New Jersey Court of Errors and Appeals

JAMES KYSE, *Plaintiff-Appellee,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law.

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BRIEF OF APPELLANT.

Statement.

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This is an appeal from the Supreme Court of an affirmance of a judgment rendered in the Morris County Court of Common Pleas on account of the refusal of the Trial Court, to direct a nonsuit and at the end of the whole case a verdict in favor of the defendant appellant. The appeal from the Common Pleas Court was argued at the June Term, 1915, before Chief Justice Gummere and Justices Swayze and Bergen.

The following is a statement of the case as tried in the Common Pleas:— 30

On October 31, 1914, James Kyse, the appellee, a young colored man, claimed he boarded one of the defendant's trains at Madison, New Jersey to go to the next station, Chatham.

He took a seat in the second or third car about three seats from the front door and as the train was coming into the station and while it was still in motion, got up, walked to and opened the door and pushed it back to its catches but whether 40

he set it upon the catches or not he did not know, neither was there any proof that the door catches were insecure or defective.

After he pushed the door back and almost immediately thereafter, the train came to a stop and the door swung shut injuring the appellee's fingers.

The negligence charged against the defendant was that by reason of the insecure catch or fastener on the door and the negligent operation, to wit, violent stopping of the train, the door which was opened by the plaintiff, injured him.

The trial court determined that there was no evidence that the door catch or fastener was defective, and left to the jury the sole question as to whether the train was negligently operated, refusing both to direct a non-suit or a verdict on the ground asked for; that no negligence was shown in the operation of the train.

Being an unreported accident and not witnessed by any one, the status of the case so far as the respective motions concerned was the same at the end of the case as when the motion for non-suit was urged, the plaintiff being the sole witness to the accident and his testimony alone being necessary to be considered.

* * *

The Supreme Court held that the Common Pleas Court did not err in refusing to direct a non-suit or verdict in favor of the defendant appellant in-as-much as the "jury might properly infer negligent operation" from the evidence adduced by both parties at the trial of said cause.

In its opinion, affirming the Common Pleas, the Supreme Court stated that the plaintiff appellee,

> "opened the door and pushed it *over the catch* put there for the purpose of holding it; that at this time the car gave a sudden jerk or lurch of sufficient force to throw plaintiff

forward and unfasten the door from the catch" * * *

"We think that if a slowly moving car about to stop is suddenly given such a jerk * * * and the force is sufficient to unfasten a car door from a catch supposed to hold it in place, in the ordinary operation of a train, a jury might properly infer negligent operation." Case, pp. 35-6.

The appellant would have no disagreement with the judgment of the Supreme Court in this matter if there was any evidence in the entire record from which the jury could reasonably infer that the door was put back properly on its catch. But we most respectfully insist that the case is barren of any evidence upon which such a conclusion could have been reached.

It is on account of the lack of such testimony that the appellant has stated as its grounds of appeal to this Court to be that there was "no evidence that said door was on its catch at the time said car gave a sudden jerk or lurch" (p. 1, ll. 34-5-6).

It is manifest, therefore, that if there was no such evidence in the entire case, that both the allowance of the Trial Court to let the jury predicate negligence upon the part of the defendant and the Supreme Court in affirming said allowance, there must have been error.

Argument.

On the trial of this case the plaintiff testified that he arose from his seat and opened the door and "throwed it back to the catch" (p. 12, l. 1). Although he testified that he put the door on the catch (p. 18, l. 17) he said that he did not see whether the door had caught on the catch or not. He merely heard a noise and did not test the door to see whether it was in place or not (p. 19, ll. 32-37). The Trial Court conceded that there was

no proof which went towards showing the condition or insufficiency of the catch or catches upon the door and charged the jury that there was no proof that the door catch was defective or insecure (p. 33, ll. 19-28) under which circumstances the case presented no evidence of a defective door catch.

We, therefore are bound to assume that the catch for the door which injured the plaintiff was
10 in good and proper condition and sufficient for the purpose for which it had been installed upon said coach.

It is self-evident that doors move on hinges and that when they are uncatched the slightest motion of a train is apt to cause them to move to and fro, but we cannot conceive that this Court or the learned Supreme Court would have for a moment affirmed the rulings of the Common Pleas Court on account of the motion of the train as be-
20 ing negligence, *if the door in question was merely opened and not properly set upon its catches.*

Undoubtedly this Court will take judicial notice of the fact that when a door is properly set upon its catch or catches, it is fastened in exactly the same line as the running motion of the train and therefore any motion of the train which might tear a door from its moorings, i. e. catches, must indeed be of one extraordinary in nature and character, because the same would be con-
30 trary to the usual effects of well known physical laws. It is, therefore, under these circumstances that we claim the evidence given by the plaintiff shows that there was no negligent or extraordinary motion of the train, and that a perusal of his evidence, which we will herein set out, shows that the motion of the train was an ordinary, non-negligent motion and produced by well known and conceded laws of motion upon a door *which the plaintiff had never set back properly upon its*
40 *catch.*

Plaintiff's Testimony as to Accident.

DIRECT EXAMINATION:

"Q. Just describe to the Court and jury what happened at that time. A. As I was coming out of the door, I mean the door of the car that I was riding in, past the station house, part of the car was coming—

"Q. And the door of the car in which you were riding had passed the house of the station? A. Yes. 10

"Q. I suppose you mean that there is a long station platform there? A. Yes.

"Q. And in the center of the station there was the house of the station proper? A. Yes.

"Q. Now the car in which you were riding had passed the house? A. Yes.

"Q. Was the car going rapidly? A. Almost come to a stop.

"Q. Go on from that point and tell us just what happened? A. I arose from my seat and seeing no representative of the company 20 or anybody, I arose from my seat and opened the door and throwed it **back to the catch, and as I was just over the sill of the door to the platform, the car gave a sudden jerk which made me go a little faster, and the door came to on my fingers,** and damaged them pretty badly. After I got off I did not see any brakeman although I looked for one. The train pulled off while I was looking at my fingers" (p. 11, ll. 21, et. seq.).

"Q. Had the car almost stopped? A. It was (p. 12, l. 19). 30

"Q Please explain the manner of the arriving of the train at the station of the railroad? A. It came to a very violent stop.

"Q. What do you mean when you say it was coming to a violent stop? A. **It was coming to a pretty even stop.**

"Q. **You mean by violent, slowly? A. Yes.**" (p. 12, ll. 28 et. seq.).

"Q. What occurred as you were about to pass from the car across the sill of the door to the platform? A. **The car gave a sudden** 40

jerk and stopped, which hustled me across the door faster and threw the door on my fingers.

"Q. You say you was hustled across the door, what do you mean? A. It threw me across the door.

"Q. **When you say hustled across, you mean the sudden lurch of the train pushed you forward?** A. **Yes.**" (p. 13, ll. 27-38).

"**Q. And then you alighted from the train? A. Yes.** (p. 10, et. seq.) l. 13.

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"Cross Examination:

"Q. At the time the door slammed on your fingers, you say you were about half way over the sill? A. **When the car gave a sudden jerk, I was half way over the sill** (p. 19, ll. 19-22).

"Q. About how long after the accident or after the door slammed on your fingers was it before the train came to a full stop? A. **It had then come to a full stop; that is what slammed the door**" (p. 20, ll. 1-5).

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The Law.

The characteristics of the motion of the train shown by the foregoing testimony of the plaintiff, we take it, fail to measure up to the proof of negligent motions shown by the following cases.

In the case of *Con. Tract. Co. v. Thalheimer*, 59 N. J. L., 475, the plaintiff was thrown from the door of the car into the street and the court dealing with a jerk of the violence described, stated that it fairly justified an inference that the tracks were improperly laid or out of order or that the brakes were improperly applied.

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In *Scott v. Bergen County Traction Co.*, 63 N. J. L., 408, the plaintiff was thrown from the car platform to the street and dealing with a jerk of such violence the court approved and followed the *Thalheimer* case, supra.

In *Burr v. Penn. R. R. Co.*, 64 N. J. L., 30, the

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plaintiff was thrown down when the train started. The court approved of the jury's finding that this was extraordinary violence in the starting of the train.

In *Field v. D. L. & W. R. R. Co.,* 69 N. J. L., 434, the plaintiff was thrown from the rear door of the train over the chain which connected the two iron guards on the last platform, the plaintiff landing on the rails of the track.

The character of this jerk, the Court held called for an explanation from the defendant and warranted the verdict against it, from the jury. 10

In *Budner vs. Pub. Service Co.,* 74 N. J. L., 298, the motorman knowing that the plaintiff was trying to get a position on the car and while the plaintiff was still on the runboard "puts on full force of the car" and threw the plaintiff off.

