New Jersey Court of Errors & Appeals

SUSAN A. SLATER,
Plaintiff,
Plaintiff in Error,

vs.

NORTH JERSEY STREET RAILWAY COMPANY,
Defendant,
Defendant in Error.

STATEMENT OF CASE.

This case comes on Writ of Error directed to the Hudson County Circuit Court to review a judgment of nonsuit granted by Judge Vail upon the trial of the case had before him with a jury.

The facts are as follows :

On the day of the accident, and for some time prior thereto, the defendant operated a street railway company in Jersey City and through a certain street known as Pacific Avenue. In Pacific Avenue it had two tracks which ran in a generally northerly and southerly direction and when they reached Communipaw Avenue, a street which crossed

Pacific Avenue at right angles, these tracks turned a curve into Communipaw Avenue (page 13.)

At about where the curve of the tracks from Pacific Avenue to Communipaw Avenue began there was a crossing. It was the custom of the defendant company to smear the tracks at and about this curve with grease or oil (answer to second interrogatory, page 10.)

On the third day of May, nineteen hundred and four, the plaintiff, Mrs. Slater, was walking across Pacific Avenue from the east to the west of the street and on the north side of Communipaw Avenue. She crossed the first two rails and as she stepped on or near the first rail of the south bound track she slipped upon the grease which had been smeared on the track or on the street and fell, breaking her arm (page 13, &c). As she was crossing her attention was centered upon an approaching car which was running south on the south bound track, and she was watching it to see that she could safely cross (page 17.)

Mrs. Slater was a married woman and sued without joining her husband.

Her allegations of negligence against the defendant were that the defendant had made a certain portion of the public highway dangerous by putting oil, grease or other slippery substance upon its tracks, and upon the street where people were used to, and had the lawful right to cross (page 4), and that the defendant wrongfully put and placed a large quantity of oil, grease or other slippery sub-

stance in the street and on the rail and wrongfully kept and continued the same in said public street (page 5.)

At the close of plaintiff's case the defendant moved to nonsuit upon the following grounds:

FIRST—That there was no negligence of the defendant shown.

SECOND—That the plaintiff was guilty of contributory negligence.

THIRD—That the plaintiff, being a married woman, could not sue without joining her husband (page 21.)

This motion was granted and the exception prayed for and sealed (page 14.)

POINT ONE.

The judgment of nonsuit cannot be legally justified, because:

FIRST—The plaintiff was not guilty of contributory negligence, per se, in not observing the grease on the street or tracks.

She had a right to presume that the street was free from obstructions or dangers created by the defendant.

> Suburban Electric Co. vs. Nugent, 29 Vr. 658. Durant vs. Palmer, 5 Dutcher 544.

And she had a right to, and in law was bound to use due care in the observation of the

approaching street car, which was a distracting danger.

Newark Passenger Railway Co. vs. Block, 55 N. J. L., 605.

And this Court has declared that "it is not negligence, per se, for a traveler upon a bridge, who is injured by a defect in the floor thereof, to lift his eyes from the path he is traveling to other objects about him that may attract his attention, and thereby fail to observe the defect."

Mahnken vs. Freeholders of Monmouth, 23 Vr. 404.

SECOND—The evidence justified an inference of negligence on the part of the defendant.

While the company had legislative permissions to run its cars through the public streets, and had a right to lay its rails in the public streets for that purpose, the Legislature did not grant to it the right to make the streets dangerous by scattering grease upon the streets or upon its rails, and if, by placing this grease upon its rails, or upon the street adjacent to the rails, it made the street dangerous for pedestrians, it would seem that the defendant should be held responsible for such condition.

The defendant admitted that it placed the grease in the street at this point (page 10), and it was, at least, a question for the jury to say in what manner it had placed this grease upon

the street, and whether it had made the street dangerous for use.

One who does or authorizes the doing of an act which creates a public nuisance, by unlawfully obstructing or interfering with the free use of a highway, becomes answerable in damages to those who suffer special injury thereby.

Driscoll vs. Carlin, 12 Vr. 28.

In the case of Klotzbach vs. Paterson Railway Co., 44 Atl. Rep., 933, the Supreme Court of this State held that although a railway company had the right to lay its tracks in the public street, yet if they were laid in such a way as to be an unreasonable obstruction to public travel, and thereby the plaintiff was injured, the defendant must respond, and that such question of unreasonableness was for the jury.

THIRD—The non-joinder of the husband was not a proper ground for non-suit.

Mrs. Slater was not living in the marriage relation with her husband (pages 19 and 20), and it is submitted that her status, with regard to her husband, brought her within the provision of Gen. Stat., Page 2,536, Section 24.

But whether this be so or not, yet the question was not available on a motion to non-suit, in as much as the defendant pleaded general issue and nothing more.

(See the pleadings.)

General Statutes, Page 2,539, Section 37, provides "that the non-joinder or misjoinder of a plaintiff shall not be objected to by

the defendant unless he give written notice of such objection to the plaintiff, within five days after filing his plea and demurrer, and state in such notice the name of the person alleged to have been omitted or improperly joined," etc.

This was not done by the defendant in the present case.

