JOHN E. ROWE & SON, Printers, 247 Market St., Newark.

N. J. Court of Errors and Appeals

10

MARY McCANN, *Defendant in Error,* *ads.* NEWARK AND SOUTH ORANGE RAILWAY CO., *Plaintiff in Error.*	*On Error to Supreme Court.*

20

BRIEF

OF ELIAS F. MORROW,

OF COUNSEL WITH DEFENDANT IN ERROR.

Mary McCann, the plaintiff in the Supreme Court, was of the age of seventeen years at the time of this accident. 30

She had left her home on James Street, in the City of Newark, in the afternoon of April 13th, 1893, on her way to visit her little brothers and sister, in the Orphan Asylum, situate on South Orange Avenue.

All the other passengers had left the car when the stables had been passed and the car had reached Grove Street.

40

At this point the girl became sick—sick at her stomach, and dazed: so sick that she felt that she could no longer remain in the car; she notified the conductor of her condition, and requested him to let her out; the conductor then stood at the door, evidently the rear door, because, after she had requested him to let her out, he passed along by her and stood at the front door, talking with the motorman.

10 She asked the conductor to stop the car, that she might get out, and gave to him a reason, a perfectly satisfactory reason, why she wished to alight.

There was direct evidence as to this, and the jury had a right to believe it; and they must have believed it, or the verdict would have been for the defendant.

See *page 10, lines 1-15; page 15, lines 30-40.*

20

When informed by the girl as to her condition the conductor told her to take her seat, to sit down and she would feel better after awhile; she did so; but, instead of feeling better, she grew more sick all the time.

And, when the conductor passed through the car, 30 on his way from rear to front, the girl said to him, "Won't you *please* stop this car?" Instead of stopping the car he simply laughed at her, and walked on to the front of the car and stood there with his back to the girl, talking with the motorman.

Louis Miller, who lived adjoining Maybaum's house, in front of which the accident happened, and was working ten or twelve steps away from the car, says the conductor was standing at the front of the 40 door (the car), having his memorandum in his hand,

writing down and looking up. *Page 37, lines 16-20.* The rear door of the car was open. *Lines 20-24.* And the conductor stood with his back towards her; or, as the witness expresses it, "Well, Mary was behind his back."

Page 38, lines 26-27.

10

It will, therefore, be observed that there was evidence, and that which the jury had a right to believe, no difference how much it was contradicted, and it was contradicted by no one except the conductor, that this girl was sick; that she made known the fact of her sickness to the conductor; and that she was so sick that she desired him to stop the car that she might get out of it. It cannot be conceived that the girl was required to descend to state to him the particulars of her sickness: he did not even ask her; but she did repeat to him her request to be permitted to leave the car. 20

30

Then the plaintiff grew sicker and sicker, and felt the absolute necessity of getting out of the car, the very rapid motion of which doubtless contributed to the increasing severity of her affliction.

And, as the only person on the car to whom she might naturally have been expected to appeal manifested such utter indifference to her request, she naturally began to look elsewhere for help.

Was she bound to remain quiet under the circumstances? Had she not a perfect right to go to the 40

door, the door which the conductor had left open, that she might there see some person on the street to whom she might cry for help ?

10 She was in a closed car, from which she could be heard much more easily by going to the rear door than by trying to call out through a window.

Her own story is that, failing to get the attention of the conductor, she got up and went to the rear of the car to see if she might see any one passing, to attract the attention of some one on or along the street; as she neared the door she staggered towards the door, falling against the door, and whether on the inside or the outside she scarcely remembers,
20 or is unable to tell; from there she was thrown upon the street and sustained the terrible injury from which she remained unconscious for a period of twenty-four or twenty-five days.

She did not leave her seat for the purpose of jumping off the car, but to see some one to have the car stopped.

See *page 17, lines 30-40.*

30

Aside from the direct testimony on this point, to which I will presently call attention, there is a circumstance of great weight, going to corroborate the girl's story. She had with her four or five little parcels, which she was going to take to her brothers and sister at the Asylum, which was more than a mile further on. The affection and considerateness which prompted her to purchase
40 these things would not have allowed her to leave

them in the car had she intended to *jump* from it; she certainly would have taken one or more of them with her.

Her own testimony is that she put them on the seat where she was sitting, intending to go back and take them; she left them there to get up and have the car stopped.

See page 16, lines 30–40.

10

All the persons about the premises at the time of the accident, in the car and off the car, agree that these articles were left in the car, though the conductor would have the jury believe they were scattered about the floor; but the story of the plaintiff is the more natural one. 20

Now, she says she did not jump out; the conductor says she did; if there was no other testimony on this point the jury had a right to believe her in preference to him; and the judge at the circuit told the jury that this was a vital point in the case; the jury could have rendered its verdict on no other theory than that the girl went to the door to attract a passer-by, and not to jump from the car. 30

New Jersey State Library

40

Sarah Steinbach, a servant in Maybaum's family, in telling what she saw, says "I saw her when she *fell* off the car.". Page *32, lines 30–40.*

And on the next page she says "just as I said this I saw this thing; this girl coming *head first* out of the car."

10

Louis Miller says he saw the girl *fall* from the car; her feet lifted up as she came out; he saw her getting up from her seat, and wondering what she was about to do; he seems to have watched her, and then he says going out and *falling* off was all one thing.

20

Now, had she jumped from the car, as the defendant insists, this man, a present employee of the company, would not have spoken of her *falling;* he would have said "*as she jumped.*"

30

There was evidence from which the jury might have found that at the time she made her request to have the car stopped, it was going slowly; she says so herself; I do not know that she was capable of judging how much faster it was going when she repeated the request; but she says it *was* going faster; (*page 15, lines 35–40*); but the woman

40

Steinbach says it was coming *very* fast (*page 33, lines 10–20*), and Miller says the car went on quite a distance after the girl fell off.

Just where she fell first I do not think very clearly appears; she doubtless reached the door, and there her dizziness overcame her and she fell; the great speed of the car threw her with violence against the jamb of the door, or against the door itself, and the swinging of the door may have thrown her out of the car, upon the rear platform, upon the ground, where she was picked up, unconscious and bleeding.

This conductor cannot say how she went out, because the evidence is clear, from disinterested sources, that at the very time he stood with his back to the plaintiff.

However that may be, the question as to whether she jumped out of the car was one for the jury under the evidence, and there being evidence in denial of the contention that she did jump, the Court cannot, on error, interfere with the result reached by the jury.

The motion to nonsuit was on the ground.

(1) That no negligence was shown on the part of the defendant; and

(2) That plaintiff was shown to have been guilty of contributory negligence.

After the jury had retired, the defendant's coun-

sel asked the Court to direct a verdict for the defendant.

The defendant then excepted to the charge to the jury, so far as the same held that upon the establishment of two propositions named, the plaintiff was entitled to recover, viz.: (a) that after the plaintiff sat down, she had communicated to the conductor her desire to alight from the car, and, (b) her action thereafter in going to the door for
10 the purpose of obtaining assistance outside the car was reasonable and prudent.

The plaintiff was in good health when she began the journey; on her way she was taken unexpectedly ill; she was the only passenger in the car;
20 she communicated to the conductor the fact that she was sick and desired him to stop the car in order that she might get off; he asked her again, "*what is the matter with you?*"; and again she told him she felt *sick* and *would like to get off*.

And in a few moments after she again requested him to stop the car, which he refused to do, and passed on to converse with the motorman.

30

Can it be pretended that she was bound to re-remain in the car without making any effort toward assistance?

What was there about the circumstances that made it unreasonable for her to ask to have the car stopped just a moment?

40 The conductor says he was going slowly; but

slow or fast, the grade was a light one, and the stopping was a matter of a minute or more time.

If her testimony is to be believed, then the conductor was apprised of her sickness and of her wish to alight, and it was at his peril if he undertook to judge of the reasonableness of her request. 10

And the fact that he knew of her condition, put an additional responsibility upon him to care for her.

He might have stopped his car and put her off in some safe place, but in doing even that he was under the duty to give her some degree of attention, in case she was so sick as to be unable to help herself; if he was so situate that he could not provide safely for her off the car, he was bound to take care of her so long as she remained his passenger. 20

The rule of law is correctly expressed in *Atcheson, etc. R. R. Co., vs. Weber 33; Kansas 543*, as follows:

> "When a passenger is found in a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made."

30

So, also, in *Croome vs. Chicago, Milwaukee & St. P. Co., 52 Minn. 296, (S. C. 53 N. W. Rep. 1128)* the rule is thus stated,—"If the carrier accepts a per-

> "son as a passenger whose inability to
> "care for himself is apparent or made
> "known to its servants and renders
> "special care and assistance necessary, 40

"the company is negligent if such assis-
"tance is not afforded. In such cases it
"must exercise the degree of care com-
"mensurate with the responsibility
"which it has thus voluntarily as-
"sumed, and that care must be such as
"is reasonably necessary to insure the
"safety of the passenger, in view of his
"mental and physical condition. And
10 "whether the defendant fully performs
"this duty is a question for the jury."

Now, if the conductor was told of this girl's ill-
20 ness, and knowing her desire to alight, he had the choice of stopping the car and assisting her out (just as would have been required of him had it been an old, infirm or blind man), where she might have been cared for by persons in the vicinity, or to have observed her while she remained in the car, in order that he might render her any special assistance her condition required.

He choose not to stop the car, but left the girl alone to care for herself.

30 Had he been mindful of his legal obligation, he would have been watchful of her and when she, according to his testimony started for the open door to jump out, she would have been prevented; or when, according to her testimony, she started towards the door to attract the attention of some passerby, he would have accompanied her and made it unnecessary to call for assistance at all.

Instead of so doing, he turned his back upon her and engaged in conversation with the motorman.

40

This, then, was the situation in which the plaintiff found herself: she was sick, dizzy, faint; and the sickness increasing; the car moving with greater speed, her appeals to the conductor unheeded, her only relief lay in her attracting some person on the outside.

The judge told the jury she had no right to jump from the car, and that if they believed that she did jump, their verdict should be for the defendant.

But I submit that she had the right to get up from her seat and go to the door to call some one; and if she was unable to procure assistance without going out upon the platform, she had a right to go there, and call some one to her.

It was a natural thing for her to do; the jury was told that before they found for the plaintiff they must say that what she did in the situation she was placed in, was reasonable and prudent for her to do; going to the door for the purpose of obtaining assistance outside of the car to have the car stopped.

So that it is an established fact in the case, established in the way approved by the law, by the verdict of a jury, that what she did was reasonable and prudent under the circumstances.

She did not therefore, by her negligence, contribute to the injury complained of.

The measure and degree of care, the omission of which constitutes negligence, is to be graduated by the age and capacity of the individual.

See *Birge vs. Gardner 19 Conn. 507.*
Daley vs. R. R. Co. 26 Conn. 591.
Robinson vs. Cone, 22 Vermont 213.
O'Mara vs. Hudson R. R. Co. 38 N. Y. 445.

The old, the lame, the infirm and the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them; no greater degree of care is required than the capacity of the person will allow him to exert.

See *Mowrey vs. Central City Railway Co.*, *51 N. Y. 666.*

10

This is in harmony with the well-established rule that persons, in sudden emergencies and called to act under peculiar circumstances, are not held to the exercise of the same degree of care and caution as in other cases; and with another principle asserted by courts, that carriers of persons for hire

20 are called upon to care more tenderly and prudently for the aged, the infirm and the partially helpless than for the vigorous and healthy of their passengers.

Thurber vs. Harlem, etc., R. R. Co., 60 N. Y. 336.

30

No one, whether sick, lame, imbecile, or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves, is all that the law requires.

See *Sheridan vs. Brooklyn, etc., R. R. Co., 36 N. Y. 43.*

40

Now, this girl was but seventeen years old, of little education; a house-servant; she had, some two years before, while riding in a car, suffered an electric shock, communicated to her through the floor of the car; it had caused a sickness similar to that from which she was suffering at the time she requested the conductor to stop the car that she might alight therefrom; (see pages 24, 25), what more natural than that she should suppose she was in contact with a similar dangerous current 10 from a force that at that time was numbering a victim a day along these trolley lines in Newark? And what more natural than her purpose to escape from the deadly presence?

Was not the jury abundantly justified in saying that her conduct was reasonable and prudent under the circumstances?

Now, I submit that the damage which the plaintiff suffered was the direct result of the failure of the defendant's servant to perform the duty which 20 the law, arising out of the contract to safely carry this girl, required of him.

She was justified, under the circumstances, in going to the door or upon the platform to call for help.

It being a reasonable thing to do, it was but *natural* that she should do so.

Whether she was capable of properly estimating the risk incurred in so doing was one of the elements to be considered in determining the reasonableness of her going; that the judge left to 30 the jury when he said to them:

> "The next question that will arise is,
> "whether what the plaintiff did in the
> "situation she was placed in was reason-
> "able and prudent for her to do—going
> "to the door for the purpose of obtaining
> "assistance outside the car to have the
> "car stopped."

40

The jury, by its verdict, say that it was a reasonable and proper thing for her to do.

In so doing she met with the accident which caused the damage.

Had the conductor done either of the things which his duty required him to do—either to have stopped the car until the plaintiff had alighted, or have given her the attention which her made-known condition required, there would have been no occasion for her going to the door.

I think any reasonable person would say that to allow her to go alone to the open door was a careless omission of duty by the conductor, and the result might have been anticipated by him.

Her falling down, out of the car, was, doubtless, owing to the absolute loss of consciousness which overtook her at the door of the car. Had the conductor been there, where, under the circumstances, his duty required him to be (for there were no other passengers in the car, and no other duty appears to have devolved upon him at the time), the accident would not have occurred.

I submit, then, that his negligent inattention to the sick plaintiff, of whose condition he was fully aware, was the *direct*, *proximate* cause of the injury.

In *Cuff* vs. *Newark and N. Y. R. R. Co.* ,*6 Vr.* 32, Mr. Justice Depue says the "intervention of the "independent act of a third person between "the wrong complained of and the injury "sustained, which was the immediate cause "of the injury, is made a test of the re-"moteness of damage which forbids its "recovery."

There was no such intervention here between the the refusal of the conductor to comply with the reasonable request of the plaintiff to be allowed to alight from the car and the prudent effort of the plaintiff to attract attention from a passer by for her relief.

In *Hammill* vs. *Pennsylvania R. R. Co. 27 Vr. 379*, it is said that the rule is that the negligence to render the defendant liable must be *causa causans* and not merely *causa sine qua non*. Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events, though such consequences be immediately brought about by intervening causes, if such intervening causes were set in motion by the original wrongdoer. And when it has been determined that there is negligence, the person guilty of it is equally liable for the consequences, whether he could have foreseen them or not. It is sufficient if the probable consequences occur. 10 20

Citing *Beven on Negligence, page 81.*

In *Ætna Ins. Co.* vs. *Boon, 95 U. S. 130*, it is said

> "the causes that are merely incidental, or
> "instruments of a superior and controlling
> "agency are not the *proximate* and con-
> "trolling ones, although they may be
> "nearer in time or place to the result."