The movement of the deceased in response to the motorman's direction added an element to the case which made it properly a jury question. 20

In *Nirlk v. J. C. & etc. Ry. Co.,* 75 N. J. L., 642, as the car came to a stop, the plaintiff, who was riding on the rear platform, in some manner fell off. In upholding the verdict for the defendant the Court said:

> "We do not overlook, nor did the learned Trial Judge, the undoubted rule that the occurrence of a sudden lurch or jerk * * * of sufficient violence to throw a passenger off the platform, who was then preparing to alight and awaiting the stoppage of the car for that purpose, justifies the inference of a breach of duty upon the part of those operating the car within the maxim of res ipso loquitur" (p. 646). 30

In *May v. North Hudson Ry. Co.,* 49, N. J. L. 445, the Court recognized the effect of the starting or stopping of a car;

> "and its effect on Mr. May could only be to 40

> incline him backward against the front door of the car where he was already standing" (p. 448).

In *Corkhill v. Camden & Suburban Ry. Co.*, 69 N. J. L., 97, the Court held that the liability of the carrier for injuries caused by the lurch of a car

> "have gone upon the ground that there was a sudden increase of speed" (sic, decrease) "under circumstances that evidenced a disregard of the safety of passengers" (p. 99).

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In *Faul v. North Jersey Street Railway Company,* 70 N. J. L., 795, the plaintiff, who was riding on the rear platform of the car, said that the "car took a jolt" and "that jolt throwed me * * * from the platform."

The Court, dealing with this case, said that no claim was made that the tracks or roadbed was in any way defective or could have caused such jolt.

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The effect of the turning on the power by the motorman caused the plaintiff's witness to swing to the side "a little bit" or "fall a little to the side."

After remarking that there was a wide difference between want of skill and negligence, the Court said:

> "No Court, certainly of this State, has yet declared that such an effect justified an inference of negligence in car operation against a carrier,"

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and that

> "it was not until extraordinary lurching and violence was shown that negligence could be presumed" (id., p. 799).

Distinguishing the Thalheimer case, supra, from the Faul case, the Court held that the distinguishing feature of that case was that act of conductor inviting the plaintiff to alight had *"put*

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the passenger off her guard at the very time she had a right to expect the car would become stationary" (ib., p. 801).

Pertinent and controlling we contend is the case of *Graf v. West Jersey and S. R. Co.*, 62 Atl. Rep., 333, the opinion of which, being short, we quote at length:

> "SWAYZE, J. The only question necessary to be considered is whether there was negligence on the part of the defendant. The only testimony of negligence is that of the plaintiff. He was a passenger, and when the conductor called the name of the station, 'got up and went to the forward end of the car, and in order to avoid the final jerk of the train, as it always gives a little kind of a jerk, held his hand up and steadied himself on the jamb of the door; the door was open, and all of a sudden the train gave a kind of a lurch to one side, just the second that it stopped, and the door shut down on his fingers.' He subsequently testified that the car went too far, and he naturally thought there would be a jerk. The motion of the car which caused the door to close seems to have been no more than the usual motion which the plaintiff himself anticipated, and we think fails to warrant an inference of negligence. In this respect the case differs from *Field v. D. L. & W. R. R. Co.*, 69 N. J. L., 433, 55 Atl., 241, where there was a jerk of sufficient violence to throw the plaintiff from a position inside the car over the chain on the opposite side of the rear platform, and from *Burr v. Penn. R. R. Co.*, 64 N. J. L., 30, 44 Atl., 845, where there was a very violent and unusual lurch of the car backward and forward. The Trial Judge should have granted the motion to non-suit.
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> "The judgment must be reversed and there must be a new trial."

See also the recent case of *Chester v. P. S. Ry. Co.*, 94 Atl., 953.

Similar cases have arisen in other jurisdictions, references to a few of which is here made.

In *Foley v. B. & M. R. Co.* (Mass.), 79 N. E. 765 the Court said:

> "There is nothing to show that the jar of the train in question resulted from any negligent act on the part of the defendant, either as to speed or construction of the car or track. It is true that the speed was described as 'swift', and the jar or lurch as quite 'violent,' 'terrible' 'awful,' 'very severe' and unexpected. Mere expletive or declamatory words or phrases as descriptive of speed, or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are slight, if, indeed, they are of any, assistance in determining the real character of the fact respecting which they are used."

Even more strong were the words used by the plaintiff in describing the movement of the train in *Hunt v. Boston El. Ry. Co.,* (Mass.), 87 W. E. 489, the Court passing in which said:

> "There is nothing in the evidence to show the speed at which this car was run was excessive. The evidence on this point is a mere accumulation of declamatory adjectives. * * * It is a matter of common observation that there are lurches of trains upon the elevated structure, and that there is every probability that these are necessary in the present state of the science even in connection with their operation under the high degree of responsibility which attaches to the defendant as a common carrier" (p. 490).

In *Jonas v. L. I. R. R. Co.,* 21 Misc. (N. Y. p. 306), the plaintiff went out on the front platform of the train as it was approaching the station and while it was yet in motion, as the train neared the station, its speed was slackened,

and in bringing it to a standstill the cars encountered the "jerk" which caused the plaintiff to fall to the platform, the Court said that:

> "Not one word appears in the case to serve as a means of determining that this 'jerk' was avoidable with the exercise of reasonable care upon the part of the defendants' employees, and that this 'jerk' was of more than ordinary violence, from which latter fact an inference of the omission of reasonable care would have been allowable." * * * 10
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> "We cannot say that this trial court was bound to take judicial notice that a train of cars can be brought from motion to a state of inertia without impact, or 'jerk' of some degree; and, in absence of evidence showing the latter fact, how can the defendant or its employees, be said to have failed in the observance of reasonable care because of an occurrence which does not appear could be avoided" (p. 307).

Cases like the *Graf* case in New Jersey, supra, 20 dealing with both the operation of the train and an injury being caused by a slamming door are herewith referred to.

In *Weinschenck v. N. Y., N. H. & H. R.R. Co.*, 76 N. E. 662 (Mass.), the Court said:

> "The train had not reached the station, and no call of the station had been made. *Trains cannot be run without some jolts, especially in stopping; and this is a matter of common knowledge.* She knew that this door was open. 30 *There was no evidence that it was fastened back or that she believed it fastened back; and it is generally known that catches of car doors are not intended to hold them securely against being shut, but only to guard against them being lightly or easily moved. This is all that she would have had a right to infer even if she had believed or known that the door was held by the catch.*
>
> "* * * This woman had voluntarily left the inside of the car, and put herself in a posi- 40

tion where she might be hurt if she should lose her balance by reason of a jolt of the car.

"But however, this may be, we do not think that there was any evidence of negligence in the defendants.

"The jolt of the car was described as an unusual one; but it does not appear to have been due to any defect in track or car, or to any carelessness in the running of the train" (p. 662).

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In *Muller v. Man. Ry. Co.,* 48 Misc. (N. Y.) 524, the Court said:

"As the train approached that street, the conductor announced it and the plaintiff arose and went to the door, preparatory to alighting when the train should stop. He put his hand in the jamb of the doorway and, as he says, 'through the sudden stop of the train, I bruised my hand when the door slammed.' This is the only evidence as to how the accident came to happen. * * * There is nothing in the case to show that there was any excessive or unusual jolt or jerk in the stopping of the train.

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"* * * The mere characterization of the stop as 'sudden' is not sufficient to justify the conclusion that it was unusual, or anything more than is necessarily attended upon stopping a train" (p. 525).

In *Rodriguez v. Int. Rap. Tr. Co.,* 85 Misc., 366 the Court said:

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"This court has held that the mere sudden closing of a car door due to no unusual motion of the train does not justify the presumption of negligence on the part of the defendant" (p. 367).

In view of the preceding authorities, it is respectfully submitted that there was no evidence from which a jury should have been allowed to determine.

1. That the door in question was on its catch, and,

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2. There being no evidence that the door was on its catch, that the motion of the train was negligent in character.

The Trial Court erred in refusing to both nonsuit and direct a verdict and the Supreme Court erred in affirming said Common Pleas Court's judgment.

The judgment of the Supreme Court affirming the Morris County Court of Common Pleas should be set aside. 10

Respectfully submitted,

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New Jersey Court of Errors and Appeals

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JAMES KYSE Plaintiff-Appellee vs. THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY Defendant-Appellant	Action at Law Brief of Plaintiff-Appellee

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FACTS IN THE CASE.

James Kyse, plaintiff appellee resided in Madison, N. J., at the time the cause of action arose. On the morning of October 31st, 1914, he boarded a train run and operated by the D., L. & W. Railroad Company. His destination was the next Station East—Chatham. As he approached Chatham and after the train was in the Station, but not quite stopped, he arose from his seat and prepared to alight when the accident occurred. 30

At the conclusion of the plaintiff's case a motion was made for a nonsuit on the ground that no negligence of the Railroad had been shown. This motion was denied. (P. C. page 25, lines 18-20.)

