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TESTIMONY FOR DEFENDANT.

Notice of Appeal.

(Filed July 6, 1928.)

Bayonne District Court

ANNA K. BARNEY, an infant, by KATHRYN BARNEY, as her next friend, *Plaintiff*, *v.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant.*	In Tort. Notice of Appeal.

To ANNA K. BARNEY, an infant, by KATHRYN BARNEY, as her next friend, or DAVID BERMAN, her attorney.

SIRS:

TAKE NOTICE that the defendant, Hudson & Manhattan Railroad Company, hereby appeals to the New Jersey Supreme Court from the judgment of the Bayonne District Court rendered in the above stated action on June 22, 1928.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Dated July 2, 1928.

Served July 3rd, 1928.

Specification of Determinations and Directions Appealed From.

(Filed July 16, 1928.)

[Same Title]

The Hudson & Manhattan Railroad Company, a body corporate, defendant-appellant herein, herewith files its specification of determinations and directions of the District Court of the City of Bayonne, with respect to which it is dissatisfied in the point of law.

1. Said court erred in refusing to nonsuit the plaintiff when thereunto moved, whereas said motion should have been granted for the following reason urged in support thereof:

(a) The evidence in the case does not disclose any negligence on the part of the defendant, which was the proximate cause of the injury.

2. Said court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff when thereunto moved, whereas said motion should have been granted for the following reason:

(a) The evidence in the case does not disclose any negligence on the part of the defendant, which was the proximate cause of the injury.

3. Said court erred in charging the jury:

> "In this case the suit is against what is known in law as a common carrier—a railroad—and the degree of care which the law requires of a railroad is that it should exercise a high degree of care for the safety of its passengers. To give you that rule in the

language of the court, a common carrier of passengers must use a high degree of care to protect him from danger that foresight cannot anticipate. By foresight is meant not foreknowledge absolutely, nor that actually such an accident as happened was suspected or apprehended, but that the characteristics of an accident are such that it can be classified among the things that without due care are likely to occur and that due care can prevent."

4. Said court erred in charging the jury:

"The first function, therefore, when you go into the jury room is to consider the evidence as given here by the witnesses, and determine from that evidence: Did the Hudson & Manhattan Railway Co., by its agents in this case, use the high degree of care which the law requires of it to use to protect this plaintiff from injury—her testimony being that she got on to this crowded car (there was no room inside the car; that is, no seats); that the platform itself was crowded; that she stood with her back to this doorway or in this vestibule; and that, as the train lurched, she went forward, caught the saddle, or a part of this doorway, and just as she did so, the trainman closed the door on her fingers."

5. Said court erred in charging the jury:

"Should you, however, determine from the evidence that the railroad company in this case did not, under the circumstances at the time and place, use the high degree of

care which is required of them toward its passengers, then you must make another inquiry, from the facts from the evidence, and that is as to whether this plaintiff—this young girl, Anna—as to whether she herself was guilty of negligence; she being also required to use—I shouldn't say 'also'—she being required to use the ordinary degree of care, skill, and diligence at the particular time and in the particular place, and, of course, under the particular circumstances; and if she was negligent and her negligence in anywise contributed to the happening of this accident, then she would not be entitled to recover, even if the railroad company was negligent itself; because, where both are at fault, the law does not undertake to divide the responsibility, and a person cannot recover in an action of negligence if he or she, as the case may be, were also negligent and the negligence contributed to the happening of the accident."

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged July 6, 1928.

DAVID BERMAN,
Attorney of Plaintiff-Respondent.

State of Demand.

(Filed April 26, 1928.)

[Same Title]

The plaintiff, Anna K. Barney, an infant, by her mother and next friend, Kathryn Barney, of the City of Jersey City, County of Hudson and State of New Jersey, complains of the defendant and says:

1. On or about the 21st day of April, 1928, the defendant corporation operated and controlled a certain railroad line between Jersey City and New York City.

2. On that day, the infant plaintiff boarded one of the said trains operated by the defendant at one of its stations commonly known as Journal Square, in the City of Jersey City, New Jersey.

3. At the time and place aforesaid, the defendant by its agents and servants, so carelessly and negligently operated the said train as to severely injure the infant plaintiff.

4. The negligence of the defendant, its agents and servants, consisted of:

a. Failure to properly control door on one of the cars of the said train, thereby striking the said infant plaintiff, Anna K. Barney.

b. Failure to keep a proper lookout for passengers riding on the said train.

c. Failure to use a high degree of care in operating the said train.

5. By reason of said injuries, the infant plaintiff has suffered a great deal of pain and agony,

and in the future will be compelled to undergo great pain and suffering; and the infant plaintiff has been permanently and seriously injured, and has been confined to her home, and in the future will be compelled to be at home for a long period of time.

Infant plaintiff, Anna K. Barney, demands as damages the sum of Five Hundred ($500.00) Dollars.

DAVID BERMAN,
Attorney of Plaintiff.

Transcript of Clerk's Docket.

DISTRICT COURT OF THE CITY OF BAYONNE, N. J.

State of New Jersey,
County of Hudson, } ss.:
City of Bayonne,

No. 51116.

ANNA K. BARNEY, by her next friend, KATHRYN BARNEY,
Plaintiff,

v.

HUDSON & MANHATTAN RAILWAY Co., corporation of the State of N. J.,
Defendant.

In Tort.
David Berman, Plaintiff's Attorney.
Collins & Corbin, Defendant's Attorneys.

Costs.	City.	Al.	
Entering Suit			A summons was issued tested May 25th A. D., 1928, returnable June 7th A. D., 1928, at ten o'clock in the forenoon.
Summons and Copy	1.50		

Transcript of Clerk's Docket.

Costs.	City.	Al.
Service and Return,	.60	
Additional Defendant,		
Mileage,	.80	
Adjournments,		
Filing Offset,		
Trial Fee,	1.50	
Oaths Administered,		
Exhibits Marked,		
Filing Affidavits		
Filing Papers,		
Certifying Papers		
Copy of Papers,		
Subpoenas Issued		
Serving Subpoenas		
Serving Notices		
Witness Fees		
Recording Description of Papers,		
offered in Evidence,		
Offered on proof		

The Sergeant-at-Arms returned the summons as follows, viz.:

I served the within summons May 31st A. D., 1928, on C. K. Corbin, agent in charge of principal office and upon whom service may be served, the defendant, by reading the same to him and delivering to him a copy thereof.

Robert J. Livingston
Constable

Plaintiff's demand was filed May 25th, A. D., 1928.

This cause was called for trial June 7th, A. D., 1928, at ten o'clock in the forenoon.

Adjournment was taken upon application of plaintiff unto June 21st A. D., 1928, at ten o'clock in the forenoon. Further adjournment was taken upon application of plaintiff unto June 22nd, A. D., 1928 at ten o'clock in the forenoon.

The Defendant demanded a jury. A venire returnable June 22nd, A. D., 1928 at ten o'clock in the forenoon, was issued to Jos. Fedorko, Sergeant-at-Arms.

Costs.	City.	Al.	
Issuing Order,			Said Sergeant-at-Arms returned said venire with the following jurors summoned, viz.:
Filing Order,			Dorothy Woodward, Emma Stephens, Nora Keating, Alice Kelly, Mary Shepard, Augusta Scharff, Susan Long, Ellen Gormley, May Sklenar, Agnes Nolan, Percy Gordon, Cath. Brady.
Serving Order,			
Scire Facias,			
Venire,	1.25		who were severally sworn according to law.
Summoning Jury	1.00		June 22nd, A. D., 1928, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:
Attending Jury,	.50		
Jury Fees,	9.00		On the part of the plaintiff Anna Barney, Dr. Louis Pyle, Cath. Barney, sworn.
Attorney's Percentage	15.00		On the part of the defendant Max Weinberg, John Croughan, sworn.
			Freda Lipshutz, Stenographer, sworn.
			The Sergeant-at-Arms was sworn to attend said jury, who retire, and after deliberation return and say they find a verdict for the plaintiff in the sum of $300.00
			and so say they all.

Transcript of Clerk's Docket.

Costs. City. Al.

Execution,
Service and Return,
Mileage,
Transcript of Judgment

Whereupon it is on this 22nd day of June , A. D., 1928, by this Court considered that said Anna Barney, infant etc. plaintiff, , recover against said Hudson & Manhattan Railway Co., a corp., defendant the sum of Three Hundred Dollars and no cents, debt, and Nineteen Dollars and forty cents, cost of suit.

By consent cases No. 51116 and 51117 to be tried together with same jury.

Notice of Appeal Filed July 6th, 1928.

Appeal Bond filed July 6th, 1928.

I, Gustave F. Ruh, Clerk of the District Court of the City of Bayonne, do hereby certify that the above is a true copy of the within record.

July 10th/28.

GUSTAVE F. RUH,
Clerk.

Notice of Appeal.

(Filed July 6, 1928.)

BAYONNE DISTRICT COURT.

KATHRYN BARNEY, *Plaintiff*, v. HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant*.	In Tort. Notice of Appeal.

TO KATHRYN BARNEY or DAVID BERMAN, her attorney.

SIRS:

TAKE NOTICE that the defendant, Hudson & Manhattan Railroad Company, hereby appeals to the New Jersey Supreme Court from the judgment of the Bayonne District Court rendered in the above stated action on June 22, 1928.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Dated July 2, 1928.

Served July 3rd, 1928.

Specification of Determinations and Directions Appealed From.

(Filed July 16, 1928.)

[SAME TITLE]

The Hudson & Manhattan Railroad Company, a body corporate, defendant-appellant herein, herewith files its specification of determinations and directions of the District Court of the City of Bayonne, with respect to which it is dissatisfied in the point of law.

1. Said court erred in refusing to nonsuit the plaintiff when thereunto moved, whereas said motion should have been granted for the following reason urged in support thereof:

(a) The evidence in the case does not disclose any negligence on the part of the defendant, which was the proximate cause of the injury.

2. Said court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff when thereunto moved, whereas said motion should have been granted for the following reason:

(a) The evidence in the case does not disclose any negligence on the part of the defendant, which was the proximate cause of the injury.

3. Said court erred in charging the jury:

> "In this case the suit is against what is known in law as a common carrier—a railroad—and the degree of care which the law requires of a railroad is that it should exercise a high degree of care for the safety of its passengers. To give you that rule in the

language of the court, a common carrier of passengers must use a high degree of care to protect him from danger that foresight cannot anticipate. By foresight is meant not foreknowledge absolutely, nor that actually such an accident as happened was suspected or apprehended, but that the characteristics of an accident are such that it can be classified among the things that without due care are likely to occur and that due care can prevent."

4. Said court erred in charging the jury:

"The first function, therefore, when you go into the jury room is to consider the evidence as given here by the witnesses, and determine from that evidence: Did the Hudson & Manhattan Railway Co., by its agents in this case, use the high degree of care which the law requires of it to use to protect this plaintiff from injury—her testimony being that she got on to this crowded car (there was no room inside the car; that is, no seats); that the platform itself was crowded; that she stood with her back to this doorway or in this vestibule; and that, as the train lurched, she went forward, caught the saddle, or a part of this doorway, and just as she did so, the trainman closed the door on her fingers."