I submit that the plaintiff was not bound to sit still in the defendant's car, after she had made known her condition to its servant and requested to be allowed to alight; what appeared to her as a reasonable person in her situation to be impending danger if she remained there longer was sufficient justification for what she did up to the time she lost consciousness, whether she was then inside the car or outside on the platform, even though she fell from the platform directly upon the ground and received the injury complained of. 30 40

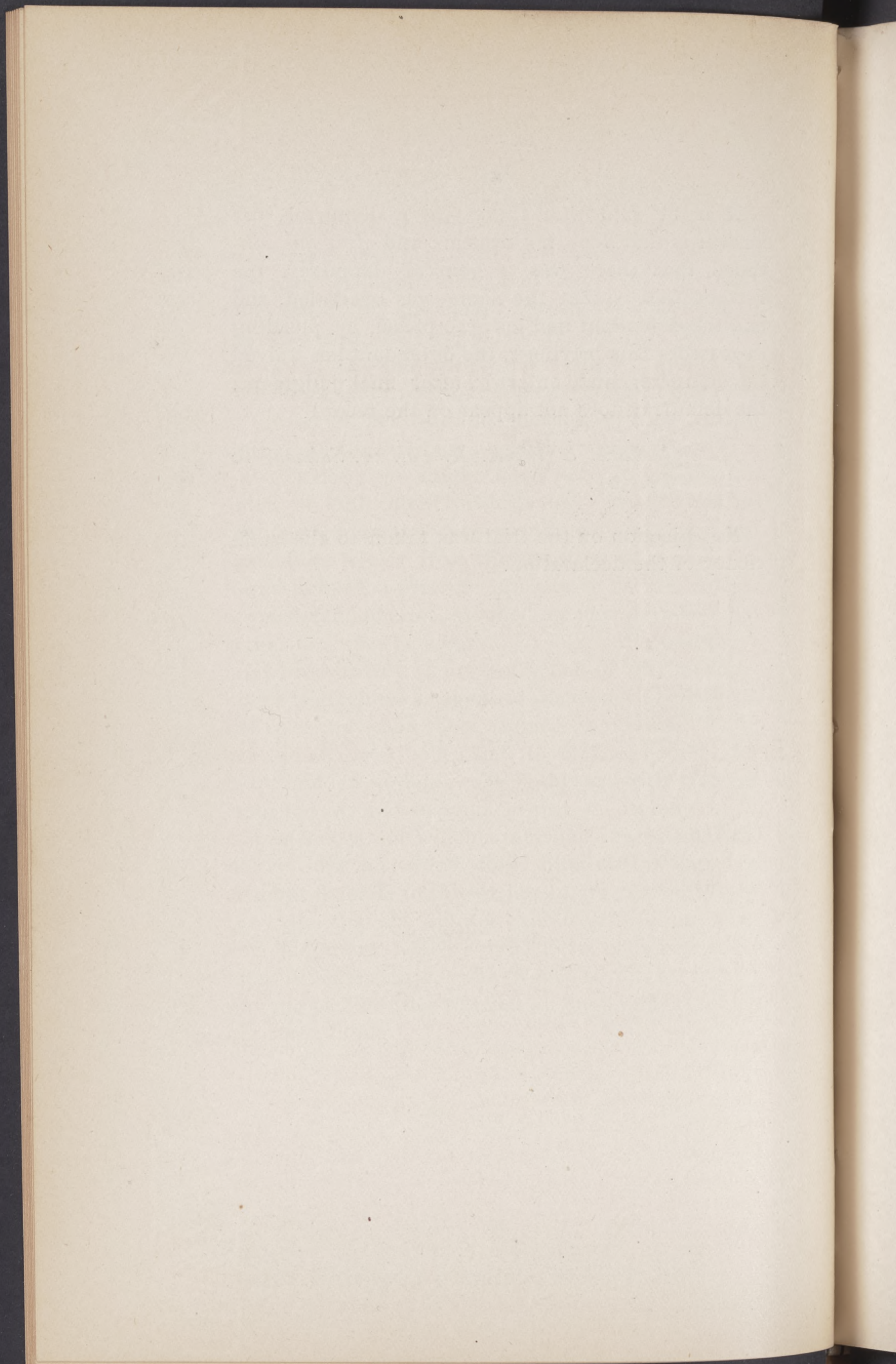
Think of the situation; she was a young girl of seventeen, alone in this car; a sickness of a peculiar character suddenly overtakes her; she becomes faint and dizzy; she makes known her condition to the only man, the only person in the car; he tells her to sit still, she will soon be better; she grows more faint and dizzy and appeals to the conductor to *please* let her off, and the answer is a leering smile, and the conductor and the motorman hold a
10 conversation; she might have seen in all this an omen of evil intent towards her; she did realize that her physical safety was dependent upon her immediate release from the situation in which she found herself, a prisoner practically in the vehicle of the defendant, not intended for such purposes, but rather to stop whenever and wherever a passenger might reasonably want to stop and of which proper notice is given to the agent of the owner in charge of the car; and when there seemed no other relief for
20 her and she was compelled to look elsewhere for help, and, in so doing, she is thrown with violence from the car and sustains an injury, lifelong in its consequences, for which a jury has awarded her the paltry sum of twenty-four hundred dollars, an attempt is made to thwart her in its realization by the claim that she did not exercise all the prudence and judgment which might have characterized a man of experience, who wants to alight from a moving car in order to meet an engagement or get
30 get some lunch.

I observe an assignment of error (the first one) that the declaration is not sufficient in law, etc. That is in effect a demurrer, which, so far as the record here shows, is now first injected into the case.
40

If it be said that there was a demurrer, my answer is that does not appear; and if it be conceded that there was a general demurrer, the further fact is that the same was overruled, and and the defendant had leave to plead; by pleading over under this privilege, the defendant has waived the demurrer, and, on error, after final judgment, the demurrer does not appear on the record.

Del. Lack. & W. R. R. Co., vs. Salmon, 10 *Vr.* 301. 10

No objection on the trial was taken to the sufficiency of the declaration.



New Jersey Court of Errors and Appeals

10

THE NEWARK AND SOUTH ORANGE RAILWAY COMPANY, *Plaintiff in Error,* *vs.* MARY McCANN, *Defendant in Error.*	*In Error to Supreme Court.*

20

Brief for Plaintiff in Error by Robert H. McCarter.

This action was tried before MR. JUSTICE DEPUE and a jury at the Essex Circuit, and resulted in a verdict for the plaintiff for twenty-four hundred dollars damages, besides costs.

A motion to non-suit the plaintiff at the close of her case was made and refused, and after the evidence was al 30 in the defendant moved the Court to direct a verdict in its favor, which was also refused, and it is upon the exceptions sealed to these two rulings, as well as the certain parts of the charge, that this Writ of Error is sued out.

The case itself is a remarkable one, and quite unique in all its features.

The plaintiff, a girl eighteen years of age, was employed as a servant in the city of Newark, and on the afternoon of the 13th of April, 1893, took a trolley car of the defendant in Newark, for the purpose of going to see 40

her sister and brothers in St. Michael's Orphan Asylum, in South Orange. By the arrangements then in vogue, the plaintiff was compelled to change from the trolley car in which, at the time of the accident she was riding, to a horse car to complete her journey to the hospital at South Orange, the railroad being equipped with electricity on South Orange Avenue only up to a point about 670 feet beyond where the accident occurred.

The plaintiff had paid a through fare, and had secured a
10 ticket entitling her to complete her journey on the horse car. At the time of the accident she was the only passenger, the conductor and motorman being the only other occupants of the car.

The following is her description of the accident (p. 10, line 5):

"A. When I got to Grove street I felt sick, and went to the door and told the conductor to stop the car. He says, "What's the matter?" I says, "I feel sick, and I would
20 like to get off." And he says, "What's the matter with you?" I says, "I felt sick and would like to get off." He told me to take my seat and set down, and I would feel better after awhile; and I did so, and, instead of feeling better, I was feeling sicker all the time.

Q. Go on?

A. And he passed through the car, and I says, "Won't you please stop this car?" He looked at me and kind o' smiled, and he went on to the front of the car and began talking to the motorman. And then I got up and went to the rear of the car to see if I could see any one passing, to attract their attention; and when I got up I kind o' stag-
30 gered through the car to the door, and fell kind o' in the corner.

Q. The corner of the car, or the corner of the door?

A. The corner of the door of the car.

Q. Did you fall against it, or not?

A. I went this way (pitching forward), and I went on this side (to the right); and I remember nothing more after that.

Q. Do you know how you went off the car, Mary?

A. No, sir; I don't."

40 This the only reference to the accident that she makes

in her direct evidence, and on her cross-examination she thus (p. 15, line 30) continues:

"Q. What was the feeling?

A. I felt kind of dazed, and as if I couldn't stay in that car any more. I felt sick to my stomach.

Q. And you wanted to get out?

A. Yes, sir.

Q. Was the car going slow or fast?

A. It was going fast. At the time I wanted to get out first it was kind o' slow, and I told him to let me out; and when I saw that he wouldn't let me out, and it was going fast, I got scared, and wanted to get out the worst way." 10

And on page 17, at the top, she thus continues:

"Q. Well, the conductor, you say, was in front of you at that time?

A. Yes, sir.

Q. Talking to the driver?

A. Talking to the motorman.

Q. And after he had gotten by you, you got up, laid your bundles on the seat, and started towards the door?

A. Yes, sir. 20

Q. Had you seen anybody outside before you got up?

A. No, sir.

Q. You said you started to the door to see if you couldn't see somebody and ask them to stop the car?

A. Yes, sir.

Q. Couldn't you look out and see if anybody was there?

A. Well, I didn't look out; I got up to go and look.

Q. How far were you from the door where you were sitting; which side of the car were you sitting?

A. I was sitting on the right hand side going up.

Q. And about how far from the door?

A. About in the middle, I should think. 30

Q. It was a closed car, or open?

A. Closed.

Q. And you kept getting dizzier and dizzier?

A. Yes, sir.

Q. And you kept getting dizzier after the conductor passed you, before you got up?

A. Yes, sir; I was very dizzy, and I felt a queer sensation.

Q. And you had a great desire to get off the car?

A. Yes, sir.

Q. Isn't that what you got up for, to get off the car? 40

A. Not to jump off; I got up to see some one to have the car stopped.

Q. How was some one going to stop the car?

A. To get the motorman to stop.

Q. They were going very slow?

A. Yes, sir.

Q. And you only got as far as the door jamb?

A. Yes, sir.

Q. And struck your shoulder on the right side?

A. Yes, sir.

Q. Then you don't remember anything?

10 A. No, sir; after kind o' falling through the car by the door, where the seats are in the back, I remember nothing more; I went through the door, that's all I remember.

Q. Were you perfectly well at that time?

A. No, sir.

Q. Weren't you periodically sick at that time?

A. No, sir; I was kind o' sick at my stomach and dizzy.

Q. Not before you got on the car?

A. No, sir.

Q. And you had a desire to get off the car?

A. Yes, sir.

Q. Where was the conductor when you first asked him

20 to stop and let you off?

A. In the rear of the car.

Q. You had a pass entitling you to go on to the little horse-car, hadn't you?

A. Yes, sir."

It further appears in plaintiff's case that she had only about 670 feet to travel in the trolley car before it would end its journey and she would take the horse car; that there was a grade of between one and one-half and two per cent. descending from the MAYBAUM house in front of

30 which she met with the accident; and that she was accustomed to make the journey frequently, and was familiar with it. It further appears that she had received her transfer ticket from the conductor at the car stable some thousand feet from the place of the accident, and that he was perfectly aware that she intended to take the other car and go through.

The plaintiff offered two other witnesses to prove how the accident occurred.

40 One of these was SARAH STEINBACH, who was sweeping

the porch of MR. MAYBAUM's house, and thus testifies (p. 33, line 10):

"Q. And she fell off which side of the car?
A. She fell off by Mr. Maybaum's house, in the gutter.
Q. On the same side that you were?
A. Yes, sir.
Q. What attracted your attention to the car at the time that she fell off?
A. Mrs. Maybaum was watching her children going across to Mr. Aschenbach's, and she stood in the front door; and I said, "I am sure that it is a good thing the children is across. Just look at the speed of the car?" It was going very fast down the hill. "Well," she says, "they're all right." Just as I said this I saw this thing; this girl coming head first out of the car and laying in the gutter, with the water from the zinc factory on her. She was bleeding out of the mouth and nose. She was a very heavy girl, and we pulled her as good as we could up on the bank to bring her too." 10

The other witness was LOUIS MILLER, who was working on the road in front of the lot next to MAYBAUM's, and he testifies (p. 37, line 11): 20

Q. When you first saw the car, was Mary still in the car?
A. She just had stood up and turned round and wanted to go towards the door.
Q. Who else was in the car with Mary?
A. I seen no one else but the conductor.
Q. And where was the conductor?
A. He was standing at the front of the door, having his memorandum in his hand, and writing down, and looking up.
Q. Was he at the back door?
A. No; at the front door. 30
Q. Was the rear door of the car open or shut?
A. Open.
Q. Did you see Mary McCann fall from the car?
A. Yes; I saw the white petticoats, how the feet lifted up."

And being cross-examined, she said (p. 38):

"Q. The conductor, you say, was marking on a memorandum?
A. Well, I know nothing about that; I don't know what he was writing. 40

Q. Was he writing?

A. When this trouble occasioned thereby, I naturally took particular notice of it.

Q. Did you see her rise from her seat?

A. Yes; everything passed so quick—

By the Court:

Q. When you first saw her, was she sitting down or standing up?

A. No; she was standing.

By Mr. McCarter:

Q. Was she up when you first saw her, or was she sit-
10 ting down?

A. While the car was coming she was getting up, and I just thought in my mind: what is she going to do?

A. And how far was the conductor from her?

A. Well, Mary was behind his back.

Q. And what did she do after she got up?

A. Going out and falling off was all one thing."

This is all the evidence offered by the plaintiff to substantiate her case, and on it she relied to prove the neglect of the defendant company.

20 The defendant moved for a non-suit on two grounds, viz: one, that there was no proof of negligence on the part of the defendant; and two, that the plaintiff was guilty of contributory negligence.

The reasons given by the trial Judge in refusing this application are found on pages 40 and 41 of the case, and they show that his mind was in a state of great doubt about the matter. Amony other things he says:

"I am not so sure of the law regulating this case as
" counsel seems to be. There are some principles of law
30 " that regulate the responsibilities of a carrier of passen-
" gers, that I consider as settled. One is, that they are not
" insurers; they simply undertake to carry, under an obliga-
" tion to exercise reasonable care for the safety of passen-
" gers. Another principle of law is well settled, and that
" is that the injury which causes the damage must be the
" proximate result of the act of the person who is sued as a
" defendant. In every case it is necessary, where an action
" is brought against a carrier of passengers, to see that both
" of those incidents of the action are supplied by the proof.

"Now, I don't feel sure in this case that the facts laid
40 " before the Court are sufficient to bring the case within

"both of the principles that I have mentioned, and there-
"fore I will deny the non-suit, and will consider the mat-
"ter when the whole of the evidence is in. * * * *

"My scruple about this case, and it is quite a serious
"one, is in the last proposition that I have mentioned;
"whether this injury can be considered as the proximate
"result of the refusal of the conductor to stop the car either
"at Grove street or when the passenger stated to him after-
"wards that she was sick. * * * * *

"But then there is another principle involved, and I
"think it is quite fundamental, and that is the damages
"from injuries that result, must result from a wrongful act 10
"in order to be actionable; must be such as could reason-
"ably be viewed as the probable result of the wrong done.
"My scruple in this case, and it is probably more than a
"scruple, is whether the conductor could be held to have
"reasonably apprehended this result from the sickness of
"the passenger and his refusal to stop the car. * * *

"Now, I do have a doubt about this case. I will bear it
"over in my mind, and for the present shall refuse to non-
"suit."

In this I respectfully contend there was error. 20

Where was the negligence of the defendant? The car was within a stone's throw of its destination. It was going down hill quite rapidly. The only passenger expected to take the horse car at the terminus. According to her evidence she changed her mind and desired to alight at or near Grove street. We will admit she had a right so to change her mind. Did she insist upon it? No! She acquiesced in the conductor's suggestion and resumed her seat. According to her story the conductor then walked past her through the car, and as he passed her she said: 30 "won't you please stop the car?" and he went out to the front of the car, after looking and smiling at her. They were then 670 feet or thereabouts from the terminus. Perhaps it was wrong for him not to have heeded her re-request, but did that justify her, in a dizzy condition, leaving her seat and walking or staggering to the open door of this rapidly moving car without the knowledge of either the conductor or motorman? Why did she not ring the bell, or call to the motorman to stop? Did the conductor have any reason to suppose that she would do so foolish a thing 40

as walk to an open door of a car, in hopes she might see some one who would ask the motorman to stop the car? She did not even look out of the window to see if there was any one on the street to whom she could appeal. "She was very dizzy and felt a queer sensation" before she arose from the seat. She "had a great desire to get off the car," and she went. The conductor's back was turned to her, and the motorman had no idea she wanted to get off.