In Ball & Hill vs. Consolidated Franklinite Co., 3 Vr. 102, the facts were that one of the plaintiffs who sued upon a promissory note was a married woman and sued without joining her husband. The Supreme Court said: "The wife was strictly a right party, and the irregularity consists in the non-joinder of the husband. But this is a defect which, at common law, could only be objected to by a plea in abatement. Besides, the Supplement to the Practice Act forbids the reception by the Court, at the trial, of all objections founded on the non-joinder of parties, except on certain conditions which did not exist in this case."

See also Brown vs. Fitch, 4 Vr. 418.
Also Lehman vs. Hauk, 13 Vr. 206.

The declaration in this case was filed on the second day of July, nineteen hundred and six, and the plea of general issue was filed on July twelfth, nineteen hundred and six.

At that time the act entitled "An act for the protection and enforcement of the rights of married women" (P. L. 1906, page 525) was in force.

It is respectfully submitted that the judgment below should be reversed with costs.

WARREN DIXON,
Of Counsel with Plaintiff in Error.

No. March Term 1906.

New Jersey Court of Errors and Appeals.

Susan A. Slater, Plaintiff, Plaintiff in Error, *vs.* North Jersey Street Railway Company, Defendant, Defendant in Error.	In Tort. On Error.

BRIEF FOR DEFENDANT IN ERROR.

The above entitled action was tried before the Hon. Benjamin A. Vail, Judge of the Hudson Circuit Court, and a jury. It resulted in a non-suit.

The plaintiff assigns error on the granting of the non-suit.

The plaintiff, a married woman, living with her husband, on the third day of May, Nineteen hundred and four, was walking west on the northerly side of Communipaw Avenue, in Jersey City; Communipaw Avenue runs east and west; Pacific Avenue runs north and south. When the plaintiff reached the northeasterly corner of Communipaw and Pacific Avenues, she endeavored to cross Pacific Avenue from east to west; she had walked nearly all the way across, when she alleges she

slipped on the rail farthest west, fell and injured herself. She alleges she slipped on some grease or oil, which was on or near the track. The defendant in answer to interrogatories served upon it, admitted that at some time before the day in question, it had placed grease or oil upon the curve of the track at this point.

At the close of the plaintiff's case, a non-suit was asked for upon the grounds (1) that no negligence had been shown upon the part of the defendant or its servants, (2) contributory negligence upon the part of the plaintiff, and (3) that the suit was instituted April 30, 1906, and that the evidence discloses that at that time the plaintiff was a married woman, living with her husband and that he had not been made a party to the action.

I.

Upon the first ground urged by the defendant a non-suit was properly granted. The defendant, it is true admitted having placed grease or oil upon the tracks at or near the point where the plaintiff alleges she fell, *some time before the date in question.* There is no proof that the grease or oil had not been properly placed upon the curve, or that the same was placed upon the surface of the track, or that the grease the plaintiff slipped upon was the grease or oil placed there by the defendant, or that the defendant had no legal right to so place oil or grease at this point to ease the curve. The plaintiff proved nothing but that she fell on what she states was grease, and that some time before that the company had placed grease or oil at or near this point. This fact, without other proof of negligence is not sufficient to charge the defendant with the plaintiff's injury.

II.

The second ground for the non-suit is strongly urged.

Assuming that the grease or oil upon which the plaintiff slipped was placed at the point in question by the defendant, the evidence plainly discloses that the plaintiff was guilty of such contributory negligence as would bar a recovery. She states on direct examination (page 13) as follows:

> Q. While you were crossing, did anything happen to you? A. I slipped on the side toward Kopido's, that is the west side, and fell between the two rails * * *
>
> Q. What did you slip on? A. I afterwards learned it was grease upon the surface of the tracks, grease smeared upon the stones and track.
>
> Q. How did you fall? A. I fell violently,—this foot slipped curling around the left ankle, and throwing me violently over and bending my arm completely; my right foot slipped on the track. I was looking at the car that was coming to see if I could safely cross, and I stepped on the rail and walk at the same time, and I slipped.

On cross-examination, she states (page 17):

> Q. What time of the day? A. About ten o'clock in the morning.
>
> Q. A bright, clear day? A. Yes, so far as I remember.
>
> Q. You were crossing the tracks there in the usual way? A. Yes.
>
> Q. Was it the far track that you slipped on? A. The track next to Kopido's.
>
> Q. Which rail was it you slipped on? A. I was on the rail at the time I slipped, I was

looking at the car to see if I could safely cross, the car was coming up towards me from Jersey City.

Q. You had to hurry across a little? A. I did not have to hurry, the car was about the middle of the block.

Q. You were not looking where you were stepping? A. No. I was looking at the car.

Q. And you fell? A. My foot slipped, my right foot slipped.

Q. You didn't know what you slipped on at the time? A. No, I looked to see what I had slipped on and I saw the track and the sides of the track had something on it, also on the cross stone, the cross walk between the tracks.

Q. Are you sure there is a cross walk and a stone there? A. I think you will find a cross walk across the track there.

Q. You saw this grease in the curve of the track? A. I saw it positively on the surface also.

Q. So you could see it very plainly? A. Plainly. If I had looked I would have avoided it properly; I looked to see that I could cross the track safely without the car running me down.

