

New Jersey Court of Errors and Appeals

DAVID GUENTHER, <i>Plaintiff in Error,</i>	}	<i>In Tort.</i> <i>On Error.</i>
<i>vs.</i>		
PUBLIC SERVICE RAILWAY COM- PANY,		
<i>Defendant in Error.</i>		

Brief of Plaintiff.

THIS MATTER COMES UP ON WRIT OF ERROR ISSUED TO THE ESSEX COUNTY CIRCUIT COURT BY PLAINTIFF BRINGING UP A JUDGMENT OF NON-SUIT.

Facts.

On the eighth day of October, nineteen hundred and eight, David Guenther, plaintiff, was driving two-horse team (the wagon being loaded with furniture) east on White street near Day street, which latter street crosses White street at right angles, in the City of Orange, County of Essex; Day street running north and south, and White street running east and west. His horses were going on a slow jog trot. With him was a young man who with himself were employees of Hahne & Company, a department store in the City of Newark, to whom the horses, wagon and outfit belonged. It was about ten minutes after one in the day time (page 9 of paper book).

On arriving at the cross walk (which was about 22 feet from the car track, which car track was located on Day street, there being no car track on White street), he looked first south on Day street and did not see anything, and looked north on Day street and saw a car, which he says was about 315 feet away (page 23) (several other witnesses for the defendant fix it as hereinafter shown). Being an experienced driver, he allowed his horses to proceed across Day street, knowing, as he states, that he had ample time in which to cross. When he was on the track he heard a noise, which caused him to look up, and he saw a trolley car bearing down upon him about 30 feet away. He whipped up his horses, but the car, however, struck the rear wheel of his wagon overthrowing it, killing Joseph Shay, the young man who was with him, throwing out the plaintiff to the street where he lay unconscious, later being taken to the hospital. The impact carried the heavy delivery wagon (weighing 2,200 pounds, plus the weight of the load, it being loaded with furniture), a distance of 55 feet (page 17), as to question how fast the car was going:

Witness states (page 14):

Q Could you tell when you were on the car track whether the car was coming rapidly or slowly?

A I could tell when I was on the car track the way it was coming. It was coming very fast.

Q Could you tell when it was up the hill?

A No, sir.

Immediately after the accident, plaintiff was taken to the Hospital. He was injured about the head, severely cut on the head, and bruised on the shoulder and legs. His wrist was so badly injured that to-day it is stiff, and will never be otherwise. His nervous system was so shocked that he has not recovered, and it is doubtful if he will recover. He was laid up from

his work for six months. His doctor's bill was over \$200. He also spent \$20 for medicine. His clothes, worth about \$13, were ruined. He cannot do the work he did before because of his injuries.

The point at which the plaintiff was thrown out was 24 feet from the point of impact (page 17). The plaintiff still has headaches. Before the accident he was a strong young man. Salary was \$13 a week.

George A. Smith, witness for the plaintiff, testifies (page 42) : that he judged the car was about 200 feet away when he first looked, but immediately after said he is not sure of this. He states (page 43) that he saw the wagon coming down White street, that the horses were on a jog; he states he was about 600 feet away, making the car upwards of 800 feet away from where he stood when he first saw it. On page 44, that the wagon was carried 47 paces after the trolley car hit it. Page 45, he states that the car he should judge to be coming 20 miles an hour. He states on page 46 that when the horses' heads reached the track the car was 30 or 40, maybe 50 feet away, coming down a slight grade (page 46). *The horses were on the track at this time* (page 47). On page 47, before the horses got on the track the car must have been 100 feet away coming pretty fast. *This was just before the horses stepped on the track that the car was 100 feet away* (page —).

Clara E. Nottan, witness for the plaintiff, shows that the motorman was holding the thing in the top of the car (which is the switch controlling the current) with one hand while he was working the car with the other. Page 49, that the car was going very fast. She was in the car when the car struck the wagon, and states, on pages 49-50, that the motorman had trouble with the car, it apparently being out of order. She says, on page 53, the horses were on a trot but slow; that when the horses' heads had reached the cross walk at White street, the car was

about the distance of the width of the court room from the corner of the street.

Clarence J. McCarthy (page 57) saw the team on the cross walk, did not see the car until it was close to the wagon when the car was about 50 feet away. At the time the horses were about on the track, *just going over the track*. The horses broke loose from the wagon by reason of the impact (page 58). Under cross examination this witness showed that his idea of 50 feet was correct by illustrating with the length of the court room (pages 58-59).

The injuries to the plaintiff are shown by the evidence of Vena Guenther (pages 60-61), and Dr. Steiner (page 38) and the plaintiff (page 12).

The exceptions of counsel for plaintiff are to the judgment of the court, granting a non-suit, for the reason that the court was compelled to weigh the evidence and put himself in the place of the jury by so doing. The court attempts to fix the location of the team and the location of the wagon when it was first seen by the plaintiff, which was the province of the jury. He disregards the evidence of the plaintiff, takes up, weighs and considers the evidence of the other witnesses, and denies that the car was 300 feet away, but *decides* the distance was much less, and much less than in the case of Peterpolo, which case was decided in the New Jersey Supreme Court and is referred to in citation given hereinafter.

The court clearly erred in thus weighing the evidence, and he erred in deciding the case at bar on the Peterpolo case, *as in the Peterpolo case the evidence was that the plaintiff saw the car, saw it was coming fast, and knew he was taking a chance in crossing the track*, while in the Guenther case he saw the car 315 feet away, and he was unable to tell that it was coming fast, and proceeded across the track with the knowledge that he had ample time to cross. He had a right to assume under the cases cited herein that the car was under the control of the motorman, and

that his rights on the streets as soon as he had obtained them would be observed.

Counsel claims under the authority of the following cases that the court erred, and furthermore counsel insists under the authority of these cases that the Peterpolo case (decided in the Supreme Court) is in direct conflict with the cases, decided by the Supreme Court and Court of Errors and Appeals in the State of New Jersey, but whether the Peterpolo case correctly states the law in this state or not, it would not affect the case at bar for the reason above stated that Guenther was within his legal rights to proceed slowly across the street, the car being *in his judgment* 315 feet away, *and in his judgment* he could not tell (know) it was coming fast. The correct view of the facts seems to be to counsel that the car was when he first looked *was not coming fast*, but that it was coming down a grade and the car being out of repair, the speed was greatly accelerated until it was going at a great speed. This is shown by the terrible force of the impact, carrying the wagon weighing 2,200 pounds plus the load and a pair of horses the tremendous distance of 55 feet after it struck the wagon, smashing the wagon and contents, showing that there was no attempt on the part of the motorman to stop the car, or that if he did make any such attempt the car was in such bad order that he could not stop.

It is no doubt a fact that even if the car was but 50 feet away at the time that the wagon was on the track, the motorman should have stopped his car in that distance, presuming he had it under control, and it was in ordinary good running order, the plaintiff having secured his place on the street.

The court went into some process of figuring out how many miles an hour the car must have gone in order to strike the wagon. If this is done on whose testimony will it be based—Mr. Guenther, Mr. Smith, Mrs. Clara Nottan or Mr. McCarthy?

To do this clearly demonstrates the province of the jury was invaded and the case should have gone to the

jury. Who could fix this fact but the jury? Even if it was figured out by the court legally, the speed will be shown to be within a possibility, and the case should have gone to the jury. The plaintiff has a right to assume the jury would take the most favorable view of his case. Similar distances were passed upon in the cases hereinafter cited.

Peterpolo case
used
Atl. Rep
pg 307
 The court, as above stated, is inclined to put too much weight upon the case of *Peterpolo vs. Public Service Railway Company*, 75 Atl. Rep., 889, a case in the New Jersey Supreme Court. This is easily distinguished.

If the *Peterpolo* case is examined it will be found that the only case cited is the case of *Schwanewede vs. N. Hudson Ry. Co.*, 51 Atl. Rep., 696. Both in this case and the *Peterpolo* case, the court decided on the evidence of the plaintiff that when he was 20 feet from the track he knew the car was coming at *full speed*. *One witness says he never saw a car go so fast in his life.*

In the *Schwanewede* case, *the plaintiff said that he took a chance*, and the court there decided he could not, knowing the car was coming at a tremendous rate of speed, and knowing that he was going to take a chance, if a chance brought on a collision, hold the defendant company. In the *Peterpolo* case the facts were similar to the *Schwanewede* case, as he states he saw a car 150 or 200 feet away and the plaintiff said that the car was going fast, very fast. Here again *the court on the strength that the plaintiff was taking a chance and failed decided in favor of the defendant*; but in the *Peterpolo* case, the court further stated:

"If the car at that moment had been going at a moderate speed, or had appeared to the plaintiff to be either not moving, or moving at a moderate speed, it could not be said that his failure to stop his team was negligence; for the plaintiff could

See, Sutton vs Bell, decided in the Court of Errors & Appeals of New Jersey, June 20, 1910, in which Mr. Justice Garrison, speaking of the function of the jury in this respect said;

"The existence of negligence, whether of the plaintiff or of the defendant, depended upon the conclusion to be reached from a variety of circumstances, considered, not as isolated occurrences, but altogether, and in view of their relation to and reaction upon each other. To draw a conclusion as to the conduct of the parties under circumstances thus connected is of the very essence of the jury function. In proportion as such circumstances multiply and intercalate, it becomes more and more a matter of deciding between conflicting inferences, and less and less a matter of declaring that one inference alone is conclusively compelled by the testimony. The latter, viz., to decide that there exists no recognizable controversy upon the testimony, is the function of the court; but to recognize the existence of such a controversy and to proceed to decide it is to usurp the function of the jury, which, in the present case, the court very properly refused to do."

Att. Rep.
Vol. 77 A.T.R., No. 1, August 25, 1910.

See also

Greuter

-20-

New York Cent. R.R. Co.

Law, 298, where the plaintiff } No. 78
these cases the Court of Er- } *Att. Rep.*
judicial notice that he was not } Page 166
to say that he was not } New Jersey
away, and that a } Court of Error & Appea
at the place where it was

(1) The contributory negligence must clearly appear.

(2) In reviewing a non-suit, granted at the close of plaintiff's testimony

ORIGINAL
RECEIVED

assume that he could reach the track before the car, and that the motorman would respect his rights to cross, he having gained a position on the track. But this was not the condition of affairs. All the plaintiff's witnesses say the car was going fast, or very fast. The plaintiff himself says that the car was running with extreme rapidity. This knowledge he must have gained from observation at the time."

which principal distinguishes it from the case at bar in that Guenther testified *several times*, notably on page 14, that he could *not tell how fast* the car was coming when it was up the hill. He did state after he got on the track 50 feet away that he saw it coming very fast. He states he was an experienced driver and knew he had time to cross.

The position of the plaintiff in error is vindicated by the case of *Zindler vs. Public Service Ry. Company*, decided November, 1909, in the New Jersey Court of Errors and Appeals, 74 Atl. Rep., 478. Here was a case where the plaintiff was one block away and is identical with the case at bar. A non-suit was granted in the Circuit Court and on error the lower court was reversed.

Also the case of *Conrad vs. Elizabeth R. R. Company*, 70 N. J. Law, page 676, where the plaintiff was a block away.

