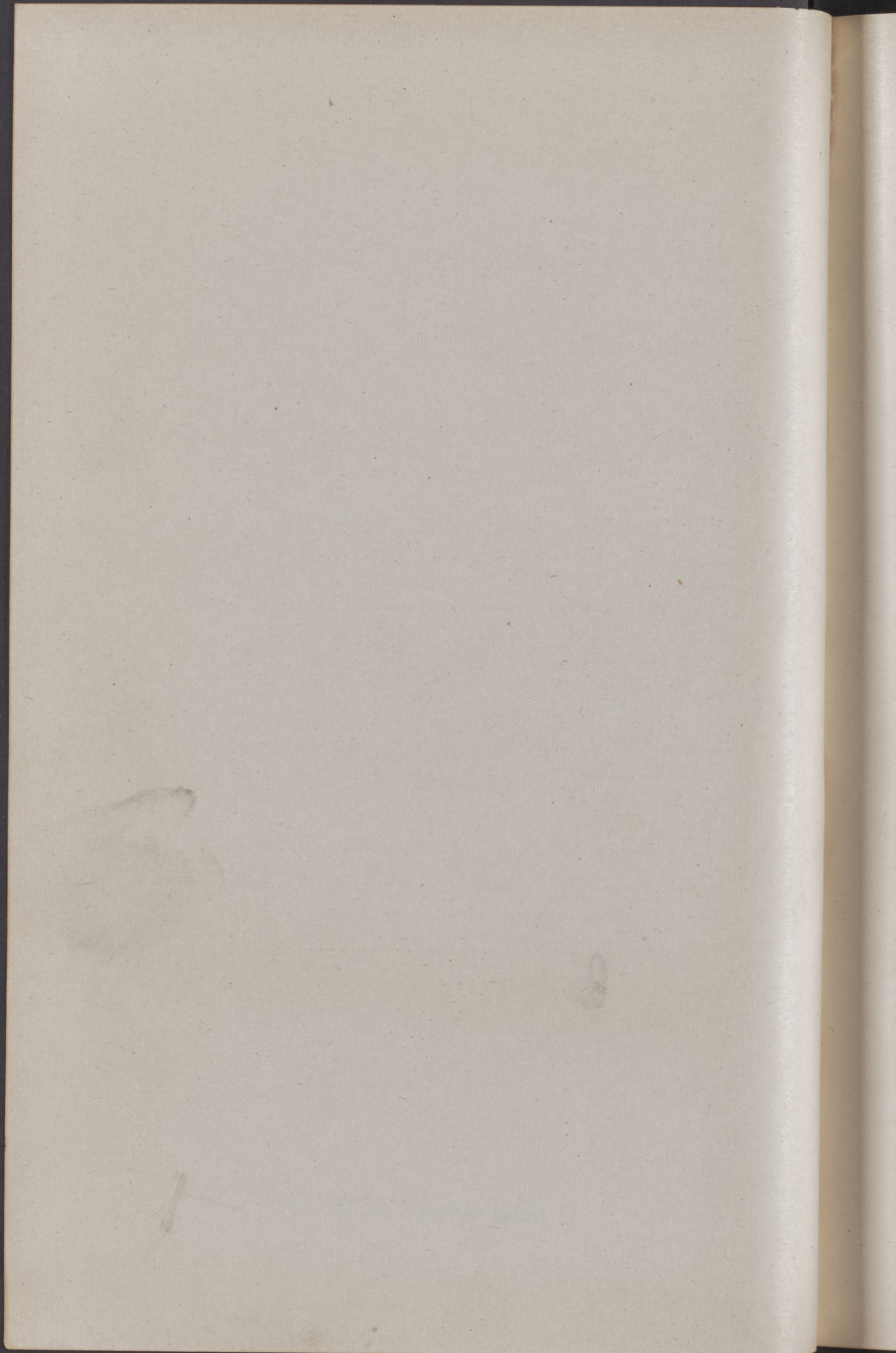


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NOTICE OF APPEAL.
NEW JERSEY SUPREME COURT.

HAZEL BOYER, Administra- trix ad prosequendum of the Estate of Kermit B. Williams, <i>Plaintiff,</i> v. GREAT ATLANTIC & PACIFIC TEA Co., a corporation, <i>Defendant.</i>	}	Action at Law. Notice of Appeal.
	10	

To William C. French, Esquire, Attorney of 20
Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The Court overruled the defendant's motion for a non-suit.

2. The Court overruled the defendant's motion for a directed verdict in favor of defendant.

3. On the whole case there was no proof of negligence on the part of the defendant.

4. The plaintiff was guilty of contributory negligence.

5. There was no evidence to sustain the verdict.

CARR & CARROLL,
*Attorneys of Great Atlantic
& Pacific Tea Co., Appel-
lant.*

10 Dated, July 26, 1923.

[ENDORSED]

Service of the within notice is hereby
acknowledged this 31st day of July,
1923.

William C. French,
Atty. for Pltff.

20

COMPLAINT.

The plaintiff, residing in the City and County of
Camden, and State of New Jersey, says:

1. That on or about October 27, 1919, the said de-
fendant was the owner of a certain team of horses
and wagon, and was engaged in driving the same, by
its agents and servants on and upon the public
30 streets of the City of Camden, and particularly at
or about Ninth Street and Ferry Avenue, in the city
and county aforesaid.

2. At the time and place aforesaid the said Ker-
mit B. Williams was lawfully upon said street when
the said defendant, by its agents and servants care-

lessly and negligently drove the wagon owned and operated as aforesaid upon and against the said Kermit B. Williams, thereby inflicting upon him personal injury, as a result of which he died.

3. The negligence of which the plaintiff complains and of which the defendant is guilty consists of the fact that said wagon was operated at a high and unreasonable rate of speed under the circumstances; that no warning was given the said Kermit B. Williams of the approach of said wagon; that the said Kermit B. Williams was carelessly and negligently run down in broad daylight. 10

4. The said Kermit B. Williams died as a result of said injuries on or about November 1, 1919, leaving him surviving, his mother, Hazel Boyer, who has suffered pecuniary loss by reason of the death of the said Kermit B. Williams.

5. This suit is brought within two years from the death of the said Kermit B. Williams and letters *ad prosequendum* upon the estate of the said Kermit B. Williams was regularly granted to the said Hazel Boyer by the surrogate of the County of Camden, November 20

Judgment will be demanded for the sum of \$20,000 damages.

JAMES MERCER DAVIS,
Attorney of Plaintiff.

[ENDORSED]

A True Copy,
W. Penn Corson,
Sheriff,
By James E. Hewitt,
Under Sheriff.

10

ANSWER.

The defendant answered as follows:

Defendant, a corporation, says that:

1. It denies the first paragraph of the complaint.
2. It denies the second paragraph of the complaint.
- 20 3. It denies the third paragraph of the complaint.
4. It has no knowledge of the matters and facts set forth in the fourth paragraph of the complaint, and leaves the plaintiff to make such proof thereof as she may be advised.
5. It has no knowledge of the matters and facts set forth in the fifth paragraph of the complaint, but upon information and belief, believes such facts
- 30 to be true.

DEFENSES.

Plaintiff's intestate contributed by his own negligence to the injuries resulting in his death.

CARR & CARROLL,
Attorneys for Defendant.

JUDGMENT.

NEW JERSEY SUPREME COURT.

STATEMENT.

10

HAZEL BOYER, Admr. etc.,	}	Action at Law.
v.		
GREAT ATLANTIC & PACIFIC TEA		
Co.		

Judg't entered February 17, 1923. 20

Damages	\$1000.00
Costs	
Attorney	32.00
Disbursements	15.28
	\$1047.28

EDWARD J. KELLEHER,
Clerk.

30

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY CIRCUIT.

10	HAZEL BOYER,	} <i>Plaintiff,</i>	} Action at Law.
	v.		
	GREAT ATLANTIC & PACIFIC		
	TEA Co.,	} <i>Defendant.</i>	

December Term, 1923. 2-8-23.

20

APPEARANCES:

For the plaintiff, WILLIAM C. FRENCH, ESQ.

For the defendant, CARR & CARROLL, ESQS.

Before LLOYD, J., and a jury.30 (Mr. French opens the case for the plaintiff to
the jury.)(Mr. Carr opens the case for the defendant to the
jury.)

HAZEL BOYER, SWORN.

