatment and observation?

A. I had him under my treatment for a few days, but I had him under observation, that is I came in to see him after that for a matter of some weeks.

Q. Did this condition continue during the entire time that you had him under observation?

A. Yes, sir.

By the Court:

Q. When was the last you saw him?

A. I don't remember the date.

Q. Approximately?

A. I can only say it was some weeks after I saw 10 him.

By Mr. Bramhall:

Q. State from your opinion as a physician whether or not the condition which you found him suffering from might or could cause or produce death?

(Objected to.)

The Court: The probability.

20

Mr. Bramhall: Yes, the probability of life or death.

A. Yes, it probably would cause death.

Q. You were not present at the time of his death?

A. No, sir.

(Cross-examination waived.)

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ROY WOODWARD, sworn in behalf of plaintiff.

30

Direct examination.

By Mr. Bramhall:

Q. Where do you reside?

A. Buffalo.

Q. What school or schools are you a graduate of?

A. Graduate of the University of Georgia in 1916.

Q. What hospitals have you been connected with subsequent to your graduation from the medical university?

A. I was connected with the New York City Health Department in 1916 during the infantile paralysis epidemic, and I was in the Childrens' Hospital in Buffalo early in 1917, and the Lackawanna Steel  
10 Company Hospital as surgeon for about two months before I entered the service in 1918.

Q. Were you in the military service of the United States?

A. Yes, sir.

Q. When did you enter the service?

A. Active duty in May, 1918.

Q. To what organization were you attached?

A. I was attached to the camp organization, Camp  
Lee, Virginia.

20 Q. What particular branch of the service is that?

A. That was medical work in the infirmary for several months. That was to start with. I was in the mustering office. I was with the battalion when the armistice was signed, and I went to the hospital where I stayed until September; I was in service from September, 1918 to September, 1920.

Q. Where were you stationed in 1920?

A. I left the service.

Q. Then what did you do?

30 A. I went into the public health service.

Q. Where were you stationed?

A. In Fox Hills.

Q. While you were stationed at Fox Hills Hospital did you have occasion to examine Eugene L. Brennan?

A. I did.

Q. Had he been in military service?

(Objected to.)

The Court: If he knew of it.

By the Court:

Q. From your personal knowledge do you know whether or not he had been in the service?

A. Yes, sir, from the facts of his records. He wouldn't have been in the hospital if he had not been 10 in the army.

By Mr. Bramhall:

Q. Tell by what process he came to your hospital?

A. He was in the hospital at the time I went there. The Public Service took over the hospital at Fox Hills from the army about the 15th of October, 1920, and I reported there on October 20, 1920, and the patients were in the wards at that time. 20

Q. Was he a patient in the ward of this hospital?

A. Yes, sir.

Q. Did you have him under your care and observation for some time?

A. I had him under my care and observation until his death.

Q. I am making the examination with regard to see whether or not it was a record that you made and kept at that hospital in connection with the treatment and observation of Eugene L. Brennan? 30

A. Yes, sir.

Q. Was that record kept by you?

A. This record was. This record was not. (Indicating.) This was a record kept by the army when I took him over.

Q. The records I now hand you, was that the record that was kept by you?

A. Yes, sir.

Q. That was in the record cards of the operation of this hospital?

A. Yes, sir.

Q. From what did you find Brennan suffering at the time you took him over?

A. He had a paralysis of the leg, partial paralysis of his abdomen, incontinence of urine and fecal due to paralysis of the bladder and rectal muscles  
10 which was caused by an old fracture.

Q. Did you make any examination to ascertain what caused his condition from which he was suffering from at that time?

A. Yes, sir.

Q. State what you found?

A. I found the old fracture and paralysis.

Q. Fracture of what?

A. The vertebra.

Q. What do you mean by old fractures—a previous  
20 fracture?

A. Yes, sir.

Q. And the vertebra was fractured?

A. The cervical vertebra.

Q. Which one?

A. The X-ray plates showed the fifth, sixth and seventh.

Mr. Fryling: I object and ask that that be stricken out.

30 The Court: It will be.

Q. You don't know except what the X-ray showed which it was?

A. There was no way I could tell other than the X-ray.

Q. Where did you get the X-ray?

A. The X-ray was in the hospital.

Q. How was that made? Was it made at your request or order or how did you happen to have it made?

A. That X-ray was before I went there.

Q. Do you know whether or not this X-ray describes his condition at the time you saw this person?

(Objected to.)

10

The Court: Objection sustained. He could only know from the records, I suppose.

Q. You found he was suffering from paralysis?

A. Yes, sir.

Q. Did you find anything about him that might produce this paralysis?

A. Scar of an old operation.

Q. Where was that operation?

A. In the cervical region.

20

Q. By old operation, what do you mean, the previous operation?

A. The previous operation, the scar.

Q. What vertebrae were in the region of this place where he had been formerly operated upon?

A. It was over the cervical vertebra.

Q. Where?

A. The lower cervical vertebra.

Q. And the condition you found him suffering from, state the probability of his recovery or death? 30

A. There was no chance of his recovery.

Q. Did he finally die?

A. He did.

Q. And from these conditions?

A. The result of these conditions.

Q. The result of these conditions?

A. Yes, sir.

Q. Do you remember the date?

A. He died on January 24, 1921. I only remember that date from reviewing my records.

Q. A record you made yourself?

A. Yes, sir; a record with my signature on.

Mr. Bramhall: I offer those records.

10 (Marked Exhibit P2 for identification.)

Q. Doctor, assuming that Eugene L. Brennan was in the military service of the United States on September 14, 1918, and boarded one of the cars of the defendant in this case and was riding on the step of the car, and rode from Raritan Arsenal or Nixon Station to a point in New Brunswick, near George Street; that while in that position he was caught between the car he was riding on and a passing car, and wedged between these two cars, and finally taken out from between these two cars and was taken to a hospital and examined and found that he was suffering from a dislocation of a cervical vertebra and suffering with paralysis of the muscles of the leg, abdomen and thorax; state whether or not that might or could have been caused from the accident which I have described?

20

(Objected to.)

30

The Court: Probably could have caused that condition?

Witness: Yes.

Cross-examination.

By Mr. Fryling:

Q. Were you there on January 24, 1921?

A. Yes, sir.

Q. Was he under your care at the time he died?

A. Yes, sir, directly.

Q. You say he was under your care at that time?

A. Practically under my care. I had charge of 10  
the ward and had charge of the men.

Q. You didn't sign the death certificate, did you?

A. I believe not.

Q. If he was in your charge at that time do you  
know why it was that you didn't sign it?

A. I believe the policy of the hospital was the  
commanding officer of the hospital signed it.

Q. From what?

A. From the diagnosis of my chart.

Q. You were there and know personally about his 20  
death on that day?

A. Yes, sir.

Re-direct examination.

By Mr. Bramhall:

Q. These injuries from which you found him suf-  
fering caused his death or the injuries which I have  
described in my hypothetical question, whether or 30  
not they did cause his death?

A. The conditions resulting from the injury  
caused his death.

Q. As the result of these injuries he died?

A. Yes, sir.

ANDREW BRENNAN, sworn in behalf of plaintiff.

Direct examination.

By Mr. Bramhall:

Q. Where do you reside?

A. Lockport, New York.

10 Q. Are you the father of Eugene L. Brennan, deceased?

A. Yes, sir.

Q. State when this boy entered the military service.

A. May 26th, I believe, 1918.

Q. What was the date of his discharge?

Mr. Fryling: I object. That is not proper proof.

20 The Court: If he was there and saw him discharged he may state it.

Witness: No, I didn't see him discharged.

Q. What was the age of this boy when he entered the military service?

A. Twenty-three.

Q. Was he with you at that time?

A. He was.

30 Q. Was his mother living at that time?

A. She was.

Q. She subsequently died?

A. Yes.

Q. Where did you live at the time he entered the service with reference to Lockport, did you live in town or in the country?

- A. About a mile and a half from the city limits.
- Q. And had this boy lived with you and your wife from his infancy on up?
- A. He had.
- Q. What kind of a farm did you have?
- A. Truck farm and fruit.
- Q. How large a farm?
- A. Seventeen acres.
- Q. State whether or not this boy employed his time in working on this farm taking care of this fruit farm of yours? 10
- A. After he quit school.
- Q. When did he quit school, how old was he?
- A. It was about three years; about twenty.
- Q. Mr. Brennan, what was the nature of the service or work that this boy performed on the farm?
- A. He had charge of it, took charge of it, and planned the work, general managing of it, and had an interest in it after he was twenty-one years old.
- Q. What kind of work did he do? 20
- A. Trimmed the orchards, sprayed lime, sulphur spray, and other material for taking care of the trees, cultivated the land, raised truck gardens, carrots and several small things.
- Q. Did that take his entire time during the summer months and spring?
- A. Yes, it did.
- Q. What did he do or what was done with the crop that was raised, the fruit and vegetables, and so forth? 30
- A. Done the marketing and drew the money, taking a part of it, after expenses were deducted.
- Q. When the product was marketed how did you live, where did you get your living?
- A. He maintained the house. In fact, I hadn't paid any attention to the house, he looked after that, and any other work in the house, helped his mother;

his mother wasn't very strong, and he used to help her out, never had a sister to help in the house and he was pretty well used to that work.

Q. Did he continue that work up until he left the farm and went into the army?

A. Well, with the exception of, I think, of thirty days work in Buffalo, just prior to the time he went into the army; he used to go up Sunday mornings and come up Saturdays, I think, for three or four  
10 weeks, something like that.

Q. He was working away from home thirty days in all his lifetime?

A. Probably.

Q. What is your age now?

A. Fifty-eight.

Q. And what was your condition of health with reference to the time he entered the service and now?

A. My health was bad, not capable of doing any  
20 strenuous work or exercising much.

Q. Are you still living on the farm?

A. No, sir.

Q. How long have you been not living on the farm?

A. Pretty nearly two years.

Q. Who is looking after or working the farm?

A. The farm has not been worked in two years.

Q. You mean that it has been abandoned?

A. Practically so. Part of the house is rented to  
30 a young couple; four rooms is rented to a young couple.

Q. But is the farm worked, is there any income from the farm?

A. No, sir; it has not been this year or last year.

Q. Do I understand that you are not able yourself physically to look after the farm?

A. No, I can't look after it.

Q. Were you residing with him?

A. I reside with my son's family in the city, in Lockport, about two miles from the farm.

Q. How long has the boy's mother been dead?

A. Three years last April.

Q. How long have you been making your home with your son there?

A. Since a year ago the 1st of January or the latter part of December.

Q. What was the approximate income received, 10 I mean the total amount that was received from the products of this little farm that he took care of and looked after until his death?

Mr. Fryling: I object. It does not appear that this witness had any knowledge of it.

The Court: Of course, he ought not to testify unless he knows.

20

Mr. Fryling: He has already indicated that he does not know. He says that the son gave him a part of his money that he received from time to time.

By the Court:

Q. Do I understand that your son marketed the farm products?

A. Yes, sir.

30

Q. He did that himself?

A. Yes, sir.

Q. And then paid the expenses?

A. Yes, sir.

Q. And then paid over a portion of the net profits to you?

A. Yes, sir.

By Mr. Bramhall:

Q. Your expense that he paid, did that include the living expenses of you and your wife?

A. What he paid me?

Q. Is that what you got from the income?

A. Yes, sir. That was deducted from the income.

Q. After all those living expenses were paid he also paid you some money each year?

10 A. Yes, sir.

Q. How much did you receive?

A. I never kept a positive record of it.

Q. Just approximately how much?

A. Approximately five or six hundred dollars.

Q. Up until he entered the army?

A. Yes.

By the Court:

20 Q. Have you other children?

A. Yes, sir.

Q. How many children have you?

A. I have got six sons.

Q. All living?

A. Six living.

By Mr. Bramhall:

30 Q. State whether or not he was ever married?

A. No, he never was married.

Q. He had no children?

A. No, sir. The only one dependent on him was his mother.

Q. And you stated that he left six children?

A. Yes, sir.

Q. Tell their names?

A. Charles A.

Q. And their ages at the time of his death?

A. He was forty-four and Wilfred J., forty-three, and George A., forty-one. I think I will have to look up the record. Louis J., thirty-eight, Albert V., thirty-four. I can't think of any more. Eugene was the seventh. J. Frank, who is in New Mexico.

Q. How old is he?

A. He is thirty-six.

Q. Are all these married?

A. All except one.

10

Q. Which one?

A. Albert, the youngest.

Q. Where does he live?

A. Cleveland, Ohio.

By Mr. Bramhall:

Q. State whether or not while Eugene was in the army that he sent any money home to you or your wife?

20

A. I received some which I acknowledged as presents to his mother on pay day. He had a check sent, I don't exactly know just how much, but it amounted to the regular sum that he used to give home.

By the Court:

Q. That came from the government or Eugene, which?

30

A. Came from himself.

By Mr. Bramhall:

Q. That continued until he got sick?

A. Yes, sir, a short time before he died.

Q. I wish you would state the condition of this boy's health at the time he entered the army.

A. His health was apparently good. In fact, I asked, as there were three others in the service, of his brothers —

(Objected to.)

10 Witness: I tried to have him excused from the service and he had a doctor examine him, and he operated on him once for varicocele, and he told me that the doctor said he was in perfect health.

(Objected to.)

Witness: He apparently was in perfect health after this operation.

20 Q. Was he apparently in good health at the time he entered the service?

A. He apparently was.

Q. He worked right along?

A. Yes, sir.

Q. State whether or not he left any will or did he died intestate?

A. He didn't leave any will.

Q. What was his age at the time of his death?

A. Twenty-seven.

30 Q. How are you supported now, have you any —

Mr. Fryling: I object to that as immaterial and irrelevant.

The Court: Objection sustained.

Q. At the time of his death state whether or not you paid the funeral expenses?

(Objected to.)

(Objection sustained.)

Cross-examination.

By Mr. Fryling:

Q. When Eugene left school, I understand he stayed home with you? 10

A. Yes, sir.

Q. And at that time what was your business?

A. Well, I done light work on the highway and what work I could do on the farm, on the place.

Q. That is, up to the time that he went to school Mrs. Brennan and you and Eugene were living home together?

A. Yes, sir.

Q. Anybody else there at the time?

A. There was the other boys, were there part of 20 the time. The younger one, the one next to him, was there, while he was going to school, and makes it his home until some time after, until he got a position, and he moved out of town.

Q. When Eugene got through school Albert was home and some of the other boys were home?

A. No; they wasn't stopping at home regularly. They had business away from home.

Q. At that time Albert was home?

A. He was home when he was out of school. 30

Q. He was going to school and up to that time he had been going to school?

A. Yes, sir.

Q. And the four of you lived there together?

A. I think Eugene left school before Albert did. He took a special course, bacteriological school, and Eugene devoted his time to the farm.

Q. And while Albert and Eugene were going to school you were doing some road work, did some light work around the farm; is that correct?

A. Yes, sir.

Q. And you supported the family during that time?

A. Yes, sir.

Q. And did any of your other sons help in supporting the family?

10 A. Positively did, through donations or presents; I don't know just exactly what they did, but I know they were very generous with their mother.

Q. All of your boys are away?

A. Yes, sir.

Q. And those that weren't married helped in supporting your family; is that correct?

A. I couldn't call it support. What they gave, they gave it more in the form as a present. That was not depended on.

20 Q. You say they gave donations and that was given to you for the support of their mother and you?

A. Yes, sir.

Q. And that was used for the support of the family?

30 A. That was kept separate. The mother made a special account of that, all small things like that. In fact, when she died, she had a small bank account that was collected by different things like that, prizes that she had won.

Q. Up to the time when he had left school, when he was twenty years old, you supported him with such donations as you got from your other boys?

A. Yes, sir.

Q. And when he left school he didn't go to work outside for some time?

A. No.

Q. And then he started to help you in this small farm?

A. After he got through with school he took charge of the farm.

Q. I suppose you still did the same kind of work on the farm as you had before that?

A. No, I didn't. The condition of my health wouldn't permit it.

Q. Then after you left school you continued to work on the highways, didn't you? 10

A. Work that I done on the highway wasn't what was considered any manual work.

Q. You were an inspector, were you not?

A. Why, yes.

Q. And you were an inspector before he left school and after he left school you continued that same kind of work?

A. I did. One year I didn't go on the road at all. I had to take care of the farm, didn't do any inspecting work. 20

Q. What year was that that you didn't do any inspecting and did some farm work?

A. It was 1919, I think.

Q. And Eugene continued his home and his work around the farm up to about a month before he enlisted in the army; is that correct?

A. That is correct.

Q. How long before Eugene quit school that Albert quit school? 30

A. I couldn't tell you.

Q. About how long was it?

A. I am not positive.

Q. Was it a matter of several months?

A. I know that he was taking a commercial course after Eugene quit school.

Q. Albert, according to the age you gave, was seven years older than Eugene?

A. No. I didn't mean that. He was three years older, Albert was.

Q. Albert was three years older than Eugene and he continued in school after Eugene left school?

A. Yes, sir.

Q. After he quit school did he do any work on the farm?

A. No, sir.

10 Q. He stayed home for some time after he quit school before he got a job?

A. Not long.

Q. How long?

A. I couldn't tell you in weeks or months. It was only a short time. I believe he had a position before he left school.

Q. Wasn't it several months?

A. No, sir.

Q. When Eugene got this job in Buffalo what kind of a job was that?

20 A. I don't know exactly. He worked at the Pierce-Arrow Manufacturing Company.

Q. That was the first time he got a job away from home?

A. Yes, sir.

Q. It was about a month before he enlisted?

A. Yes, sir.

Q. He left your home and he went to Buffalo to live?

30 A. No, he came home week ends, always spent Saturday evenings and Sundays and some times he come home during the week.

Q. How far is Lockport from Buffalo?

A. Twenty-six miles.

Q. He got a job in Buffalo and came to visit you week-ends?

A. Yes, sir.

Q. And he worked for the Pierce-Arrow people?

A. Yes, sir; he had a room there.

Q. With the money that he made there he paid his board there?

A. I suppose so.

Q. During the month he went to Buffalo he didn't send any money home?

A. I don't remember his sending any.

Q. You don't know of any money that he sent to Mrs. Brennan during that month that he was working in Buffalo?

10

A. I don't know whether he sent any money to his mother. He might have done so some weeks, while he was going to school and during vacation he worked home.

Q. He worked on the farm while he was in Buffalo?

A. Whatever there was to take care of, there was a little chance to get away during the spring season, and trimming season, and he got his work ahead, so he took the wages, I believe he went there and took the job.

20

By the Court:

Q. That was right in the spring season? If he enlisted in May, it was right in the spring season?

A. We get reports from the State Department.

Q. What kind of fruit do you have?

A. Apples, pears.

Q. The month of May is spraying season for 30 apples?

A. Spray any time, in fact, only until the blossoms appear in the spring.

Q. I am speaking about the later spray?

A. That is considerably later in Western New York than it is here.

By Mr. Fryling:

Q. Out of money that he got from the sale of things that he grew on this farm, he gave you some money; isn't that correct?

A. I wouldn't say positively that he did. He might have. He was generous with his money, but his mother received a check from him regularly.

10 The Court: You misunderstand the question. Mr. Fryling is not referring to after he got in the service.

By Mr. Fryling:

Q. Before he went to Buffalo, when he was at home?

A. Oh, yes.

20 Q. From the things that he raised on the farm you say he sold and he gave you some money?

A. Yes, sir.

Q. Did he give Mrs. Brennan some money, too?

A. He might have. He bought the supplies for the house and for the barn and horses and chicken feed, and feed.

Q. During that time you were doing inspecting work?

A. Part of the time I was.

Q. And you were earning money?

30 A. Yes, sir.

Q. What did you do with the money you earned?

A. A big part of it I used for several purposes, paying up, probably debts, and I had the general supervision of the farm.

Q. You gave Mrs. Brennan some money for the running of the house?

A. Yes, if she required it.

Q. And she did require it?

A. Yes, sir.

Q. How were you paid?

A. Monthly.

Q. Every month when you got your pay you would give a considerable part of your money to Mrs. Brennan to run the house with, wouldn't you?

A. No, why, she always had access to it.

Q. But she always needed it?

A. Not when it was coming from another source. 10

Q. Didn't you, as a matter of fact, give her something every month that you earned anything?

A. No, sir, we never had that way of getting along.

Q. Who paid the expense of running the house, you or Mrs. Brennan?

A. She or Eugene, who ever bought anything, paid for it.

Q. You, too?

A. I probably bought some.

Q. If you bought things for the house you would 20 pay for them?

A. Yes, sir.

Q. And you frequently bought things for the house, of course?

A. Might have bought something.

Q. You had to support the house, didn't you?

A. Didn't consider it supporting the house because it was generally run from the proceeds of the place and it was run from the proceeds of the place.

Q. Did you consider that you were depending on 30 your son for your entire support?

A. No, in consideration of the share that we got from the products of the place I considered that I was paying.

Q. You separated what you got from your son, you considered as rent what you got from him for the use of your land; is that correct?