Also the case of *Lambertson vs. Consolidated Trac-tion Company*, 59 N. J. Law, 298, where the plaintiff was 300 feet away. In these cases the Court of Errors and Appeals *took judicial notice* that it was not foolishness for the plaintiff to say that he saw a car 300 feet away or a block away, and that a collision occurred when he reached the intersection, and that if such collision did occur, that the plaintiff or the car as the court below in the Guenther case in effect put it, could not have been at the place where it was testified they were.

The plaintiff also respectfully refers to the cases of *Comben vs. Belleville Stone*, 59 N. J. L., 226; *Glynn vs. Consolidated Traction*, 59 Law., 432.

It is respectfully submitted the judgment of the court below should be reversed.

GEORGE H. PEIRCE,
Attorney and of Counsel with Plaintiff.

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Writ of Error.

Filed August 16, 1910.

(SEAL) The State of New Jersey to Wilbur
A. Heisley, Esq., Judge of our Circuit
Court at Newark, in and for the County
of Essex. GREETING:

10

Because in the record and proceedings and also in
the giving of judgment in a plaint, which was in our
Circuit Court, holden at Newark, in and for the said
County of Essex, between David Guenther, plaintiff,
and Public Service Railway Company, defendant, of
an action upon contract, manifest error hath inter-
vened to the great damage of the said David Guenther
as by his complaint, we are informed, we being willing
that speedy justice should be done to the parties afore-
said, in this behalf, do command you distinctly and
openly to send, under your seal, the record and pro-
ceedings aforesaid, with all things touching and con-
cerning the same to the "Court of Errors and Appeals"
in the last resort of New Jersey, on the twenty-fifth
day of August, 1910, together with this writ, that the
record and proceedings aforesaid, being inspected, we
may further cause to be done thereupon, what of right
and according to the law ought to be done.

20

Witness, our Chancellor and President Judge of
our said Court of Errors and Appeals at Trenton.
aforesaid, the fifth day of August, nineteen hundred
and ten.

30

(Signed) S. D. DICKINSON,

Clerk.

GEORGE H. PEIRCE,

Attorney.

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Return.

Essex County Circuit Court.

10	DAVID GUENTHER, <i>vs.</i> PUBLIC SERVICE RAILWAY COMPANY, a corporation.	}	<i>In Tort.</i>
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The answer of Wilbur A. Heisley, Judge of the Essex County Circuit Court, within named:

20 The record and proceedings of the plea, whereas 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.

(Signed) WILBUR A. HEISLEY,
 (L. S.) *Judge of Essex County Circuit Court.*

30

40

Summons.

Filed March 23, 1909.

ESSEX COUNTY, ss.

The State of New Jersey, to the
(L. S.) Sheriff of the County of Essex aforesaid,
GREETING:

10

You are hereby commanded to summon Public Service Railway Company, a corporation, defendant to appear before the Circuit Court of said County on the seventh day of April, nineteen hundred and nine, to answer unto, David Guenther, plaintiff, in an action in tort, wherein the plaintiff claims from the defendant ten thousand dollars. And have you then and there this writ.

Witness, William S. Gummere, Esquire, Judge of said Circuit Court at Newark, the 22nd day of March, in the year one thousand nine hundred and nine.

20

JOHN B. WOOLSTON,

Clerk.

GEORGE H. PEIRCE,

Attorney.

30

40

Declaration.

Filed March 23, 1909.

Essex County Circuit Court, of the
(L. S.) seventh day of April, nineteen hundred
and nine.

10

ESSEX COUNTY, ss.

Public Service Railway Company, a corporation,
under and by virtue of the laws of the State of New
Jersey, the defendant in this suit, was summoned to
answer unto David Guenther, the plaintiff herein, in
an action in tort, and thereupon the said plaintiff, by
George H. Peirce, his attorney, complains;

20 For that, whereas, the said defendant, heretofore
to wit, at Orange in the County of Essex, aforesaid, on
the eighth day of October, nineteen hundred and eight,
was possessed of and by its servants and agents had
the control and management of a certain motor or
street railway car, which was operated, propelled and
run along by electric power, in and upon certain rail-
way tracks, in the possession, operation, control and
management of the said defendant, said track or
tracks being situated upon and extending along Day
street, public street or highway in the City of Orange,
30 in the County of Essex aforesaid, and, being so as
aforesaid, was then and there the possessor and opera-
tor of a certain motor or street railway car, which by
a certain motorman and a certain conductor, as its
servants and agents, by means of electricity, it then
and there propelled, operated and ran along said
tracks of its said railway and along and through said
Day street, and past the points where White street
and Wallace street, in said City of Orange, open into
and connect with the said Day street, to wit, at
40 Orange, in the County of Essex, aforesaid, and

Whereas, the said plaintiff, heretofore to wit, on the said day and date last aforesaid, at Orange, aforesaid, was lawfully seated in and driving certain wagon, drawn by two horses, through in and upon said White street in an easterly direction at the place where the same opens into and connects with the said Day street, at the crossing provided for pedestrians, wagons, vehicles and others, in a careful and prudent manner, and thereupon it then and there became and was the duty of the said defendant to use due and proper care in the use, management and control of said motor or street railway car, while being operated, propelled and run along said public street or highway, and upon said tracks as aforesaid, and to use due and proper care in operating, propelling and running said car along said public street or highway, so as to avoid colliding with and running into persons or vehicles lawfully driving along or crossing said public street or highway, and to operate, propel and run said car at such a rate of speed, so as to keep the same within safe and proper control, and to keep a proper and reasonably careful lookout for wagons, horses, teams and others crossing said public street or highway, and to have the said motor or street railway car under the control of its said motorman, so as not to negligently or willfully injure him, the said plaintiff, then and there, and to give proper warning of the approach of its said car by the ringing of a gong, which was its usual method of warning, or by other reasonable warning.

Yet, the said defendant, not regarding its duty in that behalf, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said plaintiff, at the time and place aforesaid, did not use due and proper care in the use, management and control of said motor or street railway car, while said car was being operated, propelled and run along said public street or highway, upon said tracks, as aforesaid, so as to avoid colliding with and running into persons or vehicles lawfully driving along or crossing said

public street or highway, and did not use due and proper care in operating, propelling and running said car along said public street or highway, and did not operate, propel and run said car at such a rate of speed so as to keep the same within safe and proper control, and did not keep a proper and reasonably careful lookout for wagons, horses, teams and others crossing said public street or highway, and did not have the said motor or street railway car under the control of its said motorman, so as not to negligently or willfully injure the said plaintiff, and did not give proper warning of the approach of said car by the ringing of a gong or by other reasonable warning, but wholly failed and neglected so to do; and the said defendant did, to wit, on the day and year aforesaid, in the City of Orange, in the County of Essex, aforesaid, by its servants, so carelessly, negligently and improperly operate, propel and run said car in, upon and along said public street or highway, and upon said tracks, as aforesaid, and at such a high rate of speed, as to lose the safe and proper control of the same, and the said defendant did, then and there, unlawfully and negligently propel, operate and run said car in, upon and along said public street or highway at an unusually high and dangerous rate of speed, and without giving any warning of its approach by sounding its gong, which was its usual signal of approach, or by any other reasonable warning, so that the said motor or street railway car, through the negligence of the said defendant and its servants, as aforesaid, then and there collided with and ran into violently and with great force the said wagon in which the said plaintiff was then and there seated and driving and which was then and there being lawfully pulled by two horses attached thereto along said White street, aforesaid, at the point where the same opens into and connects with the aforesaid Day street, and at the point where the crossing is located for pedestrians, wagons, teams and others to cross over from the said White street, across the said Day street, in order to

get on to Wallace street aforesaid, and while the said plaintiff was then and there in the act of driving his said wagon from the said White street, across the said Day street and across the tracks of the said defendant in order to get on said Wallace street, with such force and violence as to completely detach said horses from said wagon and to carry said wagon and drag and push the same along said Day street a great distance, to wit, the distance of one hundred feet or more, and the said plaintiff was then and there with great force and violence suddenly thrown from and off of said seat and violently upon said street or highway, rendering the plaintiff unconscious, thereby seriously, painfully and permanently bruising, wounding and injuring the said plaintiff, so that his life was despaired of, and all this without any fault or negligence of the said plaintiff; and also by means of the premises, the plaintiff became and was sick, sore, lame and disordered, was rendered unconscious, suffered severe lacerations of the scalp, three in all, necessitating the scalp to be sewed up in many places, suffered a severe pain or fracture of the wrist, injured the muscles and bones of the wrist and one arm, left arm from shoulder to elbow badly bruised and lacerated, left leg from knee to hip badly bruised and lacerated, right knee badly sprained and wrenched, and suffered other severe and painful internal and external bruises, wounds and injuries about the head, shoulders, back, sides, hips, legs and arms, and suffered a complete disarrangement of the entire nervous system, all of which injuries were of a more or less permanent nature; and thereby also causing the clothing which the plaintiff then and there wore of great value, to wit, the sum of one hundred dollars, to be greatly damaged and destroyed (and this without any fault or negligence on the part of said plaintiff).

And also by means of the premises, the said plaintiff became and was greatly bruised, hurt, injured, and wounded in and upon the head, shoulders, arms, hips, legs and other parts of his body so that he became and

was sick, sore, lame, disabled and disordered and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which said time the said plaintiff suffered and underwent, and in the future will suffer and undergo, great pain, and was hindered and prevented, and in the future will be hindered and prevented, from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted and lost and was deprived of, and in the future will lose and be deprived of divers great gains, profits and advantages, which he ought and otherwise would have derived and acquired, and thereby also the said plaintiff was forced to lay out and expend and did necessarily lay out and expend divers sums of money, to wit, the sum of one hundred and fifty dollars for his care and nursing, and for the attendance of his physicians, and for drugs and medicines for his use in and about his sickness, aforesaid, in endeavoring to be cured of the said wounds, bruises and injuries, so received as aforesaid, and thereby also the said plaintiff was forced and obliged to pay, lay out and expend divers large sums of money, in the whole amounting to a large sum of money to wit, one hundred dollars, in and about restoring and replacing his said clothing, so as aforesaid damaged and destroyed, and has been and is by means of the premises otherwise greatly injured and damaged, to wit, at Orange, in the County of Essex, aforesaid.

Wherefore, the said plaintiff says that he is injured and has sustained damages to the amount of ten thousand dollars, and therefore, he brings his suit, etc.

GEORGE H. PEIRCE,

Attorney for Plaintiff.

Plea of general issue, filed by the defendant April 2, 1909.

ESSEX COUNTY CIRCUIT COURT.

 DAVID GUENTHER,

vs.

 PUBLIC SERVICE RAILWAY COMPANY.

 } *In Tort.*
 } *Interro-*
 } *gatories.*

10

To George H. Peirce, Esq.,
Attorney of Plaintiff.

Sir:

Please take notice that the defendant in the above stated cause requires answer under oath from David Guenther, the plaintiff therein, to the following interrogatories proposed in the above cause, within ten days after service thereof upon you.

20

1st. What time of day or night did the accident happen?

Answer: About 1:10 P. M.

2nd. Describe in detail the injuries which you suffered by reason of the accident.

Answer: My head was cut, my right hand and wrist were badly sprained and otherwise injured, my body and legs were severely bruised and I sustained a severe shock to my whole system and was rendered unconscious.