Now, it is a matter of some importance that the plain-
10 tiff had a very similiar experience some two years previous on one of the electric cars of the Consolidated Traction Road in Newark, except, in that case, the door was shut and the conductor was on the rear platform, and she was happily saved from an accident. This was brought out at her cross-examination and she thus describes it (p. 24, line 15):

"A. It was on Sunday night. I was out, and I was going home. It was ten o'clock, and I took the car on the corner of First street and Central avenue; and when I got down
20 near Morris avenue the conductor came in, as I thought for my fare, and when he came in he happened to stoop down to open the little trap in the floor, and out of there come a blue light and a little red flame; and I seen him leave this little door open; and he got up and walked out to the rear of the car again; and I thought it was very funny that he opened that and didn't ask me to move; and I got up and went on the other side of the car to sit; and when I got there I felt sick, and I felt dizzy, and I went to the rear of the car and asked the conductor to stop the car; and when he did, he held the door shut, and I kicked and hollered, and—

30 Plaintiff's counsel objects to the testimony as incompetent.

The Court: I suppose the question was asked with a view of showing that she was subject to sickness of this character.

By Mr. McCarter:

Q. Did you feel dizzy and sick at that time in the same way that you felt this time?

A. Yes, sir.

Q. That was on the other road, the Consolidated; that wasn't on the South Orange?

40 A. No, sir.

Q. How long before?
A. I guess it was about two years.
Q. And you wanted to get out that time, too?
A. Yes, sir.
Q. You had the same dizzy feeling?
A. Yes, sir.
Q. The same feeling of sickness?
A. Yes, sir."

This girl seems to have had a mania for getting off of cars, She seems to be subject to fits of dizziness accompanied by an impulse to get out. In view of this previous incident we cannot but conclude that, either purposely or not, she now misconstrues her motive in staggering to the door. *She really intended to get off*. If she had only expected to ask some one to "get the motorman to stop" (p. 17, line 34), this rapidly moving car, she would have gone to the front door, which was also open, and she would have looked to see if there was any one to accost before starting (ibid., line 15). Why not ask the motorman himself instead of "going to look" for some one on the street, behind the car, who could by some magic prevail upon the innocent but fast receding motorman to stop the car in order to allow a passenger to alight, of whose desire he was entirely unaware, although the bell rope was there, and he himself stood by the open door of the front platform and within a few feet of her.

There is no evidence that the car was being negligently run; or that its speed was accelerated or in any way changed. There is no evidence that either the conductor or motorman knew or had any idea that the plaintiff had left her seat. It is, on the other hand, quite evident that if she had retained her seat, in her dizzy condition for the very brief time it would have required the car to run 670 feet down hill, the accident would never have occurred.

Under these circumstances it is insisted that every one of the grounds urged upon the trial Judge, which, as he frankly stated, gave him more than a scruple—a "grave doubt," as to whether he should not direct the plaintiff

to be called, are and were sufficient to non-suit the plaintiff.

The is no such causal relation between the refusal of the conductor to stop the car when requested by the plaintiff, and the accident, as to make the defendant responsible therefor. Possibly the plaintiff could have sued the defendant and recovered any damage she could have shown as a result of its refusal to stop when requested. But did that refusal justify her—sick and dizzy as she was
10 —to rise from her place of safety which she had resumed in direct compliance with the conductor's request, and without his knowledge or that of the motorman, deliberately go to the open door? There is not only no proof whatever of negligence proximately resulting in the injury complained of, but the injury could never have been received had not the plaintiff wantonly put herself in a position making it possible.

Passengers owe certain duties to their carriers, and have certain responsibilities. In an empty rapidly moving car
20 the natural place for a passenger is on the seat. As was said by COCKBURN, *J.*, in Gee v. Metropolitan Railway Co., L. R., 8 Q. B, 161, 165: "It is said that the duty of the company is to convey a passenger safely as long as he sits quietly in the carriage, and if an accident happens from any act of his, inconsistent with the ordinary behavior of passengers, he has only himself to thank, and the company are not liable. *I quite agree that the passenger must not do anything inconsistent with what passengers ordinarily do on a journey.*"

30 The language of MONTAGUE SMITH, *J.*, in the celebrated case of Adams v. L. & Y. Railway Company, L. R., 4 C. P., 739, 742, is most applicable in this case: "Many cases might be put in which the defendant's negligence causes inconvenience which would not justify the plaintiff in incurring danger to avoid it. *Take the case of a passenger intending to alight at a station, but the train starting before the door of the carriage has been opened for him to get out, if he then opens the door and jumps out, he must take the consequences of his act, otherwise he would throw*
40 *on the company a greater risk than they have undertaken.*

If he keeps his seat he may bring an action against the company for carrying him on, and to recover from them the true damages."

This language was used in a case where the defendant company were admittedly negligent in having an insecurely fastened door in its railway carriage, which it broke and injured the plaintiff who was unexcusably shutting it just before it was time for him to alight.

The case at bar is very much stronger, because there is no proof of negligence whatever on the part of the railway company. 10

Where is the negligence of the defendant?

In *Nichols v. Middlesex Railroad Company*, 106 Mass., 463, the plaintiff was a passenger on a horse car, and as the car approached the place where she desired to stop, she got up from her seat, rang the bell, walked to the back platform, and the car having stopped while she was in the act of stepping off, it suddenly started, and she was thrown down and injured. There was evidence in the case that neither the driver or the conductor knew she was getting 20 off the car until after she fell. The conductor at the time was on the front platform. The defendant requested the Court to charge: "That if the plaintiff took upon herself the charge of the car, and without notice to any one, the conductor then being on the car, she rang the bell, and without the knowledge of the driver or conductor proceeded to get off, she can not recover.

"That it was the duty of the plaintiff to have notified some one in charge of the car, if she desired to get of without such notice or without the knowledge of those in 30 charge of the car, she did so at her peril, and can not recover."

The Court refused so to charge as requested, but did charge: "that the burden was upon the plaintiff to prove that the female plaintiff was in the exercise of due care, and that the injury was occasioned by the negligence of the defendants, and solely by their negligence; that if want of care on her part contributed at all to the injury the plaintiff could not recover; that a very important question was whether or not the car had stopped when the 40

injury occurred * * * that in case of a horse car the question must be left to the jury to decide upon the whole evidence whether or not the injury was caused solely by the negligence of the defendant."

The Supreme Court says: "We are of opinion that the substance of these instructions should have been given. If the plaintiff attempted to get off the car without any notice to the conductor or driver, and was injured by the sudden starting of the car, such injury cannot be attributed to the
10 negligence of the defendants. The alleged negligence consisted in improperly starting the car when a passenger was getting off; but if the conductor or driver neither knew or were notified nor had the means of knowing that a passenger desired to get off, or was in the act of getting off, there was no negligence in starting the horses at a faster gait. Upon the evidence reported in the bill of exceptions it would be competent for the jury to find that the plaintiff undertook to get off without any notice to the defendant's servants in charge of the car, and without their knowledge,
20 or having the means of knowing that she was getting off.'

If it be said in answer to this authority that the plaintiff in the case at bar was not getting off, the answer is, neither did the defendant's car start suddenly. There was not the slightest ground to suppose that a woman who had told the conductor she was sick, and who, in obedience to his suggestion had sat down within 670 feet of her destination, would, of her own accord, although dizzy, rise and walk to the open door of the car. She voluntarily placed her-
30 self in a place of danger. While the aisle of a car, even at the open door is not necessarily dangerous, yet it is not the natural and proper place for a passenger to be, especially when she felt "very dizzy," and was "getting dizzier and dizzier," and if an accident occurred to her while in that place and in that condition, then she, and not the railroad, is responsible. It is not claimed that she was not in the full possession of her faculties at the time; on the contrary, she claims to have deliberately placed her bundles on the seat before she arose.

40 The principle applicable seems to be laid down in the

American and English Cyclopedia of Law, Vol. 2, p. 765:

"A passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the carrier responsible for injuries of which his position was the efficient cause, as for instance: * * Riding on an engine or on the platform of a moving car, or putting his head or arm out of the window of a car in motion, or riding in the baggage or other car not intended for the carriage of passengers. * * or *standing or sitting when the car is in motion near to an open side door*, or riding on an open platform and thus exposing himself to the risk of injury from cinders, &c." 10

The case of *Shakenberry v. Metropolitan Street Ry. Co*, 46 Fed. Rep., 177, is quite analagous, and while the report is simply a charge to the jury, yet it appears that a new trial was sought on the ground of misdirection and refused, so that the charge received mature assent.

Here the plaintiff, who was a passenger on a street railway which crossed a steam road at grade, became alarmed as the car was crossing the steam road, at the 20 near approach of a locomotive, and rushed to the platform and was injured. The Court held that the only possible ground upon which any liability could be fastened upon the street railway company was the impending danger which seemed to threaten her remaining there.

See also Ray, *Negligence of Imposed Duties*, p. 34.

May v. North Hudson Ry. Co., 20 Vr., 445.

Siner v. Great Western Ry. Co., L. R., 4 Exch., 117. 30

Ball v. N. Y. L. E. & W. Ry. Co., 24 Vr., 283.

II.

The Court erred in not directing a verdict for the defendant.

We have seen the serious doubt that the learned trial Judge had as to whether he should not grant a non-suit. It would seem that any such doubt should have been dissipated by the defendant's case. 40

The conductor and motorman both testify—and they are necessarily the only witnesses the defendant had. The former, after stating that he had given the plaintiff a through ticket, and that after they left the car house there were no other passengers in the car beside the plaintiff, says, (p. 40, line 1):

"Q. Now, what happened?

A. Well, so soon as we passed the car house, where we have to hold the trolley ropes, I went inside the car, about 10 two steps from the back door, and the lady was sitting in the second window from the back door, on the right hand side going up, and I stood alongside of her; and when we came down near Maple avenue to near Maybaum's, the motorman opened the door, and I made about two or three steps forward in the centre of the car, and he asked me what time we would go out the next trip (it was a new run for the motorman); and I told him 2:45 or 2:49, or something like that, and I turned round and went back again, just seen her jumping off the car; and she had five or six packages and a big package or box, and the little packages was laying on the floor, and the big packages on the seat 20 alongside of her.

Q. Did she ask you to stop the car?

A. No, sir; she didn't say a word to me.

Q. Didn't she say any word from the time you passed the car house?

A. No, sir; nothing.

Q. Did you know she was sick?

A. No; I didn't know it.

Q. Was your attention attracted to her by anything she said or did?

A. No, sir; she didn't say a word, nothing."

30

Edward Smith, the motorman, after testifying that as this was a new trip to him, he had inquired of and learned from the conductor what time the return trip commenced, thus continues (p. 51, line 30):

"Q. And then what happened—after he told you what did you do?

A. I looked ahead, and just after he left me he gave me a bell, and I heard him say something, and he pulled up.

Q. What did you hear him say?

40 A. I don't remember what he said; I know he hollered.

Q. Did you see the plaintiff, Mary McCann, or any woman passenger on that car?

A. No, sir.

Q. At all?

A. No, sir.

Q. You didn't see the plaintiff going off the car?

A. No, sir.

Q. Where was the first intelligence or information you had that there was anything the matter?

A. When the conductor hollered; when I got the bell to stop.

Q. That was the first information you had of any trouble? 10

A. Yes, sir.

Q. What did you do then?

A. I stopped the car as soon as I could.

Q. How far did you run?

A. In my estimation, twelve or fifteen feet, maybe a little further.

Q. Then what was done?

A. I left the car and went back to where the lady laid.

Q. Who went back?

A. The car; we reversed the car.

Q. Then what did you and Deemer do? 20

A. We got off, and by that time there was others there.

Q. Who were "we"?

A. Me and the conductor.

Q. What did you do?

A. We picked the lady out of the ditch and laid her up on the dry part of the ground.

Q. Well?

A. We opened her vest and gave her as much air as we could."

Now, surely these witnesses in no way strengthened the plaintiff's case. The motorman did not know the plaintiff 30 was in the car, and the conductor swears that the plaintiff never even spoke to him, and that the first thing he knew as he turned around from the front of the car he saw the plaintiff stepping or jumping off. What satisfaction can the plaintiff derive from this evidence?

The Court declined to direct a verdict and charged the jury, guardedly, but as I conceive erroneously. After quoting the plaintiff's description of her colloquy with the conductor (above referred to) in which she says she 40

asked him to stop as she felt sick, and he told her to sit down, as she would fell better soon, the Judge says (p. 56, line 11):

"Now, if the case ended just there, and after this conversation with the conductor, she had left her seat and gone to the rear door, and had fallen from the car, she would not have been entitled to recover; for the reason that she acquiesced in the direction of the conductor that she should sit down and she would fell better. If the case ended there, I would have no hesitation in directing a verdict
10 for the defendant. The point of inquiry in this case is what occurred after that time, and I read her own statement. She says:

"Instead of getting better, I was feeling sicker all the time; and the conductor passed through the car, and I says: 'Won't you please stop this car?' He looked at me and kind o' smiled. He went on to the front or the car and began talking to the motorman."

"Now, was the condition of the plaintiff such, with regard to her sickness, that it was reasonable for her to ask the conductor to stop and let her off for that reason, and did
20 *she communicate to the conductor the urgency of her condition?*

"I have read the evidence on the part of the plaintiff. The testimony on the part of the defendant is that the conductor was not made aware in the slightest degree of the sickness of this plaintiff. Of course, if you except that view of the evidence, the case ends. But, on the plaintiff's own testimony, the point will arise *whether she so communicated her desire to alight at that time because of her sickness* that the duty reasonably rested upon him to stop the car and let her off.

"Now, I turn to the next point in the case, and that is
30 whether, assuming that she did communicate to the conductor her condition, and her request to stop the car, what she did after that time was reasonably proper in order to relieve her from the condition in which she was. She testifies:

"Then I got up and went to the rear of the car to see if I could see anybody passing, to attract their attention."

"That was the object that she testified she had in view when she left her seat. If she left her seat for the purpose of jumping from the car, or alighting from it while it was in motion, she would be debarred by that fact from a recovery in this case; because a passenger who alights
40

from a moving car takes upon himself the responsibility of the risks he voluntarily undertakes.

"Now, the question arises on that evidence whether that was her object in going to the rear of the car, in the first place, and in the second place, whether, under the evidence, you judge that it would have been reasonable for her to obtain the assistance of any persons from the outside with a view of enabling her to alight from that car because of her sickness; whether she used proper efforts with regard to the *communication to the conductor of her condition*, and of the urgency of allowing her to alight.

Then she says:

10

"When I got up I kind o' staggered through the car to the door, and fell kind o' in the corner of the door this way. I remember no more after that."

"Of course, that which occurred in the course of this transaction after she became dizzy and unconscious is not to be imputed to her. The point is, whether, after she acquiesced in the first communication of the conductor, she communicated to the conductor her desire to have the car stopped, and whether what she did after that time, in going to the door for the purpose for which she says she went there, was, in the judgment of the jury, a reasonable and proper thing for her to do. It is on these two propo- 20 tions that this case must turn. She didn't want to alight because she chose to terminate her journey there; she *wanted to alight because of her sickness. Did she communicate that fact to the conductor after she sat down, and desire him at that time to stop the car for the purpose of allowing her to alight? If she did, then the first proposition that is involved in this case will be established in favor of the plaintiff, and then it became the duty of the conductor to stop his car and allow her to leave it in safety. If no such communication was made to the conductor, then this case ends.*"

30

Now, it must be remembered that according to the plaintiff's own story, she never referred to her illness after she had sat down. Everything she pretends to have said to him after she resumed her seat, is found at line 15 of page 10, and it is: "Won't you please stop this car?" It would seem, therefore, that by the narrow rule adopted by the trial Judge himself, we were entitled to a verdict. For ought that appears, the prediction of the conductor that the plaintiff would "feel better after awhile," had been fulfilled. There is not one syllable in the case to show 40

that after the plaintiff again sat down, acquiescing in the conductor's request, that she either communicated or intimated by word or gesture that she was still sick.