At the conclusion of the defendant's case, counsel for 40

the defendant asked for a direction of a verdict on the ground that no negligence had been shown in the operation of the train and because the plaintiff had been guilty of contributory negligence. This motion was also denied and a verdict was returned for plaintiff from which defendant appealed, and from the judgment of the Supreme Court confirming the said verdict, appeals to the Court of Errors and Appeals.

In its reasons given for this appeal besides the reason
10 that the Supreme Court was in error in sustaining the Court of Common Pleas, it states that the Supreme Court found in the record matters not therein contained.

A perusal of the evidence relating to the cause of the accident, empatically shows that the Supreme Court was justified in finding, that (a) the door did engage with the catch; and (b) that there was a stopping of the train so extraordinary as not only to throw or "hustle" the plaintiff through the door, but also to wrench the door loose from its proper fastening.

20 Both of these findings are disputed by the defendant.

POINT I.

THE EVIDENCE CLEARLY ESTABLISHED THE NEGLIGENCE OF THE RAILROAD IN THE OPERATION OF ITS TRAIN.

The plaintiff testified that when the train was entering the station at Chatham, which was his point of destination, he, being seated about three seats from the door and on the right hand side of the train as it was bound East, arose
30 from his seat, the train then having no appreciable headway and approached the door, which, in the absence of any employee of the Railroad Co., he opened with force sufficient to engage the catch with the floor catch, when the train gave a sudden jerk. (P. C. page 12.)

On cross examination, he was further interrogated about the opening of the door and whether the same engaged the catch. It appears from the evidence that plaintiff did fasten the door in the usual and ordinary manner. His testimony
40 is as follows. (P. C. page 18.)

Q. You got up from the seat and started to walk to the door?

Ans. I did.

Q. Open the door?

Ans. Certainly.

Q. Which door?

Ans. Right hand and pushed it back on the clutch, throwing it from my right hand back to the left.

Q. When you pushed it back did you set the door on the catch? 10

Ans. I did.

Q. How many catches on that door?

Ans. I did not notice how many.

Q. One or two?

Ans. I don't know whether there was two or not. There was one.

Q. Did you look, to see whether there was a catch up at the top?

Ans. No.

Q. You did not examine either catch? 20

Ans. No.

Q. You did not examine the catch at the bottom?

Ans. No.

Q. How long did you hold the door there in that position?

Ans. I did not hold it at all.

Q. Just passed it over to your left hand?

Ans. Yes and pushed it over back and it caught.

Q. Then you did what?

Ans. Let it go. 30

The evidence further shows that he had not left the coach proper when the accident occurred.

Q. Had you passed to the platform yet?

Ans. I had not. (P. C. page 13.)

Q. What occurred as you were about to pass from the car across the sill of the door to the platform?

Ans. The car gave a sudden jerk and stopped, which hustled me across the door faster, and threw the door on my fingers. (P. C. page 13.) 40

Q. You say you were hustled across the door, what do you mean?

Ans. It threw me across the door. (P. C. page 13.) Again in cross emaxination by Counsel for the defendant Company, the plaintiff stated.

Q. Then you say that the train gave a sort of sudden movement and hustled you along?

Ans. Yes.

Q. It hustled you over the sill of the door?

10 Ans. Over the sill. (P. C. page 18-19.)

Q. As it hustled you over the sill of the door you threw your hand around in what manner?

Ans. In that manner (witness illustrates), to grab it.

Q. You threw up your hand by the frame of the door, to catch yourself?

Ans. Yes, in the casing of the door.

Q. To catch yourself?

Ans. Yes.

Q. Where was your body?

20 Ans. About half way over the sill.

Q. You put your hand up to try to prevent yourself from falling?

Ans. Yes.

Q. And immediately after that the door swung on your finger?

Ans. At the moment the car gave the jump the door came over on my fingers.

Q. How long after you put your fingers on it did the door swing over on your fingers?

30 Ans. The same moment.

Q. At the time the door slammed on your fingers you say you were about half way over the sill?

Ans. When the car gave a sudden jerk I was half way over the sill.

Q. Your right hand was caught?

Ans. Exactly.

The evidence of the plaintiff stands wholly uncontradicted, and the attempt of counsel for the defendant Com-

40 pany to introduce evidence of the train crew proved abor-

tive as the conductor, one Harry Kitchen, was forced to admit on cross examination that he had no recollection of the circumstances. (P. C. page 27.) The question must therefore be narrowed down to the inquiry as to whether the sudden jerk or unusual stopping of a train moving slowly into a station, coupled with the fact that a device designed to hold the car door in place while stopping under ordinary circumstances, either failed to perform its office or the stoppage of the train was so unusual and violent as to wrench the door from its fastner, whereby a passenger lawfully thereon is injured, constitutes negligence of the railroad Company.

The appellee submits that the decisions clearly maintain the proposition that the sudden stopping of a Railroad train when coming into a station to discharge passengers is negligence and respectfully invites the Court's attention to the case of Field vs. D., L. & W. R. R. Co. In that case, Field with his wife and children entered the Railway train in Hoboken enroute to Harrison. As they approached the station he arose and walked to where his wife and children were seated, notifying them to prepare to alight. He then returned to the rear of the car which was the last one of the train, and just as he *reached the door a sudden jerk* of the train threw him out of the door to the road bed, inflicting the injuries for which he sought compensation.

The Railroad employees denied they had noticed any jerk and no other eye witness of the accident was produced. The defendant's counsel moved for nonsuit.

Mr. Justice Voorhees reading for the Court, (unanimous for affirment) said:

> "An issue of fact had been raised by the plaintiff's evidence which made *submission to a jury* necessary. It was clearly a jury case and a motion for a verdict was properly refused, and we find no error in the ruling of the trial Court."

Field vs. D., L. & W. R. R. Co., 69 N. J. Law, page 433 &c.

This case is on all fours with the one at bar. In the case at bar, Kyse, the plaintiff, approached the place of his destination, at Chatham, N. J. He awaited an announce-

ment of the station stop by some person of competent authority, but there being no such announcement and no attempt by any employee of the Railroad Company to open the door, he, when the train had almost come to a stop, opened the door as he had a right to do for the purpose of alighting. When suddenly the car gave a violent "lurch" or jerk, then coming to a complete stop; the lurch or jerk throwing him forward across the sill, he extended his hand and caught the jamb of the door to prevent himself from
10 being thrown from the train, and while his hand was on the jamb the door which had been loosened by the lurch or jerk of the car closed on his fingers inflicting the injury complained of, and for which the jury has awarded him damage.

The testimony distinctly shows that the appellee was not upon the platform of the car, he was inside, in the body or cab of the car and was only "*hustled across the sill*" by the sudden jerk of the train. Surely this sudden jerk of the train, sufficient to, as the appellee says, "hustle him across
20 the sill" explains most graphically the conditions which prevailed and establishes beyond peradventure the negligence of the appellant.

Field vs. D. L. W. R. R. (Cited Supra.)

This view is also supported by a number of cases in this State; viz.—

Wheeler vs. South Orange & Maplewood Traction Co., reported in 70 N. J. L. Cases, page 725; Trussell vs. Morris County Traction Co., 77 Atl., page 535, 79 L., page 533, and Carroll vs. Central R. R. Co. of N. J., 79 Atl. page 293,
30 81 L., page 567.

In the Wheeler case it was "a sudden movement of the car forward" which caused the injury (p. 726 1st paragraph): In Trussell vs. Morris County Traction Co., it was the "rounding a sharp curve at a speed of 20 miles an hour" which was the primary cause of the accident. In Carroll vs. Central R. R. of N. J., a passenger was preparing to alight at the station in Red Bank, when the train "violently started" (Vol. 79 Atl. p. 294, 81 Law 567), which caused the
40 accident. These cases hold that even a slight variance

from the ordinary operation of a trolley car or train, resulting in injury to a passenger, raises a question of negligence which must be submitted to the jury.

POINT II.

THE EVIDENCE FAILS TO DISLOSE ANY NEGLIGENT ACT OF THE PLAINTIFF CONTRIBUTING TO HIS INJURIES.

In the case of Consolidated Traction Co. vs. Thalheimer (30 Vroom p. 474), a passenger on a street car had notified the conductor of her wish to alight, and while the car was still in motion arose from her seat and prepared to leave the car, walking to the rear door, which was open, and just as she was coming out of it, was thrown off the car in a movement of the car which she described as a "lurch" or "jerk." The court held that at the most it was a question for the jury, whether, in preparing to leave the car, Mrs. Thalheimer was acting without proper care.

