

New Jersey Court of Errors and Appeals

SARAH MILLER and ALBERT MILLER,
Plaintiffs-Appellant,

vs.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

WILLIAM E. GREENLEAF, administrator of Elvina Greenleaf, deceased.

Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANT.

Nature of Case.

The actions in question, which by consent of counsel were tried together, were brought in the Hudson County Circuit of the Supreme Court to recover damages for injuries to the plaintiff, Sarah Miller, and for the death of her mother Elvina Greenleaf, caused by being struck by a trolley car operated by defendant in Jersey City, June 19, 1910.

The Trial Court after hearing the evidence submitted by the plaintiffs ordered judgment of non-suit

in both cases on the ground that no negligence on the part of the defendant had been established and on the further ground that on the evidence so submitted the plaintiffs were, as a matter of law, guilty of contributory negligence. From this ruling the plaintiffs appeal to this court.

Summary of Facts.

The injury complained of occurred on the 19th day of June, 1910, at the Southwest corner of Fairmount and Bergen Avenues at about 10:15 P. M. The general direction of Bergen Avenue is north and south and that of Fairmount Avenue East and West; Fairmount Avenue crosses Bergen Avenue, but that part to the West of Bergen Avenue is a few feet further north than the part to the East of Bergen Avenue. The defendant's southbound car tracks which are within ten or fifteen feet of the curb (state of case, p. 48), turn from Bergen Avenue almost at right angles easterly into Fairmount avenue, the track commencing to curve at the spot where plaintiff and her mother were standing at the time of the accident. At the time of the injury the corner in question was very brightly lighted (state of case, pp. 29 and 48). Plaintiff, Mrs. Miller, had boarded defendant's cars at the same point on two, and her mother on two and her sister on several different occasions prior to the accident, one of which was in the morning of the same day on which the accident happened (state of case, pp. 25, 50, 55).

On the evening in question, plaintiff, Mrs. Miller, and her mother, on their way from church to their home, walked along the southerly sidewalk of Fairmount Avenue in an Easterly direction towards Bergen Avenue, until they came to the southwest corner of the two streets, when they reached this point they saw the car they wished to board, approaching them on Bergen Avenue from the north and distant about a half a block, approximately one hundred fifty feet

(state of case, pp. 20, 21). They stepped from the curb toward the track and when close to the track stopped, and Mrs. Miller raised her right hand in signal to the motorman to stop the car which was then opposite the "ice cream saloon," on the northwest or opposite corner (a distance of approximately forty-five feet). The motorman, who was looking in their direction, apparently for the purpose of stopping in response to the signal, slackened the speed of the car (state of case, pp. 29, 38), until the forward end of the car had passed the plaintiffs and then without warning of any kind he suddenly increased its speed so that the rear end of the car in taking the curve swung out and struck the plaintiffs, who, expecting the car to stop, had remained in their original position until it was too late to avoid the outswing (state of case, pp. 20, 21, 30, 39, 40).

SPECIAL POINT.

Plaintiffs were in a place of danger unknown to be such to them, but known to defendant to be such, and plaintiffs were not warned of such danger, nor given a reasonable opportunity of reaching a place of safety.

POINTS TO BE NOTED.

FIRST POINT.

1. There was sufficient evidence offered by the plaintiffs to warrant the submission of the case to the jury on the question of defendant's negligence.

SECOND POINT.

There was sufficient evidence offered by the plaintiffs to warrant the submission of the case to the jury on

A. The question as to whether or not the plaintiffs were guilty of any negligence.

B. If guilty of negligence whether or not such negligence was the proximate cause of the injury complained of.

THIRD POINT.

The questions of defendant's and plaintiffs' negligence and whether such negligence, if any, of the plaintiffs was the proximate cause of the injury, should have been submitted to the jury.

ARGUMENT.

FIRST POINT.

1. There was sufficient evidence offered by the plaintiffs to warrant the submission of the case to the jury on the question of defendant's negligence.

The plaintiffs in assuming the position they did assume were in the exercise of legal rights which the defendant was bound to respect. Consolidated Traction Co. vs. Lambertson, 59 N. J. L., 297 (36 Atl., 100). Cited with approval in Peter Polo vs. Pub. Service Ry. Co., 79 Atl., 307; 81 N. J. L., 390 (N. J. E. & A., 1911). The motorman if he was keeping the lookout, which by law he was bound to keep, saw or should have seen plaintiffs leave the curb and approach the track when his car was half a block distant from them, and knew or should have known that they would reach the track before his car reached them.

By virtue of their having first reached the track without negligence on their part (this question is hereinafter considered), it became the duty of the motorman to place his car under such control that he could avoid striking the plaintiffs, as was said by Pitney, Chancellor, in Peter Polo vs. Pub. Service Ry. Co., *supra*:

“* * * he (the motorman), must keep such a lookout on the tracks ahead of him and he must keep his car under such control as to be able to reduce its speed and even to bring it to a standstill, if necessary to avoid collision with a traveler who without negligence on his part might happen to cross the track in front of the trolley car—plaintiff had the right to assume that the motorman was aware that if the plaintiff without negligence on his part reached the

point of crossing ahead of the trolley car he had the right of way and that such right of way would be respected by the motorman—”

The position assumed by the plaintiffs was one of safety and was made one of peril only by the act of the motorman in failing to stop his car. *The signal given him by Mrs. Miller of their intention to board the car apprised him of the fact that they did not expect to be placed in peril because they clearly expected him to stop the car. He and not they knew that they were about to be placed in a position of peril by his act,* and it became his duty to stop the car. He had no right to run them down. *Camden G. & W. Ry. Co. vs. Preston* (E. & A., 1896); 59 N. J. L., 264 (35 Alt., 1119), in which case the testimony showed that the trolley car ran into a wagon on its tracks going in the same direction the court saying in part: “If the motorman knew that decedent’s wagon was on the track so that a collision with it was necessary or even probable should the car advance it was his wilful and wrongful act which caused the accident.” See also *Consolidated Traction Co. vs. Haight* (E. & A., 1897, 59 N. J. L., 577); (37 Atl., 135). And *Glasco vs. Jersey City H. & P. St. Ry. Co.* (E. & A., 1911); 79 Atl., 368; 81 N. J. L. (52 Vr.), 469, in which it was said:

“She (the plaintiff), had a right to assume that the motorman would keep a reasonably careful lookout ahead and that he would use the appliances of the car to keep it under reasonable control and to check or stop it if need be before it reached her.”

Hayden vs. Fairhaven Co., 56 Atl., 613 (Conn. Ct. of Errors, 1904):

“The plaintiff was in fact in a position of danger and the motorman, upon the facts in the case, had a right to presume that the plaintiff was aware of it and would govern himself accordingly. *He had a right to so presume*

as the court told the jury, until it is apparent or by the exercise of reasonable diligence would be apparent to him that the person is in danger and is not aware of the danger, or is not so situated that he can avoid the danger."

In the case at bar the facts show clearly that the plaintiffs never knew they were in any danger until they were actually struck.

If he did not intend to stop it was his duty to warn them of the impending peril in sufficient time to enable them to avoid it by stepping back from the track. His failure to do this clearly constituted gross negligence and disregard of the rights of the plaintiffs. *Buttelli vs. Jersey City H. & R. Electric Co.*, 59 N. J. L., 302 (36 Atl., 700); (Sup. 1896), in which the facts showed that defendant's trolley car ran into the plaintiff who was slightly deaf and who was walking either on or close to the track. Magie, Chancellor, for the Court, saying in part:

"The peculiar right of street railways to require others passing on the highway to leave their tracks free for their cars to pass upon proper occasions obviously imposes on others the duty to leave such tracks free for passage *upon observing or being informed that such passage is required.* * * * It had not the right to exclude him from its tracks within the public highway, but only to remove from the track when he observed or was notified that one of its cars required to use the track. * * * Since the duty he owed to the company was only to remove from the track when he perceived or was notified that such removal was necessary to the passage of a car it is obvious that his act was not necessarily a breach of that duty for *he might assume that he would receive notice if his removal was necessary* * * * if he deliberately in broad daylight with full opportunity to perceive that plaintiff did not heed any signals of the gong, if it was rung, or any notice derived from the rumbling of the car, ran plaintiff down and did him the

injury complained of it cannot be contended that such conduct was not negligent."

The motorman in the case at bar had the same opportunity to perceive the plaintiffs and their ignorance of their danger as did the motorman in the case last above cited, and like him failed to stop the car and to warn the plaintiffs, but continued in utter disregard of his duty and their rights, and ran them down.

The same principle obtains in New York State as is instanced by the case of *Copeland vs. Met. St. Ry. Co.*, 73 N. Y. Supp., 856, in which it was said:

"* * * We think from the evidence presented that the motorman should have seen the *plaintiff who was in full view* endeavoring to cross the avenue to enable her to be in a position to take the car and that *it was incumbent upon him either to slow down to avoid the accident or else give her some warning of his intention to proceed with undiminished speed.*"

This case was sent back for retrial and verdict was found for plaintiff. It was then appealed (79 N. Y. Supp., 1054), to App. Div., and from there appealed to Court of Appeals which unanimously sustained the courts below (177 N. Y., 570).

Beyond question the motorman, if he was properly attentive to his duties, after the plaintiffs first stepped from the curb and after he was signaled to stop had ample opportunity both to stop the car and to warn the plaintiffs although either would have been sufficient, and we maintain that his failure to adopt one or the other of these courses constituted gross negligence.

SECOND POINT.

Plaintiffs were not guilty of negligence.

A.

As we have already shown they were not negligent *per se* in standing close to the defendant's tracks in the public street. If they were negligent at all it must have been because they remained in that position when they saw the car approaching.

We contend that the fact that they had boarded other cars of defendant at the same point on previous occasions together with the further fact that the speed of the car in question was slackened just before it reached the point where the other cars had stopped, gave them the right (so far as relieving them of the charge of contributory negligence is concerned), to assume that in the absence of any signal to the contrary, the car in question was also about to stop in response to plaintiff's signal. In this contention we are supported by the case of Glasco vs. Jersey City H. & P. St. Ry. Co., 79 Atl., 368, 81 N. J. L. (52 Vr.), 469 supra, in which the Court said:

*" * * * She, the plaintiff was entitled to consider that the car usually stopped at that crossing."*

And by *Loder vs. Met. St. Ry. Co., 82 N. Y. Supp., 957 (Supp. Ct. N. Y., App. Div., 1903)*, in which it was said:

"She accounts for her position, however, by her knowledge of the previous practice of the defendant in operating this portion of its line which led her to suppose that no cars were to be expected to approach from the south. We think that the jury were entitled to take into consideration the plaintiff's information in this

respect as bearing upon her prudence under the circumstances and that it cannot be held as a matter of law that her conduct establishes contributory negligence."

Especially is this true when, as in the case at bar, the car slackened speed at the signal to stop, and led the plaintiffs to believe that it was about to stop as had the other cars.

That was precisely what took place in the case at bar, Mrs. Miller says in her testimony (state of case, page 25), that she had boarded cars at this point before on the two different occasions that she signaled the motorman to stop (page 30), that the car slackened its speed (page 38), that he did not warn them (page 30), that they remained in the same position, and that she "thought it was going to stop" (page 20), and that the outswing of the car "came too quick for me to move" (page 39).

Plaintiffs were in a position made dangerous by the act of the motorman, and they had no opportunity to move to a place of safety. We maintain that under these circumstances no negligence can be charged against them. Had the motorman moved his car around the bend slowly enough for plaintiffs to have moved with the car, expecting it to stop, until the car had passed around the curve, and then increased its speed, plaintiffs would not have been injured.

If the plaintiffs were guilty of negligence such negligence was not the proximate cause of the injury complained of.

B.

We contend that even if it be admitted that the plaintiffs were in some degree negligent in assuming the position they did assume, nevertheless, the motor-

man having had ample opportunity to observe the danger in which his act was about to place the plaintiffs and having had ample opportunity thereafter to stop his car and to warn them and failed to do so, *it was his act and not the act of the plaintiffs which was the proximate cause of their injury.* The facts in this case clearly call for the application of the doctrine of "The Last Clear Chance." This is a well settled principle and has been well summarized as follows:

"It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence notwithstanding the plaintiffs' own negligence exposed him to the risk of injury if such injury was more immediately caused by the defendant's omission after becoming aware of the plaintiffs' danger to use ordinary care for the purpose of avoiding injury to him."

(Sherman & Redfield on Neg., 6th Ed., Sec. 99 and numerous authorities there cited.)

This principle has been adopted and applied by the Courts of this state (Traction Co. vs. Haight E. & A., 1897; 59 N. J. L., 577; 37 Atl., 135; Ball vs. Camden & Trenton Co., 76 N. J. L., 539; Hayward vs. North Jersey St. Ry. Co., 74 N. J. L., 678; Camden G. & W. Ry. Co. vs. Preston E. & A., N. J., 1896; 59 N. J. L., 264; 35 Atl., 1119, in which last case, it was said by the court:

*"If the motorman knew that decedent's wagon was on the track so that a collision with it was necessary or even probable should the car advance, it was his wilful and wrongful act which caused the accident. If the agent of defendant by the exercise of ordinary care could have avoided the collision notwithstanding decedent's negligence he was bound to do so, and the company is responsible for any damages that result from failure in that respect * * *."*

A careful analysis of this principle as applied to the case at bar discloses that it consists of two elements.

1. Knowledge or opportunity for knowledge by defendant of plaintiff's peril.

2. Reasonable opportunity to avoid after discovery of peril.

We have already shown in our discussion of Point I that plaintiff's act of standing close to the track in plain view and signalling to the motorman their desire to have him stop his car, notified him as a man attentive to his duties and of reasonable prudence, that they expected him to stop his car and consequently were ignorant of the peril in which he was about to place them.

This shows that there was present the first element.

Under this rule, it is entirely immaterial that they had no right to expect him to stop his car at that particular point, it is sufficient if he saw or should have seen that they were in fact ignorant of their peril, relying, as they evidently were, upon him stopping his car at that particular point.

As we said under Point I the motorman, if he were keeping the lookout he was bound to keep, saw the plaintiffs when they stepped from the curb, while he was still a half a block distant and this, coupled with the fact that he was approaching what amounts practically to a right angled curve, should have impelled him as a reasonably prudent man to have his car, when it reached the curve where the plaintiffs were standing, under such complete control that, it could be brought to stand still at a moment's notice, so that when he was signalled he could have stopped his car almost instantly, and the testimony shows that he in fact did have his car under perfect control and slackened the speed of the car just before it reached the curve. He did not even attempt to stop his car, but continued for half a block before he stopped (state of case, p. 48).

This proves conclusively that he *could readily have stopped the car* before the rear end struck the plain-

tiffs, had he so desired and that he made no attempt to avoid striking them.

Instead of increasing the speed he should have slackened the speed of the car while rounding the curve and thus given plaintiffs an opportunity to reach a place of safety.

But even admitting that this could not be done he still had an abundance of time after the signal in which to motion with his hand or ring the bell for them to step back, from the track, but he failed to do even this simple act to save them from injury. Thus we see that there was present also the second element, *i. e.* opportunity to avoid accident.

Cases Distinguished.

At this point, we wish to comment on the cases involving accidents caused by the outswing of trolley cars at curves. These cases are not numerous and we have here, as we believe, collected the most important of them and will show how each one is to be distinguished from the case at bar. We believe that each of these cases can be distinguished from the one at bar on one of two general grounds:

(1) Either that the plaintiff in the cases cited moved from a place of safety to one of danger without the knowledge of the motorman, or

(2) That the motorman had no reason to believe that plaintiff in the cases cited was not aware of this danger and would not presumably take measures to avoid it.

In the case at bar the motorman saw plaintiffs in a place of danger and saw that they were ignorant of their danger and hence had no reason to suppose they would attempt to avoid a danger of which they were ignorant.

On the first ground, the case of *James Riddle, Admr., etc. vs. 42nd St. &c. Ry.* (173 N. Y., 327),

may be distinguished from the case at bar. The plaintiff who was working in a trench beside the tracks at a curve, on seeing a car approach, leaned back while the forward part of the car passed by and then straightened up or leaned forward before the rear end had passed.

While in view of the motorman he was in a position of safety and apparently fully alive to the situation and without the knowledge of the motorman changed his position and was injured.

The facts in the case of Garvey vs. Rhode Island Co., 26 R. I., 80 (58 Atl., 456) (Sup. Ct., 1904), are somewhat uncertain. The facts as stated in the first part of the case as reported show that *the motorman slackened the speed of the car in response to plaintiffs' signal*, and in the face of this statement the Court says: "But when one places himself in such a position that the motorman is unable to see him *as must have been the case at bar.*" The question at once arises, how could the motorman slacken the speed of the car in response to plaintiff's signal unless he saw the plaintiffs? Again, the Court lays down the rule, which we have shown is recognized in this state, as follows: "When one negligently places himself in front of a moving car the motorman who is in a position to see him is bound to avoid injuring him if possible notwithstanding his own negligence." This is a correct statement of the "Last Clear Chance" doctrine, and after thus stating correctly this rule of universal application the court continues and holds that even if plaintiff had a right to assume when she saw the car slacken speed, that it would stop shortly, she had no right to assume that it would stop at any particular point, the Court saying in part: "And until the plaintiff had been given to understand by some act of the motorman or conductor that she could safely attempt to board the car or at any rate until the conditions were such that she could do so, *the defendant owed her no legal duty.*"

The facts, the law and its application to the facts can be reconciled only on the theory that the plaintiff while in view of the motorman was in a place of safety and placed herself in a place of danger after the front end of the car had passed *so that the motorman could not see her*.

If the motorman saw the plaintiff and she was in a place of danger, then this decision is in effect a repudiation of the "Last Clear Chance" doctrine adopted by the Courts of this State, and in this very opinion stated to be the law of Rhode Island.

If he did not see the plaintiff in a place of danger then the case is not parallel with the case at bar because the motorman then *had no opportunity to avoid the accident*.

This case is cited by the Supreme Court in *Jelly vs. North Jersey St. Ry. Co.*, 76 N. J. L. 191 (68 Atl., 1091). But it was cited as authority for the proposition that when a person is standing by the track at a curve, on seeing a car approach and in view of the motorman, starts to walk away from the car the motorman may assume that he will not remain where he will be struck, but being in the act of reaching a place of safety will continue on his course with reasonable speed.

In that case the *motorman was misled by plaintiff's* act of walking away into believing that he was avoiding the car, whereas in the case at bar the *plaintiffs while they were in a place of danger, were misled by the act of the motorman* in slackening the speed of the car into believing it would stop. And for that reason the case has no application to the case at bar.

The case of *Kauffman vs. Interurban St. Ry Co.*, 88 N. Y. Supp., 382, is distinguishable from the present case because in that case the motorman had no intimation that the plaintiff *who was waiting for the car to pass*, would not step back, the Court saying: "She had the fullest opportunity of seeking a place of safety for herself or *giving notice to the*

motorman to stop if she had any idea of danger." "Give notice" to the motorman is precisely what the plaintiffs did in the case at bar.

The decision in that case was made to rest entirely upon the ground of contributory negligence because the plaintiff had no reason to believe the car was about to stop and in fact she knew it was to pass on.

Creenan vs. International Ry. Co., 139 App. Div. (N. Y.), 863 (1910).

The facts in that case show that the plaintiff walked alongside of the car in such a position that the motorman could not see him.

Kozlowski vs. Rochester etc. Ry. Co. (142 App. Div., 248).

The plaintiff in that case had no reason to believe that the car would stop at the station. In fact the questions presented by the facts in that case are to be decided by the rules applicable to steam railroads rather than to street car lines running upon the public streets.

The case of Matuliwicz vs. Met. St. Ry. Co., 95 N. Y. Supp., 7, also is distinguishable. In that case the facts show that the motorman did not see the plaintiff.

And on the same ground Widmer vs. West End Ry. Co., 32 N. E., 899, Mass. Sup. Jud. Ct., 1893, which was cited in Jelley vs. North Jersey St. Ry. Co., *supra*, the Court saying: "for he had no reason to suppose that she would come so near the rear end of the car as to be struck when it went by."

In no one of the cases above cited did the motorman see the person in a dangerous position, and have the opportunity to see that he was ignorant of his danger and that in his ignorance he intended to remain in such position as had the motorman in the case at bar.

THIRD POINT.

The questions of defendant's and plaintiffs' negligence, and whether such negligence, if any, of the plaintiffs, was the proximate cause of the injury, should have been submitted to the jury.

That unless the evidence points so clearly to but one conclusion that the minds of reasonable men could not differ, the question of negligence on the one hand, and of contributory negligence on the other, must be submitted to the jury, is too well settled a rule to require citation.

The Courts of this State have ever been reluctant, and rightly so, to withdraw questions such as this from consideration by the jury as is instanced in the following cases. *Cammeron vs. Jersey City H. & P. St. Ry. Co.* (Sup. Ct., 1904) 70 N. J. L., 633 (57 Atl., 417), in which the motorman failed to stop his car, then running at high speed, when he saw plaintiff approaching and distant two hundred feet, leading a horse which was apparently frightened by the car.

Consolidated Traction Co. vs. Lambertson, 59 N. J. L., 297, in which plaintiff attempted to drive a horse and wagon across defendant's tracks in front of a car, three hundred feet distant and approaching at a very high rate of speed. *Searles vs. Elizabeth P. & C. J. Ry. Co.*, 70 N. J. L., 388 (57 Atl., 134), where practically the same facts existed except that car was distant about two hundred feet. *Bauer vs. North Jersey St. Ry. Co.*, 74 N. J. L., 24 (E. & A., 1907) (67 Atl., 1037), where pedestrian attempted to cross the tracks in front of a car distant seventy-five or one hundred feet and "going fast," in which the Court says in part:

"Where reasonable minds may differ as to whether a person on foot who crosses a street when upon the sidewalk in front of an approaching trolley car was under the given circumstances guilty of an act of negligence which contributed to the injury is always for the jury."

Migans vs. Jersey City H. & P. St. Ry. Co., 76 N. J. L., 535 (70 A. T. L., 168), in which ambulance driver turned out of side street into intersecting street when he saw a trolley car approaching 130 feet distant.

Joerg vs. Public Service Ry. Co. (77 N. J. L., 372) (71 Atl., 1126), in which driver of automobile attempted to drive his automobile across tracks when he saw a trolley car approaching and distant 150 feet when he was 20 feet from the track. This decision was rested on the principle that plaintiff had a right to assume that his right of way acquired by virtue of first having reached the point of crossing, would be respected, thus affirming the *Lambertson* and *Peter polo* cases above cited.