5. Said court erred in charging the jury:

"Should you, however, determine from the evidence that the railroad company in this case did not, under the circumstances at the time and place, use the high degree

of care which is required of them toward its passengers, then you must make another inquiry, from the facts from the evidence, and that is as to whether this plaintiff—this young girl, Anna—as to whether she herself was guilty of negligence; she being also required to use—I shouldn't say 'also'—she being required to use the ordinary degree of care, skill, and diligence at the particular time and in the particular place, and, of course, under the particular circumstances; and if she was negligent and her negligence in anywise contributed to the happening of this accident, then she would not be entitled to recover, even if the railroad company was negligent itself; because, where both are at fault, the law does not undertake to divide the responsibility, and a person cannot recover in an action of negligence if he or she, as the case may be, were also negligent and the negligence contributed to the happening of the accident."

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged July 6, 1928.

DAVID BERMAN,
Attorney of Plaintiff-Respondent.

State of Demand.

(Filed April 26, 1928.)

[Same Title]

The plaintiff, Kathryn Barney, residing in the City of Jersey City, County of Hudson and State of New Jersey, says that:

1. She is the mother of Anna K. Barney, an infant seventeen years of age.

2. On or about the 21st day of April, 1928, the defendant corporation operated and controlled a certain railroad line between Jersey City and New York City.

3. On that day, the said infant Anna K. Barney, boarded one of the said trains operated by the defendant at one of its stations commonly known as Journal Square, in Jersey City, New Jersey.

4. At the time and place aforesaid, the defendant by its agents and servants, so carelessly and negligently operated the said train as to severely injure the plaintiff's infant daughter, Anna K. Barney.

5. The negligence of the defendant, its agents and servants, consisted of:

a. Failure to properly control door on one of the cars of the said train, thereby striking the said infant, Anna K. Barney.

b. Failure to keep a proper lookout for passengers riding on the said train.

c. Failure to use a high degree of care in operating said train.

State of Demand.

6. By reason of the said injuries, the infant suffered a great deal of pain and agony, and was for a long time confined to her bed and home, and still is confined to her home, and is unable to engage in her lawful work.

7. The infant has been and still is in the care and custody of the plaintiff, and the plaintiff was entitled to and did receive all the wages and earnings of the said infant.

8. As a result of the accident and the injuries sustained by the infant, the plaintiff has been compelled to expend large sums of money in and about attempting to cure the said infant of her injuries, and the said plaintiff, to whom the infant turned over all her earnings, was thereby deprived of this said lawful income from her daughter, Anna K. Barney.

Plaintiff demands as damages, the sum of Five Hundred ($500.00) Dollars.

DAVID BERMAN,
Attorney of Plaintiff.

Transcript of Clerk's Docket.

DISTRICT COURT OF THE CITY OF BAYONNE, N. J.

State of New Jersey,
County of Hudson, } ss.:
City of Bayonne,

No. 51117.

KATHRYN BARNEY,
Plaintiff,

v.

HUDSON & MANHATTAN RAILWAY Co., corporation of N. J.,
Defendant.

In Tort.

David Berman, Plaintiff's Attorney.

Collins & Corbin, Defendant's Attorneys.

Costs.	City.	Al.
Entering Suit		
Summons and Copy	1.50	
Service and Return	.60	
Additional Defendant,		
Mileage,		
Adjournments,		

A summons was issued tested May 25th A. D., 1928, returnable June 7th A. D., 1928, at ten o'clock in the forenoon.

The Sergeant-at-Arms returned the summons as follows, viz.:

I served the within summons May 31st A. D., 1928, on C. K. Corbin agent in charge of principal office and upon service may be made, the defendant, by reading the same to him and delivering to him a copy thereof.

Transcript of Clerk's Docket.

Costs.	City.	Al.	
Filing Offset,			
Trial Fee,	1.50		
Oaths Administered,			
Exhibits Marked,			10
Filing Affidavits,		Robert J. Livingston, Constable.	
Filing Papers,		Plaintiff's demand was filed May 25th A. D., 1928.	
Certifying Papers,			
Copy of Papers,		This cause was called for trial June 7th, A. D., 1928 at ten o'clock in the forenoon.	20
Subpoenas Issued		Adjournment was taken upon application of Plaintiff unto June 21st A. D., 1928, at ten o'clock in the forenoon.	
Serving Subpoenas			
Serving Notices		Further adjournment was taken upon application of plaintiff unto June 22nd A. D., 1928 at ten o'clock in the forenoon.	30
Witness Fees,			
Recording Description of Papers, offered in Evidence,			
Offered on Proof,			
Issuing Order,			
Filing Order			40
Serving Order,			
Scire Facias,			
Venire,			

Costs.	City.	Al.	
Summoning Jury,			June 22nd A. D., 1928, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:
Attending Jury,			
Jury, Fees			On the part of the plaintiff Anna Barney,
Attorney's Percentage,	4.20		Dr. Louis Pyle, Kathryn Barney, sworn.
			Freda Lipshutz, Stenographer, sworn
			On the part of the defendant.
			The Sergeant-at-Arms was sworn to attend said jury, who retire, and after deliberation return and say they find a verdict for the plaintiff in the sum of $84.00
			and so say they all.
Execution			Whereupon it is on this 22nd day of June A. D., 1928, by this Court considered and adjudged that said Kathryn Barney, plaintiff recover against said Hudson & Manhattan Railway Co., a corporation, defendant the sum of Eighty four Dollars and no cents, debt, and Eight Dollars and sixty cents, costs of suit.
Service and Return			
Mileage			
Transcript of Judgment,			

Costs. City. Al.

By consent cases No. 51116 and 51117 be tried together with same jury.

Notice of Appeal filed July 6th, 1928.

Bond of Appeal filed July 6th, 1928.

I, Gustave F. Ruh, Clerk of the District Court of the City of Bayonne, do hereby certify that the above is a true copy of the within record.

July 10th, 1928.

GUSTAVE F. RUH,
Clerk.

Stenographer's Oath.

DISTRICT COURT OF THE CITY OF BAYONNE.

KATHRYN BARNEY,
Plaintiff,

v.

HUDSON & MANHATTAN RAILROAD CO., a corporation of the State of New Jersey,
Defendant.

ANNA K. BARNEY, an infant, by KATHRYN BARNEY, her next friend, and KATHRYN BARNEY, individually,
Plaintiffs,

v.

HUDSON & MANHATTAN RAILROAD CO., a corporation of the State of New Jersey,
Defendant.

Before Hon. Harry B. Dembe, Judge, and a Jury.
June 22nd, 1928.

State of New Jersey, }
County of Hudson, } ss.:

I, FRIEDA H. LIPSCHITZ, solemnly swear before the Almighty that I will correctly and truly interpret the testimony about to be given in this case, and correctly transcribe the same, according to the best of my skill and understanding, so help me, God.

FRIEDA H. LIPSCHITZ.

Sworn and subscribed to before me this 22nd day of June, 1928.

GUSTAVE F. RUH,
Clerk.

Testimony.

DISTRICT COURT OF THE CITY OF BAYONNE.

KATHRYN BARNEY,
Plaintiff,

v.

HUDSON & MANHATTAN RAILROAD Co., a corporation of the State of New Jersey,
Defendant.

ANNA K. BARNEY, an infant, by KATHRYN BARNEY, her next friend, and KATHRYN BARNEY, individually,
Plaintiffs,

v.

HUDSON & MANHATTAN RAILROAD Co., a corporation of the State of New Jersey,
Defendant.

Before Hon. Harry B. Dembe, Judge, and a Jury.

June 22nd, 1928.

APPEARANCES:

For the Plaintiffs, DAVID BERMAN, Esq., by JACOB J. FEINBERG, Esq.

For the Defendant, COLLINS & CORBIN, Esqs., by CHARLES W. BROADHURST, Esq.

Jury sworn.

It is stipulated by counsel on both sides that the case be tried before a jury of eleven.

ANNA K. BARNEY, one of the plaintiffs, being first duly sworn according to law, upon her oath testifies as follows:

Direct examination by Mr. Feinberg:

Q. Miss Barney, how old are you? A. I am seventeen.

Q. Were you on any train any place? A. Yes; I was on the Hudson & Manhattan tube on my way to New York, on the Hudson & Manhattan tubes.

Q. Did you get on the train? A. Yes, sir.

Q. Where did you get on? A. Journal Square.

Q. Before you get on the train, do you have to pass through a guard in the gate, and pay any money? A. Yes, sir; have to put six cents in the box.

Q. Did you do that? A. Yes, sir.

Q. Did you have to go down stairs? A. Yes, sir.

Q. When you got on the train, tell us what happened. A. After the doors shut and the trains started to go, I lost my balance and caught hold of the door, and just then the conductor came out and slammed the door in my fingers.

Q. What did you catch hold of? A. The frame of the door.

Q. Where were you standing? A. On the platform of the train.

Q. Why didn't you sit down? A. Because the train was crowded.

Q. Was it crowded on the platform? A. Yes, sir.

Mr. Broadhurst: Don't be leading.

Q. How many people were there on the platform? A. About fifteen people on the platform, and I was standing right near the door, and I had my face—my back against the frame there.

Q. Against the frame; and then what happened? A. And then, as the train started, I held on, and the conductor came out and slammed the door in my fingers.

Q. Did he say anything to you? A. No; and I said, "Ouch," and he said, "Well, why don't you keep your fingers out of there?"

Q. Is that the way he said it? A. Well, he cursed, too.

Q. And then what did you do? A. I moved back toward the other door and stood there. I got off at Grove Street and went into the ladies' room and washed my hand with cold water.

Q. What did you notice about it? A. It was all swollen and black and blue, and the nails were all discolored underneath.

Q. Did it bleed? A. No; but there were all blood blisters on it.

Q. Then what did you do? A. I went on the next train that came along, and went to 24 Walker Street, where my sister works, and she took me up to the nurse on the sixth floor, and they took an X-ray there.

Q. Was it in the telephone building? A. Yes, sir.

Q. Were you working for them then? A. Yes, sir.

Q. They made an X-ray of your finger? A. Yes, sir.

Q. Of your hand? A. Yes.

Q. And did you see your own doctor then? A. Yes, sir; Dr. Pyle.

Q. How many times did you see him? A. Four times.

Q. Did he treat you? A. Yes, sir.

Q. How long did he treat you? A. He put my

hand in splints, and it was in splints for two and a half or three weeks.

Q. Could you use your fingers after you took the splint off? A. I couldn't bend them for a while.

Q. Did you have pain? A. Not much; I had some.

Q. Is the pain all gone? A. It still hurts a little all around the bone.

Q. Have you anything on the fingers now, the ladies could see? A. No.

Q. Will you walk down and show them the two fingers you were talking about. Show the two fingers with your hand.

(Witness shows fingers to jurors.)

Q. How long were you unable to do your work? How long were you out? A. Five weeks.

Q. How much were you making a week? A. $15.00.

Q. How often do you get pain in that now? You say you have pain in that bone now. Is it constant or on and off? A. Only when we have to push keys; and when I push keys, it hurts me.