30

3rd. What was your occupation at the time of the accident?

Answer: Driver.

4th. What wages were you receiving at the time of the accident?

Answer: Thirteen dollars per week.

40

5th. Were you confined to your house as a result of the accident? If so, for how long?

Answer: I was confined to my house for a little over five months as a result of the accident.

6th. Were you confined to your bed as a result of the accident? If so, for how long?

Answer: I was confined to my bed for six days.

10 7th. When after the accident did you return to work?

Answer: Returned to work on March 24, 1909.

8th. How old are you?

Answer: Thirty-two years.

9th. Were you suffering from any disease or disability before the accident? If so, describe your trouble.

Answer: No.

20 10th. You say you were injured—describe your injuries in detail.

Answer: I was injured as described in my answer to the first interrogatory.

11th. Did you employ a physician as a result of the accident? If so, give address and street number.

Answer: Dr. E. Steiner, 577 High street, Newark. Dr. Harris, of Orange Memorial Hospital.

30 12th. How long did this physician attend you?

Answer: Dr. Harris attended me for about three weeks after the accident, since which time Dr. Steiner has been attending me.

13th. What were your physicians' bills?

Answer: My physicians' bills up to the present time amount to about \$175.

40 14th. What wages are you now receiving per week and where are you working? Give address and street number.

Answer: I am now working for Hahne & Company and receiving thirteen dollars per week.

15th. Have you recovered from your injuries? If not what is now the matter with you? Describe in detail.

Answer: My hand and wrist has not recovered from the accident and I suffer from headaches, am nervous, etc.

(Signed) DAVID GUENTHER,
Plaintiff.

10

L. J. TYNAN,
Attorney of Defendant.

Dated, August 9th, 1909.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

20

David Guenther, of full age, being duly sworn, on his oath says, that he is the plaintiff in the suit, in which the foregoing interrogatories and answers are made, and that he is familiar with the facts in the case, and that the facts set out in the said answers and the statements made therein are true to the best of his knowledge as he verily believes.

DAVID GUENTHER. 30

Sworn and subscribed before me this
1st day of October, 1909.

WILFRED C. ROSZEL,
Attorney at Law of New Jersey.

40

ESSEX CIRCUIT COURT.

DAVID GUENTHER

vs.

PUBLIC SERVICE RAILWAY CO.

10

Transcript of shorthand notes of testimony taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., June 1, 1910.

Before Hon. Wilbur A. Heisley, judge, and a jury. George H. Peirce for plaintiff.

L. J. Tynan for defendant, Howard MacSherry of counsel.

20

Mr. Peirce opened for the plaintiff.

DAVID GUENTHER, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q Mr. Guenther, where do you live?

A I live in Newark.

Q Whereabouts?

A street, 565.

30

Q How old are you?

A Thirty-three years old.

Q How long have you worked for Hahne & Co.?

A More than ten years.

Q For how long have you driven horses?

A The last ten years.

Q Where were you on the 8th day of October, 1908?

A Day and White street, Orange.

Q On which street were you, on White street?

40

A On White street.

Q What were you doing there?

A Delivering furniture.

Q What kind of a team had you?

A I had a team anybody could drive.

Q Was it one or two horses?

A Two horses.

Q What kind of a wagon was it?

A A big top wagon, furniture wagon.

Q How much did it weigh?

A 2,300.

Q Was there any furniture in the wagon?

10

A Yes, sir.

Q You were on White street, coming which direction?

A East on White, towards Day street.

Q How much furniture did you have on the wagon?

A I had about half a load.

Q How is the ground there, is there a hill going towards Day street?

20

A Yes, sir.

Q Is it down a descent, down a hill, or down an incline?

A Well, it is, yes.

Q How is the ground coming south, coming from north to south on Day, at White?

A An incline.

Q When you got to the crosswalk, what did you do?

A I looked.

30

Q Which way?

A First I looked south, and then north.

Q What did you see north?

A Nothing.

Q What did you see south?

A Oh, north, a trolley car.

Q What did you see south?

A Nothing.

Q How far away was the trolley-car to the north?

A About a block.

40

Q What did you do?

A I knew I had lots of time to cross there, I knew it by an experienced driver.

Q You say you have driven teams for twenty years?

A Yes, sir.

Q Now, Mr. Guenther, you reached the crosswalk, and then what did you do?

A Reached the crosswalk, and I looked.

10 Q I know, what did you do then?

A Well, I drove on; when I got in the centre—

Q Then what happened?

A The trolley hit me, hit the wagon, and sent it in the gutter.

Q How far away was the trolley-car when you reached the car track?

A Thirty-five feet, about.

Q What did you do, if anything, on the car track?

A I whipped the horses to get across, when I
20 heard the noise of the car.

Q Then what happened?

A The car hit the wagon and sent me in the gutter, laying there unconscious.

Q Could you tell when you were on the car track whether the car was coming rapidly or slowly?

A I could tell when I was on the car track the way it was coming it was coming fast.

Q Could you tell when it was up the hill?

30 A No, sir.

Q How were you injured?

A I was injured on the head.

Q Let us see your head.

A (Witness exhibits his head.)

Q Turn around there and show the jury where you were hurt.

A Along in here (indicating), and my wrist.

Q What happened to your wrist? Show your other wrist, twist it around.

40 A (Witness exhibits his wrist.)

Q Now, what can you do with the other wrist.
What have you got that on there for?

A Well, it swells.

Q Now, just see how far you can use your wrist.

A (Witness illustrates.)

Q Was your wrist that way before the accident?

A No, sir.

Q What other injuries did you suffer?

A I was bruised on the shoulder, legs.

Q Well, how much bruised?

10

A Well, all black and blue.

Q What was your business with Hahne & Co.?

A Driver.

Q What do you do, what are your duties?

A Well, I was driving a furniture wagon at that time.

Q Was there anything else you had to do besides driving?

A Delivering furniture.

Q Do you have to lift the furniture out and in the wagon?

20

A Yes, sir; load and wagon and unload it.

Q Are you able to do that to-day?

A No, sir.

Q Why not?

A My hand, I can't lift with it.

Q What are you doing for Hahne & Co. to-day?

A Driving a small wagon.

Q What kind of packages do you have?

A Small packages.

30

Q What effect, if any, did it have on your nerves?

A Well, it has caught me now; I was never nervous before, but I am now.

Q Now, after it knocked you out on the ground what did you next know?

A I knew when I was in the hospital.

Q What hospital were you taken to?

A The Orange Memorial.

Q How long were you there?

A Six days.

40

Q What doctor attended you there?

A Dr. Harris.

Q Is he in the court room?

A I suppose he is; he was here.

Q Where were you taken after you got to the hospital?

A I was taken home.

Q How long were you incapacitated from work?

A Nearly six months.

10 Q Full six months?

A No, about a week or so less.

Q Perhaps two weeks less than six months?

A Yes.

Q Did you get any compensation for that time; were you paid any wages?

A No, sir.

Q What is your doctor's bill, or have you any doctor?

A I have a doctor.

20 Q What is his name?

A Dr. Steiner.

Q What is his bill?

A His bill is over \$200.

Q What have you paid out for medicines and liniments and so forth?

A About \$20.

Q What happened to your clothes?

A The clothes was all ruined; I didn't know where half the stuff was.

30 Q You never got it, you mean?

A I never got it.

Q What were the clothes worth?

A Well, the clothes were worth about \$13.00.

Q Now, who was with you on the wagon?

A Joseph Shay.

Q What happened to Joseph Shay?

A Well, he died four hours afterwards, after getting knocked off.

40 Q Now, tell me, if you know, how far the wagon was carried by the impact with the trolley-car?

A Fifty-five feet.

Q How do you know that?

A I measured it.

Q How far from the point of the impact were you thrown out?

A Twenty-four feet.

Q How do you know that?

A I measured it.

Q What happened to the wagon, and what happened to the horses by reason of the impact?

10

A Well, I didn't see the wagon, and I didn't see the horses afterwards; was lying there; I heard the wagon—

Q Did you see them later?

A Well, I seen them after I got out of the hospital.

Q Now, when did you say that you first saw the trolley-car?

A When I was on the crosswalk.

Q And how far was that away?

20

A One block.

Q What is the name of the street a block away?

A Snyder street.

Q Is that to the north, or to the south?

A That is to the north.

Q Where were you when you saw the trolley-car the second time?

A I was on the car track.

Q Now, you speak of your nerves; how are you nervous?

30

A Well, I am nervous now, I can't drive, or anything.

Q How is your head?

A My head, I always have headaches.

Q How often do you have headaches?

A Well, I can't tell.

Q Frequent, or infrequent?

A In.

Q Often or otherwise?

A Otherwise.

40

Q How often do you have headaches now, tell us that.

A Well, just according how the weather is; rainy weather I generally catch it in the head.

Q Did you have headaches before?

A Never.

Q What was your business years before?

A Butcher business.

Q What kind of health did you have up to the
10 time of the accident?

A Good health.

Q Were you ever sick before the accident?

A No, sir.

Q What is your salary to-day?

A \$13 a week.

Q What was your salary before you got hurt?

A \$13.

20 *Cross examination by Mr. MacSherry.*

Q Then you are receiving to-day the same amount of money for your labor as you received at the time you were hurt?

A Before I was hurt, yes, sir.

Q And you do not have to work so hard?

A No, sir.

Q How old are you, please?

A Thirty-three years.

Q What is your weight?

30 A My weight?

Q Yes.

A 174 pounds.

Q How much do you think you weighed just before the accident?

A Well, I couldn't just say.

Q You have not lost weight?

A I believe I weighed 180 pounds.

Q Well, that is not much. You are not nervous now, are you?

40 A Yes, sir.

Q Now, this moment?

A Yes, sir.

Q What about?

A I feel it all through me.

Q Have you ever been in court before?

A Once.

Q Well, you are interested naturally in the result of this case, aren't you?

A No, sir.

Q Not at all?

10

A No, sir.

Q Don't you think the fact of being in this courtroom, on the witness stand, and seated here in the presence of the judge and jury and counsel, and splendid looking women, has some effect to make you nervous?

A No, sir.

Q Don't you think it does?

A No, sir.

Q What doctor's bills have you received, Mr. Guenther? 20

A Well, I received one for \$200.

Q Covering what period, please?

A Dr. Steiner.

Q Any other?

A No, I don't know what the other one is, up in the hospital.

Q What do you have a doctor for now?

A For my hand.

Q Anything else?

30

A No, nothing else.

Q Have you had a doctor for anything else with the exception of your hand for the last six months?

A Yes, sir.

Q For what?

A For my head, sometimes.

Q Have you had any in the last three months, do you think?

A I had a doctor for my hand right along.

Q I mean with the exception of your hand? 40

A No, sir.

Q How long were you in the hospital?

A Six days.

Q After six days where did you go?

A I went home.

Q How long were you confined to your bed?

A Well, along while I was in the hospital.

Q That is six days?

A Six days.

10 Q And how long were you confined to your house?

A Six months, about.

Q Were not out of the house?

A I was out of the house, going around; I wasn't working.

Q I wasn't talking about that; after you came out of the hospital were you able to go outdoors?

A Oh, yes.