Zolpher vs. Camden Ry. Co., 69 N. J. L., 417 (55 Atl., 249) (E. & A., 1903), in which plaintiff who was riding a bicycle close to the track turned into the tracks 12 feet in front of a car running at rate of five miles an hour.

Hayward vs. North Jersey St. Ry. Co., 74 N. J. L., 678 (E. & A., 1906), where plaintiff attempted to cross the tracks without looking for cars, her whole attention having been diverted by a passing police patrol wagon.

Copeland vs. Met. St. Ry. Co. (73 N. Y. Supp., 856), in which plaintiff crossed track for purpose of boarding the car, in which it was said:

"We think from the evidence presented that the motorman should have seen the plaintiff who was in full view endeavoring to cross the avenue to enable her to be in a position to take

the car and that it was incumbent upon him either to slow down to avoid an accident or else give her some warning of his intention to proceed with undiminished speed. * * *

The testimony therefore that the motorman continued to approach the crossing at full or very rapid speed without ringing any bell or giving any warning at a time when the plaintiff was passing across the tracks, with a view to reaching the sidewalk where she could board the car and after he had the opportunity to see her when she was over half a block away was sufficient evidence from which the jury might infer that he failed to observe that duty which he owed her."

We maintain that in ordering judgment of nonsuit against the plaintiffs in the case at bar, the Trial Court erred in not permitting the jury to pass upon the questions of defendants' negligence and plaintiffs' contributory negligence.

CONCLUSION.

In conclusion we respectfully submit first that the evidence shows as a matter of law that the defendant was guilty of negligence and that the plaintiffs were free from contributory negligence and secondly, if not as a matter of law, the evidence was such that the minds of reasonable men could honestly differ as to the conclusions to be drawn therefrom, and that the Trial Court erred in refusing to allow the questions to be passed upon by the jury.

Respectfully submitted,

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WILSON E. TIPPLE,
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Of Counsel with Plaintiffs-Appellant.

New Jersey Court of Errors and Appeals.

SARAH MILLER and ALBERT MILLER,

Plaintiffs-Appellants,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant-Appellee.

On Appeal.

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WILLIAM E. GREENLEAF, Adminis-
trator of ELVINA GREENLEAF,. de-
ceased,

Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY COM-
PANY,

Defendant-Appellee.

On Appeal.

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BRIEF OF DEFENDANT-APELLEE.

These two actions were brought and, by stipulation of counsel, were tried together in the Hudson County Circuit of the Supreme Court, before Hon. Benjamin A. Vail and a jury, and resulted in a judgment of non-suit in each case. From these judgments the plaintiffs have appealed, and by stipulation the appeals are likewise argued as one.

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Facts.

The actions arise out of the same occurrence, which happened on June 19, 1910, and in which plaintiff, Sarah Miller, and Elvina Greenleaf, the intestate of plaintiff William E. Greenleaf, sus-

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tained injuries, whereof Elvina Greenleaf afterwards died, in the City of Jersey City, at the intersection of Bergen and Fairmount Avenues. The two highways cross one another practically at right angles, Bergen Avenue running north and south and Fairmount Avenue running east and west; and the defendant company maintains a double track surface trolley line along that portion of Bergen Avenue which lies to the north of the point of intersection of these highways, and turning into that portion of Fairmount Avenue which lies to the eastward of Bergen Avenue. The intersection of these two highways is, however, not exact, Fairmount Avenue not forming a continuous highway across Bergen Avenue but that portion of it which is east of Bergen Avenue is a little south of the portion on the westerly side, so that the south crosswalk from the westerly portion of Fairmount Avenue practically coincides with the north crosswalk of the easterly portion.

For this reason it happens that the curve of the southbound track of defendant company, alongside which the accident occurred, lies for the most part south of the above mentioned crosswalk, upon which the injured persons in these cases were at the time of the accident. And as a result of this situation the southbound cars of the defendant company running on this street, which are of the pay-as-you-enter type having an extremely wide rear platform, attain their greatest outward swing over and beyond the westerly rail of the southbound tracks at this curve, almost directly at the point where the above mentioned crosswalk is located.

The pertinency of this rather detailed description is to be found in the nature of the occurrence on which these actions are founded. The accident was of the kind known in railway parlance as a "rear-swing" collision, consisting in that the injured persons stood so near the tracks along

which the car was passing that by reason of the sharpness of the curve (both Bergen and Fairmount Avenues being of but ordinary width at this point) and the great length or distance from the pivot on which the rear trucks swing to the outermost end of the extra wide rear platform, the injured persons came within the arc or radius described by the moving rear end of the car beyond the westerly rail as the forward trucks rounded the curve into the easterly portion of Fairmount Avenue, and were struck by it as it passed them. 10

And it is the action of the injured persons in taking and maintaining their position within this arc or circle as the forward portion of the car passed them without slacking sufficiently to indicate that it was about to come to a stop before the rear end came opposite them, which constitutes the entire point of these cases, both at the trial and on this appeal. Upon the legal question thus arising the Trial Court granted the non-suits, and it is the action of the Trial Court in so doing which is here complained of and sought to be reviewed and reversed. This is the point of the whole matter. 20

Argument.

Plaintiffs have sought to meet and overcome the implication of contributory negligence arising from the conduct of the injured parties, by transferring to the shoulders of defendant's motorman upon the car in question a duty to have avoided the inevitable consequence of their placing themselves in such a position, by bringing his car to a stop before the rear platform came opposite them. And the claim is that this duty became incumbent upon him by reason of the fact that one of the injured persons, plaintiff Sarah Miller, upon taking her position signaled to the motorman, then approaching and but a short distance from the 30 40

curve, that she desired to become a passenger. This is supplemented by evidence (the sufficiency of which is hereinafter discussed) designed to support an alleged custom of defendant to stop its cars on Bergen Avenue before grounding the curve, rather than on Fairmount Avenue.

Evidence.

10 The only testimony produced concerning the facts of the accident was that of plaintiff, Sarah Miller, one of the injured persons. The record is so short as to permit of its being abstracted at length. She testified on her direct examination that after leaving Parmly Memorial Church at corner of Fairmount Avenue and Boulevard she came right down straight Fairmount Avenue to Bergen Avenue on the right hand side; got to the corner of Bergen Avenue and saw the Jackson Avenue car in the middle of the block and when it
20 got a little past the ice cream saloon witness stepped out from the sidewalk into the street and raised up her right hand to the motorman, and still had her right hand raised, and the motorman was directly in front of her (p. 20); looked right toward her, but did not stop and the front end of the car had passed her and the rear end of the car as it turned around the curve struck witness and her mother, knocking witness unconscious (p. 21). Witness did not exactly know just the
30 distance of the motorman away when she raised her right hand to signal him to stop; at that time the car was just passing the ice cream saloon and witness was out in the street and did not move from the spot where she stood until she was knocked off of it (p. 21).

40 There was a bright light right over the corner of Bergen and Fairmount Avenues on the night witness attempted to board the car. The motorman slackened his car after witness had raised her

right hand to signal him to stop (p. 29). Witness saw the motorman when she raised her right hand; when she first raised her hand he was by the ice cream saloon; the last she remembers he was right directly in front of her; he was on the car coming towards her; he gave no signal or warning (p. 30. From where witness stood she could tell that the motorman was looking right towards her. At the time witness raised her right hand the car was by the ice cream saloon opposite the corner. Mrs. Greenleaf stood on witness' right hand, and witness was nearest toward the direction from which the car was coming (p. 31).

On her cross examination (p. 35 et seq.) she testified that she had discovered since the last trial that the motorman slackened his car in response to her signal (p. 35). She had passed around that corner on cars before and knew that cars turned from Bergen Avenue into Fairmount Avenue at that corner. When she got there that night she could see the tracks and the curve of the tracks as they went into Fairmount Avenue from Bergen. Witness' mother had also gone around there at various times in cars (p. 37): she had good eyesight; it certainly was light at the time. Witness testified at the last trial that when the car turned the curve it seemed that the motorman put on more speed instead of stopping, and the car seemed to be going faster as it took the curve. Before the car took the curve it seemed as if it slackened up and then went on around the curve a ways. Witness had stepped out from the curve before the car was passing the ice cream saloon. Witness could not tell how close to the track she got; it was close enough for the front of the car to get by her where she stood (p. 38). As the car came down Bergen Avenue and got a little past the ice cream saloon witness held her hand up and the car kept coming right along and the front of it went by her and she still stood there: she could see the front of the car go around, and the rear

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of the car came around and kept swinging out and around the track as the car went around the curve, going down eastward into Fairmount Avenue, and witness stood still there (witness did not move because it came too quick for her to move) and did not move after the front passed her all the way to the time the rear went around that curve until it came in contact with her. Witness stood right still and could see the car (p. 39) plainly. Witness supposes that on all vehicles turning a curve the rear end has to swing around if it is on fixed rails.

Evidence of Alleged Custom.

In order to take the cases out of the rule which he knew would be invoked against him, plaintiffs' counsel, in this the second trial of these cases, endeavored to introduce evidence of an alleged custom of defendant's employees to stop their cars at the crossing where the injured persons were standing before taking the curve, so that upon it he might rest a claim that the injured persons in taking the position which they did, were acting in reliance upon the alleged custom.

For this purpose plaintiff, Sarah Miller, testified on her direct examination (p. 24) that she had boarded defendant's cars at that point twice before the date of the accident, in May, 1910, just before Decoration Day and about three or four months before that (p. 25) that on the former occasions she had with her brother's little boy, and on the latter occasion her sister Viola.

On her cross examination she testified (p. 35) that she found out since the previous trial of these actions that she got on the car at this corner twice instead of once; that it was since the last trial that her brother's boy had spoken to her about getting on the car with her once in 1910; that at the previous trial she had testified "Oh, I never got out at that corner, so I couldn't take any

notice of that corner"; and "I got on at that corner once, I think, that is all".

Viola Greenleaf, the sister of plaintiff, Sarah Miller, testified on direct examination (p. 49) that she had got on a Jackson Avenue car at that corner with her mother, Mrs. Elvina Greenleaf, on the morning of the dedication of Parmly Memorial Church, June 19, 1910; that she had got on the car at the corner several times before the accident.

On cross examination (p. 55) she testified that she could not tell just how many times she had gotten on there; that it was several times, over three times; that she did not say a single word in all the first trial of these cases about getting on at that corner before the accident, but she recollects now having got on with a friend whom she used to visit (p. 55); that this was about two or three years before the date of the accident (p. 57). 10

On redirect examination (p. 57) she testified that she was asked at the first trial of these actions whether she had ever boarded that car before that morning at that place and had answered that she had done so several times. 20

On re-cross examination (p. 57) she stated that she did testify on the previous trial about getting on a car previous to the accident.

At this point the typewritten transcript of the testimony given by the witness at the former trial was offered in evidence in contradiction of her testimony on the re-direct and re-cross examination after plaintiffs admitted its genuineness. 30

Plaintiff next produced *Dr. Philomen Hummell*, who testified on his direct examination (p. 61) that he is a practicing physician of Jersey City, having his office for seven years at 689 Bergen Avenue, which is over a block from the corner of Fairmount Avenue; that he had never boarded a car at the corner of Fairmount Avenue and Bergen Avenue; that he had observed that cars stop at 40

that corner; that the car has stopped to allow people to get off; that some passengers got on the car when he got off on more than one occasion; that the corner at which the car stopped on these occasions was about the corner where the candy store is, the southwest corner (p. 62). That he never saw the car stop close to the opposite corner, but it would stop when it was going around the corner, usually about where the candy store is; that he could not say how many times this had

10 happened; quite a number of times (p. 63).

On cross examination (p. 63) he testified that the candy store corner is the northwest corner; he pushed the button and the car would stop there; sometimes it would stop on the other corner, Kink-head's corner, around at Fairmount Avenue, the southeasterly corner, after the car had turned the curve and stopped around; that the northwest—the candy store—is before the car crosses Fairmount Avenue.

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A map of the *locus in quo* was then admitted in evidence, and counsel for both parties stipulated upon the record that the northwest corner of Fairmount Avenue and Bergen Avenue is the ice cream saloon spoken of by the witness Hummell; on the southwest corner is a beer saloon; on the northeast corner is a dry goods store; on the southeast corner is Paul Bryant's dyeing place; and that the plaintiffs stood on the southwest corner in front

30 of the beer saloon, between the curb and the car track; and that the distance between the curb and the car track is approximately nine feet and three inches.

The foregoing represents a complete and exhaustive abstract of the entire testimony upon the facts of the accident, omitting only the testimony concerning the damages, which is immaterial on this appeal.

The case is thus one of the most simple in its

40 features, and we submit, admitting of little, if

any, controversy over the propriety of the disposition made of it by the learned trial court.

For the purpose of clearness in discussion, if indeed it be necessary to adopt any distinct order of argument, we shall first discuss what we consider to be the main question here presented, and then take up the alleged distinguishing features which are claimed to take these cases out of the general rule, viz:

First. The legal effect and incidents of these "rear-swing" collisions, as considered in the cases which have come before the courts. 10

Second. The legal effect of plaintiff's signal as an expression of her intention to board the car at that point, as shifting to the motorman the burden and duty to take precautions for their safety, and

Third. The sufficiency of the evidence hereinbefore detailed to establish a custom of defendant to stop its cars at the corner where the injured persons stood, so as to entitle them to place themselves in so perilous a position in reliance thereon. 20

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POINT I.

The nature of this accident, viz, a collision between plaintiff and the rear end of defendant's moving car swinging out beyond the track as the car rounded a curve, precludes legal liability on the part of defendant, because

10 (a) Defendant was under no duty, in operating its cars over this curve, to watch out for and warn persons upon the highway who might be or come within the range of the outward swing of its rear platform, and

(b) Plaintiffs were guilty of contributory negligence in taking and maintaining a position so close to the track as to come within the range of the outward swing of the rear platform when they knew or ought to have known, that the car
20 was not likely to stop before reaching them.

This appeal, in substance, brings before this court the correctness of the rule and doctrine laid down by our Supreme Court in 1908 in the case of *Jelly v. North Jersey Street Railway Company* and reported in 76 Law at 191, 68 Atl., 1091; 6 Street Railway Reports 533, and of its application by the trial court as controlling in the case at bar. In that case the plaintiff approached a
30 car on a curving track, and taking his stand near the outer rail made an inquiry of the motorman as the car slowed down and came up to him, for the purpose of boarding the car if it should prove the right one for his destination; but receiving a negative answer turned away and started to walk from the track and the motorman quickened the speed of the car again; and when the projecting rear end of the car came up to him he was struck by its swing. The Supreme Court
40 held, on the authority of two of the cases to be hereafter discussed, that the trial court erred in refusing to direct a verdict for defendant.

The *Jelly* case is the only instance which has come before the higher courts of this state, of these "rear swing" collisions, and with the foreign cases which accorded with it, formed the basis of the defendant's motion for a non-suit at the trial, and of the court's allowance of that motion.

It is respectfully submitted that the doctrine of the *Jelly* case is sound in principle and supported by the entire weight of authority elsewhere, and that the rule which it established has general application to rear-swing collisions and is controlling here. 10

That the *Jelly* case should not be thought an isolated precedent it is proposed to present the decisions elsewhere which have developed the law on the subject, and of which the *Jelly* case was but the natural outcome, and then, having established the weight of precedent in this matter, to consider the validity of the reasoning on which they rest, under the heads of negligence and contributory negligence, before proceeding to take up the distinctions which plaintiff's counsel seeks to draw between them and the case at bar. This arrangement is perhaps the natural one because all of these cases were (see Record, p.) before the trial court on the argument of counsel. 20

The subject of rear-end collisions has up to date come before the courts of last resort of seven jurisdictions in twelve reported decisions. These jurisdictions are: Connecticut, Kentucky, Massachusetts, New Jersey, New York, Pennsylvania and Rhode Island, and the cases are the following: 30

Widmer v. West End St. Ry. Co., 158 Mass., 49; 32 N. E., 899 (1893);

Riddle v. Forty-second St. M. & St. N. Ave. Ry. Co., 173 N. Y., 327; 66 N. E., 22 (1903);

Hayden v. Fair Haven & W. R. R. Co., 76 Conn., 355; 56 Atl., 613; 2 St. Ry. Rep., 67; (1904); 40

- Garvey v. Rhode Island Co.*, 26 R. I., 80;
58 Atl., 456; 3 St. Ry. Rep., 802;
(1904);
- Kaufman et ux. v. Interurban St. Ry.
Co.*, 43 Misc., 634; 88 N. Y., Supp.,
382 (1904);
- Matulewicz v. Metropolitan St. Ry. Co.*,
107 App. Div., 230; 95 N. Y. Supp.,
7 (1905);
- 10 *Hoffman v. Philadelphia Rapid Transit
Co.*, 214 Pa., 87; 63 Atl., 409 (1906);
- Jelly v. North Jersey St. Ry. Co.*, 76 N.
J. L., 191; 68 Atl., 1091; 6 St. Ry.
Rep., 533, (1908);
- South Covington & Cincinnati St. Ry.
Co. v. Besse*, 33 Ky. Law Rep., 52; 108
S. W., 848; 16 L. R. A., N. S. 890
(1908);
- Louisville Rwy. Co. v. Ray*, Ky. ;
124 S. W., 313 (1910);
- 20 *Gribbins v. Kentucky Terminal & Trac.
Co.*, 150 Ky., 276; 150 S. W., 313
(1912).

30 The point has thus been considered four times
in New York, and three times in Kentucky. And
the circumstances of the cases have been of the
most various character. In some cases the plain-
tiffs have been pedestrians, in others intending
passengers, or even bystanders on street corners,
caught by the overlapping construction of the
car; other cases have involved accidents to wag-
ons, the plaintiff being either the driver, or a
passenger, or the owner. Yet in spite of this
great variety of circumstances, these courts have
all reached the unanimous conclusion that in this
class of cases there can be no recovery.

40 The question first presented itself to the courts
of Massachusetts, in 1893, in the *Widmer* case, the
facts of which were, as stated in the court's opin-
ion, that plaintiff "was standing near the side of

the track waiting for a car (a horse car) to go by. She testified that she saw the car, that she was coming from the south; that she saw the front of the car go by her, and thought she was far enough from it to be safe, but was struck by the handle on the rear dasher of the car, as it went around the corner." A judgment for the plaintiff was set aside, on the ground that no negligence had been shown on the part of defendant.

The next case, the *Riddle* case, arose ten years later, in New York, and went to the Court of Appeals. There plaintiffs intestate was working in an excavation or trench three or four feet deep on the outside of a curve and close against the outer rail; and as the car approached and the forward portion came opposite him, he leaned away from the car so as to be out of its way, but straightening up after the car had partially passed, so that his face was nearest the car, he was struck on the nose and knocked backward by the rear step which projected out some eight or ten inches further than when the car was on a straight track, and subsequently died of apoplexy caused by a cerebral hemorrhage. That court held it error to have refused to grant a non-suit.

In the next case, the *Hayden* case, the facts were still stronger. In that case plaintiff, who was standing on the sidewalk, near the curb on a corner on the inner or concave side of a curve which passed close to the sidewalk, was struck by the middle portion of the running board of an open car, which at the maximum point on that curve projected a distance of forty-two inches outside the rail at the center of the car, and overlapped the sidewalk by twenty-five inches. An instruction which placed upon the plaintiff the duty to look out for his own safety even though he was standing on the sidewalk, was approved, and a judgment on a verdict for defendant affirmed.

In the same year the highest court of Rhode Island also passed upon this question in the *Garvey* case. The case is of peculiar interest in that its facts formed *almost an absolute parallel with those of the case at bar*. The declaration alleged that plaintiff was an intending passenger, and taking her stand near the outside rail of a curve, signaled the motorman who thereupon brought the car almost to a standstill on the curve and plaintiff walked toward it; but while
 10 she was standing in the street he suddenly increased the speed of the car, causing the rear end to strike her. The Trial Court did not even allow the case to come to trial but sustained a demurrer to the complaint and was held to have committed no error in so doing.

In the same year (1904) and the following year, two more rear swing collision cases came before the courts of New York, providing a significant opportunity for testing of the correctness
 20 of the rule laid down two years before in the *Riddle* case. These were the *Kaufman* case and the *Matulewicz* case.

In the former case, plaintiff was crossing the street at a cross-walk where the tracks of defendant turned into the side street, the nearest rail being three feet from the curb at the cross walk; as she stepped from the curb she saw a car approaching about seven or eight houses, or 140
 30 to 150 feet away, and stopped two feet from the track to permit it to pass around the curve, but was struck by the swing of the projecting rear portion and knocked under the wheels of a passing wagon. The court reversed an order denying a motion for a new trial after a verdict for the plaintiff on the ground that even if the motorman could be said to have been negligent, plaintiff's own negligence contributed to the accident.

In the *Matulewicz* case plaintiff was standing
 40 in the street at the northwest corner of Madison

Avenue and Forty-Second Street, Manhattan, waiting for one of defendant's south bound cars to turn from Madison Avenue eastward into Forty-Second Street, and was seen by the motorman in that position; and although the entire body of the car passed him in safety, he was struck by the coiled fender at the rear end, as the car rounded past him on the curve. On the authority of the *Riddle*, *Widmer*, *Hayden* and *Garvey* cases the Appellate Division held it error to have denied a motion for new trial after verdict for the plaintiff on the ground of contributory negligence. 10

That next state to consider the question, was Pennsylvania, in the following year, in the *Hoffman* case, which went to the highest court. The case presented still another variety of facts. Plaintiff while crossing the street at a corner where there was a curved switch over which cars were shifted to a track on the side street, stopped on discovering that her path was blocked by a car which had come to a stop before being backed around the switch, and in that position was struck by the outward swing of the fender projecting from what was now its rear end, as the car swung around the curve. The Supreme Court of Pennsylvania held it error to have refused a direction of verdict for defendant. 20

In the same year, (1906) the question was presented for the fourth time, to the courts of New York, in the *Waters* case. Here the accident was of still another kind; the curve was almost double, a reverse, or S-shaped one, and plaintiff was driving a wagon along the street out of which the car turned, and the outside of the second or main curve (the track turning first in the opposite direction to afford sufficient clearance from the curb for the swing), and in the opposite direction to that of the car; plaintiff stopped his wagon as the forward end of the car, which was just making the curve, came opposite and passed him in safety, at a point five feet from the narrowest clear- 30 40

ance space between the car and the curb (that space being 6 feet 4 inches,—the width of the wagon between the outside of the hubs being 5 feet 6 inches, and the hubs projecting 5 inches on each side); but not driving close enough to the curb and the motorman increasing his speed, the projecting rear portion of the car struck the step attached to the shaft of the wagon, throwing plaintiff. On the authority of the *Matulewicz* case the Appellate Division reversed an order denying a new trial after verdict for the plaintiff on the ground that he was contributorily negligent.