By Mr. French:

Q. Mrs. Boyer, where do you live?

A. 666 South 2nd.

Q. Do you remember the 27th day of October, 1919, when your little boy was killed?

A. Yes, sir.

10

Q. What was his name?

A. Kermit B. Williams.

Q. How old was he?

A. Not quite seven years old

Q. You did not see the accident, did you?

A. No, sir.

By the Court:

Q. You are married again?

20

A. Yes.

Q. You were married twice?

A. Yes.

Q. And you are his mother?

A. Yes, sir.

By Mr. French:

Q. Was he brought home, the first you knew of it?

A. No, sir, he was taken to the Homeopathic Hospital. 30

Q. Did he die there?

A. Yes, sir.

Q. How long after the accident?

A. Not quite twenty-four hours.

Q. You went and saw him there, did you?

A. Yes, sir.

Q. What kind of boy was he?

A. He was an excellent boy, a good boy.

Q. Was he bright or dull?

A. He was a bright boy.

Q. Did he run errands or anything of that kind?

A. Yes, sir, he was going up the street for me when he got killed, to the drug store at Mt. Ephraim and Kaighn Avenue.

10 Q. How old are you?

A. I am twenty-nine.

By the Court:

Q. What family have you beside the boy?

A. No one at all but my husband.

Q. Are you the boy's only relative, that is, his near relative?

A. Yes, sir.

20 Q. Anybody else?

A. Yes, sir, he has a grandmother.

Q. Yes, but no father?

A. His father is living, yes, sir.

Q. Where is he?

A. I don't know, sir; somewhere in Trenton or somewhere, I don't know, sir.

Q. What, were you divorced from him?

A. No, sir, I was not married. It was an accident; he promised to marry me and didn't marry
30 me.

The Court: Does the statute give a remedy for a natural mother?

Mr. French: I don't think there is any distinction there.

The Court: Well, there used to be. I am inclined to think there is an enabling statute, though, that enables the mother to inherit from the child.

Mr. French: Oh, yes, there is that.

The Court: Well, go on, Mr. Carr.

Mr. Carr. I don't want to ask any embarrassing questions if it can be avoided. It is clear in the 10 record that this lady was not married and the child——

The Court: She said the man promised to marry her and didn't—that is what you say, isn't it?

The Witness: Yes.

By the Court:

Q. Williams never did marry you? 20

A. No, sir.

Q. But you married subsequently a man named Boyer?

A. Boyer is my maiden name.

Q. Oh, Boyer is your maiden name?

A. Yes.

Cross-examination.

By Mr. Carr:

30

Q. Are you married now?

A. Yes.

Q. What is your name now?

A. My name is Turner.

Q. When did you marry Mr. Turner?

A. The 19th of October.

Q. I beg pardon?

A. The 19th of October.

Q. Of last year?

A. Yes, sir.

Q. Actually married, were you?

A. Yes, sir.

Q. Did this little boy go to school?

10 A. Yes.

Q. Do you know what grade he was in at school?

A. No, sir.

Q. How long had he been going to school?

A. Well, I just don't know how long.

Q. Two or three years?

A. I judge about a couple of years.

Q. How do you fix his age as being about seven?

A. He was born in 1913.

Q. Born in 1913?

20 A. Yes.

Q. Are you positive of the year?

A. Yes.

Q. When was he born in 1913?

A. What was that?

Q. When was he born in 1913?

A. When was he born?

Q. Yes, what time?

A. Why, the 17th of January.

Q. January 17th?

30 A. Yes.

Q. 1913?

A. Yes, sir.

Q. Who was the physician that attended you, do you remember?

A. I had a lady attended me.

Q. A lady?

A. Yes.

Q. And who was it, do you remember?

A. Her name was—she was a Polish lady; I don't remember.

Q. Do you know her name?

A. No, sir, I don't remember.

Q. Do you know whether the birth of the child was reported?

A. I don't know that.

Q. And you don't know the name of the Polish lady?

A. No, sir.

Q. Do you know where she lives?

A. She is dead, I think.

SPENCER JOHNSON, SWORN.

The Court: Gentlemen, let's straighten out this other matter first. Mr. Carr, have you any recollection of when the statute was passed? 20

Mr. Carr: You mean the death act or the enabling act?

The Court: The enabling act.

A. No, sir, I have not; in fact, this feature of the case I did not know was in the case and I did not look it up. I will have my office look it up while we are going on with the case. 30

The Court: Very well.

By Mr. French:

Q. What is your name, young man?

A. Spencer Johnson.

Q. How old are you?

A. Thirteen.

Q. Do you remember the accident that happened to Kermit?

A. Yes, sir.

Q. Where were you?

A. Where was I when?

Q. At the time, yes, had you been on the trolley
10 car?

A. Yes, sir.

Q. Where did you get on?

A. Got on at Liberty Street.

Q. How far did you ride?

A. To the middle of Kaighn Avenue—no, to the middle, you know, of Mt. Ephraim Avenue.

Q. Did anything happen to the other boy?

A. Yes, I jumped off first and brother Baby
20 jumped off after me.

Mr. French: That is the name the boys called him.

Q. Then what happened?

A. Brother Baby stumbled.

Q. Where did he stumble?

A. Stumbled in the track.

Q. Which track, the one the trolley car was on or
the other one?

30 A. The other one.

Q. And then what happened to him?

A. This here wagon was trotting fast.

Q. And did the wagon run over him?

A. Yes, sir.

Q. Was the trolley car moving when it ran over
him?

A. It was moving.

By the Court:

Q. The trolley car was moving?

A. Yes.

Q. When he jumped off?

A. Yes.

Q. When both of you jumped off?

By Mr. French:

10

Q. Well, did Kermit jump off or fall off?

A. Jumped off and stumbled in the track.

Q. Now, when he jumped off, how far away was the wagon?

A. About fifteen or twenty feet from him.

Q. Was the wagon going fast—the trolley car then?

A. Yes, sir.

Q. How far away were you at this time?

A. I was crossing the street.

20

Q. Could you see it?

A. I turned around.

Q. I say, could you see what happened?

A. Yes, sir.

By the Court:

Q. Which way was he going by the trolley?

A. Which?

Q. The wagon.

30

A. He was going up Mt. Ephraim Avenue.

Q. Yes, but which side of the trolley, the right or left side?

A. The right.

Q. What part of the car were you boys riding on?

A. The back.

Q. What part of the back?

A. Where the conductor stands.

Q. Were you riding inside the car or where?

A. No, sir, on the step.

Q. Was the door closed?

A. Yes.

Q. What was it, one of these long steps or a step that goes up into the car?

10 A. A step that goes up into the car.

Q. A closed car, was it?

A. Yes, sir.

Q. Then you were riding on the step outside with the door closed?

A. Yes, sir.

By Mr. French:

Q. Then the step you were riding on was on the
20 same side the wagon was on?

A. Yes, sir.

Q. Did you see the wagon coming?

A. No, sir.

Q. What did they do with Kermit then, after the wagon ran over him?

A. Took him to the hospital.

Q. That is all you know about it?

A. Yes.

30 Cross-examination.

By Mr. Carr:

Q. Were you riding on the right-hand step or the left-hand step, the way the car was running?

A. I was riding on the left-hand step.

Q. The left-hand step?

A. Yes.

By the Court: Which is the left-hand step—
which was it, the one away from the wagon or the
one toward the wagon?

A. The one to the wagon.

By Mr. Carr:

10

Q. The one toward the wagon?

A. Yes.

By the Court:

Q. Well, was it on the side of the car where the
people get in or the other side?

A. It was in the back part of the car.

Q. Well, where people get in?

A. Where people get in.

20

Q. It wasn't on the left side of the car then, was
it?

A. Yes, sir.

Q. What do you mean by "left side of the
car?"

A. What I mean?

Q. Yes, which is the left side?

A. On this here side. (Indicating.)

Q. Well, now, let's see; you were going up to Mt.
Ephraim Avenue, were you? 30

A. Yes, sir.

Q. And the car was on the right-hand side of Mt.
Ephraim Avenue?

A. Yes.

Q. Now, were you on the side nearest to the curb
or the other side?

A. I was on the nearest side to the curb.

Q. Well, that would be the right side, you see; you are talking about the right side of the car, not your right side?

A. Yes, sir.

By Mr. Carr:

10 Q. Did you boys see the conductor coming?

A. No, sir.

Q. What made you jump off?

A. Jump off?

Q. What made you jump off the car?

A. Jumped off because we was almost down to Kaighn Avenue.

Q. Almost to Kaighn Avenue?

A. Yes, sir.

20 Q. Well, you didn't jump off until the conductor opened the door, did you?

A. He didn't open the door.

Q. Yes.

A. He didn't open the door?

Q. Did he come toward the door just about the time you jumped off?

A. Yes.

Q. That was the reason you jumped off, wasn't it, because the conductor was coming?

30 A. Yes, sir, and because we got to Kaighn Avenue, too.

Q. Well, when you saw the conductor, you thought it was time to get off, didn't you?

A. Yes, sir.

Q. Did you jump first?

A. Yes.

Q. And when you jumped, did you start to run, or what did you do?

A. Started to run.

Q. Running toward Kaighn Avenue?

A. Running across the track.

Q. Well, were you on the side nearest the curb or the furthest away from the curb?

A. Nearest to the curb.

Q. And you jumped off, and did you run toward Kaighn Avenue?

A. Yes, sir.

Q. How far did you run?

10

A. Not far before brother Baby got killed.

Q. How far did you run?

A. I don't know.

Q. When you jumped off, was the other boy on the car?

A. No, he was killed.

Q. No, but when you jumped off the car, was the other boy on the car?

A. No, sir.

Q. Did he jump off first?

20

A. Well, I jumped off first; he was coming after me.

Q. Then you did not see him jump, did you?

A. No, sir.

Q. And you did not turn around until you heard somebody cry out, do you think?

A. I heard him call my name.

Q. You heard somebody call?

A. Yes.

Q. And then the boy had been run over?

30

A. Yes, sir.

Q. And you didn't turn around until you heard somebody call, did you?

A. Yes, sir.

Q. So you did not see the other boy from the time you jumped until the time he was struck by the wagon?

A. No, sir.

Q. Isn't that so?

A. Yes.

Q. Now, do you remember making a statement on October 29, 1919, to detective Whaland about this accident, the city detective?