It thus appears from the plaintiff's own testimony that had she looked where she was stepping, she would have avoided the accident, and passed safely to the opposite side. She admits that the danger, if any, was perfectly obvious, and that she saw it plainly immediately after the accident, and then states with great positiveness that had she been looking, she would have avoided it and the accident.

It can hardly be doubted that with this evidence before him the learned Judge properly non-suited the plaintiff.

It is well settled law that a person must use reasonable precautions in crossing a street and avoid obvious danger. One cannot walk blindly into danger, and then hold another for his own carelessness. In this instance the plaintiff alleges that the grease or oil was plainly obvious, and in no wise hidden; it needed no special observation to discover it; it was in plain sight, and to be seen by any person using ordinary care and paying the slightest attention to his surroundings. The plaintiff testifies that she was not frightened or hurried by reason of anything on the street. It is true she states she saw a car coming, which she desired to avoid, but she testifies positively and with great emphasis that the car was over a half a block away, and that she did not have to hurry (pages 12 and 18).

> Q. You had to hurry across a little? A. I did not have to hurry, the car was about the middle of the block.

That this is so is borne out by her actions after she fell. She states she fell and although she was dazed, she yet had time to rise unassisted, look at the track to ascertain what had caused her to fall, and cross to the sidewalk before the car reached her.

III.

The third ground for a non-suit was that at the time plaintiff instituted this action she was a married woman and living with her husband, and that her husband was not made a party thereto; that therefore the suit should fail. The action was commenced April 30, 1906. The summons was served May 2, 1906. At that time the plaintiff testifies she was married and living with her hus-

band, and living with him at the time of the trial. At common law, for an injury committed to the person of the wife during marriage, by battery, slander, etc., the wife could not sue alone in any case.

9 East., 471;
11 East., 301;
Chitty on Pleading, Vol. 1, page 72.

The husband and wife must join if the action be brought for the personal suffering or injury to the wife.

Chitty on Pleading, Vol. 1, page 73;
Anderson v. Anderson, 1 Bush (Ky.) 327;
Starbaird v. Frankfort, 35 Me., 89;
Lang v. Morrison, 14 Ind., 597.

The act of May 17, 1906, (page 525) enabling the wife to sue alone had not yet been passed.

The common law on this subject was in force on April 30, 1906, and at the time of the institution of this action, the law of this State did not authorize or empower a married woman to sue in her own name for a tort committed against her. It was necessary in order to maintain the action that the husband should be made a party to the suit and join with her therein. The wife could not sue alone in any case except when deserted by her husband.

Pennsylvania R. R. Co. v. Goodenough, 26 Vr., 581, and cases cited therein.

As stated in the above mentioned case the husband was so identified with the action that he could release the cause of action; could take and receive the money upon rendition of the judgment,

and could compromise the action before judgment.

The plaintiff alleges, however, that because the defendant gave no notice of non-joinder with its plea, or within the time allowed by law, to the plaintiff, it cannot now take advantage of the fact that the husband was not joined as a party plaintiff. He refers to the practice act of 1903, section 36, as his authority.

The non-joinder of which the practice act speaks is the non-joinder of a proper party to the action. It could hardly be applied where the interest in the proceeding of the person not joined is unknown to the defendant. It is not intended to apply to an action where the *right* of the plaintiff to sue is in question. It may apply to a case where the person having an interest *in conjunction with the plaintiff* has not been made a party. In such a case the right of the plaintiff to sue is not questioned.

Applying the rule contended for to a case like the one at hand, would work great injustice to the defendant. In this case there is nothing in the pleadings to apprise the defendant of the fact that the plaintiff was a married woman. The suit was instituted in her individual name; she was unknown to the defendant, and it was not possible for the defendant to know that she was a married woman until after plea had been filed, and the case was at issue. How, therefore, could the defendant within five days after plea filed give notice of non-joinder of the husband of plaintiff when there was nothing in the pleadings to apprise it of that fact, and it had no knowledge thereof, and could not ascertain such fact until long after the five days had expired and the case was at issue.

We respectfully insist, however, that the statute does not apply to an action brought by a married woman without her husband joining therein, un-

less she had been deserted by him. The husband is not merely a *proper* party to the proceeding, or one whose joinder or non-joinder does not interfere with the right of the plaintiff to sue. Not only under the law of this State is he a proper party, but he is a *necessary* part. Without him the wife has no right of action and the suit must fail. The objection goes to the very foundation of the right of the plaintiff to institute the action. It is not a mere objection that another person, having a separate and distinct right, or a joint right was not joined, but the plaintiff without her husband has absolutely no right to institute the action.

The plaintiff as a married woman had no right to sue for the injuries claimed. She was entitled to no action against the defendant. The defendant was under no legal obligation to her as an individual without her husband joining in the action. A non-suit was therefore proper and the ruling of the court was correct.

W. D. EDWARDS,
E. F. SMITH,
Of Counsel.

NEW JERSEY, ss.: The State of New Jersey to Benjamin A. Vail, Esquire, Judge of Our Circuit Court, at Jersey City, in and for the County of Hudson, Greeting:

(L. S.)