Finally, the courts of Kentucky have passed upon this question in three recent cases, the last one being decided only two years ago.

In the first of these Kentucky cases, the *Besse* case, which was a wagon case, but somewhat differing from the *Waters* case, plaintiff was driving a wagon around a curve along one of two double tracks as the car came towards him on the other track, and as the car passed, the wagon, its projecting rear end struck the hind end of the wagon, throwing the plaintiff; there was evidence that as the forward end of the car passed plaintiff he drove between the tracks and nearer the car, and that the hind end of the car never projected as far as the track on which plaintiff was driving. The Court of Appeals reversed a judgment for the plaintiff on the ground that a verdict should have been directed for defendant.

Two years later, in 1910, in the *Ray* case, the negligence of the driver of a wagon in a similar accident was imputed to a passenger in it who sued. The statement of facts as set forth in the court's opinion, is so short as to permit of quotation: "Plaintiff was a passenger upon a wagon going north on Fourth Street. When the wagon had reached a point near the intersection of P Street with Fourth Street, it met a car going

"south on Fourth Street, which had stopped to let
 "off passengers and turn the switch to go over
 "onto P Street. While the driver of the wagon
 "was attempting to drive by the car, it started
 "out P Street, and as it swung around, the hind
 "end of the car collided with the front end of the
 "wagon, and plaintiff was thrown to the ground
 "and injured." On this state of facts the court
 held, on the authority of the *Besse* case, that a
 peremptory instruction to find for defendant
 should have been given by the trial court to the
 jury. 19

The last and most recent case on the subject of
 rear-swing collisions is the *Gribbins* case, where
 for the third time the courts of Kentucky re-
 affirmed their conviction of the correctness of the
 doctrine which the *Besse* case had established.
 The case arose on demurrer to a petition alleging
 that plaintiff was crossing the street at a corner
 where defendants tracks curved "and in so doing 20
 "she walked at a reasonable, and as she believed,
 "a safe distance from the track on which said
 "car was running coming north on south Broad-
 "way Street behind and toward plaintiff," and
 that she did not know the "great and unreason-
 "able distance" which the projecting rear end of
 the car extended beyond the outer rail at the
 curve, whereas defendant's employees well knew
 the same, but the latter, with gross carelessness
 and negligence, failed and refused to warn plain- 30
 tiff of the danger, or to lessen the high speed of
 the car, to wit, six miles an hour, or to stop the
 car so as to prevent it from striking her. The
 demurrer was sustained.

With the facts and holdings of these decisions
 thus before us, let us then proceed to inquire
 whether on principle any basis of negligence exists
 in these rear-swing collisions, and in particular
 whether this defendant or its employees violated
 any duty resting upon them in respect to these 40
 plaintiffs? To this end it is most enlightening to

examine and compare the reasoning of these courts upon the circumstances thus presented to them, and which they deemed adequate to support their conclusion. Those cases, we think it must be admitted, present a sufficient variety to test and assure the validity of any rule which might be educed therefrom. It is submitted that but one conclusion—the conclusion reached in these cases—can be the result of any correct analysis of the implications of these rear-swing collisions, because

(a) **No negligence can be attributed to the Street Railway Company or its employees in these rear-swing collisions.**

No point is made in the cases at bar, as in some of the above decisions, that any negligence is involved in the construction of these cars and the existence of an overhang—circumstances which have been forced on street railway companies as the necessary outcome of the enlargement of their equipment to meet growing traffic demands, and of the accompanying substitution of double for the old single trucks, and the adoption of the pay-as-you-enter type; for no matter what the arrangement and distance of the trucks, an overhang must exist somewhere, if not at the ends, then at the middle of the sides, as in the *Hayden* case, above noted.

What negligence then can be imputed from the operation of the car in these rear-swing collision cases?

It is submitted that in this inquiry no assistance can be derived from, and the subject is only confused by reference to, the cases of pedestrians who place or find themselves in a position of danger while crossing straight tracks, either by miscalculation of the distance and opportunity to cross and clear the track, or by crossing without observing the presence or nearness of the car. Of this character are nearly all the New Jersey cases

cited under Point I of appellants' brief—the Lambertson, Peter Polo, Glasco, Butelli and other familiar decisions. The situation and circumstances in those cases involve elements so entirely different from those of the cases at bar as to make them useless in this connection. The rear-swing collision cases stand, and must be considered, by themselves. It may be admitted that pedestrians, or vehicles, engaged in crossing street railway tracks, may require the motorman of an approaching car to heed the danger in which they have placed themselves, and by his action protect them from the consequences of their own negligence. But this arises from the equal rights of pedestrians and vehicles *engaged in crossing* a highway, to use the space occupied by the street railway tracks. Now no such right is asserted in these rear-swing collision cases. By the very nature of the cases, the injured party is not engaged in crossing the track; he has not yet set foot on it, and has rather indicated a contrary intention, by stopping before the forward end of the car has come opposite him, or at least he has not advanced so close to the track by the time the forward end comes opposite him, as to indicate to any reasonable man that he can or will attempt to cross the track. He does not challenge the right of the motorman to proceed by the assertion of his equal right to use the same portion of the highway. Hence all the rules which the courts have elaborated by successive analyses of the implications of the exercise of these co-equal rights are utterly irrelevant and unavailing here.

The nature of the peril to which the injured party is subject in these rear-swing collision cases is likewise very different. It is special in its nature, existing only at that particular point, at which it is a necessary and obvious incident of the operation of the car, and is presented to the attention and notice of all who use the highway by the presence of the curving tracks. Whereas

in the crossing cases, the peril is simply the ordinary and general one.

It is the nature of this peril which governs the rules and the law respecting the rights and duties created by it. The existence of the overhang is a matter so obvious to all observing persons, presented constantly to their eyes in their daily use of the public highways, as to be a matter within the judicial notice of courts. Knowledge of this rear-swing is one of those things which the law expects of all. In the *Jelly* case our Supreme Court said, quoting from the *Garvey* case:

“Every person who is of sufficient intelligence to be capable of being left alone in the streets must be presumed to take notice of the obvious fact that the body of a street car must necessarily swing out some little distance from the track on the outside of the curve.”

The obvious and familiar character of this danger constitutes the reason and basis of the rule in all these rear-swing collision cases. The corollary of the knowledge of the danger imputed to all persons by the law is the duty, as reasonably careful persons, to avoid it. And the likelihood that reasonably prudent persons will heed this duty to avoid the danger constitutes a factor and guide in reliance whereon the motorman of street cars may govern their own acts in the operation thereof.

These considerations control the question whether any duty rests upon the motorman or conductor of the street car toward persons injured in rear-swing collisions. The duty generally sought to be imposed on them is to warn such persons of the danger, or to stop the car if it is evident that they do not realize it. That neither duty exists, but little examination is necessary to show. If the injured party at the time the forward portion of the car has come opposite him,

has stopped to permit it to pass, the mere ringing of the bell would not serve to warn him of the danger of the overhang, for he would naturally assume the warning to be directed to persons on the track ahead; and by no stretch of duty can the motorman be expected to turn from the operation of his car to warn a person standing at the side. If, on the other hand, the injured party still advancing in the direction of the car, and has not reached it at the time the forward portion comes opposite him, then the motorman, having passed him when he was some distance away, cannot be expected to continue to pay attention to him, for the motorman's duty lies *in front of him*—and no court has extended the duty of the conductor to warn persons at the side of the car of any such danger. And in either case, *the law will presume from the knowledge of the overhang which it imputed to him as an observing individual, and his duty to avoid it, that he will act with reasonable care and withdraw before the danger becomes imminent. And the employees of the railroad company may act in reliance on this presumption, and continue to operate the car in the expectation that it will be fulfilled and that he will draw back in time, before the overhanging rear portion comes opposite him. This presumption, and the right of the motorman to act on it, enters into and governs the duty which the motorman owes him. If the motorman or conductor may expect him to draw back, and may act in reliance thereon, clearly they have no absolute duty to warn him or to stop the car to avoid striking him.*

This is the unanimous conclusion of all the decisions to which reference has been made. Negligence in these rear-swing collisions is quite negatived.

In the *Jelly* case, our Supreme Court, after quoting plaintiff's testimony on his cross examination that at the time he was struck he was

four or four and a half feet from the track, and did not step farther away when he knew the car was swinging out because he supposed he was out of distance, commented as follows on the facts as thus disclosed, concerning the alleged negligence of the motorman.

10 "We are unable to see in this testimony any evidence of negligence on the part of the motorman. He was running the car in the ordinary way around the loop. He saw the plaintiff two or three feet away from the car, *with no reason to apprehend that he would remain in a place where he was likely to be struck.*"

In thus reasoning upon the facts of this accident, the Supreme Court is in accord with the cases which have been cited.

20 In the first case on the subject, the *Widmer* case, (cited and followed in the *Jelly* case) decided in 1893, when horse-cars were still in use, the Supreme Judicial Court of Massachusetts held the driver of the horse-car to have violated no duty of due care, in the following terms:

30 "There was no reason why the driver should not drive past her and around the corner, for he had no reason to suppose that she would come so near the rear of the car as to be struck when it went by. The only witnesses who testified besides the plaintiff were two police officers, one of whom was stationed there for the better protection of the public, and he testified that he 'did not stop the car, and had no occasion to'; that 'it was not going rapidly,—jogging around the corner at the regular rate, as they always go.' The other, in describing the rate of speed of the car at the time of the accident, said 'that the horses started off at a smart walk, and he didn't think they were trotting.' There was no evidence of negligence which had any connection with the accident in the facts that there was no switchman stationed there, and that the conductor turned the switch. The

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bill of exceptions discloses nothing that the defendant did or neglected to do of which the plaintiffs can justly complain."

In the *Hayden* case the Connecticut court ruled that even though plaintiff was standing on the sidewalk when struck by the overlapping running board, no greater duty could be required of the motorman than if plaintiff had been in the street, and held that no negligence was shown:

"The court charged the jury that a motor-
man operating an electric street car has the
right to presume that upon the approach of
the car the warning being given of such ap-
proach, an adult person on the track, or in
a position near the track, where he is liable
to be struck, will exercise reasonable care for
himself, and will remove himself from his
position of danger as the car approaches.
The plaintiff complains of this, but, we think,
without sufficient reason plaintiff concedes
that such a presumption exists with reference
to a person in the street, but contends that no
such presumption exists with reference to
one on the sidewalk. This distinction is not
tenable as applied to a case like the present.
The plaintiff was in fact in a position of
danger, and the motorman upon the facts
in the case, had the right to presume that
plaintiff was aware of it, and would govern
himself accordingly. He had a right to so
presume, as the court told the jury, until it
is apparent, or by the exercise of reasonable
diligence would be apparent to him, that the
person is in danger, and is not aware of the
danger, or is so situated that he cannot avoid
the danger. The jury were properly in-
structed on this point."

In the *Garvey* case the Rhode Island court likewise negatived the idea of negligence on the part of defendant. This is the case, it should be remembered, which parallels the case at bar:

"Again, we fail to see that the defendant was guilty of any negligence in the premises. Even assuming that, from the act of the

10 motorman in slackening the speed of the car in response to the plaintiff's signal, she had the right to assume that it would stop shortly, and while on the curve, yet, as already suggested, she had no right to assume that it would stop at any particular point on the curve, nor was it the duty of the motorman to stop at any particular point thereon. And until the plaintiff had been given to understand by some act of the motorman or conductor that she could safely attempt to board the car, or at any rate until the conditions were such that she could do so, the defendant owed her no legal duty."

In the *Matulewicz* case the court ruled that neither the motorman nor conductor is under any duty with respect to persons taking positions within the range of the rear swing of the car:

20 "It may be assumed that motorman in discharge of his duties was bound to see plaintiff. Nevertheless it seems to me that under the circumstances the plaintiff being an adult, apparently in full possession of health and vigor, the motorman might rightfully assume that plaintiff, if necessary, as the car turned the curve, would have drawn back far enough to avoid being struck. * * * In view of the well known fact that the rear of a street car in rounding a curve necessarily swings out some little distance from the track at the outer edge, it is extending the obligation of street railroad companies too far to impose upon the conductors of their cars the duty of warning persons upon the street against the danger of collision with the rear end after the body of the car has passed in safety."

40 In the *Hoffman* case it was insisted for plaintiff that defendant should have removed or diminished the degree of projection of the fender which struck plaintiff before backing the car, and that in permitting the projection they were negligent. The pertinency of the ruling of the court on this contention consists in that the existence of the projecting rear end of the car does not constitute negligence in these rear-swing collisions:

"The first question to be considered is whether there was any evidence of negligence by defendant which justified the court in leaving the question to the jury * * * The learned counsel for appellee contended in the court below, and argues here, that inasmuch as the defendant company, through its employees, did not cause the fender to be raised before the car proceeded to back around the curve, it was guilty of negligence. This position is not tenable under the facts of this case. There was no evidence in the case to show that it was customary or necessary to keep the fender raised at the rear end of the car. Fenders were placed on the cars because of a popular demand that they should be so placed as a protection to the public. In the absence of any evidence showing that the use of the fender by defendant was not a proper one, a jury cannot be permitted to draw an inference of negligence."

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In the *Ray* case the Kentucky tribunals likewise decline to impose any duty upon street railway employees in accidents of this character:

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"This court has, in a long line of cases, held, that it is the duty of those in charge of a street car to keep a lookout so as to avoid injuring those who may be crossing or upon the street in front of the moving car. But this rule has never been so extended as to require the employees in charge of the car to keep a lookout at corners and curves so as to prevent others using the street from colliding with the rear end of the car."

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And finally, in the *Gribbins* case, the courts of Kentucky, reiterating their conclusions of the *Ray* case, firmly established the rule for that jurisdiction that negligence cannot be ascribed to defendant in rear-swing collisions:

"The next ground of negligence relied upon is that the companies were negligent in not warning plaintiff of the dangerous position in which she had placed herself by telling her that the car would strike her, and in not

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stopping the car, so as to avoid having the rear end thereof strike her. The petition upon this branch of negligence is faulty in two particulars. In the first place, the companies were under no duty of keeping a lookout for persons so as to prevent them from coming in contact or collision with the rear end of their cars, as was expressly decided in *South Covington & Cincinnati Street Railway Co. v. Besse*, 108 S. W., 848, 33 Ky. Law Rep., 52 16 L. R. A. (N. S.), 890, and *Louisville Railway Co. v. Ray*, 124 S. W., 313. Not being required to keep a lookout for her safety or to warn her that she was liable to be injured by the rear end of the car, as it turned the corner, if she came too near the track, those in charge of the car owed her no duty whatever, unless they actually saw or discovered the peril of her position in time to have avoided injuring her. The petition alleges that the employees in charge of the car saw the plaintiff, and knew that the rear end of the car would swing out over the side of the track toward plaintiff a sufficient distance to strike her, or by the exercise of ordinary care could have seen her and known of said things. This, in effect, is but an allegation that, by the exercise of ordinary care, those in charge of the car could have seen her peril, and hence is not a sufficient allegation to support the plea of negligence; for, where no lookout duty is required, those in charge of the car must have had actual knowledge of her perilous position in time to have avoided injuring her before the companies can be held to have been guilty of actionable negligence."

"The speed at which the car is alleged to have been traveling, to wit, six miles an hour, cannot be attributed to appellees as an act of negligence; for the rear end of the car in rounding the curve was not thereby caused to extend any further beyond the track than it would have if it had been going at a much lower rate. Considered as a whole, the petition not only fails to charge any actionable negligence on the part of appellees * *"

(b) Persons who fail to avoid the rear-swing of the overhang of street cars are guilty of contributory negligence.

No one, we think, will dispute the logic of the proposition that if the existence of the swinging overhang is so obvious a peril that knowledge of it will be imputed to all observing persons, and that the motorman may in operating his car presume that as reasonably careful persons they will draw back from such a peril, then their failure to do so constitutes such a lack of reasonable care that they must be deemed guilty of contributory negligence. The propositions are complementary, and one is the necessary corollary of the other. 10

Examination of the decisions discloses that the courts to which this question has been presented have acknowledged the correctness of this reasoning. With even greater unanimity than is shown on the question of negligence (for not all of the courts have considered whether the motorman violated any duty) have they declared that persons injured in these rear-swing collisions are barred from recovery by their own negligence. 20

For New Jersey, we have the declaration of our own Supreme Court in the *Jelly* case:

"The testimony of the plaintiff shows that he saw the car swinging around the loop, but supposed he was far enough away to have the car miss him. There is nothing in this case which shows that the plaintiff was a passenger of the defendant. He was waiting in the street for a car that would carry him to his destination, and the company had no contractual relation with him. He saw the car was in motion, and also that it was swinging around the loop; but he thought he was far enough from the car to be safe. There is no reason why the motorman should not continue with the car around the loop, nor had he any reason to suppose that the plaintiff would remain so near as to be struck by the rear of the car as it went by." 30 40

Here again the *Jelly* case is supported by the entire array of reported decisions. The views of these tribunals on the subject of contributory negligence sufficiently appear from the subjoined excerpts from their opinions.

10 “But assuming that no warning was given, the fact remains that the decedent saw the car as it approached; that he leaned back in the trench so as to be out of its way; that there was plenty of room in the trench for him to remain at a safe distance from the car while it passed, and had he done so no injury would have resulted; but by raising up and bringing his face nearer to the car while it was passing him he came in collision with the step. This was his own act, and we think it was contributory negligence on his part * * He knew that the trench was at the point where there was a curve in the tracks around which the cars ran * * and that in rounding the curve the rear of a car would be thrown to a greater distance from the track than the side of the car when running upon a straight line. He was familiar with the situation; he understood the dangers, and in engaging in the work understood the risks.”

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Riddle v. Forty-Second St. Ry. Co.,
(above cited).

The doctrine of the *Hayden* case is indicated by the extract already quoted.

30 The doctrine of the *Garvey* case which was cited in the *Jelly* case, and to which reference has already been made, is as follows:

40 “That the plaintiff knew that the position which she took while the car was rounding the curve was a dangerous one must be presumed, as every person who is of sufficient intelligence to be capable of being left alone in the streets must be presumed to take notice of the obvious fact that the body of a street car, in rounding a curve, must necessarily swing out some little distance from the track on the outside of the curve. And for

one to place himself within reach of the swing or overhang of a car while it is in motion is as much a bar to his recovery in an action against the company as though he had negligently placed himself in front of a moving car, and been injured thereby."

Garvey v. Rhode Island Ry. Co., (above cited).

"She, (plaintiff), stopped at what she thought was a perfectly safe distance from the track; but she was mistaken. Can we say of the motorman, who was evidently of the same opinion which she entertained that his mistake was negligence without a like fault falling on her? She had the fullest opportunity of knowing and choosing her position, and the fullest opportunity of seeking a place of safety for herself, or giving notice to the motorman to stop if she had any idea of danger. She evidently believed that she was clear of all danger of a collision, but with equal, and possibly better means of knowing than the motorman, she made a mistake in so believing. 10 20

"If then, it was negligence, for the motorman to make a miscalculation, was it not equally negligent for her to do so? They owed the same duty to each other, and each had a right to assume that the other would discharge it. That being so it cannot be held that the motorman was negligent in thinking exactly as she thought. No different standard of care can be applied to either; if one was negligent, the other was negligent." 30

Kaufman, et ux. v. Interurban St. Ry. Co., (above cited).

"I do not see how plaintiff in this case at bar can be acquitted of contributory negligence unless we disregard the principle applied in these decisions * * Plaintiff does not say or suggest in his testimony that he was not aware of the fact that the rear of the car was likely thus to swing out in rounding the curve, and I agree with the Supreme Court of Rhode Island that an adult wayfarer on the street, apparently in full possess- 40

ion of his faculties, is chargeable with knowledge of the danger which he runs under such circumstances."

Matulewicz v. Metropolitan St. Ry. Co.,
(above cited).

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"On the question of contributory negligence the case is equally conclusive against the plaintiff. It is true she was at a crossing on a public street where she had a right to be, but the defendant also had a right to be there in the exercise of its franchise. The law requires of both parties the exercise of reasonable care. This duty rests on plaintiff as well as on defendant. If appellee saw the danger, or should have seen it under the circumstances, and could have avoided it by the exercise of reasonable care, and of this there is no doubt, it was her duty to do so, and failure to perform her duty defeats her right to recover damages."

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Hoffman, et ux. v. Philadelphia Rapid Transit Co., (above cited).

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"The evidence shows that the plaintiff was guilty of contributory negligence * * He knew that the rear end of the car would swing around, and gives that as his reason for stopping. Instead of using the means at his disposal to avoid the accident which ordinary prudence would have suggested, he did nothing * * The car did not strike the wheel but the step attached to the shaft, which from the evidence did not project out as far as the wheel * * If the plaintiff had driven close to the curb, and the hub on the left side had projected over the curb, this would have given a clear space of fifteen inches at the point of collision between the right hub and the nearest point approached thereto by any part of the car * * It is evident that plaintiff could have driven more than fifteen inches near the curb; how much more would depend on the extent to which the outside of the right hub projected beyond the step which was struck by the car * * Here the plaintiff had the time, space and opportunity to turn to the left and avoid the accident, and

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his failure to observe this simple and obvious precaution requires a reversal of the judgment."

Waters v. United Traction Co., (above cited).

"It is the duty of those driving other vehicles to keep a lookout for the cars, and to exercise ordinary care to keep out of their way. The street car must stay upon its tracks. In making a turn, as the trucks are not at the end of the car, the end must project more or less beyond the track, according to the length of the car and the degree of the curve. Every driver of a vehicle must know that the motorman cannot control the hind end of the car at a curve so as to keep it from swinging out as far as, by nature, it will go. It is therefore incumbent upon the driver of a vehicle passing a street car to keep out of the way; and, at curves, to drive farther from the car than at other points. He must expect the car to stay on its track, and he must expect that the end of the car will swing out in turning the curve; and, if he does not make a sufficient allowance for the swing of the car, and drives so close to it that the car, in turning, strikes the vehicle, the fault is his own, and not that of the street car company."