Q Then you were not confined to your house, but you were not able to work, that is what you meant?

20 A I meant able to work.

Q That is, you were not able to resume the work you were doing before the accident?

A I could not do any work at all.

Q For six months?

A Yes, sir.

Q And did any of your wages go on at that time?

A No, sir.

Q Then after that you started in again at the same wages?

30 A Yes, sir.

Q Now, what do you say is the matter with you now; what is the trouble with you now, Mr. Guenther?

A Well, just my hand; can't move that.

Q Are you driving horses now?

A Yes, sir; I am driving one horse.

Q And this team, was it a young team that you had or an old team?

A Well, it was a team anybody could drive.

40 Q I didn't ask you that; it was a young team, wasn't it?

A No, it wasn't no young team.

Q Do you know of the fact that Messrs. Hahne & Co., your employers, made a claim against the company for compensation?

Objected to.

Q For compensation for a young, vigorous team—

Objected to.

The Court. Well, for the purpose of refreshing his memory. It don't make any difference what Hahne & Company claimed. Let him answer it. 10

Q Don't you know that Hahne & Co. claimed that a strong, powerful and young team of horses had been injured by the trolley-car?

A Yes, they might have been young, about eight years old.

Q How long had you driven them?

A I had driven them thirty days.

Q (Showing witness paper.) Do you recollect signing this paper; that is your signature, isn't it? 20

A Yes, sir.

Q Well, you signed that paper, didn't you?

A Yes, sir.

Q It was read over to you before you signed it, wasn't it?

A Yes, sir.

Q And you knew what you were signing?

A Yes, sir.

Said paper marked D. 1 for identification. 30

Q At the time of the accident, which was October 8, 1908, you had been driving for Hahne for about how long?

A Going on nine years.

Q And you were familiar with this locality at White and Day streets, were you not?

A Yes, sir.

Q You knew there was a trolley line on Day street? 40

A Yes, sir.

Q And you were fairly familiar with the grades and conditions there at those streets?

A Yes, sir.

Q From your experience, now, as you approached the corner of Day and White streets how far along the trolley track to the north can you see?

A About a block.

Q Is it a straight street, Day street, for a block?

10. A Yes, sir.

Q And how far can you see from the south?

A About the same.

Q Is it straight to the south?

A Yes, sir.

Q There is only a single track?

A Single track.

Q And in which direction do the cars come?

A The car came in the south.

Q What kind of a wagon did you have?

20. A Big wagon.

Q Was it covered?

A Well, it wasn't covered, we had only the side, one side, where it was raining.

Q Was there any difficulty looking out of the wagon?

A No, sir.

Q Nothing to obstruct your view?

A Well, the shade on the side.

30. Q Well, could you see out of the rear of the wagon?

A Yes, you could see out of the rear of the wagon.

Q When you looked out of the front did you have to lean over the seat?

A Yes, sir.

Q And was there anyone with you?

A Yes, sir.

Q Was there a hood over the seat?

A Yes, sir.

Q And who was driving?

40. A I was driving.

Q Now, there being but one track there, how near to the track was your horse's head when you looked for a car?

A I was on the crosswalk.

Q That is about how many feet away, do you think, from the first rail of the track?

A About 22 feet.

Q You have measured it, haven't you?

A Yes, sir.

Q When did you make your measurements up there? 10

A About three weeks ago, four weeks.

Q There hasn't been any change there since the day of the accident?

A No, sir.

Q The rails are there, and the street, the same way?

A Yes, sir.

Q Now, as you approached the track, say about 22 feet away, or, namely, on the crosswalk, with an unobstructed view, you saw this car about a block away? 20

A Yes, sir.

Q Now, what do you mean by about a block away.

A That block was 315 feet, I measured it.

Q You think the car—

A Was about 315 feet.

Q How was it coming?

A Well, I could not say how it was coming then.

Q Why not? Can't you tell whether a car is coming, 300 feet away, fast or slow, on a level track? 30

A Not the way she was, the trees and stuff there.

Q But you saw the car?

A I saw the car.

Q Could you hear it?

A No, sir.

Q It must have been coming fast, wasn't it?

A It was coming fast, I knew it after I got on the track. 40

Q It was coming fast; it must have been coming fast at the time you saw it.

Mr. Church. I object to the conclusion.

The Court. Yes.

Q Was it down grade, or level grade?

A Down grade.

Q The car coming on a downgrade?

A Yes, sir.

10 Q About 315 feet away, exactly 315 feet away; and when, just before your horse stepped on the track, you had seen the car now, coming on a down grade 315 feet away, did you look again before your horse stepped on the track?

A No; I looked after I got on the track.

Q After looking 22 feet away, and seeing this car 315 feet away, coming downgrade, you did not look again until you got on the track?

20 A No; I knew I had lots of time to cross the track, an experienced driver.

Mr. MacSherry. I ask that that go out, your honor.

The Court. Yes, strike it out. He says no, he did not.

Q Where was your horse when you looked the second time?

A The horse was over the track, and I was on the track.

30 Q And the track between the rails is about five feet and a half, isn't it?

A Something like that.

Q Were the horses all the way across the track?

A Yes, sir.

Q Then what did you do?

A I whipped him to get across.

Q And you were struck where?

A In the rear wheel.

Q When you were twenty-two feet from this track, were your horses on a trot or walk?

40 A They were on a regular dog trot.

Q Now, what was there to prevent you from seeing that car before your horses stepped on the track, if it was coming down grade?

A Well, I knew I had lots of time to get across.

Q No, you don't answer my question.

Q (*By the Court.*) Nothing to prevent your seeing it if you looked again, was there?

A No, sir.

Q (*Further cross.*) And you had your horses under control?

A Yes, sir.

10

Q And you had them under such control that you could have stopped them before you went on the track, if you wanted to?

A Well, I knew I had lots of time.

Q No, you don't answer my question. You had these horses covering twenty-two feet from the sidewalk to the first rail, you had these horses under such control that you could have stopped them if you wanted to, didn't you?

20

The Court. You could have stopped them between the crosswalk and the rail.

A No, I could not do it.

Q Why not?

A On account the horses was near the trolley track when the car was over a block away.

Q Haven't you said you had your horses under perfect control?

A Yes, I had them under perfect control, but I couldn't stop them.

30

Q Wait a minute; and anybody could drive them?

A Anybody could drive them.

Q Do you mean to say that after you left the crosswalk, twenty-two feet away from the first rail of that track, and you saw the car 315 feet away coming down grade?

A Yes, sir.

Q That you traveled that twenty-two feet to the track without looking for the car again, and you could not have stopped your horses if you tried to? 40

A Well, I could have stopped them, but the horses would have stood right on the track then.

Q You don't follow me at all. Do you mean to say that between the crosswalk and the track you could not have stopped your horses if you wanted to?

A I could have stopped them.

Q Could you have stopped them before you went to the track?

A No, sir.

10

Q You could not?

A No, sir.

Q Then you left the crosswalk twenty-two feet away—

A I was on the crosswalk, the horses wasn't, I was.

Q You have said you were 22 feet away; how far were your horses when you first looked for the trolley-car?

A Well, you couldn't see the trolley until you got on the crosswalk.

20

Q You don't answer my question, because you see the vital part of it.

Mr. Peirce. That is not fair, your Honor.

Q I understood you to say on your direct examination that when your horses reached the crosswalk that you looked for the car, is that right or not?

A Yes, sir.

Q (*By the Court.*) Do you understand what he asked you?

30

A Yes, sir; now I do.

Q (*Further cross.*) And that that crosswalk was about 22 feet away from the first rail of the track?

A Yes, sir.

Q I understood you also to say that you did not look again until your horses had got over the track, or on the track, and also your wagon, at least that part of it which you were on, is that right?

A Well, you couldn't see no car when the horses head hit the crosswalk.

40

Q (*By the Court.*) No, you don't answer his question. He wants to know if you looked again, after looking at the crosswalk until your horses were on the track; did you look, or not?

A Yes, I looked.

Q (*Further cross.*) Where?

A After I was on the crosswalk I couldn't look, after leaving the crosswalk, and got on the trolley track, I looked, and there was the noise of the car attracted me. 10

Q Just listen to me, won't you. How many times did you look for that car before you were struck?

A Twice.

Q Once at the crosswalk?

A Yes, sir.

Q And once when you were on the track?

A Yes, sir.

Q Now, that is right, isn't it?

A Yes, sir.

Q And the first time you looked the car was 315 feet away, coming downgrade? 20

A Yes, sir.

Q And the second time you looked the car was how close to you?

A 35 feet.

Q How do you know?

A About 35 feet.

Q Will you indicate from where you are sitting to some point in the room down here?

A Just about, not quite, to the end of the room. 30

Q Not quite to the end of the room?

A Down the court, about the fourth last seat.

Q You mean down here (indicating)?

A Yes, sir.

Q Have you any idea how far that is?

A Well, I could not say; I judge about—

Q Do you think that is about 30 feet?

A Something like that; 35 or 40.

Q Do you think you have a very good idea of distance? 40

A (Not answered.)

Mr. MacSherry. We have the length of this courtroom, your Honor.

Q You have not a very good idea of distance, have you?

A No, sir.

Q Why your wagon was hit right on the side, wasn't it?

10 A Right at the hind wheel.

Q And if you did not look until you yourself got on the track, and it is a single track there, while you were moving about 3 feet the car moved about 30 or 40?

A It must have; it came fast.

Q And your horses on a trot. You do not mean to say that, now do you?

A My horses was on a slow dog trot.

20 Q Now, Mr. Guenther, could you have, if you wanted to, after your horses heads left the crosswalk, could you have stopped your team before you went on the track?

Mr. Peirce. He has asked that question three or four times.

Mr. MacSherry. Yes, and he has not answered.

The Court. I think he said he could.

Mr. Peirce. He said he could not.

The Court. Let him answer.

30 Q Then you could not have stopped it?

A No, sir.

Q Then you left the crosswalk with a team of horses—you left a point where your horses heads were 22 feet from the track—

A No, sir; I didn't say that.

40 *Mr. MacSherry.* I submit to your honor if I have not asked him, and if he did not testify, that when his horses were on the crosswalk, 22 feet away, he looked for a car. Has not he said that?

Mr. Peirce. He said when he was on the crosswalk.

The Court. He has said it both ways.

Q How far were your horses heads from the track when you first looked for the car?

A Well, I couldn't say how far they was, but I was on the crosswalk, on the seat of the wagon, when I looked first.

Q Then, according to that, you did not look for the trolley car as you went down to that track when your horses were 22 feet away, did you? 10

A Yes, sir; I couldn't see any trolley then.

Mr. MacSherry. Well, I don't understand it.

Q How far was your seat from the heads of the horses?

A 13 feet.

Q Then if while you were on the crosswalk, you were 22 feet from the trolley track, and it was 13 feet from the heads of your horses to where you were sitting, then you did not look for a trolley car until your horses heads were 9 feet from the track, did you? 20

A It is the only time I could see the trolley.

Q You don't answer my question.

A (Not answered.)

By the Court.

Q Is that so?

A Yes, sir. 30

Q You say you could not see up the street where the trolley car was until the seat of the wagon on which you were riding was at this crosswalk?

A Yes, sir.

Q And that would bring your horses heads within nine feet of the rail?