A. Yes, sir.

Q. Did you consider what Mrs. Brennan got from him was rent, too?

A. No, I did not, except it was for the use of the house.

Q. The principal money that Eugene brought home was given to Mrs. Brennan, wasn't it?

A. Yes, sir—that is, for the sale of products of the place?

10 Q. Yes.

A. No.

Q. He gave that to you?

A. Yes, sir.

Q. As far as giving Mrs. Brennan you don't know how much he gave her?

A. I don't know how much it cost to run the place.

Q. When he got in the army did he send you anything personally?

20 A. In the shape of money?

Q. Yes.

A. No, sir; I don't think he did. I don't remember it.

Q. Have you any knowledge of your own of anything that he sent to Mrs. Brennan while he was in the army?

A. I saw checks. I don't remember just ——

Q. Whose checks were they?

A. They were his checks.

30 Q. Did he have a bank account during the time that he was in the army?

A. He had a bank account in Lockport when he went in the army.

Q. After he sent you money after he went in the army you say he sent you checks?

A. They may have been drafts or orders, I

wouldn't say positive what they were, I wouldn't say whether they were a draft on a certain bank.

Q. How often did Mrs. Brennan receive these checks or drafts that you saw?

A. Possibly for a year or so she was getting money regularly from him.

Q. That was after his death?

A. No, sir.

Q. Didn't the regular period of receiving money from the government start after his death? Is it true that the checks that came regularly started to come after his death? 10

A. I don't know as they came every month. I didn't see them every month, didn't always see them when they did come, but understood that she was getting something from him every month. It wasn't referred to me.

Q. You don't know of your own knowledge?

A. Yes, sir.

Q. When you speak of checks or drafts coming in regularly, isn't it true that it came in regularly after she died? 20

A. No.

Q. Are you sure of that?

A. Yes, sir.

Q. The only knowledge you have about that is what Mrs. Brennan told you?

A. I knew she was getting this and taking care of it. It was paid monthly, I believe, by the government. 30

Q. What he sent to Mrs. Brennan, what you know about that is what Mrs. Brennan told you?

A. No, that is not so, because I saw some of those vouchers or checks.

Q. What were these vouchers and checks that you saw?

A. I don't know as I can explain them now.

Q. Were they his checks or vouchers?

A. They were something that represented money.

Q. You don't know whether they were his personal checks or not?

A. I understood they were coming from him and I know some of them were.

Q. And you say you saw them?

A. Yes, I have seen some of them. I don't say I saw all of them.

10 Q. These that you saw, were they checks of your son?

A. That I couldn't answer; I don't remember just what they were; I don't just remember the form.

Q. You had a son J. W. What is his full name?

A. John Wilfred.

Q. Is that the son that you referred to as Wilfred, forty-three years old?

A. Yes, sir.

20 By the Court:

Q. Do you know how far Eugene went in school? Where did he go to school just before he quit?

A. Lockport High School. I don't think he graduated there; I am pretty sure he didn't.

Q. He finished grammar school?

A. Yes, sir.

Q. And went to high school?

A. And was in high school.

30 Q. You don't know how far he went in high school?

A. No, I don't.

Re-direct examination.

By Mr. Bramhall:

Q. During the vacations, while he was in high school, state whether or not he ever worked?

A. He always worked at home during vacation.

Q. When he was not in school he worked?

A. Yes, sir.

Q. You stated that during the time he was working on the farm you received net about \$500 a year, about that?

A. Yes, sir.

By the Court:

10

Q. How many years did you get that?

A. I remember about two. I think he worked it three, that he had charge of it, where there was an agreement and understanding between he and I.

By Mr. Bramhall:

Q. This amount that you received from him, was that in connection with the working of the farm, you didn't leave the farm out, as I understand it? 20

A. No, sir.

(Objected to.)

By the Court:

Q. You left the farm to your boy?

A. Had a verbal agreement that he was to take care of the farm, do the work and divide up the net profits half and half.

30

Q. State what the facts are with reference that you say he was to divide the money afterwards, you were not involved in the expenses that he was to pay out before this money was divided?

(Objected to.)

(Objection overruled.)

A. It was separated, material and up-keep, separated the machine and what tools were used, and if he hired any extraordinary help for the picking or things of that kind or purchase of barrels, for fruit and the upkeep of the horses.

10 Q. Did he keep an account at the end of the year showing how much he had taken in and how much his expenses were?

A. Yes, he kept a book. It was just opened up and showed me what there was to do and I accepted it.

By Mr. Bramhall:

Q. Where is that book?

20 A. That may be possibly at home; I wouldn't say; my goods is still in the house, or at least are supposed to be there, part of them, and I haven't lived there for over a year and a half.

Q. Out of the moneys that he took in for the sale of produce was to pay the expenses and then as rent for the land he would give you half and kept half for himself?

A. Yes.

Q. What did he have to do with the paying of the household expenses?

A. It was considered that the expenses were to be taken from the place.

30 Q. In the bargain that you made with him about this division of profits was there anything said about that, was that in the bargain?

A. Yes, sir.

Q. What was the bargain about that?

A. I was to have the use of the place, the use of the tools and stock and have one-half the net proceeds of the farm.

Q. That is what we are getting at, what entered into this net, what were the expenses that he was to pay out before there was a division?

A. The upkeep of the house.

Q. What do you mean by that?

A. I don't mean any especial repairs or anything of that kind, simply supplying for the family, supplying groceries and such as that as were necessary to be bought and feed for the stock and the spraying materials and other things that was used, 10 and if there was any special purchase I was to pay half of it.

(At one o'clock P. M. the Court took a recess.)

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AFTER RECESS.

GEORGE A. BRENNAN, SWORN on behalf of plaintiff. 20

Direct examination.

By Mr. Bramhall:

Q. You are related to the decedent, Eugene L. Brennan?

A. Brother.

Q. Where do you reside?

A. Near Philadelphia. 30

Q. Were you appointed administrator ad prosequendum in this case?

Mr. Fryling: I object. The letters speak for themselves.

(Papers referred to are offered in evidence and marked Exhibit P3.)

Q. What is your age?

A. Forty-one.

Q. What was your age at the date of the death of your brother Eugene?

A. Thirty-nine, I believe.

10 Q. What, if anything, were you contributing to the support, or contributing in any way, to your father, Andrew Brennan, on May 26th, 1918?

(Objected to.)

The Court: What is the purpose of that?

20 Mr. Bramhall: That is the time the decedent enlisted and I thought that would determine at that time what evidence there was as to what Eugene was doing at that time; if he contributed anything at all at that time that would correspond with the date.

The Court: Objection sustained.

Q. What, if anything, did you contribute to your father's support before Eugene Brennan enlisted in the service?

30 (Objected to.)

(Objection sustained.)

Q. What, if anything, do you contribute to your father's support at the present time?

(Objected to.)

(Objection sustained.)

Q. What, if any, pecuniary damage have you suffered by reason of the death of your brother Eugene?

Mr. Fryling: I object. That is asking for a conclusion of law.

The Court: If you mean in dollars and cents I will sustain the objection. If you mean he can give 10 the details of his pecuniary loss he may do so.

A. I am not sure that I understand the question.

Q. (Question read.)

A. I don't think that I suffered any pecuniary damage.

Q. Do you know what financial assistance your brother Eugene gave your brother, of your own personal knowledge? 20

Mr. Fryling: Answer that yes or no.

A. I do.

Q. What?

A. In a general way, previous to his enlistment in the army, he stayed home and took care of mother and father with the exception of what father contributed to his own support.

Q. Do you know what that amounted to? 30

The Court: The question is do you know?

A. Exactly not.

Q. Approximately?

A. Yes, approximately.

Q. What?

(Objected to.)

The Court: You may cross-examine him on that if you wish to.

By Mr. Fryling:

Q. You say you know in a general way that your father helped support the house; that is correct?

10 A. Yes, that is correct.

Q. You were not there, were you?

A. At various times I was there visiting him.

Q. The only time you have been at your father's house since your brother Eugene left school, you were there on visits; is that correct?

A. That is correct.

Q. How long a visit would you make?

A. Sometimes one day and sometimes several days.

20 Q. How long a time would you say?

A. Perhaps several days. Not as much as a week at any one time.

Q. How often did you visit your home from the time Eugene left school up to the time he went in the army?

30 A. I have no way of determining that, but I would say, to the best of my knowledge, perhaps three or four times some years and more other years. It probably would be from four to six times a year, I would say, to the best of my knowledge on that.

Q. So far as your knowledge is concerned with respect to the contributions of Eugene, the only thing you know is what your family told you, is that correct?

A. I was conversant with the conditions there.

Q. You were conversant with the conditions, because of what your father told you?

A. No.

By the Court:

Q. How were you conversant with them?

A. I knew under what conditions brother was working home.

Q. How did you know it?

10

A. By visiting there.

Q. The mere visiting there didn't give you that information?

A. Well, by observation then.

Q. Well, what did you see?

A. I saw this: that my youngest brother Gene, was looking after the farm work hard and taking care of father and mother. My father worked occasionally, when he was able to, and I was familiar with conditions.

20

Q. How did that make you familiar with the financial conditions?

A. It looked to me that the financial conditions were obvious on the face of it.

Q. What was turned over to your father?

A. I only know that from what I have heard testified here, only what he turned over for the support of the house and father and mother.

The Court: I will sustain the objection.

30

Q. What did you observe Eugene would be doing at the farm when you visited him?

The Court: Hasn't he just told us that?

Q. Did your father at the same time do anything?

The Court: He just testified to that.

Q. Were there any workmen there at times when you were there at that farm?

A. There may have been occasions in the fruit picking time.

Q. Were there?

A. I wouldn't be positive as to that. I wouldn't make an answer on that.

10

By the Court:

Q. How large was this orchard?

A. Approximately ten acres.

Q. How large were the trees?

A. As we would say, full grown. Part of the orchard was old and the other trees I would say, were in their prime.

Q. That would be 350 trees?

20

A. I don't know as I figured that out.

By Mr. Bouton:

Q. How large was the farm?

A. 17 acres.

Q. How long had Gene been working on the farm, according to your personal knowledge?

A. I believe entirely after leaving school, and before leaving school until such time as he was  
30 able to work outside of his school hours.

Q. How long, to your knowledge, did he devote his entire time to it, how many years before he entered the service?

A. My memory on that is approximately two years.

Cross-examination.

By Mr. Fryling:

Q. You knew that before he went in the army he had left the farm and had gone to work in Buffalo, didn't you?

A. I was no doubt familiar with it at the time by correspondence only. I was living at that time, 10  
in or near Philadelphia.

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ANDREW BRENNAN, recalled in behalf of plaintiff.

Direct examination.

By Mr. Bramhall:

Q. We want you to state, if you know, the value 20  
of the contributions made to you by your son in the way of support in the household, that is, the upkeep of the household, table and fuel and things of that kind.

(Objected to.)

The Court: I suppose the question should be whether he knows. 30

Q. State whether or not you know the value of the contributions made by your son Eugene L. Brennan, to your household in the way of supplying the table and the house and fuel and those things that are necessary for the upkeep of a home?

(Objected to.)

The Court: I will sustain the objection to the question in that form.

Q. Do you know what it costs for the upkeep of a house? a

10 Mr. Fryling: I object on the ground that it is not re-direct examination. I thought we had finished with this witness.

By the Court:

Q. Do you know what your son paid?

A. Approximately I do.

By Mr. Bramhall:

20 Q. What was it?

A. About six or seven hundred dollars a year.

Q. State whether or not that was up until the time he went in the army?

A. Yes.

Cross-examination.

By Mr. Fryling:

30 Q. How much was the total cost for the upkeep of the house?

A. I couldn't give it definitely.

Q. About six or seven hundred dollars?

A. No; the house and upkeep of the barn, teams and everything of that kind.

Q. Would you say the total cost was about six or seven hundred dollars? You say now, when he

contributed six or seven hundred dollars that was the total upkeep of the house and expenses for raising the fruit and everything else that he raised, is that correct?

A. I considered the work that he done and the upkeep of the house——

Q. I am asking you what you say, six or seven hundred dollars a year you figure the cost of the upkeep of the house and the expenses incidental to the raising of the fruit crop and any other crops that were raised? 10

A. In the raising of the crops——

The Court: The question was what it cost your son and you said six or seven hundred dollars and now you say you think that was the value of his labor.

Witness: That is what I think it cost him and what it would cost me. 20

By the Court:

Q. What your son paid, what he contributed?

A. He contributed the upkeep of the table and the house.

Q. This six or seven hundred dollars includes all expenses which came from the proceeds of the sale of the crops?

A. No, sir. 30

Q. You don't know what it includes?

A. It includes really the upkeep of the house.

Q. What do you mean, the upkeep of the house?

A. The board and such as is required——

Q. Whose board?

A. My wife's, myself and son.

Q. You figured that is what your board is worth, is that what you mean?

A. Yes, sir.

The Court: The figure will be stricken out.

By Mr. Bramhall:

Q. Mr. Brennan, the question asked originally was  
10 with reference to what it would cost your son to support the house.

Mr. Fryling: I object, if that is supposed to be a question.

The Court: That is not a question so far.

Q. The question I asked was whether or not you are able to answer that question as to what it did  
20 cost him?

A. Not definitely, not to the cent.

Q. We don't want to know exactly, approximately.

A. It cost about \$600—

(Objected to.)

Q. Answer yes or no.

A. Yes.

Q. Answer the question as to what it cost for groceries, fuel and the expenses of keeping up the  
30 house at that time.

A. That is what I was answering, six or seven hundred dollars; that is what I understood by that.

Q. Afterwards you said that included the labor that he did in the house?

A. Probably did, because he used to help a little in the house.

Q. And you include that in the six or seven hundred dollars?

A. Yes, sir.

Mr. Fryling: I ask that those figures be stricken out.

The Court: They will be.

By Mr. Bramhall:

10

Q. I will ask that question another way. The Court has ruled that your testimony as to what he contributed to the support of the household in dollars and cents, not what he did around there, not that he drew the water and milked the cows—

The Court: That may be an element of damage, but he has not stated that as yet.

Q. Do you know approximately what, if anything, he paid in the way of keeping up the table and fuel and such bills as that during the year? 20

By the Court:

Q. In other words, what was your grocery bill that he paid?

A. I couldn't say just what it was; probably in the neighborhood of three or four hundred dollars.

Q. What else did you buy?

30

A. Coal.

Q. What did the coal cost?

A. Probably a hundred dollars for the season.

Q. What else did you buy?

A. Incidental expenses.

Q. What was it that he bought?

A. I can't name anything else that he bought; that is just for the house.

By Mr. Bramhall:

Q. The potatoes and things that went on the table and the eggs and chickens that went on the table, did he raise them?

A. He raised them.

10 Q. Did he contribute those things to the support of the household?

A. Yes, sir.

Q. State approximately, if you can, what those products cost for the supply of the table.

(Objected to.)

A. \$100, \$125, \$150, something like that.

20 By Mr. Fryling:

Q. How much did your son make out of renting this farm?

A. I presume that he made about an amount equal to what he paid me.

Q. Five or six hundred dollars a year?

A. Four or five hundred dollars, \$500 probably.

Q. He used that for himself, did he?

30 A. Yes, I presume so. I don't know just what it was used for, but he didn't give it to me.

Q. You made four or five hundred dollars out of your share of the profits?

A. Yes, I did while he was working the farm.

Q. And during the time that you made these four or five hundred dollars a year out of the profits, did you use that towards the expenses of the payment of running the house?

A. There was expenses that I had to pay. I owed some debts.

Q. Will you answer my question? Did you use any part of that money for expenses of running the house?

A. Possibly, a small amount of it.

Q. How much of that did you use for household expenses?

A. A very small amount; I couldn't say in cash; I don't remember any definite articles that I purchased in the house, but I presume possibly, he may have done so. 10

Q. Who bought the groceries?

A. That is a pretty hard question.

Q. Did you buy the groceries?

A. Sometimes, possibly I did, but I can't quite specify any time that I did.

Q. Did your wife buy groceries?

A. Probably she did.

Q. Did you give your wife money frequently to buy groceries? 20

A. No, sir.

Q. By cash or on credit?

A. Paid cash. I never heard of a bill come in.

Q. What do you know about the amounts that your son paid out for groceries?

A. I know approximately what it would cost to run the farm, the place.

Q. How do you know that?

A. I ran it myself. 30

Q. During the time that he was running the farm, do you know how much groceries were bought?

A. Ran the things the same way they had been run. I know it was worth that.

Q. How often did your son buy groceries?

A. Not very often.

Q. How was the coal bought or was it charged up as the coal was delivered?

A. Paid when it was delivered?

Q. How often did you see your son pay for coal?

A. I know for two seasons—

Q. How often did you see him pay for it?

A. I don't know as I saw him pay for it at all.

Q. How often did you pay for coal?

A. Many times.

10 Q. While he was running the farm?

A. No, sir. When he was buying the coal he bought it through a co-operative deal, the granges.

Q. What were the expenses of all the farm products raised on the farm, how much were the expenses per year?

A. With the value of his work I don't know just how much it would cost. It took up his time, took up his work.

20 Q. Irrespective of his time, what would you say it cost for raising the products?

A. Probably a hundred dollars extra for labor.

Q. Was there any other expense besides that?

A. No. The spray material that I paid half of, it was deducted from the products.

Q. What did that cost?

A. It cost something like fifty dollars or sixty dollars.

Q. A year?

A. Yes, sir.

30 Q. And the other expenses?

A. In apple picking time there was expenses.

Q. What were the expenses there?

A. I couldn't just say during his time of renting, just what his expenses were.

Q. Were there any other expenses by reason of these products?

A. There might be some blacksmith bills or something of that kind.

Q. I understood you to say that they were fifty or sixty dollars a year. Didn't you say that the expenses incidental to growing the farm products, that your son contributed to the house about \$100 to \$150 a year?

The Court: For the table, he means.

10

A. I said the grocer's bill.

Q. You are talking about running the house?

A. Yes, sir.

Q. As a matter of fact, that was more than the expense of all the products that was used on the farm, wasn't it?

(Objected to.)

(Objection sustained.)

20

Q. Didn't you testify a while ago, that the expenses in raising the farm products that you used at the table, amounted to about \$100 or \$150 a year?

A. I meant the value of them, not the expense of raising them.

Q. You meant the value of them?

A. Yes, that is what I understood.

Q. Did you mean that before your lawyer objected?

30

A. I thought I stated it in that way. I didn't mean the expense of raising them.

Q. How do you arrive at the value of those things?

A. I estimated about the amount that it would take to run the house and the value of our poultry and eggs.

By the Court:

Q. The poultry and the eggs and the apples and things of that kind is what you include in the \$100 to \$150?

A. Yes, sir.

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10 FRANK L. LATHAN, recalled in behalf of plaintiff.

Direct examination.

By Mr. Bouton:

Q. How long, prior to September 14, 1918, did you live in New Brunswick?

A. All my life.

20 Q. Were you there living every day during 1919, prior to September 14th?

A. Yes, sir.

Q. What was your business on September 14, 1918?

(Objected to.)

Q. Were you located in business at George and Albany Streets?

30 A. I was.

Q. What were the hours of your business?

A. Working hours?

Q. Yes.

A. From seven in the morning until eight o'clock; probably longer.

Q. Did you observe for any period of time prior to September 14, 1918, the manner in which cars

arriving from Camp Raritan carried passengers when they arrived at this corner near which your business was?

Mr. Fryling: I object. In the first place, the question is identical to that which was asked of this witness on re-direct examination, and I objected then, and the Court sustained my objection on the ground that it was not re-direct examination.

1001

The Court: I did not hear a word of objection from you when the question was asked.

Mr. Fryling: Perhaps that is correct. I object to it on the ground that it is not re-direct examination and on the ground that the question itself is improper and incompetent and that it is immaterial what might have occurred on previous occasions.

The Court: I am rather strongly of that same view, but I am going to permit that testimony, because Mr. Bouton seems to feel so strongly about it, and then we will determine the effect to be given to it later. Certainly it may have something to do with what occurred on that day, that is, the condition of the car on this particular day as to crowds may have considerable to do with this case. I do not know about that. Until it's shown that there was contributory negligence, that is not part of your case.

3002

Mr. Bouton: We would like to ask this witness, if he knows, to tell us what he knows about this particular car on that day.

The Court: Yes, he may do that.

Q. Did you observe, when you saw this car coming towards you, whether or not it was crowded?

A. Yes, sir.

Q. Describe what you mean by that?

A. Regarding the crowd.

Q. Describe what you saw the condition of the car to be.

10 A. I saw soldiers hanging around the back, part of the back of the platform of the car, standing on the steps, the front platform of the car. I didn't see any of them riding on the roof.

Q. Did the inside of the car appear to be crowded or not?

A. Yes.

Mr. Bouton: It is conceded that the summons and complaint, as part of our case, were served September 1, 1922.

20 Mr. Fryling: That is admitted. It is admitted that the summons was served on that day: We make no further admissions.

Mr. Bramhall: I am going to offer in evidence, under the seal of the Secretary of War, the service record of Eugene L. Brennan, showing the date of his discharge.

30 Mr. Fryling: I will admit that Eugene L. Brennan was discharged from military service on October 5, 1920. I admit that he enlisted in military service on May 6th, 1918.

Mr. Bramhall: I offer Public Resolution No. 103, Sixty-fifth Congress, H. R. No. 6361, entitled: An Act to extend protection of civil rights of the individual and military establishments engaged in the present war.

(Paper referred to is marked Exhibit P4.)

Mr. Bramhall: I desire to offer Public Resolution No. 8, Sixty-seventh Congress, joint resolution, terminating the state of war between the Imperial German Government and United States of America and the Military Austria-Hungarian Government and the United States of America, approved July 2, 1921. That shows the termination of the war for the purpose of this record here. 10

(Paper referred to is marked Exhibit P5.)

PLAINTIFF RESTS.

