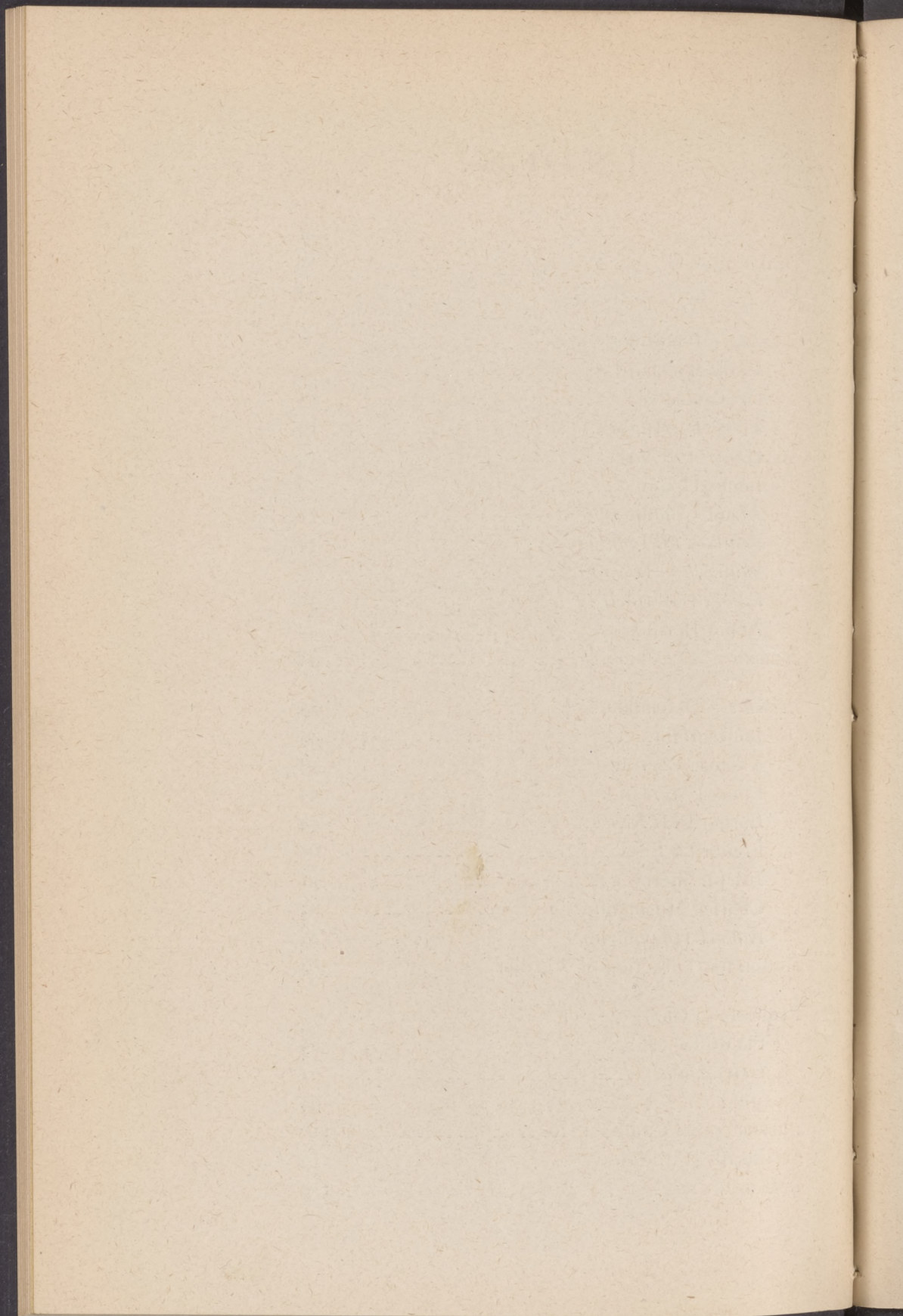


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Hudson Circuit Court of the eleventh day 10
of September, eighteen hundred and
ninety-three.

HUDSON COUNTY, ss. :

The North Hudson County Railway Company, the defendant in this suit, was summoned to answer unto Jacob Bernhard, administrator of all and singular the goods, chattels, right, credits, moneys and effects, which were of John Bernhard, late of the County of Hudson aforesaid, deceased, the plaintiff 20 herein, in an action of tort; and thereupon the said plaintiff by Henry E. Wills, his attorney, complains for that, whereas, the said defendant at all times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the State of New Jersey, and whereas the said John Bernhard departed this life intestate, in the County of Hudson aforesaid, on the nineteenth day of August, in the year eighteen hundred and ninety-three, leaving the plaintiff, his father, and Victor Bernhard and 30 Edward Bernhard, his brothers; and Mary Bernhard, his sister, his next of kin him surviving.

And whereas the said defendant before and at the time of the committing of the grievances hereinafter mentioned at the County of Hudson aforesaid, was the possessor, proprietor and operator of a certain street railway, running from the ferry at Hoboken at the east end of Ferry street through divers streets, including the Bull's Ferry road or boulevard, situate in the Township of Weehawken, all in the County of 40

Hudson, aforesaid. And whereas all said streets were public streets, opened and dedicated by law to public use in general, and whereas said defendant was then and there the possessor, proprietor and operator of a certain electric motor-car and a certain street car thereto attached, which by its servants and agents it then and there propelled through said last named street by use of electricity and governed by a motor-man and conductor along the railway tracks of said
10 company.

And being such possessor, proprietor and operator of said railway, tracks, motor and street car, it became and was the duty of the defendant towards the said John Bernhard to use care and diligence in the operation of its said road, track, motor and car, so as not to injure him.

And whereas the said John Bernhard in his lifetime, to wit, on the day and year last aforesaid was lawfully in and upon the tracks of the said company in
20 the Boulevard aforesaid and in the act of crossing the same.

Yet the said defendant disregarding its duty in this behalf and wrongfully and unjustly intending to injure, prejudice and aggrieve the said John Bernhard and his next of kin, aforesaid, by its servants and agents on the day and year last aforesaid, at Weehawken, in the County of Hudson aforesaid, so unlawfully, negligently and unskillfully propelled said motor, with said car attached thereto, along said
30 track, and so neglected to use and affix ordinary safeguards and fenders upon said motor and so neglected to warn the said John Bernhard of the approach of said motor and car, and so negligently propelled said motor and car, and another motor and car of said company going in an opposite direction past one another at an unusual and dangerously high rate of speed along said last named street that said John Bernhard, without negligence on his part, was then and there by said first named motor and car struck,
40 run down and run over, and his legs crushed and

mained, so that he died then and there from said injuries.

And plaintiff avers that the said John Bernhard was at the said time of the age of nine years and not of sufficient discretion to apprehend and guard against the danger of receiving the injuries aforesaid, and that letters of administration upon the estate of the said John Bernhard, deceased, were on the thirtieth day of August, eighteen hundred and ninety-three, granted and issued to him, the plaintiff, by the Surrogate of the County of Hudson aforesaid. 10

Wherefore the plaintiff saith that he hath been injured and suffered pecuniary damage in the sum of five thousand dollars, and therefore he brings this suit for the benefit of the next of kin of said deceased in accordance with the statute in such case made and provided.

HENRY E. WILLS,
Attorney of Plaintiff.

20

HUDSON COUNTY CIRCUIT COURT.

THE NORTH HUDSON COUNTY
RAILWAY COMPANY

ADS.

JACOB BERNHARD, Administrator
of the goods, &c., of John Bern-
hard, deceased.

In Tort.

30

And the said defendant, by J. C. & S. A. Besson, its attorneys, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them or any part thereof in manner and form as the said plaintiff hath above thereof com- 40

plained against it, and of this the said defendant puts
itself upon the country, &c.

J. C. & S. A. BESSON,
Attys. for Deft.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

10 MYLES TIERNEY, being duly sworn according to
law upon his oath, says: He is the president of The
North Hudson County Railway Company, the above
named defendant; and deponent further says that the
said plea is not intended for the purpose of delay,
and that he, this deponent, is advised and verily be-
lieves that the said defendant has a just and legal de-
fense to said action on the merits of the case.

MYLES TIERNEY.

Sworn and subscribed before }
me this 30th day of Sep- }
tember, A. D. 1893. }

20

S. C. BESSON,
M. C. C. of N. J.

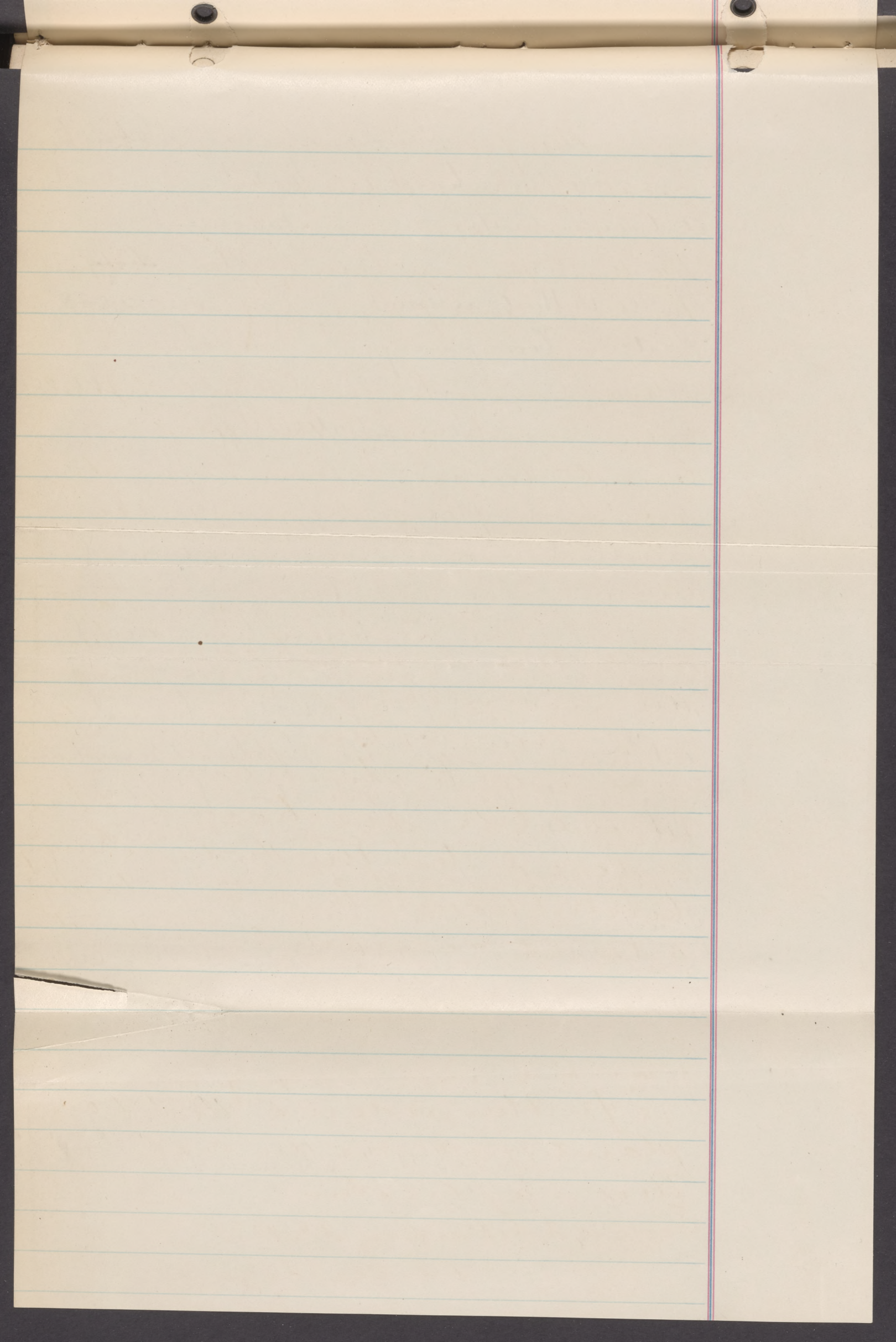
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40

Hudson Circuit Court
Jacob Bernhard In tnt.
Administrator Judgment on
vs. Verdict and
The North Hudson County Damages 2628.
Railway Company. ~~Interest~~
Costs. 66.20
Henry Ewells Atty.

Judgment after verdict in the above
entitled action was rendered
the twenty fifth day of February
in the year Eighteen hundred
and ninety five in favor of
the plaintiff Jacob Bernhard
Administrator of John Bernhard
against the defendant The
North Hudson County Railway
Company for the sum of Twenty
~~five~~ hundred and twenty eight
Dollars Damages and sixty six
Dollars and twenty cents. Costs of suit

Judgment entered and signed
February 25th 1895.
Job H Lippincott
Judge.



New Jersey Supreme Court
Jacob Bernhard Adm &c }
vs }
The North Hudson County } Case certified
Railway Company }

This cause having been certified to this Court from the Hudson County Circuit Court for its advisory opinion on the rule to show cause why the verdict rendered in the cause should not be set aside and a new trial granted and the Court having heard the argument of counsel and being of the opinion that said rule to show cause should be discharged, It is ordered that the Hudson County Circuit Court be and is hereby advised accordingly and it is further ordered that the plaintiff recover the costs of this application.

Entered February 23 1894

On motion of
Henry E. Wells
Attorney

Benjamin F Lee Clerk of the
Supreme Court of the State
of New Jersey do certify that
the foregoing is a true copy
of an order made by the
Court in above cause and
entered in the minutes thereof

Seal

In testimony whereof I
have hereunto set my
hand and the Seal
of said Court at Trenton
this Twenty third day
of February A D Eighteen
hundred and ninety five
Benj F Lee Clerk.

of Job H Lippincott Justice of the Supreme Court
holding the Circuit Court in and for the County of
Hudson hereby certifies that the within writ of Habeas
was presented to me in open Court this 10th day of
March 1895.

Job H Lippincott
Judge



New Jersey ss.

The State of New Jersey
To Hon Job H Lippincott
Judge of our Circuit Court
at the City of Jersey City
in and for the County of
Hudson,

or such Justice of the Supreme
Court of the State of New Jersey
as shall hold such Circuit
Court.

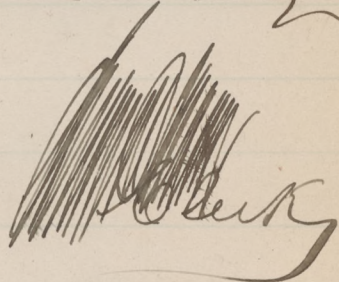
Greeting. Because in
the record and proceedings
and also in the giving of
judgment in a plaint
which was in our Circuit
Court holden at the City of
Jersey City in and for the
said County of Hudson between
Jacob Bernhard Administrator
of all and singular the goods
and chattles rights and credits
moneys and effects which were
of John Bernhard deceased
Plaintiff and the North
Hudson County Railway
Company dependant of an

action in tort manifest error
hath intervened to the great
damage of the said The North
Hudson County Railway Company
as by its complaint we are
informed we being willing
that the error if any there
be should in due manner
be corrected and full and
speedy justice should be
done to the parties aforesaid
in this behalf do command
you that if judgment be
thereupon given then to
distinctly and openly to
send under your seal the
record and proceedings aforesaid
with all things touching
the same or concerning the
same to our Court of Errors
and Appeals in the last
resort in all causes before
the Judges thereof at Trenton
in the State of New Jersey on
the twenty fifth day of March
~~next~~^{instant} together with this writ
that the record and proceedings

aforesaid being inspected we
may further cause to be done
thereupon for correcting that
even what of right and
according to law ought to be
done.

Witness His Alexander McGill
our Chancellor and President
Judge of our said Court of
Errors and Appeals in the
last resort at Trenton aforesaid
the ~~21st~~^{25th} day of March A.D.
Eighteen hundred and ninety
five

Geo Holmes,
Atty for plaintiff



HUDSON CIRCUIT COURT,

APRIL TERM, 1894.

JACOB BERNHARD, Adminis-
trator of John Bernhard, de-
ceased,

vs.

THE NORTH HUDSON COUNTY
RAILWAY COMPANY.

Debt.

10

Mr. WILLS, Attorney ; Mr. THOMAS F. NOONAN,
of Counsel with Plaintiff.
Mr. HOLMES for Defendant.

This cause was tried at the Hudson Circuit, April
23, 1894, before Mr. Justice LIPPINCOTT, with a jury. 20
Mr. Wills opens for plaintiff.

JACOB BERNHARD, sworn for plaintiff, testifies as
follows :

DIRECT-EXAMINATION by Mr. Wills :

I am the plaintiff in this case ; I am the adminis-
trator of John Bernhard, my son, who was killed,
August 19th last, by a trolley of the defendant, near
Sturm's Garden, in Weehawken. The next of kin 30
are two brothers of his, Eddie and Victor, and one
sister, Mary. I have been married the second time ;
the lady who is now my wife is not their mother. At
the time of this accident John was nine years old, on
the 26th of July before the accident.

Q. Was he at the time of his death a healthy boy ?

A. So far as I know, yes ; sound in every way.

Q. Where did you live at that time ? A. Hudson
avenue, Guttenburg, and the boy lived at home with
me.

40

Q. Was John accustomed to go much upon the streets unattended? A. No.

Q. Did he go alone? A. No; Eddie went with him; Eddie is 12 years old now. Victor is 14.

Q. When he did go on the streets, where did he go? A. Straight to school, about four blocks.

Q. How was he as to size? A. About middle size, kind of small.

Q. Was he bright at school? A. He was not bright; I never received no tickets from school
10 whether he was good or not in his lessons; if they are good they get merits at school. We always had trouble with him at home about his lessons.

Q. Were you at Sturm's Garden on the 19th of August, 1893? A. Yes, I was inside the park attending to the bowling alley; I was one of the committees of the picnic society there. My wife was with me; this boy came there with his mother from
Guttenburg to the park; my wife and John and Mary and Eddie came with me; we walked from
20 Guttenburg to Union Hill; Victor stayed at home.

Q. Describe Sturm's place? A. It is an amusement park for societies; they have prizes for shooting and bowling, and such things; they have picnics there two or three times a week, and festivals during the summer; I have occasion to pass and repass there every day, and I know.

Q. How long has that been an established picnic garden, to your knowledge? A. Ten years, to my knowledge.

30 Q. Do you know whether persons congregate in front of that park, near the tracks of this railroad? A. Yes; it is very crowded almost all the time, people going in the park and passing backward and forward all the time. The garden is at the corner of the Boulevard and Wiehawken street; there is a foot passage there for people, about 175 feet from the place of the accident on Wiehawken street.

Q. What hour was your boy killed? A. Between five and six, near six in the evening.

40 Q. Do the cars at that hour of the day pass there

from the ferry more frequently than at other hours of the day? A. Yes, more cars come up at that time; the cars were running always as fast as they could.

Q. How did your boys get out into the street? A. They wanted to play outside; the picnic inside for the boys was over, for prizes and running, and games of that kind, so that the boys went outside to play; I don't know how long they were out. The first I knew of the injury, my son Eddie came into the alley and told me, and I ran out, and then Johnny was on the stoop of Sturm's. I didn't see the accident. A 10
young man named Schaefer had picked him up from the car and brought him into the saloon. I saw the bones in his legs were all cut up, right across the upper part of the legs above the knee and below the knee, and he was hurt on the head, too; he lived about two hours after the accident. He was taken to St. Francis Hospital in Hoboken; I was there when he died. He spoke a few words after he was brought into the saloon. He didn't say anything about how he was hurt. 20

Q. What is your trade? A. A practical engineer. I am working as a machinist in New York, Forty-eighth street, for H. G. Stevens & Sons; they keep a lumber mill; I have worked there eighteen years; I have worked at my trade twenty-two years.

Q. If the boy had lived, were you in a position to have taught him your trade?

Question objected to as too remote, and overruled.

Plaintiff prays exception. 30

Q. What were you earning at your trade at the time of this accident? A. \$18 a week.

Q. From that you were able to support your family and to have saved sufficient to have given this boy together with your own knowledge of the machinist trade sufficient teaching to have made him when a man, a machinist?

Question objected to as too remote. Overruled. 40

Q. At what age do boys generally commence to learn your trade? A. At fourteen, and they serve at least four years.

Q. At eighteen, if he received ordinary instructions in his trade, and had ordinary intelligence, what wages would he probably earn? A. The same as me, \$18, but not in the beginning; it would be about \$16, and then he would get more as he grew better in his trade.

Q. Did you intend to educate this boy in your
10 trade? A. Yes.

Q. How old are you? A. Forty-three.

Q. Are you in good health? A. Yes.

Q. You have a home up there? A. Yes.

Q. You have a boy fourteen years old? A. Yes; he is learning the cabinet makers' trade.

Q. Can you say if things kept on as they were at the time of the boy's death, you would have been able from your means to have trained this boy to your own trade? A. Yes.

20 Q. What does a boy earn while he is putting in his time learning his trade? A. About a dollar a day, and he gets more towards the end of his time.

Q. (By the Court.) Sometimes boys don't get anything while they are learning their trade? A. Yes, at the beginning.

Q. (By the Court.) And it depends somewhat on the capacity of the boy? A. Yes.

Q. Was your boy quick to learn the mechanical trade? A. He was handier at that than any in the
30 school, for the practical part.

CROSS-EXAMINATION by Mr. Holmes:

Q. You say John always went out with his brother Eddie? A. Generally, and with one friend that we have living in the house, the same age.

Q. What was the difference in the ages of Eddie and John? A. Eddie was not quite two years older than John

40 Q. Were they born in Guttentburg? A. John and

Eddie was; Victor was born in New York. John always lived in Guttenburg. The boys went to the public school in Guttenburg. We lived on the east side of Bergenline avenue; on the east side of the steam road; the school-house is on the west side of the steam road and the boys in going to school had to cross the steam road every day, going and coming.