Q. It didn't hurt you before this accident? A. No; it didn't hurt me then.

Cross examination by Mr. Broadhurst, as follows:

Q. Anna, where were you going to on this day? A. I was going to New York to see my sister in the telephone building.

Q. This was a Saturday afternoon? A. Yes, sir.

Q. Were you working that day at all? A. Yes, sir; I worked in the morning, and I got off half a day, at eleven o'clock.

Q. You were going to New York to see your sister, you say? A. Yes, sir.

Q. Did you use the Hudson & Manhattan trains at Journal Square quite frequently before this? A. Yes, sir.

Q. Where did you live at the time of the accident? A. On Fairview Avenue.

Q. Jersey City? A. Yes, sir.

Q. And you still live there? A. No, we moved since, and I live on Communipaw Avenue.

Q. Jersey City? A. Yes, sir.

Q. And you had used the various trains of the Hudson & Manhattan tubes? A. Yes; I often used them.

Q. How long had you been working before this occurred? A. I just started this day.

Q. You mean the Saturday? A. Yes.

Q. Saturday morning of this day was the first you started to work? A. Yes.

Q. What had you been doing before that? A. I did work for the telephone company before that.

Q. Where? A. In the same place; but I was dismissed for a while, and then I went back.

Q. How long was it before the accident you were out of employment? A. It was in June of last year.

Q. Of 1927? A. Yes, sir.

Q. And this happened in April of 1928? A. Yes.

Q. So, between June, 1927, and April, 1928, you weren't working? A. No; I was home with my mother.

Q. Can you tell us, Anna, whether the train that you got on had red or green cars? A. Yes; red.

Q. That would be the type of train that comes from Newark to New York, if you know from riding on the tubes? A. Yes.

Mr. Feinberg: If she knows.

Q. I say, do you know if that is the type of train? A. Yes.

Q. Do you recall what part of the train; that is, the front, or the center, or the rear, you got on? A. It was about in the center of the train of the whole line of trains.

Q. Of all the cars, you mean? A. Yes; and after the door was shut I got on, and the train started to go, and I held on.

Q. Do you recall which door you went in? Was it the front door of that car, or the rear door you went in? A. The front door.

Q. This guard that closed the door, as you say, can you tell us what he looked like? A. He was quite an elderly man.

Q. How old would you judge he would be? A. Between fifty and sixty.

Q. Did he wear glasses or not? A. I wouldn't swear to that, but I do think he had white glasses, with a silver brim.

Q. He had white glasses on? A. Yes; and he had a grey mustache.

Q. What was the color of his hair? A. He had his cap on. I think that was grey, too.

Q. Was there anything else about him that you noticed? A. There isn't.

Q. Could you give us some idea as to his height? Was he as tall as I am, or was he taller, or was he shorter? A. No; he wasn't very tall.

Q. Was he my height? A. I don't think he was quite as tall as you.

Q. How heavy a man was he? Was he stouter than I, or what? A. He wasn't very stout; he was just nice.

Q. And had you ever seen him on the trains before, this particular man; ever notice him particularly? A. I never noticed.

Q. And this train that you were going to take—you were going to New York, as I understand? A. Yes, sir.

Q. And about what time of the day was it? A. It was half past two.

Q. In the afternoon? A. Yes, sir.

Q. At that time, April 21st, we didn't have daylight saving yet, did we? A. No.

Q. Did you have any particular time that you had to get to New York? A. No; I didn't.

Q. You say it was about half past two when the accident occurred, you believe? A. Yes, sir.

Q. Now, when you went into the car, you referred to having you back against the same part of the car? A. Yes.

Q. By the way, this door that struck your finger was a connecting door that went from one car to the other? A. Yes, sir.

Q. So that it was the door you would walk through to get from one car to the other? A. Yes, sir.

Q. What part of the car was it you had your back? A. The part with the door. There was a space, about that wide, between that door and the other.

Q. As you go into the door of the Hudson & Manhattan trains, through the door that has the rubber fenders, you have on one side of you a metal space that constitutes the front of the car, of perhaps two or three feet; and the other side is sort of a blank wall? A. Yes, sir.

Q. Which side did you have your back against; the side which has the blank wall, or the side which would be the end of the car? A, The end of the car.

Q. The front of the car? A. Yes.

Q. That is, the vestibule in which you were standing would be about three or three and a half feet wide? A. Yes, sir.

Q. Were there other people standing there, too? A. Yes; there was.

Q. On which side of the car itself were you standing? Were you standing on the side nearest the platform? As you face New York—as the train would go toward New York—were you standing in the vestibule on the right side of the car or the left side of the car? A. As you come in the door, I was standing on the right-hand side.

Q. As you go in the door? A. Yes.

Q. Let's see. A. You come in the door this way, and to the right there is a little space there, wall like, and I was standing right there near the door.

Q. We will assume the train is going toward New York now. A. I will be on the left-hand side.

Q. And your back against the end of the car? A. Yes, sir.

Q. Would that put your left side nearest the connecting door? A. No; my right side.

Q. How far had the train gone, do you think, from the station before you lost your balance? A. It hadn't even gone into the tunnel yet.

Q. It was somewhere between where you got on and the tunnel that goes on into the ground, just beyond Journal Square; is that right? A. Yes, sir.

Q. Did you see this guard up to the time that he closed the door? A. No; he was in the other train.

Q. In other words, he was in the rear of the other car? A. Yes, sir.

Q. And you say that, as the train was going along, you lost your balance?

Mr. Feinberg: She didn't say that. She said the train lurched first.

The Court: This is cross examination.

Mr. Feinberg: Excuse me. Go ahead.

Q. Do I understand, as the train was going along, and before it started to go down the tunnel, you lost your balance? A. It was just when the train pulled out, when the train first started to go.

Q. Which was it: Was it just as the train started off the station, or between the tunnel and the station? A. That is before it comes to the tunnel.

Q. Where was the train when you lost your ballance? Had it started in motion? A. Yes; it was in motion.

Q. How far do you think it had gone before you lost your balance? A. It was just starting.

Q. Do you mean two or three feet or a half dozen feet? A. Just about two or three feet.

Q. What did you do with your hand? A. I held on to the door, like that.

Q. You mean you grabbed it, like that, when you lost your balance? A. Yes.

Q. Before that, where did you have your hand; at your side? A. I had it in my pocket in front of me.

Q. You had your pocketbook with you, and you had that in your hands, in front of your body? A. Yes.

Q. When you lost your balance, you put your right hand over toward the door to catch it? A. Yes. The door was open.

Q. You put your right hand over toward the jamb on the right side, to save your balance? A. Yes, sir.

Q. How quickly did the door close on it? A. I no sooner had my hand on it, and the conductor closed it.

Q. You no sooner had your fingers on the side there, when the conductor closed the door and caught your fingers? A. Yes, sir.

Q. Now, then, how did you get your fingers out? Did he open the door, or did you pull them out? A. No; I couldn't pull them out. It was a few seconds before I could get the nerve to open the door.

Q. He didn't open the door? A. No; he just stood there, like a nut, a dope, or something.

Q. Was he standing in your car? A. Yes.

Q. Where was he when the door closed? A. Right next to me.

Q. In your car? A. Yes.

Q. When had he come in your car? I think you said before he was in the other car? A. He was in the other car. I guess the other train door was shut. The door was open, and he came in our car.

Q. Was he there when the train started? A. No; just when it pulled out he came in.

Q. You lost your balance, and he came into your car and closed the door as the train started? A. Yes, sir.

Q. How quickly did it all happen—very quickly? A. Yes, sir.

Q. So the closing of the door, and you losing your balance, and grabbing this jamb, are almost simultaneously? A. Yes, sir.

Q. You say your fingers were in the jamb for a couple of seconds before you say you got courage enough to open the door? A. Yes, sir.

Q. What was he doing at the time? A. He just stood there.

Q. Was he looking at you? A. I screamed, and he turned around, and as he turned around, I had the door open.

Q. He had his back toward you? A. He was facing the door, and as he shut it, I screamed. Then he turned around. He didn't pay a bit of attention. I opened the door myself.

Q. Were your fingers in there? A. Yes; but I only opened it a little bit, and let it slam again. It stayed open, and he closed it, and he said, "You should keep your fingers out of there."

Q. How did he know? A. I called him a dope, and he saw that my fingers were taken out.

Q. The first time he knew your fingers were caught was when you called him a dope? A. He saw it before.

Q. He didn't make any effort to help you? A. No.

Q. Were there any men? A. There was a lady with children. I guess there were men, too.

Q. Quite a few people? A. Yes, sir.

Q. Nobody attempted to open it? A. No. Some lady asked me if I hurt myself, and I said, "No, not much."

Q. You said he said you should keep your fingers out of the door. Did any men in the car say anything to him? A. No. Then he went in the other car.

Q. In back or in front of it? A. Where he was before.

Q. He had been in front of the car you had been riding in? A. Yes, sir.

Q. Did you take his number? A. No; I didn't.

Q. How long after the accident was it that you complained, or made any complaint? A. Well, as soon as I got home, I told my mother, and we called up the Hudson & Manhattan, and they told us to call up some place else.

Q. Whom or where did you call; do you know?

A. I forgot the number. Then they gave us a number to call up. It was a Cortlandt number, I think, and we called them up, and then they gave us another number.

Q. When was that? A. This was half past three, when I got home.

Q. When you went to New York and had the nurse look at your fingers, what did you do—stay in New York? A. No; I came home.

Q. What time? A. Half past three or four o'clock.

Q. When was this when you called these numbers you referred to? A. Right after I got home.

Q. Do you know whom you spoke to? A. I do not.

The Court: Did you do the calling, or your mother?

A. My mother called up first, and then she went out in the kitchen. She called up three places, and the third place gave her another place to call up, and my mother said, "Don't bother; maybe Mr. Beerman can get the right party on the 'phone."

Q. When was it you saw the doctor, Dr. Pyle? A. On Wednesday. I went Tuesday. Monday night I was going out and couldn't go. Tuesday I went to his house, and his wife said he wasn't home and wouldn't be home until late. So she sent me to his father's house on Bergen Avenue, and his father said he wouldn't meddle with his son's work.

Q. Then you first saw Dr. Pyle on Wednesday following the accident? A. Yes.

Q. Is your father dead? A. Yes, sir; my father is dead twelve years.

Q. There is one thing I haven't quite clear in my mind yet, Anna, and that is, the side of the car that you were standing in in this vestibule. Assuming that the train was going toward New York, the way it was going, would you be in the vestibule as you face New York? Now, would you be in the vestibule on the right-hand side of the car or the left-hand side? A. My left side was nearest to the door as you walk in.

Q. But there are two platforms through which you can get on the train? A. On Journal Square you can get in only through the one.

Q. Which side of the train would that door be on as the train faces New York; on the left or the right? A. Facing New York?

Q. Yes? A. On the left-hand side.

Q. When you went in the door, where did you stand in the vestibule; right near to that door? A. Yes, sir.

Q. And you put your back against the wall? That would be the front of the car? A. No; that would be just like the rear end of the car.

Q. You say the rear end of the car? A. Yes.

Q. In that vestibule, Anna, one side of that vestibule has little round windows with bars across it, out of which the motorman would look if he were running the train. Has the window glass in it? A. I didn't notice.