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Mr. Fryling: I desire to move for a non-suit, first, on the ground that the plaintiff in this suit, is not entitled to recover because at the time of his death or preceding the death of Eugene L. Brennan, he could not have recovered in an action, because of his position on the car at that time. 20 Secondly, on the ground that there has been no proof of negligence against the defendant company. Third, that it has not been proved that the plaintiff's intestate was a passenger on the trolley car of the defendant. Fourth, that the plaintiff's intestate assumed the risk incident to the position that he took upon the trolley car of the defendant. Fifth, on the ground that it appears that there was contributory negligence on the part of the plaintiff's intestate. 30

The Court: I would like to ask a question of Mr. Cullings.

HARRY T. CULLINGS, recalled.

By the Court:

Q. When you boarded this car, did the defendant and you get on together?

A. Not together, no, sir.

Q. Different places?

10 A. He was by the side of me, around me, at the time the car came in and there was a crowd there.

Q. Did you see him on the car at all?

A. I seen him go for the car, but I didn't see him on it.

Q. After he boarded the car, did you see him?

A. No, sir.

Q. What part of the car were you riding in?

A. In the rear platform by the door.

Q. Was there a conductor on that car?

20 A. Yes, sir.

Q. And a motorman?

A. Yes, sir.

Q. And where was the station of the motorman?

A. In the front of the car.

Q. Did you see the conductor?

A. Yes, sir.

Q. What did he do?

A. What do you mean—he collected fares.

Q. Did he collect the fares?

30 A. Yes, sir.

Q. Where did he collect the fares?

A. He stood down by the steps as they got on, collected the fares.

Q. Was there a fare box there on that rear platform?

A. Not to my knowledge, no, sir.

Q. How did he collect them?

A. In his hands.

Q. As you got on?

A. As we got on, yes, sir.

Q. Do you know whether Brennan got on the rear platform?

A. As to that I couldn't say, no, sir.

Q. After the car started, what did the conductor do with reference to the fares, if anything?

A. He got through or got what he didn't get, took up the fares as he walked through the car. 10

Q. He walked through the car collecting fares?

A. Yes, sir.

Q. And I think you said it was about four miles?

A. I didn't say I knew the exact distance.

Q. Ordinarily there is a place to ring up fares, but you don't know anything about that in this car?

A. No.

By Mr. Fryling:

20

Q. Don't you know that there was a fare box on a pay-as-you-enter car?

A. Not to my knowledge.

Q. At the rear doors?

A. No, sir.

Q. You are sure you paid your fare?

A. Yes, sir.

Q. Have you any recollection whether you put your fare in the box or handed it to the conductor?

A. Yes, sir. 30

Q. You have a distant recollection as to that?

A. Yes, sir.

Q. But still you are not sure whether there was a fare box on the car?

A. I couldn't remember that; I don't think there was.

By the Court:

Q. Which side of the car did you get on?

A. Facing towards the car, on my left-hand.

Q. What?

A. Facing the same direction; I got on the back platform as the car was facing west towards New Brunswick.

Q. You got on the back platform?

10 A. Yes, sir.

Q. Did you get on the left side or the right-hand side of the platform?

A. The only side that was open on the back.

Q. Which side?

A. That would be the left side as you go facing the direction of the car, that is, the side opposite the other rail.

Q. Was there a double track there?

20 A. No, sir, the other side opposite the station, opposite the store on the corner there.

Q. It was a single track, was it?

A. Yes, sir.

Q. Just what doors were open on that car?

A. Both vestibule doors were open.

Q. Both rear vestibule doors?

A. No; the vestibule doors leading to the car.

Q. There is a vestibule comes out from the back, isn't there?

A. Yes, sir.

30 Q. There is a door on the left-hand side of that vestibule and one on the right-hand side of that vestibule?

A. Yes, sir.

Q. Were both of these vestibule doors open, both on the left-hand and the right-hand side of the car?

A. I can't say as I know exactly.

Q. Is there a vestibule in front of that car, too?

A. Yes, sir.

Q. Were the doors open there?

A. They were open, yes, sir.

Q. At that time, at the time the car was receiving passengers?

A. Not to my knowledge. I couldn't swear they were both open or not.

Q. Could you swear either one of them was open?

A. One of them was open.

10

Q. Was that on the left-hand or the right-hand side of the car as the car was going to New Brunswick?

A. I can't remember.

Q. Is that the way the door was of the trolley car, referring to Exhibit D1 for identification?

A. It is a double end car.

Q. Both ends of the car were the same?

A. Yes, sir.

Q. Does that show the kind of a car it was, so far as the door and platform are concerned? (Showing witness photograph.)

20

A. Yes, but I couldn't swear that is the same car.

Q. So far as the door and platform was concerned, it was the same as this photograph, was it not? Did you notice any difference about the platform and door of this car?

A. Yes, sir.

Q. Don't you know that No. 1909 was the exact car that you rode on and that this is a photograph of the same car?

30

A. I couldn't swear exactly. The car is not exactly the same condition now as it was then.

Q. Do you notice any difference between that step of the platform and the step of the door that you rode on?

A. I can't remember that it was a double door that folded like that.

Q. Do you know whether it was a double door or a single door?

A. As to the door I couldn't recall, no, sir.

Q. Don't you know of any difference between this door and platform and step and the one of the car that you rode on?

A. No, sir.

10 Q. When you got on the car the rear door that you got on, was on the right-hand side of the trolley car, if you were standing facing the front of the trolley car, wasn't it?

A. Yes, sir.

Q. And, as far as you know, that is the only door on the trolley car that was open, isn't that true?

A. Yes, sir, as far as I know.

20 Q. And the only fare that you saw the conductor collect was the fares that he collected on the inside of the car and the fares that he took on the back platform?

A. He stood on the back platform and he took the fares as they got on.

Q. So that the fares that were paid to him as the passengers got on the car were while he stood on the back platform?

A. Yes, sir, he collected fares from the back vestibule windows from soldiers standing in the back.

30 Q. And those are the only fares that you know were collected?

A. Yes, sir.

By Mr. Bramhall:

Q. Where were those fellows situated that he collected fares from, the windows there?

A. On the rear bumper, hanging on the rims of

the car; it is an iron fender that goes around the back.

Q. They were riding on that?

A. Yes, sir.

The Court: I think it is a question for the jury whether or not he was a passenger. The testimony now is that there was only one door open. As far as he remembers it was the rear door. The soldiers as they entered paid their fares to him. 10  
The decedent boarded that car at that place, because he was with Mr. Cullings as they approached the car and he was on the same car when they got to New Brunswick, which one witness told us was four miles distant. He was seen on the front platform of that car, so that from anything that appears in this case, the logical way for him to get there was to have gotten through the rear platform, through the car and to his position on the front platform. He could have gotten there some other way, I un- 20  
derstand that, but from anything that appears now, that was the most logical way, and it will be for the jury to say whether or not he was not a passenger, whether or not his fare was presented and collected, and the fact that he did get to the front platform in this way he had to pass this conductor collecting the fares.

Mr. Fryling: The evidence shows that the plaintiff was guilty of contributory negligence. 30

The Court: The motion for non-suit will be denied.

(Defendant's counsel prays an exception to this ruling of the Court.)

(Exception noted as ground of appeal.)

(Adjourned until Thursday, May 8, 1924, at ten o'clock A. M.)

The Court: I might say that after having looked over the decisions since adjournment last evening, that were given to me on both sides, I have decided that if Mr. Bouton can produce the testimony, in view of the situation being changed in my mind, from the fact that it now appears from the testimony that that door was closed and those people were riding on the outside of the steps with the door closed, that Mr. Bouton ought to be permitted, if he can produce that testimony, to show what had been the practice theretofore, in carrying passengers upon these cars from Camp Raritan to New Brunswick. As I said yesterday, it is not because I think the matter is as important as Mr. Bouton thinks it is, but because, in the event of the plaintiff failing to recover in this suit, and the case being reviewed by the appellate court, if they feel that it is of the importance that Mr. Bouton thinks it is, it would then be in the case. I doubt ordinarily if I would take that course, but Mr. Bouton has been to great expense to bring witnesses from various parts of the United States, and if the matter can be in such shape now so that the decision of this court or in the appellate court may be a finality without the necessity of bringing all those witnesses at great expense that it must be to bring them here, I would like to put the case in that shape.

30 (At this point an adjournment is taken until two o'clock P. M.)

(Continued pursuant to adjournment.)

The Court: It may be noted on the record that this case is opened for the purpose of the plaintiff producing additional testimony.

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CHARLES S. PRYOR, sworn in behalf of plaintiff.

Direct examination.

10

By Mr. Bramhall:

Q. Where do you reside?

A. New York City.

Q. Were you ever in the military service of the United States?

A. Yes, sir.

Q. Where were you stationed?

A. Originally, at Fort Snelling, Minnesota.

20

Q. Were you ever stationed at Raritan?

A. Yes, sir.

Q. Were you ever stationed over at Raritan Arsenal?

A. Yes, sir.

Q. And where is Nixon station with reference to Raritan Arsenal?

A. Adjoining.

Q. When were you stationed at the Raritan Ar-

30

A. I went there June 1st or 2nd, 1918.

Q. What organization were you attached to?

A. O. M. I. S.

Q. Were you a commissioned officer?

A. Not at that time.

Q. Did you become such?

A. Yes, sir; sergeant.

Q. You were a sergeant while you were there?

A. No, sir, I was sergeant from June only until the 1st of October, then I received a commission. Had been in school three months.

Q. Were you there continuously from June until September, 1918?

A. Yes, sir.

10 Q. Did you have occasion to be at Nixon station where the Public Service discharge and receive passengers?

A. I did, at the two stations.

Q. I have reference to Nixon station.

A. Yes, sir.

Q. I will ask you to state to the Court and jury if you observed during those months, the manner of loading the cars with passengers there at Nixon station?

A. I did.

20 Q. State what that was.

Mr. Fryling: I object to that as immaterial, what the practice had been on other occasions other than the occasion involved in this accident.

The Court: The objection will be overruled.

(Defendant's counsel prays an exception to this ruling of the Court.)

30

(Exception noted as ground of appeal.)

Q. State the method of loading the cars.

A. Including the day in question?

Q. Up until the day in question.

A. May I explain it in my own words?

The Court: Yes, without characterizing it.

Q. Don't give your opinion about it, just what you saw.

A. I had a permanent post, being a sergeant was attached to Colonel Harding's headquarters. Part of my duties was to go down to New Brunswick, as well as Metuchen, and sort of look after some of the boys when they got into trouble. After I received a commission I was appointed judge adjutant and my main work simply a part of the work I did as sergeant. I used to go down to New Brunswick during the day and very frequently at night I used to go down a great many times with one of the other sergeants who was on the same work. We took a trolley at Nixon's station, which is on the New Brunswick station from the camp, you walk out of the upper gate to where the M. P. office was and you would go down a short piece of road where the trolley ran between New Brunswick and Metuchen. There were a great many civilians working at Metuchen and there were a great many civilians would take a car, many civilians. When I went down in June our organization was the only organization at the upper gate, that is, the school camp, and we had, I think, about three or four hundred. The barracks were not completed; there were no roads, that is, no paved roads, and the cars at that time were not sufficient to take care of the soldiers who came with us, that is, our school consisted of—that is, we were going abroad, but we never got there. The civilians got on at the lower gate and come up to Nixon station, and invariably all the doors were open and you had to jump to get a seat. I don't think I ever had a seat, everybody that could get on the car got on the car, there was

no use waiting for the second car because the second car would be just about as crowded. Conditions kept getting worse, until the latter part of July, August and September, it was really a very great effort to get over to New Brunswick; you could get to Metuchen because few of the soldiers went there. I have myself gotten on one of these trolleys there—this was when I was enlisted; I never did it after I was commissioned because we  
10 had the use of a motorcycle and sidecar. I have ridden to New Brunswick hanging on to the side of the car and I remember one time very distinctly riding to New Brunswick—

(Objected to.)

Witness: This is not my opinion. This is what I actually did.

20 (Objected to.)

Witness: You want me to give a statement as to actually what occurred.

The Court: What occurred in practice generally, not an isolated instance.

Witness: I did this a number of times, not only once, but very many times because it was my duty  
30 to go in there from the camp as well as when I was off duty and was going in for my own pleasure to some of the dances which they gave there in New Brunswick. A number of times—I can frankly say, there were no times when the cars was not overcrowded and I mean by overcrowded, either hanging on some part of the outside, the front and rear steps, the rear bumper and the left step, which

I heard the testimony here where this boy was; I have seen them standing on that, because it was only one track at Nixon station; the door was open and everybody just swarmed into it. The conductor every time I was on the car, collected the fare from the ground on the outside, a number of cases where I recall my fare, one time—

(Objected to.)

10

The Court: Not a single occurrence, but what was the general practice?

Witness: The general practice was, from my observation, that the fare was collected from those on the outside, and it was done in that way, the conductor sometimes waited until everybody got on, or as many as could pile on, then he would get along and take the fares both the front and the rear—

20

Q. You mean on the outside?

A. I mean on the outside while the car was standing there. While the car was stopped everybody got on, as many as you could get on, he would take your fare and if you objected to paying your fare, which I did, he would say, "Get off or I will put you off," which was told to me, I remember distinctly, because I felt rather strongly about it at the time and remarked—

30

(Objected to.)

Witness: There was collected from myself standing on the platform hanging on and—

By the Court:

Q. Let me ask you how far this single track extended.

A. I cannot tell you the distance from the camp to New Brunswick, but I do know that somewhere between New Brunswick and the camp there is a siding where we used to have to wait for another car coming along, there was some sort of siding, 10 according to my recollection, which was right near to New Brunswick.

Q. Do you know where Highland Park is?

A. Yes, sir; that is the extension from the—I don't know the direction, but the side of that river toward the camp is called Highland Park.

Q. How far from the north part of Highland Park is George Street?

A. I don't know where George Street is.

Q. That is where the post office is. If you want 20 to go to Metuchen, where the trolley car goes to the right, how far do you say that is?

A. I didn't get that.

Q. As you go out the automobile road goes to the left, doesn't it?

A. The Lincoln Highway only goes to that school or church. The trolley goes out by way of Nixon. My recollection is, that it is around that locality.

Q. That is where the double track comes?

A. There is a siding.

Q. I want to know where the permanent double 30 track commences?

A. I don't remember.

Q. You remember that there is a double track to Highland Park?

A. I wouldn't say all the way through, but I do know there is, because I can remember passing. I

think there is a fire station down there somewhere. I don't think it goes beyond the little church.

Q. How far is the little church?

A. I think the little church is half the distance between Nixon and the post office, I would say, approximately. I don't know for sure.

Q. Approximately two miles from George Street?

A. If it is four miles from Nixon station to George Street, I would say about two miles; something around there; I am not sure. 10

The Court: Being familiar with the situation there myself, I do not agree with Mr. Pryor.

Witness: The paved street ends, as I recall it, the edge of Highland Park—

Mr. Fryling: I object. Do not volunteer anything. 20

Witness: I am trying to answer the Judge's question.

Q. Proceed.

A. On numerous occasions I have seen either the motorman or the conductor reach through the open window and collect fares from those on the outside.

Q. Standing where?

A. Standing on the inside, reaching out. This was 30 in the summer time and—

Q. Where were the passengers standing?

A. On the outside, on the step, as well as on the bumper and on the front.

Q. Which steps?

A. The left-hand, and going in both doors would be open at Nixon station. If you couldn't get in

on the front you would try to get on the rear. Some would run around from the front to the rear and would run around to the rear and get places. There was a way to get places. That is the general custom. I have seen it time and time again and I have seen all four doors open so all people could get on.

Q. You said something about stopping at a siding—

10 Mr. Fryling: I don't want to object to every question.

The Court: Is it understood your objection goes to every question put to this witness and any other witness and it will be understood that your objection goes to all this line of testimony, and you may have an exception noted.

(Exception noted as ground of appeal.)

20

Q. You said something about stopping at a siding?

A. You didn't always stop and I don't recall the car stopping on the way from New Brunswick out, coming out. You usually waited for the incoming car.

Q. State whether or not it was the custom and practice where these cars were heavily loaded, to collect the fare, stop up there and collect the fares when they didn't collect them down below?

30

A. Yes, collected fares all the way in.

By the Court:

Q. I understand you to say that many occasions you yourself have ridden on the front left-hand step?

A. No, sir; I myself have ridden on the rear step;

I have never myself ridden on the front left-hand step.

Q. Have you yourself ridden on the left-hand step?

A. Yes, sir; not on many occasions.

Q. Was the door closed?

A. The door was open, as I recall it. I have seen soldiers riding on the step with the door closed, the front and rear at the same time.

Q. Do you know whether or not the fares of those 10 soldiers had been collected?

A. Of every one I couldn't say. The custom was to collect every fare, either while they were standing at Nixon, while they were waiting, sometimes at that little—

Q. I don't think you are now answering my question, as to whether or not you had yourself seen fares collected from passengers who were standing on the left-hand step with the door closed?

A. I cannot definitely say that I have seen fares 20 collected with the door closed. I have done this, I have seen fares collected from people standing on the front step. The door may or may not have been closed.

Q. I wanted your recollection.

A. I couldn't say standing on the rear left-hand step. I couldn't see the front door open or close. My estimation would be that they were.

Q. The windows in the doors themselves were not open? 30

A. I don't know whether they was or not. I would say they wasn't. I don't recall this particular car.

Q. So that the only way of collecting fares from people who were on the outside of the car by a person on the inside of the car would be through either the front or rear windows?

A. No, sir. Not the rear windows would not be,

because the windows, if I may see the photograph, if this is one of the cars with the door—there is the front platform has open windows on, there are windows which will open—

Q. I said either through the front or rear windows.

A. I wouldn't call them the rear windows.

Q. If the doors are closed and the glass is closed then the only way to collect the fares from the outside by a person inside of the car would be either  
10 through the rear or front windows?

A. The windows are next to the door, but not the rear windows, not through the rear of the car. The seats are right up to the door.

Q. Can you pick out three rear windows in that car?

A. Underneath the word "Special." I was calling this the front, if this is the rear of the car, I  
20 was referring to this window.

Q. You were referring to the side windows either on the side of the front or back platform?

A. Yes, sir.

By Mr. Bouton:

Q. You stated a moment ago that they went around and collected fares around the cars from those who were on the cars. State whether or not you saw them collect the fares from those on the outside while the conductor was outside.

30 A. Well, he was standing on the ground while he was at Nixon.

Q. Where were those passengers located that he was collecting from?

A. Any available space they could put their feet on on the outside of the car, on the rear.

Q. Right side, left side or both sides?

A. At Nixon the left side.

By the Court:

Q. These cars that didn't start from Nixon, they came through from Metuchen?

A. I couldn't say where they started.

Q. But they came from beyond Nixon?

A. Some of them would have people in when they got to Nixon and some of them were empty.

Q. You don't know whether some of them started at Nixon station?

10

A. I don't know whether they started without passengers. They had no passengers until they came to Nixon. Where they came from, I don't know.

By Mr. Bouton:

Q. Go ahead and tell what the custom was collecting fares from passengers and people standing on the step, on the inside or left side or right-hand side, whether the doors were open or closed.

A. I have seen fares collected by employes, by one of the crew, from inside from men on the outside, asking for fares. That has happened to myself.

20

Q. You have seen them collected that way?

A. The custom is if they were soldiers; there might be exceptions for civilians. The civilians had the best of it.

The Court: You state now from your observation; do not state what your opinion was. Tell us the custom about collecting the fares of those on the step.

30

Witness: The custom was to collect fares, but if they were on the front or back step or through the windows, the custom is so general that there wasn't any question about it. It was many times I went through with it.

JOSEPH E. FINN, sworn in behalf of plaintiff.

Direct examination.

By Mr. Bramhall:

Q. Where do you reside?

A. Newark.

10 Q. Were you stationed at Raritan Arsenal some time during the year 1918?

A. Yes, sir.

Q. Were you in military service?

A. Yes, sir.

Q. Just state how long you were stationed there prior to September 14, 1918.

A. From July 10, 1918, to October 31, 1918. Again from February 2nd to February 6th—

20 Q. Never mind that. What arsenal were you attached to?

A. The I. O. M. S.

Q. The same as Mr. Pryor?

A. Yes, sir.

Q. Were you a private or what was your rank?

A. Ordinance sergeant, non-commissioned officer.

Q. Did you have occasion to go to Nixon station during the time you went in service there?

A. Yes, sir.

Q. How often?

30 A. Every night.

Q. Did you observe the cars of the Public Service Company which was carrying passengers from Nixon station to the town of New Brunswick?

A. Yes, sir.

Q. How often did you observe the cars, did you see them loading or unloading passengers?

A. Every night that I was there.

Q. State in your own way what the custom was of this company with reference to the manner of loading the cars and approximately the number of passengers that would get on the cars, where the passengers would ride on these cars and how the fare was collected, if any, and, generally, what took place when they undertook to load these cars with passengers going into New Brunswick.