Q. Had Johnnie ever gone to school alone? A. Not as I know of, and I don't believe he did, because his two brothers went with him, and also his friend 10 named Neudecker.

Q. Was John slow at his books? A. Yes, he was backward for his age everyways.

Q. Didn't he like to play ball and go out into the streets? A. He was very seldom out in the street.

Q. Was he a sickly boy? A. No.

Q. He was not large for his age as he ought to be? A. He was not very large, about three feet; he was nine years old.

Q. Had he ever had much sickness? A. No. 20

Q. Had he had the usual children's sicknesses, such as measles, croup, whooping-cough, scarlet fever; did he ever have any of those? A. No.

Q. You say he was handy with tools? A. Yes. I always brought during the holidays blocks and such things for the boys to make houses out of, and he was handy at that, and he was always cutting something, and he would build bridges and towers with the blocks.

Q. You are stationary engineer? A. Yes, a 30 machinist.

Q. You are working in New York? A. Yes.

Q. Have you lost much time? A. No. I work ten hours a day, every day. I go to work at six in the morning and get home at a quarter to seven. In 18 years I have been sick twice, and that is all I was ever away from my business.

Q. Once in awhile you got off Saturday? A. Yes.

Q. How far is Sturm's Park from Guttenburg? A. About four miles. 40

Q. You have said that you knew that the horse cars ran by this place frequently, and that there were crowds of people there every day; how do you know that? A. I went down to Union Hill very often, and I come very often to the tower, and I went to Sturm's very often, I went down on the steam railroad, and I have been there on Sundays also, back and forward.

Q. When you went to New York from your place what ferry did you take? A. The old Weehawken Ferry, Forty-second street. My shop in New York is only eight blocks from Forty second street; that is the nearest ferry to my work.

Q. How long had you been at the picnic before this accident occurred? A. I arrived there about two o'clock in the afternoon.

Q. Was John there at two o'clock? A. Yes.

Q. There were some games there for the children? A. Yes; running and jumping and other things; my boys all took part in the games.

20 Q. Did John win any prize? A. No; he was the last one, but he got a prize because all hands got a prize, but he didn't win any.

Q. Sturm's is a picnic ground on the corner? A. Yes; corner of Wiehawken street and Bull's Ferry road, on the northwest corner, and it runs from the corner of Wiehawken street up the Bull's Ferry road about 100 feet.

Q. The park is all in behind the building? A. Yes.

30 Q. The buildings are right along the street on Bull's Ferry road? A. Yes.

Q. There is a porch in front of Sturm's buildings? A. There is a stoop there.

Q. There is no park in front of Sturm's on Bull's Ferry road? A. No.

Q. Can you indicate on the map where John was run over? A. Yes.

40 Indicates and the letter "A" is marked on the point.

Q. It was at the point marked "A" on the map?
A. Yes.

Q. Do the buildings at Sturm's run all the way down to the corner? A. There is only a fence runs down; there is a house on Bull's Ferry road which runs along southwest along the road; in that house is a saloon and bar-room; it runs all the way to the corner of Wiehawken street. Up Wiehawken street it is inclosed. There are only one or two buildings in Wiehawken street. There is a fence which runs all along Wiehawken street. There is no entrance on 10
Wiehawken street. The entrance to the park is on Bull's Ferry road at the point indicated on the map "B."

Q. From "B" down to the corner is a dance platform inclosed? A. No, sir; only a place to sit down by; it is inclosed. The entrance to the park is at "B" on Bull's Ferry road. Bull's Ferry road is about 75 feet wide from curb to curb. The tracks are in the middle of the road.

Q. Your children wanted to go out in the street to 20
play? A. Yes. The first I knew they were out was when my boy came back and told me Johnny was run over. I was inside attending the bowling alley. My wife was there with me.

Q. The mother of these children was dead at that time? A. Yes.

Q. Was your wife looking after the children? A.
Yes.

Q. Did they have her permission to go out into the street? A. No. They went themselves. 30

Q. They were taking care of themselves all afternoon? A. They were running around in the park.

Q. Where was your wife at the time of the accident? A. Inside the park alongside the alley.

Q. Did your boys frequently go west of Bergenline avenue? A. No; only when they went to the school picnic at Steiner's park.

Q. The steam road was running between the school and your house? A. Yes, and the boys had to go to school in the morning and back at noon and back in 40

the night. The steam road was about four blocks from my house. John used to go to the public school.

Q. You say boys are apprenticed at the age of fourteen to trades? A. Certainly.

Q. He has to be a pretty smart and healthy boy, don't he? A. He was a healthy boy. He was the liveliest of all. But he was not very big.

Q. If a boy is bright and active and good size for his age, doesn't he have a better chance to be appren-
10 ticed at fourteen than a boy with under-size? A. It depends somewhat upon his school education. Some- times a practical boy has more advantage than the others.

Q. If the boy is brighter and smarter, he has a bet- ter chance to get more money? A. That depends upon the business.

Q. Sometimes boys don't get any pay while they are learning their trade? A. That depends upon the bargain their fathers make; it depends upon the con-
20 tract; sometimes they get 25 cents and 50 cents a day.

REDIRECT-EXAMINATION by Mr. Noonan :

Q. Did you ever walk down from your home to Sturm's Park? A. Yes, but I didn't walk that day; the boys walked down, and they were running round themselves in the park all afternoon, taking care of themselves.

Q. How long would it take you to walk down? A. Half an hour, three quarters of an hour, some-
30 times more, depending upon how many times I stopped in to get a drink.

Q. How frequently did you go by Sturm's place in the car? A. Sometimes not in a month, and some- times every other day.

Q. You say John was the last in the games? A. Yes, in running, and he was crying because he couldn't get ahead; the boys that beat him were eight or nine years old.

Q. Your house is about four blocks from the steam
40 railroad? A. Four blocks from the school-house; he

had to walk four blocks every day to school, back and forward; my house is only about a block and a half from the steam railroad; the trains run along there about every twenty minutes; there is no flag-man or gateman there; there were no gates over the steam railroad; it is a big, wide, open, common field, not very much built up there; you can see all around.

RE-CROSS-EXAMINATION by Mr. Holmes:

10

Q. The steam railroad runs through Second street?

A. Yes.

Q. Your boys went right straight up the street a block and a half and across the steam road? A. Yes.

Q. Did you ever tell the boys to be careful when crossing the tracks, that they might get run over?

A. Yes, I always told them as often as I could, and they understood it.

Q. (By Mr. Noonan.) What kind of a noise do the trains make going along there? A. They whistle and ring the bell.

Dr. CHARLES B. CONVERSE, sworn for plaintiff, testifies as follows:

DIRECT-EXAMINATION by Mr. Wills:

I am county physician; I examined the body of this boy, John Bernhard, at St. Mary's Hospital, Hoboken, on the 20th of August; I found both thigh bones were broken in quite a number of pieces; the soft parts of both thighs very extensively lacerated. These injuries were sufficient to cause the death of anybody; they were so severe as to be almost impossible to expect a recovery from anybody. The cause of death was compound, comminuted fracture of both thighs. I do not know how the accident happened. I did not attend the inquest. I sent an affidavit stating the same facts that I state here.

40

THOMAS R. HUGHES, sworn for the plaintiff, testifies as follows :

DIRECT-EXAMINATION by Mr. Wills:

I reside at Weehawken ; I am a clerk ; I was outside on the sidewalk in front of Sturm's on the 19th of August last, about six o'clock in the evening ; I was returning from the West Shore ferry ; there was a picnic in Sturm's ; I knew that by the music and the people there ; I probably stood there five minutes ;
10 there were several children playing in the street.

Q. Did you notice anything of a child being run over by the trolley car there at that location? A. I did ; the little boy Bernhard, about which this suit is.

Q. What was he doing when you first saw him? A. My attention was drawn to him when he was almost within being run over.

Q. How far was he from the curb, or the children that you saw playing when he was run over? A.
20 That I could not state ; they were all grouped together.

Q. Did you notice the direction in which he ran from the children? Look at this diagram. "B" is Sturm's stoop above the entrance. You were standing about here (indicating)? A. Yes.

Q. And the children were playing in the street about there (indicating)? A. Yes.

Q. The children were about in front of "B"? A. Yes ; somewhere round there. I could not designate
30 the exact number of feet they were away from that point.

Q. How far out near the tracks did you see them play? A. They were playing all the way between the sidewalk and the track, back and forth in the road.

Q. Did you notice any of them crossing the track? A. I noticed this boy trying to cross the track.

Q. Did you notice the direction in which the boy ran when he started across the track? A. I think he
40 ran nearly straight across.

Q. At what point would you fix it? A. I should fix where he crossed the track somewhere between "B" and this point there (indicating); it might have been as far up as the blacksmith shop. The platform is quite long.

Q. And his direction might have been about as my pencil stands now? A. Yes; it might have been almost straight across; it might have been a little northward.

Q. How many children were playing in the street?
A. I would say four or five young boys. 10

Q. Did you notice any other children running across beside this boy? A. No; he was the only one I noticed. They probably would all have been run over if they had all started.

CROSS-EXAMINATION by Mr. Holmes:

Q. Were you standing on the sidewalk? A. Yes.

Q. How near to the curb were you? A. The sidewalk is about six or eight feet wide; I was probably 20 within a foot of the curb.

Q. Did you notice any car coming down while you were standing there? A. Yes.

Q. Were the children between the track upon which the car was coming down and the curb at the time? A. Yes.

Q. What would you say was the distance from the curb to the first track? A. That is the down track, the one nearest Sturm's; the westerly track is the down track and the easterly track is the up track. 30

Q. Did you notice the car coming up? A. I noticed the car going down.

Q. Did you notice the car coming up, as the other car went down? A. I could not say now that I did notice the car coming up.

Q. Was your attention directed to anything? A. My attention was directed to this boy, attempting to cross the track; the motor going south had just passed, and he immediately made an effort to cross after the trolley had passed. 40

Q. How close to the westerly track was he standing when the car going down passed? A. Within four or five feet of it.

Q. Were there other children behind him? A. Yes, he was a little in advance of the group.

Q. Was he apparently prepared to run across the track as soon as the car had passed? A. He must have been, because he did run.

Q. How soon after the car passed him did he try to go across? A. At once.

10 Q. Did he run or walk? A. He ran.

Q. How close to the back of the car did he pass? A. He might have been three or four feet of it.

Q. Did he pause at all after getting on the westerly track? A. He was made aware of a motor coming the other way by the man constantly ringing the alarm on the motor coming up.

Q. Did you hear that bell ring on the motor coming up? A. Yes.

Q. Did you see the boy struck? A. Yes; I saw
20 the motor knock him down.

Q. At what point did the cars pass each other? A. As the trailer of the car going south had passed, the motor going north came right out from the other end of it in such a way that the boy didn't know there was a motor coming north, because he could see it; he was struck almost instantly.

Q. Did you see how quickly the motorman applied the brake and stopped the car? A. Yes; I should think it stopped in its own length.

30 Q. Did you see the boy under the car? A. Yes.

Q. Did more than one wheel of the motor go over him? A. Only the front wheel went over him; he seemed to be against the hind wheel; he was not quite to it, because they removed him without having to move the motor at all. He was plumb up against the hind wheel but it had not passed over him, it had not pinned him. A passenger on the car coming north jumped out and removed the boy, and carried him into a neighboring saloon.

40 Q. Did you hear any exclamation from the motor-

man on the car coming up? A. Yes, I heard him halloing out; he was shouting for the boy to get out of the way, and he was putting on brake at the same instant.

Q. Did any of the other children attempt to cross the track? A. No.

Q. There was no street crossing at this point where the boy was run over? A. No; it was about the middle of the block between Wichawken street and Franklin street.

Q. Is there any street on the opposite side of Bull's 10 Ferry road, any crossing street? A. No, there is a continuous line of fence there.

Q. These children were playing in the street between the car tracks and the curb? A. Yes, playing tag or some such game.

Q. Did any of them go across the street while you were standing there? A. No.

Q. Were there any vehicles in the street? A. I didn't notice any.

Q. (By the Court.) Show me on the map where 20 the cars passed each other? A. About here (indicating); that would be pretty near midway between Wichawken street and Franklin street. (The point indicated is marked "D.") That was about the middle of the block.

Q. Had the boy crossed the east track, that is, the up track, when he was struck? A. He had crossed the westerly track, and he was struck by the motor coming northward; he made an attempt to cross the easterly track, and there is where he was struck; he 30 was on the westerly rail of the easterly track when he was struck.

Q. (By a Juror.) How far was he from the north-bound motor when you heard the motorman call out to him? A. Probably ten feet away.

Q. Was the motorman then putting on brake? A. Yes; he applied it at once; he could not see the boy before, because the trailer was passing.

Q. Did you judge he called out and applied the 40

brake the moment he saw the boy? A. Yes; he was shouting and putting on brake instantly.

Q. Was that directly after the motor going down had cleared the motor coming up, or just passed it?

A. Yes.

Q. Did this boy stop; did he look, before he crossed the track? A. For a moment, I should think he lost his presence of mind; it took but an instant before he was struck.

10 REDIRECT-EXAMINATION by Mr. Wills:

Q. You say there was nothing attracted your attention to the motor coming up as you stood there?

A. Yes.

Q. You saw the down car coming? A. Yes.

Q. Nothing attracted your attention until the trailer had passed and the up car was running the boy down?

A. Yes.

Q. Your attention was attracted by a sudden ringing of the bell? A. Yes.

20 Q. What was he ringing the bell for? A. He naturally would not ring the bell until he saw something to ring it for.

Q. Then you didn't hear the ringing of the bell until the down car had passed, and he was running on to the boy? A. Yes.

RE-CROSS-EXAMINATION by Mr. Holmes:

30 Q. When did he begin ringing the bell? A. The moment he saw the boy. My attention was drawn to the ringing when the boy was in danger; I had nothing to call my attention to his ringing before that. He may have been ringing before that, but I didn't notice whether he was or not; he may have been ringing and I not notice it; I was watching the children, and listening to the music, and there was a picnic inside.

REDIRECT-EXAMINATION by Mr. Noonan:

40 Q. At the time you saw the little boy running across the west track and get right in front of the up-

motor, at that time you heard the ringing of the gong?

A. Yes.

Q. And at that time you were filled with alarm for the safety of the boy? A. Yes.

Q. You then distinctly heard the ringing of the gong? A. Yes.

Q. You had not, so far as you know, heard the ringing of the gong before that? A. No.

Q. You say that at the same time you heard the ringing of the bell you noticed the man putting on the brake? A. Yes. 10

Q. Did you notice him doing anything else at the time? A. Yes; I noticed him calling out.

Q. You noticed the ringing of the bell, the calling out, and the putting on the brake? A. That is all I noticed. I don't see as he could do anything else.

RECROSS-EXAMINATION by Mr. Holmes:

Q. You saw this boy pass within four feet of the motor going down? A. He immediately started to cross after the trailer has passed south. 20

Q. He was running then? A. Yes.

Q. How soon after he started to cross there did the other motor appear?

The Court: Isn't it apparent from the testimony that it was instantaneously?

HENRY E. CLARK, being sworn for the plaintiff, testifies as follows:

DIRECT-EXAMINATION by Mr. Wills: 30

Q. Where do you reside? A. 143 Jefferson street, Union Hill.

Q. What is your business? A. Salesman in New York City.

Q. You go and come daily; every day? A. Yes.

Q. Did you on August 19, 1893, go and come daily? A. Yes.

Q. Have you had occasion to observe the operation of the motor line existing at that time at the 40

junction of High avenue and Wichawken street? A. Yes.

Q. Do you know where Sturms' place is? A. Yes.

Q. What is the character of that place? A. A picnic ground, music, dancing, &c. I live one block from it, up around the corner. I have resided three years in that place.

Q. Do persons congregate in the street there at Sturms' place? A. It is a picnic place; when there is a
10 picnic there, there is somebody there; when there is no picnic there is nobody there. They had picnics there two or three times a week. A great number of people congregate there at picnics.

Q. You remember the evening of 19th of August last? A. I do.

Q. Did you see the injury to this boy? A. I did. I had just come up in the car ahead of this car, about four or five minutes ahead, and I saw some children there that belonged in the house where I lived; the
20 children were playing round the street, right round in the street in front of Sturms.

Q. In front of letter "B" on the diagram? A. Yes, they were running across the street, and across the tracks, and along the street; there were about a dozen or fifteen of them playing round there. Jefferson street is about a block and a half from where these children were playing; I got off the car at the corner of Jefferson street, and was standing there probably four or five minutes.

30 Q. Did you see John Bernhard run over? A. Yes.

Q. When was your attention first attracted to him? A. There was music down there; the children were playing there; I was just speaking to the man that keeps the saloon; I was standing on the corner looking that way, and I says, "For God's sake, there is somebody run over." There were two little girls down there that belonged in the house where I live, and I was waiting on the corner for the little girl; I
40 had some candy for her; they were playing there.

Every Saturday night I bring some candy along for the children.

Q. You didn't know the Bernhard boy then? A. No.

Q. Did you notice the car that went down? A. Yes.

Q. Did you notice whether it had a trailer? A. There was one car going down at a kind of a slow rate.

Q. One car? A. A car and a trailer going down at a slow rate, and in the meantime the other car come 10 just as fast as you could imagine a car goes, at a terrible rate; I never saw a car go faster, and that knocks the little boy, it was done so quick, and a young fellow there picked him up and I run down and took him in and opened the legs of his pants to give him a little relief before the doctor come.

Q. Did you notice whether the boy ran up towards you before he crossed the track, or whether he ran straight across? A. He come toward me.

Q. Locate the place on the map where he was 20 struck by the north-bound motor? A. About here (indicating on map between the word "Bull's" and "Ferry"). That's pretty near about it, I think.

Q. Describe the game the children were playing? A. Playing round, tag I should think, one running after the other; I am sure there was a dozen of them in the street. The track is about thirty feet from the curb and they were playing all round, all scattered round; some of them was across the track.

Q. Is there anything to obstruct the view of the 30 up-bound motor-man from seeing these children 500 feet down toward Weehawken? A. No.

Q. Was there any obstruction there in the street, of any kind, at the time to prevent the uptown motor man seeing the children playing in the street? A. No.

Q. Excepting the passage of the down motor? A. Not that I know of.

Q. Did you notice the motor that ran over the boy coming up the hill? A. Yes.

Q. You were looking in that direction? A. Yes, because I was attracted to the children.

Q. And is it from that you judge he was coming at such a rapid rate of speed you describe? A. He came terrible; he went just like a shot.

Q. How far down the Boulevard did you see this up-bound motor? A. Say 500 feet.

Q. Did you see him before the trailer had passed? A. That I cannot say.

Q. Can you tell exactly where the cars passed one
10 another? A. Yes.

Q. Was it about at the point where the boy was struck? A. Just about, a little below, but very close to it; the one car stopped, and going down slowly, and the other come right along and they caught him right there; it was done so quick I can't give you no time of it.

Q. Both the cars were in motion at the time? A. Yes.

Q. And the up car fast? A. Yes.

20 Q. Did you notice whether or not the boy had to pause, to wait, for the down trailer before he crossed, or whether he went right across? A. That I can't answer, I don't know.

Q. You say the down car was slowing to stop, or had stopped? A. The down car had stopped and went right in motion, and the other car came flying right along, and it was done so quick, I could not tell you any more.

Q. The down car had stopped? A. No, they both
30 was in motion at the time of the accident.

Q. Where did the down car stop after the accident? A. The down car was gone then, they went right along, I didn't notice that.

Q. Did you hear any gong or bell, or other signal of alarm given before the boy was struck? A. No.

Q. How far away north were you from it? A. About 175 feet.

Q. Was there any gong or signal rung to warn that boy? A. I didn't hear it; that's what I was think
40 ing of, that man wasn't minding his business.

Q. Do you know what signals this motor company had previously used upon their cars to warn people of the approach of their cars? A. They had a gong which the motor man works with his foot on a knob on the front of the car.

Q. Was it usual for them to give that signal when approaching a crossing or when people are upon the track? A. They generally do.

Q. So far as you know, there was no gong rung on this day? A. No, I didn't hear it.

Q. Was the motorman looking ahead? A. I can't 10 tell. There was four or five people round on the front platform, and when the accident happened they all jumped out like a shot; whether the motorman was looking ahead or not I can't tell.

Q. He was surrounded by other persons on the front platform? A. Yes.

Q. You think there were four or five? A. Yes, might have been six, I didn't count them. I saw them from where I stood.

Q. How many times did you see any of these chil- 20 dren cross the street before the little fellow was run down? A. I couldn't tell you that. Do you mean on the same day?

Q. Yes. A. I was only there five or six minutes.

Q. Did you see any children cross there at that point where John Bernhard was run down? A. They was up and down all round the track, playing round and running.

Q. How shortly before John Bernhard was run over did you see a child cross in front of the motor? 30

A. During the time I was there they was all playing round.

Q. How shortly before, one minute or two minutes? A. Well, say one minute before.

Q. Was that a boy or a girl that went across? A. I couldn't exactly tell; there was girls and boys all mixed up.

Q. Did you notice any fender on the front of the car? A. No.

Q. Anything that would be a substitute for a fender? A. No.

Q. Anything that would save a child from being run over by the car? A. No.

Q. Was there anything on the front of the car to keep a child from being carried under the wheels? A. Nothing at all.

Q. Have you observed in any city during the past five years any safeguard or fender to prevent persons from getting under the wheels?

10 Defendant objects to the question as immaterial and irrelevant.

The Court admits the question, to which admission the defendant prays exception.

A. Yes; the Broadway car, about four or five inches from the ground; they have something; it may be a good thing, it will chuck you on the side.