But, suppose she had done so, and the conductor still ignored her request, in view of the adjacency of the terminus of her journey, did that justify her in leaving her seat and walking to the rear door, dizzy as she was? Did the conductor have the slightest reason to suppose she would do such a thing? Was it a reasonable thing to do? 10 Could any one reasonably suppose that a woman feeling sick and desiring to leave a car, which is within 670 feet of its journey's end, and descending at a rapid rate a grade of one and one-half per cent., would stagger to the back door in the hopes of hailing some hypothetical person who was in some supposititious way to prevail upon the distant and fast receding motorman to stop the car? It is strenuously urged that such a state of facts left nothing for the jury to pass upon? There was no question to be left to the jury. The case showed no neglect whatever on the de- 20 fendant's part. The only tort, if any, committed by the defendant, was its refusal to stop, and if the plaintiff had remained and could have shown that she sustained any damage thereby, possibly an action would have lain, as before stated, to recover compensation therefor; but such refusal did not justify her in ignoring every other means at hand, either pulling the bell or asking the motorman to stop, and in her condition walking to the door of the car without the slightest warning or notice to either conductor or motorman.

30 If juries are to be allowed to pass upon the reasonableness of every hazardous and foolish act by which women are put in positions where, in the ordinary course of things they become injured, our courts will be fully occupied in trying cases of that kind alone. Nay, more! Railroads will not be able to carry on their business or to resist the onslaughts of this modern *fin de siecle* form of highway robbery.

ROBERT H. McCARTER,
of Counsel with Defendant.

40 February 28, 1896.

INDEX.

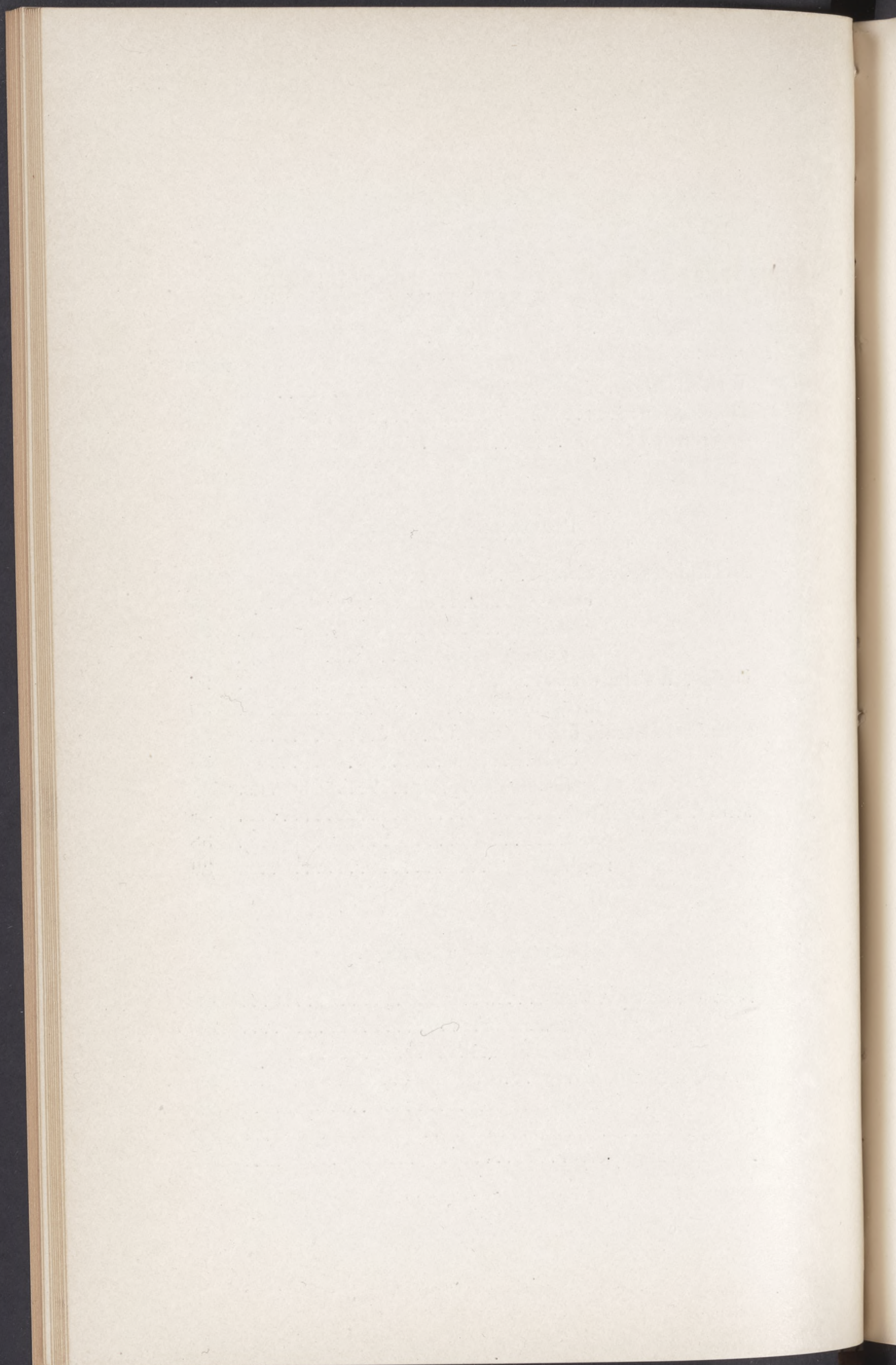
	PAGE
Writ of Error	1
Declaration	3
Judgment	7

Plaintiffs' Evidence.

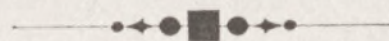
	PAGE
McCann, Mary, direct	8
cross	14
re-direct	26
(recalled), cross	54
Dodge, Walter, direct	26
cross	30
Steinbach, Sarah, direct	32
cross	35
(re-called), direct	39
Miller, Louis, direct	35
cross	38
re-direct	39

Defendants' Evidence.

	PAGE
Deemer, Joseph, direct	42
cross	44
re-direct	49
Smith, Edward, direct	50
cross	53
Charge	55
Assignments of error	61



New Jersey Court of Errors and Appeals.



NEWARK & SOUTH ORANGE RAILWAY COMPANY, *Pl'ff in Error.* *vs.* MARY McCANN, *Def't in Error.*	*In Tort.*

10

20

NEW JERSEY, *ss*:

[L. S.] The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature, before you, between Mary McCann, plaintiff, and Newark and South Orange Railway Company, defendant, in an action in tort, manifest error hath intervened, to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the first Tuesday of December next, together

30

40

with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of the State of New Jersey ought to be done.

Witness: Our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the eighteenth day of November, eighteen hundred and ninety-five.

10 HENRY C. KELLEY,
Clerk.

WILBUR A. MOTT,
Attorney.

The answer of the Justices of the Supreme Court of New Jersey within named, the record and proceedings whereof mention is within made, with all things touching and concerning the same, we certify to the Court of Errors and Appeals in a certain schedule to this writ
20 annexed, as within we are commanded.

M. BEASLEY,
Chief Justice.

DECLARATION.

NEW JERSEY SUPREME COURT of the twenty-fifth day of September, in the year of our Lord, one thousand eight hundred and ninety-three.

30

ESSEX COUNTY, *ss:*

Newark and South Orange Railway Company, the defendant in this suit, was summoned to answer unto Mary McCann, the plaintiff therein, who prosecutes this action by Redmond P. Conlon, her guardian, appointed for this purpose by this Court, in an action of tort, and thereupon the plaintiff complains for that whereas, the said defendant, heretofore, to wit, on the thirteenth day of April, in
40 the year eighteen hundred and ninety-three, was the

owner and proprietor of a certain street railway line in,
along and upon a certain street or highway in the city of
Newark, in said county of Essex, in the township of
South Orange and county aforesaid, and known as South
Orange avenue, and of certain cars thereupon drawn by
electrical appliance, in which cars the said defendant was
then and there accustomed to convey passengers over and
along said highway for hire and fare, paid to the said de-
fendant in that behalf, to wit, at Newark, in the said
county of Essex; and the said defendant being such 10
owner and proprietor of the said street railway and cars,
and causing the same cars to be drawn over, along and
upon the said railway line as aforesaid, the said plaintiff,
heretofore to wit, on the day and year aforesaid, at
Newark, aforesaid, at the special instance and request of
the said defendant, became and was a passenger in one of
the said cars, to be safely and securely carried in said car
by the said defendant over and along said railway in said
street or highway near to the Shooting Park on the south-
erly side of said South Orange avenue, in said township of 20
South Orange, and from a certain street in said city of
Newark, and called Broad street, to a certain other street
in said township of South Orange, known and called
Sandford street; and the said defendant then and there re-
ceived the said plaintiff as such passenger to be carried as
aforesaid, and thereupon it then and there became and was
the duty of the said defendant to use due and proper care
that the said plaintiff should be safely and securely carried
and conveyed by and in said car over and along said railway
on the said journey as aforesaid; yet the said defendant, 30
not regarding its said duty in this behalf, did not use due
and proper care that the said plaintiff should be safely and
securely carried and conveyed by and in the said car afore-
said on the said journey, but so carelessly and negligently
aused the said car to be drawn upon and along the said
railway that the said plaintiff was without any fault on her
part thrown out of the said car to and upon the ground
with such great force and violence that she was then and
there greatly stunned, bruised and hurt in and upon her
body, and was rendered and became unconscious and par- 40

alyzed and otherwise injured, and, also, by means of the premises, the said plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during which time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to her necessary and lawful business by her during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which she
10 otherwise would have derived and acquired from the same, and thereby also the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers other large sums of money, amounting in the whole to the sum of one thousand dollars in and about the endeavoring to be cured of the said sickness and other injuries received as aforesaid, to wit, at Newark, aforesaid.

And whereas also, the said defendant before and at the time of the committing of the grievances hereinafter next mentioned, to wit, on the day and year aforesaid, at New-
20 ark aforesaid, was the owner and proprietor of a certain other street railway line in, along and upon a certain street or highway, in the said city of Newark, in the said county of Essex, known as South Orange avenue, and of certain other cars thereupon drawn by electrical appliance, in which cars the said defendant was then and there accustomed to convey passengers over and along said highway, for certain hire and reward in that behalf paid to wit, at Newark aforesaid; and the said defendant, being such owner and proprietor of the said street railway and cars,
30 and causing the same cars to be drawn over along and upon said railway line as aforesaid, for the purpose aforesaid the said plaintiff heretofore, to wit, on the thirteenth day of April, in the year of our Lord, one thousand eight hundred and ninety-three, at Newark, aforesaid, at the special instance and request of the said defendant became and was a passenger for hire and reward then and there by her paid to the said defendant, in one of the said cars, to be safely and securely carried in said car by the said defendant over and along said railway in said street or highway, from a
40 certain street in said city of Newark, known and called

Broad street, to a certain other street in said township of South Orange aforesaid known and called Sandford street, and the said defendant then and there received the said plaintiff as such passenger to be carried as aforesaid and thereupon it then and there became and was the duty of the said defendant, not only to use due and proper care that the said plaintiff should be safely carried and conveyed by and in the said car over and along said railway on the said journey as aforesaid, but also that the said defendant should take reasonable and proper care of the said plaintiff while on the said journey in the car of the said defendant. And the said plaintiff further saith that while on the said journey, she, the said plaintiff, became sick, dizzy and faint and thereupon notified the agent and servant of the said defendant then and there having charge of the said car, so drawn upon the said railway line as aforesaid in which the said plaintiff was a passenger as aforesaid of her said sickness, dizziness and faintness, and requested him to stop the said car, which car was then and there being propelled and drawn along and upon the said railway line of the said defendant at a high rate of speed, and it then and there became and was the duty of the said defendant to cause the said car to come to a full stop, in order that the said plaintiff might get out of said car, because and on account of her said sickness, dizziness and faintness, and it then and there became the duty of the said defendant to take proper care of the said plaintiff in her sickness, dizziness and faintness aforesaid, and to use all reasonable, proper and necessary means to protect her from all injury and harm which might come to her, because of her sickness, dizziness and faintness aforesaid. Yet the said defendant, not regarding its said duty in this behalf did not use due and proper care that the said plaintiff should be safely and securely carried and conveyed by and in the said car as aforesaid, on the last journey as aforesaid, and did not take reasonable and proper care of the said plaintiff while on the said journey in the car of the said defendant, as aforesaid, and did not cause the said car to come to a full stop, in order that the said plaintiff might go out of the said car,

because and on account of her said sickness, dizziness and faintness, and did not take proper care of the said plaintiff in her sickness, dizziness and faintness aforesaid, and did not use all reasonable, proper and necessary means to protect the said plaintiff from all injury and harm which might come to her because of her sickness aforesaid, but on the contrary thereof the said defendant refused to stop the said car as aforesaid, and caused the same to be continued to be drawn along the said street railway at such high rate
10 of speed aforesaid. and carelessly and negligently left the rear door of the said car open and carelessly and negligently left the said plaintiff alone in said car and did not protect her from falling out of the said car through the said door in her said sickness, dizziness and faintness and so carelessly and negligently caused the said car to be drawn upon and along the said railway on the said street at such high rate of speed that the said plaintiff, while endeavoring lawfully to call to her aid in her said sickness, dizziness and faintness some person or persons along and upon said
20 highway over which the said car was being drawn as aforesaid, was, while sick, dizzy and faint as aforesaid, without any fault or negligence on her part, thrown out of said car through the said door so carelessly and negligently left open as aforesaid, to and upon the ground with such force and violence that she was then and there greatly stunned, bruised and hurt in and upon her body, and was rendered and became unconscious and paralyzed, and otherwise injured, and, also, by means of the premises, the said plaintiff became and was sick, sore, lame and disordered, and
30 so remained and continued for a long space of time, to wit, hitherto, during which time the said plaintiff suffered and underwent great pain, and was hindered and prevented from transacting and attending to her necessary and lawful business by her during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages, which she otherwise would have derived and acquired from the same and thereby the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers other large sums of money,
40 amounting in the whole to the sum of one thousand dollars

in and about the endeavoring to be cured of the said sick ness and other injuries received as aforesaid, to wit, at Newark, aforesaid.

And so the said plaintiff saith that she is injured and hath sustained damages to the amount of ten thousand dollars, and therefore she brings suit, &c.

ELIAS S. MORROW,
Attorney of Plaintiff.

Plea general issue. 10

Judgment on postea for plaintiff for

$2 400.00	Damages
62.42	Costs
$2 462.42	

20

30

40

Supreme Court, Essex Circuit.

September 30, 1895.

10

MARY McCANN,

vs.

NEWARK AND SOUTH ORANGE RAILWAY CO.

Before Hon. David A. Depue, J., and a jury.

20 For plaintiff appears Elias F. Morrow.

For defendant appear Wilbur A. Mott and Robert H. McCarter.

Mr. Morrow opens for plaintiff.

A map prepared in behalf of plaintiff is placed upon the wall.

MARY McCANN, plaintiff, sworn in her own behalf.

30 *Direct examination* by Mr. Morrow :

Q. Mary, you are the plaintiff in this case; you brought suit against the Newark and South Orange Railway Company ?

A. Yes, sir.

Q. Do you remember the 13th of April, 1893 ?

A. I remember taking the car going to the hospital, the Orphan Asylum.

Q. When was it, in 1893 ?

40 A. It was April 13th.

Q. And where did you take the car?

A. I judge between Broad street and Plane street, on Market.

By the Court:

Q. To go where?

A. To go to St. Michael's Orphan Asylum at South Orange.

Q. The South Orange car you took, then?

A. Yes, sir. 10

By Mr. Morrow:

Q. Who were you going to see?

A. My little sister and two brothers.

Q. Where were they?

A. In the Orphan Asylum.

Q. They had been there how long?

A. They had been there for seven years.

Q. You boarded the car between Broad and Plane, on Market? 20

A. Yes, sir.

Q. Did you pay your fare?

A. Yes, sir.

Q. When you got to the horsecar stables, on South Orange avenue, who was in the car besides yourself?

A. That I don't remember.

By the Court:

30

Q. Was there anybody?

A. No, sir. I don't know; I couldn't tell you.

By Mr. Morrow:

Q. When you got to Grove street was anybody in the car with you?

A. No, sir.

Q. Just tell us what occurred when you got at or near Grove street?

40

A. When I got to Grove street I felt sick, and I went to the door and told the conductor to stop the car and let me get off. He said, "You don't want to get off here, do you?"