Q. One side is a blank wall, alongside of which the seats are? A. Yes.

Q. Which side did you have your back against; the wall part where the seats are, or the other part? A. The wall part where the seats are; but there isn't any window in the train. There is only the door that I slammed my fingers in. I was on that side of the platform.

Q. Looking at the diagram which I show you, Anna, this rounded end, of course, represents the front of the car; and these open spaces on each side would be the front door through which you go to the platform of the car. A. I was in the back part; this part of the car. I say that was the beginning of the train going that way.

Q. You were in the rear of the car? A. Yes, sir.

Q. Suppose we turn it that way. This would be the rear of the car, then. We will assume this is the doorway, the entrance that goes from one car to the other. This is the entrance doorway in here, in which you go from one car to the other. On each side of that doorway there is a little vestibule. A. Yes.

Q. Which side did you have your back against? A. Right there.

Q. That would be the end of the car? A. Yes, sir.

Q. Now, were you in the rear of that car or in the front of the car? A. The last part of the car—the rear of the car.

Q. The rear of the car in the direction in which the train was going. You were up against this side here.

(Diagram marked for identification, "D-1.")

Q. You say, Anna, that where you boarded the train you boarded it from the left-hand side of the car? A. Yes, sir.

Mr. Broadhurst: That's all.

Mr. Feinberg: Was the train crowded in the body of the car as well as on the platform? A. Yes; it was.

LOUIS PYLE, witness on behalf of plaintiffs, being first duly sworn according to law, upon his oath testifies as follows:

Direct examination by Mr. Feinberg:

Q. Dr. Pyle, you are a practicing physician of New Jersey, practicing in Jersey City? A. Yes, sir.

Q. On or about April 24th or 23rd, did you see Anna Barney, the last witness on the witness stand? A. Yes.

Q. And did you subsequently get from her, or through her, this X-ray, which is labeled, "New York Telephone Co."? A. Yes.

Q. And after examining the girl, did you positively identify that X-ray as the X-ray of her fingers? A. Yes.

Q. And what was the matter with her hand? A. A fracture of the small bone of the hand, of the middle and the fourth fingers of the right hand.

Q. You mean two fingers? A. Yes; and contusions and bruises, with evidences of blood underneath the nail and on the surface of the nail.

Q. Was that the condition on Wednesday when you saw it? A. Yes.

Q. Did she tell you when it happened? A. I forget when it happened, but she said a day or two before she had her hand caught.

Q. Did she tell you where? A. Yes; the tube train.

Q. When did she have the X-ray? A. I think she brought it in that night.

(Mr. Feinberg offers the X-ray in evidence, marked "P-1.")

Q. How many times did you see her? A. I saw her four times in the office; the last one on May 10th.

Q. Did she show you a report from the telephone company? A. I forget whether she showed me a report.

Q. Did you see that report from the telephone company? A. I wouldn't need that. I can read the plate myself.

Mr. Broadhurst: There isn't any dispute, Mr. Feinberg, but what that plate shows a fracture of the two bones the doctor described.

Q. Doctor, you have seen her hand today? A. Yes.

Q. And you have seen her two nails; one is still discolored? A. Yes.

Q. In your opinion, how long will she have that condition until it heals up? A. The nail will be fine in a few weeks. The nail because of the injury had to be lost, and a new one will take its place.

Q. How long will it take to have that normal? A. In three or four weeks.

Q. Won't that ever come off? A. The shell at the tip will come off, but a new nail will be in in three or four weeks.

Q. You heard her say whenever she presses keys of the telephone company, she has pain? A. Yes. That is usual in such cases. It will be two months, maybe more, greatly decreasing until lost.

Q. It might be more than two months?

Mr. Broadhurst: Please don't force the doctor.

A. It might, to get her nail.

Q. What is the usual time it takes? A. Maybe a couple of months.

Q. What was your charge? A. I charged her

$2.00 a visit, four times in the office. She is one of my patients, and she hasn't much money.

Mr. Broadhurst: There isn't any permanent disability?

A. I don't think so.

Q. Would you say it would be reasonable for her to be out five weeks? A. When I discharged her on May 10th, I said she wouldn't be able to do work two or three weeks.

Q. Five weeks would be a reasonable time? A. Yes.

KATHRYN BARNEY, one of the plaintiffs, being first duly sworn according to law, upon her oath testifies as follows:

Direct examination by Mr. Feinberg:

Q. You are the mother of Anna Barney? A. Yes.

Q. Your husband is dead? A. Yes.

Q. And whenever Anna worked, did she turn her wages over to you? Yes.

Q. Do you remember this day, April 21st, when she came home? A. Yes.

Q. And showed you her hand? A. Yes.

Q. How long was she out of work before that?

Mr. Broadhurst: I cannot seriously dispute that.

Q. Did you spend any money for medicine? A. Not for medicine, no; just for treatment.

Q. You gave the doctor $8.00? A. Yes.

Q. Did you spend $1.00 for medicine? A. For X-ray.

Mr. Feinberg: It usually costs $10.00. We won't say that is high.

Motion for Nonsuit.

Mr. Broadhurst: If your Honor please, I wish to move for a nonsuit in behalf of the defendant, because it seems to me that the evidence in the case does not disclose any negligence on the part of the defendant. The testimony is that this young girl, standing with her back against the rear of the car, loses her balance as the train is leaving the station—a matter of several feet; and that, simultaneously with the losing of her balance, she passed her hand to the side for something to support herself, gets her fingers against the jamb of the door, and the door is closed.

It seems to me on that set of facts there is no evidence of any negligence, certainly, in the operation of the train.

The Court: You just left out one of the premises, that when the train lurched she lost her balance.

Mr. Broadhurst: Assuming that that is so, if your Honor please, I don't understand that the mere fact that a train lurches constitutes negligence. The United States Supreme Court has just recently held that the mere lurching of a train is not evidence of any negligence. A train, as any vehicle propelled by power, has a certain amount of lurching and jarring and jolting. The mere jolting or jarring or lurching of a train, starting in motion, is not evidence of negligence.

The Court: I will deny the motion. It is a question for the jury.

Mr. Broadhurst: Exception.

The Court: I will allow an exception.

MAX WEINBERG, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

Direct examination by Mr. Broadhurst:

Q. Mr. Weinberg, what is your position with the Hudson & Manhattan Railroad Co.? Where do you live, Mr. Weinberg? A. 147 Water Street. New York City.

Q. What is your position with the Hudson & Manhattan Railroad Co.? A. Train starter.

Q. Where are you located? A. Hudson Terminal Building.

Q. How long have you worked for the company? A. Close on to twenty years.

Q. Were you working April 21st, 1928? A. Yes, sir.

Q. As part of your work, do you have anything to do with the assignment of the men on the various runs of the trains that run between New York and Newark and from Newark to New York? A. Yes, sir.

Q. And on April 21st, 1928, were you personally acquainted with the various men that operated the trains, such as conductors and trainmen, etc.? A. Yes, sir.

Q. Now, do you know whether the Hudson & Manhattan Railroad Co. had in its employ at that time a man operating its trains, who would answer to this description: A man between fifty and sixty years of age, probably not quite as tall as I am, not stout or thin, but just nice; grey mustache, probably grey hair, wore glasses with a sort of a metal rim? A. Yes; we have a man.

Q. Now, what is that man's name? A. Croghan.

Q. Spell it for us, will you. A. C-r-o-g-h-a-n.

Q. Is Mr. Croghan in court? A. Yes.

Q. Have you any other man answering that description who was working then? A. We have a conductor, Schwetze.

Q. Spell that. A. S-c-h-w-e-t-z-e.

Q. Do you keep records of the time that the various men are working on the various days? A. Yes, sir.

Q. Did you keep that on April 21st, 1928? A. Yes, sir.

Q. Have you looked up those records and brought them with you? A. I have.

Q. Can you tell us where Schwetze, what time Schwetze started to work on that day?

Mr. Feinberg: Who keeps the records?

Q. Do you keep the records, do you? A. I do. We keep the carbon copy and the original.

Mr. Feinberg: Is the record in your handwriting now?

A. Yes, sir.

Q. Are these the records that you referred to? A. That's it.

Q. The time the men would be on? A. That is in connection with the work they do from day to day.

Q. Would that record tell us what time Schwetze would be on duty that time? A. This would tell you the run Schwetze would be on duty.

Q. His run? A. His first run.

Q. Will you turn to it? A. Yes.

Q. What does it show? A. It shows that vacancy filled by Schwetze, and substitutes Holland.

Q. What time? A. It doesn't show the time of starting here, but the run, indicating run "O." I know that the run starts at a certain time.

Mr. Feinberg: I object to that. He produces a record to show certain time Schwetze was not working, and he said he cannot tell what time he was. I object to it.

A. I can tell you the time.

Q. This record shows you what time? A. Shows the run Schwetze worked on duty in question.

Q. That is designated by some symbol, is it? A. By an initial.

Q. What is that initial? A. Initial "O."

Q. Do you know from your experience with the company at what time that run "O" starts, and where it starts? A. I do.

Q. What time does it start, and from where? A. Starting time, 3:27, leaving Hudson Terminal at 3:37, westbound.

Q. A. M. or P. M.? A. P. M.

Q. Is that record which you show here on Schwetze on run "O"? A. Yes; that was his starting time.

Q. Does your record show where Mr. Croghan was working at that time? A. At the time? Yes.

Q. Will you turn to that for us? Does Schwetze wear glasses, by the way? A. I am in doubt. I don't think he does.

Q. Well, Croghan is here; I will call Croghan.

Cross examination by Mr. Feinberg, as follows:

Q. That record doesn't show that 3:37 run you are talking about, does it? A. No.

JOHN CROGHAN, witness on behalf of defendant, being first duly sworn according to law, upon his oath testifies as follows:

Direct examination by Mr. Broadhurst:

Q. Mr. Croghan, you are employed by the Hudson & Manhattan Railroad Co.? A. Yes, sir.

Q. And you are between fifty and sixty, are you? A. Yes, sir.

Q. Now, how long have you worked for the company? A. Seventeen and a half years.

Q. Can you tell us, on April 21st, 1928, of this year, where you were working, about 2:30 P. M.? A. I was in the loop yard at Manhattan Transfer, shifting cars at that time from Park Place down to the Transfer.

Q. The loop yard is just outside of Manhattan Transfer? A. Between Manhattan Transfer and Harrison.

Q. Were you operating a train going eastbound out of Summit Avenue at 2:30 that day? A. No, sir; I wasn't on that road.

Q. Do you recall any such occurrence of a young lady having her hand caught on a connecting door? A. No, sir.

Cross examination by Mr. Feinberg, as follows:

Q. You don't wear glasses? A. Not when working.

Q. You haven't a grey mustache? A. No.

Q. You are not as tall as he? (Witness stands up.)

Q. You are a little shorter, aren't you? That's all.

Mr. Broadhurst: I wish to renew my motion for a direction, on the same ground, which I assume your Honor denies.

The Court: Motion denied.

Mr. Broadhurst: Exception.

Court's Charge.

The Court: Ladies of the Jury: By consent of counsel in this case, you are called upon to hear and determine two cases upon the same evidence and at the same time; the first being that of Anna K. Barney, who is an infant, by Kathryn Barney, her next friend, against the Manhattan Railway Co., in which Anna Barney seeks to recover damages from the Hudson & Manhattan Railway Co., by reason of what she alleges to have been the negligence of the defendant company, on or about the 21st day of April, 1928, and through which negligence she alleges she sustained injuries of which she complains.