Mr. Holmes: We object to this line of testimony as immaterial and irrelevant, and not competent.

20 Mr. Wills: We do not call this witness as an expert. I want to show what he means by fenders, whether he has seen them elsewhere.

Q. Have you seen them in common use in New York City.

Question is objected to by the defendant. It is admitted by the Court, to which admission defendant prays exception.

30 A. Yes; every day. They have something new now, they have a wicker basket there.

Q. At the time of this accident they hadn't any wicker basket? A. They haven't got anything on this road here.

Q. But on the Broadway cable line there is something? A. Oh, yes; about four inches from the ground; if you are caught under it it will sling you on the side. But there was nothing on these cars.

Q. Did you hear any outcry made by this boy 40 from where you stood? A. No.

CROSS-EXAMINATION by Mr. Holmes :

Q. You got off the car coming home at the corner of Jefferson street and Bull's Ferry road? A. Yes; and I stood there talking with the man that keeps the saloon from the time I got off until this accident happened.

Q. And you say that about a minute before this car came up you saw some of the children had gone all the way across the track? A. Yes.

Q. Was it a boy or a girl that had crossed the track before this car came up? A. All I know when the accident happened I seen the boy run over, that's all; there was dozens of boys and girls; I didn't count them; all round the street.

Q. Were there any children, boy or girl, on the east side of the car track? A. I don't know which is east or west up there.

Q. Sturms is on the west side of the street; now, at the time this boy was killed was there any person on the east side of the street, or in the road east of the car track? A. They was all round; I don't know whether they was east or west; the children swarmed like bees round there; there was a dozen running round on the street, and that's all I know about it.

Q. How far were you from the accident? A. About 150 feet. I was the first man that got hold of the boy excepting one, the man that picked him up from the wheel, and then I was the first man to take hold of him.

Q. I understood you to say that about a minute before the accident happened you saw a child go over across the tracks on the road to the east side, entirely across the road; did you see such a thing? A. I saw not only one, but I saw dozens of them running up and down.

Q. Across the tracks? A. Yes, they run all round there, playing round there like a lot of children.

Q. Did they run across the tracks? A. Yes, I saw them running up and down.

Q. I want to know whether you saw any of these children run across the railroad tracks, all the way across the track? A. I couldn't answer that question; I seen the children running round there playing; I couldn't tell whether they went over the track or not.

Q. (By the Court): The question is, did you see any go across the track? A. Yes.

Q. How many? A. I didn't count them.

Q. Did you see one? A. Yes.

10 Q. How long before this car came up did you see the one go over? A. I didn't see the one, I didn't know the boy; but I saw a lot of children there playing, and I seen this accident happen just as quick as lightning, and I went down, and that is all I know, I don't know anything more.

Q. Did the little boy that was killed run suddenly behind the car that went down? A. My dear sir, counsellor, I don't know anything about that; the boys and girls was playing there, and this car come
20 up.

Q. Did you see this little boy that was killed run across the track directly after the one going down had passed? A. I didn't know the boy, and I didn't notice him; I only seen the accident, just in the minute; whose boy it was or what boy it was I didn't know anything about that.

Q. The car going down was going slowly? A. Yes.

Q. It had not stopped round there, had it? A. It had not stopped at my corner; it stopped down be-
30 low, after it had passed me at Wichawken street.

Q. At the time the boy was run over both cars were in motion? A. Yes.

Q. And this boy was struck just about as the cars passed each other? A. That's it, not much out of the way, I couldn't tell the exact feet.

Q. The car which was going down was on the track nearest to you? A. Yes.

Q. And the car coming up was on the track farthest from you, towards the east side of the road?
40 A. Yes.

Q. And you say that car was coming rapidly?
A. It came terrible, just as hard as it could go.

Q. Where was the car when you first saw it? A. About 200 feet away from me; I was watching the children.

Q. You were not looking at the car coming up? A. Certainly; they were not more than ten feet out of the way there, I couldn't help watching it coming up.

Q. When did you first see the upbound car? A. I could see the car about 500 or 1,000 feet off.

Q. Did you see it a thousand feet away? A. Yes, 10 probably that.

Q. And it was then coming at a terrific rate? A. Yes.

Q. Did you do anything to warn the child on the street? A. No, I thought the man would have sense enough to stop there; what could I do?

Q. The children were all in the street at the time? A. Yes.

Q. And you were engaged in conversation with the man on the corner? A. I was not speaking exactly 20 to anybody, I was standing outside merely, by myself at that time. The saloon keeper, I think, had just went in; he had been standing alongside of me, I was watching for the girl, I had called her name even; I was there alone.

Q. To whom did you exclaim "for God's sake, somebody is run over?" A. To the saloonman, he had just gone in about a second.

Q. Were you listening to hear whether any bell was rung? A. If there was any bell rung I could 30 hear it, and I didn't hear any.

Q. Do you say no bell was rung? A. I didn't hear it.

Q. I understood you to say you could not say whether this little boy paused before going across the track or not? A. I can't answer that question, because the thing was done so quick; I seen him roll over, and that did the whole business.

Q. (By the Court.) Do you understand what he means by the word "pause?" A. No. 40

Q. Did he stop before crossing the track? A. No

Q. He was running in the street then? A. I can't answer that question.

Q. So you can't say whether he stopped to look before crossing behind the down-town car or not?

A. No, I don't think he had time to look, it was done so quick, it was done in a jiffy; so quick I didn't count the time.

Q. You were the first one that went down and got the boy out? A. No, I run right down, and I seen a
10 young man having the boy; I saw him taken out from under the car; I don't know how much of the car passed over the boy.

Q. From the moment you saw the boy struck, how soon did the car stop? A. He was struck, he was run over by one wheel only, and that was done in a jiffy, and the car was stopped very quickly.

Q. How many miles an hour do you say the car was running? A. I couldn't say, as I understand it,
15 to 18 miles an hour, I guess,

20 Q. Approaching you at that rate? A. Yes.

Q. Do you mean to tell us you can judge of the speed of a car approaching you? A. Yes.

Q. Did you ever have any experience in electric cars? A. I ride on them every day.

Q. It was coming up a steep grade there? A. Yes, pretty steep.

REDIRECT-EXAMINATION by Mr. Wills:

30 Q. I call your attention to the fact that Bull's Ferry road runs on a curve in coming up that hill, so that you standing at Jefferson avenue could see down to the point "Road," on the diagram? A. Yes.

Q. Then could you observe the sides of the car so as to be able to notice its rate of speed? A. Yes.

Q. It was not like a car coming straight towards you? A. No.

JAMES HOGAN, sworn for the plaintiff, testified as follows ;

DIRECT-EXAMINATION by Mr. Wills :

Q. Where do you reside? A. 255 Baldwin avenue, Jersey City.

Q. How long have you resided here? A. I was born in Jersey City.

Q. Have you traveled in different cities of the the United States? A. Yes.

Q. Have had occasion when in these cities during the past dozen years to notice the trolley, motor, cable and other street cars? A. Yes.

Q. State what cities you have been in? A. All through the South and Southwest, Philadelphia, Charlottesville, Va., Washington, Baltimore, Savannah, Richmond, Danville, Pensacola, New Orleans, Chattanooga, Mobile, Augusta, Birmingham, Cincinnati, Chicago, Brooklyn, N. Y., Pittsburg, New York City.

Q. While in those cities did you have occasion to observe the street cars with reference to fenders being upon the front of the cars to avoid injuries to persons in the street?

Mr. Holmes: I object to the question on the ground that it is not a question whether a fender would have prevented the killing of this boy, and also because if other companies use devices it casts no obligation upon us to use such appliances; it is not evidence of want of ordinary care that we do not use them.

Mr. Wills: The declaration charges that they did not use proper appliances.

The Court: I will admit this class of evidence and give the defendant an exception.

(Stenographer reads the question.)

A. Yes, sir.

Q. Now, how long ago did you see anything

in the nature of a fender upon the street cars of Philadelphia?

Question objected to by the defendant.
Admitted by the Court. Exception.

A. Two years ago.

Q. What character of fender did you see in use in Philadelphia? A. The entire lower part of the car boxed up.

10 Mr. Holmes: This accident happened in August, 1893, and the question applies to two years ago.

The Witness; Two years ago last December.

The Court; Defendant need not object to every question of the same character, an exception will be allowed to all this class of testimony.

Q. Describe what you saw in Philadelphia? A.
20 The entire lower part of the car boxed in, down to three or four inches from the ground; they call that a box-fender. It will prevent anything from going under the wheels.

Q. In Charlottesville, Va.? A. About two years ago I was there; they had a sort of board running across the front part, and it would throw everything from the front of the wheels.

Q. You have seen the cars used at Union Hill? A. Yes.

30 Q. Do you mean that kind of a board? A. No; something up even with the platform, and down to within about four inches of the track.

Q. In Baltimore? A. There they have a wire screen, such as in on the Broadway cable. I saw that two years ago last December.

Q. In Savannah? A. About three years ago; they were using electric cars with overhead wire; there was some wire work on the cow-catcher; a sort of a cage.

40 Q. In Richmond, Va.? A. I have been there three

or four times within the last two years, and in Richmond they use a sort of wire work something similar to the Broadway cars, New York; they come down to within four or five inches of the tracks, and in Danville they use the same thing. In Charlotte, N. C., they use something like a cow-catcher, which will shove everything one side; it is impossible for anything to get under the wheel.

Q. Is that so as to all these tenders that you mentioned that they prevent anything from getting under the wheels? A. Yes, anything over five inches can't 10 get under.

Q. Would a person roll along in front of a car? A. If they fall half way on the side it will shove them out; if they fall in front it will take them along with the car, because they can't get under it.

Q. If they are shoved with a curved front they would naturally slip to one side or the other? A. Yes.

Q. In Pensacola? A. They have the wheels boxed in entirely. They put them on a year ago last De- 20 cember.

Q. In New Orleans? A. I was in New Orleans three years ago, and there they used the Broadway system; I would call it a wire front.

Q. In Chattanooga? A. On the Lookout Mountain Road they have this wire front, and in Mobile, Alabama, I was there two years ago.

Q. In all of these cities that you have mentioned you say they use this same cage front? A. Yes.

Q. In Cincinnati? A. They had a board in front 30 of the wheels.

Q. In Chicago? A. It is five years ago when I was in Chicago, and they didn't have any fenders then.

Q. In the cities in which you have noticed these fenders were the appliances so affixed and carried down toward the pavement that it would be impossible for a human being, even a child, to get under the wheel?

Question objected to.

Q. How near to the pavement do these fenders generally run down? A. From three and a half to five inches. A child two years old could not go under it on a woman's arm in Savannah.

CROSS-EXAMINATION :

Q. What is your trade or occupation? A. I canvass for a silver polish.

Q. Do you canvass for fenders? A. No.

10 Q. You travel round the country canvassing and selling silver polish? A. In the winter time, for the last five years. I stay north in the summer and south and southwest in the winter.

Q. Do you know anything about the mechanical construction of the fenders? A. No more than I see; I am not a machinist.

Q. Were the fenders that you have spoken of fixed, stationery, or were they movable? A. I didn't notice that.

20 Q. Did you ever see any accidents upon the fender? A. I saw a colored woman with a child on her arms, the child fell down, and it was shoved along, and gave the motorman time to stop the car; the child was scratched a little on the neck.

Q. Did the child die? A. It hadn't died when I left the place, that was a week after.

Q. Do you know the rate of speed the car was traveling? A. About ten miles an hour. I saw the accident; it was last January.

30 Q. When was it you observed these other fenders in the other cities? A. I always go down the coast in the winter, and along the Gulf as far as Galveston.

Q. Ever see any accident in New York or Brooklyn? A. No.

Q. They have accidents in Brooklyn, don't they?

Question objected to and overruled.

Q. You read the newspapers?

40 Question objected to and overruled.

Q. Did you ever see a movable fender, one which moves up and down? A. I don't know that I have; I have merely seen them in front of the cars.

Q. You say they are from three to five inches about the track? Yes.

Q. All that you are testifying to is what you have seen? A. Yes.

Q. Not from any practical mechanical knowledge? A. No.

ABNER CONKLIN, sworn for plaintiff, testifies as follows: ¹⁰

DIRECT-EXAMINATION by Mr. Wills:

Q. What is your business? A. I am a hotelman.

Q. You reside in Jersey City? A. Yes, at 102 Waverly street; I was born in Hoboken; have lived here on the Hill about six years.

Q. Have you visited various cities of the United States? A. Yes. ²⁰

Q. And have you observed whether upon street cars, cable, or electric cars any fenders or appliances are used to protect people from being run over in the street?

Question objected to. Admitted. Exception.

A. Yes, I have.

Q. What cities have you been in previous to August 19 last? A. In Newark, I have seen them there about three years ago; they had an iron with a canvas on it, bowing out in front of the car; it was covered with canvas; about two years ago I was in Philadelphia, and there I saw the wire fender upon the electric cars; upon the cable cars; that is a fender running down to about four inches of the track, from the platform of the car, a sort of a cow-catcher; it is curved in front. About two years ago I was in Washington, D. C., and I noticed the wire fender there, the same as in Philadelphia. About two years ago I was in Balti- 40

more, Savannah, Richmond, Pensacola, New Orleans, Chattanooga, Atlanta, Augusta, Macon, Birmingham, Chicago, and they used a fender in all of those cities.

Q. You have heard the testimony of Mr. Hogan, the preceding witness? A. Yes.

Q. Is your description substantially the same as his?

Question objected to. Admitted. Exception.

A. Yes; I travel with him.

10 Q. Have you had occasion to notice in New York or Brooklyn the last two or three years? A. Yes; in Brooklyn two years ago I noticed a wire fender.

Q. Is that so constructed as to throw a person to one side or the other of the car? A. Yes; to prevent any one going under the wheel.

CROSS-EXAMINATION by Mr. Holmes:

Q. When did you first observe cars in New York with fenders on? A. About two years ago.

20 Q. Did you ever see any accident happen to a car with a fender on? A. No.

Q. Then, whether they would prevent injuries or not you don't know? A. I don't know.

Q. How were the fenders attached to the cars? A. I don't know.

Q. How old are you? A. Eighteen.

WILLIAM O. JENNINGS, sworn for the plaintiff, testifies as follows:

30 EXAMINATION by Mr. Wills:

I live at 3 Vine street, Jersey City; have lived here twenty-nine years; I am thirty-two years old; I am a locomotive fireman.

Q. Have you noticed the trolley cars of this city and of other cities? A. Yes.

Q. Have you had occasion to inquire into the advisability of the adoption of fenders, and especially to observe the use or disuse of fenders upon street rail-
40 way cars? A. Yes.

Q. Have you made any experiments in that line?

A. I have.

Q. State what you have done in that line?

Defendant objects that the witness is not an expert in fenders.

The Court admits the question, to which defendant prays exception.

A. I have arranged a life-saving machine which can be worked from under the car; when the end of a car hits a person it will carry the person along. I also have another, which extends two feet ten inches in front of the car and about two inches from the ground, which will throw a person into a wire screen with springs and hold them there until the car stops.

The Court: This is not competent; it is not what I thought you were going to show.

Q. Where have you observed other trolley cars than in this county, and where have you observed whether they use fenders or not? A. On the New Jersey Traction Company cars I have noticed fenders; piece of pipe running out in front of the car covered with canvas; they use them in Jersey City; I have noticed them since last August.

Mr. Wills: We ask to have that stricken out.

The Court: It may be stricken out.

Q. How did you come to work on inventing fenders? A. Because I had heard and read of so many being killed and run under the cars.

Q. In what cities have you known fenders to be used on cars? A. Only in Jersey City and New York. In New York there is a screen all around the car; they have been using them there for two years on the Broadway Cable Road; it is a wire netting attached to the body of the car running along the side and front of the car, and comes down to about four or five inches of the track.

Q. Was that your first observation of such things?

A. Yes.

Q. How long have you been studying the question of fenders? A. About two years since I first started.

Q. In your judgment, if there was some kind of a fender such as has been described by the last two witnesses, in the front of the cars, would or would not that prevent the causing of the death of a person, though they might be injured some?

Question objected to by defendant. Admitted by the Court. Defendant prays exception.

10 A. It certainly would prevent death?

Q. Such a thing as they have described, and as you have observed also, would that prevent a child nine years old from getting under the wheels of a car? A. I don't think it would; it might knock the child over on its face or back, and then the fender could go right over it.

Q. How does yours differ from the others?

Question objected to. Admitted. Exception.

20 A. Mine would come within two or three inches of the ground, and they would roll.

Mr. Wills: What the witness has seen and invented since this accident we are willing should be stricken out.

CROSS-EXAMINATION:

Q. You are a locomotive fireman? A. Yes, for the Pennsylvania Railroad.

30 Q. You have been devoting your odd time to the invention of a fender? A. Yes.

Q. Because the fenders which have existed heretofore were not sufficient for the purposes for which they were made? A. That's the idea.

WILLIAM A. DONER, sworn for the plaintiff, testifies as follows:

DIRECT-EXAMINATION by Mr. Wills:

Q. Where do you live? A. Jersey City.

40 Q. Have you had occasion to go about the different cities of the United States to any extent? A. Yes.

Q. Name the cities you have been in, and observed fenders? A. Elgin, Ill.; Chicago, Philadelphia, Brooklyn, Baltimore, Columbus.

Q. In those cities did you see a fender in use? A. Yes, I saw it in use in Chicago, too,

Mr. Holmes: We object to this line of examination on the grounds previously stated, and also on the further ground that it now appears by the evidence by the expert of the plaintiff that the fenders used in the cities are not good 10 for the purposes for which they were made, and the non-use of them would not be negligence.

The Court admits the evidence, to which defendant prays exception.

A. In Chicago on the cable line they used a wire fender three years ago which comes down to within two inches of the track—a wire netting, curved in front, and projecting about a foot.

Q. If that fender is used on a car, could a child's body get under the wheels of the car? 20

Question objected to; admitted; exception.

A. No; I don't think it could.

Q. In these other cities where you visited, how near did the fender come to the track? A. In Brooklyn, about six inches; they had an iron grate projecting under the car, worked by the motorman, by a lever from the platform. I saw that in use nine months ago.

Mr. Wills: We ask to have that stricken out. 30

The Court: It may be stricken out.

Q. Where else have you seen it? A. In Columbus, O.; three years ago, I saw a wire netting similar to the one used in Chicago; it come down to four inches of the track, just enough to clear the track. In Newark, O., about the same time, they used the same as the one in Columbus.

Q. Have you had occasion to experiment in the manufacture of proper fenders? A. Yes; I com- 40

menced about three or four years ago. I had an idea that a man could be picked up and saved without being injured, and now I have got a thing which will pick up a man without a scratch.

Q. Has your invention been published and made known to the railroads previous to the 19th of August, 1893? A. No, sir.

Q. Then you are just ripening the thing in your mind and on paper? A. Yes.

Q. You haven't put it on the market yet? A. No, 10 sir.

CROSS-EXAMINATION.

Q. How old are you? A. Twenty-five years old.

Q. What is your business? A. Machinist.

Q. What sort of a machinist? A. First-class.

Q. What machinery do you work on? A. A general mechanic.

Q. Do you construct steam engines? A. Anything in the line of machinery.

20 Q. Do you construct horse cars? A. No; that is out of my line.

Q. You have an invention in your mind of a fender? A. I haven't got it in my mind.

Q. I suppose you have invented this thing because the others don't work at all? A. I have got something better than the others.

30 EDWARD BERNARD, sworn for plaintiff, testifies as follows:

DIRECT-EXAMINATION by Mr. Wills:

Q. Your brother was killed by this accident? A. Yes.

Q. Were you there in the street at the time? A. Yes.

Q. What were you and John doing there that day? A. Playing tag.

Q. Where was your mother and father? A. In 40 the park.

Q. You and Johnny were outside? A. Yes.

Q. How many other children were there at the time? A. About 10 or 12, all playing tag.

Q. How did John come to get run over? A. He run out in the street; he run out to the tracks; then he went up towards home.

Q. Then did he finally cross the track? A. No; he kept going up.

Q. Why didn't he cross? A. Because the other car was coming down.

Q. After the other car went down? A. Then the other one was coming up. 10

Q. Did the other one hit him? A. Yes.

Q. Run over him? A. Yes.

Q. Before that up-car came, did you hear any bell or gong to warn you that there was a car coming? A. No.

Q. How long had you been playing in the street before the motor came along? A. About 10 or 15 minutes.

Q. Playing on the sidewalk? A. Out in the street.

Q. Where in the street? A. Right across the way; 20 he was in the street with the other boys, and I was on the stoop.

Q. At that time when he was hurt? A. Yes.

Q. Do you mean that they went across the tracks back and forth? A. Yes.

Q. The first you knew of the up car was what? A. I heard somebody holler, "Get out of there," and then I looked around and I seen he was under the car.

CROSS-EXAMINATION by Mr. Holmes: 30

Q. You say that John ran up the road, up the Bull's Ferry road? A. Yes.

Q. And he was then on the track towards Sturm's? A. Yes.

Q. How far up did he run? A. Not so far up.

Q. As much as from between you and me? A. Yes.

Q. About as much as that? A. Yes.

(Mr. Holmes: That appears to be about 12 feet.) 40

Q. He was running up, that was because the other car was coming down? A. Yes.

Q. And he must have seen the other car coming down? A. Yes.

Q. Just as soon as the car passed him, did he turn then and go right across the track? A. No.

Q. How far more did he run? A. He didn't run very far yet.

Q. But he didn't stop running? A. No.

10 Q. He kept running and turned and went across the track? A. Yes.

Q. How far from the door at Sturm's were you standing? A. Opposite the door that goes into the picnic grounds.

Q. Were you watching the little boys playing? A. Yes.

Q. Just before this had there been a runaway horse there? A. I didn't see any.

20 Q. Were there any other boys on the side of the car tracks farther up from Sturms, over towards the other side of the street? A. No, sir; they were all on my side.