South Covington & C. St. Ry Co. v. Besse (above cited).

"In this case the fault clearly lay with the driver. He knew that he could not with safety drive as close to the car as he was attempting unless it remained stationary. He had no reason to believe that it would do so, but on the contrary, had every reason to know that as soon as the passengers were discharged and the switch turned, it would continue on its course out P Street. When he discovered the presence of the hole in the street, he should have either checked his horse and not voluntarily driven into a place of danger, or else he should have driven further away from the cars than he did."

Louisville Ry. Co. v. Ray (above cited).

10 "Considered as a whole, the petition not only fails to charge any actionable negligence on the part of appellees, but, on the contrary, shows that in crossing the street at that point appellant, while aware of the presence of the car upon the track and that it would turn around the curve, felt that she was at a sufficiently safe distance to avoid coming in contact with the end of the car. She simply misjudged what would be a safe distance and continued on the way across the street, without looking to ascertain whether she was out of danger. The exercise of the slightest care on her part would have saved her from injury. The street at that point was of ample width as to have enabled her to cross in safety, and it is apparent that her failure to do so was more the result of lack of care on her part than of any negligence on the part of those operating the car."

Gribbins v. Kentucky T. & T. Co., (above cited).

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POINT II.

Intending passengers are no less bound to observe and avoid the swinging overhang than are other persons or vehicles.

30 Having considered the general aspect of these rear-swing collisions, on principle and in the cases, it remains to consider whether there can be any successful dispute as to the universal application of the principle which underlies them. Appellants seek to avoid the effect of these unanimous declarations of the Courts by setting up as a distinguishing feature in the cases at bar that they signalled to the motorman their intention to board the car, took their dangerous station in reliance upon his acknowledgment of that signal by slackening his speed, and that his act relieved them of their duty to avoid this obvious danger
40 and imposed upon him the duty to watch out for

their safety as the forward end of the car passed by and beyond them, and to bring the car to a stop, if necessary, in case they should be observed by him to maintain their position.

It is submitted, however, that the obvious character of the peril is neither changed nor removed by the fact that the person subjecting himself to it is an intending passenger, and that this fundamental feature of the obviousness of the peril is controlling in such case as in every other.

Even on a straight track it is well settled, for example, that in the case of railroads, intending passengers who are waiting for a train to stop are required, under pain of being held guilty of contributory negligence, to take a position outside the range of any projection.

A boy between five and six years old was standing upon the edge of a platform so close that he was struck and injured by the projecting step of a car.

HELD, "the plaintiff had no right to place himself in the position in which it was possible for him to be injured in such a manner, and the defendant was not bound to take precaution against such injury."

R.R. Co. v. Schwindling, 101 Pa. St., 258.

Where a person intending to board a train on a steam railroad stands too near the edge of the platform and is struck, he is guilty of contributory negligence barring recovery.

Penn R. R. Co. v. Bell, 122 Pa., 58; 15 Atl., 561.

Where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable.

Matthews v. Penn. R. R. Co., 148 Pa., 491;
24 Atl., 67.

In this respect no distinction obtains as regards the legal rules regulating steam railroads and those which respect electric street railways.

10 "It is the duty of a person intending to enter a car upon a highway to take a position outside the reach of an approaching car; for it is common knowledge that a car usually passes a person who has signalled it to stop, so that he may enter by the rear end."

Nellis on Street Railways (2nd ed.) § 361;

Citing:

Cox v. South Shore & Boston St. Ry. Co.,
182 Mass., 497; 55 N. E., 823.

20 Plaintiff, intending to board an approaching street car, the side of which projected over the rail about eight inches, stood in a space about two feet from the south rail of the track at a stopping place, and as the car approached plaintiff leaned his head forward and signalled the car, when he was struck on the head by some part of the car, but his body was not injured.

HELD, that the plaintiff was guilty of contributory negligence in not taking a position outside the reach of the car, and was not entitled to recover.

20 *Neale v. Springfield St. Ry. Co.*, 189
Mass., 351; 75 N. E., 702.

40 We do not think that in any of the above cases, the Courts would have deigned to entertain the proposition advanced by these appellants that the engineers of those trains or the motormen of those cars were under any duty to observe that the injured persons were within range of projections on that if they had observed it, they were bound to stop their trains or cars before the projections came opposite them.

Nor does the mere slackening of the speed of the car operate as an invitation to an intending passenger to take, much less to maintain a position immediately preparatory to boarding the car, and involving imminent peril should the car not come to a stop. The relation of passenger and carrier does not begin until the car has actually stopped in response to his signal.

Nellis on Street Railways (2nd ed.) § 252
and cases cited.

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"The relation of carrier and passenger does not exist between a street railway company and a person who has given a signal, but who is struck by the unexpected swinging of the car from its proper track on to a switch track."

Ibid § 258.

Citing:

Donovan v. Hartford St. Ry. Co., 65
Conn., 201, 32 Atl., 350. 20

But the mere slackening of the speed of the car is no invitation to attempt to board the car, and does not entitle the intending passenger. In *Kennedy v. North Jersey Street Railway Company*, 72 Law, 19, 60 Atl., 40, 3 St. Rwy. Rep., 608, our Supreme Court, speaking by Garrison, J., significantly observed:

"It is not questioned that an invitation of
this sort may give use to legal responsibility
on the part of the defendant, but an essential
factor—indeed the essential factor—in such
invitation is the existence of some state of
facts from which the servants of the defendant
knew or ought to have known that their act
of slowing the speed of the car might give use
to the belief that it was for the purpose of
permitting the plaintiff to become a passenger.
If this be not so, then every diminuation of
the speed of a moving car from any cause
whatsoever inaugurates possible liabilities as

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to all persons who may make the attempt to board such car while in motion, although the servants of the defendant may be entirely unaware of the necessity of regulating the running of the car with respect to such attempts."

Indeed, so clear is the duty of the intending passenger to observe and wait for the actual stoppage of the car that it is held that the motorman is entitled to presume that he will wait and
 10 to act in reliance on such presumption.

"Those in charge of a street car have the right to assume that one who hails the car desires it to stop, and intends not to board it while in motion, and owes him no duty to warn him off, even if they believe he intends to board the car before it has stopped and doubt his ability to do so."

Ibid, §297.

Citing:

- 20 *Holohan v. Washington & G. R. Co.*,
 18 Wash. L. Rep., 751; 8 Mackey (D.
 C.), 316;
Oddy v. West End St. Ry. Co., 178 Mass.,
 341; 59 N. E., 1026;
Brown v. Seattle City R. Co., 16 Wash.,
 465; 47 Pac., 890.

And if the motorman may govern his actions by the presumption that the intending passenger
 30 will wait until the car has stopped, it necessarily follows that any action of his in accelerating the speed of the car while the intending passenger is waiting and before it has come to a stop, cannot be held to amount to negligence on his part.

"A motorman of an electric street car who while the car is slowly approaching a street corner, observes a person who desires to become a passenger signaling him to stop, is not bound to assume that the intending passenger will attempt to board the car until it
 40 has actually stopped, and no negligence can

be imputed to the motorman if he accelerates the speed of the car before it is actually stopped and before the rear thereof has reached the place where the intending passenger is standing, unless, at the time he increases the speed of the car, he sees that the intending passenger is then attempting to board it."

Monroe v. Met. St. Ry. Co., 79 App Div., 587; 50 N. Y. Supp., 177.

"A person desiring to become a passenger on a street car has the right to insist that it shall come to a stop to enable him to do so; but if the car does not stop, the carrier is not at fault if he attempts to board the car while in motion, unless its speed is so diminished as to amount to an invitation to him to get upon it and then is subsequently accelerated without notice while he is in the act of getting on; where, however, it is alleged as the foundation of the action that the car having stopped, was started before he was able to get upon it, the fact of the stopping of the car is essential to his case." 10 20

Savage v. Third Av. Ry. Co., 29 App. Div., 556; 51 N. Y. Supp., 1066.

There is no evidence in this record that the motorman of the car had so far slackened his speed that it was even fairly safe for these appellants to attempt to board it. The only evidence in the case is that he first slackened and then accelerated the speed of the car. And it is submitted that under the foregoing decisions and considerations they were not entitled to rely upon any slackening howsoever slight, in remaining in a position defined by all the courts as one of such obvious peril. Entirely apart from the question of the rear swing, they would certainly be held contributory negligence in attempting to board such a moving car. When therefore the element of the imminent rear swing is added, we submit, that judged by this test, they were certainly not entitled to remain where they were. 30 40

This fact, in the interest she discovers a more a for trial of this (p. 35)

It is submitted that these principles, governing the conduct of intending passengers toward cars approaching them upon straight tracks, apply *a fortiori* when the car is hailed by them at a curve. That the case of an intending passenger, so far from presenting an exception to the doctrine of rear swing collisions, is fully and entirely controlled by it. And we are fortunate in having express authority on the matter—an “all fours” case, if one is possible, in the Garvey case, already mentioned, which provides at this point a most significant test of the considerations just discussed. Plaintiff was an intending passenger and, taking her station in the outside of a curve close to the track, hailed the car; the motorman slackened in response to the signal and then quickened his speed and plaintiff was struck exactly as here. It is therefore most interesting to read appellant’s very contentions there discussed by the Rhode Island court and dismissed:

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“And although the speed of the car was being slackened in response to her signal before she assumed the position of danger on said curve, yet as it had not come to a standstill, she had no right to infer that it would do so at any particular point on the curve, and hence she had no right to take a position where the swing or overhang of the car would come in contact with her person. It is to be noted in this connection that the plaintiff was not attempting or intending to board the car while it was in motion. * * * Indeed, the former act would seem to be a stronger bar to his recovery than the latter, for, when one negligently places himself in front of a moving car, the motorman, who is in a position to see him, is bound to avoid injuring him, if possible, notwithstanding his own negligence. But, where one places himself in such a position that the motorman is unable to see him, as must have been true in the case at bar, and is hit by the swing or kick of the rear part of the car when rounding a curve, we fail to see how any liability can be fastened upon the company.”

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POINT III.

Proximate Cause.

Appellants seek to avoid the logical consequences of what they in so doing impliedly admit to have been negligence on their part by the claim that such negligence in remaining within the range of the overhang was not the proximate cause of their injury. And they endeavor to apply to the facts of this case the doctrine of "last clear chance" and invoke ^{an} illustration of the very indefinite statement of the general principal of proximate cause which is italicized on page 11 of their Brief those same cases of collisions on straight tracks which they attempted to quote as authority here in another connection before referred to. 10

It is submitted it cannot be seriously contended that the doctrine of last clear chance has any true and valid application here. In its very nature and principle, that doctrine must obviously find exclusive illustration in collisions on straight tracks. It is a subordinate doctrine developed by the courts out of the equality of rights to the use of the public highway on the part of pedestrians engaged in crossing trolley tracks, with the company operating its cars. But in these rear swing collisions *the injured parties are not taking a chance*. They are remaining in what to them seems a place of absolute safety. They do not contest the right of the car to proceed, nor run a risk by claiming a superior right of way. No right of way is claimed at all. 20 30

But we need not rely on principle to show that no question of proximate cause can here be raised.

In the *Ray* case, the Court adverted to the question of proximate cause in the following language:

"When he (the driver of the wagon) discovered the presence of the hole (which 40

was his alleged reason for approaching close to the car) in the street, he should have either checked his horse and not driven voluntarily into a place of danger, or else he should have driven further away from the car than he did. His failure to do one of these things was the direct cause of plaintiff's injury."

Garvey v. Rhode Island Co., 58 At. Rep., 457.

10 And in the *Garvey* case, the question was directly presented whether plaintiff's injury was caused by remaining close to the car or by the motorman's action in suddenly increasing its speed. The Court held as follows:

20 "But counsel for the plaintiff places much stress upon the fact that, after the speed of the car had been slackened in response to the signal to stop, its speed was suddenly accelerated and that this was the proximate cause of the plaintiff's injury. We do not see that this is so. Having placed herself within the reach of the overhang of the car, as the plaintiff did, it was inevitable that it would strike her if it did not stop and she remained in that position. So that the mere fact that the speed of the car was subsequently accelerated was not the proximate cause of the accident, as it must have happened in any event, except as above stated. And hence it would seem to be clear that the plaintiff's negligence was the proximate cause thereof."

30 We submit that the irrelevancy of the doctrine of "last clear chance" in these cases effectually disposes of appellant's claim that there was at least a jury question on proximate cause. The doctrine of last clear chance is always invoked to solve the taking of a cause from the jury on the ground of proximate cause and, we submit, that not only is this question not one for the jury, but that there can be no contention that the conclusions of the *Ray* and *Garvey* cases is correct.

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POINT IV.

Appellant's alleged custom.

Still further admissions of the weakness of appellants' case are involved in the introduction of what is claimed to be evidence in support of a "custom" of defendant or its employees to bring their cars to a stop in response to signals by intending passengers on the west side of Bergen Avenue, at the south crosswalk from Fairmount Avenue at the middle of the curve, instead of at the other end of the curve in the eastern portion of Fairmount Avenue.

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The insufficiency of of this evidence as proof of a custom cannot fail to strike one at the most cursory reading of the detailed abstract of the testimony hereinabove set forth. It comprises the evidence of plaintiff Sarah Miller and one other witness, a minor, and a relative, the girl Viola Greenleaf, who testify to two instances separated by an interval of over a year, on which they boarded cars at that point. And on cross-examination plaintiff Sarah Miller ^{and Viola Greenleaf} acknowledged that ~~she~~ had just learned of these instances since a former trial of these cases. And the other witness, the physician Philemon Hummel, so far from establishing the custom plaintiff desired, testified that the car stopped at the opposite end of the curve.

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So weak is this evidence that appellants have not attempted to rely on it as a custom in their brief. As well do two swallows make a summer as these two instances—assuming them to have been proved—make out a general custom on which appellants might rely. But appellants seek to utilize this evidence in more subtle fashion by making it a ground for a state of mind in assuming so perilous a position. But the very authority on which they rely, the quotation from the *Glasco* case reveals the weakness of the whole argument. It is a pure assumption in these

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cases to say that the evidence came anywhere near showing that the cars (as the Court in the *Glasco* case said) "usually stopped" at that crossing. Two instances are no more "usually" than they are a general custom.

Nor can this testimony be held to show any "previous practice" of defendant, as in the case of *Loder v. Metropolitan St. Ry. Co.*, cited by appellants.

10 We do not think that appellants themselves will dispute that this evidence, so far from bolstering up the weakness of their case, is scarce worthy of serious consideration.

The judgment should be affirmed.

Respectfully submitted,
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EDWIN F. SMITH,
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Of Counsel.

New Jersey Court of Errors and Appeals.

SARAH MILLER and ALBERT MILLER,
Plaintiffs-Appellant,

vs.

On Appeal.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

WILLIAM E. GREENLEAF, administrator of Elvina Greenleaf, deceased,

Plaintiff-Appellant,

vs.

On Appeal.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANT.

Permission having been granted by the court at the argument of the above entitled cases on the twenty-ninth day of June, nineteen hundred and fourteen, we hereby submit for consideration by the court, the supplemental brief in answer to the contentions raised in the brief of our opponent.

In our original brief (pages 6, 13, &c.), we have commented on and distinguished all of the "Rear End Collision" authorities cited in our opponent's brief, excepting the following:

Hoffman vs. Philadelphia Rapid Transit
Co. 214 Pa. 87; 63 Atl. 409 (1906).

South Covington & Cincinnati St. Ry. Co.
vs. Besse 33 Ky. L. Rep. 52; 108 S W
848, 16 L. R. A. n S 890 (1908).

Louisville Ry. Co. vs. Ray (ky) 124 S W
313 (1910).

Gribbins vs. Ky Terminal & Trac. Co. 150
Ky. 276 150 S W 338.

Walger vs. J. C. H. & P. Ry. Co. 71 N. J. L.
356 (Cited by Appellee on the argument
but not in brief).

Waters vs. United Traction Co. 99 N. Y.
Supp. 763.

We will first comment on briefly and distinguish each of these cases from the case at bar, then answer the arguments set forth in the brief of our opponent in the order in which they appear.

In the Hoffman Case, above cited and mentioned in our opponent's brief (pages 15, 30), it is expressly stated that "*the motorman and conductor did not have any notice of the plaintiffs' presence at the side of the car, and not it is contended that they failed in the performance of any duty in not looking out and seeing her as she stood at that point.*"

This case is to be distinguished from the case at bar because in that case the motorman had no notice of the plaintiff's presence and hence it cannot be said, had an opportunity to avoid a peril which he did not see, whereas in the case at bar, the motorman saw the plaintiffs and had reason to know of their intention to board the car and hence knew their danger.

In the Besse case, (Appellee's Brief, pages 17, 31), the facts show that *the driver of the vehicle, after he had passed from the view of the motorman, drove toward or nearer to the car which injured him.*

Here again, we have a case where the plaintiff while in sight of the motorman was in a place of

safety and when in a position where the motorman could no longer see him, moved to a place of danger.

In the Ray case, (Appellee's Brief, pages 16 and 25) it does not clearly appear whether the motorman saw or could have seen the plaintiff, although we believe it may be inferred from the opinion contained on page 25 of Appellee's brief, that the motorman could not see him.

If the motorman did or with a reasonably careful lookout, could not see the plaintiff, the case does not apply to the case at bar for the reason already stated.

If he did see the plaintiff, then the court in effect says to the motorman, "Even if you see that by continuing the course of your car you are certain to strike a pedestrian or vehicle, you may nevertheless disregard him and strike him and you will be free from liability." This is precisely what Chancellor McGill, in *Camden G. & W. Ry. Co. vs. Preston* (see original brief, page 11), said the motorman could not do.

This same court recognized in part the fallacy of this decision when it said in the Gribbins case (Appellee's brief, pages 17 and 25) :

"Those in charge of the car owed her no legal duty whatever unless they actually saw or discovered the peril of her position in time to avoid having injured her."

This case has the effect of qualifying the previous decisions so that the rule in Kentucky is exactly the same as the rule in Connecticut, as laid down in the Hayden case (see original brief, page 6), except that under the Kentucky rule actual knowledge must be proved.

The Kentucky court, in laying down this rule that actual knowledge must be proved, adopts as its premise the proposition that no legal duty rests on the motorman to look out for or to see anything

beyond the space required for the free passage of the car when on a straight track. That this premise is wholly false, is proved by the fact that motormen are universally held bound to see persons approaching the track for the purpose of crossing.

If a motorman is bound to see a person who is nearing the track for one purpose i. e. crossing, he is bound to see the person who is nearing the track for another purpose, i. e. boarding the car.

The question of knowledge or want of knowledge on the part of the motorman is a question to be passed upon by the jury which will in each case take into consideration the peculiar circumstances, such as light, distance from the track, obstructions to view, conduct of the motorman, &c.

True Rule.

We contend that the true rule to be deduced from the authorities above mentioned on rear end collision cases and the authorities covering the doctrine of the Last Clear Chance, may be laid down as follows:

When the motorman sees or has a reasonable opportunity to see a person in such a position that he will be struck by the rear end of the car as it rounds the curve, he may presume that the plaintiff is aware of the danger and will step back and avoid it.

He may so presume until it is apparent or by the exercise of reasonable diligence would be apparent to him, that the person is in danger and is not aware of the danger or is so situated that he can avoid the danger. If after discovering the person's danger and his ignorance of it or inability to avoid it, he has an opportunity to avoid collision either by warning the person or

stopping the car, and fails to do so, is liable to the person injured.

Contributory Negligence.

In our opponent's brief, page 35, appears a clause from the case of *Kennedy vs. North Jersey Street Railway Co.* 72 N. J. L. 19; 60 Atl. 40) which reads as follows:

"It is not questioned that an invitation of this sort may give rise to legal responsibility on the part of the defendant, but an essential factor—indeed the essential factor—in such invitation is the existence of some state of facts from which the servants of the defendant knew or ought to have known that their act of slowing the speed of the car might give rise to the belief that it was for the purpose of permitting the plaintiff to become a passenger."

This is precisely the rule we desire to have applied to the case at bar. The essential "state of facts" is supplied (1) By plaintiffs having boarded cars at the same point on previous occasions (knowledge of which must be imputed to this particular motorman); (2) by the fact that the motorman was apparently looking towards the plaintiffs; (3) By plaintiffs' signal to the motorman to stop the car to allow them to board it; (4) by his act in slackening the speed in acknowledgment of that signal.

Whether these four circumstances taken together furnish a "state of facts from which the servants of the defendant knew or ought to have known that their act of slowing the speed of the car might give rise to the belief that it was for the purpose of permitting the plaintiff to become a passenger" is a question for the jury and not for the court.

This, we believe, fully answers the contention of

our opponent, as set forth on pages 32, &c., of his brief in Point II.

Our opponent contends on page 39 of his brief, that the "Last Clear Chance" doctrine is only to be applied to those persons crossing the tracks or attempting to cross the tracks in front of the car, and says:

"But in these rear end swing collisions the injured parties are not taking a chance. They are remaining in what to them seems a place of absolute safety. They do not contest the right of the car to proceed nor run a risk by claiming a superior right of way. No right of way is claimed at all."

If the "Last Clear Chance" doctrine, which disregards the plaintiff's negligence, is to be invoked in behalf of those who "run a chance" or "contest the right of the car to proceed" or "run a risk by claiming a superior right of way" how much more is it to be invoked in behalf of those who "do not take a chance" and who "are remaining in what to them seems a place of absolute safety" and who "do not contest the right of the car to proceed" nor "run a risk by claiming a superior right of way."

Our opponent has not made it clear why this doctrine is to be applied in favor of one in front of a car and is not to be applied in the case of a person who in plain view stands close to the car.

We submit that there is absolutely no difference in principle and this doctrine is by no means "a subordinate doctrine" but is a universal doctrine applied to all classes and kinds of negligence cases.

We have already stated our view of the part which the evidence of the previous practice of the defendant in stopping its cars at the point in question plays in the cases at bar.

We maintain now as we maintained in our origi-

nal brief, that the facts introduced in evidence before the court below was such as to require the submission of the entire case to the jury, and that the judgment of the court should be reversed.

Respectfully submitted,

DEGRAW & MURRAY,
WILSON E. TIPPLE,
(of the New York Bar.)
Attorneys of Plaintiffs Appellant.

Notice of Appeal.

Filed January 15, 1914.