The second suit is that of Kathryn Barney, who is the mother, also against the Hudson & Manhattan Railway Co., in which she seeks to recover damages which she alleges she sustained by reason of the negligence of the defendant company toward her daughter.

I, of course, realize that you ladies as jurors are new in the work and are wondering at what it is all about or what is expected of you; so I might say right at the outset that jurors are the judges of the facts. In other words, where a dispute or a controversy arises on a question of fact, the jury is called upon to determine that question of fact; and, finding the facts, the only other function that remains is to apply the rules of law, as given by the Court, to the facts after you find them.

In the remarks of counsel to you while summing up, something was mentioned with regard to the amount that was recovered in other courts or by other persons, and I want you to disregard that, because you ladies will remember that at the outset I called your attention to the fact

that you are called upon to decide the cases between Anna K. Barney against the Hudson & Manhattan, and Kathryn Barney against the Hudson & Manhattan Railway Co.; and you are in nowise concerned with what did happen or may have happened or should happen in some other court or some other case. You are only concerned with what happened in this particular case.

This action is founded upon negligence. Now, negligence has been defined, or is defined, as such a failure or omission by a legally responsible person to use a degree of care, skill, or diligence, which it was his or its legal duty to use, for the protection of another person from injury; taking into consideration the time and the place and the happening of the act; and which said failure or omission is the proximate cause of the injury to the person to whom the duty is due.

In this case the suit is against what is known in law as a common carrier—a railroad—and the degree of care which the law requires of a railroad is that it should exercise a high degree of care for the safety of its passengers. To give you that rule in the language of the court, a common carrier of passengers must use a high degree of care to protect him from danger that foresight cannot anticipate. By foresight is meant not foreknowledge absolutely, nor that actually such an accident as happened was suspected or apprehended, but that the characteristics of an accident are such that it can be classified among the things that without due care are likely to occur and that due care can prevent.

The first function, therefore, when you go into the jury room is to consider the evidence as given here by the witnesses, and determine from that

evidence: Did the Hudson & Manhattan Railway Co., by its agents in this case, use the high degree of care which the law requires of it to use to protect this plaintiff from injury—her testimony being that she got on to this crowded car (there was no room inside the car; that is, no seats); that the platform itself was crowded; that she stood with her back to this doorway or in this vestibule; and that, as the train lurched, she went forward, caught the saddle, or a part of this doorway, and just as she did so, the trainman closed the door on her fingers.

That is substantially her testimony, and I might say to you right now that if I in my charge should refer to any part of the testimony, or if the lawyers did, and your recollection of the testimony as given by the witnesses is different from any statement that I may make or that the lawyers have made, then use your own recollection, because that is what should govern you in this case, and not anything that I may say or the lawyers may say with regard to it.

Now, then: If the defendant company did use the high degree of care which the law requires of them to use to protect this passenger, then, of course, they were not guilty of any negligence and your verdict could be reached at that point, that you find in favor of the defendant and against the plaintiff.

Should you, however, determine from the evidence that the railroad company in this case did not, under the circumstances at the time and place, use the high degree of care which is required of them toward their passengers, then you must make another inquiry, from the facts from the evidence, and that is, as to whether this plaintiff—this young

girl, Anna—as to whether she herself was guilty of negligence; she being also required to use—I shouldn't say "also"—she being required to use the ordinary degree of care, skill, and diligence at the particular time and in the particular place, and, of course, under the particular circumstances; and if she was negligent and her negligence in anywise contributed to the happening of this accident, then she would not be entitled to recover, even if the railroad company was negligent itself; because, where both are at fault, the law does not undertake to divide the responsibility, and a person cannot recover in an action of negligence if he or she, as the case may be, were also negligent and the negligence contributed to the happening of the accident.

But, if you find that the plaintiff, Anna, was not negligent, and that the defendant company was negligent, then she would be entitled to recover; and she would be entitled to recover in her case for the pain and suffering which she had as a direct result of this accident, and such pain and suffering as in all probability she is likely to have in the future by reason of this accident, and you will probably recall her testimony—that it required a period of four or five weeks, I think five weeks, that she was out of work by reason of this accident; and that she still has pain in her fingers at the present time, and the doctor says that it is probable that it may continue for some time in the future.

But, in her case all she would be entitled to recover would be for the pain and suffering directly resulting from this accident, not for any loss of wages, and not for any payments to the doctor, because, she being an infant, her wages would

belong to the parent, and any expenditures necessary would have to be paid by the parent; so that she in her case, if entitled to recover, cannot recover for those items, but only for pain and suffering —those she had and is now having, and such pain and suffering which she in reasonable probability will suffer.

The burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence if the defendant was negligent; and by the greater weight of the evidence is meant the quality of the evidence rather than the quantity—the weight that it has with you for probability, for likelihood, for veracity, and for things of that kind.

The burden of proving contributory negligence is upon the defendant. The defendant must satisfy you, by the greater weight of the evidence, that the plaintiff was guilty of negligence; that her negligence in this case contributed to the happening of the accident, if and before you can determine that the plaintiff is not entitled to recover by reason of contributory negligence, if the defendant has been negligent.

Now, in the second case that you have—that of the mother—your deliberations will, of course, be controlled entirely by what you find in the first case; for, if you should find in the first case that the plaintiff, that Anna is not entitled to recover any damages, then, of course, the mother in the second case would likewise not be entitled to recover. If, on the other hand, you find in the first case that the plaintiff is entitled to recover, then it necessarily follows that in the second case the mother would be entitled to recover, and she would be entitled to recover such damages as she sustained by reason of this accident, in loss of wages, and

in effecting a cure for her daughter, and such money as in all reasonable probability she may still be called upon to expend in effecting the cure.

If you find in favor of the plaintiff, your verdict will be that you find in favor of the plaintiff and against the defendant, and fix the damages at whatever sum you may find due.

If you find in favor of the defendant, your verdict will be that you find in favor of the defendant and against the plaintiff.

You have two cases and two verdicts—one in each case.

Mr. Broadhurst: Exception to that part when you said: "Degree of care that the law requires; that it should exercise a high degree of care for the safety of passengers"; also, when you instructed the jury that the first function is to determine from the evidence if the Hudson & Manhattan Railway Co., by its agents in this case, used the high degree of care which the law requires to protect the plaintiff.

Also, that part of your Honor's charge where you said that the plaintiff was required to use ordinary degree of care, in laying down the degree of care as to contributory negligence.

The Court: What did I say? I never said "high degree of care."

Mr. Broadhurst: I don't think "ordinary" is correct.

I ask to take exception to that part of your Honor's charge where you say, referring to the plaintiffs again, "If you find that the plaintiff was negligent and the defendant was negligent, she would not be entitled to recover."

In the mother's claim, damages for such money as she may be expected to spend in the future.

The Court: You may have them.

Mr. Feinberg: I take an exception on the ground that the Judge charged contributory negligence, when it was not proved, or any ground of contributory negligence set up.

The Court: How would you file it?

Mr. Feinberg: You would set it up in your defense or summing up. Was any allegation made of contributory negligence?

Certification of Trial Judge.

To the Chief Justice of the Supreme Court of New Jersey:

I do certify that the foregoing transcript, made by the stenographer designated by me and sworn, as the minutes and proceedings of the trial of the cases of Kathryn Barney, plaintiff, *vs.* Hudson & Manhattan Railroad Co., a corporation of the State of New Jersey, and Anna K. Barney, an infant, by Kathryn Barney, her next friend, and Kathryn Barney, individually, plaintiffs, *vs.* Hudson & Manhattan Railroad Co., a corporation of the State of New Jersey, at the District Court of the City of Bayonne; to be used on the appeal herein.

HARRY B. DEMBE,
Judge.

Dated July 3, 1928.

Opinion of Supreme Court.

(Filed March 8, 1929.)

NEW JERSEY SUPREME COURT.

Nos. 408-409, October Term, 1928.

ANNA K. BARNEY, an infant, by Kathryn Barney, as her next friend,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

KATHRYN BARNEY,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

Submitted October 13, 1928; Decided March 7, 1929.

SYLLABUS

1. When a passenger in the charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, then the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised.

2. The care due from a common carrier and its servants toward passengers in their charge is a

high degree of care to protect them from danger that foresight can anticipate.

3. By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather than the characteristics of the accident are such that it can be classified among events that without due care, are likely to occur, and that due care would prevent.

4. The crowding of a railroad car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate and employ care to avert.

5. The plaintiff, a passenger, entered a car of the defendant railroad's train by a side door near the end of the car. There were no vacant seats, and the car, and the vestibule at the front and which she had entered, were crowded with standing passengers, and she was obliged to stand. She stood with her back against the front end of the car alongside of the open intercommunicating door through which persons pass from one car to another. When the train started she lost her balance and grabbed the jamb of the intercommunicating door. "Just then" the conductor came through that door from the car ahead and "slammed" the door on plaintiff's fingers, inflicting the injury for which suit was brought. When the conductor slammed the door he was standing "alongside" of the plaintiff and was "facing" the door which he was closing. These facts, testified to by the plaintiff, were uncontradicted. Without calling the conductor as a witness, and without producing any evidence relating to the negligence of the conduc-

tor, the defendant moved for nonsuit and for a directed verdict in its favor upon the ground that there was no evidence of negligence on the part of the defendant;

HELD, that such motions were rightly denied.

On Appeal from the District Court of the City of Bayonne.

Before Justices TRENCHARD, KALISCH and LLOYD.

For the appellant, COLLINS & CORBIN (CHARLES W. BROADHURST, of Counsel).
For the appellees, JACOB FEINBERG and DAVID BERMAN.

The opinion of the Court was delivered by TRENCHARD, J.:

These appeals bring up for review judgments entered in the District Court of the City of Bayonne in favor of the plaintiffs-appellees (hereinafter called the plaintiff), and against the defendant-appellant (hereinafter called the defendant).

In the first action, the plaintiff Anna K. Barney, a minor 17 years old, sues to recover for personal injuries sustained while a passenger on one of defendant's trains at or near the Journal Square Station, Jersey City. She sustained a fracture of the small bone of the middle and fourth fingers of the right hand, caused by her fingers being squeezed between the jamb and the door of a car in one of defendant's trains, when the conductor operating the train slammed the door. The second action is brought by her mother and seeks to recover for the loss of services and expenses incident to the injuries sustained by her daughter, the mother being a widow.

The cases were tried together by consent and resulted in verdicts in favor of both plaintiffs.

The defendant argues but one point, namely, that the trial court erred in refusing to nonsuit the plaintiff and to direct a verdict for the defendant when thereunto moved, on the ground that there was no evidence of any negligence on the part of the defendant.

The evidence from which negligence is to be inferred, if it is to be inferred, is that given by the plaintiff. That uncontradicted testimony discloses the following matters of fact:

The plaintiff, Anna K. Barney, on the day in question, entered the defendant's station at Journal Square, Jersey City, paid her fare and boarded one of the defendant's trains. She entered one of the cars by a side door near the end of the car. There were no vacant seats. The car, and the vestibule at the front and which she had entered, were crowded with standing passengers, and she was obliged to stand. She stood with her back against the front end of the car alongside of the open intercommunicating door through which persons pass from one car to another. When the train started she lost her balance and grabbed the jamb of the open intercommunicating door. "Just then" the conductor came through that doorway from the car ahead and "slammed" the door on plaintiff's fingers, inflicting the injury for which suit was brought.