Q. Begin again. When you got to Grove street—?

A. When I got to Grove street I felt sick, and went to the door and told the conductor to stop the car. He says, "What's the matter?" I says, "I feel sick, and I would like to get off." And he says, "What's the matter with
10 you?" I says I felt sick and would like to get off. He told me to take my seat and set down, and I would feel better after awhile; and I did so, and, instead of feeling better, I was feeling sicker all the time.

Q. Go on?

A. And he passed through the car, and I says, "Won't you please stop this car?" He looked at me, and kind o' smiled, and he went on to the front of the car and began talking to the motorman. And then I got up and went to the rear of the car to see if I could see any one passing, to
20 attract their attention; and when I got up I kind o' staggered through the car to the door, and fell kind o' in the corner.

Q. The corner of the car or the corner of the door?

A. The corner of the door of the car.

Q. Did you fall against it or not?

A. I went this way (pitching forward) and I went on this side (to the right); and I remember nothing more after that.

Q. Do you know how you went off the car, Mary?

30 A. No, sir; I don't.

Q. If you had jumped off, would you have remembered?

A. I didn't jump off, Mr. Morrow.

Objected to.

Ruled out.

Q. You don't know how you went off?

A. No, sir.

40 By the Court:

Q. When were you next conscious ?

A. The 9th of May.

Q. At was place ?

A. At the hospital.

By Mr. Morrow :

Q. The Memorial Hospital, in Orange ?

A. Yes, sir.

Q. Do you remember anything between this time when you struck against the jamb of the door and the 7th or 8th of May next ? 10

Witness: The 7th or 8th of May ?

Mr. Morrow : The time you became conscious ; that is, when you found yourself at the hospital ; just tell us the first thing you recollect at the hospital. Did you ever hear your name mentioned there ?

20

A. Yes, sir : there was a little boy used to wait on the door, and I used to hear him come up and ask how Mary McCann was.

Q. You heard a little boy ask how Mary McCann was ?

A. Yes, sir ; and I always used to wonder who Mary McCann was, and finally I began to think that I was Mary McCann.

Q. Was there anything about your person that led you to believe that you were Mary McCann—about your hand ?

A. I had two spots on my hand ; and when I looked at 30 them one day, I thought I was Mary McCann ; but I couldn't think that I was in a hospital ; I didn't know whatever brought me there ; I used to always ask what brought me there.

Q. You don't know how you got there, then ?

A. No, sir ; I don't.

Q. When you recovered consciousness, Mary, did you find yourself injured in any way ?

A. Yes ; I found my head, and I found my hand—my arm.

40

Q. What was the matter with your head?

A. Well, they were going to fix it, or something, the doctors was, and they had it all bandaged.

Q. Did you find yourself injured anywhere else but about your head?

A. Well, it was quite some time before I could walk, or before I could step right.

Q. Since then have you found any other injury?

A. Only that I can't use my arm.

10 Q. Which one?

A. The left arm.

(By request of counsel witness stands up.)

Q. Just show how high you can get that arm up without help. (Witness raises her arm.) Can't you get it higher than that?

A. No, sir.

Q. Swing it forward and backward, will you? (Witness 20 does so.) Can't you swing it back like that? (illustrating.)

A. No, sir; not up, I can down.

Q. Can't you get it up like I do mine?

A. No, sir; not higher than that.

Q. How do you manage to dress your hair?

A. I have to get on my knees and rest my hands on my head, like that, (illustrating.)

Q. Can't you do it in any other way?

A. No, sir.

Q. You can't get your hand to your head unless you 30 rest it on something and put your head down to it?

A. No, sir.

Q. Can you carry a pail of water?

A. No, sir; I can't without spilling it all over me.

Q. Can you take up a pail of water and hold it out from you as you used to?

A. No, sir.

Q. What will it do?

A. It will go against me and spill it all down my dress?

Q. Have any physicians and surgeons examined your 40 arm?

Witness: Since I was at the hospital?

Mr. Morrow: Yes.

A. Yes, sir.
Q. Who?
A. Dr. Dodge.
Q. Who else?
A. Dr. Steckler.
Q. Did Dr. Fewsmith examine you?
A. Yes, sir; Dr. Zeh was the first to examine me. 10
Q. And Dr. Dodge?
A. And Dr. Dodge next.
Q. And Dr. Fewsmith?
A. Yes, sir.
Q. And Dr. Steckler?
A. Not Dr. Steckler since I came out.
Q. Was he one of the surgeons or physicians in the hospital when you were there?
A. Yes, sir. 20
Q. And Dr. Dodge?
A. Yes, sir.
Q. At the time your were injured, for whom did you work?

The Court: What was her employment?

Mr. Morrow: A servant. In whose employment were you prior to your injury?

A. In Mr. Conlon's. 30
Q. And how long had you been in his employ?
A. At that time, I was two years in August, and then I remained from August until April.
Q. Did you go back there after you came back from the hospital?
A. Yes, sir.
Q. How long did you remain there?
A. Until the 23d of November.
Q. Why didn't you remain longer?
A. I don't know. 40

Q. What salary did you receive prior to your injury while you were there?

A. I got $8.00 a month.

Q. How old were you then?

A. Then I was going on 17; I was little past 18 when I had the accident.

Q. How old are you now?

A. I am 21.

Q. When were you 21?

10 A. Sunday week.

By the Court:

Q. What was the condition of your health before this time?

A. It was all right; I was well; I was never sick.

By Mr. Morrow:

Q. Was your arm all right prior to this accident?

20 A. Yes, sir.

Q. Not injured in any way?

A. No, sir.

Cross-examination by Mr. McCarter:

Q. What time in the day was this, Mary?

Witness: When was this accident?

30 Mr. McCarter: Yes.

A. Well, they say it was half past three.

Q. What time did you get on the car between Broad and Plane streets?

A. I got on, I guess it was about half-past two, or a quarter or twenty minutes to three.

Q. About half-past two?

A. Yes, sir.

Q. Where had you come from, Judge Conlon's house?

40 A. Yes, sir.

Q. Where does he live?
A. In James street, then.
Q. And you came down from where?
A. I came down James street, and through Washington, and I walked over to Hahne's, in the back way, and came down Broad street. I either walked down Broad street or took the car at that place.
Q. You don't remember which?
A. No, sir.
Q. When did you commence to feel sick? 10
A. When I got to Grove street.
Q. Were you sick when you were at the car house?
A. No, sir.

The Court: Where is the carhouse?

Mr. Morrow: This side of Grove, probably a distance of two blocks.

By Mr. McCarter:

20
Q.. You stopped at Grove street;
A. Yes, sir.
Q. The passengers had got out there?
A. Yes, sir.
Q. And the car would have gone on to the end of the road?
A. Yes, sir.
Q. And you didn't feel sick then?
A. No, sir.
Q. What was the feeling?
30
A. I felt kind of dazed, and as if I couldn't stay in that car any more. I felt sick to my stomach.
Q. And you wanted to get out?
A. Yes, sir.
Q. Was the car going slow or fast?
A. It was going fast. At the time I wanted to get out first it was kind o' slow, and I told him to let me out; and when I saw that he wouldn't let me out, and it was going fast, I got scared, and wanted to get out the worst way.
Q. You had some bundles with you? 40

A. Yes, sir.

Q. What?

A. I don't know exactly what I had all.

Q. You had five or six packages?

A. Yes, sir; I had a handkerchief, a parcel; I had some candy, I had some garters, I had some stockings, I had some apples.

Q. How many bundles had you?

A. Well, that I couldn't tell.

10 Q. More than one?

A. Oh, yes, sir.

Q. You had four or five?

A. Yes, sir; three or four, anyhow.

Q. Probably more?

A. Yes, sir.

Q. You had a package of apples?

A. Yes, sir. I had the apples done up in a box.

Q. How big a box?

A. Square box.

20 Q. Pasteboard?

A. Yes, sir; about that long and that wide (indicating).

Q. Where had you gotten these different articles?

A. The candy I got at Hahne's, and the cake I got in the baker's; I had cake, too.

Q. That was a separate package?

A. Yes, sir.

Q. And the garters and things were together?

A. Yes, sir. I might have them in different packages; I might have had them altogether; very likely I had.

30 Q. I want your best recollection about it. You had three or four packages at least, hadn't you, in your hand, or on your lap, when you sat there?

A. Yes, sir.

Q. When you got up to get out of the car, what did you do with the packages?

A. I put them on the seat of the car where I was sitting.

Q. Why did you put them on the seat?

A. Because I intended to go back and take them. I

40 left them there to get up to have the car stopped.

Q. Well, the conductor, you say, was in front of you at that time?

A. Yes, sir.

Q. Talking to the driver?

A. Talking to the motorman.

Q. And after he had gotten by you, you got up, laid your bundles on the seat, and started toward the door?

A. Yes, sir.

Q. Had you seen anybody outside before you got up?

A. No, sir. 10

Q. You said you started to the door to see if you couldn't see somebody and ask them to stop the car?

A. Yes, sir.

Q. Couldn't you look out and see if anybody was there?

A. Well, I didn't look out; I got up to go and look.

Q. How far were you from the door where you were sitting; which side of the car were you sitting?

A. I was sitting on the right hand side going up.

Q. And about how far from the door?

A. About in the middle, I should think. 20

Q. It was a closed car, or open?

A. Closed.

Q. And you kept getting dizzier and dizzier?

A. Yes, sir.

Q. And you kept getting dizzier after the conductor passed you, before you got up?

A. Yes, sir; I was very dizzy, and I felt a queer sensation.

Q. And you had a great desire to get off the car?

A. Yes, sir. 30

Q. Isn't that what you got up for, to get off the car?

A. Not to jump off; I got up to see some one to have the car stopped.

Q. How was some one going to stop the car.

A. To get the motorman to stop.

Q. They were going very slow?

A. Yes, sir.

Q. And you only got as far as the door jamb?

A. Yes, sir.

Q. And struck your shoulder on the right side? 40

A. Yes, sir.

Q. Then you don't remember anything?

A. No, sir; after kind o' falling through the car by the door, where the seats are in the back, I remember nothing more; I went through the door, that's all I remember.

Q. Were you perfectly well at that time?

A. No, sir.

Q. Weren't you periodically sick at that time?

A. No, sir; I was kind o' sick at my stomach and dizzy.

10 Q. Not before you got on the car?

A. No, sir.

Q. And you had a desire to get off the car?

A. Yes, sir.

Q. Where was the conductor when you first asked him to stop and let you off?

A. In the rear of the car.

Q. You had a pass entitling you to go on to the little horse-car, hadn't you?

A. Yes, sir.

20 Q. Tell the jury (I don't know that they all know) what you would have done if you hadn't been sick and had this accident?

Objected to.

Q. You had been to the Orphan Asylum before?

A. Yes, sir.

Q. Where is that?

A. In South Orange avenue, near Sanford street, on South Orange avenue.

30

Mr. Morrow: It is that large brick building on the right hand side, beyond Vailsburg.

The Court: How far beyond Grove street?

Mr. Morrow: It must be a mile or more, about a mile beyond where the cars were then running with electricity.

40 The Court: How far beyond Grove street?

Mr. Mott: About a mile and a half.

The Court: And on South Orange avenue?

Mr. Mott: Yes, sir.

By Mr. McCarter.

Q. Can you tell us whether at that time the trolley was running all the way to the Orphan Asylum?

A. No, sir; the trolley wasn't running all the way to the Orphan Asylum; we had to change cars at the Shooting Park. 10

Q. Do you know how far the Shooting Park is beyond Grove street?

A. It is quite a little distance, that's all I can tell you.

Q. When you told the conductor that you were going through, what did you get, if anything?

A. I got—When I was going through to South Orange?

Mr. McCarter; Yes. 20

Witness: I got a ticket from Vailsburg.

Q. And that entitled you to a ride on this horse-car after you got off the trolley?

A. Yes, sir.

Q. You don't know how far the Shooting Park is beyond the car stables?

A. It is quite a little distance, that's all I can tell you.

Q. As far as from here to Washington street? 30

A. It is farther than that, I think.

The Court: Let me understand. The South Orange car frem Market street runs along South Orange avenue; then the same line carries its passengers to the Shooting Park, and from the Shooting Park on by horsecar?

Mr. McCarter: They do now; they didn't then. 40

The Court: The same line?

Mr. McCarter: Yes, sir.

The Court: So that after that the horsecars takes passengers from the trolley road?

Mr. McCarter: They did at that time.

The Court: And she got a ticket for the horsecar, which would have been effectual when she got there?

Mr. McCarter: Yes, sir.

The Court; She was still on the trolley car?

Mr. McCarter: Yes, sir. I was trying to ascertain from the witness how far beyond the car stables the trolley went before she would have taken the horsecar.

By the Court:

Q. How far was it from where you were last conscious, when you staggered against the door, as you expressed it —how far was that this side of where you would have taken the horsecar?

A. I guess it's as far from here to Plane street, this side.

Q. A couple of hundred feet then?

A. Yes, sir; about as far as that, maybe not quite as far.

[Another map is here placed upon the wall on on the part of defendant, the scale of which is said to be 30 feet to the inch.

It is admitted that the distance from the Maybaum house to the junction with the horse railroad is about 670 feet.

It is further admitted that the distance from Grove street to the Maybaum house is about 800 feet.]

By Mr. McCarter:

Q. You had been accustomed, I suppose, Mary, at the time your brothers and sisters were up at the asylum, to go out there frequently?

A. Yes, sir.

Q. Isn't it down grade there from Shooting Park to the horsecar?

A. I don't know what you mean?

Q. Don't you go down hill a little bit?

A. Yes, sir. 10

Q. Quite a good deal, don't you?

A. Yes, sir.

Mr. McCarter: The gradient is stated there, and that may be admitted on the record

The Court: Now the grade from Grove street to Maybaum's?

The Surveyor: It will average about 1.80 feet to the hundred. 20

The Court: And from Maybaum's to the horsecar line?

The Surveyor: Well, I will call that a two per cent. grade for a distance of about 200 feet this side of that switch, and then it is comparatively flat.

The Court: There is a grade profile above here at Grove street; what is the grade? 30

The Surveyor: There it is, 1.61.

The Court: These lines are how far apart?

The Surveyor: 100 feet apart.

The Court: The next is what, the elevation of it? 40

The Surveyor: That is 1.60.

The Court: The next.

The Surveyor: There it is 1.60; the average between that point and that (indicating) is 1.60.

The Court: For how many feet?

The Surveyor: Well, for 100 feet; this side
10 of Grove street for a distance of 300 feet.

Mr. Morrow: Do you know what the grade is here on Springfield avenue?

The Surveyor: No, sir.

The Court: What is it on Broad street, say from the corner of Broad and Market down to the City Hall?

20 The Surveyor: Well, there I don't think it is over one and a half per cent., six inches to the hundred. I have presented here the natural grade of the street.

Mr. McCarter: Perhaps you could give us a comparison?

The Surveyor: The grade on Springfield avenue is very much steeper than this.

30 The Court: All the way from the Court House to the summit at Belmont avenue?

The Surveyor: Yes, sir.

The Court: How much steeper?

The Surveyor: Well, I should judge the grade on Springfield avenue is nearly five per cent.
40 grade.

Mr. Morrow: How does the grade there compare with the grade at Arlington street, from there down to Plane street; isn't this steeper than that?

The Surveyor: I should judge it is.

Mr. Morrow: You have given the distance at the top of your map on a straight line.

The Surveyor: That is a profile. The map is upside down, and that is a profile. 10

Mr. Morrow: But you have given the distances on a straight line. Isn't the distance greater on a curve there than it is on that straight line?

The Surveyor: Yes, sir.

Mr. Morrow: Then your distances which you called off here are not as great as those along the curve? 20

The Surveyor: Yes, sir.

Mr. Morrow: They are the same, are they?

The Surveyor: Yes, sir.