A. No, sir.

Q. Did you make a statement to one of the city detectives about this matter?

10 A. No, sir.

Q. You did not make any statement to one of the city detectives?

A. I told them how the boy got killed.

Q. Who did you tell?

A. Told that man that came to my house.

Q. Was he a city detective?

A. Yes.

Q. And did you sign a statement as to how he got killed?

20 A. No, sir, he was writing it.

Q. And did you sign it?

A. No, sir, I only signed my name.

Q. You signed your name to it?

A. Yes, sir.

Q. And did you tell him the truth about how it happened?

A. Yes, sir.

Q. Is that your name? (Showing witness paper.)

A. Yes.

30 Q. You wrote it?

A. Yes; no, I didn't write that.

Q. Didn't you write this "Spencer Johnson?"

A. No, sir.

Q. Who did write it?

A. I don't know; I didn't write that.

Q. You say that is not your signature?

A. No, sir, that is my name; I didn't write it.

Q. You did not write it?

A. No, sir.

Q. Did you see it signed while you were there?

A. I don't know who signed it.

Q. Did you see anybody sign your name?

A. I seen the man; he was writing down everything.

Q. And did he sign your name, too?

A. Yes, he did.

10

Q. You don't mind writing your name for me, do you?

A. No, sir.

Q. Just write "Spencer Johnson" there, will you?

(Witness complies.)

Q. That is the way you generally write it?

A. Yes.

Q. You go to school, don't you, Spencer?

20

A. Yes, sir.

Mr. Carr: I would like to have both of these marked.

(The purported statement and the copy of the signature are marked respectively Exhibits D1 and D2 for identification.)

Q. What grade are you in school?

30

A. Fourth grade.

Q. Did you and the other boy go to school together?

A. Yes.

Q. Were you in the same class?

A. No, sir.

Q. Was he ahead of you?

A. No, sir, he was lower than I was.

Q. Lower than you?

A. Yes.

Q. Do you know how old he was?

A. No, sir.

Q. You and he played together?

A. Yes, sir.

Q. How much lower in school was he than you?

10 A. Two grades.

Q. Two grades below you?

A. Yes.

Q. At that time?

A. Yes.

Q. What grade were you in then?

A. I think I was in 3rd A.

Q. You were in the third grade?

A. Yes.

Q. And he was in the first?

20 A. I think he was.

Q. You are still in the third grade?

A. Me?

Q. Yes.

A. No, sir.

Q. The fourth grade?

A. Yes, sir.

Q. That is, you have only moved up a grade in the last two years, is that right?

A. Yes, sir.

30

HARRY McDOWELL, sworn.

By Mr. French:

Q. Where do you live?

A. Why, 934 South 5th Street at the present time.

Q. And on the 27th of October, 1919, by whom were you employed?

A. The Public Service Railroad.

Q. Were you the conductor on the car that the boys were riding on?

A. I was.

Q. Did you see this accident?

A. Yes, sir.

Q. Will you describe it, just tell how it happened, please?

A. We were inbound from Woodlynne to the P. R. R. Ferry; just what trip I can't recollect, but these two boys were stealing a ride on the back step of the car.

Q. Which side of the car were they on?

A. The left-hand side of the car.

By the Court:

Q. On the left-hand side?

A. Yes, and we were in the siding between Kaighn Avenue and Liberty Street.

Q. Just a minute; would that be the side toward the west?

A. No, the east side, because we were inbound for the ferry, see?

Q. What did you mean, then, by the left side of the car?

A. The boy was on the left step of the car, your

Honor, he was on the left side of the car headed for the ferry, that was, and there is two tracks there on Mt. Ephraim Avenue.

Q. Then he was on the side nearer to the other track, or on the side nearest to the curb?

A. He was on the side nearer the other track, yes, sir.

Q. Well, you want to get straight, because you have been crooked so far.

10 A. This is straight.

The Court: You haven't got it straight; I mean, you have given us both sides.

A. There is two tracks there; we were on the right-hand track.

Q. Coming in?

A. Yes.

Q. The boys were on the left side of your car as
20 you were moving, were they?

A. That is the idea; they were on the west side of the car.

Q. That is the left side of the car?

A. This was during the zone affair; I was sitting on a stool talking to a party in the car, and happened to look around and I seen two boys standing there on the step. This one boy seen me look around, this Spencer Johnson, and he jumped off, and as he jumped off, I seen the other head fade away, and I
30 seen this A & P wagon on the other track, and the horses were going on a trot, I can't say just how fast, but the horses' heads were middle way of the car when this first boy jumped, and I quick got on my feet, and I seen one boy stumble and fall, that is, the smaller boy. I gave three bells to stop and jumped out of the car, and one of the Forge Works

little taxicabs was coming down; the wheel dragged the boy about a foot and a half before it ran over him, then it ran over him, and somebody shouted to the driver to stop, and he stopped and I jumped down and picked the boy up and put him in this Camden Forge Company's automobile and rushed him to the hospital.

Q. Now, were the boys in a position where they could have been seen by the driver if he had been looking?

10

A. Yes, they were.

Q. And how long had you seen the driver of the wagon, on Mt. Ephraim Avenue, half a square, something like that, or less than that?

A. Yes, I will say about twenty or twenty-five feet, because the horses' heads were about middle way of the car, see.

Q. That is, when the boy fell off?

A. Yes, sir.

20

By the Court:

Q. What had the boys to hold on to on the side of the car, anything?

A. Why, I am most sure there is a little iron handle there.

Q. A little iron handle—how much of a step did they have to stand on?

A. Well, they had the whole room of the step, because the steps of that car were not folding, see.

30

Q. Were not folding?

A. No, it was just a step, one step.

Q. Was it a summer car or a winter car?

A. No, it was a closed car, a winter car.

Q. Then the step remained stationary whether the door was closed or open?

A. Yes.

Q. You say the horses' heads were opposite the middle of the car when the boy fell off?

A. Yes, sir; when this one boy jumped and the other boy followed him, I got on my feet and before the car could stop, I saw the wheel drag him a foot and a half, and then went over him. Somebody from the outside yelled to the driver of the team to stop, and he stopped and picked the boy up.

10 Q. How close was the car, the wagon to the car—you say it was on the other track; what do you mean by that?

A. Why, it was just passing the car, see, there is two tracks.

Q. I know, but was it in the track or outside the track?

A. It was in the track, yes, that is, the wheel that ran over the boy was in the track. These wagons are so wide they won't even track; they are even
20 wider than the tracks, see.

Q. Do you know whether the wagon extended over the sides or not?

A. Not the side that ran over the boy didn't extend over, but the opposite side did extend over the track.

Cross-examination.

By Mr. Carr.

30 Q. This was a two-horse truck, wasn't it?

A. Yes.

Q. With big, heavy draft horses?

A. Yes.

Q. A heavy wagon?

A. Yes, and it wasn't loaded.

Q. Nothing in it at all?

A. Why, he had something in it; it was all up front; I judge—well, he had about one-fifth of a load on, I will say, at the most.

Q. Do you know whether that is up grade or down grade, or what it is?

A. No, not right there it isn't; it is about on the level, sir.

Q. About on the level?

A. Yes.

Q. And one of these boys fell off the car, didn't 10
he?

A. One boy jumped and ran and the other boy attempted to go after him and he stumbled.

Q. Well, the boy that was killed fell off the car, didn't he?

A. No, he didn't fall off; he jumped off to follow the other boy, and he stumbled.

Q. How far did he go when he stumbled?

A. Only a couple of feet or so; he went right on his face there. 20

Q. Fell right on his face?

A. Yes.

By the Court: How fast was the car moving?

A. Oh, about six miles an hour, your Honor.

Q. Your car?

A. Yes, just getting ready to come out of the siding there.

Q. Were you starting up or getting ready to stop? 30

A. We had not stopped yet; we were just moving slowly, see.

By Mr. Carr.

Q. Did the boys seem to be frightened because they saw you coming?

A. No, sir, I don't believe they saw me, hardly.

Q. You don't think they saw you?

A. No, sir.

Q. You say some one called to the driver of the wagon to stop?

A. Yes, some one standing on the corner; Hughes is his name, I believe.

Q. Did he stop promptly?

A. I don't know whether he stopped through him
10 or not.

Q. I say, did the wagon stop promptly?

A. Yes.

Q. Stopped just as soon as he could, didn't he?

A. Yes, that front wheel acted as a brake; it dragged the boy's body about a foot and a half and went over top of him, and then he had almost stopped.

Q. He stopped before the rear wheel passed over the boy's body, didn't he?

20 A. Yes.

Q. To your judgment, he stopped as quickly as he could, didn't he?

A. To my judgment, he did, yes.

Q. You made a statement in this matter, didn't you, to Officer Whaland?

A. Yes, sir, I did.

Q. That is your signature, isn't it? (Showing witness paper.)

30 A. Yes, sir.

Mr. Carr: The witness is shown statement dated Camden, October 29, 1919.