Q. Had you boys been running across the tracks at all? A. Running across and back again.

Q. Had you played across the tracks, clear across the street? A. No, not all the way over.

Q. You had kept on the side of the tracks towards Sturms all the time? A. Yes.

Q. You didn't hear any bell ring? A. No.

30 Q. You were not listening for a bell, you were watching the boys? A. Yes.

Q. Did you see the other car coming up? A. No, I was looking up the other way.

Q. You saw the car coming down because you were looking toward it? A. Yes.

Q. What other children were there in the street? A. I don't know their names; they lived down there.

40 Q. How many children from the picnic were out in the street? A. Four or five; I don't know their

names ; some was larger and some smaller than me ; they were out in the road.

Q. Were there a number of other children on the stoop? A. Yes, and some on the sidewalk.

Q. You are quite sure there were none at the time all the way over on the other side of the street? A. There were none over on that side.

Q. Do you recollect when the trolley cars first run up Bergenline avenue? A. They didn't run up there at the time this happened.

Q. There was a steam railroad there? A. Yes. 10

Q. Didn't you and Johnny cross that going to school?

Objected to as not cross-examination.

REDIRECT-EXAMINATION by Mr. Noonan :

Q. Johnny was running up and across the street? A. Yes.

Q. Was there any other boy running in front of Johnny? A. Yes. 20

Q. Was there any other boy running behind Johnny? A. Yes.

Q. How many boys altogether were running in the direction that Johnny was running at that time? A. I don't know.

Q. Was Johnny "It," or was one of the other boys "It" at that point of the game? A. I don't know.

Q. Were the boys trying to tag Johnny, or Johnny trying to tag the boys? A. I don't know.

Q. One of the boys ran across and back again? A. 30 Yes.

Q. Do you mean across all of the tracks, on to the other side of the tracks? A. No.

Q. Did nearly all of the boys run over the tracks? A. Yes.

Q. Did they run on to the tracks? A. Some of them did.

Q. How long before Johnny was run over did some of the boys run over on to the tracks? A. About ten minutes. 40

Q. How long were they playing there altogether?
A. I don't know.

ANNIE BERNHARD, sworn for the plaintiff, testified as follows:

DIRECT-EXAMINATION by Mr. Noonan ;

Q. You are the wife of the father of this boy? A. Yes.

10 Q. How long have you been married to him? A. Four years.

Q. How many children did he have by his first wife? A. Four.

Q. All living at the time you married him? A. Yes.

Q. Were they all living at home? A. Yes.

Q. Do you stay at home during the day pretty much all the time? A. Yes.

Q. You don't go to work or business? A. No.

20 Q. What were Johnny's habits as to staying in the house or going out during the day? A. He was not very smart, and I could not let him go out very well alone; he was more at home and at school?

Q. Did he go out of the house often except when he went to school? A. No, not often; when he did go out Eddie went with him; he was a very small boy for his years.

Q. Could you send him on errands? A. No.

30 Q. How far is the bakery from your house? A. About a block; the butcher store is two blocks, and the grocery store half a block.

Q. Could you send him on errands? A. No; he would not bring me the right things; I had to send Eddie.

Q. Why didn't Johnny bring you the right things?
A. He was not smart enough.

CROSS-EXAMINATION:

40 Q. Was the boy sick much? A. No; he was never sick since I knew him.

Q. Was he delicate? A. He was not weakly; he was never sick, only small.

Q. Did he study his books much? A. He didn't study at all; he could not do it; his older brother had to help him all the time when he had anything to do.

Q. Did he go out to play alone in the streets at all? A. No; his elder brother always went with him, and another boy, one year older, who lived with us, went with him too.

Q. Why didn't he study his lessons at home? A. 10
He had lessons to study, but he could not do it; somebody had to help him.

HENRY CLARK, recalled by plaintiff:

Q. You resided around the corner from this place about three years? A. Yes.

Q. Had you had occasion to observe whether or not children played in front of Sturm's place on other occasions besides the day this boy was hurt? 20

Question objected to that there is no specific allegation in the declaration that this was a point where children were accustomed to play.

Admitted. Exception.

A. Yes.

Q. How many times had you had occasion to observe children playing there besides the day this boy was killed?

Objected to. Admitted. Exception. 30

A. Every day; I passed there every day twice.

Q. How many times can you say, a week, or a year, or a month, you saw children playing there? A. Six times a week, except Sundays.

Q. What time of day did you see it there? A. I got home between four and five o'clock, or between five and six, and I always saw children playing there.

Q. (The Court.) Did you see any more children 40

playing there than at other places in the street? A. Yes, in the winter time they have sleighing down both sides; in the summer time they are running round Sturm's stoop all the time from morning to night.

Q. Is there a pump there, a watering place? A. Yes.

Q. A blacksmith's shop there? A. Yes, right along side.

Q. A sort of a little settlement? A. Yes.

10 CROSS-EXAMINATION :

Q. These children you saw playing there were playing on the stoop or sidewalk? A. Oh, yes; they are playing all round there, all around the stoop, they run all round the track, they are all round like children.

Q. Whose children did you see playing there this time? A. I know a dozen of them. I have got four of them in my house; I have got two on the other side, and they are playing there all the time, always
20 around there.

Q. Principally at the corner of Weehawken street? A. Yes, around that neighborhood there.

Q. Weehawken street and Bull's Ferry road is where they play? A. Yes.

Q. There is a platform at Sturm's corner? A. Yes.

Q. A stoop? A. Yes.

Q. They play about the walk and that stoop? A. Yes, just about where the broad spot is, where they have room there, you can see plenty of them every
30 night.

Plaintiff offers in evidence the letters testamentary.

[PLAINTIFF RESTS.]

Defendant moves for a nonsuit on the ground that no negligence is shown on the part of the defendant, and that contributory negligence has been shown on
40 the part of the plaintiff sufficient to defeat a recovery;

and also upon the ground that the evidence shows this to be an unavoidable accident. And also that there is no evidence in the case to show that it was the defendant's car that did the injury.

The Court: As to the last point the Court will permit the plaintiff to show that if it does not appear in the case, at any time, and as to the other points the motion to nonsuit is refused.

To this refusal defendant prays exception. 10

JAMES BAIN, sworn for defense, testifies as follows:

DIRECT-EXAMINATION by Mr. Holmes:

I live on the Bull's Ferry road between Franklin and Weehawken street, on the west side of the boulevard; my house is about 75 feet from Sturm's place; I am 25 feet from the corner, the second house from the corner going south. I recollect this accident to this boy; it was Saturday; I got home about half- 20
past two; I work in New York for Rogers, Peet & Co.; I was at the window reading a paper, a nice warm day, the window open; this accident happened about 10 or 15 minutes to six, I was sitting in the window looking out.

Q. Had you been down to the street a few minutes previous? A. Yes, some of my children were down there, there was a horse come running down the street, and I ran down to see that nothing happened to my children, and I took them upstairs. 30

Q. You were sitting inside when the accident happened? A. Yes.

Q. Were your children inside when the accident happened? A. Yes, except one boy.

Q. How many children were in the street at the time the accident happened? A. Unless they were out in the middle of the street, I could not see because of the top of the piazza and a store sign; I could see the car tracks; I could see everything within four or 40
five feet of the west side track.

Q. Did you see this car coming down? A. Yes.

Q. How fast did it come? A. Exceedingly slow.

Q. When did you first see the car that was coming up? A. I could see it down at the corner just as it comes round the curve at the foot of Weehawken street.

Q. How far down the road can you see from your window? A. Down to the other curve where the horses used to be stabled, in the shanty; that is about a thousand feet from my house.

10 Q. Where did these two cars pass each other? A. Right in front of Sturm's, about the centre of the block.

Q. Did you see these boys in the street when the down car was going down? A. No, sir; there was no boys there, but I could hear the noise of the boys just as the car was going past, regular jolly, amongst themselves.

Q. How many boys did you see together there? A. I guess I just seen about three.

20 Q. Could you see the three before they got upon the car track? A. Yes.

Q. Which boy was in advance of the three? A. He seemed to be the smallest, that is the boy that got killed. They stopped till the downtown car went passed, then he made to go across; I could see the top of the other car, and I thought the boy would be hurt; I went downstairs, and before I got down the first wheel was over him, and George Schaffer and another gentleman were taking out the boy.

30 Q. This boy that was killed, how did he go with reference to the car which was going down? A. He ran straight across.

Q. How soon after it went past him? A. Right after it went past him.

Q. Where was the car which was coming up; how was that with reference to the car going down? A. The car coming up was about the middle of the car going down, passing it.

Q. Did you see the little boy run up the track? A.

Yes, I saw him make to run across the track, and I knew he could not clear the car.

Q. Did you hear anybody shout? A. Yes.

Q. Did you see the car stop? A. The car had stopped when I got down.

Q. Did more than one wheel pass over him? A. Just one wheel. The second wheel was just touching him; they got him out without moving the second wheel.

Q. Did you see the motorman on the front of the car? A. Yes. 10

Q. Was there anybody with him? A. No, he was all alone; there was nobody beside him on the front platform of the car.

Q. When did you first observe the car which was coming up? A. I could see it farther down, but I could not say there was any danger until this other car was close upon it and the boys come running out; they seemed to come out all at once.

Q. Did you notice how quickly the motorman stopped his car? A. Yes; I don't know how he managed to stop it in the space that he did; he stopped it in about sixteen feet, I suppose. 20

Q. Did you see this car coming up all the time while you were sitting there? A. I observed it down about the corner. I had no reason to be looking for the cars, because there was no children there.

Q. Were there any children on the easterly side of the street at all? A. None at all.

Q. You could see the easterly side perfectly? A. Yes. 30

CROSS-EXAMINATION by Mr. Noonan:

Q. What were you doing in the window there?
A. Sitting, looking out; it was a warm afternoon; I was facing to the east, looking directly out of the window, nobody with me; my family was in the adjoining room; I guess my oldest girl was in the same room there with me; I was sitting there from about half-past three, in the same place, except a few min- 40

utes I was down bringing up my children from the runaway horse.

Q. Your house is on the same side as Sturm's? A. Yes; between Sturm's and the the next street above.

Q. The accident happened about what time? A. Between ten and fifteen minutes to six.

Q. The horse run away about what time? A. Between three and four.

Q. Did you notice how many children were downstairs when you went down? A. I did not. There are always some children playing there all the time; a number of children come there to play in that neighborhood.

Q. The boulevard is a wide thoroughfare? A. Yes.

Q. And the blacksmith's shop is there? A. Yes.

Q. And there is a big piazza there on which the boys play? A. Yes, they are always around the corner of Franklin; my house is right on the corner of Franklin.

20 Q. You command a view of the boulevard from your window for about a thousand feet down? A. Yes, I could get a view of the car coming up, but I could not get a view of the car very far coming down, only just the other side of Franklin street. I could have a distinct view of the car down the boulevard for a thousand feet, the same as if I was on the sidewalk, only standing on the sidewalk there are some trees that might interfere with the view while my window is elevated over the sidewalk.

30 Q. Those trees would not be in the way of a person looking down the boulevard? A. No, only my house stands 12 feet farther back than if I was on the sidewalk and therefore I have a longer view down the hill.

Q. There is nothing to obstruct the view of a motorman coming up the hill for a thousand feet down from Sturm's? A. No, nothing to obstruct his view.

40 Q. Nothing to obstruct his view of persons between Sturm's and your place? A. No.

Q. A man coming up the hill from a thousand feet down could command a view of the boulevard in front of your place between the sidewalk and the car track? A. Yes.

Q. You saw this car coming up the hill? A. Yes.

Q. You also noticed the car coming down? A. Yes.

Q. From how far above your house could you see the car coming down? A. Just the other side of Franklin street, about 50 feet.

Q. There was no vehicle in the street between the 10
place where you first saw the car coming down and the place where you first saw the car coming up to obstruct the view of any person standing anywhere along the street there? A. No, sir.

Q. You first saw the down car when it was about at Franklin street? A. Yes.

Q. You first saw the car coming up when it was about a thousand feet down the road? A. Down about the curve, about 300 feet down; I could see the car down about here (indicating on the map). 20

Q. And your house is about here (indicating on map)? A. Yes, the second lot from the corner.

Q. Which window of your house were you in?
A. The side next to Egan's.

Marked F on the map.

Q. You first saw the up car when it was below Weehawken street? A. Yes, between that and the old shanty; that would be about the middle of the hill at the place marked X on the map. 30

Q. You first saw the down car? A. About opposite Franklin street, at the point marked Y.

Q. Which did you see first? A. The down car.

Q. How soon thereafter did you see the up car?
A. I didn't pay any particular attention until they were passing each other, and then I saw these boys coming out and that was what made me notice it.

Q. Did the down car stop from the time you saw it until it passed the other car? A. No.

Q. Did the up car stop from the time you saw it 40

until it passed the down car? A. No, then it stopped for the accident; it had to stop. The down car was going exceedingly slow.

Q. As fast as the ordinary jog of horse-car horses?

A. Yes, a slow jog.

Q. While the down car was going at a slow jog from Franklin street to just this side of your house, the up car went at some place from about 700 feet, didn't it? A. I didn't see them both at the same time; I saw the one coming up first, then I seen the
10 one in Franklin street after.

Q. That car passed by the other about 100 feet south of Franklin street? A. Yes.

Q. You first saw the up car 700 or 800 feet down from where you were? A. Yes.

Q. And that car came up while the other car came down to about 75 feet south of Franklin street? A. Yes.

Q. Then the up car was coming very fast? A. About ten miles an hour, at the usual gait.

20 Q. You mean the usual trolley-car gait. A. Yes.

Q. Was the car full? A. No; there was a trailer on both cars.

Q. You are sure there was a trailer on the up car? A. Yes.

Q. Do you travel on that line yourself? A. Yes, twice every day.

Q. Where do you go to? A. If I am working at the uptown store I take the Forty-second street ferry; if I am at the downtown store I take the Hoboken
30 ferry. I go every day. It is about three miles from my house to the ferry.

Q. Don't you think this up car was going faster than ten miles an hour? A. I don't believe it.

Q. Did you notice the speed as it came all the way up the hill, or was your attention attracted to the speed only at the time you saw this child in danger?

A. Just when I saw the child. I could see the car coming up the hill at an ordinary gait.

Q. You didn't pay particular attention to what
40 speed it was going? A. No.

Q. But you imagined it was going at an ordinary gait? A. Yes.

Q. And you think that ordinary gait is about ten miles an hour? A. Yes.

Q. What sort of a piazza is it, about, beneath your window? A. There is a regular stoop and a piazza for a vine that prevents my seeing right down on the sidewalk. My house is about thirteen feet back from the curb; it is seven or eight feet farther back than the brick house; the veranda under my window is about four feet; it slopes down from the window; I was sitting down; my elbow would be about on a level with the bottom of the window.

Q. These boys were out in front of your place? A. Between Egan's and Sturm's when I first observed them.

Q. How near to the curb could you see from your window down opposite Sturm's? A. I could see about six feet opposite the curb.

Q. Did you see any of the boys there when you first saw the down car? A. No. 20

Q. You heard the noise of the boys when you first saw the down car at Franklin street? A. Yes.

Q. Was your attention attracted to the up car in any other way than by the car itself? A. No, my attention was attracted to it when I saw the boy standing there ready to run over.

Q. You didn't hear any bell or gong ring at all? A. No.

Q. When you saw the boy starting to cross the street was there any other boy in front of him? A. 30 There was three boys there, one going after the other; I could not say which was foremost; they were pretty much about the same size.

Q. Do you know whether the boy that was killed was in front or in the rear? A. I don't know.

Q. Had they yet crossed the west track when you saw they were in peril? A. They were just about going across.

Q. When you got down the damage had been done?

A. Yes, and the car was stopped and George Schaffer and another man were at the boy.

Q. Just how the boy acted, and just how the motor-man acted, when the boy got in front of the motor, you don't know? A. No, I was then coming downstairs.

Q. Did they run up along the street as that down car was coming down? A. No, I think they rather inclined to wait until the down car went down, to run across.

10 Q. They were not standing still there while the down car was passing? A. No, they were running up a little, a sort of diagonally across and up the road; they were running after one another.

Q. You don't know how far the motor may have pushed the boy along the track? A. I don't think the car pushed the boy at all; he didn't touch the hind wheel at all; when I got down he was underneath the car, they were just beginning to kneel down to him when I got there and they took him out; 20 he was not fast at all; he must have been rolled along the track with the front wheel because his face showed that and his clothes were dirtied as if he had been rolled, as if he had been turned over.

Q. You don't know but the hind wheel may have pushed him along? A. I don't know.

REDIRECT-EXAMINATION by Mr. Holmes:

Q. You didn't hear any bell or gong? A. I could 30 not say whether it was rung nor not.

Q. (By the Court). Did you hear the bell or gong? A. No, I didn't hear it; I was not listening for any bell at the time; I had been reading my paper.

Q. When you first saw the up car it was at the point marked X on the map? A. Somewhere about there.

Q. Then did you see the down motor after that? A. Yes, at the point marked Y.

Q. How nearly opposite the entrance to Sturm's was 40 it the boy was found on the track when the motor

stopped? A. The motor was stopped between Egan's and Sturm's, if anything nearer to Egan's. The boy was about where it is marked D on the map.

RECROSS-EXAMINATION :

Q. You saw the down car some time before you saw the up car? A. No, I saw the up car some time before I saw the down car.

Q. You had good hearing? A. Yes.

Q. The window was open at the time? A. Yes.

Q. (Mr. Holmes.) You didn't see the boy struck by the motor? A. No, I saw him running in front and I knew he couldn't avoid being struck. 10

Q. (Mr. Holmes.) How close to the car going down did he run behind? A. Just right behind it.

Q. You don't know how close behind he passed, all you know about it is that he started across, or you thought he started across just behind it when you yourself started to run downstairs? A. Yes.

Q. But just how close behind it he passed you don't know? A. No. 20

THOMAS CARROLL, sworn for the defense, testifies as follows :

I live in Weehawken ; I am town clerk ; I have the ordinance book here in which the ordinances are originally recorded.

Q. Turn to the ordinance giving the North Hudson County Railroad Company the right to operate trolley cars on Bull's Ferry road in your town? A. It is on page 55. That is the ordinance they were operating under in August, 1893. 30

Defendant offers it in evidence.

LOUIS FOREMAN, sworn on the part of the defendant, testifies as follows :

DIRECT-EXAMINATION by Mr. Holmes :

I am town clerk of the Town of Union ; I produce the ordinance book of that town ; it contains the orig- 40

inal ordinance authorizing the North Hudson County Railroad Company to operate the trolley system on the Bull's Ferry road, on pages 254, 255, 256; that is the original ordinance.

CROSS-EXAMINED :

Q. There is a section in this ordinance providing that the said company shall not run their cars through the town at a greater rate of speed than ten miles an hour. Have you seen the running of the
10 the cars through the Town of Weehawken ?

Defendant objects to the question as not proper cross-examination.

Defendant offers in evidence the ordinance.

Plaintiff objects to it that it is an ordinance of the Town of Union and there is no evidence that any injury was done in the Town of Union.

The Court admits it in evidence.

Plaintiff prays exception.

20

BARNARD MCALEESE, sworn on the part of the defendant, testified as follows:

DIRECT-EXAMINATION by Mr. Holmes:

Q. Where do you live? A. Weehawken.

Q. What is your occupation? A. Laborer.

Q. Whom are you employed by now? A.

Brothers, Produce Exchange, New York.

Q. Have you been subpoenaed as a witness in this
30 case to-day? A. Yes.

Q. Were you the motorman of the motor which caused the injuries to this boy? A. Yes.

Q. Will you state to the jury just what you know about this and what happened? A. I was coming up from the ferry about a quarter of 6 o'clock on the 19th of August, and right opposite Sturm's there was another car coming down, and I was going up; he was coming down slow and I was going up the usual rate of speed a car always travels up the hill. The
40 two cars were about to pass in this position, and this

boy jumped from behind the other car in front of the motor, and my car struck him and went over him ; it happened so quick I had not time to think.

Q. Were there any other children on the east side of the track? A. No ; not on the east of the track.

Q. Was there anybody on the platform of your car besides yourself with you? A. No, sir.

Q. Was there room at this time for any one to ride on the platform?

Question objected to.

10

Q. No one was on the platform? A. No, sir ; no one on the platform.

Q. Where did you first see the car that was coming down? A. Right on the rise of the hill.

Q. Where were you at that time? A. In front of my motor, of course.

Q. Where was the motor; how far from Weehawken street? A. When I saw the other car, I guess about probably 100 feet down.

Q. From Weehawken street? A. Yes ; probably 20 that.

Q. From that point could you see the front of Sturm's place? A. I could see the front of Sturm's ; yes.

Q. Was there anybody in the street then? A. I could see a crowd of people standing on the sidewalk and the two cars passing ; I could not see the side of the street at all.

Q. Had you rung your bell before passing the other car? A. Always ; in all cases the bell is rung 30 when there is two cars passing ; that is one of the company's rules.

Q. What did you do on this occasion? A. Rang the bell ; first rang the bell up the hill at the crossing at Shaw's boulevard in the Bull's Ferry road, 75 or 100 feet from Weehawken street.

Q. Did you ring the bell at Weehawken street? A. Yes.

Q. Now, when the other car was passing were you ringing the bell then? A. Yes.

40

Q. How ; what kind of a bell was it you had? A. A gong bell.

Q. The same as they have on these other cars? A. The same as what is on the other cars belonging to the company.

Q. Tell how this boy appeared upon the track when you saw him and where the down car was? A. The two cars were in the act of passing; this boy, just as the car was passing, jumped on the track about three or four feet in front of my car; I went and threw off
10 the power and hollered something and applied the brake for all I was worth; it was done in a minute.