The statute (P. L. 1903, sec. 39, p. 666) relating to and fixing the responsibility of Railroad Companies toward passengers who go on the platform, is not applicable because (a) the evidence shows appellee had not reached the platform at the time of the accident and (b) because the Railroad did not show a compliance with the statute in that it failed to prove that the statutory notice was posted as required. The only evidence that some kind of a notice was posted in the car is given by conductor Kitchen, but the context of the notice is not disclosed, and defendant did not offer the notice in evidence nor make the context known (P. C. page 26). On page 29 of the printed case it is shown conclusively that no such notice was in evidence as the court proceeded in his charge without the notice as evidence and no exception to the court's charge was taken.

In Wheeler vs. South Orange (70 Law, page 725) a passenger on a street car while attempting to pass on the running board to a seat in the rear, by a forward movement of the car was thrown outward losing his balance, and while attempting to regain was struck by contact with a trolley pole standing between the tracks. The motion for a non-

suit was denied. The court saying in reference to the same (p. 726, paragraph 2), "To sustain this proposition (of nonsuit) it must be shown that the negligence of the plaintiff so clearly appears that it was a question for the court and not for the jury." It is the contention of appellee that the facts set forth in this case presents no act either of omission or commission by him which can by any possibility charge him with contributing in any way, directly or indirectly, to his injury, and the court committed no error in denying the
10 defendant's motion for a nonsuit, and the Supreme Court committed no error in sustaining the judgment.

POINT III.

THERE BEING A SUBSTANTIAL DISPUTE AS TO THE MATERIAL FACTS IN THIS CASE, A DENIAL OF THE MOTION TO DIRECT A VERDICT FOR DEFENDANT WAS PROPER.

The plaintiff testified to the violent stoppage of the train, while the conductor (the only witness sworn on part
20 of defense) did not remember of any unusual occurrence, in fact does not mention the occurrence at all. The situation is tersely stated in this manner. Appellee says he was injured by some peculiar movement of the train; clearly not a movement arising from the ordinary operation of a train. Appellee has described the accident in detail. The conductor had no recollection of such an occurrence. It must be apparent therefore that a situation is created such as is described in Carroll vs. Central R. R. Co. (cited supra), (81 L. 567).

30 In that case a passenger was attempting to alight from a train at Red Bank. His testimony was the only direct evidence of what occurred; no other person saw the accident. The plaintiff stated that as he attempted to get off the train at Red Bank he and two companions walked from their seats, and that as he was descending the steps of the car and was about to step from the second step the train, without warning, violently started and threw him to the ground. The two companions stated that it started up
40 "quite rapidly," "quite quick," "something out of the ordi-

nary." There was direct evidence that the train was started in the usual manner.

The trial court granted a nonsuit. Upon appeal the decision was unanimously reversed.

The court held that where there is a substantial dispute as to the facts or the *inferences* to be drawn therefrom, it is not the province of the court to determine with whom the preponderance of evidence lies; that is for the jury to determine.

10

POINT IV.

Upon all the matters and questions raised by defendant's appeal, the appellee respectfully submits that the same should be resolved in his favor and the judgment rendered in this case be affirmed, and the judgment of the Supreme Court affirming same should be sustained and affirmed.

DAVID F. BARKMAN,
Attorney and of Counsel for Appellee.

20

EDWARD A. ISAACS,
of Counsel with him on the Brief.

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INDEX.

Notice of Appeal.

(Filed Feb. 7, 1916.)

New Jersey Supreme Court.

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

10

To David F. Barkman, Esq.,
Attorney for Plaintiff.

SIR:

20

YOU WILL PLEASE TO TAKE NOTICE that the above defendant appeals from the whole of the judgment entered in the above cause to the Court of Errors and Appeals for the State of New Jersey, on the following grounds:

1. Because the Supreme Court affirmed the judgment of the Court of Common Pleas in and for the County of Morris.

2. Because the Supreme Court held that there was evidence that at the time the plaintiff left his seat in the car that the car gave a sufficient jerk or lurch to unloosen the door from its catch, there being no evidence that said door was on its catch at the time said car gave a sudden jerk or lurch.

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3. Because the Supreme Court found that a force which was sufficient to unloosen a car door from its catch which was supposed to hold it in place in the ordinary operation of a train was

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erroneous in that there was no evidence that the door of the car in question was on its catch at the time said car gave the sudden jerk or lurch, which the supreme Court stated a jury might properly infer was negligent operation.

FREDERIC B. SCOTT.
Attorney of Defendant.

Notice of Appeal.

10 (Filed, May 21, 1915.)

COMMON PLEAS COURT OF MORRIS COUNTY.

JAMES KYSE, *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a 20 Corporation, *Defendant.*	at Law. Action Notice of Appeal.

David Barkman, Esq.,
Attorney of James Kyse.

SIR:

YOU WILL PLEASE TAKE NOTICE that the above defendant appeals from the whole and every part of the judgment rendered in the above cause on the 30 13th day of April, 1915, to the Supreme Court of the State of New Jersey, and herewith sets out its grounds and reasons of appeal to be as follows:

1. Because the trial court refused to direct a non-suit against said plaintiff and in favor of the defendant for the reasons set forth by the defendant on the trial of said cause.

2. Because the trial court refused to direct a verdict in favor of the defendant and against the

40

plaintiff for and on account of the same reasons urged by the defendant on its motion for a direction of a non-suit.

Yours truly,

FREDERIC B. SCOTT,
Attorney of Defendant.

Summons.

(Filed, Dec. 8, 1914.)

10

THE STATE OF NEW JERSEY TO THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, A CORPORATION:

YOU ARE SUMMONED to answer the annexed complaint of James Kyse, in an action in the Morris County Common Pleas Court.

(Seal.)

And take notice that unless you file your answer to said complaint with the Clerk of the said Morris County Common Pleas Court, at Morristown, within twenty days, after the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

20

WITNESS, Joshua R. Salmon, Judge of the said Court at Morristown, this third day of December, Nineteen Hundred and Fourteen.

ELIAS BERTRAM MOTT,
Clerk.

30

D. F. BARKMAN,
Attorney.

40

Complaint.

MORRIS COUNTY COMMON PLEAS COURT.

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law. Complaint.

10

(1) Plaintiff resided at Madison, New Jersey, at the time of the injuries complained of, and is still a resident of Madison.

(2) Defendant was then and is still a corporation and was then and now is a common carrier of passengers by railroad from Madison to Chatham and elsewhere.

20

(3) On the thirty-first day of October, 1914, plaintiff was lawfully riding on defendant's train operated by its employees from Madison to Chatham and when the train was approaching Chatham and was about to stop for the purpose of allowing passengers to depart from the train and to receive others upon the same, plaintiff, because there were no employees of defendant on that end of the car to open the door, opened the door of said car and fastened it upon the catch in the floor of the car, which catch was there for the purpose of holding said door open. As plaintiff passed through the door on the way out of the train and as the car was coming to a stop he put his right hand upon the side of the doorway and while waiting for the train to come to a full stop defendant's servants so negligently operated said train as to jar the door loose from its fastener or by reason of an insecure fastener said door swung

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shut upon the hand of said plaintiff, crushing the second and third fingers of his right hand. Whereby plaintiff was greatly injured and prevented from doing his ordinary business and work and was obliged to spend a large sum for medical attendance, to wit, the sum of $100.00.

(4) Plaintiff demands $2,000.00 damages.

D. F. BARKMAN,
Attorney of Plaintiff.

10

Answer.

(Filed, Dec. 15, 1914.)

MORRIS COUNTY COMMON PLEAS COURT.

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

20

The above defendant, The Delaware, Lackawanna and Western Railroad Company, answering the allegations contained in the complaint of the plaintiff filed in this cause says:

1. It admits the allegations contained in the first paragraph of the plaintiff's complaint.

30

2. It has no information or knowledge sufficient to answer the allegations contained in the second paragraph of the plaintiff's complaint.

3. For a first and separate defense this defendant says that the allegations contained in the second paragraph of the plaintiff's complaint do not state a legal cause of action against it, as it clearly shows the alleged injury to the plaintiff was caused by his own negligence.

40

4. For a second and separate defense this de-

fendant says that if the allegations contained in the second paragraph of the plaintiff's complaint are true, then the said plaintiff was guilty of contributory negligence, and should not have or maintain his suit against this defendant.

This defendant, therefore, prays that the above action be dismissed against it, with its costs in the premises.

FREDERIC B. SCOTT,
10 Attorney of Defendant.

Docket.

At a Court of Common Pleas holden at the Court House in Morristown, in and for the County of Morris on Monday, the twelfth day of April, A. D., Nineteen hundred and fifteen.

20 Present:

HON. JOSHUA R. SALMON,
Judge, &c.

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, 30 *Defendant.*	Action at Law.

Attorney for Plaintiff, D. F. Barkman; Attorney for Defendant, Frederic B. Scott.

This case being moved the following jury was called and sworn.