Q. All the facts you stated to Officer Whaland were correct, weren't they?

A. Yes, sir.

(Statement is marked Exhibit D3 for identification.)

Q. And you made that statement when the matters were fresh in your memory, didn't you, a short time after the accident?

A. Yes.

Q. And whatever you said there you believed at that time to be true, didn't you?

A. I did at that time, yes, sir; I may have been a little excited over the accident, and may have made a couple of little mistakes; I can't say to that.

Q. This statement was dated on October 29th; do you think you were excited then, a few days after the accident?

A. No, sir, everything is correct, as near as I can say.

Q. There is no reason you know of why this statement should not be correct, is there?

A. No, sir.

20

PLAINTIFF RESTS.

30

Mr. Carr: If the Court please, I do not see that any negligence has been established here and I therefore ask you for a non-suit.

The Court: What is the theory of the law by which a vehicle is forbidden to pass a trolley car on the left-hand side?

10 Mr. Carr: These cars were running in opposite directions; the truck and trolley car were passing in opposite directions.

The Court: Why, I got the impression it was an overtaking.

Mr. Carr: No, sir.

The Court: The witness spoke of their passing
20 all the time.

Mr. French: Oh, no, that was right; they were opposite directions.

Mr. Carr: Running in opposite directions, yes, sir, the only side we could have passed on. I do not see the slightest evidence of negligence here.

The Court: (After argument) Mr. Carr, I think
30 it is a fairly close case, but I do not think I can withdraw it from the jury.

(Exception noted for the defendant.)

THE CASE FOR THE DEFENDANT.

EDWIN A. PARKER, SWORN.

By Mr. Carr.

Q. Mr. Parker, what is your present employment?

A. Station man, Philadelphia Rapid Transit Company. 10

Q. Philadelphia?

A. Yes.

Q. Were you at one time employed by the Atlantic and Pacific Tea Company?

A. Yes, sir.

Q. Were you employed by that company in October, October 27, 1919?

A. Yes, sir.

Q. And how long since you have been away from that company? 20

A. Well, as near as I can recollect, about two years and nine months to three years.

Q. Were you a driver of one of its teams?

A. Yes, sir.

Q. Do you remember on that date driving a team down Mt. Ephraim Avenue, Camden?

A. Yes, sir.

Q. What sort of team—what sort of wagon was it you were driving?

A. Very heavy, a large truck, a very heavy pair 30
of horses, a covered wagon, what we would call a New York tread wagon, which is about one foot wider than the standard tread here.

Q. You mean the standard tread?

A. The tread of the wheels is one foot wider than the trolley tracks here, which is supposed to be the Jersey standard.

Q. How heavy a wagon would that be?

A. A wagon weighing around forty-eight or fifty hundred.

Q. Empty?

A. Empty.

Q. Did you have any lading in the wagon?

A. I had about one order in, probably a hundred pieces, some large, some small, probably three to four hundred pounds of groceries.

10 Q. What sort of horses were you using?

A. Very heavy, very heavy draft.

Q. How fast were you driving?

A. Well, I should judge in the neighborhood of two and a half or three miles.

Q. Did you ever go very fast with those draft horses?

A. Never went over a walk, was not allowed to.

Q. Do you remember passing a trolley car on Mt. Ephraim Avenue?

20 A. Yes, sir.

Q. Was that car on the main line or on the side track?

A. On a switch.

Q. Do you know whether it was standing or moving as you approached it?

A. Moving.

Q. Moving at about what speed?

A. Well, I am not much of a judge of trolley speed; I should say around in the neighborhood of
30 four or five, maybe a little more.

Q. Just starting off the siding, was it?

A. Just come in the siding, just about going off the siding, began to go off.

Q. It is just a short siding there, isn't it?

A. That is all, yes.

Q. Now, do you remember a little colored boy being struck or an accident occurring at that point?

A. I do.

Q. Did you see anything of two colored boys hanging on the step of the trolley car?

A. I did not.

Q. What sort of seat is there in your wagon—is it an elevated seat?

A. Very high.

Q. And is there or isn't there any hood over the seat?

A. Hood and curtains both sides of the seat. 10

Q. And on what side of the seat do you sit in driving?

A. The right side.

Q. Were you keeping the usual lookout ahead?

A. Looking just exactly where I was going, right straight ahead.

Q. Did you see anything, any obstacles or obstructions at all that would cause you to reduce your speed?

A. Nothing whatever; anything that I seen would 20 convince me that I could keep right on going in the position that I was.

By the Court:

Q. How fast did you say you were going?

A. About two and a half to three miles.

By Mr. Carr:

30

Q. And what time of the day was this, about?

A. I judge around between one and two in the afternoon; I am not positive of that.

Q. Now, as you were approaching or passing this car, did you hear some one call out?

A. After I had passed the car, a gentleman stood

in the middle of the street—he ran from the sidewalk to the middle of the street and hollered, “Hey, wait a minute.” When I stopped, he said, “You have run over a boy here.”

Q. How far had you gone from the time he called to you to the time you stopped?

A. About two feet, I guess, stopped very quickly.

Q. And what did you find when you stopped?

A. I stopped when he said that I ran over a boy
10 and I jumped off the wagon quick, and the boy was about half, I should say, kneeling alongside of my wagon, about between the front and rear wheel, but not in a line with the wheel, out from the wheel.

Q. Were there any marks on your wheel to show whether it had passed over him?

A. None whatever.

Q. Did any marks indicate whether or not he had been dragged along in front of the wheel?

A. Not that I noticed.

20 Q. As far as you could see, were any of the bones—the boy’s bones broken?

A. No, sir, I didn’t see a mark on the boy.

Q. Did you see any blood or anything on the wheels?

A. No blood; no blood on the boy, no blood on the wheels.

Q. Then what did you do after you found the boy was there and hurt?

A. Inquired for the nearest hospital, stopped a
30 motorist going by, picked the boy up, put him in the motor car and had him sent to the hospital, which was two or three blocks above.

Q. Did you afterward go to see how the boy was getting along?

A. Yes, drove to the hospital and inquired how the boy was. They said at that time——

(Objected to.)

Q. Never mind what they said.

A. They couldn't tell——

Mr. French: Just a minute.

Q. Then did you report the accident to the police department yourself?

A. Yes, sir, drove to the City Hall myself and 10 reported the accident.

Cross-examination.

By Mr. French:

Q. Is there any doubt that your wagon killed the boy, Mr. Parker?

A. Sir?

20

(Question repeated.)

A. No, sir, I don't think there is any doubt about it.

Q. The first you saw and knew about the boy was when somebody called to you and you found him near your wheel?

A. Exactly right, yes, sir.

Q. Not right under it?

A. Not right under, no.

30

Q. That is the first you knew about it?

A. The first I knew about it.

(Mr. French at this point asked Mr. Carr for the production of a statement.)

The Court: Mr. Carr, the other side is entitled to have the paper; you have used it.

Mr. Carr: I have not used it, if the Court please.

The Court: I beg your pardon; you asked the witness if his statement in there was not correct. Pass it over.

10 Mr. Carr: I make this suggestion, if counsel calls for it we have a right to put it in evidence.

Mr. French: Oh, we want it in.

Q. Did you write that, sir?

The Court: Oh, I beg your pardon, Mr. Carr; I thought you were referring—I thought counsel was referring to the other statement.

20 Mr. Carr: No, sir.

The Court: Oh, well, that is a different matter. Judge French, you have no right to that.

A. It is my signature.

30 Mr. French: I subpoenaed Mr. Whaland this morning with these statements taken by the police department.

The Court: That is another matter, but this witness has not been cross-examined or asked anything about it.

Mr. French: Suppose I make him my own witness?

Mr. Carr: I have no objection.

The Court: Well, if the other side voluntarily surrenders the paper and you two cross-examine upon it, that is another matter, but the Court will not order the surrender of private papers.

Mr. French: It is not a private paper; it is in the custody of the police department. The police department made an investigation of this accident, and this man wrote this statement out and says it is his signature, and Detective Whaland is here with me. 10

The Court: This appears to be a paper in the possession of the opposite party, quite regardless of its origin. The only way to get a paper of that sort is to call for it in advance of trial. I won't permit this method of getting that paper. Pass it back to counsel. 20

Mr. Carr: If Judge French wishes this paper—

The Court: Well, the law is if he calls for it and uses it he must put it in. If you are willing to waive the necessity of prior call——

Mr. Carr: Oh, yes.

The Court: Very well, then, put it in. I was under the impression you were calling for one of the other papers that were examined upon. 30

Mr. Carr: No, he was not; that was the reason I was reluctant.

Q. This was alleged to have been made on Octo-

ber 27, 1919—"Statement of Edward A. Parker, 41 years, 3049 Germantown Avenue, Philadelphia"—that is you, isn't it?

A. That is me.

Q. And that is your signature—look and see if it is not your writing where it is written out, will you please?

A. Yes, that is my writing.

Q. You wrote it all, didn't you?

10 A. Yes.

Q. I call your attention to this portion of it: "I was on the trolley tracks, between Kaighn Avenue and Liberty and a trolley car coming north passed me at the switch. I saw two boys jump on behind the trolley at Liberty Street but paid no more attention to them until some man going along the street shouted for me to stop." Is that right?