Q. How far did your car go before you stopped? A. From eight to ten feet, I should say.

Q. Did you have another car attached? A. Yes; had a trailer.

Q. How is that hill, is it a steep hill? A. Yes, a pretty steep hill; I could not tell the grade of it though.

Q. How fast did you come up the hill? A. Be-
20 tween six and seven miles an hour.

Q. How fast were you going when you passed the down car? A. Between six and seven miles an hour.

Q. Did that car have on it what is called a speed controller, or such apparatus? A. It had a speed controller, yes.

Q. How was it regulated, as to how fast it was running? A. Where do you mean?

Q. I mean on the motor? A. I should say from
30 ten to eleven miles an hour.

Q. Could you go any faster than that? A. I don't think so; not to the best of my opinion.

Q. Was the controller regulated to that point? A. Yes, the controller was in good order.

Q. Was it part of your business to understand the arrangement of that? A. Yes, certainly.

Q. How much of a grade is there on that hill, the Bull's Ferry hill? A. I could not answer that.

Q. In regard to some other place? A. It is a pretty
40 steep hill.

Q. And is on a curve, isn't it? A. Yes.

Q. Do your cars run faster or slower going around a curve? A. Slower, of course.

Q. What effect has it when you have a car attached? A. Lessens the speed.

Q. How does that operate on the curve, does it lessen the speed there? A. Undoubtedly.

Q. Before you passed the car that was coming down did you look to see whether anybody was about to cross the street, your last view that you had of the car coming down did you look to see whether anybody was coming in that direction? A. Yes, and I seen no one on the street, the track was all clear. 10

Q. But you did see people on the sidewalk by Sturms? A. Yes.

CROSS-EXAMINATION by Mr. Noonan;

Q. That is your signature, isn't it? A. That ain't my signature.

Q. Is that your signature? A. Yes.

Q. This is your signature to the testimony you gave 20 before the Coroner at the inquest, isn't it? A. Yes; I have not read it, but that is my signature anyhow.

Q. You swore to this, didn't you? A. I suppose so.

Q. That is the only paper that you did; that is where you gave an account of this thing, isn't it? A. Yes.

Q. This is the testimony you gave before the Coroner? A. That is right.

Q. This was read over to you before you signed it? 30 A. Yes, sir.

Q. Did you not say before the Coroner this: "I could not say where the boy came from"? A. That is right, yes.

Q. Then you could not say where the boy came from, could you? A. I never saw the boy till he came in front of the car, I did not see him till he jumped in front of my car.

Q. Why did you say before the Coroner, "I could not say where the boy came from"? A. I can't say 40

now where he came from ; the first place I see him was when he came from behind the car.

Q. Within what distance did you stop your car?

A. From 8 to 10 feet, about ; I can't exactly tell you it by inches.

Q. When you saw the boy first he was about 4 or 5 feet in front of you? A. Four or five feet.

Q. And from the front of your car to the hind wheel, how far is that, about 20 feet, isn't it? A. Not quite that.

10 Q. It is 15 feet anyhow? A. I suppose pretty nigh that.

Q. Well, 15 feet from the front of your motor back to the hind wheel, and 4 or 5 feet that the boy was when you first saw him, that is 19 or 20 feet from where the boy was when you first saw him to the back wheel of your motor, and you say you could stop the motor in 10 or 12 feet? A. I think I could, yes ; I can't be exactly accountable for 5 or 6 inches.

Q. Why did you not stop it in that distance? A. I 20 stopped it as quick as I could.

Q. As soon as you saw the boy you put on your brake? A. Yes, put on my brake and turned the switch off.

Q. And that is all you did to stop the car, you threw off the power and applied the brake? A. Yes.

Q. You are sure that is all you did to stop the motor? A. I am sure that is all.

Q. Don't you know that the quickest way to stop 30 the motor is to put on the reverse? A. Probably to put on the reverse might kill somebody ; to stop the car, it might shoot somebody off the car.

Q. That is what the reverse is for, to stop the car quickly? A. I don't exactly know.

Q. How long were you operating one of these cars as a motorman? A. I guess about three months.

Q. How long had you been driving before that, in the employ of this company, driving their horses?

40 A. I never drove horses.

Q. Were you ever employed on that line at all?

A. No, sir.

Q. And you were there for about three months?

A. Yes.

Q. Passing by there about how often a day? A. Ten or eleven times a day, every day.

Q. And you were instructed in the proper management of your car when you went there? A. Yes.

Q. Who instructed you? A. The electrician, Mr. Bonti. 10

Q. Didn't he instruct you about the use of the reverse? A. Of course.

Q. And were you instructed that the use of the reverse was for the purpose of stopping the car quickly when it was necessary to stop it quickly to prevent collision with some person on the street? A. I never was told that in case of collision.

Q. You were never told that? A. No, sir.

Q. You were never told by any person who was giving you instructions in the proper management of that car, that the reverse was there for the purpose of stopping the car very quickly in case of necessity, to save some person's life, were you? A. No, sir. Of course I understood that myself.

Q. You knew what the reverse was for? A. Yes, I understood that.

Q. You had operated the reverse before? A. No, sir.

Q. You had never operated the reverse? A. Never. 30

Q. Had you never backed your car? A. Backed up.

Q. Did you back it up letting it go down hill, or by using the reverse? A. By using the reverse.

Q. You know that when you are going along with one of those motors, that if you throw off the power that simply stops pushing the car on more still, but don't do anything else to stop it except to cease pushing it on, you know that, don't you? A. Yes.

Q. And you know that when you put on your 40

brake that does not apply any force to push the car back, only keeps it from going ahead, don't you? A. That is right, yes.

Q. But you know this, when you apply your reverse you bring to bear upon that car the entire electric power for the purpose of shoving it back, don't you? A. Yes.

Q. The handle for that reverse is right alongside of the lever that you use to work the car, isn't it? A. Yes, that is right.

10 Q. You had to drop your hand down on the reverse and pull it right back in order to apply your reverse, wasn't that the action? A. That is about the action.

Q. The action to put on the reverse is to throw off the power, to let go and pull back and put on the reverse? A. Yes.

Q. You can do that in less than one second, can't you? A. I think I can.

Q. You can do that while the car was going the
20 four or five feet that the boy was away from the front platform of your car, couldn't you? A. I hardly think so. I turned off the power at the time but I did not reverse.

Q. You did not try that? A. No.

Q. If you had tried that, you probably would have stopped the car before the front wheel went over the boy, would not you? A. I don't know, I don't think so.

Q. But you don't know whether you would or not?
30 A. No, I am not sure.

Q. Did you have any passengers in your car? A. Yes, there was a few of them.

Q. Do you know whether they were sitting up front or in the rear? A. I don't know where they were sitting in the car.

Q. Did you hallo at the boy when you saw him in front of your motor? A. Yes, sir.

Q. Wasn't he more than three or four feet in front of your motor when you first saw him? A. No, sir;
40 I don't think so.

Q. But he might have been seven or eight? A. No, he was not so much as that.

Q. Had you already passed the down car when you first saw the boy? A. The two cars were passing, the front of my car was passing the other car.

Q. What part of the other car was the front of your car at when you first saw the boy? A. The two cars were right together, like that, right about passing.

Q. Each car about the same length? A. About the same length. 10

Q. Was the front of your car about at the rear of the down car when you first saw the boy? A. Just about.

Q. The boy was running somewhat up the street? A. He was running across the track and got just as far as the rails.

Q. He was running across and upwards, wasn't he? A. No, I don't think he was running upward; I think he was running about straight across to the best of my opinion. 20

Q. You don't know about that? A. No, I can't say for certain.

Q. What did you do first when you saw the boy? A. I threw off the power and applied the brake first.

Q. You say the boy got beneath the car and out of your sight in a flash? A. Yes, in an instant.

Q. Did you feel the jolt when the wheels went over him? A. I could not say that I did; no.

Q. Do you know how far he was pushed along before the wheel went over him? A. That I could not say. I don't know. 30

Q. Did you have a trailer on behind your car? A. Yes, sir.

Q. You had the power full on, didn't you, coming up the hill? A. Yes.

Q. And you had had it full on for some distance down the hill? A. Yes.

Q. You only had two or three passengers in your trailer? A. I don't know what was in the trailer. 40

Q. But you had a light load so far as your motor was concerned? A. Yes; I could not say exactly how many were in. I know there was only a few.

Q. About where on the map, was it, where you ran over the boy? There is Weehawken street, there is Franklin street; about where is it (referring to map)?

A. About the blacksmith shop.

Q. The blacksmith shop is about here (indicating on map)? A. The front platform of my car was about at the south end of the blacksmith shop.

10 Q. That was about here? A. About here (indicating on map).

Q. Here is where the man was in the window; is there a vacant lot between the blacksmith shop and his house? A. No.

Q. The blacksmith shop is close up to his house? A. Yes.

Q. There is where he was himself at that window, and the blacksmith shop would be about this far up hill? A. Yes.

20 Q. And it must be about down here where you struck the boy (indicating on map)? A. Yes.

Q. You had the full power on then, didn't you? A. Yes.

Q. You were almost on the level grade, weren't you? A. No, sir.

Q. You had been going eight or nine miles an hour coming up this steep hill? A. I say six or seven.

Q. That might be eight or nine, mightn't it? A. It might be.

30 Q. You know it was more than four or five, don't you? A. Yes.

Q. You know it was least six, don't you? A. Between six and seven.

Q. And so far as you know it might have been about eight? A. No.

Q. But anyhow, between six and seven as you were coming up this steep grade? A. Yes.

Q. And you had the full power on still when you got practically on the level; if you went about seven
40 miles an hour coming up this steep hill and going

around that sharp curve, if you had the same power on when you got here you must have been going at least ten miles an hour? A. No, I don't think so, but the car was not quite off the curve.

Q. You did not put on the brake at all coming up the hill? A. How do you mean? Before the accident?

Q. Yes? A. No.

Q. The curve did not bother your speed any, did it? A. Of course it did.

Q. They grease up the inside part of the curve 10 once in a while, don't they? A. No; not there they don't.

Q. Don't you know that these trolleys climb the hill almost as well as they go down? A. Indeed they do not.

Q. They don't? A. No, sir.

Q. You say that as you were coming up the hill you saw a crowd of people in front of Sturms'? A. Yes.

Q. About how many were in the crowd? A. That 20 I could not say, probably 20 or 25, maybe not that many.

Q. And some of them were out in the street? A. They were on the sidewalk.

Q. You don't know but what some of them were in the street? A. I did not see no one on the street.

Q. The down car as it approached you was going very slowly? A. Going down slowly; yes.

Q. And, so far as you knew, it was about slowing up to let off or take on some passengers? A. No, sir; 30 it did not.

Q. Didn't it stop at all down below? A. Down about 100 feet or 150 feet below.

Q. It stopped at the crossing just below Sturms'? A. Stopped at the little path that goes across there.

Q. That is a regular street crossing there? A. It ain't a street crossing, it is a pathway from the cars; he stopped there.

Q. To let off or take on passengers? A. I don't know what he did.

Q. When that car was coming toward you so slowly you knew there was quite a number of people on the other side of that car, didn't you? A. I know the people were on the sidewalk.

Q. And a number of children there? A. I did not see no children, I saw a terrible crowd after the accident.

Q. Right away after the accident you saw the children there? A. Yes, I saw a lot of them.

10 Q. And right after the accident you found out, if you did not find out before, that there had been quite a lot of children around there? A. Certainly I saw a lot of children.

Q. If they were there as you were coming up, and as your view of the place where they were was obstructed by the down car, why did you not slow up your car as to prevent striking any of them who might undertake to cross behind that car? A. There was no crossing there and no crossing on the street there.

20 Q. Why did you sound your gong away down the hill? A. When we meet another car, no matter where it is that is the company's rule; I rang it at that little path coming up the hill, I rang it before we came to a crossing of each street.

Q. The little path below Sturms'? A. Yes.

Q. At that time the down car was away up the street? A. Away up the street.

Q. There was no occasion to ring it then for the down car? A. Not for the down car.

30 Q. You say the rule is for you to ring your bell when you are about passing another car in an opposite direction? A. Yes, and approaching a street crossing.

Q. You had a full view of the street? A. Yes.

Q. And why were you ringing then if there was nobody there? A. To comply with the company's rules.

Q. But the other car was four or five hundred feet up from you? A. I don't understand you, where do
40 you mean that I rang the bell?

Q. You said yourself that you rang the bell when you were coming up the hill? A. Yes, at the short boulevard crossing the park.

Q. Here is Weehawken street, is this the pathway? A. No, the pathway comes down here at this point (indicating on map).

Q. This is the Bull's Ferry road and this is the branch road? A. This pathway comes down here to the other track.

Q. And was it then when you rang the bell? A. Yes. 10

Q. Is that about where you began to ring your bell? A. About here (indicating).

Q. And you say there was nobody at this crossing at the time? A. No.

Q. There was no occasion to ring so far as anybody there was concerned? A. No, sir.

Q. And when you were down here, it was here that you passed the other car? A. Yes.

Q. And that car was going slow? A. Yes.

Q. And you were going quickly? A. Yes. 20

Q. If you began ringing here, the other cart must have been about at Franklin street when you began ringing away down here, is that so? A. Yes.

Q. There was no occasion for you to ring then so far as that car was concerned? A. It was a crossing.

Q. There was nobody there for you to ring? A. We are not supposed to wait to ring till we see a person.

Q. You had a full view of the entire street? A. 30 Yes.

Q. And past Sturms' to the blackmith shop? A. Yes.

Q. And although there were so many people there, 25 or 30, and although you had a full view of the people there, yet you don't know, you say, whether there was any child there in the street or not at the time? A. I did not see any.

Q. You were not watching very carefully? A. Yes, I was looking out ahead. 40

Q. When did you stop ringing your gong? A. I was ringing my gong till I saw the child, and I halloed something all at once, and then I stopped ringing when I halloed.

Q. When you are coming to a crossing, especially in open country like that up there, where you have a full view of the whole street, you do not ring your bell unless there is somebody or some vehicle around there, do you? A. Yes.

Q. Always? A. Always.

10 Q. And after you get to the crossing and see that you are passing the crossing in safety, then so far as the crossing is concerned, you stop ringing, don't you? A. Yes, providing there is nothing else in your way.

Q. And you did not see anything else then, after you passed this crossing? A. No.

Q. Then, following your usual custom, you would stop ringing there? A. Yes.

20 Q. And were you getting up to where you saw the car coming down when you began ringing again just as you were passing that car? A. Yes.

Q. But you would not begin to ring till you were passing the car? A. Coming right up to it.

Q. As the two fronts of the cars would be coming together and passing each other? A. Yes, probably before that.

Q. How long before that, a second or two? A. Maybe 20 feet or so.

30 Q. Now, how far were you from the other car when you resumed the ringing of your bell? A. I should think probably about 50 feet.

Q. The usual rule, you say, was about 20 feet? A. It would all depend, sometimes ring it probably sooner than others.

Q. Why do you say about 50 feet at this time? A. I think about 50 feet.

Q. Do you mean to say you have in your mind now as a specific recollection by which your mind can go back? A. No; I simply suppose it.

40 Q. It may have been only 20 feet? A. Yes,

Q. And it might possibly be only 10 or a dozen feet? A. Oh, no, not so short a time as that.

Q. You saw these people there on the sidewalk, so many of them, walking around, streaming out of that picnic garden, standing, talking, laughing, idle and festive and absent-minded? A. I don't know what they were doing.

Q. Didn't they appear to you to be idle there and absent-minded? A. They were standing right around there.

Q. Why did you not begin ringing your gong for 10 some distance down from Sturm's place, instead of waiting till you got within about 20 feet of the car? You had seen people going into and coming out of that place on other occasions when there were picnics there? A. Yes.

Q. During that month of August they had had several picnics in there? A. I don't know how many picnics they had.

Q. Quite a number, anyhow? A. Sometimes you would see no one; they would be all in the 20 park.

Q. But quite a number of times during that month of August, or during that summer, June, July and August, they had picnics there as you were passing by? A. Yes.

Q. And during those times you frequently saw many children around there in front of Sturms'? A. No, I can't say that I ever did.

Q. You often did see children there? A. Yes; not very often. 30

Q. You often did see children playing there in front of Sturms'? A. No, I did not.

Q. Did you never see them playing there? A. I won't say that, but not often.

Q. You saw them playing there sometimes? A. Probably I have, but I can't recollect; I say not frequently.

Q. You passed by there how often in a day? A. About ten or twelve or eleven times a day.

Q. If they were there you did not notice them? 40

A. I would notice them; it was not a regular playground for children.

Q. Boys were not in the habit of playing there?

A. No, sir.

Q. Not in the habit of congregating there? A. No, sir.

Q. Not in the habit of being there in the afternoon or evening, boys were not? A. No.

Q. If they were there during the time you passed by, you did not notice them there? A. I did not
10 notice them; no, sir.

REDIRECT-EXAMINATION by Mr. Holmes;

Q. How long had you been passing there that summer? A. I guess about three months.

Q. Where did you live before the accident? A. At Weehawken.

Q. Close by Sturms'? A. A good ways down, in Nineteenth street.

Q. When you passed by there on your car, how
20 often did you observe picnics? A. I could not say exactly; not very often.

Q. Did you know Sturms' place yourself? A. Yes, I have been in there about twice, I guess. It is a large place in the rear; I never have been to a picnic in it; I have been in it twice at a ball, the rear part of the building.

FREDERICK EITEL, sworn on the part of the defendant, testifies as follows:

30 DIRECT-EXAMINATION by Mr. Holmes:

I live at 724 Garden street, Hoboken; I am a civil engineer; I made this map; I made it by actual measurements.

Q. Will you tell us what the grades are; just explain the grades on the map, starting at the word "draft," on the lower left hand corner? A. The grade right here is 120.4; that is the elevation about high tide; about 50 feet further in, 126.7; so that
40 makes 6.3 per cent. in 100 feet.

Q. Coming further along, take it from the point that you have just left out there, to Weehawken street; what is the grade per hundred there? A. That is 4.5 here.

Q. How much is the grade from the last point marked 134.5 to the point marked 141.3; what is the difference there? A. 140 is the length between the two points; the elevation is 6.8.

Q. Have you measured the distance between X and Y on the map? A. That is 340 feet.

Q. (By Mr. Noonan.) What is the elevation at X ¹⁰ and what is the elevation at Y? A. Here is 144.7, and below is 129, that is 15 feet in 340.

Q. Fifteen feet in a distance of 340 feet? A. Yes, sir.

Q. What is the distance from the curb line at Weehawken street to the west rail of the down track? A. Fourteen feet and six inches on the south line.

Q. What is the distance at the point marked D on the map? A. Twenty feet and four inches.

Q. How wide is the sidewalk? A. Twelve and a ²⁰ half feet.

Q. What is the difference from the southwest corner of Jefferson street to the point marked D, right from that corner? A. 350 feet from here to there (indicating on map).

Q. Now, how far is it from D down to the end of the map, all the way down? A. Do you mean measuring in a straight line or along the track?

Q. Measuring right around? A. 480 feet.

Mr. Holmes: So that the distance from that ³⁰ corner all the way down as far as you can go is less than a thousand feet. We offer the map in evidence.

CROSS-EXAMINATION by Mr. Noonan:

Q. This is the curb line in here, is it not (indicating on map)? A. Yes.

Q. Drawing the tape from the point where the collision took place, marked D on the map, down to the 40

track in such a manner as to skip the curb line, then there is an unobstructed view, is there not, for a person on the front of the motor, all the way from the last line across the street; a person on the front of the car would have an unobstructed view to this point here, way down to the last line across the street here? A. It is 10 feet lower here than there.

Q. A person on the platform on a motor here has an unobstructed view to away up here, has he not (indicating on map)? A. Here is two feet and a half 10 above the track.

Q. That would make him up about 3 or 4 feet high? A. His eyes are only at an elevation of 128.

Q. He could not see up there? A. No, because that point is two feet higher than this one.

Q. The man's eyes are two feet higher than the ground here? A. 120 and 7 feet is 127.

Q. Let him stand on the front of the motor, how high is he from the ground? A. Seven feet and a half plus the man.

20 Q. The top of the platform of the motor is how high from the ground? A. Two feet and a half.

Q. That man, the motor man, is about five feet seven high? A. Yes.

Q. That would be 10 feet? A. 7 feet.

Q. He is 7 feet above the ground here, those children up here are about 3 or three and a half feet high, that raises him about 3 feet above the ground; could not a man of his height standing on the front platform of a motor here see children there? A. Yes.

30 Q. And from here where he could see them, which I will mark X₄, up to D, is how far about? A. 360 feet.

Q. You have given us the grades down along the hill here? A. Yes.

Q. After you get up on the hill what is the grade from this 100 mark here to D, what is the grade from the north side of Weehawken street to D, where the collision took place? A. 4.6 to the hundred.

Q. That is the south side of Weehawken street? A. Yes.

40 Q. Now, can't you take it from the north of Wee-

hawken street ; after that motor had climbed this steep grade coming up here and got here, he got practically on a level, didn't he? A. From here to there is a grade (indicating on map).

Q. What is the grade from D to Franklin street?
A. Between these two points is 3.4.

Q. In what distance there? A. 120 feet.

Q. 120 feet is 3 feet and four-tenths? A. Yes, two and eight-tenths per cent.

REDIRECT-EXAMINATION by Mr. Holmes : 10

Q. A person standing down at X₄, which you have marked X₄, could a person standing on the corner of Jefferson street, on the southwest corner, see any car coming down at X₄ from here? A. Not very well, he could not look around the corner.