Because in the record and proceedings, and also in the giving of judgment in a plaint, which was in our Circuit Court, holden at Jersey City in and for the said County of Hudson, between Susan A. Slater, plaintiff, and North Jersey Street Railway Company, defendant, in an action of tort, manifest error hath intervened to the great damage of the said Susan A. Slater, plaintiff, as by her complaint we are informed, we being willing that speedy justice should be done to the parties aforesaid in this behalf, do command you distinctly and openly to send under your seal the record and proceedings aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the Last Resort in all Causes, at Trenton, on the twenty-sixth day of February, nineteen hundred and seven, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right, and according to the law and custom of the State of New Jersey, ought to be done.

Witnesses, Our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the ninth day of February, in the year of our Lord, one thousand nine hundred and seven, &c.

S. D. DICKINSON,
Clerk.

WARREN DIXON,
Attorney of Plaintiff in Error.

The answer of Benjamin A. Vail, a Judge of the Hudson County Circuit Court, within named.

The record and proceedings of the plea whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes, within specified, at the day and place within contained, I certify in a certain schedule to this writ annexed, as I am within commanded.

B. A. VAIL,
Judge.

Attest:
JOHN ROTHERHAM,
Clerk.

HUDSON COUNTY, ss: THE STATE OF NEW JERSEY, to the Sheriff of the County of Hudson, aforesaid, GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON NORTH JERSEY STREET RAILWAY COMPANY, if in your County it may be found, so that it be and appear before our Circuit Court to be holden at Jersey City in and for the said County of Hudson on the tenth day of May next to answer unto SUSAN A. SLATER in an action of tort to her damage fifteen thousand dollars as is said: And have you then there this writ.

(L. S.)

WITNESS, Jonathan Dixon, Esquire, a Judge of our said Circuit Court, at Jersey City aforesaid the thirtieth day of April in the year One Thousand Nine Hundred and Six.

JOHN ROTHERHAM,
Clerk.

WARREN DIXON,
Attorney.

HUDSON COUNTY CIRCUIT COURT
of the April Term, nineteen hundred and six.

HUDSON COUNTY, ss.:

North Jersey Street Railway Company, a corporation, the defendant in this suit was summoned to answer unto Susan A. Slater, the plaintiff herein, in an action of tort, and thereupon the said plaintiff by Warren Dixon, her attorney, complains.

For that whereas the said defendant at all times hereinafter mentioned was, and still is, a corporation doing business in the County of Hudson aforesaid, and at said times was the operator, possessor and manager of a certain Street Railway, Railway Cars and Railway Tracks laid in and through certain public streets or avenues including certain public street or avenue called Pacific avenue, and a certain public street or avenue called Communipaw avenue in Jersey City in the County of Hudson aforesaid, both of which said public streets or avenues were used by the public for travel.

And whereas the said plaintiff on the third day of May, nineteen hundred and four, in Hudson County aforesaid, was walking in and across said Pacific avenue in or near the place where it joins Communipaw avenue, and was crossing on foot that portion of the said Pacific Avenue in which the said rails or tracks of the said defendant were then and there laid, maintained and operated by the said defendant.

Whereby it became and was the duty of the said defendant to have the said rails and tracks in a reasonably safe condition for pedestrians to cross the same, and the said street, and then and

there it became and was its duty not to make the said place dangerous for pedestrians by putting and placing oil, grease or other slippery substance upon said tracks and upon said street where people were used to, and had the lawful right to, cross, and whereby they would be liable to be thrown to the ground and injured.

Yet the said defendant, disregarding the said several duties in this behalf so negligently and carelessly had and maintained the said tracks and rails aforesaid in an unsafe condition for pedestrians to cross the same or said street, and then and there so negligently and carelessly put and placed oil, grease and other slippery substance on said tracks and rails and street where people were accustomed to cross the same, and thereby made the said street dangerous for pedestrians to cross the same, so that the said plaintiff, while then and there lawfully crossing and attempting to cross the said street, and without any knowledge on her part of the dangerous condition of the same, stepped into and upon said oil, grease and other slippery substance so placed upon said street and tracks by the said defendant, and by reason thereof she slipped and fell to the ground and sustained injuries, and this without any fault or negligence on her part.

By means of which wrongs and injuries the said plaintiff then and there became and was greatly injured, wounded and fractured in her head, limbs, body and mind, internally and externally, and therefrom ever since has been, and during the remainder of her natural life will be injured in her head, limbs, body and mind, and therefrom has undergone during said time and in the future will undergo, great pain and anguish of body and mind and therefrom during all of said time has been prevented from pursuing her lawful affairs, and in the future will be prevented from pursuing her lawful affairs and occupations from which she

was accustomed to earn and receive, and but for said injuries would have earned and received, and in the future would have been able to earn and receive large sums of money, and by means of the premises said plaintiff has been forced to lay out and expend large sums of money and in the future will be forced to lay out and expend large sums of money in and about endeavoring to be cured of her said injuries.

And also for that whereas the said defendant at all times hereinafter mentioned was and is a corporation operating, maintaining and managing a certain street railway and railway tracks and rails laid in and through certain public streets or avenues in Jersey City in the County of Hudson aforesaid, including a certain public street or avenue commonly called Pacific Avenue, and a certain public street or avenue commonly called Communipaw Avenue, which said streets at the time of the committing of such grievances and from thence hitherto have been, and still are, common public streets and highways for all persons to go, return, pass, and re-pass in and upon at their free will and pleasure, to wit, in Jersey City aforesaid.