A. I always travelled between Nixon and New Brunswick between six and six-thirty every evening. The men left camp at retreat, 6:30, and I travelled every evening between the two towns, Nixon and New Brunswick, and if I was going to New York from New Brunswick, I would get on a train, I had to get the first car that came along and in generally every instance I had to hang on the outside. 10

Q. Tell us generally what you did and what the rest of them did.

A. Well, the cars arrived at Nixon station; sometimes there were passengers in them, but most recently there were no passengers. When the cars arrived they were open, both ends, and the soldiers rushed on as best they could. I don't remember travelling on the cars when the doors were closed because the doors couldn't close on account of the men. I waited very frequently and got on the back myself and stood with one foot on the bumper and one arm around the stanchion, and my fare in every instance that I can remember was collected by the conductor, either by reaching out or reaching over the head of the man in front of me, and in many cases when the car came to a stop the conductor got up and stood at the front and waited until the car was crowded, then he signalled the motorman and then the car would stop. If there were any men hanging on the platform it was quite often he collected the fares from the men outside and then 20 30

he would get on himself, and in the interval between Nixon and New Brunswick he worked himself from the front of the car to the rear and collected all the fares.

Q. Were there any stops made?

A. Occasionally, at the beginning of New Brunswick.

Q. But not until you came to Albany Street?

10 A. Yes, down in the lower part of the town. I am not familiar with the name of the street.

Q. Do you know where they cross the river?

A. Yes, sir.

Q. Is it there, about the first stop?

A. Yes, sir; very few soldiers ever left the car before the bridge, not until they got to the main part of the town.

20 Q. State whether it was the practice to carry soldiers on both steps, both on the left and right-hand side of the car during that interval you were stationed there.

A. It was at all times, and in the latter part of November we received 6000 men who were sent to the camp for France.

Q. I don't think that would be proper, after the accident which was on the 14th of September. Will you tell us what the custom was with reference to the manner and method and the extent of loading these cars?

30 A. That is what I have already stated, they were at all times packed.

Q. To what extent, which step, what step?

A. Both the front and rear on both sides, if there was any room on the left-hand side.

Q. Was it not the custom and practice of the company to collect fares from the passengers from soldiers who were riding on all the steps?

A. It was. I never rode on a crowded car without

paying my fare, and every crowded car I rode on the rear platform hanging on the outside or just inside of the door.

Q. Did you ever see them collect fares from passengers riding on the left-hand side step?

A. Yes, sir, as I said, when the conductor got on the front of the car he collected from the man on the outside.

Q. You have seen him do that on both sides of the car? 10

A. Yes.

Q. Both the left and the right?

A. Yes, sir.

Q. And do you know whether or not the doors were open or closed?

A. On the occasions when I saw people getting on the front I wasn't waiting for that particular one, I was waiting for another one.

Q. Did you ever see the motorman collecting fares? 20

Mr. Fryling: I object. There is no authority for the motorman to collect fares.

The Court: The question may be answered,

Q. Tell whether or not you ever observed the motorman collecting fares through the windows or sides.

A. No, I didn't. 30

Cross-examination.

By Mr. Fryling:

Q. Did you ever ride on the left step of the car when the door was closed?

A. No, sir.

By the Court:

Q. Did you observe where the continuous double track commenced?

A. No, sir; it is simply my recollection that it was somewhere between Nixon and New Brunswick, but nearer Nixon.

Q. You don't remember how far from New Brunswick the double tracks extended—by the continuous  
10 double track extended I mean out towards Nixon, do you?

A. No, sir; but the best of my recollection is that it was just beyond the outskirts of New Brunswick.

Q. Do you know where Highland Park is?

A. No, sir; not exactly.

Q. Highland Park is the borough which is toward Nixon from the river; New Brunswick ends at the river; Highland Park is a borough that runs out  
20 to the Lincoln Highway.

A. Yes, sir.

Q. That you call New Brunswick, do you?

A. Yes, sir.

Q. You regard that as part of New Brunswick?

A. I did in my testimony.

By Mr. Fryling.

Q. At that place, at that part of New Brunswick,  
30 the double tracks are there, are they not?

A. They are there.

Q. And where you say that the cars usually made a stop at the outskirts of New Brunswick, of Highland Park, there were double tracks, were there not?

A. Yes, sir; that is in the area of Highland Park.

Q. Do you know where George Street is, where the post office is?

A. From what was brought in Mr. Pryor's testimony; before that I hadn't known. I know where the post office is, yes.

Q. How far is that from the place where you say the cars usually made stops?

A. The cars began making stops at the junction where the Lincoln Highway joins the street, where the tracks are laid.

Q. That is the northerly end of Highland Park? 10

A. Yes, sir.

Q. About how far is that from where the post office is?

A. I should say it is probably two miles or two and a quarter.

Q. And in that space of two or two and a quarter miles the car made a number of stops?

A. No, not a number. The stops were infrequent.

Q. But there were occasionally some stops? 20

A. There were, yes, sir.

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TRAYTON BALLARD, SWORN in behalf of plaintiff.

Direct examination.

By Mr. Bouton:

Q. Where do you live? 30

A. New Brunswick, New Jersey.

Q. How long have you lived in New Brunswick?

A. I have lived in New Brunswick since last September.

Q. Did you live in that vicinity before that?

A. No, sir; had been in the service. I was stationed at Camp Raritan from June 1, 1918, to March, 1919.

Q. As I understand it, you were at Camp Raritan from June 1, 1918, up to and beyond September 14, 1918?

A. Yes, sir.

Q. And you were in the military service?

A. Yes, sir.

10 Q. Were you connected with the same organization that Mr. Pryor was?

A. Yes, sir.

Q. Were you familiar with the place called Nixon's station?

A. Yes, sir.

Q. State whether or not that was where the defendant operated its cars for carrying passengers, soldiers to and from New Brunswick.

20 A. We used to go to Nixon to get on the cars for New Brunswick.

Q. How often did you visit Nixon station during the time you were there up to the 14th of December, 1918?

A. I don't remember, four or five times a week.

Q. State if you observed the method of loading and the extent to which the cars of the defendant were loaded and the manner of collecting fares and how the cars were loaded at that point at the time you were at the station.

30 A. We would go to Nixon and wait for the cars and when the cars came along they were usually crowded with the civilians from the lower gates and they would all rush for the cars and if you were lucky you got inside of the car, and often you could stand on the steps or wait for the next car to come along, and that was likely to be as crowded, and it

was wise to get the first car that came along and take your chance on the rear bumper or rear step or wherever you could get a hand on.

Q. State to what extent and how they were loaded and how they rode on those cars.

A. They would ride anywhere, on the rear or front steps or on the rear bumper, and I always paid my fare, whether you had a seat or whether you had a chance to hold on; if you were on the car they would collect your fare.

10

Q. Did you ever observe people riding on the left-hand step, both front and back?

A. I don't recall them riding on the front steps, but on the rear steps usually, both doors open on the rear because the cars were too crowded to close the doors, they could not close the doors at Nixon.

By the Court:

Q. What do you say about the front doors?

A. The front door was on the fast line cars, you could get that if you were lucky. The fast line cars, they wouldn't allow us on the front end of the car. The yellow cars, they would open the right-hand door, as I remember, in front, and usually both the front doors.

20

Q. How about the left-hand front door?

A. I don't remember that being open.

By Mr. Bramhall:

Q. Did you ever ride on the inside step of the car?

30

A. I never did myself.

Q. You saw people riding on them?

A. Yes, sir.

Q. Did you ever see them collecting fares from the windows?

A. Yes, sir; they used to stand all around the rear end of the car.

By the Court:

Q. Counsel is asking about the left front step.

A. No, sir; I haven't seen them riding on the front left step; I don't recall them riding on the left front; I got on the rear end myself.

By Mr. Bramhall:

10 Q. Did you observe them collecting fares when they were standing on the left rear step?

A. Yes, sir.

Q. What about standing on the bumper of the car, state whether or not they collected fares?

A. They didn't collect fares—

Q. How did they collect fares, tell what the conductor did.

20 A. Usually if he couldn't collect the fares you would pass your fare to the man close to you and he would hand it over to the conductor, he would usually hand it over. I don't know whether the conductor got it or not, but I paid my fare always.

Q. State whether you ever saw the conductor go on the ground and collect fares?

A. Yes, sir, he did.

Q. State whether or not this condition obtained from the time you went there up until the 14th of September.

30 A. At the time I went there in June, it was not so bad, but after the crowd began to get there you could never get a car anywhere in town after six o'clock at night.

By the Court:

Q. When did the crowd come up from Camp Dix?

A. I think the camp began to fill up about July and August.

By Mr. Bramhall:

Q. You state now that later in the summer they were loaded more heavily, but that occurred, say, on the 14th of September, and how were they loaded at that time?

A. They were packed always at that time.

Q. State whether or not it was a single track at that point.

A. It is a single track to Nixon, as I remember, 10 and there is a turnout just beyond Nixon where the cars had to wait, sometimes for the fast line coming from New Brunswick, or from the other way. The fast line seems to have the right of way. The fast line had a double track a short distance for a turn out.

Q. That is where they had a passing station?

A. Yes, sir.

Q. From there to New Brunswick, do you know how far it was that there was only a single track, 20 if you know?

A. It was a double track all the way from Highland Park, but not until you got almost to Highland Park the double track didn't start, almost to Highland Park.

Q. Then after it left Highland Park, was it a single or double track?

A. A double track all through Highland Park.

Q. And then up George Street, New Brunswick?

A. All through, right up to George Street. 30

Q. How far was that?

A. From the camp?

Q. No, from George Street to where the double track begins.

A. About two miles.

Q. It would be about half the distance then?

A. I should say, not quite half.

Cross-examination.

By Mr. Fryling:

Q. During September, around that time, when the camp had a great many soldiers there and trolley cars came along the soldiers took sort of possession of the trolley car, didn't they?

A. No, there the possession was taken of them  
10 by the civilians before they got to us.

Q. What was left of the cars the soldiers took sort of a forcible possession of them?

A. I wouldn't say forcible. You had to ride to get to New Brunswick, that was the only way to go.

Q. Irrespective of what anybody might say they got on any part of the car they could?

A. Any part of the car you could get, yes, sir.

Q. You went to New Brunswick three or four  
20 times a week?

A. On an average of three or four.

By the Court:

Q. Frequently early in the evening?

A. Not until after retreat.

Q. I suppose you went there for pleasure?

A. Yes, sir.

Q. You had no business there?

A. No, sir.  
30

Q. I suppose that is so with most of them?

A. Yes, just for some place to go.

By Mr. Fryling:

Q. On those occasions that you speak of when you saw those trolley cars loaded or travelling, the front left door of the trolley car was always closed?

A. I don't remember the left door being open, but the front right door was frequently open.

Q. The front right end door to let passengers get on?

A. If there were passengers on the car, when we were on the front end, the motorman would open the front end of the car and he didn't get a chance to close it before they got on, whether they let them on or not.

Q. The soldiers would swarm on so he couldn't close the right front door; that is true, isn't it? 10

A. Yes, sir.

Q. And some times both of the rear doors would be open?

A. In the majority of times both rear doors would be open.

Q. And you never saw any one riding on the left front step when the door was closed?

A. I don't recall them riding on the left front step. 20

Q. The step that you say you saw them riding on, the door at that step was always open?

A. Always open, yes, sir, both rear doors were open.

Q. And those are the steps that you saw them ride on?

A. Yes, sir.

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FRANK ZUNINO, sworn in behalf of plaintiff. 30

Direct examination.

By Mr. Bramhall:

Q. Where do you reside?

A. Highland Park.

Q. Where were you residing during the spring and summer of 1918?

A. Highland Park.

Q. The same place?

A. Yes, sir.

Q. State where you reside with reference to the tracks of the Public Service Company.

A. The left going into New Brunswick from Newark.

10 Q. State what, if anything, you observed with reference to passengers riding on the outside of these cars on the way from Nixon station to New Brunswick during the period you were living there up until the 14th of September, 1918.

A. How they were riding?

Q. What?

A. I didn't get that.

20 Q. Just tell the Court and jury whether you saw at frequent intervals as to passengers or people riding on the outside of these cars that were proceeding from Nixon station to New Brunswick, commencing back in the spring of 1918, up until the 14th of September; that is as late as you are allowed to testify to.

A. The cars were very crowded, riding all over the car.

Q. What do you mean by all over?

A. The steps, bumpers, on the roof.

30 Q. State whether or not you saw people riding on the left-hand step of both the front and back.

A. I did, even on the front bumper, hanging on.

Q. How often did that occur, was it daily or weekly?

A. Every night around 6:30 or 7:30 I used to work at the arsenal and quit at 4:30 to get my supper and then walking to New Brunswick I used to often see this.

Q. How long were you working at the arsenal prior to the 14th of September?

A. The latter part of 1917, that is the winter, until the winter of 1918.

Q. Where did the double tracks commence?

A. Sixth Avenue, Highland Park.

Q. And continued into George Street, New Brunswick?

A. Yes, sir.

10

By the Court:

Q. How far is it from Sixth Avenue to George Street?

A. About a mile.

PLAINTIFF RESTS.

20

ALBERT SUTTON, sworn in behalf of defendant.

Direct examination.

By Mr. Fryling:

Q. Where do you live?

A. New Brunswick.

Q. What is your business?

A. General contracting.

30

Q. On September 14, 1918, what was your business?

A. Worked at Camp Raritan.

Q. And on the evening of September 14, 1918, did you go from Camp Raritan to New Brunswick?

A. I did.

Q. Did you go in a Public Service trolley car?

A. Yes, sir; on the front left-hand side.

Q. Where did you board the car?

A. At the front of the camp entrance.

Q. (Showing witness photograph) I show you a photograph marked D1 for identification and ask you if you recognize that as the car, or the kind of the car that you boarded, and whether that photograph is a correct representation of the steps, platform and door of the car?

10 A. Yes.

(The photograph is offered in evidence and marked Exhibit D1.)

Q. Were there many people boarded the car at the same time?

A. There was two soldiers, one on each side of me.

20 Q. Did anybody else come on the car?

A. The car was jammed up all over.

Q. Did you make an effort to get into the car?

A. That is how I came to take the other side.

There was no other way of getting on.

Q. When you boarded the car was it moving or standing still?

A. Standing still when I got on.

Q. When you got on, did you get on the same time as these other two people got on that you speak of?

30 A. I am not sure; I wouldn't say that exactly sure; I think one was on, and I think one got on at Camp Raritan, although they may have both got on; I didn't notice that in particular.

Q. When you got on, was the door open or closed?

A. Closed.

Q. How long did you continue on the car?

A. From there to New Brunswick.

Q. Whereabouts in New Brunswick?

A. George Street.

Q. All that time was the door closed?

A. It was always closed. I never had known them to open it, the crowd was so great inside.

Q. Did you pay your fare?

A. No, sir.

Q. Did you see whether or not the two soldiers that were on the steps with you paid their fare?

A. I don't think so.

Q. Did the conductor or motorman or any one else at any time that you were on the car, make any effort to collect the fares from you or any one of you standing on that step? 10

A. No, sir; it was impossible for the conductor to get out of the car; he was pinned in so closely.

Q. And before this car stopped suddenly, were there any fares collected on the ground?

A. I don't know about that. I don't know if there was any collecting done outside. I know there was no one came near us for it. 20

Q. Did anything occur on the trip before you got to New Brunswick, any effort made to put you off the car?

A. I think at one place—I am not sure, but there was one place we stopped and he demanded us to get off the car or pay our fare. I didn't see him. I could hear him talking.

Q. Who was that?

A. I think it was the conductor. I am not positive. 30

Q. Did you get off?

A. No, sir.

Q. Did you notice anybody get off?

A. No, sir.

Q. Were any fares paid?

A. I couldn't say that. That was in the rear of the car.

Q. At that time nobody came near you to collect any fare?

A. No, sir.

Q. You stayed on the car until it got to George Street?

A. Until they struck George Street.

Q. (Showing witness photograph) I show you a photograph and ask you if you recognize that as a picture looking west on Albany Street at George  
10 Street?

A. Yes, sir.

(The photograph referred to is offered in evidence and marked Exhibit D2.)

Q. When you got to George Street, was there an accident?

A. Yes, sir.

Q. What happened?

20 A. When we got to George Street there was another car coming from Albany Street; we hadn't got to George Street yet, we were about a car length from George Street, and the man in front of me stepped back, and I stepped back as far as I could, and paid no attention to the man in back of me and I felt something grab my arm as if it were turning towards the way the car was coming; that was all until he hollered he was hurt.

Q. You were standing on what part of the step?

30 A. The center of the step.

Q. Toward the front end of the car, was there anybody?

A. There was a man in front of me.

Q. Was he in uniform?

A. He was in uniform, and then I was next to him and this man that got caught was the one next to the car.

Q. All the three of you on the front step?

A. Yes, sir.

Q. And you were in the center?

A. Yes, sir.

Q. And you say that the man in front of you would lean in?

A. Yes, in the vacancy.

Q. The door of the car was no further than the body of the car?

A. The door step was there, going up the step, 10  
it left us about ten inches.

Q. There was more space in the door than the body of the car?

A. Yes, sir; about ten inches or a foot.

Q. So the man in front of you leaned in toward the door?

A. Yes, sir.

Q. Did the car pass you?

A. Just went by me.

Q. Neither you nor the man in front of you was 20  
injured?

A. No, sir, wasn't touched at all.

Q. And you heard some exclamation?

A. I felt something grab my arm and I turned and I saw his body going with the other car that was going down George Street. That was the last and then it was all confusion.

Q. What was then?

A. The soldier jumped off and he said——

Q. Did the car stop? 30

A. They stopped after running about eight or nine feet.

Q. Where was the man then?

A. He was about seven or eight feet in between the cars.

Q. Were the two cars stopped at that time?

A. They were stopped at the same time.

Q. What did you do?

A. I went home.

Cross-examination.

By Mr. Bramhall:

Q. How soon after this thing happened did you leave, immediately?

10 A. Immediately. I knew there would be trouble and I left.

Q. You didn't stay there to help pick him up?

A. No, sir, not at all.

Q. You didn't know of any accident happening or didn't see his position at all before he was struck?

A. Yes, I saw fast between the cars, that was all.

Q. I mean before the car struck him, you didn't observe his position on the car?

20 A. No, only I knew he stood alongside of me, because I could feel his feet against mine.

Q. You didn't notice where these other men got on?

A. No, but they were all on all the while we were riding; I don't know where they got on; I know one of them got on at Camp Raritan; whether the other one got on at Nixon I don't know, but I thought both of them got on at Raritan.

30 Q. You don't know whether they paid their fare previously to getting on?

A. No.

Q. Which one was it that got on at Nixon, the one that stood in front of you or the one nearest the car?

A. That I couldn't say, but I know one of them was on when we left Camp Raritan; I am positive

there was one; I thought there was two there; they always jump on there when the car came along.

Q. How long had you been working at that camp prior to this accident?

A. A year or a year and a half.

Q. Had you been in the habit of riding in crowded cars—

(Objected to as not cross-examination.)

Q. You say you are a contractor; in what line of contracting are you? 10

A. Shore work and all such work.

Q. And for whom?

A. Different parties in New Brunswick. I sewered off the City of New Brunswick.

Q. You now live in New Brunswick?

A. Yes, sir.

Q. And you didn't give your name to the conductor at the time this accident happened? 20

A. No, they didn't know I was on the car.

Q. How long afterwards was it that they did observe that you ere on that car?

A. Shortly after I had been notified; I don't know whether it was thirty days; I was notified if they wanted me they would call me.

Q. Who notified you that you were on that car?

A. I couldn't say.

Q. Was the complaint made by this company that imparted that information to you? 30

A. No. There was a list or something started at the time. I think it was the motorman that told me, "You are wanted in case of a lawsuit comes up," and I asked him what it was and he told me, he says, "That fellow is suing for damages or going to sue," something similar to that.

Q. You say that was thirty days after the accident?

A. Thirty days or sixty days; I don't remember; it is quite a long while ago.

Q. Did this motorman interview you?

A. No, sir, not a word. I wouldn't know him.

Q. Did he tell you what he knew about it?

A. No, sir.

Q. Did you ever tell anybody about it before you  
10 came in the court room?

A. No, sir. I kept quiet about it because I didn't want to come here.

Q. You never told anybody until you became a witness?

A. Yes, sir.

By the Court:

Q. I understand you got on at Camp Raritan?

20 A. Yes, sir.

Q. Camp Raritan is the next station?

A. Yes, sir.

Q. And further away from New Brunswick than  
Nixon?

A. Yes, sir; about half a mile.

Q. When that trolley car came up to Nixon, did  
you get off there?

A. No, sir.

Q. You stayed on?

30 A. Yes, sir.

Q. You were there all the time the trolley car  
was at Nixon?

A. Yes, sir.

Q. Did anybody, either at Nixon or between Nixon  
and New Brunswick, collect a fare from anybody  
on that left front step?

A. No, sir.

By Mr. Bramhall:

Q. Did you see what the other men were doing, the two men riding on the side of you?

A. I saw what was done on the side where I was; it was all I was looking at.

Q. Did you observe what they were doing as they were riding along side of you?

A. Yes, sir.

Q. What were they doing?

10

A. Standing there waiting for the car to start. It only stopped a moment or two.

Q. Where?

A. At Nixon's.

Q. After you left there you heard some disturbance about fare?

A. That was where they stepped down again, hollow.

Q. Where is the hollow?

A. Before you reach Nixon's it goes up into a 20 hill, before you go up this steep hill.

Q. Who was making this disturbance?

A. The conductor was making a fuss. He said that anybody that didn't pay his fare could get off the outside.

Q. You don't know whether they did pay their fare?

A. I didn't see anybody pay their fare.

Q. But you don't know whether they did or not?

A. No, sir.

30

Q. You don't know where these men came from, whether they had been previously on the car?

A. The two soldiers?

Q. Yes.

A. I can swear that one got on up at the camp; I think the two of them; I am not positive, but after we left Nixon there was nothing got on.