Q. When would he first see the car at all? A. He could see it there (indicating on map).

RECROSS-EXAMINATION by Mr. Noonan :

Q. You seem to have a notion that this fellow has 20 to perform the feat of looking around the corner to see that car? A. He might be able to see the top, but he could not see the bottom.

Q. He don't have to look around the corner at all, does he; this is a field here, isn't it? A. No; there are trees there.

Q. There are very few trees there; he can look across the field and see the car coming? A. I don't know.

Q. Anyhow, he could see the top of the car very 30 easily away down here at Jefferson street? A. Yes.

Mr. Holmes : The map is in already.

The Court; I have admitted the map.

JOSEPH SHERRY, sworn on the part of the defendant, testifies as follows :

DIRECT-EXAMINATION by Mr. Holmes :

Q. What is your occupation? A. Motorman.

Q. Who do you work for? A. North Hudson County Railway. 40

Q. Do you recollect this accident? A. Yes, sir.

Q. Were you the motorman of the car that was going down? A. Yes.

Q. Where did you first see the motor that was coming up the hill, at what point? A. When I seen him it was at Weehawken street.

Q. You saw his motor at Weehawken street? A. Yes.

Q. And where were you? A. I was coming down about Jefferson street.

10 Q. You were about at Jefferson street? A. Yes.

Q. How fast were you running? A. I was running at the rate of from three to four miles an hour.

Q. And how fast was the car running which came up, would you judge? A. I should judge about from seven to eight miles.

Q. Had you gone up that hill? A. Yes, sir.

Q. How long before the accident happened had you gone up the hill? A. Well, about twenty minutes.

20 Q. Did you have a controller on your car? A. I did; yes, sir.

Q. An apparatus which regulated the extreme speed at which you could run? A. Yes; I did.

Q. How was that controller; was it regulated to an extreme speed on the surface? A. Yes.

Q. What was it on the level surface, what was the highest speed you could run on a level surface as controlled? A. Well, I could not really say; from twelve to sixteen miles.

30 Q. In coming up the hill there, how fast do you come up that hill; what is the best speed you can make with your car? A. Well, with a trailer, the best speed is from seven to eight miles with a trailer on.

Q. Now, what do you say about who was in the street on this day when you come down; did you remark anybody between your track and Sturms'? A. No.

Q. Were you looking out for people? A. Yes.

40 Mr. Wills: I move to strike out the last question and answer on the ground that this witness

is not an expert as to the rate of speed that all trolleys make. He said the best speed his car could make would be so and so; he don't know how fast this other car could run.

The Court: He said his car would make sixteen miles an hour with a controller on.

The Witness: That is on a level without a trailer.

The Court: The question is whether he knows how the other car was regulated. 10

Q. Did you know the other car? A. Yes; I have run the other car.

Q. How long before the accident? A. I could not tell you that, because we change cars every day, we have a different car every day.

Q. How much could you do with the other car, the one that caused the accident, coming up the hill, what is the best speed you could do with that? A. I could not go as fast with that car as I could with my own, the one I run. 20

Q. I am talking now with reference to the trailer being attached, how many miles an hour with a trailer attached could you come with the car that caused the accident, up that hill? A. From seven to eight miles up that hill.

Q. Could you do that with the car that caused the accident? A. Yes.

Q. With the trailer attached? A. Yes, with the trailer attached.

Q. Did you observe anybody in the roadway when you were passing Franklin street? A. No, sir. 30

Q. Was there anybody in the roadway by the Bull's Ferry road? A. Not that I noticed.

Q. Was there anybody in the roadway between the track that you were on and the west side of Bull's Ferry road? A. Not that I noticed.

Q. Were you on the lookout? A. Yes, sir.

Q. What were you looking out for? A. I was looking straight ahead, I was not looking over on the sidewalk, I was looking out for whether anybody was 40

crossing or not. How could I tell whether anybody was crossing there; there is a street called Weehawken street; there is wagons come down that street there; that is what I was looking out for.

Q. Were there any children close to your car, in the street? A. Not that I noticed on that side of the street, on the west side.

Q. Just as you met the car coming up did you see any children in the street? A. No, sir; I did not
10 notice them.

Q. Where did you pass the other car, about what point? A. Well, between Franklin and Weehawken street.

Q. About how far from the centre of the block? A. I should judge about one hundred feet from Franklin street.

Q. Did you hear the other man ringing his bell? A. Yes, sir.

Q. How long before you saw that car coming up
20 did he ring his gong? A. He was about fifty feet—how is that?

Q. Did you hear him ringing before you saw him coming; did you hear McAleese ringing his gong before you saw him? A. Yes, sir.

Q. How long after you heard him ring was it that you noticed him coming up? A. Well, he was about a minute or two; not quite a minute.

Q. He was then opposite Weehawken street? A. Yes.

30 Q. Now, when you saw him after that did you hear him ring again? A. I did not notice him ringing the bell then.

Q. Did you hear him ring his bell as he went by your car? A. Yes; when he came up close to my car he rang the bell.

Q. How far was he ringing it before he commenced to pass you, just as he was right close to you? A. Yes; he rang the bell when he come right up to me.

Q. And was he ringing it when he passed you? A.
40 Well, yes; he kept on ringing it.

CROSS-EXAMINATION by Mr. Noonan :

Q. When did you first fix this in your mind, that he rang the bell before you even saw him coming?

A. Well——

Q. Don't you know whether you have it fixed in your mind at all? A. About ringing the bell before I got up to him?

Q. Before you saw him? A. I don't know whether he was ringing the bell then or not.

Q. Before you saw him you don't know? A. No, 10 I did not give no particular attention to this.

Q. You don't know if he did ring his bell or sound his gong before you got him into sight, do you? A. No, sir.

Q. Why did you say then when Mr. Holmes was asking you questions just now, that you heard his bell ringing before you saw him and that then in a minute or two, not quite a minute, you saw him, why did you say that? A. That was——

Q. That was some other time, was it? A. No, sir; 20 that was at that time.

Q. Then why did you say so? A. Well, I heard him ring the bell when he was close up to me.

Q. Why did you say that you heard his bell ringing before you saw him; don't you know whether you did say it or not? A. Yes, I do.

Q. Well, did you say it? A. I said when he came up to me, when he was near close to my car I heard him ring his bell.

Q. I am not talking about that time at all; before 30 he got close to you, before he got near enough to you for you to see him? A. Yes, I did hear him, I did hear him ring.

Q. (By the Court.) Is that when he was coming up close to you or when he was at a distance? A. Well, a distance about 50 feet.

Q. You saw him, then, didn't you? A. Yes, I did see him.

Q. But you heard his bell ringing before you saw him, didn't you? A. Before I saw him? I heard his 40

bell ring when he was a distance away from me, where I could not see him, yes.

Q. (By the Court.)—Where you did not or where you could not? A. Where I couldn't see him.

Q. You heard the bell ringing before you could see him or his car at all? A. Yes.

Q. How long did you hear the bell ringing before you could see him or his car coming to you, two or three minutes? A. No, sir.

Q. Two minutes? A. No, about a minute.

10 Q. How do you know that it was his bell that you heard? A. There was no other car around there.

Q. You were ringing your bell, weren't you? A. Not at the time.

Q. Were you ringing your bell at all running along there? A. Not at this time when I heard his ring; I did not.

Q. When you heard him ringing you stopped, didn't you? A. No, sir; I did not ring at all.

Q. Did you ring at all from Franklin street to be-
20 low Sturms'? A. I started to ring when I got near Weehawken street.

Q. You had passed him then, hadn't you? A. Yes.

Q. And you did not ring before you got to Weehawken street after passing Franklin? A. No.

Q. Why not ring when you were passing him? A. Well, I had—

Q. You had what, tell us what you think; you forgot about it, did you; you don't know whether you
30 rang or not, do you? A. I did not ring the bell when I passed him.

Q. Why didn't you? A. Because I did not see anybody.

Q. Did you ring when you were at Franklin street? A. Yes, at every cross street I rang the bell.

Q. You ring also when you are passing another car going in another direction? A. Not unless the car stops.

Q. That was the rule of the company, only when
40 the car stops? A. Then I ring.

Q. That was the rule, wasn't it?

Mr. Holmes: I object to that, you shut me off on that yourself.

The Court: You can ask him whether that was his custom?

Q. That was your rule to ring when you were passing another car only after the other car had stopped there, wasn't it? (No answer).

The Court: The witness does not seem to understand. 10

Q. How many times did you ring your bell from the time you got to Franklin street until you got past Weehawken street? A. About three or four times when I got up near Weehawken street.

Q. Three or four? A. Yes, sir.

Q. How many times did the up motorman ring his bell? A. I did not exactly take notice how many times he rang.

Q. He rang it twice at least, didn't he? A. Oh, 20
yes, more than twice.

Q. At least three times then, wasn't it? A. I should say so.

Q. Would you say four times? A. Well, may be a hundred times; I don't know.

Q. You did not hurt anybody going down that day, did you? A. No, sir.

Q. He hurt somebody going up, didn't he? A. Yes.

Q. You want to get him ringing his bell and giving 30
plenty of signal of his approach, don't you?

The Court; Go on and get the facts.

Q. You have not in your mind any specific memory that the up motorman rang his bell? A. Yes; I have.

Q. You only think he rang it because it was the rule to ring it when passing, is that all? A. No, sir; that is not the thing at all.

Q. When did you first tell anybody that he did ring his bell, before you got on the stand here to-day?

A. I did not tell anybody. 40

Q. You told nobody about it since that day? A. No, sir.

Q. Do you know Mr. Mersheimer here? A. Yes; I do.

Q. He is the agent of the company, isn't he? A. Yes, sir.

Q. He hunts up their evidence in these accident cases? A. I believe he does.

Q. He has been talking to you about it? A. No, sir; not a word said to me about it.

10 Q. Did anybody else say anything to you about it? A. No, sir.

Q. How did you get here to-day? A. I was told to come here.

Q. Who told you? A. One of our starters told me.

Q. Why did he tell you?

The Court: I don't think that is competent.

20 Q. Didn't he tell you because you had told him or somebody else that you knew the up motor man had rung his bell; isn't that so? A. No, sir.

Q. Did you testify at the Coroner's inquest? A. Yes, sir.

Q. Why did you not testify there that the up motor-man had rung his bell? A. They did not question me that.

Q. They did not? A. No, sir.

30 Q. You knew you were sworn there to tell all you did know? A. I answered the questions they put to me; that is all I could tell them.

Q. You say the fastest speed you could make going up the hill with a trailer would be seven or eight miles an hour? A. Yes, sir.

Q. That would depend upon how many people you had in the trailer, and how many people you had in the motor, somewhat, wouldn't it? A. Well, yes.

40 Q. Couldn't you go along much better with a light car than with a heavy car? A. No, sir; not much better there.

Q. It don't make much difference, does it? A. No, sir.

Q. The power that you have for those cars can propel a motor and a trailer filled with passengers almost as well as if the cars were empty, can't it?

A. No, sir; it cannot.

Q. Well, nearly as well? A. Nearly; yes.

Q. And it can propel the cars up the hill almost as well as on level ground, can't it? A. No, sir.

Q. How many times did you try this car that this up motorman had this day? A. I had been running 10 that car a good many times.

Q. What was the number of that car? A. Thirteen.

Q. An unlucky number. What was the number of your car? A. No. 6.

Q. Did you ever try it to see the rate of speed you could get out of thirteen? A. Well, I never tried, but when I had the full power on that was the most speed I could get out of her, seven to eight miles, with a trailer going up the hill.

Q. Did you ever try to see the rate of speed you 20 could get out of another going up hill with a trailer?

A. It was about the same.

Q. Then No. 13 was as good as No. 6 if you worked her right? A. She went as good.

Q. How close to your car was the up bound motor when he began ringing his bell? A. About 50 feet, I should judge.

Q. And did he keep ringing his bell all the time he was passing your motor? A. Yes; he kept ringing his bell till he passed my motor. 30

Q. And you were ringing your bell at the same time? A. No; I did not ring my bell at the time I passed him.

REDIRECT-EXAMINATION by Mr. Holmes:

Q. How does the land lay on the east side of the road there as to high ground or low ground on King's side? A. King's side is high ground.

Q. How much higher than the street do you think it is? A. About eight feet. 40

RECROSS-EXAMINATION by Mr. Noonan:

Q. The sidewalk is how wide there on the right hand side going up the hill, the east side? A. About four or five feet.

Q. And then the land slopes from there up on a gentle slope to a hill top, don't it? A. Yes.

Q. How far in from the sidewalk is it where it begins to slope up? A. About 8 or 10 feet.

Q. The sidewalk is 6 or 7 feet wide? A. Yes.

10 Q. And 8 or 10 feet from the sidewalk it begins to slope? A. Yes, sir.

Q. And in about what distance does it get that elevation of 8 feet, what distance from the bottom of the hill is there to the top of the hill, about 20 or 30 feet of a gentle slope, isn't it? A. Yes.

Q. You have often been up that way? A. Yes, sir.

20 Q. There is the Bull's Ferry road, as you round this bend here the road is very wide and you have a full view of that side of the street all the way to the blacksmith shop? A. Yes; all the way to the blacksmith shop.

Q. From away down here? A. Yes.

By Mr. Holmes:

Q. That is so, if the car is coming down, is it? A. Yes; that is, without any wagons or any car passing there, you have a full view from that place there to the top of the hill and the blacksmith shop.

30 Q. Were you the down motorman at that time? A. Yes, sir.

Q. You were not coming down here as he was coming up here, were you (indicating on map)? A. No—down here, do you mean?

Q. From the time you got to Franklin street, to about Franklin street, you were coming along all the time at three or four miles an hour? A. Yes, sir.

40 Q. When he was commanding a view of the blacksmith shop you must have been some distance from here, the other side of Franklin street somewheres,

because you met him up in the middle of the block?

A. Yes.

CHARLES MUSMANN, sworn on the part of the defense, testifies as follows :

DIRECT-EXAMINATION by Mr. Holmes :

Q. Do you recollect this accident? A. Yes.

Q. Were you the conductor of the motor coming up the hill that McAleese had? A. Yes, sir.

Q. Did you see the other car pass, coming down? ¹⁰
A. I seen it when we passed by, but I did not take notice of it before.

Q. Did you hear McAleese ring his bell? A. Yes, sir.

Q. How long before your motor passed did you hear him ring? A. I know he rang the bell before we passed the park below Weehawken street, and then he rang the bell before we passed that car, and he rang the bell right along so long as we passed the ₂₀
car.

Q. When the motor stopped did you see him stopping it? A. Yes; I see him applying the brake and the car stopped very short.

Q. How fast were you coming up the hill? A. I guess about 7 or 8 miles an hour.

Q. How fast were you going past the down car? A. I did not take notice of it.

Q. Were you going any faster than when you were coming up by the foot path? A. No; I don't think ₃₀
so.

CROSS-EXAMINATION by Mr. Noonan :

Q. You were the conductor of the up car? A. Yes.

Q. What were you doing as the car neared Weehawken street, collecting fares? A. Yes; if there was anybody to collect from.

Q. Was there anybody to collect from then? A. ₄₀
No.

Q. Were you on the motor or the trailer? A. On the motor.

Q. Was a conductor on the trailer? A. Yes.

Q. How many passengers did you have in the motor? A. About three or four.

Q. How many passengers in the trailer? A. I could not say; more passengers than I had on the motor.

Q. Just a few more? A. Yes; I guess so.

Q. How far is it from your starting point down to the ferry, up to the top of that hill? A. I could not tell exactly the distance.

Q. What is your route along there; what is your starting point and your stopping point? A. Our starting point is West Hoboken depot.

Q. The old stables? A. Yes, sir.

Q. And the winding up place is the ferry, is it? A. Yes.

Q. Do you know the distance from the stables to the ferry? A. No; I don't know the distance.

20 Q. What is the schedule time of that run? A. Twenty-three minutes.

Q. When you say that the car was running about 7 or 8 miles up the hill you don't know but what it might have been 8 or 9 miles, do you? A. No; I don't think it was that.

Q. But you don't know the distance from the ferry to the stables? A. No, I do not.

Q. And you don't know how fast you ran between those two points? A. No; I do not.

30 Q. And you don't know exactly what the speed is you make any place? A. No.

Q. And you can't think out any one mile along the road, to know what distance any two points make a mile? A. No.

Q. And you have never timed how fast you did go from one place to another except from the stables to the ferry? A. No.

Q. And so far as you know you might have been going eight or nine or ten miles when you got to the top of that hill? A. No, they can't go that fast.

40

Q. How do you know? A. I ran on an open car and they never did run that fast.

Q. Do you mean to say a trolley-car with full power on can't go ten miles an hour? A. Up hill with a trailer.

Q. Can't it go ten miles an hour on the level? A. Yes.

Q. Can't it go twenty miles an hour on the level? A. I don't think so.

Q. Can it go eighteen? A. I don't know; I don't think it can. 10

Q. Do you think it can go fifteen? A. Yes.

Q. Why can't it make ten going up hill? A. I don't know.

Q. Can't you go as fast, nearly, coming up hill as you can on the level? A. No.

Q. You can go two-thirds as fast? A. I don't know, they might.

ROBERT HEINEMANN, sworn on the part of the defendant, testifies as follows: 20

DIRECT-EXAMINATION by Mr. Holmes;

Q. What is your occupation? A. Conductor.

Q. You were conductor of what car on the 16th of August last? A. Car No. 6.

Q. Was this the car going down the hill at the time this accident happened? A. Yes.

Q. Where were you? A. On the car.

Q. Were you on the trailer or on the motor? A. 30
On the motor.

Q. Did you hear the other car coming up? A. I saw it coming up.

Q. Did you hear the motorman ringing his bell on that car? A. Yes, I did.

Q. How far from your car going down did you hear him ring? A. I heard him when he came around the curve in the neighborhood of the park, just where we could see them until he had passed me as I was not busy at the time. 40

Q. Was that car ringing when you went by, was McAleese's car ringing when he passed you? A. He was.

Q. Ringing his gong? A. Yes.

Q. Did you notice how fast he was coming? A. At the usual rate of speed.

Q. What do you call the usual rate? A. About as fast as they generally go coming up the hill.

Q. How fast do they generally go? A. What we figure is seven to eight miles an hour.

10

[DEFENDANT RESTS — EVIDENCE CLOSED.]

Adjourned to 10 A. M. to-morrow.

TUESDAY MORNING, April 4, 1894.

Mr. Holmes: I ask the Court to direct a verdict on
20 the following grounds:

1. That there is no proof that the defendant was negligent, and the verdict must therefore be for the defendant.
2. That the proof shows that the decedent materially contributed to the cause of his death, and the verdict must therefore be for the defendant.
3. The proof shows that the death was caused by
30 an unavoidable accident for which the defendant is not responsible, and therefore the verdict must be for the defendant.
4. That the proof shows that the death was due to a mere accident for which the defendant is not responsible, and the verdict must therefore be for the defendant.
5. That there is no proof that the father and next
40 of kin of the deceased have suffered any damages,

and a verdict for no more than nominal damages can be returned by the jury.

6. That the proof shows that the father and next of kin were guilty of negligence which materially contributed to the death, and the verdict must therefore be for the defendant.

The Court refuses to direct a verdict for the defendant, to which refusal defendant prays an exception to each request as if it were a separate and formal ruling upon each request. 10

PLAINTIFF REQUESTS THE COURT TO CHARGE THE JURY AS FOLLOWS:

1. It is the duty of the motorman of a trolley car, when running his motor along a public street, to keep a constant lookout ahead, unless some other *equal* public duty growing out of his employment occupies his attention, or his attention is distracted by such cause as would warrant a reasonably prudent man in withdrawing his attention from the road ahead under the same circumstances. 20

2. And if for any time, while running along a public street, the motorman suffers his attention to be taken away from the street ahead, the burden of proof is on the company to prove a set of circumstances to excuse such inattention.

3. This duty of the motorman to look ahead embraces the duty of keeping a lookout, with reasonable care, for foot-passengers within a reasonable distance ahead and on both sides of the track such as will enable him to prevent injury to such foot-passengers, so far as the same may be prevented by reasonable care on his part. 30

4. It is the duty of a motorman to exercise reasonable care under all circumstances to prevent injury to foot-passengers. 40

5. If he did not keep a lookout ahead, he was negligent. If he did keep such a lookout and if he saw, or by due care could have seen, these children playing there in the street, and if they so conducted themselves as to apprise a reasonably prudent and cautious motorman that they, or some one of them, were or was apt or likely to start across the street behind the down car, as it passed them by, then the motorman of the up car was bound to so reduce the speed of his car as to have it well under control, as he approached and passed the down car, which obstructed his view of the street where the boys were, so that in case one of them started across, right behind the down car, he could at once stop his motor and prevent injury to such boy.

6. If there were there at the time such a set of circumstances as would ordinarily lead a reasonably prudent motorman, as his motor came up the hill towards those boys, to apprehend danger to any of those boys there and then playing, then it was the duty of the motorman of this motor to use due care, so to control his car as he approached those boys as to avoid that danger and prevent injury to any of those boys.

7. It is the duty of a motorman, running a motor in a public street, to exercise such a degree of care, watchfulness and precaution as are proportionate to the case, judged by common prudence and experience; and when children are playing in the street, near the track, the degree of care required by the motorman is thereby increased because common prudence and experience say that greater care is necessary to prevent injury to children than to adults.

8. A motorman has not the right to suppose that children in the streets will look out for themselves as well as adults; but he should use such care to avoid injury to them as their apparent helplessness, ignor-

ance and inattention; and their likelihood, through inattention and indiscretion of running into danger, may render necessary.