Yet the said defendant well knowing the premises while it was so possessed of and managing said railway and railway tracks as aforesaid, to wit, the 3d day of May, nineteen hundred and four, in Jersey City, in the County of Hudson aforesaid, wrongfully and injuriously put and placed a large quantity of oil, grease or other slippery substances in said streets and on said rails, and wrongfully and injuriously kept and continued the same therein.

By means of which negligent and improper conduct of the said defendant in that respect afterwards, to wit, on the third day of May, nineteen

hundred and four, the said plaintiff while going and passing across said street accidentally stepped upon and in the said oil, grease and other slippery substances so spread upon the said street and said rails, and thereby was thrown down to the ground.

By means of which wrongs and injuries the said plaintiff then and there became and was greatly injured, wounded and fractured in her head, limbs, body and mind, internally and externally, and therefrom ever since has been and during the remainder of her natural life will be injured in her head, limbs, body and mind, and therefrom has undergone during said time and in the future will undergo, great pain and anguish of body and mind, and therefrom during all of said time has been prevented from pursuing her lawful affairs, and in the future will be prevented from pursuing her lawful affairs and occupations from which she was accustomed to earn and receive, and but for said injuries would have earned and received, and in the future would have been able to earn and receive large sums of money, and by means of the premises said plaintiff has been forced to lay out and expend large sums of money and in the future will be forced to lay out and expend large sums of money in and about endeavoring to be cured of her said injuries.

Wherefore said plaintiff says that she has been injured and suffered damage in the sum of Fifteen Thousand Dollars, and therefore she brings her suit, &c.

WARREN DIXON,
Plaintiff's Attorney.

And the said defendant, by Bedle, Edwards & Holmes, its attorneys, comes and defends the

wrong and injury, when, &c., and says that it is not guilty of the commission of the grievances, or any or either of them in manner and form as the said plaintiff has, in her said declaration, above complained against it, and of this it puts itself upon the country, &c.

BEDLE, EDWARDS & HOLMES,
Defendant's Attorneys.

Therefore, to try the issue above joined let a jury come before the said Circuit Court of Jersey City aforesaid on the fourth day of February, nineteen hundred and seven, as yet of the December Term, nineteen hundred and six, who neither, &c., by whom, &c., to recognize, &c., because as well, &c., the same day is given to the parties aforesaid, and the jurors of the jury above mentioned also come who to speak the truth of the matters aforesaid, being chosen, tried and sworn, and the said plaintiff having presented her evidence to said Court and jury, and the said defendant having thereupon moved to non-suit the said plaintiff, and the said Court having thereupon ordered a non-suit of the said plaintiff upon the motion of the said defendant;

THEREFORE IT IS CONSIDERED that the said plaintiff be non-suited and that her said action be dismissed and that the said defendant do recover against said plaintiff its costs taxed against the said plaintiff at the sum of
Dollars.

Judgment entered and filed this seventh day of February, nineteen hundred and seven.

BENJAMIN A. VAIL,
Judge.

INTERROGATORIES.

HUDSON CIRCUIT COURT.

SUSAN A. SLATER,
Plaintiff,

vs.

NORTH JERSEY STREET RAILWAY COMPANY,
Defendant.

To Messrs. Bedle, Edwards & Holmes,
Attorneys of Defendant:

Please to take notice that the plaintiff demands that you cause to be served within the time limited by law, answers under oath on behalf of said defendant to the following interrogatories.

FIRST: On and before the third day of May, nineteen hundred and four, did the defendant Company operate, manage and control the trolley tracks laid in and through Pacific Avenue, running into Communipaw Avenue, in Jersey City, Hudson County?

SECOND: On and before the third day of May, nineteen hundred and four, did the said defendant Company place, or cause to be placed, upon the rails laid in and through said Pacific Avenue, at or near where the same curved into Communipaw Avenue, in Jersey City, any grease or other slippery substance?

THIRD: If the last interrogatory is answered

in the affirmative, state the name and address of the person or persons who, on behalf of said defendant Company, put or placed grease or other slippery substance on said rails at or near the intersection of said Pacific Avenue and Communipaw Avenue last prior to the third day of May, nineteen hundred and four?

FOURTH: If the second answer is in the affirmative, state in detail and with full particulars the method employed by said defendant for putting such grease or other slippery substance upon said rails at or near said intersection of Pacific and Communipaw avenues, in Jersey City, on or about the third day of May, nineteen hundred and four?

FIFTH: If the second interrogatory is answered in the affirmative state what kind of grease or other slippery substance was put or placed upon said rails last prior to the third day of May, nineteen hundred and four?

SIXTH: State whether on or about the third day of May, nineteen hundred and four, at or near the intersection of Communipaw and Pacific avenues, the said defendant Company placed, or caused to be placed, any oils, grease or any slippery substance upon the rails of its trolley tracks at or near the curve from Pacific Avenue to Communipaw Avenue, and the nature and quality of such substance, if so placed there by it or under its direction or authority.

Dated October 10th, 1906.

Yours truly,

WARREN DIXON,
Plaintiff's Attorney.

ANSWERS

HUDSON COUNTY CIRCUIT COURT.