A. That is right; I seen two boys run to the trolley.

20 Q. Now, did you see two boys hanging on the step?

A. No, sir.

Q. You saw them running toward the trolley, is that right?

A. Run toward the rear of the trolley and jump on, but I did not see them after that, supposed they had jumped off and went on the other side.

Q. And that was a block away, was it?

30 A. A block away, yes, sir.

By the Court: What made you suppose they dropped off?

A. Because I took a good look kind of sideways to see if I could see them, your Honor, on the rear of the car, because the car at the time these boys had jumped off was just about to go in the switch.

Q. This was a car with a flush door, wasn't it?

A. A closed car.

Q. When the doors were closed, the boys were outside of the car?

A. They were on the rear of the car; they were not on the side of the car, otherwise I would have seen them, if they had been on the step.

Q. You say they were not on the step?

A. No, sir; if they had been on the step, I would positively have seen them.

10

By Mr. French:

Q. Now, after you saw the boys jump on the car, you did not look at the car any more, did you?

A. I always look at a car when I am passing to see that I have room enough to clear it.

Q. Well, is that all? That is all you looked for, wasn't it?

A. I looked for to see that there was nobody hanging on the side.

Q. You did look for that?

A. I did, always, positively.

Q. I notice you say here, "I paid no more attention to them until some one coming along the street shouted for me to stop."

A. I didn't pay any attention to them, because I didn't see them to pay any attention to, but I looked to see if they were hanging on the car, and did not see them.

30

Q. Did you say you paid no more attention to them? Didn't you write that—see if you didn't say that.

A. All right, sir, if it is on there, I certainly said it.

Mr. French: It is on there; that is all.

By Mr. Carr:

Q. You say you would have seen them if they had been on the step, on the side of the car?

A. Yes, sir.

Q. You were satisfied they were not there, is that the situation?

A. Positively, they were not there.

Q. Do you know whether that was a folding step,
10 or whether it was an open step?

A. I do not know; I am not familiar with these cars in Camden.

CHARLES W. WHALAND, SWORN.

By Mr. Carr:

20 Q. Mr. Whaland, are you connected with the police department?

A. Yes, sir.

Q. Of the City of Camden?

A. Yes, sir.

Q. Were you connected with the police department in October, 1919?

A. I was.

Q. What were your duties then?

A. City detective.

30 Q. Were you assigned to investigate and report on an accident occurring to Kermit Williams?

A. Yes, sir.

Q. Did you make an investigation?

A. I did.

Q. Did you see the boy himself?

A. Yes, sir, in the hospital.

Q. And did you obtain the statements of witnesses?

A. I did.

Q. And the boy's statement?

A. No, only verbally.

Q. I mean, the verbal statement of the boy?

A. Yes.

Q. Then did you make a written report or memorandum of it?

A. I did.

10

Q. I show you a report on the heading of the Department of Police, Camden, New Jersey, dated November 13, 1919, and ask you if that is the report that you made?

A. Yes.

Q. Is that in your handwriting?

A. Yes.

Q. Do you know what age the boy appeared to be?

(Objected to.)

20

A. According to my report, I have it nine years.

Mr. French: I object, unless he knows what age it was. I object to that question as to what age he appeared to be.

By the Court:

Q. The boy was dead, then, wasn't he?

30

A. No, not when I saw him.

Q. Well, he was lying in bed?

A. In bed, yes.

By Mr. Carr:

Q. Was he able to talk to you?

A. Oh, yes.

Q. Did you talk to him?

A. Yes.

Q. Did he make any statement as to how the accident occurred?

A. I find that I have down there that he told me he was stealing a ride and did not see the wagon when he jumped off of the trolley. Of course, I don't remember now the exact words that were said or
10 anything about it; of course, I can only go by my report, because that was four years ago, practically four years, three years, and I only had to do with the criminal end of it and when that was through, I didn't bother anything more about it.

Q. You wrote down what he said, did you?

A. Yes, I interviewed Kermit before he died, and he told me he was stealing a ride and didn't see the wagon when he jumped from the trolley.

Q. He made that statement to you, did he?

20 A. That is what he told me, yes.

Q. May we see these other two reports, Mr. Whaland?

A. Sure.

Q. The statement of Spencer Johnson which was attached to your report and now marked Exhibit D1 for identification, who signed that?

A. Mr. Johnson.

Q. The little colored boy that was on the stand?

A. Yes.

30 Q. You didn't write it, did you, the signature?

A. Oh, positively not, no; I had no reason to.

Q. Did you put down just what he told you?

A. Yes.

Q. That was his statement?

A. Yes.

Q. And then he signed it?

A. Yes.

Q. Do you know whether you read his statement to him before he signed it?

A. Yes.

Q. Is that your practice?

A. Yes.

Mr. Carr: I offer the statement.

(Said paper is marked Exhibit D1.)

10

The Court: What does it say, Mr. Carr?

Mr. Carr: (Reading) "Camden, N. J., October 29, 1919. Statement of Spencer Johnson, 869 VanHook Street, age ten years. Kermit Williams and I were near the Homeopathic Hospital, and we saw a trolley car coming, so we hopped on behind and rode nearly to Kaighn Avenue, and then the conductor opened the door and Kermit jumped off and jumped under the wheel of the wagon, and I jumped off and run. Signed, Spencer Johnson." 20

Q. The statement dated October 29 of Harry McDowell, you obtained that statement?

A. Yes, sir.

Q. That is Mr. McDowell's signature?

A. Yes.

Q. The statement dated Camden, October 27, 1919, of Edward A. Parker, age forty-one years, 3049 Germantown Avenue, Philadelphia, you obtained that likewise? 30

A. Yes, sir.

Mr. Carr: Now, the McDowell one was previously marked D3 for identification. I will offer it.

(Said paper is marked Exhibit D3.)

Mr. Carr: (Reading) "Statement of Harry McDowell, 343 Liberty Street. I am a conductor on the 6th and 8th Street line. My car was north-bound on our 2:17 trip from Woodlyne. We were running on the Liberty Street siding; I was sitting on the stool at the register, and I happened to look up, and I saw Spencer Johnson standing on the
10 left side of the car stealing a ride, and then I saw the other fellow as he fell backwards, and I saw the wagon coming at the same time on the other track. I jumped up off my stool and pulled three bells and opened the door and jumped out, and just as I snatched the handle of the door, I saw the left front wheel run over the boy's body, and then somebody shouted at the driver and he stopped before the back wheel ran over the body. The driver of the wagon picked the boy up and put him in an auto
20 and they took him to the hospital. Signed by Harry McDowell." "Statement dated October 27, 1919, of Edward A. Parker: I am employed as a driver for the Atlantic and Pacific Tea Company. About three P. M. this afternoon, I was driving south on Mt. Ephraim Avenue. I was on the trolley tracks between Kaighn Avenue and Liberty and a trolley car coming north passed me at the switch. I saw two boys jump on behind the trolley at Liberty Street, but paid no more attention to them until
30 some man going along the street shouted for me to stop. Jumping off the wagon, I saw one boy lying under the wagon and the other boy running down the street. The man that shouted at me—Hughes, I think his name is—told me that I had run over a boy. I picked the boy up and put him in a passing automobile and sent him to the Homeopathic Hos-

pital. Then I drove on to the hospital and inquired how bad the boy was hurt, after which I drove to 1550 Mt. Ephraim Avenue and delivered the balance of my load, and then came to the City Hall and reported the accident. Signed by Edward A. Parker.”

No cross-examination.

10

DEFENDANT RESTS.

The Court: Mr. Parker, just come back to the stand a minute, please.

EDWARD A. PARKER, recalled.

By the Court:

20

Q. What have you to say about the correctness of that statement signed by you?

A. The statement signed by me is correct as I seen it at that time, which was three and a half to four years ago.

The Court: That is all.

BOTH SIDES REST.

30

Mr. Carr: If the Court please, I make a motion for a directed verdict for the defendant on the ground that there is no liability shown, no negligence.

The Court: (After argument.) Let me recall this conductor and find out just exactly what sort of position this step was in.

HARRY McDOWELL, recalled.

By the Court:

10

Q. Just tell me a little more definitely what the construction of this entrance is where these boys, you say, were standing.

A. Why the step is stationary, and the door opens by a handle.

Q. Does the step come out flush with the car or extend beyond the outside?

A. No, it comes out flush with the outside of the car.

20 Q. And the door does what?

A. There is a handle on the door; it just opens and shuts. You open it as some one is getting off or on.

Q. Some of these steps close as the doors close?

A. This is not that kind, sir.

Q. This one remained open?

A. Yes.

Q. But as it remained open, you say it was flush——

30 A. With the outside of the car, yes, sir.

Q. Was there room for a boy between the outer edge of the step and the doorway when it was closed?

A. Yes.

Q. Without being so that he could hide, that is, so that a view of him would be shut off?

A. Why, I don't get you, sir.

Q. What is the width of the step, do you know, the step on the outside of the door?

A. The width of it is about ten inches.

Q. Outside of the door?

A. Outside the door, yes.

Q. When did you first see these boys, how long before the accident?

A. One minute or two before the accident is all I saw them. 10

By Mr. Carr:

Q. Do you remember the number of that car?

A. No, sir, I do not.

Q. Do you know why it was you did not state in your statement of October 29, 1919, that these boys were on the step?

A. I do not know, sir.

Q. You can't account for that? 20

A. I can't account for it, no, sir.

The Court: (After further argument.) Well, gentlemen, I still think it is a case where I cannot dispose of it as a question of law. I think it is a question of where the boy was, and the question of whether or not the actions should have been anticipated, whether they were voluntary or involuntary, and the question of whether they ought to have been seen is all a question for the jury. The motion will be denied and exception noted. 30

(Exception noted for defendant.)