9. If the jury find that the motorman would, by the exercise by him of reasonable care, have seen the boys there playing as he came up the hill, and would, by the exercise of ordinary prudence, be led to believe that there would be danger or injury to any of those boys when he reached where they were, then he was bound to so control his car and conduct himself 10 as if he had actually seen the boys and had actually been led to so believe there was such danger, because whatever he could do and would believe, by the exercise of reasonable care, to save the boys from injury.

10. If the boys were there, in a place of danger, or if they were likely to be in danger there from the motor, and if the motorman could have seen by reasonable care that they were or were apt to be in such 20 danger, then he was bound to have seen; and so seeing, if he could by reasonable care have prevented injury, then he was bound to prevent it.

11. If the positions or conduct of any of the boys there playing were such as to furnish to a reasonably prudent motorman any reason to apprehend that any of them was likely to come on the track when the car reached them, then the motorman of this car was bound to use due care to slow down his car and get 30 it under control.

12. The rights of trolley car companies in the public streets is not paramount or superior to the rights of the traveling public, either on foot or in carriages, in the public streets.

13. Trolley cars must be run in the public streets so as not to endanger foot passengers using the streets in the customary way.

14. Trolley car companies have no right to run their cars in the public streets at an unusually fast rate of speed for a street, or at such a fast rate of speed as to interfere with the customary and usual use of the public streets with safety to themselves by persons crossing the streets on foot.

15. Such companies are required to run their cars in the public streets at a speed which shall be reasonably safe to the public traveling on foot in the 10 streets.

16. Trolley companies have not the right to run their cars in the public streets at such a rate of speed as is permitted in a steam railroad train crossing a public street at grade.

17. If a trolley car is run in a public street at an unreasonably rapid rate of speed, or at such a rapid rate of speed as to endanger or interfere with the 20 customary use of the street by a person on foot, the trolley company is guilty of negligence.

18. And the trolley company is obliged to refrain from running its motors at an unreasonably fast rate of speed, so as to avoid injury to children playing in the street as much so as it is to avoid injury to pedestrians in the customary use of the street.

19. A trolley company is bound to use greater care 30 to prevent injury to children playing in the street than to prevent injury to grown persons traveling in the street, because of the fact that children are less able to appreciate danger and to avoid it than adults are, and also because the children so playing are apt to be more distracted than when traveling across the street.

20. Although trolley car companies are not required by any statute of the State to give any particular sig- 40 nal of the approach of their cars in a public street,

yet they are obliged by the law to use reasonable caution and care not to interfere with the rights or endanger the safety of any of the public engaged in the customary use of the streets; and they are obliged to give such signal or signals of their approach as reasonable care for the safety of foot passengers shall dictate; and if the ringing or sounding of the bell or gong as such signal is necessary for such reasonable care and caution, then they are obliged to ring or sound a bell or gong as such signal; and if they have adopted for use on their cars a bell or gong for such signal, then the public have a right to rely on and require such signal, and the companies are in duty bound to give such signal of the approach of their cars; and if they fail in this duty to exercise reasonable care and caution for the safety of the public, they are guilty of negligence for such failure. 10

21. When a motorman of a trolley car sees a person ahead of his motor on the track in position of imminent danger, it is the imperative duty of the motorman to use every effort to prevent the motor from running over that person; and in such case the motorman is bound to use every means at his command to stop his motor as soon as possible, not inconsistent with the safety of his passengers. 20

He is bound to throw off the propulsion power of the motor and to put on the brake and also to apply the reverse power.

He is bound also to give such signal of his approach to such person as best he can as will best warn such person of his danger. 30

22. If the trolley company was guilty of negligence by neglecting to use due care for the performance of any of his duties toward this boy, and if it thereby injured this boy—he not contributing in any degree to the injury by a failure on his part to exercise such care as could be reasonably expected under the circumstances from a boy of his age and intelligence— 40

then the company is liable for damages for such injury.

23. The fact that the boy was *playing* there in the public street, does not decrease the duty of the motorman to take reasonable care to prevent injury to the boy; nor does it increase the duty of the boy to take any more care than could be reasonably and ordinarily expected of a boy of his age and intelligence under the circumstances.

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24. Even if playing in the street be an unlawful use of the street, yet that will not relieve the motorman of his duty to take reasonable care to avoid injury to the children so playing.

25. If the boy, in playing and running as he was, was but obeying his childish instincts, and did not have sufficient discretion to inform him of his danger or to avoid the danger, then he was not negligent, and did not by negligence contribute to his injury.

20 And it is a question for the jury to say whether he was but obeying his childish instincts, and whether he had such sufficient discretion or not.

26. The rule concerning contributory negligence, supposes sufficient intelligence to know and appreciate danger.

30 If the boy's conduct was such as would be reasonably expected in a boy of his age and intelligence, then the jury may find that the boy exercised ordinary and reasonable care for a boy of his age and intelligence. And that is all that can be required of the boy.

27. This boy was not bound to be looking out for a motor coming up there and then, unless a boy of his age and sense, in the exercise of such care and caution as could be reasonably expected from such boy, under the circumstances, would ordinarily look out for a motor so coming under such circumstances.

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28. This boy cannot be required to have exercised any greater care, then and there, than is usually, generally and ordinarily exercised by children of such age and intelligence under such circumstances.

29. The law makes due allowance for the thoughtlessness and indiscretion of children. The same care required of grown persons is not required of children. If a boy of the age and intelligence of the boy who was here injured, would ordinarily play as this boy was then and there playing, and would be apt ordinarily to run across the street behind the down motor, either to get away from the other boys or for any other purpose, as this boy did, then it cannot be said that this boy was guilty of negligence in so playing and crossing, because, in such a case, he did what such a boy would ordinarily do, and that is all the law requires.

30. And in considering what care would be reasonable care in this boy at the time, the jury should judge by common experience what care such a boy would ordinarily exercise ; that is under the circumstances—the circumstances that the boy was engaged in playing a game, and that another car was at the time running down ; and the jury may consider whether or not the attention of such a boy would ordinarily be distracted by any excitement of the game, or by the down car from the up car ; and the jury may consider whether or not the boy's view of the up car was obstructed by the down car ; and the jury will consider all the other circumstances of the case ; and if, considering all the circumstances of the case, this boy exercised such care as such a boy would ordinarily exercise under the circumstances, then he was free from negligence.

31. That the law compels a child to support his parents in their old age ; and that the jury have a right to consider this as well as the natural instincts

of a child to assist his parent or not in estimating damages.

32. That it was the duty of defendant to use its usual and formally adopted signal of a gong at a point especially dangerous to foot passengers, if the jury believe that they had adopted this signal and that this place was a dangerous point.

33. That the defendant was bound to use greater
10 care in passing a place well known as a play-ground for children in the street than at other indifferent points on the road.

34. That the jury have a right to consider the interest of the employee-witnesses and indifference of other witnesses in determining who tells the truth.

DEFENDANT REQUESTS THE COURT TO CHARGE
20 THE JURY AS FOLLOWS :

1. That there is no proof that the defendant was negligent and the verdict must therefore be for the defendant.

2. That the proofs show that John Bernhard materially contributed to the cause of his death and the verdict must therefore be for the defendant.

3. That the proofs show that the death of John
30 Bernhard was caused by an unavoidable accident for which the defendant is not responsible and the verdict of the jury must be for the defendant.

4. The proofs show that the death of John Bernhard was due to a mere accident for which the defendant is not responsible and the verdict must therefore be for the defendant.

5. That there is no proof that the father and next of
40 kin of John Bernhard have suffered any damage and

a verdict for nominal damages only must now be returned by the jury.

6. That the proofs show that the father and next of kin of said John Bernhard were guilty of negligence which materially contributed to the death of said John Bernhard and the verdict must be for the defendant.

7. The defendant had at the time of the accident a lawful right to run a motor and car attached thereto, 10 called a trailer, at the place where the accident occurred on both of the tracks in question.

8. That the fact that a motor and car attached thereto was operated or run by the defendant on the tracks in question, at the time and place in question, does not of itself establish negligence nor make the defendant liable.

9. That there is no proof in this case that any of 20 the fenders described by the plaintiff's witnesses would have prevented John Bernhard from being killed if the car which ran over him had been equipped therewith, or with any one of the fenders described by the plaintiff's witnesses.

10. That there is no proof that there was any fenders in use or invented that would have prevented the death of John Bernhard if the motor car which ran over him had been equipped therewith. 30

11. That there is no proof that the car which ran over John Bernhard was not equipped with ordinary safeguards and fenders.

12. That there is no proof that the defendant's officers or agents knew of any safeguards or fenders that would have prevented the death of John Bernhard if the car which ran over him had been equipped therewith, 40

13. That there is no proof that there was any fender or safeguard for motor cars that the defendant should have had upon the car in question.

14. The mere fact that the accident occurred does not of itself prove negligence nor make the defendant liable.

15. The running of a car in violation of an ordinance does not make the defendant liable.

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16. If the jury believe that the accident was unavoidable, their verdict must be for the defendant.

17. That in order to find a verdict for the plaintiff the jury must first find that the motorman who was in charge of the motor which ran over Bernhard did not use reasonable care in the operation of the motor at the time and place in question.

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18. If the jury believe that said motorman did use reasonable care in the operation of said motor at said time and place, then the verdict must be for the defendant.

19. That if the jury believe that the father and next of kin of said John Bernhard were negligent, and that such negligence materially contributed to the cause of the death of said John Bernhard, then their verdict should be for the defendant.

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20. That there is no evidence which will warrant the jury in finding a verdict for more than actual damages; punitive damages must not be given.

Gentlemen of the Jury :

This is an action brought by Jacob Bernhard, administrator of John Bernhard, deceased, against the defendant The North Hudson County Railway Company, to recover damages for the death of the de-

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ceased, his son, occasioned by the alleged negligence of the defendant.

This suit is brought by the father as administrator of his deceased son, for the pecuniary loss by reason of the death arising to the next of kin of the deceased. In order that there should be a recovery here, of any amount of damages, it will be necessary for you to find that this death was occasioned by the negligence of the defendant company. There must have been negligence on the part of the defendant, which negligence was the proximate or natural cause of the 10 death of John Bernhard.

If you should determine that the defendant's negligence was the cause of this death, then it will be necessary for you to say what amount of damages shall be given the plaintiff here for the pecuniary loss of his son's life to him and to the next of kin of the deceased.

Now, you must bear in mind that there was no intention on the part of the corporation defendant, or its employes or servants to injure the decedent, 20 or to cause his death.

If there exists any right of recovery here it arises out of inadvertence, or from that defect of human nature, of not being, at all times and under all circumstances, able to foresee what may happen in the use of agencies, which it has become necessary to use in order that the business of the community may be carried on.

Cases of this kind arise out of the statute. Previous to the passage of the statute an action of this 30 kind was no part of the methods of the administration of civil justice. We have a statute in this State which provides that, whenever death results from the neglect, default or wrong of another, under such circumstances, that an action would have lain for the injury arising from such default or neglect, if death had not ensued, the personal representative of the decedent shall have a remedy by action. That is, if the deceased would, if living, have had a remedy for his injury, his personal representatives have one 40

on account of his death, and therefore the case is governed by the same principles of law, in relation to the right of recovery, and the establishment of negligence as the cause of death, as if the plaintiff had not been killed by this accident, but merely injured and was suing here by his next friend for damages because of those injuries which did not result in death. This is so with the one exception, that the general principles which relate to the measure of damage where death did not result, do not apply in
 10 all respects in the measure of damages which you are to make. It may be that a person who is injured, under the law, may recover a far greater amount of damages than his representatives could recover if he had died, because in such a case his personal suffering, his distress of body and of mind, frequently form quite an element in the computation of damages.

If you should arrive at a conclusion, under the rules of law to be given you, that there should be a recovery, then you can, under the statute, award such
 20 damages as you may deem fair and just with reference to the pecuniary injury resulting from such death to his father and his brothers and sisters, who are his next of kin. You see the statute has carefully measured to the extent to which you can award damages. The rule is not perhaps very definite, but the damages are limited to the money loss arising to his next of kin by his death, and therefore, if you find any more than nominal damages, you must from the evidence conclude, applying your
 30 judgment, that his next of kin were in some pecuniary way interested in the continuance of his life, and it is to the extent of that pecuniary value that you can award damages. You are to give effect to the statute to the extent of pecuniary damages. You are not to give any damages of a punitive character. You carefully regard this, that you are to give no damages which betoken a motive or desire to punish, no smart money; no money for example's sake. The damages to be given are simply
 40 remunerative, in money, to the father and next of kin,

and are to be that sum which will meet the reasonable expectation that the father and next of kin had of a pecuniary benefit arising from the continuance of the life of the boy who was killed. What would they have been pecuniarily benefited by the continuance of his life? Being a boy of tender years they had not as yet been benefited at all, pecuniarily, by his life, and, therefore, there can be no award for damages because of such consideration in the past. You can give nothing for the mental distress, pain or anguish of his father, his brothers or sisters over their loss, 10 nothing for sympathy with them. The child was of tender years, and perhaps but little can be gleaned from the evidence of his pecuniary value to the father and next of kin, and, therefore, much must be left to your good judgment. Almost all evidence which could be given upon this subject would be merely hypothetical. The principle is, that the jury should calculate the damages in reference to a reasonable expectation of pecuniary benefit from the continuance of life, up to and even beyond the time 20 of his majority. You can consider the bodily health, or weakness of the child; its ill-health, or good health, its sprightliness of mind, or the want of it, aptitude and willingness to be useful, or the want of these qualities, all these things can be considered by you on the question of damage. If he was a boy of strength it would tend to enhance, and if a boy of weakness to diminish the damages. Good health, aptitude, sprightliness of mind, would tend to enhancement, the want of these qualifications would 30 tend to diminution of damages. Aptitude and willingness to be useful in his way, or the want of these qualities can all be considered by you in making up your estimate. The rules of law to be given you by the Court are not very difficult to give you; the difficulty is in your application of them. This is an important subject, as important as any other part of the case, this question of damage, for the validity of the verdict frequently depends upon the good judgment of the jury in the award. It is within the province, 40

says a learned writer upon this subject, of the jury who have before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years as the deceased here; and yet, to hold, without such proof, the plain-

10 tiff cannot recover, would in effect render the statute nugatory in most cases of this description. It cannot be said as matter of law that there is no pecuniary damages in such a case, or that the expense of maintaining and educating the child would necessarily exclude any pecuniary advantage which the parent or next of kin could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child; the

20 circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion. And when, from the age and undeveloped state of the child, any estimate of the value of the services until majority would be matter of opinion, in which no particular or special knowledge in the way of expert testimony could be procured, there is nothing better

30 than the judgment and common sense of the ordinary juror called to the duty of determining such value, and upon such testimony, the sound discretion of the jury must be relied on to determine the value. You can take into consideration all the chances of life, and the chances of his ever attaining, under the circumstances, his majority. And upon this question the continuance of pecuniary benefit, after his majority, you may consider, if you think he ever would have attained his majority, you can take into consideration the chances of his bestowing benefits upon his father

40 and next of kin. He might become a married man

and with children; what would then be the chances of his bestowing any benefits of his life upon his next of kin? And you can also take into consideration in diminution of damages, the burden, pecuniarily, he would be to his father or next of kin during his minority for maintenance, education and support, or in case of sickness or ill-health after his majority.

In this matter of damages you must use a cool and cautious judgment, and be careful to allow none but pecuniary considerations, money considerations arising from him to his father and next of kin, and if 10 your good judgment should induce you to conclude that no pecuniary benefit could ever have arisen from the continuance of his life to the next of kin you would award only nominal damages. But in a case of this character you can take all the facts and circumstances, all the evidence upon this subject into consideration. His father and next of kin are entitled to have the full pecuniary value of the continuance of his life.

Now, you will apply these rules if you reach the 20 question of damages, and assess them accordingly.

But before you reach this question of damages you will be required to answer other questions which lie at the very foundation of the right of recovery here.

The gist of the action is negligence. Negligence on the part of the servants of the defendant corporation proximately causing this death. That is, negligence, the natural and ordinary results of which were the injuries to the deceased, and his consequent death.

Now, then, in cases of this kind, it may be quite 30 monotonous to the Court to give you the principles of law which apply, because these cases are becoming of frequent occurrence, but there is no way of avoiding that duty, and there is no desire on the part of this Court to escape it, and it is well for jurors to have these principles firmly established in their minds and to apply them intelligently when they enter upon the investigation and consideration of the facts and circumstances shown by the evidence.

Now, the Court say to you that the gist of the 40

action is negligence ; negligence on the part of the defendant which caused the death of the deceased.

Now, there can be no question in this case that this boy came to his death on the nineteenth day of August, 1893, by being run over by an electric trolley car running on the Bull's Ferry road, between Weehawken street and the boulevard, about the middle of the block, sometime about six o'clock in the evening. He was run over by an electric trolley car belonging to the defendant corporation, managed and conducted
 10 by it. He was a boy about nine years of age, and evidently was engaged in playing upon the street at or just before the time of the accident. He had been brought to a picnic which was being held at a place called Sturm's Park, the entrance of which was, I believe, nearly opposite the place on this street where the accident occurred. He had strayed or gone out of the picnic grounds into the street, and there is some difference of testimony here as to whether he was running ahead of the trolley car which struck
 20 him on the track, or whether he was struck while he was going across the tracks from behind another car which had just passed in an opposite direction. There is some evidence here that he and some other children had been and were playing over this street, on the side of it, and either partially or wholly across the tracks. It will be noticed that this was not at a crossing ; it was about in the middle of a block, near or about the entrance to this park. There is some evidence that by reason of the park and other things
 30 that this was a much frequented place by children and others. These facts show the general situation of affairs in this locality on this street.

As I have said, this action is brought to recover damages for injuries and death, on an allegation of negligence, want of care or want of performance of duty on the part of the defendant.

The first question that arises is a consideration of what the duties, rights and obligations of the parties were there. You are to determine here, under the
 40 facts, how and in what manner the deceased boy

came upon this street, and his position there, and how he came into that position, where he was struck and killed. However he may have been upon the street, the defendant cannot be absolved from a liability of active negligence towards him by reason of which his death ensued, but before considering that phase of the case it, perhaps, is well to have a view of the duties of the defendant, the obligations of the defendant, and also the rights of the defendant there in the operation of the car.

The defendant was operating a street electric trolley railroad. They were authorized by law to use electric motors instead of horses in the propulsion of their cars. By force of law they were authorized to use the method of propulsion and the cars that were used at that time. The question is whether the power of propulsion and these cars were used at this time and place without reasonable, ordinary care, and whether the want of that reasonable, ordinary care was the cause of this death.

Now, upon this question of negligence the Court has concluded to say to you that among the acts of negligence charged against the defendant as the cause of this accident are the want of fenders, proper fenders to these cars at this time, and that the car which run over the deceased, and the car which was passing in the opposite direction had attached to them a second car called a trailer. There has been evidence given upon both these subjects, and it is contended here in this case by counsel for plaintiff, that the want of the fender, and the attachment of the second car or trailer were acts of neglect, or default, or acts of negligence contributing proximately to this accident. The facts in relation to both of these matters are not disputed at all, that is the facts as presented by the plaintiff are not disputed by the defendant, and I think they must now be dealt with by the Court. I have allowed the full development of the case on this point, and I can find no disputed facts here. It is clear that these cars were without fenders, that this car which ran over this boy was without

a fender or other protection around it, in front, or by the side of the car. It is also clear that these two motors were being run each with a second car, which is known as a trailer, attached. Therefore, there being no disputed fact, it becomes the duty of the Court to control these two alleged elements of negligence of the defendant.

And, first, as to the want of the fenders. As the evidence in this case stands, for the purposes of this case, my instruction to you is to disregard entirely, 10 as a distinct element of negligence proximately causing the injury and death in this case, the want of any fender in front of or around this car. So far as this case is concerned in this respect this defendant may be considered as having adopted, and as having in use, such reasonably proper and improved methods and machinery in the operation of its cars, as were required at that time by law, or required in the exercise of ordinary care in the management of them, for the safety not only of its passengers, but for the safety 20 of those having occasion to use the streets through which the cars run, as foot passengers or otherwise, and, therefore, if you should find no other element of negligence on the part of the defendant save that of the alleged want of a fender to its cars, you will find for the defendant, and the plaintiff will be entitled to no recovery. The Court has concluded to put its instruction on that point in that form for the purposes of this case.

Again, as to the alleged element of negligence in 30 the motor having another car, or trailer as it is called attached. Here there were two cars, one passing the other, at or about this place, and each had a trailer attached, and there has been a contention that the attachment of those trailers were to a greater or less extent involved in the negligence of the defendant, which contributed to this accident. At the point of meeting, or passing, on the block on the street where this accident occurred, it is in proof that the motor cars were so 40 attached, and it is charged here that this is a distinct

element of negligence contributing to this accident, as one of the proximate causes of this accident. Now, the situation of these cars, and the length of the train of the two cars may be considered by you, along with the other facts in this case as bearing upon the question whether the view of the street, up or down, was more or less obstructed thereby, and as bearing upon the alleged negligence of the motorman in the conduct of his car, or of any alleged contributory negligence upon the part of the decedent, or any alleged negligence in relation to the rate of speed, or 10 bearing upon the question whether or not a gong was sounded properly. But as a distinct element of negligence of the defendant in the operation of its road and the performance of its duty to the public, involving the causes of the injuries and death here in question, and the subject matters of this inquiry, you need not regard it at all, that is, as a distinct element of negligence, or the want of performance of duty to the deceased or to the public, you need not regard it at all. 20

Upon the undisputed facts of this case the Court has concluded to say to you that the use of the trailers as attached to the motor cars was not neglectful conduct on the part of the defendant in the operation of its road, nor was it an act which contributed to this death. Therefore, should you find no other element of alleged negligence of the defendant than this in this case you must find a verdict for the defendant.