Q. You don't know whether they were previously on other parts of the car or on the steps of the car?

A. If they had been in the car they wouldn't come around that place where I was.

Q. You mean if they had been on the back steps they wouldn't have come around the front steps?

A. They wouldn't come if they had been on the back steps. It is a poor place to ride.

Q. Who got you in this?

10 A. I don't know.

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EMIL FITZKE, sworn in behalf of defendant.

Direct examination.

By Mr. Fryling:

20 Q. Where do you live?

A. Perth Amboy.

Q. What is your business?

A. Machine operator.

Q. By whom are you employed?

A. National Lead.

Q. On September 14, 1918, were you a conductor employed by the Public Service Railway Company?

A. Yes, sir.

30 Q. And were you in charge of this trolley car that had this accident?

A. I was.

Q. What was the first that you knew of anybody riding on the front left step of the trolley car on this particular trip?

A. Well, I didn't know the man was there until I got up to George and Albany Streets, just as the car was pulling in I heard a woman scream.

Q. Did you at any time collect fares from any passengers riding on the left front step of that car?

A. No, sir.

Cross-examination.

By Mr. Bramhall.

Q. How long had you been conductor for this com- 10  
pany?

A. Previous to the accident?

Q. Yes.

A. I couldn't exactly say, to tell the truth. I don't remember what day I started.

Q. Can't you give us some inkling about how long you had been there, a week or a month?

A. At the time I started until I quit, that was in November, was somewhere between nine and ten 20  
months.

Q. Running on this line all the time?

A. Not all the time. I was only an extra man, but I was most of the time on that run.

Q. Did you ever break in as a motorman during this time?

A. Yes, sir.

Q. What was the seating capacity, crossways or lengthwise?

A. The front, past the door, were front ways, and then they were crossways. I believe the car held 30  
about fifty passengers seated, between forty-five and fifty.

Q. Do you know how many passengers you had on this particular date?

A. At the time of the accident?

Q. Yes.

A. Between fifteen or twenty.

Q. At the time of the accident?

A. Yes, sir.

Q. Then your seats were not all filled in the car?

A. Not at the time of the accident, no, sir.

Q. How many had you had on this car at the time it left Nixon?

A. Between 110 and 125; I couldn't say exactly.

Q. Where did the motorman stand in this car, where was his controller box?

10 A. In the front end.

Q. Whereabouts in the front end was it? You are familiar with this type of car?

A. Yes, sir.

Q. What type is it?

A. 1900 type.

Q. And where was the air with reference to the controller box?

A. The air was on the right-hand side of the controller box, about two feet from the controller box.

20 Q. Let us get at it this way; this is the controller box here and the air is over to the right about two feet? (Illustrating.)

A. Yes, sir.

Q. Where was the air with reference to the front center of the vestibule?

(Objected to as immaterial and as not cross-examination.)

30 Q. Where in reference to the center of this vestibule is the controller box?

A. On the left-hand side.

Q. (Illustrating.) About here is it?

A. Yes, sir.

Q. Where is the air?

A. About two feet over.

Q. About over here?

A. Yes, sir.

Q. Where did the doors commence, at the left of the motorman?

A. Yes, sir, on the left and right, both.

Q. Does the door commence about where the bend of the car is, that is, from the straight side—I mean, how much space is there between the door and the controller box, is the door next to the motorman and the controller box?

A. About a foot, a foot and a half.

10

Q. (Illustrating.) So we will say this is where the motorman was standing and the door was about a foot from his left-hand?

A. The handle is about a foot from where he opens the door.

Q. There is a handle there for the motorman to operate this door?

A. Yes, sir.

Q. And this door is glass, the upper half of it?

20

A. Yes, sir.

Q. So that the motorman by turning, slightly this way, can observe the door of the car and see what the situation is?

A. At that time he would have a hard job to determine what the condition was, the soldiers were surrounding him so.

Q. He had room enough to operate his car?

A. Just about, because I have done it many times.

Q. These doors, how are they opened?

30

A. With a handle.

Q. Was it air control?

A. No, sir.

Q. Just merely by the handle?

A. Yes, sir.

Q. Did that door buckle outward or inward?

A. Inward, that is why it would be hard for the

motorman to open it in case there was some one standing out there.

Q. The doors move together? (Illustrating.) Here is the door here and here is a hinge in the center, is there not?

A. On the 1900 door I don't believe there is a hinge there.

Q. Look at that and see if there is not a hinge on that door, look at that picture?

10 A. Yes, there is a hinge on it.

Q. Then if there is a hinge there it is capable of being opened?

A. Yes, sir.

Q. From the floor of this platform I wish you would tell the Court and jury about what the distance is down to the level of this step?

A. I don't know.

20 Q. About what would it be? Here is the platform I am standing on and down here are the steps. What was the distance from the top of that step up to the platform, a foot, or how far would it be?

A. About a foot.

Q. On the side of the car, immediately in front, under the word "Special," state whether or not the seats ran lengthwise or crosswise?

A. Lengthwise.

30 Q. During the operation of this particular car on this day do you know whether or not these windows were capable of being lowered or not? How did the windows operate, up or down, or did they go down in the body of the car or were they pushed up?

A. Down in the body of the car.

Q. State whether or not you had the windows open on that occasion?

A. I cannot state, no, sir.

Q. The middle of September?

A. It keeps warm.

Q. Do you have any rules and regulations with reference to the ventilation of the car?

A. The orders from the company were if any passengers wanted them open to open them, but we had ventilators in the car.

Q. Where the motorman was operating his car, were those windows capable of being lowered or raised?

A. If it was desired, yes, sir.

10

By Mr. Fryling:

Q. Did you collect any fares on the ground before the car started from the camp?

A. No, sir.

Q. Did the motorman ever collect any fares?

A. Not to my knowledge.

PLAINTIFF RESTS.

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DEFENDANT RESTS.

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Mr. Fryling: I desire to move for the direction of a verdict for the defendant for four reasons: First, that the plaintiff is not entitled to recover in this suit, because if the decedent had lived, he would not have been entitled to recover. Secondly, there has been no proof of negligence on the part of the defendant. Thirdly, on the ground that the plaintiff's decedent assumed the risk of riding in the position that he took on this car. Fourthly, on the ground that it appears that the plaintiff's decedent was guilty of contributory negligence. Fifthly, that there is no proof that the plaintiff's decedent was a passenger in the trolley car, and that there is now positive

30

proof that he was not a passenger, and was a trespasser, or, at best, a licensee, my contention, however, being, that he was a trespasser.

The Court: Just before the adjournment of court last evening a motion was made for a non-suit and the motion was denied. The decision of that motion was based on a misapprehension by the Court of a very important item in the testimony. It has  
10 entirely escaped my attention, that the testimony showed that the front left-hand door was closed and that the plaintiff, with another, or others, was on the step outside of that door holding fast to the stanchions. The stenographer's record shows that such was the testimony. In view of that situation, it was insisted upon behalf of the plaintiff that it was  
20 important to show the previous custom of the defendant company in carrying passengers from Camp Raritan to New Brunswick, with reference to the crowded condition of the cars, and the collection of fares of those who were permitted to ride upon the steps and bumpers of the car. I have some doubt about the relevancy of that testimony, but after a very careful consideration of the cases submitted on both sides, between the adjournment of Court last evening and this morning, I came to the conclusion, in view of the item of testimony which I have overlooked in denying the motion to non-suit, that that ruling was an erroneous one and that the  
30 non-suit ought to have been granted. But in view of the insistence of the plaintiff that the custom referred to was important, under the circumstances, I concluded that the plaintiff ought to have the opportunity of showing what that custom was. My conclusion that the plaintiff ought to have that opportunity was influenced by the fact that the witnesses in the case have been gotten together with a great

deal of difficulty and come from long distances, and, although personally I had considerable doubt, and still have, whether or not that would have any influence in the decision of this motion, or indeed, in the decision of this case, I felt that if this case should be appealed, and the Appellate Court should differ from my view, the whole matter then would be before the Appellate Court, including the testimony relating to previous custom.

It is very true, as has been suggested in the argument, that the case of *Trussell v. Morris County Traction Company*, 79 L. at p. 535, says: "A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride, with the express or implied consent of the company." Admittedly, in the *Trussell* case, the plaintiff was a passenger, that is, the plaintiff's decedent was a passenger on that car. He was on the rear step. The conductor knew he was there because he received his fare. He was thrown off the car while rounding a sharp curve and fell to the ground and was killed. 10 20

Another case to which reference is made is *Hop-poch v. Easton Transit Company*, 77 N. J. L., 342, which, again, is a case where the plaintiff rode upon the step of the front platform, but again admittedly he was a passenger and it was known to the conductor that he was a passenger upon the car, because it appears that he paid his fare. The Court said, "Moreover, it was fairly open to the jury to find from the testimony that the plaintiff rode on the step with the knowledge and consent of the motor-man and conductor. Under such circumstances he was not conclusively guilty of negligence." 30

Another case to which reference is made is *City Railway Co. v. Lee*, 21 Vr. 435. The Court, in sustaining the verdict said, by Mr. Justice Knapp, "The position on this outside platform undoubtedly was attended with some risks and exposures. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; but there is a liability of collision with such vehicles in passing." And, then omitting a portion of the paragraph, it says: "But he was not presumed to know that the company's road was so constructed, or its cars so run as to render a position in which it invited him to ride, a dangerous one." This was a case where he was brushed off in going through one of these turn-out switches by a passenger similarly on the inside running-board of the other passing car. Admittedly in this case, if there had been no one on the running-board he would not have been in danger, there would have been plenty of room for the passing of another car on the inside with one person standing there or with two persons standing on one car, but where they were on both cars, then there was a danger. But here I come to the sentence I omitted; "And had the plaintiff received his injury from such cause"—that is, vehicles passing on that side of the car—"It may be that negligence contributing to his injury may be imputed to him." I find a case exactly in point in Pennsylvania, and I will read the whole decision: "Judgment non obstante veredicto was entered by the Court below on the ground of the contributory negligence of the plaintiff. It might well have been entered for failure" (that is, a judgment of nonsuit) "to establish any negligence of the defendant company which caused the injuries sustained. The

contributory negligence of the plaintiff could not well have been clearer. He was eighteen years of age and thoroughly familiar with the situation surrounding the car upon which he became a passenger. When he attempted to board it, he found it crowded, and, not being able to enter it, he stepped on the lower left front step. He knew that on the adjoining track cars would pass the one upon which he was riding; and the clearance between them was but six inches. While standing on the step of the car, with his body extending beyond the clearance and with his face turned toward the inside of the car, another approached on the adjoining track, and of course, struck him. That he cannot recover is to obvious for discussion. *Harding v. Philadelphia Rapid Transit Co.*, 217 Pa., 69, 66 Atl. 151." In this case this double track extended from the easterly end of Highland Park, and, as one witness said, it was a mile to where the accident happened, and other witnesses, who are not quite so frank, say that that distance was two miles, and this accident did not happen until near the end of that run in George Street, New Brunswick. The witnesses who testify on that subject say this car made an occasional stop, at least from the easterly end of Highland Park, where the double track begins, into New Brunswick. So if it were a single stop this passenger, or this occupant of the step, would have had opportunity either to leave the car or get another position in the car, if, by the leaving of passengers, room was afforded.

Referring to the *Harding* case, the Pennsylvania Court in a *per curiam* opinion, said: "One riding on the running-board of a small car, outside of a lowered bar, is negligent *per se*, and cannot recover for injuries received, whether he could have got a safer position or not."

I do not believe our New Jersey Courts go quite as far as those Pennsylvania cases on the subject of contributory negligence, but I am very much influenced by what Mr. Justice Knapp says in the case of the *City Railway Company v. Lee*, from which I have already quoted where he says: "The position on this outside platform undoubtedly was attended with some risk and exposures. One riding in that manner is chargeable with the knowledge that the public highway in which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing. And had the plaintiff received his injuries from such cause, it may be that negligence contributing to his injury would be imputed to him." In this case I had some doubt as to whether or not Brennan was a passenger on that car, assuming that this testimony as to custom was legal testimony and properly received in this case, it is entirely overcome by the testimony which has been produced on the part of the defendant by the conductor, and particularly by Mr. Sutton, That he did not pay any fare is pretty clearly established. That he did get on at Nixon seems to be established—or, rather, that he went for the car at Nixon is pretty well established, and that he did not get on at Raritan. There is no testimony as to the part of the car which he boarded at Nixon except in the testimony given by Mr. Sutton, and excepting the fact that when that car arrived at New Brunswick he was on that front platform. Mr. Sutton has forgotten which soldier it was that got on, is not sure where either one got on; that when that car came to Nixon he was on that platform; he was there when the car stopped at Nixon; he was there from the time the car left Nixon until it arrived at the place where the

accident happened, and that neither of the two soldiers paid any fare and that no representative of the company came to collect.

However, if that be a jury question, as insisted by the plaintiff, it seems to me we must ask ourselves the fundamental question in a case of this kind; what negligence on the part of the defendant company resulted in the injury to Eugene Brennan, the injury which resulted in his death? Because, if he could not have recovered had he survived then, of course, under our statute the administrator *ad prosequendum* in this case cannot recover. For him to have recovered, had he survived, he would have had to show negligence on the part of the company. It is not shown that the place where this accident happened that the tracks of the defendant company are any closer together than they are at any other place along this line; it is not shown that there were any defects in the tracks at the place where this collision occurred, such as a lowering the inside track, which would bring these cars any closer together than at any part of the line; it is not shown that there was any excessive speed; it is not shown that there was any lurch or jar or jerk of the car in which he was riding, or of the other car, either, which would have caused him to fall off or up against the other car. All we have is the fact that as this car passed the decedent was found wedged between the cars, and it is insisted on behalf of the plaintiff that the doctrine of *res ipso loquitur* applies. But can that be, in view of the fact that the decedent, Eugene Brennan, was not alone on this front step? There was at least one other person, and Mr. Sutton, who was on that step, says there were two others besides the soldiers who were on that step, and they passed this car in safety, that they were not touched at all. It does not appear that the place

upon the step where Brennan was was any closer to the eastbound car than where Sutton and this other soldier stood. That being so, what is the proof of negligence? What did the defendant company do that it ought not to have done? What did it omit that it ought to have done? I can see nothing. There are many things additional which have occurred to me which might be said along the lines that have already been suggested in what I have said.

- 10 As much as I dislike non-suits and directions of verdicts, particularly in a case of this importance, and particularly where the sympathies are aroused, as they are in this case, where a young man who was in the service of his country and lost his life, and particularly in a case involving death, where the deceased person cannot speak for himself, it is with great reluctance that I non-suit or direct a verdict, but I feel in this case that there is nothing that I ought to leave to this jury to determine as to the
- 20 right of the plaintiff, as administrator *ad prosequendum* of this suit, but that it is my duty, notwithstanding the pull at the heartstrings, the other way, to grant the defendant's motion, which I now do, and an exception to this ground of appeal on behalf of the plaintiff may be noted.

*Grounds of Appeal*

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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GEORGE BRENNAN, Admin- istrator <i>ad pros.</i> of the Estate of EUGENE BREN- NAN, deceased, <i>Plaintiff-Appellant,</i>	} Action at Law. Grounds of Appeal.	10
v. PUBLIC SERVICE RAILWAY COMPANY, a corporation, <i>Defendant-Appellee.</i>		

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The plaintiff-appellant assigns the following grounds of appeal:

1. Because the Court refused to allow an amend-  
ment to the complaint alleging a certain custom per-  
mitted by the defendant.

2. Because the Court granted a non-suit.

3. Because the Court did not allow the case to go  
to the jury.

30

Respectfully,

JAMES MERCER DAVIS,  
*Attorney of Plaintiff-  
Appellant.*

*[Faint handwritten text visible on the right edge of the page]*

COURT OF ERRORS AND APPEALS  
OF NEW JERSEY

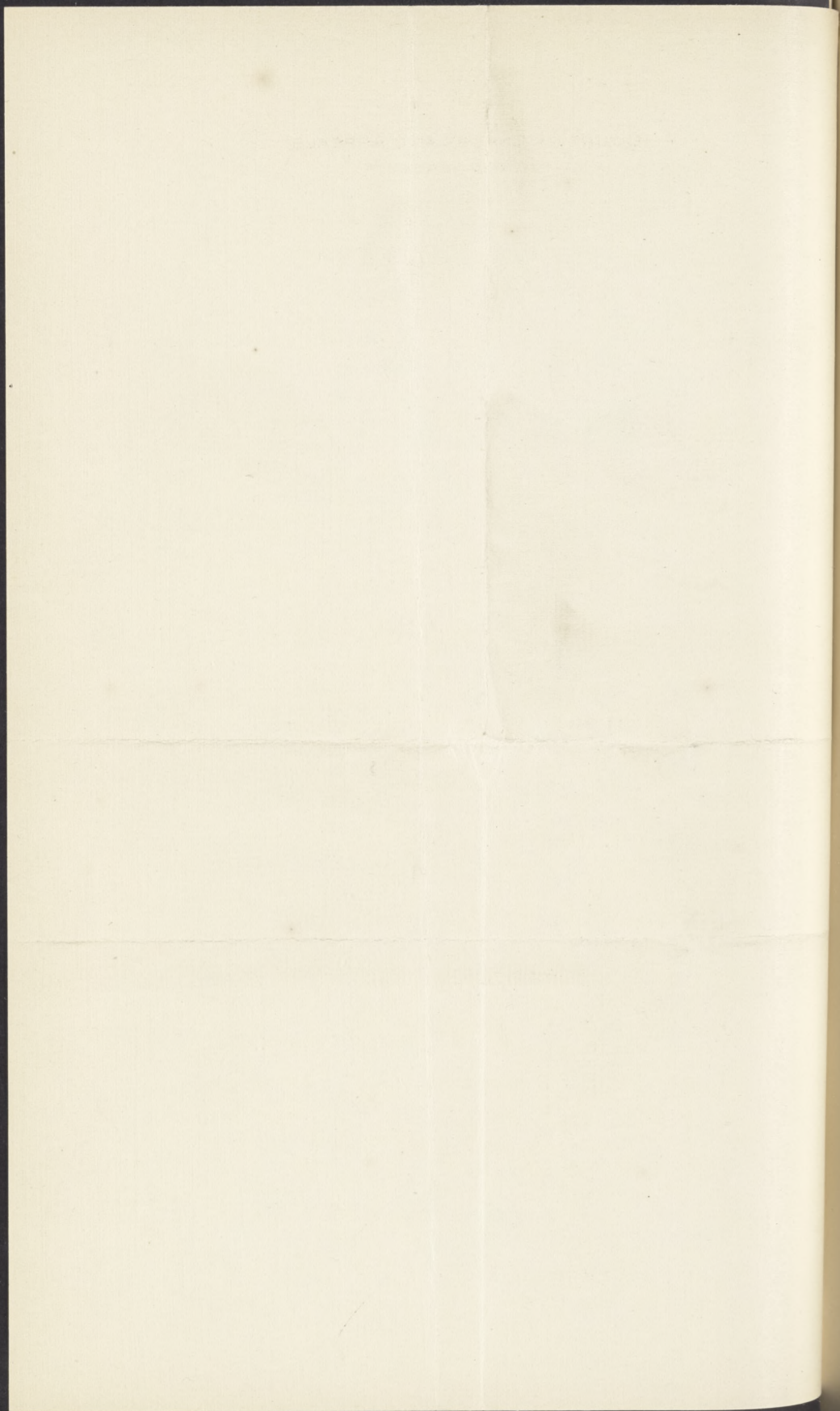
Jos. Mearns Davis Esq.  
Camden  
N.J.

Dear Sir:

In submitting case  
#2 - Breunau vs. Public Service  
I find we are short one  
brief of the appellant.

Please send me another  
copy of your brief so that  
this case can be properly  
submitted.

Yours Truly  
Victor F. Meyer.



NEW JERSEY COURT OF ERRORS AND  
APPEALS

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GEORGE BRENNAN, Admr. ad prosequendum of the Estate of EUGENE BRENNAN, deceased, <i>Plaintiff-Appellant,</i>	} ACTION AT LAW.
vs.	
PUBLIC SERVICE RAILWAY COMPANY, a corporation, <i>Defendant-Appellee.</i>	

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**BRIEF OF PLAINTIFF-APPELLANT**

---

JAMES MERCER DAVIS,  
*Attorney of Plaintiff-Appellant.*

JOSEPH COULT,  
*Attorney of Defendant-Appellee.*

Sat below: DUNGAN, CIRCUIT JUDGE.

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FACTS

This case was commenced on the 31st day of August, 1922, by George Brennan, Administrator ad prosequen-

dum of the Estate of Eugene Brennan, deceased, on account of the death of the said Eugene Brennan.

Eugene Brennan, deceased, enlisted in the military service of the United States on May 26, 1918, at the age of twenty-three years (S. C. 66-10). On September 8th, 1918, he was transferred from Camp Dix to Camp Raritan, New Jersey (S. C. 46-20). September 14, 1918, he boarded one of the defendant's cars at Nixon Station (S. C. 47-20) for the purpose of riding to the Town of New Brunswick, N. J., and it appears that this was his first trip over defendant's trolley line (S. C. 53-20) from Camp Raritan to New Brunswick.