At this point a recess was taken until 1.30 o'clock P. M.

Trial of the cause resumed after recess, in the presence of counsel for the respective parties.

CHARGE OF THE COURT.

10 LLOYD, J.

Ladies and gentlemen: This case I am submitting to you with somewhat of reluctance. The undoubted facts are that the boys were on the trolley car; some of the testimony indicated that they were on the rear of the trolley car, or that they were on the side at the step, and they got off of the car, and the boy whose death this action was brought was killed by a truck that was being driven by the defendant's servant. After a considerable amount of reflection, I have reached the conclusion that there is but one phase of this case that it is proper for me to submit to you on the question of negligence, and that is, the question of attention by the driver of this horse and wagon. There is testimony in the case from which you could infer that the boy stepped off when the heads of the horses were about the middle of the car. The driver says he did not see them at that point at all, and it is argued to you that if he had been giving attention, he would have seen them both on the car and as they stepped off. The testimony in the case is that the vehicle was going very slowly indeed, two and a half to three miles an hour. One of the witnesses testified that when the boy jumped off or got off the wagon was fifteen or twenty feet away. That is qualified very much

by the statement that he made. The conductor, however, says that the horses' heads were about the center of the car, and the question I am going to submit to you is whether or not there was a want of attention at that time by the driver which constituted negligence, and whether, if it did constitute negligence, that negligence was the cause of the boy's death. That would involve, of course, the question of whether attention under the circumstances would have saved the boy. Now, the distance from the center of the car to the rear is obviously a short distance, if you find that to be the fact. There was other testimony in the case which would indicate that that is not true at all, that the boys got off from behind the car, but if that be a true statement of it, it would indicate, of course, a very short distance in which to control a vehicle. 10

Counsel has argued the case to you upon another theory, and that is that it was the driver's duty to anticipate that these boys would get off on the side of the car. Careful thought of the case has compelled me to reach the opposite conclusion, that if these boys were in a place of safety, so far as he was concerned—one of them ten years of age and the other approaching seven—that he was not obliged to anticipate that they would jump off the car in front of his moving vehicle. The rule of the law is that one has a right to assume in the absence of some indication to the contrary that another is going to use reasonable care, and until something to indicate the contrary appears, he may continue with that assumption. So that the case resolves itself down to the single question in the first place where the boys were; if the boys were behind the car and jumped off from there, that is the end of the case; there is no liability. If they were on the step 20 30

and stepped off sufficiently far ahead for the driver of the wagon to control his team in the exercise of reasonable care if he had been giving proper attention, then in that event, you might find that it was the negligence of the driver in operating his vehicle, and in that event only.

But there is another phase to this case which is of equal importance, and that is, the conduct of the boys themselves. It is true that a boy of tender
10 years is not called upon either by us as individuals or by the law to exercise the care and caution which grown people exercise. To expect such a thing as that would be to expect that which is contrary to nature, contrary to all experience. You know that the human mind does not mature until years of experience. Nevertheless, there is a responsibility on boys even of six or seven years of age, and it is the responsibility to exercise the care which boys of that
20 age reasonably may be expected to exercise; and if this little boy stepped off of this vehicle in the face of danger when one of his years would not be expected to do it, then the law would say that he could not recover, nor could those coming after him recover.

If you reach in this case the question of damages, there are elements which should be borne in mind. In the first place, the boy was approaching seven years old, according to the mother's statement; there is some testimony that he might be older than
30 that, but that is her testimony, and if she is truthful, she ought to know. There comes a time when a child, of course, may be of value to its parents, but there is also a time in the age of such a child when he is nothing but a burden in a financial sense; there is no money return from a boy seven years of age. Up to fourteen, the law requires that he

shall go to school, and until he reaches fourteen years of age, there is probably little if any value that he could be to the mother. From then on, until twenty-one years of age, it might be reasonably expected possibly that she might derive some benefit, but you see that would be, if you began at fourteen, seven years off—not so long now, but it would have been at that time. The money award is based upon the present value of the loss which the mother sustains. That means, of course, anticipating by a number of years any possible revenue that she would have gotten from this child. Then, of course, there enters into it in this particular case the perhaps somewhat unusual element of illegitimacy; a parent of a child born in wedlock may have a certain hold on the child which a parent of a child born out of wedlock might not have—I do not mean legally, but I mean in practice, she might assume other relations which in this case she has done; she has married since, and she might not derive the benefit which a mother with the hold of matrimony would derive; and it might be that the benefit that she would derive, even if he had lived and lived on up until twenty-one years of age, would have been more or less curtailed by the fact that he was not a legitimate son. The law does recognize, however, the right of such a parent to inherit from the child; at common law there was no such right, but our beneficent laws in this enlightened age have recognized the natural claims of a mother upon a child so situated and she is awarded his estate.

Now, the law in this case provides that it is the pecuniary loss which the next of kin sustains; the next of kin in this case is the mother, and it is the pecuniary loss which she sustains, for which alone she may bring this action. It is for you, if you

reach that point in the case, to carefully consider what financial benefits would have arisen to the mother if this boy had continued to live. You are to weigh upon the one side the fact that she would have to support him for several years without any return at all, that whatever would come in the future would be deferred for a number of years, and when it did start to come in, it would come in in small amounts. On the other side, you are entitled

10 to weigh the fact that already several years have passed since this accident happened; it happened in October, 1919, nearly three and a half years ago, and you are entitled to consider the fact of that time having elapsed.

Now, when you retire, take up this case and the single point that the Court has given to you, as to whether or not there was want of care in the driver of this vehicle in not attending to his driving and what was before him. If there was no negligence

20 there, there is no liability at all. If there was negligence there and that was the cause of the boy's death, there is liability unless the boy himself, by his own negligence, contributed to his death; if he did, there is no right to recover even in that event.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HAZEL BOYER, Administra-
trix *ad prosequendum* of
the Estate of KERMIT B.
WILLIAMS,

Plaintiff-Appellee,

v.

GREAT ATLANTIC & PACIFIC
TEA Co., a corporation,
Defendant-Appellant.

Action at Law.

BRIEF OF PLAINTIFF-APPELLEE.

The counsel for the appellant on page 9 of his brief quoted at length and verbatim the Judge's charge in this case. The Judge said, *inter alia*, "After a considerable amount of reflection, I have reached the conclusion that there is but one phase of this case that it is proper for me to submit to you on the question of negligence, and that is, the question of attention by the driver of this horse and wagon."

Now, we approve of counsel's wisdom in citing this portion of the Judge's charge inasmuch as this constitutes the crux of the whole case.

The driver of this wagon, Edwin A. Parker, saw the two boys jump on the trolley car over a square

away, see page 36, State of the Case, lines 10 to 20, is as follows:

“Q. I call your attention to this portion of it:

‘I was on the trolley tracks, between Kaighn Avenue and Liberty and a trolley car coming north passed me at the switch. I saw two boys jump on behind the trolley at Liberty Street but paid no more attention to them until some man going along the street shouted for me to stop.’ Is that right?

A. That is right; I seen two boys run to the trolley.”

After these boys got on the trolley car and they were small boys and the boy who was killed and whose death is the subject of this suit was not quite seven years old, page 7, lines 10-16; they were in plain open sight of the driver of this wagon if he had paid attention as it was his duty to do from the time they got on until the time the small boy was run over.

Now, the driver whose negligence was the cause of the accident while he could have seen the boys says that after they jumped on the car he paid no further attention to them (see page 36, lines 15-18), of course, he says that he could not see the boys because they were on behind the car (see page 37, lines 5 to 10), but he is an interested witness and he is contradicted by the motorman on the trolley car, Harry McDowell (see page 23, printed book, lines 7 to 38):

“Q. Now, were the boys in a position where they could have been seen by the driver if he had been looking?

A. Yes, they were.

Q. And how long had you seen the driver of the wagon, on Mt. Ephraim Avenue, half a square, something like that, or less than that?

A. Yes, I will say about twenty or twenty-five feet, because the horses' heads were about middle way of the car, see.

Q. That is, when the boy fell off?

A. Yes, sir.

'By the Court:

Q. What had the boys to hold on to on the side of the car, anything?

A. Why, I am most sure there is a little iron handle there.

Q. A little iron handle—how much of a step did they have to stand on?

A. Well, they had the whole room of the step, because the steps of that car were not folding, see.

Q. Were not folding?

A. No, it was just a step, one step.

Q. Was it a summer car or a winter car?

A. No, it was a closed car, a winter car.

Q. Then the step remained stationary whether the door was closed or open?" "

And also page 24, lines 1 to 15, as follows:

"A. Yes.