By Mr. McCarter:

30

Q. When had you been up before to see your brother and sisters?

A. About a month.

Q. This was a clear day, Mary?

A. No, sir, it wasn't; kind o' cloudy.

Q. It wasn't raining?

A. Well, it was raining when I was hurted, but I don't know as it was raining before; but it was cloudy.

Q. When had the last passenger gotten off?

A. At the car stables, the electric car stable. 40

Q. Where had you gotten your through ticket to Vailsburg?

A. At the stable, I think.

Q. You hadn't vomited before you got up?

A. No, sir.

Q. Have you ever had one of these attacks before?

A. No, sir; not like that.

Q. What had you had like that?

A. I had a shock on Central avenue electric cars once
10 before.

Q. What do you mean by that?

A. Why, a shock of electricity.

Q. Riding on the car?

A. Yes, sir.

Q. What happened to you?

A. It was one Sunday night. I was out, and I was going home. It was ten o'clock, and I took the car on the corner of First street and Central avenue; and when I got down near Morris avenue, the conductor came in, as I
20 thought for my fare, and when he came in, he happened to stoop down to open the little trap in the floor, and out of that there came a blue light and a little red flame; and I seen him leave this little door open; and he got up and walked out to the rear of the car again; and I thought it was very funny that he opened that and didn't ask me to move; and I got up and went on the other side of the car to sit; and when I got there I felt sick, and I felt dizzy, and I went to the rear of the car and asked the conductor to stop the car; and when he did, he held the door shut,
30 and I kicked and hollored, and—

Plaintiff's counsel objects to the testimony as incompetent.

The Court: I suppose the question was asked with a view of showing that she was subject to sickness of this character.

By Mr. McCarter:

Q. Did you fell dizzy and sick at that time in the same
40 way that you felt this time?

A. Yes, sir.

Q. That was on the other road, the Consolidated; that wasn't on the South Orange?

A. No, sir.

Q. How long before?

A. I guess it was about two years.

Q. And you wanted to get out that time, too?

A. Yes, sir.

Q. You had the same dizzy feeling?

A. Yes, sir. 10

Q. The same feeling of sickness?

A. Yes, sir.

Q. Now, had you ever had, on any other occasion beside the time on Central avenue, that sickness?

A. No, sir; never before.

Q. Nor since?

A. No, sir.

Q. How near were you to this purple flame you speak of?

A. I was sitting right by it; the trap was right there beside me. 20

Q. You can carry a pail with your right hand, can't you?

A. Yes, sir.

Q. Your right hand is not in any way affected?

A. No, sir.

Q. What are those spots you referred to?

Witness: On my hand?

Mr. McCarter: Yes. 30

A. I don't know; they were two little sores like.

Q. That is, on the left hand?

A. On the right.

Q. Your hands were sore before, and when you saw that you recognized yourself?

A. Yes, sir.

Q. Up to that time you didn't know whether you were Mary McCann or not; you didn't know who you were?

A. No, sir. 40

By the Court:

Q. Had you been in the habit of riding on the electric cars?

Witness: Before the accident?

The Court: Yes.

A. Yes, sir; I used to ride on them.

10 Q. How often had you been on the South Orange line as far west as the place where this thing occured?

A. Well, I guess I had been eight or ten times.

Re-direct examination by Mr. Morrow:

Q. Were you ever sick at any other time than this on the South Orange car?

A. No, sir; never.

Q. When you got up to call somebody to your assistance

20 did you take your bundles with you?

A. No, sir.

Q. Where did you leave them?

A. On the seat.

Q. Do you know what became of them, of your own knowledge?

A. No, sir.

30 WALTER DODGE, sworn in behalf of plaintiff.

Direct examination by Mr. Morrow:

Q. Dr. Dodge, you are a physician and surgeon, and practising in Orange, N. J.?

A. Yes, sir.

By the Court:

40 Q. Connected with the Memorial Hospital?

A. Not at present.
Q. Were you in April, 1893?
A. Shortly after that.

By Mr. Morrow:

Q. Did you ever see Mary McCann?
A. Yes, sir.
Q. Where did you first see her?
A. At the Memorial Hospital, in Orange.
Q. And when, Doctor? 10
A. The 23d day of May.

By the Court:

Q. Was that the beginning of your connection with the case?
A. Yes, sir.
Q. What was her condition then, conscious or unconscious?
A. She was unconscious at that time. 20
Q. Was she in bed?
A. Yes, sir.
Q. Undressed?
A. Yes, sir.
Q. And unconscious?
A. Yes, sir.

By Mr. Morrow:

Q. How long did she remain unconscious?
A. Well, I will have to refer to some notes for that. 30

The Court: You can do so, Doctor.

Witness (after referring to notes): May 25.

By Mr. Morrow:

Q. That is, for two days?
A. Yes, sir: after I came.
Q. Were there any signs of returning consciousness the first time you saw her? 40

A. Not consciousness; no, sir.

Q. When did you discover any sign of returning consciousness?

A. It was reported to me on the morning of the 25th, that she had spoken.

Q. Did you see her that day?

A. Yes, sir.

Q. At what hour?

A. I suppose about half-past nine in the morning.

10 Q. Was she conscious then?

A. Well, conscious enough to ask for a drink; not enough to talk, or to take much notice of what was going on.

Q. Did you make any examination of her the first time you saw her?

A. Yes, sir.

Q. Of her bodily condition?

A. Yes, sir.

Q. Did you discover that she was injured anywhere;
20 and if so, where and in what way?

A. Well, she had what remained of some contusions on the left side of her head and face, and also on the left shoulder, the left elbow; and there was a large area of black-and-blueness on the inner side of her left arm.

Q. Were the muscles of the left arm injured; and if so, what muscles?

A. Apparently not at that time.

Q. Did you discover that they were injured afterwards?

A. It was discovered that there was a very flabby con-
30 dition of the large muscle over the shoulder.

Q. What do you call that, Doctor?

A. The deltoid.

Q. What nerve supplies those muscles?

A. The circumflex nerve.

Q. Was that in its normal condition or not?

A. I couldn't tell you whether it was at that time or not.

By the Court:

40

Q. Did you notice at that time whether she was able to raise her arm ?

A. I don't know whether she was able to raise it or not ; no, sir. She did not use that arm as freely as she did the other arm. That is noted on the record.

Q. Describe to the jury the condition of that arm ?

A. The left arm seemed to be somewhat drawn downward from the socket in the shoulder, so that it formed a marked flatness over this region here at the shoulder-joint, as compared with the other shoulder ; it was not as round 10 and full as the right one ; and for that reason it was supposed at one time that there was a dislocation of the shoulder-joint.

By Mr. Morrow :

Q. Have you examined her since that time, Doctor ?

A. Yes, sir.

Q. And since she came out of the hospital ?

A. Yes, sir.

Q. How recently ? 20

A. It was last spring.

Q. In what condition did you find her arm and shoulder then ?

A. The arm, with the exception of the deltoid muscle, seemed to be in a very fair condition ; but there was an evident atrophy of the deltoid muscle of the left side.

Q. What do you mean by that ?

A. A wasting of the muscle, and an area of anaesthesia.

Q. What is that ?

A. A loss of sensation to the touch, over certain por- 30 tions of the left shoulder. The area of anaesthesia corresponds with that portion of the left shoulder which is supplied by the sensory fibres of the circumflex nerve.

Q. What are those fibres ?

A. The sensory fibres of the circumflex nerve.

Q. What is the effect of that ?

A. The effect of the loss of power of the sensory fibres is loss of the sense of touch over the portion which is supplied ; and of the muscular fibre; is loss of nutrition in the muscle and loss of power over the muscle. 40

Q. When did you examine her last?

A. It was in April; I forget the exact date.

Q. That would be April two years after this accident?

A. Yes, sir: just about.

Q. What you have been saying, does that have reference to her condition in April last?

A. This last April; yes, sir.

Q. Then, in your judgment, she has not recovered from the effects of the injury, or had not at that time?

10 A. No, sir.

Q. What is the probability of her recovering fully; will she ever have the use of that arm as she had prior to this accident?

A. I think not.

Q. Won't you state to the jury where the connections are of this deltoid muscle, and how it operates?

A. The deltoid muscle is a large triangular muscle, with its point pointing downward, and is inserted into the bone of the arm about here (indicating.) The upper portion is

20 attached to the collar bone, and to the prominence of the shoulder blade and part of the back of the shoulder blade.

Q. And is the muscle that enables a person to lift his arm?

A. One of the muscles.

Q. There are three of those connections with the deltoid muscle?

A. There are three divisions of the deltoid muscle.

Q. One to draw the arm back, the other forward, and the other upward. Are the three branches of the deltoid

30 muscle affected?

A. I don't think you can speak of three branches of the muscle; it is all one muscle.

Cross-examination by Mr. Mott:

Q. One is the rear movement, one the forward, and the three together elevate the arm. Is the whole muscle then affected?

A. I think the posterior portion is more affected than

40 the anterior portion.

Q. With the deltoid muscle destroyed, what physical power has the person lost?

A. The person has lost the principal power which raises the arm from the side to a horizontal position.

By the Court:

Q. And moves it back and forward?

A. And partly moving it backward and forward; although there are other muscles that help in those movements. 10

By Mr. Mott:

Q. If a person can lift their arm to a horizontal position what would you say was the condition of the deltoid muscle?

A. I shouldn't say that that alone implied any condition of the deltoid muscle.

Q. Well, how do you lift your arm in that position? 20

A. You use principally the deltoid muscle to lift your arm to a horizontal position; but there are other muscles which rotate the scapular or shoulder blade, tilting the shoulder blade this way, so as to raise the arm.

Q. Could I raise it like that (illustrating) with the deltoid destroyed?

A. I don't think you can, sir; not with any strength.

Q. I couldn't raise it, with the deltoid destroyed, above the horizontal position?

A. I didn't say that; I said, with the same strength. 30

Q. How much physical power, with the deltoid destroyed, have you taken out of my arm, how much of the power to work at manual labor?

A. I can't give you any definite figures on that.

Q. Could I do manual labor?

A. I don't think you could.

Q. Could I sweep a floor?

A. I don't know whether you could or not. It isn't necessary to raise your arm to a horizontal position to hold a broom.

40

Q. Could I wash?

A. I should think you could, because you don't have to raise your arm.

By the Court:

Q. Suppose with that arm there was power to use a washboard, what would that indicate?

Witness: I don't understand the question.

10 The Court: Suppose there is power in washing to move the clothes over the washboard, what would that indicate?

A. It would principally indicate that the muscles which flex and extend the elbow were not involved.

Q. If you destroy the deltoid muscle, have you taken any power out of my forearm?

A. No, sir.

20 Q. Anything I can do from the elbow down can be done?

A. Yes, sir.

SARAH STEINBACH, sworn in behalf of plaintiff.

Direct examination by Mr. Morrow:

30 Q. Have you ever seen this young lady before, the plaintiff?

A. Yes, sir.

Q. Where did you first see her?

A. In Mr. Alex. Maybaum's house.

Q. On South Orange avenue?

A. Yes, sir.

Q. Was she in the house when you first saw her?

A. No, sir; I saw her when she fell off the car.

Q. You first saw her when she fell off the car?

40 A. Yes, sir.

Q. Where were you when she fell off ?

A. I was sweeping the piazza on the right hand of the house.

Q. And she fell off which side of the car ?

A. She fell off by Mr. Maybaum's house, in the gutter.

Q. On the same side that you were ?

A. Yes, sir.

Q. What attracted your attention to the car at the time that she fell off ?

A. Mrs. Maybaum was watching her children going across to Mr. Aschenbach's, and she stood in the front door ; and I said, "I am sure it is a good thing the children is across. Just look at the speed of the car ?" It was going very fast down the hill. "Well," she says, "they're all right." Just as I said this I saw this thing ; this girl coming head first out of the car and laying in the gutter, with the water from the zinc factory on her. She was bleeding out of the mouth and nose. She was a very heavy girl, and we pulled her as good as we could up on the bank to bring her too. And then we called for Mr. Maybaum's man, and he came, and we brought her into Mrs. Maybaum's dining-room and laid her on the lounge, and we cut her clothes and tore the buttons off, trying to bring her too, and cut the strings on her back : and we rubbed her with water and liquor and vinegar ; and then she lay there about two hours in our house. Mrs. Maybaum done all in her power to try to bring her too. Then the car went on, and when they turned from the switch they brought in the things in the house.

Q. Who brought them in ?

A. The conductor.

Q. What things did he bring ?

A. A square box, and two or three small packages ; marbles, and stockings and garters, and little things she was bringing to her brothers and sister in South Orange.

Q. Any candy ?

A. Candy and apples. The conductor brought them in and left them with Mrs. Maybaum. And then they telegraphed for the doctor, and he came ; I don't know what his name was; and he telephoned for the ambulance to

Newark, and they wouldn't come ; and she laid so long there, and was in such a terrible condition that they sent for the ambulance to Orange, and they come and brought her out on the stretcher; and she didn't know anything at that time.

By the Court:

Q. What time was this in the day when you saw her fall
10 from the car?

A. It was in the afternoon.

Q. Can you tell nearly at what time?

A. No, sir ; I could not.

Q. Can't you tell pretty nearly?

A. I couldn't say the time.

Q. Can you tell the Court and jury what time it was when the ambulance came?

A. It was quite a ways after dinner.

Q. Was it before or after dark?

20 A. Oh, before dark.

Q. How long after you saw her fall from the car was it before the conductor came back with those packages?

A. He went as far as the switch and came back again.

Q. It was not very long?

A. No, sir.

Q. At the time you found her in the gutter was she conscious or unconscious?

A. Unconscious; she didn't know anything. She was bleeding at the mouth and nose.

30 Q. Did you notice whether she breathed?

A. No, sir; she didn't at that time; nor till later in the day.

Q. She remained in the house how long?

A. A couple of hours before the ambulance came.

Q. She was taken out of the house on a stretcher to the ambulance?

A. Yes, sir; and one of our buffaloes and a white counterpane went along.

Q. What was her condition at that time?

40

A. Well, she was unconscious; she didn't know anything.

Q. Can you say whether she got any better while she was there?

A. No, sir; we thought she would die in the house.

Q. Where did she show injuries?

A. On her head, and the side of her face, and on her arm; because when we would raise her arm she would let it fall. One hand we could lay across.

Q. Did the other one drop down? 10

A. Yes, sir.

Cross eamination by Mr. Mott:

Q. Did she move at all?

A. No, sir; she didn't make any move at all; no signs of it.

Q. The car stopped that night?

A. The car went on, and then came back.

Q. Are you sure? 20

A. Yes, sir; sure of it.

Q. Do you mean to say the car didn't stop and back up?

A. No, sir; it didn't stop; the car was going too fast; they couldn't stop it; it was going full speed.

LOUIS MILLER, sworn in behalf of plaintiff.

Direct examination by Mr. Morrow:

30

Q. Where do you live?

A. In Vailsburg.

Q. Just turn around and look at the map, and see if you can tell us where you lived on the 13th of April, 1893?

A. I lived in Vailsburg.

Q. Where did you live in April, 1893?

A. I lived in Vailsburg two years ago.

Q. Whereabouts as compared with Maybaum's?

A. Just next to Maybaum's house; I lived next to Maybaum's house seven years.

40

Q. Then for seven years you lived next house to Maybaum's?

A. Yes.

The Court: The next house the other side of Maybaum's?

Mr. Morrow: This side. This is supposed to be Maybaum's house here (on map.)

10 Q. You see these things marked "Trees"?

A. Yes, sir.

Q. Is that the house you lived in?

A. Yes, sir.

By the Court:

Q. What street is that?

A. That is the same street.

20 By Mr. Morrow:

Q. South Orange avenue. Do you remember Mary McCann. Did you ever see her?

A. Yes, sir.

Q. Where did you first see her?

A. I seen her first falling out of the car.

By the Court;

Q. Did you see her fall out of the car?

30 A. Yes.

By Mr. Morrow?

Q. Go on in your own way and tell these gentlemen what you saw, how she fell out, and all about it. Where were you?

The witness made an unintelligible answer, and the court interpreter in the German language repeated the question.