A Yes, sir.

Further cross examination.

Q Why couldn't you see?

A Trees, and houses, and all, that lot there.

Q Now, after you looked the first time, and you saw this car 315 feet away coming downgrade, could you have stopped your horses then if you wanted to?

A Yes, but I had lot of—

10 Q Wait a minute, you have answered the question; you could have stopped, couldn't you?

A Not after I was on the crosswalk.

Q That is dodging me.

A (Not answered.)

Q (*By the Court.*) He is asking you if, when you were on the crosswalk, you could have stopped your horses before you reached the track. What do you say, could you or not, if you wanted to?

A If I wanted to, yes.

20 Q (*Further cross.*) But you didn't?

A No.

Q And you went right on the track?

A Yes, sir.

Q And before you had got even your wagon half-way across the track the car hit you?

A I was pretty near across the track.

The Court. Yes, he didn't say that.

Q How far was your wagon across the track before you were hit?

30 *Mr. Peirce.* He has answered that several times; he said it struck the hind wheel.

The Court. He did say it struck the hind wheel.

Q From the time you first saw the trolley car, with your horses' heads nine feet from the trolley track, how many feet do you think your horses travelled before you were hit?

A I couldn't just tell you that.

40 Q You have made measurements? Had your horses got over the track?

A Yes, sir; cleared the track, and I cleared the track.

Q How far over the track were your horses?

A Four or five feet.

Q From the time you saw the car until you were hit do you think your horses travelled ten feet?

A Travelled more than that.

Q Did they travel fifteen?

A May have travelled fifteen.

Q Do you think they travelled more—

10

A No, sir.

Q Or less; about?

A About.

Q Then from the time you saw this car until you were hit your horses travelled at a trot fifteen feet, about?

A Yes, sir.

Q You have been in court once before, haven't you, Mr. Guenther?

A In Newark?

20

Q Any place?

A I was always in Newark, all over, drove all over.

Q No, you have been in court, I say, as a witness?

A Yes, sir.

Q And you were in court a short time ago, were you not?

A Quite a while ago.

Q Were not you in court January 13th, 1909 at the trial of Edward Trawin, the motorman of this car?

30

A Yes, sir.

Q And you were present when he was being tried for manslaughter, were you not?

A Yes, sir.

Q By a jury downstairs?

A No, sir; it was up here, I think.

Q Well, upstairs then, on this floor; and you were present as a witness in that trial, which resulted—

40

Mr. Peirce. I object to the result.

The Court. Yes, I don't see what difference it would make.

Q You were a witness in that trial, were you not?

A Yes, sir.

Q Did you testify as follows: "Question: Well, how did it happen? Answer: Well, the horses was on the car track, and I couldn't turn him anymore the way the car was coming, full speed;" did you so testify?

A Yes, sir.

Q "Question: Did you hear anything? Answer: No, sir." Did you so testify?

A Yes, sir.

Q "Question: Did you see a car? Answer: I seen the car after I hit the trick," did you so testify?

A Yes, sir.

Q Did you testify as follows in that trial: "Question: And when you first saw the car where was it? Answer: The car must have been about, well, I should judge about 30 or 35 feet away, easily, more than that;" did you so testify?

A That is right, yes; that is when I was on the track.

Q Wait a minute. Didn't you testify on that trial that when you first saw the car it was 30 to 35 feet away easily?

A Yes, sir.

Q "Question: Can you give us any idea as to how fast the car was coming? Answer: I couldn't tell you, it was going at a high rate of speed when it caught the wagon, I didn't know anything more." Did you so testify?

A Yes, sir.

Q Did you testify as follows: "Question: You were driving with this man Mr. Shay who is dead? Answer: Yes, sir. Question: And it is down grade on this White street at Columbia Hill? Answer: Yes, sir.

Q Question: You were going down this grade trying to

hold the horses in? Answer: Yes, sir; I had a brake on, too. Question: You were going on a trot? Answer: Yes, sir, going on a dog trot;" did you so testify?

A Yes, sir.

Q Did you testify as follows: "Question: It is a bad corner, no doubt about that? Answer: Yes, sir. Question: And when you got up to the corner you looked and saw this car coming along, and tried to get your horses to stop? Answer: No, sir, I urged them across. Question: Be good enough to tell the jury what you urged them across with. Answer: I hit them with a whip. Question: Hit them with a whip? Answer: Yes, sir." Didn't you so testify?

10

A Yes, sir.

Q Do you remember in June, 1909, going to an outing, or picnic, somewhere?

A Not as I know of.

Re-direct examination.

20

Q Was or was not this what you testified to: "The car must have been, well, I should judge, about 30 or 35 feet away, easily more than that?"

A Yes, sir.

Q To what point of time did you refer to that the car was 30 or 35 feet away, easily, more than that?

Mr. MacSherry. I submit that is not proper.

Mr. Peirce. It is a re-direct examination.

The Court. I think it is proper.

30

A I was on the trolley track, but I also seen it once before.

Q Where did you see it before that?

A See it a block away, when I was on the crosswalk.

Q Were you on the crosswalk, or were the horses on the crosswalk?

A I was on the crosswalk.

40

Re-cross examination.

Q Why do you say now, that when you say the car was 30 or 35 feet away, easily, more than that, was when you were on the track, when you testified here that it was when you first saw the car that it was 30 or 35 feet away, easily?

A Well, I thought he meant when I was on the car track.

10

DR. LEON HARRIS, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q What is your profession?

A Physician.

Q What college did you graduate from?

A Cornell.

Q Is there a medical school at Cornell?

20

A Yes, sir.

Q Where did you practice medicine in October, 1909?

A I was at the Memorial Hospital.

Q Did you ever see Mr. Guenther?

A Yes, I saw him.

Q Under what circumstances?

A Why, I picked him up with the ambulance when he was hurt with another man in a trolley accident.

Q Where did you pick him up?

30

A It was on Day street, I don't remember the other street, near some other crossing about a block from the schoolhouse there.

Q What was his condition when you picked him up?

A He was badly dazed, and he had a lacerated wound of the scalp, had a contusion of the right shoulder, back and right wrist.

Q What did you do with him?

40 A Why we put him in the ambulance with the other man, and brought him to the hospital, where

I treated the scalp wound, and applied liniments to his contusions.

Q Have you recently looked at him, examined him?

A Why, I saw him to-day. I saw him here.

Q Did you examine his wrist?

A Yes, I looked at his wrist.

Q Did you look at his wrist before this some time?

A He was in my office a week or ten days ago, and told me this trial was to come off, and told me he would notify me as to the time, and he showed me his wrist then. 10

Q What condition did you find his wrist in to-day?

A Why, it is ankylosed, stiff.

Q Do you remember how long he was in the hospital?

A I think about somewhere around two weeks; I guess two or three weeks.

Q Did you render a bill to him? Are you going to render a bill to him?

A Well, I would, just for the time that I spend in the courtroom, but not professionally. 20

Not cross examined.

GEORGE A. MARTIN, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q What is your position with Hahne & Co.?

A Superintendent of delivery. 30

Q Do you know Mr. Guenther?

A I do.

Q How long have you known him?

A I should judge about ten years.

Q Do you remember about the time he met with an accident?

A I do.

Q Did you know the horses?

A I do.

Q Who bought those horses for Hahne & Co.? 40

A I did.

Q Where did you buy them?

A New York.

Q Did you personally try the horses at any time?

A I did.

Q Did you try them as to city sounds?

A I did.

Q How did you find them?

A Very satisfactory.

10 Q What do you mean by that?

A Well, they were not afraid of trolleys, nor they were not afraid of elevated railroads.

Q What was the character of work that Mr. Guenther performed before he got hurt?

A Well, he drove a furniture delivery wagon; delivered furniture and heavy goods.

Q What did that require him to do as to lifting?

A Well; it required a great deal of strain, and a great deal of lifting, both with his hands and his back and his legs.

20 Q What is he doing to-day for Hahne & Co.?

A He is driving a package delivery wagon to Rahway.

Q Is he able to do the heavy work that he formerly did?

A No, sir.

Q Why have you still employed him, if there is any reason you care to give?

A Well, he has always been a good man; a good
30 man with his horses; we could give him any horse there was in the place, and he always came back with it, and never misused him; his horses were always in excellent condition. He drove one horse to my knowledge for five years.

Q Is he able to perform the duties properly that he does to-day?

A No, sir; he is not.

Q Why not?

A His wrist hurts him; I have to send an extra
40 man with him. If he has an extra piece, a stove, or

icebox, I have to send an extra man with him, or pay a man to help him take it in the house.

Q Why do you keep him?

A Because he has always been a faithful man.

Cross examination by Mr. MacSherry.

Q What is your position there?

A Superintendent of delivery.

Q How long have you been there?

10

A I have been there thirty years.

Q And it is your duty to see that goods are sent out?

A Yes, sir.

Q And look into the personality of the drivers, and see that they look after the horses, and so on?

A That is right.

Q This man has been in your employ how long?

A In the neighborhood of ten years.

Q You thought a good deal of him?

20

A I certainly did.

Q And you valued his services very highly for the reasons you stated?

A Yes, sir.

Q How is it, then, that the great firm of Hahne & Co., under your immediate supervision, and with your knowledge, would let this man get hurt while in your employ, and in your actual work, and let him be six months home without receiving any salary?

Objected to as irrelevant.

30

Objections sustained.

Q Did you pay him anything while he was sick?

A Not that I know of.

Q Not a cent?

A No, sir.

Q Didn't you send him some flowers?

A I think my wife did, yes, sir.

Q And left him to look out for himself?

A Yes, sir.

40

Q For six long months?

A Yes, sir.

Q Who employed him at the end of six months, you?

A I did.

Q At the same compensation?

A I did.

Q And he is getting that now?

A He is.

10 Q Did you buy the horses that he was driving?

A I did.

Q From whom?

A Fishbourne & Carroll.

Q How long before the accident?

A That I could not say.

Q About?

A I should judge six weeks.

Q Were they good horses?

A Very good.

20 Q Young or old?

A Young.

Q Full of life and strength?

A No, they were not so full of life.

Q You pride yourself on your horses, don't you?

A I certainly do.

RECESS.

30 DR. EDWIN STEINER, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q You are a medical doctor?

A Yes, sir.

Q Of what college are you a graduate?

A Jefferson Medical College, Philadelphia.

Q How long have you been practicing medicine?

A Nine years.

40 Q Did you attend Mr. Guenther, the plaintiff in this case?

A I did.

Q When?

A I think it was from November, a year ago, until the present time.

Q What was the trouble with him when he came to you?

A It seemed to me he was suffering from the results of a dislocated wrist—he had a scalp wound—that is, he was not bruised, did not show any bruises, but he complained of pain in his hip and knee.

10

Q Was there any trouble in his shoulder that you know of?

A He complained of pain there.

Q What have you done for him? What sort of treatment have you given him?

A Well, for his wrist was the main injury. I put his hand on a splint, and gave him the rest treatment, applied electrical treatment; do that in order to do as much as we can to prevent the wrist from getting stiff. He had a scalp wound I had to treat.

20

Q Did he ever complain of having any headaches?

A Yes, sir.

Q Have you looked at the wrist recently?

A Last week.

Q What condition was the wrist in?