Now, the rule is that when a passenger in the charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, then the jury have the

right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised. Whalen *v.* Consolidated Traction Co., 61 N. J. L. 606; McPherson *v.* Hudson &c. R. R. Co., 101 N. J. L. 410.

In the case at bar the evidence, which we have recited in effect, was uncontradicted. No affirmative testimony was produced by the defendant tending to show that the slightest degree of care was used by the servant (conductor) of the defendant corporation. The defendant failed even to produce the conductor who perchance might have been able to give some testimony to show due care on his part in the operation of the train.

We think that the uncontradicted testimony of the plaintiff tended to show that she was injured through an act of the defendant's servant which might have been prevented by due care, and hence the jury had the right to infer negligence, since the defendant failed to prove that due care was exercised.

The defendant argues that the evidence of the plaintiff "shows the losing of her balance and placing of her fingers on the jamb of the door occurred at the same instant the guard (conductor) came into the car and closed the door." No doubt these several incidents followed one another "quickly" or "almost simultaneously," as the plaintiff admitted on cross-examination, but it does not follow conclusively that they occurred at the "same instant." On the contrary it is apparent that they did not. The question remains whether the evidence justifies the inference that the act of the conductor which resulted in the injury might have been prevented by due care on his part. We think that it did. The care due from

a common carrier and its servants toward passengers in their charge is a high degree of care to protect them from danger that foresight can anticipate. Whalen *v.* Consolidated Traction Co., 61 N. J. L. 606; Hansen *v.* North Jersey St. Ry. Co., 64 N. J. L. 686. By foresight is meant not foreknowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care would prevent. The crowding of a railroad car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate and employ care to avert. Hansen *v.* North Jersey St. Ry. Co., 64 N. J. L. 686. Bearing in mind these principles, and all the circumstances, including the fact that the plaintiff was standing on the crowded platform alongside of the jamb of the door, that she had lost her balance with apparently no means of support except the door jamb, all of which was within the range of the conductor's vision when he slammed the door, it seems not irrational for a jury to infer, in the absence of any explanation on his part, that he knew, or in the exercise of due care should have known of the liability of the plaintiff to injury from his act, and that he did not employ due care to avert that danger. See also cases collected in note in 18 Amer. & Eng. Ann. Cases, P. 1164.

The motions to nonsuit and direct a verdict were therefore properly denied, and the judgment will be affirmed, with costs.

Order of Affirmance of Judgment.

(Filed March 21, 1929.)

NEW JERSEY SUPREME COURT.

NOS. 408-409, OCTOBER TERM, 1928.

ANNA K. BARNEY, an infant, by Kathryn Barney, as her next friend,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

KATHRYN BARNEY,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from Bayonne District Court.

Order of Affirmance of Judgment and Remittitur.

This cause having been duly argued at the October Term, 1928, of this Court by Messrs. Collins & Corbin, of counsel for the defendant-appellant and Jacob Feinberg and David Berman, of counsel and Attorney for the Plaintiffs-Appellees, and the Court having considered the same, and finding no error in the record or proceeding in the Bayonne District Court;

It is thereupon, on this 21st day of March, 1929, ORDERED and ADJUDICATED, that the judgment of the Bayonne District Court, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Bayonne District Court

to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 21, 1929.

On motion of

DAVID BERMAN,
Attorney for Plaintiffs-Appellees.

FEINBERG AND FEINBERG,
Of Counsel with Plaintiffs-Appellees.

Notice and Grounds of Appeal.

(Filed April 3, 1929.)

NEW JERSEY SUPREME COURT.

ANNA K. BARNEY, an infant, by Kathryn Barney, as her next friend,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

KATHRYN BARNEY,
Plaintiff-Appellee,
v.
HUDSON & MANHATTAN RAILROAD COMPANY,
Defendant-Appellant.

On Appeal from Supreme Court.
Notice and Grounds of Appeal.

To

DAVID BERMAN, Esq.,
Attorney of Plaintiffs-Appellees.

SIR:

TAKE NOTICE that the defendant-appellant ap-

peals to the Court of Errors and Appeals from the whole of the judgment entered in the above causes, on the following ground:

The Supreme Court erred in refusing to reverse the judgment of the Bayonne District Court, for one or more of the reasons advanced before the Supreme Court for such reversal.

Dated April 1, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged April 8, 1929.

DAVID BERMAN,
Attorney of Plaintiffs-Appellees.

New Jersey Court of Errors and Appeals

ANNA K. BARNEY, an infant, by Kathryn Barney, as her next friend, *Plaintiff-Respondent,* *v.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appellant.*	In Tort. On Appeal from New Jersey Supreme Court.
KATHRYN BARNEY, *Plaintiff-Respondent,* *v.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appellant.*	

BRIEF OF COLLINS & CORBIN IN BEHALF OF DEFENDANT-APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Supreme Court affirming the judgment of the District Court of the City of Bayonne in favor of the plaintiffs-respondents (hereinafter called the plaintiff), and against the defendant-appellant (hereinafter called the de-

fendant) (p. 56). In the first of the above entitled actions the plaintiff, Anna K. Barney, a minor, sues for personal injuries sustained April 21, 1928, while a passenger at the Journal Square station, Jersey City. The injuries were caused by her fingers being squeezed between the jamb of the door of a car in one of the defendant's trains. The second action is brought by her mother who seeks to recover for the loss of services and expenses incident to the injury sustained by her daughter.

The defendant demanded a trial by jury in both actions, and the cases were consolidated for trial by consent. The trial resulted in a verdict in favor of the minor for $300.00 and in favor of the mother for $84.00 (p. 3, line 30; p. 9, line 20; p. 18, line 30 to p. 19, line 10). The record of the trial taken stenographically by an appointee of the Court, certified by the Trial Judge together with a certified copy of the transcript prepared by the Clerk of the Court, constituted the state of case. Appeal was taken by the defendant to the New Jersey Supreme Court, which affirmed the judgment in an opinion of the October Term, 1928, written by TRENCHARD, J. (pp. 50, *et seq.*). It is from the judgment of affirmance of the Supreme Court that the present appeal is taken (p. 56).

(2)

Grounds of Appeal.

There is but one ground of appeal, namely, that the Supreme Court erred in giving judgment for the plaintiffs-respondents instead of for the defendant-appellant, for some one or more of the grounds urged in the Supreme Court (pp. 57-58).

The specification of determinations and directions appealed from argued in the Supreme Court,

raised the single question of whether or not the Trial Judge erred in refusing to nonsuit the plaintiff or to direct a verdict in favor of the defendant when thereunto moved on the ground that there was no evidence of any negligence on the part of the defendant which was the proximate cause of the injury sustained (p. 2, lines 15-30; p. 11, lines 15-30).

(3)

Prefatory Statement.

The brief for the defendant in the Supreme Court fully covered the question involved and we shall, therefore, present it verbatim to this Court, and at the conclusion we shall discuss the reasons advanced in the opinion of the Supreme Court for affirming the judgment, for the purpose of indicating wherein we think the Supreme Court erred.

(4)

BRIEF OF THE ARGUMENT.

I.

The Trial Court erred in refusing to nonsuit the plaintiffs or direct a verdict in favor of the defendant on the ground that there was no evidence of any negligence on the part of the defendant which was the proximate cause of the injury.

The facts in the case are not in dispute. They were testified to by the plaintiff Anna K. Barney as the only witness. She stated she was 17 years of age and on the day in question entered the defendant's station at Journal Square, Jersey City,

paid her fare and boarded one of the defendant's trains. When asked what happened she said:

> "Q. When you got on the train, tell us what happened? A. After the doors shut and the train started to go, I lost my balance and caught hold of the door, and just then the conductor came out and slammed the door in my fingers" (p. 22, lines 1-30).

She frequently used the Hudson & Manhattan trains previous to the date of the accident (p. 25, lines 1-10). The door which struck against her fingers was one of the intercommunicating doors, that is, one through which a person passes to go from one car to another car of the train (p. 27, lines 20-30). When she entered the car at the front end there were a number of people standing and she stood with her back against the front end of the car (p. 27, lines 30-40), which placed her right hand nearest to the intercommunicating door. She lost her balance just as the train was starting. It had only moved two or three feet. Before that she had her hands in front of her. Upon losing her balance she threw her right hand to catch hold of something, and the fingers caught the jamb of the door. At the same instant, the door, which was being closed by the guard, came in contact with the jamb and also her fingers (p. 20, lines 10-40). Previous to the train starting, the guard had been in the car ahead (p. 28, lines 30-40). He had just closed the intercommunicating door of the car ahead and had stepped into the car in which the plaintiff was standing, closing that door as he came in and with his back toward the plaintiff, when the accident happened. In this respect the plaintiff testified:

> "Q. Where was he (the guard) when the door closed? A. Right next to me.

"Q. In your car? A. Yes.

"Q. When had he come into your car? I think you said before he was in the other car. A. He was in the other car. I guess the other train door was shut. The door was open, and he came in our car.

"Q. Was he there when the train started? A. No; just when it pulled out he came in.

"Q. You lost your balance, and he came into your car and closed the door as the train started? A. Yes, sir.

"Q. How quickly did it all happen—very quickly? A. Yes, sir.

"Q. So the closing of the door, and you losing your balance, and grabbing this jamb, are almost simultaneously? A. Yes, sir" (p. 30, lines 1-40).

There was absolutely no evidence of any negligence on the part of the defendant in the operation of the train which caused the plaintiff to lose her balance. The plaintiff's attorney in stating an objection to the cross examination, said that the plaintiff had testified the train lurched (p. 28, lines 40-42). The Trial Judge, in the denial of the motion for nonsuit, stated that the plaintiff testified the train lurched and she lost her balance (p. 38, lines 20-25). Again in his charge to the jury he stated that the testimony was, the plaintiff lost her balance due to a lurch of the train. We challenge our adversary to point out in the record, any place where the plaintiff, who is the only witness, testified that anything was unusual about the operation of the train. Even the ordinary lurching of a train would not constitute negligence, though the plaintiff lost her balance as a result of it.

At the conclusion of the plaintiff's case (pp. 37 and 38), and of the entire case (p. 42), the defendant moved for a nonsuit and a direction of a verdict respectively, on the ground that there was no evidence of any negligence which was the proxi-

mate cause of the plaintiff's injury. These motions were denied and exceptions to the rulings noted. The specification of determinations and directions appealed from preserve this point for argument on this appeal (p. 2, lines 1-30; p. 11, lines 10-30).