40

A. I was working ten or twelve steps away from the car.

Q. On the lot next to Maybaum's house ?

A. Right on the corner from Bond's.

Q. Bond's house is the house marked there ?

A. That one marked there.

Q. What did you first see ?

A. She had fallen off the car.

Q. What attracted your attention to that car ?

A. When the car was passing ; every workman looks up at the car. 10

Q. You looked up and saw the car coming ?

A. Yes, sir.

Q. When you first saw the car was Mary still in the car ?

A. She just had stood up and turned round and wanted to go towards the door.

Q. Who else was in the car with Mary ?

A. I seen no one else but the conductor.

Q. And where was the conductor ?

A. He was standing at the front of the door, having his memorandum in his hand, and writing down, and looking up. 20

Q. Was he at the back door ?

A. No ; at the front door.

Q. Was the rear door of the car open or shut ?

A. Open.

Q. Did you see Mary McCann fall from the car ?

A. Yes ; I seen the white petticoats, how the feet lifted up.

Q. Did she go off feet first or head first ?

A. Her head was down when I seen her. 30

Q. Did you assist in picking her up and carrying her to Maybaum's house ?

A. Yes ; I took her right off the ditch there. I wanted to open her dress in front, but I couldn't do it when these ladies came along.

Q. Was she conscious or unconscious ?

A. Oh, she was dead ; and blood and water coming from the mouth.

Q. And from her ears also ?

A. I didn't take notice of everything, but all around her 40

head was full of blood.

Cross-examination by Mr. McCarter:

Q. The conductor, you say, was marking on a memorandum?

A. Well, I know nothing about that; I don't know what he was writing.

Q. Was he writting?

10 A. When this trouble occasioned thereby, I naturally took particular notice of it.

Q. Did you see her rise from her seat?

A. Yes; everything passed so quick—

By the Court:

Q. When you first saw her was she sitting down or standing up?

A. No; she was standing.

20 By Mr. McCarter:

Q. Was she up when you first saw her, or was she sitting down?

A. While the car was coming she was getting up, and I just thought in my mind; what is she going to do?

Q. And how far was the conductor from her?

A. Well, Mary was behind his back.

Q. And what did she do after she got up?

A. Going out and falling off was all one thing.

30 By the Court:

Q. Did the car stop after she fell off, or did it go on?

A. Well, it went on quite a distance yet.

Q. Did it stop before it reached the place where it stops to connect with the horsecars?

A. Yes; it did.

Q. Were you there when the car came back?

A. Well, I returned to my work; I hadn't time to look at the car; everything happened so quick.

40 Q. When the car came back to Maybaum's, did it come

on to Newark, or did it go back again to the place where the horsecars are ?

A. The car went down to the Shooting Park, and changed, and went off down to Newark.

Re-direct examination by Mr. Morrow :

Q. Who was in the car besides Mary McCann ?

A. I haven't seen anybody else.

Q. Did you help pick Mary up ?

A. I carried her in.

Q. Near where she lay did you see any apples, marbles, or packages of any kind ?

A. Nothing I have seen. They brought these packages out of the car and put them down in Maybaum's place.

SARAH STEINBAACH, re-called in behalf of plaintiff.

Direct examination by Mr. Morrow :

Q. Who was in the car besides Mary that day ?

A. Nobody but the conductor.

Y. And where was the conductor ?

A. He was in the front part of the car.

Q. Do you know what he was doing there ?

A. No, sir ; I didn't take notice.

Q. What do you mean by the front part of the car ?

A. At the front part, where the motorman is ; not on the platform, in the door.

Q. When you picked Mary up, did you find any marbles and apples, or any of these packages around her ?

A. No, sir ; they were in the car.

Plaintiff Rests.

Defendant's counsel moves that plaintiff be non-suited, on the ground

(1) that no negligence has been shown on the part of defendant ; and

(2) that plaintiff is shown to have been guilty of contributory negligence.

After argument, the Court said:

Depue J. I am not so sure of the law regulating this case as counsel seems to be. There are some principles of law that regulate the responsibilities of a carrier of passengers, that I consider as settled. One is, that they are not insurers; that simply undertake to carry, under an obliga-
10 tion to exercise reasonable care for the safety of passengers. Another principle of law is well settled, and that is that the injury which causes the damage must be the proximate result of the act of the person who is sued as a defendant. In every case it is necessary, where an action is brought against a carrier of passengers, to see that both of those incidents of the action are supplied by the proofs.

Now, I don't feel sure in this case that the facts laid before the Court are sufficient to bring the case within both of the principles that I have mentioned, and therefore, I
20 will deny the non-suit, and will consider the matter when the whole of the evidence is in.

There is no evidence now to show any reason why the conductor couldn't have stopped at any point. A horsecar or an electric car engaged in the transportation of passengers through a public street is presumed to stop to receive and discharge passengers at all points. They are vehicles that are provided for the carrying of persons who have occasion to resort to that mode of travel at any point in the line on which the car runs; and it is also a mode of trans-
30 portation that, in the ordinary sense, would recognize the right of the passenger to determine how long he should remain a passenger in the car.

Now, there seems to be no reason why this car shouldn't have been stopped at Grove street. There doesn't seem now to be an obvious reason why, because of the nearness of this car at the time to the terminus of the route of the electric cars, or by the grade, there was any difficulty or any impropriety in the passenger asking to be allowed to alight from the car at the point where this request was
40 made.

Another observation I may make at this time, and that is that if this passenger found herself to be sick, and desired to leave the car for the purpose of getting relief from her illness, as the case now stands I see no reason why she should not have been allowed to leave it, either at Grove street, where she informed the conductor of her illness, or at the place (where is left a little uncertain) where she communicated again to the conductor that she was sick; and I fail to see, from the examination of this case at this time, anything that would militate against her right to leave the car for her convenience, if she was sick at that time. Nor have I any hesitation in affirming the diligence required of the persons in charge who are notified of the illness of passengers to exercise what, in their judgment of the jury, would be reasonable care for the well-being of the passengers. I think the cases, although they have not been settled, are quite full upon that point.

My scruple about this case, and it is quite a serious one, is in the last proposition that I have mentioned; whether this injury can be considered as the proximate result of the refusal of the conductor to stop the car either at Grove street or when the passenger stated to him afterwards that she was sick. If she had arisen from her seat and gone to the rear of that car and jumped off, I should have had no hesitation in non-suiting her; because the act that caused injury would have been the voluntary act of the passenger herself. But the evidence shows that she arose from her seat and went to the door, not for the purpose of alighting, but for the purpose of calling to any one she might see standing in the street for assistance. Now, I fail to see that that was an act that would be unreasonable under the circumstances, if she was so sick that, in the judgment of the jury, she ought to have been allowed to leave the car. She testifies that when she went there she became unconscious; and if she reached that point without being guilty of any negligence on her part, then if, in her unconscious condition, she was thrown from the car, it would be difficult to connect the act of falling with the voluntary act of the plaintiff in going to the door for the purpose that she has stated.

10

20

30

40

But then there is another principle involved, and I think it is quite fundamental, and that is the damages from injuries that result must result from a wrongful act in order to be actionable; must be such as could reasonably be viewed as the probable result of the wrong done. My scruple in this case, and it is probably more than a scruple, is whether the conductor could be held to have reasonably apprehended this result from the sickness of the passenger and his refusal to stop the car.

10 I have said more than I intended when I said that I didn't propose to non-suit, but I said that with a view of directing the minds of counsel to what I consider to be the principles that must regulate this case. It is not every injury that is the result of a wrongful act that is actionable; it is only such injuries, to adopt a phrase that is quite expansive, and therefore not always to be applied on the spur of the moment, as are a proximate of the wrong complained of.

Now, I do have a doubt about this case. I will turn it
20 over in my own mind, and for the present shall refuse to non-suit.

Defendant's counsel prays an exception and that said exception may be sealed, and it is sealed accordingly.

David A. Depue
J. S. C. [L.S.]

30

Mr. Mott opens for defendant.

JOSEPH DEEMER, sworn in behalf of defendant.

Direct examination by Mr. Mott:

Q. Where do you live?
40 A. 206 Cannon street.

Q. What is your occupation ?
A. Conductor on the South Orange railway.
Q. How long have you been working for the road ?
A. It is four years next spring.
Q. That was before electricity was put in ?
A. Yes, sir.
Q. You used to be a conductor when the horsecars were there ?
A. Yes, sir.
Q. Were you working for the road on the 13th of April. 1893 ? 10
A. Yes, sir.

By the Court :

Q. The conductor on the car on which this accident happened ?
A. Yes, sir.

By Mr. Mott :

20

Q. Now, Mr. Deemer, do you remember where this lady, Miss McCann, got on the car ?
A. No ; I can't remember where she got on ; I don't know : at Washington or Broad street ; I can't remember; no, I think at Washington street.
Q. She paid her fare ?
A. Yes, sir ; she gave me a quarter, and she said Vailsburg, and I gave her 19 cents back and a ticket for Vailsburg.
Q. There were other passengers in the car at that time ? 30
A. Yes, sir ; three or more.
Q. You went on in the regular course and got up to the carhouse. After you passed the carhouse were there any other passengers on ?
A. Nobody except the lady.

By the Caurt :

Q. There was no other passenger at Grove street ?
A. No, sir.

40

By Mr. Mott ;

Q. Now, what happened ?

A. Well, so soon as we passed the carhouse, where we have to hold the trolley ropes, I went inside the car, about two steps from the back door, and the lady was sitting in the second window from the back door, on the right hand side going up, and I stood alongside of her ; and when we came down near Maple avenue to near Maybaum's, the motorman opened the door, and I made about two or three
10 steps forward in the centre of the car, and he asked me what time we would go out the next trip (it was a new run for the motorman) ; and I told him 2:45 or 2:49, or something like that, and I turned round and went back again, just seen her jumping off the car ; and she had five or six packages and a big package or box, and the little packages was laying on the floor, and the big package on the seat alongside of her.

Q. Did she ask you to stop the car ?

A. No, sir ; she didn't say a word to me.

20 Q. Didn't she say any word from the time you passed the carhouse ?

A. No, sir ; nothing.

Q. Did you know she was sick ?

A. No ; I didn't know it.

Q. Was your attention attracted to her by anything she said or did ?

A. No, sir ; she didn't say a word, nothing.

Q. You say you had a new man for motorman ?

A. Yes, sir.

30 Q. By that you mean that you and the motorman had not been running together ?

A. Yes, sir ; that is the reason he opened the door and asked me the time of the next trip ?

Q. Were you on time when you got to the carhouse ?

A. Yes, sir ; right on time.

Cross examination by Mr. Morrow :

Q. Had this motorman been engaged by the company
40 prior to this time ?

A. Yes, sir.

Q. How long had he been in the employ of the company?

A. I don't know how long.

Q. Is he in the employ of the company now?

A. Yes, sir.

Q. Is he here to-day?

A. Yes, sir.

Q. How near to the front door were you when Mary went off of the car? 10

A. I was about in the centre of the car.

Q. And she sat next to the rear window?

A. The second window from the back door, on the right hand side going out.

Q. And you had gone there because the motorman called to you to find out whether you were on time or not.

A. Yes, sir: I told him it was 2:45 or 2:49.

Q. Did you take out your watch?

A. No, sir. 20

Q. You just guessed what time it was?

A. It was a new run for the motorman.

Q. The motorman asked you what time it was?

A. No, sir; he only asked what time to go out the next trip?

Q. When you got to the end of the line?

A. Yes, sir.

Q. Did you tell him?

A. Yes, sir.

Q. How did you know what time? 30

A. I had a time table.

Q. You say you were on time; how did you know that?

A. Well, we had only five minutes from the carhouse down to the 'pike and back.

Q. How do you know that you were on time?

A. Well, I know that I wasn't much behind time.

Q. How did you know it?

A. I looked at the watch before we came up to the carhouse.

Q. Hadn't you looked at your watch since? 40

A. No, not after that.

Q. And when the motorman asked you what time you had to leave the end, didn't you look at your watch?

A. No, sir.

Q. When you were talking to him Mary went off the car?

A. She walked off the car; yes, sir.

Q. While you were talking with him?

A. Yes, sir; I seen her jumping off the car.

10 Q. You believe she jumped off?

A. I seen her jumping off the platform.

Q. Do you want us to believe that?

A. Yes, sir.

Q. Will you tell us what time you left the upper end at that time? What was the schedule time?

A. Do you mean the Shooting Park or the carhouse? The leaving time for the carhouse I don't know; I think it was 2:45 or 2:49.

Q. What time were you to leave the switch to come 20 back?

A. I don't know; I can't remember that.

Q. Then how do you know you were on time?

The Court: Well, is it any difference whether he was on time or not?

Mr. Morrow: If he was on time, I am prepared to ask him something else.

30 The Court: He said he looked at his watch and knew he was on time before he got to the carhouse.

By Mr. Morrow:

Q. Well, then, from the carhouse down to the end of the track you had to run in five minutes?

A. Yes, sir.

Q. You were expected to do that, were you?

40 A. We have to do that; it is five mitutes.

Q. Were you going at a rapid rate of speed or very slow when she went off?

A. We didn't go down fast.

Q. At what rate were you running the car at that time?

The Court; I don't think it makes any difference. If she jumped off or went off without the fault of the conductor, whether the speed was fast or not would be a matter of no importance.

Mr. Morrow: It would go to show that he didn't want to stop, because he was in a hurry to get there. 10

The Court: I understand that he recollects his time at that point and from there to the switch.

By the Court:

Q. Now, how fast did you ordinarily run over that part of your route between the carhouse and the Shooting Park? 20

A. They go to the Shooting Park in five minutes altogether.

Q. How many miles an hour, about?

Mr. Mott: We can figure. I think it is about six miles an hour.

By Mr. Morrow:

Q. Did you bring these little things that Mary had with her in to Maybaum's house? 30

A. No; I fetched them down to the carhouse.

Q. Do you mean the carhouse up here on Sixteenth street?

A. Nineteenth street; yes, sir.

Q. You went down to the end of the route?

A. Down to the Shooting Park, and then came back up to the carhouse.

Q. Then what became of those things?

A. I put them inside of the office. 40

Q. After Mary went off how soon did you discover that the things were in the car?

A. Well, after she went off I seen all the packages on the floor before I gave the motorman the bell to stop the car.

Q. As soon as she went off did you discover the things in the car?

A. Yes, sir; right away.

Q. Where did you stop it?

A. I don't know.

10

By the Court:

Q. After Mary went off where did you stop your car?

A. We stopped the car right away.

By Mr. Morrow: Just turn round and look at this map.

(Witness does so.) This is Mr. Maybaum's house, here is the one next to it, here are the stables, here is a row of

20

trees. Do you know whether Mary went off before you got to Maybaum s house or after?

A. Before we got to Maybaum's house.

Q. At which point of these trees, about?

A. About the centre between those two.

Q. Here is the road to the slaughter-house; did you get as far as that before you stopped the car?

A. No, sir.

Q. At what point between Maybaum's and the slaughter-house did you stop the car?

30

A. We stopped the car this side of Maybaum's house.

Q. And then you saw these things of Mary's in the car?

A. Yes, sir.

Q. Didn't you pick them up and take them in to Maybaum's house?

A. No, sir.

Q. You went on down to the end?

A. Yes, sir.

Q. And then went back to the stables?

40

A. Yes, sir.

Q. And took them in the stables?
A. Yes, sir.
Q. Why didn't you take them in the Maybaum house?
A Well, they were packages or something like that—
Q. You knew they belonged to this girl, didn't you?
A. Yes, sir.
Q. Yon knew she had been taken into Maybaum's house?
A. Yes, sir.
Q. Why didn't you take the packages in there?
A. Well, I thought it was better to take them down to the office. 10
Q. Isn't it a fact that you didn't stop your car at all till you got down to the switch?
A. No, sir.
Q. Sure of that?
A. Yes, sir; I am sure of that.