A It is still stiff.

Q In your opinion will it ever get so he can use it?

A No, sir.

Q What condition, if any, did you find as to his nervous system?

30

A Well, he complains continually of headaches; he complains very much in that wrist in changeable weather.

Q What is your bill, doctor?

A My bill will be \$225.

Q How many months have you attended him?

A Well, from November a year ago until the present time.

Q November of what year?

A 1908.

40

Q Then it was a year ago last November?

A Last November.

Q Do you know what caused the headaches, doctor?

A Well, he did not complain of any headaches before this. It must have been due to the blow, or injuries he had on the scalp, which came from a direct blow.

10 *Cross examination by Mr. MacSherry.*

Q Did you know him before the accident?

A No, sir.

Q Well, you will pardon me, if you did not know him before the accident—

A Beg pardon?

Q You say you did not know him before the accident?

A No, sir.

20 Q Now, I say, if you will pardon me, I do not mean to be personal, but if you did not know this man before the accident how can you say that because he complains of headaches now, which he did not complain of before the accident, therefore they must be from this accident?

A If he did not complain of any trouble before the accident, and he complains of it since the accident, we must attribute it to the accident.

30 Q You don't know whether he complained of any trouble before the accident, or not?

A No, sir, except from the history of the case.

Q Did you keep any records of this man?

A I did.

Q Your office is just across the street?

A It is within a block and a half of here.

Q Can you produce your records of charges in this case?

A I can.

Q Will you do it?

40 A I will.

Q You have said, in answer to the question, will it ever be so he can use it, his wrist, that you do not think he ever could; you don't mean that, do you?

A Yes, sir.

Q He does use it, doesn't he?

A He doesn't have the same motion he had before.

Q You mean he will not have the same use of the wrist he had before. He has some use of the wrist?

A He won't have the same use he did before.

A He has to have some use of the wrist to drive, 10
doesn't he?

A He has to have some use of the wrist.

Q Are you attending the man now?

A I am.

Q What for?

A The stiffness in his wrist, and his headaches he complains of.

Q Does he visit you now, or you him?

A He visits me.

Q How often has he visited you in the last month? 20

A Twice.

Q How often in the last three months?

A I can't give you that unless I have the record.

Q About?

A He has visited me on the average, I think, without my records here, every three weeks in the last three months.

Re-direct examination.

30

Q Why haven't you got your records here?

A I went to the hospital, and I didn't know this case was coming on until about quarter of eleven.

Q You had an operation?

A Yes, sir.

Q And you have come directly from the operation?

A I did.

Q Have you had your lunch?

A Not yet.

40

GEORGE O. SMITH, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q Mr. Smith, where do you reside?

A Orange, New Jersey.

Q What is your business?

A Express business.

Q Do you remember the 8th day of October, 1908?

A Yes, sir.

10 Q Did you see an accident at White and Day street?

A Yes, sir.

Q Where were you?

A I was in front of our express office.

Q How near is your express office to the corner?

A About 600 feet, a little over.

Q What did you see on that occasion?

A Well, after dinner I happened to be looking down, we call it—

20 Q Looking north?

A Looking north; and I stood out on the curb, and I saw a team, just saw their heads coming out of White street, and I saw a car coming down.

Q How far was the car away when you first saw it?

A I could not judge very well, the way I stood; I should judge a couple of hundred feet, probably.

Q Are you sure it was 200 feet, or more, or less?

A No, sir; I am not sure of it at all.

30 Q Now, tell us what happened; you saw the team come out of White street, and the car coming down?

A The team came out of White street, and they drove them across Day street, and I saw the car coming down, and I thought there was going to be an accident.

Q Then what?

A By the looks from there; and I didn't have time to think very long before I heard the crash. I went down there—

40 Q What happened to the team and driver?

A There was two on the wagon; I don't know which one was the driver. They laid on the ground when I saw them.

Q You saw the wagon when it came down White street?

A Yes.

Q How fast were the horses moving?

A Well, just on what we call a jog.

Q Did you ever have anything to do with horses?

A Yes, sir.

Q What experience have you had with them?

10

A I never done anything else for a couple of years.

Q Did you ever drive any race horses, fast horses?

A Yes, sir.

Q Were you standing on White street, or Day street?

A Day street.

Q How far away from White street did you stand?

A About 600 feet, I think; I never measured it.

Q To the north or south?

20

A North.

Q Then you were looking directly down the street?

A Yes, sir.

Q And you saw the horses' heads come out from behind the house?

A Just a little descent down Day street from my office to White street, and then it is a little ascent up.

Q Then you were the other side, the car was between you and the team?

A No, sir.

30

Q Where was the car?

A (Illustrating) Day street runs the same as this, and White street here.

Q Call this Day street, and White street at right angles; where was the car relative to this rule, and where were you when you first saw it?

A I should judge about 200 feet north of White street.

Q And you stood how far north of White street?

A About 600 feet.

40

Q Then the car was between you and the wagon, was it not?

A No, sir.

Q Oh, the car was 200 feet beyond where you were?

A Yes, sir. White street runs down this way, and Day street this way, and the car was up here, and I stood over there, down Day street.

Q Oh, you were down the other side?

10 A Yes, sir, the other side, south.

Q Oh, you were south; you said north?

A Yes, sir; south of White street.

Q Was there any pause in the horses as they came along?

A No, didn't appear to be any pause.

Q Did you notice whether or not the driver looked?

A No, I couldn't see that; didn't notice that at all.

20 Q What did the driver do after the horses were on the track?

A That I couldn't see; didn't notice at all that part of it.

Q Did you notice whether or not the driver whipped up the horses?

A It was all done so quickly, and I was too far away to see any whipping, anything of that kind.

Q How far was the wagon carried after it was struck by the trolley-car?

30 A About forty-seven paces.

Q Did you pace it?

A Yes, sir; perhaps I may be a little short of three feet to a pace; I don't know about that; forty-seven of my paces, I think; I think that is what it was.

Q Did you notice whether or not the motorman had the car under control?

Mr. MacSherry. Wait a minute.

The Court. I don't see how he could tell.

40 I sustain the objection.

Q Did you notice whether the car was coming fast or slowly?

A Yes, sir; I noticed it.

Q How was it coming?

A Pretty fast.

Q What do you mean by "coming pretty fast"?

A Well, coming, I should judge, twenty miles an hour, at that rate, three minutes rate.

Q Could you see the motorman before he struck the—

10

A No, sir.

Cross examination by Mr. MacSherry.

Q Just tell me, please, again, where you stood, will you?

A I stood on Day street south of White street.

Q That is south of New street, isn't it?

A Yes, sir.

Q Now, Wallace street is a sort of continuation of White street, isn't it? 20

A Yes, a little jog, not direct across.

Q Was this wagon coming out of White street or Wallace?

A White street; coming down White street, going east.

Q How fast do you think the horses were traveling; about what rate per mile?

A Well, a jog trot, I think, is about from five and a half to six miles an hour, in that neighborhood. 30

Q And when you first saw him come out of White street, you mean you first saw the horses coming from the house line of White street?

A Coming from what, sir?

Q Coming out of the house line on White street.

A They came out of White street. If you will allow me I will explain to you a little how White street is.

Q I have got it here. But when you saw the horses were they on the crosswalk then? 40

A Their heads about on the crosswalk; perhaps, the horses.

Q Heads on the crosswalk, that is right, is it?

A I think so.

Q At that time the car, you think, was about 200 feet away?

A Fully that.

Q And coming fast?

A Coming pretty fast.

10 Q You were too far away to know whether any gong was rung?

A Oh, no, I couldn't tell.

Q Now, did they come out of White street and go straight to the track?

A I think so; they may have curved the least bit to the north, but I think they came across.

Q Did he change the speed of the horses any?

A That I could not see.

20 Q When the horses were just about to get on the track, you understand?

A Yes.

Q Did you follow him all the way down to the track?

A What, with my eye?

Q Yes.

A Yes, sir.

Q Now, when the horses' heads reached the track about how far was the car away then from him?

30 A Well, it would be hard for me to tell, because the wagon, you know, was between the car and me at that time; but looking at the top of the car, and so forth, I didn't measure that, though, I should think it was about, say 30 to 40 feet, maybe 50 feet.

Q So when the horses' heads reached the track do you think that the car, coming fast, was between 30 to 50 feet away?

A I should think so.

Q Coming fast at a downgrade?

A Well, call it a grade, just a very light one.

40 Q That is before the horses got on the track?

A No, the horses was on the track at the time.

Q I am asking you before the horses stepped on the track.

A Excuse me; I didn't understand it. Now put your question.

Q Just before the horses stepped on the track, how near had the car at this rate of speed got to it?

A Why, it must be 100 feet away before the horses' heads were on the track.

Q And coming fast?

10

A Coming pretty fast, yes, sir.

Q And the horses didn't travel very far before the wagon was hit, did they?

A Not very far.

Q Well, will you explain, if you please, Mr. Smith—I don't want to argue with you—but the distance from the crosswalk to the track has been testified to as about 22 feet?

A Well, I think—I don't think it is that far, on a guess.

20

Q You don't, eh?

A No, sir; without measuring it I would not say it was that far. Day street is a narrow street; I don't think Day street is over 30 or 32 feet wide, on a guess.

Q Yes, but at White street the crosswalk comes in about 10 feet from the curb line?

A Not 10 feet, no, sir.

Q Well, pretty near it?

A Ten feet from the gutter, do you mean?

30

Q It is wider between the crosswalk and the first rail than it is between the curb line of Day street and the first rail?

A Yes, the sidewalk sets in, the curb, that sets in a few feet.

Q Do you think that the wagon traveled the distance between the crosswalk and the first rail while the car was going 100 feet?

A I don't just understand that question.

Q Do you think that the car traveled 100 feet

40

while the wagon was traveling the distance between the crosswalk and the track?

A Pretty close to it. When I say 100 feet you know I didn't measure it at all.

Q Can you designate any place on that block north of White street where you saw that car at the time that the wagon came out of White street?

A Have you on the map Mr. Bray's house, Judge Bray's house? I should think it was 50 feet, about,
10 probably, above that, I don't know how far that is from the corner.

Q How many houses is that from the corner of White street?

A Well, there is a row of houses, and I don't know how many is into it, but I think there is six, I am not positive about that, and then there is about 50 feet, I judge, of ground before you come to Mr. Bray's house; it is on the side line of Mr. Bray's, I should think about 50 feet.

20

CLARA E. NOTTAN sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q You reside where?

A East Orange.

Q Were you present on the 8th day of October, 1908, when Mr. Guenther got hurt?

30 A I was in the car.

Q What part of the car did you sit in?

A Well, I can't exactly tell.

Q Well, in the front, or back of the car?

A In the back of the car.

Q What kind of car was it, closed or opened?

A Closed car.

Q When did you first see the wagon in which Mr. Guenther was riding?

A I saw it in White street.

40 Q Whereabouts was the car at that time?

A Well, the car was pretty near the corner of White street. You can't see it until you get near there, you know, on account of this row of houses.

Q Do you know what the motorman was doing at that time?

A He was holding over this thing over the top of the car, whatever it is, the motor, I guess.

Q The switch, do you mean?

A Yes, sir, holding it.

Q One or two hands?

A One hand.