SUSAN A. SLATER,
Plaintiff,

vs.

NORTH JERSEY STREET RAILWAY COMPANY,
Defendant.

In Tort.

To Warren Dixon, Esq.,
Attorney of Plaintiff,

Sir:—Please take notice that the following are answers to the interrogatories served upon the defendant on October 11, 1906:

Answer to first interrogatory: Yes.

Answer to second interrogatory: We placed black oil upon the curve at that point before that date, but do not know whether we did it that day or not. Sometimes we used grease, but don't know which we were using at that time.

Answer to third interrogatory: Do not know.

Answer to fourth interrogatory: Oil is carried in a pail and put on with a swab, grease is put on with a stick with a flat end.

Answer to fifth interrogatory: Do not know. We sometimes used black oil, and occasionally used grease.

Answer to sixth interrogatory: See answer to second interrogatory.

NORTH JERSEY STREET RAILWAY COMPANY,
By Bedle, Edwards & Holmes,
Attorney.

Dated October 22nd, 1906.

STATE OF NEW JERSEY)
)ss:
COUNTY OF HUDSON)

Martin White, of full age, being duly sworn, on his oath says that he is Superintendent of the Department of Maintenance of Way of North Jersey Street Railway Company, the defendant in the suit in which the foregoing answers and interrogatories are made, and he says that he is familiar with the operation, management and control of the trolley tracks of the defendant Company laid in and through Pacific Avenue, running into Communipaw Avenue, in the City of Jersey City and County of Hudson, and is the best agent of the defendant Company to answer the foregoing interrogatories.

Deponent further says that the facts set out in the said answers and the statements made therein are true to the best of his knowledge, as he thoroughly believes.

Subscribed and sworn before)
me this twenty-second day) MARTIN WHITE.
of October, 1906.)

LEONARD J. TYNAN,
Master in Chancery of New Jersey.

SUSAN A. SLATER, the plaintiff, sworn in her own behalf, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

Q. Where do you live. A. 279 Communipaw Avenue, Jersey City.

Q. Did you live there on the 3rd day of May, 1904? A. I did.

Q. On the 3rd day of May, 1904, were you walking across Pacific Avenue, near Communipaw Avenue? A. I was.

Q. Which side of the street did you start from? A. I started from the east side, crossing toward the north side, at the crossing.

Q. We will assume that Pacific Avenue runs north and south, about, then Communipaw Avenue runs east and west, don't it? A. Yes, I was crossing from east to west on the north side of Communipaw Avenue.

Q. At Communipaw Avenue the trolley tracks curve into Pacific Avenue. A. Yes, they turn the corner there.

Q. Is there a crosswalk there? A. There was a crosswalk there, crossing from the east to the west side.

Q. Now, with regard to that cross-walk, where were you walking? A. I was walking toward Kopido's store, direct over the street.

Q. How many tracks are there in that street? A. Two tracks, four rails.

Q. While you were crossing, did anything happen to you? A. I slipped on the side toward Kopido's, that is the west side, and fell between two rails.

Q. That was the farthest tracks? A. Yes, I had crossed two rails, and then it was between the two rails of the second track that I fell on.

Q. What did you slip on? A. I afterwards learned it was grease upon the surface of the track. Grease smeared upon the stones and track.

Q. How did you fall? A. I fell violently, this foot slipped, curling round the left ankle and throwing me violently over and bending my arm completely; my right foot slipped on the track. I was looking at the car that was coming to see if I could safely cross, and I stepped on the rail

and walk at the same time, and I slipped.

Q. How did you fall? A. I fell, doubling my right hand under me completely, and for a moment I was dazed and the car was almost upon me before I could get up, I asked for assistance then, people were standing on the corner; I saw where I had slipped and I asked them to help me into Kopido's store on the corner; in there I asked them to assist me to the doctor's. I said: "I think my wrist was broken"; they seemed to think they could not be very well spared, I said I was fainting and asked them to help me, they didn't seem to be willing, so I went alone. There were two well-dressed gentlemen standing at the corner, they disappeared completely; I don't know who they were, I have never been able to learn who they were.

Q. Where did you go? A. I walked out of the store and I saw Dr. Lampson on the opposite side, I went over to him and said to him: "I have slipped on the track"—(interrupted).

Mr. Edwards: I object to that, and ask to have it stricken out.

The Witness: I said: "Doctor, I believe my wrist is broken." He said: "It is, come right with me to my office." I went to his office and he set my wrist. Then I went home. The whole inside of the hand and the fingers were affected, and at the present time these fingers (showing) are almost useless.

Q. Then you went home? A. Yes.

Q. Were you confined at all to the bed? A. I did not lie down in bed. I was a fit subject for it, but I didn't go to bed.

Q. How long were you in these bandages and splints? A. I think it was six weeks before the doctor took the bandages off.

Q. In the meantime you were visiting the doc-

tor? A. Every second day at that time, that continued for a month, every second day, and then during the whole year he treated my hand.

Q. Have you been seeing him for that arm? A. Yes, I have been consulting him up to the present time. My hand was helpless for some time.

Q. How old are you? A. Fifty-three years of age.

Q. At the time of this accident had you been supporting yourself? A. I had been giving massage, that was the business I was following up to that date.