Re-direct examination by Mr. Mott:

Q. It is a rule of the company, isn't it, that any packages found in the cars shall be returned to the office? 20
A. Yes, sir.
Q. When you stopped your car, what was done with the car?
A. I run the car back.
Q.. What did you and the motorman do?
A. We got right off the car.
Q. And you assisted in picking her up?
A. Yes, sir.
Q. And laid her upon the bank? 30
A. Yes, sir; and opened her dress.
Q. Did you stay there till she was carried into the house?
A. After that we went to the Park and back again.

By the Court:

Q. Did you stay until she was taken into the house?
A. Yes, sir.
Q. Who carried her in?
A. Mrs. Maybaum, and I think one of the conductors. 40

Muller was there. I don't know who exactly carried her in; I only know that they carried her in Maybaum's, that's all I know.

By Mr. Mott:

Q. Did you say you went to the place where Mary lay and took hold of her?

A. We went back with the car; I stopped the car, and went back with the car and we picked her up.

10 Q. Who picked her up?

A. Me and the motorman.

Q. And what then?

A. And we opened the dress right here (at the bosom;) and after that, Mrs. Maybaum and that lady over there, she was there too, they carried her in; and another man, he is a conductor now on the line, he helped to carry her in.

Q. Was he a conductor on the line at that time?

A. No, sir; not at that time.

20

[By request of counsel the witness Muller stands up.]

Q. Did you see that man there?

A. Yes, sir.

Q. Is he the man that you speak of?

A. Yes, sir.

Q. You saw him there?

A. Yes, sir; I saw him there in that place.

30

EDWARD SMITH, sworn in behalf of defendant.

Direct examination by Mr. Mott:

Q. Where do you live?

A. 384 South Nineteenth street.

40 Q. What is your occupation?

A. Motorman.

Q. On what road ?

A. South Orange railway.

Q. How long have you been working for the road ?

A. Four years ago last March.

Q. Then you used to work there when it was a horse railroad ?

A. Yes, sir.

Q. Were you working for the road on the 13th of April, 1893 ? 10

A. Yes, sir.

Q. Were you motorman on the afternoon when this accident occurred on this car of which Mr. Deemer was the conductor ?

A. Yes, sir.

Q. Do you remember the conductor speaking to you near the end of the line ? or did you speak to him ?

A. Yes, I asked him what time we left on our next trip.

Q. This was a new run for you ?

A. Yes, sir ; I believe it was the second day. 20

Q. You had a regular time-table ?

A. Yes, sir.

Q. That you were operating by ?

A. Yes, sir.

Q. And that time-table has been changed since then several times ?

A. Yes, sir.

Q. He told you what time you left ?

A. I think it was 2:40 something he told me.

Q. And then what happened ? After he told you what did you do ? 30

A. I looked ahead, and just after he left me he gave me a bell, and I heard him say something, and he pulled up.

Q. What did you hear him say ?

A. I don't remember what he said ; I know he hollered.

Q. Did you see the plaintiff, Mary McCann, or any woman passenger on that car ?

A. No, sir.

Q. At all ?

A. No, sir. 40

Q. You didn't see the plaintiff going off the car?

A. No, sir.

Q. Where was the first intelligence or information you had that there was anything the matter?

A. When the conductor hollered; when I got the bell to stop.

Q. That was the first information you had of any trouble?

A. Yes, sir.

10 Q. What did you do then?

A. I stopped the car as soon as I could.

Q. How far did you run?

A. In my estimation, twelve or fifteen feet, maybe a little further.

Q. Then what was done?

A. I left the car and went back to where the lady laid.

Q. Who went back?

A. The car; we reversed the car.

Q. Then what did you and Deemer do?

20 A. We got off, and by that time there was others there.

Q. Who were "we"?

A. Me and the conductor.

Q. What did you do?

A. We picked the lady out of the ditch and laid her up on the dry part of the ground.

Q. Well?

A. We opened her vest and gave her as much air as we could.

Q. What next?

30 A. That's all I remember until the next car came up; that is, our following car.

Q. Did you wait there till it came up?

A. Yes, sir.

Q. What headway were you running on at that time?

A. Four minutes.

Q. And when your following car came up, then you got on your car and went along?

A. Yes, sir.

Q. Did you notice any bundles in the car?

40 A. I did not.

Q. You didn't pick those up?

A. No, sir.

Cross-examination by Mr. Morrow :

Q. Who was there by Mary when you came up?

A. Nobody.

Q. I understood you to say that when you got there there were others there?

A. Then I saw Mr. Muller, and as we got to the place where the lady was, Mrs. Maybaum and some other gentleman on horse-back came there. 10

Q. Was Sadie Steinbach there?

A. Not that I saw.

Q. Muller was there when you reached there?

A. Yes, sir.

Q. Did you notice that she was bleeding from her nose and ears and mouth?

A. Yes, sir.

Q. And unconscious?

A. Yes, sir. 20

Q. Did you think her dead?

A. No; but I thought she wouldn't live long.

Q. When the conductor came to you what did he say?

A. I don't remember what he said.

Q. Did he open the front door to speak to you?

A. No, sir.

Q. Was it open?

A. No, sir; I opened it and asked him what time we left next trip, and he told me. 30

Q. Did he take out his watch?

A. No; he just told me what time I left.

Q. How close was he to you?

A. In the width of the car.

Q. Was he facing you?

A. Yes, sir; he was looking towards me.

40

MARY McCANN re-called for further cross-examination.

By Mr. McCarter:

Q. I think you said you left work last April. You left Judge Conlon's then ?

A. Last November a year ago.

Q. And you haven't had any employment since then?

A. Yes, sir; I am in employment, but not steady. I didn't have much employment, but I am at present.

10 Q. What are you getting now a month ?

A. I am getting $10.

Q. What were you getting at Conlon's ?

A. I got $12 at Conlon's.

Q. That is $3 a week. What did you get at Judge Conlon's before the accident.

A. $12 a month.

By the Court:

20 Q. You said $5 a week before, didn't you ?

A. Yes, sir.

By Mr. Mott:

Q. Didn't you say you got $5 at Judge Conlon's?

A. Well, after the accident.

Q. You got $12 afterwards, as long as you staid there?

A. Yes, sir.

Q. And are getting $10 a month now ?

30 A. Yes, sir.

Defendant Rests.

Mr. McCarter sums up for defendant.

Mr. Morrow sums up for plaintiff.

After argument, the Court charges the jury as follows:

Depue, J. This case, gentlemen, differs in its features 40 from ordinary cases that are tried before a court and jury,

involving a question of liability for damages arising from negligence in the performance of duty. As you are aware, at the close of the plaintiff's case, and in the disposition of the moment to non-suit, I expressed my views to counsel, with some reluctance and hesitation, with regard to the application of the rules of law that I stated to this case. I have now had the opportunity of turning this case over in my mind, and of reaching a conclusion that at this time is satisfactory to me, and which I shall adopt as the law applicable to this case.

The facts, gentleman, are these :

On the 13th of April, 1893, the plaintiff became a passenger on a car of the South Orange Street Railway Company. She took passage with the intention of going to the South Orange Orphan Asylum, and she had tickets for that purpose. The fact that she had tickets, and that that was her destination, was known to the conductor on this car. The evidence shows that when she reached a point in the neighborhood of Mr. Maybaum's house, she either jumped, fell, or was thrown from the car, receiving serious injury, and for the injury she received she has brought an action against the railway company.

In every case of this kind these propositions are involved : First, a duty on the part of the defendant; secondly, failure to perform that duty ; thirdly, damages which are the proximate result of the failure to perform that duty ; and fourth, if the plaintiff himself has contributed by his own negligent conduct to the injury for which he brings his action to recover damages, he is debarred from recovery.

Now, all these propositions with the exception of the last must appear affirmatively in this case, and they make the plaintiff's cause of action, the burden of proving which always rests on the plaintiff.

A few words only on each one of these propositions.

The plaintiff was a passenger on a street railway. The plaintiff had a right, although she held a ticket for South Orange, to ask the conductor to stop at any point at which she desired to alight. But, gentlemen, she had no right, because of the failure of the conductor to stop, to jump

from the car; nor had she a right, under ordinary circumstances, to require that the car should be stopped in order that she might alight, on the peril of being responsible for any injury that she might sustain by leaving the car while it was in motion.

The plaintiff says that when she reached Grove street, in her own language, "I felt sick, and I went to the door and told the conductor to please stop the car. He says: 'What's the matter?' I says, 'I feel very sick, and I
10 would like to get off.' He told me to take my seat and sit down, and I would feel better after awhile, and I did so."

Now, if the case ended just there, and after this conversation with the conductor, she had left her seat and gone to the rear door, and had fallen from the car, she would not have been entitled to recover; for the reason that she acquiesced in the direction of the conductor that she should sit down and she would feel better. If the case ended there, I would have no hestitation in directing a verdict for the defendant. The point of inquiry in this case is
20 what occurred after that time, and I read her own statement. She says:

"Instead of getting better, I was feeling sicker all the time; and the conductor passed through the car, and I says: 'Won't you please stop this car?' He looked at me and kind o' smiled. He went on to the front of the car and began talking to the motorman."

Now, was the condition of the plaintiff such, with regard to her sickness, that it was reasonable for her to ask the conductor to stop and let her off for that reason, and did
30 she communicate to the conductor the urgency of her condition?

I have read the evidence on the part of the plaintiff. The testimony on the part of the defendant is that the conductor was not made aware in the slighest degree of the sickness of this plaintiff. Of course, if you except that view of the evidence, the case ends. But, on the plaintiff's own testimony, the point will arise whether she so communicated her desire to alight at that time because of her sickness that the duty reasonably rested upon him to stop
40 the car and let her off.

Now, I turn to the next point in the case, and that is whether, assuming that she did communicate to the conductor her condition, and her request to stop the car, what she did after that time was reasonably proper in order to relieve her from the condition in which she was. She testifies:

"Then I got up and went to the rear of the car to see if I could see anybody passing, to attract their attention."

That was the object that she testified she had in view when she left her seat. If she left her seat for the purpose of jumping from the car, or alighting from it while it was in motion, she would be debarred by that fact from a recovery in this case; because a passenger who alights from a moving car takes upon himself the responsibility of the risks he voluntarily undertakes. 10

Now, the question arises on that evidence whether that was her object in going to the rear of the car, in the first place, and in the second place, whether, under the evidence, you judge that it would have been reasonable for her to obtain the assistance of any persons from the outside with a view of enabling her to alight from that car because of her sickness; whether she used proper efforts with regard to the communication to the conductor of her condition, and of the urgency of allowing her to alight. 20

Then she says:

"When I got up I kind o' staggered through the car to the door, and fell kind o' in the corner of the door this way. I remember no more after that."

Of course that which occurred in the course of this transaction after she became dizzy and unconscious is not to be imputed to her. The point is, whether, after she acquiesced in the first communication of the conductor, she communicated to the conductor her desire to have the car stopped, and whether what she did after that time, in going to the door for the purpose for which she says she went there, was, in the judgment of the jury, a reasonable and proper thing for her to do. It is on these two propotions that this case must turn. She didn't want to alight because she chose to terminate her journey there; she wanted to alight because of her sickness. Did she com- 30 40

municate that fact to the conductor after she sat down, and desire him at that time to stop the car for the purpose of allowing her to alight? If she did, then the first proposition that is involved in this case will be established in favor of the plaintiff, and then it became the duty of the conductor to stop his car and allow her to leave it in safety. If no such communication was made to the conductor, then this case ends.

If you find that proposition in favor of the plaintiff, then
10 the next question that will arise is, whether what the plaintiff did in the situation she was placed in was reasonable and prudent for her to do; going to the door for the purpose of obtaining assistance outside of the car to have the car stopped.

As you find these two propositions, so your verdict should be. If the plaintiff has established both, then the plaintiff will be entitled to a verdict. If either is resolved, under the evidence, in favor of the defendant, then the defendant is entitled to a verdict.

20 Now, if you find a verdict for the plaintiff, the next question will be the assessment of damages. That she was seriously injured can hardly be disputed under the evidence. She was found lying in the gutter, unconscious. She was unconscious all the while she remained at Mr. Maybaum's house, which, according to my recollection of the evidence, was about two hours. She was taken from there on a stretcher to the hospital. She remained, according to the evidence, in an unconscious condition from the 13th of April, when she was taken there, until the 7th or
30 8th of May, when the doctor says she was conscious enough to ask for a drink of water. The evidence is that she remained at the hospital until the 23d of November of the same year. She lost the wages she would have earned from the 13th of April to the 23d of November. Her wages at that time were $12 a month. The evidence further than that is that after her discharge from the hospital she returned to her former employer, I think, and received for her services $5 a month, $3 less than she had received before. Since that time she has been in an employment from
40 which she realized $10 a month.

The figures I have mentioned, gentlemen, are the figures that will enter into a calculation, so far as a calculation enters into a verdict of this kind. The diminished income she has received since her discharge would represent the pecuniary injury she sustained.

In addition to that, in a case of this sort, the plaintiff is entitled to recover compensation for pain and suffering, and also damages that may result in the future for the permanency, if the evidence shows that there was permanency, of the injury she received. For admeasuring damages of that kind the law prescribes no rule; that is left to the good judgment and good sense, the unbiased, unprejudiced judgment of a juror. 10

Mr. Morrow: There was some mistake in a date your Honor gave. Your Honor remarked that she was at the hospital until November; she was only there until June. She went back to her employment in November.

The Court: Yes; she lost her employment until November. 20

The jury having retired,

Defendant's counsel asks the Court to direct a verdict for the defendant.

The Court declines so to do. To which ruling of the Court the defendant's counsel pray an exception, and that its said exception may be sealed, and it is sealed accordingly. 30

David A. Depue
J. S.

Defendant's counsel pray an exception to that portion of the Court's charge to the jury which holds that upon the establishment of the two propositions named the plaintiff will be entitled to recover; that is to say, upon the establishment to the satisfaction of the jury (a) that after the plaintiff sat down she had communicated to the conductor her desire to alight from the car, and 40

(b) her action thereafter in going to the door for the purpose of obtaining assistance outside of the car, was reasonable and prudent, the plaintiff was entitled to a verdict, and that its said exception may be sealed, and it is sealed accordingly.

David A. Leventritt [?]
J. S. Ct.

10

The foregoing exceptions are signed subject to the charge as delivered.

20

David A. Leventritt
J. S. Ct.

30

40

ASSIGNMENT OF ERRORS.

New Jersey Court of Errors and Appeals.

10

NEWARK AND SOUTH ORANGE RAILWAY CO. *Plaintiff in Error,* *vs.* MARY McCANN, *Defendant in Error.*	*Assignments of Error.*

20

Afterwards, that is to say, on the first Tuesday of December, in the year of our Lord, eighteen hundred and ninety-five, in the Court of Errors and Appeals, in the last resort in all causes of the State of New Jersey, comes the said Newark and South Orange Railway Company, by Wilbur A. Mott, its attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit: 30

That the declaration aforesaid and the matters therein contained, are not sufficient in law for the said Mary McCann to have her aforesaid action against the Newark and South Orange Railway Company.

There is also error in this, to wit: for that the said Justice before whom the said trial was had, at and upon the aforesaid trial of the said issue joined between the aforesaid parties, declined to non-suit the plaintiff at the close 40

of her case, although he was requested so to do by the defendant's counsel.

There is also error in this, to wit: for that the said Justice, at the close of the case, although requested by the defendant's counsel, declined and refused to direct a verdict for the defendant.

There is also error in this, to wit: that the said Justice in the course of his charge to the jury, charged the jury that upon the establishment by the plaintiff to the satisfaction of the jury (a) that after the plaintiff sat down, she had communicated to the conductor of the car her desire to alight therefrom, and (b) her action thereafter in going to the door for the purpose of obtaining assistance outside of the car was reasonable and prudent, the plaintiff was entitled to a verdict.

Therefore, the said The Newark and South Orange Railway Company prays that the judgment aforesaid, by reason of the aforesaid errors, and all other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said Newark and South Orange Railway Company may be restored to all things it has lost, on occasion of the said judgment, and that the said Mary McCann may rejoin to the said errors.

WILBER A. MOTT,

Att. for and of Counsel with Plaintiff in Error.

Common joinder in Error.