On September 14, 1918, defendant maintained and operated a trolley line from Nixon Station, N. J., and other points to the town of New Brunswick, N. J. The defendant's trolley line was a single track (S. C. 106-20, 117-10, 126-10 and 131-10-20-30) from Nixon Station to the town of Highland Park, which was for all purposes a part of New Brunswick, N. J., being just across the river therefrom; that the single track line was about two miles in length (S. C. 131-30). From the town of Highland Park, the trolley line became a double track system extending to George and Albany Streets in New Brunswick, and to other points (S. C. 131-10); that on the 14th day of September, 1914, the deceased boarded one of defendant's trolley cars (S. C. 47-20) at Nixon Station, which was near Camp Raritan, for the purpose of riding to the Town of New Brunswick (S. C. 47-10), and he took a position on the left front step of said car, and continued to ride thereon together with two other passengers (S. C. 138-20-30) until the car was nearing George Street in New Brunswick, when a car going in the

opposite direction from the car on which plaintiff's intestate was riding and on a parallel track (S. C. 138-20), and while so passing, crushed and injured the said Eugene Brennan between the car in which he was a passenger and the passing or opposing car (S. C. 36-20-30); that the tracks at the point of the accident at George and Albany Streets were parallel and straight for a distance of 1300 feet (S. C. 25-10-20), approaching the place of the accident; that it was about 6:30 o'clock P. M. Daylight Saving Time (S. C. 41-10) when Brennan was injured and he was in clear view of the motorman of the approaching car (S. C. 25-10-20) and (36-10-20-30), and was on the steps to the left of the motorman of the car (S. C. 147-10-20), on which he was riding.

The space between the two car tracks at the point of accident was 4 ft. 4 in. (S. C. 27-20), and the overhang of each of the cars or the distance each car extended over the inside rail toward the center space between the two car lines was 21 in. (S. C. 27-10) leaving a space of approximately 10 in. between the two passing cars. Immediately following the injury to Eugene Brennan he was taken to St. Joseph's Hospital, New Brunswick, N. J. (S. C. 58-10) and was later removed to Camp Raritan, N. J., (S. C. 58-10) where an examination disclosed that he had a paralysis of his legs and the muscles of his abdomen and thorax and an injury to the spinal cord "which practically busted it entirely," so that no nerves could pass up or down the spinal cord (S. C. 58-10-20) so that left him paralyzed from the arms and shoulders down. Eugene Brennan was later transferred to Fox Hill hospital, where he died on January 24, 1921, as the result of the injuries which he sustained (S. C. 64-20-30) and (S. C. 65-10-20-30).

This car had a seating capacity of forty-five or fifty passengers, (S. C. 145-20-30) and at the time of the injury to Brennan on September 24th, 1918, there were in and on the car approximately one hundred and twenty-five passengers (S. C. 55-10).

The employes of the defendant in charge of the car were cognizant of this fact and collected fares not only from those who were within the car, but also those who were riding on the steps, platform and bumper. (S. C. 129-10-20-30).

It became and was a custom which the defendant, its agents, servants and employes well knew and permitted to exist for passengers from Nixon Station near Camp Raritan to ride on the steps, bumper, on the top of the cars and in fact all over the cars until they were loaded to more than twice their normal capacity. (S. C. 134-10-20-30) (S. C. 145-20-30).

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#### ARGUMENT

1. It is contended in this case that the decedent was a passenger on the car, and, as a passenger was entitled to that degree of care to which passengers are entitled.

There is no evidence in the case that the decedent actually paid his fare (S. C. 143-26 et seq. and 140-29) and (138-1 et seq.), but there is abundant evidence through the case that the conductor collected the fares before moving the car, while he stood on the back platform, and also from those that were on the different parts of the car (S. C. 108-18), and there is evidence also of the general

custom to permit passengers to ride on any available part of the car either inside or out and to collect fares from them. Obviously this had to be the case in view of the fact that this car was designed to carry between 45 and 50 passengers, whereas it had, on this trip, 125 passengers on the car (S. C. 146-8).

It was a reasonable conclusion to which the jury might arrive that these men had paid their fares because, after the car started no fare was demanded of them (S. C. 138-1), and this especially in view of the fact that fares had been collected from persons who were standing on the rear bumper and elsewhere on the car. The learned Court correctly arrived at the conclusion expressed at (S. C. 109-6). "The Court: I think it is a question for the jury whether or not he was a passenger. \* \* \*" This question seems to me important in determining the degree of care to which the decedent was entitled to receive at the hands of the defendant, and also important in determining the question of contributory negligence, for it is manifest that if the decedent was a trespasser, and was insisting on riding in a place of danger, the degree of care which was owed to him by the defendant would be entirely different from the degree of care it owed to him in case he was a passenger. If he were a passenger and had been accepted as such by the defendant, then the defendant would owe him, as a passenger, a high degree of care. If he were a trespasser, the defendant would owe to him only the duty of abstaining from wilful injury.

It seemed to me that in this posture of affairs, it was a question of fact for the jury to determine and it did not become a question of law for the Court, so that the Court could say that as a matter of law the decedent was guilty of contributory negligence.

2. As to whether or not the defendant was guilty of contributory negligence, it became, under the facts of this case, a question of fact for the jury.

The evidence in this case is that this decedent had been in this Camp only about a week and that this was the first time that he had ridden on this trolley car (S. C. 46-22, et seq.) (especially S. C. 53-7).

“By the Court: Q. Had you ever been to New Brunswick before?

A. No, sir.

Q. Do you know whether this was Brennan's first trip?

A. Yes, sir, it was our first pass out.”

The trolley line at the point of departure from the station at which the deceased boarded the car was a single track. Not only the decedent, but a great many other people, were standing at various positions on the outside of the trolley car. He could have seen the conductor collecting the fares from those that were standing on the outside.

The trolley car started from the station after the conductor had collected most of the fares and while he was collecting the balance of them from passengers in similar positions to that of the decedent.

There is no evidence that the persons boarding this car either going inside or taking positions outside were warned of any danger, but, on the other hand, were accepted as passengers while in these positions, which, it appears later on, became dangerous by reason of changed

conditions. It is a fair assumption with these facts in front of him, Brennan had no knowledge that his position would become more hazardous as they proceeded on their way toward New Brunswick, but that circumstance was known to the defendant, and its servants in charge of the trolley car, and yet these men were encouraged by the defendant, under the circumstances, to assume these positions, which developed to be dangerous and never at any time on this trip warned the decedent and those similarly situated that his or their positions would after a while become dangerous. Under those circumstances, it seems to me that the question of contributory negligence was a question of fact for the jury. The learned trial Judge appeared to take the solution of that question in his own hands by saying that the trolley car stopped at different places along the line and persons got off and on, and seems to assume, by reason of that situation, that a condition would develop that the decedent might have left his position on the outside of the trolley car and left his dangerous position. That question appears to be controverted and certainly a question of doubt is a question for the jury, and so the question of the decedent's contributory negligence appears to us under the circumstances, that if he be a passenger or not, is a question of fact for the jury to determine.

In *City Railway Co. v. Lee*, 50 N. J. L. 435, this Court dealt with precisely the situation at bar and Judge Knapp wrote the opinion. It was held:

“The plaintiff below was riding upon an open street car. The seats and platforms of the car were filled with passengers, and he was obliged to take his place with others on the foot-board running longitudinally with

the car. At the point where he entered this car there was but a single track; further on the track was double, with a space of two feet eleven inches between the nearest rails of the two tracks. There was not room for persons standing on these foot-boards to pass each other in safety if both foot-boards were occupied by passengers. Plaintiff was knocked off and injured by colliding with a passenger standing on the foot-board of a like car passing on the other track. Plaintiff was a stranger to this road, unfamiliar with its construction, equipment and management. Held, that if the question of contributory negligence was raised by the case, it was one for the jury, and it was properly submitted to them."

Here, therefore, is a case exactly in point with the case at bar and deals with the question of contributory negligence and held that the contributory negligence was a case for the jury.

It was on the ground of contributory negligence that the learned trial judge directed a verdict against the plaintiff.

I submit that the judgment of the learned trial judge was erroneous and that the case should have gone to the jury.

3. At any rate, the doctrine of last clear chance applies in this case.

I find no case in New Jersey in which the Court has said, in so many words, that it has adopted the doctrine of last clear chance. In fact those words, so far as I

can find, have never been used in the Courts of New Jersey. Judge Thompson in his work on Negligence defines the doctrine of last clear chance in these words:

“The party who has the last opportunity of avoiding accident, is not excused by the negligence of anyone else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury. Stated otherwise, the doctrine is that where both parties are negligent, the one that had the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it,—his negligence being deemed the direct and proximate cause of it. In expounding this doctrine, and applying it to the case of a man killed by a train on a railway track, the Supreme Court of North Carolina, speaking through Avery, J., says: ‘The admitted test rule to which we have averted, that he who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible, must be applied, in contemplation of the law which prescribes and fixes their relative duties. The law, as settled by two lines of authorities, here imposes upon the engineer of a moving train the duty of reasonable care in observing the track; and if, by reason of his omission to look out for cows, horses and hogs, he fails to see a drunken man, or reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of duty. If he is guilty of a breach of duty, we cannot controvert the propositions which necessarily follow from the admission that, but for such omission, or if he had taken advantage of the last clear opportunity to perform a duty imposed by law, the train would have been stopped and a life saved.’”

<sup>1</sup> Thompson on Negligence, Sec. 241, page 230.

Corpus Juris defines the doctrine of last clear chance to be—"It may be stated to be a liability resting upon defendant, although plaintiff may have been guilty of negligence on his part contributing to the injury. In such case, if defendant or its agents could have seen plaintiff's danger in time to have averted the injury, although plaintiff may have been guilty of negligence contributing to the accident, it becomes the bounden duty of defendant to use reasonable precautions to avert the injury to plaintiff. The general statement of the doctrine is as follows: The party who has the last opportunity of avoiding an accident is not excused by the negligence of anyone else. His negligence and not that of the one first in fault is the proximate cause of the injury." And, again, "Where both parties are negligent, the one that has the last clear opportunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it, his negligence being deemed the direct and proximate cause of it. The doctrine chiefly relates to proximate cause." Again, it has been said in Corpus Juris, "What is understood by it is this, that where plaintiff, by his own negligence, has placed himself in a dangerous position where injury is likely to result, defendant, with knowledge or such notice as is equivalent thereto of plaintiff's danger, is bound to use reasonable care and diligence to avoid injuring plaintiff, and where by the exercise of such care he could do so but fails to avoid the injury, this negligence introduces a new element into the case and renders defendant liable, because such negligence becomes the direct and proximate cause of the injury. (11Corpus Juris 280, et seq.)

Now our Courts have applied this "Humanitarian Doctrine," although it has not been so labelled by our Courts.

In *Taylor v. Lehigh Valley R. R.* and *Stambler v. Lehigh Valley R. R.*, 87 N. J. L. 673, an automobile was stalled on a railroad track at a public crossing, and the Court held that it was the duty of the engneier, if he saw there was possible danger of collision, to exercise reasonable care and diligence to avoid it by stopping his engine.

In *Merklinger v. Lambert*, 76 N. J. L. 806, an action was brought for the death of a boy riding a bicycle and killed by an automobile. In this case the third error assigned was the refusal of the judge to charge "if, notwithstanding the negligence of the plaintiff, the injury would still have occurred, his right of recovery is not defeated." This request was properly refused; "it does not embody a correct proposition of law pertinent to the case, in that it fails entirely to consider the fact that the chauffeur might not have been negligent and the accident might have been wholly unavoidable."

To the same effect is the case of *Biddle vs. Camden & Atlantic Railroad Company*, 55 N. J. L. 615, in which the negligence consisted of the unnecessary, negligent, wanton and malicious blowing of locomotive whistle in consequence of which the horse of the plaintiff was frightened and injuries in consequence inflicted upon the driver. The Court held that although blowing of whistle on railroad locomotive was allowed and required that if it was done negligently, wantonly or maliciously, such negligence, wantonness or maliciousness is actionable if injury results therefrom.

The proposition of the last clear chance. In *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577, the cir-

cumstances created a situation calling for the doctrine of the last clear chance, and this Court held "It is the duty of others not to obstruct the track, but a violation of such duty does not necessarily constitute such contributory negligence as will relieve the trolley company from responsibility for an accident which might have been avoided by the exercise of proper care."

A clearer case is that decided in the Supreme Court. *Rafferty, Admr. v. Erie R. R. Co.*, 66 N. J. L. 444. In this case the Court said (p. 447-7) "We will look at the question raised upon the trial whether, notwithstanding the negligence of the driver, there was evidence tending to prove that the accident, or its fateful consequences, might have been avoided by the timely action of the company's servants in checking the speed of the train." It appears that the decedent was a passenger in a car driven by her brother; that they listened for the train, but heard nothing. The fireman testified "when about 1000 ft. from the crossing he saw this wagon coming down the road, the horse on a trot; that it slackened up near the crossing, and probably ten or fifteen feet from the crossing it stopped; that he did not warn the engineer then, but thought they were going to stand there; that all in a second the man who was driving hit the horse on the back with the reins and started off, and the engineer saw them at that time and applied the brakes, \* \* \* as soon as he saw the horse's head." He admitted it was his duty, as fireman, under the rules of the road, to look out for obstructions and to notify the engineer immediately on seeing them. The trial court and the Supreme Court held that it was the duty of the engineer and fireman, if they saw that there is possible danger of collision, to exercise reasonable diligence and reasonable care to avoid it; that

such a duty devolves under the law upon the Company's servants, and there can be no question." This case was cited, with approval, in *Taylor v. Lehigh Valley R. R.* (supra) in an opinion written by Justice Black for this Court.

In *Zolpher v. Cam. & Sub. Ry. Co.*, 69 N. J. L. 417, Mr. Justice Swayze wrote the opinion for this Court. The plaintiff was riding on a bicycle on the tracks of the defendant in advance of an approaching car, and was struck by the car and injured. On account of the high wind, the plaintiff got off of his bicycle while between the rails of the car and did not look around. The trolley car was about 12 ft. away from him when the plaintiff dismounted from his bicycle. Justice Swayze said: "The greatest difficulty in the case arises from the fact that the plaintiff stopped in the car track, and it is forcibly argued that the motorman could not anticipate this action of the plaintiff. If this case had rested on the plaintiff's case alone, I should have difficulty on this score; but, in my judgment, the testimony of Taylor justified the inference that the motorman was inattentive, and that if he had given proper attention the accident might have been avoided. Greater care and attention is necessarily required of the motorman when a vehicle is on the track in front of him than when he has a clear road."

In the case at bar the motorman had a clear unobstructed view as they approached each other for 1300 ft., at least the car upon which the decedent had been riding, traveled upon a straight track for 1300 feet before arriving at the point of the accident. As it approached the point of the accident, the crowded condition of the car must have been clearly visible to the motorman of the

car approaching the car on which the decedent was riding. The decedent, with two others, was standing on the front left step of the car, that is on the near side to the car which was approaching the decedent's car, and in the front part of the near side, so that, if the motorman of the approaching car had paid the slightest attention to the track ahead of him and to the car approaching him, he certainly could have seen him, the decedent, and others, who were on the outside of the car and next to the car approaching. Likewise, the motorman of the car in which the decedent was riding knew or should have known in the exercise of reasonable care that the decedent and others were riding on the outside of his car, and the conductor certainly knew it, he collected fares, and the decedent and two others were riding beside the door which was to the left of the motorman, and the door had glass in the top part so that all the motorman on the car in which the decedent was riding had to do to observe the presence of the decedent on the steps immediately to his left, was to turn his eyes. Can it be said that in the distance, which is variously testified as being four miles from Nixon Station to the point of the accident that the motorman of the trolley car in which the decedent was riding did not or should not have seen the decedent during those four miles.

The proximity of the two cars to each other as they passed on the street was a matter which certainly would be imputed to the knowledge of each of the motormen and to the conductors. It is said there were 10 in. intervening between the two cars as they passed. Certainly the two motormen must have known that there was not room for men to stand on the step between these two cars as they passed, and certainly it must have been

known that it was a dangerous position to put a passenger in, or to state it differently, the defendant's agents must have known that the decedent and others stationed with him were in a position of danger. If the decedent were a passenger the Company owed him the duty of providing a reasonably safe place in which to ride. They owed the deceased the duty of giving him an opportunity to extricate himself from the dangerous position thus created. So long as the car upon which the decedent was riding continued to so travel it was dangerous for the deceased to leave his position on the step. The danger of that position did not become apparent until the approaching car came into view. When it came into view the dangerous position of the decedent was apparent, or should have been to the motormen of both trolley cars. Under these circumstances, could it be fair to argue that the defendant Company owed the duty to the deceased to allow him an opportunity to remove from the dangerous position into a position of safety? There is not the slightest proof in the case that such an opportunity was offered. If the deceased was a passenger, the greater care devolved upon the Company. Certainly, it cannot be said that when a trolley company accepts a man as a passenger and he assumes a position of risk, which is clearly obvious to the Company, that they can thereafter proceed and run their trolley car in such a way as to bring about the death of passengers without notifying him of the danger and giving him an opportunity to extricate himself. The evidence in this case was that it was the first time that the deceased ever rode on this trolley car. It is, therefore, clear, that he did not know of the dangers which confronted him. The learned trial Judge held that it was a question of fact for the jury whether or not the deceased was a passenger. If he were a passenger, as I

have already said, the greater the duty of the defendant Company to give him a safe passage, but if he were a trespasser, or, if he were negligent in assuming the position upon the trolley car which he did, although it clearly appears that the danger was not apparent to him at the time that he entered upon the trolley car, and there was no evidence that he knew the trolley upon which he was riding would encounter a trolley car going in the opposite direction as later happened.

Certainly, it cannot be said, it seems to me, that the defendant can be exonerated from bringing about the death of this deceased when it was clearly within their power to have prevented it by the exercise of the slightest degree of care, namely to give the deceased an opportunity to remove from the dangerous position, when the deceased was in a position of apparent danger perfectly apparent to the approaching car seems beyond argument; that he was in a position of danger clearly apparent to the motorman of the car on which he rode is likewise beyond the realm of probability. Certainly these were two jury questions and if jury questions, then it is my contention that this Court and the Court below should have applied the doctrine of humanity, namely, that the life of this young man, a soldier, should not have been carelessly and negligently taken even though he had placed himself in a position of danger.

Can it be said that the defendant is justified in causing the death of a young man however foolish he may have been? Is not the doctrine of humanity, which is also here called the doctrine of last clear chance, designed for the protection of those who have not seen fit to protect themselves, and yet who, by the exercise of reason-

able care upon the part of the defendant, might have been saved from injury or death. One may assume in this case, for the purpose of argument, that the deceased put himself in a position of danger, and, therefore, contributed to his injuries, but if the doctrine of humanity, the doctrine of last clear chance is the law of this State and the defendant could in the exercise of reasonable care have seen the peril of the deceased's position, or, if in the exercise of reasonable care they should have seen the peril of the deceased's position, and notwithstanding this peril they so conducted themselves that their negligent act, either in failing to see or having seen, failed to prevent the happening of the accident, the defendant must respond in damages.

The car upon which the decedent was riding and the car that figured in the accident were approaching each other. The motormen were approaching the respective cars from the front end thereof. It was their duty to look ahead. If they had looked ahead, it is perfectly clear that they would have seen the decedent in his peril. Then what duty evolved upon the motormen respectively? Should not they have exercised reasonable care to prevent the disaster notwithstanding the deceased had placed himself in a dangerous position by his own negligence?

Judge Thompson, in the 3rd Vol. of his Commentaries on the Law of Negligence, Sec. 2634, says: "A passenger, to all intents and purposes, is one who, having paid his fare or purchased his passage ticket, boards the proper train, vessel or other vehicle of the carrier, with the bona fide intent of taking passage to his destination, and with the consent, express or implied, of the carrier's agents or servants having the authority to determine who shall

and who shall not ride upon the train, vessel, or other vehicle. It is not necessary to the acquisition of the rights of a passenger that the person boarding the carrier's vessel should have previously purchased a ticket or paid his fare."

In Sec. 2635, it is held: "Generally speaking, every person on board the vehicle of a common carrier of passengers, other than the servants of the carrier, is presumed to be there lawfully as a passenger."

If, therefore, the deceased had entered upon the trolley car with a bona fide intention of becoming a passenger and paying his fare, or had actually paid his fare, all of which the learned Trial Court held was a fact for the jury, then he was a passenger and the defendant owed him something more than the mere duty of refraining from wilful injury. It owed him the duty of reasonable care under the circumstances.

Now, suppose that the deceased was not a passenger—all of which was contrary to the conclusion of the learned trial judge. Then, under those circumstances, he comes within the doctrine laid down by this Honorable Court in the case of *Iaconio v D-Angelo, et al*, 142 Atl. 46, in which the Court laid down the doctrine of wilful negligence. This Court, by the Chancellor, said: "To force anyone from rapidly moving automobile, if conditions are known, is malicious and wrongful; evidence of intent to do willful injury to small boy by pushing him off running board of automobile held for jury." See also, *Staub vs. Pub. Ser. Railway Co.*, 117 Atl. 48.