Q. What is that business? A. It is rubbing and manipulations of the human body. Massage is a profession.

Q. Explain it? A. Grasping and rolling and kneading of the body, which requires all the use of the hand and fingers to give it correctly.

Q. How long had you been following that? A. Up to that date for ten years.

Q. Where were your patients? A. In Jersey City, New York and Brooklyn.

Q. How many patients were you accustomed to treat a week on an average? A. Sometimes I had four a day. I had sometimes three to four a day, some days.

Q. On an average how many a day or how many a week, how many a month? A. I cannot tell what the average would be.

Q. Sometimes you have four in a day? A. Yes, and sometimes two.

Q. (Mr. Edwards). None at all? A. I allowed myself no more than four patients a day.

Q. It is an exhausting sort of a thing? A. Yes, I never take more than four in a day.

Q. What is your accustomed to receive for a treatment? A. Two dollars a treatment. Out of town treatments I have received more for. Five dollars for going as far as New Rochelle.

I have received as much as five dollars for a patient out of town.

Q. Did you have many patients in New Rochelle? A. No, I didn't have many patients outside of Jersey City; most of them in Jersey City.

Q. When you have a patient does that mean for only one treatment? A. No, a course of treatment. I always advise them to take not less than twelve treatments, because the physicians in Jersey City and they sent me cases, but after I didn't go to the physicians, I could do better without them. I was carrying on the business up to the time of the accident.

Q. Since that time are you carrying on the business? A. I have not been able to give massage properly as I used to. It does not only require the wrist movement, all the fingers. Now my two fingers catch, also my hand cramps when I attempt to rub any length of time. I have tried to do it a great many times.

Q. Did you suffer any pain at the time of the accident? A. Very severe pain, a great deal of pain, all through the arm and in my hand, through the arm and to the shoulder, I will have excruciating pain in the arm and hand, and in the nerve running up to the elbow. At night my arm gets stiff. In the day I massage my own wrist with the left hand. I have been doing that since the accident. I also ascillate the wrist, I do everything my knowledge gives me to benefit the wrist and the hand ever since the injury.

Q. Have you been doing that under the advise of your physician. A. I have. For the last year it was almost impossible for me to raise anything with my hand, everything I took in the hand dropped out of my hand; I could not use the scissors at all until lately I have been able to use my scissors properly. Every night of my life I have pains in my arms, every night, rheumatism condition, I presume, and I have mentioned that to the

doctor a number of times. I rub my arm through the night and it lasts until morning, the pain does, until I begin to use it again through the day.

Q. Does it keep you awake at night? A. Yes, often at night I feel it painfully, then I rub my arm thoroughly in the morning before beginning to use it.

Q. Has your health been about the same as it was before the accident? A. I was in a very nervous condition for a year. I have gradually got over it. My general health is much better now.

Q. What was your health up to the time of the accident? A. Very good.

CROSS EXAMINATION by Mr. Edwards:

Q. You live at 279 Communipaw Avenue, Jersey City? A. Yes.

Q. You have lived for many years in that vicinity? A. Yes.

Q. Your husband is— A. Justus Slater.

Q. He lives there? A. Yes.

Q. How long have you been married? A. A little over thirty years.

Q. What day of the week was this accident? A. Tuesday.

Q. What time of the day? A. About ten o'clock in the morning.

Q. A bright, clear day? A. Yes, so far as I remember.

Q. You were crossing the tracks there in the usual way? A. Yes.

Q. Was it the far track that you slipped on? A. The track next to Kopido's.

Q. Which rail was it you slipped on? A. I was on the rail at the time I slipped, I was looking at the car to see if I could safely cross, the car was coming up towards me from Jersey City.

Q. You had to hurry across a little? A. I did

not have to hurry, the car was about the middle of the block.

Q. You were not looking where you was stepping? A. No, I was looking at the car.

Q. And you fell? A. My foot slipped, my right foot slipped.

Q. You didn't know what you slipped on at the time? A. No, I looked to see what I had slipped on and I saw the track and the sides of the track had something on it, also on the cross-stone, the cross walk between the track.

Q. Are you sure there is a cross-walk and a stone there? A. I think you will find a cross-walk across the track there.

Q. You saw this grease in the curve of the track? A. I saw it positively on the surface also.

Q. So you would see it very plainly? A. Plainly. If I had looked I would have avoided it properly; I looked to see that I could cross the track safely without the car running me down.

Q. Which way was the car going? A. Coming up Pacific Avenue, the car had not reached the curve. I was going to take that particular car; I was going up on the hill.

Q. It was right at the curve that you fell? A. Yes, at the crossing at the curve.

Q. You had seen them put oil on the curve? A. Before I did not, I did not know before that they put oil on the track, but I have seen them do it since.

Q. What is your husband's business? A. He is with the Standard Oil Company, bookkeeper, been with them for a number of years.

Q. When did you take to massage? A. Ten years before this happened. I studied the business at the Manhattan School of Training in New York, and practiced it in Jersey City.

Q. You didn't have clients all the time? A. I had patients all the time.

Q. Would you average a treatment a day the

year round? A. Yes, I generally had patients every day.

Q. Do you think you would average one treatment a day the year round? A. No.

Q. Those people paid you various prices? A. Various prices. I always had two dollars, I sometimes received a great deal more.