Supreme Court of New Jersey

SARAH MILLER and ALBERT MILLER,
Plaintiffs-Appellants,

20

vs.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

WILLIAM E. GREENLEAF, administrator of Elvina Greenleaf, deceased,

30

Plaintiff-Appellant,

vs.

PUBLIC SERVICE RAILWAY Co.,
Defendant-Appellee.

Notice is hereby given that plaintiffs appeal to the Court of Errors and Appeals of the State of New Jersey from the judgments of non-suit entered in the two above entitled causes by the Supreme Court of New Jersey holden before Honorable Benjamin A. Vail, on the following grounds:

40

1. That the trial court erred as a matter of law in entering judgments of non-suit in favor of the defendant and against the plaintiffs because the evidence

10 introduced by the plaintiffs and admitted by the court
established actionable negligence on the part of the
defendant.

2. That the trial court erred as a matter of law
when it ruled that the evidence submitted by the
plaintiff's and admitted by the court exhibited such
contributory negligence on the part of the plaintiff
Sarah Miller and the plaintiff's intestate Elvina Green-
leaf, as to preclude the plaintiffs as a matter of law,
from recovering damages from the defendant for its
20 negligence.

3. That the court erred in refusing to allow the
plaintiffs' evidence touching the question of negligence
on the part of the defendant and contributory negli-
gence on the part of the plaintiff, Sarah Miller and
the plaintiff's intestate, Elvina Greenleaf, to go to the
jury and be by it considered and passed upon.

4. That the court erred as a matter of law in ad-
mitting over plaintiff's objection the testimony of
30 Viola Greenleaf taken at the previous trial of the two
above entitled causes.

DEGRAW & MURRAY,
Attorneys of Plaintiff-Appellants.

To:

Messrs. Edwards & Smith,
Attorneys of Defendant-Appellee.

(Endorsed): "Filed Jan. 15, 1914. David S. Crater,
Clerk."

40

Acknowledgment of service on defendant December
24th, 1913, endorsed by Messrs. Edwards & Smith,
attorneys of defendant.

Summons.

10

Filed June 13, 1912.

New Jersey, ss:

(Seal.)

THE STATE OF NEW JERSEY, to the Sheriff of the
County of Hudson, GREETING:

We command you to summon Public Service Rail-
way Company, a corporation of New Jersey to be and
appear before the Supreme Court of the State of New
Jersey, to be held at Trenton in and for said State
on the nineteenth day of June, 1912, to answer unto
William E. Greenleaf, administrator of the goods
and chattels, rights and credits of Elvina Greenleaf,
deceased, in an action of tort to his damage ten thou-
sand dollars, and have you then there this writ.

20

WITNESS, William S. Gummere, Esquire, Chief
Justice at Trenton, aforesaid, the tenth day of June
in the year one thousand nine hundred and twelve.

30

WILLIAM RIKER, JR.,

Clerk.

DeGraw & Murray,
Attorneys.

40

Summons.

10

Filed June 13, 1912.

New Jersey, ss:

(Seal.)

THE STATE OF NEW JERSEY, to the Sheriff of the
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State, on the nineteenth day of June, 1912, to answer
unto Sarah Miller and Albert Miller, in an action of
tort, to their damage Ten thousand dollars, and have
you then there this writ.

WITNESS, William S. Gummere, Esquire, Chief
Justice at Trenton, aforesaid, the tenth day of June
in the year one thousand nine hundred and twelve.

30

WILLIAM RIKER, JR.,
Clerk.

DeGraw & Murray,
Attorneys.

40

Judgment Record.

10

January 15, 1914.

NEW JERSEY SUPREME COURT.

WILLIAM E. GREENLEAF, Admr.,
etc., of Elvina Greenleaf, dec'd

vs.

PUBLIC SERVICE RAILWAY COM-
PANY.

In Tort.

On Postea.

Judgment of
Non-suit.

20

Edwards & Smith,
Attorneys.

As yet of the nineteenth day of June, A. D., nine-
teen hundred and twelve.

WITNESS, William S. Gummere, Esquire, Chief
Justice.

30

WILLIAM RIKER, JR.,
Clerk.

Hudson County, ss:

Public Service Railway Company, a corporation
the defendant in this action, was summoned to answer
unto William E. Greenleaf, administrator of the goods
and chattels, rights and credits which were of Elvina
Greenleaf, deceased, in an action of tort, and there-
upon the said plaintiff, by DeGraw & Murray, his
attorneys, complains for that whereas the said de-
fendant, heretofore, to wit, on the nineteenth day of
June, nineteen hundred and ten, to wit, in the City of
Jersey City, in the County of Hudson and State of
New Jersey, was operating a certain public street rail-
way for the conveyance and transportation of such

40

10 persons as might desire to become passengers thereon, along and upon divers public streets and highways in the said City of Jersey City including the public streets or highways known as Bergen Avenue and Fairmount Avenue, and was managing, operating, propelling and running a certain passenger car on said public street railway for the transportation and conveyance of such persons as might desire to become passengers thereon, and in the operation of the said public street railway, and in managing, operating, 20 propelling and running the said passenger car, was bound in law to exercise due care and regard for the safety and welfare of persons and pedestrians lawfully upon said street and also for the safety and welfare of persons and pedestrians lawfully upon said street intending to become passengers upon said street railway and upon said passenger car; yet the plaintiff says that on the day and year aforesaid, while the said intestate Elvina Greenleaf, was lawfully upon the said public street or highway known as Bergen Avenue and crossing the same in a southerly direction at a 30 point approximately opposite the intersection of the said public street or highway known as Fairmount Avenue with the said public street or highway known as Bergen Avenue the said defendant corporation, notwithstanding its said duty to exercise care and regard for persons and pedestrians lawfully upon said street or highway known as Bergen Avenue, in managing and operating the said street railway and in managing, operating, propelling and running the said passenger car, by its servants or agents so negligently and 40 carelessly managed and operated the said street railway and so negligently and carelessly and at such an excessive rate of speed, managed, operated, propelled and run the said passenger car on said public street railway on and along said Bergen Avenue as aforesaid that the rear end of said passenger car while turning on the said public street railway from said Bergen Avenue in a southerly direction into and upon

the said Fairmount Avenue, struck and collided with the said intestate Elvina Greenleaf, while she was lawfully upon and crossing the said Bergen Avenue as aforesaid, and that by the force of the striking and collision, the said intestate, Elvina Greenleaf, was thrown upon the ground with great violence by the force of the said blow, and was thereby greatly bruised, maimed and injured, and became sick, sore, lame and disordered, and shortly thereafter, to wit, upon the twenty-first day of June, nineteen hundred and ten, the said intestate died because and by reason of the injuries so inflicted upon her by the negligence of the servants of the defendant; and the plaintiff avers that his said action as aforesaid was commenced within twenty-four calendar months after the death of said Elvina Greenleaf, deceased; whereby an action hath accrued to the plaintiff, according to law and the statute in such case made and provided, to demand of and from the defendant the damage sustained by the next of kin of the said intestate, amounting to the sum of ten thousand dollars.

And for that also at the time and place aforesaid, the said defendant corporation was operating a certain public street railway for the conveyance and transportation of such persons as might desire to become passengers thereon along and upon divers public streets and highways in the said City of Jersey City, including the public streets or highways known as Bergen Avenue and Fairmount Avenue and was managing, operating, propelling and running a certain passenger car on said public street railway for the transportation and conveyance of such persons as might desire to become passengers thereon, and in the operation of the aforesaid public street railway and in managing, operating, propelling and running the said passenger car, was bound in law to exercise due care and regard for the safety and welfare of persons and pedestrians lawfully upon said public street or highway known as Bergen Avenue and for the safety

10 and welfare of persons lawfully upon the said public
street or highway known as Bergen Avenue desiring
and intending to become passengers on the said street
railway and passenger car, and the said intestate El-
vina Greenleaf, being then and there lawfully upon
the said public street or highway known as Bergen
Avenue and crossing the same in a southerly direction
at a point approximately opposite the intersection of
the said public street or highway known as Fairmount
Avenue with the said public street or highway known
20 as Bergen Avenue, at which point the said plaintiff
knew that the said defendant was accustomed to stop
its said passenger cars, with the intention and for the
purpose of boarding the said passenger car and be-
coming a passenger upon the said public street rail-
way and upon the said passenger car of the defendant,
which was being managed, operated, propelled and run
by the defendant or its agents or servants upon said
public street railway upon and along the said public
street or highway known as Bergen Avenue in a north-
westerly direction, and the said intestate Elvina Green-
30 leaf, having notified and signaled the agent of the
defendant, to wit, the motorman in charge of and
operating, managing, propelling and running the said
passenger car, of her desire and intention then and
there to board the said passenger car and to become
a passenger upon the said public street railway and the
said passenger car, it then and there became and was
the duty of the defendant through its agents or ser-
vants to stop the said passenger car in order that the
40 said intestate Elvina Greenleaf, might board the same
and become a passenger upon the said public street
railway and the said passenger car, and be by it car-
ried to her destination.

Yet the defendant, notwithstanding its duty as
aforesaid, did not exercise due care and regard for
the safety and welfare of the persons lawfully upon
the said public street or highway known as Bergen
Avenue and persons lawfully crossing the same with

the desire and intention of boarding the said pas- 10
 senger car and becoming passengers upon the said
 public street railway and the said passenger car, but
 wholly disregarding its duty in that behalf, did not
 exercise due care and regard for the safety and wel-
 fare of the said intestate Elvina Greenleaf, to board
 the same and become a passenger upon the said public
 street railway and the said passenger car, and with-
 out warning the said intestate, Elvina Greenleaf of
 its intention not to stop said passenger car, continued
 to manage, operate, propel and run the said passenger 20
 car at a high and excessive rate of speed and so care-
 lessly and negligently operated, propelled and run the
 said passenger car upon the said public street known
 as Bergen Avenue, that the said intestate, Elvina
 Greenleaf, being then and there lawfully upon the said
 Bergen Avenue and crossing the same with the desire
 and intention of boarding the said passenger car and
 becoming a passenger upon the said public street rail-
 way and the said passenger car and waiting for and
 expecting the said car to stop, and expecting and in- 30
 tending to become a passenger thereon as aforesaid,
 such desire, intention and expectation having pre-
 viously by her been made known to the defendant,
 its agent or servant as aforesaid, was struck by the
 rear end of said passenger car as it turned from the
 said Bergen Avenue in a southerly direction into and
 upon the said Fairmount Avenue and was violently
 thrown to the ground and bruised and injured as
 aforesaid, and shortly thereafter, to wit, upon the 40
 twenty-first day of June, nineteen hundred and ten,
 died by reason of the injuries so inflicted upon her by
 the careless and negligent acts of the defendant, its
 servants and agents; and the plaintiff avers that his
 said actions as aforesaid was commenced within twen-
 ty-four calendar months after the death of the said
 Elvina Greenleaf, deceased; whereby an action hath
 accrued to the plaintiff in accordance with the law and
 statutes in such case made and provided, to demand

10 and have from the defendant the damages which have been sustained by the next of kin of the said intestate, amounting to the sum of ten thousand dollars.

And the said plaintiff says that by reason of the premises an action hath accrued to him to have and demand of and from the defendant the damages aforesaid, amounting to the sum of ten thousand dollars; and therefore he brings his suit, etc.

20 Defendant as to the first count in said declaration mentioned, and as to the matters and facts mentioned therein, comes and defends the wrong and injury, when, etc., and says that it is not guilty of the supposed grievances therein laid to its charge, or any or either of them, in manner and form as the said plaintiff hath therein complained against it and of this it, the said defendant, puts itself upon the country, etc.

30 And the said defendant as to the second count in said declaration mentioned, and as to the matters and facts mentioned therein, comes and defends the wrong and injury when, etc., and says that it is not guilty of the supposed grievances therein laid to its charge, or any or either of them, in manner and form as the said plaintiff hath therein complained against it and of this it, the said defendant, puts itself upon the country, etc.

40 Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Jersey City, in and for the County of Hudson, on the third Tuesday of September, A. D., nineteen hundred and thirteen, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit, the sixth day of December, A. D., nineteen hundred and thirteen before our said Supreme Court at Trenton, come the said parties by their attorneys aforesaid, and the justice

before whom, etc., having first sent hither his record
had before him in these words, to wit: 10

This action was tried before Justice Benjamin A. Vail with a jury on November twelfth, nineteen hundred and thirteen at the Hudson Circuit, and after a consideration of the evidence submitted on behalf of the plaintiff, the Court being of the opinion that the plaintiff had not made out a cause of action against the defendant, a judgment of non-suit was ordered.

Whereupon it is adjudged that the action be dismissed and that the defendant recover of the plaintiff its costs which are taxed at— 20

Therefore it is considered that the said plaintiff, William E. Greenleaf, admr., etc., of Elvina Greenleaf, dec'd take nothing by his said writ and that the said defendant, Public Service Railway Company do go thereof without day, etc.

Judgment signed this sixth day of December, A. D., nineteen hundred and thirteen.

WILLIAM S. GUMMERE,
C. J. 30

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have set my
hand and the seal of said Court at
Trenton, this eighth day of January, 40
A. D., nineteen hundred and fourteen.

WM. C. GEBHARDT,
(Seal.) Clerk.

Judgment Record.

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Filed January 15, 1912.

NEW JERSEY SUPREME COURT.

	SARAH MILLER and ALBERT MILLER vs.	} In Tort. On Postea.
20	PUBLIC SERVICE RAILWAY COM- PANY.	

Edwards & Smith,
Attorneys.

As yet of the nineteenth day of June, A. D., nine-
teen hundred and twelve.

30 WITNESS, William S. Gummere, Esquire, Chief
Justice.

WILLIAM RIKER, JR.,
Clerk.

Hudson County, ss:

40 Public Service Railway Company, a corporation the
defendant in this action, was summoned to answer
unto Sarah Miller and Albert Miller, her husband, the
plaintiffs therein in an action of tort and thereupon
the said plaintiffs by DeGraw & Murray, their attor-
neys, complain for that whereas the said defendant
heretofore, to wit, on the nineteenth day of June, nine-
teen hundred and ten to wit, in the City of Jersey
City, in the County of Hudson and State of New Jer-
sey, was operating a certain public street railway for
the conveyance and transportation for such persons as

might desire to become passengers thereon, along and upon divers public streets and highways in the said City of Jersey City, including the public streets or highways known as Bergen Avenue and Fairmount Avenue, and was managing, operating, propelling and running a certain passenger car on said public street railway for the transportation and conveyance of such persons as might desire to become passengers thereon, and in the operation of the said public street railway, and in managing, operating, propelling and running the said passenger car, was bound in law to exercise due care and regard for the safety and welfare for persons and pedestrians lawfully upon said street and also for the safety and welfare of persons and pedestrians lawfully upon said street intending to become passengers upon said street railway and upon said passenger car; yet the plaintiffs say that on the day and year aforesaid, while the plaintiff Sarah Miller was lawfully upon the said public street or highway known as Bergen Avenue and crossing the same in a southerly direction at a point approximately opposite the intersection of the said public street or highway known as Fairmount Avenue, with the said public street or highway known as Bergen Avenue, the said defendant corporation, notwithstanding its said duty to exercise care and regard for persons and pedestrians lawfully upon said street or highway known as Bergen Avenue, in managing and operating the said street railway and in managing, operating, propelling and running the said passenger car, by its servants or agents so negligently and carelessly managed and operated the said street railway and so negligently and carelessly and at such an excessive rate of speed managed, operated, propelled and run the said passenger car on said public street railway on and along said Bergen Avenue as aforesaid, that the rear end of said passenger car while turning on the said public street railway from said Bergen Avenue in a southerly direction into and upon the said Fairmount Avenue,

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10 struck and collided with the said plaintiff, Sarah Miller while she was lawfully upon and crossing the said Bergen Avenue as aforesaid, and that by the force of the striking and collision, the said plaintiff Sarah Miller, was thrown to the ground and was thereby greatly bruised and injured, and became sick, sore, lame and disordered, and so remained for a long space of time, to wit, from thence hitherto and was so greatly injured that her breast and side were bruised and lacerated and that her sight and hearing were, and have since remained, and now are, seriously injured
 20 and impaired, and she likewise received other bruises and injuries to her body which have greatly impaired her health; in consequence of which said injuries said plaintiff was confined to her bed and was helpless for many weeks thereafter and her nervous system became and is completely deranged and disordered, and will so remain for the rest of her life; and during all the said time the said plaintiff suffered and underwent great pain from said injuries, and in the future will suffer great pain, and thereby was and still is
 30 hindered and prevented, and in the future will be hindered and prevented, from properly attending to her lawful affairs, business and duties by her during all that time to be performed and transacted, whereby said plaintiffs say that they have been injured and have sustained damage to the amount of ten thousand dollars.

And for that also at the time and place aforesaid, the said defendant corporation was operating a certain
 40 public street railway for the conveyance and transportation of such persons as might desire to become passengers thereon along and upon divers public streets and highways in the said City of Jersey City, including the public streets or highways known as Bergen Avenue and Fairmount Avenue and was managing, operating, propelling and running a certain passenger car on said public street railway for the transportation and conveyance of such persons as might desire to be-

come passengers thereon, and in the operation of the
 aforesaid public street railway and in managing, oper- 10
 ating, propelling and running the said passenger car,
 was bound in law to exercise due care and regard for
 the safety and welfare for persons and pedestrians
 lawfully upon said public street or highway known as
 Bergen Avenue and for the safety and welfare of per-
 sons lawfully upon the said public street or highway
 known as Bergen Avenue desiring and intending to
 become passengers on the said street railway and pas-
 senger car, and the said plaintiff, Sarah Miller, being 20
 then and there lawfully upon the said public street or
 highway known as Bergen Avenue and crossing the
 same in a southerly direction at a point approximately
 opposite the intersection of the said public street or
 highway known as Fairmount Avenue with the said
 public street or highway known as Bergen Avenue,
 at which point the said plaintiff knew that the said de-
 fendant was accustomed to stop its said passenger cars,
 with the intention and for the purpose of boarding the
 said passenger car and becoming a passenger upon the
 said public street railway and upon the said passenger 30
 car of the defendant, which was being managed, oper-
 ated, propelled and run by the defendant or its
 agents or servants upon said public street railway upon
 and along the said public street or highway known
 as Bergen Avenue in a northeasterly direction, and the
 said plaintiff, Sarah Miller, having notified and sig-
 nalled the agent of the defendant, to wit, the motor-
 man in charge of and operating, managing, propelling
 and running the said passenger car, of her desire and 40
 intention then and there to board the said passenger
 car and to become a passenger upon the said public
 street railway and the said passenger car, it then and
 there became and was the duty of the defendant,
 through its agents and servants, to stop the said pas-
 senger car in order that the said plaintiff might board
 the same and become a passenger upon the said public
 street railway and the said passenger car, and be by it
 carried to her destination.

10 Yet the defendant, notwithstanding its duty as
aforesaid, did not exercise due care and regard for the
safety and welfare of the persons lawfully upon the
said public street or highway known as Bergen Ave-
nue and persons lawfully crossing the same with the
desire and intention of boarding the said passenger
car and becoming passengers upon the said public
street railway and the said passenger car, but wholly
disregarded its duty in that behalf, did not exercise
due care and regard for the safety and welfare of the
20 said plaintiff, Sarah Miller, and failed to stop the said
passenger car and failed to allow the said plaintiff,
Sarah Miller, to board the same and become a pas-
senger upon the said public street railway and, the said
passenger car, and without warning the said plaintiff,
Sarah Miller, of its intention not to stop said pas-
senger car, continued to manage, operate, propel and
run the said passenger car at a high and excessive rate
of speed and so carelessly and negligently operated,
propelled and run the said passenger car upon the said
public street known as Bergen Avenue that the said
30 plaintiff, Sarah Miller, being then and there lawfully
upon the said Bergen Avenue and crossing the same
with the desire and intention of boarding said pas-
senger car and becoming a passenger upon the said pub-
lic street railway and the said passenger car and wait-
ing for and expecting the said car to stop, and expect-
ing and intending to become a passenger thereon, as
aforesaid, such desire, intention and expectation hav-
ing previously by her been made known to the defend-
40 ant, its agent or servant, as aforesaid, was struck by
the rear end of said passenger car as it turned from
the said Bergen Avenue in a southerly direction into
and upon the said Fairmount Avenue and was vio-
lently thrown to the ground and bruised and injured
as aforesaid, and has thereby sustained damage to the
amount of ten thousand dollars.

And for that also the said plaintiff, Albert Miller,
by reason of the negligent and careless operation of

the said car, whereby his wife, the said Sarah Miller, was injured as aforesaid, has been put to great expense in the care of his said wife, and in the furnishing of medicines and medical treatment for his said wife, and by reason of her incapacity to attend to her household duties, has had to lay out and expend a large sum of money in the endeavor to effect her cure and for the proper discharge of the duties in his household to which his said wife has been accustomed to attend when in her usual health, and thereby has been injured and has sustained damages to the amount of two thousand dollars, part and parcel of the amount hereby demanded. 10 20

And the plaintiffs aver that this action was commenced within twenty-four calendar months from the time of the injury aforesaid.

Wherefore, the plaintiffs say that they have been injured and have sustained damage to the amount of ten thousand dollars; and therefore they bring their suit, etc.

Defendant, as to the first count in said declaration mentioned, and as to the matters and facts mentioned therein comes and defends the wrong and injury when, etc., and says that it is not guilty of the supposed grievances therein laid to its charge, or any or either of them, in manner and form as the said plaintiff hath therein complained against it, and of this, the said defendant, puts itself upon the country, etc. 30

And the said defendant as to the second count in said declaration mentioned, and as to the matters and facts mentioned therein, comes and defends the wrong and injury when, etc., and says that it is not guilty of the supposed grievances therein laid to its charge, or any or either of them, in manner and form as the said plaintiff hath therein complained against it and of this it, the said defendant, puts itself upon the country, etc. 40

Therefore, let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court

10 to be holden at Jersey City, in and for the County of Hudson, on the third Tuesday of September, in the year of our Lord, one thousand nine hundred and thirteen, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now, at this day, to wit, the sixth day of December A. D., nineteen hundred and thirteen, before our said Supreme Court at Trenton come the said parties by their attorneys aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

20 This action was tried before Justice Benjamin A. Vail with a jury on November twelfth, nineteen hundred and thirteen, at the Hudson Circuit, and after a consideration of the evidence submitted on behalf of the plaintiffs, the Court being of the opinion that the plaintiffs had not made out a cause of action against the defendant, a judgment of non suit was ordered.