1. David W. Heiman; 2. Hiram Dilley; 3. Stewart Fritts, Jr.; 4. John Conover; 5. Hosmer P. Smith; 6. Ira Sanders; 7. David C. Apgar; 40 8. Miller M. Mowder; 9. Joseph P. Roth; 10. Frederick Marquard; 11. Hubert Nixon; 12. George Beatty.

Docket.

MORRIS COMMON PLEAS.

Court adjourned until Tuesday morning April 13th, 1915. Tuesday morning April 13th, 1915, Court met pursuant to adjournment.

Present:

HON. JOSHUA R. SALMON,

Judge, &c.

10

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

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Trial continued.

Witnesses: 1. James J. N. Kyse; 2. Dr. Bliss A. Coultas; 3. William Lasker; 4. James Lasiter; 5. Harry Kitchell.

The evidence in this case being closed, the jury, after argument of Counsel and a charge from the Court retired to a private room to consider their verdict, with a Constable sworn to attend them, after being out some time they returned into Court and say they have agreed upon their verdict and by their foreman say they find a verdict in favor of the plaintiff and against the defendant and assess the damages of the plaintiff in the sum of Three hundred and fifty dollars ($350.00) and so say they all, therefore &c.

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Judgment.

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law. On Trial.

10

Judgment in an Action at Law on Trial and verdict of jury rendered in favor of the plaintiff and against the defendant for the sum of Three hundred and fifty dollars damages $350.00

And Fifty dollars and ninety-two cents costs of suit, 50.92

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Whole amount of damages and costs $400.92

On motion of David F. Barkman, Attorney of plaintiff.

Judgment signed April 13, 1915.

JOSHUA R. SALMON,
Judge &c.

30

Recorded in Book "C" of Abstract of Judgments, page 159.

ELIAS BERTRAM MOTT,
Clerk.

STATE OF NEW JERSEY, } ss.:
County of Morris. }

I, ELIAS BERTRAM MOTT, Clerk of the County
40 of Morris, and also Clerk of the Court of Com-

mon Pleas holden in and for said County, do hereby certify that the foregoing are true, full and correct copies of the Summons and Complaint, Answer, Minutes of the Trial and Judgment entered in the case of James Kyse vs. The Delaware, Lackawanna and Western Railroad Company as fully and entirely as the same remain on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, at Morristown, this Twenty-first day of May, A. D., Nineteen hundred and fifteen. 10

(Seal.)

ELIAS BERTRAM MOTT,
Clerk.

Testimony.

MORRIS COUNTY COMMON PLEAS. 20

JAMES KYSE, *Plaintiff,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Transcript.

30

Transcript of evidence taken in the above stated case at the Court House in Morristown, New Jersey, on April 13th, 1915, before Honorable Joshua R. Salmon, Judge.

Edward A. Isaacs, Esq., and David F. Barkman, Esq., for the plaintiff.

Frederic B. Scott, Esq., for the defendant.

40

JAMES NATHANIEL KYSE, sworn for himself in his own behalf.

DIRECT EXAMINATION BY MR. ISAACS:

Q. Where do you live? A. Madison, New Jersey.

Q. Where did you live on October thirty-first of
10 last year? A. Madison, New Jersey.

Q. What is your business? A. Painter.

Q. How long have you been a painter? A. Three and a half or four years.

Q. Where were you working in October of last year and especially on the thirty-first of October? A. Chatham, New Jersey.

Q. What time did you leave your house to go to work? A. I generally left about half past

Q. What train? What road? A. Delaware,
20 Lackawanna and Western Railroad.

Q. In October did you board a train of the defendant company? A. Yes.

Q. At Madison? A. Yes; Madison.

Q. Buy a ticket? A. Yes.

Q. At the station? A. Yes.

Q. The ticket entitle you to ride to Chatham? A. Chatham.

Q. You boarded the train at Madison? A. I
30 did.

Q. Where did you sit when you entered the train? A. Two or three seats from the door.

Q. Which door of the car? A. The right hand side.

Q. Facing which way? A. Facing the engine; New York.

Q. Facing easterly toward New York? A. Yes.

Q. Which door of the car? A. The front door.

40 Q. What transpired after you left the station at Madison, and when you were arriving at the

station in Chatham, tell the Court and jury all that occurred at that time? A. When I was arriving at Chatham——

Q. First, if I may ask you, when you entered the car at Madison, was there a trainman there who closed the door? A. Yes.

Q. Did you hear any announcement as to what the next stop would be? A. I did.

Q. What did you hear? A. Chatham.

Q. Did the brakeman stay in the car? A. I did not see him.

Q. Was there a brakeman at the door of the car or any announcement made in the car of the arrival of the train at Chatham? A. I did not hear any announcement.

Q. I ask you did you see any brakeman there? A. There was not when the car pulled in the station at Chatham.

Q. Just describe to the Court and jury what happened at that time. A. As I was coming out of the door, I mean the door of the car that I was riding in, past the station house, part of the car was coming——

Q. And the door of the car in which you were riding had passed the house of the station? A. Yes.

Q. I suppose you mean that there is a long station platform there? A. Yes.

Q. And in the center of the station there was the house of the station proper? A. Yes.

Q. Now the car in which you were riding had passed the house? A. Yes.

Q. Was the car going rapidly? A. Almost come to a stop.

Q. Go on from that point and tell us just what happened? A. I arose from my seat and seeing no representative of the company or anybody, I arose from my seat and opened the door, and

throwed it back to the catch, and as I was just over the sill of the door to the platform, the car seven or seven.

gave a sudden jerk which made me go a little faster, and the door came to on my fingers, and damaged them pretty badly. After I got off I did not see any brakeman although I looked for one. The train pulled off while I was looking at my fingers.

Q. How long about did the car stand at the station? A. I should judge a minute and a half.

Q. Make it at least a minute and a half? A. I should judge so.

Q. During all that time did you see any brakeman at either end of the car? A. No, I did not.

Q. I understood you to say there was no brakeman to say the train was in the station? A. No.

Q. Had the car almost stopped? A. It was.

Q. Or was it proceeding rapidly?

MR. SCOTT: I object to Mr. Isaacs leading his witness.

MR. ISAACS: Well, I did not hear you making any objections to the questions.

Q. Please explain the manner of the arriving of the train at the station of the railroad? A. It came to a very violent stop.

Q. What do you mean when you say it was coming to a violent stop? A. It was coming to a pretty even stop.

Q. You mean by violent, slowly? A. Yes.

Q. When you saw the car was proceeding to slow up you started to get up? A. Yes.

Q. How far from the door of the car were you? A. Six or eight feet.

Q. You proceeded to the front door of the car and all the time was the car increasing in speed or diminishing? A. Going slower.

Q. How fast was the car going when you opened the door, I mean whether it was going at any appreciable rate of speed or had it commenced to come to a stop? A. It had commenced to come to a stop, I cannot judge the mileage.

Q. Then you opened the door? A. Yes.

Q. Had you passed the platform yet? A. I had not.

Q. What occurred as you were about to pass from the car across the sill of the door to the platform? A. The car gave a sudden jerk and stopped, which hustled me across the door faster and threw the door on my fingers.

Q. You say you was hustled across the door, what do you mean? A. It threw me across the door.

Q. When you say hustled across, you mean the sudden lurch of the train pushed you forward? A. Yes.

Q. And do you say that any part of your person got between the jamb and the door? A. Yes, my hand.

Q. Which hand? A. Right hand.

Q. When you felt the lurch and were thrown forward, you put out your hand and caught the jamb of the door? A. I did.

Q. What happened then? A. The door came to on them.

Q. Which fingers were they? A. The two middle fingers.

Q. Third and fourth fingers? A. Yes.

Q. Which hand? A. Right hand.

Corrected to the second and third fingers.

Q. And then you alighted from the car? A. Yes.

Q. What did you do when you got off the train? A. I stood there holding my fingers.

Q. Did you suffer any pain or anything of that kind? A. Yes.

Q. By that you mean they were hurting very bad? A. They were numb.

Q. Was there any blood there at that time? A. No.

Q. What did you do with your hand? A. I took my handkerchief and wrapped it around them and held them.

Q. And the train moved off? A. Yes.

Q. Where did you go? A. Down to Fairmont Avenue.

Q. Where did you go down there? A. I went over the track of the railroad, and I showed them to a friend, and told him where I had an accident.

Q. Did you tell him where you had an accident? A. Yes.

Q. What did you tell him? A. I told him I had an accident.

Q. What did he say? A. He said to go to the doctor.

Q. Did you go to the doctor? A. I did.

Q. What doctor? A. Dr. Coultas.

Q. And how long was your hand in condition so that you could not use it? A. I should judge between five and six or seven weeks.