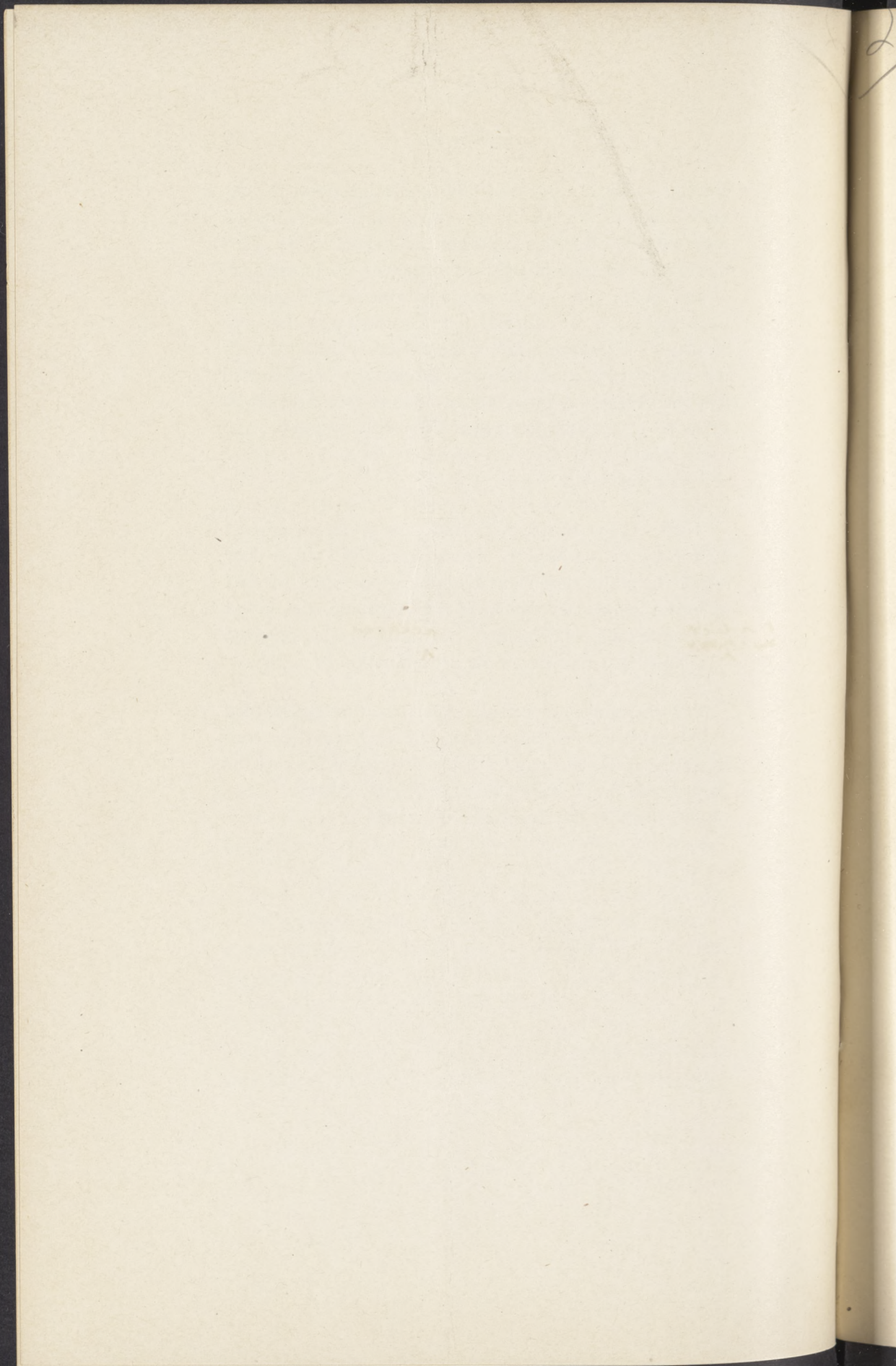
It must be a question of fact for the jury to determine whether or not either, or both, of these motormen op-

erating trolley cars approaching each other, with the deceased and others in plain view, did or should have knowledge of the dangerous condition in which the deceased was stationed and that the continuance of the movements of the trolley cars would result in serious consequences to the deceased. If either of the motormen saw this condition and with knowledge of these facts, proceeded with the trolley cars so that injury resulted, it is submitted that the defendant, under those circumstances, would be liable to respond in damages. And this would be the result whether the deceased was a passenger or whether he was a trespasser.

If he were a trespasser, still he is protected against willful injury. If he were a passenger, a still larger duty rested upon the defendant and these questions of fact were not questions, which, it seems to me, the Court could determine as a matter of law, but he was required to submit these matters to the determination of a jury.

It is, therefore, respectfully submitted that the learned trial court erred in withdrawing the case from the consideration of the jury and that the directed verdict of the jury should be set aside and a new trial ordered.

All of which is respectfully submitted.



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

## New Jersey Court of Errors and Appeals

<p>GEORGE BRENNAN, Administrator <i>ad prosequendum</i> of the Estate of Eugene Brennan, deceased,  <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE RAILWAY COMPANY, a corporation,  <i>Defendant-Appellee.</i></p>	}	<p><i>Action</i>  <i>at Law.</i></p>
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### BRIEF OF DEFENDANT-APPELLEE.

This is the plaintiff's appeal from a directed ~~judgment~~<sup>dict</sup> for the defendant. The ~~judgment~~<sup>alleged</sup> appeal from is not set up in the printed State of the Case, and the record is so incomplete in other respects that it is difficult to see how this Court can, in justice to the defendant-appellee, determine the questions raised by the appeal.

The action in the Court below was based on injuries sustained by plaintiff's intestate September 14, 1918, resulting in his death and alleged negligent acts of the defendant-appellee causing such injuries.

The trial of the action was commenced in the Essex Circuit May 5, 1924, and continued through May 7th and May 8th, inclusive.

Defendant-appellee, on the day in question, operated an electric street railway from Nixon Station, Camp Raritan, over a single track to, or near, Highland Park, and over double tracks through Highland Park and New Burnswick. In the evening of that day a closed trolley car

started a trip to New Brunswick from Nixon Station. It had four sets of doors, one on each side at the rear and one on each side at the front. The doors at the rear were opened to permit prospective passengers to enter, when a tremendous crowd, mostly soldiers from the camp, boarded. The left front door was not opened, but remained closed at all times. Passengers crowded the car, including the front platform inside the closed vestibule occupied by the motorman. Plaintiff's intestate, together with another soldier, and one Albert Sutton, instead of entering the car by one of the doors—which had been opened—got on the front left step where they could not be seen by the motorman or conductor, and rode in that position outside of the closed door all the way to Albany and George streets in New Brunswick. During the trip the car made stops, particularly after reaching Highland Park, and after proceeding along so that they had opportunities to alight where double tracks were maintained. The three men continued in the same position on the step outside the closed door, and without having paid any fare. Proceeding on Albany street, New Brunswick, approaching George street, and slowing to stop at that intersection, the trolley car passed a trolley car proceeding in the opposite direction on the adjoining track. Sutton and one soldier on the step moved in against the closed door to avoid the passing car. Plaintiff's intestate did not take that precaution, and was crushed between the bodies of the two cars, sustaining injuries from which he subsequently died.

The plaintiff-appellant sets up three grounds of appeal (see end of Printed Case).

The first ground relied upon is:

"1. Because the Court refused to allow an amendment to the complaint alleging a certain custom permitted by the defendant."

The printed case sets up an amended complaint and fails to set up the original complaint, or any other amended complaints. At the end of the amended complaint it is stated that it was "Filed Feb. 9, 1923" (p. 5). Then what appears to be an answer to an amended complaint is marked at the end thereof, "Filed Jan. 26, 1923" (p. 9), or prior to the filing of the particular amended complaint set up.

At the trial (p. 29) plaintiff applied for leave to amend the complaint alleging a custom permitted by the defendant, and after objection by defendant's counsel, and argument thereon, the plaintiff was permitted to amend (top of p. 33).

After witnesses called by the plaintiff had testified, and the plaintiff had rested, a motion for a non-suit was made. The Court recalled a witness, and later said (p. 110):

"I might say that after having looked over the decisions since adjournment last evening, that were given to me on both sides, I have decided that if Mr. Bouton can produce the testimony, in view of the situation being changed in my mind, from the fact that it now appears from the testimony that that door was closed and those people were riding on the outside of the steps with the door closed, that Mr. Bouton ought to be permitted, if he can produce that testimony, to show what had been the practice theretofore, in carrying passengers upon these cars from Camp Raritan to New Brunswick. As I said yesterday, it is not because I think the matter is as important as Mr. Bouton thinks it is, but because, in the event of the plaintiff failing to recover in this suit, and the case

being reviewed by the appellate court, if they feel that it is of the importance that Mr. Bouton thinks it is, it would then be in the case. I doubt ordinarily if I would take that course, but Mr. Bouton has been to great expense to bring witnesses from various parts of the United States, and if the matter can be in such shape now so that the decision of this court or in the appellate court may be a finality without the necessity of bringing all those witnesses at great expense that it must be to bring them here, I would like to put the case in that shape."

The case was thereupon opened for the very purpose of producing testimony to establish such custom, and witnesses were permitted, over objection by the defendant, to testify thereof.

At the close of the whole case the learned Trial Judge said (p. 150):

"—it was insisted upon behalf of the plaintiff that it was important to show the previous custom of the defendant company in carrying passengers from Camp Raritan to New Brunswick, with reference to the crowded condition of the cars, and the collection of fares of those who were permitted to ride upon the steps and bumpers of the car. I have some doubt about the relevancy of that testimony, but after a very careful consideration of the cases submitted on both sides, between the adjournment of court last evening and this morning, I came to the conclusion, in view of the item of testimony which I have overlooked in denying the motion to non-suit, that that ruling was an erroneous one and that the non-suit ought to have been granted. But in view of the insistence of the plaintiff that the custom referred to was important, under the circumstances, I concluded that the plaintiff ought to have the opportunity of showing what that custom was. My conclusion that the plaintiff ought to have that opportunity was influenced by the fact that the witnesses

in the case have been gotten together with a great deal of difficulty and come from long distances, and, although personally I had considerable doubt, and still have, whether or not that would have any influence in the decision of this motion, or indeed, in the decision of this case, I felt that if this case should be appealed, and the appellate court should differ from my view, the whole matter then would be before the appellate court, including the testimony relating to previous custom."

So that in reference to the first ground it is shown not only that the Court did not refuse to allow an amendment to the complaint alleging a certain custom permitted by the defendant, but permitted such amendment to be made, and also permitted the plaintiff to call four witnesses: Charles S. Pryor (p. 111); Joseph E. Finn (p. 122); Trayton Ballard (p. 127), and Frank Zunino (p. 133), in an effort to prove the custom the plaintiff sought to rely upon.

The second ground of appeal set up in the printed case is:

"2. Because the Court granted a non-suit."

The Court did not grant a non-suit. No judgment of non-suit is sent up with the record, and, as contended by defendant-appellee, at the beginning of this brief, the printed case shows no judgment of any kind from which an appeal might be taken.

At the close of the plaintiff's case the defendant moved for a non-suit (p. 103). The Court recalled the plaintiff's witness Harry T. Cullings, and thereafter the motion for non-suit was denied (p. 109, l. 30); and then the Court permitted the plaintiff to call other witnesses to prove an alleged custom. The plaintiff finally rested (p.

135), and the defendant proceeded with its defense by calling the following witnesses: Albert Sutton (p. 135); and Emil Fitzke (p. 144). The defendant put in evidence two photographs Exhibit D. 1 (p. 136); and Exhibit D. 2 (p. 138), neither of which exhibits are sent up with the record, nor has the plaintiff-appellant sent up with his record plaintiff's Exhibit P. 1, received in evidence (p. 23). After the evidence was all in, and both sides had rested, the defendant moved for a direction of a verdict for the defendant (p. 149), which motion for a directed verdict was granted.

The third ground of appeal set up in the printed case is:

"3. Because the Court did not allow the case to go to the jury."

The Court did not allow the case to go to the jury because the Court properly granted the motion of the defendant for a directed verdict. No judgment for the defendant is set up in the printed case from which an appeal might be taken.

The plaintiff, in the amended complaint set up in the printed case (p. 1) alleges the alleged negligence of the defendant as follows:

"4. At the times herein mentioned on September 14, 1918, the defendant's westbound rails and tracks and eastbound rails and tracks with respect to each other at and near the place of accident herein referred to, were in a dangerous, unlawful, unsafe and negligent condition and state, by reason of the defendant having unlawfully, negligently and wrongfully neglected and failed to properly lay and maintain said rails and tracks at the said points and places so as to prevent accidents and injuries to passengers lawfully riding on the

front left step of its westbound cars and so as to be fit and safe for its carriage at the said points and places of such passengers at the times herein mentioned on September 14, 1918, because the said westbound rails and tracks and eastbound rails and tracks were so close together at the said points and places as to cause its eastbound cars to pass so close to its westbound cars as to make it unsafe and dangerous for its said passengers so riding, and of which condition of said rails, tracks and cars defendant had notice or should have had notice by reason of the length of time that said conditions had existed on and prior to September 14, 1918.

“5. On September 14, 1918, while the decedent was lawfully riding as a passenger on the left-hand front step of one of the defendant's trolley cars which was being used, supervised, controlled and operated by the defendant, by its servants, agents and employees in a westerly direction on and along Albany Street, New Brunswick, New Jersey, toward George Street and said car had reached a point on said Albany Street near but east of George Street, the said defendant by its servants, agents and employees, negligently, wrongfully and unlawfully, used, supervised, controlled and operated the said car on its said westbound rails and tracks on which the decedent was so riding and negligently, wrongfully and unlawfully, used, supervised, controlled and operated another of its trolley cars on its said eastbound rails and tracks in an easterly direction past or partly past said other car and which said rails and tracks were in the dangerous, unlawful, unsafe and negligent condition and state aforesaid whereby the decedent without warning was struck by the car going in an easterly direction and squeezed between said two trolley cars, suffered numerous, serious and dangerous injuries in and about his body, namely fracture of the vertebrae, injury to the spinal

cord, partial paralysis, injury to the abdomen, injuries to the nervous system and abrasions, and which wrongful acts neglect and defaults of the defendant as herein mentioned and the aforesaid injuries to decedent resulting therefrom caused decedent's death on January 24th, 1921."

And by a further amendment at the trial (p. 32):

"That on September 14th, 1918, and for a sufficient time prior thereto to give the said defendant notice, it was the custom and practice of the defendant to permit persons as passengers to board its cars at Nixon's Station, New Jersey, on its line at Nixon's Station, and to permit said persons as passengers to ride on the outside of the cars, including its steps, from said Nixon's Station to New Brunswick, New Jersey, and that pursuant to said custom and practice the decedent, Eugene L. Brennan, was permitted as a passenger to board said car and to ride on the front step of the said car from said Nixon's Station to New Brunswick."

The original complaint, and the complaint as amended, is founded on negligence, and the violation of duty owing a passenger. There are no allegations of any wilful or wanton act on the part of the defendant, or its servants.

It was not shown that, at the place where the accident happened, the tracks were any closer together than they were at any other place along the line; it was not shown that there were any defects in the tracks at the place where the accident occurred, such as a lowering of the inside rail, which would bring the cars any closer together than at any part of the line; it was not shown that there was any excessive speed; it was not shown that there was any lurch or jar, or jerk, of the car on which defendant was riding, or of the other car either,

which would have caused him to fall off or against the other car. All that was proved is the fact that as the cars passed, the decedent was found wedged between the cars. See the Court's findings on the motion for a direction of a verdict (p. 155).

There was no proof of any custom or practice of defendant to permit persons as passengers to ride outside of a closed door on the front left step of its cars.

William J. Benco, a witness called by the plaintiff (p. 13), testified that at about 6 or 7 o'clock he boarded a street car on Albany street in New Brunswick in front of the post office going towards the camps; that it passed George street and met another car coming very slow in the opposite direction, and as they were passing three windows were broken on the side toward the passing car; the car stopped and he got out and saw a soldier between the two cars. The motorman, conductor and some of the passengers, got on top of the cars and pressed the cars further apart so as to release the body. He says (bottom of p. 19) that the intersection of Albany and George streets is about four miles from Camp Raritan.

Asher Atkinson, a witness called by the plaintiff (p. 20), testified and identified a map which was put in evidence. The map showed two sets of parallel tracks in Albany street with four feet and eight and a half inches between the inside rails (p. 24, l. 30); that (p. 25, l. 20) the double track continues from George street to Woodbridge avenue in Highland Park, a distance of around a mile; that he measured a trolley car (p. 26) that showed an overhang measuring 21 inches.

Frank Lathan, a witness called by the plaintiff (p. 34), testified that on September 14, 1918 at about seven o'clock in the evening he was at the southeast corner of Church and Albany streets; that (p. 35) he observed a trolley car coming from the direction of Camp Raritan with a soldier standing on the left front step; that (p. 36) in the vicinity of George street cars going in the opposite direction were passing each other—one going fast and one slow—when he heard “a holler”; the cars stopped and he saw a soldier fastened between the two. He says (p. 38, l. 20) that when he saw the car proceeding before the accident the soldier stood on the step facing the door holding the handle, and standing at the rear of the step. A civilian was also on the step—the first one on the step facing the same way; that (p. 39, l. 10) the sides of the cars seemed to him to be about ten inches apart. Under cross examination he said (p. 42) that the westbound car was slowing up to make a stop at George street; and the car going in the opposite direction had stopped at its near side of George street, and had just started from a standing position, and had crossed George street. Neither car was going very fast. He further testified (p. 44) that the door at which the soldier stood, was closed, and that so far as he could see no part of the two cars came together as they attempted to pass each other.

Harry T. Cullings, called by the plaintiff (p. 46), testified he was in the military service, as was Eugene L. Brennan, stationed at Raritan, that (p. 47) he left camp with him and went to Nixon Station where they waited a couple of minutes until a trolley car came which they boarded. He got off the car (p. 48) in New Brunswick a block beyond the bridge in front

of Klein's Hotel, and (p. 49) walked down the street to Albany and George streets where he saw two cars, and saw a soldier between the two, who (p. 50) he afterwards recognized as Brennan. The car had made several stops (p. 52) from the place he boarded it and where he got off, to take on and discharge passengers. He further testified (p. 55) that over 125 soldiers boarded the car where he boarded it.

Harry T. Cullings, recalled by the plaintiff (p. 104), testified that he and Brennan did not board the car together; that they were together when the car arrived, but there was a crowd. He did not see him get on the car, nor did he see him after he boarded the car. The witness got on the rear platform. There was a motorman at the front, and there was a conductor who collected fares. He could not say (p. 105) whether Brennan got on the rear platform. He says he (the witness) boarded the car at the rear platform at the left side—the only side that was open on the back. The track there was a single track. He could not say whether the doors at the front were opened (p. 107). Again he said (p. 108, l. 10) that he got on the right-hand side at the rear, and, so far as he knew, that was the only door that was open. The only fares that he saw collected were those collected as soldiers entered the rear door, and from soldiers on the rear of the car.

At this point the Trial Court, under a misapprehension of the testimony (p. 109), said that the testimony now is that there was only one door open; the soldiers as they entered paid their fares; and concluded that as he was at the front platform when the car reached New Brunswick he must have entered by the rear door and

paid his fare. After adjournment the Court said (p. 110):

“I might say that after having looked over the decisions since adjournment last evening, that were given to me on both sides, I have decided that if Mr. Bouton can produce the testimony, in view of the situation being changed in my mind, from the *fact that it now appears from the testimony that that door was closed and those people were riding on the outside of the steps with the door closed*, that Mr. Bouton ought to be permitted, if he can produce that testimony, to show what had been the practice theretofore, in carrying passengers upon these cars from Camp Raritan to New Brunswick. As I said yesterday, it is not because I think the matter is as important as Mr. Bouton thinks it is, but because, in the event of the plaintiff failing to recover in this suit, and the case being reviewed by the appellate court, if they feel that it is of the importance that Mr. Bouton thinks it is, it would then be in the case. I doubt ordinarily if I would take that course, but Mr. Bouton has been to great expense to bring witnesses from various parts of the United States, and if the matter can be in such shape now so that the decision of this court or in the appellate court may be a finality without the necessity of bringing all those witnesses at great expense that it must be to bring them here, I would like to put the case in that shape.”

The plaintiff then proceeded to call witnesses in an effort to prove such custom, but there was no proof produced showing any custom permitting passengers to ride on the front step of the car outside of the closed door.

Charles S. Pryor, called by the plaintiff, testified (p. 111) that he was stationed at Camp Raritan; that (bottom of p. 118) he had frequently ridden on the cars from the camp, but never on

the front left-hand step, and (top p. 119) any time that he rode on the step of a car the door was open, nor could he say that he had ever seen fares collected from the passengers standing on the step with the door closed.

Joseph E. Finn, called by the plaintiff (p. 122), testified (p. 123, l. 20) that he did not remember any experience when he rode on the cars when the doors were closed.

On cross examination (p. 125, l. 30) he said that he never rode on the left step of the car when the door was closed.

Trayton Ballard, called by the plaintiff (p. 127), testified (p. 129, l. 10) that in his experience he did not recall any persons riding on the front steps, but he testified that on other occasions he saw passengers riding on the rear steps when the doors at the rear were open, and the car was too crowded to close the doors, and that he did not recall any occasions when he saw the left-hand front door open to admit passengers boarding at the camp, and that he never rode on the inside step of the car; (top of p. 130) that he has never seen passengers riding on the front left step; that he always got on the rear end himself; that (p. 133) he did not remember any occasion when the left door was opened when cars were loaded at the camp; that the front right door was frequently opened; that when the car moved at the camp frequently the soldiers would swarm on so that the doors could not be closed, and sometimes both of the rear doors would be open, but he never saw anyone riding on the left front step when the door was closed, and that when he did see anyone riding on the other steps of the car, the door of that step was always open.