That the defendant is not an insurer of the safety of its passengers and is only under a duty to exercise a high degree of care for their safety, is so elementary that citation of authority need not be given. What the defendant could have done under the undisputed and uncontroverted facts in this case to have avoided the injury sustained by the plaintiff, we do not know. There is no claim that the guard was negligent in failing to observe the position of the plaintiff's hand, because the undisputed evidence shows the losing of her balance and placing her fingers upon the jamb of the door, occurred at the same instant the guard was coming into the car and closing the door. There can be no negligence on the part of the defendant because the door was left open, because the undisputed testimony shows that the train was just starting in motion as the guard was closing the door. There can be no claim of negligence in the operation of the train which caused the plaintiff to lose her balance, as there is not one word in the record that the train lurched or jolted or was operated in any manner different from the normal operation of trains.

In the case of *Power* v. *Boston Electric R. Co.*, 161 N. E. 623, the Supreme Court of Massachusetts, in a decision as late as May 28, 1928, held as follows:

> "The undisputed evidence showed that the plaintiff was injured because, pushed against a car in a train which had just stopped for passengers, he placed his hand against an opening door and was unable to remove it be-

fore it was caught and jammed between the door and the casing into which the door slides in opening.

"There is no evidence that the guard knew, or was careless in not knowing, that the hand was in a place of danger, and nothing to show that the crowd striving to enter and pushing the plaintiff against the door was unusual and called for special precautions on the part of the defendant and its servants. The motion of the door was that usual to opening doors, and would not justify an inference of want of repair or careless handling.

"The judge was not in error in directing a verdict for the defendants. The accident was a mishap of travel not due to negligence."

The Supreme Court of Pennsylvania, in the case of *Polis, et al.* v. *Philadelphia & R. Ry. Co.*, 117 Atl. 415, held that the defendant was not liable under the following circumstances:

"This young lady, who is very small, stepped out onto the platform (of the coach on which she was riding) and turned to go down the steps; she left her hand around this wooden door frame, with her fingers over the place where the door would come, if it swung to of its own accord, or if somebody kicked it shut, or if somebody actually pulled it or threw it shut. As a matter of fact, there is no evidence at all as to how the door (was) shut, except that which we may draw from the words of the man she described as the conductor, who opened the door, after her hand was pinched, and said: 'I am sorry; the door slipped out of my hand.' From this you might infer he had the door knob in his hand, or the frame of the door in his hand, intending to close it, that he had not gotten hold of it sufficiently, and it had slipped out of his fingers. Could you infer negligence on the part of the conductor, assuming he was the conductor, from that fact? To do so (in the absence of evi-

dence as to how long the hand had been on the door jamb) you would have to infer that he knew plaintiff's hand was there, or he ought to have known (it), or that, in the exercise of his duty, as custodian of the train, so to speak, and caretaker of the passengers, he should have known some person was out on the platform with her hand around the door frame and in the socket or groove where the door would come. I do not think the law justifies us in putting such a duty upon the crew of a train, and the decisions of our courts are to that effect."

In the case of *L'Hommedieu* v. *Delaware, L. & W. R. Co.*, 101 Atl. 933, the Supreme Court of Pennsylvania held a nonsuit was proper under the following facts taken from the opinion:

"The plaintiff, a passenger in a day coach on defendant's vestibuled train approaching Scranton, when the station was called and the car door into the vestibule was opened by the trainman, left his seat and went forward into the vestibule, preparatory to alighting. There he took a position facing the unopened vestibule door, through which he expected to go. In order to steady himself in that position, he placed his right hand against the jamb of the car door, with his fingers in the space between the door and the jamb. Before the station was reached, the trainman who stood in the vestibule in front of the plaintiff reached into the car and pulled shut the open door upon the plaintiff's fingers, inflicting the injury for which the action was brought. The reason for thus shutting the door was not disclosed on the trial, as the defendant offered no evidence.

"There is no proof that the trainman actually saw the position of the plaintiff's fingers, nor is there any contention that he acted wantonly, as he must have done if he had seen; but the claim is advanced, as the foundation of liability, that he ought to have seen, and in the exercise of due care for the safety

of the passenger should not have closed the door without warning or other precaution.

"We cannot sustain this view. There is no evidence that the trainman was not acting within the proper line of his duty, and presumptively he was so acting when he shut the door. He was under no obligation to see where the plaintiff's fingers happened to be, nor to foresee any reasonable probability of their being placed in such a precarious position."

The Supreme Court of Massachusetts in the case of *Cashman* v. *New York, N. H. & H. R. Co.*, 87 N. E. 570; 201 Mass. 358, held the defendant was not liable where the facts were as follows as stated in the opinion of the Court:

"While the elevator man was in the act of closing the door, I put out my hand to save myself and he closed the door to and crushed my hand with it in the jamb of the door. * * * I knew the door would be closed just as quickly as he could close it, so I could get my train.' Except the operator of the elevator, who testified that he knew nothing of the accident until more than two weeks after it happened, she was the only witness. She further testified that her hand was in such a place that, when the door came to, it struck her hand; that she had to put it somewhere to support herself; and that while it was in that position the door struck it.

"It is at least very doubtful whether there was any evidence to warrant a finding that the plaintiff was in the exercise of due care. There was certainly no evidence to show that the operator of the elevator was negligent. By the plaintiff's direction, and to enable her to reach her train, he was trying to move the elevator quickly, and he had no reason to expect that, while he was in the act of closing the door, she would be pushed and would put her hand where the door would close against it."

In *Maillefert* v. *Interborough Rapid Transit Co.*, 98 N. Y. Sup. 207, the Supreme Court of New York held:

> "For the guard of a subway car, into which passengers were coming through a door opened only two-thirds of its width, to open in its full width, whereby a passenger, who, being crowded, had just put his hand on the casing of the door, had his finger crushed was not negligence; it not appearing that the guard knew or could have seen where the passenger's hand was, and there being nothing to show that it was common for passengers to place their hands on the door for support."

In *O'Rourke* v. *Interborough Rapid Transit Co.*, 92 N. Y. S. 317, 46 Misc. 453, the plaintiff testified (p. 318):

> "A. I started to go in, and as I started to go in the guard slammed the door and caught me on the fingers.
>
> "Q. Did you see the guard as he was about to close the door? A. I saw him just as he was standing there.
>
> "Q. Did you see the door as it was being shut? Did you see him make the motion to shut the door before the door struck you? A. The first thing I knew, I got it on the fingers.
>
> "Q. Were you walking into the car? A. I was about to enter the car.
>
> "Q. Did the guard give you any warning or any notice that he was going to shut the door? A. No; he did not warn me at all."

From the examination of the guard, this appears (p. 318):

> "A. Well, after the train passed Franklin Street I announced my station and closed my door, and this man claimed he got his hand caught in the door that I was after closing.
>
> "Q. That is the first you knew of it? A. That is the first I knew of it.
>
> "Q. Did you see his hand there at any time? A. No, sir; his hand was not there."

In reversing the judgment entered for the plaintiff in the Trial Court, GIEGERICH, J., said (p. 318):

> "From all this testimony it seems a fair and natural inference that the act of the guard in closing the door, and of the plaintiff in placing his hand on the door jamb, were simultaneous, and that the plaintiff placed his hand in the way just as the door struck. It might be more accurate to call this an accident occurring without legal responsibility on the part of anyone, than to attempt by analysis to determine the questions of negligence and contributory negligence."

In *Siegel* v. *Interborough Rapid Transit Co.*, 126 Misc. 452, 214 N. Y. S. 71, judgment for the defendant was affirmed where a passenger, who, to preserve his equilibrium placed his hand on the edge of a fully opened sliding door, which came forward several inches and then slid back into the casing simultaneously with the plaintiff's act of putting his hand on it.

We respectfully submit that in view of the undisputed evidence in the case failing to disclose any negligence on the part of the defendant which was the proximate cause of the plaintiff's injury, the Trial Judge erred in refusing to nonsuit the plaintiff or direct a verdict in favor of the defendant.

(5)

Comments on the Opinion of the Supreme Court.

The Supreme Court affirmed the judgment of the District Court on the ground that an inference might be drawn that the injury to the plaintiff might have been prevented by due care on the part of the defendant's servant. The Court said:

"In the case at bar the evidence, which we have recited in effect, was uncontradicted. No affirmative testimony was produced by the defendant tending to show that the slightest degree of care was used by the servant (conductor) of the defendant corporation. The defendant failed even to produce the conductor who perchance might have been able to give some testimony to show due care on his part in the operation of the train.

"We think that the uncontradicted testimony of the plaintiff tended to show that she was injured through an act of the defendant's servant which might have been prevented by due care, and hence the jury had the right to infer negligence, since the defendant failed to prove that due care was exercised" (p. 51, lines 10-25).

The Supreme Court relied on the cases of

Whalen v. *Consolidated Traction Co.*, 61 N. J. L. 606;

McPherson v. *Hudson & Manhattan R. R. Co.*, 101 N. J. L. 410.

In the *Whalen* case, *supra,* it appeared that the plaintiff was standing on the running board of defendant's trolley car and as the defendant's conductor passed him to collect fares, the conductor stumbled, caught hold of the plaintiff to save himself and thereby threw the plaintiff from the running board. While it is true that the testimony did not disclose what caused the conductor to stumble and thus necessitated his catching hold of the plaintiff, nevertheless this unexpected and unnatural action on the part of the conductor was such as to call upon the defendant through its conductor for an explanation.

In the *McPherson* case, *supra,* defendant's train stopped in the station and the doors of the car were opened to permit passengers to board. While

the plaintiff was entering one of the doors from the station platform to the car, the door suddenly closed upon her. It was held that the open door constituted an invitation to the plaintiff to enter and when it was suddenly closed catching her, the presumption was it was closed by an employee of the defendant who had closed it before she had a reasonable opportunity to board or without warning to her.

The case at bar is not in any respects, we contend, similar to either one of these cases. In the case at bar the plaintiff on entering the front end of the car stood with her right side nearest to the intercommunicating door. As the train started in motion she lost her balance, threw her right hand out to catch hold of something and grasped with it the jamb of the intercommunicating door at the same instant that the guard who was coming through the door into her car, was in the act of closing that intercommunicating door. The plaintiff specifically said on cross examination, that the losing of her balance, the grabbing of the jamb, and the closing of the door were simultaneous (p. 30, lines 1-40). If the plaintiff in this case had testified that she had hold of the jamb of the door for an interval of time previous to the accident, we concede there might be some inference that the guard was negligent in closing the door without warning her to take her hand away or in failing to make observation to see if anybody's hand was in that place. This would probably be authorized under the case of *Whalen* v. *Consolidated Traction Co., supra,* cited by the Supreme Court. Or, on the other hand, if while passing from one car to another the guard should close the door and catch the plaintiff's fingers, under the case of *McPherson* v. *Hudson & Manhattan R. R. Co., supra,* cited by the Supreme Court, negligence might be

inferred. In the case at bar, however, the plaintiff was not using the door to pass from one car to another, nor was she using the jamb to steady herself in the car. Her act in losing her balance and placing her hand on the jamb was simultaneous with the action of the guard in closing the door, and we cannot see how, even though the defendant's duty is to exercise a high degree of care toward its passengers, foresight could anticipate that danger.

The Supreme Court concedes in its opinion that the testimony failed to show any negligence on the part of the guard, but says that because the defendant did not produce the conductor to testify that he was not negligent, the case was properly submitted to the jury. The Supreme Court said:

> "We think that the uncontradicted testimony of the plaintiff tended to show that she was injured through an act of the defendant's servant which might have been prevented by due care, and hence the jury had the right to infer negligence, since the defendant failed to prove that due care was exercised" (p. 54, lines 20-30).