Whereupon, it is adjudged that the action be dismissed and that the defendant recover of the plaintiffs its costs which are taxed at

30 Therefore, it is considered that the said plaintiffs, Sarah Miller and Albert Miller, take nothing by their said writ and that the said defendant, Public Service Railway Company, do go thereof without day, etc.

And it is further considered, that the said defendant, Public Service Railway Company, do recover against the said plaintiffs, Sarah Miller and Albert Miller, the sum of _____, for its costs and charges by it about its defense in this behalf laid out and expended by the Court now here adjudged to the
40 said defendant and with its assent according to the form of the statute in such case made and provided, and that the said defendant, Public Service Railway Company, have execution thereof, etc.

Judgment signed this sixth day of December, A. D., nineteen hundred and thirteen.

WILLIAM S. GUMMERE,

C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office. 10

In Testimony Whereof, I have set my hand and the seal of said Court at Trenton, (Seal) this eighth day of January, A. D. nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk. 20

Stipulation Incorporated in Proceedings and Trial.

Counsel for the respective parties agree that the two actions shall be tried together, and they also ask that the following stipulation be entered on the record in each case:

"It is hereby stipulated, by and between Messrs. Edwards & Smith, attorneys of defendant, and Messrs. DeGraw & Murray, attorneys of the plaintiff, that the electric or trolley car which plaintiff claims caused the injury for which the above entitled action is brought, was then operated, managed and controlled by the above named defendant corporation, Public Service Railway Co., or by its duly authorized agents or servants, and that formal proof of such operation, management and control and of such authorization is hereby expressly waived. 30 40

"This stipulation, however, to be used only at the coming trial of the above entitled cause and is to be be used in no other proceeding whatsoever."

10 **Stenographic Report of Evidence.**

MRS. SARAH MILLER, sworn:

Direct-examination by Mr. Tipple:

Q. Where do you live, Mrs. Miller? A. 123A Orient Avenue.

Q. How old are you? A. Forty.

Q. Where did you live in June, 1910? A. 93 Orient Avenue.

20 Q. In June, 1910, did you meet with an accident?
A. I did.

Q. Where? At what point? A. Bergen Avenue and Fairmount Avenue.

Q. Where had you been that evening? A. To the dedication of the Parmly Memorial Church on the Boulevard.

Q. What time in the evening was it? A. Quarter after ten.

Q. You left the church, did you? A. Left the church.

30 Q. Corner of Boulevard and Fairmount Avenue. Who was with you, if anybody? A. My mother.

Q. After leaving the church in which direction did you go? A. We came right down straight, Fairmount Avenue to Bergen Avenue, on the right-hand side.

40 Q. Now, will you tell in your own way to the Court and jury just exactly what happened as you came in line with Bergen Avenue, just what you did and what happened, as far as you can tell it? A. As we came along Fairmount Avenue to Bergen Avenue, we got to the corner of Bergen Avenue and saw the Jackson Avenue car in the middle of the block and when it got a little past the ice cream saloon I stepped out from the sidewalk into the street and I raised up my right hand to the motorman, and I still had my right hand raised, and the motorman was directly in front of me and I naturally thought he was going to stop—

Sarah Miller, Direct

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Mr. Smith: I object and ask to have it stricken out.

Mr. Tipple: We have no objection to its being stricken out, that part.

The Court: Yes; what she thought will go out of the record.

Q. Tell just what you did? A. The motorman looked right toward me, and thinking that the car was going to stop—

20

Q. Don't say what you think. Just tell the facts. You cannot tell what you thought? A. Well, I was sure this car was going to stop.

Mr. Smith: I ask that it be stricken out.

The Court: Yes; that will have to go out. Just state what you did.

Q. Just tell what you did? A. I raised my right hand and gave a signal for the motorman to stop, and he did not stop and the front end of the car had passed me and the rear end of the car as it turned around the curve, my mother and I were both struck; I was knocked unconscious and that is the last I remember.

30

Q. How far away was the motorman at the time that you raised your right hand as you have described to signal him to stop? A. I didn't exactly know just the distance.

Q. Well, where was the car in respect to the street? A. Why, when I first gave the signal he was just passing the ice cream saloon.

40

Q. Where were you at that time? A. Out in the street.

Q. And did you remain in that same place or did you move from that place from that time until you were hit? A. I didn't move from the spot until I was knocked off of it.

Sarah Miller, Direct

10

Q. As I understand it, from the time you raised your right hand, which you held up, you were in the street and you remained in that same place until you were struck; is that right? A. That is right.

Mr. Smith: I object to it as leading.

The Court: Yes; she had already said it before.

Mr. Smith: He had said it, but he was impressing it on her mind by reiteration.

20

The Court: I will let it stand.

Q. What is the next that you remember, Mrs. Miller? A. When I came to in the hospital, the City Hospital.

Q. Do you know when you came to? A. Do I know when I came to? Yes.

Q. What time was it, have you any idea whether it was the same night or next day, or when it was? A. I think it was around Monday some time.

30

Q. How did you feel then? A. Oh, I had pains all in my back and my knees and my head; I couldn't raise my arms; I had pains all through my inside.

Q. Did you continue to be conscious from that time on? When you regained consciousness were you conscious right along? A. Yes, sir.

Q. How long were you in the hospital? A. Tuesday evening.

Q. Until when? A. Tuesday evening.

40

Q. How did you feel during that time? You have described how you felt after you came to; now describe how you felt from the time you came to until you left the hospital. Describe if you felt any pain or how you felt? A. I had pains all through my inside and all my limbs and my head and my back; I couldn't turn.

Q. You were in the hospital Monday night, were you? A. Yes, sir.

Sarah Miller, Direct

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Q. Did you sleep Monday night? A. No.

Q. How did you get home from the hospital, Mrs. Miller? A. With a coach.

Q. After you arrived home where did you go? A. They put me to bed.

Q. How long were you confined to your bed? A. About seven weeks.

Q. What doctor treated you? A. Doctor Hummel.

Q. How long did Dr. Hummel treat you? A. Well, he is still treating me.

20

Q. You say you were in bed seven weeks? A. Seven weeks.

Q. How did you feel during the time that you were in bed? Describe your condition, how you felt? A. I couldn't turn in bed; my head ached, and then all my back ached me, and I had to be put in straps; my arms and all my limbs ached me so that I couldn't move them at all.

Q. How long did that condition continue? A. Well, that continued about eight or nine weeks.

30

Q. Did you sleep any to speak of during that time. A. No, and I can't sleep now—very little.

Q. How did you feel after you got out of bed? Describe how you felt then? A. I didn't seem to have any control of my limbs at all. I would go right down—seemed as if they went right from under me.

Q. Did you suffer any pain anywhere? A. Yes, I am still suffering pain.

40

Q. Where? A. In my back and my head and my limbs. I suffer quite a good deal.

Q. How does your condition compare, the way you feel now with what it was after you got out of bed? A. Well, I seem to be getting weaker instead of stronger.

Q. Do you suffer any insomnia now, that is do you sleep? A. Yes; I don't sleep hardly any.

Sarah Miller, Direct

10

Q. What was your condition of health, Mrs. Miller, prior to the time of this accident? A. Very good.

Q. Did you suffer these pains that you have described? A. No, I did not.

Q. Prior to that time? A. I did not.

Q. Did you have loss of sleep prior to that time? A. No; my sleep was all right.

Q. Did you see your mother in the hospital? A. I did.

Q. Where was she in respect to your cot? A. She was right opposite me in the same ward.

Q. How long did she remain in the same ward? A. They took her out of there Monday night.

Q. Did you see her when they brought her in? A. No, I did not.

Q. When is the first that you saw your mother? A. Monday.

Q. Will you describe her as you saw her? A. When I saw her in the hospital she was unconscious, she didn't know nothing.

Q. Did you see her after she was taken away from that part of the ward where you were? A. No.

Q. Did you see her remains at any time? A. They brought her casket to my bed.

Q. You were home then at that time? A. I was home at that time.

Q. Now, Mrs. Miller, coming back to the scene of the accident, will you state whether or not you ever boarded a car at that point before? A. I did.

Q. How many times? A. Well, I said at the last trial it was once, but my sister recalled that we had boarded it another time.

Mr. Smith: I object.

The Court: No; that won't do.

Sarah Miller, Direct

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Q. The question is, do you know how many times you boarded the car there? A. I remember after she spoke about it, yes.

Q. Now, do you know? A. I do.

Q. How many times did you board the car at that point before? A. Twice.

Q. Now, how long before this Sunday night had you boarded the car at that point? A. It was in May sometime, I don't know just exactly. Just before Decoration Day. They were holding memorial services in the church for the soldiers.

20

Q. That was the Parmly Memorial Baptist Church where you and your mother attended? A. The same church.

Q. When was the other time that you boarded the car at that corner? A. That was about three or four months before that.

Q. Do you know whether your mother ever boarded the car at that point before?

30

Mr. Smith: I object unless she was present.

The Court: Yes.

Mr. Tipple: Yes, I wish to qualify my question. If she was not present, I withdraw it. Strike out my question and I will reframe it.

Q. Were you present at any time with your mother? A. I was not.

Q. When she boarded that? A. I was not.

Q. How old was your mother? A. Sixty-one.

40

Q. Were you down there in the morning at the Parmly Memorial Baptist Church? A. No.

Q. Did you and your mother go down in the evening together? A. We did.

Q. You left your home together? A. We left our home together.

Q. You lived at 93 Orient Avenue? A. At the time, yes.

Sarah Miller, Direct

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Q. Who lived there in this house? A. My mother, my father, my husband and son, and I.

Q. Was there one or two families living there; I mean did you two live together or did you live separate? A. We lived separate.

Q. How large a house was it? A. Nine room house.

20 Q. What part of the house did you occupy? A. I had upstairs and my mother had down stairs.

Q. Was it what is known as a two-story and basement house? A. Two-story and basement.

Q. And you had the upstairs and your mother had the downstairs and basement? A. Downstairs, yes.

Q. Now, on the morning of June 19, 1910, you and your mother left—or in the evening rather? A. In the evening.

Q. You and your mother left the house together and you came down to church? A. We came down to church.

30 Q. How did you come down? A. We walked from our house, Orient Avenue to the Boulevard.

Q. Yes; and you walked down to church, did you, from your house? A. To the church.

Q. From the house, you and your mother? A. Yes.

Q. What time did you arrive at the church, about? A. About half past seven.

40 Q. Then services continued, did they, until you came out?

Mr. Smith: I object.

A. Yes.

Mr. Tipple: It is material.

Mr. Smith: Immaterial and irrelevant.

Sarah Miller, Direct

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Mr. Tipple: I am merely going to show that they were there during the time of the service—how long they were there. That is material, as to whether they are negligent or not in this suit, and that is only preliminary. I can reframe my question, if your Honor suggests it.

The Court: If it is objected to, of course it is not material, the length of time they were in this church. I think the question is improper and I will overrule it.

20

Mr. Tipple: I understand that you rule the form of the question is improper?

The Court: No, the subject matter you are referring to is irrelevant. I think the time they were in the church makes no difference to the issue in this case. The only issue is what occurred at the time they got out on the street.

Mr. Tipple: Might I suggest to your Honor that it might have some bearing on the physical condition of this plaintiff, Mrs. Greenleaf?

30

The Court: I do not see that. I overrule the question.

Q. Mrs. Miller, you say that you and your mother both lived in this place. Now, who did your mother's work, if anybody? A. My mother done her work and I done mine.

Q. At any time did your mother do anything for you in any way? A. In case of sickness, when my children were sick and I was sick.

40

Q. What did she do then? A. She took care of my house and took care of me.

Q. How long before this accident had you been sick? A. Seven years.

Q. At that time you say your mother took care of you? A. She did.

Sarah Miller, Direct

10

Q. Was there anything else that your mother would do for you, either in sickness or in helping you in any way, financially or in any way? A. She did. She bought my clothes when I needed them and she used to do for my children.

Q. Do you know whether she did anything for your brother? A. I do.

Q. How old is your brother? A. He is about thirty-nine.

20

Q. Was your brother a member of her household? A. He was.

Q. What did she do for your brother, if you know? A. She used to give him things he needed, and when he was out of work she used to take care of him.

Q. Did she ever help him in any way financially? A. She did. She started him in business.

Q. What kind of business did she start him in? A. The ice business.

30 Q. Did your mother ever do anything for your sister? A. She did.

Mr. Smith: To her knowledge.

Q. Yes: of course to your knowledge.

The Court: Oh, yes; it must be so.

Q. Only tell, Mrs. Miller, what you actually know, not what some one else tells you? A. No.

40 Q. How old is your sister? A. She is twenty-four, now.

Q. How old did you say your mother was when she died? A. Sixty-one.

Q. And you have said that your sister lived at home with your mother? A. She did.

Q. Now, did your mother ever do anything for your sister? A. She did.

Q. What did she do for your sister? A. She got her things that she needed to wear, and when she was sick she used to take care of her.

Sarah Miller, Direct

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Q. How many children were there in that family?
I mean brothers and sisters, yourself and who else?

A. My brother and I.

Q. Your brother and your sister? A. Yes.

Q. And your sister's name is what? A. Viola.

Q. What is your brother's name? A. Samuel.

Q. Their last name is Greenleaf? A. Greenleaf.

Q. And Mrs. Greenleaf was the mother of the three of you? A. Yes.

Q. Mrs. Miller, how was this place at the corner of Bergen Avenue and Fairmount Avenue lighted on that night that you attempted to board the car? A. It was a bright light right over the corner.

20

Q. Did the motorman when you raised your hand to signal him slacken his car or not?

Mr. Smith: I object to it as leading. It is telling her what to say.

The Court: It is a leading question.

Q. State whether or not the motorman slackened his car after you had raised your right hand to signal him to stop?

30

Mr. Smith: Now, if the Court please, I desire to protest against counsel asking leading questions, knowing that they will be stricken out and then reframing them in another way. It is not fair and it is not proper examination.

Mr. Tipple: I did not intend to be unfair, if the Court please.

40

Mr. Smith: You know what she will say now. You know she will not say anything else except what you are telling her to say.

The Court: The question now asked is proper. Of course the other one was not.

(Question repeated.)

A. He did.

Sarah Miller, Direct

10

Q. State whether or not he could see you in the place where you were standing?

Mr. Smith: I object.

A. He certainly could.

Mr. Smith: I object as calling for a conclusion, and ask that the answer be stricken out.

20

The Court: Yes; you must show such facts as will raise an inference that he could see, not her conclusion.

Q. State whether or not when you raised your right hand you saw the motorman? A. I did.

Q. Where was he? A. He was right directly in front of me the last I remember, but when I first raised my hand he was by the ice cream saloon.

Q. Where was he on the car? A. He was on the car.

30 Q. Was he coming towards you? A. Coming towards me.

Mr. Smith: I object.

The Court: That is leading.

Q. State whether or not he gave you any signal or warning? A. He did not.

Q. Which direction was the motorman looking when you saw him and when you raised your right hand as you have described?

40

Mr. Smith: I object.

A. Right toward me.

Mr. Smith: When I object, Mrs. Miller, I wish you would not answer.

The Court: If she could see and if she could tell which way he was looking, of course

Sarah Miller, Direct

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she knows and can testify to it, but not a mere inference.

Mr. Smith: I ask that the answer be stricken out.

The Court: The answer will go out.

Q. Could you tell, Mrs. Miller, from where you stood in which direction the motorman was looking? I could.

Q. In which direction was he looking? A. He was looking right towards me. 20

Mr. Smith: I object to it as necessarily calling for the conclusion of the witness. She could say his eye was directly on her.

Mr. Tipple: I think that objection is ridiculous. She can tell which general direction he was looking, whether he was looking back of him or ahead of him.

The Court: Of course if she knows she can tell what she saw, but she can only testify as to what she actually saw, and not what she surmised. 30

Mr. Tipple: That is all; and she says she was looking at him.

Q. Mrs. Miller, how far away was this car when you raised your right hand? A. By the ice cream saloon.

Q. About how far was that, in respect to the street? A. Opposite the corner. 40

Q. What position did Mrs. Greenleaf stand in in respect to yourself; on which side of you? A. Right hand side of me.

Q. Who stood nearest toward the direction from which the car was coming to the car? A. I did.

Q. How were you dressed that night? A. I had a white waist on and a check skirt.

Sarah Miller, Direct

10

Q. What kind of hat? A. Black hat with a light flower in it.

Q. How was your mother dressed? A. She was dressed in mourning.

Q. Mrs. Miller, prior to this accident, what did you weigh?

Q. I weighed one hundred and twenty-six and a half pounds.

Q. What is your weight now? A. One hundred.

20

Q. Prior to this accident, Mrs. Miller, who did your work? A. I did.

Q. You didn't have any servant? A. I did not.

Q. Since the accident who is doing your work? A. Well, since June my daughter-in-law is doing it. After the accident my sister had to stay home eight months from business.

30

Mr. Smith: I object to it as absolutely irrelevant, whether she had to stay home or not. She can state what she did, and then we can determine afterwards whether it was necessary.

Mr. Tipple: Yes, I consent to that being stricken out.

Q. Merely state, Mrs. Miller, who did your work, if anybody? State who did it and that is all. After the accident now who was the first one that did your work? A. My sister.

40

Q. After that who, if anybody, did it? A. An aunt of mine.

Q. How long did your sister do it? A. Eight months.

Q. After that how long did your aunt do it? A. Well, when she went back to business then my aunt would come a week or so and give her a chance to go back to business again.

Q. And alternating, that is the way they did the work? A. That is the way.

Sarah Miller, Direct

10

Q. Until what time? A. Then in November my sister gave up her position and stayed home until May.

Q. Of what year? A. This year.

Q. Have you done any housework since the accident? A. Only just a little. I do a little sewing and set table, that is all I can do.

Q. Do you do anything pertaining to the meals and things of that kind about the house? A. No, I do not.

20

Q. Have you tried to? A. I have tried to.

Q. Prior to this accident had your mother been ill? A. In 1909 she had pneumonia.

Q. How long was she ill at that time? A. I don't exactly know how long it was.

Q. She recovered after that? A. She certainly did.

Q. How long prior to the accident had she been doing her work? I mean from the time she was sick how long had she gotten so she could do her work?

30

A. Around a year she had been doing her own work after her sickness.

Q. You saw her? A. I did.

Q. Every day? A. I did.

Q. Did you notice her physical condition when you saw her from time to time? A. I did.

Q. How did she seem to be generally in health? A. Well, she seemed to be very well, what I saw of her; she did not complain.

40

Mr. Smith: I ask to have it stricken out, if the Court please.

The Court: That will go out.

Q. What doctor treated you, Mrs. Miller, after you were brought home? A. Dr. Hummel.

Q. Do you remember when Dr. Hummel first treated you? A. When I was brought home from the hospital.

Sarah Miller, Direct

10

Q. Do you remember the date? A. The 20th of June, or the 21st. The day my mother died I was brought home from the hospital.

Q. When next did he see you? A. He treated me right along.

Q. How often did he treat you? A. He came steady there for a year, every day there. It was quite some months when he was coming every day.

20

Q. Will you state, Mrs. Miller, how, if any, you feel differently now than you did prior to the time the accident took place? A. Well, I have fainting spells I didn't have before the accident, and I have headaches all the time, and my eyesight and my limbs—I haven't got the right use of my limbs; I lose all control of them.

Q. Anything else? A. I have that pain in my back and spine.

30

Q. Mrs. Miller, was there anyone with you at the time that you have described as getting on the car at this point, the corner of Bergen Avenue and Fairmount Avenue? A. My mother and I.

Q. No; I mean prior to the date of the accident. when you boarded the car at that corner was there anyone with you on those other occasions? A. There was.

Q. Who? A. My brother's boy.

Q. What? A. My brother's little boy.

Q. Anyone else? A. No.

40

Q. Any other time? A. No.

Q. Which time was it that your brother's little boy was with you? A. That was in May, Sunday evening.

Q. Was anyone with you when you got on three or four months before? A. My sister.

Q. That is Viola, is it? A. That is Viola.

Q. What is the name of the aunt that you have indicated as helping you with your housework? A. Mrs. Fink.

CROSS-EXAMINATION by Mr. Smith:

Q. Mrs. Miller, since the last trial of this case you have talked the matter over with various people, haven't you? A. I have not.

Q. Who was your lawyer at the last trial? A. Carrick.

Q. You have talked it over with Mr. Murray and Mr. Tipple, haven't you? A. I have.

Q. What did you mean by saying you haven't talked it over with anyone? Since the last trial you have talked it over with Mr. Murray and Mr. Tipple, haven't you? A. I certainly have.

20

Q. And since the last trial you have found out that you got on this car at the corner of Fairmount Avenue and Bergen twice instead of once, haven't you? A. I have.

Q. You have testified that you have discovered that the motorman slackened his car in response to your signal, haven't you? A. I have.

30

Q. Isn't it since the last trial that you have talked with your brother's boy as to his getting on the car with you once in 1910? A. Why, he spoke about it himself.

Q. Since the last trial? A. Why, sure.

Q. Isn't it since the last trial that your sister and you have talked about your getting on the car at the corner of Fairmount Avenue and Bergen twice instead of once? A. Why, of course.

40

Q. You did swear, didn't you— A. Well, you can't remember everything when you first talk about the accident.

Q. Just a minute. A. I am telling just the facts.

Q. You did testify under oath at the last trial that you had only been at this corner getting on a car once, didn't you?

Sarah Miller, Cross

Mr. Tipple: I object to this form of cross-examination. The proper way to impeach the witness is to read the testimony by question and answer.

The Court: That is so.

Mr. Smith: Yes, that is correct.

Q. Did you not say at the last trial in response to this question: "That goes around the corner, doesn't it," speaking of the Belt Line car; and your saying, "Oh, I never got out at that corner, so I couldn't take any notice of that corner." You said that, didn't you?
A. I did.

Q. And I saying to you: "You had been down there before," and your saying, "I got on at that corner once, I think, that is all." Is that so? A. That is so.

Q. Then of course you knew at that time, didn't you, Mrs. Miller, that you were under your oath testifying in court? You knew that? A. I knew that, yes.

Q. Isn't it true also, Mrs. Miller, that you told Judge Carrick, your lawyer at that time, that you had only gotten on a car at this corner once?

Mr. Tipple: I object, if your Honor please, as not proper cross-examination.

The Court: You must read the testimony if you want to contradict.

Mr. Smith: I do not say it is in the testimony.

The Court: Then the conversation with a lawyer would not be competent.