The defendant then called as its first witness Albert Sutton (p. 135) who testified that he was a general contractor in business in New Brunswick, and on September 14, 1918 he had worked at Camp Raritan, and that on the evening of the day in question he went from the camp to New Brunswick on a Public Service trolley car; that (p. 136) he was on the front left-hand side and boarded the car at the camp entrance, but many people boarded the car at the same time, and there were two soldiers, one on each side of him. When asked if he made an effort to get into the car he said that was how he came to take the other side. The car was standing still and his recollection is that one man was already on the step and some had got on at Camp Raritan. When he got on the step the door was closed, and he continued there from the camp to New Brunswick; that (p. 137) the door remained closed all the time, and that it had not been the custom to open that door; that he paid no fare and the two soldiers that were on the step with him paid no fare, and that no effort was made at any time by the conductor or motorman, or anyone else, at any time to collect fares from the three of them who stood on that step; that at no time did anyone come near them to collect fares; that (p. 138, l. 20) when the car approached George street there was another car coming from Albany street; when the man in front of the witness, who was standing on the step, stepped back, and the witness stepped back so as to avoid the car going in the opposite direction, that he felt something grab his arm as if it were turning towards the way the car was coming, and then he heard a yell; that he was standing in the center of the step; that there was a man alongside of him on the step toward the front of the car in uniform,

and that the man that was injured was on the same step on the other side of him; that (p. 139) all three were on the front step, and the witness was in the center, and the man toward the front and the witness leaned in toward the door, and the car going in the opposite direction passed the one man, and the witness without injury; then when he heard the yell the car stopped in about 8 or 9 feet; that the two cars stopped at the same time; that (p. 140, l. 24) the other two men were on the car; that one of the other men on the front step got on at Camp Raritan, but he did not know whether the other one got on at Nixon—they were both on at Camp Raritan; that (p. 142) Camp Raritan is the next station further away from New Brunswick than Nixon; that when the car got to Nixon he stayed on and was on the front step all the time the trolley car was at Nixon; and he says in answer to the Court's question that no one, either at Nixon or between Nixon and New Brunswick collected a fare from anybody on that front step; that (p. 144) if either of the two soldiers, who were on the step with him, had been in the car any time they would not have come around on the step outside of the closed door because it was a poor place to ride.

Emil Fitzke, called by the defendant (p. 144), testified that he was the conductor of the trolley car in question; that he did not know anyone was riding on the front left step until the car got to George and Albany streets, and he heard a woman scream; and (p. 145) at no time did he collect any fares from any passengers riding on the front step of that car; that (p. 147, l. 20) by reason of the fact that the front platform was so crowded with soldiers it would be diffi-

cult for the motorman to have seen anyone standing on the front left step.

At the close of the entire case the defendant moved for the direction of a verdict, which motion was granted, and in granting the motion, among other things, the Trial Court said (p. 150):

“Just before the adjournment of court last evening a motion was made for a non-suit and the motion was denied. The decision of that motion was based on a misapprehension by the court of a very important item in the testimony. It has entirely escaped my attention, that the testimony showed that the front left-hand door was closed and that the plaintiff, with another, or others, was on the step outside of that door holding fast to the stanchions. The stenographer’s record shows that such was the testimony. In view of that situation, it was insisted upon behalf of the plaintiff that it was important to show the previous custom of the defendant company in carrying passengers from Camp Raritan to New Brunswick, with reference to the crowded condition of the cars, and the collection of fares of those who were permitted to ride upon the steps and bumpers of the car. I have some doubt about the relevancy of that testimony, but after a very careful consideration of the cases submitted on both sides, between the adjournment of court last evening and this morning, I came to the conclusion, in view of the item of testimony which I have overlooked in denying the motion to non-suit, that that ruling was an erroneous one and that the non-suit ought to have been granted. But in view of the insistence of the plaintiff that the custom referred to was important, under the circumstances, I concluded that the plaintiff ought to have the opportunity of showing what that custom was. My conclusion that the plaintiff ought to have that opportunity was influenced by the fact that

the witnesses in the case have been gotten together with a great deal of difficulty and come from long distances, and, although personally I had considerable doubt, and still have, whether or not that would have any influence in the decision of this motion, or indeed, in the decision of this case, I felt that if this case should be appealed, and the appellate court should differ from my view, the whole matter then would be before the appellate court, including the testimony relating to previous custom."

And again (p. 154, l. 16) the Court said:

"In this case I had some doubt as to whether or not Brennan was a passenger on that car, assuming that this testimony as to custom was legal testimony and properly received in this case, it is entirely overcome by the testimony which has been produced on the part of the defendant by the conductor, and particularly by Mr. Sutton, That he did not pay any fare is pretty clearly established. That he did get on at Nixon seems to be established—or, rather, that he went for the car at Nixon is pretty well established, and that he did not get on at Raritan. There is no testimony as to the part of the car which he boarded at Nixon, except in the testimony given by Mr. Sutton, and excepting the fact that when that car arrived at New Brunswick he was on that front platform. Mr. Sutton has forgotten which soldier it was that got on, is not sure where either one got on; that when that car came to Nixon he was on that platform; he was there when the car stopped at Nixon; he was there from the time the car left Nixon until it arrived at the place where the accident happened, and that neither of the two soldiers paid any fare and that no representative of the company came to collect.

"However, if that be a jury question, as insisted by the plaintiff, it seems to me we must ask ourselves the fundamental question

in a case of this kind; what negligence on the part of the defendant company resulted in the injury to Eugene Brennan, the injury which resulted in his death? Because, if he could not have recovered had he survived then, of course, under our statute the administrator *ad prosequendum* in this case cannot recover. For him to have recovered, had he survived, he would have had to show negligence on the part of the company. It is not shown that the place where this accident happened that the tracks of the defendant company are any closer together than they are at any other place along this line; it is not shown that there were any defects in the tracks at the place where this collision occurred, such as a lowering the inside track, which would bring these cars any closer together than at any part of the line; it is not shown that there was any excessive speed; it is not shown that there was any lurch or jar or jerk of the car in which he was riding, or of the other car, either, which would have caused him to fall off or up against the other car. All we have is the fact that as this car passed the decedent was found wedged between the cars, and it is insisted on behalf of the plaintiff that the doctrine of *res ipsa loquitur* applies. But can that be, in view of the fact that the decedent, Eugene Brennan, was not alone on this front step? There was at least one other person, and Mr. Sutton, who was on that step, says there were two others besides the soldiers who were on that step, and they passed this car in safety, that they were not touched at all. It does not appear that the place upon the step where Brennan was was any closer to the eastbound car than where Sutton and this other soldier stood. That being so, what is the proof of negligence? What did the defendant company do that it ought not to have done? What did it omit that it ought to have done? I can see nothing. There are many things additional which have oc-

curred to me which might be said along the lines that have already been suggested in what I have said.

“As much as I dislike non-suits and directions of verdicts, particularly in a case of this importance, and particularly where the sympathies are aroused, as they are in this case, where a young man who was in the service of his country and lost his life, and particularly in a case involving death, where the deceased person cannot speak for himself, it is with great reluctance that I non-suit or direct a verdict, but I feel in this case that there is nothing that I ought to leave to this jury to determine as to the right of the plaintiff, as administrator *ad prosequendum* of this suit, but that it is my duty, notwithstanding the pull at the heart-strings, the other way, to grant the defendant's motion, which I now do, and an exception to this ground of appeal on behalf of the plaintiff may be noted.”

The facts in this case are clearly distinguished from those cases where a person rides on a part of the car not intended for the carriage of passengers, but upon the express or implied invitation of the carrier. There is absolutely no evidence to justify any inference that plaintiff's intestate was invited to ride on the front left step of the trolley car outside of the closed door. The doors at the rear of the car had been opened for passengers to enter, and at no time was the door at the front opened, nor did intestate pay a fare, although he had ridden a considerable distance.

The plaintiff attempted to prove a custom to permit passengers to ride in the position occupied by intestate, but it will be noted that there was no such proof in the case. There was proof admitted in evidence by the Trial Court, notwithstanding the fact that it was of the opin-

ion that such proof was irrelative—that passengers rode on the steps and bumpers at the rear of the car. In that proof, however, it appears that the passengers rode in those positions because the passengers crowded onto the car at those places where the doors were opened to admit them as passengers, and the entrances became so crowded that the conductor was unable to close the doors. If such proof was proper it, however, does not justify any inference that there was any implied invitation extended to ride on the steps outside of a closed car which had never been opened for the purpose of admitting passengers.

In the case of *Barlow v. Jersey City, &c. Ry. Co.*, 67 N. J. Law 364, decided by our Supreme Court, a lad of nearly twelve years, without invitation, express or implied, got upon the step of the front platform of a moving electric street car, meaning to become a passenger on the car. Access to the platform was barred by a closed door, the place provided for ingress to the car being at the rear platform. He rapped on the door and the motorman looked toward him but did not open the door, stop the car, or lessen its speed. The car struck a wagon and the boy was thrown off and injured. It was held, in an action against the company operating the street railway, to recover damages for such injury, that the plaintiff was properly non-suited, because the company owed him no duty except to abstain from wilful injury.

The facts in the Barlow case are considerably stronger against the defendant therein for the reason that there the proof showed that the motorman of the trolley car knew that an infant was riding on the step. In the case at bar there is no evidence whatsoever to bring home to the

defendant the fact that the plaintiff's intestate was on the step outside of the door.

In the Barlow case the plaintiff sprang on the step of such platform with the purpose, as he testified, of paying fare as a passenger and riding to his home.

In the opinion written by Mr. Justice Collins, the Court said:

"The plaintiff was in no sense a passenger. He got upon the step of the car at a place where he must have seen, if he had looked, that ingress was barred. That sometimes in defendant's cars the door at that place was left open, and that passengers were allowed to enter there before the car started, did not excuse him from looking to see if an invitation, by an open door, was then extended to him to enter there. He knew that the rear platform was the proper place to enter a car, and his excuse that the platform he tried to get upon would eventually be the rear one only emphasizes that knowledge. It should be noticed, too, that when the car would be turned so as to make it the rear platform, the proper place of ingress would have been on the opposite side of the car from that on which the plaintiff attempted to enter it. If the motorman saw the plaintiff on the step, he owed him no duty but to abstain from wilful injury. He was not legally called on to open the door. His attention might be needed in the operation of the controller and brake and in keeping a lookout, especially as he was running without headlight or fender. If it be urged that he was negligent in running his car without those protections, or in not observing that the wagon with which he collided projected over the path of the car, it is sufficient answer to say that only passengers properly in or upon the car or persons lawfully using the highway could have had legal cause to complain of such negligence.

“The plaintiff relies on the case of *Kelly v. Consolidated Traction Co.*, 33 Vroom 514, but the circumstances of that case were very different from those now involved. There a conductor started a car when he saw a passenger in the act of getting upon it with precarious footing. We held that, although the attempted entrance was at a place where it need not have been looked for, yet, if it was seen, the conductor ought not to have started the car. We have never held that to one who jumps on a moving car at a place where he has no right to expect ingress to be afforded, either conductor or motorman owes a duty to stop the car or to lessen its speed. In the case in hand, if the motorman in fact saw the lad, common humanity should have prompted him to do one of these things in order that the danger of the situation might be averted; but legal duty chargeable to the master is a very different matter.”

The Barlow case has been cited with approval by this Court in *Gehring v. Atlantic City R. R. Co.*, 75 N. J. Law 492.

In the case of *Schmidt v. West Penn. Rys. Co.*, 112 Atl. Rep. 22, the Supreme Court of Pennsylvania held that a boy eighteen years of age boarding a crowded street car, which he could not enter, and standing on a step where he knew that there was only six inches clearance between the car and any other car that would pass on the next track, was guilty of contributory negligence. The Court said:

“Judgment *non obstante veredicto* was entered by the court below on the ground of the contributory negligence of the plaintiff. It might well have been entered for failure to establish any negligence of the defendant company which caused the injuries sustained.

“The contributory negligence of the plaintiff could not well have been clearer. He

was 18 years of age and thoroughly familiar with the situation surrounding the car upon which he became a passenger. When he attempted to board it he found it crowded, and, not being able to enter it, stepped on the lower left front step. He knew that on the adjoining track cars would pass the one upon which he was riding; and the clearance between them was but six inches. While standing on the step of the car, with his body extending beyond the clearance and with his face turned towards the inside of the car, another approached on the adjoining track, and of course struck him. That he cannot recover is too obvious for discussion. *Harding v. Philadelphia Rapid Transit Co.*, 217 Pa. 69, 66 Atl. 151, 10 L. R. A. (N. S.) 352.

“Judgment affirmed.”

In the case at bar the double track extended from the easterly end of Highland Park (p. 153, l. 20), a distance of from one to two miles, and the accident did not happen until near the end of that run in George street, New Brunswick. The witnesses, who testified on that subject, say this car made an occasional stop, at least from the easterly end of Highland Park, where the double track begins, into New Brunswick. So if it were a single stop plaintiff's intestate would have had opportunity either to leave the car or get another position in the car, if, by the leaving of passengers, room was afforded.

In the case of *Flynn v. Consolidated Traction Co.*, 64 N. J. Law 375, Chief Justice Magie, speaking for our Supreme Court said:

“From the state of the case it appears that the evidence most favorable for plaintiff disclosed the following facts, viz., that he was a passenger on a trolley car of the defendant company; that he notified the conductor of his desire to alight when some

distance from the corner at which he wished to leave the car; that thereafter the speed of the car was diminished more and more until near the corner when plaintiff stepped down upon the run-board of the car in preparation to alight; that the car then suddenly increased its speed; that plaintiff turned toward the rear of the car and shouted and waved a basket, which he held in his hand, to the conductor in token of his continued desire to alight; that the conductor rang the bell to stop the car, and that as plaintiff turned back to face the front of the car his head was brought in contact with the iron handle of the door of a milk wagon which was moving and in the same direction in which the car was going, and that he thus received the injury for which he brought his suit.

“It will be assumed that upon this evidence the jury might find that there was negligence on the part of the company’s servants,— \* \* \* But the weight of this evidence need not be considered, for a verdict which attributes to plaintiff upon the facts enumerated by him no contributory negligence cannot, in my judgment, be sustained.

“The case was tried upon the theory that it was not negligence *per se* for a passenger to go upon the run-board.

“When a passenger was invited to take passage in a street car so full of passengers that he was obliged to stand on a run-board, it was held, in the Court of Errors, that he did not, by taking that position, negligently contribute to an injury arising from a danger created by the carrier by reason of its construction and operation of its road and which was unknown to the passenger. *City Railway Co. v. Lee*, 21 Vroom 435.

“In a later case in the same court, a passenger who occupied a run-board of a trolley car under similar circumstances, and was jostled therefrom by reason of a stumble

of the conductor which might have been due to the conductor's negligence, was held entitled to go to the jury on the question of the negligence of the conductor. *Whalen v. Consolidated Traction Co.*, 32 Vroom 606.

"In delivering the opinion of the court in that case, Mr. Justice Dixon, however, declared that a passenger who took such a position assumed the risks of such dangers as are obviously incident to it. This suggests that the true rule is that a passenger under such circumstances is not to be considered as negligent with respect to dangers arising from the construction of the car or its operation by the carrier and its servants, but that the passenger may be considered negligent with respect to dangers which may be said to arise *ab extra*. A similar view of a passenger's relation was expressed in *New York, Lake Erie and Western Railroad Co. v. Ball*, 24 Vroom 283. Upon this view a passenger might perhaps be charged with negligence in respect to the obvious danger of coming in contact with other vehicles lawfully using the street, but no opinion is intended to be expressed upon this point which was not fully argued.

"The verdict, however, cannot, in my judgment, be sustained. Assuming that plaintiff, in occupying the run-board, did not act negligently, yet he was under a duty while there to take reasonable care for his safety. Such care would include the use of his senses to observe and avoid passing vehicles. Due care was obviously negatived by his admission that he leaned over from his position on the run-board, in his eagerness to signal the conductor, so far that his head must have extended beyond the wheels of the milk wagon, because it came in contact with the handles of the door on the top or cover of the wagon which only projected a few inches beyond the door. Either he failed to make any observation which would have disclosed the moving wagon and its proximity to the car and

enable him to avoid it, or he observed it and took an obvious risk in leaning over to signal the conductor.

“In either view his conduct was negligent, and a verdict to the contrary is indefensible.

“Let the rule be made absolute.”

In the Flynn case the plaintiff was a passenger, whereas in the case at bar the plaintiff's intestate was not a passenger. It is contended by appellee that, under the law as laid down in the Flynn case, were he a passenger there would be no liability because of the contributory negligence of plaintiff's intestate. Two other persons were riding in exactly the same position as was plaintiff's intestate—outside of the closed door. They were not injured because they realized the danger of the position they took and moved in close to the door so as to avoid coming in contact with the trolley car passing in the opposite direction. Plaintiff's intestate knew, or must have known, the danger of his position, and he could likewise have avoided injury by moving in toward the door as did the others in like positions.

The plaintiff-appellant at page 5 of his brief quotes the Trial Court as saying— “I think it is a question for the jury whether or not he was a passenger—.” Immediately on the following page of the printed case (p. 110) the Trial Court corrected that statement. When the statement was made the Trial Court was under the impression that the evidence showed that plaintiff's intestate had boarded the trolley car at the rear; had paid his fare and walked through the trolley car and taken a position on the front step with the door open. The Trial Court had either forgotten, or not heard, considerable of the evidence in the case, but during the interim of adjourn-

ment had had some of the testimony read to him and then said:

"I might say that after having looked over the decisions since adjournment last evening, that were given to me on both sides, I have decided that if Mr. Bouton can produce the testimony, *in view of the situation being changed in my mind, from the fact that it now appears from the testimony that that door was closed and those people were riding on the outside of the steps with the door closed—.*"

Again the matter is made clear on the Court's remarks in the printed case (p. 150) where the Court said:

"Just before the adjournment of court last evening a motion was made for a non-suit and the motion was denied. The decision of that motion was based on a misapprehension by the court of a very important item in the testimony. It has entirely escaped my attention, that the testimony showed that the front left-hand door was closed and that the plaintiff, with another, or others, was on the step outside of that door holding fast to the stanchions. The stenographer's record shows that such was the testimony."

In the printed State of the Case (p. 154, l. 16) the Court said:

"In this case I had some doubt as to whether or not Brennan was a passenger on that car, assuming that this testimony as to custom was legal testimony and properly received in this case, it is entirely overcome by the testimony which has been produced on the part of the defendant by the conductor, and particularly by Mr. Sutton, That he did not pay any fare is pretty clearly established."

The plaintiff-appellant in his brief relies upon the case of *City Railway Co. v. Lee*, 50 N. J. Law 435, but in that case the plaintiff was a

passenger on the car of the defendant company. There the proofs showed that the plaintiff was invited by the agent of the company to take a position on the run-board, and such position was taken with the assent of the company's agent. A person might stand on one foot-board and pass a car on the other track without injury if the foot-board of the car on such other track were free from passengers. There was not room for a person standing on these foot-boards in safety if both foot-boards were occupied by passengers. The plaintiff was knocked off his car and injured by colliding with a passenger standing on the foot-board of a like car of the company passing in an opposite direction along the double track, and the Court held that the question of contributory negligence of the plaintiff was for the jury. The Court said:

“The position on this outside platform undoubtedly was attended with some risks and exposures. One riding in that manner is chargeable with the knowledge that the public highway on which the track lies is used in all its parts by the ordinary vehicles of travel; that there is a liability of collision with such vehicles in passing. And had the plaintiff received his injury from such cause, it may be that negligence contributing to his injury would be imputed to him.”

The plaintiff-appellant in his brief relies upon the doctrine of last clear chance, and contends that it applies in this case. He says that he can find no case in New Jersey in which the Court has said in so many words that it has adopted that doctrine. Our understanding, however, is to the contrary, and that such doctrine has not been recognized in this State but has been repudiated.

In the case of *Menger v. Laur*, 55 N. J. Law 205, at p. 216, Mr. Justice Depue, speaking for the Supreme Court, said:

“In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is, whether the faulty act of the plaintiff was so remote from the injury as not to be regarded in a legal sense as a cause of the accident, or whether the injury was proximately due to the plaintiff’s negligence as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not in a legal sense a contributory cause thereof, then the sole question will be whether, under the circumstances and in the situation in which the injury was received, it was due to the defendant’s negligence. But if the plaintiff’s negligence proximately, that is, directly contributed to the injury, it will disentitle him to a recovery, unless the defendant’s wrongful act was willful or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the co-operating negligence of both parties, or to determine the comparative degree of the negligence of each.”

In *Barlow v. Jersey City, &c. Ry. Co.*, *supra*, the Supreme Court said:

“In the case in hand, if the motorman in fact saw the lad, common humanity should have prompted him to do one of these things in order that the danger of the situation might be averted; but legal duty chargeable to the master is a very different matter.”

Again the plaintiff-appellant contends that if the intestate was not a passenger the plaintiff would be entitled to recover for a willful or wanton act. There is no allegation in the complaint, either as originally filed, or as amended, alleging any willful or wanton act on the part of the de-

fendant or its servants, nor is there any evidence whatsoever amounting to proof of any willful or wanton act.

It is respectfully submitted that the Trial Court properly directed a verdict under the facts in this case for the defendant-appellee, and that the plaintiff-appellant's appeal should be dismissed.

Respectfully submitted,

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