Q. Was it bandaged during all this time? A. It was.

Q. After seven weeks were you able to use the hand with any degree of freedom? A. I could not.

Q. Could you paint with your right hand after seven weeks? A. No.

Q. You say you could not handle a brush? A. No.

Q. How much were you receiving as wages prior, to the accident? A. Three and a half per day.

Q. How long had you been working for the employer for whom you were working at that time? A. Three and a half or four years.

Q. Are you still working for the same man? What did the doctor do? A. He washed it with medicine and bandaged it and put rubber across them.

Q. How many times did you call at the doctor's place? A. Between thirteen and fifteen times, I guess, or more. 10

Q. Do you know what the charge from the physician is? A. One dollar a call.

Q. Did you expend any money yourself for medicine? A. I did.

Q. How much did you expend? A. Around two dollars.

Q. And your doctor's bill is around fourteen dollars? A. I judge so. 20

Q. You were absolutely disabled six or seven weeks? A. Yes.

Q. And you lost absolutely that much of your earnings? A. I did.

Q. After the six or seven weeks how long were you only able to work part time? A. I suppose about three weeks.

Q. From that time on you were able to work? A. From that time on.

Q. During the three weeks when you were partially disabled how much wages did you lose? A. I could only make two dollars a day. 30

Q. And your regular wages are at the rate of three dollars and a half per day? A. Yes.

Q. Will you show your hand to the jury so that they may see where the scars are upon the hand now?

Witness exhibits his hand to the jury.

Q. During all this time will you state to the 40

Court and jury what your feelings were in the hand, as to pain, as to suffering pain? A. I had much pain, so much, I could not rest nights, I had to carry my hand in a sling, I was not able to leave it down.

Q. You say you suffered a small or a great degree of pain? A. Great degree.

10 Q. Have you still pain in the hand? A. Not unless I pick up something hard that touches that finger.

Q. Is it tender when you use a paint brush? A. Very.

CROSS EXAMINATION BY MR. SCOTT:

Q. Had you been working down in Chatham for some time before this accident occurred? A. Yes.

Q. You went down to the same place every 20 morning? A. Yes.

Q. For how long? A. Practically all—from the spring practically.

Q. You went down on that same train? A. I usually went by trolley.

Q. Was this the first morning you went by train? A. No.

Q. How many times had you ridden down on that train at that time of the morning? A. I don't just remember.

30 Q. Had you gone down ten or fifteen times at that time on that train? A. I don't suppose that many times.

Q. Five times? A. I suppose somewhere like that.

Q. What time did you get to the station at Madison for the train? A. Five or ten minutes before the train came.

Q. What time did the train leave Madison? A. 40 Well, it is due to leave there at 7.40. I didn't look at my watch to see.

Q. What time did it leave there that morning? A. I don't know.

Q. What time did you get to the Madison station? A. Half past seven.

Q. Did you wait long for the train? A. I did not.

Q. How long? A. Ten minutes.

Q. When you got to the train with respect to the engine and the car, did you get in the car next to the engine, or the next? A. I guess about two or three cars, two or three cars from the engine. I think it was two or three cars from the engine. 10

Q. You are sure, it was in the second or third car from the engine? A. Yes.

Q. You are sure of that? A. Yes.

Q. You were not, in the smoking car? A. No.

Q. Did you board the train with anybody you knew? A. I did not. 20

Q. You were alone on that occasion? A. Yes.

Q. When you went on the car did you enter the car in the rear or front door? A. Front door.

Q. You took a seat on the right hand side? A. Yes.

Q. That is toward the Chatham station side? A. Yes.

Q. About three seats from the front door? A. Yes, I did. 30

Q. After you left Madison you said the brakeman called out the next stop as Chatham? A. I should judge a brakeman; he was in uniform.

Q. Would you recognize him if you saw him? A. I don't know as I would.

Q. Will the crew of Mr. Kitchen's train stand up—which one of these gentlemen over there; which is the one? A. I don't know either one of them.

Q. You don't recognize either one of them? 40
A. No, I don't recognize them.

Q. How long did it take you to run down to Chatham? A. Five minutes.

Q. This morning when you were arriving at Chatham you looked out of the window and saw the station buildings? A. Yes.

Q. When you saw the station building the train was still moving? A. Yes.

Q. You got up off from the seat and started to
10 walk to the door? A. I did.

Q. Open the door? A. Certainly.

Q. Which door? A. Right hand and pushed it back on the clutch, throwing it from my right hand back to the left.

Q. When you pushed it back did you set the door on the catch? A. I did.

Q. How many catches on that door? A. I did not notice how many.

Q. One or two? A. I don't know whether
20 there was two or not. There was one.

Q. Did you look, to see whether there was a catch up at the top? A. No.

Q. You did not examine either catch? A. No.

Q. You did not examine the catch at the bottom? A. No.

Q. How long did you hold the door there in that position? A. I did not hold it at all.

Q. Just passed it over to your left hand? A.
30 Yes and pushed it over back and it caught.

Q. Then you did what? A. Let it go.

Q. How far had the train gone, was the train still in motion as you pushed the door back? A. Yes.

Q. Then you say the train gave a sort of sudden movement and it hustled you along? A. Yes.

Q. It hustled you over the sill of the door? A. Over the sill.

Q. As it hustled you over the sill of the door
40 you threw your hand around in what manner?

A. In that manner (witness illustrates), to grab it.

Q. You threw up your hand by the frame of the door, to catch yourself. A. Yes, in the casing of the door.

Q. To catch yourself? A. Yes.

Q. Where was your body? A. About half way over the sill.

Q. You put your hand up to try to prevent yourself from falling? A. Yes. 10

Q. And immediately after that the door swung on your finger? A. At the moment the car gave the jump the door came over on my fingers.

Q. How long after you put your finger on it did the door swing over on your fingers? A. The same moment.

Q. At the time the door slammed on your finger you say you were about half way over the sill? A. When the car gave a sudden jerk I was half way over the sill. 20

Q. Your right hand was caught? A. Exactly.

Q. As you stated before you did not examine the catch of the door? A. No.

Q. You don't know how many there were? A. No.

Q. The method you used in putting the door back was to open the door with your right hand and pass it over to the left giving it a kick with your foot. A. Yes. 30

Q. You did not see whether it had caught at the top or bottom? A. I did not look to see, but I heard a noise.

Q. You heard the impact, you did not test it to see whether it was in place, or didn't shake the door? A. No.

Q. How long did the whole occurrence take place from the time you opened the door until the door caught on your fingers? A. Just a few seconds. 40

Q. About how long after the accident or after the door slammed on your fingers was it before the train came to a full stop? A. It had then came to a full stop; that is what slammed the door.

Q. Coming to a stop closed the door? A. Yes, that coming to a full stop is what closed the door.

10 Q. I show you a letter, Mr. Kyse, and ask you if you wrote that letter or was it written for you? A. It was written for me.

Q. You dictated the letter? A. Yes.

Q. Who wrote that letter? A. My wife.

Q. Does it correctly represent the situation present in your mind as regards the accident at that time? A. I guess it does.

Q. In that letter—you have read this over before it was sent to the company? A. I don't re-

20 member whether I did or not.

Q. Will you just look it over? A. Yes.

Q. In this letter you say that you was about to let go of the door casing in front of the steps when the accident happened? A. Yes.

Q. Did you put your hand up on the door casing to preserve your equilibrium, or your balance? A. That is what I caught myself there for.

Q. What have you to say as to whether the Chatham station was on a straight track or a

30 curved track? A. I think it is straight.

Q. Can you tell from the motion of the train that morning when you got up out of your seat? A. I don't remember whether it is straight or curved.

Q. From the motion of the train as you got up out of your seat could you tell? A. No.

RE-DIRECT EXAMINATION BY MR. ISAACS:

40 Q. You did not get up until the car was in the station? A. I did not.

Q. You have been asked something about a letter which was written; that letter was written to them by your wife? A. It was.

Q. And dated November 2nd? A. Yes.

Q. It was not intended by you that the letter should contain a full history of the affair, but it was merely a notification to the company about your injury? A. Exactly.

Q. You did not mean to put yourself on record as detailing the entire history from the minute you left your home that day? A. No, sir. 10

Q. You were asked by Mr. Scott about the catch at the bottom of the door on the floor to which the bottom of the door goes, you did not examine the catches? A. No.