So also the mere act of the cars passing each other at the point at which they did pass on this block was 30 not of itself an act of negligence here. The cars had the right to pass at this point; it was in the middle of the block and not at any crossing of streets, and the defendant cannot be held to any liability for this act of the cars passing each other at the point where they did pass each other.

We now turn to a consideration of the other alleged acts of negligence, alleged by the plaintiff to have existed proximately contributing to this death, the consideration of which are questions for your determina- 40

tion, and upon the result of which determination there will be a verdict either for the plaintiff with damages or a verdict for the defendant.

As I have said, there is no question but what the deceased was run over by the car passing on the easterly side of the trolley tracks and his death caused by being so run over.

Now, the plaintiff claims here, and it is to these alleged elements of negligence said to be the cause of the death, that your attention is invited; these alleged acts of negligence are substantially, that at the point of this accident these cars passed each other without the ringing of the gong, that the gong did not at or about the place, and before reaching the place of the accident, ring to warn the deceased, who was on the street there, of danger, nor was any other warning given of danger by the ringing of the gong or otherwise until the very moment of the accident; also, that the car which was the cause of the accident passed the other car at a dangerous rate of speed, or at an unreasonable rate of speed; or, as it is sometimes called, an unusual rate of speed; that the motorman was negligent in not keeping a proper look out for the safety of those on the street ahead of his car, or who might be there on foot ahead of his car; nor did he control his car, nor the rate of speed of his car, so as to be able to avoid accident and danger to those ahead; and that he was generally across this space running his car at an unusual and dangerous rate of speed, and that from one of these alleged elements of negligence, or from the combination or concurrence of two or more, or all of these alleged elements of negligence, and as a natural and ordinary consequence thereof the injury and death of the deceased arose.

Now, if the negligence of the servants of the defendant in these respects occasioned the death, then the defendant is liable for damages here unless the deceased himself by some want of care, or neglectful conduct attributable to him in law, contributed in any degree to his death. If he so contributed, then

however neglectful the servants of the defendant may have been, there can be no recovery.

Now, I do not think at this time there can be any difficulty about the principles of law to be applied in relation to the situation here. The defendant was authorized to use these cars and these motors on this public street. And that distinguished to some extent the position of this defendant from that of an ordinary railway company operating its cars on its track, which is its own private property. In the place in which the defendant was authorized to use motors in the propulsion of their cars, the public had rights as well as the defendant. The Legislature did not, nor could it, unless by process of condemnation, set apart and devote this public street to the exclusive use of the defendant. So that at the time and place here in question, while the defendant was authorized by law to use electric motors in the propulsion of its cars, which method of propulsion admitted of a greater speed than the use of horses, they were authorized to exercise these rights not to the exclusion of the public, but having reasonable regard to the rights of the public in this public street. The defendant had in a sense a priority of right to use the track for the purpose of running their cars along it, and the right of the public, and the right of the deceased were subordinated to the right of the company exercising its franchise in this street, yet the existence of that right carried with it an obligation and a duty on its part to exercise that right so as not to unreasonably imperil the safety of the deceased, or of people having occasion to use the streets in the ordinary way. And the Court say to you now that this child was, so far as the evidence in this case shows, lawfully upon the street. It is the duty of the trolley company to regulate their speed so as not unreasonably to imperil the safety of anyone having occasion to cross their tracks, or who may be on the street, and to give such notice, and such warning as would have enabled the deceased with the use of ordinary care to avoid danger from the

use of the car by the defendant. And the conclusion of this case depends upon whether under the evidence it be shown affirmatively by the plaintiff, for the burden of proof to establish negligence causing death or injury is upon the plaintiff, that on the occasion in question the defendant failed, through its servants or employees to perform these duties required of it by law, and failed to observe the obligations which the law places upon it, which failure and neglect caused this death.

- 10 Now, you find in the law also a relative duty upon the part of one upon the street, and that duty is the same in principle as that upon the company; the persons upon the street have the right to the customary, usual, ordinary use of the street, but they must use it so as not to imperil themselves, and so as to avoid danger if it can be avoided, and they are bound to use ordinary care in this respect, it was the duty of the decedent here, in law, to use that street in an ordinarily reasonable manner, to avoid danger, 20 to avoid injury, and if he failed in this, and by his own neglect this death occurred, there can be no recovery here.

Now, the question is, here, did the defendant fail to observe the obligations which the law places upon it, and did that failure cause this accident. The question is, here, whether by a failure to give signal or warning; by a rate of speed at the time and place under the circumstances in approaching this place of accident, the de- 30 fendant was negligent and failed in the exercise of its duties toward the decedent, and the public, and thus caused this accident; did it exercise the degree of care which the law places upon it while exercising its right upon this public highway. If in a case of this kind the evidence fails to establish any culpable negligence or want of care on the part of the defendant in these respects the case for that reason ends in its favor, and there can be no recovery. If the evidence does establish to your satisfaction culpable 40 negligence in these respects, which have been men-

tioned by the Court, and which culpable negligence was the cause of this accident, of this death, then there would be a recovery, and an assessment of damages, unless you find from the evidence that the deceased by some culpable negligence of his own contributed in any degree to the injury and death, and if his neglect, or default, did so contribute, then there could be no recovery.

Now, I do not intend to go into the facts of this case. The child, for whose death damages are claimed, was about nine years old. He had gotten 10 upon the street, it may be by reason of the carelessness of its parents, it may be by the carelessness of the next of kin, but the Court charges you here however careless they may have been of the child, their carelessness, in this case, or their negligence, is not imputable to him. The doctrine has been established in this state, I think, so well that the Court must say that under the circumstances of this case there can rest upon the child no imputable negligence by reason of the carelessness, neglect or default of its 20 parents or next of kin, or those having it in charge. A child of tender years, being within the care of its parents, nurse or guardian, who are careless of it, and by reason of that carelessness the child suffers injury, from an independent cause, like being run over by a car, or from any other independent cause, the doctrine in this state is that that negligence of the parent, nurse or guardian, is not imputable to the child, so as to absolve the party whose independent negligent act causes the death or injury. 30

This child was evidently gratifying its childish instincts or desires, and was playing upon the street. There is some evidence here that this child with others was playing upon the westerly side of the street, and that almost instantly after the car on that side of the street passed, the child darted across the track on which this car had proceeded up the hill, and on to the track of the other car, and was caught there and almost instantly killed, both cars passing each other at that point. Now, it is for you to say 40

whether this was an unavoidable accident there or not.

From the accident itself, no presumption of negligence arises against the defendant. A mere accident without negligence creates no liability. An unavoidable accident, or inevitable accident as it is sometimes called, creates no liability upon the defendant. By an unavoidable or inevitable accident I mean one where the cause of the injury is unusual, where reasonable and ordinary care and ordinary human fore-
 10 sight could not have foreseen or prevented it or provided against it; for such an accident as that no liability is incurred by any one.

Now, was the car which had passed going slowly, if it was, and if the car which struck the deceased was going at a reasonable rate of speed, that is, if the motor-man was using reasonable care to keep it at a reasonable rate of speed, and it was going at a reasonable rate of speed; the motorman was using ordinary care to keep a proper look-out, as is contended
 20 by the defendant; and if the child darted quickly from one track to the other and was caught in that way, there could be no recovery here; it would be under such circumstances an unavoidable accident, so far as the defendant is concerned. I think this principle of unavoidable or inevitable accident is important for the jury to keep in view. You may find that you must apply this principle in this case. You may find that you do not need to apply, that you ought not to apply it; but I ask you to keep it in
 30 your mind, and ascertain if the facts are not sufficient for an application of this principle. You cannot find a verdict against the defendant simply because an accident occurred; you must find negligence on the part of the defendant which was the natural cause of this accident, and if it was an unavoidable accident, there can be no recovery.

Now, it is contended here that this child had no lawful occasion to use this street, to be playing on it at this place, and that, therefore, that fact excuses the
 40 defendant. That fact alone will not excuse the de-

fendant from the natural results of its negligence causing the death, if such negligence existed. The child did not in strictness have any lawful occasion to use this street in this way. But it was a child of somewhat tender years, probably gratifying its childish instincts to play where vehicles and cars were in motion, and in order to give greater gratification to the boy's childish instincts and desires; however, it may have been upon the street, the child was entitled to protection from the defendant's cars, which ordinary and reasonable care in the manage- 10 ment, operation and running of its cars would insure. This protection given to an infant of tender years is based upon public policy. A child of tender years is always, in a certain sense, a ward of the State, and as a State ward is entitled to whatever safeguard the State can, in conformity with sound principles, throw around it. But, it being there, if such care was used, reasonable, ordinary care, and still the accident happened, then the defendant is not liable to a recovery against it here. If such care was not used in the 20 running of this car, and such want of care resulted naturally in this death, then a liability arises for such damage as the law allows, unless some act of the child contributed to the injury.

If this car was being run at an unusual, or dangerous rate of speed, and this caused the child to be caught and killed, a liability ensues, unless the deceased himself contributed by some act, or want of care, to the result. No law or ordinance can justify an unusual or dangerous rate of speed, so as to excuse a defendant 30 from liability for accident caused by it.

Now, at this point the Court will not say to you that it was necessary for this motorman to ring his bell. I do not regard the ordinance of the town through which this car passed as of any materiality upon this question at all, either as to the rate of speed or the ringing of the bell. There is no statute which requires the ringing of a gong or bell, but under the circumstances of this case it is a question for you whether it should have been done or not; but the 40

defendant, through its servants, were bound to take every reasonable precaution to warn foot passengers of the approach of danger, and I shall leave it here for you to say whether it was required at this place or not. The evidence on this point is in some dispute. Some witnesses say the gong was rung, others say it was not, or they did not hear it. If it was rung there over a reasonable space before the accident occurred, then that ends the consideration of this want of its ringing as a matter of inquiry here, as an element of
10 neglect. If it was not rung, and you deem it was one of those necessary, reasonable precautions which should have been taken there under the circumstances, and if for the want of it this accident happened, then liability ensues, and it is for you to say what effect the want of its ringing had there as a cause of this accident. There is also some evidence here that this boy did not run across the track, but as if in childish play ran upon the track, ran ahead of this motor. If this be so, was the ringing of the bell
20 a necessary precaution, reasonable and necessary precaution to warn the boy off the track ahead. If it was it should have been rung, notwithstanding the boy might be wrongfully there. If it was rung, then that ends this matter, so far as this element of neglect is concerned.

The motorman on this car was bound to keep a lookout ahead to a reasonable degree, but only to a reasonable degree. He had his motor to run; his attention to some extent must be diverted to his car, to
30 its appliances for running, and sometimes to avoid dangers to persons at crossings, and persons who have lawful occasion to cross the streets at other points, or to vehicles on the street, and crossing the street, because there is no arbitrary exclusion from any part of the street from vehicles and foot-passengers who may have occasion to use any part of the street, at any time, and that occasion may be a lawful one. He must use reasonable, ordinary care to keep a lookout ahead, to avoid danger to persons on the street. He
40 was bound to use ordinary, reasonable care, the care

that an ordinarily prudent and reasonable man, understanding the danger of the motive power within his control, would use to avoid danger to this child. And if such care was used, then so far as this matter of lookout is concerned the defendant is chargeable with no negligence in this regard, and there could be no recovery on this ground. But if he did not use this ordinary reasonable care, and because of that neglect, or want of this care, or keeping this lookout, this accident and death resulted as a natural consequence, then the defendant would be liable unless excused by 10 the contributory negligence of the deceased.

The motorman was bound to use such care and such control over the motive power of the car that it should not obtain an unusual and dangerous rate of speed. He was bound to care, to caution, in this respect, proportionate to his duty, which was to run this car at such rate of speed as was compatible with the safety of others in the customary, ordinary use of the streets. The care which he was bound to use was only ordinary care, but ordinary care in one 20 situation and under one set of circumstances may not be ordinary care in another situation under other circumstances, and, therefore, he was bound to ordinary care under the circumstances as you find them to have existed there. The speed must be a reasonable rate of speed; it must not be an unusual or dangerous rate. Now, this presents another question for you to determine, whether this motorman was running at an unusual or dangerous rate of speed. If he was running at a reasonable rate of speed, exercising 30 ordinary care, reasonable care in this matter, and still the accident happened, the defendant cannot be held responsible for it. You may look at the locality. This was not a street crossing; it was along about the middle of the block. Was the motorman under the circumstances using ordinary care in running this car and controlling its rate of speed. If he was not using reasonable care, so as to regulate the speed, so as to have reasonable control of the car as to its speed 40 for the purpose of stopping it to avoid danger, and

this neglect caused this accident, the plaintiff can recover; but if he was running with ordinary care in these respects under the circumstances existing there, and surrounding him, at a rate of speed reasonable with the existing condition of things and still the accident occurred, however unfortunate it may have been, there could be no recovery.

You can always keep in mind the principle that if the accident was caused by the boy's own act, in any aspect of the case, there can be no recovery.

10 There can be no recovery here simply because the car was there, or simply because the car was operating on the street. In order to create liability of the defendant, either from its own act or the act of its servants, it must be in that situation that the negligent act of the servant, caused the death, proximately caused the death, naturally caused the death.

Now, I do not intend to go into the details of the evidence here any farther, it is so fresh in your minds that all the circumstances are with you, and they
20 have been fully commented upon by counsel. The case is for you to say whether there existed any negligence on the part of the defendant, as submitted to you under the charge of the Court which caused this death. If so, there will be a recovery; if not, there will be no recovery.

I now proceed to the consideration of another question or rather a question which is necessarily involved in this case.

This is a boy of nine years, playing upon this
30 street or being there. He is to be judged as an infant, he is to be judged as a boy of tender years, as the age of nine years would be judged.

Now, in this matter of age, a very young child, as a matter of law, cannot be guilty of contributory negligence, and it is upon this point that I now direct your inquiry, as to whether this deceased was guilty of contributory negligence which in some degree contributed, naturally, either by itself or in conjunction with the negligence of the defendant, to the in-
40 jury which caused the death. I say a very young

child cannot be guilty of contributory negligence, yet during the last years of infancy the presumption is strong that the child may be guilty of contributory negligence; during the intermediate period there is a presumption of capacity, and the burden of proof is on the plaintiff to show that the child was not capable of contributory negligence, or had capacity, or as some writers express it, that the burden of proof is upon him to show that he was *non sui juris*. Cases arising during the intermediate period always involve questions of fact for the jury. The boundaries of 10 these periods cannot be fixed positively, but must remain indefinite, and be determined by the circumstances of each particular case, and determined by the jury. Now, the Court would say to you, that a child of two or three years of age could not be guilty of contributory negligence, and all along between this very young or tender age, up to the last years of infancy it becomes a question for the jury to determine, and it is for you to say here whether under all the circumstances of the case the child of this age of 20 nine years was capable of contributory negligence.

Now, you have here a child of nine years, and you judge him as a child of that age. The law does not expect from him the same degree of care and thoughtfulness as from an adult. It is for you to find what degree of care can be required by a child of that age, under all the circumstances you find surrounding him, his capacity, for instance, as proved in the case. Some children of nine years are quite bright, smart, intelligent, active, while others are dull in compre 30 hension, maybe stupid, of very little capacity, or very little reasoning power, and, therefore, you take this case as it stands. If he was guilty of contributory negligence, and you find he had capacity for contributory negligence, and was guilty of it, and that was the cause of his injury either by itself or in conjunction with the negligence of the defendant, then the next of kin must suffer without remedy. All that was required of this child was that he exercise the 40 care and prudence equal to his capacity. If the child

was old enough to have some perception of the danger, and he was capable of exercising other faculties for self preservation, it is held that he is bound to do so, as I have stated, only as efficiently as can reasonably be expected of a child of its age, its maturity and capacity. The public streets are accessible as well to children and infirm persons as to those who are in the maturity of their strength and their powers, and all classes are equally under the protection of the law.

- 10 Now, under these rules, was the deceased guilty of any act, any contributory act resulting by itself, or in conjunction with the negligence of the defendant in the injury and death. If he was guilty of such contributory negligence, however great the negligence of the defendant might have been, or however much it might have been the cause of this accident, still the plaintiff here would be remediless.

The Court, in order to give you these principles of law, has necessarily made some comments upon the
20 facts, but that has not been for the purpose of indicating to you at all in which direction your finding shall be. It must be left to you to determine whether there should be a recovery or not. If no recovery, then your verdict shall be for the defendant. If you find the defendant liable, then it will be for the plaintiff for such damages as should be assessed under the principles of law as the Court has given you.

- 30 Defendant prays exception to the refusal of the Court to charge as requested in the written request, except so far as charged.

And to the charge of the Court, where the Court said that however careless the father or next of kin may have been, it is not attributable to him. To whatever the Court said on imputable negligence.

Also to what the Court said as to the right and the
40 capacity of the infant to be upon the street ; to what over the Court said about the right of the infant to

be upon the street, taking the ground that the infant under the evidence was of sufficient age to be guilty of contributory negligence as matter of law.

Also to what the Court said in respect to infancy, as to the intermediate period, being for the jury.

Also that what was required of this child was the exercise of care and prudence equal to his capacity; if he was old enough he was bound to do so, if he was not he was not bound to do so.

Plaintiff prays exception of the Court to charge as requested in the written requests, and also to the modifications made by the Court of the written requests. 10

Also to that part of the charge of the Court which instructed the jury they might entirely disregard the question of fenders and that the jury might consider the defendant as having adopted proper machinery and appliances.

To what the Court said that they might not regard the use of a trailer as a distinct cause of negligence. 20

Also where the Court said that the passing of the cars as they did at the point in question cannot be negligence, because they have a right to pass there.

And where the Court left it to the jury to say if the company was obliged to ring or sound a bell or gong as a signal of warning of approach, in view of the facts there. 30

Also where the Court said the jury should judge him as a child of nine years of age.

And what the Court said about the sudden darting of the boy across the street being an unavoidable accident.

Where the Court said that the child coming up to the age of twelve or fourteen would be guilty; whatever the Court said on that point. 40

Where the Court said negligence must, of course, have been through the servant or agent of the defendant, thus excluding the negligence of the defendant itself, excluding improper and insufficient instructions.

HUDSON CIRCUIT COURT.

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THE NORTH HUDSON COUNTY
RAILWAY COMPANY

In Tort.

ADS.

Rule to show
cause.

JACOB BERNHARD, as Admr.,
&c., John Bernhard, deceased.

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This cause having been brought to trial at the April Term of this Court and a verdict rendered by the jury for the sum of twenty-five hundred dollars for the plaintiff on the twenty-fourth day of April, eighteen hundred and ninety-four, and this rule having been applied for within four days after the said verdict was rendered, it is, on this twenty-eighth
30 day of April, eighteen hundred and ninety-four, on motion of George Holmes, of counsel for defendant, made in open court,

Ordered, that the plaintiff or his attorney show cause before this Court on Saturday the twelfth day of May next at ten o'clock in the forenoon, at the Court House in Jersey City, why the said verdict should not be set aside and a new trial granted in this action on the grounds that the verdict is excessive, contrary to the evidence, contrary to the
40 weight of the evidence, contrary to the charge of the

Court, contrary to law and also for errors committed on the trial by the Court.

JOB H. LIPPINCOTT,
Judge.

Rule actually entered April 28, 1894, on motion of Geo. Holmes.

(A true copy.)

DENNIS McLAUGHLIN,
Clerk.

[SEAL.]

10

HUDSON CIRCUIT COURT.

THE NORTH HUDSON COUNTY
RAILWAY COMPANY

ADS.

JACOB BERNHARD, Administra-
tor, &c., John Bernhard, de-
ceased.

In Tort.

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A rule to show cause why a new trial should not be had, having been granted in this case, upon the alleged grounds that the verdict is excessive, contrary to the weight of evidence, contrary to the charge of 30 the Court, contrary to law and for errors committed on the trial by the Court; I, Job H. Lippincott, the Judge holding said court, before whom the trial of said cause was had, do hereby direct that a case be made and stated and printed, consisting of the pleadings and oral and other testimony delivered in said cause, and do direct, there being doubt and difficulty in my judgment, as to the proper disposition of said rule, that the same and the case be certified to and argued at the bar of the Supreme Court, such argu- 40

ment to be heard at the June Term eighteen hundred and ninety-four, of said Supreme Court.

JOB H. LIPPINCOTT,
Judge.

(A true Copy.)

DENNIS McLAUGHLIN,
Clerk.

[SEAL.]

10 NEW JERSEY SUPREME COURT.

THE NORTH HUDSON COUNTY
RAILWAY COMPANY

ADS.

JACOB BERNHARD, Administra-
tor of John Bernhard, de-
ceased.

In tort on case
certified.

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And the said defendant comes and assigns the following reasons why the verdict in this cause should be set aside and a new trial granted:

FIRST.—Because the said Judge on the trial of the said cause should have non-suited the plaintiff.

30 SECOND.—Because the said Judge on the trial of the said cause should have directed a verdict for the defendant.

THIRD.—Because the charge of the said Judge on the trial of the said cause was contrary to law.

FOURTH.—Because the verdict of the jury was contrary to the charge of the Court.

40 FIFTH.—Because the verdict of the jury was contrary to the weight of the evidence.

SIXTH.—Because the verdict of the jury is contrary to law.

SEVENTH.—Because the damages awarded by the jury are excessive.

EIGHTH.—Because the said Judge on the trial of said cause should have charged the matters requested by the defendant, and because of his refusal to charge the said matters.

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NINTH.—Because the said Judge on the trial of said cause wrongfully and illegally admitted evidence in substance, that at and about the place where the accident happened, it was a place frequented by children, and where children habitually played.

That the motors or cars of the defendant complained of had no fender upon them.

That the motors or cars of other certain street railway companies had certain devices or fenders upon them.

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J. C. & S. A. BESSON,
Attorneys of Defendant.