Q. You say the horses' heads were opposite the middle of the car when the boy fell off?

A. Yes, sir; when this one boy jumped and the other boy followed him, I got on my feet and before the car could stop, I saw the wheel drag him a foot and a half, and then went over him. Somebody from the outside yelled to the driver of the team to stop, and he stopped and picked the boy up.

Q. How close was the car, the wagon to the car—you say it was on the other track; what do you mean by that?

A. Why, it was just passing the car, see, there is two tracks."

This shows that the boys were hanging on the left side of the car on the step at the side of the car in the rear and for a whole square or right in the plain open sight of Parker, the driver, if he had paid attention. This testimony must be taken as true because, McDowell, the motorman, could not have seen the boys in any other position.

Mr. Carr prints McDowell's statement made to Detective Whaland on page 42 of printed book but this statement in no wise contradicts McDowell's testimony at the trial but rather confirms it as he repeats again, that the boys were on the side of the car all of the time.

Nobody knows what the boy under seven is going to do and here was this big lumbering wagon projecting away the side of the track because it had a New York tread and was very wide (see page 24, lines 30 to 40), and the trouble must have been that the over-hanging of the trolley car and the over-hanging of the wagon left no room for the boys to hang on and the boys saw that the side of the wagon would come pretty close to brushing them off unless they had jumped and all these was a combination of circumstances perfectly apparent to the matured driver and neither apparent nor appreciated by the boy under seven years of age and if the driver of the wagon had stopped or kept it under control as it was his duty to do, the accident would have been averted.

McDowell says, page 25, lines 24 to 30 as follows:

“By the Court: How fast was the car moving?”

A. Oh, about six miles an hour, your Honor.

Q. Your car?

A. Yes, just getting ready to come out of the siding there.

Q. Were you starting up or getting ready to stop?

A. We had not stopped yet; we were just moving slowly, see."

And also, that the boy was dragged under the wheel a short distance before it went over him, page 24, lines 4 to 10. And this whole situation was taken care of by the learned trial Judge in his charge (page 47 and page 48).

It seems to us that the charge of the Court was unusually favorable because the Court said, page 47, lines 33 to 35, and page 48, lines 1 to 25, as follows:

"So that the case resolves itself down to the single question in the first place where the boys were; if the boys were behind the car and jumped off from there, that is the end of the case; there is no liability. If they were on the step and stepped off sufficiently far ahead for the driver of the wagon to control his team in the exercise of reasonable care if he had been giving proper attention, then in that event, you might find that it was the negligence of the driver in operating his vehicle, and in that event only.

"But there is another phase to this case which is of equal importance, and that is, the conduct of the boys themselves. It is true that a boy of tender years is not called upon either by us as individuals or by the law to exercise the care and caution which grown people exercise. To expect such a thing as that would be to expect that which is contrary to nature, contrary to all experience. You know that the human mind does not mature until years of experience. Nevertheless, there is a responsibility on boys even of six or seven years of age, and

it is the responsibility to exercise the care which boys of that age reasonably may be expected to exercise; and if this little boy stepped off of this vehicle in the face of danger when one of his years would not be expected to do it, then the law would say that he could not recover, nor could those coming after him recover."

So, the Court charged the jury that if the boys were behind the car and jumped off from there that was the end of the case and there was no liability so, the jury must have found as a fact that the boys were on the side of the car as the motorman testified so that this narrowed the case down to the question of the attention of the defendant's driver; he had a full square over three hundred feet with the boys in constant view and he had had his whole side of the street in which to turn to the right and avoid the boys or he could have stopped his wagon before the boys moved; if he had adopted either course there would have been no trouble. It might be said that he was not bound to anticipate that the boys would move suddenly from the place of safety on the trolley car to one of danger in front of his truck but it seems to us that this position is not sound because small children hanging on to the side of a moving trolley car are not ^{IN} a position of safety but are in a position precarious in the extreme because it needs to be remembered that these boys were hanging on the car and any looker-on must have seen that they would be compelled to leave that dangerous position quickly and suddenly in the immediate future and the cause of the whole trouble is found in the words of the defendant's servant, Parker, the driver, when he said, page 36, lines 15 to 20:

"I saw two boys jump on behind the trolley

at Liberty Street but paid no more attention to them until some man going along the street shouted for me to stop. Is that right?

A. That is right; I seen two boys run to the trolley."

And also, page 36, lines 28 to 30:

"Q. And that was a block away, was it?

A. A block away, yes, sir."

So, that it was for the jury to say in line with the charge of the Court, whether this driver was or was not guilty of negligence in not paying any further attention.

Of course, this was a busy street and a busy section and drivers of all vehicles should not be permitted to drive over a full square and pay no attention to what the children in these crowded city districts are doing. It would seem that the constantly increasing press of the busy street life of today which is characterized in many districts by a bewildering swirl of moving machinery and twisting humanity including children and grown-ups, many of them without the facilities of resorting to the open spaces for recreation demand that these of mature years and right judgment who are charged with the piloting of dangerous and powerful agencies should be made to realize that the streets are risky places and that they should have at heart and constantly in mind the care and welfare of the little ones. This does not mean that stealing rides on vehicles of any description should be countenanced or approved by judicial dicta but it is only giving voice to what courts have held for time out of mind that children under seven are seldom guilty of negligence and, is not it only a corollary of the theorem enunciated centuries ago in Asia Minor, "Suffer the little

children to come unto me'' and also, in another instance, ''Because they know not what they do.''

Respectfully submitted,
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Appellee.*

NEW JERSEY COURT OF ERRORS AND
APPEALS.

HAZEL BOYER, Administratrix *ad prosequendum* of
the Estate of KERMIT B. WILLIAMS,
Plaintiff-Appellee,

v.

GREAT ATLANTIC & PACIFIC TEA Co., a corporation,
Defendant-Appellant.

ACTION AT LAW.

APPELLANT'S BRIEF.

STATEMENT OF FACT.

This is a case under the Death Act by the mother of a seven year old boy, and grows out of the following facts:

A trolley car was running northward on Mt. Ephraim Avenue, Camden, and the deceased, Kermit Williams, then about seven years of age, together with another boy, Spencer Johnson, was stealing a ride on the rear of the trolley car, when he either fell or suddenly jumped off and stumbled in the street as the defendant's heavy wagon drawn by two horses, and driven very slowly—at two and a half to

three miles an hour—was passing the trolley car in the opposite direction. This is described as—

“Very heavy, a large truck, a very heavy pair of horses, a covered wagon, what we would call a New York tread wagon, which is about one foot wider than the standard tread here.”

P. 29, lines 30-34.

The testimony with relation to where Kermit Williams was standing is slightly in conflict. Spencer Johnson, his playmate, places him on the rear step outside with the door closed (p. 14, lines 11-13). This was on the same side as the wagon.

On page 13 Johnson testifies that Kermit (the deceased)

“Jumped off and stumbled in the track.

“Q. Now, when he jumped off, how far away was the wagon?

“A. About fifteen or twenty feet from him.”

The value of this, however, is entirely destroyed by the following testimony of Spencer Johnson on cross-examination:

“Q. No, but when you jumped off the car, was the other boy on the car?

“A. No, sir.

“Q. Did he jump off first?

“A. Well, I jumped off first; he was coming after me.

“Q. Then you did not see him jump, did you?

“A. No, sir.

“Q. And you did not turn around until you heard somebody cry out, do you think?

“A. I heard him call my name.

“Q. You heard somebody call?

“A. Yes.

"Q. And then the boy had been run over?

"A. Yes, sir.

"Q. And you didn't turn around until you heard somebody call, did you?

"A. Yes, sir.

"Q. So you did not see the other boy from the time you jumped until the time he was struck by the wagon?

"A. No, sir.

"Q. Isn't that so?

"A. Yes."

Page 17, lines 18, *et seq.*; page 18, lines 1 to 3.

Since Johnson did not see the boy jump, and did not see him until after he had been run over, it is obvious that his testimony in this regard has no value.

The only other witness of the plaintiff is Harry McDowell, the conductor of the trolley car, who testifies as follows:

"This was during the zone affair; I was sitting on a stool talking to a party in the car, and happened to look around and I seen two boys standing there on the step. This one boy seen me look around, this Spencer Johnson, and he jumped off, and as he jumped off, I seen the other head *fade away*, and I seen this A. & P. wagon on the other track, and the horses were going on a trot, I can't say just how fast, but the horses' heads were middle way of the car when this *first boy* jumped, and I quick got on my feet, and I seen one boy stumble and fall, that is, the smaller boy.* * *The wheel dragged the boy about a foot and a half before it ran over him, then it ran over him, and somebody

shouted to the driver to stop, and I jumped down and picked the boy up. * * * ”

Page 22, lines 24, *et seq.*

The conductor places the boy on the rear left step of the car outside of the door, which was closed. He further testifies:

“Q. You say the horses’ heads were opposite the middle of the car when the boy fell off?

“A. Yes, sir; when this one boy jumped and the other boy followed him, I got on my feet and before the car could stop, I saw the wheel drag him a foot and a half, and then went over him. Somebody from the outside yelled to the driver of the team to stop, and he stopped and picked the boy up.”