WILLIAM LASSITER, sworn for the plaintiff. 20

DIRECT EXAMINATION BY MR. ISAACS:

Q. Where do you live? A. Madison.

Q. Did you live there in October last? A. Yes.

Q. What is your profession? A. Painter.

Q. Were you employed in painting in October last year? A. Yes.

Q. Employed by the same boss as the plaintiff James was working? A. Yes.

Q. Did you report for duty at the same time? A. Yes. 30

Q. You remember October 31st? A. Yes.

Q. Were you working in Chatham at the same time? A. Yes.

Q. How did you go down to Chatham? A. By trolley.

Q. Did you see Kyse? A. After I got to Chatham.

Q. When did you see him at Chatham? A. Little before eight. 40

Q. Where? A. At the Chatham station.

Q. Station of the trolley or railroad? A. At the railroad.

Q. Just describe how and where you saw him October 31st, 1914? A. I got off from the car at Fairview Avenue, the trolley goes down by the station, out at the end of the station. I was there about the end of the station and as I walked under the trestle, I got out there and saw the train was coming into the station. I stopped, and the train stopped, and I saw Kyse coming off; I says I would just wait and we would walk up together.

Q. Did he come on? A. He come down, I saw he had his hand wrapped up. He said, "I had an accident on the door of the car." I says, "Let me see." He opened it up. I said, "Let me see your hand."

THE COURT: What did you see?

A. I saw his fingers, they was all smashed up and bleeding. I said, "You better go up and see the doctor because you might get blood poisoning."

CROSS EXAMINATION BY MR. SCOTT:

Q. Where were you when you saw him? A. I was standing there under the trestle in the end of the station.

Q. Fairmont Avenue? A. Fairview Avenue, at the end of the steps.

Q. That is all.

JAMES LASSITER, sworn for plaintiff.

DIRECT EXAMINATION BY MR. ISAACS:

Q. Where do you live, Mr. Lassiter? A. Madisan, New Jersey.

Q. Boss painter? A. I am.

Q. You were employing James Kyse? A. Yes.

Q. In October last? A. Yes. 10

Q. Was he working up at Chatham? A. Yes.

Q. How long was he away after the time of the injury to his hand? A. Six or seven weeks.

Q. How much wages were you paying him? A. Three dollars and a half.

Q. Was that a week or a day? A. Three dollars and a half per day. I am not paying him anything now.

Q. I meant when he was working for you, of course. 20

MR. SCOTT: No cross examination.

MR. SCOTT: I ask that the Court direct a non-suit on the ground that no negligence has been proved on the part of the plaintiff company. The allegation of negligence in this case is that as the plaintiff was a passenger on the train and that there were no 30 employees on duty at that end of the car to open the door, and that he opened the door of the car and fastened it upon the catch in the floor which catch was for that purpose to hold the said door. The plaintiff passed through the doorway and out of the door and placed his hands upon the side of the door, and that the servants so negligently operated the train as to tear the door 40 loose from its fastening. There are two al-

legations of negligence in this case. There is no proof that the plaintiff fastened the door; the plaintiff says he did not examine it, and he did not know whether there was one or two fasteners on the door, he heard the contact, but did not, and he don't particularly state, and he don't charge, he set the door on the fastening. I think there is no proof that the fastening was insecure.

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After this element then we come to the charge of negligence, and that was that he went to the door and opened the door, and that he stepped forward, and a peculiar movement of the train occurred as a train will, and that the train was so negligently operated as to tear the door loose from its fastenings. The Court knows and it is common knowledge that doors swing on hinges.

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I ask for non-suit because there is no proof that the defendant company was negligent in the operation of the train.

THE COURT: I think, Mr. Scott, in view of what I find to have happened, included in the testimony of the plaintiff, to wit, such portions of it as are included in these words, "that he saw no brakeman out there "to open the door, and the car gave a "sudden lurch," and that further, "when "about to cross the sill of the car there was "a sudden jerk and the car stopped" and further that he was "hustled across the "door, that there was a sudden lurch which "threw him forward, when I caught the "door jamb, and the door came on me" and further that "when the train was still in "motion it hustled me along, and that the "movement of the car gave a sudden jar, "and that the door slammed on my fingers,

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"that there was a sudden stop, and that "that was what closed the door." That goes to the testimony of the plaintiff witness, that it raises a condition which appeals to the Court as being, that is an interpretation of the situation as unusual in the character of the stop made by the train, because it is this phase of the testimony, I feel that that branch of the case is one that the jury is bound to consider, testing it out by that whether or not they find that the company is negligent on the case as it now stands, and, therefore, I deem it my duty to deny your motion, and will grant an exception to the defendant.

PLAINTIFF RESTS.

HARRY KITCHEN, sworn for the defendant.

DIRECT EXAMINATION BY MR. SCOTT:

Q. You are a conductor of the Lackawanna Company? A. Yes.

Q. And were you a conductor in the passenger service in October the thirty-first, 1915, last year? A. Yes.

Q. Can you tell us whether you had a train that ran from Madison and through Chatham on the morning of that day? A. Yes.

Q. What time did that train leave Madison? A. Seven forty.

Q. You did not see the young gentleman here, the plaintiff, have you any recollection of it? A. I don't have any recollection of seeing him that morning. I have seen him but I cannot recall any particular morning.

Q. How many cars do you have on that trian? A. Four.

Q. In these cars do you have a notice similar in character to this printed notice I show you? A. Yes.

Q. Where was that notice posted? A. Posted in each end of the car.

Q. With relation to the side of the door? A. The front door.

10 Q. About how far from the front door? A. I should judge eight or ten inches from the side of the door.

Q. And with relation to the height from the floor? A. Well, about five or six feet, as near as I can judge.

Q. What have you to say as to whether the same can be seen as a person walked down the aisle toward the front door? A. They are in perfect view as you walk down the aisle.

20 Q. Have you any particular or special recollection as to the movement of the train that morning at Chatham? A. Nothing out of the ordinary.

CROSS EXAMINATION BY MR. ISAACS:

Q. You don't know anything about the accident at all? A. No answer.

Q. You don't know anything about the accident at all? A. Not in regards to the man being hurt, no.

30 Q. You are on the train every day? A. Yes.

Q. The mere fact that the cars should happen to stop suddenly at any particular station would not impress itself on your mind? A. Yes, it would.

Q. You are able to state to the jury every instance where a car is stopped suddenly? A. If it is out of the ordinary. We keep records of such things.

40 Q. Where do you draw the line between an ordinary stop of the car, a sudden jerk, and an ex-

traordinary sudden stop of the car? A. An extraordinary stop of the car would be where it would probably throw somebody off their feet in the aisle if they were standing up.

Q. The plaintiff testified that in this that if he had not caught the jamb he would have been thrown off his feet, now are you able to tell us of such a stop occurring? A. I have no recollection. 10

Q. I am not asking you about your recollection; I am asking you whether such an occurrence did occur? A. I don't remember.

DEFENDANT RESTS.

CASE CLOSED.

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MR. SCOTT: I now press my motion for a direction of a verdict.

This is according to Section 39 of the Railroad Act, which provides that if a sign is posted in a conspicuous place in the train, that a person going on or upon the platform of the car while in motion is guilty of contributory negligence, as set out in the case of *Rivers v. Pennsylvania Railroad,* 80 N. J. Law, page 217. 30

THE COURT: The first branch of the motion to direct a verdict was disposed of when you repeated your motion, and the same ruling is made as before, and exception is granted thereon

Now as to this second reason assigned which goes to the provision of the Statute, the 39th section, page 257 of 1893 P. L. Mr. Isaacs, what have you to say about that? 40

After further argument.

THE COURT: I realize that the only question in my mind is now whether or not he was going on that platform and there remaining until the car stopped. I do not believe the testimony warrants me in resolving that proposition against him. He no doubt was in a position there out of which he intended to proceed, as he did proceed, to leave the car, but whether he was then going on that platform before that train stopped, the testimony is not so sufficient nor so explicit as to warrant me in saying he was and not finding him there in the testimony, I feel the doubt should be resolved in his favor, and I feel I am warranted in doing that through my discretionary power in view of this situation. That is the second branch of the motion to direct a verdict, and I think the motion should be denied and an exception granted, and that this case should go to the jury for their consideration of the whole condition.

Charge.

Gentlemen of the Jury: This case is now at that state where it is about to be turned over to your hands for your consideration and for your determination. The substance of the allegation is that the plaintiff has suffered from injuries at the hands of the defendant, because of a certain transaction which has been developed before you in the testimony, and which appears to be that the plaintiff was upon a train and in the car of the defendant and therefore as a passenger and that as he alleges because of the operation of the train he sustained injuries to his person, as he has detailed them before you, with the result as alleged of being out of work, and suffering and of incurring necessary expense incident to this injury.

Now there are certain fundamental rules which you should address your mind to which control the situation as developed in this case. The first to be stated is that it is a rule of law that if a plaintiff contributes toward the negligence, that is, negligent himself, that in such a situation where he claims, as the plaintiff does here, he would not be entitled to damages. In other words, that the right of recovery is not extended in law to one who contributes toward the injury of which he complains; contributes in that he is negligent in some duty that he owes to himself, perhaps, or to others.