Mr. Smith: She can claim privilege as to anything of that kind. I am asking if she did not say that.

The Court: You said Judge Carrick.

Mr. Smith: Of course she can claim privilege and she can refuse to answer on the ground of privilege.

Sarah Miller, Cross

10

The Court: Certainly; and if after being notified she does not desire to take the privilege that is proper.

Mr. Smith: I ask if she did not tell her counsel, and her lawyer can object if he wants to.

Mr. Tipple: I certainly do object.

The Court: It is for the witness to say whether she claims her privilege.

Mr. Smith: She can say that she refuses to answer. 20

Mr. Tipple: I consider it a privileged communication and it would be certainly impossible to get Judge Carrick and other people whom she might have talked to to testify against her.

The Court: I do not care what she said to her counsel, it is a privileged communication if she desires to avail herself of the privilege. If she says that, of course—

Mr. Tipple: For the sake of clearing the atmosphere I will admit on the record that she told Judge Carrick that she only got on that car once, at that time. 30

Mr. Smith: That is all I want, sir.

Q. Mrs. Miller, you had passed around that corner on cars before, hadn't you? A. Yes.

Q. You knew that cars turned down from Bergen Avenue into Fairmount Avenue at that corner? A. I did. 40

Q. When you got there that night you could see the tracks, couldn't you? A. I could.

Q. Saw the curve as it goes into Fairmount Avenue from Bergen? You could see the curve of the tracks, couldn't you? A. I could.

Q. Your mother had also gone around there, hadn't she, at various times, in cars? A. In cars, yes.

Sarah Miller, Cross

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Q. That night you say you could see. She had good eyesight, hadn't she? A. She had good eyesight.

Q. Could see the tracks; it was light enough? A. Certainly was light.

Q. In fact, Mrs. Miller, you did testify at the last trial, did you not, in response to this question, "When did you first notice he was going faster?" And you said, "Why, when he turned that curve it seemed that
20 he put on more speed instead of stopping;" and then my saying to you, "In other words, as it took the curve it seemed to be going faster to you, is that right?" And your saying, "Yes." That is true, isn't it? A. That is true.

Q. So, as a matter of fact, Mrs. Miller, you did not see him slacken the car at all, did you? A. When he got in front of me I mean they took the curve and it seemed as if it slackened up.

Q. Oh, before it took the curve it seemed as if it
30 slackened? A. Yes.

Q. You mean the car was coming down Bergen Avenue and before it took the curve it slackened up and then went on around the curve a ways, didn't it? A. Yes.

Q. Isn't that what you mean? A. That is what I mean.

Q. Now you say you stepped out from the curb when this car was passing the ice cream saloon, is
40 that right, or had you stepped out before? A. I had stepped out before.

Q. Then as I understand you you had stepped from the curb out toward the track? A. I did.

Q. How close to the track did you get? A. I couldn't exactly tell you how close it was.

Q. Pretty close? A. Close enough that the front of the car had passed me.

Sarah Miller, Cross

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Q. Close enough for the front to get by you, where you stood? A. Yes.

Q. As the car came down Bergen Avenue and got a little past the ice cream saloon you say you held your hand up; is that right? A. I did, yes.

Q. And the car kept coming right along; is that right? A. Kept coming right along.

Q. And the front of it went by you and you stood still—still stood there? A. I did.

Q. And the front of it went around. You could see that, couldn't you? A. I could see that. 20

Q. And the rear of it came around; is that right? A. Yes, the rear.

Q. The front went around first? A. Sure.

Q. And then the rear came around, and the rear of it kept coming out, didn't it, swinging out and around the track? A. As it went around the curve.

Q. For instance, the car going that way, as I have this book pointed, south, and then it takes the curve, and the front of it went around the curve; is that right? A. Yes. 30

Q. Going down eastward into Fairmount Avenue, and the rear of it kept swinging out, and you stood there still, didn't you? A. I did.

Q. Did not move? A. No; it came too quick for me to move.

Q. I didn't ask you that. I ask to strike that out, if the Court please. Now, you see, I didn't ask you that, Mrs. Miller. I say you did not move, did you? A. No, I did not move. 40

Q. And after the front passed you all the way to the time the rear went around that curve, until it came in contact with you, you did not move, did you? A. I did not.

Q. Stood right still? A. Stood right still.

Q. You could see the car? A. Yes, I could see the car.

Sarah Miller, Cross

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Q. Plainly, couldn't you? A. Of course I could.

Q. Of course you knew at that time, didn't you, Mrs. Miller, if the car went around the curve the rear end would have to swing out? A. I didn't know anything about the—

Q. Didn't you know that all vehicles turning a curve the rear end has to swing if it is on fixed rails? You knew that, didn't you? (No answer.)

20 Q. Isn't that true, Mrs. Miller? A. I suppose it has to swing around.

Q. Of course. Now, Mrs. Miller, you had been testifying, of course, in answer to question from your counsel, that you lived in your mother's household and that your brother lived in your mother's household, and that your sister lived in your mother's household. Why, your mother was married, wasn't she? A. She was married?

Q. Yes. A. Of course she was married.

30 Q. And your father was living at the time, wasn't he? A. Why of course he was living.

Q. Still living? A. Still living.

Q. He was working? A. He was working.

Q. What had he to do with this household, nothing at all? Didn't your father cut any figure down there at all? A. Of course he supported my mother.

40 Q. Well, you say it was your mother's house; your brother lived in your mother's house and your sister lived in your mother's house, and your mother gave you this and your mother gave that to your sister. Where did your father come in?

Mr. Tipple: Just a minute. There is no testimony that the mother owned a house. There was merely the question of family—two families, the mother's family and this woman's family. I object to counsel characterizing the testimony.

Sarah Miller, Cross

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The Court: I suppose the object of it, Mr. Tipple, was this. If you can recover for her death it would be only for such amount as they had an expectation of receiving from her.

Mr. Tipple: That is all.

The Court: And if her husband was living and running the house the fair inference is that he was the one that was supporting the house, and not the wife.

Mr. Smith: Of course, that is it.

20

Mr. Tipple: There is no testimony at the present time to the effect that the mother was supporting the house. The testimony is, as I recall it, what she did for these children herself, and it doesn't make any difference, as we look at it, where she got the money from as long as she herself gave it, and also gave them certain service. There is no testimony that she took them in her home.

The Court: Those questions were asked on direct-examination and I think this is proper cross-examination.

30

Mr. Smith: He used the words himself; he said, "Your mother's household—your mother's home."

The Court: I will allow it.

Q. It was your father's house, wasn't it? Your father's home? A. Sure it was my father's home.

Q. And your father's household; isn't that true? A. Certainly it was.

40

Q. Your father supported your mother, didn't he? A. Of course, he supported her. What my mother done for us was not my father's money.

Q. You notice I didn't ask you that, Mrs. Miller. You will get plenty of opportunity, Mrs. Miller, through your counsel—

Sarah Miller, Cross

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The Court: Proceed.

Q. Your brother lived home in your father's home, didn't he? A. He did.

Q. Your sister Viola lived home in your father's home, didn't he? A. He did.

Q. Mrs. Miller, haven't you been really designating this as your mother's household and your mother's home from the very fact that you understand from
20 counsel that it is the things you received from your mother that you must collect for, if anything, in this case? Isn't that the reason you used those words? A. Why, no; never thought of such a thing.

Q. Well, it surely wasn't from the fact that your mother was boss of the house, was it, that you called it your mother's household and mother's home? Wasn't it your father's A. Of course it was my father's.

Q. Mrs. Miller, who is your family physician prior
30 to the accident? A. Dr. Pyle.

Q. Dr. William Pyle? A. Dr. William Pyle.

Q. Where is his office? A. Corner of Reed and Bergen Avenue.

Q. How long had he been the physician of your family? A. Oh, a good many years.

Q. Treated you? A. He treated me.

Q. Treated your mother? A. He did.

Q. Any of the other members of the family? A.
No.

Q. Eh? A. No; only my children when they were
40 sick, that is all.

Q. Only your children. Dr. Pyle, Mrs. Miller, had treated you for some long time, hadn't he, prior to the time of this accident? A. Yes; seven years.

Q. Eh? A. For seven years.

Q. For seven years? A. For seven years before the accident that I had.

Sarah Miller, Cross

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Q. Not after that? A. After the accident?

Q. Not after the seven years? A. No; I did not.

Q. At that time he had been treating you for nerve trouble, hadn't he? A. I never knew he did—I never was nervous.

Q. Now, Mrs. Miller— A. I did not; no, and he never doctored me for nervous trouble.

Q. Didn't Dr. Pyle treat you for inward trouble?

A. No; only the time I had appendicitis, that is all.

20

Q. When was that? A. That was the seven years before I met with the accident.

Q. Did not Dr. Pyle treat you for inward trouble aside from appendicitis—woman's trouble? A. No, sir; he did not.

Q. Did not Dr. Pyle treat you for a disease of what you know as the ovaries? A. He did not.

Q. Are you sure? A. I am sure, yes.

Q. Did not Dr. Pyle treat your mother for a long time, through two attacks of pneumonia? A. He did.

30

Q. Did not Dr. Pyle treat your mother for what is known as tubercular consumption? A. No, sir.

Q. Did not? A. No, sir; he did not.

Q. Sure of that? A. I am sure of it, yes.

Q. You knew, Mrs. Miller, didn't you, that your mother died of what is known as uremic poisoning?

A. No, sir; I did not.

Q. Didn't the doctors tell you that? A. No, sir; they did not.

Q. Did not the county physician tell you that? A. They did not.

40

Q. None of them? A. No, sir; never; nobody ever told us.

Q. Did you ever get a copy of the death certificate of your mother? A. I did not.

Q. So that you never had any knowledge really what she died from did you? A. I did not.

Sarah Miller, Re-direct

Q. Did Dr. Pyle, Mrs. Miller, at the time he treated you advise you to go under an operation? A. When I had appendicitis he did.

Q. You say it was appendicitis? A. That is what he said.

Q. At that time he advised you to have an operation? A. He did.

Q. Mrs. Miller, you say that Mrs. Greenleaf bought your clothes? A. She did.

Q. Well, Mrs. Miller, you are married? A. I am.

Q. Didn't your husband support you? A. My husband was out of work quite a while.

Q. Out of work quite a while? A. Yes; and he was laid up sick for six months with rheumatism, and she done for me then.

Q. During the time your husband was out of work your mother bought your clothes? A. Well, she used to do for me when I was housecleaning; she always helped me out then.

Q. And your sister Viola, didn't she work? A. She did.

Q. And your brother Samuel, thirty-nine years old, did he work? A. He worked when he could get it.

Q. When he could get it? A. Yes.

Q. Supported himself, didn't he? A. He did.

Q. And Viola supported herself? A. Well, she never made very much money to support herself right.

Q. No; but she made enough, I presume, to buy her own clothes, didn't she? A. No; she did not.

Q. What was she doing? A. She was working in New York in a wholesale drug house.

Q. Drug house? A. Yes.

RE-DIRECT EXAMINATION by Mr. Tipple:

Q. Mrs. Miller, will you state why it was that on the last trial you testified that you boarded that car

Sarah Miller, Re-direct

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only once, and upon this trial that you boarded it there at that same place twice?

Mr. Smith: I object.

The Court: She has already said, Mr. Tipple, that she recollected it since the last trial. That is the explanation. She said that on cross-examination.

Mr. Tipple: If your Honor please, he brought out that she had testified on the last trial that she had boarded that car only once, and upon this trial— 20

The Court: And he asked her why she so testified and she said she recollected it since.

Mr. Tipple: If that is so I withdraw my question. I did not remember she had answered the question.

The Court: That is so, isn't it?

Mr. Smith: She did, sir. She said, however, she had talked it over and she recollected it since. 30

Q. How did Dr. Pyle treat you, Mrs. Miller, as you have testified to at the time he treated you for appendicitis? A. Ice bags.

Mr. Smith: How did he treat you? A. Ice bags.

Q. Anything else? A. No.

Q. Did your mother have any other income than what was produced by your father? A. She did. 40

Mr. Smith: If the Court please, I do not see the object of it. Of course, if her mother died they would get what she had.

The Court: Yes; if she had property they would inherit it in the absence of proof of her will to show she had disposed of it in some other way. Unless you propose to show that she was engaged in some business or occupa-

Edward T. Sullivan, Direct

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tion which brought her in a regular income which ceased with her death.

Mr. Tipple: I merely suggest it to answer the cross-examination to the effect that Mrs. Miller at different times gave money to her children in addition to service.

The Court: She said yes. She said she had other property.

20

Mr. Tipple: I think it is immaterial where it came from, and that was the reason I objected at the time.

30

The Court: It might be material in this way, Mr. Tipple. Suppose she was in possession or ownership of property and she died without a will, then it would go to her husband for the children, and they would gain instead of lose by her death, and if they gained by it they would not have any claim against the defendant company; but if she was making a salary for doing something and that ceased and some of it was going to her children, then it would be proper to show what she was getting. That is my view of it.

EDWARD T. SULLIVAN sworn.

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Direct-examination by Mr. Tipple:

Q. Mr. Sullivan, you are a police officer in Jersey City? A. I am.

Q. How long have you been on the force? A. Four years and nine months.

Q. Do you remember this accident that happened on the corner of Bergen Avenue on the 19th day of June, 1910? A. I do.

Edward T. Sullivan, Direct

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Q. Well, now, Officer, will you state to the Court and jury just what you know of your own knowledge as to what you saw of the accident? A. Well, I was standing on the corner of Bergen Avenue and Duncan Avenue and somebody was holloaing and I saw a crowd of people running towards Bergen Avenue and Fairmount and I ran down with them; when I got there I saw Officer Johnson and I saw there was an accident there and I asked him if he had the particulars of it and sent for the ambulance.

20

Mr. Smith: I object to the officer stating what he said to anybody. Just what you saw.

The Court: He merely asked if he had the particulars.

Mr. Smith: Then I do not object to that.

A. He said, "Yes, everything was attended to; the ambulance was sent for." I saw Mrs. Greenleaf lying in the gutter. She was moaning about her back, about her back or side—I don't remember just which it was now—it was some part of her body. The ambulance came and we put Mrs. Greenleaf in the ambulance, and then went to the ice cream store and Mrs. Miller was lying on two tables, and we put her in the ambulance. That is all I know about the accident.

30

Q. Did you see the car? A. Yes, sir.

Q. Where was that? A. The car was about a block away from the accident.

Q. Down Fairmount Avenue? A. Down Fairmount Avenue, yes.

40

Q. Did you testify here on the last trial? A. I did.

Q. The Officer Johnson that you have mentioned, did he testify here at the last trial? A. He did.

Q. How long since you have seen Officer Johnson? A. Saw Officer Johnson about three weeks ago.

Edward T. Sullivan, Cross

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Q. Do you know where he is now? A. He told me then he was going to Texas.

Q. Do you know where he is in Texas? A. Why, I don't know, no; he didn't just say where.

Q. What is the condition of the light at that particular point, Officer? A. You mean the location of it?

Q. No; I mean the light at night. How is the light?

20

Mr. Smith: At that time?

Q. Yes; at that time? A. Very bright.

Q. What street did you say you stood at when you heard the— A. Duncan Avenue and Bergen.

Q. How far is that? A. Full block.

Q. How far from the tracks was it that Mrs. Greenleaf lay when you came there? A. She was laying partly in the gutter and partly on the sidewalk.

Q. How far, about, is that from the tracks; do you know? A. From what?

30

Q. From the tracks? A. From the tracks?

Q. The outside track? A. Oh, I don't know; I should judge that would be about ten or fifteen feet, probably.

CROSS-EXAMINATION by Mr. Smith:

Q. Mr. Sullivan, what you have testified to is practically what you said at the last trial, isn't it? A. As near as I can remember it.

40

Q. But you have made a mistake as to the distance the car was away. You did testify at the last trial, did you not? A. I did.

Q. That the car was a half a block down? A. I said it went a block or a half a block, I think, at that time.

Viola Greenleaf, Direct

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Q. I show you this and ask you if you did not say, "About a half a block down"?

Mr. Tipple: I object to the showing of the testimony. He can ask the question.

Q. Did you not say, Mr. Officer, that at the last trial that when you saw the car—you may read it, Mr. Tipple, at page 41—that the car was half a block down? A. I may have said it then. That is three years ago. I can't just remember. It may have been a half a block or a block. 20

Q. I am not trying to confuse you. Your mind may have been fresher on the subject than it is now? A. I should think it would be.

Q. So as a matter of fact it may have been just a half a block? A. I wouldn't say. It was between a block and a half a block.

By Mr. Tipple:

Q. Did you see the motorman there, Mr. Sullivan? A. Yes; I saw him standing there. 30

Q. Did you have any conversation with him? A. Why, no, I didn't. I don't remember as I did. I think Officer Johnson done all that.

Q. Did you have any conversation with the conductor? A. I don't remember.

VIOLA GREENLEAF sworn.

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Direct-examination by Mr. Tipple:

Q. How old are you, Viola? A. Twenty-four.

Q. You are a sister of the plaintiff, Mrs. Greenleaf, are you? A. Yes.

Q. Mrs. Miller, I mean? A. Yes.

Viola Greenleaf, Direct

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Q. State whether or not you ever got on the car, Jackson Avenue car, with your sister? A. Where?

Q. At the corner of Bergen Avenue and Fairmount Avenue? A. Not with my sister.

Q. With whom did you get on? A. My mother.

Q. Do you remember the date? A. I do.

Q. When was the last time that you got on with your mother? A. Well, that was the morning of the dedication, June 19, 1910.

20

Q. Where did you and your mother get on the car, which corner? A. Right on the corner where she was struck.

Q. Corner of Fairmount Avenue and coming down from the church? A. Yes, sir.

Q. Had you ever gotten on that car at that corner before?

Mr. Smith: I object.

A. I have, sir.

30

Mr. Smith: I object to it on the ground it is irrelevant, incompetent and immaterial as to whether this person ever got on the car at that corner before or not.

The Court: How do you make that competent?

Mr. Tipple: I think we can show custom if the car stopped there not only on this occasion when they were there, but it stopped there other times and took on passengers, and I think we have alleged that in our complaint.

40

The Court: If it stopped there at irregular periods it would not establish a custom.

Mr. Tipple: Yes, sir.

The Court: It would? That the car stopped at irregular periods to let people on or off would not establish a custom, would it?

Viola Greenleaf, Direct

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Mr. Tipple: I think if we can show that the car stopped there, even though we cannot show it stopped there every day, we can show by different people that got on there at that point, it would show it stopped there and it established a custom.

The Court: Would that establish a custom?

Mr. Tipple: I do not think we would have to show it stopped there every time. I think if they stopped there occasionally it would establish a custom.

20

The Court: Of course I do not mean to say that stopping five times would not establish a custom and six times would; but you have to show, in order to establish a custom, that it was the custom, not an irregular thing. We know most of these places have "Stop" signs, and that is where cars are expected to stop, but supposing it stopped some other place once in a while, would that establish a custom to stop at that other place?

30

Mr. Tipple: Not once in a while, but we cannot show how often it stopped there unless I start, and this is the start. I am trying to show that the car stopped there at different times for people to get on, and this is one of the persons by whom I wish to establish the custom.

The Court: Suppose you do establish that, how does that change the situation in this case that here was a curve and these people were struck while the car was swinging around the curve? I do not see that so far you have changed this situation from the last case.

40

Mr. Smith: May I interrupt your Honor? Such a custom must consist of two things; it

Viola Greenleaf, Direct

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must consist of a continuous stopping at that place, with another element, to the knowledge of the person who was injured.

The Court: Yes.

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Mr. Smith: Now, Mrs. Miller says that she only got on at that corner twice. That could not establish a custom. Mrs. Greenleaf is dead, and she cannot testify as to her knowledge. Therefore they could not possibly establish a custom by the proof of other people that a car did stop there at times and they got on or off.

30

Mr. Tipple: The question on the part of people would only go as a question to be submitted to the jury, for them to take into consideration of whether she was guilty of contributory negligence, or whether she was justified on this day to again stand in that same place and present herself expecting to board the car where she had boarded it before.

The Court: It seems to me—

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Mr. Tipple: May I continue? I mean in regard to the proposition in respect to the car having stopped there frequently to take on passengers, I think that the jury might also take that into consideration, as to whether the motorman when he came down to that place should either have had his car under control and stopped as he had done before, or, as other cars had done before, from time to time, he should have given some signal or something should have taken place on his part to warn this woman, in view of the fact that he was not going to stop there; and if cars stopped there frequently to take on passengers the company and the motorman is bound to know that fact.

Viola Greenleaf, Direct

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The Court: It is not so much a question of contributory negligence as a question of the negligence of the company, which would be the preliminary question in the case. Assuming they had been in the habit of stopping the cars there to let people on or off, whether they were guilty of negligence in running past that point without stopping; because if they were not guilty of negligence we do not get to the question of contributory negligence.

20

Mr. Tipple: Of course we are not discussing at this time the question of a non-suit; at the same time we can raise it at this point if your Honor wishes.

The Court: I was going to suggest to counsel, for the purpose of saving possible costs, that unless there is some testimony which is going to change it from the testimony submitted at the former trial, I would dispose of it right now, because if you are going to put in all your medical testimony and your other testimony and then I dispose of it adversely to you, you have to get all that printed, and if I go on and take the testimony of the defendants and then direct a verdict you have that to print; and it seems to me you have enough in the case now, if your contention is right, to get a reversal. If I am right, it is not worth while for you to spend all the money that is necessary to spend in printing the case, and I throw that out as a suggestion to counsel. I cannot say I will stop the case now unless counsel consent.

30

40

Mr. Tipple: What I was about to suggest to your Honor is that, as far as the cases that have been submitted to your Honor are concerned, if your Honor will grant me the time,

Viola Greenleaf, Direct

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and I won't take very long either, I think I can very clearly convince your Honor that this case is not analogous, but we have cases that show—

The Court: Not analogous to the case that was tried?

Mr. Tipple: Not analogous to the cases that your Honor has looked at.

20

The Court: I have looked at all of them and I looked at the New Jersey case.

Mr. Tipple: Yes; we have a collection, and I think Mr. Smith has the same cases.

The Court: I have no doubt he has. I have no doubt he has all the cases.

Mr. Tipple: I am willing to do anything to have your Honor pass upon it.

The Court: I only make this suggestion, Mr. Tipple, to save expense.

30

Mr. Tipple: Of course I do not want to say anything in front of the jury; may I come up just a moment?