Q How long had he been holding his hand there?

A Well, quite a while, on and off.

Q Was the car going slowly, or fast?

A No, sir, very fastly.

Q Very fast?

A Yes, sir.

Q What did you see next? After you saw the wagon coming out of White street what did you see?

A I saw the wagon strike the car—I mean the car strike the wagon. 20

Q Then what happened?

A Why, the men were hurt, of course.

Q Did it knock the wagon aside, or carry it along?

A Yes, sir.

Q How far did it carry it?

A I can't tell you how far, but knocked it up against the stoop part of that bakershop.

Q Did you see the wagon a few minutes before the crash?

A Yes, sir; I saw the wagon. 30

Q What did the motorman do, if anything, to check the car?

A Well, I think he tried to stop the car.

Q Yes, then what did he do?

A I don't know what you mean by that.

Q Well, did he stay right there on the platform?

A Yes, sir; he did all he could do; I will tell you, he had had trouble with the car, if I darst to tell it.

Q What trouble did he have with the car? 40

A Well, ever since we got onto it that thing going back and forth, you know.

Q Where did you get on?

A Oh, I got on at—well, I forget the name of the street—this side of the school, we changed cars.

Q You say the thing overhead, the switch, kept going back and forth?

A Yes, kept going back and forth, whatever it is.

Q What did he do?

10 A He tried to right it, keep it from going.

Q Did, or did he not, retain his hand on the switch?

A Yes, he did, going down from Park Avenue.

Q Was his hand on the switch at the time the car struck the wagon?

A Yes, sir.

The Court. His hand on the switch?

Mr. Peirce. Yes, sir, on the overhead.

20 *Witness.* Yes, sir.

Q Now, did you hear any conversation between the motorman and the conductor as to the condition of the car?

Mr. MacSherry. When was that?

Mr. Peirce. At this very time.

Mr. MacSherry. I shall object to it.

The Court. I sustain the objection.

30 Plaintiff's counsel prays exception to the ruling of the Court, and the same is allowed, and signed and sealed accordingly.

(Signed) WILBUR A. HEISLEY,

(L. S.)

Q Do you know whether or not the motorman jumped back into the car about the time of the crash?

A No, sir; he did not, he stayed to his post.

Q And your idea is he stayed right there?

40 A Yes, sir.

Q What did the driver do when he got on the track, if anything?

A Why, he tried to get across.

Q In what way did he try?

A He whipped his horse to get across.

Q How far did the car go after it struck the wagon?

A Well, of course, I can't tell the measurement, you know, but it went almost to this end of the house near the gas office there.

10

Q How far do you suppose that is?

A Well, I couldn't tell you.

Q As far as from here to the end of the courtroom?

A Well, it is quite a little distance from New street.

Cross examination by Mr. MacSherry.

Q What part of the car were you in?

A In the back part.

20

Q Was it an open or closed car?

A Closed car.

Q And the seats, did they run lengthwise, or across?

A Lengthways.

Q And did you have a good view of the front of the car?

A Yes, sir.

Q Of anything, that was going on in front?

A Yes, sir.

30

Q There wasn't anything to interrupt your view?

A No, sir; there was nothing.

Q And were there many people in the car?

A No, sir; there wasn't a great many people.

Q About how many between you and the front, do you think?

A Well, there wasn't many on the side I sat.

Q Well, when you speak of the motorman putting his hand up above, do you know what is called the overhead, that blows sometimes, and is pushed back?

40

A Yes, sir.

Q That is what you mean?

A Yes, sir; that is what I mean.

Q You don't know anything about the operation of a trolley car, I suppose?

A No, I don't think I do.

Q You don't know whether that has anything to do with the speed of the car or not, do you?

A No, I haven't studied that up.

10 Q You couldn't say that?

A No.

Q And you do know of your own knowledge, in travelling on cars, that that very frequently happens, doesn't it?

Objected to?

Objections sustained.

Q Now the car was going pretty fast, wasn't it?

20 A Yes, sir.

Q And going on a downgrade?

A Yes, sir.

Q And when you first saw the horses come out of White street were they near the crosswalks, or far away from the crosswalk?

A Well, they were not very far away.

Q Had they reached the crosswalk yet?

A Just about, yes, sir.

Q And how close was the car to them then?

30 A The car was quite a little distance.

Q Well, about?

A Well, I couldn't tell you.

Q Look across this room.

A Probably that way.

Q What do you say?

A Probably across, as near as that.

Q This way (indicating)?

A Yes, sir.

40 Q I want to be sure about it; I don't want to quote your testimony afterwards and have it wrong.

A No. Well, I have forgotten a good deal of it; I am trying to remember it.

Q When the horses heads had reached the cross-walk on White street, the horses at the time were coming on a trot?

A No, sir; not very fast.

Q Not very fast, but on a trot; and at that time the car, going fast, had reached a point, not exactly, but about the distance of the width of this room from the corner of the street, that is about right, is it? 10

A I guess so, yes, sir.

Q And that is your best recollection of what you saw that day?

A I think so.

GEORGE P. GASCOYNE, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q You are a police officer in Orange? 20

A Yes, sir.

Q Where were you standing on the 8th of October at the time of the accident to Guenther's wagon?

A Day and New streets.

Q How far is that from Day and White?

A A very short block.

Q (*By the Court.*) To the south, or north?

A To the south.

Q (*Further direct.*) Did you notice at that time where the car was; that is, before the accident? 30

A At Park avenue.

Q How far is Park avenue and Day street from where you were standing—Park avenue and White street?

A Two blocks.

Q Where was the car? You say at Park avenue?

A Park avenue.

Q That is Park avenue and Day street?

A Yes, sir. 40

By the Court.

Q Where was that as regards Day street and White street, to the north?

A Two blocks to the north.

Q And three blocks from you?

A From me, yes.

Further direct.

10 Q Where did you see the horses and wagon first?

A I first see them when the car and wagon collided together.

Q You had not seen them before?

A No.

Q What happened to the wagon when it was struck by the car?

A Some of the furniture was knocked out on the street.

Q How far did it carry the wagon and horses?

20 A I don't know where it hit it.

Q You don't know how far?

A No, sir.

Q What happened to the horses, if anything?

A I don't know about the horses.

Q Did the horses still remain attached to the wagon?

A No, I believe not, but I can't say positive, you know, afterwards they were brought around to the wagon.

30 Q You saw them loose from the wagon afterwards?

A Well, the harness was on the horses.

Q You went immediately to where the wagon was, did you not, at the time of the accident?

A I went to where this man Shay was.

Q You went to where Shay was?

A Yes, sir.

40 Q How near did Shay lay to where the horse and wagon was?

A Right up against it.

Q Were the horses attached or detached, that is, loose or fastened to the wagon at that time?

A I don't know at that time.

Q You worked for the Public Service at one time, didn't you?

A Yes, sir.

Q You worked for them three years, what as?

A Motorman.

Q How fast would you say the car was going when it struck the wagon as it came down Day street? 10

A I couldn't say, I didn't see it hit the wagon.

Q You saw it before that?

A I saw it over at Park avenue.

Q How fast was it coming when you first saw it?

A Just coming out of the switch; there is a turnout, as they call it.

Q You remember being a witness in the criminal case, don't you?

A I was a witness here, yes. 20

Q Now, how fast was that car coming when you observed it?

A It just came out of the turnout at Park avenue when I first observed it.

Q Did you see it after it came down from the turnout?

A No, because I was waiting for a car in the opposite direction to go home to dinner, and would have to wait for this car going south to get at the turnout at Main street, popularly known as Music Hall, at the corner. 30

Q But you saw the car after it left the switch?

A Coming across Park avenue, yes, sir.

Q How fast was it coming?

A It could not be coming very fast; I couldn't tell you the rate of speed it came across Park avenue, because it just came out of the turn-out.

Q Did you say at the criminal trial that it was going nine or ten miles an hour?

Mr. MacSherry. When, at what point? 40

Q Did you say at any time that the car was going nine or ten miles an hour at the criminal trial?

Q Not to my memory now.

Q Didn't you say at the criminal trial this, in answer to the Prosecutor's "Question: You can't tell us about how fast it was going in miles, per hour? Answer: Well, it was going nine or ten miles an hour;" didn't you say that?

A I can't recall now.

10 Q Isn't it a fact it was going nine or ten miles an hour?

A I don't know; if I knew I would tell you; I can't recall it now, I say.

Q Have you talked with anybody about this case, Mr. Gascoyne?

A No, sir.

Q Did you ever test a car, while you were motor-man, as to how fast this type of car would go?

A No, sir; this is a thing I never knew.

20 Q Didn't you say at that trial "Well, we have tested them, and they make fifteen miles an hour?"

A Well, the company claims that; I never could tell that; I never had anything to tell how fast a car went; the company always have their inspectors.

Q Didn't you say that at the criminal trial?

A I don't think so.

Q You would be surprised if that was in the book, would you?

A Well, I don't know; but I never could tell—

30 Q Well, that is all.

Cross examination by Mr. MacSherry.

Q Three blocks away you did see the car moving, didn't you?

A Yes, sir.

Q You could see it moving?

A Yes, sir.

CLARENCE J. MCCARTHY, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q Do you remember an accident to Mr. Guenther on the 8th of October, 1908?

A Yes, sir.

Q Where were you?

A Standing on the front stoop of the grocery store.

Q Did you work in the grocery store?

A Yes, sir.

Q Where did you first see the car?

A I didn't notice the car.

Q Where did you first see Guenther's team?

A About on the crosswalk, I think, on Day street.

Q Did you see the car at any time?

A Not until it got close to the wagon.

Q Where was the wagon when the car got close to it? Hadn't you seen the car before that?

A Not until it was about 50 feet away.

Q Where was the wagon at that time, when it was 50 feet away?

A The horses were about on the track; just going over the track.

Q The horses were just going over the track when the car was 50 feet away?

A About that.

Q Did you notice what the motorman did, if anything?

A No, sir.

Q How fast was the car coming, if you noticed it?

A I didn't notice it.

Q What did the driver do, if anything, when he was on the track, as the car approached him?

A He whipped the horses to see if he could not get across in time.

Q Then what happened?

A The car struck the wagon.

Q Do you know how far it carried the wagon?

A No, sir; I don't; pretty near 100 feet.

Q What happened to the horses? Did they remain fast to the wagon, or did they break loose?

A No, they were broke right loose, the shock loosened them from the wagon.

Cross examination by Mr. MacSherry.

10 Q You saw these horses just before they went on the track?

A At the crosswalk.

Q Where was the car then?

A I didn't notice it then.

Q Are you sure of that Mr. McCarthy?

A Yes, sir.

Q Well, now, when the horses had reached the track how far was the car away then?

A About 50 feet when they were on the track.

Q What is your idea of 50 feet?

20 A A little more than the width of this room.

Q About how much more than the width of this room, do you think?

A Well, about ten feet.

Q So you think that is about right, do you?

A Yes, sir.

It is agreed that the width of the court room is 32 feet 10 inches from wall to wall.

30 Q Then you think that, as the horses were, at the time you speak of, the place you speak of, that the car was that distance away, coming fast?

Mr. Peirce. Do you mean it is 33 feet from this end to that end?

Mr. MacSherry. No, across the room; the width of the room.