Now incidental to that phase of the case there is also the provision of law which I think it proper for you to take into consideration when you address your minds to the evidence here after you retire from this room. That principle of law is what I have already read, and is the 39th section of the statute in question, and this section reads:

"In case any passenger on any railroad

shall be injured by reason of his going or remaining on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury; provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers."

MR. SCOTT: I desire to ask the Court for permission to offer the exhibit in evidence so that it may go to the jury.

THE COURT: Was it your intention to have it entered?

MR. SCOTT: Yes.

(After argument).

It is somewhat embarrassing for me under the circumstances, and while I am willing to meet all usual and unusual embarrassments, I see here no hard, clean-cut proposition, in that this is the particular notice or that it is so physically any concrete proof that it is the notice that was actually posted in the car, so that there remains some argument upon its admissibility; at any rate it seems to strike me in that view. I think perhaps it is the better part of prudence to proceed without the evidence, and inasmuch as defendant's counsel does not press the request, the Court will proceed with such charge as I have without regard to this notice, or its admissibility in evidence.

However, gentlemen, the situation is that there is a provision of law as I have read it to you, but in that connection I must call your attention to the fact that it does not appear as a matter of record in his case that such notice was posted showing printed regulations which is contemplated in the act. In other words, that would seem to resolve itself into this situation, that it is not shown on the defendant's case that there is any com-

pliance with the regulations provided for and it is therefore logical to say that so far as that section is concerned there may be no availing of it by the defendant in regard to that of which it speaks, namely, that if any passenger shall be injured on any platform by reason of his going on the platform of the car, etc.

And so you must center your attention on this element of contributory negligence, so far as that branch of the matter is concerned. 10

Now on the other side of the case there is this to be said, and that is that a carrier of passengers must use a high degree of care to protect a passenger from danger that foresight can anticipate. By foresight is meant not fore knowledge absolute nor that exactly such an accident was apprehended, but that the characteristics of the accident are such that it can be classified among events that, without due care, are likely to occur, and that due care cannot prevent. So that in this case you must find as a fact before you can find in favor of the plaintiff and against the defendant that the defendant was negligent. In other words, that the defendant owed a duty to this plaintiff which it failed to carry out. 20

Incidental to that you must also find, if you find negligence of the defendant, that as a result of that negligence the injuries alleged actually were suffered by this plaintiff, and if you find that to be the case you are entitled to compensate him for those injuries. 30

Now there is a rule of law that applies to compensation of injuries, or, as it is called, compensatory damages. They are such as will compensate the plaintiff for bodily injuries, also injury to health or suffering according to its degree as likely to be temporary or permanent; also the expense incidental to cure or lessening the amount of the injury, and the pecuniary loss sustained 40

through inability to attend to his business or profession which may be of a temporary character or such as may incapacitate the party for the remainder of his life. In this case the evidence tends to show that the plaintiff was under the doctor's care and that he made eleven visits to Doctor Coultas. The plaintiff places these visits at thirteen to fifteen and he places them at one dollar a call. The doctor places them at eleven calls. There is no contradiction that he expended money for medicines, around two dollars, and that he lost six or seven weeks' salary, and that he was getting three dollars and a half per day, and it is a matter of computation if you find that he did lose time. He states that he lost partial time for three weeks, and during the three weeks he made two dollars a day. So far as the reimbursement element is concerned, if you come to the conclusion of liability, then you will be able from these figures to take care of that subject.

So far as the other contentions are concerned, personal injury, pain and suffering, you are to exercise your judgment on the compensatory value of them, if you find a state of liability in this case.

Now it seems to me that the case resolves itself into two propositions in the first instance, and that is the one of contributory negligence, and secondly, the negligence on the part of the defendant. If you find the plaintiff to be in that position of contributing by his negligence to his injury, then it is your obligation to find a verdict for the defendant, and if you find that there is no contributory negligence on the part of the plaintiff, and still find that there is negligence on the part of the defendant from the manner of its operating its trains, and that of necessity goes to the character of operation, and if you find that with such operation there is negligence, and that

these injuries were received because of that negligent operation of the train, then you must go further, of course, and weigh up and fix damages to which he is entitled.

I first will charge you with these propositions on the part of the defendant:

There was no negligence upon the part of the defendant company in not having a member of the defendant's train crew come to the door out of which the plaintiff subsequently started to go and was injured before said train came to a stop at the Chatham station.

As a proposition of law, I think it is clear to so charge you that this fact in itself is not such as to be characterized as a negligent act on the part of the defendant.

2. There was no proof that the door catch on the door which injured plaintiff was defective or insecure.

There was no proof which I recollect which goes to the condition, sufficiency or not of the catch or catches upon the door, so that you must address your minds to the other facts of the case as they are impressed upon your mind, and as they are shown by the evidence in this case.

MR. ISAACS: I have two requests, if your Honor please.

MR. SCOTT: I don't know as Mr. Isaacs knows that the practice of the Court is that all requests to charge should be handed to the Court before the close of the case, and I now make objection to the requests of Mr. Isaacs to charge.

THE COURT: I will consider these two requests, as I think it within the discretion of the Court.

The first request is "that it is not contributory negligence to go into the aisle of the car when the car is slowing up coming into the station." As a proposition of law the Court charges you accordingly.

The second is "that the sudden lurch of the car resulting in the injury is negligence, per se, that is in itself, which entitles the plaintiff to recover."

The Court refuses to charge that proposition because of this phase of the case, that the question of what is a sudden lurch is a matter of degree, and what I might call a sudden lurch might not be to another on the jury who would not agree with that; in other words, you would require a larger lurch, limiting ourselves to that term, than I might, and on the other hand, I might require a larger lurch than either you or Mr. Isaacs, or Mr. Scott, and you must therefore take into consideration all the conditions of the train there, of the train in its manner of stopping and of the necessity of stopping, and applying the rules which I have stated before as to the negligence on the part of the defendant, if any, and the contributory negligence, if any, on the part of the plantiff, you are to consider all of the situation.

Clerk's Certificate.

STATE OF NEW JERSEY, }
County of Morris. } SS.:

I, ELIAS BERTRAM MOTT, Clerk of the County of Morris, and also Clerk of the Common Pleas Court holden in and for said County, do hereby certify that the foregoing is a true, full and correct copy of the Notice of Appeal in the case of *James Kyse v. The Delaware, Lackawanna and Western Railroad Company* as fully and entirely as the same remains on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, at Morristown, this Twenty-first day of May, A. D., Nineteen Hundred and Fifteen.

ELIAS BERTRAM MOTT,
Clerk.

(Seal.)

Opinion of the Supreme Court.

Nov. 8, 1915.

NEW JERSEY SUPREME COURT.

JAMES KYSE,
Plaintiff-Appellee,
against
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-Appellant.

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Argued June Term, 1915, before Chief Justice Gummere, and Justices Swayze and Bergen.

David F. Barkman, for Appellee.

Frederic B. Scott, for Appellant.

PER CURIAM:

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The plaintiff was a passenger on defendants train, and had his hand injured by the closing of the car door for which he recovered a verdict of $350 and defendant appeals. The errors specified are refusal to non-suit, and to direct verdict for defendant.

From the evidence the jury might infer that plaintiff left his seat in the car as it was running into the station at Chatham for the purpose of alighting; that he opened the door and pushed it over the catch put there for the purpose of holding it; that at this time the car gave a sudden jerk or lurch of sufficient force to throw plaintiff forward, and unloose the door from the catch; that to save himself from being forced to the platform of the car, he grabbed the door jamb and his fingers were caught by the door and injured; we think that if a slowly moving car about to stop, is suddenly given such a jerk as to throw a passenger forward so that he is compelled to

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grasp the door jamb to save himself from falling and the force is sufficient to unloose a car door from a catch supposed to hold it in place in the ordinary operation of a train, a jury might properly infer negligent operation.

The judgment will be affirmed.

Remittitur.

(Filed, February 7, 1916.)

10 NEW JERSEY SUPREME COURT.

JAMES KYSE, *Plaintiff-Appellee,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, 20 *Defendant-Appellant.*	Action at Law.

(From appeal to the Supreme Court from the Morris County Common Pleas Court.)

This cause having been submitted on brief at the June term, 1915, of this court by David F. Barkman of counsel for the plaintiff, James Kyse, and Frederick Scott of counsel for the defendant, The Delaware, Lackawanna and Western Railroad Company, and the Court having considered the same, and finding no error in the record 30 or proceedings in the trial of said cause in the Morris County Common Pleas Court;

It is thereupon ordered and adjudged that the judgment of the Morris Common Pleas Court removed by appeal in this cause be affirmed with costs, and that the record be remitted to the Morris Common Pleas Court to be proceeded with in accordance with this judgment and the practice 40 of said court.

On motion of

DAVID F. BARKMAN,
Attorney of Plaintiff-Respondent.