On cross-examination McDowell testifies as follows:

“Q. And one of these boys fell off the car, didn’t he?

“A. One boy jumped and ran and the other boy attempted to go after him and he stumbled.

“Q. Well, the boy that was killed fell off the car, didn’t he?

“A. No, he didn’t fall off; he jumped off to follow the other boy, and he stumbled.

“Q. How far did he go when he stumbled?

“A. Only a couple of feet or so; he went right on his face there.

“Q. Fell right on his face?

“A. Yes.”

McDowell, page 25.

* * * * *

“Q. I say, did the wagon stop promptly?

“A. Yes.

"Q. Stopped just as soon as he could, didn't he?

"A. Yes, that front wheel acted as a brake; it dragged the boy's body about a foot and a half and went over top of him, and then he had almost stopped.

"Q. He stopped before the rear wheel passed over the boy's body, didn't he?

"A. Yes.

"Q. *To your judgment, he stopped as quickly as he could, didn't he?*

"A. *To my judgment, he did, yes.*"

McDowell, page 26.

McDowell made a statement in writing to City Detective Charles Whaland, which appears on page 42 of the record. On page 27 McDowell states with regard to this statement:

"Q. And you made that statement when the matters were fresh in your memory, didn't you, a short time after the accident?

"A. Yes.

"Q. And whatever you said there you believed at that time to be true, didn't you?

"A. I did at that time, yes, sir; I may have been a little excited over the accident, and may have made a couple of little mistakes; I can't say to that.

"Q. This statement was dated on October 29th; do you think you were excited then, a few days after the accident?

"A. No, sir, everything is correct, as near as I can say.

"Q. There is no reason you know of why this statement should not be correct, is there?

"A. No, sir.

McDowell, page 27.

The statement referred to in the above cross-examination reads in part as follows:

"I was sitting on the stool at the register, and I happened to look up, and I saw Spencer Johnson standing on the left side of the car stealing a ride, and then I saw the other fellow *as he fell backwards*, and I saw the wagon coming *at the same time on the other track*. I jumped up off my stool and pulled three bells and opened the door and jumped out, and just as I snatched the handle of the door, I saw the left front wheel run over the boy's body, and then somebody shouted at the driver and he stopped before the back wheel ran over the body."

Page 42.

Certainly the above statement must be accepted in lieu of the former testimony of the witness, and discloses absolutely no negligence on the part of the driver.

The witness, Spencer Johnson, had also made a statement in writing to Detective Whaland, which appears on page 41, and reads in part as follows:

"Kermit Williams and I were near the Homeopathic Hospital, and we saw a trolley car coming, so we hopped on behind and rode nearly to Kaighn Avenue, and then the conductor opened the door and Kermit jumped off and jumped *under the wheel of the wagon*, and I jumped off and run."

Edwin A. Parker, the driver of the defendant's wagon, testified in part as follows:

"Q. Were you keeping the usual lookout ahead?"

"A. Looking just exactly where I was going, right straight ahead.

"Q. Did you see anything, any obstacles or obstructions at all that would cause you to reduce your speed?

"A. Nothing whatever; anything that I seen would convince me that I could keep right on going in the position I was."

Page 31.

"Q. Now, as you were approaching or passing this car, did you hear some one call out?

"A. After I had passed the car, a gentleman stood in the middle of the street—he ran from the sidewalk to the middle of the street and hollered, 'Hey, wait a minute.' When I stopped, he say, 'You have run over a boy here.'

"Q. How far had you gone from the time he called to you to the time you stopped?

"A. About two feet, I guess, stopped very quickly.

"Q. And what did you find when you stopped?

"A. I stopped when he said that I ran over a boy and I jumped off the wagon quick, and the boy was about half, I should say, kneeling alongside of my wagon, about between the front and rear wheel, but not in line with the wheel, out from the wheel.

"Q. Were there any marks on your wheel to show whether it had passed over him?

"A. None whatever.

"Q. Did any marks indicate whether or not he had been dragged along in front of the wheel?

"A. Not that I noticed."

Page 32.

At the conclusion of the plaintiff's case a motion for a non-suit was made on the ground that no negligence had been established. This motion was refused and an exception noted.

At the conclusion of the whole case a motion for a directed verdict for the defendant was made on the ground that no negligence was shown. This motion was denied and an exception noted for the defendant.

In overruling the latter motion the Court said, *inter alia*:

"I think it is a question of where the boy was, *and the question of whether or not the actions should have been anticipated, whether they were voluntary or involuntary*, and the question of whether they ought to have been seen is all a question for the jury."

Page 45.

The Court in its charge to the jury abandoned the view that the question of whether or not the actions of the boy should have been anticipated.

"Counsel has argued the case to you upon another theory, and that is that it was the driver's duty to anticipate that these boys would get off on the side of the car. Careful thought of the case has compelled me to reach the opposite conclusion, that if these boys were in a place of safety, so far as he was concerned—one of them ten years of age and the other approaching seven—that he was not obliged to anticipate that they would jump off the car in front of his moving vehicle."

Charge of the Court, page 47.

The Court submitted the case to the jury upon the following ground:

"After a considerable amount of reflection, I have reached the conclusion that there is but one phase of this case that it is proper for me to submit to you on the question of negligence, and that is, the question of attention by the driver of this horse and wagon. There is testimony in the case from which you could infer that the boy stepped off when the heads of the horses were about the middle of the car. The driver says he did not see them at that point at all, and it is argued to you that if he had been giving attention, he would have seen them both on the car and as they stepped off. The testimony in the case is that the vehicle was going very slowly indeed, two and a half to three miles an hour. One of the witnesses testified that when the boy jumped off or got off the wagon was fifteen or twenty feet away. That is qualified very much by the statement that he made. The conductor, however, says that the horses' heads were about the center of the car, and the question I am going to submit to you is whether or not there was a want of attention at that time by the driver which constituted negligence, and whether, if it did constitute negligence, that negligence was the cause of the boy's death. That would involve, of course, the question of whether attention under the circumstances would have saved the boy. Now, the distance from the center of the car to the rear is obviously a short distance, if you find that to be the fact. There was other testimony in the case which would indicate that that is not true at all, that the boys got off from behind the car, but if that be a true statement of it, it would indicate, of course, a very short distance in which to control a vehicle."

The learned trial Judge apparently overlooked the fact that the boy, Spencer Johnson, had testified on cross-examination that he did not see Kermit Williams at all from the time Johnson jumped from the car until after Williams had been struck by the wagon, and that while McDowell testified in one place that Kermit Williams had jumped after Spencer Johnson, that Kermit only went two feet when he, Williams, stumbled and fell right on his face, and also that Parker, the defendant's driver, had stopped the wagon promptly—as quickly as he could. At any rate, McDowell's earlier testimony is entirely superseded by his written statement (page 42), which he acknowledges to have been correct, and which stated that Kermit Williams while stealing a ride fell backwards as the wagon was coming at the same time on the other track.

Parker, the defendant's driver, testified that he was looking straight ahead; that he saw no obstacles or obstructions, "and anything that I seen would convince me that I could keep right on going in the position I was."

An analysis of the testimony makes it clear that Kermit Williams fell off of the trolley car as the team was passing; that the driver was looking straight ahead, and that even though the boy had jumped off that within two feet he stumbled and fell on his face.

It is respectfully submitted that the evidence in this case utterly fails to disclose any negligence on the part of the defendant. Certainly the driver was not bound to anticipate that this boy would fall off the trolley car, either directly in front of his team or directly in front of the front wheel. There is no evidence whatever that the driver failed in any way either to maintain a lookout or quickly to stop his team.

The sole question which the trial Court submitted to the jury was whether or not there was a want of attention at the time by the driver which constituted negligence, and whether attention under the circumstances would have saved the boy. Of course, negligence cannot be inferred from the mere happening of the accident itself. See *Kingsley v. D. L. & W. R. R. Co.*, 81 N. J. L. 536. The driver said he did look and he did not see the boy. If he did look and did not see it was because the boy was not there. It cannot be argued that because the boy was struck he was there in time for the driver to have seen him.

This is the reverse of a railroad grade crossing accident, where it may be properly argued that if there was an unobstructed view of an approaching train the plaintiff is encountered by the dilemma that if he had looked he would have seen the train, and that if he did not see the train he did not look. The presence of the train at such distance is a certain factor. The presence of the boy at such a distance is an uncertain factor.

The mere fact that he fell or jumped from the car when the horses' heads were midway of the car does not warrant the inference that he jumped or fell into the line of vision of the driver, because the car itself constituted an obstruction to the view, and he might easily have run or stumbled into the path of the vehicle after the driver had passed.

Where one of two inferences may with equal probability be drawn from the same set of facts, and one of such inferences exonerates the defendant, the defendant cannot be held liable.

See *Stumpf v. D. L. & W. R. R. Co.*, 76 N. J. L. 153; *Austin v. Penna. R. R. Co.*, 82 N. J. L. 416; *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658.

It is respectfully submitted that there is no evidence of negligence on the part of the defendant, and that the judgment should be reversed.

CARR & CARROLL,
*Attorneys for Defendant-
Appellant.*