(Counsel talk to Court at side bar.)

Q. Miss Greenleaf, had you ever gotten on this car before at the corner of Bergen Avenue and Fairmount Avenue?

Mr. Smith: I object.

40

A. I believe so.

Mr. Smith: Objected to on the ground that it is irrelevant, incompetent and immaterial as to whether this witness has—

The Court: I will allow it.

A. I got on at that corner, at that very corner.

Q. Got on or off? A. I got on at that corner.

Q. When? A. Well, at several times before the accident and the morning of the accident.

Viola Greenleaf, Cross

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Mr. Smith: Same objection, if the Court please.

Q. You attend the church down there, do you? A. No; I didn't attend that church; that was my mother's church.

CROSS-EXAMINATION by Mr. Smith:

Q. Let's see; you said you had gotten on there before? A. I had. 20

Q. Is that right? A. Yes.

Q. Will you tell me how many times? A. Well, that I just cannot tell, just how many times.

Q. Well, tell me? A. I know I visited a friend and I used to walk down there and take a car.

Q. Tell me how many times? A. Well, quite a few times. I just can't tell the times.

Q. Tell me how many times? A. Well, I am not supposed to count the times. I know it was several times I got on at that corner. 30

Q. You are testifying in a court of law under oath. Will you kindly tell me how many times? A. It was over three times I got on before the accident.

Q. Three times before the accident? A. Before the accident, over three times.

Q. Miss Greenleaf, you testified in the last trial, didn't you? A. I know I did.

Q. Did you say one single word in all of the last trial about getting on at that corner before? A. Perhaps I didn't. 40

Q. Did you? A. No; perhaps I didn't, but I recollect now that I have.

Q. You recollect since the last trial, don't you? A. With a friend of mine, yes.

Q. Who is the friend? A. That I used to visit.

Q. Have you been recollecting with him or her?

A. With her.

Viola Greenleaf, Cross

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Q. You have been recollecting with her, haven't you? A. I have, sir.

Q. Since the last trial? A. I have.

Q. Sure of it? A. Sure I have.

Q. Been talking with Mr. Tipple? A. Well, I never met this lawyer.

Q. Did you talk with him? A. No, sir, I have not.

Q. With the other one behind? A. I have, sir.

Q. Since the last trial? A. Yes.

20 Q. You have told him about your recollection since the last trial? A. I have.

Q. Hasn't he told you to be sure and remember that you got on at the corner of Fairmount Avenue and Bergen Avenue before the accident? Hasn't he? A. No; he hasn't spoken with me.

Q. Didn't he tell you to be sure and remember that? A. I don't remember him telling me that.

Q. Miss Greenleaf, did not Mr. Murray there tell you to be sure and remember? A. I don't remember
30 him telling me that.

Q. Will you say he did not? A. He asked me if I did, but he never told me to be sure and remember.

Q. Yes. Now, Miss Greenleaf, you were not with your mother at the time of the accident, were you?

A. I was with her at the service that morning.

Q. I didn't ask you that. A. No; I wasn't that night, no.

Q. Over how long a period with this friend of yours
40 had you boarded a car at this corner prior to the accident? A. What do you mean, since I have seen her?

Q. No; over how long a period were these three times that you boarded a car you say at Fairmount Avenue and Bergen; three months, five months, a year? A. Well, before the church ever thought of being up there.

Viola Greenleaf, Re-direct, Re-cross

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Q. I don't know when the church thought of being up there. I am asking you when. A year before?
 A. Oh, it must have been about two or three years before that.

RE-DIRECT EXAMINATION by Mr. Tipple:

Q. Were you asked upon the last trial, Miss Miller, how many times or if you had ever boarded that car at that point before? A. I believe I—

20

Q. No; were you asked upon the last trial? A. Upon the last trial?

Q. Yes? A. Well, if I was asked if I ever got on that car in the morning?

Q. Were you asked if you had ever got in the car, independent of that morning, independent of the other times, at the last trial? A. I believe I was.

Q. Were you asked at the last trial whether you had ever boarded that car before that morning at that place? A. Yes, I was.

30

Q. You were asked that at the last trial? A. Yes.

Q. What was your answer? A. I said several times.

RE-CROSS EXAMINATION by Mr. Smith:

Q. Don't you know, Miss Greenleaf, that is not so? Don't you know you just testified to this gentleman that at the last trial you never said a word about getting on the car before the accident? A. Well, I certainly did.

40

Q. Didn't you just say to this gentleman here a minute ago— A. That I never got on the car there?

Q. That you never said anything about it at the last trial? A. No, I didn't.

Q. Did you at the last trial testify that you had gotten on a car? A. I did.

Viola Greenleaf, Re-cross

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Q. At that corner before? A. I did.

Q. You are sure of that? A. I am.

Q. Positive of it? A. Yes.

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

Q. Then if it is not in the testimony I suppose the stenographer has left it out, has he?

Mr. Tipple: I object.

The Court: Yes; she can't say that.

20

Mr. Smith: I withdraw the question. At this point, then, I ask the counsel to admit that this is a copy of the testimony taken at that trial.

Mr. Tipple: I don't know about it.

Mr. Smith: I will ask counsel for the plaintiff to admit that the copy of the testimony he has is the copy of the testimony taken at that trial.

Mr. Tipple: I don't know.

30

Mr. Smith: Will you admit it or won't you admit it?

The Court: You can call the stenographer.

Mr. Smith: I am trying to avoid that by asking him to admit it.

Mr. Tipple: I don't know.

Mr. Smith: You are using it?

Mr. Tipple: Yes.

Mr. Smith: Did you get it from the stenographer?

40

Mr. Tipple: I assume it was taken at the last trial.

The Court: You cannot take an assumption.

Mr. Tipple: I will admit it then if that is necessary.

Mr. Smith: I will ask Miss Greenleaf to examine it and tell me—

Viola Greenleaf, Re-cross

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Mr. Tipple: Let's have it marked for identification. It is a copy that I admit that was taken at the last trial and we will mark it for identification.

Mr. Smith: Just as to the testimony of Miss Greenleaf.

Mr. Tipple: No; you asked me for the whole minutes. You did not ask me about Miss Greenleaf.

Mr. Smith: The testimony of Miss Greenleaf. 20

The Court: I do not understand it goes to the whole record. It is only for this purpose.

Mr. Smith: That is all.

The Court: If you want to withdraw your admission which was made under a misunderstanding—

Mr. Tipple: I would like to if I may ask her one or two questions before admitting it.

Mr. Smith: Who? 30

Mr. Tipple: The witness.

The Court: She does not know—

Mr. Tipple: No; but I wish to ask her a question.

By Mr. Tipple:

Q. Did you testify at the last trial? A. I did, sir.

Q. Testified on behalf of your sister? A. I did; yes.

Q. And Judge Carrick tried the case at that time? A. Yes. 40

By Mr. Smith:

Q. Before Judge Speer? A. Yes, sir.

Q. Now, Miss Greenleaf, will you look through your testimony starting at page 69, and point out to me therein any place where you testified at that trial that

Viola Greenleaf, Re-cross

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you had boarded a car at this corner prior to the time of the accident? A. Well, you asked me that question. I remember you asking me.

Q. I am asking you to take the testimony— A. You asked me the question.

Q. I am asking you to take the testimony? A. And I said yes.

Q. I am not asking you that. I ask you to read your own testimony?

20

Mr. Tipple: I do not think it is fair to ask this witness to read the previous testimony.

The Court: I do not think it is necessary.

Mr. Smith: I am only doing it for the purpose—

The Court: You can use that testimony.

Mr. Smith: I am only doing it to show this lady she has not testified to the truth.

A. I certainly am.

30

Mr. Smith: That is all.

A. I took an oath, didn't I?

40

Mr. Smith: I will offer the testimony. I offer this testimony of Miss Greenleaf taken at the last trial for the purpose of contradicting her as to her statement that she testified at that time that she had boarded a car at this corner, the corner of Fairmount Avenue and Bergen Avenue, at any time prior to the date of this accident.

Mr. Tipple: I object.

The Court: Then you do not admit it.

Mr. Tipple: It is incompetent, irrelevant and immaterial. I admit that is the testimony. I object to it going in evidence in that way. I object to this going in evidence in this way.

Philomen Hummel, Direct

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The Court: Don't let us have any misunderstanding about this. If counsel does not admit that is a copy of the testimony taken at the former trial, the only way to get it would be to call the stenographer and let the stenographer swear that is a copy of his notes taken at this trial.

Mr. Tipple: I will admit that.

The Court: You can object to the relevancy.

Mr. Tipple: That is all I object to.

20

The Court: I admit it.

Mr. Tipple: I ask an exception.

DR. PHILOMEN HUMMEL sworn.

Direct-examination by Mr. Tipple:

Q. Doctor, you are a practicing physician in Jersey City? A. Yes.

30

Q. Where is your office? A. 689 Bergen Avenue.

Q. How long has your office been at 689 Bergen Avenue? A. Seven years.

Q. How far is that from the corner of Bergen Avenue and Fairmount Avenue? A. About a block—over a block.

Q. Will you state whether or not you have ever boarded a car at the corner of Fairmount Avenue and Bergen Avenue?

40

Mr. Smith: I object to it as irrelevant, incompetent and immaterial.

The Court: I will allow it.

A. No, I have not.

Q. Have you ever observed whether the cars stop at the corner of Bergen Avenue and Fairmount Avenue?

Philomen Hummel, Direct

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Mr. Smith: I object to it as irrelevant and immaterial.

A. Yes, I have.

The Court: I think that is going a little too far. A car might stop and not stop to take on or let off passengers.

Mr. Tipple: I am going to follow it up.

Mr. Smith: I take an exception.

20

Q. Doctor, I wish you would confine any answer you might have to my question in this regard to prior to June 19, 1910. Now, have you ever seen a car stop at the corner of Bergen Avenue and Fairmount Avenue prior to June 19, 1910?

Mr. Smith: I object.

A. Yes; it has stopped to allow people to get off.

The Court: I will allow the question.

30

Q. For what purpose, Doctor?

Mr. Smith: I object to it as calling for a conclusion

The Court: I will allow it.

A. To get off.

Q. What's that? A. To get off the car.

Q. Did you ever see passengers get on a car at the corner of Bergen Avenue and Fairmount? A. Yes; 40 some got on when I got off, on more than one occasion.

Q. And that is prior to June 19, 1910? A. Yes.

Q. At which corner was that, Doctor, that the car stopped as you have indicated? A. About the corner where the candy store is.

Q. Which corner is that? A. Well, that is the southwest corner.

Philomen Hummel, Cross

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Q. Did you at any time ever see a car stop on the opposite corner, that is, just before going around the curve into Fairmount Avenue from Bergen Avenue?

Objected to as incompetent, irrelevant and immaterial and too remote. The Court allowed the question. Exception to defendant.

A. Well, not close to the corner. That is, the car would stop when it was going around the curve.

Q. Yes? A. Oh, usually about where the candy store is, that corner. 20

Q. How often did this happen, that you saw the car prior to June 19, 1910?

Objected to for the same reasons. Question allowed.

A. I couldn't say how many times. Quite a number of times.

CROSS-EXAMINATION by Mr. Smith: 30

Q. Doctor, you are sure of that, are you? Sure of what you are saying? A. Yes, I am.

Q. The corner where the candy store is? A. Right where the corner of the candy store is; perhaps a few feet from the candy store corner; the car would stop sometimes a little further.

Q. At the candy store corner? A. Yes.

Q. Positive of that? A. Yes.

Q. Now, Doctor, the candy store corner is the northwest corner, isn't it? A. Yes; that is right. 40

Q. Northwest corner? A. Yes.

Q. Sure of that, aren't you? A. Yes; that would be the northwest corner.

Q. That is where you saw the car stop, isn't it? A. Well, I pushed the button and the car would stop there. Sometimes it would stop on the other corner, Kinkhead's corner.

Philomen Hummel, Cross

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Q. Kinkhead's corner? That is around at Fairmount Avenue, isn't it? A. Yes; exactly.

Q. That is the corner which would be the southeasterly corner, wouldn't it? A. Yes.

Q. That is after the car had turned the curve and stopped around? A. Yes.

Q. Isn't that right? A. Yes.

Q. Now, the northwest corner—the candy store—is before the car crosses the street, isn't it—crosses
20 Fairmount Avenue; isn't that right? A. Yes.

Q. Those are the two places you are speaking of? A. Yes.

Mr. Tipple: That is our case as far as that point goes.

Mr. Smith: I would like to have it admitted on the record that the northwest corner of Bergen Avenue and Fairmount is the opposite corner to the corner where these ladies say they attempted to board the car. Where they attempted to board the car
30 would be what is known as the southwest corner.

Mr. Tipple: If your Honor please, I have no objection to the map going in, showing exactly the situation.

The Court: You had better put the map in.

Mr. Tipple: No objection.

Mr. Tipple: Letters testamentary of Alvina Greenleaf, deceased, dated 5th of November, 1913, admitted in evidence.

40 Paper marked Exhibit P2.

Mr. Smith: It is admitted that the map shows that the northwest corner of Fairmount Avenue and Bergen Avenue is the ice cream saloon spoken of by the witness Hummel; on the southwest corner is a beer saloon; on the northeast corner is a dry goods store; on the southeast corner is Paul Bryant's dyeing place; and that the plaintiffs stood on the southwest corner

Motion to Non-suit

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in front of the beer saloon, between the curb and the car track; and that the distance between the curb and the car track is approximately nine feet and three inches.

PLAINTIFF RESTS.

The Court: I will hear your argument now, if you have any argument. I ask counsel for the plaintiff if they have any further testimony relating to the accident, and they say no, and I will now hear a motion to non-suit.

20

Mr. Smith: I make a motion to non-suit on the ground that there has been no evidence showing negligence on the part of the motorman, and that the evidence conclusively shows contributory negligence on the part of the plaintiff and the decedent.

Mr. Tipple: May it please the Court, I have no further testimony in regard to the negligence that we sought to prove against the defendant, but, of course, I have not gone into the case in regard to damages, and if your Honor wishes at this time to hear argument as to whether a non-suit should be granted I would like an opportunity to be heard.

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(Argues.)

The Court: I will grant a non-suit.

Mr. Tipple: I would like to have a formal objection to the ruling.

The Court: Take your objection.

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Exhibit D1.

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VIOLA GREENLEAF, called and sworn on behalf of the plaintiff, testified as follows:

Direct-examination by Mr. Carrick:

Q. You are a sister of Mrs. Miller and a daughter of Mrs. Alvina Greenleaf? A. Yes.

Q. And where did you live in June, 1910? A. 93 Orient Avenue.

Q. With your mother and father? A. Yes.

20 Q. And for nearly a year past your sister and her family have been part of the household, or in the same house? A. Yes.

Q. What is your age? A. Twenty-two.

Mr. Smith: Twenty-two, did you say?

The Witness: Twenty-two.

Q. And where are you employed? A. In New York.

Q. Whereabouts? A. In Fulton Street.

30 Q. And have been employed for how long? A. About three years.

Q. During all that time, and prior to that time you were living with your father and mother? A. I was.

Q. And what did your mother do for you in her lifetime? A. Well, she did several things for me. She attended to me when I was sick; she used to tend to me and be up with me nights; she used to buy me things that I need, and also my brother.

Q. What sort of things; what do you mean by that?

40 A. Well, my clothes.

Q. You say she also provided for your brother? A. Yes; my brother also.

By the Court:

Q. Were you present with her when she bought your clothes? A. I was, sir.

Q. And how often during the year would she buy your clothes? A. Well, several times; I know every

Exhibit DI

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time I wanted anything she used always to go down and buy me something.

Q. If you were present when they were bought, what did they cost ordinarily? A. Well, I can't just say now. I know they used to cost quite a great deal. I know she used to buy me suits and—

Q. That won't help much. A. Well, she used to buy me suits and the suits would cost sometimes around seventeen to eighteen dollars a suit.

Q. How often during the year would she buy you anything like that? A. Well, sometimes two or three times. I would get, well, not exactly a suit, but the makings of a dress, and then—

20

Q. What else were you present at the purchase of or saw the price paid for? A. Well, she used to buy me shoes and hats.

Q. Shoes, how much, and hats, how much? A. Well, my shoes averaged around three dollars.

Q. How often would you need those in a year, and get them? A. Well, I used to have—like in the summer I would get like ties and towards fall I would get shoes—

30

The Court: Go ahead, Judge.

Q. Now, you of course saw your sister, Mrs. Miller's condition before the accident when she was hurt?

A. I did.

Q. Won't you state what her general health was? A. Her health was very good before the accident.

40

Q. As compared with her present appearance how did she appear then? A. She used to attend to her household duties and everything and now she doesn't seem to be able to do anything like that.

Q. As to her weight and general appearance; what have you to say about that? A. Well, her weight averaged around 126 or 127 pounds.

Exhibit D1

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CROSS-EXAMINATION by Mr. Smith:

Q. Of course you went to business? A. I went to business.

Q. You were away from the house all day, weren't you? A. Well, I was away from the house all day; I used to get home around about thirty minutes after six.

20 Q. You were away all day? A. Well, I didn't go away so early.

Q. What time did you go away? A. I used to get the seven fifty-seven train.

Q. And you got back at six-twenty at night? A. And I was home on Saturdays; I was off on Saturdays.

Q. Aside from Saturdays. Take Monday, Tuesday, Wednesday, Thursday and Friday; you went away at seven fifty-seven and returned at six something at night? A. Yes.

30 Q. And of course while you were over in New York you could not possibly see what Mrs. Miller was doing? A. There was some times I was ill; I could see.

Q. When you were away in New York you could not possibly see what Mrs. Miller was doing home? A. Not while I was in New York; certainly not.

Q. Were you working in New York? A. I was.

40 Q. Were you earning any money while you were working over there? A. I was.

Q. And did you buy any of your own clothes with the money that you earned? A. No; mother used to help me out with my clothes when I started to work.

Q. Didn't you buy your own clothes? A. No; I didn't make enough money to buy my own clothes.

Q. Well, with what you made did you buy them? A. I used to help buy them and mother used to help me out with them.

Exhibit P2

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Q. What do you make? A. I only make six dollars a week.

Q. And that six did you use for your own purposes? A. No, I don't. I used to have to pay my expenses out of it and my dinner.

Q. And the rest of it? A. The rest of it I used to buy what I needed and mother helped me out.

Q. Then you used it for your own purposes? A. Of course I didn't have much left after my meals and all were taken out—my dinner money.

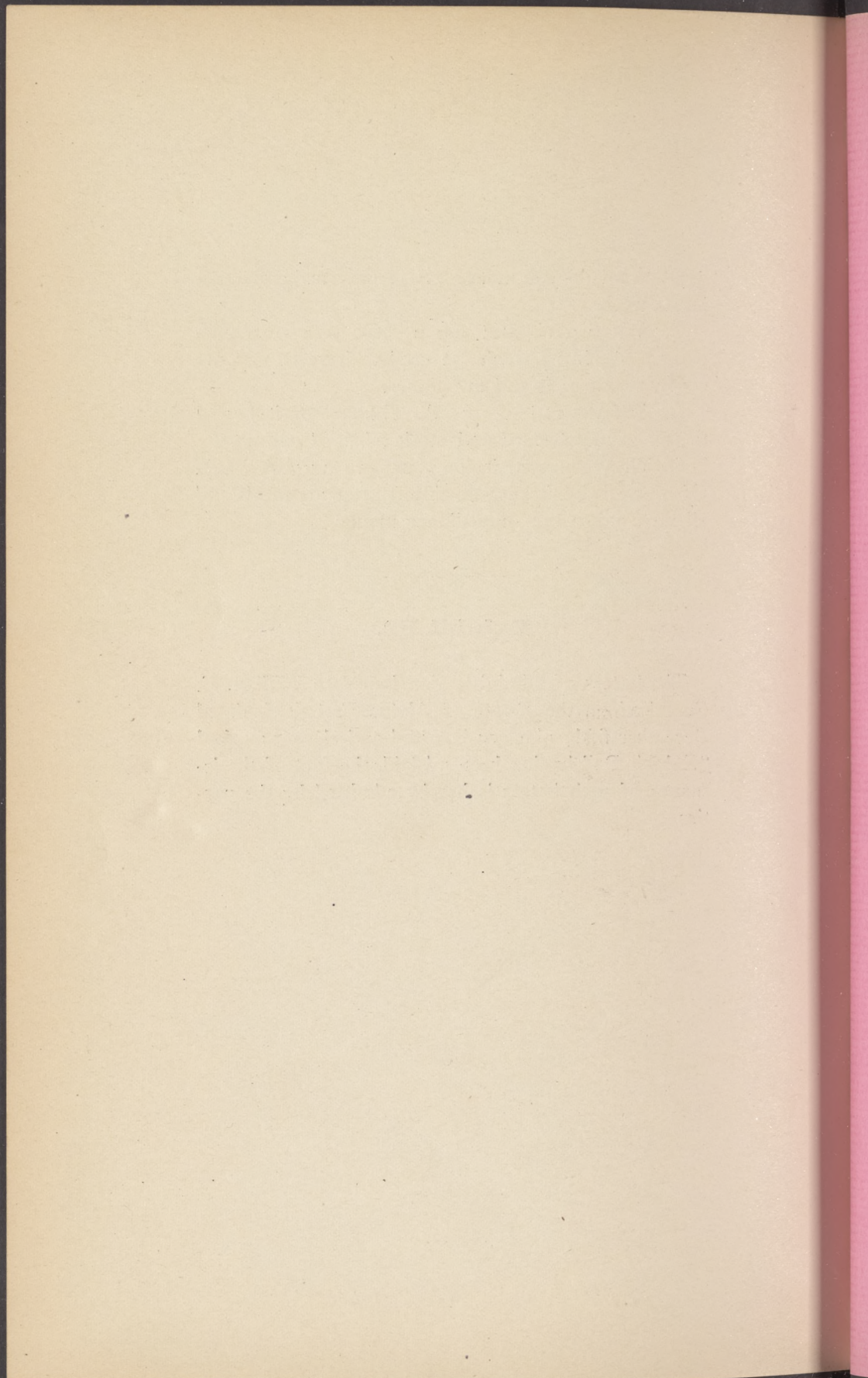
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Exhibit P2.

The letters of administration issued to William E. Greenleaf on the Estate of Alvina Greenleaf, dated December fifth, nineteen hundred and eleven, marked "Exhibit P2" having been mislaid, the fact of the issuance of such letters is hereby admitted by the parties.

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