Q. You did work for less than two dollars? A. Only parts of the body—sometimes an arm or a limb. My stated price was two dollars.

Q. What did you get when you did only a part of a body? A. Sometimes requested by a physician, stating that the patient was poor, I charged them a dollar, never less than one dollar.

Q. Did you have many patients? A. A great many patients, was busy all the while.

Q. You did your household work the same time? A. Part of the time. I had to do some household work.

Q. You have been doing household work since the accident? A. During the first year it was not possible; I am obliged to do it now.

Q. You have no difficulty in doing it? A. I am obliged to do it, but I suffer while I am doing it.

Q. It pained you quite a little for the first year? A. Very much indeed.

Q. How long were you going to the doctor regularly? A. About seven weeks every second day, after that he treated me through the year.

Q. Have you paid the doctor's bill? A. Some, not much.

Q. Did your husband pay the doctor? A. No.

RE-DIRECT EXAMINATION by Mr. Dixon:

Q. You have not been living in marital relations with your husband? A. I have not for some years.

RE-CROSS EXAMINATION by Mr. Edwards:

Q. You are living in the same house? A. Yes.

Q. Living together? A. Not as man and wife.

Q. He supports you? A. No, he does not support me, he pays his part toward the house expenses.

Q. You live in the same house? A. Yes.

Q. How much of the house do you occupy? A. The entire house.

Q. Your husband occupies the house? A. He occupies his portion of the house.

Q. He lives there with you? A. He lives in the house, yes.

Q. You are not living apart from him? A. We are, in one sense of the word. We are not living as man and wife.

Q. You are living there on good terms with him? A. Pretty good terms, yes.

SARAH ATTERBURY, sworn on the part of the plaintiff, testifies as follows:

DIRECT EXAMINATION by Mr. Dixon:

Q. Where do you live? A. 7 Pine Street.

Q. Are you familiar with the locality corner of Pacific and Communipaw avenues, where the car tracks curve? A. Yes, sir.

Q. Shortly before the third day of May, 1904, did you have occasion to cross the street at Pacific Avenue? A. Yes.

Q. Did you see any grease or oily substance there? A. I thought I did. I was crossing there one day and nearly sprained my ankle.

Mr. Edwards: I ask to have the last part of that answer stricken out.

Mr. Dixon: I want to prove that she

slipped in the same place.

Mr. Edwards: I object to it as immaterial.

Mr. Dixon: I want to show that a nuisance existed in order to charge the defendant with knowledge so far as to Public streets are concerned.

The Court: And you want to show knowledge of the condition brought home to the defendant?

Mr. Dixon: I will not press the matter; I don't want to take any chances in the matter.

PLAINTIFF RESTS.

Defendant moves for non-suit, on the grounds, First, no negligence has been shown in the defendant, or its servants; Second, contributory negligence of the plaintiff has been shown; Third, this suit was brought on the 30th day of April, 1906, summons served May 2, 1906, this is a married woman and the husband was a necessary part to this suit. The accident happened in 1904. He has not been made a party. The husband and wife by evidence are living together in the same house.

Mr. Dixon: Under the statutes I think the husband is not a necessary part in this suit.

A non-joinder or mis-joinder cannot be objected to by the defendant unless written notice is given of such objection to the plaintiff within five days after filing of plea.

The Court: What have you to say as to the other question that the plaintiff did not look where she stepped or she might have seen the oily substance there.

Mr. Dixon: That is a question for the jury. She might and she might not have. She is only expressing her own judgment, and it is for the jury to say whether that is a correct judgment or not. She might not have assumed that the crossing was safe, her attention was directed to the approaching car. There the Company created a nuisance.

The Court hears argument of counsel on both sides and says: It seems to me under the evidence in this case and the decisions in this State, it is my duty to direct a non-suit, and I shall so direct.

(To the Jury): You are relieved, gentlemen, from the further consideration of this case.

Plaintiff prays exception to the ruling of the Court, and it is signed and sealed accordingly.

BENJ. A. VAIL (L. S.)
Judge.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Last Resort in All Causes.

SUSAN A. SLATER,
Plaintiff,
Plaintiff in Error,

vs.

NORTH JERSEY STREET RAILWAY COMPANY,
Defendant,
Defendant in Error.

AFTERWARDS, that is to say, on the twenty-sixth day of February, nineteen hundred and seven, in the Court of Errors and Appeals, in the last resort in all causes, comes the said SUSAN A. SLATER, by Warren Dixon, her attorney, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said Bill of Exceptions, and also in the giivng of the judgment aforesaid there is manifest error, to wit:

FIRST: That at the trial of the said cause in the Hudson County Circuit Court, the Judge, before whom, &c., at the close of the plaintiff's case illegally ordered the said plaintiff to be non-suited, against the objection of said plaintiff.

SECOND: That judgment was rendered in favor of said defendant whereas, by the law of the

land, judgment should have been rendered in favor of said plaintiff.

WHEREFORE, the said plaintiff in error, SUSAN A. SLATER, prays that the judgment aforesaid, by reason of the errors aforesaid, may be reversed, annulled and for nothing holden, and that she may be restored to all things which she has lost by reason of said judgment.

WARREN DIXON,
Attorney for Plaintiff in Error.