Q (*By Mr. Peirce.*) Did you say it was a little more than the width of this room?

A Down this way (indicating).

Q Then the length of the room?

40 A It is a little more than the length of this room.

Q (*Further cross.*) How long do you think this room is?

A About 60 feet.

Mr. MacSherry. The length of this room is 56 feet 9 inches.

Q You didn't see the car when it was at the crosswalk?

A No.

Q After he left the crosswalk how were his horses going? 10

A On a trot.

Q And when was it that he whipped his horses?

A When the front wheel was between the two tracks.

Q And did he stop at all after he left the crosswalk?

A No.

Q Did he stop at the crosswalk?

A No.

Q Did you see him do anything at the crosswalk? 20

A No, sir.

Q Were you looking at him at the time?

A Yes, sir.

Q Did you see him look in either direction?

A I did not notice.

Q You were looking at that man as he came across the crosswalk?

A I wasn't looking at the man especially.

Q No, but you saw him there?

A I saw the wagon. 30

Q I know you did, and another man with him?

A Yes, sir.

Q And from the time that he left that crosswalk until he reached the track did you at any time see him look in the direction of the car?

A I did not notice it.

VENA GUENTHER, sworn for the plaintiff.

Direct examination by Mr. Peirce.

Q You are the sister of Mr. Guenther, the plaintiff.

A Yes, sir.

Q Do you remember an accident that he met with in October, 1908?

A Yes, sir.

10 Q What was his condition after the accident, if you know?

A Well, I seen him up in the hospital at nine o'clock in the evening.

Q Nine o'clock the same day?

A The same day. I never got notice until about, well, it was after six.

Q You saw him in the hospital that night?

A Yes, sir.

Q What was his condition?

20 A His face was twice the size, all swollen, and then his whole head was bandaged up, and his right arm was all bandaged up and he could hardly talk to me.

Q When did you next see him?

A Well, I went to see him every day.

Q Do you reside with him now, in the same house?

A Yes.

30 Q What is his condition as to nervousness since the accident?

A Well, he seems to be nervous, shaky all over, severe headaches, and then he hasn't any control of his right hand.

Q How does he exhibit his nervousness?

A Well, he isn't the same no more; he isn't the same as he had been before. He was strong, powerful.

Q Was he sick at any time before that.

A No, sir; he was a well boy.

Q How has he been since the accident?

A He has not been the same.

NOT CROSS EXAMINED.

Mr. Peirce. We rest with the understanding that it is admitted that the defendant operated the car.

Mr. MacSherry. Yes, and I would like it to be admitted that this printed testimony is the record of the criminal trial; we have both used it. 10

Mr. Peirce. Oh, yes.

PLAINTIFF RESTS.

Mr. MacSherry. I move for a nonsuit on the ground that the evidence shows that the plaintiff was guilty of negligence which contributed to this accident.

(Argued.)

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Adjourned to June 2, 1910, at ten o'clock, A. M.

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SECOND DAY

Newark, N. J., June 7, 1910.

Continued pursuant to adjournment.

Appearances as before.

The Court. At the close of yesterday's session the motion to nonsuit was made, and had been discussed considerably by counsel. I was more or less in doubt as to what disposition should be made of it, because I was uncertain whether my memory of the testimony was accurate or not. During the interim, though, I have thought very long and earnestly on the subject, and have this morning read transcripts of the testimony. I think, as a general thing, it may be safely said that it is a rare case where a Court is justified in nonsuiting in a trolley litigation, because of the fact that the rights of both parties, the plaintiff and defendant, in the streets, are equal, neither being paramount. Nonsuits are frequently granted in railroad crossing cases, because of the paramount right of the railroad to cross the street. But counsel for the plaintiff has quoted three cases by the Court of Errors and Appeals, in each of which it clearly appears that the car, when seen by the plaintiff, was at least a block, and in two of the cases 300 feet, away. It seems to me in this case there are two crucial and essential facts to be determined upon this motion. One is where was this car when the plaintiff saw it; and, secondly, what was its rate of speed? I do not see how the Court of Errors could have done anything else than it did in the cases quoted, namely, to hold that a person seeing a car 300 feet away from him, in the absense of something absolutely extraordinary, has the right to assume that the car is under control, and that the man operating it will respect the rights of the traveller, and will check its speed, even though it be going fast, before that distance of 300 feet has been covered. And in such cases, and

perhaps, in less distances, resonable minds might differ as to the advisability of a traveller pursuing his course, with knowledge that a car was approaching; and in such cases the jury, and the jury alone, is the body which must pass upon the propriety of the plaintiff's action. But there also is a class of cases where the car so close, and where the danger and the risk of crossing are so apparant, that the Court is obliged—not may, but is obliged—as a mater of law, to say that there is no question about which reasonable minds may fairly differ, and take it from the jury. And so in this case I conclude that if it be a fact, if the weight of evidence offered by the plaintiff tends to establish the fact, probably does establish the fact, that this car was 300 feet away when he saw it, and although it was going very fast—it is absolutely a question for the jury to determine whether or not this plaintiff was acting reasonably in attempting to cross the track. There is no use discussing the speed of this car; it is conceded to have been going very rapid. The plaintiff himself, in one place, says it was going rapidly. Other witnesses say it was going very rapid. One man, Mr. Smith, estimates it at 20 miles an hour, going very fast. So that point is disposed of. But is the question answered as to where the car was when the plaintiff first saw it? He says that he was on the seat of the wagon, which was directly over the side walk; 22 feet, he measured it from the track. He says that he saw this car 315 feet up the street, and he measured it. He says that the hind wheels of his wagon were struck by the car. He was 22 feet from the tracks. Suppose we say that there was a distance of 8 feet between his seat and the hind wheels of the wagon—there was not that much, but we will assume there was—that would make a distance of 30 feet the hind wheels of that wagon had to progress before it was struck by the trolley-car.

The trolley-car, he said, was 315 feet away. If that is so the car had to come ten and half times as far as

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the wagon had to go, and in other words, it likewise had to go ten and a half times as fast, in order to be 315 feet away, and overtake the wagon on the crossing. That is demonstrated to a mathematical certainty. He says he is positive as to these distances, because he measured each of them; and I say it follows, just as surely as the day follows night, that the car had to go ten and a half times the distance, and it had to go ten and a half times the speed that this wagon went, in order to be 315 feet away from it. There is no escape from it unless we absolutely misconstrue the plain rules of arithmetic. He says that his horses were on a trot; other witnesses say his horses were on a trot. We cannot sit here and absolutely forget, and become oblivious to things we perceive all our lives. We all have an idea as to how fast people walk, or how fast they cannot walk. We have an idea of the various gaits of horses. Those were young horses, eight or nine years of age, good horses, employed by a large department store, good strong horses, and I say it is fair to assume that those horses, although they were on a jog-trot—and I take judicial notice that that means a slow trot, not a rapid trot—that they were averaging five miles an hour. The witness who estimates it for the plaintiff says that they were going five and a half to six miles, but I put it at five miles an hour. If that is so, it would make that car going at the rate of ten and a half times five miles, which would be fifty-two and a half miles an hour, in order to have the car 315 feet away; a proposition which is so absurd as not to receive the consideration of thoughtful people. It cannot be possible that the trolley-car was going so fast as that. But I will assume that the horses were only jog trotting four miles an hour. It would be painful, in my judgment, to look at a horse going on a trot at only four miles an hour. But we will assume that he was going only four miles an hour. The car would be going, at that rate, forty-two miles an hour, which to my mind, is simply ridiculous. I have ridden on trolley-cars,

and every man in this courtroom has, and I venture to say that there is not a man in this room who has ever seen a trolley-car in the city going much more than half of forty miles an hour. So it seems to me the figures given by this plaintiff clearly indicates that the car was not 315 feet away from him. Let us take the other evidence. Mr. Smith says he saw the horses heads coming out of White street on the crosswalk when the car was about 200 feet away. That is his best estimate. That is 50 feet further than the Peterpollo case. There is a wide distinction between 200 feet and 315. Mrs Notman sat in the car, and she says that she saw the horses. She is a witness for the plaintiff. She saw the horses just about at the crossing, and the car was about the width of this courtroom from the crossing. The width of this courtroom is about 32 feet. She is a witness for the plaintiff. That clearly indicates that the car was not 315 feet away. Gascoyne, I think, was the policeman, and he says very little about it. McCarthy says the car was 50 feet from the wagon when the horses were on the track. All this leads me to this conclusion, that the witnesses for the plaintiff have established, not that the car was 315 feet away, but that the distance was very much less than that, and much less than in the case of Peterpollo which has been referred to, and for that reason I feel obliged to grant the nonsuit.

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Plaintiff's counsel prays exception to the ruling of the Court granting a non suit, and the same is allowed, and signed and sealed accordingly.

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(Signed) WILBUR A. HEISLEY,

(L. S.)

Mr. Peirce. There was put in evidence some portion of the testimony given at the trial in the criminal court.

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Mr. MacSherry. I think we ought to have it stipulated, in case of review, that we do not want all that testimony in, only that portion referred to in the cross examination.

The Court. At the close of your case yesterday both counsel agreed that the printed testimony was the record of the evidence in the criminal case.

10 Mr. Peirce. That applies to that portion of the evidence which was used in cross examination.

The Court. Yes.

Essex County Circuit Court.
In Tort

On Non-suit
Judgment entered
June 2 A. D. 1910.
Costs 24.29

20

L. J. Tynan, Atty. of Plt.

Judgment on non-suit in the above entitled action in tort was entered on the second day of June, A. D. 1910³⁰, in favor of the said defendant, North Jersey Street Railway Company and against the said plaintiff, David Guenther, for the sum of costs of suit

Judgment entered and signed
June 2, A. D. 1910.

Wm. S. Summers,
Judge.

Assignments of Error.

Filed August 27, 1910.

New Jersey Court of Errors and Appeals

DAVID GUENTHER

vs.

PUBLIC SERVICE RAILWAY COM-
PANY, A CORPORATION.

In Error.

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And now, on this day, the plaintiff in error, assigns the following causes of error:

1. Because the Circuit Court of the County of Essex ruled out the following question propounded by counsel for plaintiff.

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Q "Now, did you hear any conversation between the motorman and the conductor as to the condition of the car?"

Whereupon the plaintiff's counsel prayed an exception which was allowed and sealed.

2. Because the said court gave a judgment of non suit as against the plaintiff, in favor of the defendant, on the ground of contributory negligence, whereas said Circuit Court of the County of Essex should have given judgment on said motion of non suit in favor of the plaintiff, and as to such decision the plaintiff prayed an exception which was duly allowed and sealed.

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GEO. H. PEIRCE,

*Attorney for and of Counsel with
Plaintiff in Error.*

Common joinder filed September 12, 1910.

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New Jersey Court of Errors and Appeals

THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

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NEW JERSEY.
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NEW JERSEY.
THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

No. 1.
In Fact.
On Writ
of Error.

THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.
THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.
THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

No. 2.
In Fact.
On Writ
of Error.

THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.
THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.
THE COURT OF ERRORS AND APPEALS,
NEW JERSEY.

No. 3.
In Fact.
On Writ
of Error.

Replew Brief for Defendant and
Plaintiff in Error.

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