This, in effect, placed the burden on the defendant to prove it is free from negligence rather than leaving the burden on the plaintiff to prove negligence. It has been held in this State time and time again that negligence is never presumed, but always must be proven. That the only presumption of fact which the law recognizes is an immediate inference from the facts proved, and mere theories and inferences do not authorize a verdict, unless they are the only conclusions which can reasonably be drawn from the facts proven, and if a plaintiff is to succeed it is incumbent on him, in the absence of direct evidence, to show not only existence of such possible responsibility, but the

existence of such circumstances as would justify the inference that the plaintiff's injury was caused by the negligent act of the defendant, and which would exclude the idea that it was a cause with which the defendant was not connected.

Maphet v. *Hudson & Manhattan R. R. Co.*, 98 N. J. L. 369;
McComb v. *Public Service R. R. Co.*, 95 N. J. L. 187;
Stumpf v. *D., L. & W. R. R. Co.*, 76 N. J. L. 153;
Chester v. *Cape May Real Estate Co.*, 78 N. J. L. 131;
Rom v. *Huber*, 93 N. J. L. 360.

In *Hughes* v. *Atlantic City R. R. Co.*, 85 N. J. L. 212, in an action for personal injuries caused by the explosion of an electric light bulb in the ceiling of a passenger car, the Trial Judge charged that the burden of proof as to showing the actual cause of the accident, shifted from the plaintiff to the defendant, and imposed upon the latter the burden of making an explanation exculpating itself from negligence. This Court held that this was an unwarranted extension of the application of the maxim *res ipsa loquitur*.

We respectfully contend that the Supreme Court overlooked this line of cases when it concluded that the judgment below should be affirmed, because the defendant failed to call its conductor in order to prove that he exercised due care. We contend that even if he was called as a witness and testified to the same facts as given by the plaintiff, the Trial Judge would have been compelled to have directed a verdict for the defendant, as there would still be an absence of any proof of negligence. The mere fact that the defendant did not call him, cannot be said to weaken its position

in this respect. This is not a criminal case where any inference may be drawn from the failure of the defendant to put its witnesses on the stand. If the plaintiff's version of the occurrence was conceded to be an accurate statement of what happened, there would be no object in the defendant calling its guard to reiterate the same facts. The purpose of calling witnesses for the defense is to prove facts which are contrary to those established by the plaintiff. In any negligence action, if the Supreme Court is right, we fail to see how a Trial Judge could grant a nonsuit on the ground of failure to prove negligence, because the Trial Court could say that the defendant would first have to testify and show he was free from negligence himself, although the plaintiff on her case proved that to be the situation.

Some mention is made in the opinion of the Supreme Court that the car was crowded and this fact entered into had something to do with the defendant's negligence. The difficulty with that contention, however, is that the case was not tried or submitted to the jury on any theory that the defendant was negligent, due to the crowding of passengers in its car. The case which the Supreme Court cites of *Hansen* v. *North Jersey Street Ry. Co.*, 64 N. Y. L., dealt with the case of a passenger who was crowded off a trolley car. The plaintiff in the action at bar made no claim that she was pushed or crowded into the doorway or against the jamb, so that we fail to see how that case is in anywise dispositive of the one at bar.

(6)

CONCLUSION.

It is therefore respectfully submitted that the judgment below should be reversed and a *venire de novo* awarded.

May Term 1929.

EDWARD A. MARKLEY,
CHARLES W. BROADHURST,
Of Counsel with the Defendant-Appellant.

COLLINS & CORBIN,
Attorneys for Defendant-Appellant.

New Jersey Court of Errors and Appeals

ANNA K. BARNEY, an infant by KATHRYN BARNEY, as her next friend, *Plaintiff-Respondent,* *v.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appelant.*	IN TORT. On Appeal from New Jersey Supreme Court.
KATHRYN BARNEY, *Plaintiff-Respondent,* *v.* HUDSON & MANHATTAN RAILROAD COMPANY, *Defendant-Appelant.*	

BRIEF OF DAVID BERMAN IN BEHALF OF PLAINTIFFS-RESPONDENTS.

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Supreme Court affirming the judgment of the District Court of the City of Bayonne in favor of the plaintiffs-respondents (hereinafter called the plaintiff), and against the defendant-appellant (hereinafter

called the defendant) (p. 56). In the first of the above entitled actions the plaintiff, ANNA K. BARNEY, a minor, sues for personal injuries sustained April 21, 1928, while a passenger at the Journal Square Station, Jersey City. The injuries were caused by her fingers being squeezed between the jamb of the door of a car in one of the defendant's trains. The second action is brought by her mother who seeks to recover for the loss of services and expenses incident to the injury sustained by her daughter.

The defendant demanded a trial by jury in both actions, and the cases were consolidated for trial by consent. The trial resulted in a verdict in favor of the minor for $300.00 and in favor of the mother for $84.00 (p. 3, line 30; p. 9, line 20; p. 18, line 30 to p. 19, line 10.) The record of the trial taken stenographically by an appointee of the Court, certified by the Trial Judge together with a certified copy of the transcript prepared by the Clerk of the Court, constituted the state of case. Appeal was taken by the defendant to the New Jersey Supreme Court, which affirmed the judgment in an opinion of the October Term, 1928, written by TRENCHARD, J (pp. 50, et seq.). It is from the judgment of affirmance of the Supreme Court that the present appeal is taken (p. 56).

(2)

GROUNDS OF APPEAL

The defendant-appellant argues that the Supreme Court erred in affirming the judgment of the District Court.

The only point raised by the defendant-appellant in the Supreme Court was that the Trial

Judge erred in refusing to non-suit the plaintiffs or to direct a verdict in favor of the defendant when thereunto moved on the ground that there was no evidence of any negligence on the part of the defendant which was the proximate cause of the injuries sustained. (P. 2, lines 15-30; P. 11, lines 15-30.)

(3)

BRIEF OF THE ARGUMENT.

(I.)

The Trial Court ruled properly in refusing to non-suit the plaintiffs or direct a verdit in favor of the defendant. The issue involved was purely one of fact for the jury.

It is conceded by counsel for the appellant that the facts in the case are not in dispute. The plaintiff, ANNA K. BARNEY, testified that she was 17 years of age, that on the day in question she entered the defendant's station at Journal Square, Jersey City, paid her fare and boarded one of the defendant's trains. When asked what happened she said, (p. 22-L 10-20).

> "Q. When you got on the train, tell us what happened. A. After the doors shut and the train started to go, I lost my balance and caught hold of the door, and just then the conductor came out and slammed the door in my fingers.
>
> "Q. What did you catch hold of? A. The frame of the door.
>
> "Q. Where were you standing? A. On the platform of the train.

"Q. Why didn't you sit down? A. Because the train was crowded.

"Q. Was it crowded on the platform? A. Yes, Sir." (p. 22, lines 1-35).

On the above state of facts alone, we feel that the plaintiff set up a prima facia case of negligence against the defendant.

The rule pertaining to negligence and the duty of common carriers is well defined in this state in the case of *Whalen vs. Consolidated Traction Co.*, 61 N. J. L. 606 and in the case of *Scott vs. Bergen County Traction Co.*, 63 N. J. L., 407 and in a long line of subsequent cases.

Justice Dixon in the opinion delivered by him in the case of *Whalen vs. Consolidated Traction Co.*, supra, said:

"The ordinary rule in actions for negligence is that plaintiff must produce some affirmative proof of the want of care on the part of the defendant and if his evidence is as consistent with care as with negligence in the defendant, he must fail.

"But in actions for injuries suffered by passengers while in charge of common carriers, the rule is somewhat different. The rule there applicable is modified by the doctrine which seems to have given rise to the almost absolute responsibility of the common carrier of goods—the doctrine that the carrier's greater means of ascertaining and disclosing the cause of damage placed upon him a greater duty of explanation.

"The rule supported by authority is that when a passenger shows that he was injured

> through some defect in the appliance of the carrier, or through some *act* or *omission* of the carrier's servant which might have been prevented by due care, then the Jury have the right to infer negligence, unless the carrier proves that due care was exercised."

In the case at bar no affirmative testimony is set up to show that the slightest degree of care was used by the servant (conductor) of the defendant corporation. The defendant failed even to produce the conductor who might have been able to offer some testimony to show due care on his part in the operation of the train.

In the case at bar it is conceded by counsel that the testimony of the infant plaintiff is uncontroverted and no affirmative testimony is set up to show that the slightest degree of care was used by the servant (conductor) of the defendant corporation.

The case of *McPherson vs. Hudson and Manhattan Railroad Company*, 100 N. J. L. 262, is practically on all fours with the case at bar There, "The plaintiff was a passenger waiting on the station platform of the defendant Railroad Company for a train. The train entered the station. The plaintiff saw the center door of a car opened, and entered. The door operated by air pressure was then suddenly closed, pinning the plaintiff between the door and the door jamb, injuring her." On that state of facts the Court in an opinion delivered by JUSTICE KATZENBACH, said:

> "When the door was suddenly closed, catching the plaintiff, the presumption was that it was closed by the employee of the de-

fendant. From these facts there arose a presumption of negligence on the part of the defendant. It was such an accident, that its mere happening charged the defendant with negligence and placed upon it the burden of showing that the plaintiff's injury was not due to any fault on its part."

In that case the plaintiff had to overcome the testimony set up by the defendant that the door might have been closed by an independent agency, a third party, not a servant or agent of the defendant, but in the case at bar, it is conceded that the door was actually closed by the agent of the defendant and the Court below ruled properly in refusing to non-suit the plaintiff or direct a verdict in favor of the defendant and properly permitting the question of negligence to go to the jury. We believe that it was a question for the jury as to whether or not the servant of the defendant used the degree of care required of him to be used when he closed the door on the infant plaintiff's fingers. There is no evidence adduced by the defendant to show that the conductor looked before he closed the door, and we feel that his act was the proximate cause of the happening of the accident.

The opinion delivered by JUSTICE KATZENBACH in the case of *McPherson vs. Hudson & Manhattan Railroad Company, Supra,* was affirmed on March 16, 1925 by the Court of Errors and Appeals of this State in 101 N. J. L., p. 410, in which the Court cited with approval the doctrine laid down in the *Whalen case,* to which we have already referred.

The Brief filed by counsel for the defendant argues the fact hat there was no evidence ad-

duced by the plaintiff, that there was anything unusual about the operation of the train, or that the plaintiff lost her balance due to a lurch of the train.

We contend that it is immaterial in the case at bar as to whether or not the train lurched or whether the lurch of the train was ordinary or extraordinary.

The uncontroverted evidence is that the train was crowded, that because the infant plaintiff had to ride on the platform of the train which was also crowded, she lost her balance; that she caught the jamb of the door for support and that the conductor slammed the door upon her fingers, thereby injuring her. On this state of facts we feel that the question properly became one for the jury and in this contention we are supported by the cases in point in this state.

CONCLUSION

We respectfully submit that the Judgment below should be affirmed.

JACOB FEINBERG,
Of Counsel.

DAVID BERMAN,
Attorney of Plaintiffs-Respondents.

May, 1929.